# Is the Fetus a "Human Being"?

by Marvin Kohl

Pending before the New York State Court of Appeals is the case of Robert M. Byrn versus New York City Health & Hospitals Corporation and the parents of unborn children of less than 24 weeks gestation whose lives are about to be terminated by abortion induced at municipal hospitals. The plaintiff alleges that his wards, Infant Roe and a class of infant unborn children between four and 24 weeks' gestation, are live human beings, and that they therefore possess inalienable rights under both the federal and state constitutions. The plaintiff contends that the present penal code discriminates against each member of the class he represents, depriving him of his right to live and of due process of law. In essence, the court is being asked to declare the new abortion laws of 1970 unconstitutional, thereby permanently enjoining the defendant from committing any abortional act except to preserve the life of a pregnant female.

The moral and legal weight of the case turns upon two arguments: first, that from the point of view of science and law each abortion is the killing of a living human being; and second, that the irreparable harm of death to members of this class of unborn infants clearly outweighs the possible harm to parents or society.

It is important to realize that the plaintiff deftly avoids the central legal issue, namely, the question of public health and welfare versus individual rights. It is clearly established that the Fifth Amendment of the Constitution protects the absolute right of every person not to be deprived of life without due process of law. But this protection is subject to an important qualification: Its exercise may properly be limited by government action where such exercise clearly and presently endangers the public health, welfare, or morals. Prior to July 1, 1970, the New York State law [section 125.05 (3)] made an abortional act justifiable only when it was necessary to preserve the life of the pregnant female. To return to this law is to divert the reasonable demand for safe medical services to illicit and dangerous sources, and this constitutes a clear and present danger to society.

The question as to the humanity of the fetus is complex and cannot be resolved by speech-making or by appealing to irrelevant testimonials. Rhetoric aside, it simply is not "*a fact* beyond dispute" that each unborn human infant is a human being. The plaintiff argues this point at length, but mistakenly interchanges the term "class of unborn human infants" with "class of human beings" in the premises of his argument, and thereby begs the crucial question. Moreover, the fact that abortion reforms have been as successful as they are clearly indicates that the plaintiff's claim is very much in dispute.

Lines can be, and are, reasonably drawn between born and unborn progeny. If an individual is a member of the biological species *Homo sapiens, and* it has or has had an independent nature capable of sustaining and regulating its own metabolic pattern, then it is a human being, entitled to all rights held to be inalienable.

This should not be taken to mean that the human fetus in its early stages of development does not have rights. It does; but they are not human rights, or more precisely, not human beings' rights. Hence, the fact that the courts recognize rights of the fetus is not relevant. After all, the courts also recognize the rights of animals, corporations, and human corpses. But what of it? Surely we all know that to recognize a right is not necessarily to recognize it as an equal or even a human right.

The rights of humans between birth (or its like) and death take moral precedence over the rights of other beings. I call this the Maximization Principle. It tells us that actual human beings are of more consequence than potential ones; that when there is a conflict of rights between human beings and animals, dead human beings, or future humanity, the rights of human beings take moral priority and ought to be maximized. ■

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