ISSUES IN LAW & MEDICINE

CONTENTS

Preface iii

Article

Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence 119
Abstract 119
I Dividing Human Beings into Persons and Non-Persons 122
A. Human Being 123
B. Person 125
II Dehumanizing Humans with Personhood Theories ... 127
III Segregationist Theories Acquire the Force of Law 133
IV The Liberal's Dilemma 142
V Equality and Self-Evident Truths 148
VI No Justice Is Possible Without Morality 153
VII Defining the Rule of Law 154
VIII Mislabelling Rule by Law as the Rule of Law 155
IX The Genesis of the Rule of Law in America 160
X How Human Slavery Ruined the Rule of Law 163
XI When Unborn Human Beings Were Persons 172
XII Pre-*Roe* American Abortion Jurisprudence 180
XIII When Feminists Opposed Abortion 184
XIV Attempting to Restore the Rule of Law: The Fourteenth Amendment 185
XVI Artificial Persons Gain Protection Under the Fourteenth Amendment 187
XVII Do Unborn Natural Persons Qualify Under the Corporate Personhood Tests for Protection Under the Fourteenth Amendment? 198
XVIII Segregating Unborn Natural Persons From Born Persons Under the Fourteenth Amendment 200
XIX The Erosion of Legal Protection for the Unborn 201
XX *Brown v. Board of Education*: A Model to Restore the Rule of Law 206

VOL. 22, NOS. 2 & 3 FALL 2006/SPRING 2007

XXI The Road To *Roe*: The Rise of Privacy, Unrestrained Personal Liberty and Fundamental Rights 208
A. Historical Limits on Personal Liberty 210
B. Protecting Children Under the First Amendment 220
C. Using Privacy to Justify Unrestrained Personal Liberty That Harms Others 223
D. The Conflict Between the First and Fourteenth Amendments 230
E. Steinberg v. Brown: The Precedent Ignored in *Roe* 232
XXIII Rule by Law v. Rule of Law 234
A. Bryn 234
B. The Aftermath of *Bryn* 241
XXIV Abandoning the Rule of Law: *Roe* and *Doe* 243
A. Roe 243
B. Doe 246
XXV Defending the Rule of Law for Murderers 248
XXVI The Imposition of Rule by Law: *Casey* 251
XXVII How Segregation Works: *Cruzan* 255
XXVIII The Conservatives Retreat 257
XXVIX The Turning Point: Public Outrage over Partial Birth Abortion 257
XXX The Revival of Human Slavery 261
A. Cloning 262
B. Embryonic Stem Cell Research 264
C. Vaccines 265
XXXI International Law 267
A. Expanding the Class of Depersonalized Humans 267
B. Political Correctness: The Canadian Model 270
C. Universal Human Rights 271
XXXII The Moral Imperative to Protect Human Life from Conception 273
XXXIII Restoring the Rule of Law 275
XXXIV When Judicial Review Fails 282
XXXV Summary of the Case for Constitutional Personhood 286
XXXVI When Human Being and Person Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence: Equal at Last 287
Opinion of this Honorable Court 287
XXVII Beyond Personhood 289
A. Is There an Affirmative Government Duty Under the Fourteenth Amendment to Protect Unborn or Born Persons? 290
B. Application to Abortion 294
C. The "New" Moral Case for Aborting a Constitutional Person 296
D. The Jurisprudential Argument 299
Conclusion 302

Preface

The featured article in this edition of *Issues in Law & Medicine* is the thesis of professor Charles I. Lugosi, which was submitted and defended as part of the requirements for his Doctorate in Juridical Science from the University of Pennsylvania. In it, he applies the Fourteenth Amendment of the United States Constitution to the issue of abortion. The Fourteenth Amendment was intended to protect people from discrimination by the states. But racism is not the only thing people need protection from. As a constitutional principle, Dr. Lugosi reasons that the Fourteenth Amendment is not confined to its historical origin and purpose, but is available to protect all human beings, including all unborn human beings. The Supreme Court can define "person" to include all human beings, born and unborn. It simply has chosen not to do so.

Dr. Lugosi argues that science, history and tradition establish that unborn humans are, from the time of conception, both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of "person" under the Fourteenth Amendment. The legal test used to extend constitutional personhood to corporations, which are artificial "persons" under the law, is more than met by the unborn, demonstrating that the unborn deserve the status of constitutional personhood.

He concludes that there can be no "rule of law" if the Constitution continues to be interpreted to perpetuate a discriminatory legal system of separate and unequal for unborn human beings. Relying on the reasoning of the Supreme Court in *Brown v. Board of Education*, the Supreme Court may overrule *Roe v. Wade* solely on the grounds of equal protection. Such a result would not return the matter of abortion to the states. The Fourteenth Amendment, properly interpreted and applied to unborn human beings, would thereafter prohibit abortion in every state.

Due to the length of Dr. Lugosi's thesis, this edition of *Issues in Law & Medicine* is a double edition, and identified as Volume 22, Numbers 2 and 3. Thus, this double edition constitutes both the Fall 2006 and Spring 2007 editions.

— James Bopp, Jr., J.D.
Editor-in-Chief

Article

Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence

Charles I. Lugosi, LL.B., LL.M., M.B.E., S.J.D.*

ABSTRACT: The Fourteenth Amendment was intended to protect people from discrimination and harm from other people. Racism is not the only thing people need protection from. As a constitutional principle, the Fourteenth Amendment is not confined to its historical origin and purpose, but is available now to protect all human beings, including all unborn human beings. The Supreme Court can define "person" to include all human beings, born and unborn. It simply chooses not to do so.

Science, history and tradition establish that unborn humans are, from the time of conception, both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of "person" under the Fourteenth Amendment. The legal test used to

*Visiting Professor of Law, Michigan State University School of Law; LL.B., University of Western Ontario, 1979; LL.M., M.B.E. (Bioethics), and S.J.D., University of Pennsylvania, 2001, 2002, and 2005 respectively. This article is the author's thesis for his Doctorate in Juridical Science. His supervisor was Anita Allen-Castellitto, Professor of Law and Philosophy at the University of Pennsylvania. Committee Members were professors Frank Goodman and Seth Kreimer. Portions of this article have been published under the following titles: *If I Were a Rich Corporation, I'd Be a Constitutional Person Too*, 10 Texas Rev. Law & Politics 427 (2006); *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 34 Georgetown J. Law & Public Policy 361 (2006); *Beyond Personhood: Abortion, Child Abuse and Equal Protection*, 30 Oklahoma City U. Law Rev. 271 (2005); *When Abortion Was A Crime: An Historical Perspective*, 83 U. Detroit Mercy L. Rev. 51 (2006); and *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 St. Louis U. L. J. 425 (2004). Correspondence may be addressed to the author at cilugosi@yahoo.com. The author expresses his appreciation to Professor Kathy Tomaszewski for proof reading this article.

extend constitutional personhood to corporations, which are artificial "persons" under the law, is more than met by the unborn, demonstrating that the unborn deserve the status of constitutional personhood.

There can be no "rule of law" if the Constitution continues to be interpreted to perpetuate a discriminatory legal system of separate and unequal for unborn human beings. Relying on the reasoning of the Supreme Court in *Brown v. Board of Education*, the Supreme Court may overrule *Roe v. Wade* solely on the grounds of equal protection. Such a result would not return the matter of abortion to the states. The Fourteenth Amendment, properly interpreted, would thereafter prohibit abortion in every state.

> I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change in circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain under the regimen of their barbarous ancestors.[1]

Since fetuses and embryos on an objective modern scientific basis are human beings, it may be argued that it is morally wrong to deny unborn human beings the status of personhood.[2] If it is accepted, as I believe, that the unborn members of the human species are human beings, then it is arguable that as human beings they are natural persons as a matter of law. If all this is true, I contend that it is immoral and legally wrong to exclude the unborn human being at any age prior to birth from the constitutional meaning of person under the Fourteenth Amendment to the U. S. Constitution. It is my position that American constitutional law will not conform to the rule of law, and will fail to honor the basic doctrines of equal protection under the law and substantive human rights, until the legal meanings of "human being" and "person" are identical and are mutually recognized as a matter of constitutional law when a new human being is created at the time of conception.

Denial of constitutional personhood to the unborn human being segregates an entire class of the human family making the unborn human being legally separate and unequal to those members of the human family who have been born.

[1] Thomas Jefferson, taken from a letter to Samuel Kercheval, July 12, 1816, inscribed on the wall of the statue chamber, Jefferson Memorial, Washington D.C.

[2] *See* Charles I. Lugosi, *Respecting Human Life in 21st Century America*, 48 St. Louis U. L.J. 425 (2004). I accept biological fact that fetuses and embryos are human beings. Leading advocates of abortion, including Judith Jarvis Thomson, to make their strongest arguments, are compelled to accept the premise that a fetus is a human being, a person, from the time of conception, and then proceed to argue that abortion is morally permissible. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Affairs 1, 47-66 (1971).

The result is that only those wanted children who are chosen to live and who are in fact born become legally recognized as a person following a live birth. For it is birth that marks the current legal boundary when a legal person is recognized in the United States of America, and bestows the constitutional rights of life, liberty and citizenship.

Unlike legally recognized persons, the unborn members of the human family who are not chosen for live birth have a different destiny. These unborn human beings are non-persons in law, and as such, are subject to the will of physically mature and legally empowered persons, normally their mothers. As non-persons, these unborn human beings risk treatment as commodities and property, for they are not legal constitutional persons. Their physical body parts, such as fetal brain tissue, may be harvested as living commodities for use in commercial scientific experiments designed to cure diseases of mature persons, such as Alzheimer's disease. Many non-persons are thus destroyed and forced into the role of disposable slaves designated to advance medical, reproductive and scientific goals such as embryonic stem cell research and cloning. Other non-persons who are the product of in vitro fertilization (IVF) are created outside the human womb and will also never be born, for millions of these non-persons are frozen indefinitely until used for science or ultimately discarded.

Non-persons have no constitutional right to life. Prior to birth, all non-persons, both wanted and unwanted, have no legal rights other than those specifically bestowed by positive law. Prior to actual birth, a non-person's destiny may change at any time. An unwanted human being may become chosen for birth, and a previously wanted human being may become unwanted. Even after birth, there are no guarantees that constitutional personhood will endure, for a transition from person to non-person is possible, if positive law and legal definition makes it so.

As a matter of current American constitutional law, the word "person" does not have the same meaning as "human being," until the process of live birth has been completed. Until then, the law permits parents, doctors, scientists, and judges, amongst others, to openly discriminate between human beings that are chosen for birth and those that are not. Even though in the United States, the Fourteenth Amendment to the Constitution offers a right of equal protection and due process so that no person is deprived of his or her life or liberty, this right is denied to any human being who is not defined as a person—all unborn human beings.

I contend that the Fourteenth Amendment, unlike the Fifth Amendment, which was intended to protect people from government, was intended to protect people from discrimination and harm from other people. Racism is not the only thing people need protection from. As a living constitutional principle, the Fourteenth Amendment is not confined to its historical origin and purpose, but is available now to protect all human beings that are defined as non-persons, including all unborn human beings, individually, and as a class. The Supreme Court can define "person" to include all human beings, born and unborn. It simply chooses not to do so. It is a matter of judicial interpretation.

In the following discussion, I will show that the common law, history and tradition establish that the unborn from the time of conception, were both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of "person" under the Fourteenth Amendment. I will further show by comparison that the legal test used to extend constitutional personhood to corporations, which are legally artificial persons, is more than met by the unborn, demonstrating that the unborn deserve the status of constitutional personhood.

I maintain that there is no rule of law if the Constitution is interpreted to perpetuate a legal caste system of "separate and unequal," where there is no justice for the unborn. I contend there is no justice for the unborn human being so long as there is denial of equality, respect, dignity, liberty, life, and due process of law. Since the word "person" in the Fourteenth Amendment is capable of being interpreted liberally in an objective manner consistent with the rule of law to include all human beings, not to do so violates the natural law which is the foundation of the Declaration of Independence and the core liberal ideals of equality and human dignity.

Finally, I will argue that all unborn human beings, whether wanted or not, have a right to equal protection and due process under the Fourteenth Amendment. If I am right, then the Constitution gives all embryos and fetuses the right to life and the inherent right to be born, free from the current and future threats of unnatural death and involuntary sacrificial exploitation as subjects in medical experiments.

Relying on the reasoning of the Supreme Court in *Brown v. Board of Education,*[3] I will show by analogy and the use of paraphrase that the U.S. Supreme Court can overrule *Roe v. Wade*[4] on the grounds of equal protection alone. Such a result would not return the matter of abortion to the various states. The Fourteenth Amendment would thereafter prohibit abortion in every state.

What follows is a blueprint for constitutional change that will show that the jurisprudence and constitutional text exists for interpreting "person" to mean the same thing as a natural human being.

The Supreme Court has the power to reverse flawed precedent and can now do justice according to the rule of law. There is simply no place in American society for a caste system[5] that discriminates against non-persons.

I. Dividing Human Beings Into Persons and Non-persons

Does the word "person" in the Fourteenth Amendment include unborn human beings? If it does, then embryonic stem cell research, cloning, the destruction of IVF embryos, and abortion are potentially unlawful. If it does not, as a matter of logic and consistency, cloning, embryonic stem cell research, the freezing and destruction of embryos, and abortions ought all to be lawful, subject to rational regulation.

---

[3] Brown v. Board of Education, 347 U.S. 483 (1954).

[4] Roe v. Wade, 410 U.S. 113 (1973).

[5] Plyler v. Doe, 457 U.S. 202, 213 (1982) (Brennan, J.) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

To decide whether an unborn human being is a "person" in the constitutional sense, the first steps are to decide what is a human being, and when a human being begins its existence as a living organism. The next steps are to discover what is a person, decide whether a human being is equivalent to a person, and whether a person in the constitutional sense ought to be confined to natural persons born and unborn—that is, human beings that are fully human and are not artificial beings or any derivative or hybrid of any non-human animal species.

A. Human Being

What is a human being? Science informs us as to the answer. Putting aside philosophical differences, biology supplies the lowest common denominator of agreement between reasonable people. Human embryology is so advanced there is no doubt that a new human being is created at the time of conception.[6] Unlike living stem cells, sperm, or eggs, once there is union between a sperm and an egg, a new human being is created. It is a unique individual with its own DNA and is a member of the human race. This new human being, provided it survives natural and externally induced hazards, will develop according to its own genetic blueprint long after its birth, until the process of development and degeneration cause this organism to die of natural or external causes.

From the time of conception, a new creation, the zygote, has come into existence.

> [O]nce the zygote had been formed, *there is a new organism*, different from the two gamates taken separately, but the same as the fetus, the child and the adult into which it develops. For there is no discontinuity in the process of embryogenisis from the zygote stage to the fetal stage and beyond. No substantial changes take place after fertilization. The neo-conceptus, i.e. zygote and the entity after the first cleavages, *is the same individual organism as the adult into whom it later develops*.[7]

The new genome, contained in the zygote, is internally activated by a biochemical process and assumes control of the whole morphogenetic process from the beginning of embryonic development.[8] The zygote divides from one cell into two, from

---

[6] Erich Blechschmidt, The Beginnings of Human Life 16-17 (Heildberg: Springer-Verlag, 1977) ("This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenisis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."); and Clark Edwards Corliss, Patten's Human Embryology: Elements of Clinical Development 30 (1976) ("It is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."); *accord* Keith L. Moore, The Developing Human: Clinically Oriented Embryology 1, 14 (1982) ("This cell [zygote] results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is *the beginning of a human being*.").

[7] Angelo Serra & Robert Colombo, *Identity and Status of the Human Embryo: The Contribution of Biology, in* Identity and Status of Human Embryo: Proceedings of Third Assembly of the Pontifical Academy for Life 128, 159 (Juan De Dios Vial Correa & Elio Sgreccia eds., 1998) (emphasis added).

[8] *Id*.

two into four, and from four into eight.[9] These cells are called totipotent, because they have a full range of developmental capacity to turn into any type of tissues or organs that are part of the adult human body.[10] Totipotent cells are also able to differentiate differently in various environments, and are able to develop into a complete individual.[11] Once the eight-cell stage is reached, the cells lose their totipotency.[12]

The nature of totipotency is to execute a plan according to a given program.[13] Undisturbed by external intervention, left alone totipotent cells will carry out the plan nature intended in an ordered unique and coordinated process.[14] Given the right conditions, an isolated totipotent cell can start its own life cycle.[15] At that point, the cell could be considered a new biological identity.[16] Until then, totipotent cells remain part of the embryo without in any way diminishing its unique biological individuality.[17]

Assuming cell division, or cleavage, continues to occur, the resulting collection of cells is known as the morula.[18] The embryo continues to develop, and around the sixth day a fluid-filled space forms within the morula.[19] A blastocyst forms as a hollow ball of cells with an inner and outer cell mass.[20] Stem cells are part of this inner cell mass.[21] They are pluripotent, or undifferentiated cells, potentially able to become a source for any type of human cell, and able to live indefinitely in culture as a cell line.[22]

Scientists who want to engage in embryonic stem cell research remove these stem cells from the blastocyst, and can grow them indefinitely in petrie dishes for use in medical research. The good news is that these stem cells hold the potential promise of cures for Parkinson's disease, spinal cord injuries, various cancers, and many other possible afflictions.[23] The bad news is that the removal of stem cells from a blastocyst destroys that embryo, and in the process kills an unborn human being.

---

[9] Alan Holland, *A Fortnight of My Life is Missing: A Discussion of the Status of the Human Pre-Embryo*, 7:1J. Applied Philosophy 25, 25 (1990).

[10] *Id.*

[11] Serra & Colombo, *supra* note 7, at 172.

[12] Holland, *supra* note 9, at 29.

[13] Serra & Colombo, *supra* note 7, at 172.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Serra & Colombo, *supra* note 7, at 128–77.

[19] Holland, *supra* note 9, at 29.

[20] Melissa Serravallo, *They Can Dish It Out, But Can We Take It? What the Culturing of Stem Cells Means for Our Future*, previously *available at* http://www.gene-watch.org/magazine/vol13/13-2stemcell.htm moved to http://www.gene-watch.org/genewatch/archives.html (2000) (copy on file with author).

