may be enough to invoke the minimal due process requirements of the fourteenth amendment before a student may be suspended from a public school on charges of misconduct.

Having expanded the Roth rationale to its logical limits, the Supreme Court in Goss lends further authority to the proposition that governmental infringement of any property interest granted by state law which is not de minimus may, in a proper case, come under the protection of the due process clause. However, the primary impact of the Goss decision is that the courts are now in agreement that education is a property interest protected under the due process clause of the fourteenth amendment. Thus, a person cannot be arbitrarily deprived of an education, wherever the right to that education is secured by a state compulsory attendance statute. The Supreme Court appears to have gone as far as it can without overruling Rodriguez and declaring education to be a fundamental right protected by the United States Constitution.

GLENN W. SODEN

WRONGFUL DEATH: FETAL RIGHTS—CAUSE OF ACTION GRANTED FOR FETAL DEATHS UNDER WRONGFUL DEATH STATUTE

Eich v. Town of Gulf Shores, 300 So. 2d 354 (Ala. 1974)

A wrongful death action, Eich v. Town of Gulf Shores, was decided as a result of an automobile accident that occurred on March 2, 1974, near the small Alabama town of Gulf Shores. Although the facts of the incident were not fully recounted, it appears that the plaintiff, who was eight and one-half months pregnant at the time, was struck by a negligently operated city police car and severely injured. Although plaintiff recovered from her injuries, the child did not and was stillborn. Mrs. Eich then sued, seeking damages for the death of the unborn child and basing her action on an Alabama wrongful death statute, entitled “Suits for injuries causing death of minor child.” That statute reads in relevant

74 411 U.S. 1, 35-36 (1973), and at 110-17 (Marshall, J., dissenting).

1 300 So. 2d 354 (Ala. 1974).
2 Id. at 355.
3 Id.
4 The defense of governmental immunity had been waived. Id. at 355 n.1.
part: "When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person . . . the mother . . . may sue. . . ."  

The trial court dismissed the case, and the appeals court affirmed, holding that the term "minor child" cannot be construed to include children yet unborn. The Alabama Supreme Court did not agree however, and in Eich v. Town of Gulf Shores held that a cause of action for prenatal wrongful death does exist under the Alabama statute.

In so holding, the Alabama Supreme Court joins a growing number of courts that have broadened judicial construction of wrongful death statutes, to allow the prosecution of wrongful death actions in cases involving fetal deaths. In this respect Eich is not unique. However, the rationale used to support this decision is unique and appears highly unsatisfactory.

Perhaps the most widely recognized rule of statutory construction is that statutes in derogation of the common law are to be strictly construed, and wrongful death statutes are in derogation of the common law rule that a cause of action in tort dies with the victim. In examining the statute relied upon in Eich it would seem apparent that the result should turn upon the meaning of the term "minor child." Should it be construed so as to include a fetus? The defendant argued that selection of this term indicated legislative intent to limit the cause of action granted to children born alive, and pointed for support to the decisions of other courts construing similar language, which have held that fetal deaths are not encompassed by such language, and that only the legislature can properly extend a wrongful death statute to include such a cause of action.

The Eich court was unimpressed, however, stating that "it is often necessary to breathe new life into existing laws less [sic] they become stale and shelfworn," and asserting that it felt responsibility to "insure the necessary growth of the law in this vital area." Thus, having stated its

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6 300 So. 2d 354, 355 (Ala. 1974).
7 Id.
12 300 So. 2d 354, 357 (Ala. 1974).
13 Id.
objective the court proceeded to justify its granting a cause of action in this case, without ever touching directly upon the central issue, i.e., the true meaning of the term "minor child" in the context of the statute at hand.\textsuperscript{14}

To justify this action the court pointed to the underlying purpose of the statute which was perceived as being the preservation of human life through the punishment of wrongdoers, rather than the awarding of compensation to survivors.\textsuperscript{15} According to the court, damages recoverable under the wrongful death statute "are entirely punitive and are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life."\textsuperscript{16}

