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QUANTITATIVE INTERFERENCE WITH THE RIGHT TO LIFE: ABORTION AND IRISH LAW

MARY MATHEWS*

Although the right to life is internationally recognized, the apparently simple injunction not to kill is not easily interpreted. In this area, as elsewhere, human law does not have to enforce the whole of morality:¹ *non omne quod licet honestum est*. Legally, there exists a conflict between a natural law approach, in which the right to life is recognized from the time of conception, and a liberal and humanitarian approach involving, among other things, utilitarian considerations.

After a brief survey of the ancient's views on abortion, this Article will examine existing statutory provisions upon which the crime of abortion rests in Ireland. It will next consider the rights, if any, accorded to the fetus at law, and will then conclude with a discussion of the relevant constitutional provisions—in particular, those providing the right to privacy and the rights of a fetus, if any, under the Irish Constitution.

ANCIENT LEGAL CODES

For centuries, the practice of abortion, which occurred with varying frequency in many countries, was condemned by clergy as well as lawyers. The modern legislative trend toward condoning abortion is retrogressive, for legalized abortion is completely opposed to ancient legal codes. The Sumerian Code of 2000 B.C. is the oldest known code of laws to penalize a citizen for having brought about an abortion.² The Middle Assyrian Code of 1500 B.C., which referred to the fetus as a human life,³ provided that a woman proved to have “cast the fruit of her womb by her own act” should suffer impalement.⁴ Similarly, the Code of Hammurabi of 1800 B.C., the

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¹ See G. WILLIAMS, *THE SANCTITY OF HUMAN LIFE AND THE CRIMINAL LAW* 197 (1958).

² See C. JOHNS, *THE LAWS OF BABYLON AND LAWS OF THE HEBREW PEOPLE* (1912).

³ See G. DRIVER & J. MILES, *THE ASSYRIAN LAWS* 107-08 (1935).

⁴ Section 53 of the Middle Assyrian Code made it an extremely serious crime for a woman to procure or cause her own abortion. The savage punishment of impalement, imposed for only

Hittite Code of 1300 B.C., and indirectly the Book of Exodus all contained punishments for abortion.⁵

Prior to 1803, the law of England and Ireland only prohibited abortions that occurred after the fetus had quickened or moved in the womb.⁶ This limitation on the prohibition against abortion was probably based upon the ancient speculation as to the time when life commenced. Aristotle had estimated the time to be forty days after conception for males and ninety days after conception for females.⁷ From the 14th century onward, many theologians held that the abortion of a "non-souled" fetus was justified.⁸ They believed that approximately forty days were required for a male fetus to develop sufficiently to support a soul while approximately eighty days were required for a female fetus to do the same.⁹ Blackstone, the great English jurist of the 18th century, believed that life began in law as soon as the infant is able to stir in the mother's womb.¹⁰ Under these views, it is hardly surprising that abortion before quickening only became a crime in 1803, and even then was not punishable as severely as abortion after quickening.¹¹

the most heinous crimes, was directed against those committing abortions. It was apparently considered an affront against religion and the worst offense a mother could commit. *Id.* at 115-17. A penalty was also imposed for the destruction of an embryo as a result of an assault upon a pregnant woman. *Id.* at 110-11.

⁵ For the most part, these ancient laws directed their penalties against persons who committed assaults upon pregnant women. The punishments varied depending upon the class and/or marital status of the victim. Apparently, only the Assyrian Code directly referred to what we know of today as abortion. 1 G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 413-16 (1952).

⁶ See 3 E. COKE, *INSTITUTES* *50; I. HAWKINS, *PLEAS OF THE CROWN* ch. 31, § 16 (4th ed. 1962).

⁷ See ARISTOTLE, *HIST. ANIM.* 7.3.5836; *GEN. ANIM.* 2.3.736, 2.5.741.

⁸ See AUGUSTINE, *DE ORIGINE ANIMAE* 4.4.

⁹ *Id.*

¹⁰ 1 W. BLACKSTONE, *COMMENTARIES* *129. This concept of the recognition of life after quickening was also reflected in Blackstone's belief that a woman who was convicted of a capital offense and sentenced to death should be able to gain a delay of execution by proving she was pregnant. In such a case, twelve women would determine if the convict was quick with child. If the woman was barely with child, however, no delay in execution based on pregnancy would be allowed. 4 *id.* at *31.

¹¹ See Lord Ellenborough's Act, 1803, 43 Geo. 3, c. 58, §§ 1-2. Section 1 provided capital punishment for the abortion of a quick fetus, while section 2 provided lesser penalties for abortion before quickening. *Id.* One of the key areas of disagreement in the debate concerning abortion and its legality involves the point in time at which a fetus becomes a human being. According to one commentator, the points in time which are most widely held to be the beginning of human life include:

the moment of conception; the time (about the seventh or eighth day) at which segmentation, if it is to take place, takes place; the time (about the end of the sixth week) at which fetal brain activity commences; the moment (sometime between the thirteenth and twentieth week) of quickening, when the mother begins to feel the movements of the fetus; the time (about the twenty-fourth week) at which the fetus becomes viable, that is, has a reasonable chance of survival if born; and the moment of birth.