[21] *See id.*

[22] *Id.*

[23] *Id.*

This scientific search for the biological truth is entirely objective and reliable. I therefore assume all zygotes, embryos and fetuses are human beings from the time of conception until the time of natural death.[24]

B. Person

What is a person? Law informs us as to the answer. Scientific evidence of humanity is irrelevant. A person may be a human being after birth but not before. A person may be a human being after birth, but that human being may be denied life because of race, disability, or religion. The lawmakers' use of the word "person" is analogous to that of an elastic band, being stretched or retracted to accomplish a political agenda. If a human being is included in the definition of person, then there is legal sanctuary for that individual. If a human being is not included in the definition of a person, then there is no legal protection for that individual. This process is entirely subjective.

For example, designating a human being as viable based on respiratory function is the starting place when the state interest may in theory protect unborn human life.[25] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O'Connor stated:

> [D]ivergences from the factual premises of 1973 have no bearing on the validity of Roe's central holding, that viability marks the earliest point at which the state's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of Roe, at 23-24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may, if *fetal respiratory capacity* can somehow be enhanced in the future. [26]

Viability could have been judicially defined as the time when an unborn child's heart starts beating[27] or when its brain begins functioning,[28] or when an

---

[24] I am confining my discussion to "embryos" that are living organisms and a product of the union of sperm and egg. Outside the scope of the discussion is the status of a "parthenote," the result of activating an egg with its own chromosomes, which has no potential to develop into a human being. The status of an "ovasome," the result of transplanting chromosomes from a somatic cell into an ovaplast, which may develop in the same way as a normal embryo, is assumed to be the same as an embryo. *See generally* Ann A. Kiessling, *What is an Embryo? A Rejoinder*, 37 Conn. L. Rev. 1 (2004).

[25] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[26] *See id.* at 860 (emphasis added).

[27] At three weeks, by the 18th day, the embryo's one chambered heart begins beating. *See* Dr. David Chamberlain, *Life Before Birth*, at http://www.birthpsychology.com/lifebefore/fetalsense.html.

[28] The first brain cells are formed at two weeks. *See* Lennart Nilsson, A Baby is Born (1990). Brain waves are detectible in the fifth week, at 40-43 days. "The electrophysiologic rythym of the brain develops early. Detailed EEG tracings have been taken directly from the headend of 16 mm (crown-rump) human embryos at 40 odd days gestation, recovered from the termination of pregnancies (Japan) which revealed irregular slow waves, 0.2-2.0 per second at 10-90μv with superimposed fine waves of 30-40 per second at 1-5μv. Recordings from embryos of 45 to 120 days gestation through surface and depth electrodes have shown responses to sedative and stimulant drugs, normal sleep spindles, and the effect of lack of oxygen by paroxysmal high voltage slow waves and ultimate electrical silence.

embryo is able to feel pain.[29] After all, for persons, the termination of independent respiratory function does not define death, when an elderly or disabled person's heart is beating and the brain is alive.[30] Picking respiratory function is a practical result-oriented conscious subjective choice by justices to permit unrestricted first and second trimester abortions upon non-consenting incompetent human beings, for an unborn child's heart and brain are already functioning usually before the mother even discovers she is pregnant.

Unlike a born person, like Nancy Cruzan, who by an accident became an incompetent non-viable developed human being in the prime of her life, whose life enjoys the protection of law, an unborn human being's life may be legally extinguished without consent by the substituted judgment of another human being who solely holds an arbitrary power of life and death, usually without regard for the best interests of the unborn child.[31]

Arbitrary legal boundaries, like "viability," which are designed to expose unborn children to legally approved violence in the darkness of the womb, reflect prejudices, domination, and injustice. As a "discrete and insular" minority,[32] millions of unborn children, individually or as a group, are powerless to halt their future death and suffer the burden of invidious discrimination and painful loss of life.

The intra-uterine fetal brain responds to biochemical changes associated with oxygen deprivation by abnormal EEG activity similar to that produced in the adult brain. Thus at an early prenatal stage of life, the EEG reflects a distinctly individual pattern that soon becomes truly personalized." H. Hamlin, *Life or Death By EEG*, 190 JAMA 112, 113 (1964); s*ee also Life in the Womb*, at http://www.geocities.com/sonyaelflady/nrprenatal.htm.

[29] An unborn fetus feels pain at eight weeks of age. *See* Kerby Anderson, *Arguments Against Abortion* at http://www.lifeway.com/lwc/article_main_page/0,1703,A%253D156282%2526M%253D200166,00.html. Dr. Kanwaljeet Anand, a pediatrician at the University of Arkansas Medical Center and a former Rhodes Scholar, has testified that fetuses feel pain at 20 weeks of age, and possibly weeks earlier. *See* http://brownback.senate.gov/liunbornchild.cfm. Senator Brownback has introduced the Unborn Child Pain Awareness Act of 2005, S. 51, that would require disclosing to pregnant women the facts of fetal pain and gives the option to choose anesthetic to be given to their fetus prior to abortion. *See* http://thomas.loc.gov/cgi-bin/query/z?c109:S.51.

[30] Nancy Cruzan was revived following the loss of respiratory and cardiac function She was not viable, being rendered "incompetent as a result of her severe injuries," and diagnosed to be in a "persistent vegetative state." Yet the Supreme Court protected her life as non-viable incompetent human being, unless there was clear and convincing evidence that while competent, she gave her informed and voluntary consent for the removal of her nutrition in the event of non-viability. *See* Cruzan v. Missouri Department of Public Health, 497 U.S. 26, 280 (1990).

[31] *See id*. at 286.

[32] In *U.S. v. Carolene Products Co.*, the U.S. Supreme Court noted in footnote 4 that exacting judicial scrutiny of legislation is merited when the Court discovers prejudice against discrete and insular minorities (not defined) that are not protected by democratic or political processes. As a voiceless disenfranchised class, the unborn qualify for relief from laws that deny the unborn due process and equal protection. United States v. Carolene Products, 304 U.S. 144 n.4 (1938).

II. Dehumanizing Humans with Personhood Theories

I contend that a human being is also a person from the time of conception. I define a person as a fertilized living organism of the species *Homo sapiens*. I say "fertilized" to distinguish newly created life that, left to nature, will develop into a baby, and eventually into an adult, from a living cell of the human body that has no such future. My definition applies to all persons living both inside and outside the womb. This definition draws a bright line intended to give constitutional legal protection to all human beings, from the beginning to the very end of life. This protection includes the inalienable rights to life, liberty and the pursuit of happiness. In my view, the unborn are human beings, and as such, are to be respected as persons from the first moment of their creation.[33]

To accept that personhood is a legal right or moral status that may be "conferred" as opposed to an inalienable right reduces the "right" to life to a "privilege." Constitutional persons exercise the power of life and death over the members of the non-person caste through laws that bestow or remove personhood. Inequality is institutionalized and philosophically rationalized. The practical result is the loss of respect for the sanctity of unborn human life.

Personhood theories reveal a common theme—the depersonalization of members of the human family by cleaving personhood from the unborn human being. Our children are inheriting a world that is insensitive to the routine discrimination against the present caste of non-persons—embryos and fetuses, and possibly future non-persons—infants, the physically and/or mentally disabled, the brain injured, the elderly, those in a coma, and those who have incurable fatal illnesses.[34] This modern day discrimination between members of the human family is based upon the degree of physical, psychic and social development of the human being.[35]

There are numerous identifiable boundaries in the lifespan of a human being that may be used by the courts and governments to decide when to confer personhood upon a human being. Where to draw the line causes disagreement, for in the real world of human nature and development, there are no borders or boundaries. Criteria to define personhood rest on philosophic distinctions that create illusions and serve political purposes.[36] They are all artificial and arbitrary concepts that

---

[33] For a contrasting view, *see generally* Jens David Ohlin, *Note: Is the Concept of the Person Necessary for Human Rights?* 105 Colum. L. Rev. 209 (2005). Ohlin argues that personhood is a cluster concept comprised of biology, rational agency and conscious unity. These components are divisible and may be used to justify the denial of constitutional personhood to embryos and fetuses.

[34] Laura Palazzani, *The Meanings of the Philosophical Concept of Person and their Implications in the Current Debate on the Status of the Human Embryo*, *in* Identity and Statute of the Human Embryo: Proceedings of Third Assembly of the Pontifical Academy for Life 74, 88 (Juan de Dios Vial Correa & Elio Sgreccia eds., 1997).

[35] *Id.* at 89.

[36] *Id.* at 83–88; Ronald B. Dworkin, Life's Dominion 23 (1993); Clifford Grobstein, Science and the Unborn: Choosing Human Futures (1988); Francis C. Wade, *The Beginning of Individual Human Life from a Philosophical Perspective*, *in* Human Life and Health Care Ethics 22 (James Bopp, Jr. ed., 1985);

purport to neatly and fairly divide the continuum of life that varies for each unique human being.

Some philosophers and legal scholars, whom I call segregationists, argue that unborn human beings are not persons because they do not possess the characteristics of a person. A common technique in this argument is to generate a list of characteristics that define when personhood begins. The following list represents many of these artificial boundaries, which correspond to physical, psychic and social development of the human organism at various stages of development. They include:

1 Moment of *conception* (assignment of genetic identity);

2. Beginning of the *primitive streak* (after which time twinning is no longer possible);

3. *Implantation* of the embryo in the womb;

4. Formation of the nervous system and *sentience* (the ability to feel *pain*);

5. Formation of the cerebral cortex of the brain (the ability to reason is a concern, as well as the logic of paralleling "brain life" with "brain death");

6. *Quickening* (when the mother can feel the baby move);

7. When the fetus looks like what people expect a human being to look like (*morphological similarity*);

8. Fetal *viability* (when a pre-mature baby can survive outside the womb with medical assistance and the help of others);

9. *Birth* (the moment of fully emerging from the mother's body—as distinguished from partial birth);

10. Acquisition of *self-consciousness*;

11. Acquisition of ability to *reason*;

12. Demonstration of *intelligence* (a minimum I.Q.);

13. *Self-determination* (assertion of will);

14. *Socialization* (the formation of conscious relationships to other people);

Gary B. Getler, *Brain Birth: A Proposal for Defining When a Fetus is Entitled to Human Life Status,* 59 S. CAL. L. REV. 1061 (1986); Agota Peterfy, *Fetal Viability as a Threshold to Personhood*, 16 J. LEGAL MED. 607 (1995); John A. Robertson, *Embryos, Families, and Procreative Liberty: the Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 972 (1986).

15. *Memory* (the ability to remember); and,

16. *Aspirations* (the ability to look forward to achieving hopes and dreams).

Segregationists claim it is morally acceptable to experiment upon embryos up to fourteen days after the time of conception, arguing that these organisms are not even human beings. In rejecting the argument that embryos younger than fourteen days of age are not human beings, Professor Alan Holland writes:[37]

> You and I are human beings. *There is only one concept of 'human being'—the biological one. A human being is simply a living organism of the species Homo sapiens.* In contemplating embryo research we must describe accurately, honestly and without sentimentality what it is that we propose to do. We must not hide from ourselves (what I believe to be) the fact that when we experiment on human embryos we experiment on human beings.[38]

One might disagree with Holland by presuming that the proper form of a human being is what our imagination conjures up when we are asked to picture a human being in our minds. Most of us would think of a reflection of ourselves. Why would we not imagine a fetus, an ill or disabled person, or a person of a different race or sex? Our mental image of a human being changes when we realize an embryo can never be a future human being because *it already is a human being*.[39] An embryo is not only a human being; it is also a person. Philosopher Diane Irving sums up the argument: "'Personhood' begins when the human being begins."[40]

In attempting to identify the criteria needed to be a human being, the one thing that is relevant is ignored—an embryo already possesses all the characteristics it needs to qualify as a human being by its very nature, appropriate to its age and stage of development. To suggest an embryo must possess the characteristics found in a normal human being at a different age and stage of development is simply not a credible argument, even if one assumes such "characteristics" are readily definable.[41]

To be a person, I contend that it is enough just to be a fertilized living human organism of the species *Homo sapiens*.[42] Human development is a rational continu-

---

[37] Alan Holland, *supra* note 9, at 35–36 (emphasis added).

[38] *Id.*

[39] *See id*. at 25.

[40] Diane Nutwell Irving, *Scientific and Philosophic Expertise: An Evaluation of the Arguments on "Personhood,"* 60 Linacre Q. 18, 18 (1993).

[41] *See id*. at 28.

[42] Others disagree with me. Clifford Grobstein argues that what matters is not the beginning of life, but of self. For unborn human beings, self begins when the embryo or fetus may be generally visually recognized as human, sufficient to evoke an empathetic response in the observer. Clifford Grobstein, From Chance to Purpose 84 (1981). John Harris takes the position what matters is not when life begins, but when life begins to matter morally. John Harris, The Value of Life 12 (1985). Lawrence Becker will not confer the status of personhood until the fetus has completed its metamorphosis and assumed its basic morphology (just like the butterfly is not yet a butterfly when it is in the form of a

ous process of generating the human organism as well as the rational process of degeneration prior to death. Medical doctors know there is an innate, organized and coordinated pattern to body functions in the living and in the dying that by their very nature are rational.[43]

The science of embryology proves that new human life begins at the time of conception.[44] Still, many pro-choice advocates deny the objective truth of this biological fact and maintain that embryos and fetuses are only potential life. Others, like Judith Jarvis Thomson assume for the sake of argument that a fetus is a human being and a person from the moment of conception.[45] Nonetheless, she ably defends abortion, arguing no woman has the moral obligation to carry her unborn fetus to term.[46] To illustrate her point, she invents a story about someone waking up to discover her body plugged into a male violinist who would die without life support from a fatal kidney disorder, unless the violinist remains plugged in over the next 9 months.[47] The analogy is to an unwanted pregnancy. Thomson decides it is morally permissible to unplug the violinist, without considering whether the mother has a fiduciary duty to be merciful as a "good neighbor" to her unborn child. Anita L. Allen supports Thomson and argues the hypothetical fact of "connection" to the violinist has no moral bearing on the woman's right to choose to remain connected for the next nine months.[48]

Thomson is right that there is no constitutional obligation to be a "Good Samaritan."[49] However, it is this aspect of unselfish love and service to "the least among us" that distinguishes us from others who may be less charitable. It is our love for our neighbor and whether we care for and protect the poor, the helpless and the most vulnerable among us, which determines whether we live in a desirable, civilized society.

Philosopher Michael Tooley, in support of searching for a moral justification of abortion and infanticide asks, "[w]hat properties must something have to be a person . . . [a]t what point in the development of the species *Homo sapiens* does the

---

caterpillar or pupa). Lawrence C. Becker, *Human Being: The Boundaries of the Concept*, 4 PHIL. & PUB. AFFAIRS 334, 337–338 (1975). Joseph Donceel believes a person cannot exist until the primitive streak develops (when the neurological system of the embryo begins to form into what becomes a spinal cord). Joseph Donceel, *Abortion: Mediate or Immediate Animation*, 5 CONTINUUM 167, 170 (1967).

[43] *See generally* SHERWIN B. NULAND, HOW WE DIE: REFLECTIONS ON LIFE'S FINAL CHAPTER (1994); SHERWIN B. NULAND, HOW WE LIVE (1998) (originally published as SHERWIN B. NULAND, THE WISDOM OF THE BODY (1997)); and PAUL BRAND & PHILIP YANCY, FEARFULLY AND WONDERFULLY MADE (1987).

[44] *See* Erich Blechschmidt, *supra* note 6.

[45] Judith Jarvis Thomson, *supra* note 2, at 47-48.

[46] *Id.* at 44.

[47] *Id.* For a response to Thomson, *see* Francis J. Beckwith, *Personal Bodily Rights, Abortion, and Unplugging the Violinist*, 32 INT'L PHILOSOPHICAL Q. 105 (1992) AND ROBERT L. BARRY, MEDICAL ETHICS: ESSAYS ON ABORTION AND EUTHANASIA 39–63 (1989).

[48] Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 468 (1987).

[49] *See* THE HOLY BIBLE, *Luke* 10:25–37.

organism possess the properties that make it a person?"[50] Tooley uses the analogy of human slavery to make the point that most people would find slavery of adult human beings morally unacceptable because, at a minimum, adults have experiences and are capable of expressing thought with language.[51] Tooley argues that an embryo, fetus or newborn infant has none of these properties and cannot be regarded as a person.[52] Tooley maintains that an organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity. This is known as the "self-conscious" requirement.[53]

Tooley thus justifies the legalization of infanticide and the euthanasia of persons who are in a persistent vegetative state. What Tooley initially failed to recognize is that human beings at various times move in and out of self-consciousness as fate and circumstances determine if we continue to meet personhood criteria. The ability to enjoy self-consciousness in the case of the unborn is merely a transient state that lasts just a small fraction of one's lifetime. While part of our society may accept the termination of the unborn, it is not ready to always accept Tooley's position and reclassify a person as a non-person.

Philosopher Joseph Fletcher too has been greatly influential in advancing lists of criteria to remove fetuses from the human family. "What is critical is personal status, not merely human status."[54] Fletcher makes no apologies for his goal to promote abortion or his undisguised utilitarian philosophy: "The one [decision] which results in the greater good for people is the correct one. On this basis there is an open and shut case for abortion, obvious and overwhelming; it can be justified very often, sometimes for reasons of human health, sometimes for reasons of human happiness."[55]

Fletcher frankly admits that for him ethics is the business of providing rational critical reflection about the problems of the moral agent, whether that problem is in biology, medicine or law.[56] Ethics in Fletcher's world are result-driven. When Fletcher wanted to put an end to compulsory pregnancy, the means to this end was the creation of a list of criteria to disqualify the fetus from personhood. The ethics of abortion itself, the killing of innocent human life, was irrelevant.

> If we adopt the sensible view that a fetus is not a person, there is only one reasonable policy, and that is to put an end to compulsory pregnancy. The ethical principle is that pregnancy when wanted is a healthy process, *pregnancy when not wanted*

---

[50] Michael Tooley, *Abortion and Infanticide, in* Bioethics: An Anthology 21, 23 (Helga Kuhse & Peter Singer, eds. 2000); For a rebuttal, *see* Patrick Lee, Abortion and Unborn Human Life 7–45 (1996).

[51] Tooley, *supra* note 50, at 23–24.

[52] *Id.* at 23.

[53] *Id.* at 24.

[54] Joseph Fletcher, Humanhood: Essays in Biomedical Ethics 11 (1979).

[55] *Id.* at 136.

[56] *Id.* at 12.