By emphasizing this retributive purpose the court was able to resolve what it felt was an inconsistency under prior law whereby recovery was allowed where injury occurring during pregnancy caused the death of a child after a live birth, but was denied where the injury caused the immediate death of the fetus.\textsuperscript{17} The court pointed out that to deny recovery in \textit{Eich} "would only serve the tortfeasor by rewarding him for his severity in inflicting the injury."\textsuperscript{18} The prospect of punishing a tortfeasor in a situation where the child was born alive, but subsequently died because of the injury, and denying a cause of action where the wrongful act prevented live birth so impressed the court that it considered itself compelled by "logic, fairness and justness" to recognize a cause of action for prenatal wrongful deaths.\textsuperscript{19}

Although recognizing such a cause of action may lead to a just result, basing this result on a theory of retribution presents certain problems. One such problem was raised in the dissenting opinion. The homicide statutes of Alabama, which also have as their purpose the preservation of human life, have been construed so as to prevent the conviction for murder or manslaughter of a person who has killed a fetus that was stillborn.\textsuperscript{20} The rationale behind this interpretation of the homicide laws is the axiom that one cannot kill someone who is already dead.\textsuperscript{21} This inconsistency between interpretations of the wrongful death statute and the homicide statute\textsuperscript{22} is

\textsuperscript{14} ALA. CODE tit. 7, § 119 (1960).
\textsuperscript{15} The inapplicability of the concept of compensatory damages with respect to the Alabama death statutes was determined in 1912 in Louisville & Nashville R.R. v. Bogue, 177 Ala. 349, 58 So. 392 (1912).
\textsuperscript{17} 300 So. 2d 354, 355 (1974).
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Singleton v. State, 33 Ala. App. 536, 35 So. 2d 375 (1948).
\textsuperscript{21} Id. at 378.
\textsuperscript{22} This inconsistency can also occur under Ohio law. The Ohio wrongful death statute, OHIO REV. CODE ANN. § 2125.01 (Page 1968), allows recovery for a stillborn child as shown by Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959). However, under the Ohio vehicular homicide statute, OHIO REV. CODE ANN. § 2903.06 (Page...
particularly troublesome because, logically, the punitive purpose behind a 
homicide statute should *a fortiori* be stronger than for a wrongful death 
statute, especially with respect to homicides that involve a willful or 
malicious destruction of life.

Another problem left open by the *Eich* court's reliance upon a theory 
of retribution is precisely when the state's interest in the life of a fetus 
begins for purposes of applying the wrongful death statute. If the *Eich* 
court had squarely faced the problem of defining a "minor child" under 
the statute, the problem of determining when the state's interest begins 
would have been resolved. However, since according to the Alabama 
Supreme Court wrongful death damages are to be determined solely "by 
reference to the quality of the tortious act," the implication is strong 
that the life rights of a fetus, for purposes of applying the statute, emerge 
at the moment of conception. If the emphasis is truly to be placed on the 
punishment of those who interfere with potential human life, then it can 
be argued that the same standard for recovery employed in an action 
involving an eight and one-half-month-old fetus should be used in an 
action involving a recently fertilized egg. But, if this be the case, how 
would the court handle the complicated problems of proving causation 
that would surely ensue? 

Apparently, the Alabama Supreme Court would recognize a wrongful 
death action in the case of a fetus that is considerably younger than eight 
and one-half months, since the *Eich* opinion contains references to a state 
interest in fetal deaths at earlier stages of pregnancy. In particular, the 
court pointed out a provision of Alabama law requiring that a "death 
certificate must be registered for all fetal deaths where the fetus was 
advanced to or beyond the twentieth week of uterogestation," as 
expressive of a public interest in fetal deaths. In addition, the *Eich* court 
cited the decision of the United States Supreme Court in *Roe v. Wade* for the 
proposition that "a potential future human life is present from 
the moment of conception and the state's interest and general obligation 
to protect life thus extends to prenatal life."

