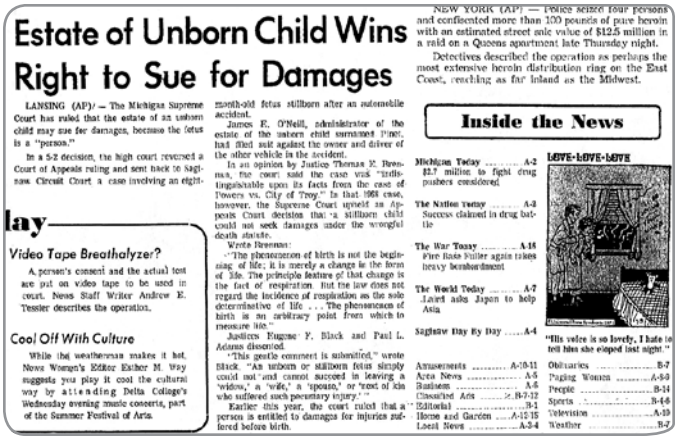
O'Neill v Morse

Unborn Persons in Michigan

385 Mich 130 (1971)



Estate of Unborn Child Wins Right to Sue for Damages

LANSING (AP)— The Michigan Supreme Court has ruled that the estate of an unborn child may sue for damages, because the fetus is a "person."

In a 5-2 decision, the high court reversed a Court of Appeals ruling and sent back to Saginaw Circuit Court a case involving an eight-month-old fetus stillborn after an automobile accident.

James E. O'Neill, administrator of the estate of the unborn child surnamed Pinet, had filed suit against the owner and driver of the other vehicle in the accident.

In an opinion by Justice Thomas M. Brennan, the court said the case was "indistinguishable upon its facts from the case of Powers vs. City of Troy." In that 1961 case, however, the Supreme Court upheld an Appeals Court decision that a stillborn child could not seek damages under the wrongful death statute.

Wrote Brennan:

"The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principle feature of that change is the fact of respiration. But the law does not regard the incidence of respiration as the sole determinative of life . . . The phenomenon of birth is an arbitrary point from which to measure life."

Justices Eugene F. Black and Paul L. Adams dissented.

"This gentle comment is submitted," wrote Black. "An unborn or stillborn fetus simply could not and cannot succeed in leaving a 'widow,' a 'wife,' a 'spouse,' or 'next of kin who suffered such pecuniary injury.' "

Earlier this year, the court ruled that a person is entitled to damages for injuries suffered before birth.

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Video Tape Breathalyzer?

A person's consent and the actual test are put on video tape to be used in court. News Staff Writer Andrew E. Tessler describes the operation.

Cool Off With Culture

While the weatherman makes it hot, News Women's Editor Esther M. Way suggests you play it cool the cultural way by attending Delta College's Wednesday evening music concerts, part of the Summer Festival of Arts.

NEW YORK (AP) — Police seized four persons and confiscated more than 100 pounds of pure heroin with an estimated street sale value of $12.5 million in a raid on a Queens apartment late Thursday night.

Detectives described the operation as perhaps the most extensive heroin distribution ring on the East Coast, reaching as far inland as the Midwest.

Inside the News

LOVE-LOVE-LOVE

"His voice is so lovely, I hate to tell him she eloped last night."

©July 9, 1971, edition of the *Saginaw News.*

The social ferment of 1960s liberalism intensified into a full-blown cultural revolution. Protests originating in the civil rights movement escalated into Black Power and urban riots. Opposition to the Vietnam War, and other student unrest, set American college campuses ablaze. American Indians and other ethnic minorities, the elderly and disabled, and prisoners and homosexuals all organized and protested. The most significant changes were in sex roles and the status of women. Among the most controversial issues of the 60s—and the one that most concerned the courts—was that of abortion. Across the nation in the late 1960s there were dogged political contests over the liberalization of abortion laws. The outcome varied, with some states amending and some retaining restrictive abortion statutes before the United States Supreme Court struck down all state abortion laws in the *Roe v Wade* decision of 1973. On the eve of *Roe,* Michigan voters rejected a referendum to decriminalize abortion and, in *O'Neill v Morse,* the Michigan Supreme Court dramatically reversed its precedents and held that unborn children were "persons" under the state's wrongful death laws. As the opening paragraph of the decision put it, the case was indistinguishable upon its facts from the case of *Powers v Troy.*[1] At the same time that the United States Supreme Court in *Roe* swept away the state's ample protection of the right to life in criminal law, Michigan's unborn children went from having almost no recognition in the state's civil law system to being recognized as persons.