> *is a disease*—in fact, a venereal disease. The truly ethical question is not whether we can justify abortion, but whether we can justify compulsory pregnancy. If our ethics is [sic] of the humane brand we will agree that we cannot justify it, and would not want to. [57]

So far as I can discover, every segregationist philosopher who promotes a list of attributes needed to qualify as a person has made sure that they themselves fit the criteria they propose for others. For example, Tooley later modified his theory to ensure that he would not be considered a non-person during the time he slept. These lists are designed to ensure that embryos, fetuses, and in some cases, neonates will fail the test of "personhood." These lists are not designed to be inclusive of all members of the human family, but are instead meant to exclude classes of human beings who fail to meet the criteria of what a "person" is.

The effect of segregationist philosophy creates a facially neutral and socially acceptable "objective" means to discriminate between human beings in order to transform an immoral act into an ethically acceptable and legal one to achieve desired goals. Abortion, selective reduction, embryonic stem cell research, cloning, the creation of human chimeras and active euthanasia may then be done with a clear conscience, peer approval and with legal immunity.

Personhood theories will remain so long as there is prejudice against unborn human life and a desire to perpetuate an unequal class system in America. However, immoral concepts have no coercive power unless they are embodied in law. Political and judicial institutions have the power to reject and hopefully the wisdom to recognize clever arguments that ask them to condone and sanction immoral acts. The story of The Emperor's New Clothes[58] is an apt reminder of the wisdom and power of an innocent child who spoke the truth grown-ups lacked the courage to say.

Without a precise judicial answer as to what constitutes a person or a human being, the question of when human life begins remains open as a matter of jurisprudence. A fluid definition of "person" fits new societal goals and circumstances

---

[57] *Id.* at 138.

[58] Everyone said, loud enough for the others to hear: 'Look at the Emperor's new clothes. They're beautiful!' 'What a marvelous train!' 'And the colors! The colors of that beautiful fabric! I have never seen anything like it in my life!' They all tried to conceal their disappointment at not being able to see the clothes, and since nobody was willing to admit his own stupidity and incompetence, they all behaved as the two scoundrels had predicted. A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage. 'The Emperor is naked,' he said. 'Fool!' his father reprimanded, running after him. 'Don't talk nonsense!' He grabbed his child and took him away. But the boy's remark, which had been heard by the bystanders, was repeated over and over again until everyone cried: 'The boy is right! The Emperor is naked! It's true!' The Emperor realized that the people were right but could not admit to that. He thought it better to continue the procession under the illusion that anyone who couldn't see his clothes was either stupid or incompetent. And he stood stiffly on his carriage, while behind him a page held his imaginary mantle.

Hans Christian Anderson, *The Emperor's New Clothes* at: http://www.deoxy.org/emperors.htm.

as they arise.[59] Personhood is analogous to a rubber band that can be stretched or contracted to decide who is or is not presently eligible to be a member of the human family. Criteria to decide who is eligible to be or remain a person are limited only by one's imagination.

Personhood theories violate the respect for life and human dignity basic to the natural law.[60] Removing the status of personhood from living human beings is an affront to human dignity and the essence of what it means to be human. Substance is what matters, not form. At the very core of our humanity, we are all the same and share a common biological origin. Deviance from this creates inequality before and under the law, invidious discrimination and disrespect for human life. All this is as old as the history of mankind.

What is new are the scientific accomplishments made possible by the advance of biotechnology, and the exploitation of a new class of non-persons. Using biotechnology as an opportunity and excuse to create, destroy and manipulate human embryos is nothing less than legalized homicide under the mask of good intentions.[61] Just because something is scientifically achievable does not automatically mean that it is morally right.

I reject the arguments for personhood as these theories lack respect for human life. In a single lifetime, a human being will be at different times a person or a non-person. Fairness and equality require constant respect for human life throughout the continuum of human life in all its forms. We live in community, share our common humanity and depend on one another. When someone is weak and vulnerable, this is our opportunity to demonstrate our love, mercy and kindness.

III. Segregationist Theories Acquire the Force of Law

The legal question of whether an unborn child, presumed to be a human being, was a constitutional person acquired national importance in 1973, when the Supreme Court in *Roe v. Wade*[62] ruled an unborn child was not a person until it was born. The decision in *Roe v. Wade* opened the door for the legal termination of the life of any form of unborn human life (embryo or fetus) at any time prior to birth within a woman's body.

Justice Blackmun, who authored the majority opinion, avoided answering the question of when human life begins:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compel-

---

[59] Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 Stan. L. Rev. 599, 601 (1991).

[60] *See generally* John Finnis, Natural Law and Natural Rights (1980).

[61] *See* Mauro Cozzoli, *The Human Embryo: Ethical and Normative Aspects*, *in* Identity and Statute of Human Embryo: Proceedings of Third Assembly of the Pontifical Academy for Life 260, 286–87 (Juan de Dios Vial Correa & Elio Sgreccia, eds. 1998).

[62] 410 U.S. 113 (1973).

> ling interest in protecting that life from and after conception. *We need not resolve the difficult question of when life begins.* When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer.[63]

It was unnecessary to decide this question, as the answer did not matter, since the Court specifically held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[64] An unborn being was therefore not a "person" and had no right to life. Personhood was to be conferred by operation of law only after a baby was fully born. The constitutional right to life was thus reserved for those children chosen by love or fate to be born. Justice Blackmun suggested that if the unborn were constitutional persons, the case for abortion would collapse.[65]

Roe v. Wade declared that unborn human beings were not "persons" and accordingly did not have any constitutional right to life and liberty.[66] This result was in line with the Court's review of history that disclosed "the unborn have never been recognized in the law as persons in the whole sense."[67] The decision also fully restored the freedom to have an abortion prior to quickening that existed at the time the Constitution was adopted.[68]

Even though the Court denied personhood to unborn human beings, the Court also held the right to privacy did not elevate the decision to have an abortion into an unqualified or absolute right.[69] The "right" to an abortion was subject to state interests in regulation. The Court identified two complementary state interests that become increasingly compelling as the fetus develops biologically. First, the state has a valid interest to regulate the abortion industry by regulations that are "reasonably relate[d] to the preservation and protection of maternal health."[70] This state interest commences at the end of the first trimester of pregnancy. Prior to this time, the decision to abort is unregulated and is the exclusive decision of the mother, who presumably relies upon the advice of her abortion provider.[71] Second, a state interest is triggered at the point of fetal viability, when the fetus is presumed to have the capacity to have a meaningful life outside its mother's womb.[72] In the third trimester, the state is permitted to "proscribe abortion" by regulation "except

---

[63] *Id.* at 159 (emphasis added).
[64] *Id.* at 158.
[65] *Id.* at 156–57.
[66] *Id.* at 158.
[67] *Id* at 162.
[68] *Id* at 140.
[69] *Id.* at 155.
[70] *Id.* at 163.
[71] *Id.*
[72] *Id.*

when it is necessary to preserve the life or health of the mother."[73] In this manner, the Court balanced the complementary interests of the state and the pregnant woman, but failed to consider the interests of the unborn.

The unborn are thus denied the right to life under the Constitution, because the unborn are not constitutional persons and are therefore legally unequal to a pregnant woman. As "things," or quasi-property, the unborn are still subject to government regulation. Just as there are federal and state regulations that limit individual liberty to cut down trees, slaughter domestic animals, and control hunting and fishing seasons of wildlife, state laws may protect the health of pregnant women and regulate abortion. Unlike state laws that protect animals from cruelty and excessive slaughter, there are no such limits regarding the abortion of unborn human beings.

In the 1992 case of *Casey*, the majority of the Supreme Court, led by Justices Souter, Kennedy and O'Connor, retained and reaffirmed what they believed was the central holding in *Roe*.

> Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.[74]

In rejecting for the sixth time the invitation of both the amicus curiae and the United States' to overrule *Roe v. Wade*,[75] the Court reaffirmed that it was "settled" that the Constitution places limits on a State's rights to interfere with a person's liberty to make decisions on family and parenthood.[76] "Person" of course means a pregnant woman, and does not include the fetus.

Left unconsidered again was the life and liberty interests of the unborn. The Court in *Casey* did not engage in a balancing analysis between the inferior life interest of the unborn human being and the superior liberty interest of its mother. Departing from *Roe*, the Court abandoned the trimester framework, as going too far, for it did not recognize enough the state's legitimate interest in regulating abortion prior to fetal viability.[77] However, even though the Court recognized the state's profound

---

[73] *Id.*

[74] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

[75] *Id.* at 843.

[76] *Id.* at 849.

[77] *Id.* at 873, 878. The Court's experience was that a pregnant woman was not deprived of the

interest in "potential life" throughout the duration of pregnancy,[78] the Court chose once again not to confer constitutional personhood on the unborn.

Justice Stevens, in concurrence with the majority, correctly observed that there has never been a single dissent (let alone a majority opinion) by any Justice on the fundamental issue decided in *Roe* that the fetus was not a "person" within the language and meaning of the Fourteenth Amendment.[79] This is why the termination of "life" by abortion is not entitled to constitutional protection, nor is there a competing life and liberty interest to the life and liberty interest of the pregnant woman.[80]

Justice Blackmun made the same point in *Casey*, and added that even the Solicitor General in oral submissions before the Court did not question the constitutional non-personhood status of the unborn child.[81] The state interest in regulating the lives of unborn children is simply "a legitimate interest grounded in humanitarian or pragmatic concerns."[82] Since *Roe*, the Supreme Court has not been presented with a challenge concerning the legal status of the personhood of an unborn human being. Instead, the cases have centered on a multitude of state regulations that are designed to sway a woman's choice,[83] or chill a physician's willingness to provide abortion services.[84]

Casey lacked an investigation by the Court to answer the question posed in *Roe* of when a human being is created. Justice O'Connor candidly admitted, that one's beliefs would be affected by whether the unborn is a "life" or "potential life." She wrote:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, *depending on one's beliefs, for the life or potential life that is aborted.*[85]

---

ultimate choice to have an abortion even when the state regulated abortion prior to fetal viability in the first trimester. *Id.* at 875.

[78] *Id.* at 878.

[79] *Id.* at 913 (Stevens, J., concurring in part and dissenting in part).

[80] *Id.*

[81] *Id.* at 932 (Blackmun, J., concurring in part and dissenting in part).

[82] *Id.*

[83] *Id.* at 916–17 (Stevens, J., concurring in part and dissenting in part). *See also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); *accord* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

[84] Colautti v. Franklin, 439 U.S. 379 (1979).

[85] Casey, 505 U.S. at 852 (emphasis added). Justice Scalia, concurring in part and dissenting in part, agreed with Justice O'Connor that it was a value judgment whether embryos and fetuses were human life at all, and noted that in some societies, newborn children were not yet human and incompetent elderly no longer so. According to Justice Scalia, this value judgment is one to be made by the elected representatives of the people, in a democratic manner. If the various states wished to permit abortion on demand, that was permissible. The Constitution does not require abortion on demand;

Having stated this, the Court in *Casey*[86] followed *Roe*[87] and used the term "potential life" to describe the unborn. These references are evidence that the Court never has and does not presently recognize the unborn as alive, as persons, or even as human beings.

The view that the unborn are not alive and represent only potential life is highly controversial. Whatever term one might use to describe the unborn, there is no biological basis to deny that the unborn, from the first moment of their creation at conception, are fully alive and are fully human. This language of "potential life" contradicts what many people know to be true and defies indisputable evidence of the living unborn available to the public.[88] Justice O'Connor's plurality opinion in

---

it is silent on the issue, and if the states at one time legally proscribed abortion, the states could now legalize abortion. *Id*. at 979-80, 982.

[86] *Id.* at 859. "Roe's scope is confined by the fact of its concern with post conception *potential* life." *Id*. (emphasis added). "On the other side of the equation is the interest of the State in the protection of *potential* life," and "the State has legitimate interests in the health of the woman and in protecting the *potential* life within her." *Id.* at 871 (emphasis added). "[R]egulations designed to protect the woman's health, but not to further the State's interest in *potential* life, are permitted during the second trimester" *Id.* at 872 (emphasis added). "Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the *potential* life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in *potential* life throughout pregnancy." *Id.* at 876 (emphasis added). "[T]he interest in protecting *potential life* is not grounded in the Constitution." *Id.* at 914 (Stevens, J., concurring in part and dissenting in part) (emphasis added). In part, Justice Stevens reached his conclusion by "weighing the State's interest in *potential life* and the woman's liberty interest." *Id.* at 916 (emphasis added).

[87] Roe v. Wade, 410 U.S. 113, 162–163 (1973).

> [T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the *potentiality of human life*.

Id. (emphasis added). "With respect to the State's important and legitimate interest in *potential life*, the 'compelling' point is at viability." *Id.* at 163 (emphasis added).

[88] *See* J. Madeleine Nash, *Inside the Womb*, TIME, Nov. 11, 2002, at 68. *See also* C.W. Kischer, *When Does human Life Begin? The Final Answer*, 70(4) LINACRE Q. 326-39 (2003). *See generally* ALEXANDER TSIARAS & BARRY WERTH, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS (2002). Amazon.com promotes this book in the following manner:

> [T]hrough Alexander Tsiaras' remarkable achievements in medical imaging technology, parents can *see*, for the first time, the awe-inspiring process of a new life unfolding, in stunning, vivid detail. . . . As biologists have decoded the molecular basis of life, computer scientists have developed non-invasive, three-dimensional techniques for visualizing the body. Alexander Tsiaras has been a pioneer in merging these explorations and discoveries. He has created a virtual camera studio that enables him to view a human body or any part of it individually, scan it, enlarge it, rotate it, adjust its transparency so that we can view inside a living being, and light it from any angle. The result is an ability to illuminate the unseen elements that make us who we are, and the miraculous images in *From Conception to Birth*.

Editorial Reviews, Amazon.com, *at* http://www.amazon.com/exec/obidos/tg/detail/-

Casey stated *Roe* could be reversed if its basic premises of fact were erroneous or based on ignorance that rendered the Court's prior central holding to be unjustifiable.[89] It is a myth to pretend unborn human life is "potential life." The truth is that an unborn human being is a life with potential. Expounding the myth of "potential life" is the kind of major factual error that supports a reversal of *Roe*.

Nearly 30 years after *Roe*, the right to an abortion is entrenched in American law. Before viability, a pregnant woman has a right to choose to terminate her pregnancy.[90] "'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional."[91] An "undue burden [means]. . . a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion

---

/0385503180/ref=pm_dp_ln_b_6/103-6505130-0674262?vglance&s=books&vi=reviews. When a woman discovers she is pregnant (usually days after she has missed her menstrual cycle), there is a live human being within her that has a beating heart and can feel pain:

> By the end of the second week of pregnancy, there is a distinct embryo present. The fetus has a developing brain and a rudimentary heart. By the end of the third week of pregnancy, the fetus has the beginnings of vertebrae, developing eyes and ears, a closed circulatory system (separate from the mother's), a working heart, the beginnings of lungs, and budding limbs. By the end of the fourth week of pregnancy, the fetus has a developing nose, and a pancreas. By the end of the fifth week of pregnancy, the fetus has the beginnings of vertebrae, a bony jaw and clavicle, developing eyes, ears, and nose, a closed circulatory system, a working heart, lungs, limbs, hands, feet, and a pancreas. By the end of the sixth week of pregnancy, the fetus has a vertebral column, a bony jaw and clavicle, a primitive cranium, ribs, a developing nervous system, a closed circulatory system with a working heart, developing eyes, ears, and nose, lungs, limbs, hands, feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid body, and germs of teeth. By the end of the seventh week of pregnancy, the fetus has a vertebral column, a bony jaw and clavicle, a primitive cranium, ribs, femur, tibia, palate, upper jaw, developing nervous system, a closed circulatory system with a working heart, developing eyes, ears, and nose, lungs, arms, legs, hands, feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid body, germs of teeth, and the beginnings of muscles. By the end of the second month of pregnancy, the fetus has a vertebral column, a bony jaw, clavicle, and palate, a cranium, ribcage, femur, tibia, forearms that can be distinguished from arms, and thighs that can be distinguished from legs, a developing nervous system, sympathetic nerves (meaning the fetus can feel pain), a closed circulatory system and a working heart, eyes, developing ears and nose, lungs, arms and forearms, legs and thighs, hands and feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid, germs of teeth, and developing muscles.

Gray's Anatomy, *The Form of the Embryo at Different Stages of Its Growth, at* http://www.yahooligans.com/reference/gray/15.html (last visited Nov. 16, 2003). An embryo becomes known as a fetus (Latin for 'young one or offspring') at eight weeks of age. "Everything is now present that will be found in a fully developed adult." *Your Right to Know the Facts Before Your Baby Is Aborted*, Diskbooks Electronic Publishing, *at* http://diskbooks.org/factsabort.html (last updated Sept. 9, 2003).

[89] *Casey*, 505 U.S. at 855.

[90] Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

[91] *Id.* (quoting *Casey*, 505 U.S. at 877).

of a nonviable fetus."[92] After viability, the state may promote its interest in the fetus to regulate, and even proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[93] These legal principles are the framework for the peculiar institution of abortion, where a mother is legally permitted to choose prior to her due date, which, if any, of her children will live or die.

Within these legal confines, the State of Nebraska attempted to proscribe a gruesome method of post viability abortion known as a D&X or "partial birth" abortion. In this procedure, the person performing the abortion partially delivers vaginally a living unborn child before killing it and completing the delivery.[94] Nebraska's legislation criminalizing this procedure was held unconstitutional because the law lacked an exception for the preservation of the health, not the life, of the mother, and it imposed an undue burden on a women's ability to choose a partial birth abortion.[95] Cruelty and pain to the fetus was irrelevant in the Court's determination of the constitutional issues. The Court ignored the key question of whether a fetus, and in particular a partially born fetus, is a constitutional person. Again, not one Justice, even in dissent, referred to the fetus as life, as opposed to "potential life."

The continued denial of legal personhood invites judges to turn a blind eye to reality. Personhood is an imaginary status that cannot alter the biological fact of humanity:

> And personhood is not a matter of fact. It is not a thing or a concrete property inhering in a thing. It is a status, legal and moral, that we confer as a normative matter at a certain point in human development. Stripped of any reifying (or theifying) premises, personhood is no different in its conceptual structure from another status conferred later in life: adulthood.[96]

Legal jurisprudence that is disconnected from biological truth is of little worth in the debate over the value of incipient human life. The legal and moral distinction between person and human being must be harmonized if there is to be true equality and fairness among all members of the human family. Justice requires that there be laws to uphold the sanctity of all human life, from the very beginning to the very end of life. Otherwise, no one's life is secure, because law without justice leads to tyranny.

These Supreme Court cases suggest that it is time to think "outside of the box" and directly answer two questions. Are the unborn living human beings from the time of conception? Ought constitutional personhood be conferred on unborn human beings from the time of conception until the time of natural death?

