

## The Human Foetus as a Legal Person

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### Résumé de l'article

Cet article a pour but de développer et de mettre à jour l'article de l'auteur paru sous : « Natural Law, our Constitutions, and the Unborn », (1996) 27 *Revue générale de droit* 21-53.

Une emphase particulière est mise sur la révolution judiciaire, initiée par la Cour suprême du Canada dans l'affaire *Montréal Tramways Co.* de 1933 et menée par l'académicien juriste américain, William Prosser. Vers 1955, les cours à travers l'Amérique du Nord en sont généralement venues à reconnaître, en matière de responsabilité et généralement dans les litiges privés, l'existence des enfants à naître comme personnes légales depuis et après la conception.

L'auteur démontre que cette révolution judiciaire n'était rien d'autre que la reconnaissance d'une ancienne règle du droit civil de Rome, réaffirmée par Tribonian au VI<sup>e</sup> siècle et reconnue également par la common law d'Angleterre à plusieurs occasions avant et après la Révolution américaine.

L'auteur explique de plus que cette règle aurait dû prévenir la décision de la Cour suprême des États-Unis dans *Roe v. Wade* et sa progéniture canadienne, mais fut ignorée.

L'auteur admet qu'humanité et justice, aussi bien que tradition légale, peuvent nécessiter quelques concessions en procédure criminelle. Mais il illustre, en référant à des décisions récentes et tragiques aux États-Unis et au Canada, pourquoi les libertés civiles de tous, requièrent une réaffirmation de l'ancienne règle à l'effet que dans tous les litiges privés, le foetus humain doit être protégé comme personne légale depuis et après la conception.

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# The Human Fœtus as a Legal Person

JOHN REMINGTON GRAHAM  
of the Minnesota Bar

## ABSTRACT

*This article is meant to amplify and update the author's article published as "Natural Law, our Constitutions, and the Unborn", (1996) 27 Revue générale de droit, 21-53.*

*Particular emphasis is laid on the judicial revolution initiated by the Supreme Court of Canada in the Montréal Tramways Co. case in 1933, and led by the American legal scholar, William Prosser. By about 1955, courts across North America generally came to recognize in the field of torts, and in private litigation generally, the existence of unborn children as legal persons from and after conception.*

*The author shows that this judicial revolution was nothing but a recognition of an ancient rule of the civil law of Rome, restated by Tribonian in the 6<sup>th</sup> century, and acknowledged also by the common law of England on repeated occasions before and after the American Revolution.*

*The author shows furthermore that this rule should have prevented the decision of the United States Supreme Court in *Roe v. Wade* and its Canadian progeny, but was ignored.*

## RÉSUMÉ

*Cet article a pour but de développer et de mettre à jour l'article de l'auteur paru sous : « Natural Law, our Constitutions, and the Unborn », (1996) 27 Revue générale de droit 21-53.*

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*L'auteur démontre que cette révolution judiciaire n'était rien d'autre que la reconnaissance d'une ancienne règle du droit civil de Rome, réaffirmée par Tribonian au VI<sup>e</sup> siècle et reconnue également par la common law d'Angleterre à plusieurs occasions avant et après la Révolution américaine.*

*L'auteur explique de plus que cette règle aurait dû prévenir la décision*

*The author allows that humanity and justice, no less than legal tradition, may necessitate some concessions in criminal proceedings. But he illustrates, by reference to recent and tragic decisions in the United States and Canada, why the civil liberties of us all, demand a reaffirmation of the ancient rule that, in all private litigation, the human fetus must be protected as a legal person from and after conception.*

*de la Cour suprême des États-Unis dans Roe v. Wade et sa progéniture canadienne, mais fut ignorée. L'auteur admet qu'humanité et justice, aussi bien que tradition légale, peuvent nécessiter quelques concessions en procédure criminelle. Mais il illustre, en référant à des décisions récentes et tragiques aux États-Unis et au Canada, pourquoi les libertés civiles de tous, requièrent une réaffirmation de l'ancienne règle à l'effet que dans tous les litiges privés, le fœtus humain doit être protégé comme personne légale depuis et après la conception.*

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## I. THE IMPOSSIBLE CONTRADICTION IN CONTEMPORARY LAW

Beginning with *Roe v. Wade*,<sup>1</sup> judicial decisions of our era on abortion have turned on an idea of fundamental law that we each enjoy a right of privacy, a “right to be let alone” by our government when it comes to certain intimate activities and choices in our lives. A noted formulation of this right, good either in Canada or the United States, is found in a much-admired judicial opinion wherein it says: “The makers of our Constitution

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

undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's *spiritual nature*, of his feelings and intellect".<sup>2</sup>

And from this right of privacy is supposed to follow an immunity from criminal prosecution against a woman who elects for personal reasons of her own to abort her unborn child, at least if the fœtus is not yet viable.

