titution cannot eliminate human intentions, that even the sovereign will as reflected in that most basic of all laws cannot know what evil lurks in the hearts of men.

In sum, this paper was introduced through the doctrine of *stare decisis* which, as the reader ofthe law knows, has its limitations. For one, the possibility is always there that the Supreme Court will reverse itself, as in fact it did to LIN-SANG in GARCIA-PADILLA. And then again, since the interpreting decision becomes part of the law construed, that decision also becomes subject to the balancing principle in law that "when the reason for the law ceases, the law itself ceases." It is not therefore surprising that martial law jurisprudence in our jurisdiction has proved to be peerless as a *rex tyrannosaurus:* the *raison d'etre* of the law involved and of the jurisprudence has been banished from our land. And the sovereign will, scarred as it was by the martial law experience under the previous dispensation, has proved to be a greater forum than our Supreme Court could ever be.

THE LESSONS OF A MISCARRIAGE: THE CONSTITUTION ON ABORTION

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"Wherever law ends, tyranny begins"
John Locke[1]

INTRODUCTION:

Unlike Locke, we thought that with the advent of the 1987 Constitution, tyranny has ended and law has begun. But before the optimism could sink in, a serious doubt has been cast. Bigotry-which is tyranny in its most subtle form-seems to have made a comeback in Article II Section 12, to wit:

> "Sec. 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. *It shall equally protect the life of the mother and the life of the unborn from conception. xxx"*

This paper will argue that the doubt can still be resolved, happily, in favor of the law. The right to abort is a protected liberty under the Due Process Clause.

THE RIGHT TO PRIVACY AND ABORTION:

One of the more controversial discussions during the sessions of the 1986 Constitutional Commission was on the issue of abortion. Strewn all over the Records of that body are arguments that range from the placid, even contemplative, debate on when life actually begins to the impassioned plea against a form of eugenics likened to the anti-Semitic sentiments of Hitlerian Germany. Pro-life advocates among the Commissioners attacked the prevailing jurisprudence in the United States which allows abortion up to the sixth month of pregnancy without State intrusion on the ratio that this is pursuant to the expectant mother's right to privacy.[2]

This constitutional right to privacy or the "right to be let alone"[3] has not always been recognized in American Constitutional Law, having been reserved to the police power jurisdiction of the individual States. Until 1965, the right to privacy was limited to libel and Fourth Amendment questions regarding search and seizure.[4] The breakthrough was achieved in the leading case of Griswold v. Connecticut[5] but not without a considerable struggle because of the absence of a specific guarantee of the right to privacy in the text of the U.S. Constitution.

Candidate for LL.B, 1988.

[1] John Locke, *Second Treatise of Government,* edited with an introduction by C.B. Macpherson (Indianapolis: Hackett Publishing Co., 1980), p. 103.

[2] Roe V. Wade, 410 U.S. 113 (1973).

[3] Paul A. Freund *et al., Constitutional Law: Cases and Other Problems* (Boston: Little, Brown and Co., 1977), p. 1126.

[4] Joel B. Grossman and Richard S. Wells, *Constitutional Law and Judicial Policy Making* (New York: John Wiley and Sons, 1980), p. 1316.

[5] 381 U.S. 479.

Briefly, the case involved the constitutionality of a Connecticut statute making it an offense to use birth control devices or to instruct anyone in their use. Striking down the statute as unconstitutional, the Court's opinion was based on the intimacy of marital relations and the recognition of this right to privacy in marital affairs as a "peripheral" or "penumbral" right emanating from several fundamental constitutional guarantees, including the right of association and the due process clause. However, a precise justification could not be agreed upon by more than three Justices.[6]

The basic teaching of *Griswold* is the inclusion of marriage within the zone of privacy. But the case was concerned with the use of contraceptives, as confined to married couples. Then came *Eisentadt v. Baird* (1972),[7] where the U.S. Supreme Court held unconstitutional a statute prohibiting all distribution of contraceptives to *single persons*. Hesitating to anchor the decision on the right to privacy, as in *Griswold*, the Court, finding no rational distinction between married and unmarried persons, ruled that the statute violated the equal protection clause. Strictly viewed, *Eisentadt* did not present a substantial innovation, but it served as a transitional vehicle:

