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SOCIAL COMMENTARY: VALUES AND LEGAL PERSONHOOD*

JEFFREY A. PARNESS**

INTRODUCTION

I believe it generally unwise to vote for one-issue candidates since they are often unversed in the great diversity of issues that surely will confront them if elected. Similarly, in law, I believe across-the-board implementations of any single societal value are generally unwise for they typically undermine other established values. Thus, before voting for a one-issue candidate and before fully implementing a single value into law, I believe one must be confident that the issue and the value are so important that all other concerns are properly deemed secondary. Because such important issues and values are rarely found, few one-issue candidates are elected and few values are absolute under law. One generally votes for candidates because they best represent his views on all relevant issues and seeks to live under a legal system which best represents his view on the proper balance of competing values.

While the need for the balancing of competing values in lawmaking might appear self-evident, there are occasions when lawmakers consider implementing a particular value without considering other conflicting values. A certain value might be deemed so important that it overrides other countervailing values, but such an assessment should only be made after there has been a full deliberation of the consequences. This deliberation is especially crucial when implementation is sought through an amendment to the Constitution of the United States,¹ since

* This paper is based upon an address delivered by the author at the Fourteenth Conference on Value Inquiry at the College of Arts and Science at Geneseo of the State University of New York. The conference was held on April 18 and 19, 1980, and its topic was Values in the Law.

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¹ U.S. CONST. art. V provides the necessary procedure for amendment of the Constitution:

The Congress, whenever two thirds of both Houses shall deem it

that amendment process is far more difficult than the process involved in revision of most other legal documents.

Over the past few years, and particularly since the United States Supreme Court's seminal decision in *Roe v. Wade*,² there have been loud cries to equate genetic conception with the inception of personhood under the fifth and fourteenth amendments of the Constitution. Proponents premise their cries on the facially appealing value that all forms of human life should be protected by society. One important aspect of the proposed equation is, of course, that human life begins at conception;³ another is that such an implementation of the value is as appropriate in the political and social realm as it is in the religious and moral realms.

Since the decision in *Roe*, the proponents of this equation have advanced two similar types of proposals for a federal constitutional amendment. The first recognizes constitutional personhood as beginning with conception, thereby guaranteeing the right to life to all pre-birth forms of human life.⁴ The second, and more prevalent type of proposal, likewise recognizes constitutional personhood as beginning with conception, but permits

necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

² 410 U.S. 113 (1973).

³ See, e.g., ILL. ANN. STAT. ch. 38 § 81-21 (Smith-Hurd 1977): "[T]he unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State." MONT. REV. CODES ANN. § 94-5-614 (1977): "[T]he tradition of the state . . . to protect every human life, whether unborn or aged, healthy or sick" NEV. REV. STAT. § 28-325(1) (1979): "[T]he will of the people of the state . . . to provide protection for the life of the unborn child whenever possible" In this essay the differences between conception and fertilization are insignificant, so included in my analysis are proposals placing the onset of life at fertilization. See, e.g., North Dakota SCR4015, cited and described in 8 FAM. PLAN./POP. REP. 99 (1979).

⁴ See, e.g., H.R. REP. NO. 294, 96th Cong., 1st Sess. (1979), and various state resolutions cited in 3 FAM. PLAN./POP. REP. (1975); 4 FAM. PLAN./POP. REP. (1975); 5 FAM. PLAN./POP. REP. 99 (1977); 7 FAM. PLAN./POP. REP. 107 (1978); 8 FAM. PLAN./POP. REP. 99 (1979); and 9 FAM. PLAN./POP. REP. 86 (1980).

abortions to avoid maternal deaths.⁵ The only significant difference appears to involve the question of whether or not the state's interest in protecting the continuation of the mother's life should take precedence over the state's interest in protecting the unborn's potentiality for life. In resolving such a question, the value that all forms of human life should be protected cannot be fully implemented since the protection of one life form will inevitably foreclose complete protection of another life form. More generally, however, each type of proposal strongly supports the value that human life should be protected.⁶

While the cries for the equation of conception with personhood are sincere and perhaps involve the most prominent concern of all human values—the protection of human life—such cries typically are unaccompanied by any significant consideration of competing values. Thus, the proponents fail to disclose how their proposed equation would conflict with other, long-recognized American values. Furthermore, the proponents make no reference to the traditional laws which support these other values, thereby implicitly, if not explicitly, recognizing that the protection of human life should begin only at birth.

