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OVERRULING ROE v. WADE: AN ANALYSIS OF THE PROPOSED CONSTITUTIONAL AMENDMENTS*

CHARLES E. RICE**

It is a great pleasure for me to participate in this special issue honoring Professor John D. O'Reilly and Professor Richard S. Sullivan. The impact of a law teacher is often not apparent to his students until their later years in the profession. While I was attending Boston College Law School, my appreciation of Professors O'Reilly and Sullivan was substantial and genuine. But it is only in later years that I have come to appreciate fully the real education they provided. Their insights went beyond the mere technical analysis of cases, though both of them made such analyses thoroughly and well. Rather, we gained from these gentlemen an appreciation of the deeper issues of fairness and morality that underlie current questions of public law. The ethical concerns imparted in the O'Reilly and Sullivan courses, especially in Constitutional Law and Labor Law, have been and are an enduring element of my own professional outlook. I do not mean an identity of view on particular issues. For the O'Reilly and Sullivan courses underlined the fact that there are few questions in public law that are not subject to reasonable and legitimate variance of views. Rather, I refer to their inculcation of a spirit of inquiry and their respect for the fact that there are elements of justice and morality that cannot be ignored in any sound approach to public law.

As a contribution to this special issue, I venture to offer some comments on the most critical constitutional issue ever faced by the American people. Very few issues of public law are so clear as to be beyond legitimate debate. One of these, in my opinion, is abortion, which involves the unjustifiable killing of innocent human beings. In any society that has not taken leave of its senses, it is beyond question that innocent human beings should not be defined as non-persons and subjected to death at the convenience of others. Unfortunately, the current state of our law on this point is a measure of our degradation. On January 22, 1973, the Supreme Court of the United States, in *Roe v. Wade*,¹ held that the child in the womb is

* The thesis advanced here is an elaboration on that originally presented in an article by the author entitled "The Dred Sott Case of the Twentieth Century," which was published in 10 *Houston Law Review* 1054 (1973). The basic analysis contained in the earlier article is presented here for the benefit of the reader.

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¹ 410 U.S. 113 (1973).

not a "person" within the meaning of the Fourteenth Amendment, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."² Having decided that the child in the womb is not a "person," the Court then held that the mother's right to privacy prevents the state from prohibiting abortion except in very limited situations, and went on to invalidate Texas statutes which prohibited abortion except when "procured or attempted by medical advice for the purpose of saving the life of the mother."³ In the companion case, *Doe v. Bolton*,⁴ the Court struck down Georgia statutes, patterned after the American Law Institute's Model Penal Code, which prohibited abortion unless "performed by a physician duly licensed" in Georgia when

based upon his best clinical judgment . . . an abortion is necessary because:

- (1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
- (2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
- (3) The pregnancy resulted from forcible or statutory rape.⁵

At the time of the Supreme Court rulings, fourteen other states had statutes similar to the Georgia provisions and thirty other states had more restrictive prohibitions comparable to the Texas laws.⁶

In *Wade* the Supreme Court held that the mother's right of privacy, whether it

be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁷

The Court went on to indicate, however, that the right of privacy "is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical stan-

² U.S. Const. amend. 14, § 1. See 410 U.S. at 157-58.

³ Tex. Pen. Code Ann. arts. 1191-94, 1196 (1952). See 410 U.S. at 117-18, 152-55.

⁴ 410 U.S. 179 (1973).

⁵ Ga. Code Ann. § 26-1202 (1972).

⁶ See enumeration in *Roe v. Wade*, 410 U.S. at 140.

⁷ *Id.* at 153.

dards, and prenatal life, become dominant.”⁸ But state regulation of abortion may be justified only by a “compelling state interest.”⁹ The Court rejected the contention advanced by the State of Texas that the compelling state interest attaches here “from and after conception.”¹⁰ Rather, “[w]ith respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.”¹¹ Prior to the end of the first trimester, the state may neither prohibit nor regulate abortion, which “must be left to the medical judgment of the pregnant woman’s attending physician.”¹² From the end of the first three months to viability, the state may not prohibit abortion but may “regulate the abortion procedure in ways that are reasonably related to maternal health.”¹³ Of course, at any stage, the state may proscribe any abortion by a person who is not “a physician currently licensed by the State.”¹⁴

The state’s interest in “potential life” does not become compelling enough to justify any prohibition of abortion until viability. “Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.”¹⁵ “For the stage subsequent to viability,” the state may regulate and even forbid abortion “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁶ The health of the mother, said the Court in *Bolton*, includes “psychological as well as physical well-being”¹⁷ and “the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being”¹⁸ of the mother. The mental health of the mother is such an elastic ground for abortion¹⁹ that the Supreme Court decisions effectively permit elective abortion right up until the time of normal delivery.

In the abortion cases, the Supreme Court said: “We need not resolve the difficult question of when life begins.”²⁰ The Court endorsed “the view that the fetus, at most, represents only the

⁸ Id. at 155.

⁹ Id.

¹⁰ Id. at 156.

¹¹ Id. at 163.

¹² Id.

¹³ Id.

¹⁴ Id. at 165.

¹⁵ Id. at 160.

¹⁶ Id. at 164.

¹⁷ 410 U.S. at 191-92.

¹⁸ Id. at 192.

¹⁹ See Ford, Mass-produced, Assembly-line Abortion, *California Medicine* 117 (Nov. 1972).

²⁰ *Roe v. Wade*, 410 U.S. at 159.

potentiality of life."²¹ Without considering or deciding the question of whether or not the child in the womb is a human being, the Court held that he is not a "person" within the meaning of the Fourteenth Amendment. The Court said that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."²² It could be argued that the Court's ruling in this respect left the door open to Congress to define the child in the womb as a "person" pursuant to the congressional power to enforce the Fourteenth Amendment by appropriate legislation. It is more likely, however, that the Court regarded the child in the womb as inherently incapable of being considered a Fourteenth Amendment "person" absent a constitutional amendment to that effect.

It is not my purpose here to criticize the abortion decisions in detail. Professor Robert M. Byrn has exposed the many specific errors and evasions found in the majority opinions in those cases.²³ As Professor Byrn demonstrates, the Supreme Court's opinions in *Wade* and *Bolton* are an intellectual shambles. I will not try to cover the same detailed ground that Professor Byrn did. Rather, after examining the medical evidence which establishes that the unborn child is a human being from the moment of conception, this article will evaluate the propriety of excluding this class of human beings from the protections of the Fourteenth Amendment. Thereafter, the jurisprudential significance of the underlying theory of the decisions—the theory that an innocent human being can be legitimately defined as a non-person and subjected to death at the discretion of others—will be analyzed. Finally, possible remedies for the decisions will be discussed.

I. FOURTEENTH AMENDMENT "PERSONHOOD" OF THE UNBORN CHILD

A. *The Unborn Child as Human Being*

Without deciding whether or not a child in the womb is a human being, the Court in *Wade* and *Bolton* determined that he is a non-person and that he can be killed, therefore, at the discretion of others. In so acting, the Court failed to give the benefit of the doubt to life, *i.e.*, to personhood. If the justices regarded the matter as doubtful, they ought at least to have followed the general tendency of our law and tradition to give the benefit of the doubt to innocent

²¹ *Id.* at 162.

²² *Id.* at 158.

²³ Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *Fordham L. Rev.* 807 (1973).

life.²⁴ Unfortunately, in ruling that the child in the womb is a non-person without stopping to consider whether or not he is a human being, the Court acted like the hunter who sees movement in the undergrowth and shoots in reckless disregard of whether it is a man or a deer causing the movement. Moreover, the Court's decisions are as indefensible as if the Court had explicitly found the unborn child to be a human being and then had defined him as a non-person, for the Court in effect held that he is a non-person whether or not he is human. For all the Court knows, therefore, he is human. The decisions have the same jurisprudential character as if the Court had defined an acknowledged human being as a non-person.

There can be no basis for doubting that the unborn child is a living human being and is so from the moment the father's sperm combines with the mother's ovum. Dr. Bradley Patten of the University of Michigan Medical School spelled this out in his basic text on human embryology:

Every one of the higher animals starts life as a single cell—the fertilized ovum. This fertilized ovum, as its technical name zygote implies, has a dual origin. It is formed by the fusion of a germ cell from the male parent with one from the female parent. The union of two such sex cells to form a zygote constitutes the process of fertilization and *initiates the life of a new individual.*

* * *

. . . The reproductive cells which unite to *initiate the development of a new individual* are known as gametes . . . the small, actively motile gametes from the male being called spermatozoa or spermia, and the larger, food-laden gametes formed within the female being termed ova. . . .