The difficulty here is that this right of privacy is premised on the idea that human nature is first and foremost a spiritual reality, which is the very reason why the right is inalienable, thus incapable of being taken away by government. But an inalienable right is by definition not granted by the government, and so, if it exists, it must derive from natural law which is an inherent moral and physical order of the world, given by the hand of God. Nor can there be any legitimate doubt that the existence of natural law, granted by God, is a constitutional postulate in Canada and the United States.<sup>3</sup>

In granting this much, as cannot be avoided, we are caught up in an impossible contradiction.

For it has been judicially found as fact in litigation, upon examination of modern biological and medical knowledge, that an unborn child is genetically separate and distinct from its mother virtually from the moment of conception.<sup>4</sup> If human nature is a spiritual reality, as ordained by fundamental law, and if separate and distinct human reality begins with conception, as is undeniable in light of the discoveries of modern science, then, constitutionally speaking, human nature becomes separate and distinct from and after conception. And then the inevitable conclusion must be that a human fœtus is, from and after conception, a legal person with civil rights.

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2. The famous dissent of Louis Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928), p. 478, emphasis added: this dissent became law in *Katz v. United States*, 389 U.S. 347 (1967). The right of privacy there recognized was later given fuller development in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

3. The Preamble of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act of 1982* states that Canada is founded on the "supremacy of God and the rule of law". The opening passages of the *Declaration of American Independence* acknowledge the "laws of nature and nature's God", and upon this bedrock the United States Constitution is built. These provisions must be read in light of what Sir William Blackstone said in his lectures at Oxford University, entitled *Commentaries on the Laws of England*, Christian Ed., 1765, Book I, pp. 38-43: he there acknowledged natural law and the existence of God as the true basis of our constitutional order. The greatest natural law judge in North America during this past century was Ivan Rand of Canada. See, e.g., M. SCHNEIDERMAN, "The Positivism of Hugo Black v. the Natural Law of Ivan Rand: a study in contrasting judicial philosophies", (1968) 33 *Sask. L. Rev.* 267-272.

4. MATHESON, J., in *Borowski v. Attorney General of Canada and Minister of Finance of Canada*, [1984] 4 D.L.R. 4<sup>th</sup> 112 (Q.B. Sask. 1983), pp. 124 and 128. Judicial commentary of like tenor and effect is found in the opinion of BROGEN, C.J., dissenting, in *Stemmer v. Kline*, 128 N.J. Law 466, 26 A. 2<sup>d</sup> 684, p. 687 (1942). Cf. *Smith v. Brennan*, 31 N.J. 353, 157 A. 2<sup>d</sup> 497, p. 502 (1960).

## II. LEGAL TRADITION AND THE UNBORN

Aside from philosophical questions, we should address the legal standards of human existence according to legal principles which we did not make up to suit our contemporary prejudices, but inherited from legal tradition. In this way, we may benefit from the wisdom of the past. This wisdom, far from resting upon ignorant superstition, turns on practical realities which transcend the mundane contentions of our day and age.

The classical principles of unborn human life, as they came to us from the common law of England, merit special notice:<sup>5</sup> — First, abortion was recognized as a criminal offense, but only if the prosecutor could prove that the foetus had quickened, *i.e.*, that foetal movement could be physically felt by the mother within her body, usually beginning at 16-18 weeks; — secondly, upon conviction, criminal abortion could be punished only as a grave misdemeanor; — thirdly, the act of killing an unborn child could never be punished as murder or manslaughter, or, in other words, felonious homicide was impossible unless the infant was born alive before it died; — fourthly, in any and all private litigation an infant *en ventre sa mère*, *i.e.*, law French meaning an unborn child, was deemed to be a legal person from the moment of conception, in any event as soon as the pregnancy of the mother was known by any reasonable means.