B. BRODY, *ABORTION AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW* 80 (1975).

PRESENT STATUTORY LAW

In Ireland, the offense of abortion is legally defined in the Offences Against the Person Act,¹² which establishes a maximum punishment of imprisonment for life whether abortion is attempted before or after quickening.¹³ The statute covers two situations: (1) where a pregnant woman uses any means with intent to procure her own miscarriage;¹⁴ and (2) where anyone else unlawfully uses means with such intent, whether the woman is pregnant or not.¹⁵ Instances of "means" given in the statute are "poison or other noxious thing" or "any instrument."¹⁶

A leading Irish case concerning an attempt to procure a poison or other noxious thing is *People v. Thornton*.¹⁷ The appellant was tried and acquitted in the circuit court at Galway on charges of having unlawful carnal knowledge of a domestic servant at his house on a number of occasions when she was under the age of fifteen years.¹⁸ He was also charged with unlawfully attempting to obtain ergot, knowing that it was intended to be used unlawfully for the purpose of procuring a miscarriage for the girl.¹⁹ With regard to the latter charge, the prosecution adduced evidence of a conversation alleged to have taken place between the accused and a medical doctor who was treating the girl at the time.²⁰ The accused was alleged to have asked the doctor "'wasn't there some drug named ergot?'"²¹ It was held by Judge Haugh in the court of criminal appeal that the conviction relating to attempt should be quashed.²² The judge viewed the evidence as consistent with explanations which did not necessarily involve an attempt by the accused to obtain ergot for the purposes alleged by the prosecution.²³ Judge Haugh also stated that where a charge is based on an alleged attempt to commit a crime, the jury should be told by the trial judge that neither mere desire to commit a crime nor such desire followed by an intention to do so is sufficient to constitute an attempt.²⁴

The offense of abortion is a crime.²⁵ Its existence on the statute books

¹² 1861, 24 & 25 Vict., c. 100, § 58.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Another section in the Offences Against the Person Act provides for the punishment of "penal servitude" for those who supply or procure means to accomplish an abortion. *Id.* § 59.

¹⁷ [1952] I.R. 91 (Crim. App. 1950).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 95.

²² *Id.* at 97.

²³ *Id.* at 96.

²⁴ *Id.* at 93.

²⁵ United Kingdom records show that the penalty imposed for illegal abortion is usually nine months imprisonment. G. ABRAHAMS, *MORALITY AND THE LAW* 107 (1971). In the Irish case of *People v. Coleman*, [1945] I.R. 237 (Crim. App. 1944), a circuit court conviction on two

recognizes the value of human life from conception, but no rights result for the unborn as a consequence. In other countries, it has been possible to remove or alter criminal prohibitions against abortion without effecting a violation of any rights.²⁶ In many of these nations, legislation liberalizing abortion law has frequently been justified under the heading of "social policy."²⁷

It is an offense to use instruments under the Offences Against the Person Act.²⁸ Is it ever possible to lawfully use instruments; in other words, is there any defense to the crime laid down in the Act? In *The King v. Bourne*,²⁹ a 1938 case which attracted considerable public attention at the time, a defense was read into the statute in Britain. A girl of fourteen was raped by a number of soldiers with great violence, and as a result of this assault became pregnant.³⁰ Dr. Aleck Bourne, the defendant, was a leading obstetric surgeon and gynecologist who performed the abortion with the consent of the girl's parents.³¹ After a careful examination of the girl, he concluded that it was his duty to perform the operation since, in his opinion, continuance of the pregnancy would probably cause her serious injury.³² The court held that if the operation was done in good faith for the purpose of preserving the life of the potential mother it was lawful.³³ Although there may be no difference between saving and preserving a mother's life, the latter is arguably wider. It is likely that the surgeon need not expect a mother's life to be curtailed during the period of gestation or in delivery for abortion to be legal. It also appears that the mother need not be in imminent peril of death; it is enough if the doctor anticipates that

counts of criminal abortion was reversed. It is interesting to note that the sentence imposed by the lower court was fifteen years of penal servitude on each count, the sentences to run concurrently, *id.* at 243-44, despite the fact that under the Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 58, an offender was subject to penal servitude for life.

²⁶ In the United States, for example, laws restricting abortion were struck down because they infringed upon the constitutionally protected right of privacy. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

²⁷ See Tietze, *Incident of Legal Abortion*, in A. OMRAN, *LIBERALIZATION OF ABORTION LAWS: IMPLICATIONS* 1-7 (1976).

²⁸ See text accompanying note 16 *supra*.

²⁹ [1939] 1 K.B. 687 (Cent. Crim. Ct. 1938).

³⁰ *Id.* at 688.

³¹ *Id.* at 690.

³² *Id.* at 688. Dr. Bourne testified during the trial that it was the psychological injury about which he was concerned. Moreover, he would not have performed the operation if the girl had venereal disease, for fear that his action would spread it, or if the girl was feeble-minded or of a "prostitute mind." *Id.* at 694-95.