* * *

. . . The growth and maturation of the sex cells, the liberation of the ovum, and the transportation of the sperm are all factors leading toward the actual union of the gametes. It is the penetration of the ovum by a spermatozoon and the resultant mingling of the chromosomal material each brings to the union that culminates the process of fertilization and *initiates the life of a new individual.*²⁵

²⁴ The most notable instance of this benefit of the doubt is the "presumption of innocence" in criminal law, under which "the prosecution must prove, beyond a reasonable doubt, all the elements of the crime charged" before a defendant can be subjected to fine or imprisonment. W. LaFave & A. Scott, *Criminal Law* 52 (1972). This benefit of the doubt applies to all crimes, including capital crimes where execution is the penalty.

²⁵ B. Patten, *Foundations of Embryology* 3, 35, 82 (1964) (emphasis added).

Fertilization, according to Dr. Patten, begins "a new individual life history."²⁶ Thereafter, the process of development is one of growth, and "birth is but a convenient landmark in a continuing process."²⁷ Twenty years ago, a New York court commented as follows upon these simple facts of life:

The mother's biological contribution from conception on is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as prenatal.²⁸

Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital, Troy, New York, described his own encounter with the unborn child:

Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.

The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of "embryos" which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!

. . . When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.).

²⁶ *Id.* at 79.

²⁷ *Id.* at 3.

²⁸ *Kelly v. Gregory*, 282 App. Div. 542, 544, 125 N.Y.S.2d 696, 697 (1953).

. . . It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia.²⁹

Without belaboring the point, it is abundantly clear that the Planned Parenthood Association was correct when it admitted the simple fact in a 1963 pamphlet, before that group began to advocate abortion, that:

An abortion requires an operation. It kills the life of a baby after it has begun. It is dangerous to your life and health. It may make you sterile so that when you want a child you cannot have it. Birth control merely postpones the beginning of life.³⁰

B. *The Unborn Child as Person*

Taking it as an established fact that the unborn child is a human being, why, it may be asked, is it wrong to define him as a non-person? In the 1857 *Dred Scott* case,³¹ the Supreme Court held that a free Negro, descended from slaves, could not become a "citizen" of the United States.³² The Court in *Dred Scott* appeared to regard slaves as so inferior that as to them, and apparently to some extent freed Negroes as well, "the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people," were not intended to "include them, or to give to them or their posterity the benefit of any of its provisions."³³ The inferior constitutional position of slaves resulted from specific provisions of the Constitution which treated slaves as property by forbidding Congress to prohibit the importation of slaves before 1808³⁴ and by requiring states to which any slaves should escape to redeliver them to their masters.³⁵ There are, of course, no such specific restrictions directed by the Constitution, including the Fifth and Fourteenth Amendments, against the child in the womb so as to deprive him of personhood and therefore the right to live. Absent

²⁹ Albany Times Union, March 10, 1970, at 17, col. 3, cited in Byrn, *Abortion-on-Demand: Whose Morality?*, 46 *Notre Dame Law. J.* 5, 8-9 (1970).

³⁰ See Ratner, *Is It a Person or a Thing?*, Report 20, 22 (April 1966).

³¹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³² The Court's holding was subsequently rendered nugatory by the Fourteenth Amendment, which provides that: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside." U.S. Const. amend. 14, § 1.

³³ 60 U.S. (19 How.) at 409.

³⁴ U.S. Const. art. I, § 9.

³⁵ U.S. Const. art. IV, § 2.

such provisions, there is no constitutional basis for the denial to the unborn child of this right.

The 1973 abortion decisions did the same thing to the child in the womb that the *Dred Scott* case did to the slaves. Where the right to life or liberty depends on the existence of personhood, it violates elementary natural justice to deny that status to certain classes of human beings while granting it to all others.

It was the general intent of the framers of both the Fifth and Fourteenth Amendments to treat all human beings as persons and therefore as falling within the protections of those amendments. Congressman John Bingham, who sponsored the Fourteenth Amendment in the House of Representatives, described it as having universal application and noted that it pertained to "any human being."³⁶ Senator Allen A. Thurman, in commenting on the scope of the equal protection clause of the Fourteenth Amendment, stated that

[It] covers *every human being* within the jurisdiction of a state. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, *every human being* within the jurisdiction of a State from any deprivation of an equal protection of the laws.³⁷

With respect to the due process clause of the Fifth Amendment, the Supreme Court in *Ex parte Milligan*³⁸ stated that: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and *covers with the shield of its protection all classes of men, at all times, and under all circumstances.*"³⁹ In that same opinion, declaring unconstitutional the Civil War suspension of the writ of habeas corpus, the Court said: "By the protection of the law *human rights* are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."⁴⁰

Although it does not appear that the framers of the Fifth and Fourteenth Amendments specifically considered the status of the child in the womb, we can legitimately infer their intent to protect the unborn child from their more general intent to include all human beings as persons. This is especially so since we know today, as the framers of the Fifth and Fourteenth Amendments did not clearly know, that the unborn child is a human being. Moreover, even if it could be said that the framers did consider the point and intended to

³⁶ Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

³⁷ 3 Cong. Rec. 1794 (1875) (emphasis added). See generally A. Avins, *The Reconstruction Amendment Debates* 12, 29, 36, 220-21, 274, 460, 556, 558, 565, 622, 631, 708, 733, 737-38, 740-42 (1967).

³⁸ 71 U.S. (4 Wall.) 2 (1866).

³⁹ *Id.* at 120-21 (emphasis added).

⁴⁰ *Id.* at 119 (emphasis added).

regard the unborn child as a non-person on the belief that he was not a human being,⁴¹ such an intention should not control today because it would have been based on an outmoded and erroneous factual assumption—namely, that the child in the womb is not a human being. For this reason the framers' general intent to regard all human beings as persons should control.⁴²

More recently, the Supreme Court considered the scope of the Fourteenth Amendment and formulated criteria for personhood encompassing all living human beings. Addressing itself to the rights of illegitimate children, the Court in *Levy v. Louisiana*⁴³ said: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."⁴⁴

Unfortunately, the Supreme Court in *Wade* and *Bolton* did not even discuss the criteria for personhood enunciated in the *Levy* case. Under the *Levy* standard, the child in the womb is clearly a person, for he is human, he lives and has his being.⁴⁵ In other words, all living human beings are persons. Nor can it be argued that somehow the unborn child, though alive, is less than human. As the living issue of human parents, what else can he be but human? He is not a giraffe or a turnip or a toad.

It is significant, too, that the Supreme Court's denial of personhood to the unborn child runs counter to the general development of the law in this century. In the fields of property, torts and equity, the courts have increasingly harmonized the law with the advancing scientific knowledge of life before birth.⁴⁶ Almost thirty years ago, a

⁴¹ Research has failed to uncover any evidence to this effect.

⁴² Although the Fourteenth Amendment does not specifically mention corporations, it is well settled that corporations have the rights of persons within the meaning of that amendment. See discussion in *County of Santa Clara v. Southern Pac. R.R.*, 18 F. 385, 396-99 (D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886). See also *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). While it appears that at least some of the framers had corporations in mind when they used the word "person" in the Fourteenth Amendment, there is no clear indication of a general intent to include corporations as persons. See *Graham, The Conspiracy Theory of the Fourteenth Amendment*, 47 *Yale L.J.* 371 (1938). Nevertheless, corporations are treated as persons. The intent of the framers of the Fourteenth Amendment to include all human beings as persons is far more explicit and clear than their intent to include corporations. Therefore, once it is shown that the unborn child is a human being he should be considered a "person" within the Fourteenth Amendment sense of the word.

⁴³ 391 U.S. 68 (1968).

⁴⁴ *Id.* at 70 (emphasis added).

⁴⁵ Although the *Levy* case dealt with the rights of afterborn illegitimate children, it cannot be gainsaid that the standard actually set down by the Supreme Court applies as well to unborn children. For a more detailed discussion of this point, see *Byrn, An American Tragedy: The Supreme Court on Abortion*, 41 *Fordham L. Rev.* 807, 842-43 (1973).

