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Source: *Family Planning Perspectives*, Vol. 6, No. 1 (Winter, 1974), pp. 6-7

Published by: [Guttmacher Institute](#)

Stable URL: <http://www.jstor.org/stable/2133615>

Accessed: 13/06/2014 06:28

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Comment and Controversy

The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment

By Harriet F. Pilpel

Neither the United States nor any state shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protections of the laws. From proposed amendment to the U.S. Constitution, introduced in the House by Representative Lawrence J. Hogan (R-Md.) (H.J. Res. 261), and in the Senate by Senator Jesse A. Helms (R-N.C.) (S.J. Res. 130).

The avowed purpose of the Hogan-Helms amendment is to reverse the decisions of the U.S. Supreme Court in the 1973 Texas and Georgia abortion cases, and to make all abortions illegal—apparently, even those performed to save the life of the pregnant woman. Thus, the proposed amendment, on its face, is much more restrictive than any of the state antiabortion statutes which existed before the decisions. Beyond this, the definition of the fetus as a “human being” or person, would overturn the holding of the Supreme Court in the Texas and Georgia cases that the unborn, whether in the fetus, embryo, blastocyst, or zygote stage, is not a “person” entitled to the constitutional protections of due process and equal protection of the laws. The legal consequences of such an amendment would go far beyond abortion, and create confusion, if not chaos, in numerous areas of well-established law.

Considering the sweeping effects such an amendment is likely to have, it is surprising that, by March 1, 1974, 62 representatives had signed petitions calling for discharge of the Amendment from Committee, and an immediate floor vote.

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It seems beyond question that the proposed amendment *would not*, in fact, abolish or prevent induced abortions. It has been estimated, for example, that 70 percent of the legal abortions performed on New York City residents following passage of a liberalized law in 1970 — about 50,000 abortions each year — replaced abortions previously obtained clandestinely and illegally under the old restrictive laws.* The amendment *would*, however, make abortion once again the dangerous, discriminatory, degrading and expensive procedure it used to be, and abortions would once again be performed without medical supervision in the second and third trimesters of pregnancy, and without established government guidelines.

And what would be the cost involved in obtaining this unfortunate result?

First of all, our constitutional law would be thrown into disarray. Court interpretations could be required for every point in the Constitution which refers to “persons” to determine whether, in each context, “persons” includes the unborn “from the moment of conception.” (The word “conception” is itself ambiguous, sometimes referring to the moment of fertilization, sometimes to the time of implantation, about five days later. Neither point is ascertainable with pregnancy tests currently available.) Could, for example, abortion be permitted to save the life of the pregnant woman without violation of the rights of the unborn? As a person, would every fetus (if not every fertilized ovum) have to be counted in the census, as called for by the Constitution? Aside from the inherent difficulty in ascertaining the number of fetuses that might be in utero at any particular time, how would a census which included the unborn affect apportionment of legislative districts (under the ‘one man-one vote’ principle)? What im-

pact would it have on revenue sharing or formula grants which are based on population?

In the realm of criminal law, would anyone committing any crime involving a pregnant woman (theft, for example, or criminal assault) be guilty, *ipso facto*, of murder under the ‘felony-murder’ rule, which classifies as murder the killing of a person in the course of committing a lesser crime? (Abortion has not, in the history of English or U.S. law, been considered the equivalent of murder.) Indeed, might not anyone charged with carelessness or recklessness which resulted in a miscarriage be found guilty at least of manslaughter?

Could a pregnant woman be held in prison or be otherwise incarcerated without violating the rights of the fetus-person in her womb?

Could a pregnant woman be held liable criminally, if she had a miscarriage, and it was found that during her pregnancy she drank, smoked, took drugs, got inadequate rest, ate badly or engaged in strenuous physical activity such as skiing or jumping horses? If she took a medicine for her own health which inadvertently resulted in fetal loss, would she still be held accountable under the axiom that a person must be deemed to have “intended” the natural consequences of his or her acts?

Could all women of reproductive age be required to take a monthly pregnancy test? This may seem outlandish, but how else could the state know what fetus-persons are entitled to constitutional protection? Could all women whose pregnancy is established be subjected to a mandatory regimen of behavior protective of the

* C. Tietze, “Two Years’ Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City,” *Family Planning Perspectives*, 5:36, 1973.