Roe v. Wade and the Protection of the Unborn

The decision in *Roe v. Wade* prompted much of the previously discussed criticism, in part because it was read to be a clear and sweeping rejection of government's ability to protect pre-birth forms of human life.⁷ While the Court's decision does

⁵ See, e.g., H.R. REP. NO. 51, 96th Cong., 1st Sess. (1979); S. REP. NO. 22, 96th Cong., 1st Sess. (1979).

⁶ Even when possible protection of only one life is at stake, the proposals seemingly still would not grant absolute protection. Under the fifth amendment to the Constitution, deprivation of life by the federal government would still be permitted where there was due process of law; and under the Constitution's fourteenth amendment, deprivation of life by state governments would still be permitted where there was due process of law. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, wherein the Court held that under certain circumstances a state may impose the death penalty for certain crimes without violating the fourteenth amendment's due process clause.

⁷ This criticism was further encouraged by certain judicial decisions. See, e.g., *People v. Smith*, 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976), where the court declared: "The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law

reject the view that the attempted societal protection of human life could begin at conception, it does so in only a very narrow context. The Court was asked to equate personhood with conception in the context of the fourteenth amendment's protection of "persons" from state denials of "life" without "due process of law" and from state denials of the "equal protection of law." At issue before the Court was the validity of the Texas statutory scheme regulating abortion; the scheme effectively denied to many women the opportunity to secure abortions,⁸ which was said to infringe upon a woman's constitutionally protected right to privacy. In striking down the Texas scheme because of its restrictions on the exercise of privacy rights, the Court necessarily had to find that fetuses were not "persons" possessing the fourteenth amendment right to "life."⁹

In reviewing the Texas statutory scheme, the Court found that three reasons were traditionally advanced to justify the existence of state abortion statutes: (1) The discouragement of illicit sexual conduct; (2) the protection of the health of the mother; and (3) the protection of prenatal life.¹⁰ The Court quickly disposed of the first reason, indicating that it was an inappropriate state purpose, and declaring the statute overbroad in failing to distinguish between the married and the unwed mother.¹¹

Against the other two rationales, both found to be legitimate, the Court weighed the women's recognized right to privacy. With respect to the state's interest in protecting the health of the mother, the Court observed that the medical risks inherent in early first trimester abortions were lower than

the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, father (as here), or a third person."; and *Larkin v. Cahalan*, 389 Mich. 533, 208 N.W.2d 176 (1973), where the court interpreted *Wade* in a similar manner, by limiting the scope of a manslaughter statute to the destruction of a viable unborn child.

⁸ Relevant portions of the Texas statutory scheme can be found in *Roe v. Wade*, 410 U.S. 113, 117 n.1 (1973).

⁹ 410 U.S. at 156-57. "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment . . . If this suggestion of personhood is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the Amendment."

¹⁰ *Id.* at 148-52.

¹¹ *Id.* at 148.

those in carrying the fetus to full term.¹² Thus, the state could not justify a ban on early abortions by relying on the need to protect maternal health. With respect to the governmental interest in prenatal life, the Court did say that the states had an "important and legitimate interest in protecting the potentiality of human life,"¹³ but held that this interest only became "compelling" in the second trimester. This period, between the 24th and 28th week of pregnancy,¹⁴ had been found by medical science to be the point of fetal viability. Because a compelling reason is a requisite to state interference with fundamental rights,¹⁵ such as the right to privacy,¹⁶ the Texas restrictions on early abortions were invalidated. In light of *Roe*, states may only prohibit abortions, except when the life or health of the mother is in danger, after viability is attained. The result is the now familiar rule that in the first trimester the abortion decision is one solely between the mother and her doctor; in the second trimester, the states may regulate abortion to the extent necessary to protect the life and health of the mother; and in the third trimester, the states may prohibit abortion completely, except where the life or health of the mother is in jeopardy.

Notwithstanding the Court's ruling that neither viable nor nonviable fetuses are persons protected under the fourteenth amendment, and that a state does not have a compelling interest in protecting the nonviable fetuses' potentiality for life after birth, the Court's decision does not preclude a *state* from characterizing fetuses as persons or from protecting the nonviable fetuses' potentiality for life, or continued life. As long as such characterizations or protections occur outside the context of the fourteenth amendment they are appropriate.¹⁷ Yet, the

¹² *Id.* at 149.