The history of Michigan abortion law was fairly straightforward and typical. In 1848, the legislature declared that to kill an unborn child at any stage of gestation, unless necessary to save the life of the mother, was manslaughter.[2] But few criminal prosecutions concerned abortion: one scholar estimates that there were about 40 convictions between 1893 and 1932.[3] The state's private-law or civil status of unborn children was more unsettled and began as quite unsympathetic to the unborn. In 1937, a woman brought suit for injuries that she sustained on a streetcar, injuries she claimed caused her then unborn child to die three months after his birth.[4] The Court held that no person could sue for injuries sustained *in utero.* But Michigan was an outlier among states; most jurisdictions did allow actions for prenatal torts. Between 1960 and 1968, the Court began to revise its position, and fully abandoned it in 1971 in *Womack v Buckhorn.*[5] The Court now held that "a child has a legal right to begin life with a sound mind and body."[6] It was a democratic majority that was more willing to follow developments in other states.[7] Although the two major political parties developed sharply defined and opposing positions on abortion in the 1980s, with Democrats generally supporting abortion rights and Republicans opposing them, this was not the case in the 1960s–1970s.

Shortly before *Womack* altered Michigan Supreme Court jurisprudence, while walking with a friend on a cold December day, Carol Pinet, eight months pregnant, was struck by a car as a result of an automobile accident that occurred at the intersection where she was standing. Mrs. Bernice May Morse, driving a Ford Falcon, skidded through a stop sign and struck a Nash Rambler driven by Gary Root. Root's car was pushed off the road onto the sidewalk where Pinet and her friend stood, injuring both women. Pinet sustained minor injuries, but the baby boy she carried was stillborn. James O'Neill, the administrator of her son's estate, sued Mrs. Morse, the driver of the car that ran the stop sign and caused the accident. Acting under the assumption that an unborn child was not a person, the circuit court summarily dismissed the action.

The new Michigan Constitution had established a Court of Appeals, to which O'Neill brought his case. The Court of Appeals rejected his appeal by a 2-1 vote. Judge S. Jerome Bronson dissented, noting that "the constantly evolving legal history of our Bill of Rights" should now include the unborn, just as Indians, aliens, convicted felons, corporations, and labor unions had come to be treated as "persons."[8] O'Neill appealed to the Michigan Supreme Court.

In a 6-1 decision, the Court overturned the Court of Appeals decision in *O'Neill* and held that O'Neill could sue for damages caused by the death of the unborn child, because the child was a "person" under the state's wrongful-death statute. Justice Brennan, in the majority opinion, noted that barely a month earlier the Court in *Womack* had overturned the precedents that denied

recovery for prenatal torts. Brennan observed that courts in other states had recognized prenatal personhood. "The phenomenon of birth is not the beginning of life," Brennan wrote, "it is merely a change in the form of life." The Court swept aside old ideas that regarded the unborn child as indistinguishable from its mother, because dependent on her. "A baby fully born and conceded by all to be 'alive' is no more able to survive unaided than the infant *en ventre sa mere.* In fact, the babe in arms is less self-sufficient—more dependent—than his unborn counterpart." In short, Brennan concluded, "The phenomenon of birth is an arbitrary point from which to measure life."[9] The Court also pointed out that the legislature had recently amended its laws of inheritance to recognize the interests of unborn children, instructing probate courts to appoint guardians for unborn persons. "If property interests of unborn persons are protected by the law," Brennan asked, "how much more solicitous should the law be of the first, unalienable right of man—the right to life itself?"[10]

Justice Black entered a characteristically lively dissent. Fundamentally, he objected to what he saw as judicial activism by the majority, imputing its own desires into legislative intent, gratifying what he called their "insatiable demands for unconstitutional legislation."[11] In rather opaque dudgeon, Black announced, "This writer, slated now to contribute an offering prior to scriven by or on behalf of a majority of the justices, proposes to lance our feverish disagreement with aim toward ascertainment as now due of the specific issue of legislative intent and purpose."[12] Simply put, he argued that statutes regarding inheritance and property rights were inapplicable to unborn children. "An unborn or stillborn fetus simply could not and cannot succeed in leaving a 'widow,' a 'wife,' a 'spouse,' or 'next of kin who suffered such pecuniary injury.' Nor could any legislator of 1848, or of 1939, or of 1965, reasonably have conceived otherwise." The majority "have concentrated too much on that one word 'person,' and too little on the purposeful rest of these unitary statutes."[13]