⁴⁶ See Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 *Notre Dame Law.* 349 (1971).

federal court noted that: "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact."⁴⁷ Dean William L. Prosser summarized the status of the unborn child in the law of torts:

So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it has been held that it may maintain a statutory action for the wrongful death of the parent. So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties, are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof.⁴⁸

Interestingly, a majority of courts now hold that even the parents of a stillborn child may maintain a wrongful death action where the child's death was caused by prenatal injury.⁴⁹ In equity cases, too, the law has protected the rights of the unborn child. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,⁵⁰ the New Jersey Supreme Court compelled a mother to undergo a blood transfusion to save the life of her unborn child, even though the transfusion was contrary to her religious beliefs:

⁴⁷ *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946).

⁴⁸ W. Prosser, *Handbook of the Law of Torts* 336 (4th ed. 1971) (footnotes omitted).

⁴⁹ In the following cases the courts found that an unborn infant who receives injury and as a result thereof is stillborn is a "person" within the meaning of the state's wrongful death statute: *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Rainy v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954). Contra, *Durrett v. Owens*, 212 Tenn. 614, 371 S.W.2d 433 (1963); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *La Blue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960).

⁵⁰ 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.⁵¹

Unfortunately, the Supreme Court in *Wade* and *Bolton* defined the child in the womb as a non-person and thus in effect permitted his right to live to be outweighed by his mother's right of privacy. It should be clear that the right of privacy of one human being should not be protected from infringement at the expense of the life of another, innocent human being.

In sum, it is clear that legal authority, neglected by the Court in the abortion decisions, points toward treatment of the unborn child as a person. The abortion decisions thus constitute a denial of constitutional protections to a class of persons—a morally repugnant and precedentially dangerous result.

II. THE SIGNIFICANCE AND POTENTIAL CONSEQUENCES OF THE *Wade* AND *Bolton* DECISIONS

In the wake of the Supreme Court abortion decisions, efforts are being made to change the law so as to allow active euthanasia and also passive euthanasia through the withholding from patients of clearly ordinary treatments.⁵² This should not be surprising, for the Supreme Court rulings do not involve abortion alone. Rather, they rest upon a whole new philosophy of life. If some human beings can be defined as non-persons because they are too young, that is, because they have not lived nine months from their conception, others can be so defined because they are too old, because they are retarded, or because they have other similar disabilities.

The Supreme Court was strangely silent about the jurisprudential validity of a decree depriving an innocent human being of personhood and the right to live. In 1972, the New York Court of Appeals did discuss that issue in a case sustaining the permissive New York abortion law against the objection that the child in the womb is a person and that the statute therefore violated his constitutional rights.⁵³ The New York court specifically found that the

⁵¹ Id. at 423, 201 A.2d at 538.

⁵² See San Francisco Examiner, Jan. 26, 1973, at 18, col. 1; Williams, Number, Types and Duration of Human Lives, 493, 496 Northwest Medicine (July 1970); Comment, Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations, 48 Notre Dame Law. 1202 (1973).

⁵³ *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

unborn child is in fact human and that he is "unquestionably alive."⁵⁴ But then the court went on to conclude that the legislature may legitimately deprive that innocent human being of personhood:

What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g., Kelsen, *General Theory of Law and State*, pp. 93-109. . . .⁵⁵

The controlling philosophy here can be seen in the New York court's reliance on Hans Kelsen as authority for its conclusions. As one analyst has put it, Kelsen's "pure" theory of law is

perhaps the most consistent expression of analytical positivism in legal theory. For it is characteristic of legal positivism that it contemplates the form of law rather than its moral or social contents, that it confines itself to the investigation of the law as it is, without regard to its justness or unjustness, and that it attempts to free legal theory completely from all qualifications or value judgments of a political, social, or economic nature.⁵⁶

Kelsen regards the "legal person" as "the subject of legal duties and legal rights."⁵⁷ In Kelsen's view, the law does not have to regard all human beings as persons and a law would be no less valid because it excluded some innocent human beings from the category of persons.

Law, in Kelsen's view, is a form into which contents of any kind may be put, according to the prevailing social views. The content of law may be changed every day by those to whom lawmaking power has been entrusted. The possibility of natural law is categorically denied by Kelsen.⁵⁸

Another commentator sees Kelsen's " 'pure theory of law' [as] sheer positivism, excluding from the domain of jurisprudence the 'irrational' idea of justice as mere emotion."⁵⁹

We have established in our law, as of January 22, 1973, the principle that some innocent human beings can be defined as non-persons and thereby deprived of the right to live. So far the child in the womb is the only victim. But it is predictable that the principle

⁵⁴ *Id.* at 199, 286 N.E.2d at 888, 335 N.Y.S.2d at 392.

⁵⁵ *Id.* at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.

⁵⁶ E. Bodenheimer, *Jurisprudence* 285 (1940).

⁵⁷ H. Kelsen, *General Theory of Law and State* 93 (1946).

⁵⁸ E. Bodenheimer, *Jurisprudence* 285 (1940).

⁵⁹ C. Wu, *Fountain of Justice* 42 (1955).

will be extended as well to the retarded, the senile and other target classes. The Supreme Court described "viability" as "the capability of meaningful life outside the mother's womb."⁶⁰ If viability requires capacity for "meaningful" life, what about the retarded, the sick and the senile? And who is to decide what is "meaningful"? "There is the well-known fact," wrote Hannah Arendt,

that Hitler began his mass murders by granting "mercy deaths" to the "incurably ill," and that he intended to wind up his extermination program by doing away with "genetically damaged" Germans (heart and lung patients). But quite aside from that, it is apparent that this sort of killing can be directed against any given group, that is, that the principle of selection is dependent only upon circumstantial factors. It is quite conceivable that in the automated economy of a not-too-distant future men may be tempted to exterminate all those whose intelligence quotient is below a certain level.⁶¹

Under the Nuremberg Laws of 1935, the Nazis deprived Jews of their citizenship and political rights.⁶² Later they were deprived of their lives as well, pursuant to a "euthanasia" program designed to achieve "the destruction of life devoid of value."⁶³ Permissive abortion inflicts upon the child in the womb the same inequality that the Nazis inflicted on the Jews; that is, the victim in both cases is subjected to death where other human beings are not, because the victim is regarded as a "life devoid of value." This analogy becomes even stronger when one considers the procedures now available to the medical community. The process of amniocentesis, whereby a quantity of amniotic fluid is extracted and analyzed for certain genetic defects, *e.g.*, Down's Syndrome (mongoloidism), is being continuously improved as to the number of defects which can be recognized while the child is still in the womb. It would be possible to combine systematic testing of unborn children for genetic defects with systematic abortion of all those with a probability of being born genetically defective, thus exterminating "undesirables" before they are even born. The only significant difference between abortion and euthanasia is the age and location of the victim. Under the governing jurisprudence of analytical positivism, the decision to kill in either case will be entirely unimpeded by "irrational" considerations of justice.

⁶⁰ Roe v. Wade, 410 U.S. at 163.

⁶¹ H. Arendt, *Eichmann in Jerusalem* 288-89 (1965).

⁶² See H. Arendt, *Eichmann in Jerusalem* 39 (1954).

⁶³ F. Wertham, *A Sign for Cain* 153 (1969).

III. POSSIBLE REMEDIAL ANSWERS TO THE *Wade* AND *Bolton* DECISIONS

A. *Federal Legislation*

Abortion, then, is a big problem. But one has to be careful in trying to solve it. There are several possible remedies. One is for Congress to exercise its power to enforce the Fourteenth and Fifth Amendments by simply defining the child in the womb as a person at least insofar as his right to live is concerned. However, it is doubtful that such a definition would survive the scrutiny of the Supreme Court, since it is likely that the *Wade* and *Bolton* decisions mean that, in the Court's view, the unborn child is inherently incapable of being considered a person in the absence of a constitutional amendment.⁶⁴

Another possible remedy arises from the power of Congress, under Article III, Section 2 of the Constitution, to withdraw the appellate jurisdiction of the Supreme Court, and the trial and appellate jurisdiction of lower federal courts, in cases involving abortion laws.⁶⁵ But this remedy, while desirable, would be only partial. A withdrawal of abortion cases from the jurisdiction of federal courts would leave the state courts free to handle such cases, and it would not invalidate the abortion decisions of the Supreme Court. At least some state courts and legislatures would consider themselves bound by the Supreme Court precedents and others could possibly arrive at the same conclusion on their own initiative. The withdrawal of abortion cases from the jurisdiction of the federal courts would therefore not be adequate to stop abortions.