This last rule dealing with private litigation was historically derived from the civil law of Rome: an unborn child could not only inherit property at least in that its share was held in its behalf, but it was also said, “He may have an injunction, and he may have a guardian”.<sup>6</sup> The question naturally arises why, in conceding to a human foetus the status of a legal person, the common law of England imposed significant restraints upon criminal prosecution of abortion.<sup>7</sup>

5. W. BLACKSTONE, *op. cit.*, note 3, Book I, pp. 129-130, and Book IV, p. 198.

6. The legal status of an infant *en ventre sa mère* in private litigation was stated expansively in *Thelluson v. Woodford*, (1799) 31 Eng. Rep. 117 (Ch.), p. 163, by Buller, J., who made elaborate reference both to the common law of England and to the civil law of Rome. Such had by then been the law for hundreds of years. See, *e.g.*, *Earl of Bedford's Case*, 77 Eng. Rep. 421, p. 424 (Wards 1587). The common law rule against perpetuities was that no interest in property is good unless it must vest or fail within twenty-one years of some life in being at the creation of the interest. If a child was conceived but not born within the twenty-one years, he was deemed a legal person capable of inheriting so as to save the interest. See, *e.g.*, *Ould v. Hospital for Foundlings*, 95 U.S. 303 (1877), p. 312.

7. Some older American cases past have expressly disregarded the limitations of the common law on criminal prosecution for procuring an abortion, as stated by W. BLACKSTONE, *op. cit.*, note 3, Book I, p. 129, and Book IV, p. 198, and held flatly that procuring an abortion, at any time after pregnancy was known, even before the foetus quickened, was a crime at common law as received with modifications in certain States. See, *e.g.*, *Mills v. Commonwealth*, 13 Pa. St. 630 (1850), pp. 632-633, and *State v. Slage*, 82 N.C. 653 (1880), p. 655, and 83 N.C. 630 (1880), p. 632.

It has been suggested that these restraints were based on legal ignorance of prenatal life<sup>8</sup>. But two considerations plainly show that this theory cannot be right.

For centuries leading up to the American Revolution, the medical profession honored the oath of Hippocrates : This oath included the promise never to give a pessary to induce an abortion, and this promise derived from the teachings of Pythagoras whose view, premised on human nature as a spiritual reality, plainly was that, from the moment of conception, a human being exists.<sup>9</sup> The knowledge of Pythagoras was largely intuitive and mystical. But the knowledge of Hippocrates was rooted in his astute observations as a physician, which, after all, have been confirmed by sophisticated technology in our day and age.

And running parallel to traditional medical knowledge is traditional legal principle. From at least the 6<sup>th</sup> century if not before, the rule of the civil law of Rome was :

<i>Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur.</i> <sup>10</sup>	An unborn child is cared for, as if he were already born, whenever its interests require.
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And this rule was adopted by the common law of England.<sup>11</sup>

There was no legal ignorance about the human reality of an unborn child when the civil law was codified by Justinian and the common law was restated by Blackstone. So it was that, in all private litigation at common law, or in equity, under a code of civil law, and, needless to say, in all proceedings of canon law, the traditional rule has always been that an unborn child at any stage of pregnancy is a legal person whose interests must be protected whenever its just rights or needs are called to the attention of the court by anyone having standing to do so.

The traditional restraints on criminal prosecution may be justified as the mercy of the law, founded on a recognition that a woman in weakness

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8. See, e.g., C.D. FORSYTHE, "Homicide of the Unborn Child : the Born Alive Rule and other Legal Anachronisms", (1987) 21 *Valparaiso Univ. L. Rev.* 563-629.

9. These facts are so indisputable that they were conceded by BLACKMUN, J., albeit grudgingly, in *Roe v. Wade*, *supra*, note 1, pp. 130-132. The view of Pythagoras and Hippocrates is reinforced by Jeremiah 1:5, where it says, "Before I formed thee in the belly, I knew thee; and before thou camest forth out of the womb I sanctified thee, and ordained thee a prophet unto all nations". — King James Bible.

