

September 2017

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Recommended Citation

Dennis J. Horan, Hinshaw, Culbertson, Moelman, Goban & Fuller Chicago, Illinois (2017) "Dignity of Life Developments," *The Catholic Lawyer*: Vol. 27 : No. 3 , Article 11.

Available at: <http://scholarship.law.stjohns.edu/tcl/vol27/iss3/11>

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DIGNITY OF LIFE DEVELOPMENTS

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I. THE HUMAN LIFE AMENDMENT

The Human Life Bill was introduced in the House of Representatives in January of 1981.¹ A similar bill was introduced in the Senate.² These bills, dealing with the subject matter of abortion, are comprised of only three sections. Section 1 contains a declaration by Congress that for the purpose of enforcing the obligation of the states under the fourteenth amendment, human life shall be deemed to exist from conception, and the word "person" shall include all human life as defined within the statute. Section 2 removes the jurisdiction of all inferior federal courts from the abortion area. Section 3 is a severability clause.

Senate hearings on the bills already have begun. Several distinguished scientists have testified on behalf of the bills, presenting persuasive testimony to the scientific "fact" that the life of a person does indeed begin at conception. Introduction of the legislation, however, has sparked a furor amongst the right to life groups. Some view it as the long awaited breakthrough, while others argue that the bills cannot reverse *Roe v. Wade*,³ and, therefore, may be a snare for the unwary who will waste precious time and scarce resources pursuing a limited or even useless goal.

¹ H.R. 900, 97th Cong., 1st Sess., 127 CONG. REC. H128 (daily ed. January 19, 1981). The bill defines person to include the unborn for the purpose of the right to life guarantee under the fourteenth amendment and prohibits any inferior federal court from issuing injunctive relief in any case arising out of state or local law that prohibits or regulates abortion or the provisions of public assistance for the performance of abortions. *Id.*

² S. 158, 97th Cong., 1st Sess., 127 CONG. REC. S8420 (daily ed. July 24, 1981). See generally Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed Human Rights Legislation*, 68 VA. L. REV. 333 (1982).

³ 410 U.S. 113 (1973). The Court in *Roe* held that a woman's decision to terminate her pregnancy was encompassed by the constitutional right of privacy and was subject to regulation only if state interests are compelling. *Id.* at 153-55. With regard to the state's interest in the potential life of the unborn, the Court determined that the "compelling point" occurred at fetal viability, that is, when the fetus is capable of surviving outside the womb. *Id.* at 163. Thereafter, a state may go so far as to proscribe abortion except when it is necessary to protect the life or health of the mother. *Id.* at 163-64.

Perhaps merely keeping the issue alive is the best that can be done at the present time, at least until there is enough power to persuade the country to amend the Constitution.

Another group, however, has derived from this confrontation a two-amendment strategy modeled on the historical fact that the triumph over slavery took not one, but two amendments, and several federal statutes to achieve. Why not, therefore, conceive of the abortion problem in the same way? Instead of aiming at the conceptually perfect amendment which will cure all the ills created by *Roe v. Wade*, including private action, why not begin by seeking an amendment which does some of the job? If, after actual practice, this is not enough then a return to Congress for the passage of a second or tighter amendment could be pursued.

The idea is novel and does, indeed, have some merit. In fact, any amendment will need legislative support, whether federal, state, or both. This is an idea that has been overlooked in the entire debate over such an amendment. It was routinely considered that the amendment alone would be self-executing,⁴ would reach private action,⁵ and would define the word "person" to include the unborn from conception, thus obliterating the effect of *Roe v. Wade*. The question raised is whether, under current political realities, such a conceptual ideal can actually be enacted by Congress.⁶

The theory presently being discussed is that any amendment, even the conceptually perfect amendment, needs legislative support in each state or Congress. For example, the fourteenth amendment needed the Civil Rights Act of 1866.⁷ To solve the problem created by *Roe v. Wade* and to follow the concept that is now being enunciated, we should con-

⁴ Horan, *Human Life "Federalism" Amendment: Its Language, Effects*, 62 HOSP. PROC. 12, 12-13 (1981). The Human Life Federalism Amendment is described as being "modeled on [the] [t]hirteenth [a]mendment in the sense that it applies to abortion as an institution, just as the [t]hirteenth [a]mendment applied to slavery as an institution, including all its badges and incidents." *Id.* at 13.

