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YOUR BODIES, OURSELVES: LEGAL PROTECTION OF POTENTIAL HUMAN LIFE

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Even during a time of increasing concerns about over-regulation and excessive bureaucratic intrusion into the affairs of the private citizenry, few will seriously dispute that a proper governmental function is the protection of human life. Such protection is served by laws designed to preserve human life, as well as by laws designed to prevent handicapping human conditions.

With respect to the preservation of life, American lawmakers traditionally have focused almost exclusively on preserving the lives of those humans already born alive. Thus, tort and criminal laws are usually designed to insure that the born of today will continue with life tomorrow. Lawmakers have paid far less attention to the preservation of potential human life. Thus, there are relatively few legal regulations designed to insure the future live birth of today's unborn. This inattention is unfortunate because prevailing social policy often favors preserving the future life of potential human life, and is particularly troublesome because the remedy of self-protection is unavailable to the unborn.

With respect to the prevention of physical and mental handicaps, American lawmakers traditionally have focused almost exclusively on preventing handicaps for those humans already born alive. Thus, many tort and criminal laws are designed to insure that the born and non-handicapped of today will continue with unimpaired life tomorrow. Lawmakers have paid far less attention to the prevention of handicaps to potential human life. This lack of attention is unfortunate because prevailing social policy favors the avoidance or elimination of all potential

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handicapping conditions wherever possible. It is also especially troublesome when it involves possible handicaps to the unborn, since potential human life cannot engage in self-protection.

Recent medical and scientific advances have increased the understanding of the causes and prevention of many forms of physical and mental handicaps. Many of these advances involve handicaps that can be protected or discovered prior to birth, the prevention of which can be furthered by the legal regulation of the various stages of life, or potential life, prior to live birth. While undoubtedly there has been tremendous growth in the legal rights of a handicapped newborn to compensation from those responsible for any handicap and to other opportunities for a meaningful future life, further legal regulation of potential life is needed in order to help prevent those handicaps to newborns which are reasonably certain to occur. Compensation for existing handicaps and equal opportunity for those now handicapped are far less desirable than handicap prevention.

A partial explanation for the absence of adequate legal rules regarding the preservation of potential life and the prevention of handicaps to newborns is the general misunderstanding of the United States Supreme Court's decision in *Roe v. Wade*.¹ In that decision, of course, the high court found that human fetuses were not "persons" who possessed the right to "life" guaranteed by the fourteenth amendment to the federal constitution.² Yet this finding did not constitute a clear and sweeping negation of all American governmental authority to protect developing human fetuses and other forms of potential human life. In fact, the Supreme Court in *Roe* expressly recognized and approved a state government's "important and legitimate interest in protecting the potentiality of human life."³ In effect, the decision in *Roe* permits American governments to choose to protect potential human life, for example, by extending to a human unborn a right to life though no such right is recog-

¹ 410 U.S. 113 (1973).

² *Id.* at 158. Writing for the court, Justice Blackmun stated:

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person". . . . "Person" is used in other places in the Constitution But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

Id. at 157. Justice Blackmun continued "All this, together with our observation . . . 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.*" *Id.* at 158 (emphasis added).

³ *Id.* at 162. The Court noted that the state's interests in both the health of the pregnant mother and the preservation of potential human life "grows . . . as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.* at 162-63.

nized under the federal constitution.⁴ The decision in *Roe v. Wade* then only negated certain exercises of governmental authority protective of the unborn. The potential life protection extended by the Texas abortion scheme challenged in *Roe* was negated only because it unduly infringed upon a countervailing and a more important state interest, the interest in a woman's unrestricted right to decide about childbearing.⁵ This countervailing interest was based on the constitutionally-protected right to privacy, which was read to include "a woman's decision whether or not to terminate her pregnancy." And this countervailing interest in a woman's right to choose was deemed more important because the interest of the state of Texas in the potential human life protected by much of its abortion laws was not sufficiently "compelling."⁶ The interest in potential life needed to be compelling for the Texas laws to survive, since state laws infringing upon an individual's federal constitutional right are only valid if they serve a "compelling state interest."⁷ In particular, the Supreme Court held that the interest of Texas in the potentiality of a fetus' human life did not become compelling until the fetus' viability, which occurred when the fetus had the capability of meaningful life outside the mother's womb; that the Texas abortion laws prohibited abortions of both viable and pre-viable fetuses in order to preserve potential life; and thus, that much of the Texas abortion scheme did not serve a compelling state interest even though its laws infringed upon exercises of the privacy right.⁸

In acting to protect the human unborn, American governments will not inevitably encounter resistance based on the decisional right recognized in *Roe* or on any other constitutionally-protected right. Thus, states will not always need to show a compelling state interest in order to sustain laws protective of potential human life. Often, the protection of po-

⁴ *Id.* at 163. Justice Blackmun, after discussing the state's important and legitimate interest in the health of the mother stated, with respect to the state's important and legitimate interest in potential life:

[T]he "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

⁵ *Id.* at 153-55.