10. Quoted from Book I, Title 5, Section 7 of *Justinian's Digest* by LAMONT, J., in *Montréal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, p. 461, [1933] 4 D.L.R. 337, p. 341.

11. "And on this point, the civil law agrees with ours". W. BLACKSTONE, *op. cit.*, note 3, Book I, p. 130.

or despair and those helping her may be weighed down with unyielding circumstances, or not tangibly enough aware of innocent human life before foetal movement could be physically felt or even before a child were visible as a human baby. We may recount primordial rules which govern the merits of any criminal prosecution :

An involuntary act, as it has no claim to merit, so neither can it induce any guilt : the concurrence of the will, when it had its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it; yet as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish what it cannot know. For which reason, in all temporal jurisdictions, an overt act, or some open evidence an intended crime, is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And, as a vicious will, without a vicious act, is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will, and, secondly, an unlawful act upon such vicious will.<sup>12</sup>

And to the extent that wrongful intent may be a constitutionally necessary element of every serious crime,<sup>13</sup> the limitations imposed by the common law on criminal prosecution for procuring an abortion, or their essential statutory equivalent, may perhaps be a demand of fundamental law.

This immunity, if it exists in the true meaning of fundamental law, superficially resembles some of the characteristics, but really is radically different from the “right” announced in contemporary judicial decisions on abortion. This immunity, if it exists, is not grounded in a purely biological view of human life and sexuality, nor can it be understood as a positive right, such as the right to vote or the right to marry. It is an immunity which condones nothing : — It is not unlike the right of a citizen suspected or accused to remain silent : if he is questioned by public authority; specifically, it is a shield of persons suspected or indicted, assuring that they might not be prosecuted or punished for their ignorance, or without due consideration of mitigating factors.

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12. W. BLACKSTONE, *op. cit.*, note 3, Book IV, pp. 20-21.

13. Which is not such a difficult point to argue in light of the remarkable commentary of CHASE, J., based on natural law, in *Calder v. Bull*, 3 Dallas 386 (U.S. 1798), pp. 388-389.

Such an immunity, if it exists, may perhaps also be justified by the principle of natural law, considered as an unwritten constitutional limitation, thus stated by St. Thomas Aquinas :

*Quod lex humana dicitur aliqua permittere, non quasi approbans, sed quasi ea dirigere non potens : multa autem diriguntur lege divina, quae dirigi non possunt lege humana : plura enim subduntur causae superiori, quam inferiori.*<sup>14</sup>

Some things human laws are said to permit, not as approving them, but as having no means to regulate them justly. Many things are governed by divine law, which human law cannot properly regulate. For more things are subject to higher than lower causes.

But having shown mercy for human frailty by restraining criminal prosecution, the law must never condone a wrong against life and against nature. We thus compensate for leaving justice to God in cases beyond our competence by undertaking the duty of working justice in cases where we can do right. And we so compensate by invoking the traditional rule of the civil law of Rome and the common law of England that, in all private litigation, a human fœtus is a legal person whenever its interests cannot in justice be forgotten or overlooked.

### III. WILLIAM PROSSER'S PLEA FOR THE UNBORN

Earlier in this century now fast coming to a conclusion, there was an important development in jurisprudence concerning the law of torts. Some courts of common law in the United States had held that, if battery or negligence caused injury to a pregnant mother, and, if as a result, the fœtus was also harmed, the child could not, following its birth, bring suit by a guardian *ad litem* against the tortfeasor.<sup>15</sup> These cases were obviously wrong, because they contradicted a venerable principle which, tracing back no less than thirteen hundred years, conceded that a human fœtus is a legal person in private litigation.

14. *Summa Theologica*, I-II, q. 93, art. 3 : *Utrum omnis lex a lege aeterna derivetur.*

15. See, e.g., *Allaire v. St. Luke's Hospital*, 184 Ill. 359, (1900), 56 N.E. 638, which, however, included a very strong dissent by Boggs, J. This trend was not universal by any means, for recovery was allowed in a suit by a child for prenatal injury in *Cooper v. Blanck*, 39 So. 2<sup>d</sup>. 352 (La. App. 1923).



The Supreme Court of Canada denounced this mistake, and acknowledged the traditional rule from the time of Justinian in a case arising under the *Civil Code of Québec*.<sup>16</sup> A right of action was acknowledged in the child to recover for prenatal injuries.