B. *State Legislation*

Nor can abortions be effectively curtailed by enacting state laws restricting abortion within the confines of the Supreme Court rulings. The Supreme Court has left little or no room for the states to prevent abortions at any stage of the pregnancy. The most the states can do, within the framework of the Court's rulings, is to make it inconvenient to get abortions. Generally, this will be a waste of time and a diversion of effort from the needed constitutional amendment. It is desirable, however, to enact "conscience" protections, ensuring that no mother will be forced to undergo an abortion and no doctor, nurse or hospital will be forced to perform or provide facilities for abortions. Public Law 93-45, enacted by Congress on June 18, 1973,

⁶⁴ See *Roe v. Wade*, 410 U.S. at 158-59.

⁶⁵ See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). See also *Norris-LaGuardia Act*, 29 U.S.C. § 101 (1970).

provides that no entity receiving certain types of federal medical subsidies may

(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel, *because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.*⁶⁶

It should be noted that this provision protects not only the doctor or nurse who refuses to perform abortions but also the one who does perform them. A Catholic hospital receiving federal funds, for example, is therefore forbidden to deny or suspend staff privileges of a doctor who performs abortions off the premises of that hospital.

C. Constitutional Amendments

The essential remedy to the abortion problem is a constitutional amendment. There are two basic types that could be enacted to deal with abortion. One is the permissive or "states' rights" amendment that would allow each state to make its own decision whether to permit or forbid abortions. The other is the prohibitory sort of amendment that would actually forbid abortions.

1. A "States' Rights" Amendment

A permissive or "states' rights" amendment has been introduced in the House of Representatives by Representative Whitehurst (R.-Va.). Its operative language provides:

Section 1. Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating or prohibiting the practice of abortion.⁶⁷

There are two objections to this type of amendment. First, it

⁶⁶ Pub. L. No. 93-45, § 401(c) (June 18, 1973) (emphasis added).

⁶⁷ H.R.J. Res. 427, 93d Cong., 1st Sess. (1973).

could be argued that the amendment would not require state courts to uphold state statutes prohibiting abortions. The Whitehurst amendment merely makes it constitutional, under the United States Constitution, for the states to allow, regulate or prohibit abortion. The amendment does not overrule the Supreme Court's abortion decisions, nor does it confer personhood on the child in the womb, nor does it affect the state courts' interpretations of the due process and equal protection clauses in *state* constitutions. All states have such due process and equal protection clauses in one form or another, and they are generally assumed to correspond in meaning to the similar clauses in the Fifth and Fourteenth Amendments to the United States Constitution. In construing those clauses, the state courts could regard the decisions of the Supreme Court of the United States as determinative, including the *Wade* and *Bolton* rulings that the unborn child is a non-person. The state courts could conceivably invalidate state prohibitions against abortion, even after adoption of the Whitehurst amendment, on the ground that such laws violate the mother's right to privacy which is protected by the due process clause of the state constitution.

The second objection to the Whitehurst amendment is one of principle. Abortion is wrong because it violates the unborn child's basic right to live. It is wrong for the Supreme Court to deny that right. But it would also be indefensible to condition that right on the concurrence of the legislature in each state. That would be similar to contending that each locality in Germany during World War II should have been allowed to decide whether or not to have a death camp to exterminate undesirables. It would constitutionalize the mass murder of millions.

2. *Prohibitory Amendments*

The second type of constitutional amendment is one that would prohibit abortion rather than leave the decision up to the states. This is the preferable approach. There are two major amendments of this type pending in Congress. One, introduced by Congressman Lawrence J. Hogan (R.-Md.), provides:

Section 1. Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws.

Section 2. Neither the United States nor any State shall deprive any human being of life on account of illness, age or incapacity.

Section 3. Congress and the several States shall have the power to enforce this article by appropriate legislation.⁶⁸

The other, introduced by Senator James L. Buckley (Conservative, R.-N.Y.), provides:

Section 1. With respect to the right to life, the word "person," as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency.

Section 2. This Article shall not apply in an emergency where a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

Section 3. Congress and the several States shall have power to enforce this Article by appropriate legislation within their respective jurisdictions.⁶⁹

Each of these amendments is called by its sponsor the Human Life Amendment. Each has several co-sponsors and has been introduced in both houses of Congress. The Hogan amendment was introduced in the Senate by Senator Jesse Helms (R.-N.C.).

The critical question with respect to these amendments is whether they apply from the moment of conception, that is, from the moment when the female ovum is fertilized by the male sperm. This is no mere academic issue, for it is increasingly clear that the abortion of the future is likely to be abortion by pill. For example, the interim report to shareholders of the Upjohn Company for the quarter ended March 31, 1973 states:

In February we submitted to the U.S. Food and Drug Administration a new Drug Application for the use of Prostaglandin F2 alpha for the *interruption of pregnancy in the mid-trimester*. The rate of acceptance of this product in the United Kingdom, where it was introduced last year, has been even better than projected. Although not expected to generate significant sales or earnings in the immediate future, this product will fill an important clinical need.⁷⁰

The test of a constitutional amendment on abortion is whether it

⁶⁸ H.R.J. Res. 261, 93d Cong., 1st Sess. (1973).

⁶⁹ S.J. Res. 119, 93d Cong., 1st Sess. (1973).

⁷⁰ Upjohn Co., Interim Report 2 (1973) (emphasis added). This report covered the three months ending March 31, 1973.

will prevent the licensing of abortifacient pills and devices. If they are licensed for use at any stage of pregnancy, even the earliest, it will be impossible to control their use at every stage. In order to prevent the licensing and legal distribution of abortifacients, the constitutional amendment on abortion must prohibit abortion at every stage beginning with the moment of conception. And the prohibition must be unequivocal.

The Hogan-Helms amendment would place the unborn child, as far as his right to live is concerned, in the same position as if he were simply defined as a "person" for Fourteenth Amendment purposes. He could not be deprived of his life without due process of law. Nor could he be denied the equal protection of the laws. But the Amendment would not prevent the state from making reasonable classifications to govern the rights of the child in the womb to inherit, to sue for personal injuries, and in other matters where reasonable and legitimate distinctions can be made between the child in the womb and an older human being. Such distinctions in varying degrees now exist in the laws of all the states, and the Human Life Amendment would not disturb them.

In *Roe v. Wade*, the Supreme Court mentioned in passing what the Court called "new embryological data that purport to indicate that conception is a 'process' over time, rather than an event."⁷¹ It is necessary for any prohibitory amendment to be so written that the Supreme Court will have no choice but to apply it from the beginning of life, that is, from the moment of the fertilization of the ovum. The use of the term "from the moment of conception" in the Hogan-Helms amendment appears to be sufficient for this purpose. If it said merely "from conception," it would be open to the argument that it implicitly adopted the Supreme Court's apparent idea that conception is a process rather than an event. It might then be argued that the "process" is not complete until some time later than fertilization of the ovum and that therefore the amendment's protections should not attach until that later time. But the use of the pinpointing "from the moment of" would seem to rebut that inference and ensure that the amendment should reasonably be applied only to the moment of fertilization. In fact, it might even be preferable to say "from the moment of fertilization" rather than "from the moment of conception," since it could be argued that the "moment of conception" does not occur until the "process" of conception is complete. In any event, the amendment should use whatever language is necessary to ensure that the Supreme Court will not misconstrue the intent of the amendment. Nor should there be any

⁷¹ *Roe v. Wade*, 410 U.S. at 161.

hesitation in using explicit scientific terms, including express references to the union of the sperm and ovum, if the use of such terms will prevent misconstruction.