> "The step from married to single is, as a matter of circumstance, small, but as a step in the expansion of constitutional meaning, it was enormous. If privacy as a right can protect decisions by married couples or single persons to prevent pregnancy, then a subsequent and obvious question raised is *whether post-conception decisions such as abortion* are to any extent also protected by the right to privacy xxx"[8]

With the foregoing providing the missing link to this unfolding jurisprudential evolution, we now turn to *Roe* v. Wade,[9] the precursor of the abortion cases. At issue there was a constitutionality of a Texas statute making it a crime to procure an abortion or to attempt one, except with respect to an abortion procured or attempted with medical advice for the purpose of saving the life of the mother. Justifying the challenge, which was principally founded on the right to privacy, the Court opined:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable psychologically and otherwise to care for it. xxxx. We do not agree that *by adopting one theory of life*, Texas may override the rights of the pregnant woman that are at stake."[10]

[6] Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, anchored the right to privacy on the Ninth Amendment which provides that: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

[7] 405 U.S. 438 (1972).

[8] Grossman and Wells, supra, p. 1320 (ITALICS SUPPLIED).

[9] 410 U.S. 113 (1973).

The Court was quick to say that the right to abort is hardly absolute and is limited by "compelling State interests."[11]

The only task left then was in locating these legitimate State interests. The Court proceeded, with characteristic Stoicism, by categorizing them into two. The first is the State's interest in the health of the mother. This was pinpointed to be at approximately the end of the first trimester. Rationalizing, the Court said that this is based on the fact that "until the end of the first trimester mortality in abortion may be less than mortality in childbirth."[12] Simply put, it is more likely that the mother would die of abortion *after* the first three months than she would had she aborted during the same period. Thus, beginning from the end of the first trimester, the State may regulate "the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[13] The second category is the "State's important and legitimate interest in potential life. The compelling point for this is at viability, which approximately begins on the seventh month, because the fetus then presumably has the capability of meaningful life outside the mother's womb,"[14] From the seventh month onwards, the State may go so far as to proscribe abortion except when it is necessary to preserve the life or health of the mother.

Like other hard cases that make bad law, *Roe* is not wanting in critics. Professor Tribe noted that the decision never explained "why comparative mortality figures should provide the only constitutionally relevant measure of permissible state regulation of a particular procedure in the interest of health."[15] He further posited the view that the Court in *Roe* was not just choosing between the alternatives of abortion and continued pregnancy but was "choosing among alternative allocations of decision-making authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy."[16] The Court's identification of legitimate State interest in potential life as starting only from the seventh month has also been criticized thus:

> "What is unusual about Roe is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus' existence is unable to overcome it. xxx The point that often gets lost in the commentary,

[10] *Ibid.*, at 155, 162. (ITALIC SUPPLIED).

[11] *Ibid.*, at 154.

[12] *Ibid.*, at 163 (29, 30).

[13] *Ibid.* at 163 (29, 30).

[14] *Ibid.*, at 163 (32, 33).

[15] Lawrence H. Tribe, "Foreword; A Model of Roles in the Due Process of Life and Law," *87 Harvard Law Review*, 1, 4.

[16] *Ibid.*, p. 11

> and obviously got lost in Roe, is that before the Court can get to balancing stage, before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[17]

The cases stemming from Roe were consistent. These reflect attempts by the States to realign their abortion laws with the holding in Roe. Among the provisions of abortion statutes invalidated by the U.S. Supreme Court are procedural requirements, that abortion be performed in an accredited hospital with the prior approval of a hospital abortion committee;[18] one prohibiting the use of a specific procedure (saline amniocentesis);[19] consent provisions, including spousal consent;[20] parental consent for an unmarried woman under eighteen;[21] a detailed informed consent requirement on physicians to make known to patients the emotional and physical complications of abortions,[22] and a 24-hour waiting period after signing a consent form.[23] The reasoning in these cases hinged on the theory that these measures would ultimately influence the decision to abort.

Of more recent vintage and one that merits an extended discussion is the 1986 case of *Thornburgh v. American College of Obstetricians and Gynecologists.*[24] By far, this case is one of the most stringent tests of *Roe v. Wade*, generating an ambivalent 5-4 majority with Chief Justice Burger, who concurred in *Roe* but dissented here, suggesting its re-examination.[25]

For the determination of the Court was the constitutionality of six provisions of a Pennsylvania statute: a) informed consent; b) printed information; c) reporting requirements; d) determination of viability; e) degree of care required in post-viability abortions and f) second physician requirement when viability is

[17] John Hard Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," *82 Yale Law Journal 920*. 935, 948-949.

