

An Alarming Pre-*Roe* View of Personhood: The 1972 *Byrn* Decision

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In 1972 the New York Court of Appeals decided *Byrn v. New York City Health & Hospitals Corp.*,ⁱⁱ an important milestone in the liberalization of abortion laws already in progress prior to the Supreme Court's 1973 decision in *Roe v. Wade*.ⁱⁱⁱ This paper will critique the disturbing view of human personhood adopted by the *Byrn* court.^{iv} Another goal is to stimulate discussion of several of the issues flowing from a correct view of personhood.

As late as 1965, forty-nine of the fifty-two American jurisdictions, including the State of New York, had criminal abortion statutes "limiting legal abortions to the single purpose of saving the life of the prospective mother."^v From 1966 through 1970, however, thirteen states made their abortion statutes more permissive along the lines suggested by the 1962 Model Penal Code.^{vi} During this period, efforts were also made in New York to liberalize its abortion law. Attempts failed in 1968 and 1969, but in 1970 a law passed that became the subject of the *Byrn* decision. Under this new legislation, abortion was permissible to preserve the woman's life or if the abortion was within twenty-four weeks after the commencement of pregnancy.^{vii}

The *Byrn* litigation began when the Supreme Court of Queens County appointed Robert Byrn as guardian ad litem for the infant "Roe" and all members of the class of unborn infants of less than twenty-four weeks gestation scheduled for abortion in New York City public hospitals. The guardian was appointed to seek a judgment declaring the new law to be unconstitutional and to prevent the hospitals from performing any abortions other than those necessary to preserve the life of the female.^{viii} The case eventually made its way to New York's highest court, which rendered its decision on July 7, 1972.

The court stated the issue as follows: whether children in embryo must be recognized as persons in the law and therefore entitled to a

constitutional right to life.^{ix} An affirmative answer might have seemed a foregone conclusion in view of the court's concession at the beginning of the opinion:

It is not effectively contradicted...that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not human, and it is unquestionably alive.^x

To the *Byrn* court, however, there was no necessary correspondence between the natural order and the legal order.^{xi} Legal personhood does not automatically follow from biological personhood or even philosophical/religious personhood.^{xii} Whether legal personhood should be granted is a legal question, to be decided by each legal system for itself. The decision usually devolves on the state legislature, based on public policy considerations. While the legislature has the power to confer legal personhood on the unborn,^{xiii} it is not required to do so. It can legitimately do what the New York legislature did in the 1970 law, provide protection to the unborn far short of conferring legal personality.^{xiv}

The majority's concept of legal personhood was eloquently critiqued in a dissenting opinion by Judge Adrian Burke. Burke believed that to uphold a law that allows the destruction of unborn children who are "human" and "unquestionably alive" is to accept "the thesis that the 'State is supreme,' and that 'live human beings' have no inalienable rights in this country."^{xv} The State can "decide what human beings are persons or nonpersons."^{xvi} The majority's rationale would allow some future legislature to "do away with old folks and eliminate the great expense the aged are to the taxpayers."^{xvii}

Judge Burke argued that the 1970 New York law was unconstitutional because it conflicted with the Declaration of Independence. That document proclaims that the right to life comes "not from the State but from [the Creator], an external source of authority superior to the State."^{xviii} The Declaration, moreover, proclaims the right to life to be

inalienable, meaning “that it is incapable of being surrendered.”^{xxix} In Judge Burke’s view, the Declaration proclaimed an “American concept of...natural law binding upon government and citizens alike, to which all positive law must conform.”^{xxx}

Premising the pro-life position on the Declaration of Independence has recently perhaps been most associated with Alan Keyes. In an April 2001 statement on the proposed Unborn Victims of Violence Act, Keyes said that the

division of unborn children into the categories human will imposes on them is...the essence of the pro-abortion position. The proud claim of the right to decide who is human, and who is not, is the heart of the evil. And the most powerful weapon against it is the truth on which America was founded—it is self-evident that human beings do not have the power to make or unmake the dignity of our fellow man according to our arbitrary will. To be human, rather, is to belong to a community of creatures who are the common recipients of the endowment, made by a will beyond our own, of an equal and unalienable dignity.^{xxxi}