The Buckley amendment is less precise in its application to the early stages of life. The Buckley amendment provides that "the word 'person' . . . applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age" The Supreme Court in *Roe v. Wade* refused to consider or resolve the question of when life begins. The Court did not acknowledge that the child in the womb is a living human being. It is not sufficient, therefore, for a constitutional amendment directed against abortion to extend its protection simply to "human beings." Some defining language is necessary to make it clear that human life and the protection of the Constitution both begin at the moment when the child is conceived. The Hogan-Helms amendment's qualifier, "from the moment of conception," would seem to answer this need more clearly than the Buckley amendment. The commentary released by Senator Buckley's office on his amendment said:

It is a question of biological fact as to what constitutes "human being" and as to when "offspring" may be said to come into existence. While the facts concerning these matters are not in dispute among informed members of the scientific community, the ways in which these facts are to be applied in any particular case will depend on the specifications contained in implementing legislation passed consistent with the standard established by the amendment. Such legislation would have to consider, in the light of the best available scientific information, the establishment of reasonable standards for determining when a woman is in fact pregnant, and if so, what limitations are to be placed on the performance of certain medical procedures or the administration of certain drugs.⁷²

"Under the amendment," according to the Buckley commentary, the test in each case will be a relatively simple one, i.e., whether an "unborn offspring" may be said to be in existence at the time when the abortion technique or medicine is applied. Particular standards on this point are to be worked out in implementing legislation.⁷³

The use of the term "unborn offspring" is ambiguous in its

⁷² Release from office of Sen. James L. Buckley, May 31, 1973.

⁷³ *Id.*

failure to specify a particular time at which one becomes an "offspring." This invites an adoption by state legislatures of viability or some other post-fertilization standard to determine when one becomes an "offspring" so as to be entitled to the right to live. The Buckley amendment does not require that offspringhood be defined so as to begin at the moment of conception. The ambiguity of the term "unborn offspring" is not cured by the further qualification, "at every state of their biological development, irrespective of age," because for the constitutional protection to attach you must first be an "offspring," whatever that means. Only when you have achieved the status of offspringhood will the constitutional protection attach "at every stage" of your "biological development" and "irrespective of age." As the Buckley commentary on his amendment states, "the test in each case will be a relatively simple one, *i.e.*, whether an 'unborn offspring' may be said to be in existence at the time when the abortion technique or medicine is applied."⁷⁴

A different contrast between the Buckley and Hogan-Helms amendments is found in their treatment of abortion where it is claimed to be necessary to save the life of the mother. It is increasingly clear that "abortion to save the life of the mother is apparently scarcely more than a theoretical question in the present state of gynecology."⁷⁵ As one doctor has commented:

Most abortion proponents not involved in public efforts to promote their cause, admit that elective removal of the fetus is without psychiatric or medical justification. This is because the fetus has not been shown to be a direct cause of any emotional disorder, and present medical capabilities make pregnancies safe. Almost always, other means than abortion are available to handle any medical or psychiatric indications that make an abortion mandatory.⁷⁶

The Hogan-Helms amendment would protect the right to live of the child in the womb, so that he could not be killed for any reason that would not justify the killing of his elder brother or his grandmother. The amendment would merely apply the existing principles of due process of law and the equal protection of the laws to all human beings, including the child in the womb. The Supreme Court rulings defined the child in the womb as a non-person and deprived him of his most basic right. All the amendment would do is give the child in the womb the same right to continue living as his

⁷⁴ *Id.*

⁷⁵ Williams, *The Sacred Condominium*, reprinted in J. Noonan, *The Morality of Abortion* 146, 162 (1970).

⁷⁶ S. Nigro, *A Scientific Critique of Abortion as a Medical Procedure* 9 (1971).

older brother, with both of them, of course, being governed by the even-handed application of the principles of due process and equal protection. In the theoretical case where the abortion is allegedly performed to save the life of the mother, there is a parity of values: one life for another. Although I oppose the legalization of abortion even there, I concede that the issue is legally debatable because of this parity of values. Where the abortion is performed for a lesser reason, however, such as for the physical or mental health of the mother, or because of a defect of the child, or because the child was conceived by rape or incest, that parity of values is no longer present. Killing the child for any such reason can fairly be described as killing for convenience. The basic principle is the same as that which underlay the Nazi extermination of the Jews. It is the principle that an innocent human being can be killed if his existence is inconvenient or uncomfortable to others or if those others consider him unfit to live.

The Hogan-Helms amendment would not prevent the state legislatures and the courts reviewing state laws from continuing to regard abortion to save the life of the mother as legally justifiable pursuant to the principles of legal necessity⁷⁷ and self-defense (in the case of the mother) or defense of a third party (in the case of the doctor performing the abortion) that are applied to human beings generally. On the other hand, it would not require such a result and it would not require a state to allow abortions for the alleged purpose of saving the life of the mother. The Hogan-Helms amendment would leave the door open to eventual repeal of such laws. Incidentally, if such laws were strictly enforced, abortions would be reduced to the vanishing point because there is no medical or psychiatric situation in which abortion is really necessary to save the life of the mother. As Dr. R.J. Heffernan of Tufts University stated in a 1951 address to the Congress of the American College of Surgeons: "Anyone who performs a therapeutic abortion (for physical disease) is either ignorant of modern methods of treating the complications of pregnancy, or is unwilling to take time to use them."⁷⁸ To regard abortion to save the life of the mother as legitimate self-defense or defense of a third party is to indulge a fiction, since "abortion to save the life of the mother is apparently scarcely more than a theoretical question in the present state of gynecology."⁷⁹ Also, I do not believe the unborn child should be

⁷⁷ For a discussion of the doctrine of "legal necessity" as it applies to the maternal lifesaving exception to criminal abortion, see Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *Fordham L. Rev.* 807, 853-54 (1973).

⁷⁸ Quoted in J. Willke & J. Willke, *Handbook on Abortion* 37 (1971).

⁷⁹ Williams, *supra* note 75, at 162.

considered an aggressor so as to justify the use of such principles of defense against him. Nor is abortion to save the life of the mother justified by the common law doctrine of legal necessity.⁸⁰ The preferable interpretation of the Hogan-Helms amendment would not, in my opinion, justify abortion where it is claimed to be necessary to save the life of the mother. But Hogan-Helms would leave this issue to resolution by the courts applying constitutional principles applicable to all human beings.

The Buckley amendment, in contrast, handles the "life of the mother" situation explicitly. Section 2 of the Buckley amendment has the effect of making the child in the womb a non-person "in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." The Buckley amendment would freeze into the Constitution the allowance of abortion where it is alleged to be necessary to save the life of the mother. To write into the Constitution a permanent legitimization of abortion to save the life of the mother is unsound, in my opinion, especially where that legitimization is accomplished by denying personhood to the child in the womb in such a situation. Since the Buckley amendment would make the child in the womb a non-person when "continuation of the pregnancy will cause the death of the mother," it could be argued that in such a case it would relieve the doctor of his duty to try to save the child as well as the mother. Possibly, he could be held to be at liberty to decide to terminate the pregnancy by killing the child, who is defined as a non-person, even when it would be possible to terminate the pregnancy by means that would save the child's life.

The commentary issued by Senator Buckley's office on his amendment stated:

There is, however, an exceedingly small class of pregnancies where continuation of pregnancy will cause the death of the woman. (The most common example is the ectopic or tubal pregnancy.) It is our intention to exempt this unique class of pregnancies, without opening the door to spurious claims of risk of death. Under the amendment, there must be (a) an emergency in which (b) reasonable medical certainty exists that (c) continuation of pregnancy will (d) cause the (e) death of the woman. This is designed to cover the legitimate emergency cases, such as the ectopic pregnancy, while closing the door to unethical physicians

⁸⁰ See *United States v. Holmes*, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842); *Regina v. Dudley*, 14 O.B.D. 273, 15 Cox Crim. Cas. 624 (1884). See generally F. Inbau, J. Thompson & C. Sowl, *Criminal Justice* 14-15 (1968); J. Hall, *General Principles of Criminal Law* 422-23 (1947).

who in the past have been willing to sign statements attesting to risk of death when in fact none exists or when the prospect is so remote in time or circumstance as to be unrelated to the pregnancy.⁸¹

This reference to ectopic pregnancies is curious because even if the ectopic pregnancy did not threaten the mother's life, it is doubtful that its termination could properly be considered an abortion. I am unaware of any successful abortion prosecution, at least in recent years, in which the removal of an ectopic pregnancy was involved. The removal of ectopic pregnancies is not wrongful even in Catholic teaching because it involves the direct removal of the tube and only indirectly the death of the developing child.⁸² The removal of an ectopic pregnancy would seem to be comparable to the removal of a cancerous uterus where the woman is pregnant. It would seem that an adequate defense against a prosecution for either operation could be made without the necessity of relying on a specific constitutional or statutory allowance of abortion in cases where it is necessary to save the life of the mother.