Thereafter, one of the most famous legal scholars in the United States led the fight to reestablish this traditional rule. William Prosser's text on torts has been used by generations of law students taking bar examinations and judges on the bench in the United States since publication of his first edition in 1941. His posthumous fifth edition is still a prized classic.

Prosser's work cited and traced the roots of the traditional status of a human foetus as a legal person in private litigation, pointing to sources of civil law and common law. He also mentioned standard medical texts recognizing the human reality of an unborn child from the moment of conception. He made reference to this body of knowledge in order to demolish the main premise for denial of recovery, *viz.*, that the child did not exist as a legal person at the time of the injury. He then discussed the rapid series of judicial reversals, and concluded with satisfaction that a child may sue for prenatal injuries throughout the United States.<sup>17</sup>

Whatever temporary confusion there may have been for maybe fifty to seventy-five years against a historical backdrop of well over a millennium, the misunderstanding over the status of a human foetus as a legal person in private litigation was fully cleared up by about 1955. After that date, there remained no excuse for any competent jurist to be mistaken.

#### IV. THE REVERSAL OF PROSSER'S VICTORY

The cost of the Vietnam War to the United States went beyond large military casualties of men killed, wounded, and disabled. The economic consequences were very severe. But perhaps even more grievous were social dislocations which gripped the country: Public authority was disgraced, and

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16. The court exhaustively covered the whole subject with admirable erudition, including analysis of historical antecedents in the civil law of Rome and the common law of England, and address of contrary American decisions, in *Montréal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, [1933] 4 D.L.R. 337.

17. W.P. KEETON (ed.), *Prosser and Keeton on the Law of Torts*, 5<sup>th</sup> ed., St. Paul, West Pub. Co., 1984, pp. 367-370. The corresponding passages in the edition current when I studied law at the University of Minnesota, including the same discussion of the historical foundations of the subject, are in W. PROSSER, *Handbook of the Law of Torts*, 2<sup>d</sup> ed., St. Paul, West Pub. Co., 1955, pp. 174-175. The 4<sup>th</sup> edition, published under the same title in 1971, a year before Prosser's death, including the same analysis on pp. 335-337, was mischaracterized in *Roe v. Wade*, *supra*, note 1, p. 161: there Blackmun, J., cited the rule of those American cases which had departed from the rule given by Justinian and restated by Blackstone: This aberrant rule, which denied that the human foetus is a legal person, was said to be the "traditional rule," even though it was a temporary error in judicial history, universally overruled by American courts very quickly after 1946 in favor of legal tradition stretching back at least to the 6<sup>th</sup> century.

its loss of respectability, however deserved, induced a massive rebellion against traditional standards of all kinds, including moral standards on sex and marriage. It was in this period of cultural malaise that *Roe v. Wade* was decided in the United States, and produced a doctrine which in Canada was first rejected as utterly foreign,<sup>18</sup> then was later accepted in the second *Morgentaler* case.<sup>19</sup> And this doctrine has since produced extrapolations which should tell us that something is wrong.

Let it be freely conceded that the underlying question is loaded with the dynamite of political passion. Let it be conceded no less that, while governments must try, they can do only so much in addressing the perennial problem of unwanted pregnancy which did not arise in our generation. The problem is so old that the father of modern medicine had to admonish physicians against excessive liberality in dealing with it.

But let it also be remembered that free access to abortion is not a “women’s issue”, because there are probably more women ardently opposed to such access than men, and because, as has been often overlooked, paternity wanted or unwanted is as emotional and profound an experience as maternity.

One of the many oddities of *Roe v. Wade* is that it was, after all, a suit in equity for an injunction. It was not a criminal prosecution. In fact, on the face of the record, there was not even the remotest possibility of a criminal prosecution against the plaintiff. And because the suit was not a criminal prosecution but a civil suit, the status of unborn children as legal persons at any stage of pregnancy was a peremptory defense on the merits. The court openly conceded that, if a human fœtus were a legal person, there would be no argument against the Texas abortion law then drawn into question, because in such event the right of the fœtus to life would be guaranteed.<sup>20</sup>

The most destructive feature of the judgment is that it confounded and abrogated the traditional rule, older than Blackstone, at least as ancient as Justinian, yet as fresh as Prosser, that, in civil litigation, a human fœtus is a legal person from the moment of conception, — *Qui in utero est, custoditur!*

## V. THE GOMEZ CASE

And now the unhappy harvest. We may consider very recent developments in North America, beginning with Minnesota which has had a glorious judicial history,<sup>21</sup> but is now undergoing another kind of experience.

