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## The Dred Scott Case of the Twentieth Century

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# THE DRED SCOTT CASE OF THE TWENTIETH CENTURY

Charles E. Rice\*

We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.<sup>1</sup>

In the 1973 abortion cases, the Supreme Court quoted this language from an 1871 report of the Committee on Criminal Abortion of the American Medical Association. The Court, however, did not follow the advice. Instead, the seven man majority held that the child in the womb is 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."<sup>2</sup> The Court refused to call the child in the womb a living human being and refused to say that "life, as we recognize it, begins before live birth."<sup>3</sup>

In *Roe v. Wade* the Supreme Court held unconstitutional the Texas statute that forbade abortion except when "procured or attempted by medical advice for the purpose of saving the life of the mother."<sup>4</sup> Thirty other states had similar statutes at the time of the decision.<sup>5</sup> In *Doe v. Bolton*<sup>6</sup> the Supreme Court held unconstitutional the Georgia statutes that forbade abortion except when performed by a Georgia physician because

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1. 22 Trans. of the Am. Med. Ass'n 258 (1871), quoted in *Roe v. Wade* 410 U.S. 113, 142 (1973).

2. U.S. CONST. amend. XIV, § 5.

3. *Roe v. Wade*, 410 U.S. 113, 161 (1973).

4. TEX. PENAL CODE ANN. arts. 1191-94, 1196 (1961).

5. ARIZ. REV. STAT. ANN. § 13-211 (1971); CONN. GEN. STAT. REV. §§ 53-29 to -30 (1968); GA. CODE ANN. § 26-1201 to -1203 (1971); IDAHO CODE § 18-1505 (App. to Supp. 1971); ILL. REV. STAT. ch. 38, § 23-1 (1971); IND. CODE § 35-1-53-1 (1971); IOWA CODE § 701.1 (1971); KY. REV. STAT. § 436.020 (1963); LA. REV. STAT. § 37:1285(6) (1964) & § 14-87 (Supp. 1972); ME. REV. STAT. ANN. tit. 17, § 51 (1964); MASS. GEN. LAW: ANN. ch. 272, § 19 (1970); MICH. COMP. LAWS § 750.14 (1948); MINN. STAT. § 617.18 (1971); MO. REV. STAT. § 559.100 (1969); MONT. REV. CODES ANN. § 94-401 (1961); NEB. REV. STAT. § 28-405 (1964); NEV. REV. STAT. § 200.220 (1967); N.H. REV. STAT. ANN. § 585:13 (1955); N.J. REV. STAT. § 2A:87-1 (1969); N.D. CENT. CODE §§ 12-25-01 to -02 (1960); OHIO REV. CODE ANN. § 2901.16 (1953); OKLA. STAT. ANN. tit. 21, § 861 (Supp. 1972); PA. STAT. ANN. tit. 18, §§ 4718-19 (1963); R.I. GEN. LAWS ANN. § 11-3-1 (1969); S.D. COMPILED LAWS ANN. § 22-17-1 (1967); TENN. CODE ANN. §§ 39-301 to -02 (1956); TEX. PENAL CODE ANN. arts. 1191-94, 1196 (1961); UTAH CODE ANN. §§ 76-2-1 to -2 (1953); VT. STAT. ANN. tit. 13, § 101 (1958); W. VA. CODE ANN. § 61-2-8 (1966); WIS. STAT. § 940.04 (1969); WYO. STAT. ANN. § 6-77 to -78 (1957).

6. 410 U.S. 179 (1973).

'based upon his best clinical judgment' (1) the woman's life or health is seriously in danger; (2) the fetus would probably be born with a permanent defect; or (3) the pregnancy resulted from rape.<sup>7</sup> The Georgia statutes also required that the mother be a Georgia resident and imposed certain other procedural requirements. Adopted in 1968<sup>8</sup> the Georgia provisions were patterned on the American Law Institute's Model Penal Code.<sup>9</sup> At the time of the Supreme Court's ruling, fourteen states, including

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7. *Id.* at 183; GA. CODE ANN. §§ 26-1201 to -1203 (1971).

8. Georgia Laws, 1968 Session, 1249, 1277-1280.

9. Section 230.3 of the *Model Penal Code* reads as follows:

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed, and in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the

Georgia, had adopted some form of the American Law Institute statute.<sup>10</sup>

The opinions of the Supreme Court in *Wade* and in *Bolton* "are to be read together."<sup>11</sup> The Supreme Court held that the "right of personal privacy," whether that right "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."<sup>12</sup> The Court concluded that the right of privacy, however, "is not absolute and is subject to some limitations"; "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."<sup>13</sup> Such regulations by the state may be justified only by a "compelling state interest."<sup>14</sup> The Court rejected the contention of the State of Texas "that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest."<sup>15</sup> The Court rejected this asserted Texas interest in protecting prenatal life for two reasons. First, the term person as used in the fourteenth amendment "does not include the unborn."<sup>16</sup> Second, Texas could not rely, apart from the fourteenth amendment, on the "theory" that "life begins at conception and is present throughout pregnancy."<sup>17</sup> In short, the Court found that "the unborn have never been recognized in the law as persons in the whole sense."<sup>18</sup>

With the Texas arguments resolved, the Court held that (1) during the first three months of pregnancy, the state may neither prohibit nor regulate abortion, which "must be left to the medical judgment of the

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general public.

(7) *Section Inapplicable to Prevention of Pregnancy.* Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

ALI MODEL PENAL CODE § 230.3 (1962 Draft).

10. ARK. STAT. ANN. §§ 41-303 to -310 (Supp. 1971); CALIF. HEALTH & SAFETY CODE §§ 25950-955.5 (West Supp. 1972); COLO. REV. STAT. ANN. §§ 40-2-50, -53 (Supp. 1967); DEL. CODE ANN. tit. 24, §§ 1790-93 (Supp. 1972); FLA. SESS. LAW SERV. 380-82 (1972); GA. CODE §§ 26-1201, -1203 (1972); KAN. STAT. ANN. § 21-3407 (Supp. 1971); MD. ANN. CODE art. 43, § 137-39 (1971); MISS. CODE ANN. § 2223 (Supp. 1972); N.M. STAT. ANN. §§ 40A-5-1, -3 (1972); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); ORE. REV. STAT. §§ 435.405, 95 (1971); S.C. CODE ANN. §§ 16-82, 89 (Supp. 1971); VA. CODE ANN. §§ 18.1-62-62.3 (Supp. 1972).

11. *Roe v. Wade*, 410 U.S. 113, 165 (1973).

12. *Id.* at 153.

13. *Id.* at 155.