[18] Doe v. Volton, 410 U.S. 179 (1973); Planned Parenthood v. Ashkroft, 462 U.S. 476 (1983).

[19] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

[20] *Ibid.*

[21] Belloti v. Baird, 443 U.S. 642 (1979).

[22] Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

[23] *Ibid.*

[24] 54 L.W. 4618 (1986).

[25] *Ibid.*, at 4628.

possible. All of the above were struck down as unconstitutional. The first two provisions[26] were considered as:

> "nothing less than an outright attempt to wedge the Commwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician xx"[27]

Chief Justice Burger took exception to this and called it an "astounding rationale xx *as though abortion is something to be advocated or encouraged.*"[28] The Court found the reporting requirements objectionable because of their availability to the public. As it observed:

> "A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision *and her identity* will become known publicly."[29]

The next two provisions are related and as amplified by the statute set forth two independent requirements. First, it demands the exercise of care in preserving the life of a child intended to be born. Second, as between abortion techniques, the physician should choose that which would provide the best opportunity for the child to be aborted alive unless it presents a medical risk to the life of the mother.[30] In declaring these provisions unconstitutional, the Court cited the "undesirability of any trade-off between the woman's health and *additional percentage points of fetal survival.*"[31] Chief Justice Burger considered this contrary to the doctrine in Roe of a compelling State interest in the potentiality of human life.[32] Because of the failure of the sixth provision to provide for a medical emergency exception, the Court sanctioned it as "chilling the performance of a late abortion."[33]

To recapitulate, the right to an abortion, as it is understood in American Constitution Law, is closed to any State intervention directed at the fetus' survival up to the sixth month of pregnancy. It is only on the seventh month when the State can place on the balance its interest in the protection of potential life. But when the mother's health is likewise loaded on the scale, the balance must be tilted in its favor.

[26] The law provides that an expectant mother must give her consent to the abortion after being informed of the following: a) the name of the physician; b) that there may be physical and psychological effects; c) the particular medical risk associated with the particular abortion procedure to be employed; d) the probable gestational age; 3) the medical risk associated with carrying her child to term; f) that medical assistance benefits are available; g) that the father is liable to assist in the child's support even if he has offered to pay for the abortion; and h) that printed materials are available from the State which describe the anatomical and physiological characteristics of the fetus at two-week increments.

[27] *Ibid.*, at 4622. (ITALICS SUPPLIED)

[28] *Ibid.*, at 4628.

[29] *Ibid.*, at 4623. (ITALICS SUPPLIED)

[30] *Ibid.*, at 4624.

[31] *Ibid.*, citing Colautti v. Franklin 439 U.S. 379, 410.

[32] *Ibid.*, at 4628.

[33] *Ibid.*, at 4624.

THE CONSTITUTIONAL COMMISSION ON ABORTION:

The 1986 Constitutional Commission worked under the foregoing jurisprudential milieu. The first attempt at a pro-life provision appeared in the Due Process Clause, sponsored by Commissioner Bernas:

> "Section 1. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws. *The right to life extends to the fertilized ovum.*"[34]

The purpose was explained thus:

> "The intent of this addition is to preclude the Supreme Court from following the United States doctrine which does not begin to weigh the life of the unborn against that of the mother until the fetus has reached a viable stage of development. xxx
>
> The innovation does not say that from the moment the sperm and the egg shake hands, human life is already present, much less does it say that at that moment as soul is infused; nor does it say that the right to life of the ovum must prevail over the life of the mother all the time. All that the innovation says is that from the moment of fertilization, the ovum should be treated as life whose worth must be weighed against the life of the woman, not necessarily saying that they are of equal worth."[35]

This encountered rough sailing on the floor, prompting Commissioner Bernas to remark:

> "Fr. Bernas: xxx And the way this provision, as formulated is sailing, and speaking as someone who is sometimes referred to as a constitutional lawyer, it is my perception that *a law which is subject to innumerable interpretations and, therefore, likely to be misunderstood, misinterpreted, is a bad law.* xxx That is my conviction at the moment. Whether or not we delete this line, my only interest is that there has been an *expression of concern for life,* but that this particular line may not be the way to express it."[36]

Echoing similar sentiments, Commissioner Romulo had this to say:

> "Mr. Romulo, xx I suggest that this be adopted and transferred either to the Declaration of Principles or to that on Human Resources.
>
> The reasons for my amendment are as follows: First, I do not believe this original sentence belongs to the Article on the Bill of Rights. It is not only jarring but also *contradictory to the main purpose of a bill of rights.* The Bill of Rights is supposed to protect the individual from the State and the minority from the majority. This original proposal impinges on the right of minorities who do not believe in this Catholic concept xx"[37]

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[34] Records of the Constitutional Commission, July 17, 1986, Vol. I, p. 672. (ITALICS SUPPLIED)

[35] *Ibid.*, p. 673.