18. *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, [1975] 53 D.L.R. 3<sup>rd</sup> 161.

19. *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, *Morgentaler, Smoling and Scott v. The Queen*, [1988] 44 D.L.R. 4<sup>th</sup> 385.

20. *Roe v. Wade*, *supra*, note 1, pp. 156-157.

21. A few samples in this glorious judicial history from days gone by, finely crafted opinions on constitutional law, marked by historical understanding, noble spirit, and beautiful prose, nowadays often contradicted or ignored by the state judiciary, include *Davis v. Pierson*,

A.M. Keith became Chief Justice of Minnesota in late 1990. The following spring, he had an opportunity to display his attitudes in a published address at Hamline University in which he opened his remarks with striking words :

This afternoon I want to discuss a problem — domestic violence — that is ancient in origin with roots deep in our cultural and religious heritage. In the writings of the early Greeks, Augustine, Luther, and Calvin, the theme is the same — they often scorned and vilified the body and spoke eloquently of the concept of the spirit. We are only beginning to realize how this way of viewing the human experience put women at a decided disadvantage in civil and ecclesiastical law and even condoned and encouraged violence against them. Only recently has it occurred to many men that this type of thinking deprives us of one half of what it means to be a whole, integrated human being : the capacity for emotion and sensuality.<sup>22</sup>

It will be instructive for us to examine this proposition so we may better appreciate what it entails. We may conveniently take St. Augustine as an example of the teaching which Judge Keith has found so dangerous to domestic felicity. St. Augustine thus taught us :

The grace of God could not have been more graciously commended to us than thus, that the only Son of God, remaining unchangeable in Himself, should assume humanity, and should give us the hope of His love, by means of the mediation of a human nature, through which we, from the condition of men, might come to Him who was so far off — the immortal from the mortal; the

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7 Minn. 1, 7 Gilfillan 13 (1862); *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 14 N.W. 2<sup>d</sup> 400 (1944); *Payne v. Lee*, 222 Minn. 269, 24 N.W. 2<sup>d</sup> 259 (1946); *Wojahn v. Halter*, 229 Minn. 374, 39 N.W. 2<sup>d</sup> 545 (1949); then, in the last fading glimmer of twilight, like the reign of Majorian shortly before the collapse of the West Roman Empire, *Knapp v. O'Brien*, 288 Minn. 103, 179 N.W. 2<sup>d</sup> 88 (1970). Lovers of the law everywhere may read these cases with delight.

22. A.M. KEITH, "Domestic Violence and the Court System", (1991) 15 *Hamline L. Rev.* 105-114, p. 105-106. Not a small flaw in Judge Keith's theory is brought out in a huge mass of published empirical data which have been reviewed by Dr. Murray Straus at the University of New Hampshire, in "Physical Assaults by Wives, A Major Social Problem", in R. GELLES and D. LOSEKE (eds.), *Current Controversies on Family Violence*, Newbury Park (CA), SAGE Publications, 1993, Ch. 4, pp. 67-87. Dr. Straus thus summarized the facts : that "women initiate and carry out physical assaults on their partners as often as men do", noting further that physical assault is "not necessarily the most damaging type of abuse. One can hurt a partner deeply — even drive the person to suicide — without ever lifting a finger. Verbal aggression may be even more damaging than physical attacks". — *Id.*, pp. 67-68. Specifically, Dr. Straus stated : "To avoid the problem of male underreporting the assault, rates were recomputed for this chapter on the basis of information provided by 2,994 women in the 1985 National Family Violence Survey. The resulting overall rate for assaults by wives is 124 per 1,000 couples, compared with 122 per 1,000 for assaults by husbands as reported by wives. The difference is not great enough to be statistically significant. Separate rates were also computed for minor or severe assaults. The rate of minor assaults by wives was 78 per 1,000 couples, and the rate of minor assaults by husbands was 72 per 1,000 couples. The severe assault rate was 46 per 1,000 couples by wives and 50 per 1,000 for assaults by husbands. Neither difference is statistically significant". — *Id.*, pp. 68-69.