14. *Id.*

15. *Id.* at 156.

16. *Id.* at 158.

17. *Id.* at 159.

18. *Id.* at 162. The Court stated that "[i]n areas other than criminal abortion the law has been reluctant to endorse any theory that life as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations, and except when the rights are contingent upon live birth." *Id.* at 161.

pregnant woman's attending physician."<sup>19</sup> (2) 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."<sup>20</sup> "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."<sup>21</sup> (3) "For the stage subsequent to viability," the state may regulate and even proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>22</sup> The health of the mother includes "psychological as well as physical well-being"<sup>23</sup> 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" of the mother.<sup>24</sup> (4) The state "may proscribe any abortion by a person who is not a physician" "currently licensed by the State."<sup>25</sup> In view of the subjectivity of the mental health of the mother as a standard for abortion,<sup>26</sup> it is fair to say that the *Wade* and *Bolton* decisions are a practical license for elective abortion at any stage, right up to the last minute before normal delivery.

The Supreme Court held in *Wade* and *Bolton* that the word "person," as used in the fourteenth amendment, does not include the "unborn."<sup>27</sup> It is not entirely clear whether the Court meant that the child in the womb is inherently incapable of being considered a "person" under the fourteenth amendment or whether it would concede that Congress has the power to define him as a "person" pursuant to the congressional power to enforce the fourteenth amendment by appropriate legislation. It is fair to conclude, however, that the Court was defining the child in the womb as incapable of being considered a "person" without a constitutional amendment. In either case, the Court's declaration of nonpersonhood for the child in the womb is interesting because of the Court's avoidance of the critical issue of whether the child in the womb is a living human being. *Wade* and *Bolton* could have been decided without reaching the issue of the personhood of the child in the womb. In both cases, federal courts had issued declaratory judgments that the state restrictions on abortion were unconstitutional but had declined to enjoin prosecutions under the state laws.<sup>28</sup> The decisions not to enjoin were based on the

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19. *Id.* at 164.

20. *Id.*

21. *Id.* at 160.

22. *Id.* at 165.

23. *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973).

24. *Id.* at 192.

25. *Roe v. Wade*, 410 U.S. 179, 191-92 (1973).

26. See Ford, *Mass-Produced, Assembly-Line Abortion*, CAL. MEDICINE, Nov. 1972, at 117.

27. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

28. *Doe v. Bolton*, 319 F. Supp. 1048, 1053 (N.D. Ga. 1970) *Modified and aff'd*, 410 U.S. 179 (1973); *Roe v. Wade*, 314 F. Supp. 1217, 1224-25 (N.D. Tex. 1970), *aff'd in part and rev'd in part*, 410 U.S. 113 (1973).

abstention doctrine, a policy of federal noninterference with pending state prosecutions except in extraordinary situations.<sup>29</sup> The Supreme Court could have decided both cases on the basis of abstention principles without reaching the issue of personhood. Instead, the Court reached out to define the child in the womb as a nonperson, and it did so without first deciding whether or not he is a human being. In neither the Georgia nor the Texas case was there an explicit finding that the unborn child is a human being. The closest that either district court came to deciding that issue was the following conclusion of the district court in the Georgia case:

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence. Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.<sup>30</sup>

The Supreme Court accepted "the view that the fetus, at most, represents only the potentiality of life."<sup>31</sup> The Court concluded, however, that it need not decide the question of when life begins.<sup>32</sup> Having placed the question of the humanity of the child in the womb in the undecided category, the Court proceeded to rule that, whether he is a human being or not, he is not a person. It should be remarked, however, that this method of procedure fails to give the benefit of the doubt to personhood and therefore to life rather than to nonpersonhood and therefore to death. One is entitled to expect the Supreme Court instead to follow the general thrust of our law that the benefit of the doubt should be given to innocent life rather than death. It is difficult to see how the Supreme Court, in deciding as it did, is in a different position from the hunter who sees a movement in a bush and fires without knowing whether it is a man or a deer. To decide that the child in the womb is a nonperson and therefore that he can be killed at the discretion of others, without first deciding whether or not he is a human being, is reckless at best.

Interestingly, the Supreme Court had pending before it another case which did present squarely the issue of the humanity of the child. In *Byrn v. New York City Health and Hospitals Corp.*<sup>33</sup> the highest court of New

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29. See *Zwickler v. Koota*, 389 U.S. 241, 253-54 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965).

30. *Doe v. Bolton*, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) *modified and aff'd*, 410 U.S. 179 (1973).

31. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

32. *Id.* at 159.

33. 31 N.Y.2d 194, 286 N.E.2d 687, 335 N.Y.S.2d 390 (1972).

York State held that the liberalized abortion law of that state does not deny equal protection of the laws to the child in the womb. It was claimed, on behalf of the child, that he is a living human being and is therefore entitled to be treated as a person within the meaning of the equal protection clause of the fourteenth amendment. Therefore, it was argued, the statute that permits him to be killed by abortion where it is not necessary to save the life of his mother is unconstitutional because it arbitrarily discriminates against the child by permitting him to be killed for reasons that would not legally justify the killing of human beings already born. The *Byrn* case involved abortions performed in public hospitals.

The significance of the *Byrn* decision is not that the challenge to liberalized abortion was rejected. Rather it is that the New York Court of Appeals isolated and decided the one constitutional issue on which the abortion controversy turns, whether the Constitution requires that every human being be accorded the rights of a person. The court first conceded the humanity of the child:

It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not human, and it is unquestionably alive.<sup>34</sup>

But then the majority opinion asked "whether a human entity, conceived but not yet born, is and must be recognized as a person in the law."<sup>35</sup> The answer given by the court was that the giving or withholding of personality rights to human beings is essentially a policy decision and it is generally a matter for the legislature to decide:

The process is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been "legally" rendered. That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.<sup>36</sup>

The *Byrn* case thus presented the issue clearly. There was a finding of fact that the child in the womb is a human being and a ruling of law that he need not be regarded as a "person." It is futile to speculate why the Supreme Court used the less clearly cut Georgia and Texas cases as

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34. 286 N.E.2d at 888.

35. *Id.* at 889.

36. *Id.*

a vehicle for its epochal ruling. Perhaps it would have been embarrassing for the Court to acknowledge that the victim of abortion, whom it defines as a nonperson, is in fact a human being. Such, after all, was the finding of fact by the New York courts in *Byrn*, and it could have been difficult for the Court to overturn it. It would be less shocking to enshroud the ruling of nonpersonhood in a cloak of ambiguity as to the humanity of the victim.

