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Equal Protection of the Laws and the 14th Amendment: Value or Humanity?

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The Helms hearing about a constitutional amendment concerning human life, held in the summer of 1982, may not have created much interest (or heat), but it created some important light. It is also strange and disturbing that its basic thrust was not widely commented on.

It was disturbing because the "pro-choice" people have now shifted the basis of the abortion argument to exactly the place it should have been from the beginning: the nature of the abortus.

Witnesses for the bill — geneticists, embryologists, etc. — offered testimony of an overwhelming nature, which led to only one conclusion: apart from conception, there is no plausible moment of the beginning of the human individual.

Incredibly, the opponents of the constitutional amendment side-stepped this momentous issue and said that what really mattered was not whether the unborn was a human being, but whether it was a human being valuable enough to protect. This sudden shift from a question of fact to one of value has not seen such argumentation since the case of *Dredd Scott v. Sanford* (1857).

For years (at least, since 1973), the whole movement to repeal the abortion decisions (one hesitates to call them "laws" since they were simply "discoveries" by the Court where none had seen them before)

has been opposed by vociferous and explicit denials of this central and crucial fact, namely, that the unborns are humans-in-being. The unborn were, said the pro-choice people, "products of conception," "protoplasm," "alpha," "cells," etc. All of a sudden, the locus of the argument has changed and the question of fact conceded: "Yes, of course, the unborn are humans-in-being, but the 14th Amendment protects only persons (a legal concept), and this status is given only to those we want or value."

This was essentially the argument of the New York Court of Appeals in *Byrn v. New York City Health & Hospital Corp.* (1972), a case challenging the liberal abortion laws of New York. Of course, said the court, the unborn are human — that is granted. The real issue, however, is whom does the law protect, for it is the law which says who are protectable persons, and who are not.

This judicial positivism at the time of *Byrn* was honest and refreshing because, as they say, courts are not in the business of making laws but interpreting laws. It was for the legislature, limited by the Constitution, to determine who is a legal person, said the New York Court of Appeals. Since the New York legislature had declared that the unborn were not legal persons, at least for the first 24 weeks, they had no protection under the laws and could be killed at will. This simplistic and positivist view of the relationship between legality and morality has the advantage of being simple and morally painless. It is also irrelevant to the issue, which was: are the unborn humans-in-being?

Now, for the first time in a national forum, the "pro-choice" people have conceded, like the New York Court of Appeals, that the unborn are human beings, although because they are unwanted, they are without rights. In other words, the rights of the unborn are dependent, not upon the inherent fact of their being human, but upon value or wantedness. This is legal positivism, but it is, at least, clear and forthright. The Helms hearing brought out and settled this major point of the abortion debate of the past 10 years: the humanity of the unborn had never been a point of real importance to the pro-choice people; it had only been an arguing point all along. It is at least refreshing to clear the air and have the basic issues faced once and for all. It reminds one of the editorial in *California Medicine*, more than a decade ago (1970), which forthrightly said:

[T]he 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 extrauterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if it were not often put forth under socially impeccable auspices.

This same argument is not new in constitutional law or jurisprudence; it is at least as old as *Dred Scott* (1857), and probably much older.

The question was looked at in *Roe v. Wade* (1973) and resolved the negative: Does the 14th Amendment protect the unborn? Was the intent of the framers of that amendment to include the unborn? The Supreme Court, in a rather sloppy historical analysis, concluded that it was not.

On the contrary, the argument of the framers was broad enough to encompass the unborn within its sweep, precisely because of the nature of that historical argument surrounding the birth of the 14th Amendment. How was this so?

The lawyers in 1866 who drafted the bill knew well the argument of Chief Justice Taney in *Dred Scott*. It was precisely that thinking and reasoning about human beings which the lawyers of the bill had to overcome, once and for all, in and by a constitutional amendment. If *Dred Scott* was to be effectively overturned.