³³ *Id.* at 691. Judge Macnaghten compared the statute in question to the Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, c. 34, under which anyone who wilfully caused an infant to die was guilty of a felony, but no person could be found guilty unless it was proven that he acted without good faith for the purpose of preserving the life of the mother. Judge Macnaghten considered the "good faith" provision and concluded that although no such provision appears in the Offences Against the Persons Act, the section outlawing the use of an instrument with intent to procure a miscarriage should be read as if it were qualified by a similar provision. [1939] 1 K.B. at 691.

the child cannot be delivered without the mother's death.³⁴

In view of this acceptance of therapeutic abortion in Britain, the *Bourne* defense of necessity could, in appropriate circumstances, be read into the statutory provision in force in Ireland. This is significant since utterances in favor of therapeutic abortion have already been made in the Irish Senate.³⁵ Although it was not clear at the time of *Bourne* whether more could be read into the defense of necessity, this doubt was eventually resolved in *Newton v. Stungo*.³⁶ There, Judge Ashworth, in his directions to the jury, after stating that "use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman," added that this included mental as well as physical health.³⁷

The criterion of necessity applied by the courts is subjective; the question is not whether the operation is in fact necessary to preserve the life of the mother, but whether the defendant believes it to be necessary. This belief does not have to be based on reasonable grounds. It is enough if the doctor acts with an honest belief. In determining this, the court will consider the size of the medical fee; if large, this suggests *mala fides*.³⁸ The court will also consider whether the defendant followed accepted medical practice.³⁹

Because of the uncertainty in Britain after the aforementioned cases, pressure grew for a precise indication as to the circumstances in which abortion was legally permissible.⁴⁰ The result was the passage in 1967 of the British Abortion Act.⁴¹ Under the Act, an abortion may be performed up to the twenty-eighth week of pregnancy if two medical practitioners certify in good faith

- (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.⁴²

The Committee on the Working of the Abortion Act was set up in 1971 under Mrs. Justice Lane to examine alleged abuses under the Act.⁴³ It

³⁴ *Id.* at 692-93.

³⁵ SENATE DEBATES, c. 560 (Dec. 19, 1973); SENATE DEBATES, cc. 353 & 356 (Feb. 21, 1974).

³⁶ 1958 CRIM. L. REV. 469 (Cent. Crim. Ct. May 19, 1958).

³⁷ *Id.* *Newton* is discussed in Harvard, *Therapeutic Abortion*, 1958 CRIM. L. REV. 600, 605 (1958).

³⁸ Harvard, *Therapeutic Abortion*, 1958 CRIM. L. REV. 600, 608 (1958).

³⁹ *Id.* at 613.

⁴⁰ 1 BRITISH MED. J. 182 (1967).

⁴¹ Abortion Act, 1967, c. 87.

⁴² *Id.* § 1(1). The Act also permits the doctor to consider the pregnant woman's "actual or reasonably foreseeable environment." *Id.* § 1(2). For a discussion of the "logical oddities" of the Act, see Crawford, *Abortion: A Logical Oddity*, 126 NEW L.J., 252 (1976).

⁴³ The committee was directed to "review the operation of the Abortion Act of 1967." Sir

recommended a reduction of the period within which abortion could be performed from twenty-eight to twenty-four weeks⁴⁴ because of the chances of survival of a fetus outside the womb at that age.⁴⁵ According to the findings of the committee, the number of abortions granted on the ground of risk to the life of the pregnant woman was very small; two percent for 1971.⁴⁶ The highest percentage of abortions, 76.4 percent in 1971, were carried out on the grounds of risk of injury to the mental or physical health of the mother.⁴⁷ The next largest category, 3.3 percent in 1971, related to risk to the physical or mental health of existing children.⁴⁸

It appears that most Irish women who seek abortions in Britain do so on the grounds of risk to their own physical or mental health.⁴⁹ Therefore, a defense of necessity restricted to threat to the life of the mother would be of little practical consequence in Ireland. It is a well known fact, however, that the British Abortion Act is of considerable practical consequence in Ireland.⁵⁰

About fifteen years ago abortion was an emotive word in Britain. It is far less so today. One fact that is becoming obscured about the 1967 Act is that it does not permit the wanton killing of unborn babies. Paradoxically, the Act has as its root a respect for human life. From the purely legal point of view, as the text of the Act and its long title⁵¹ make clear, it is a law which protects medical practitioners from criminal prosecution when they perform an abortion in certain stated circumstances. The right to abortion given under the Act is not a legal right, *strictu sensu*. The Act says that a pregnant woman can, if she follows the proper procedure laid

Keith Joseph, Secretary of State for Social Services, stated in answer to a Parliamentary Question on Feb. 23, 1971:

The Enquiry will be concerned with the way the Act is working and not with the principles that underlie it. It will be open to the Committee not only to recommend changes in the law but also to suggest interim changes in the Regulations under the present Act should they find this necessary.