---

[92] *Id.*

[93] *Id.* (quoting *Casey,* 505 U.S. at 879).

[94] No anesthetic is given to the unborn child during this procedure. *See generally*, Effects of Anesthesia during a Partial-Birth Abortion: Hearing before the Subcomm. of the Constitution of the Comm. on the Judiciary, 104th Cong. 313 (1996).

[95] *Stenberg*, 530 U.S. at 929–30.

[96] Jed Rubenfeld, *supra* note 59, at 601.

Individual states may amend their state constitutions to legally define a human being as beginning at the time of conception and to confer personhood upon the unborn. Individual states may enact criminal, tort and other laws that outlaw abortion, violence against wanted unborn human beings, embryonic stem cell research, and cloning. Such steps are in conflict with the Supreme Court jurisprudence that denies constitutional personhood to the unborn. Legal challenges will inevitably lead to a decision by the Supreme Court of the United States, and the opportunity to reverse *Roe v. Wade* will again emerge. If the Supreme Court were to rule that the meaning of person in the Fourteenth Amendment includes the unborn human being, then all states, including those that deny personhood to the unborn, would be compelled to follow suit.

Anticipating this strategy, Justice Stevens in *Casey* cited legal scholar and philosopher Ronald Dworkin, who rejects the notion that states could "overrule the national arrangement" by declaring that fetuses are persons and ought be conferred constitutional rights competitive with pregnant women.[97] According to Dworkin, states do not have the power to increase the constitutional population by unilateral decision and thereby decrease rights the Constitution presently gives to women.[98] Justice Stevens omits any reference to the Ninth[99] and Tenth[100] Amendments to the Constitution, and relies on his reference to Dworkin to assert "as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have . . . a 'right to life.'"[101]

Since it is not constitutionally prohibited to interpret the word "person" to include embryos and fetuses, and since the power to confer personhood upon a human being is not assigned by the states to the United States by the Constitution, there is a prima facie case that, notwithstanding any chilling effect created by Justice Stevens, the states may confer constitutional personhood upon fetuses and embryos. This is consistent with the decision of the Supreme Court in *Webster v. Reproductive Health Services,*[102] where a Missouri statute designed to protect unborn children in a non-abortion context was held to be constitutional. It is unrealistic to assume abortion will be totally banned, or that many pro-choice supporters will peacefully accept constitutional reform that grants civil rights to the unborn. What is possible is to elevate the rights of the unborn to equal the rights of those born alive, including pregnant women, so that in any balancing analysis, the right to life

---

[97] *Casey*, 505 U.S. at 914 n.2 (Stevens, J., concurring in part and dissenting in part).

[98] *Id*. (quoting Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. Chi L. Rev. 381, 400–01 (1992)).

[99] U.S. Const. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[100] U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[101] *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part).

[102] Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

of the unborn will ordinarily prevail over the liberty interest of the pregnant woman unless she is in danger of imminent death.

Until the Supreme Court decides otherwise, a woman's right to terminate her pregnancy continues as an exercise of her personal liberty. But there is a limit to personal liberty when its exercise is incompatible with not just the liberty of another, but the life of another person. Assuming one day unborn human beings will be conferred constitutional personhood from the time of conception, the liberty interest of the mother will then ordinarily yield to the life interest of her unborn child. One exception may be when the life of the mother is at risk, such as occurs in an ectopic pregnancy, when the embryo has implanted into the fallopian tube instead of its proper place in the womb. In this situation, both the mother and the unborn human being inside her will die. If the only medical option left is abortion, and the mother's life will be saved, a strong moral case based on self-defense can be made to justify an abortion in this rare situation.[103]

If constitutional personhood is conferred upon the unborn, a woman's legal reproductive choice arguably ends at the time of conception. Prior to conception, a woman has a right to exercise her liberty and choose any method of contraception if that method does not harm another human being. For example, a condom satisfies this condition, unlike the "morning after pill,"[104] which prevents an embryo from adhering to the lining of the uterus, thereby causing its death.[105] Laws permitting certain forms of contraception that are not abortifacients are consistent with the holding in *Griswold v. Connecticut*.[106] In every case, however, reproductive choice ends when a woman is pregnant, for she has already reproduced, as she is with child and is a mother.[107] Reproductive choice would no longer exist for a woman who has become a victim of rape or contraception that failed.

These consequences of bestowing constitutional personhood on the unborn would cause major upheaval in society, similar to the abolition of slavery and racial desegregation. Historically liberal thinkers have supported legal reform to achieve

---

[103] Assuming it is not yet medically possible to transplant the embryo to the womb or to another place where it can survive and thrive, the doctrine of double effect permits an operation to save the life of the mother even if its unintended effect is to cause the death of the embryo.

[104] The morning after pill is not a contraceptive, but is an abortifacient that causes a chemically induced abortion. In its common form it contains estrogen and certain progestin hormones. Emergency Contraceptive Pills (ECPs): The Truth, the Whole Truth and Nothing But the Truth, Life Insight 3 (1998). Planned Parenthood argues this pill is a contraceptive. Planned Parenthood Fed'n of Am., Inc., E*mergency Contraception, at* http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html (last visited Oct. 9, 2003).

[105] It is factually wrong to suggest human life does not begin until implantation has occurred. Life begins earlier, at conception. *See* Emergency Contraceptive Pills (ECPs)*, supra* note 104, at 2. *But see* Planned Parenthood's argument on biological grounds that ECP's are not abortions, *at* http://ppfa.org/pp2/portal/files/portal/medicalinfo/ec/fact-contraception-abortion.xml.

[106] Griswold v. Connecticut, 381 U.S. 479 (1965).

[107] Rosemary Bottcher, *How Do Pro-Choicers "Fool" Themselves? in* Prolife Feminism: Different Voices 57 (Gail Grenier Sweet ed., 1985).

justice, for inequality and discrimination were viewed as evils that had to be eradicated, even at the high price of sacrificing one's own flesh and blood. Those who today consider themselves liberal thinkers and advocates of equality and the rule of law are compelled to re-examine the question of abortion, for it is at the root of all debates pertaining to the current exploitation of living unborn human beings, and the ongoing deaths of millions of unborn human beings.

IV. The Liberal's Dilemma

Liberal equality at its core promotes the idea that basic political and civil rights belong equally to each person and should be protected by law. These rights have priority in our society.[108] That is why the idea of equal opportunity is so appealing in a society that values individual freedom. The prevailing view of liberalism is that people's fate should be determined by their choices and not by the circumstance they happen to be in.[109] But what if your circumstance is one of being an unborn human being destined to be aborted?

Being morally equal to one another is integral to John Rawls' concept of the "Original Position." Central to Rawls' theory of justice[110] is the proposition that inequalities are allowed if they "improve" one's initial share of primary goods, such as life and liberty, but are not allowed if they "invade" one's fair share.[111] In his hypothetical of the Original Position, people are behind a "veil of ignorance" so that all are similarly situated, without knowing in advance one's future.[112] This forces people to choose principles of justice that are fair so that no one is advantaged or disadvantaged by the outcome of natural chance or the contingency of social circumstances.[113]

Take, for example, a fetus that does not know in advance whether it will be aborted. Behind the "veil of ignorance," a fetus would presumably choose principles of justice consistent with the goal of having an equal opportunity to be born. The same may be said of an embryo that seeks to avoid a fate of exploitation and destruction. Both the fetus and embryo are in the same position as people who entrust their moral equality to the government so they would be protected from being killed by any oppressor. The role of the justice system is to choose principles of justice that promote what individuals need or will want in order to lead the "good life."[114] However, to state the obvious, leading the good life is impossible when the principles of justice fail to protect life itself.

Anita L. Allen suggests that a hypothetical fetus may be willing to sacrifice its life and accept its fate of abortion without abandoning its sense of equal worth,

---

[108] Will Kymlicka, Contemporary Political Philosophy 56 (2002).
[109] *Id.* at 59.
[110] John Rawls, A Theory of Justice 12 (1971).
[111] Kymlicka, *supra* note 108, at 55.
[112] Rawls, *supra* note 110, at 12.
[113] *Id.*
[114] Kymlicka, *supra* note 108, at 64.

"simply through appreciation of the equal worth of the pregnant woman by whom it must be borne and her potential as a person."[115] The hypothetical fetus is "justified" in innocently placing its trust and life in its mother "because it does not have to believe itself less worthy of respect than other human beings in order to accept that the law will not compel women to see each pregnancy to term."[116]

My dispute with Allen's hypothetical is that she does not consider or place adequate weight on the proposition that the basic instinct of the reasonable fetus is to survive. Moreover, it may be the highest duty of the pregnant woman to subordinate her civil liberties and even sacrifice her life out of love for her fetus. How can taking the life of an innocent human being out of necessity ever be justified in order to preserve the personhood potential of the woman from the responsibilities and joys of motherhood?

Lord Coleridge, in finding Dudley and Stephens guilty of murdering a cabin boy on the high seas, feeding on his flesh and drinking his blood, rejected this kind of reliance on the defense of necessity.[117] The Court rejected "the choice" made by Dudley and Stephens that the cabin boy would hypothetically agree that their lives were more important than his and would be willing to die so they could carry on as breadwinners for their families:

> Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen.... [I]t is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.[118]

There is also an inherent conflict of interest when the decision to abort is left to the sole discretion of the pregnant woman, who stands to "profit," like Dudley and Stephens, by terminating the life of a child.

There is an imbalance of legal, political, economic and social power between a fetus and its mother. This inequality is acceptable so long as in her constitutional exercise of personal liberty to improve her life, the pregnant woman does not abuse her power and extinguish the life of her innocent unborn child that has been entrusted to her protection. Individual conscience and self-regulation does not guarantee this power will not be abused.

If we are morally equal to one another, none of us are inherently subordinate to the will of others or are the property of another.[119] Birth marks the point at which the law says we are free and equal. What is stopping us from moving the marker back to the point of conception? Perhaps utilitarian goals such as embryonic stem

---

[115] Allen, *supra,* note 48 at 487.

[116] *Id.*

[117] R v. Dudley and Stephens, 14 Q.B. 273, 286–87 (1884).

[118] *Id.* at 287–88.

[119] Kymlicka, *supra* note 108, at 61.

cell research that can cure disease, cloning that can bring health and happiness, and abortion that can preserve a lifestyle prevail. These rational choices are fine if you are already a person and enjoy constitutional rights. But if you are behind a veil of ignorance in the original position, you might feel differently if you are a non-person and unlucky enough to be sacrificed for the common good of humanity. What if the marker that designates personhood is moved forward from birth and you find yourself a human being with disabilities that is reclassified as a non-person?

Utilitarian philosophy opposes constitutional protection for the unborn whose lives are vulnerable to the selfish needs or wants of constitutional persons.[120] Liberal equality provides an answer to utilitarianism, if the legal system reflects principles of justice that are consistent with protecting the weakest, youngest and most vulnerable members of the human family.

Do not civil libertarians have a duty to oppose immoral and unethical conduct and laws that oppress and enslave members of the human family? This duty becomes more urgent especially when this oppression is legal and generally accepted in society. Consistent with the core values of what it means to be a civil libertarian exists a moral imperative for liberals to speak out and take action to stop the destruction and exploitation of innocent unborn human beings. William Galston, in contemplating opposing views on the issue of slavery that led to the Civil War, stated: "[W]e cannot be indifferent to fundamental (and decidable) questions of right and wrong." [121]

In my view, a true civil libertarian is one who believes in the sanctity of all human life, that all living members of the species *Homo sapiens* are created equal, and that all human beings are persons, from the moment of conception until natural death. An activist government, including a courageous judiciary, is necessary to choose principles of justice to protect all human beings. Professor Robert George of Princeton University identifies what I have termed a true civil libertarian as a "contemporary Rooseveltian."[122] Consistent with this view, Pope John Paul II qualifies as "an old fashioned liberal"[123] and has in fact been the champion of extending human rights to the unborn.[124] Segregationist philosophy that classifies some human beings as persons and others as non-persons is incompatible with this broad view of egalitarian liberty.

On the other side, there are segregationists who also claim to be civil libertarians, but support abortion on demand in the name of women's equality, sexual free-

---

[120] *See id.* at 65.

[121] William A. Galston, Liberal Purposes: Goods, Virtues and Diversity in the Liberal State 274 (1991).

[122] Robert P. George, The Clash of Orthodoxies: Law, Religion and Morality in Crisis 250-51 (2001).

[123] *Id.* at 235, 240–47, 257.

[124] *See* Pope John Paul II, Donum Vitae, *reprinted in* Marilyn Wallace & Thomas Hilgers, *The Gift of Life* app. at 224 (1990); John Paul II, *Evangelium Vitae*, 16.6.7 Theology Digest (U.S. Catholic Conf., Wash., D.C.), Mar. 25, 1995, at 7.

dom, tolerance and compassion.[125] By their actions, these segregationists advocate inequality and practice discrimination to advance a "quality of life" agenda. They believe in abortion, cloning, and embryonic stem cell research and were instrumental in the creation, promotion and expansion of the non-person caste. Segregationists believe that human beings are not persons until certain developmental criteria are met and that a human being exists only when certain personhood criteria have been satisfied. These pseudo-civil libertarians promote the oppression of unborn human beings, and in the process undermine the fundamental principles of justice central to liberal equality.

Both sides adamantly believe they are right. There appears to be no middle ground. Who is the true liberal?

There are common themes that appear today in this ideological war that date back to the American Civil War when human slavery was legal. Both segregationists who support abortion now and those who supported slavery then, argue certain classes of human beings are not persons, have no constitutional rights to life and liberty and are property to be disposed of or exploited at will. Age, size, physical location, and other grounds have replaced race as permitted grounds of discrimination. Huge financial profits were made from owning plantation slaves. Similarly, abortionists operate medical practices and clinics that profit from providing abortion services and the selling of fetal body parts. Slavery and abortion both attained institutional and legal standing, and won judicial approval from the Supreme Court of the United States. All segregationists reject the opposition of desegregationist liberals who are despised for trying to impose their own morality on others, claiming this is interference with privacy and personal freedom in a democratic and pluralistic society.

The violence of abortion is accepted by segregationists as a cultural cost necessary to promote the quality of life of persons over the sanctity of life of non-persons. Language is used to dehumanize members of the human family by utilizing derogatory or clinical terms to depict non-persons as property or as something less than human. For example, "product of conception" can mean to a pathologist the physical remains of an aborted human being. Focusing the argument on choice avoids deciding the morality of the underlying action of enslaving a fellow human being or killing an unborn child.

On September 22, 1862, when President Abraham Lincoln issued his Emancipation Proclamation,[126] his words did not free any slaves until the Union later won the Civil War and the Thirteenth Amendment[127] to the Constitution formally freed

---

[125] George, *supra* note 122, at 253.

[126] Abraham Lincoln, Selected Speeches and Writings 368–69 (Library of America ed., 1st Vintage Books 1992).

[127] U.S. Const. amend. XIII § I: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this

the slaves on December 18, 1865. On January 14, 1988, President Ronald Reagan issued his Personhood Proclamation,[128] which has not yet accomplished its intended result to grant constitutional personhood and the right to life to the unborn, from the moment of conception to the time of natural death. So far, there has been no second Civil War or Right to Life Amendment to the Constitution, but there has been large scale civil disobedience, court battles, RICO civil actions, political battles over judicial appointments, political party polarization, violent crimes against abortion providers, restrictions against free speech, and a generally divided nation on the issue of abortion.[129] If President Lincoln is right that a nation divided against

article by appropriate legislation."

[128] Proclamation No. 5761, 53 Fed. Reg. 1464-65 (Jan. 19, 1988):

> We are told that we may not interfere with abortion. We are told that we may not 'impose our morality' on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it 'imposing morality' to prohibit the taking of life after people are born. We are told as well that there exists a 'right' to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.
>
> That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.
>
> All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality—that *they in fact are persons*. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.
>
> Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the *personhood of the unborn be declared and defended* throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the 'humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth.' This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.
>
> NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby *proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death*, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children.

Id. (emphasis added).

[129] Operation Rescue, led by Randall Terry, was the largest peaceful civil liberties movement in American history. Over 70,000 arrests occurred between 1987 and 1994. Randall Terry, *A Walk Through History, at* http://206.176.210.45:8834/home/index.cfm?page=2 (last visited Oct. 9, 2003).

itself cannot stand,[130] what will the future bring, if the status quo merely prolongs the inevitable victory by one side or the other?

Civil libertarians have championed the cause for the abolition of the slavery of the African-American, promoted the equality of women, fought for the abolition of the death penalty for convicted criminals, and campaigned for civil rights, gay rights, animal rights, environmental rights, and for the elimination of workfare that enslaves the poor. In all these efforts, civil libertarians have portrayed the underlying value of human, animal and biological life, rejected all forms of slavery, and assumed the moral obligation to respect those vulnerable interests in our society who cannot effectively overcome oppression and exploitation without help from the rest of us. Is it not consistent for civil libertarians to champion the cause of the poorest, weakest, and most vulnerable members of our society?

Unlike a human being who is a constitutional person, embryos and fetuses have no constitutional protection from being destroyed, experimented upon or cannibalized for parts. Cloning and embryonic stem cell research represent modern forms of human exploitation by the powerful over the powerless and is no different in principle from traditional slavery rooted in ancient history. Slaves were historically used to achieve personal, societal, commercial and political goals. Slaves could be forced to perform tasks and undergo personal sacrifices to advance the civilization of past cultures. Slaves were depersonalized so they could be forced to do things that a citizen had a right to refuse. The historical arguments for slavery are the same arguments that are used today to justify the utilitarian exploitation of unborn human life.

Current regulations govern the abortion industry, just as once slave owners had to contend with laws that regulated the treatment of slaves.[131] A pregnant woman

By comparison, the Civil Rights movement accounted for only about 7,000 arrests between 1958 and 1968. *Id.* According the National Abortion Federation, Terry's numbers are out of date and too low. From 1977 to 2004, the total number of arrests for peaceful protests, including disruptions and blockades, in the United States and Canada, have totaled 134,158. Arrests for violence or threats of violence, have totaled 4352. There have been 7 arrests for murder. *National Abortion Federation Violence and Disruption Statistics* at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf.

[130] Lincoln, *supra* note 126, at 131.

> "A house divided against itself cannot stand."
>
> I believe this government cannot endure permanently half *slave* and half *free*.
>
> I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided.
>
> It will become *all* one thing, or *all* the other.
>
> Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new*—*North* as well as *South*.