The Buckley amendment's formulation concerning abortion to save the life of the mother is vulnerable also in its permanent constitutionalization of abortion to save the life of the mother. It would be preferable not to constitutionalize specifically such abortions and to leave the door open to eventual statutory repeal of the laws that permit them.

It is interesting to note that the Catholic Bishops of New York State supported the 1972 repeal of that state's permissive abortion law although the repeal, later vetoed by Governor Rockefeller, would have restored the pre-1970 law which permitted abortion only to save the life of the mother.⁸³ Consistent with this position, one could fairly accept an amendment, such as the Hogan-Helms amendment, which would permit but not require the states to allow abortion where it is alleged to be necessary to save the life of the mother.

Both the Hogan-Helms and the Buckley amendments contain language directed against euthanasia as well as abortion. Euthanasia can be either passive or active. With respect to passive euthanasia, the law generally forbids the withholding of ordinary treatments, although the question of whether a particular treatment is extraordinary or ordinary must necessarily depend largely on

⁸¹ Release from office of Sen. James L. Buckley, May 31, 1973.

⁸² See National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Facilities* No. 16 (Sept. 1971).

⁸³ See *N.Y. Times*, May 11, 1972, at 1, col. 1.

medical judgment.⁸⁴ With respect to active euthanasia, the law now forbids active intervention to terminate life, whether it be by injecting an air bubble into the veins, by poisoning or by other means.⁸⁵ Section 2 of the Hogan-Helms amendment would invalidate any state law which allowed or tolerated the killing of any human being by anyone, whether public official or private party, on account of the victim's illness, age or incapacity. The Buckley amendment undertakes to achieve the same end by a different approach. The Buckley amendment would not explicitly forbid euthanasia on account of illness, age or incapacity. It simply provides that "all human beings" are "persons," "irrespective of age, health, function or condition of dependency." While the Buckley amendment's affirmation of personhood may be a sufficient protection, the more explicit Hogan-Helms formula would seem preferable.

3. *Problems Presented by Passage of a Constitutional Amendment*

a. *Applicability of Amendment to Private Persons*

Both the Hogan-Helms and Buckley amendments would bring the unborn child within the category of personhood as far as his right to life is concerned. They do not undertake to forbid private abortions directly. Their approach instead is to extend the constitutional guarantees to the unborn child. It may be asked whether those amendments would effectively prevent abortions committed by private persons where no state action is present. The answer is that the prohibitions of both the Hogan-Helms and Buckley amendments would operate against private persons. The Hogan-Helms amendment, for example, would prevent all abortions for reasons less than the preservation of the life of the mother. And it would prevent those abortions whether performed by private parties or public officials. Human beings in general cannot be legally killed where it is not necessary to save the life of another. If a state or federal law permitted the child in the womb, unlike his older brother, to be killed by anyone (whether a private party or a public official), where it is not necessary to save the life of another, it would deprive the child of equal protection of the laws and of due process of law, and would be unconstitutional under the amendment. This is clear from the following comment offered by the Supreme Court in *Wade* with respect to its decision in the 1971 case of *United States v. Vuitch*,⁸⁶ which held that the Washington, D.C., abortion statute, which permits abortion where necessary for

⁸⁴ See Editorial, When Do We Let the Patient Die?, 68 *Annals of Internal Medicine* 695 (1968).

⁸⁵ See generally C. Rice, The Vanishing Right to Live 51-72 (1969).

⁸⁶ 402 U.S. 62 (1971).

the preservation of the mother's life or health, is not void for vagueness:

[T]he word "person," as used in the Fourteenth Amendment, does not include the unborn. This is in accord with the results reached in those few cases where the issue has been squarely presented. . . . Indeed, our decision in *United States v. Vuitch* . . . inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.⁸⁷

Under the Hogan-Helms amendment, the lives of all human beings from the moment of conception until birth would be entitled to the same equal protection of the laws as the lives of all those persons already born. Therefore, after the passage of this amendment the performance of an abortion would result in the termination of a life entitled to constitutional protection. Consequently, a state statute permitting abortion would be unconstitutional since it would deny the unborn child both equal protection of the laws and due process of law. The existence of such a statute in a given jurisdiction would thus constitute sufficient state action to prevent abortions performed by private persons. However, in a jurisdiction where no such statute is in existence, or where there is an unenforced restrictive abortion statute, further considerations must be explored.

b. *Effect of Amendment on Prior Strict Abortion Statutes Subsequently Repealed by Permissive Abortion Laws*

It can also be argued that a constitutional amendment invalidating permissive abortion laws would restore to vitality the previous laws in existence in every state which allowed abortion only to save the life of the mother. We must be careful, however, not to overstate this argument. There is no controlling precedent in the amendments that have already been added to the Constitution. The Sixteenth Amendment, for example, which authorized Congress to tax incomes without apportionment among the states, was prompted by the decision in *Pollock v. Farmers' Loan & Trust Co.*,⁸⁸ which held that the federal income tax was a direct tax and was invalid because it was not apportioned. After the adoption of the Sixteenth Amendment, Congress enacted new income tax provisions, and as a result a decision could not be had on the possible revival of the earlier income tax by the adoption of the

⁸⁷ Roe v. Wade, 410 U.S. at 158-59.

⁸⁸ 157 U.S. 429 (1895).

amendment.⁸⁹ Nor does the repeal of Prohibition by the Twenty-first amendment shed light on the problem. By the Wilson Act of 1890,⁹⁰ Congress, pursuant to its power under Article I, section 8 of the Constitution to regulate interstate commerce, had authorized the states to institute Prohibition. The Twenty-first Amendment, therefore, did not present the issue of revival of a statute held unconstitutional prior to the adoption of the constitutional amendment. The answer to the revival question depends in the first instance on the intent of the amendment:

A new constitution or a constitutional amendment may, of course, expressly recognize existing statutes, or doubtless even expressly validate statutes that have been declared unconstitutional under the former constitution or the constitution as it stood prior to amendment. . . . The more difficult questions arise when the new constitution or the new constitutional provision does not expressly state whether existing statutes are to be perpetuated, or whether statutes invalid under the constitution prior to its amendment are revived without re-enactment by the legislature.

The cases are not harmonious in their answers to this question, and the opinions and decisions must be examined to make the divergences clear.⁹¹

It appears that most of the decisions support the rule that, where there is expressed no evident intent of the amendment, "the statute should be deemed not to have been revived."⁹² However, this conclusion would not necessarily apply to the Human Life Amendment, since the evident intent of that amendment might well be considered to be revival of the restrictive abortion laws. If it were held that the Human Life Amendment was intended to bar revival of the prior laws, then of course those prior laws would not be revived. However, if the Human Life Amendment were construed neither to require nor to forbid revival, the issue would seem then to depend on the intent of the state legislature at the time that it adopted the repeal or liberalization of the old restrictive law. If a state had liberalized its strict law prohibiting abortion, either before or after *Wade* and *Bolton*, it could be argued that the complete or partial repeal of the strict law was inextricably bound up with the

⁸⁹ See *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916).

⁹⁰ Act of Aug. 8, 1890, ch. 728, 26 Stat. 313.

⁹¹ O. Field, *The Effect of an Unconstitutional Statute* 289 (1935); see *State ex rel. Stevenson v. Tuffy*, 20 Nev. 427, 22 P. 1054 (1890). But see *Cobb v. Cohron*, 26 S.W. 846 (Tex. Civ. App. 1894).

⁹² O. Field, *supra* note 91, at 293.

accompanying enactment of the permissive provisions which the Human Life Amendment would invalidate. The Human Life Amendment, in invalidating the permissive law, would thus implicitly invalidate the repeal of the strict law. The old strict law would therefore be revived by the adoption of the Human Life Amendment.