Black's perception was that there were profound problems in the majority decision. One commentator noted that in *Womack* and *O'Neill,* Michigan suddenly propelled itself from a laggard state to "the forefront of the movement for allowing prenatal injury recovery." The cases amounted to "a grand-slam approach of changing almost thirty-five years of precedent in less than two months." However, the state legislature seemed to ratify the decision when it very quickly expanded the range of damages that could be recovered in prenatal wrongful-death suits.[14] The *O'Neill* decision explicitly held that birth was not a crucial factor in determining personhood; it implied that viability might be equally irrelevant, making conception the moment of personal identity.[15] And it did appear that the majority was using right-to-life language (associated with the criminal law protecting the unborn against abortion) in the civil law realm that was concerned, not with fetal life per se, but with the harm done to the unborn child's relatives.[16]

O'Neill was decided at a critical point in the national abortion-reform movement, and coincided with Michigan's clear reaffirmation of the right to life. The political movement to liberalize Victorian-era laws, in which states used their police power to regulate public morals in favor of sexual or reproductive freedom, had been remarkably unsuccessful. Legislatures refused to amend their laws that restricted access to contraceptives, even by married couples, until the 1965 United States Supreme Court's decision in *Griswold v Connecticut* struck down such laws on the basis of a constitutional "right to privacy."[17] The effort to liberalize abortion law was moving slowly and in contradictory ways before the United States Supreme Court again intervened. Most proposals provided for incremental reform, along the lines of the American Law Institute's model abortion law, which would permit "therapeutic" abortions in cases of rape or incest, severe fetal abnormality, or when pregnancy posed a grave threat to the physical or mental health of the mother. Thus, Mississippi amended its anti-abortion law to allow abortion in cases of rape in 1966. The next year, Colorado made the first significant revision, along the lines of the A.L.I. model, and North Carolina and California soon followed. Five other states amended their laws in 1970, with New York and Hawaii allowing abortion "on demand" up to the point of viability or 24 weeks. The New York statute passed by one vote in the State Senate.[18]

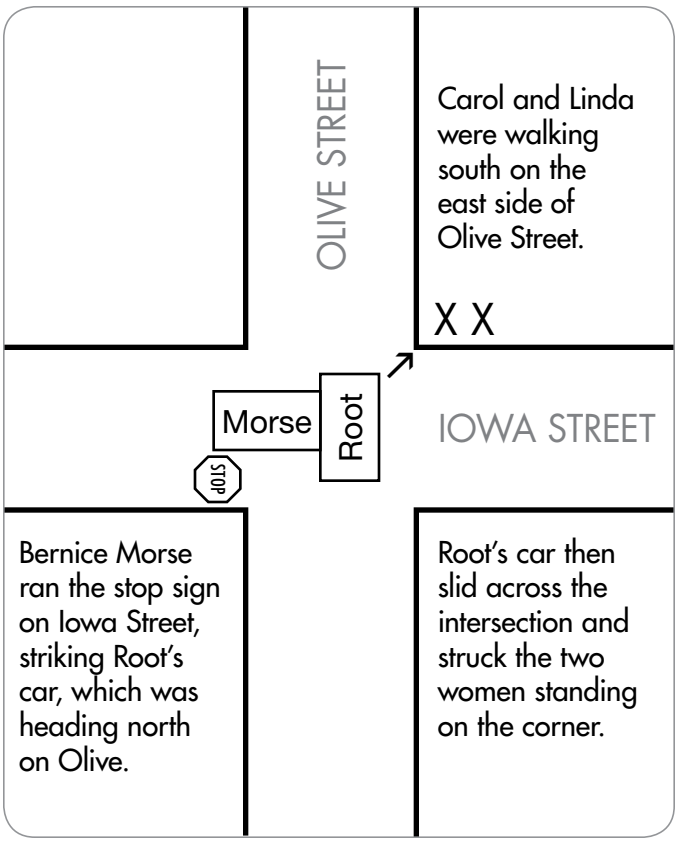
However, these reforms provoked a right-to-life reaction, and after 1970, "the abortion reform effort seemed to evaporate."[19] Twenty state legislatures rejected abortion reform bills in the first half of 1971, and six state supreme courts upheld their states' abortion laws in 1971–1972. In New York, the legislature voted to repeal the new law, but Governor Nelson Rockefeller vetoed the bill.[20] In Michigan, abortion proponents presented "Proposition B," a petition to enact a New York-style abortion law, to the voters in November. Polls indicated support for the proposal early on, and abortion reform leaders were guardedly optimistic about its chances. "The eyes of the world are on Michigan," feminist leader Gloria Steinem said. "A defeat here will slow our efforts elsewhere." But abortion opponents mobilized and mounted an