It is possible to challenge effectively in various ways the Supreme Court's refusal to acknowledge the humanity of the unborn child. The Court's avoidance of the issue was wrong because the child in the womb is in fact a human being from the moment of his conception. But to confront the abortion rulings merely on that factual plane would be a shallow response. More basic than the factual problem are the jurisprudential issues underlying the decisions. The primary issue is whether the government, acting through the legislature, the executive, or the courts, can validly define some innocent human beings as nonpersons so as to permit them to be killed at the convenience of others. Although the Supreme Court claims not to know whether the child in the womb is human, its rulings are as objectionable as if the Court had explicitly found the child to be a human being and then had defined him as a nonperson. Although it decreed him to be a nonperson in disregard of whether he is human, for all the Court knows, he is human. Therefore, the decisions have the same character as if the Court had defined an acknowledged human being as a nonperson.

The Supreme Court rulings are striking in their lack of explicit discussion of the jurisprudential issue of the validity of a decree depriving an innocent human being of personhood. Interestingly, however, the New York Court of Appeals did address that issue in *Byrn*:

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.<sup>37</sup>

The holding of the Supreme Court, that the child in the womb (who for all the Court knows is a human being) can validly be defined as a nonperson and subjected to death on that account, is the same in practical effect as the square holding of the New York Court of Appeals in *Byrn*. And it is significant that the New York Court of Appeals cited Hans Kelsen in support of its conclusion.<sup>38</sup> Kelsen's "pure" theory of law is, in the words of one commentator,

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 con-

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37. *Id.*

38. *Id.*, citing H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 93 (1949).



tents, 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.<sup>39</sup>

The "legal person," in Kelsen's view, "is the subject of legal duties and legal rights."<sup>40</sup> There is no necessity, in Kelsen's view, for the law to regard all human beings as persons. The fact that the law excludes some human beings from the category of persons while including all other humans and even corporations in that category does not deprive that law of validity.

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.<sup>41</sup>

Thus, there is no ground, in Kelsen's view, for labeling a law as essentially unjust if it excludes from personhood and therefore deprives of the right to live any particular class of humans, whether they be children in the womb, the retarded, or Jews. Kelsen's "'pure theory of law' is sheer positivism, excluding from the domain of jurisprudence the 'irrational' idea of justice as mere emotion. One wonders whether it is justice or rather its exclusion from the concept of law that is irrational."<sup>42</sup>

Unless we exclude the idea of justice from consideration, it will not be difficult to see that permissive abortion is unjust. The basic principle is precisely the principle that 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. In its denial of his right to live, abortion is unjust toward the child in the womb because it deprives him of equality before the law. Nor do we have to go back very far in history to see the baneful effects that can follow the denial of legal equality to a particular class of human beings. The Nuremberg Laws, issued by the Nazi regime in the fall of 1935, deprived Jews of their citizenship and political rights.<sup>43</sup> Ultimately, of course, they were deprived of their lives as well, pursuant to a "euthanasia" program designed to achieve "the destruction of life devoid of value."<sup>44</sup> The inequality inflicted on the Jews by the Nazis meant that they were, as a class, specially regarded as subject to extermination while other human beings were not.

Permissive abortion laws inflict a similar inequality upon children

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39. E. BODENHEIMER, *JURISPRUDENCE* 285 (1940).

40. H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 93 (1949).

41. E. BODENHEIMER, *JURISPRUDENCE* 285 (1940).

42. J. WU, *FOUNTAIN OF JUSTICE* 41-43 (1955).

43. See H. ARENDT, *EICHMANN IN JERUSALEM* 39 (1965).

44. F. WERTHAM, *A SIGN FOR CAIN* 153 (1969).

in the womb. In both cases, the denial of the right to live is based on the conclusion that there is such a thing as a "life devoid of value." When the governing jurisprudence is the analytical positivism of Kelsen, there is no inherent limit to the number or character of the target classes. "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.<sup>45</sup>

Once the principle is established that the law can legitimately deprive certain classes of the right to live, for example, by defining them as non-persons, the tendency is to expand the application of that principle. And if analytical positivism is the controlling jurisprudence, considerations of justice will be regarded as irrational and irrelevant.

The Supreme Court abortion decisions are therefore dangerous in their sanction of the exclusion of some innocent human beings from personhood. It is clear, moreover, that the rulings are erroneous in terms of logic and constitutional intent. The fourteenth amendment guarantees the rights of due process and of equal protection of the laws against infringement by the states. The fifth amendment guarantees the right of due process as against the federal government. The fifth amendment due process clause also carries implicitly an equal protection guarantee comparable to that which is explicitly applied to the states by the fourteenth amendment.<sup>46</sup> The fifth and fourteenth amendments were intended to include all living human beings within the category of "persons." It should be noted, however, that slaves were apparently not regarded as "persons" within the meaning of the fifth amendment due process clause. The *Dred Scott* case<sup>47</sup> held that a free Negro, whose ancestors were brought to this country as slaves, could not become a "citizen" of the United States. The Supreme Court, in *Dred Scott*, inferred that slaves were considered so inferior that as to them, and perhaps 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

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45. H. ARENDT, *EICHMANN IN JERUSALEM* 288-89 (1965).

46. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

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

of its provisions."<sup>48</sup> The inferior constitutional status of slaves was argued to be the result of specific provisions in the Constitution that treated slaves as property by forbidding Congress to prohibit the importation of slaves before 1808<sup>49</sup> and by requiring states to which any slaves should escape to redeliver them to their masters.<sup>50</sup> Obviously, there were no such specific restrictions directed by the Constitution against the child in the womb so as to deprive him of the basic human right to live that is protected by the due process clause of the fifth amendment.

Since the child in the womb is a living human being, he is entitled to be treated as a person. It appears that the framers of the fifth and fourteenth amendments did not address themselves to this because they did not specifically consider whether or not the child in the womb is a human being and therefore a person. Therefore, we are entitled to supply that intent to include the child in the womb as a person because of their general intent to include all human beings as persons and because we now know, as they did not with certainty, that the child in the womb is a human being. Even if the framers considered the matter and intended to exclude the child in the womb from the class of "persons," that intention would not bind the courts today. They would have based their decision on the factual assumption that the child in the womb is not a human being; science now demonstrates that assumption to be erroneous. Therefore, the governing general intention to include all human beings as persons should control. The child in the womb must now be included because he is, in simple reality, a human being from the moment of conception.