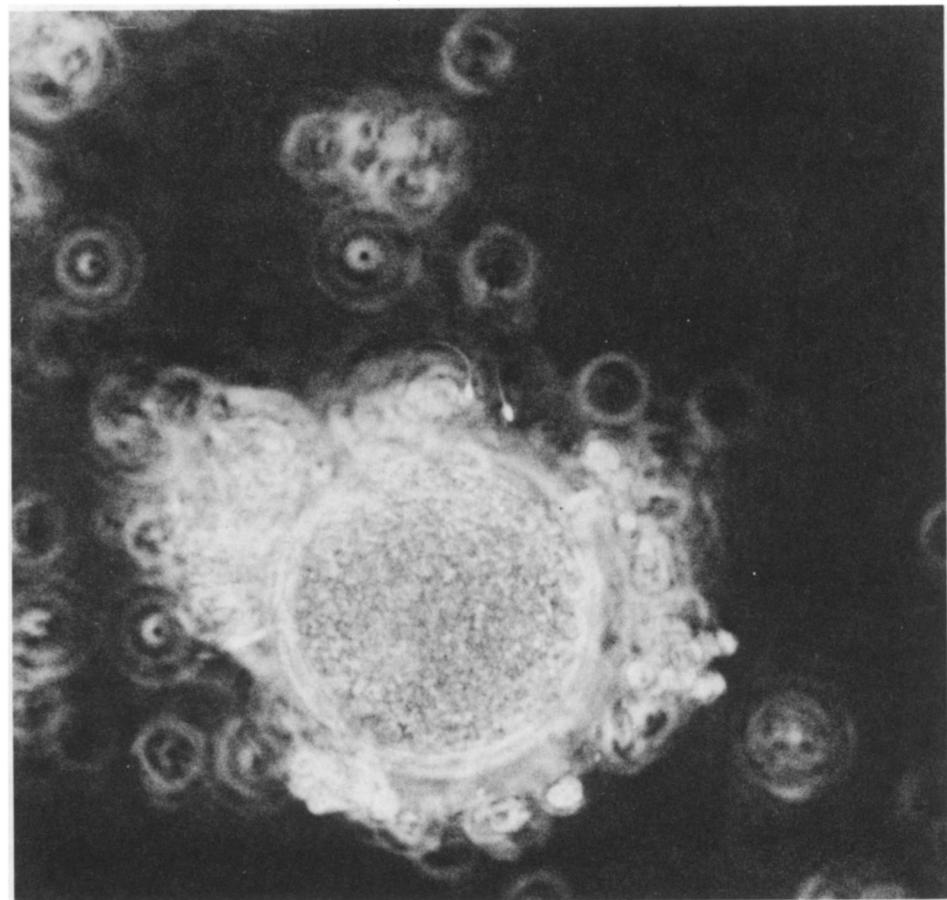
fetus-person inside of them? Whatever the answer to these specific questions, all pregnant women would necessarily be acting at their legal peril "from the moment of conception." Thus, should their pregnancy terminate with a stillbirth or miscarriage (as occurs in 15-25 percent of pregnancies), they would run the risk that their behavior during pregnancy could be subject to criminal investigation. Clearly, the right of privacy, so recently declared fundamental by the U.S. Supreme Court, would cease to exist for every pregnant woman "from the moment of conception" — and she could not know when that "moment" occurred.

In tort law (the law of civil as opposed to criminal wrongs) great confusion would also result. In many states now tort recovery for injury to a fetus is contingent on the birth of a child. Under the Hogan-Helms Amendment, recovery of damages presumably would have to be made available on behalf of the unborn "from the moment of conception," even if that conception took place only a day or week before the injury. Problems of proof that the "plaintiff" existed at the time of the injury to the woman or, that the injury caused damage to the fetus, could be insuperable.

What, for example, is the requirement of "due care" owed to the fetus-person in the womb of a woman who is a guest in an automobile on a bumpy ride? What if the driver did not know the woman was pregnant? By the same token, could the estate of a fetus sue an airline on the grounds that the death of the fetus was caused by a turbulent flight? How could the airline have prevented this, unless, perhaps, the woman (who might not know she was pregnant) announced her pregnancy in advance? Under such circumstances, would any airline be willing to transport a pregnant woman?

Could a suit be brought on behalf of the fetus or its estate on the ground that the pregnant woman negligently contracted German measles or took a drug which was harmful to the fetus, or was otherwise negligent in maintaining the pregnancy?

It is likely that if the unborn were regarded as human beings "from the moment of conception," there would spring up a new variety of malpractice actions against doctors, charging them with negligence in connection with pregnancy. As a result, doctors might be reluctant to use their best medical judgment to utilize a life-saving medical procedure on a wom-



an, if it could have the ancillary effect of causing a miscarriage in possible violation of the rights of the fetus. The same chilling effect might occur with regard to all other health personnel and institutions which might, under the circumstances, seek to avoid treating pregnant women at all.

The laws of property and inheritance could also be drastically affected. Would the estate of a fetus which miscarried need to be probated? If the fetus is a person from the moment of conception, it might inherit property, whether it was born alive or not. (Indeed, one of the most startling things about the Hogan-Helms Amendment is that, under it, birth would no longer be a significant legal event.) The many questions that would inevitably arise in such cases might well call for the official registration of all pregnancies and miscarriages, thereby greatly adding to our bureaucratic burdens.

Tax questions also would arise if the Hogan-Helms Amendment is enacted. For example, would the fetus be considered a dependent for tax purposes, whether it is born or not? If a tax deduction is sought for a fetus, how far would the Internal Revenue Service go in verifying the fact

of pregnancy (e.g., would the results of a positive pregnancy test have to be attached to the tax return)?

What could be the effect of the Hogan-Helms Amendment on the enforcement of immigration and naturalization laws? Under current law, children born in the United States to aliens are citizens. Would citizenship be extended to include all fetuses conceived in the United States? Could a pregnant woman who is not a citizen of the United States be deported without violating the constitutional rights of the fetus-person in her womb?

The foregoing represent only a few of the problems and ambiguities which could plague our legal system if the Hogan-Helms Amendment were adopted. Can even the minority of Americans who believe abortion should be made a crime, and that those persons who obtain or provide it should be punished, seriously advocate the kind of legal chaos and circumscription of the rights of the already born which would ensue if such an amendment were adopted and enforced?