⁶ *Id.* at 163-64. Discussing the "compelling" interest balancing approach the court stated, "[w]ith respect to the State's important and legitimate interest in potential human life, the 'compelling' point is at viability." *Id.* at 163. "Measured against these standards, Art. 1196 of the Texas Penal Code. . . sweeps too broadly." *Id.* at 164. "The statute, therefore, cannot survive the constitutional attack made upon it here," the court concluded. *Id.*

⁷ *Id.* at 155.

⁸ *Id.* at 162-64.

tential human life can be achieved without restricting the decisional process of those responsible for childbearing decisions. For example, the conduct of one who assaults a pregnant woman and her fetus without the woman's consent and for no legitimate reason can be legally sanctioned in order to protect potential human life. Surely, the assailant has no constitutionally-protected right in undertaking the attack. Further, the protection of potential human life can even be achieved via the regulation of those responsible for childbearing decisions, as long as the decisional process regarding childbearing is not implicated. For example, the conduct of a pregnant woman who takes heroin, knowing that she is pregnant and desirous of bearing a child, can be legally sanctioned in order to protect potential human life. There is no constitutional right implicated in the taking of heroin. Of course, those responsible for childbearing do have other relevant constitutional rights, such as the rights implicated during the decisional processes involving childbegetting and childrearing. While these constitutional concerns serve to limit further the boundaries of states laws protective of potential human life, they provide no great obstacle to legislators desirous of aiding the unborn.

Beside the difficulties with comprehending the decision in *Roe*, the absence of adequate legal rules regarding potential life preservation and handicap prevention for newborns might be explained by the general discomfort which pervades any discussion of such rules. This discomfort usually appears when the following types of questions are asked: to what extent do prospective parents have a duty to their unborn children? When should the law presume that decisions by prospective parents are consistent with the best interests of their future offspring? To what extent can the state intrude upon the decisions of the living which will, or may, have a negative impact on the unborn? And, when, if ever, should the laws recognize the interests of certain potential persons in not being born due to the prospect of severe handicaps or early death?

Notwithstanding this inevitable discomfort, the time is ripe to explore the means by which laws can preserve potential human life and prevent handicaps to newborns. Little discomfort should be encountered in implementing many necessary changes. Additionally we should begin with the simple cases. For example, it should be easy to legislate a duty in both tort and criminal law to undertake reasonable conduct toward the unborn who are clearly foreseeable to the actor and whose interests are not in conflict with the interests of the prospective mother. Thus, one who medically treats a pregnant woman seeking to bear a healthy child should owe a duty both to the woman and to her unborn offspring not to undertake conduct threatening to the health of that offspring. The scenario is not much different from a new mother seeking a well baby checkup for her newborn child. Further, one who intentionally assaults a visibly pregnant woman without her consent and without good cause should be

deemed to be acting criminally against, and breaching the duties owed to both the woman and her fetus.

Beyond the difficulties with the *Roe* decision and the discomfort attending discussions of certain potential life protections, the absence of legal rules protective of the unborn may be partially explained on the basis that laws protecting the living also serve to protect, indirectly, potential human life. Thus, it might be said that additional rules regarding the human unborn are unnecessary. It is undeniable that in such areas as crimes and torts, current protections of existing human life also served to promote the interests of today's unborn in a healthy future life. For example, in protecting from assaults women who are known to be, or who should be known to be, pregnant, a state's feticide law also protects the potentiality of human life. And, in allowing parents to initiate malpractice suits for negligent medical treatment during a pregnancy, a state's tort law also extends protections to potential human life. While such laws are commendable, they are an insufficient substitute for laws which directly serve to preserve potential human life and to prevent handicapping conditions for newborns. Thus, some state feticide laws are inapplicable to assaults resulting in the termination of potential human life where there is no knowledge and no reason to know of the woman's pregnancy. Such assaults are often prosecutable only as assaults upon the woman. Prosecutions for such assaults trigger far less severe penalties than would accompany homicide laws involving the unborn and fail to recognize at all the fetus as a victim of the crime. Analogously, some state tort laws fail to recognize the unborn as recipients of negligent medical care (if they are not, in fact, patients). Without such a recognition, state tort laws may be inapplicable to the unborn where there is both parental and medical negligence since contributory negligence is sometimes an absolute defense to a medical malpractice action.