[36] *Ibid.*, p. 696. (ITALICS SUPPLIED)

[37] *Ibid.*, July 18, 1986, pp. 721-722. (ITALICS SUPPLIED)

The fertilized ovum was thus laid to rest, but only temporaily. It was resurrected during the debates on the Declaration of Princoles and State Policies, where it was to be installed, this time, with permanence.

The sponsorship speech of Commissioner Villegas was unabashedly anti-abortion:

> "xxxx The fertilized ovum is already a separate body. It is no longer the body of the woman. xxx Conflict of rights is fictitious. If the woman has her basic rights and the unborn child's right to life is also recognized, would this not result in a conflict of rights. The conflict is only apparent. It is easily resolved by applying the following principle: When two rights come in conflict, the more basic right and/or the right concerning the graver matter takes precedence over rights involving the less basic or less serious matter. *It is clear that the right to life is more basic than the right to privacy or any other posterior rights* xxx if a mother can kill her own child, What is there to prevent us from killing each other xxx it is said that xxx dura lex sed lex. But even more demanding is life, dura vita sed vita xx"[38]

If Commissioner Bernas' ship encountered rough sailing, this one was a derelict from the very start. While the proposed provision with only minor amendments was enshrined in the Constitution, itis respectfully submitted that the aforequoted speech taken by itself is not reflective of the framers' intent. There was enough said on the floor to effectively dilute its absolutist tenor.[39]

To summarize, three things are clear from the Records. First, the provision does not assert that the unborn is a legal person. There is a positive assertion, however, that it is *human life.*[40] Thus, no displacement of Articles 40 and 41 of the Civil Code is intended.[41] Birth, not conception still determines civil personality. Second, when the life of the mother is threatened, an abortion is justified because the primary purpose is to save the life of the mother and not to abort the child.[42] This is known as the principle of double effect and is the import of the

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[38] *Ibid.*, September 12, 1986, Vol. IV, p. 599.

[39] See the exchanges between Commissioners Aquino, Ople, Villegas, and Bacani, September 17, 1986, Vol. IV, pp. 705-708; Commissioners Quesada, Villegas, and Ople, *Ibid.*, pp. 708-709; Commissioners Villegas and Tan, *Ibid.*, p. 723; and Commissioners Villacorta and Villegas, *Ibid.*, pp. 724-725; for an interesting tete-a-tete between two self-confessed celibates see Commissioners Bacani and Villegas, *Ibid.*, pp. 721-722.

[40] See the interpellation of Commissioner Bacani by Commissioner Suarez, July 17, 1986, Vol. I, p. 690.

[41] "ART. 40. Birth determines personality, but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born later with the conditions specified in the following article."

"ART. 41. For civil purposes, the fetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the fetus had an intra-uterine life of less than months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb."

[42] Sponsorship speech of Commissioner Villegas, September 12, 1986, Vol. IV, p. 599.

world "equally" in the text. Of course, this does not mean that abortion cannot be justified in other cases as will be shown in a later portion of this article. Third, the protection accorded the unborn commences "from conception." The thrust here is to preclude the Supreme Court from adopting the doctrine in *Roe v. Wade.* As originally drafted, the provision carried the phrase "from the moment of conception." The deletion evinces the intent not to pre-empt the determination of the time when conception begins.[43]

How then should Section 12 of Article II be read? To this writer's mind, there are three possible views.

1) It denies the right to abort unless the mother's health is at issue. This is the hardline anti-abortion stance taken by Commissioner Villegas. Under this view, the provision is mandatory and *Roe* is dispensable;

2) Striking a middle ground, the provision can be said to denounce *Roe* and its allied cases in only one respect, that of having heavily burdened the State's important interest in potential life to the extent that it is now well nigh impossible to apply it. Thus, the Supreme Court is prevailed upon to resist this without however eroding the concept of abortion as an exercise of the right to privacy. This way, the provision is at most pro-life but not anti-abortion.