I fully agree with both Judge Burke and Alan Keyes that our value and dignity as human beings come from God and God alone. Without a transcendent God who has declared the worth of each human life, there is ultimately no persuasive argument that human lives should be accorded any value whatever. The Declaration, I believe, recognizes this truth in declaring the right to life to be an inalienable right endowed by the Creator. The Declaration also states that these rights are bestowed at the moment of creation. I believe that for each individual this moment of creation is conception.^{xxii}

But the relationship between the inalienable right to life and the positive law of the state is complicated. Take New York’s 1970 abortion law. Since it allowed abortion up to twenty-four weeks from conception, it clearly is violative of the right to life recognized by the Declaration. But should this mean that the law is automatically invalid and thus unenforceable?^{xxiii} This in essence was Judge Burke’s position. He viewed the principles of the Declaration as trumping all other forms of law, whether a legislative enactment or the Constitution. The Declaration itself is the ultimate authority in our legal system.^{xxiv} But there is another

way to view the Declaration—as declaring our nation’s foundational aspirations. The Declaration states that the government of the United States acts legitimately only when it acts to secure the inalienable rights granted by the Creator. Under this view, the government has the raw power to act in derogation of Creator-bestowed rights, but when it does so it violates our country’s founding principles.^{xxv}

An example of this latter view of the Declaration can be found in Abraham Lincoln’s position on slavery prior to the Civil War. He viewed slavery as a “vast moral evil” that contradicted the inalienable rights enumerated in the Declaration.^{xxvi} But he did not argue that slavery was unconstitutional. Why? Because the Constitution as first adopted plainly recognized the legality of slavery.^{xxvii} Lincoln viewed legal recognition of slavery in the original states as a practical necessity to permit formation of the country.^{xxviii} But the Declaration’s principle of equality, he stated in an 1857 address, was “a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence.”^{xxix} It was because of this foundational principle of equality that Lincoln so strenuously opposed the extension of slavery to the territories. In the original states, Lincoln hoped that slavery would gradually become extinct, which is what he believed the Founders had hoped would happen.^{xxx}

Another example in the abortion context might further clarify the view that the Declaration should be considered a statement of aspirations rather than as pre-eminent legal authority. The 1996 case of *United States v. Lynch*^{xxxii} involved a violation of the Freedom of Access to Clinic Entrances Act (“FACE”).^{xxxii} Two defendants had peacefully impeded access to an abortion clinic. Judge Sprizzo of the United States District Court for the Southern District of New York granted the Government’s order for a permanent injunction. An appeal was made to the Second Circuit, based on the lower court’s alleged failure to consider a defense to the injunction based upon natural law. The Second Circuit concluded that the district judge had in fact considered and rejected such a defense.^{xxxiii} The court also held that rejecting the natural law defense

had been proper:

We agree with the district court's conclusion that natural law cannot furnish a valid basis upon which to nullify the FACE statute, or the injunction issued pursuant to it. Defendants cite, among others, Pope John Paul II's encyclical, *Evangelium Vitae*, Thomas Aquinas' *Summa Theologiae*, and Ronald Dworkin's *Taking Rights Seriously*. For better or worse...these texts do not control the decision in this case: 'the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people.' ...Defendants do not argue that FACE is unconstitutional. They argue instead that FACE (and abortion) are anathema, and thus violate principles superior to the Constitution. Under Supreme Court precedent, well-settled constitutional principles, and the rule of *stare decisis*, we decline to invalidate a federal statute (on its face or as applied) on the basis of natural law principles.^{xxxiv}

I believe that the Second Circuit was correct in refusing to invalidate a statute on the grounds of a conflict with natural law. Natural law, whether articulated in the Declaration or elsewhere, stands above positive law in moral authority,^{xxxv} but it does not stand above positive law in legal authority. Consider another example. Many states now penalize harm to the pre-born outside of the abortion context. Some states have separate laws penalizing violence against the pre-born, including murder, and other states have interpreted existing murder statutes to cover the destruction of the pre-born. But what if a state has no separate prenatal violence statute and the existing murder statute applies to the killing of a "person," with "person" explicitly defined as "a human being who has been born and was alive"? Is such a murder statute inconsistent with the Declaration's recognition of an inalienable right to life? Yes. But is the statute invalid because it does not include the pre-born within the category of person? Could someone who killed a pre-born child in this state properly be prosecuted for murder? I do not think so.^{xxxvi} Should the law be changed? Yes, to make the positive law more consistent with our country's foundational principle of an inherent right to life. But until the law is changed in that jurisdiction, the existing positive law should control.