¹³ *Id.* at 162. The Court recognized such an interest whether or not the state's protection rested on "the theory that a new human life is present from the moment of conception," since potential life was always involved. *Id.* at 150.

¹⁴ *Id.* at 163.

¹⁵ *Id.* at 155.

¹⁶ *Id.*

¹⁷ A year after *Roe v. Wade* the First Circuit Court of Appeals observed: Though the Supreme Court's decision in *Roe v. Wade* [cite omitted], arguably proscribes as unconstitutional the governmental characterization of the fetus, at least during the earlier portions of pregnancy, as a 'human being' for the purposes of assessing the interests implicated by

Court's decision in *Roe* did relate that states have traditionally only extended their full legal protections to those born alive.¹⁸ It noted that even when state law extended protections to the unborn, those protections were contingent upon live birth.¹⁹ So, within *Roe* the Court refers to laws outside the abortion context which would be undermined by a change in the Constitution regarding personhood.

The Court in *Roe* described traditional state law outside the abortion context in two ways. First, it noted that post-conception but pre-birth forms of human life usually are treated differently under law than post-birth forms of human life. Typically, the former have only their "potential life" protected,²⁰ while the latter have their "continued life" protected.²¹ Laws generally better protect the "continued life" of post-birth forms of human life than they protect the "potential life" of pre-birth forms of human life.²² Thus, the effect of the proposed equation of personhood and conception would be to place post-conception, yet pre-birth forms of life, under many of the stronger "continued life" protections.²³ This contemporary difference between

a decision to abort, that decision neither proscribes the recognition of a fetus as 'living' nor forbids the government to benefit the fetus.

Carver v. Hooker, 501 F.2d 1244, 1246 (1st Cir. 1974). See also *Parks v. Harden*, 504 F.2d 861, 864 (5th Cir. 1974), and *Green v. Stanton*, 451 F. Supp. 567, 568-70 (N.D. Ind. 1978).

Thus, it would even be appropriate for states to include fetuses as recipients of certain state constitutional rights to due process of law. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 501-03 (1977); *Robinson v. Cahil*, 62 N.J. 473, 303 A.2d 273 (1973), cert. denied, 414 U.S. 976 (1973).

¹⁸ "[T]he unborn have never been recognized in the law as persons in the whole sense." 410 U.S. 113, 162 (1973).

¹⁹ "[T]he law has been reluctant 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.

²⁰ The conceived unborn's "potential life" is protected when the chances for the unborn's subsequent healthy birth are promoted by the law, even though the law may not characterize the unborn the same way that it characterizes those already born, i.e., by not including the conceived unborn in "person" and "child."

²¹ The born's "continued life" is protected when the chances for his or her continued healthy life are promoted by the law.

²² After *Roe*, of course, constitutional restraints limit those states desirous of similarly characterizing the born and the unborn, thereby extending stronger protection to the unborn. See notes 18 and 19 *supra*.

²³ For example, abortions of post-conception but pre-birth forms of life would be eliminated or dramatically reduced. See notes 4, 5 and 9 *supra*. Differing

protecting the unborn's "potential life" and the born's "continued life" exists even though presumably the sole reason for protecting the unborn's "potential life" is the state interest in protecting the unborn's potential for "continued life"; that is, the state is only interested in the unborn's life after birth. States do not seek to protect the unborn's "potential life" when death of the unborn prior to birth is a certainty.

The Court in *Roe* also described traditional state law affecting the unborn outside the abortion context through illustrations of how American law has never treated pre-birth forms of human life as if they were persons in all respects. It noted that the unborn generally have been granted only certain inchoate rights which come to fruition upon birth,²⁴ that is, live birth triggers the retroactive vesting of rights upon the unborn. For example, it declared that a new-born child typically possesses a property interest in the estate of a father who died without a will during the gestation period.²⁵ And it found that a new-born child possesses a cause of action in tort for injuries negligently caused to that child while *in utero*.²⁶ Yet, these rights could not be exercised on the new-born's behalf in the moments before birth. A child conceived but not yet born generally cannot proceed as a beneficiary of an intestate father's estate,²⁷ or as a complaining party in a tort case.²⁸

Values and the Unborn

Underlying and supporting these American legal distinc-

measures of protection in some areas might continue if differing treatment of the unborn and the born was found not to be violative of the equal protection clause of the fourteenth amendment or of the due process clause of the fifth amendment. Analogous differences now exist between children and adults. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁴ *Supra* note 19.