It would appear from a close reading of *Roe v. Wade* that the *Eich* 
court's reliance on this case for direct support is somewhat shaded for the

1973 Special Supplement), there was no conviction for killing an unborn fetus, since 
the unborn fetus was held not a "person" in State v. Dickinson, 23 Ohio App. 2d 

300 So. 2d 354, 358 (Ala. 1974).

The practical problems of proving causation increase dramatically with less 
developed fetuses. However, as the *Eich* court points out, modern technology has made it 
easier to prove the cause of death through the testimony of expert witnesses. 300 So. 
2d at 358.


410 U.S. 113 (1973).

300 So. 2d 354, 357 (Ala. 1974).
Supreme Court, when referring to the legitimacy of recoveries in wrongful death actions for fetal deaths, spoke in terms of actions to "vindicate the parents' interest" in the loss of the potential child.\(^{28}\) The court in *Eich*, on the other hand, was not necessarily concerned with the personal loss to the parents, but rather was concerned with the culpability of the tortfeasor and the use of punishment as a means to promote the preservation of human life.

Nevertheless, there appears to be no direct conflict between the result in *Eich*, and the *Roe* holding that a state may not outlaw abortion during the first trimester of pregnancy. In *Roe v. Wade* states were restrained from regulating abortions in the first trimester of pregnancy because the mother's right to privacy was considered to outweigh the state's interest in preserving fetal life.\(^{29}\) While the state must subordinate its interest in the preservation of human life in the first trimester of pregnancy when confronted with the mother's right to privacy, the state would not appear to be precluded from asserting this interest as against a third party tortfeasor. Consequently, there would seem to be no reason why *Eich* and *Roe* need interfere with one another, since in the case of the tortfeasor there is no countervailing interest equal to a mother's right to privacy.

Although the retributive rationale of *Eich* need not conflict with abortion decisions, the traditional civil law rule on punitive damages raises one further problem. In *Kelite Products v. Binzel*,\(^{30}\) the United States Court of Appeals for the Fifth Circuit, in applying this rule, summarized the Alabama cases on punitive damages and noted: "To subject a wrongdoer to punitive damages, the jury must find that he acted with actual malice... or conscious disregard of consequences to others."\(^{31}\) It was thus recognized that something more than the mere commission of a tort is necessary for an award of punitive damages.

Therefore, it seems strange that the concept of punitive damages should be applied to an ordinary case of vehicular negligence simply because an action is brought under a wrongful death statute on behalf of a decedent. Nor does it seem proper to base such a result on the theory that a reasonable man would be "doubly careful toward a woman who is obviously pregnant."\(^{32}\) Certainly the potential tortfeasor in an accident involving two or more vehicles is most often not in a position to discern the maternal condition of potential victims. Thus, it would seem that no matter how compelling the equities in favor of allowing a cause of action for a fetal death under a wrongful death statute, the theory of retribution set forth in *Eich* does not provide a proper basis for such a cause of action.

\(^{28}\) 410 U.S. 113, 162 (1973).

\(^{29}\) *Id.* at 163.

\(^{30}\) 224 F. 2d 131 (5th Cir. 1955).

\(^{31}\) *Id.* at 143.

As alluded to earlier, other courts faced with similar issues have achieved like results without resorting to the *Eich* court's questionable and confusing reliance on a punitive rationale. The majority of such courts have straightforwardly ruled that the language of the statute involved does include a fetal death, basing that decision on the rationale that the statute is compensatory in nature, and the survivor has as much right to compensation for a life prevented, as for a life lost.

Furthermore, these courts have presented identifiable guidelines for recovery bearing upon the problem of proving causation, by ruling that wrongful death actions should result in recovery only in cases where prenatal death had been inflicted on a fetus that was viable (capable of life outside the womb) at the time of the injury. The rationale is that the probability of continued survival once this stage of development is reached is great enough to outweigh lack of proximate cause arguments based upon the probability of miscarriage or other natural causes of stillbirth.