⁵ *Id.* at 13-14. See also J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 451 (1978). Most of the constitutional protections of individual rights and liberties apply solely to actions of governmental entities. Only the thirteenth amendment which abolished the institution of slavery was also directed at controlling the actions of private individuals. *Id.*

⁶ See Caron, *Legal Assessment: Human Rights Federalism Amendment*, 11 ORIGINS 495, 498 (1982). Although the amendment does not explicitly identify the unborn as persons, it will empower the Congress and states to provide the fullest possible protection to the unborn. *Id.*

⁷ See M. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 3-7 (1946). The Civil Rights Act of 1866 and the fourteenth amendment were mutually supportive insofar as the provisions for individual civil rights were anticipated by the Act. Nevertheless, the fourteenth amendment was needed to place the substance of the Act beyond the reach of the Supreme Court and the Congress of a later time. *Id.* at 4-5. Professor Konvitz concluded, however, that congressional action culminating in the Civil Rights Act of 1875 was needed to overcome the resistance of the Southern states to the ratification of the fourteenth amendment. *Id.* at 6-7.

sider the amendment and the statute, federal or state, as poised on a fulcrum: the stronger the conceptual amendment, the less necessity for a unanimous state or federal statute; the weaker the conceptual content of the amendment, the stronger the state or federal statute. The end result may very well be identical. That is to say, one need not push the conceptually perfect amendment that reverses each and every aspect of *Roe v. Wade* if the same can be done through legislative control.

For example, if an amendment were passed simultaneously with either of the bills that are now pending in Congress, which amendment merely indicated that the states or federal government now had the right to pass such legislation, either of the current bills would bring the unborn under the protection of the Civil Rights Act. Further, if state criminal codes are amended to protect the unborn, as they did before *Roe v. Wade*, the existence of those state statutes, in conjunction with the currently created federal bills, would solve almost the entire abortion problem. This, of course, is contingent upon all of the states passing such legislation. If all the states did not, then of course there would be areas where abortion would continue to pose problems for the unborn.

Consequently, this two-amendment strategy is long range. It is a theory of how the problem can be solved using a gradual or incremental approach, as state after state is lobbied to pass the type of legislation that is necessary to protect the unborn. The theory that supports this approach is very simple but often is overlooked. The Constitution cannot be unconstitutional. If it is amended to permit the passage of legislation that can regulate or even prohibit abortion, the amendment will support the existence of such legislation and will be a bulwark against a court's assault upon it.

One point to remember is that such state or federal legislation will be necessary notwithstanding the amendment that is passed, unless it is an amendment that is self-executing, reaches private action, redefines the word "person," and contains a penalty clause. We have never had such an amendment in the past, and I doubt that the American public would accept an amendment that contained all of those elements. In effect, it would be turning the Constitution into a criminal code. I suspect that the American public, like scholars, would find that somewhat reprehensible.

The importance of such an approach is its attempt to gain the widest possible consensus for a mechanism to amend the Constitution, and to do so without the ideological problems or compromises at the state or local level. In effect, the approach would be nothing more than turning the clock back to where it was before *Roe v. Wade*, with the additional hope of restoring the "child's" civil right to life under the federal civil rights statute. It would not only restore criminal protection, but would also constitute a very strong fundamental civil rights approach. Although undoubtedly there will be pockets of resistance, it is a strategy similar to

that which was successful in the slavery debate.

I am sure that when Congress passed the thirteenth amendment they thought that by obliterating the institution of slavery through an amendment that was both self-executing and reached private action, they had once and for all solved the problem.⁸ Congress, however, soon found itself working on the fourteenth amendment in order to solve the perceived problems of the initial amendment.

In a nutshell, that is the theory that is being enunciated by a group familiar with the present problem. The solution is simply to link the two existing bills to a constitutional amendment that authorizes their existence. Having done so, the next job for the movement is the passage of supporting legislation in the states protecting the life of the unborn. Such protection for the unborn should be the major area of concern for all supporters of the prolife movement.