²⁵ "[U]nborn children have been recognized as acquiring rights or interest by way of inheritance Perfection of the interests involved . . . has generally been contingent upon live birth." 410 U.S. 113, 162 (1973).

²⁶ "[T]he traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction." It shall be noted that in some states a new-born's cause of action may not be allowed if the negligent acts occurred at a time prior to viability or to conception. *Id.*

²⁷ *See e.g.*, UNIFORM PROBATE CODE §§ 2-108 and 2-302 (1972).

²⁸ *See, e.g.*, Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 32 BAYLOR L. REV. 131, 144 (1979).

tions between those born and those conceived, yet unborn, are several values which have taken precedence over the value in protecting potential human life. Both within and without the abortion area, I believe the societal value in promoting individual freedom and the overall quality of life has at times been deemed superior to the value in protecting all post-conception forms of human life.

With respect to the promotion of individual freedom within the abortion area, the unborn's protection has clearly yielded to his or her mother's freedom. In *Roe* the Court noted that a woman's right to choose whether or not to bear or beget children, embodied within the fundamental right to privacy, was constitutionally guaranteed.²⁹ Therefore, any state infringement on that right, such as denied access to abortions, was unconstitutional absent compelling reasons.³⁰ As indicated earlier, the value that post-conception forms of human life should be protected was not found compelling, except where the form of life had reached viability. The nonviable fetus could not have its "potential life" protected from maternal acts, since the mother was constitutionally granted the freedom to choose whether or not to sustain the fetus' "potential life" by continuing with her pregnancy. While the mother has no such constitutionally guaranteed freedom of choice once the fetus becomes viable, most states since *Roe* have nevertheless chosen to recognize this freedom as superior to protection of fetal life where rape, incest or the mother's own continuing sound mental health is involved.³¹

Oddly enough, in the abortion context overtones also exist involving the promotion of the unborn's individual freedom of choice regarding the potential of his or her life. The Court in *Roe*, for example, referred to the future problems to be faced by the unborn should an abortion not be available.³² Was the Court relying on a finding that some unborn would choose not to be born, given the expected nature of their life after birth? Forseeable problems such as hostile parents, poverty, physical disabil-

²⁹ 410 U.S. 113, 154 (1973).

³⁰ *Id.* at 155.

³¹ 4 FAM. PLAN./POP. REP. 108, 109 (1975).

³² "There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." *Id.* at 153.

ities, and mental deficiencies might be grounds for determining that the unborn's probable choice would be not to be born.

Outside the abortion context a quite similar judicial finding is sometimes sought. In so-called "wrongful life" suits, children who are born alive with deformities seek monetary relief on the theory that but for the physician's acts or omissions prior to or during pregnancy, the pregnancies would have been prevented or terminated before birth.³³ In effect, children in such suits ask for a finding that they had an interest in not being conceived or born and thus have been hurt by the defendants causing them to be born alive. It should be noted that as yet no jurisdictions have fully recognized children's "wrongful life" suits.³⁴ However, judicial action in other areas may indicate a possible shift. Most courts recognize that a terminally ill patient has a constitutionally protected right to choose to live or die.³⁵ At least one court has extended such a choice to a patient who is not terminally ill and has life-saving medical treatment available.³⁶ Further, in justification of compulsory sterilization laws for mentally incompetent individuals who are found likely to produce disadvantaged offspring, a few courts have referred to the rights of the unborn offspring not to be conceived.³⁷

³³ See, e.g., *Zepada v. Zepada*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1975), and *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978), modified, *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S. 2d 110 (1977), which decided that an infant born deformed possesses a cause of action for wrongful life. Caution is urged to those further interested in reviewing such suits, since the term "wrongful life," as well as the related terms "wrongful birth," "wrongful conception," and "unplanned child actions" are often confused. See also Note, *Wrongful Birth: Fact Patterns Giving Rise to Causes of Action Distinguished and Discussed*, 4 *HAMLIN L. REV.* 59, 61 (1980).