Id. (emphasis in original).

[131] For example, the Georgia Constitution of 1798 put the killing or maiming of a slave on the

may now kill her fetus with greater liberty than an owner of African-American slaves who was not at liberty to arbitrarily kill his human slave.[132] An African-American slave was "not only property," for that slave is also "entitled to the humanity of the Court."[133] This way of thinking about slaves is similar to Justice Blackmun's thinking that state interest in potential life is a "legitimate interest grounded in humanitarian or pragmatic concerns."[134]

Consistency dictates that civil libertarians will choose to fight on the side of respecting unborn human life. Abortion is at its heart a civil rights issue.[135] To defend abortion today is in principle the same thing as defending the slavery of native-born African-Americans who were once denied citizenship and labeled as non-persons.

Civil libertarians who believe in equality are morally compelled to speak for those who cannot speak for themselves to ensure all human beings are treated as ends and never as a means to an end. Once the human family is divided into persons and non-persons, every human being is at risk to become a non-person.[136] The power to destroy other human beings leads to greater abuses as people become desensitized to immoral conduct. The killing and exploitation of the unborn are, at the most basic level, acts of violence. Everyone, including scientists, businessmen, politicians, judges, clergy, voters, doctors or patients, who benefits from, or does any harm to Depersonalized Humans, is morally culpable. "Anyone who commands, directs, advises, encourages, prescribes, approves, or actively defends doing something immoral is a cooperator in it if it is done and, even if it is not in the event done, has already willed it to be done and thus already participates in its immorality." [137]

V. Equality and Self-Evident Truths

What is truth? Are there "self-evident truths"? Are "all men are created equal"? Are all men "endowed by their Creator with certain inalienable rights"? Do these inalienable rights include at a minimum, the rights to "life, liberty and the pursuit of happiness"? Are these words mere expressions of wishful thinking or discoverable objective truths? Did Thomas Jefferson, author of the Declaration of Independence

---

same level of criminality as killing or maiming of a white man. *See* DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 58 (1966). By the 1850's, most states provided heavy fines for the cruel treatment of slaves. *Id.*

[132] *See id*.

[133] *Id.* at 248.

[134] Casey, *supra,* note 25*, at* 932 (1992) (Blackmun, J., concurring in part and dissenting in part).

[135] Mary Meehan, *Abortion: The Left Has Betrayed the Sanctity of Life*, THE PROGRESSIVE, Sept. 1980, at 34.

[136] Kevin O'Rourke, *Ethical Norms for Respect for Human Life*, *in* HUMAN LIFE AND HEALTH CARE ETHICS 52, 62 (James Bopp, Jr. ed., 1985).

[137] John Finnis, *Abortion and Health Care Ethics*, *in* BIOETHICS: AN ANTHOLOGY 13, 18 (Helga Kuhse & Peter Singer, eds., 1999).

know the injustice that is caused by subjective standards pronounced by a tyrannical King who ruled by law and an objective standard based on moral standards derived from the Supremacy of the Judeo-Christian God that is the foundation of the rule of law? I believe he did, as did those 55 other delegates from various American colonies that risked their lives and property who also signed this revolutionary document. It mattered to Jefferson that America was not governed by moral standards inherent in the rule of law. It was worth the price of treason to the British Crown.

Thomas Jefferson used the moral authority of natural law to assert for all time that all members of the human family are created equal and possess the fundamental right to life.

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station *to which the Laws of Nature and of Nature's God entitle them*, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are *Life, Liberty and the pursuit of Happiness*. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[138]

The revolutionary ideas expressed in the Declaration of Independence were novel. The dissolution of political ties between the English Crown and the Colonies was necessary to achieve separation and equality to which Americans were entitled by the "Laws of Nature and of Nature's God." It is the "Creator" which endows "all men" at the point of creation with equality and the self-evident rights to life and liberty. Thus the source of basic human dignity and the eternal inalienable rights to life and liberty is found in natural law from the moment of creation. These rights are a gift from God, an indispensable part of human nature, and a sacred trust of governments to safeguard from abuse. Every human being is regarded with equal worth, in a society where law is founded upon and infused with Christian morality. What is this Christian morality?

At the heart of Christian morality are the teachings of Jesus. The Pharisees[139] tested Jesus by asking what is the greatest commandment in the Law. Jesus an-

---

[138] The Declaration of Independence paras. 1, 2 (U.S. 1776) (emphasis added).

[139] Jesus had harsh things to say about lawyers and Pharisees: "Alas for you lawyers and Pharisees, hypocrites . . . you have paid tithes . . . but you have overlooked the weightier demands of the Law, mercy, justice, and good faith. It is these you should have practiced without neglecting the others. . . .how can you escape being condemned to hell? . . . on you will fall the guilt of all innocent blood spilt on the ground." *Matt*. 23:23-24, 33-35

swered: "Love the Lord your God with all your heart, with all your soul, with all your mind. That is the greatest commandment. It comes first. The second is like it: Love your neighbor as yourself. Everything in the Law and the prophets hangs on these two commandments."[140] Jesus gave a new commandment: love one another; as I have loved you, so you are to love one another.[141] The only thing that matters is love. God himself is love.[142] The greatest love is to give up one's own life to save the life of another human being.[143] Love is not a matter of words or talk; if it is genuine, it is demonstrated by actions.[144] "Love means following the commands of God,"[145] to be "our rule of life."[146] Love in action is proof Christians belong to the realm of truth.[147]

Justice is love in action. The history of the common law and its development suggests that the conception of justice inherited by America from England is the Christian teaching of love.[148] For example, in *Donoghue v. Stevenson*, Lord Atkin took the Christian commandment to love your neighbor as a legal duty extending a duty of care to one's neighbor.[149] Principles of justice are thus discovered by judges in the common law and are thus derived from the Christian commandment of love. Natural justice is not automatically recognizable by anyone, but by those whose thinking is imbued with habits of Christian thought and behavior passed down through generations. The principles of natural justice found in the English common law "has been molded for centuries by judges brought up in the Christian faith."[150]

The Christian religion has always stressed the importance of absolute truth.[151] Jesus taught, "I am the way; I am the truth and I am life."[152] The Holy Spirit, known as the Spirit of Truth, was promised by Jesus to be with his believers forever.[153] God's word is truth, and Christian believers are consecrated by the truth.[154] To establish truth and justice in a country, there must be rule of law founded upon a religious and moral foundation. Lord Alfred Denning, considered by many to be the greatest English jurist in the past century, observed: "Religion concerns the spirit in man whereby he is able to recognize what is truth and what is justice; whereas law is only

---

[140] *Matthew* 22:35-40 (New English Bible).
[141] *John* 13:34-35; *John* 15:12-13; 17
[142] 1 *John* 4:9,16
[143] *John* 15:13-14
[144] 1 *John* 3:18
[145] 2 *John* 6
[146] 2 *John* 6
[147] 1 *John* 3:18-20
[148] Lord Alfred Denning, The Changing Law 107 (1952).
[149] Donoghue v. Stevenson, [1932] A. C. 562 (H.L.).
[150] Denning, *supra*, note 148, at 108-109
[151] *Id*. at 100.
[152] *John* 14:6
[153] *John* 14:16-17; 15:26
[154] *John* 17:17-19

the application, however imperfectly, of truth and justice in our everyday affairs. If religion perishes in the land, truth and justice will also." [155]

President George Washington too knew this truth, for he reminded his audience in his Farewell Address of 1796 that a religious and moral foundation to law was vital to achieving justice, good government and political success:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men & citizens. The mere Politican, equally with the pious man ought to respect & to cherish them. A volume could not trace all their connections with private & public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the Oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure—reason & experience both forbid us to expect that National morality can prevail in exclusion of religious principle.
>
> 'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of Free Government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.[156]

If all men are created equal, then arguably unborn human beings, from conception, the time of their creation, are politically and legally endowed with the inalienable rights of life, liberty and the pursuit of happiness.[157] On this basis, the right of the unborn to life (no abortion, no harvesting of embryonic stem cells, no cloning), liberty (the right to be left alone, freedom from harm) and the pursuit of happiness (the right to autonomy, self-determination, development of full potential) is assured. Human beings are endowed at creation with an inalienable right to life. This natural right cannot be removed or conferred, as it is the common heritage of human beings that all are created equal. It can be discovered in existing constitutional law or explicitly restated as a constitutional amendment.[158]

I agree with the late Professor Charles L. Black Jr. that the doctrines of the Declaration should be taken to have the force of constitutional law.[159] The words of the Declaration "demolish one legal authority and set up another" and as such, are "constitutive words" and "the root of all political authority among us, of all legitimate

---

[155] Denning, *supra*, note 148, p 122.

[156] http://gwpapers.virginia.edu/farewell/transcript.html.

[157] *See* Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 Pepp. L. Rev. 819, 824 (2001).

[158] *See* James Bopp, Jr., *An Examination of Proposals for a Human Life Amendment*, *in* Restoring the Right to Life: The Human Life Amendment 3–52 (James Bopp, Jr. ed., 1984).

[159] Charles L. Black Jr. A New Birth of Freedom 8 (1999).

exercise of power."[160] Like Professor Black, I believe, the "inalienable rights" at the heart of the Declaration were formally incorporated into the Constitution in 1791 with adoption of the Ninth Amendment,[161] which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[162] Thus, the inalienable rights to life, liberty and the pursuit of happiness are rationally consistent with the text of the Ninth Amendment that refers to the rights retained by the people. In addition, according to Professor Black, the inalienable rights to life, liberty and the pursuit of happiness are the "certified cardinal values of our political morality."[163]

The legal grievances that led to the reasons for the American War of Independence offer hope that the United States is a nation founded upon the rule of law, and that at the root of the American Constitution is the objective truth that human beings and persons are one and the same, and are indistinguishable from one another. For it is only when there is harmony and proper alignment in the meanings of human being and person will our universe be free of discrimination and inequality which inevitably result so long as objective truth is ignored. If all of humanity is created equally at conception, and if each member of the human race has the inalienable right to life, liberty and the pursuit of happiness, there is no place in today's brave new world[164] for the extinguishing of embryonic and fetal life.[165]

There is a link between freedom and truth:

> When freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority . . . When God is denied and people live as though he did not exist, or his commandments are not taken into account, the dignity of the human person and the inviolability of human life also end up being rejected or compromised.[166]

Until there is a merging of the meanings of person and human being, resulting in harmony between science and the law, the current dissonance between truth and fiction will increase, rather than diminish. The cruel paradox will continue that as science adds more convincing proof that human life begins at conception, judges will continue to decide that healthy babies in healthy mothers may be killed with legal immunity as a matter of choice.[167] It is law that must conform to the objec-

---

[160] *Id.* at 9.

[161] *Id.* at 38. This position is highly contested and is not settled law.

[162] U.S. Const. amend. IX (1791).

[163] Charles L. Black Jr., *supra* note 159, at 38.

[164] *See* Aldous Huxley, Brave New World (1932).

[165] Some scholars rely on the Declaration of Independence as authority to protect unborn human life. *See* Paolo Torzinni, *Reconciling the Sanctity of Human Life, the Declaration of Independence and the Constitution*, 40 Cath. Law. 197 (2000); *see also*, Mark Trapp, *supra* note 157.

[166] Karol Wojtyla, John Paul II, *The Gospel of Life* (1995) § 96.

[167] *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

tive truth of science, so the meanings of person and human being are identical in both law and science.[168]

VI. No Justice Is Possible Without Morality

In his letter from the Birmingham Jail, Dr. Martin Luther King Jr. stated:

> Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. . . . We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.
>
> [T]here are two types of laws: There are *just* and there are *unjust* laws. I would agree with Saint Augustine that "An unjust law is no law at all." . . . .
>
> Now, what is the difference between the two? How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority. To use the words of Martin Buber, the Jewish philosopher, segregation substitutes an "I-it" relationship for an "I-thou" relationship, and ends up relegating persons to the status of things. So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful. . . . Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.[169]

I adopt Dr. King's idea that, "A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law."

St. Thomas Aquinas held a similar view, distinguishing between just and unjust laws that either conformed to the natural law, or were corruption of the law:

> Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence. . . . Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is really not a law but rather a corruption of the law.[170]

---

[168] Intellectual relativism is the archenemy of objective truth. *See* Robert Ivan Martin, The Most Dangerous Branch 11-12 (McGill-Queen's University Press, 2003).

[169] *See* http://www.sas.upenn.edu/African_Studies/Articles_Gen/Letter_Birmingham.html.

[170] Summa Theologiae I-II q. 95, a. 2

Thomas Aquinas believed when a law is contrary to reason it is unjust and lacks moral authority.[171] If a law is "at variance with natural law, it will not be law, but spoilt law."[172]

Lord Denning observed, "[a]lthough religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law."[173] Professor Patrick Devlin warned of impending social disintegration when law is divorced from Judeo-Christian morality.[174] Lord Howe agreed, "while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure. . . ."[175]

I believe that the legal segregation of unborn human beings from the rest of the human family degrades and depersonalizes the humanity of the unborn, stigmatizing non-persons as inferior to persons, who assert legal but not moral superiority over non-persons. This legal segregation substitutes an I-it relationship between a mother and her unborn child, relegating her baby to the status of a thing that may be killed with impunity. As legally inferior human beings, non-persons are at the mercy of those legally superior human beings who literally hold an arbitrary power of life or death over the unborn. Civil liberty is interpreted by persons as natural liberty—unrestrained freedom to exercise one's absolute will even if it is detrimental to other human beings and society-at-large. This kind of corrupt thinking is repugnant to a just society governed by the rule of law where every human life is treasured and unborn babies are welcomed as persons.

VII. Defining the Rule of Law

I define the "rule of law" as government by laws that people are willing to obey because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. I define "rule by law" as the antithesis of the "rule of law," meaning to be governed by unjust laws in any society, including democratic societies, where the government may exercise arbitrary powers and may abridge at will

---

[171] Thomas Aquinas, Summa Theologiae 99–107 (His Eminence Michael Cardinal Browne & The Most Reverend Father Aniceto Fernandez, trans., 1963).

[172] *Id.* at 105.

[173] *See* Denning, *supra* note 148, at 99. The separation of law from morality is particularly relevant in the debate between legal positivists, and natural law proponents. I am a natural law proponent, for law without morality can lead to authoritarian regimes like that of Nazi Germany. After the Nuremberg Trials, Professor Hart and Professor Fuller debated the merits of divorcing law from morality. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); and Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

[174] Patrick Devlin, The Enforcement of Morals (1996).

[175] Regina v. Howe, 1 A.C. 417, 430 (H.L. 1987).

inalienable human rights and remove from constitutional protection the inalienable civil rights of any human being, such as creating a class of non-persons. The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential coerced obedience* is the defining characteristic in a "rule by law" society. Without a moral component that squares with the eternal and natural law of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law. A caution is in order: my definition of the rule of law is not universally accepted, for as we will see further in our discussion, there are other definitions that are accepted by judges and legal scholars.

Linkage of the rule of law and the supremacy of God is foundational for the flourishing of truth and justice.[176] Truth and justice do not exist in a vacuum; they exist in a society of human beings, organized into a political state. Unfortunately, a state may become tyrannical, so that truth and justice can disappear or be stifled. The solution is respect for every human being as a person. The person becomes paramount, not the state. The state exists for the benefit of every human being; human beings do not exist for the benefit of the state.

America was founded upon the rule of law, as I understand it, anchored in the common law infused with Christian morality,[177] but has of late lost her moral compass, no longer being a nation of religious people thirsting for universal justice. The resolution to the current cultural, political, and legal war over abortion, and the derivative battles over embryonic stem cell research and cloning, is found in the universal truth anchored in the concept of the rule of law that we are all created equal and that we all possess an inalienable right to life and liberty. Explicitly interpreting "person" in the Fourteenth Amendment to mean all human beings, including the unborn, from the time of conception to the time of natural death, will fulfill the promise and vision of the signers of the Declaration of Independence. For there can be no rule of law, so long as the word "person" is legally manipulated to exclude and segregate classes or individuals from the human family, and discriminate against legally created castes in order to legally justify the killing or enslavement of human life. Not until then will there exist the rule of law in America.

VIII. Mislabelling Rule by Law as the Rule of Law

The United States Supreme Court in *Casey* displayed its fundamental disagreement with my definition of the rule of law, choosing instead the doctrine of *stare decisis* over justice. Justice O'Connor equated abortion law jurisprudence built upon a questionable substantive due process right of privacy[178] and now personal

---

[176] *See* Denning, *supra* note 148, 122.

[177] *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[178] Griswold v. Connecticut, 381 U.S 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); *accord* Roe v. Wade, 410 U.S. 113 (1973).

autonomy[179] to the "rule of law:" "The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. *It is a rule of law* and a component of liberty we cannot renounce." [180]

Whether conceived as "judicial legislation"[181] or a "judicially derived rule"[182] a constitutional right to an abortion is not the same thing as the "rule of law" as I have defined it, but its antithesis. The act of abortion, in and of itself, is repugnant to the rule of law. That is why many people intuitively refuse to accept pronouncements by the Supreme Court in favor of abortion as legitimate. A judicial declaration that there is a constitutional right to an abortion, in the face of undisputed evidence that abortion unjustly kills innocent unborn children, is actually rule by law. From the viewpoint of the unborn, there is no moral component to the license to abort. That a mother may arbitrarily exercise her liberty and take the inalienable life of a very young human being who belongs to the class of non-persons is not equality before the law. Coercion and force are the hallmarks of rule by law.

The rule of law cannot exist when law is divorced from morality. Yet that is exactly what the Supreme Court accomplished in *Casey*, by voiding state criminal laws that prohibited immoral conduct (abortion) by elevating the personal liberty of one class of human beings (mothers) over the life and liberty of another class of human beings (unborn children). Justice O'Connor wrote, "Our obligation is to define the liberty of all, not to mandate our own moral code."[183] The rule of law is thus ousted in that "realm of personal liberty where the government may not enter."[184] Judeo-Christian moral and ethical beliefs, once the very foundation of the common law for hundreds of years, will no longer rationally justify criminal laws that affect individual autonomy and the intimate choices of individuals that touch on personal dignity.[185] Individual members of the class of persons who have matured in their personhood can define their own meaning in life, and choose their

---

[179] Lawrence v. Texas, 539 U.S. 558 (2003).

[180] Planned Parenthood of Southeastern Pennsylvania vs. Casey, 505 U.S. 833, 871 (emphasis added).

[181] *See* Roe, 410 U.S. at 174, (Rehnquist, J., dissenting opinion) ("The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.").