At this point, one may be wondering why it is that I disapprove of the *Byrn* decision. After all, the court in *Byrn* rejected the dissenting

Judge Burke's view that I have criticized—that independent legal significance should be given to the Declaration of Independence. Once again, the *Byrn* majority held that whether legal personality should be accorded is a policy question for the legislature, subject to the Constitution. The court acknowledged that the legislative action might “be wise or unwise, even unjust and violative of principles beyond the law,” but concluded that this does not affect the legality of the legislative choice.^{xxxvii}

The chief problem with the majority decision, as I see it, is its dispassionate amorality.^{xxxviii} The court capitulated completely to the legislative determination without even a comment on the moral issues at stake. Recall that the court had conceded that the fetus is human and unquestionably alive. The court also conceded that from a religious and philosophical perspective the conceived child might be viewed as a person. And yet the court made no moral assessment whatever of a law that allowed unrestricted abortion until the twenty-fourth week of pregnancy. The court's washing its hands of the moral issue is truly contemptible.^{xxxix} Even if the Declaration granted the court no authority to strike down the law, the court at least should have honestly confronted the issue of whether the law violated the moral principle of the sanctity of life embodied in the Declaration. Had it done so, ideally the court would have concluded “yes,” strongly expressing its disapproval of the new legislation and urging its repeal.^{xl}

I must say that the preceding paragraph leaves me somewhat unsettled about the position I am taking. Expressing disapproval of the legislature based on the Declaration seems a futile, if not pitiful, gesture when compared with Judge Burke's alternative of striking down the law as unconstitutional because it violates the Declaration. Another disturbing point is Judge Burke's observation that the majority's approach to legal personality was the same argument made by the Nazi lawyers at Nuremberg.^{xli} Indeed, if legal personality depends on positive law alone, what was the legal basis for prosecuting the Nazis who acted in conformity with positive law? Is the charge of “crimes against humanity” a defensible basis for the war crimes trials? But if so, should former slave owners have been prosecuted after the Civil War? And how

many pro-lifers would support the idea of prosecuting former abortionists if *Roe* is ever overturned and the law returns to its pre-*Roe* state?^{xliii}

In conclusion, I will briefly note several additional points that show the complexity of the issues being discussed. First, adopting a view that the Declaration contains principles that trump all other law would leave many problems to be addressed. The chief one is who decides the practical meaning of Declaration principles. Witness Professor George Fletcher's essay, *In God's Image: The Religious Imperative of Equality Under Law*.^{xliii} Fletcher believes that the Declaration makes equality an imperative requiring the judiciary to strike down all caste-enforcing discrimination. Interestingly, while Fletcher is ambivalent about whether under his approach courts should invalidate legal doctrines supportive of abortion freedom,^{xliiv} he is quite clear that the courts, based on the premise of human equality in the Declaration, should strike down any laws that both reflect and reinforce cultural assumptions about the intrinsic superiority of heterosexuals over homosexuals.^{xliv} Many would disagree with Fletcher's reading of the Declaration. Which side is correct?^{xlvi}

Next, my view that the Declaration has a more limited role to play in the abortion controversy has its own complications. I have argued that the Declaration recognizes the existence of a right to life from conception. But doesn't this make problematic the position of most pro-lifers that a life-of-the mother exception should be recognized? I am aware of the self-defense analogy commonly used to justify this exception. But think about how the exception works in practice.^{xlvii} An abortion could occur legally if the doctor, generally a professional abortionist, concludes that the abortion is necessary to save the mother's life. But what oversight commonly is required of this decision? The *Byrn* majority accused the plaintiff of being inconsistent based on this point. The court wondered why the guardian for the fetuses did not insist that the fetus to lose its life be entitled to notice and hearing through a guardian ad litem, as would be done with any child's property rights, born or unborn.^{xlviii}