³⁴ But see *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977). For a dissent to such action see *Peters and Peters, Wrongful life: Recognizing the Defective Child's Right to a Cause of Action*, 18 *DUQ. L. REV.* 857 (1980).

³⁵ See, e.g., *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied, 429 U.S. 922 (1976); and *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977). See generally Note, *The Right of Privacy and the Terminally Ill Patient: Establishing the Right to Die*, 31 *MERCER L. REV.* 603 (1980).

³⁶ *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978), where the court noted the patient had a right to refuse an operation where the probability of recovery was good, the risks involved were limited, and there was the absence of a dim prognosis.

³⁷ See, e.g., *N.C. Ass'n. for Retarded Children v. State of N.C.*, 420 F. Supp. 451, 458 (M.D.N.C. 1976), where the court stated: "[T]he legitimate state interest

Even outside the abortion context, individual freedom of the mother, and of others, often takes priority over the protection of human life, or in essence, the unborn's "potential life." Thus, relatively few, if any, legal restrictions are imposed upon the conduct of a prospective mother, notwithstanding rather strong evidence that certain actions such as smoking or drinking will endanger the life or health of her unborn child.³⁸ Restrictions are not typically placed on employers, who are free to require prospective parents, as conditions of continued employment, to subject themselves to tasks and environments which will probably endanger the life or health of future children.³⁹ Criminal sanctions often do not cover intentional or unintentional acts taken against, or causing harmful effects to, unborn children.⁴⁰ While certain criminal sanctions are imposed upon those committing illegal abortions to govern acts against the unborn child when there is no maternal consent and thus when no true abortion

of preventing the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent . . ."; and *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976), where the court found the interest of the unborn child sufficient to warrant sterilization of a retarded individual.

³⁸ For a review of parent's role in causing prenatal injury see Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 73-76 (1978). See also King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1682 (1979), maintaining the viability rule might be appropriate. For an example of a contemporary legal restriction on parental conduct see CAL. PENAL CODE § 270 (West Supp. 1980), which includes the child abandonment and neglect law protective of children conceived but not yet born.

³⁹ One barrier to many such restrictions has been thought to be the prohibitions against sex discrimination. See Note, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 J. OF L. REF. OF U. OF MICH. 237 (1979), and Furnish, *Prenatal Exposure of Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980).

⁴⁰ *State v. Brown*, 378 So. 2d 916, 918 (La. 1979). In this case the Louisiana Supreme Court found that a fetus was not a "human being" within the meaning of a state murder statute even though the statutory definition of "person" included "a human being from the moment of fertilization and implantation." The court found in *State v. Larsen*, 578 P.2d 1280 (Utah 1978), that an unborn fetus is not included within the crime of homicide. Cf. *State v. Anderson*, 135 N.J. Super. 423, 343 A.2d 505 (1975), where the court declared that "fetuses which are the victims of a criminal blow or wound upon their mother, who are subsequently born alive, and who thereafter die by reason of a chain of circumstances precipitated by such blow or wound, may be victims of murder." In the CAL. PENAL CODE § 187 (West Supp. 1980), murder includes unlawful killing of a fetus.

was intended,⁴¹ such sanctions are far less severe than those imposed for similar criminal acts against people born alive.⁴² More severe legal restrictions or sanctions would undoubtedly deter some acts against the unborn, thereby protecting their potentiality for life. Yet, for whatever reasons,⁴³ this deterrence has not often been sought; therefore individual freedom of the born has not been diminished.

With respect to the societal value favoring furtherance of the overall quality of life, again in the abortion context, the protection of the unborn has yielded to the interests of the born. In *Roe*, the court expressed concern for the quality of life for those already in society who would be affected by the delivery of a child unable to be aborted. For example, the Court discussed the consequences on the lives of the mother and other members of the child's family. The Court said the "apparent detriments" to mothers unable to abort included "a distressful life and future" caused by additional, unwanted offspring, "psychological harm," the taxing of "mental and physical health," and the "stigma of unwed motherhood."⁴⁴ The Court mentioned "the distress for all concerned" with the advent of an "unwanted child" and "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."⁴⁵ Further, several of the justices who participated in the *Roe* decision have commented in later cases upon the consequences to non-family members of state denials of access to abortions. They have referred to the

⁴¹ See, e.g., *People v. Smith*, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976), where a husband's assault on his pregnant wife, which caused the death of a non-viable fetus, was said to be punishable under the criminal abortion statute; and *State v. Gyles*, 313 So. 2d 799, 800 (La. 1975), where the Louisiana Supreme Court declared the hitting of a woman with a stick, causing stillbirth, to be punishable as a criminal abortion.