1 REPORT OF THE COMMITTEE ON THE WORKING OF THE ABORTION ACT § A, ¶ 1, at 1 (1974).

⁴⁴ *Id.* § R, ¶ 520, at 171.

⁴⁵ *Id.* § J, ¶ 279, at 90.

⁴⁶ 2 *id.* ch. 4, ¶ 113-14, at 54-55. A relatively small number of abortions in England are performed on the basis of potential physical or mental abnormalities of an unborn child—1.1%. A negligible number of abortions (24 out of a total of 126,777 in 1971) were performed in emergency situations to save a pregnant woman's life or to prevent her from suffering grave physical injury. It is interesting to note the enormous increase in the total number of abortions performed in Great Britain since the inception of the Abortion Act. There were 23,641 legal abortions performed in 1968 and 126,777 performed in 1971—a 540% increase. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* ch. 8C, ¶ 361(d), at 208.

⁵⁰ A total of 578 abortions were performed on Irish women in Great Britain in 1971. *Id.* ¶ 355, at 204.

⁵¹ The full title of the Abortion Act is: "An Act to amend and clarify the law relating to the termination of pregnancy by registered medical practitioners." Abortion Act, 1967, c.87, § 1.

down by the Act, alter her and her surgeon's existing legal duty not to perform an abortion upon her, so that the surgeon will acquire a duty to perform the abortion or to request some other surgeon to perform it if the woman asks him to do so.⁵² Her request, in other words, becomes legally permissible. In the Hohfeldian sense, she is given a power to alter her own and her surgeon's existing duties.⁵³ It is clear, however, that the Act does not give ethical approval to abortion.⁵⁴

RIGHTS OF THE FETUS AT LAW

Pro-abortionists dislike the use of the phrase "unborn child." They are forced to work out a philosophy denigratory of the fetus in order to support their thesis. Yet, the very question whether one can deprive the *nasciturus* of life seems strangely ill put in light of the present trend towards development of more protective rights for the unborn.

In a 1968 French case,⁵⁵ Mme. Saulze, having contracted German measles in the course of her duties as a schoolteacher, gave birth to a child suffering from serious disabilities.⁵⁶ She received damages for herself and her child on the grounds that a child who has been conceived must be recognized as a person entitled to the benefit of the principle of state responsibility.⁵⁷

German developments are even more significant. Torts against the unborn were originally regarded as conceptually impossible in Germany. Today, however, section 823(1) of the German Civil Code embodies the principle that "whoever intentionally or negligently causes unlawful damage to life, body, health, property or any other right of another person, is

⁵² The proper procedure for determining whether an abortion may be legally performed requires that two registered medical practitioners certify that the continuation of the pregnancy involves a greater risk to the life of the woman, or of injury to the mental or physical health of the woman, or to any existing children in her family than if the pregnancy was terminated; or that there is substantial risk that the child will be born with a handicap. In addition, the termination must be carried out in a certified hospital. If, however, there is immediate risk perceived by the physician, these requirements need not be complied with. See Abortion Act, 1967, c. 87, § 1.

⁵³ According to Hohfeld, a duty is a correlative of a right. If, between two people, one has a right enforceable against the other, the latter has a duty toward the former. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Cook ed. 1923). Before the Abortion Act, neither the surgeon nor the mother had a right to an abortion—both had duties not to perform one. Under the new law, however, the woman by request and the doctor by certification can change the preexisting duty.

⁵⁴ See G. ABRAHAMS, *MORALITY AND THE LAW* 29 (1971). Abrahams suggests that simply because the law has been passed does not, without more, signify society's ethical approval. The legislature is not necessarily voicing a moral or religious judgment, for the law can be regarded as public health legislation. *Id.*

⁵⁵ Minister of Nat'l Educ. v. Saulze, (Conseil d'État, Nov. 6, 1968), discussed in Weeramantry, *Judicial Application of the Rule of Law*, *REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS* 43 (1969).

⁵⁶ *Id.* at 44.

⁵⁷ *Id.* at 44-45.

liable to make good the resulting damage."⁵⁸ It is quite clear from case law that "person" covers unborn persons. In 1949, the Supreme Court of Schleswig-Holstein awarded damages to a child born with venereal disease which had been transmitted from the mother. The father was held liable to pay damages for negligence causing injury to health. Similarly, in 1952, a woman contracted venereal disease in the course of a blood transfusion and transmitted the disease to her subsequently conceived child.⁵⁹ She was given a remedy by the German Federal Court against the hospital administration under section 823(1).⁶⁰ In 1972, the same court, pursuant to the same statute, awarded damages to a spastic child for injuries sustained while *en ventre sa mère* as a result of a road traffic accident.⁶¹

In Poland, the Supreme Court in 1965 had to consider whether a child injured in the course of an unsuccessful abortion was entitled to a remedy against the hospital.⁶² It is somewhat horrifying that a case like this could arise at all. The Court decided for the plaintiff-child, holding that he was "entitled to compensation for injuries sustained whilst in the womb of the mother in spite of the fact that the act which caused the injuries was committed before birth and was directed against the mother."⁶³