Finally, wouldn't a right to life from conception create big problems concerning the birth control pill? At last year's conference I attended a presentation by Dr. William Colliton. His main point was to stress the

abortifacient properties of the pill.^{xlix} The accuracy of this can be confirmed simply by looking at the *Physicians' Desk Reference*. I looked at the 2001 Edition under Ortho-Tri-Cyclen, a popular birth control pill. Under the subheading Clinical Pharmacology, this appears: "Although the primary mechanism...is inhibition of ovulation, other alterations include changes in the cervical mucus (which increase the difficulty of sperm entry into the uterus) and the endometrium (which reduce the likelihood of implantation)."¹ What this says to me as a layman is that it is entirely possible that the pill in any given case can operate as an abortifacient by preventing implantation of the fertilized egg. Especially fascinating is that the patient labeling does not disclose this possible effect of the pill. It says only that the pill is taken "to prevent pregnancy."^{li}

Why has the pro-life movement in general dodged this issue? Hasn't the National Right to Life Committee for years said that it takes no official position on the issue of artificial methods of contraception? I understand politically why pro-lifers are reluctant to oppose the pill, but isn't the failure disturbing as a matter of principle?^{lii} If life does indeed begin at conception, isn't that life ended just as effectively by a birth control pill's preventing implantation as by RU-486 or suction aspiration?^{liii}

NOTES

i. This paper is a slightly revised and annotated version of the talk by the same name that I gave at the Conference.

ii. 286 N.E.2d 887. (By the way, in New York, the court of appeals is the highest state court, with the supreme court being a lower court. This is the opposite of the situation in most states.)

iii. 410 U.S. 113.

iv. I first became aware of *Byrn* and its alarming view of personhood in reading John Noonan's article, "The Root and Branch of *Roe v. Wade*," 63 *Nebraska*

Law Review 668 (1984). This short article remains one of the best written on the subject of abortion.

v. *Byrn v. New York City Health & Hosps. Corp.*, 329 N.Y.S.2d 722, 725 (App. Div. 1972). This is the opinion of the supreme court that, as explained in footnote 2, in New York is a lower court than the court of appeals. The court described the fifty-two American jurisdictions as “the 50 states, the District of Columbia and Puerto Rico.” *Ibid.*

vi. *Ibid.* The Model Penal Code added as permissible grounds for abortion preservation of the mother’s health, grave fetal handicap, and pregnancies resulting from rape and incest. *Ibid.*

vii. *Ibid.*

viii. *Ibid.*, pp. 723-24.

ix. 286 N.E.2d at 888.

x. *Ibid.*

xi. *Ibid.*, p. 889.

xii. *Ibid.* The court cites the example of slavery to show that all human beings have not automatically been granted legal personhood. *Ibid.*, pp. 889-90.

xiii. *Ibid.*, p. 890. *Roe*, of course, soon declared that this was not the case. So, as alarming as the *Byrn* court’s view of personhood is, *Roe* is even more alarming.

xiv. 286 N.E.2d at 890. The court recognized that a legislature’s public policy choices are constrained by the Constitution. *Ibid.*, pp. 889-90. In, however, what I believe to be an astonishing neglect of duty, the court failed even to discuss the merits of the constitutional question before it, instead merely stating the bald conclusion that “[t]he Constitution does not confer or require legal personality for the unborn.” *Ibid.*, p. 890.

xv. *Ibid.*, p. 892.

xvi. *Ibid.*, p. 895.

xvii. *Ibid.*, p. 893. Burke believed that this approach “would parallel the Hitler laws which decreed the death of all the inmates of mental hospitals and also

decreed that for many purposes non-Aryans were nonpersons.” *Ibid.*, pp. 893-94.

xviii. *Ibid.*, p. 893.

xix. *Ibid.*

xx. *Ibid.*, p. 892.

xxi. Alan Keyes, “Rescuing America’s Unborn Children,” *WorldNetDaily*, April 30, 2001.