II. EUTHANASIA AND THE TERMINATION OF MEDICAL TREATMENT

Euthanasia is another major area of concern, although it has not reached the level of consciousness that the abortion issue has. The euthanasia issue is much more difficult to understand. Its impact is much more subtle, and its movement is very, very difficult to perceive. Currently it is moving in multiple directions, both legislative and judicial.

In my opinion, the courts are a very strong bulwark against euthanasia's legalization. There are, however, cases developing that may unwittingly lay the legal groundwork for euthanasia. The cases to which I am referring are *Quinlan*,⁹ *Saikewicz*,¹⁰ *Dinnerstein*,¹¹ *Storar*¹² and *Spring*.¹³

⁸ See 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 23-24 (1970).

⁹ *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). The constitutional right of privacy was held to extend to the decision to discontinue life-prolonging treatment when the attending physicians and the hospital "Ethics Committee" concluded that there was no reasonable possibility that the patient could return to a cognitive, sapient state. 70 N.J. at 39, 54, 355 A.2d at 663, 671.

¹⁰ *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977). The right to decline chemotherapy was held to extend to a mentally incompetent person if the court determined that as a competent person, the patient would have refused treatment. *Id.* at 753, 370 N.E.2d at 431.

¹¹ *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (Ct. App. 1978). The decision to withhold resuscitative treatment from an aged, terminally ill patient in the event of cardiac or respiratory arrest was deemed to be a medical decision not requiring prior judicial approval. *Id.* at 474-75, 380 N.E.2d at 139.

¹² *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981). Absent any compelling, countervailing state interest, a comatose, terminally ill person may refuse extraordinary life-prolonging treatment as an exercise of his constitutional right of privacy subsequent to a judicial determination that there is clear and convincing evidence of his intent and satisfaction of medical criteria. *See id.* at 376-80, 420 N.E.2d at 70-72, 438 N.Y.S.2d at 272-74.

¹³ *In re Spring*, 405 N.E.2d 115 (Mass. 1980). The decision to either continue or terminate

The problem that they have created is not insurmountable, but it is not to be ignored. Indeed, in handling these cases the courts have been very conscientious, so conscientious that they have built a very narrow consensus as to when medical treatment may be terminated. The courts have constitutionalized the right to refuse medical treatment by making it a part of the right of privacy.¹⁴ Further, by virtue of the doctrine of substituted judgment, the courts have allowed that right to be exercised by another person.¹⁵ Fortunately, they have narrowly circumscribed the exercise of that right by limiting its use to terminal and hopeless cases, so that, even with the creation of this novel doctrine, they have not unwittingly legalized euthanasia.

However, the groundwork for the legalization of euthanasia would exist if a third person could exercise the constitutional right to refuse medical treatment on behalf of another, unless the exercise by that person was carefully and legally circumscribed. If, for example, a person had reached a stage in his medical development where he was no longer able to consent, and the law allowed a third person to refuse medical treatment on his behalf, without some very tight control the refusal of medical treatment by that third person might constitute euthanasia.

The courts have laid down the principle that a refusal of medical treatment on behalf of another is limited to these narrow grounds: when, and only when, the patient is suffering from an incurable and terminal condition; there exists no medical treatment which would cure or reasonably prolong life; and the patient is irreversibly comatose or incompetent.¹⁶ Only when all these conditions are present, will courts authorize termination of medical treatment.¹⁷ There must also, however, be the absence of a countervailing state interest such as the duty to preserve life,¹⁸ the duty to protect third persons,¹⁹ the prevention of suicide,²⁰ or the preservation

life-prolonging treatment for an incompetent person should be made by the court on the basis of substituted judgment and not delegated to a private person or group. *Id.* at 119-20.

¹⁴ *E.g.*, 70 N.J. at 38-42, 355 A.2d at 662-64.

¹⁵ 373 Mass. at 750-51, 370 N.E.2d at 430-31. Under the doctrine of substituted judgment, the court held that the guardian ad litem in making his recommendation to decline life-prolonging treatment, and the judge in formulating his decision, should attempt to determine what the decision of the incompetent person would be, were he competent. His actual interests and preferences and his present and future incompetency should be considered. *Id.*

¹⁶ *See, e.g.*, 52 N.Y.2d at 371, 420 N.E.2d at 67-68, 438 N.Y.S.2d at 269-70.

¹⁷ *See, e.g.*, 70 N.J. at 51, 54, 355 A.2d at 669, 671.