⁴² See, e.g., Note, *Feticide in California: A Proposed Statutory Scheme*, 12 U. OF CAL. AT DAVIS L.J. 723, 733 (1979), stating that "the penalty for murder is disproportionate to the relatively light penalty for abortion"

⁴³ Harmful parental action against the fetus may not be deterred because of the right of autonomy inhering in certain aspects of the family relationship and certain economic disincentives. See Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 76 (1978), and Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980).

⁴⁴ 410 U.S. 113, 153 (1973).

⁴⁵ *Id.*

"welfare costs that will burden the State for the new indigents and their support in the long, long years ahead."⁴⁶

There has also been commentary on the expected quality of life of those born because of the unavailability of abortions. One justice has said the effect of precluding abortions is "to relegate millions of people to lives of poverty and despair."⁴⁷ The thrust of this point of view is that not only is the quality of life of those born worthy of enhancement, but there is also some need for prebirth termination of the lives of those whose projected quality of life is low.

Outside the abortion context, the furtherance of the overall quality of life is also often placed ahead of the protection of the unborn's potentiality for life. There is a famous, or infamous, early United States Supreme Court case dealing with a state compulsory sterilization law for female mental incompetents likely to produce incompetent offspring. In a widely quoted passage, Mr. Justice Holmes spoke of society's right "to prevent our being swamped with incompetence"⁴⁸ and "to prevent those manifestly unfit from continuing their kind"⁴⁹ in upholding the law. While such language is often avoided today in light of our experience with the master-race concept of Nazi Germany, compulsory sterilization laws still exist.⁵⁰

Consequences of Equating the Born and the Unborn

Adoption of a federal constitutional amendment based upon the question of conception and the onset of personhood for fifth and fourteenth amendment purposes would have dramatic consequences to the present balance of such competing values as the protection of human life, the promotion of individual human freedom, and the furtherance of the overall quality of human life. These consequences, though usually overlooked during

⁴⁶ *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting). *See also* *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977).

⁴⁷ *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Marshall, J., dissenting). *See also* note 44 *supra* and accompanying text.

⁴⁸ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

⁴⁹ *Id.*

⁵⁰ *Supra* note 37 and accompanying text.

discussions of such constitutional change, are so severe that the change should not be made.⁵¹

In illustrating the distinction between the protection of the unborn's "potential life" and the born's "continued life,"⁵² the *Roe* Court applied those concepts to the tort and property areas.⁵³ While the ramifications of adopting the aforescribed constitutional amendment in these areas are somewhat unclear,⁵⁴ there is no doubt that certain serious problems would arise. For example, there would be a need to eliminate the present utilization of the viable/nonviable dividing line in tort cases seeking damages for prenatal injury and involving such claims as wrongful death⁵⁵ and non-parent (or third party) liability to children born alive.⁵⁶ Yet such eliminations are not trouble-

⁵¹ This view is only strengthened by my belief that alternate channels exist for those primarily seeking to reverse the consequences of the decision in *Roe v. Wade*. For example, a more limited constitutional amendment directed only at the issue of abortion is possible. Compare Florida Resolution H 380 [petitioning Congress to propose a constitutional amendment which would guarantee each state the right to regulate the termination of pregnancy within its jurisdiction] with Louisiana Resolution HCR 21 [requesting that Congress consider a constitutional amendment which would prohibit abortion in all instances except when the mother's health is in danger]. In West Germany where abortion constitutes an act of killing, the state hopes to "prevent the killing of unborn life through enlightenment about the prevention of pregnancy." Jonas and Gorby, *Translation of the German Federal Constitutional Court Abortion Decisions*, 9 JOHN MARSHALL J. PRACTICE AND PROCEDURE 605, 660 (1976).

⁵² *Supra* notes 20-23 and accompanying text.

⁵³ *Supra* notes 25-28 and accompanying text.