[182] Casey, 505 U.S. at 866.

[183] *Id.* at 850.

[184] *Id.* at 847.

[185] For example, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" *per* Justice Stevens' dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 at 216 (1986), adopted as "controlling" for Due Process cases by Justice Kennedy in *Lawrence v. Texas*, 123 S. Ct. at 2483-84. Moral disapproval will also not survive a constitutional challenge under the Equal Protection Clause: "Indeed we have never held that moral disapproval, without any other asserted state interests, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons," per Justice O'Connor. *Id*. at 2486.

own values, whether they are moral or not. The decision to bear or not bear a child that has been conceived[186] is one of those choices that are at the heart of liberty:

> [T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life***.** Beliefs about these matters could not define the attributes of personhood were they formed under compulsion by the State.[187]

In commenting on the above passage, Justice Scalia recognized that the creation of a zone of personal privacy, free from legislated morality, to legally engage in immoral conduct that goes beyond sexual preferences to include the killing of human beings, destroys the rule of law: "I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined 'concept of existence, etc.,' *it is the passage that ate the rule of law*." [188]

One characteristic of a rule of law society is that moral choices that promote justice, respect and the dignity of all human life lie at the heart of all legislation and judicial decisions. This is no longer the case in American society, for in its political goal to legalize abortion, the Supreme Court attained the result it wanted, but at the cost of the rule of law. The precedent set in the abortion cases validates new principled constitutional attacks upon laws that presently outlaw same sex marriage, polygamy, bigamy, prostitution, adult incest, bestiality, assisted suicide and active euthanasia.[189] In a new age of relative morality, there are no standards of right and wrong based upon God's laws. This means the beginning of "the end of all morals legislation,"[190] where individual liberty prevails over the collective wisdom of elected representatives who espouse moral values.

When the Supreme Court wants to, it can act in the name of the rule of law. For example, in *Romer v. Evans*, it has purged a discriminatory state constitution that targeted as a class, politically powerful gay men and women.[191] Amendment 2 of the Colorado state constitution prohibited all legislative, executive or judicial action designed to protect gays and lesbians as a class. Justice Kennedy, writing for the majority, invoked the rule of law to invalidate Amendment 2. First, Justice Ken-

[186] In Eisenstadt v Baird, 405 U.S. 438 (1972), an equal protection case, Justice Brennan extended the right of privacy to include an individual's choice to get pregnant (beget) and to terminate a pregnancy (bear): "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

[187] *Casey*, 505 U.S. at 851 (emphasis added).

[188] Lawrence v. Texas, 123 S. Ct. at 2489 (emphasis added).

[189] *Id.* at 2490. Justice Scalia lists of sexual offenses, such as adultery and fornication, that are now in jeopardy.

[190] *Id*. at 2495.

[191] Romer v. Evans, 517 U.S. 620 (1996).

nedy noted that the target class was identified by a single trait, sexual orientation. Secondly, he noted that it was this identified single trait that disqualified an entire class of human beings form legal protection and equality before the law. This was unprecedented, and called for reversal, for Amendment 2 created a caste system of human beings that is foreign and repugnant to the notion of the rule of law:

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance . . . . A law declaring that in general it shall be more difficult of one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . .
>
> "If the constitutional conception of 'equal protection of the laws' means anything, it must at very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[192]

The most odious aspect of the offending state constitutional amendment was that it was a status based classification of persons designed to make one group of human beings unequal to everyone else: "A State cannot so deem a class of persons a stranger to its laws."[193] "Class legislation … [is] obnoxious to the prohibitions of the Fourteenth Amendment …"[194]

Romer is instructive, for it compels us to ask analogous questions about the plight of the unborn human being. Are not embryos and fetuses, being unborn, also identified by this single trait? Are not unborn humans also unable to seek legal protection because they fall outside the judicial definition of "person"? By virtue of their age and condition, are not unborn human beings unable on their own to seek the Court's assistance? Are not unborn human beings, as a class of unpopular people, the target of harm? Is not the classification of unborn human beings to depersonalize them as a matter of legal definition a deliberate choice to make them unequal and so deprive them of legal protection?

Yet when the Supreme Courts wants to create a caste system, as it did in *Roe v. Wade* and *Casey*, it has done so by depersonalizing the politically powerless class of unborn human beings. Justice Stevens in *Casey* accounts for the predicament in which the unborn human being is placed, laying the responsibility upon all the members of the Supreme Court, for not one Justice has ever declared that an unborn human being is a "person" within the meaning of the Fourteenth Amendment:

> The Court in Roe carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." 410 U.S. at 156. After analyzing the usage of "person" in the Constitution,

---

[192] *Id*. at 633-634 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
[193] *Id*.
[194] *Id*. at 635 (Kennedy J., citing Civil Rights Cases, 109 U.S. at 24).

> the Court concluded that that word has application only postnatally." *Id.*, at 157. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, have never been recognized in the law as persons in the whole sense. *Id.*, at 162. Accordingly an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.* at 159. From this holding, there was no dissent, see *id.*, at 173; indeed, *no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."*[195]

For these reasons, Justice Stevens stated the State's obligation to protect the life and health of the mother has to take precedence over any duty to the unborn, which is literally defined out of constitutional existence. Anticipating that some States might try to return the unborn back into constitutional existence, Justice Stevens turned to the arguments of Professor Ronald Dworkin, to reject such possibility: "If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women."[196]

To reverse *Roe v. Wade* and *Casey*, all that is needed is to equate unborn human beings with born human beings. The unborn will remain unequal until a majority of the members of the Supreme Court rules unborn human beings are "persons" within the language and meaning of the Fourteenth Amendment to the U.S. Constitution. When that defining moment arrives the case for abortion collapses.[197]

Until then, tyranny governs unborn human beings, who now live in a world of slavery and death, subject to the supreme arbitrary will of a master class, which in matters of personal autonomy, is free from any law imbued with moral principles.[198]

Justice O'Connor suggested the Supreme Court's legitimacy would be seriously weakened to admit it was wrong in *Roe v. Wade* and overrule it. It is conceivable that a reversal would throw into disarray the status quo, confuse people who just abide by the law and possibly create guilt in those who once had doubts about aborting their children, but resolved them by relying on the wisdom of the Supreme Court. Justice O'Connor refused to overrule *Roe v. Wade* not only because of reasons established pertaining to judicial precedent, but because "it would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme

---

[195] *Casey*, 505 U.S. at 913 (emphasis added).

[196] *Id.* at 914 (citing Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. Chi. L.Rev. 381, 400-01 (1992)).

[197] *See* Roe v. Wade, 410 U.S. 113, 156-157 (1973).

[198] "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Lawrence v. Texas, 123 S. Ct. 2472, 2475 (Kennedy J.).

Court of a nation dedicated to the rule of law."[199] O'Connor correctly observed that the Supreme Court's power lies in its legitimacy as perceived by the people. Overruling *Roe v. Wade*, according to Justice O'Connor, would damage much more than the Court's legitimacy—it would damage the rule of law.[200]

Nothing could be further from the truth. The point of this discussion is to justify the overruling of *Roe v. Wade* and *Casey* to restore the Supreme Court's legitimacy and to correct Fourteenth Amendment jurisprudence by equating "human being" with "person" to bring American constitutional law into conformity with the rule of law. Legitimacy is derived by comporting to the Constitution, and not by acting as a non-elected super-legislature, caving in to political pressure or exercising personal predilections.[201]

Our next task is to discover what the rule of law is, why morality is inseparable from it, and to understand how the current absence of the rule of law threatens judicial integrity and social harmony.

IX. The Genesis of the Rule of Law in America

The origin of the rule of law in American constitutional law may be traced back to June 15, 1215 when King John of England needed to appease his Barons at Runnymede, as they were angry with him over unfair taxes, abuse of royal power, and unjust laws. Under duress, King John submitted to the Great Charter, known as the Magna Carta, and thereby surrendered some of his royal perogative and sovereign power.[202] This event marked the commencement of a government of laws, and not of men. It was a modest beginning to the separation of powers, guarantees of political liberty, limitations on the authority of government officials, and legal reform consistent with justice. The absolute power of the English monarch was forever lost, for in England there was now the humble beginning of an early form of rule by law.

The great English barrister and jurist, Lord Edward Coke, an advocate of the rule of law, greatly influenced the development of American constitutional law.[203] Over the course of his life, Lord Coke, in his quest for justice, fought for the following principles: no human being may by sheer will and might govern another human being, for both were equal under the law and under the sovereign authority of God; an unjust law (statute) violating the common law was no law at all, and

---

[199] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865 (1992).

[200] *Id*. at 869.

[201] *Id*. at 963 (Rehnquist, CJ).

[202] *See generally*, William Swindler, Magna Carta: Law and Legacy (1965); available at http://www.fordham.edu/halsall/source/magnacarta.html.

[203] Lord Coke, as author of the Institutes of the Laws of England, influenced generations of American lawyers who looked to him for guidance in matters of civil liberties and constitutional law. *See* http://www.fee.org/vnews.php?nid=3899 *See also* http://www.archives.gov/exhibit_hall/featured_documents/magna_carta/legacy.html

may be declared void by a court of law (Dr. Bonham's case, decided in 1610); [204] the law must be a certain and reliable guide and preserve fundamental liberties from arbitrary deprivation (stability and freedom under law); and no one on order of the King may be indefinitely detained without charge (origin of habeas corpus). These were just four significant contributions he made to the evolving concept of the rule of law.

In his capacity as Chief Justice of the Court of Common Pleas, Coke fearlessly asserted the independence of the judiciary, much to the dismay of King James I, who expected judges to act as submissive servants. Coke's loyalty to the English Crown was not in question, for he had previously served as Attorney General during the reign of Queen Elizabeth I, and had successfully prosecuted Sir Walter Raleigh for treason. After the death of Elizabeth I, King James was publicly asserting rule by law, equating himself with God, claiming it was his divine right to substitute his reasoned judgment for judicial decisions he disagreed with. On November 13, 1608, Lord Coke confronted and rebuked the King, quoting Bracton, saying, "The King ought to be under no man, but under God and the law."[205] The King was predictably furious. The King not only believed he was above the law; he believed he was the law.[206]

Attorney James Otis Jr. knew the difference between rule of law and rule by law.[207] Following the death of King George II in 1760, Writs of Assistance became vigorously exercised in the colonies. Otis delivered a legal submission on February 24, 1761, in the council chamber of the Old State House in Boston, in defense of his clients, Boston merchants, who challenged the unchecked legal authority of customs officers to search for smuggled goods. Otis condemned Writs of Assistance as unconstitutional, contrary to natural law and human rights. He declared that the power of these general search warrants was contrary to the rule of law, for a man's home was his castle. To search a person's home was an invasion of privacy and a threat to individual liberty, for writs of assistance were unchecked governmental authority exercised at the suspicious whim and mere will of the executive, who did not require any legal judicial standard to be met, such as probable cause under oath. In the audience was John Adams, who recalled Otis referred to the colonies as "my

[204] In Dr. Bonham's case, Lord Coke declared void an Act of Parliament that gave the Royal College of Physicians the power to be a party and judge in the same case. This was contrary to the common law principle that no one was to be a judge in his or her own cause. This case was a forerunner to the development of the power of judicial review. *See* http://press-pubs.uchicago.edu/founders/print_documents/amendV_due_processs1.html.

[205] Swindler, *supra*, note 202, at 172.

[206] Over the next two years, King James would issue Proclamations that purportedly had the force of law, in furtherance of his divine will. In the Privy Council, Lord Coke successfully challenged this practice, observing that all indictments concluded with the words, "against the law and custom of England" or "against laws and statutes." There was never a practice of concluding with the words, "against the King's proclamation." Eventually King James dismissed Lord Coke from the judiciary, while he was serving as Chief Justice of the King's Bench and as a member of the Privy Council.

[207] At http://www.juntosociety.com/founders/jamesotis.html.

country" and inspired the flame of independence to burn in the heart of patriots.

In 1764, Otis published *The Right of the British Colonies Asserted and Proved*. In the section entitled "Of the Natural Rights of Colonists," he denounced the institution of slavery, stating, "The colonists are by the law of nature freeborn, as indeed all men are, whether black or white."[208] He explained slavery was contrary to the rule of law and inseparable from the supremacy of God:

> Does it follow that 'tis right to enslave a man because he is black? Will short curled hair like wool instead of Christian hair, as 'tis called by those whose hearts are as hard as the nether millstone, help the argument? Can any logical inference in favor of slavery be drawn from a flat nose, a long or a short face? Nothing better can be said in favor of a trade that is the most shocking violation of the law of nature, has a direct tendency to diminish the idea of the inestimable value of liberty, and makes every dealer in it a tyrant, from the director of an African company to the petty chapman in needles and pins on the unhappy coast. It is a clear truth that those who every day barter away other men's liberty will soon care little for their own.
>
> Let no Man think I am about to commence advocate for *despotism,* because I affirm that government is founded on the necessity of our natures; and that an original supreme Sovereign, absolute, and uncontroulable, *earthly* power *must* exist in and preside over every society; from whose final decisions there can be no appeal but directly to Heaven. It is therefore *originally* and *ultimately* in the people. I say supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely,* nor can they *rightfully* make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in *trust,* and on a condition, the performance of which no mortal can dispence with; namely, that the person or persons on whom the sovereignty is confer'd by the people, shall *incessantly* consult *their* good. Tyranny of all kinds is to be abhor'd, whether it be in the hands of one, or of the few, or of the many.—And tho' "in the last age a generation of men sprung up that would flatter Princes with an opinion that *they* have a *divine right* to absolute power"; yet "slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that 'tis hard to be conceived that an *englishman,* much less a *gentleman,* should plead for it." [209]

Otis continued, arguing that legal precedent was not a justification for tyranny to persist when law is in conflict with the laws of nature given by God. Where law deviates from truth and justice, it is the duty of the electorate in a democracy to exercise the right to vote and remove any tyrannical government that rules by law:

> But if every prince since *Nimrod* had been a tyrant, it would not prove a *right* to tyrannize. There can be no prescription old enough to supersede the law of nature, and the grant of God almighty; who has given to all men a natural right to be *free,* and they have it ordinarily in their power to make themselves so, if they please. .

---

[208] He later publicly repudiated these comments. *See* http://www.pbs.org/wgbh/aia/part2/2h18.html.

[209] At http://www.pbs.org/wgbh/aia/part2/2h18t.html (emphasis in original).

> . . The same law of nature and of reason is equally obligatory on a *democracy,* an *aristocracy,* and a *monarchy:* Whenever the administrators, in any of those forms, deviate from truth, justice and equity, they verge towards tyranny, and are to be opposed; and if they prove incorrigible, they will be *deposed* by the people, if the people are not rendered too abject. Deposing the administrators of a *simple democracy* may sound oddly, but it is done every day, and in almost every vote.[210]

It was this same quest for the rule of law that fueled the passion and moral outrage by those whom Otis motivated that led to the Declaration of Independence. King George III ruled by law and revolution was the result. The rebellion was morally justified because the God given inalienable rights of life, liberty and the pursuit of happiness belonged to the people and rule by law had deprived Americans of natural justice and just laws. The situation had become so desperate that patriot Patrick Henry declared, "Give me liberty or give me death."[211]

X. How Human Slavery Ruined the Rule of Law

The hope of replacing the rule by law imposed by the British Crown with natural justice bestowing upon all Americans the inalienable rights of life, liberty and the pursuit of happiness was replaced by a pragmatic compromise that was necessary to preserve a fragile union that was divided on the issue of human slavery. The Constitution adopted in 1787 expressly provided for the continuation of the slave trade. The importation of African slaves was to continue until 1808, fugitive slaves were to be captured and returned to their owners, and the apportionment of representatives to Congress counted three-fifths of each slave to allocate representation by population. In the days leading up to the Civil War, representatives from the State of Georgia admitted that, "The question of slavery was the great difficulty in the way of the formation of the Constitution."[212] Without the inclusion of the fugitive slave clause, South Carolina would have never agreed to the Constitution.[213] Rule by law thus continued after 1787, for legal equality did not extend to human slaves, who legally remained the property of their master.

It is well known that the Declaration of Independence, the Constitution of 1787, and the Bill of Rights were political compromises that were blatantly hypocritical of the noble words proclaiming the promise of universal equality in the Declaration of Independence. On the 200th anniversary of the United States Constitution, a descendant of slaves, former Supreme Court Associate Justice Thurgood Marshall delivered an address celebrating the Constitution as a living document, and not for the racist and discriminatory document it was intended to be.[214] Political compro-

---

[210] At http://press-pubs.uchicago.edu/founders/print_documents/v1ch2s5.html (emphasis in original).

[211] At http://www.yale.edu/lawweb/avalon/patrick.htm.

[212] At http://sunsite.utk.edu/civil-war/reasons.html.

[213] At http://sunsite.utk.edu/civil-war/reasons.html.

[214] Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?* 40 VAND. L. REV. 1337 (1987).

mise resulted in the omission from the final draft of the Declaration of Independence criticism of the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions.[215] Once the revolution succeeded, the southern states made a deal with the northern states that resulted in the granting of power to Congress to regulate commerce in exchange for the right of the southern states to carry on the slave trade. Both the north and the south prospered by this arrangement.[216] Free white males constituted "We the People," for slaves and women were denied civil rights and equality before the law. The Constitution was drafted to avoid the word "slave" and replaced it with the term "other persons."

Yet a remnant of the notion of the rule of law continued, in the narrow sense that rule by a government that was limited by delegated powers preserved liberty and protected society from the tyranny of a single despotic ruler. The language of rule of law emerged. In the former Province of Massachusetts Bay, the consent of the governed was exchanged in a social compact for a republican form of government in which the phrase "rule of law" was undefined in the context of the explicit separation of powers written into Article XXX of the 1780 Massachusetts Constitution:[217] "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." This was the beginning of the form of the rule by law, but not its substance. Even though the Massachusetts Constitution recognized in Article I that "All men are born free and equal, and have certain natural, essential and unalienable rights" including those of life, liberty, property, safety and happiness, slavery was not abolished. It was left to the judiciary to interpret Article I, so that by 1785, slavery was unconstitutional in Massachusetts.[218]

This idea of a "government of laws and not of men" has nothing to do with morality or just laws or rule by law as I have defined it. A "government of laws, and not of men," is after all not necessarily the rule of law. It is a mistake to label mere legality as compliance with the rule of law. For example, totalitarian regimes can be fastidiously legal, pass unjust laws, and maintain the separation of executive, legislative and judicial powers. The history of Apartheid in South Africa is a classic example of rule by law under the guise of rule of law. Racist laws are invalid according to the rule of law and as unjust laws, are not laws at all. A morally just law that invalidates racial segregation is worthy of obedience; a morally unjust law compels civil disobedience.