In fact, the equal protection clause of the fourteenth amendment was clearly intended to apply to all human beings within the jurisdictions of the states. In the leading case of *Yick Wo v. Hopkins*,<sup>51</sup> the Supreme Court held that the protection of the clause extended fully to aliens as well as citizens. "These provisions," said the Court, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."<sup>52</sup> It is obvious that the Court was using the term "persons" in such a way as to include all human beings, and such was certainly the general contemporary understanding. As Senator Allen A. Thurman (Dem. - Ohio) explained in 1875, the equal protection clause of the fourteenth amendment

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48. *Id.* at 409.

49. U.S. CONST. art. I, § 9.

50. *Id.* art. IV, § 2.

51. 118 U.S. 356 (1886).

52. *Id.* at 369.

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.<sup>53</sup>

In another context the Supreme Court in 1866, with specific reference to the "securities for personal liberty" contained in the fourth, fifth, and sixth amendments to the Constitution, including expressly the due process clause of the fifth amendment, stated, "*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.*"<sup>54</sup> 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."<sup>55</sup> Indeed, it is the evident purpose of the Bill of Rights to protect human rights. It would seem to be clearly inconsistent with that aim to hold that a human being can be deprived of the most basic human right, the right to live, by the expedient of defining him as a nonperson.

The fifth amendment was adopted in 1791, the fourteenth amendment in 1868. At those times the scientific facts of life in the womb were not clearly known. Thus it was that the highest court of Massachusetts ruled as late as 1884 that a child could not recover for injuries inflicted on him while he was in his mother's womb even though he was born alive.<sup>56</sup> Justice Oliver Wendell Holmes wrote the opinion for the court and declared that "the unborn child was a part of the mother at the time of the injury."<sup>57</sup> Holmes denied that "an infant dying before it was able to live separated from the mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator."<sup>58</sup> As the Supreme Court of Illinois summarized this view as late as 1900,

That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in *esse* for some purposes, when for its benefit, is a mere legal

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53. 3 CONG. REC. 1794 (1875). See generally THE RECONSTRUCTION AMENDMENT DEBATES 12, 29, 36, 220-21, 274, 460, 556, 558, 565, 622, 629, 631, 708, 733, 737-38, 740-42 (Avins ed. 1967).

54. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) (emphasis added).

55. *Id.* at 119 (emphasis added).

56. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884).

57. *Id.*

58. *Id.* at 16.

fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.<sup>59</sup>

If the facts of life in the womb were not clearly known in the nineteenth century, they are plainly evident now. The critical issue, of course, is whether the child in the womb is in fact a human being. In deciding this issue, he is entitled to the benefit of whatever doubts we believe to exist. Even if one somehow does not concede that the child in the womb is a living human being, one ought at least to give him the benefit of the doubt. Our law does not permit the execution, or imprisonment under sentence, of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood. The fact, however, is that the child in the womb is clearly a living human being, as the New York Court of Appeals explicitly recognized in *Byrn* and as the Supreme Court in *Wade* and *Bolton* was willing to concede in holding that whether he is human or not he is a non-person. Although he is entitled to the benefit of any doubt, he does not even have to rely on that principle for his protection.

The evidence of his humanity is abundantly clear. Dr. Herbert Ratner, for example, has pointedly summarized the reality of the child's humanity:

It is now of unquestionable certainty that a human being comes into existence precisely at the moment when the sperm combines with the egg. How do we know this? From everything we know about genetics. When the sperm and egg nuclei unite, all of the characteristics, such as the color of the eyes, hair, skin, that make a unique personality, are laid down determinatively. That's why a physician — even without any kind of formal ethical education, moral teaching or even philosophical sophistication — relying solely on medical science, knows, when he performs an abortion, that he is killing another human being. After all, the fetus isn't mineral or vegetable or dog or cat; nor is it part of mama, the way a leg or a tumor is part of mama.<sup>60</sup>

In his basic textbook on human embryology, Dr. Bradley M. Patten of the University of Michigan Medical School wrote:

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

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59. *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638, 640 (1900).

60. H. RATNER, A DOCTOR TALKS ABOUT ABORTION 2-3 (1966).

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*.<sup>61</sup>

Fertilization, according to Dr. Patten, begins "a new individual life history." Thereafter, the process of development is one of growth and "birth is but a convenient landmark in a continuous process."<sup>62</sup> The fifth grade text for the sex education program in the New York City public schools unequivocally states, "Human life begins when the sperm cells of the father and the egg cells of the mother unite. This union is referred to as fertilization. For fertilization to take place and a baby to begin growing, the sperm cell must come in direct contact with the egg cell."<sup>63</sup> Even the Planned Parenthood Association, before it began to advocate abortion, admitted the simple fact in a 1963 pamphlet:

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.<sup>64</sup>

If, as appears to be the case, the framers of the equal protection clause of the fourteenth amendment intended the term "persons" to include all living human beings, it is fair to conclude that they would have included the child in the womb in that category had they known then what we know now about prenatal development.

The Supreme Court in *Wade* and *Bolton* defined the child in the womb as a nonperson without even discussing the clearly appropriate criteria for fourteenth amendment personhood. The Court itself had established these criteria in another context from which it is evident that the child in the womb is indeed legally a person and ought to be so regarded for purposes of the fourteenth amendment and the fifth amendment as well. In *Levy v. Louisiana*<sup>65</sup> the Court held, "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."<sup>66</sup> The child in the womb meets these criteria of personhood under the equal protection clause. He is human, he lives, and he has his being. It is clear that he is a living human being. As the highest court of New Jersey summarized the state of scientific knowledge more than a decade ago, "Medical authorities have long recognized that a child is in existence from the moment of

61. B. PATTEN, *FOUNDATIONS OF EMBRYOLOGY* 35, 82 (1964) (emphasis added).

62. *Id.* at 3, 79.

63. N.Y. News, Sept. 27, 1967, at 4.

64. H. RATNER, *IS IT A PERSON OR A THING?* 20, 22 (1966).

65. 391 U.S. 68 (1968).

66. *Id.* at 70.

conception."<sup>67</sup>

The character of the child in the womb as a person is clearly recognized in the law of torts. The attitude of the law of torts toward the child in the womb was summarized by Dean William L. Prosser:

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.<sup>68</sup>

In 1953 the New York Appellate Division recognized the right of the child subsequently born alive to recover damages for an injury inflicted on him while in his mother's womb.<sup>69</sup> "We ought to be safe in this respect," said the court,

in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception . . . . If the child born after an injury sustained at any period of his prenatal life can prove the effect on him of the tort . . . we hold he makes out a right to recover.<sup>70</sup>

It is significant that a majority of courts, keeping pace with advancing scientific knowledge, now hold that even a stillborn child may maintain a wrongful death action where his death was caused by prenatal injury.<sup>71</sup>

A similar trend can be seen in the law of property. In 1946 it was noted in *Bonbrest v. Kotz*<sup>72</sup> that "from the viewpoint of the civil law and

67. *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497, 502 (1960).