Because there is no rational explanation for the absence of adequate legal rules directly protecting potential human life, attention must immediately be directed to the types of rules which can preserve unborn human life and prevent handicaps for future generations. In exploring the nature and scope of new legal rules protective of the unborn, at least four distinct inquiries should be made. First, attention must be paid to the type of conduct that can be subjected to legal regulation, that is, what constitutes unreasonable conduct or perhaps reasonable but unwarranted conduct toward the unborn? Second, note must be taken of the people who can be subjected to legal regulation, that is, who can be made legally responsible for their conduct toward the unborn? Third, consideration must be given to the appropriate type of legal regulator, that is, who can be made responsible for setting the standards of legally acceptable conduct toward the unborn? Fourth, inquiry must be pursued on the possible sanctions available for the violations of any legal regulations, that is, what

happens to those who act irresponsibly toward the unborn?

These inquiries should not be foreclosed or delayed because recent medical and scientific advances provide less than definitive evidence on some of the causes and means of preserving life and preventing handicaps. While preliminary or tentative findings counsel caution in the implementation of new legal standards, there is currently much that medicine and science now suggests can be done to preserve potential human life and to prevent the onset of handicaps for newborns. As medical and scientific advances produce more definitive answers, further inquiries should be made quickly and legal action thereon should promptly be implemented. There looms the prospect of unprecedented harm if the traditional time lag between medical and scientific advances and legal change is tolerated.

While singular approaches to each of the distinct inquiries cannot now be suggested, some general observations do seem in order. By presently discussing, debating and deciding upon certain unifying principles, the prompt creation of legal rules responsive to new medical and scientific advances will be facilitated and certain legal rules can now be formulated.

Regarding the type of conduct possibly subject to a legal regulation designed to protect potential life, differentiations need to be made between the time the relevant conduct occurs, the effect of the conduct on the unborn and the governmental interests in having the conduct occur. As for the timing of the conduct harmful to potential human life, often it should not matter whether that conduct occurred prior to conception, or during the post-conception but pre-viability stage of potential life. That is, legal regulations should at least be considered for conduct occurring long before the actual birth of the potential human life subject to state protection. Thus, many current tort law differentiations regarding the duty of reasonable care to a pre-viable fetus and to a viable fetus are ill-founded, even where reliance is not based on a misreading of the decision in *Roe v. Wade*. Compensation to a newborn handicapped as a result of a drunken driver's reckless conduct should not hinge upon whether the newborn was a three month or an eighth month old fetus at the time of the accident. As well, ill-founded are current criminal law differentiations between those who horrify parents with their intentionally-destructive assaults on children and those who horrify prospective parents with their intentionally-destructive assaults on fetuses. Of course, as a justice of the Illinois Supreme Court recently noted in the case of *Renslow v. Mennonite Hospital*,⁹ troublesome is the "specter of successive generations of plaintiffs complaining against a single defendant for harm caused by ge-

⁹ 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

netic damage done an ancestor in a nuclear accident,"¹⁰ or of "perpetual claims arising from chemical accident or long-term radiation exposure" (concerns troublesome even to those generally sympathetic to the unborn).¹¹ Yet, whatever the troubles with the drawing of fine lines, they do not justify the abandonment of any effort to sketch the legal landscape.

On the effect of the conduct on the unborn, obviously the more harmful the conduct is to the unborn, the more the legal rules become necessary. Thus, many forms of conduct terminating the potentiality of human life should be outlawed. While consensual abortion is a form of such conduct which is not outlawed, its legitimacy derives from the importance of the countervailing interests in a woman's decisional right.¹² Countervailing state interests often do not appear, however, where conduct leads to potential life termination. And, conduct resulting in harm to potential human life short of potential life termination also should often be outlawed by legal rules. Of course, conduct causing less severe physical or mental disabilities at birth or during life should be subject to less serious legal sanctions. In any event, the state interest in the protection of human life must be furthered both by laws designed to preserve potential human life and by laws aimed at preventing handicaps for newborns.