---

[215] *Id.* at 1339.

[216] *Id.* at 1338-39.

[217] At http://www.mass.gov/legis/const.htm.

[218] Commonwealth v. Jennison, slip op. (1783), at http://www.pbs.org/wgbh/aia/part2/2h38.html. The first state constitution to abolish slavery was Vermont in 1777, followed by Pennsylvania in 1780.

Professor Ronald A. Cass, former Dean at the Boston University School of Law, contends that the rule of law is not anchored in concepts of justice or natural law.[219] He argues that law is divorced from morality and that rule of law merely fulfils the need for power-constraining rule-fidelity. He cites America's acceptance of slavery and abortion as examples of how governments may adopt laws that are immoral. However, Cass maintains that immoral laws are valid laws, having passed judicial, legislative and executive scrutiny in a democratic society. Respect for the rule of law mandates obedience to immoral laws, suggests Cass.

In my view, Cass fails to recognize that a government of good laws that accord with justice and natural law is entirely consistent with a republican constitutional democracy. In my view, what Cass terms "rule of law" is by my definition "rule by law," in the truncated sense, as it was modeled by the Supreme Court prior to *Brown v. Board of Education*.[220] The idea of the rule of law is universally misunderstood and is normally assumed to be a way to describe binding legal rules of general application.[221] A significant exception faithful to my definition of the rule of law is the common law tradition of trial by jury and the doctrine of jury nullification, which prioritizes justice over precedent and the letter of the law.

The community jury is the ultimate defender of the rule of law. A jury has the legal authority to refuse to convict a defendant who is factually guilty of violating an unjust or immoral law. This doctrine of jury nullification is vital to ensuring the survival of the rule of law, for juries composed of lay people from the local community that may be ignorant of the complexities of legal rules know in their hearts and minds what is morally right and just. The English governing the American colonies knew this too, for when King George III exercised his will unjustly, trial by jury was denied. The Declaration of Independence specifically listed many reasons why revolution was preferable to rule by law, including, "For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences."[222]

For example, the Constitution of 1787 appeased the slave owning states with the fugitive slave clause. Against this provision was the right to trial by jury, enshrined in the Constitution[223] and the Bill of Rights.[224] As explained in the pre-

---

[219] Ronald A. Cass, The Rule of Law in America 15-17 (2001).

[220] Brown v. Board of Education, 347 U.S. 483 (1954).

[221] *See* Richard H. Fallon. Jr. *The Rule of Law as a Concept in Constitutional Discourse*, 97 Col. L. Rev. 1 (1997); *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U.L. Rev. 781 (1989).

[222] At http://www.archives.gov/national_archives_experience/charters/declaration_transcript.html.

[223] U.S. Const. art. III, sec. II states: "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed." At http://www.archives.gov/national_archives_experience/charters/constitution_transcript.html.

[224] U.S. Const. amend. VI states: " No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury…" Amendment Six states, "In

amble to the Constitution, the right to trial by jury was so "We the People" would "establish justice." Accordingly, it is the right as well as the duty of citizens serving on any hypothetical jury trying Harriet Tubman to acquit her, in spite of her plain disobedience to legally enacted fugitive slave laws, in order to attain the higher goal of the rule of law. Jury nullification is essential to the function of the rule of law, so disobedience to unjust laws is rewarded and not punished. No doubt had Cass served on such a jury he would have rejected the idea of jury nullification and voted to convict the famous Underground Railroad heroine Harriet Tubman of violating fugitive slave laws.[225]

The importance of trial by jury as the defender against rule by law cannot be overstated. Trial by jury is a constitutional institution essential to maintaining the rule of law. Jury nullification is the means by which justice is accomplished, in spite of a biased judge or an immoral and unjust law that is no law at all. Lord Devlin observed, "The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." [226] At a minimum, the American constitutional right to a jury was to prevent oppression by government;[227] in its fullest sense, the right to a jury trial, including the power of nullification, has been since the Magna Carta, a constitutional institution that evolved over time that has preserved the rule of law.[228]

In 1787, the legal institution of slavery, characterized by injustice and immorality, made it impossible for any flourishing of my defined concept of the rule of law. The language of "rule of law" was limited to the basic idea that a government of laws with limited powers had replaced the unchecked arbitrary will of monarchs and their representatives. This permitted freedom from the will of others and guaranteed personal liberty from tyranny. Beyond this idea, there was no discussion on the meaning of rule of law until the case of *Marbury v. Madison*.[229]

---

all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury…" Amendment Seven states "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be reexamined in any Court of the United States than according to the rules of the common law." At http://www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

[225] At http://www.civilwarhome.com/tubmanbio.htm.

[226] Devlin, *supra*, note 174, at 164.

[227] S*ee* Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); Singer v. United States, 380 U.S. 24, 31 (1965).

[228] Along with the executive, legislative, and judicial branches of government, the people retain the power to prevent tyranny and to preserve the rule of law, by express provisions in the Constitution to vote politicians out of office, to impeach judges and presidents, to keep and bear arms, and to have trial by jury in all criminal cases. The people thus are an integral part of the separation of powers doctrine, fundamental to which is the rule of law, which is at the core of our history, values and traditions.

[229] Marbury v. Madison, 5 U.S. 137 (1803).

Chief Justice Marshall relied upon Professor Blackstone's *Commentaries on the Laws of England* to resolve the question of whether there must always be a remedy whenever a legal right is violated. In concluding there must, he stated, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." [230] This reference to the idea of rule of law imports the concept that a legal finding of a violated right merits access to justice, for a right is meaningless without a remedy. This observation by Chief Justice Marshall instinctively comes close to the core idea that justice is the defining characteristic of a society ruled by law.

Despite these insights, the Marshall Court did not anchor the concept of the rule of law to justice. Contrary to the reliance on natural law infused into the Declaration of Independence, the Marshall Court saw its duty to apply the relevant law derived from legal positivism, even if that law was repugnant to the law of nature.[231] In 1825, a ship called the Antelope, carrying over 280 African slaves, was captured by American authorities and brought into the port of Savannah, Georgia, for adjudication. The slaves claimed their freedom. In ordering the slaves be returned to their owners, Chief Justice Marshall stated: "In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other . . . this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law."[232] In looking to the mandate of the law, Chief Justice Marshall looked to Admiralty law, rather than to the Constitution. To his way of thinking, law was not equal to morality, for he asserted, "Whatever might be the answer of a moralist to this question, a jurist must search for a legal solution . . . ."[233] Rule by law triumphed over rule of law in this case, for legality and not justice was the guiding force that returned the Africans to a life of slavery.

In his reasons, Chief Justice Marshall ignored the opposite result reached in an English case cited to him by Mr. Key, counsel for the appellants. That precedent was the 1771 decision of Lord Mansfield in *Sommersett's Case*.[234] James Sommersett, an African slave was brought to England by his master Charles Steuart on a business trip. Sommersett refused to serve and escaped, but was captured and held aboard his master's ship pending departure for Jamaica where slavery was legal, human beings were legally goods and chattels, and Sommersett would be sold. Sommersett sought his freedom by the writ of habeas corpus, alleging his arrival onto English soil made him a free man. Lord Mansfield agreed, and set Sommersett free, observing that while positive law legalized human slavery, the state of slavery was so odious,

[230] *Id.* at 163.
[231] The Antelope, 23 U.S. 66 (1825).
[232] *Id.* at 114.
[233] *Id.* at 121.
[234] Sommersett's Case, 20 State Tr. 1 (1772).

that it was incapable of being introduced on any reasons, moral or political. Lord Mansfield understood that rule of law incorporated morality and to return Sommersett to a life of slavery was unjust. For Lord Mansfield, "the eternal principles of natural religion are part of the common law."[235]

The contrast is striking between these two judicial decisions, especially when one considered the similar environment and similar facts. Both judgments were issued when slavery was legal in the United States and in England. Both countries viewed themselves as Christian nations, even though the Atlantic slave trade was flourishing and both countries prospered by it. Today, in more enlightened times, when human rights and natural law are preferred to positive law promoting slavery, Lord Mansfield's decision shines like a beacon of light while the *Antelope* case dwells in shameful obscurity.

Following the *Antelope* case, the Supreme Court confirmed slaves were property, that this right of property existed independent of the Constitution and that slaves were articles of commerce.[236] The rule of law was non-existent, for slaves were repeatedly denied justice in the courts.[237] The case of Dred Scott[238] illustrates the complete abdication by the United States Supreme Court from the rule of law. Chief Justice Taney's opinion is a model of rule by law reasoning. It was a decision in infamy that was not to be matched in controversy until the case of *Roe v. Wade*.

Dred Scott was a descendant of African slaves who sued for the freedom of his family in the circuit court of St. Louis county in the state of Missouri. The stipulated statement of facts set forth a history of Dred Scott being a Negro slave and the property of army surgeon Dr. Emerson, who took Scott from the state of Missouri into the Upper Louisiana Territory at Fort Snelling, where Scott married Harriet, a newly acquired slave of Dr. Emerson. A daughter, Eliza, was born on a steamboat on the Mississippi River north of the Missouri state line. After two years in the territory that later became the state of Illinois, the Scott family returned to Missouri where another daughter, Lizzie, was born. Dr. Emerson then sold the Scott family to Sanford, who "laid his hands" on the girls, Harriet and Scott and then imprisoned the entire family. The case reached the Supreme Court of the United States in 1854 where it was argued twice before a divided court.

Chief Justice Taney's reasoning was based upon rule by law, for justice was irrelevant. What mattered was the letter of the law. In deciding Dred Scott was not entitled to file suit because he was ineligible, as a matter of law, to be a citizen, on account of his race and property status, Taney justified his position:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political

[235] Evans v. Chamberlain of London, 2 BURN'S ECCL. LAW 218 (9th ed.).

[236] Groves v. Slaughter, 40 U.S. 449 (1841) (Baldwin, J., refuting dissenting Justice M'Clean, who unsuccessfully tried to prove by the text of the Constitution that while certain states treated slaves as property, "the Constitution acts upon slaves as persons, and not as property.").

[237] *See, e.g.,* Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

[238] Scott v. Sandford, 60 U.S. 393 (1857).

> or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. [239]

Taney reviewed the Declaration of Independence and the Constitution and found that African American slaves and their descendants were not constituent members of the sovereign "people of the United States," and were not, nor ever intended to be, citizens.[240] While the words of the Declaration of Independence seem to embrace the whole human family, Taney found that there were two classes of persons, one comprised of free white men and their progeny, who were recognized as citizens, and members of the enslaved black race, who were excluded from citizenship and not counted as a portion of "we the people."[241] As a separate class, this "population"[242] was "a subordinate and inferior class of beings"[243] and had no rights or privileges "but such as those who held the power and the Government might chose to grant them."[244] Individual members of this "class of persons" were regarded as ordinary articles of merchandise, to be bought and sold for profit.[245] Slavery was for the Negro's own good, for members of this race were universally beheld "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political situations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit."[246] Legal segregation from this "unhappy" and "unfortunate" race was intended to be perpetual and impassable.[247] The master class governed the slave class with absolute and despotic power.[248] Intermarriages between white persons and Negro or mulattoes, free or slave, was a crime.[249] On the scale of created beings, no one was lower than the Negro or mulattoe, free or slave, for the entire race was burdened with a stigma of the "deepest degradation."[250]

Taney demonstrated, by citing from various preambles, that legislation enacted by states, such as Connecticut, to abolish slavery, was motivated by a policy to protect poor whites from injury and inconvenience.[251] Only in the state of Maine

---

[239] *Id.* at 405.
[240] *Id.* at 404, 407.
[241] *Id.* at 410.
[242] *Id.* at 403.
[243] *Id.* at 404-05.
[244] *Id.* at 405.
[245] *Id.* at 407.
[246] *Id.*
[247] *Id.* at 409.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.* at 414.

were African Americans granted equality in civil and political rights with the white race.[252] The structure of American federalism gave the various states the power to justly and humanely deal with slaves, as required by the interests and safety of society. The national government had no authority beyond the delegated powers assigned to it under the Constitution—and the Constitution protected and permitted slavery by clauses that allowed the future importation of slaves and the return of fugitive slaves. Taney refused to be swayed by popular sentiment to interpret the Constitution liberally. There was an amending formula, and if the Constitution were to be amended, that procedure would have to be followed. It was not the duty of the court to in effect amend the Constitution and thus become the "mere reflex of the popular opinion of the day."[253] Like Justice O'Connor in *Casey*, Chief Justice Taney attempted to settle for all time the divisive issue before the Court. Taney ruled that the meanings of "people" and "citizen" were now "settled."[254]

Rather than resting his opinion at this point, Taney gratuitously proceeded to judicially review the Missouri Compromise, the 1820 Act of Congress that prohibited slavery in the Territory north of Missouri.[255] That law meant that any person who brought his or her slave into that Territory thereby freed that slave. This legislation was found by Taney to be void, a violation of the Fifth Amendment to the Constitution, which provides that "no person shall be deprived of life, liberty and property without due process of law." Since slaves were property belonging to persons, there was a violation of due process when slaves were automatically freed without compensation of any kind. Taney held that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."[256] Congress was obliged to guard and protect the slave owner's rights, not to violate them. The Missouri Compromise was therefore ruled unconstitutional.

In vain, the dissenting Justices relied upon *Sommerset's* case, and cited it for the proposition that "the state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws."[257] Justice McLean denied Lord Stowell ever overruled *Sommerset's* case in 1827, in the case of the former slave Grace who was once again enslaved in Antigua, after leaving English jurisdiction. In England, there was no law prohibiting slavery, but also no law authorizing it.[258] Justice McLean asked, "Does this not show that property in a human being does not arise from nature or from the common law, but, in the language of this court, 'it is a mere municipal regulation, founded upon and limited to the range of territorial laws?'"[259] McLean continued, "A slave is not mere chattel. He

[252] *Id.* at 416.
[253] *Id.* at 426.
[254] *Id.* at 426.
[255] *Id.* at 432.
[256] *Id.* at 451.
[257] *Id.* at 534.
[258] *Id.* at 459.
[259] *Id.* at 549.

bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[260] McLean cited to his unreceptive brethren numerous precedents from the Missouri courts that freed slaves had been taken into Illinois,[261] and so in principle reached the same result as *Sommerset's case*. Dissenting Justice Curtis agreed that slavery was "contrary to natural right," and is "created only by municipal law."[262] Curtis and McLean both referred to the judgment of the Supreme Court of Appeals for Kentucky in *Rankin v. Lydia*,[263] as authority for the unchallenged doctrine that slavery is a creature of positive law and is not found in the law of nature or in the common law: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law."[264] These arguments by McLean and Curtis suggest these justices intuitively knew slavery was unjust and contrary to the rule of law.

The reality was, as stated by Justice Campbell in his concurrence with Justice Taney, that "the American revolution was not a social revolution," but a political one: "The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent colonies became thirteen independent states." [265]

On the eve of the Civil War, there were at least three classes of persons[266] in the United States. There were white adult males who were citizens that enjoyed full civil and political rights; there were women and minor children of the Caucasian race who lacked full civil and political rights; and then there were the persons at the lowest end of the scale, members of the Negro race, who were slaves, and had no citizenship. However despised and inferior these slaves were, they were described in the Constitution as "persons" even though they were not "persons in the whole sense" as were white males, and no one suggested for a moment they were anything less than human beings. Justice Taney confirmed that even female African slaves were persons subject to the law. Sitting as a circuit court judge, Justice Taney found Amy, a young African-American woman slave, guilty of theft, after rejecting her defense that she could not be guilty of a crime because only "persons" were within the jurisdiction of the court.[267]

[260] *Id.* at 550.

[261] *Id.* at 551-52, 554-55.

[262] *Id.* at 624.

[263] Rankin v. Lydia, 2 Marsh., 12, 470.

[264] Scott v. Sandford, 60 U.S. 393, 536, 624 (1857).

[265] *Id.* at 502.

[266] The class status of other persons, such as Native American Indians and Asians, is beyond the scope of this article. Dissenting Justice McLean noted, in contrast to the treatment of the Negro, in the recent treaty with Mexico, "we have made citizens of all grades, combinations and colors." Scott v. Sandford, 60 U.S. 393, 533 (1857).

[267] United States v. Amy, 24 F. Cas. 792, 809–10 (C.C.D. Va. 1859) (No. 14,445).

XI. When Unborn Human Beings Were Persons

Were unborn children ever considered to be human beings, and if so, persons too? The following survey of the British common law is helpful, not just to answer these questions, but to understand the seamless nature of the early American common law and to suggest that at one time, the unborn were arguably "persons in the whole sense," contrary to the conclusion of Justice Blackmun in *Roe v. Wade*.

The history of the common law reveals that laws against homicide protected all human beings, including unborn children. When a pregnant mother felt her baby move within her (quickening), this was considered evidence that the woman was "with child." Blackstone's *Commentaries* describes the right to life as "a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[268] In Blackstone's lifetime, legal protection of the fetus from homicide began at "quickening," when it was assumed that life began for the unborn child.[269] In the Thirteenth Century, Brackton and Fleta ruled that killing an unborn child where there was evidence of "quickening" was homicide.[270] As the common law developed over several hundred years, famous legal authorities including Fleta, Staunford, Lambarde, Dalton, Coke, Blackstone, Hawkins, and Hale referred to the unborn human being as a "child" and never as "potential life."[271] There was never an issue of personhood.

The English common law, according to the learned 12th century jurist, Henry de Bracton,[272] equated the killing of an unborn child that had begun to stir in the womb with homicide, the slaying of "man by man."[273] The unborn child was accorded the status of a human being and it was a crime to harm it in any way. Bracton summarized the law: "If there is anyone who strikes a pregnant woman or gives her a poison which produces an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide."[274]

---

[268] William Blackstone, Commentaries on the Law of England I 125 (1765).

[269] *Id*. at 125-26.

[270] Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis U. Pub. L. Rev. 229, 285 n.338 (1987). For a range of common law history pertaining to legal protection of the unborn, *see* Robert M. Bryn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1972); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1978); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250 (1975); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563 (1986); Shelley Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. Legal Hist. 20 (1984).

[271] Horan, *supra* note 270, at 289–91 nn.359–78.