unchangeable from the changeable; the just from the unjust; the blessed from the wretched. And, as He had given us a natural instinct to desire blessedness and immortality, He Himself continuing to be blessed, but assuming mortality, by enduring what we fear, taught us to despise it, that what we long for He might bestow upon us.<sup>23</sup>

Judge Keith proposed that men who believe this teaching, for example, will be less integrated as human beings, less capable of emotion and sensuality, and more prone to beat their wives. It is a certainly a unique point of view which seems not to have been previously expressed.

The Preamble of the Minnesota Constitution begins, "We, the people of the State of Minnesota, grateful to God for our civil and religious liberty", etc. The fundamental law of Minnesota thus rests on the same constitutional postulates as the fundamental law of Canada and of the United States. From this much alone, it can be inferred that, in civil litigation in Minnesota, a human fœtus is a legal person. And some years ago, the Minnesota Supreme Court agreed that, "[...] [f]rom the viewpoint of the civil law and the law of property, a child *en ventre sa mère* is not only regarded as a human being, but as such from the moment of conception — which it is in fact".<sup>24</sup>

Yet, since the remarkable address at Hamline University just noted, the case of *Women v. Gomez*<sup>25</sup> reached the Minnesota Supreme Court. It was a suit in equity for an injunction requiring the State to pay for abortions under a statute enacted by the legislature to provide medical assistance to the less fortunate. The legislature specifically excluded abortions from the benefits made available, but Judge Keith, speaking for the court, held that the exclusionary clause in the statute was not allowed by the Minnesota Constitution. The pretext for this extreme holding was that the Minnesota Constitution acknowledges an inherent right of privacy including the option of a woman to terminate pregnancy so long as the fœtus is not yet viable.<sup>26</sup>

Prior to this case, in a bid for political support, the then-serving Attorney General of Minnesota had announced to the press that he was "pro-choice".<sup>27</sup> This political posturing is sufficient to explain why he made no attempt to plead and argue by way of defense that, as previously acknowl-

23. From *The City of God*, Book X, Ch. 29, translated by Marcus Dods, in R.M. HUTCHINS (ed.), *Great Books of the Western World*, Vol. 18, Chicago, Encyclopedia Britannica, 1952, p. 317.

24. *Verkennes v. Corniea*, 229 Minn. 365, (1949), 38 N.W. 2<sup>d</sup> 838, p. 840.

25. 542 N.W. 2<sup>d</sup> 17 (Minn. 1995).

26. In *Harris v. McRae*, 448 U.S. 297 (1980), it was held that, under the United States Constitution, there is no obligation of any State to fund abortions on demand of persons receiving public medical assistance.

27. As reported in the story on Hubert H. Humphrey III, beginning on the front page of the *Minneapolis Star-Tribune*, December 31, 1992. This story was the prelude of his bid to become governor, which, however, was not successfully launched until later. On November 3<sup>rd</sup>, 1998, Humphrey's quest ended when he was defeated in the gubernatorial election by Jesse Ventura.

edged by the Minnesota Supreme Court,<sup>28</sup> the unborn are legal persons in private litigation. As earlier suggested by the United States Supreme Court,<sup>29</sup> this rule would have required dismissal of the suit.

The case is repugnant for many reasons, not the least of which is that it represents notorious substitution of eccentric ideology and election slogans for the grandeur of the law.

## VI. THE WINNIPEG CASE

But the trend has ascended, if possible, into an even more shocking crescendo in Canada.

Having once ventured onto the murky bottom of *Roe v. Wade*, it was inevitable that the Supreme Court of Canada should either change course and return to legal tradition, or continue along the same course and flatly deny the status of the unborn as legal persons in any situation.

In *Tremblay v. Daigle*,<sup>30</sup> the Supreme Court of Canada denied that a human foetus is a legal person in private litigation.