A leading case in support of this interpretation is *Selective Life Insurance Co. v. Equitable Life Assurance Society of the United States*,⁹³ in which the Arizona Supreme Court said: "Where the clause containing the repeal is incidental to the rest of the statute, and the latter is invalid, the clause containing the repeal will likewise be deemed invalid, leaving the prior law in full force and effect."⁹⁴ There would appear to be no reason why the result would be different where the invalidity of the permissive laws is caused by a constitutional amendment which operates prospectively, as distinguished from a judicial decision which operates retrospectively. This is so because the obvious intent in repealing strict abortion laws was to replace them with valid permissive laws, and the intent to repeal would arguably be conditional on the continued validity of those permissive laws.⁹⁵ This argument, of course, is necessarily a tentative one, since its validity would depend in each state on the legislative intent involved in the enactment of permissive abortion in that state, and upon the position of the courts of that state on the general issue of whether invalidation of a repealing statute revives the statute which was repealed.

It could be that the legislature intended the repeal of the strict law to be severable from the liberalized provisions that were enacted with it. In such a case, the invalidation of the liberalized provisions by the Human Life Amendment would not invalidate the repeal of the restrictive law and would therefore not revive the restrictive law.⁹⁶ However, in the adoption of the Human Life Amendment the Congress and state legislatures could express a definite intent on this point which would of course be controlling, because of the supremacy of the federal constitutional amendment, regardless of the ordinary posture of the state law on the point.

c. *Potential State Defiance of a Constitutional Amendment: The Applicability of the Thirteenth and Fourteenth Amendments*

It is possible, of course, to imagine a situation in which a state will simply defy the constitutional amendment forbidding abortion

⁹³ 101 Ariz. 594, 422 P.2d 710 (1967).

⁹⁴ Id. at 601, 422 P.2d at 717.

⁹⁵ See *Faubus v. Kinney*, 239 Ark. 443, 449, 389 S.W.2d 887, 891 (1965).

⁹⁶ See O. Field, *supra* note 91, at 283-86; Annot., 102 A.L.R. 802 (1936).

and will adopt or continue to maintain a permissive law or simply repeal all its provisions relating to abortion. It does not seem, however, that this possibility presents a real problem. In fact, it is the same conjecture that was raised concerning the legislative reapportionment decisions of the Supreme Court.⁹⁷ In this latter situation, the conjectures and fears were dissipated by the general willingness of the American people to abide by the rule of law. However, in the event that a state did so defy the Human Life Amendment, it could be argued that the failure of the state to punish the killing of human beings in the womb, who would be protected as persons by the Human Life Amendment, would constitute a denial of the equal protection of the laws in violation of the Fourteenth Amendment. Since state action is necessary to find a violation of the Fourteenth Amendment, the state action in this case would have to be found in the inaction of the state in failing to enforce its general laws against homicide in protection of the unborn child. In *Catlette v. United States*,⁹⁸ the Court of Appeals for the Fourth Circuit held that there was a violation of a statute punishing deprivations of civil rights "under color of any law" where a police officer ignored his duty to protect a group of Jehovah's Witnesses and allowed the Witnesses to be assaulted by a mob.⁹⁹ The court said:

It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection.¹⁰⁰

Likewise, in *Picking v. Pennsylvania R.R.*,¹⁰¹ the Third Circuit found a violation of a federal statute providing civil liability for deprivations of civil rights under color of law¹⁰² where a justice of the peace refused to perform his duty to grant a hearing before the plaintiffs were extradited from the state. The court said:

As to the defendant Keiffer, the complainant alleges that he was a justice of the peace and that he denied and refused a hearing to the plaintiffs upon their arrest on August 15, 1941. If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty with-

⁹⁷ See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

⁹⁸ 132 F.2d 902 (4th Cir. 1943).

⁹⁹ The statute in question was the predecessor of the current 18 U.S.C. § 242 (1970).

¹⁰⁰ 132 F.2d at 907. See also *State ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹⁰¹ 151 F.2d 240 (3d Cir. 1945), cert. denied, 332 U.S. 776 (1947).

¹⁰² 42 U.S.C. § 1983 (1970).

out due process of law in violation of the Fourteenth Amendment. . . . The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken "under the color" of the law of the state.¹⁰³

The court in *Picking* seemed to require that the official's inaction be pursuant to a conspiracy before that inaction could become state action. Moreover, the Supreme Court precedents bear out the conclusion of Justice Brennan, in his separate opinion in *Adickes v. Kress & Co.*,¹⁰⁴ that "[o]ur cases have never explicitly held that state inaction alone in the face of purely private discrimination constitutes a denial of equal protection."¹⁰⁵ Nevertheless, the argument that equal protection can be denied by state inaction has not been without support in the Supreme Court. In their separate opinion in *Bell v. Maryland*,¹⁰⁶ Justice Goldberg, Chief Justice Warren and Justice Douglas, in quoting with approval the view expressed in correspondence by Mr. Justice Bradley, who wrote the opinion for the Court in the *Civil Rights Cases* of 1883,¹⁰⁷ stated:

"Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." These views are fully consonant with this Court's recognition that state conduct which might be described as "inaction" can nevertheless constitute responsible "state action" within the meaning of the Fourteenth Amendment.¹⁰⁸

If a case were clearly presented of a police officer who stood by and refused to attempt to stop a lynch mob from killing its victim, it would be difficult to imagine the Supreme Court holding otherwise than that the officer's refusal to perform his duty to protect life is state action in denial of equal protection of the laws.¹⁰⁹ If the state officer who refused to act were a prosecutor whose inaction occurred after rather than during the crime, it would seem no less fair to find that his inaction constitutes culpable state action. While such a

¹⁰³ 151 F.2d at 250.

¹⁰⁴ 398 U.S. 144 (1970).

¹⁰⁵ *Id.* at 230.

¹⁰⁶ 378 U.S. 226 (1964).

¹⁰⁷ *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁰⁸ 378 U.S. at 309-11.

¹⁰⁹ See Peters, *Civil Rights and State Non-Action*, 34 *Notre Dame Law* 303 (1959); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 *Cornell L.Q.* 375 (1958).

finding might present difficult problems of interfering with prosecutorial discretion, a systematic refusal to prosecute for a particular crime would arguably raise the commission of that crime to the level of a custom or usage with the force of law. Thus, in *Adickes v. Kress & Co.*,¹¹⁰ the Supreme Court said:

Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garfield said: "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.¹¹¹

The application of these concepts to abortion is readily apparent. If a state law punishes as homicide the intentional, unjustified killing of persons, and if the state authorities adopt a policy of not prosecuting for the killing of unborn persons while prosecuting for the killing of all other classes of persons, it is fair to say that such official inaction denies the child in the womb the equal protection of the laws. The systematic refusal to prosecute abortionists is no less a denial of equal protection than the systematic refusal to prosecute members of lynch mobs. There is a denial of equal protection whether or not the prosecutor is actively in conspiracy with the lynch mob or the abortionist. Some problems are presented by this analysis, however. If the state homicide law were not originally intended by the legislature to apply to abortion, the duty to prosecute under that law would depend on construing the legislative intent to apply the homicide law to human persons generally. Since the child in the womb would not be clearly recognized as a person until the passage of the Human Life Amendment, it could be argued that his newly-conferred status of personhood would entitle him to the protection of the homicide law pursuant to the general legislative intent to extend that protection to all human persons.

¹¹⁰ 398 U. S. 144 (1970).

¹¹¹ *Id.* at 167-68.

Another problem that would arise in the enforcement of the Human Life Amendment is that of standing to sue. If a state refused to enact or enforce a law prohibiting abortions, a class action brought by a guardian ad litem on behalf of unborn children would seem to be the appropriate remedy to compel the prosecutor to cease and desist from discriminatory enforcement of the homicide law. In *S. v. D.*,¹¹² the Supreme Court held that the mother of an illegitimate child had no standing to sue to compel the prosecutor to prosecute the father who refused to support the child. The Texas statute subjected to criminal penalties any "parent" who refuses to support his or her child, but the Texas authorities had construed the statute to apply only to parents of legitimate children. The Court held that the mother had failed to show that "her failure to secure support payments results from the nonenforcement, as to her child's father," of the criminal statute.¹¹³ The statute was not a civil contempt type of provision, wherein the father could secure release from jail on payment of support to the child.