68. W. PROSSER, *LAW OF TORTS* § 55, at 336 (4th ed. 1971).

69. *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696, 698 (1953).

70. 125 N.Y.S.2d at 697-98; see Byrne, *A Critical Look at Legalized Abortion*, 41 L.A. BAR BULL. 320 (1966).

71. *State of Maryland, Use of Odham v. Sherman*, 234 Md. 179, 198 A.2d 71, 73 (1964); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107, 111-12 (1967); see W. PROSSER, *LAW OF TORTS* § 55, at 335-38 (4th ed. 1971); Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAWYER 5 (1970); Maledon, *The Law and the Unborn Child; The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAWYER 349, 359 (1971).

72. 65 F. Supp. 138 (D.D.C. 1946).

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.<sup>73</sup> The law of property has long recognized the rights of the child in the womb for purposes that affect the property rights of that child. In *Theellusson v. Woodford*<sup>74</sup> the court rejected the contention that a devise for the life of a child in the womb was void because such a child was a nonentity:

Let us see, what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.<sup>75</sup>

When the property rules of the English common law were adopted by American courts the same approach was taken:

It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child en ventre sa mere is "born" and "alive" for all purposes for his benefit.<sup>76</sup>

Indeed, there is authority for the proposition that the child in the womb will be regarded as in existence even where it is against his interest to do so.<sup>77</sup>

For purposes of equity, too, the law has recognized the existence of the child in the womb. An unborn child, for example, can compel his father to provide his support.<sup>78</sup> He can compel his mother to undergo a blood transfusion for his benefit, even where such transfusion is forbidden by the mother's religious beliefs. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>79</sup> the mother refused for religious reasons to have blood transfusions that were medically necessary to save the life of the child in her womb. The court held that the child's right to live outweighed even the mother's right to the free exercise of her religion:

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.<sup>80</sup>

73. *Id.* at 140.

74. 4 Ves. 227, 31 Eng. Rep. 117 (1798).

75. *Id.*

76. *In re Holthausen's Will*, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (Surrogate's Ct. 1941).

77. *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517, 521 (1926).

78. *Kyne v. Kyne*, 38 Cal. App. 2d 122, 100 P.2d 806, 809-10 (Dist. Ct. App. 1940); *Metzger v. People*, 98 Colo. 133, 53 P.2d 1189, 1192 (1936).

79. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

80. 201 A.2d at 538.



It would be possible to multiply medical opinions and reinforcing legal decisions in support of the proposition that the child in the womb should be recognized as a person within the meaning of the equal protection clause. Suffice it to say that the child in the womb satisfies the three criteria for personhood—he is human, he lives, and he has his being. As the living offspring of human parents, he can be nothing but human. As a living human being, he is therefore a person within the meaning of the equal protection clause.

In reaching the conclusion that the child in the womb is a "person," we are construing the intent of the framers of the fourteenth amendment. They intended to include all living human beings in the category of "persons." So, too, did the framers of the fifth amendment due process clause, subject of course to the special treatment of slaves at that time. This is construction by implication, for the framers expressed no clear intent on the specific issue of the child in the womb. It probably never occurred to them. If it had, and if they intended specifically to exclude the child in the womb from the category of "persons," their intent should be disregarded for two reasons. First, it was invalid because such a determination was obviously based on a factual misconception of prenatal development. If the framers of the fourteenth and fifth amendments regarded the child as anything but a living human being, they were factually wrong, and any judgment based on that factual error should be ignored. Second, in deciding this issue, we should follow the rationale of the Supreme Court in its 1954 school segregation decision;

In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson*<sup>81</sup> was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>82</sup>

Considering the child in the womb in the light of what science has revealed about him, it is clear that he is as much a living human being as his older brother. He therefore should be as much a person in the eyes of the law.

Once the child in the womb is determined to be a person, it remains to be considered whether it would violate his equal protection rights to allow him to be killed in situations where his older brother could not be legally killed. In *Takahashi v. Fish and Game Commission*,<sup>83</sup> the Court said, "The fourteenth amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens

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81. 163 U.S. 537 (1896).

82. *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954).

83. 334 U.S. 410 (1948).

under non-discriminatory laws.”<sup>84</sup> It is true that the equal protection clause does not forbid all classifications. “The prohibition of the equal protection clause goes no further than the invidious discrimination.”<sup>85</sup> The classification, however, must pass the test of reasonableness, and the scrutiny to which it is subjected will become more rigorous as the rights affected become more basic.

In *Skinner v. Oklahoma*,<sup>86</sup> the Court invalidated an Oklahoma compulsory sterilization statute on the ground that it denied equal protection of the laws because it arbitrarily determined who would be subject to sterilization. One comment by the Court in *Skinner* is particularly relevant to the abortion problem because it emphasizes the special scrutiny that must be given to statutes that interfere with basic rights:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races and types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.<sup>87</sup>

The right to live is more basic even than the right to procreate. And there is “no redemption” for the aborted child in the womb. The abortion is to his “irreparable injury” and by it he “is forever deprived of a basic liberty.” Any law that interferes with the right to live must therefore be carefully scrutinized. It is important to observe with respect to abortion the strict scrutiny requirements applied by the *Skinner* Court to the sterilization statute. It is appropriate also to apply the principles that govern the application of the equal protection clause to another basic right, the right to be free from racial discrimination. The Court declared in *McLaughlin v. Florida*<sup>88</sup> that a state law

which trenches upon the constitutionally protected freedom from invidious official discrimination based on race . . . even though enacted pursuant to a valid state interest, bears a heavy burden

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84. *Id.* at 420.

85. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

86. 316 U.S. 535 (1942).

87. *Id.* at 541.

88. 379 U.S. 184, 196 (1964).

of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related to the accomplishment of a permissible state policy.<sup>89</sup>

In view of the intrinsic nature of abortion as the deliberate killing of an innocent human being, it can hardly be said to be necessary or even rationally related to the accomplishment of a legitimate state policy.

Discrimination in employment on account of age is now forbidden by federal law that enunciates a strong public policy,<sup>90</sup> and while age is a reasonable criterion for determining the right to vote or to drive a car, it certainly should not be considered a reasonable basis for determining whether one has a right to continue living. The child in the womb should have the same right as his older brother or sister not to be killed. And the fact that he temporarily reposes in his mother's womb rather than in an incubator or a crib should not operate to deprive the child of the right to continue living.