Finally, the varying governmental interests must be recognized and differentiated in distinguishing between legal and illegal activity harmful to potential human life. These governmental interests in the unborn include the interests that individuals have and the interests that the public at large has. The task of lawmaking is easiest when both strong individual and public interests coincide. Thus, one should expect to find laws designed to curb uninvited assaults on the unborn children of pregnant women; the women, their friends and family members, and the public at large all disfavor such assaults, and the assailant in no way can reasonably urge a legitimate individual interest in harming the unborn. Incidentally, what is surprising (if not shocking) is the relative absence of such protective laws within American governments. The task of differentiating between proper and improper conduct is far more difficult when legitimate individual and public interests clash. Thus, there are controversial laws promoting potential human life which are founded on a strong public interest, though there exist legitimate and competing individual interests. Exemplary are the laws providing financial subsidies for child birth, but not abortion, as well as laws mandating that prospective parents supply the necessities of continuing potential life to those conceived but not yet born. In clashes of individual and public interests, the protection of potential human life is not always deemed paramount. American govern-

¹⁰ *Renslow*, 67 Ill. 2d at 349, 367 N.E.2d at 1255 (1977).

¹¹ *Id.*

¹² See *supra* notes 3, 4, 6 and accompanying text.

ments do sometimes promote rather than deter the termination of potential human life. For example, our governments encourage, facilitate, mandate or pursue the most serious form of harm to the human unborn by their laws permitting abortions, criminalizing certain incestuous relationships between consenting adults who are blood relatives, and compelling sterilization of incompetents who are likely to be unfit parents and to beget severely handicapped offspring.

Beyond the inquiries regarding the type of conduct possibly subject to laws protecting potential human life, appropriate are inquiries concerning the type of people potentially covered by such laws. In particular, questions about potential parents' legal duties to the unborn are difficult because unlike most others, these prospective parents possess constitutionally-protected rights in such areas as childbearing, childbegetting, and childrearing (to the extent to which the latter is read to cover the rearing of the unborn). Equally hard are questions about the responsibilities of those whose conduct harms the unborn, but whose conduct is far removed from the unborn in time, place, and thinking. Besides the difficulties involved in determining who might be subject to state regulations protective of the unborn, difficulties arise regarding the state of mind to be required of anyone subject to such regulations. Surely we should be more severe with those intending to terminate or otherwise harm potential human life. However, negligent, grossly negligent and even non-negligent actors should be absolutely immunized from legal regulations designed to protect potential human life. Legal regulations can serve to educate those with both good and bad intentions regarding the social commitment to potential life protection, and to deter some of the citizenry who might otherwise unintentionally undermine the potentiality for human life.

The inquiries regarding the proper legal regulators, as well as the most appropriate legal sanctions, for breaches of duties to the unborn are intimately related. As our constitutional schemes of government now operate, certain sanctions are available only from certain regulators and certain regulators are better positioned to make judgments on the scope of any duties owed the unborn. Thus, because criminal sanctions must be included in the new bag of protections for potential human life, state legislatures and the Congress are appropriate legal regulators. Moreover, because certain new legal duties to the unborn need to be implemented quickly via rule promulgation and to be founded on fast-breaking medical and scientific advances unintelligible to most lay people, administrative agencies are appropriate legal regulators. Finally, because certain legal duties require a much slower evolutionary process in which to flourish (thus demanding some advance warning to those about to be regulated and a step-by-step approach wherein each new step is small and founded upon the experiences of earlier steps), common lawmaking courts are also appropriate legal regulators.

Since a variety of legal regulators and of legal sanctions must be employed to extend further protection to potential human life, the prospects of uncoordinated and even conflicting efforts are far from remote. Our scant experience with such protective extentions emanate from a singular governmental source. Thus, in Illinois, the General Assembly has repeatedly asserted, since the decision in *Roe*, that the public policy of the state was "to protect the right to life of the unborn child from conception." This public policy is furthered by certain Illinois statutes protecting the potentiality of human life. These statutes include the act prohibiting intentional abortions of viable fetuses excepting those found medically necessary to preserve the life or health of the mother, as well as the act prohibiting the intentional failures to preserve viable fetuses intended to be aborted. Yet, this public policy is frustrated by other Illinois statutes, such as the acts requiring fetuses to be born alive in order to gain protection from the crimes of homicide, manslaughter and assault.

Coherent, direct and adequate laws protecting potential human life are long overdue. New laws are now needed which preserve the potentiality of life and which prevent handicapping conditions to newborns. Further laws will become imperative with continuing medical and scientific advances. These laws should not be foreclosed by a misunderstanding of the U.S. Supreme Court's decision in *Roe v. Wade*, by the general discomfort attendant to discussions on the proper legal balance between the interests of the born and the interests of the unborn, or by the indirect protection afforded potential human life inherent in certain laws protective of those now living. In exploring the nature and scope of these new laws, necessary subjects of inquiry include the type of conduct to be regulated, the people subject to such regulation, the appropriate legal regulator and the boundaries of resulting legal sanctions. Today's agenda for legal change must include the protection of the people of tomorrow.