xxii. Recall that the *Byrn* court recognized the existence from conception of a living human with “an autonomy of development and character.” See *supra* text accompanying n.10. Since these are widely-acknowledged facts that have never been effectively contradicted, conception necessarily seems to be the moment of creation for each individual human. By the way, it goes without saying that if the moment of creation—the key point at which rights are bestowed—can be manipulated at will by those in power, any concept of inalienable God-given rights becomes meaningless.

xxiii. Of course, if the fetus’s right to life is directly and independently protected by the Constitution, the state law would be unenforceable. This, though, raises the issue of whether the word “person” in the Fifth and Fourteenth Amendments was intended to cover the pre-born.

xxiv. For an excellent article supporting this view, see Mark Trapp, “Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn,” 28 *Pepperdine Law Review* 819 (2001).

xxv. This, I believe, is the view of Alan Keyes. See Alan Keyes, “Yes, Let’s Wear the Mantle of Lincoln,” *Human Events*, August 11, 2000.

xxvi. See his speech at Chicago, Illinois (July 10, 1858) in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, Vol. 2, p. 494; Letter to James N. Brown (Oct. 18, 1858), in *Ibid.*, Vol. 3, p. 327.

xxvii. Slavery, although not mentioned by name, was assumed to have current legal validity in the Congressional apportionment, slave importation, and fugitive slave provisions.

xxviii. See his speech at Chicago, *supra* n. 26, at p. 501; Letter to James N. Brown, *supra* n.26.

xxix. Speech at Springfield, Illinois (June 26, 1857), in Basler, *supra* n. 26, Vol. 2, p. 406. The pro-life movement's insistence on the humanity of the pre-born has had its own gradually spreading influence, as seen in the laws banning partial-birth abortion (although now declared to be unconstitutional) and the many state statutes criminalizing violence against the pre-born in non-abortion contexts.

xxx. See his speech at Chicago, *supra* n. 26, at pp. 491-92. Lincoln's evidence for the intent of the Founders was the Constitution's slave importation provision, which allowed Congress to prohibit the African Slave Trade after twenty years, and the Northwest Ordinance, 1787 federal legislation that prohibited slavery in any new states to be formed from the Northwest Territory. See *ibid*.

xxxi. No. 96-6137, 1996 WL 717912, at *1 (2d Cir. Dec. 11, 1996).

xxxii. 18 U.S.C. § 248.

xxxiii. *United States v. Lynch*, *supra* n. 31, at *2. The Second Circuit quoted the district judge's explanation to defense counsel: "That seal above my head says ...this is Caesar's court. This is not a church, this is not a temple, this is not a mosque. And we don't live in a theocracy. This is a court of law. I will look at all the legal issues." *Ibid*. It is interesting to note that the district judge, in later dismissing criminal contempt charges against the defendants for subsequently violating the injunction, held that the defendants' "sincere, genuine, objectively based and, indeed, conscience-driven religious belief" precluded the finding of willfulness necessary for a conviction. *United States v. Lynch*, 952 F. Supp. 167, 170 (S.D.N.Y. 1997), appeal dismissed, 162 F.3d 732 (2d Cir. 1998).

xxxiv. *United States v. Lynch*, *supra* n. 31, at *2.

xxxv. In my view, this is so only if the natural law is premised in God's revealed truth.

xxxvi. Such a law conceivably could be invalid if found to be unconstitutional based on a proper interpretation of the Constitution itself. The issue here, however, is whether inconsistency with the Declaration per se makes a statute

invalid.

xxxvii. 286 N.E.2d at 889.

xxxviii. Another major deficiency has already been mentioned: the court's failure to discuss the constitutional challenge to the New York statute. See *supra* n.14. This is incredible given that the court itself described the issue as "whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life." 286 N.E.2d at 888. Moreover, the lower appellate court had explicitly ruled on a constitutional question, holding that the drafters of the Fifth Amendment had not intended to include the unborn. 329 N.Y.S.2d at 735. The court of appeals, however, ignoring as well the constitutional issues briefed in the appeal of the case, merely inserted at the conclusion of its opinion the unsupported assertion that the unborn were not legal persons under the Constitution. See 286 N.E.2d at 890.