Taney Denied Protection

It will be remembered that Chief Justice Taney was determined to deny blacks every possible protection under the Constitution because that was the only way to uphold the system of slavery. Every designation of humanity had to be eliminated, because that would have been fatal to his argument. Taney was *not* a juridical positivist. The Roman law had clearly seen that even slaves were *personal* humans-in-being. The Roman jurists simply said that the law excluded these persons from its protection. Taney had no such simplicity because the history of the common law, under Christian influence, held clearly that every human-in-being was a *person*, protectable by and through the law. Therefore Taney had to desperately exclude blacks from the notion of *persons*: he had to deny their humanity. Thus, through 300 pages of tightly reasoned historical analysis, blacks were never called "people" or "human" or "men" or "citizens." Taney always called them simply "a degraded race," "a subordinate and inferior class of beings," who possessed no power or rights beyond what the white man chose to give them. But the beginnings of juridical positivism were also present: Taney held that the framers of the Constitution had no intention of including slaves as citizens.

When the drafters of the 14th Amendment set out to compose that document, it was *this* reasoning which had to be eliminated from the Constitution, once and for all. For this purpose, they sought the clearest word, undimmed by quibble, with which to secure forever the rights each of us should enjoy under a sheltering law. The word they chose was "person," which, from the most primitive history in Western thought and philosophy, only meant a "human in being" (the *persona* in Roman law, which applied to all people, even slaves, and the *prosonon* in Greek law). No person, no human-in-being, would ever again be considered a person because he or she was "valuable" or

not, much as the slave was valuable property to the slaveholder with whom he, the slaveholder, could do as he pleased. Every human was a person, protected by the amendment. Every person, every human-in-being, had the equal protection of the laws which the states and the federal government must protect via the 5th and 14th Amendments.

It is therefore illogical, unhistorical, and a complete denial of the very intent of the framers to now come around and give that amendment an exclusionary meaning by eliminating certain humans from the equal protection of the laws — the very thing which its framers set out to eliminate forever from the text of the Constitution.

In the abortion debate, once again, unborn human beings (now, by admission of the pro-choice people themselves) are denied the equal protection of the laws, exactly as were the blacks in *Dred Scott*. But the pro-choice strategy stumbled exactly along the course Chief Justice Taney had followed. The Constitution, said Taney, did not bestow personhood on the black man, because that is not what the founders had historically in mind. At the Helms hearings, the pro-choice people argued in a similar way: although person would ordinarily include the unborn (just as the Declaration of Independence would ordinarily include the black man, because he was human, said Taney), since the unborn had never (since 1866) received the full benefit of law, the amendment should not be read with them in mind. The unborn, who are humans-in-being, are denied the equal protection of the laws because they are not persons, not because they are humans-in-being, but because they are unwanted.

The Helms hearings have therefore re-enacted the same argument and debate concerning *Dred Scott*. If my historical analysis is correct — and it is difficult to see how it is not — then the burden of proof is upon the pro-choice people to show, by clear evidence, or, at least, by probability, that this was not the intent of the framers of the 14th Amendment.

Change in the Question

The whole question has changed since 1973. A decade later, the pro-choice people concede the humanity of the unborn, but the issue now is not their humanity, but their acceptability to their elders. It is refreshing, at least, to finally be talking about the same thing, and not arguing like passing armies in the night.

It is difficult to develop a solid jurisprudence of and for this new stance of the pro-choice people. Human rights, we may conclude from their analysis, are not inherent in the human being, but are "conferred" by the people who might want them or not. The historical roots of this jurisprudential doctrine of "wantedness" are not happy ones, since, often in the past, many groups were at one time or another, "not wanted."

More to the point, the logic of this philosophy is now being extended beyond birth to those who have already been born, but are defective. Since they, too, are not wanted, by reason of their physical or mental defect, such children are now commonly allowed to slide to death in a form of postnatal abortion. The logic of the jurisprudence of wantedness has been extended to yet another group of humans-in-being. Philosophy, like reality, cannot be hidden by words.

In other words, it is difficult to escape the logic of the philosophy of life which we espouse. Not only does the "wanted" philosophy contradict the historical intent of the framers of the 14th Amendment, but also, more importantly, in denying *some* the protection of their humanity, the rights of the rest of us are jeopardized in a basic and real sense. The issues here, as in *Byrn* and *Roe*, are the philosophy and foundation of human rights.

At bottom, the abortion debate is one of inherent human rights, which are founded either in the nature of the human person or in his or her being wanted. There is no middle term between these two inherently contradictory philosophies. "Pro-choice" is a weasel word which bypasses this essential question.