Basing recovery on viability of the fetus at the time of the injury has been viewed as a convenient answer to the troublesome hypothetical first mentioned in *Stidam v. Ashmore*, wherein an Ohio Court of Appeals posed the situation of twins who are wrongfully injured during pregnancy whereupon the one born alive and who subsequently dies is allowed recovery, but the one stillborn is denied recovery. Presumably, if viability was the only factor determining recovery, the death of both twins would result in recovery.

Indeed, the viability concept provides a rational demarcation point for courts faced with the issue of when a fetus is to be recognized as a person in any context. As a matter of law, a court can readily draw the line between recovery and no recovery when it is determined that a

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33 See cases cited note 8 supra.
36 See cases cited notes 8 & 34 supra.
38 See cases cited note 35 supra.
particular fetus was not viable at the time of injury.\textsuperscript{39} If the determination of viability was not made at the trial level, a higher court may remand a case for an examination of a fetus’ ability to live independently of its mother at the time of the injury.\textsuperscript{40}

As pointed out by the Supreme Court of Oregon in \textit{Libbee v. Permanente Clinic},\textsuperscript{41} the United States Supreme Court’s abortion decision in \textit{Roe v. Wade}\textsuperscript{42} contains important language bearing on the role of the viability concept in determining the rights of a fetus:

\begin{quote}
... a fetus is not a “person” for the purpose of the Fourteenth Amendment of the Constitution of the United States ... after a fetus has become “viable” a state may prohibit abortion altogether, except those necessary to preserve the life or health of the mother and ... “State regulation protective of fetal life after viability ... has both logical and biological justification.”\textsuperscript{43}
\end{quote}

Perhaps the greatest difficulty stemming from the \textit{Eich} decision is its failure to explain why the viability concept, with its “logical and biological justification,” should have no bearing even as to a wrongful death statute that is based solely on a punitive purpose.

Not only does recognition that the Alabama statute has “always been held to be punitive only”\textsuperscript{44} obscure application of the widely accepted viability concept, but it runs contrary to the fundamental concept of tort law that instead of directing punishment against a wrongdoer, it is more important to provide “compensation to an innocent plaintiff for the loss that he has suffered.”\textsuperscript{45}

It would seem that the punitive nature of the Alabama statute is purely a product of judicial construction, since a simple reading of the statute reveals that it is phrased in much the same language as is used in the wrongful death statutes of states that adhere to the compensation concept.\textsuperscript{46} In light of the principle that punitive damages should be awarded only where there is actual malice or its equivalent, the concept of punitive damages should logically apply only under a wrongful death statute that provides for separate causes of action that distinguish between purely negligent killings and wanton or intentional killings. Without such

\begin{enumerate}
\item Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962) (fetus was 4-4¼ months old at time of injury).
\item Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).
\item 518 P.2d 636 (Ore. 1974), rehearing denied, 520 P.2d 361 (Ore. 1974).
\item 410 U.S. 113 (1973).
\item Libbee v. Permanente Clinic, 518 P.2d 636, 640 (Ore. 1974).
\item 300 So. 2d 354, 356 (Ala. 1974).
\end{enumerate}
a distinction justification of an award based on compensatory damages becomes logically compelling.

Even the court in *Eich* could not completely divorce itself from the concept of compensatory damages, for in countering defendant’s argument that allowance of a wrongful death action in cases involving fetal deaths would make for a double recovery, the Alabama court referred to the existence of an injury to two different persons, but pointed out that the plaintiff should be given relief for her physical and mental injuries, and punitive relief “derived through her right to maintain the wrongful death action for the loss of her minor child.” 47 (Emphasis added.)

Such language clearly indicates an intent to compensate the survivor; and, for the reasons outlined above, it appears that a less confusing result and more justifiable opinion would have resulted from a formal recognition of the compensatory concept in Alabama wrongful death statutes.