3) on the opposite end of the continuum, the provision can be construed to clash with guarantees in the Bill of Rights, particularly the Due Process Clause under which the right to privacy can be subsumed. The Bill of Rights, being mandatory, must inevitably prevail. The result is the grant of an absolute right to abort without regard for any interest in potential life. This was suggested by some amici curiae in *Roe.*

It is respectfully submitted that the third is the more workable solution for the following reasons:

1) In support of the above thesis, it must be remembered that the provision is ensconced in the Declaration of Principles and State Policies. Its office in the 1935 Constitution has been elucidated thus:

> "In general, therefore, the 1935 provisions were *not intended to be self-executing principles* ready for enforcement through the courts. They were rather *directives* addressed to the executive and the legislature, *the available remedy was not judicial but political.* The electorate could express their displeasure with the failure of the executive and the legislature through the language of the ballot. of the executive and te legislature through the language of the ballot.
>
> This is not to say, however, that the provisions did not have their usefulness in litigation. They also obligated the judiciary to be *guided* by the provisions in the exercise of the power of judicial review xx"[44]

The 1987 Constitution, like the 1973 Constitution, has adopted this.[45] How about the Bill of Rights where the provision used to be? How does it operate

[43] The amendment was introduced by Commissioner Padilla, *Ibid.*, p. 801.

[44] Joaquin C. Bernas, S.J., *The (Revised) 1973 Philippine Constitution: Notes and Cases, Part I (Manila: Rex Book Store, 1983), p. 40 (ITALIC SUPPLIED).*

[45] See the Sponsorship Speech of Commissioner Tingson, Records of the 1986 Constitutional Commission, September 12, 1986, Vol. IV, p. 580.

in the constitutional scheme? The sponsorship remarks of Commissioner Bernas are most apt:

> "First, the general reflections: The protection of fundamental liberties in the essence of Constitutional democracy. Protection against whom? Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zone in the private sphere inaccessible to any power holder. xxx, that as guarantee and protection, *they do not need further implementing action* by the legislature. They are limits on the *legislature and on every other official person or body, they can stop official action dead* xxx"[46]

The transposition from the Bill of Rights to the Declaration of Principles and State Policies was not an idle move. The rationale being to make the present provision merely directory and not strictly binding on the State. If the purpose were to pre-empt the Supreme Court from adopting *Roe* or the Congress from pursuing a pro-abortion policy, the proper forum is the Bill of Rights where it would have been a mandatory command that the State would have no recourse but to obey.

2) This writer fails to see how abortion can be any less private *after* the sixth months than *during* the same period if the locus of the privacy is the woman's body and her decision-making process. This is precisely the weakness of *Roe.* Under the pretext of being neutral, the logic of the opinion in this regard has betrayed its own cause. It devised a compelling interest in potential life, oblivious to the fact that once abortion is declared to be an exercise of the right to privacy it would eventually be faced with the dilemma of choosing unconditionally between the right to abort and the right to life. The cases subsequent to *Roe* can attest to this difficulty in realizing an interest in potential life. Thus, it is not necessary to consider a compelling interest in potential life, much less its burdening, when the U.S. Supreme Court cannot even find its way clear to applying it. To test the argument: Suppose a woman is in her last month of pregnancy, can she validly abort the child? Under this theory, she can. Technically, she would be prosecuted for abortion (Article 258, R.P.C.)[47] and not infanticide (Art. 255, R.P.C.)[48] provided the fetus was already dead when expelled.[49] But

[46] Records of the 1986 Constitutional Commission, July 17, 1986, Vol. 1, p. 674. (ITALICS SUPPLIED).

[47] Infra., see note 52.

[48] "Art. 255. *Infanticide.* The penalty provided for parricide in Article 246 and for murder in Article 248 shall be imposed upon any person who shall kill any child less than three days of age. xxx"

[49] Luis B. Reyes, *The Revised Penal Code* (Manila. Rex Book Store, 1977), p. 475, citing U.S. v. Edra 12 Phil. 96 and People v. Detablan, C.A., 40 O.G., Supp. 5, 30.

isn't this really a case of infanticide because the child can sustain its own life independent of the mother? This is the reasoning in *Roe*. In the final analysis, the query can be reduced to the following, sans the legalese: Is the mother right in aborting the child at such a late stage? What was once a legal question now begins to show its moral fangs. To the extent that *Roe* offers, inappropriately, a legal response to a moral problem, it is self-defeating. Whatever right to life the unborn fetus has is better left as a moral alternative than a legal delimitation.