The 1963 constitution had added an intermediate Court of Appeals to reduce the workload of the Supreme Court and allow it to concentrate on only the most important cases. The new constitution also reduced the size of the Supreme Court from eight to seven justices, which made tie votes less likely. Justice Theodore Souris had been elected to an eight-year term in 1960, but resigned in 1967 to establish the new seven-member body.[1] The sharp partisan division among Court members that characterized the early 1960s was gone. Thomas E. Brennan was the only Republican on the Court. The youngest man ever to serve as chief justice, he left the Court in 1973 to found the Thomas M. Cooley Law School, and wrote a novel (*The Bench,* published in 2000) based on his experience as a justice. Paul L. Adams, who had been defeated in the aftermath of the Court's controversial 1962 reapportionment decision, returned to the bench in 1964. Thomas M. "the Mighty" Kavanagh served as chief justice, and was joined by his unrelated namesake Thomas G. "the Good" Kavanagh in 1969. The newest members of the Court were former governors John B. Swainson and G. Mennen Williams. The senior member was Eugene F. Black, who had been on the Court since 1956.

1. Cohn, *A Footnote to a Footnote,* 75 Mich B J 494 (1996).

extensive campaign against Proposition B, and it lost by 61 percent to 39 percent, a margin of almost 800,000 votes, in "one of the most remarkable political reversals in Michigan's history." One of the architects of the proposition's defeat was Wayne County District Judge James L. Ryan, who later joined the Michigan Supreme Court and was appointed to the U.S. Court of Appeals. Observers concluded that most voters were not ready for a law as liberal as New York's and might have ratified a more incremental and moderate one. But "Having failed with the voters," Michigan pro-abortion leaders "believed that the 'emphasis will be placed in the courts.'"[21]

Michigan's referendum turned out to be the last democratic expression on the abortion issue. Indeed, a Wayne County Circuit Court judge and the Michigan Court of Appeals declared Michigan's abortion law unconstitutional in the weeks before the referendum, but the Michigan Supreme Court did not have time to consider these decisions.[22] While Michiganders were voting, United States Supreme Court Justice Harry Blackmun was drafting his opinion in *Roe v Wade,* which struck down every abortion law in the country—even New York's law was too restrictive. Under *Roe,* states could not regulate abortion at all in the first trimester, and could regulate it only to preserve maternal health in the second. In the third trimester, up to the point of birth, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Since "health" was understood to include psychological well-being, the decision amounted to abortion-on-demand up to the point of birth.[23]



2 Young Women Struck By Auto Reported 'Fair'

Two young women hit by a caroming car as they walked along Olive Road late Tuesday morning were listed in fair condition today at St. Mary's Hospital.

Carol Diane Pinet, 18, of 124 Walnut was admitted to the hospital for observation. Linda K. Pollard, 17, of Findlay, Ohio was treated for facial bruises and scrapes.

State police said the two women were walking south on Olive when a car driven by Gary Russel Root, 22, of 3692 Olive was hit by a car driven by Mrs. Bernice May Morse, 47, of 2517 Iowa, The impact knocked the Root car into the pedestrians.

The Morse car, police said, approached the intersection of Iowa and Olive, skidded when it tried to stop, and hit the Root car northbound on Olive. Mrs. Morse was ticketed for failure to stop.

The decision in *Roe v Wade* denied that unborn children were "persons" under the U.S. Constitution. Blackmun claimed that there was no agreement as to when life begins; birth seemed to be the only point at which personhood began. When Michigan and many other states attempted to prohibit "partial-birth abortion," the Supreme Court held that this imposed an "undue burden" on the constitutional right to abortion and struck such laws down.[24] At the same time, Justice Brennan's observation that birth was an arbitrary dividing line was used by proponents of neonatal euthanasia or infanticide.[25]