On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "*direct*" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a *prerequisite of standing*, is absent in this case.¹¹⁴

The Court went on to describe the general lack of standing of a person to contest the policies of prosecutors:

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris*, 401 U.S. 37, 42 . . . (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 . . . (1962); *Poe v. Ullman*, 367 U.S. 497, 501 . . . (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child.

¹¹² 411 U.S. 614 (1973).

¹¹³ *Id.* at 618.

¹¹⁴ *Id.*

But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws.¹¹⁵

The three cases cited by the Court in this connection, however, do not control in the abortion situation. In *Younger v. Harris*,¹¹⁶ the plaintiff had himself been indicted in a state court and sought unsuccessfully to get a federal court injunction against the prosecution on the ground that the prosecution violated his constitutional rights. The unborn child would not be seeking to prevent a prosecution of himself, but would seek instead to prevent official tolerance of his killing by the failure of the state to prosecute abortionists. *Bailey v. Patterson*¹¹⁷ involved efforts by Negroes to enjoin prosecutions of others under Mississippi breach-of-the-peace statutes. They were denied standing because they themselves were not threatened with prosecution. The unborn child would not seek to enjoin the prosecution of others but rather would seek to require the prosecution of abortionists on the ground that such prosecutions are essential to the protection of the unborn child's right to live. In *Poe v. Ullman*,¹¹⁸ plaintiffs alleged that the existence of Connecticut's law restricting the use of contraceptives inhibited them through fear of prosecution and thereby violated their rights. The Court held they lacked standing because there was no justiciable controversy since there was no showing that enforcement of the statute against plaintiffs was threatened or even contemplated. The unborn child, of course, is in a different position. He does not argue that his conduct is inhibited for fear of prosecution. On the contrary, he alleges that the refusal to prosecute abortionists deprives him of the equal protection of the laws. There would seem to be a sufficient nexus between the relief sought, *i.e.*, the prosecution of abortionists, and the protection of the life of the unborn child, so as to satisfy the criteria for standing established by the Supreme Court.¹¹⁹

It might also be argued, once the right of the unborn child to the protection of the Constitution is established, that permissive abortion inflicts upon him a badge of servitude in violation of the Thirteenth Amendment.¹²⁰ Although the Thirteenth Amendment

¹¹⁵ *Id.* at 619.

¹¹⁶ 401 U.S. 37 (1971).

¹¹⁷ 369 U.S. 31 (1962).

¹¹⁸ 367 U.S. 497 (1961).

¹¹⁹ See *S.v. D.*, 411 U.S. 614 (1973).

¹²⁰ U.S. Const. amend. 13 provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for

was originally directed against the institution of Negro slavery, it has expanded beyond that purpose. In *Hodges v. United States*¹²¹ the Supreme Court stated that the Thirteenth Amendment is "not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to [the care of] the Nation it commits every race and every individual thereof."¹²² On repeated occasions, the Court has invalidated peonage statutes which made it a crime to refuse to perform a contract of employment on the grounds that the statutes violated the Thirteenth Amendment.¹²³ There is no inherent reason why the concept of badges of servitude should be narrowly construed to embrace only racial discriminations. As one writer commented upon the 1968 case of *Jones v. Mayer*,¹²⁴ which held that the 1866 Civil Rights Act, enacted pursuant to the Thirteenth Amendment, forbade private housing discrimination:

The Court, by emphasizing the self-executing nature of the Thirteenth Amendment, is in a position to define basic rights which no one might constitutionally violate. If the Thirteenth Amendment, which prohibits second class citizenship, is read to apply to the characteristics of that type of citizenship now held by black Americans, then an affirmative duty could be imposed on all branches of the Government forbidding second class citizenship. By now it is clear that the Thirteenth Amendment applies not only to Black Americans. It is true that it was passed to establish freedom for Negro slaves, but reading *Jones* it appears that it was not so much the fact that plaintiffs were black that gave rise to the badges of slavery argument, but discrimination itself was held to be the badge of slavery which results in second class citizenship to any minority. It is thus clear that all who suffer from the incidents of second class citizenship are covered by the Thirteenth Amendment. Badges and incidents of slavery are not solely relics of slavery (if so interpreted, of course, it could apply only to former slaves) but it applies to characteristics of slavery in

crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

¹²¹ 203 U.S. 1 (1906).

¹²² *Id.* at 16-17.

¹²³ *Pollock v. Williams*, 322 U.S. 4 (1944); *Taylor v. Georgia*, 315 U.S. 25 (1942); *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Peonage Cases*, 123 F. 671 (M.D. Ala. 1903).

¹²⁴ 392 U.S. 409 (1968).

general; so a victim people need not have been enslaved in order to invoke Thirteenth Amendment protections.¹²⁵

It is not unreasonable to conclude that unborn children are subjected to a badge of servitude when they as a class, unlike all other human beings, are made subject to death at the convenience of others or because those others consider them unfit to live. In *Yick Wo v. Hopkins*,¹²⁶ the Supreme Court held that the discriminatory operation against Chinese laundries of a local building ordinance denied the equal protection of the laws guaranteed by the Fourteenth Amendment. The Court emphasized that it is of the essence of slavery to hold one's life or livelihood at the mere will of another:

For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.¹²⁷

The prohibitions of the Thirteenth Amendment extend to private persons, whether or not state action is involved.¹²⁸ If permissive abortion inflicts a badge of servitude on the unborn child, federal courts would have jurisdiction to prosecute private persons as well as public officials under federal civil rights acts.¹²⁹

4. *A Proposed Amendment*

It should not be supposed that any particular form of amendment is sacrosanct. While the Hogan-Helms amendment, in my opinion, is adequate to solve the problem, that amendment was not written on tablets of stone on Mount Sinai. It is possible to suggest alternatives that would do the job. Any alternative, however, must be prohibitory rather than permissive, and it must apply from the beginning of life. Once there is agreement on these points, it should be fairly easy to agree on specific language. For example, it would be possible to substitute a direct prohibition of private abortion for the indirect prohibitions embodied in both the Hogan-Helms and Buckley amendments. The following language would outlaw all abortions, both public and private, except for such cases as the ectopic pregnancy and the cancerous uterus where the mother's life

¹²⁵ Comment, Constitutional Law: Badges and Indices of Slavery Prohibited Under the 1866 Civil Rights Act, 17 *Loyola L. Rev.* 79, 103 (1970).

¹²⁶ 118 U.S. 356 (1886).

¹²⁷ *Id.* at 370.

¹²⁸ See *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

¹²⁹ See *id.*; 18 U.S.C. § 241 (1970); 42 U.S.C. § 1985(3) (1970).

is threatened and the operation, *e.g.*, to remove the cancerous uterus, is independently justified to save her life, with the death of the unborn child permitted as an unintended effect of that operation. The amendment would also preserve concurrent jurisdiction in Congress and the states over the subject:

1. Abortion is hereby prohibited within the United States and all territory subject to the jurisdiction thereof. As used in this article, abortion means the intentional destruction of unborn human life, which life begins at the moment of fertilization. 2. Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Other possibilities might readily be suggested. But whatever the form of the amendment, so long as it is adequate to overrule the *Wade* and *Bolton* decisions, it should be supported with particular urgency by all those who value the right to live of all human beings. For this is no mere academic dispute. Rather, it is an issue of life or death. It might be helpful in this context to recall the words of Dr. Joseph De Lee of the University of Chicago, who in 1940 emphasized the importance of protecting the innocent life in the womb:

All doctors (except abortionists) feel that the principles of the sanctity of human life, held since the time of the ancient Jews and Hippocrates and stubbornly defended by the Catholic Church, are correct. And we are pained when placed before the necessity of sacrificing it. At the present time, when rivers of blood and tears of innocent men, women and children are flowing in most parts of the world, it seems silly to be contending over the right to live of an unknowable atom of human flesh in the uterus of a woman. No, it is not silly. On the contrary, it is of transcendent importance that there be in this chaotic world one high spot, however small, which is against the deluge of immorality that is sweeping over us. That we the medical profession hold to the principle of the sacredness of human life and of the right of the individual even though unborn is proof that humanity is not yet lost and that we may ultimately obtain salvation.¹³⁰

¹³⁰ J. De Lee, *Yearbook of Obstetrics and Gynecology* 69 (1940). See also address by Dr. H. Ratner (Abortion: A Public Health Viewpoint), Illinois State Medical Society Symposium on Abortion, March 15, 1967.