Nor should the unborn child's right to continue living be considered inferior to any asserted right of the mother to privacy or to the control of her body. In *Wyman v. James*<sup>91</sup> the Court held that a home visit by a welfare caseworker was not an infringement on the right of privacy of the plaintiff, a mother who was a recipient of Aid to Families with Dependent Children. Significantly, the Court noted:

The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child*, and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.<sup>92</sup>

The dependent child in the womb is entitled to similar protection when what is involved is his very right to continue living. Remarkably, the Supreme Court in *Wade* and *Bolton* applied these principles in reverse. "Where certain 'fundamental rights' are involved," said the majority opinion correctly, "the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."<sup>93</sup> But the Court applied this restrictive test, requiring a "compelling state interest" to justify the regulation, not in behalf of the innocent child in the womb but in behalf of the mother whose "right

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89. *Id.*

90. 29 U.S.C. §§ 622-23 (1971).

91. 400 U.S. 309 (1971).

92. *Id.* at 318.

93. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

of privacy," according to the Court, prevents the state from prohibiting her killing her child. Since the child is defined as a nonperson, his right to continue living is outranked by his mother's right of privacy.

Several remedies have been suggested for the Supreme Court's abortion rulings. Congress has the power, 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, to decide cases involving abortion laws.<sup>94</sup> Although such action should be taken, it is but a partial remedy. Congress could not take away the jurisdiction of the state courts over abortion cases. A withdrawal of abortion jurisdiction from the federal courts would not invalidate the Supreme Court's abortion rulings. At least some of the state legislatures and state courts would consider themselves bound by those rulings, and others would decide in favor of abortion on their own initiative. A withdrawal of abortion jurisdiction from the federal courts, therefore, would not stop abortions. It would be a desirable but partial remedy.

Congress also has power to enforce the fourteenth amendment by appropriate legislation.<sup>95</sup> It is arguable that Congress could reverse the abortion decisions by simply enacting a statute defining that the word "person" in the fourteenth amendment includes the child in the womb. But it is likely that the Supreme Court would rule such a statute unconstitutional on the ground that the child in the womb is inherently incapable of being considered a "person" under the fourteenth amendment. At least the Supreme Court abortion decisions lend themselves to that interpretation. The Court majority said its examination of the history and background of the fourteenth amendment "persuades us that the word 'person,' as used in the fourteenth amendment, does not include the unborn."<sup>96</sup> If a mere statute defining the child in the womb as a "person" were enacted, it could take years to get a definitive ruling from the Supreme Court. Moreover, the ruling would likely be negative. Furthermore, the statutory definition would have to be so worded that the retarded, aged, and disabled, as well as children in the womb, could not be defined as nonpersons. Finally, the effort to enact the doubtfully effective statutory definition of the child in the womb as a "person" would detract from the certain method of amending the Constitution, and it could well prevent the adoption of such an amendment.

It is evident that the only remedy that can be certainly effective is a constitutional amendment. While such an amendment is pending, however, it would be appropriate for state legislatures to enact "conscience" provisions, ensuring that no mother will be forced to undergo an abortion

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94. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513-15 (1869); Norris-Laguardia Act, 29 U.S.C. § 101 (1971).

95. U.S. CONST. amend. XIV, § 5.

96. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

and no doctor, nurse, or hospital will be forced to perform or provide facilities for abortions. The desirability of enacting other state laws restricting abortion within the confines of the Supreme Court rulings—e.g., requiring that abortions be performed by doctors, that the father of the child consent, that efforts be made to save aborted babies who are born alive, that mothers undergo counseling before abortions, will depend on whether those restrictive laws will save the lives of children in the womb. Generally, they will condone abortion and cause some opponents of abortion to relax their efforts, but whether a particular provision will actually prevent abortions will have to be decided in each instance. In general, the Supreme Court has left no room for states really to prevent abortions at any stage of the pregnancy. The most the states can do is make it inconvenient to get the abortions. To a large extent, such action will be a waste of time and a diversion of effort from the constitutional amendment. But the judgment as to each proposal must be made in the light of the situation in each state.

There are three possible types of constitutional amendment. One is the so-called permissive type that would allow each state to make its own decision whether to allow or forbid abortions. But since abortion violates the unborn child's basic right to live, this remedy can hardly be defensible. The principles of federalism are valid, but they are not absolute. It would be incongruous at best to affirm a constitutional right to live and then to condition that right on the concurrence of the legislature in each state. That would be like urging during World War II that each locality in Germany be allowed to decide whether or not to have a death camp to exterminate undesirables. It would constitutionalize the mass murder of millions.

The second type is a prohibitory amendment that would forbid abortions but that would do so only after a time later than conception. The issue here is the early abortion by pill or other means. There are two things wrong with this type of amendment. One is that legitimizing early abortions will make it difficult to limit them to the early stages. If the amendment applies only at a stage later than conception, it will be most difficult to prosecute a doctor who performs a surgical abortion beyond the prescribed time because he will claim that he was honestly mistaken as to the stage of the pregnancy. Also some methods of abortion by pill may operate at later stages of pregnancy,<sup>97</sup> and if they are lawful at all they will tend to be used at every stage. If the amendment applies from the moment of conception, it will prevent the licensing and legal distribution of all abortifacient pills and devices. The second objection to forbidding abortion only after a time later than conception is that it is morally wrong. To withhold protection from the child at the very

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97. Refer to the discussion of prostaglandins in *Los Angeles Times*, Feb. 8, 1972, at 16, col. 2.

early stages of his life would be like arguing that the Nazis ought to stop all exterminations of Jews except of Jews below a certain age.

The third type of amendment is a prohibitory amendment that applies from the moment of conception. This is the only sort of amendment that will be effective. The application of the amendment "from the moment of conception" is crucial. Even to say "from conception," without the pinpointing "moment" that refers unambiguously to fertilization of the ovum by the sperm, would be unacceptable in view of the Supreme Court's sympathetic mention of "new embryological data that purport to indicate that conception is a 'process' over time, rather than an event."<sup>98</sup> To stop early as well as late abortions, the amendment must apply from the beginning of life.

Congressman Lawrence J. Hogan (R. - Md.) has introduced the following Human Life Amendment in Congress:

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.
2. Neither the United States nor any State shall deprive any human being of life on account of illness, age, or incapacity.
3. Congress and the several States shall have power to enforce this article by appropriate legislation.<sup>99</sup>

As far as his right to live is concerned, the Human Life Amendment would place the child in the womb in the same position as if he were simply defined as a "person" for all fourteenth amendment purposes. He could not be deprived of his life without due process of law. 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.