¹⁸ 52 N.Y.2d at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273.

¹⁹ *Eichner v. Dillon*, 73 App. Div. 2d 431, 466, 426 N.Y.S.2d 517, 544 (2d Dep't 1980). Justice Mollen discussed the relevant state interests that may militate against the termination of life-prolonging medical treatment such as the potential harm to dependents. *Id.*

²⁰ *Id.* at 466-67, 426 N.Y.S.2d at 544. Permitting a terminally ill patient to choose not to delay the inevitable is not deemed to be against public policy. *Id.*

of the ethical integrity of medicine.²¹

In *Storar's* companion case, *Eichner v. Dillon*, the court decided the issue purely on common-law grounds.²² The court did not reach the substitute judgment argument, nor the best interests approach which some courts had adopted.²³ Brother Fox was an 82-year-old brother who was left on a respirator as a result of an untoward event during surgery for a hernia.²⁴ He had clearly enunciated before the surgery, on at least two, possibly three occasions, when discussing the recently decided *Quinlan* case, that he did not want any of that "extraordinary type of treatment" performed on him.²⁵ The court accepted the proof of his wishes as clear and convincing, and affirmed the prior court ruling allowing the disconnection of the respirator.²⁶

In *In re Storar*,²⁷ a 52-year-old incompetent had terminal bladder cancer and needed blood transfusions in order to live a meaningful daily existence.²⁸ The lower court authorized the rejection of the blood transfusions.²⁹ The highest court in the state of New York took a different position.³⁰ The court likened the blood transfusions to food without which the patient would die before his terminal cancer could kill him. Authorizing the rejection of blood transfusions under these circumstances, the court held, was prohibited.³¹ The *Storar* case stands for the proposition that ordinary and necessary forms of medical treatment may not be omitted for an incompetent.³²

The Brother Fox case, while correctly deciding the issues on common law rather than constitutional grounds, correctly has indicated that the clear and convincing expression of the patient's wishes as to the withdrawal of what may be described as extraordinary treatment may be followed by the physician and the family without recourse to the courts or

²¹ *Id.* at 466, 426 N.Y.S.2d at 544. The withdrawal of extraordinary life support systems for the terminally ill in a vegetative state is consistent with current medical ethics. *Id.*

²² 52 N.Y.2d at 376-80, 420 N.E.2d at 70-72, 438 N.Y.S.2d at 272-74.

²³ *Id.* at 378-80, 420 N.E.2d at 71-72, 438 N.Y.S.2d at 274. The court found compelling proof that Brother Fox had expressed a desire not to have his life prolonged by extraordinary means. *Id.* at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. This was distinguished from the instance when no actual intent is expressed and the decision for the incompetent may be made by another person. *Id.* at 378, 420 N.E.2d at 71-72, 438 N.Y.S.2d at 274.

²⁴ *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

²⁵ *Id.* at 371-72, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.

²⁶ *Id.* at 379-80, 420 N.E.2d at 72, 74, 438 N.Y.S.2d at 274, 276.

²⁷ 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

²⁸ *Id.* at 373-75, 420 N.E.2d at 68-70, 438 N.Y.S.2d at 270-72.

²⁹ *In re Storar*, 106 Misc. 2d 880, 433 N.Y.S.2d 388 (Sup. Ct. Monroe County), *aff'd*, 78 App. Div. 2d 1013, 434 N.Y.S.2d 46 (4th Dep't 1980).

³⁰ 52 N.Y.2d at 380-82, 420 N.E.2d at 72-74, 438 N.Y.S.2d at 275-76.

³¹ *Id.* at 381-82, 420 N.E.2d at 73, 438 N.Y.S.2d at 275-76.

³² *See id.* at 382, 420 N.E.2d at 73, 438 N.Y.S.2d at 275-76.

fear of criminal or civil liability. Some have argued that statutes are necessary for this purpose and many legal policy-making groups have such statutes under consideration.³³ Those statutes should be monitored carefully.

³³ See generally Horan, *The "Right to Die" Legislative and Judicial Developments*, 13 FORUM 488 (1978); Kaplan, *Euthanasia Legislation: A Survey and a Model Act*, 2 AM. J.L. & MED. 41 (1976).