It was naturally hoped that the implications of that decision, which arose in an emotional scenario, would be soberly reexamined in less-pressured circumstances. It was hoped that the unwisdom of such "sociological jurisprudence" would become evident upon due reflection, and that then there would be a return to legal tradition. Yet things took a turn for the worse in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*.<sup>31</sup>

A pregnant woman in Manitoba was addicted to glue sniffing which was known to be injurious to the foetus. The evidence was compelling that, if she did not stop her habit, her child might well be born with congenital defects. A superior court, exercising *parens patriae* jurisdiction, ordered her committed to a place of safety where she would be cared for, but kept away from harmful intoxicants until the child was born. The suit was brought to protect the infant as a legal person. But the Supreme Court of Canada held that the detention was unlawful :

Neither the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights. This principle applies generally, whether the case falls under the rubric of family law, succession law, or tort. Any right or interest the foetus may have remains inchoate and incomplete until the birth of the child.

28. *Supra*, note 24.

29. In *Roe v. Wade*, *supra*, note 1, pp. 156-157.

30. [1989] 2 S.C.R. 530, [1990] 62 D.L.R. 4<sup>th</sup> 634, reversing with unseemly haste the judgment of the Québec Court of Appeal in *Tremblay v. Daigle*, [1989] R.J.Q. 1735, [1989] 59 D.L.R. 4<sup>th</sup> 609, which allowed an injunction in a private suit to enjoin an abortion based on the rule of civil law from the time of Justinian that, in private litigation, a human foetus is a legal person.

31. [1997] 3 S.C.R. 925, [1998] 152 D.L.R. 4<sup>th</sup> 193.

It follows that, under the law as it presently stands, the foetus on whose behalf the agency purported to act in seeking the order for the respondent's detention was not a legal person and possessed no legal rights. If it was not a legal person and possessed no legal rights at the time of the application, then there was no legal person in whose interests the agency could act or in whose interests a court order could be made.<sup>32</sup>

The Court took no notice of the protests of eminent scholars who, like prophets, had cried out for correction of judicial error.<sup>33</sup> Many centuries of legal development were trashed in these few uncomprehending sentences, as if Tribonian had never compiled the opinions of Roman judges in Justinian's Digest.<sup>34</sup>

The case is at least valuable in that it exposes the putrefaction of the underlying premise. We can be grateful for at least this much, because now all but the hopelessly blind can see the bitter fruit of irredeemable error.

## VII. CONCLUDING REMARKS

*Roe v. Wade*, second *Morgentaler*, *Daigle*, and now *Gomez* and *Winnipeg* all rest on the assumption that a human being is in essence a biological creature, a species of animals with higher intelligence than most other animals. Aside from the fact that this premise contravenes the first principles of constitutional order in every part of North America, it eradicates the premise that the most basic "rights of the individual are not derived from [...] [government], or even from the Constitution, but they exist inherently in every man [and woman], by endowment of the Creator, and are merely reaffirmed in the Constitution [...]".<sup>35</sup>

Louis Brandeis and Ivan Rand and all great natural law judges have known that the inherent rights of humanity derive from the spiritual reality of each and every human being. As already noted, it is this spiritual reality which makes our most basic rights inalienable. But if we allow the uninspiring fare and banal agenda of secular humanism to be foisted upon us by courts or any other power in society, we shall awaken, finding that our freedoms derive from government, and so can be taken away by government. We shall then be obliged either to submit or to rebel. Our children and grandchildren deserve better options than these.

Because our constitutional order is premised on the spiritual reality of each individual, we must provide a measured defense of the legal dignity of the unborn. We must concede all qualifications required by

32. [1997] 3 S.C.R. 925, p. 939, [1998] 152 D.L.R. 4<sup>th</sup> 193, p. 203.

33. The most outstanding critique, which will go down as a classic in future years, is P.A. CRÉPEAU, "L'affaire *Daigle* et la Cour suprême du Canada", in *Mélanges Germain Brière*, Montréal, Wilson & Lafleur Ltée, 1993, pp. 217-281.

34. See the high tribute to Tribonian in R. BROWNING, *Justinian and Theodora*, London, Thames & Hudson, pp. 51-52.

35. *City of Dallas v. Mitchell*, 245 S.W. 944 (Tex. App. 1922), p. 946.

humanity and justice. But we must at least acknowledge that, in private litigation, a human foetus is a legal person. This much will renew our search for truth too long lost. And it is a natural prerequisite and practical guarantee of the civil liberty of us all.

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