The Human Life Amendment would protect the right to live from the beginning of life. It would prevent all abortions for reasons less important than the preservation of the life of the mother. It would prevent those abortions whether performed by private parties or public officials. Human beings in general cannot be legally killed when it is not necessary to save the life of the killer. If a state or federal law allowed the child in the womb, unlike his older brother, to be killed by anyone (whether a private party or public official) when it was not necessary to save the life of the killer, it would deprive him of the equal protection of the laws

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98. *Roe v. Wade*, 410 U.S. 113, 161 (1973).

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

and of due process of law and would be unconstitutional under the Human Life Amendment. This position was enunciated in the following comment offered by the Supreme Court in *Wade* with respect to its decision in the 1971 case of *United States v. Vuitch*.<sup>100</sup> That case held that the Washington, D.C. abortion statute, which permits abortion where necessary for the preservation of the mother's life or health, is not void for vagueness:

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the 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.<sup>101</sup>

The Human Life 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 older brother or his grandmother. This is the standard by which abortion would be measured when it was alleged to be for the purpose of saving the life of the mother.

It can be fairly argued that it violates the rights of the child in the womb to allow him to be killed even in the case where the mother's life is endangered by continuation of the pregnancy. This conclusion could be said to be in accord with the common law principles of necessity, under which there is no right to kill another innocent, non-aggressing human being even to save the killer's life. By those common law principles, "no man can justify or excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person in order to save his own."<sup>102</sup> As one commentary states:

It is generally held that the law in no event recognizes the right of one person, however dire the situation, to kill an innocent person so that he himself may survive, and such killing is held felonious; this is the situation which might arise in a shipwreck or in similar circumstances, where there is insufficient food or means of transport. There was a dictum in *United States v. Holmes*,<sup>103</sup> that homicide is not felonious if lots are drawn to determine who shall die; this doctrine, however, was specifically discredited in *Regina v. Dudley*,<sup>104</sup> and the doctrine of homicide by

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100. 402 U.S. 62, 72 (1971).

101. *Roe v. Wade*, 410 U.S. 113, 158-59 (1973).

102. W. BURDICK, *LAW OF CRIME* § 441b (1946).

103. 25 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842).

104. 14 G.B.D. 273 (1884).

necessity has been generally repudiated by English and American courts.<sup>105</sup>

If this common law interpretation were accepted as the standard, abortion even to save the life of the mother would have to be viewed as unjustified.

It is interesting that the New York Court of Appeals in *Byrn*<sup>106</sup> criticized the arguments of the opponents of abortion because they attempted to challenge the allowance of abortion where not necessary to save the life of the mother while conceding that abortion is justified when the mother's life is at stake:

Moreover, plaintiff of necessity occupies a less than completely consistent position. He agrees that abortion is justified to save the mother's life because it is one life for another. But that is not satisfactory. Necessity may justify in the law every kind of harm to save one's life, except to take the life of an innocent. Before the law one life is as good as another, saint or sinner, genius or imbecile, child or adult. Besides, if the contrary were true, should not the one to lose his life be entitled to notice and hearing through a guardian ad litem, as would be done with any child's property rights, born or unborn?<sup>107</sup>

The assertion by the court that "before the law one life is as good as another," in the same opinion holding that the living human child in the womb can be deprived of his life by being defined as a nonperson, is a jolting incongruity. But at least one serious question is raised by the court. The common law principles of necessity do not allow an innocent four-year-old to be killed to save the life of another. How can the law allow the killing of his younger brother in the womb without depriving that younger brother of the equal protection of his right to live? The Supreme Court in *Roe v. Wade* asked the same question in different terms:

When Texas urges that a fetus is entitled to fourteenth amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?<sup>108</sup>

The difficulty, however, is not insurmountable. If the Human Life Amendment is adopted and if the constitutionality of laws permitting abortion to save the life of the mother is presented to the Supreme Court,

105. E. MARKS & L. PAPERNO, *NEW YORK CRIMINAL LAW* § 85 (1961).

106. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

107. 286 N.E.2d at 890; 335 N.Y.S.2d at 395.

108. 410 U.S. 113, 157-58 n.54 (1973).



it is likely that such laws would be sustained, perhaps by analogy to the principles of self-defense. This is so because the amendment would not impair the general law on whether one may kill another person to save one's own life. Where self-defense against attack is involved, the law allows such killing where necessary to save the life of the person attacked. The principle obtains even if the assailant is innocent, as, for example, where he is insane.

The Human Life Amendment would not prevent the state legislatures and the courts reviewing state laws from regarding abortion to save the life of the mother as a matter of self-defense and therefore legally justifiable. This is Congressman Hogan's intent, and it would be clear as a matter of legislative history that it is the intent of Congress and the state legislatures as well. The amendment would merely apply the existing principles of due process of law and 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 nonperson and deprived him of his most basic right of life. All the amendment would do is give the child in the womb the same right to continue living as his older brother, with both of them, of course, being governed by the even-handed application of the principles of due process and equal protection.

The legality of abortion to save the life of the mother is a practical issue with respect to the frequent practice of granting a woman the right to kill her baby by abortion because psychiatrists have certified that she is likely to commit suicide if the pregnancy continues. Therefore, it is concluded, the abortion is necessary to save her life, and the abortion would be thus justified even if the law permitted abortion only to save the life of the mother. In fact, however, the suicide rate for pregnant women is far less than the rate for women in general.<sup>109</sup> It is increasingly clear that there is no mental or emotional problem for which abortion is a solution:

There are no psychiatric indications for therapeutic abortion because: (1) Suicide is less of a risk in pregnancy than in a non-pregnant woman. (2) It is impossible to predict who will develop a postpartum psychosis. (3) Adequate treatment methods are available to handle psychiatric difficulties occurring during pregnancy. (4) Therapeutic abortion has its own psychiatric morbidity.<sup>110</sup>

As Seymour L. Halleck, M.D., put it:

When the psychiatrist writes a report stating that the patient will endanger her life by carrying a child to term, he is on shaky intellectual grounds. Many women with serious emotional dis-

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109. G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 79 (1970).

110. Bernstein, *Psychiatric Indications for Therapeutic Abortion*, MINN. MEDICINE 647 (1970); see Butler, *Psychiatric Indications for Therapeutic Abortion*, SOUTHERN MEDICAL J. 647 (1970).

turbances who are reluctant to have a baby never contemplate suicide; their lives are not in danger. Other emotionally disturbed women threaten suicide, but it is quite difficult to evaluate the seriousness of their threats.