⁵⁴ For example, I am uncertain of the extent to which differing legal treatments of the born and unborn would be permitted, notwithstanding the guarantees of equal protection. *Supra* note 23.

⁵⁵ King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1661-62 (1979) [noting that most states allow recovery for injuries to a viable fetus that resulted in still birth].

⁵⁶ See Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 54-55 (1978), where the author notes:

Despite universal recognition of an action for prenatal injury [against third parties], courts have differed over whether the fetus must have reached a given state of development before there can be recovery. In most states, recovery is allowed only where the fetus was viable when the injury was sustained. Although these states have not expressly rejected such a cause of action for non-viable fetuses, they have limited the precedential value of their decisions to suits involving viable fetuses (footnotes omitted).

some.⁵⁷ More troubling problems would appear for areas un-noted by the Court in human freedom and the overall quality of human life.

Alteration of the constitutional definition of "person," so as to include the fetus, would impact upon areas beyond abortion, third party torts and inheritance, and would seemingly eliminate many of the freedoms now possessed by those other than fetuses. Besides the unavailability of abortions, parental freedom would be newly impaired by the inevitable changes in the tort, family and criminal law. At least where the parent-child tort immunity doctrine has been abrogated,⁵⁸ children could sue their parents in tort for negligent prenatal injury, thereby substantially curtailing parental autonomy;⁵⁹ thus, for example, maternal discretion to smoke cigarettes, take alcohol or medication, engage in immoderate exercise or sexual intercourse, obtain employment in a fetally toxic work environment, or reside at high altitudes for a prolonged period might be limited.⁶⁰ In the family law area as well, greater protection of the fetus necessarily entails changes in child maltreatment laws.

⁵⁷ *Id.* at 56 [noting the trend toward abolition of the dividing line in non-parent liability cases]. See also Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 660 (1980) [noting the desirability and inevitability of abandoning the viability requirement in suits seeking wrongful death recovery by beneficiaries of still borns].

⁵⁸ Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 68 (1978).

⁵⁹ For equal protection purposes, a fetus weeks or months *in utero* seems indistinguishable from a "born" child days or weeks old. Cf. *Gregg v. Georgia*, 428 U.S. 153 (1976).

Given the prevailing rule in *Roe v. Wade*, the following has been observed: If children can sue their parents for negligent conduct and can sue third parties for negligence causing prenatal injury, it is logically inconsistent to deny the cause of action of a child prenatally injured by parental negligence.

Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 84 (1978). Another observer has gone further and stated that "there are no serious legal problems to recognizing legal protection of viable fetuses equal to that already afforded newborns." King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1687 (1979). Thus, although *Roe* does not bar states from protecting a fetus' "potential life" by deterring harmful parental conduct via tort law, states have not afforded such protection to date.

⁶⁰ Such maternal acts are said to be causes of prenatal injury. Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 73-75 (1978).

For example, state custody of an unborn child could be ordered by a probate court upon a finding of maternal neglect of an earlier born child,⁶¹ notwithstanding the fact that custody of the mother might be needed to enforce the order. And in the criminal law setting, parental acts of criminal abortion or feticide would need to parallel traditional murder and manslaughter enactments since the fetus' life would be constitutionally guaranteed,⁶² and seemingly, there would no longer be any reason to distinguish further between protecting "potential life" and "continued life."⁶³ Such inevitable legal restrictions on parental, and particularly maternal, autonomy are dramatically different from contemporary mores; from the traditional role assumed by the states under the doctrine of *parens patriae*;⁶⁴ and from the present federal constitutional guarantees afforded parents in decisionmaking on matters affecting the family.

In somewhat different ways the freedom of third parties would be restricted with an alteration of the constitutional definition of "person." Employers apparently would be required to provide workplaces which are not fetally toxic work environments, notwithstanding economic feasibility or business necessity; this could be particularly difficult given the duty not to engage in discrimination on the basis of sex.⁶⁵ Currently, the Occupational Safety and Health Act⁶⁶ and most state laws⁶⁷ do not extend much, if any, protection to the offspring of workers; and when such protection has been attempted, it has proved inadequate.⁶⁸

⁶¹ See, e.g., *In re Dittrick Infant*, 263 N.W.2d 37 (Mich. 1977), where a probate court order granting county department of social service temporary custody of unborn child based on parental conduct involving earlier born child was reversed because the probate code read as not extending protection to the unborn.