3) Just as significant as the theoretical under pinnings is the practical aspect of the criminal justice system as it relates to abortion. This was raised by Commissioner Natividad, drawing from his experience as a law enforcer:

> "We cannot file any case because there are no witnesses. The subject of the case, the woman herself, would be the last person to testify because she would be a co-principal in the crime of criminal abortion xxx"[50]

While it is believed that the prospect of prosecution is not the true test of whether or not an act is worth penalizing, it does end credence to the argument that it is futile to legislate on moral issues:

> ". . . . one major source of crime – is 'overcriminalization'.
> "Overcriminalization – the misuse of the criminal sanction – *can contribute to disrespect for law, and can damage the ends which law is supposed to serve, by criminalizing conduct regarded as legitimate by substantial segments of the society,* xxx Examples of statutes which raise problems of 'overcriminalization' are those laws *dealing with morals,* xxx"[51]

4) Controversial moral convictions masquerading as laws are not only futile but also degenerative because they bring to the fore the harshness of implementation. In what way can the State prevent abortion or execute an anti-abortion legislation such as what we have at the moment in Article 258 of the Revised Penal Code [52] without violating other provisions of the Constitution? Will it be justified in tying the hands of a pregnant woman attempting to abort? Or, making her expel a suspected abortifacient drug that she just swallowed? [53]

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[50] Records, September 17, 1986, Vol. IV, p. 699.

[51] James S. Campbell, Joseph R. Sahid, and David P. Stang, *Law and Order Reconsidered: Staff Report to the National Commission on the Causes and Prevention of Violence* (New York: Bantam Books, 1970), pp. 600-606, reprinted in Grossman and Wells, supra., p. 756. (ITALICS SUPPLIED).

[52] "Art. 258. *Abortion practiced by the woman herself or by her parents.* – The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon a woman who shall practice abortion upon herself or shall consent that any other person should do so. xxx"

[53] By analogy, see *Rochin v. California*, 342 U.S. 165 (1952) and *Breithaupt v. Abram*, 352 U.S. 432 (1957).

Can the woman be forced to carry the child to term without violating the constitutional prohibition against involuntary servitude? [54] Is it constitutionally feasible to deny the pregnant woman the liberty to do what she pleases with her own body? [55] Must we sacrifice straining constitutional guarantees in the Bill of Rights just because of a general, if not ambiguous, statement in the Declaration of Principles and State Policies? The constitutional bloodletting has to stop.

CONCLUSIONS

A basic tenet of any constitutional democracy is to allow the individual to make correct as well as incorrect decisions. In the realm of moral choices, the State is an uninvited, nay, an unwanted guest. To say that the right to abort belongs to the pregnant woman carries with it the *right not to abort*. But to say that she cannot abort except when her own life is at stake, which is what the Constitution seems to be saying, will effectively close the avenues of choice and would mean falling prey to the "will of a transient majority."[56]

The Constitution is not a *moral* but an *amoral* document if it is to equally protect. It is neither the venue nor the excuse for an arbitrary moral statement. The following words of Justice Holmes rings true today as it did in 1913:

> ". . . It cannot be helped, it is as it should be, that the law is behind the times . . . As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, *while there is still doubt, while opposite confictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field.*"[57]

To paraphrase another line from Holmes, the Constitution affirms to protect those values that we abhor or hate more than those that we cherish.[58]

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[54] Article III, Sec. 18(2), 1987 Constitution provides:
"No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted."

[55] Article III, Sec. 1, 1987 Constitution provides.
"No person shall be deprived of xxx liberty, xxx without due process of law. xx"

[56] The phrase "transient majority" was used by Justice Stevens, concurring in *Thornburgh v. American College of Obstetricians and Gynecologists* 54 L.W. 4618, 4627.

[57] The Occasional Speeches of Justice Oliver Wendell Holmes 171-73 (M. Howe ed., 1962), quoted in Preund, *et al.*, supra, pp. 1125-1126. (ITALICS SUPPLIED)

[58] Quoted in *PBMEO v. PMB Co. Inc.* 51 SCRA 189 (1973), the actual words were: "to protect the *ideas* that we abhor or hate more than the *ideas* that we cherish."