Psychiatrists know that even when a woman sincerely threatens suicide, she generally can be treated by traditional means without resort to abortion. They are also aware that once the patient realizes there are no alternatives, she probably will respond to psychotherapy, drug therapy, or hospitalization.

A woman looking for an abortion on psychiatric grounds quickly learns that she must talk suicide if she is to get her way. It is very easy for the female with an unwanted pregnancy, knowing that illness is a way out, to convince herself that she is ill. It makes little difference whether she does this consciously or unconsciously. The psychiatrist accelerates this process when he directly or indirectly lets the patient know that she must present grave signs of illness before he will recommend abortion.<sup>111</sup>

"No psychiatrist, if he is honest with himself," said Dr. Halleck, who is himself a proponent of abortion on request,

will claim to be able to distinguish between selfish, practical, idealistic, and irrational motivation. Nor can he describe any scientific criteria that enable him to know which woman should have her pregnancy terminated, and which should not. When he recommends an abortion, he usually lies. It is a kind lie, a dishonesty intended to make the world a little better, but it still is a lie.<sup>112</sup>

Apart from the use of this psychiatric pretext to justify abortion, it is quite clear today that there are no sufficient medical grounds for abortion to save the life of the mother. As long ago as 1951, Dr. R. J. Heffernan, of Tufts University, stated in an address to the Congress of the American College of Surgeons that "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."<sup>113</sup> Dr. Samuel A. Nigro, of Case Western Reserve University School of Medicine, in a similar vein, recently concluded that

[m]ost 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 complications of pregnancy. Indeed,

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111. Halleck, *Excuse-Makers to the Elite: Psychiatrists as Accidental Social Movers*, MEDICAL OPINION 48, 50 (1971).

112. *Id.*

113. J. WILLKE & J. WILLKE, HANDBOOK ON ABORTION 37 (1971).

if a woman wants her child, there are no medical or psychiatric indications that make an abortion mandatory.<sup>114</sup>

It is fair to say, therefore, that "[a]bortion to save the life of the mother is apparently scarcely more than a theoretical question in the present state of gynecology."<sup>115</sup> However, in the current debate we need not be entangled in this theoretical question of abortion to save the life of the mother. Rather, the question today is whether abortion will be allowed when it is not necessary to save her life. In the theoretical case where the abortion is performed to save the life of the mother, there is a parity of values, one life for another. Although I would oppose the legalization of abortion even there, the issue is debatable because of the parity of values. But when the abortion is performed for a lesser reason, whether the physical or mental health of the mother, or defect of the child, or because he was conceived by rape or incest, or for whatever reason, 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. It is a principle contrary to humanity as well as right reason. And it is manifestly repugnant to the intent and purpose of the equal protection clause of the fourteenth amendment.

Section two of the Human Life Amendment is directed against euthanasia of the retarded, the aged, and the sick.<sup>116</sup> This section would invalidate any state law that 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. In light of the Supreme Court's decisions, this is no longer a mere academic question. Anyone who thinks those decisions are merely about abortion is mistaken. If the Court can define some human beings as nonpersons because they are too young [that is, they have not lived nine months from their conception], it can also do it to others because they are too old, or retarded, or otherwise undesirable.

In the wake of the Supreme Court's abortion rulings, there are indications that serious efforts will be made to change the law so as to allow active euthanasia and also passive euthanasia through the withholding

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114. S. NIGRO, A SCIENTIFIC CRITIQUE OF ABORTION AS A MEDICAL PROCEDURE 9 (1971).

115. G. Williams, *The Sacred Condominium*, in *THE MORALITY OF ABORTION* 162 (J. Noonan 1970).

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

from patients of clearly ordinary treatments.<sup>117</sup>

The law generally does not require that extraordinary medical procedures be continued interminably long after all hope of survival has passed. There comes a time when one has a right to die in peace. While the law now forbids the withholding of ordinary treatments, the question of whether a particular treatment is extraordinary or ordinary must necessarily depend largely on medical judgment.<sup>118</sup> More importantly, however, the law now forbids active euthanasia, the active intervention to terminate life, whether by injecting an air bubble into the veins or poisoning or whatever.<sup>119</sup>

The Human Life Amendment would ensure that the sick, the aged, and the retarded, as well as the child in the womb, would not be subject to being killed for the convenience or comfort of others, because those others consider him unfit to live, or in any other situation where other innocent human beings could not legally be killed. It would conform the law to the realities of science, and its adoption would affirm the determination of our people to protect the liberty of all regardless of age or condition.

If we do not successfully protect the liberty and the right to live of the child in the womb, we will predictably fail to protect the senile, the retarded, and others whom the Nazi mentality would regard as "useless eaters."<sup>120</sup> Recently, *California Medicine*, the official journal of the California Medical Association, editorialized that the "traditional Western ethic" is being supplanted by a new ethic that will emphasize "the quality of life" and that "it will become necessary and acceptable to place relative rather than absolute values on such things as human lives."<sup>121</sup> The editorial uncovered the reason why abortion proponents have evaded the real issue and have clouded their case in subterfuge:

Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The *result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death.* The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they

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117. See San Francisco Examiner, Jan. 26, 1973, at 18, col. 1. The article describes the mounting support for the "death with dignity" bills introduced in the Florida legislature by Representative Walter Sackett, M.D. See also Williams, *Number, Types and Duration of Human Lives*, NW. MEDICINE 493 (1970). Williams, an advocate of euthanasia, states, "It seems unwise to attempt to bring about major changes permitting positive euthanasia until we have made major progress in changing laws and policies pertaining to negative euthanasia." *Id.* at 496.

118. See *When Do We Let the Patient Die?*, 68 ANNALS OF INTERNAL MEDICINE 695 (1968) (editorial).

119. See generally C. RICE, *THE VANISHING RIGHT TO LIVE* 51-72 (1969).

120. Affidavit of Defendant Brock, *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. F, ("The Medical Case") 844.

121. CAL. MEDICINE, Sept. 1970, at 67 (emphasis added).

were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.<sup>122</sup>

The acceptance by society of what is essentially the Nazi ethic is neither progressive nor inevitable. The abortion trend, the legalization of the killing of innocents for convenience, can be reversed. We can begin that reversal by recognizing in our law the basic reality that as far as his right to live is concerned, the child in the womb is a person. We must affirm that innocent life is not negotiable. And we must reestablish the basic equality of all before the law. To hold now that certain human beings may constitutionally be defined as nonpersons, so as to subordinate their right to live to the discretion of others, is to reincarnate the evil doctrine of human slavery. "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.*"<sup>123</sup>

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122. *Id.* at 67-68.

123. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (emphasis added).