The examples cited are taken from civil law countries. Common law countries have similar decisions. In South Africa, for example, a case arose in 1963 concerning a child born with cerebral palsy.⁶⁴ Although a causal connection between the accident and the injuries alleged to have resulted therefrom was not established,⁶⁵ it was stated that if this were established in an appropriate case, damages could be awarded for injury to an unborn child.⁶⁶

In 1972, an unborn person was held to come within "the neighbor principle" in *Watt v. Roma*,⁶⁷ an Australian case involving a traffic accident. There is no reason why an Irish court might not apply this reasoning. In Britain, over thirty-five years ago, a pregnant woman was injured when a ladder left up against a cinema fell upon her.⁶⁸ As a result of the accident, the child was born prematurely the following day⁶⁹ and died within twenty-

⁵⁸ German Civil Code, Book 2, tit. 25, § 823(1) (Forrester, Goren & Ilgen trans. 1975).

⁵⁹ Decision of Dec. 20, 1952, 8 BGHZ 243.

⁶⁰ *Id.*

⁶¹ Decision of Jan. 11, 1972, quoted in 27 JURISTENZEITUNG 363 (1972).

⁶² Decision of Jan. 8, 1965, noted in 10 PANSTWO I PRAWO 151 (1968).

⁶³ *Id.*

⁶⁴ Pinchin N.O. v. Santam Ins. Co., 1963 (2) S.A. 254 (W), noted in Meyer, *A Delictual Remedy for the Unborn Child*, 80 S. AFR. LEGAL J. 447 (1963) [hereinafter cited as Meyer].

⁶⁵ Meyer, *supra* note 64, at 448.

⁶⁶ *Id.* (dicta).

⁶⁷ [1972] V.R. 353 (Vic. Sup. Ct.). The "neighbor principle," developed in *Donoghue v. Stevenson*, [1932] A.C. 562, provides that the moral duty to love your neighbor becomes in law a duty not to injure your neighbor. The *Donoghue* court, in applying this rule, equated "neighbors" with reasonably foreseeable third parties. *Id.* at 580.

⁶⁸ See 83 SOL. J. 185 (1939).

⁶⁹ *Id.*

four hours.⁷⁰ The suit brought by the mother against the cinema owners was settled out of court.⁷¹ Counsel for the woman remarked to the judge at Liverpool Assizes that "in many ways it is to be regretted that your lordship has not been called upon to decide an interesting question of law."⁷² The judge replied, "I cannot say that it is a regret which I personally share."⁷³ Many have since disagreed with that judge.

The thalidomide situation presented several problems for the legal system in Britain. Motivated largely by this, the Law Reform Commission in August 1974 produced a Report on Injuries to Unborn Children⁷⁴ containing proposed legislation. It is highly significant that the legislation strives to eliminate all doubt as to whether an unborn child has rights.⁷⁵ Recovery is contingent on live birth and remedies are envisaged even for preconception injuries.⁷⁶ Thus, it appears that if a man suffering from syphilis has intercourse with a woman without telling her that he is infected, a child resulting therefrom would have a cause of action: *Vox populi suprema lex*. In common law theory, on the other hand, remedies for preconception injuries provide difficulties.

Finally, one may glance at American law. In *Zepeda v. Zepeda*,⁷⁷ the plaintiff sued his natural father for the stigma of bastardy resulting from the denial of the plaintiff's "right" to be legitimate. Counsel for the plaintiff sought to rely on a tort of "wrongful life."⁷⁸ The Illinois appellate court held that the plaintiff possessed a right, but could have no remedy, a case of *damnu absque injuria*.⁷⁹ The court recognized that factors such as men-

⁷⁰ *Id.*

⁷¹ A report of the settlement between the injured woman and the cinema which appeared in the *Solicitors' Journal*, *id.*, expressed considerable confusion about the rights of the unborn in tort law due to the "very meagre supply of case law." It referred to the leading Irish case of *Walker v. Great N. Ry.*, 28 L.R. Ir. 69 (1891), which held that no such action could be maintained for prenatal injuries. Two of the four judges in *Walker*, however, had decided the case on the ground that no duty of care was owed to the fetus because the tortfeasors were unaware of its existence.

The report also discussed the status of the unborn in other areas of the law. In the criminal area, a defendant may be liable for murder when injuries inflicted before birth result in death after birth, *The King v. West*, 2 C & K. 784, and it is incitement to murder to convince a pregnant woman to murder her child after it is born, *The King v. Shepherd*, [1912] 2 K.B. 125.

The report suggested legislative reform prior to creation of a tort rule under which the injury would be concealed "in a state of suspended animation for a period of two or three months." This concern was expressed because of the uncertainty concerning whether or not the victim would be born alive and, therefore, would be a proper complainant in a tort action. If the fetus were to die unborn the civil action would die with it. 83 SOL. J. at 185.

⁷² 83 SOL. J. at 185.

⁷³ *Id.*

⁷⁴ LAW REFORM COMMISSION, REPORT ON INJURIES TO UNBORN CHILDREN (1974).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1965).