Roe was altogether at odds with the capacious expression of unborn life that the Michigan Supreme Court stated in *O'Neill,* and caused great distress to the pro-life justices, who nevertheless abided by the U.S. decision.[26] Yet despite *Roe,* there was little change in prenatal wrongful-death jurisprudence. In 1975, the Michigan Court of Appeals held that suits could only be brought for injuries sustained by viable fetuses. Here it noted the anomaly of extensive regard for unborn children in civil law after *Roe* ended their criminal-law protection. "If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage."[27] Yet in 1996, the Court held that prematurely born, non-viable twins were included under the law. The following year, the legislature amended the wrongful death statute in a way that seemed to confirm that pre-viable fetuses were included, but the law remained ambiguous.[28]

Similarly contradictory was the case of Jaclyn Kurr, who was convicted of voluntary manslaughter after she killed the father of her unborn quadruplets when he repeatedly punched her in the stomach while she was 17 weeks pregnant. Michigan law (ever since *Pond*) allowed defendants to use lethal force to defend themselves and others against violent attacks. A Kalamazoo circuit judge held that pre-viable children were not "persons" who could be protected against attack. The Court of Appeals reversed, based on Michigan's 1998 Fetal Protection Act, which provided criminal penalties for assaults on pregnant women. The Court of Appeals also noted the amended wrongful-death act's "civil protections for fetuses and embryos." Thus, the criminal law's

protection of unborn children depended on a woman's choice to continue the pregnancy. Kurr could have chosen to abort the quadruplets in the aftermath of the assault, and no abortion opponent could raise the "defense of others" that she had used in her manslaughter case as a justification for trying to stop her. The Court of Appeals declared that it would not take up the question of the status of "embryos existing outside a woman's body," a further complication presented by modern science. The Michigan Supreme Court declined (on the 30th anniversary of the *Roe* decision) to review the decision, despite one justice's plea that "it is incumbent on us…to provide guidance for the bench and bar on this important question."[29] Indeed, the Court of Appeals seemed to be pleading for such clarification when it stated, "We emphasize that our decision today is a narrow one. We are obviously aware of the raging debate occurring in this country regarding the point at which a fetus becomes a person entitled to *all* the protections of the state and federal constitutions."[30]

The status of the unborn presented another complication in the emergence of "wrongful birth" suits. Parents of handicapped children sued physicians and hospitals for failing to diagnose prenatal defects, knowledge of which would have permitted the parents to abort the child. The New Jersey Supreme Court rejected the first wrongful birth suit in 1966. That Court noted, "Examples of famous persons who have had great achievement despite physical defects come readily to mind…. The sanctity of the single human life is the decisive factor in this suit in tort," it continued. "Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle." After *Roe,* however, many states permitted wrongful-life actions. Michigan was one of the few states to bar them.[31]

No question better illustrated the nationalization of American social policy, and the primacy of judicial social policy-making, than abortion and other life or sexual freedom issues that came to the fore in the 1960s. The United States Supreme Court gave voice to the radical individualism of the cultural revolution when it reaffirmed *Roe* in a 1992 case, although it now held that the constitutional right to abortion derived not from a right to "privacy," but from the Fourteenth Amendment's guarantee of liberty. And the United States Supreme Court defined liberty in an open-ended way: "At the heart of liberty is the right to define one's own concept of existence, of the universe, and of the mystery of human life."[32] The Court extended this principle to the liberty of homosexual sodomy in 2003. Dissenting bitterly from these decisions, Justice Antonin Scalia remarked that the Court had "taken sides in the culture war."[33] These issues made every United States Supreme Court appointment, and eventually appointments to lower federal courts and elections to state courts, the subject of fierce political struggles.