It should be pointed out, however, that adoption of the compensatory standard, in and of itself, does not solve the problem of the amount of damages that should be awarded for fetal deaths in an action based upon a wrongful death statute. This problem has so perplexed a few courts that they have simply denied recovery on the ground that the wrongful death damages are too speculative. 48

Perhaps the most ingenious attempt to measure the monetary loss occasioned by the death of a fetus is presented by the Federal Court of Appeals for the Third Circuit in *Gullborg v. Rizzo*. 49 There the court adopted an elaborate formula by which monetary damages were arrived at by subtracting the anticipated maintenance expenses of the child from the present value of the child’s prospective earnings for the balance of its life expectancy after the age of 21. 50 Pursuant to this formula the court determined from actuarial tables that a female child would have 53 years of earning capacity and that a jury award of $5,000 or even $10,000 for the loss of a fetus was not excessive. 51

Other less adventurous courts might well conclude, as the Oregon court in *Libbee v. Permanente Clinic*, 52 that a recovery should not be limited to the pecuniary value of the lost child’s life, but rather should simply reflect the “value of life lost.”

47 300 So. 2d 354, 358 (Ala. 1974).
50 331 F.2d at 560.
51 Id. at 561.
Perhaps this disparity could be resolved by turning away from the wrongful death statutes themselves as the vehicle through which such awards are delivered. As long as courts are "breathing" into the law why not cast the wind in another direction and recognize that the reason a mother should be allowed a recovery beyond her immediate physical and mental pain and suffering is because she has suffered a very special kind of loss—one that goes beyond ordinary concepts of pain and suffering.

If one were actually to make a serious attempt to quantify such a loss for the purpose of making a monetary award, the best place to start would be considering that in spite of the many thousands of dollars that a child costs its parents during its years of dependency, the value of the child to its parents must be an amount even greater, for if this were not true, parents given the choice would not elect to have children in the first place. Exactly how much more children are worth than their "maintenance cost" is anybody's guess. At any rate, it hardly seems likely that the answer to this question is any more difficult than the determination of how much money allows for an adequate punishment under a theory of wrongful death.

In any case the question will be further complicated by the possibility that the fetus, had it been left unharmed, might not have been born alive in any event. Naturally, the older the fetus is, the more likely it is to survive. This factor is no doubt responsible for decisions that allow recovery only if the fetus was viable when the injury occurred. However, the difficulty with the viability theory is that undoubtedly a great number of fetuses that are killed before they become viable could have reached a live birth. Thus, a Georgia court of appeals, recognizing that the viability point does not fully account for the potential for live birth inherent in most fetuses at earlier stages of development, has allowed recovery for death caused at any time after a fetus has become "quick" or capable of movement.55

It seems logical that if a court is willing to go this far, it could allow recovery for any death from the moment of conception and permit the technical difficulties of proof of causation to weed out claims for the wrongful killing of fetuses only a few days or weeks old. Consequently, if the age of the fetus is to have any bearing at all, it stands to reason that it should simply be another factor to consider in assessing damages. All other factors being equal, it seems logical that the younger fetus, being less capable of surviving independently of its mother and thus being subject to a greater risk of nonsurvival, should be the subject of a lesser award.

53 Consider what amount of money is proper to punish a motorist whose negligent making of a left-hand turn causes the death of a fetus he did not know existed in the womb of a woman riding in a car he did not see until after the accident occurred.
54 See cases cited note 35 supra.
55 The court in Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100, 102 (1955), recognized that the question of whether a fetus was "quick" is one for a jury. In this case a fetus was deemed "quick" after only 1½ months of pregnancy.
Whatever the method used to calculate the monetary loss engendered by the killing of a fetus, it is the loss itself, however elusive to define, coupled with the fact that the tortfeasor has caused this loss, that should serve as the basis for recovery. To the extent that the decision in Eich allows recovery in a wrongful death action where a tortfeasor has caused a mother to suffer this special kind of loss, the decision is just and logical. But, it is hoped that other courts facing this issue will reach their result in a more acceptable manner.

MARY ANN KOVACH