⁷⁸ 41 Ill. App. 2d at 259, 190 N.E.2d at 858.

⁷⁹ *Id.* at 257-62, 190 N.E.2d at 857-59. The court recognized that a wrong had been committed,

tal anguish and economic disadvantage attach to illegitimates, but could not justify a monetary recovery absent legislation allowing such recovery.⁸⁰ There is surely an irony here in the law. The factors referred to, mental anguish and the like, are the very ones which are determinative under the law of most countries of whether the essence of life can be destroyed. And there the anguish, the disadvantage, or whatever, inhere in someone other than the person whose life may be destroyed.

Later cases in the United States have tried to establish an actionable tort along the lines urged in *Zepeda*. Most have been unsuccessful. A child of a mentally deficient woman raped in a mental institution was held not entitled to sue the state of New York for negligence contributing to the occurrence of the rape and the resultant stigma of illegitimacy which attached to the plaintiff.⁸¹ In Florida, a child born illegitimately was not allowed to sue for "wrongful life."⁸² Nonetheless, many writers now favor the recognition of a tort of wrongful life.⁸³

In Ireland, the matter of civil remedies for the unborn is settled by statute. Section 58 of the Civil Liability Act enables a child injured before birth to sue for damages suffered as a result of the injury: "For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born provided the child is subsequently born alive."⁸⁴ Thus, an unborn child in Ireland is clearly a *persona juridica*.

but was reluctant to open the doors to a wide variety of suits of a similar nature:

It is not the suits of illegitimates which give us concern, great in numbers as these may be. What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.

Id. at 260, 190 N.E.2d at 858.

⁸⁰ *Id.* at 262, 190 N.E.2d at 859. The *Zepeda* court believed that the logical consequences of allowing recovery in such a case would be inconsistent with public policy. The court stated that any such radical change should come from the legislature. *Id.*

⁸¹ *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966). The *Williams* court sustained the dismissal of the action for failure to state a cause of action. *Id.* at 483-84, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

⁸² *Pinkney v. Pinkney*, 198 So.2d 52 (Fla. 1967). Although *Pinkney* was later overruled in *Brown v. Bray*, 300 So.2d 668 (Fla. 1974), the Florida Supreme Court's rationale in *Brown* did not disturb that part of the *Pinkney* holding concerning the dismissal of the daughter's action for wrongful life. *Id.* at 669.

⁸³ See, e.g., 41 N.Y.U.L. REV. 212 (1966) (action should be limited to nonconsensual intercourse); 40 ST. JOHN'S L. REV. 116 (1965) (suggesting creation of an administrative agency to handle "wrongful life" claims). See generally Note, *The Infliction of Illegitimacy—A New Tort?* 43 N.D.L. REV. 99 (1966).

⁸⁴ Civil Liability Act, 1963, § 58. It is significant that the section begins this way. It does so because of the decision in *Walker v. Great N. Ry.*, 28 L. R. Ir. 69 (1891), in which damages were denied in respect to a child *en ventre sa mère* partly on the basis that the railway company owed no duty of care to an unborn child.

The right to life is more fundamental than any other of the civil rights. It is strange that civil rights in general are expanding while the right to life in the theory of the law becomes less valuable. It is difficult to sustain an argument which denies the status of life at law to the fetus or which holds that, for policy reasons, life may be taken away—whether at the beginning or indeed the end of life.

CONSTITUTIONAL CONSIDERATIONS

In Ireland, the Constitution of 1937 adds a further dimension to the legal issue of abortion. In other countries with a written code of laws, it has been urged that a woman has a fundamental right of privacy with regard to her own person and therefore no law can validly effect a blanket ban on abortion as this constitutes a violation of privacy.⁸⁵ The right to privacy is increasing in importance. It has been recognized in a particular sense in Ireland in *McGee v. Attorney General*,⁸⁶ wherein the Supreme Court indicated that a husband and wife have a right to marital privacy.⁸⁷

The European Convention

Ireland has ratified the European Convention on Human Rights and Fundamental Freedoms,⁸⁸ article 2(1) of which declares that "[e]veryone's right to life shall be protected by law."⁸⁹ In the early 1960s, the European Commission on Human Rights at Strasbourg passed upon an application from Norway regarding abortion legislation and article 2.⁹⁰ The petition was brought in an effort to have a domestic Norwegian law permitting abortion in specific circumstances declared contrary to article 2.⁹¹ The applicant asked the commission to decide, first, whether the "right to beget offspring is an inalienable human right or if not, under what conditions and circumstances this right might be forfeited;"⁹² and secondly, "whether human rights are fully applicable to the human embryo from the time of conception, or if not, at what stages in the development of the human individual these rights take part and full force."⁹³ The com-

⁸⁵ *Cf. Roe v. Wade*, 410 U.S. 113 (1973). There, the Supreme Court of the United States held that the right to privacy is fundamental, and cannot be infringed upon by legislation absent a "compelling state interest." *Id.* at 152-56.

⁸⁶ [1974] I.R. 284 (Sup. Ct. 1972).

⁸⁷ *Id.* at 336 (Griffen, J., concurring).