⁶² *Supra* note 9.

⁶³ *Supra* notes 20 and 21 and accompanying text.

⁶⁴ Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. OF L. AND SOC. PROB. 47, 77, 81 (1978).

⁶⁵ *Id.*

⁶⁶ 29 U.S.C. §§ 651-678 (1976).

⁶⁷ It has been suggested that a "state law which allows an employer to temporarily exclude a pregnant woman from toxic work environment but requires the employer to provide another job at a comparable rate of pay and to protect the woman's seniority" would be legitimate. Furnish, *Prenatal Exposure to Fetal Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 111 (1980).

⁶⁸ *Id.* at 72 and 104.

As well, third party freedom to undertake other forms of harmful action against unborn fetuses would be substantially reduced by adoption of the proposed constitutional amendment. For example, at least some states do not now permit criminal prosecution of third parties who intentionally assault unborn fetuses,⁶⁹ thereby ceasing their "potential life," and other states which do allow criminal prosecution for such assaults often impose lesser punishments than are imposed for similar assaults on people born alive.⁷⁰ Constitutional change would limit third party freedom by requiring criminal prosecution of assault on the unborn⁷¹ and by mandating that criminal sanctions not differentiate between born and unborn victims.⁷² Incidentally, such limits on this type of third party freedom could now be implemented through legislative, as well as constitutional, change;⁷³ and I believe such legislation is long overdue, given the recognized interest of the state in protecting the "potentiality of life,"⁷⁴ the limited decision in *Roe v. Wade*, and the lack of any true state interest in permitting such third party action.

Besides eliminating many individual freedoms now possessed by those born alive, constitutional changes regarding personhood under the fifth and fourteenth amendments would also somewhat undermine the furtherance of the overall quality of life. As noted earlier, in *Roe* and elsewhere, members of the Supreme Court have expressed concern that the quality of life

⁶⁹ See, e.g., note 40 *supra*, and the recent decision in *People v. Greer*, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980), where in overturning a conviction for the murder of an eight and a half month old fetus, the court found that "the General Assembly declined to specifically include the unborn within the potential victims of homicide or to create a separate offense of feticide."

⁷⁰ See, e.g., note 42 *supra*, and MICH. COMP. LAWS § 750.322 (MICH. STAT. ANN. § 28.554 (Callaghan 1972)). The willful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter.

⁷¹ The fetus' right to life would be guaranteed specifically by the new amendment, *supra* note 9, and there appears to be no valid rationale justifying a state's failure to prosecute assaults.

⁷² *Supra* note 59.

⁷³ See, e.g., *People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980), and Note, *Feticide is Still Legal in Louisiana*, 26 LOY. L. REV. 422 (1980); See also CAL. PENAL CODE § 187 (Deering 1980). "Murder is the unlawful killing of a human being, or a fetus . . ."

⁷⁴ *Supra* note 13.

of those already born, and even for some of those who remain conceived but unborn, would be adversely affected by delivery of an unwanted child.⁷⁵ In areas beyond abortion, restriction or elimination of an individual's freedoms would also diminish in some ways the quality of life of others; for example, a pregnant woman's inability to work in a fetally toxic work environment could cause economic hardship to those relying on her income.⁷⁶

CONCLUSION

Recent cries to equate genetic conception with the inception of personhood under the fifth and fourteenth amendments of the Constitution involve perhaps the most prominent concern of all human values, the protection of human life. Yet such an equation would have dramatic consequences on the competing values of the promotion of individual freedom and the furtherance of the overall quality of life. To date, scant attention has been paid during debates on the proposed equation to the consequences of adopting the proposed equation.

I believe the consequences of constitutionally equating genetic conception with the inception of personhood are unacceptable. Long-recognized freedoms enjoyed by an unborn child's parents, as well as by other family members and various third parties, would be substantially undermined. This loss is particularly unwarranted because other channels now exist for advancing the protection of unborn human life without diminishing individual freedom and the overall quality of life.⁷⁷

⁷⁵ *Supra* notes 44-47 and accompanying text.

⁷⁶ *Supra* notes 60 and 43.

⁷⁷ *Supra* notes 51, 57 and 74, and accompanying text.