FOOTNOTES

1. *Powers' Estate v City of Troy,* 380 Mich 160, 156 NW2d 530 (1968).
2. Michigan Legislative Service Bureau, Legislative Research Division, *Abortion: A History of Abortion Laws in Michigan,* Research Report 18 (1998); Linton, *Enforcement of state abortion statutes after* Roe*: A state-by-state analysis,* 67 U Det L R 195 (1990); Linton, Roe v Wade *and the history of abortion regulation,* 15 Am J L & Med 227 (1989).
3. Shartsis, Casey *and abortion rights in Michigan,* 10 TM Cooley L R 316 (1993). Justice John D. Voelker had the protagonist of one of his novels note that his first law office had for its "last tenant, an old and recently deceased doctor, [who] had for many years practiced the stealthy arts of the abortioner," and that his initial legal practice was so unlucrative that "I dallied with the heady notion of taking a swift cram course in illicit surgery." *Hornstein's Boy* (New York: St. Martin's Press, 1962), pp 13–14.
4. *Newman v City of Detroit,* 281 Mich 60, 274 NW 710 (1937). See *Recent developments,* 70 Mich L R 729 (1972); Paonessa, *Recovery for prenatal injuries: Michigan exorcises its "Ghosts of the Past,"* 47 Notre Dame Lawyer 976 (1972).
5. *Womack v Buchhorn,* 384 Mich 718, 187 NW2d 218 (1971).
6. *La Blue v Specker,* 358 Mich 558, 100 NW2d 445 (1960); *Powers' Estate, supra; Womack, supra.*
7. Roger F. Lane interview with Justice John W. Swainson, October 18, 1990; Paonessa, *Recovery for prenatal injuries, supra* at 982.
8. *O'Neill v Morse,* 20 Mich App 679; 174 NW2d 575 (1969).
9. *O'Neill v Morse,* 385 Mich 130, 136; 188 NW2d 785 (1971).
10. *Id.* at 137.
11. *Powers, supra* at 180.
12. *O'Neill, supra* at 141.
13. *Id.* at 146–147.
14. Paonessa, *Recovery for prenatal injuries, supra* at 988, 991–992.
15. *Recent developments, supra* at 751.
16. *Id.* at 746, 755.
17. *Griswold v Connecticut,* 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965); Hittinger, *Abortion before* Roe, 46 First Things 14 (October 1994).
18. Linton, *Enforcement of state abortion statutes, supra* at 258; Karrer, *The formation of Michigan's anti-abortion movement, 1967–74,* 22 Mich Hist R 69 (1996).
19. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 82.
20. *Id.* at 92; Linton, *Enforcement of state abortion statutes, supra* at 231.
21. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 89, 95–97, 100; Mossberg, *A Key Battle,* Wall Street Journal, November 3, 1972, p 30; *Some Referenda Voters Go Against the Polls and Big Advertisers,* Wall Street Journal, November 9, 1972, p 4.
22. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 88; *People v Nixon,* 42 Mich App 332; 201 NW2d 635 (1972); *People v Bricker,* 42 Mich App 352; 201 NW2d 647 (1972); *Abortion Declared Legal in Michigan,* New York Times, October 12, 1972, p 36; Mossberg, *A Key Battle, supra.*
23. *Roe v Wade,* 410 US 113, 165; 93 S Ct 705 (1973). The Michigan Court of Appeals upheld the indictment of a physician for performing a third-trimester abortion without any medical reason. The abortionist pled guilty to a lesser charge and surrendered his license to practice medicine. *People v Higuera,* 244 Mich App 429; 625 NW2d 444 (2001).
24. *Stenberg v Carhart,* 530 US 914; 120 S Ct 2597; 147 L Ed 2d 743 (2000). The Court later upheld a similar prohibition by Congress if the procedure was "in or affecting interstate commerce," in *Gonzales v Carhart,* 550 US 124; 127 S Ct 1610; 167 L Ed 2d 480 (2007).
25. Duckworth, *Living and Dying with Peter Singer,* Psychology Today, January/February 1999.
26. Lane, interview with Justice John W. Swainson, *supra.*
27. *Toth v Goree,* 65 Mich App 296; 237 S Ct 297 (1975). The Michigan Supreme Court declined to hear an appeal.
28. Marks, *Person v potential: Judicial struggles to decide claims arising from the death of an embryo or fetus and Michigan's struggle to settle the question,* 37 Akron L R 76 (2004); Marks, *Prenatal torts in Michigan: Lingering questions about the wrongful death of a previable fetus,* 83 Mich B J 28 (2004). The legislature tried to clarify the law in Public Act 270 of 2005.
29. *People v Kurr,* 253 Mich App 317; 654 NW2d 651 (2002); George, *Woman's Fetus Defense Was Right, Judges Say,* Detroit Free Press, October 9, 2002; Will, *Life, and Death, in an Abortion Culture,* Washington Post, October 27, 2002, p B7. The quadruplets miscarried while Kurr was in prison.
30. *Kurr, supra* at 328.
31. Weil, *A Wrongful Birth?* New York Times Magazine, March 12, 2006; *Gleitman v Cosgrove,* 227 A2d 689 (NJ, 1966).
32. *Planned Parenthood v Casey,* 505 US 833, 851; 112 S Ct 2791; 120 L Ed 2d 674 (1992).
33. *Lawrence v Texas,* 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003).