xxxix. One is reminded of Lincoln's criticism of Stephen Douglas for his "anything goes" attitude toward slavery under the principle of popular sovereignty. See "A House Divided" speech at Springfield, Illinois (June 16, 1858) in Basler, *supra* n.26, Vol. 2, p. 467. The court's failure is particularly disappointing in view of the dissent, especially the last paragraph, in which Judge Burke reminds his colleagues of the reality of abortion: "[T]here can be no debate or value judgment when the operating doctors and their nurses examine the bucket in the operating room. They should know they have destroyed living human beings, the remains of which are in the bucket." 286 N.E.2d at 896.

xl. As an influential court, such a decision conceivably could have had some impact on the forthcoming *Roe* decision, which did in fact rely in part upon *Byrn*. See 410 U.S. at 158.

xli. 286 N.E.2d at 892.

xlii. The operators of the Nuremberg Files website say that this is exactly what they have in mind.

xliii. 99 *Columbia Law Review* 1608 (1999).

xliv. See *ibid.*, p. 1629 n. 47 and accompanying text.

xlv. See *ibid.*, p. 1624. See also Pauline Maier, "The Strange History of 'All

Men Are Created Equal’,” 56 *Washington & Lee Law Review* 873, 888 (1999) (suggesting that the modern promise of the Declaration includes “gay rights”).

xlvi. Disagreements about the practical meaning of Declaration principles will also occur among those, like myself and Alan Keyes (see *supra* n. 25 and accompanying text), who believe that the Declaration should be treated as a statement of core principles rather than as a document with independent legal force. Keyes, for example, argues that the federal income tax should be abolished because it is incompatible with another of the Declaration’s inalienable rights, the pursuit of happiness, in that the tax precludes self-determination in that pursuit. See Alan Keyes, *My Vision for a Better America*, http://www.renewamerica.tv/da/positions/my_vision.htm. While I agree that an income-based approach to taxation can be criticized on various policy grounds (but has advantages as well), I see no plain violation of the Declaration.

xlvii. The practical setting here would be in a state that proscribes third semester abortions (it is only at this stage of pregnancy that abortions can constitutionally be prohibited), but, as required by *Roe*, also recognizes a life of the mother exception (*Roe* also requires an exception for the health of the mother).

xlviii. 286 N.E.2d at 890. Some states do require a second medical opinion as to the medical necessity of the abortion, but this restriction is far short of an adversary hearing before an impartial judge.

xlix. See William Colliton, Jr., “The Birth Control Pill: Abortifacient and Contraceptive” in *Life and Learning*, Vol. X, p. 291 (2002).

l. *Physicians’ Desk Reference* (2001), p. 2374

li. *Ibid.*, p. 2379. An even more egregious example of inaccurate information recently came to my attention. Yasmin is a new brand of birth control pill that first appeared in the 2002 edition of *Physicians’ Desk Reference*. Its clinical pharmacology entry is identical to the previously quoted data for Ortho-Tri-Cyclen (see PDR 2002 p. 980), yet a small booklet in the package states that the pill works by stopping “the release of the egg, so there is no egg to join with the sperm if you have intercourse.” “What You Need to Know About Taking Your New Oral Contraceptive,” Berlex Laboratories (June 2000) (stopping of the egg is the *only* mechanism described). The Patient Package Insert, a separate item in the package, says only that the pill prevents pregnancy. Women reading these items obviously are not given a clue that the pill could in fact operate by

terminating a fertilized egg.

lii. At the very least, pro-lifers should insist that women be given accurate information. This is the outcome urged by Dr. Colliton. Colliton, *supra* n. 49, at p. 301. Some pro-life groups are more aggressive. An example is Northern Kentucky Right to Life (NKRL), which recently led the effort (ultimately unsuccessful) to convince the Northern Kentucky Independent District Health Board to reject federal family planning money used to distribute birth control pills. NKRL ran newspaper ads stating that the pill can cause abortions. See “Ky. Birth Control Debate Comes Down to a Vote,” *The Roanoke Times* (June 19, 2002), p. A11.

liii. A right to life from conception would also create problems for other procedures in which embryonic life is terminated, such as in vitro fertilization and stem cell research.