⁸⁸ See CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, reprinted in J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1969) [hereinafter cited as CONVENTION]. Ireland signed the Convention on April 29, 1967 in Strasbourg, EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS 811 (10th ed. 1975).

⁸⁹ CONVENTION, *supra* note 88, art. 2, § 1.

⁹⁰ Application 867/60, X v. Norway, [1961] Y.B. EUR. CONV. ON HUMAN RIGHTS 270.

⁹¹ *Id.* at 274.

⁹² *Id.* at 270-72.

⁹³ *Id.* at 272.

mission held that it was not possible to proceed with the application since article 25 of the Convention requires that an individual applicant must also be a victim of an alleged violation of human rights.⁹⁴ In later cases, however, the commission was prepared, if necessary, to consider whether an applicant was indirectly a victim of an alleged violation.⁹⁵ Thus, the commission accepted that a woman might indirectly be a victim where her complaint related to the conviction and sentence of her minor son.⁹⁶ It also accepted that a woman might indirectly be a victim where her husband was detained in a mental institution.⁹⁷ The commission considered itself competent to examine the complaints of these persons, but only to the extent that the matter complained of might have affected their own rights under the Convention. This interpretation of article 25 is not likely to be determinative in a case such as the Norwegian one, as it is doubtful whether the rights under the Convention of a morally interested applicant—*e.g.*, a father—would be affected by abortion.

In any case, the general "human rights approach" to abortion was summed up in mid-1974 by the research director of the National Center of Scientific Research in Strasbourg:

Abortion is not to be seen as a comparison between the value of two lives. [One is perhaps entitled to interpose that very often it is not looked upon as such a choice at all. The value in terms of self to the woman is placed against the essence, the very right to life, of another person as yet unborn. Without protection of the essence, one might say one cannot talk about the value of life.] Rather it is the recognition of a certain rationality in the exercise of the potential right to life which a human being has from conception . . . legal procedures should ensure that decisions taken in this matter will always be taken from the perspective of the interests of the unborn.⁹⁸

⁹⁴ *Id.* at 276. Article 25 provides:

The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the high contracting Parties of the rights set forth in the Convention . . .

CONVENTION, *supra* note 88, art. 25. There is no limitation regarding an applicant's nationality. Any person, whether he is a resident of the signatory state or not, can lodge a petition with the commission, claiming to be a victim of a violation that occurred within the jurisdiction of the state held responsible. J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 279 (1969).

⁹⁵ See, *e.g.*, Application 100/55, *X v. Federal Republic of Germany*, [1956] Y.B. EUR. CONV. ON HUMAN RIGHTS 1962; Application 1478/62, *Koolen v. Belgium*, 13 EUROPEAN COMMISSION, COLLECTION OF DECISIONS 55, 87.

⁹⁶ Application 4007/69, *X v. Federal Republic of Germany* (unpublished), *discussed in CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, BRINGING AN APPLICATION BEFORE THE EUROPEAN COMMISSION ON HUMAN RIGHTS* 5.

⁹⁷ Application 4185/69, *X v. Federal Republic of Germany*, 35 EUROPEAN COMMISSION, COLLECTION OF DECISIONS 140.

⁹⁸ Address by A. Kiss, National Center of Scientific Research, Strasbourg, 1974.

Other Countries

In West Germany, an abortion law was rejected recently in a specifically constitutional context. Section 218A of the Fifth Statute for the Reform of the Penal Law, which permitted abortion on demand in the first twelve weeks of pregnancy, was rejected by the Federal Constitutional Court of West Germany in February 1975 on the basis that abortion is "an action designed to destroy life."⁹⁹ The court held that the protection provided the right to life by the German Constitution must also apply to the unborn child.¹⁰⁰ Thus, abortion, except in certain defined circumstances, is still criminal in that country.

Another case considering the constitutional dimensions of abortion was adjudicated in Italy a week prior to the Germany decision. In form, this case is most likely to resemble a case brought under the Irish Constitution, since the Italian Constitutional Court was forced to consider the constitutional validity of a blanket ban on abortion. The court recognized the possibility of conflict between the constitutional rights of the fetus and those of the mother, and held that, where such conflict occurs, the mother's right to health and sanity must prevail over any rights of the embryo which is "not yet a person."¹⁰¹ The threat to physical or psychic health was held to be a ground capable of justifying abortion. The court also invited the legislature to draft new legislation.¹⁰² Later, the court ruled that it had no objections to a national referendum on abortion.

In the United States the Supreme Court struck down restrictive state abortion laws in 1973. Since then, there has been an increase of over fifty percent in the number of legal abortions.¹⁰³ The Court held that abortions are legal before a fetus becomes "viable," but declined to say specifically when this occurs:

We need not resolve this difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer.¹⁰⁴

Ireland

Respect for the right to life is enshrined in the Irish Constitution¹⁰⁵ along with other rights such as property rights¹⁰⁶ and the right to a good

⁹⁹ Judgment of Feb. 25, 1975, 39 BVerfGE.

¹⁰⁰ *Id.*

¹⁰¹ Decision of Feb. 19, 1975 (Constitutional Court of Italy).

¹⁰² *Id.*

¹⁰³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰⁴ *Id.* at 159.

¹⁰⁵ The Irish constitution provides: "The State shall . . . by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." IRE. CONST. art. 40, § 3.

¹⁰⁶ *Id.*

name.¹⁰⁷ There is no indication that this right is extended to unborn persons. In fact, all constitutional rights are guaranteed to "citizens,"¹⁰⁸ with the exception of the habeas corpus provisions which apply to "persons."¹⁰⁹

Two passages in recent Irish case law tend to be relied on to support the contention that legislation permitting abortion could not be introduced in Ireland under its constitution. The first is in *Ryan v. Attorney General*,¹¹⁰ wherein it was recognized that the right of bodily integrity is one of the "personal rights" in article 40 of the Constitution.¹¹¹ This right is alleged to protect the right to life of the unborn. The right of bodily integrity implies that

no mutilation of the body or any of its members may be carried out on any citizen under the authority of the law except for the good of the whole body and no process which is, or may, as a matter of probability be, dangerous or harmful to the life or health of the citizen or any of them may be imposed by the Oireachtas.¹¹²

This dictum is alleged to rule out the possibility of a law liberalizing abortion in Ireland on other than therapeutic grounds. This contention, however, is very doubtful, for the fetus is never mentioned as such; it is only where the mother's body or any member of her body is "mutilated" that action becomes ultra vires, and the fetus is not part of the mother's body, much less a member of her body. The second passage, on first reading more appropriate, is in *McGee v. Attorney General*.¹¹³ It is dictum from Judge Walsh's opinion in the Supreme Court: "[A]ny action on the part of either husband or wife or of the state to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of that human life."¹¹⁴ This extract is extremely important. It is clear that according to Judge Walsh an unborn child has "guaranteed personal rights"—guaranteed, this must mean, by the Constitution. Judge Walsh does not refer, and it is a significant omission, to guaranteed personal rights of that human life which are dependent on live birth.

According to the traditional theory of common law, there are no guaranteed or guaranteeable rights unless one is a person, born alive, severed from one's mother and capable of sustaining a writ of habeas corpus.¹¹⁵ The Succession Act gives inheritance rights to a child *en ventre sa mere* who is not illegitimate and who is subsequently born alive.¹¹⁶ The Civil Liability

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 1.

¹⁰⁹ *Id.* § 4.2.

¹¹⁰ [1965] I.R. 294 (High Ct. 1963).

¹¹¹ *Id.* at 313.

¹¹² *Id.* at 313-14 (Kenny, J.).

¹¹³ [1974] I.R. 284 (Sup. Ct. 1972). See text accompanying notes 86-87 *supra*.

¹¹⁴ [1974] I.R. at 312.

¹¹⁵ See generally W. BLACKSTONE, COMMENTARIES.

¹¹⁶ Succession Act, No. 27 of 1965, § 3 (2).

Act also contains a proviso relating to live birth.¹¹⁷ It is submitted that such a proviso is no longer justifiable. In most cases the import of the proviso is that it is cheaper to kill early rather than late. It is understandable that the proviso was necessary when it was medically and scientifically difficult to prove causation of injury. Nowadays, however, this justification does not exist. It is illogical to maintain that a stillborn child is not capable a priori of being regarded as a person for the purpose of imposing the contemplated liability. Possibly one might assume that Judge Walsh intended to signify by his omission that the proviso of live birth does not apply to constitutional claims—that an unborn person is more than merely a *potential* person under the Irish Constitution.

The complexity surrounding the meaning of “born alive” is not the least reason for abandoning the proviso. It simply augments the case for abolition of the distinction.¹¹⁸ If the proviso of live birth were abolished, a claim that a legislative ban on abortion violated a woman’s constitutional right of privacy would be difficult to sustain when weighed against a claim based on the personal right to life of a fetus. One clearly would be talking about human life, not potential human life.

CONCLUSION

Abortion concerns an area of morality which is private as well as public, and where judge and legislator alike play important roles. At present the Law Reform Commission set up under the Law Reform Commission Act of 1975 is considering reform of family law. In the view of the present writer, the commission should consider the right to life in this context. Article 4(1) of the American Convention of Human Rights declares that the state will protect the right to life “and in general, from the moment of conception.” In all post World War II documents embodying human rights provisions, the right to life is treated in a separate article. It is clearly appropriate that protection of the right to life be declared in a way that is commensurate with the importance of that right for the entire community.

¹¹⁷ See text accompanying note 84 *supra*.

¹¹⁸ Most people seem unaware of this distinction. The Irish Hierarchy seems to lack awareness, as the following extract from Part I of the Pastoral on Human Life in 1975 indicates: It is contradictory of Parliament to remove the right to life of the unborn child by passing an Abortion Act, and at the same time defend the child as a legal entity who may inherit if his father dies before he is born, and who may sue for damages if he suffers injury from drugs or trauma, such as a motor accident, during pregnancy.