[272] Bracton, trained in law and theology, wrote a treatise called, *On the Laws and Customs of England* sometime before 1259. It is regarded as the greatest medieval treatise ever written on the common law of England and was cited by Lord Coke and Sir William Blackstone, who are regarded among the greatest legal minds in English history.

[273] At http://www.lifeissues.net/writers/tay/tay_03foundingfather.html#a4.

[274] Henry de Bracton, 3 On the Laws and Customs of England ii, 4 (S.E. Thorne Trans. 1968)

In the 13th Century, Fleta restated Bracton's statement, and varied it to acknowledge legal protection for the unborn child that is formed and has a soul: "One is rightly a homicide who has pressed on a pregnant woman or has given her a poison or struck her to produce an abortion . . . if the foetus was already formed and ensouled. . . . A woman also commits homicide if, by a potion or the like, she destroys the ensouled child in her womb."[275]

Infants were recognized as human beings, whether they were killed in their mother's womb or after their births. As an evidentiary rule, it was not until the infant was out of the mother's body, and determined not to be a "monster," that there was conclusive proof that the unborn child was a human being.[276] In this manner, a creature that is a hybrid between a human and an animal may be abandoned to die, for it was not fully human. Since it was not a human being it had no rights or legal protection. A born alive rule developed.[277] It was murder to harm an unborn child in its mother's womb, so long as the infant lived long enough to be born and viewed.

The historical record of prosecutions for feticide is scant. Of two known cases, in one, the *Twinslayer's Case*,[278] the hearing was adjourned and the accused was later unavailable for trial, having been transferred to another jurisdiction to face other charges.[279] In the other, the *Abortionist's Case*,[280] the indictment failed for lack of proof of causation.[281]

The unborn child had the unquestioned status of being "a human being in actuality." It was *in rerum natura*. *Thus the unborn child was a person in law in the whole sense of the word.* Confusion occurred when legal commentator Sgt. Stanford in the 15th Century erroneously concluded, from a misunderstanding of the facts of the *Abortionist* and *Twinslayer* cases, that an unborn child was not a human being until it was born alive.[282] Stanford stated: "It is required that the thing killed be *in rerum natura*. And for this reason if a man killed a child in the womb of its mother: this was not a felony, neither shall he forfeit anything. . . . And if a man beats a woman . . . who was carrying twins, so that . . . one of the children was born and . . . two days afterward through the injury he had received he died, this was not a felony. . . ."[283]

---

[275] 1 Fleta 23.

[276] A. Horne, The Mirror of Justices 139 (Selden Soc. Ed., 1895); *see also* A. Horne, The Mirrour of Justices 209 (Rothman Reprint ed., 1968). My understanding of "monster" is based on the following definition from Dunglison's Human Phys. "physiology, persons. An animal which has a conformation contrary to the order of nature." At http://www.legallawterms.com/Law.asp-Term-M.

[277] Mark S. Scott, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 Mich. L. & Pol'y Rev. 199, 226 (1996).

[278] 1 Edw. 3 (K.B. 1327).

[279] *See* Scott, *supra,* note 277, at 227-28.

[280] 22 Edw. 3 (K.B. 1348).

[281] *See* Scott, *supra,* note 277, at 227-28.

[282] *Id*. at 230-31.

[283] William Stanford, I Les Plees del Caron c. 13 (1557).

It was left to Lord Edward Coke to correct the misapprehension that an unborn child was not a human being until it was born alive. An unborn child was affirmed to be a human being, *in rerum natura*, at the point of quickening, when the now animated unborn child was presumed to come alive. Coke also refuted Sandford's error, demonstrating that the *Twinslayer's Case* was never binding as law. The killing of an unborn child was murder when live birth provided proof of causation and the retroactive evidence the infant was both a human being and alive at the time the harm was committed. Coke's restatement of the law both corrected Sandford and harmonized with Bracton:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the child be born alive, and dyeth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive. And the Book in 1 E. 3was never holden for law. And 3 Ass. p.2 is but a repetition of that case. And so horrible an offense should not go unpunished. And so was the law holden in Bractons time. . . .[284]

While two later commentators, Sgt. Hawkins[285] and Sir William Blackstone followed Coke's analysis of the law, two other commentators, Michael Dalton and Sir Matthew Hale repeated Stanford's error that an unborn child was not a human being until it was born.[286] This created a legal fiction that set the stage for the inevitable legal result that if an unborn child was not a human being until birth, it was not a legal person until birth too. It was this error that was to be repeated by Justice Blackmun in *Roe v. Wade*.[287] The errors by Stanford, Dalton and Hale are understandable, given that in their lifetimes, the science of embryology in the 15th-16th Centuries had not developed to the point of objectively proving that an invisible unborn child nurtured in its mother's womb was alive and a human being.

Blackstone rejected Stanford's position and agreed with Coke that abortion was the homicide of an unborn human being. Blackstone categorized murder as a crime against the person of a private subject, and defined murder to be the unlawful killing of a human being: "Murder is now thus defined, or rather described, by Sir Edward Coke; 'when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. . . .'[288]

The victim, particularized as a "reasonable creature in being" is called a "person" by Blackstone, who elaborated on the elements of the crime of murder: "[T]he person killed must be a reasonable creature in being, and under the king's peace, at the time of the killing. . . . To kill a child in its mother's womb, but a great mispri-

[284] Edward Coke, 3 Institutes of the Laws of England 50 (1648).

[285] Sgt. Hawkins, 1 Treatise of the Pleas of the Crown, Ch. 31, § 16, 80 (1716).

[286] Michael Dalton, The Countrey Justice, Conteyning the Practice of the Justices of the Peace 213. (1648); Matthew Hale, 1 History of the Pleas of the Crown 433 (1670)(published in 1736).

[287] Scott, *supra,* note 277, at 230-31.

[288] William Blackstone, 4 Commentaries on the Laws of England 195 (1769).

sion: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them."[289]

Sir William Blackstone, in the 17th Century, confirmed it was a crime for a woman to kill her unborn child after quickening. The infant in the mother's womb was equated to human life. It was assumed as a matter of law that human life began at quickening:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb . . . this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor. . . .[290]

Unborn children were not only regarded as human beings, but in the eyes of the law were persons deserving of legal protection. The question of personhood did not seem to be affected by the distinction that killing in the womb was manslaughter or homicide and a misdemeanor, and not murder, if the child survived past the point of birth. The personhood of the unborn child did not turn on the gravity of the crime, nor its location. A crime against the person took place if the victim met the requirements of being alive and a reasonable creature in being.

The law divided "persons" into two categories, natural or artificial. Natural persons were those human beings created by God, "Natural persons are such as the God of nature formed us."[291] Artificial persons were corporations that were "created and devised by human laws for the purposes of society and government."[292]

A natural person enjoyed rights that were both absolute and relative. Absolute rights, such as the inherent right to life, belong to every human being in their natural state. Blackstone observed, "the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."[293] The main purpose of law ought to be "to explain, protect, and enforce such rights as are absolute."[294] Blackstone cautioned that when a human being enters society, a part of that individual's natural inherent right to liberty is surrendered in conformance to laws that protect the personal security and absolute rights of other human beings.[295] "For no man, that considers for a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also

---

[289] *Id.* at 198.
[290] *Id.* at 125
[291] *Id.* at 119
[292] *Id.* at 288
[293] *Id.* at 120.
[294] *Id.*
[295] *Id.* at 121-22. Blackstone's views were later adopted by Alexander Hamilton. The Farmer Refuted 23 (Feb. 1775) (Papers 1:86-89, 121-122, 135-136).

have the same power; and then there would be no security to individuals in any of the enjoyments of life."[296]

These "enjoyments of life" are vested in the security of the person, and are inherent natural God given rights. Blackstone defined the security of the person: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[297] English constitutional law required that personal liberty of natural persons must yield when it conflicts with the paramount inherent right to security of the person, which includes the right to life and bodily integrity of other natural persons. This constitutional law doctrine, establishing security of the person as the paramount value, even to personal liberty, made it impossible then for a woman to legally justify abortion on demand, and to take the life of another human being, as an ordinary matter of exercising her right to liberty.

Lord Justice Harcourt, in the 1713 case of *Beale v. Beale*,[298] cited Coke as authority for the proposition that a court of equity ought to protect the interests of unborn children:

> As to the other objection, it would be very bad in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for but as the law in many respects, regards the infant *in ventre sa mere*, so as to allow such child to be vouched (I Inst. 390); also as the mother may be guilty of the murder of a child *in ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison (3 Inst. 50, 51): so there is more reason that equity should consider such child, in order to its being Provided for; and therefore this posthumous child may be well looked upon, in equity, to be living at her father's death *in ventre sa mere*.[299]

In 1795, in *Doe v. Clarke*, Lord Chief Justice Eyre interpreted the words "living children" in a will to include an unborn human being.[300] Justice Sir Frances Buller concurred, observing it was "now settled" that an unborn child is considered "as born for all purposes for his own benefit."

Buller elaborated further on the *Clarke* case in a later case, *Thellusson v. Woodford*, and identified three important rules that were foundational to the common law. At the very least, an unborn child is considered "absolutely born" "whenever such consideration would be to his benefit." That was the logic that historically legally protected the unborn child from abortion, as abortion was never presumed to be for the child's benefit. The second rule is that unborn children are persons, and as such, "are entitled to all the privileges of other persons."[301] Thirdly, there is

[296] BLACKSTONE, *supra*, note 268.
[297] *Id.* at125.
[298] Beale v. Beale, 1 Peere Williams 244, 24 E.R. 373 (1713).
[299] *Id.* at 246.
[300] Doe v. Clarke, 2 H. Blackstone 399, 126 E.R. 617 (1795).
[301] Thellusson v. Woodford, 2 Vesey, Jr., 319, 323 (1798).

no reason to confine these rules to executory devises, for unborn children "should be considered generally as in existence."

In 1798, in *Thellusson v. Woodford*, the contemporary argument that an unborn child was a legal non-entity was emphatically rejected.[302] Lord Hardwicke had previously concluded that an unborn child is a person *in rerum natura*, and according to both the civil and common law the unborn child was "to all intents and purposes a child as if born in her father's lifetime."[303] In legal matters affecting the unborn child, the civil law presumed the unborn child to be born and living for all legal purposes in cases where that presumption would benefit the child. Justice Buller listed examples of what an unborn child can do: "He may be vouched in a recovery, though it is for the purpose of making him answer over in value; he may be an executor; he may take under the statute of distributions; he may have an injunction, a guardian."[304]

In *Thellusson*, Justice Buller cited numerous foundational authorities that clearly settled the law establishing that unborn children were simultaneously human beings and persons:

> In Wallis v. Hodson, Lord Hardwick says (2 Atk. 117), 'The principal reason I go upon in the question is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently *a person in rerum natura*, so that both by the rules of the Common and Civil Law she was to all intents and purposes a child as much as if born in her father's lifetime.' (Trower v. Butts, Sim. & Stu. 181.)
>
> In the same case Lord Hartwicke takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: but notwithstanding he states the rule to be, that such child is to be considered living to all intents and purposes. . . .
>
> Lancashire v. Lancashire and Doe v. Clarke go upon the same principles. In both a child *en ventre sa mere* was held to be a child living at the death of the testator. . . . In Doe v. Clarke, the words 'that whenever such consideration would be to his benefit, a child *en ventre sa mere* shall be considered as absolutely born' were used by me, because I found them in the Book [Watkin's Treatise Upon Descents 142], from whence the passage was taken. *But there is no reason for so confining the rule. Why should not children en ventre sa mere be considered generally as in existence? They are entitled to all the privileges of other persons.* . . .
>
> Goodtitle v. Wood (7 Term, R p. B. R. 103, note) is an authority on the same point. *The effect is, that there is no difference between a child actually born and a child en ventre*

[302] *Id.* at 319.

[303] *Id.*

[304] *Id.* The court in *Thellusson v. Woodford* cites numerous older English authorities that establish an unborn child is a legal person equal to that of a human being who has already been born. For example, *Doe v. Clark* held, "That whenever such consideration be for his benefit, a child *in ventre sa mere* shall be considered as absolutely born." *Goodtitle v. Wood* decided to the same effect there was no difference between a born and unborn child.

> *sa mere*. In Lancashire v. Lancashire Judge Grose says, 'I know of no argument founded on law and natural justice, in favor of the child, who is born during his father's life, that does not equally extend to a posthumous child; and I think, that, when once the law has interfered, and presumed in favor of one child, it would stop far short of justice, if it did not raise the same presumption in favor of the other.' [305]

The Master of the Rolls, Richard Pepper Arden, who was also known as Lord Alvanley, agreed with Justice Buller, for he too decided that the law had settled that an unborn child was "a life in being" and that unborn children "are considered to all intents and purposes as actually born."[306]

Significantly, Lord Alvanley, M.R. pointedly declined to accept the invitation of distinguished counsel to make new law. To make new law was contrary to "the first principles of judicial determination, and would vest a most dangerous power in the Judges."[307] It was a power "which no Judge would wish to possess."[308] The function of the judge was a declaratory one alone: "The Judges are to declare the law, not to make the law."[309] Legal reform was up to the legislative branch of government: "If an inconvenience arises, the legislature, not the Judges, must apply the remedy."[310]

Legal protection of the unborn from homicide expanded as medical knowledge increased.[311] In England, the advancement of medical science resulted in medical doctors believing that abortion prior to quickening was the killing of human life and a crime.[312] As medical knowledge became more sophisticated, and the concept of quickening became obsolete, laws in England and in the United States were enacted to prohibit abortion prior to quickening without regard to gestation. In England, Lord Ellenborough's Act of 1803 was the first statute passed that made abortions prior to quickening a criminal act (but not a capital crime like an abortion after quickening).[313] The Act was amended in 1837 and abolished the quickening distinction making abortion at any time during pregnancy a crime by both the doctor and the pregnant woman.[314]

---

[305] *Id*. at 322-25 (emphasis added).

[306] *Id*. at 334. In coming to this conclusion, the senior judge (the Master of the Rolls) relied on the case of *Long v. Blackwell*, and a string of cases since the statute of William and Mary (10 and 11 William and Mary, c. 16) including *Beale v. Beale*. There was only one case in which to a "certain extent" an unborn child was not considered to all intents and purposes as in existence: "the case of a descent in Common Law" where intermediate rent and profits belonged to the heir at law and the requirement there be a tenant to the praecipe. Thellusson v. Woodford, 2 Vesey, Jr., at 335-36.

[307] *Id.* at 332.

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469, 492–93 (1997).

[312] JOHN KEOWN, ABORTION, DOCTORS AND THE LAW 26-48 (1988).

[313] MICHAEL GROSSBERG, GOVERNING THE HEARTH 161 (1988).

[314] *Id.* at 162.

Lord Ellenborough's Act made it a felony punishable by death without benefit of clergy to cause and procure the miscarriage of any woman who was quick with child.[315] If the woman was not yet quick (in the first trimester) with child, the crime was still a felony, but punishable by a maximum sentence of 14 years:

> And whereas it may sometimes happen that Poison or some other noxious and destructive Substance or Thing may be given, or other Means used, with Intent to procure Miscarriage or Abortion where the Woman may not be quick with Child at the Time, or it may not be proved that she was 'Quick with Child'; be it therefore further enacted, That if any Person or Persons, from and after the said first Day of *July* in the said Year of our Lord One thousand eight hundred and three, shall wilfully and maliciously administer to, or cause to be administered to, or taken by any Woman, any Medicines, Drug, or other Substance or Thing whatsoever, or shall use or employ, or cause or procure to be used or employed, any Instrument or other Means whatsoever, with Intent thereby to cause or procure the Miscarriage of any Woman *not being, or not being proved to be, quick with Child at the Time of administering such Things or using such Means*, that then and in every such Case the Person or Persons so offending, their Counsellors, Aiders, and Abettors, knowing of and privy to such Offence, shall be and are hereby declared to be guilty of Felony, and shall be liable to be fined, imprisoned, set in and upon the Pillory, publickly or privately whipped, or to suffer one or more of the said Punishments, or to be transported beyond the Seas for any Term not exceeding fourteen Years, at the Discretion of the Court before which such Offender shall be tried and convicted. [316]

In 1832, the English Court of Appeal in *Rex v. Senior* upheld a manslaughter conviction of a male midwife who had killed a full-term baby with a knife by breaking and compressing the skull of the infant while the rest of the baby was still in the birth canal in the process of being born.[317] The midwife's defense was that the baby was only partially born and as such, was not a human being. This defense was rejected at trial and on appeal. Joseph Senior served a sentence of one year for manslaughter.

In 1848, Justice Maule, in the case of *Regina v. West*,[318] instructed that the jury must bring in a verdict of guilty on a charge of murder if it found that the defendant, with the intent to commit an abortion, did anything to cause the premature delivery of an unborn child, and in consequence of its premature birth, died. Anne West forced her "tight hand" "into the private parts" of pregnant Sara Hensen, and used a pin in her womb to force the male child to be prematurely born. After five hours of languishing, the six-month-old child died.[319] Despite these facts, the jury returned a verdict of not guilty of this capital crime.

In 1871, the High Court of Admiralty, in the case of *The George and Richard*,

---

[315] 43 Geo. 3, Ch. 58. At http://members.aol.com/abtrbng/lea.htm.

[316] *Id.* (emphasis added).

[317] Rex v. Senior ,(1832), 1 Moody 347 (C.A.); 168 E.R. 1298.

[318] Regina v. West, (1848) 2 Carrington and Kirwan 784, 2 Cox C.C. 500 S.C.; 175 E.R. 329.

[319] *Id.*

ruled that unborn children were entitled to sue for the wrongful death of a parent.[320] This right to litigate was granted by Parliament in 1846, when Lord Campbell's Act established a civil action and the right to compensation to surviving family members, including children, where a parent was killed in an accident.

XII. Pre-*Roe* American Abortion Jurisprudence

Prior to the American Revolution, abortion was rare, as once a woman was "quick" with child, it was assumed there was a live baby in her womb.[321] The local colonial law followed the English common law and regarded a mother's unborn child as a human being and a person.

After the War of Independence, English constitutional and common law remained the source of American legal doctrine. At the forerunner to the University of Pennsylvania, Philadelphia law professor James Wilson, who later served as a justice on the United States Supreme Court from 1789-1798, and one of only six men who signed both the Declaration of Independence and the Constitution, taught that human life began at quickening and that the law protected the unborn child from the beginning of its existence:

> With consistency, beautiful and undeviating, human life from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and in some cases, from every degree of danger. [322]

The inalienable right to life, as part of the Declaration of Independence, can thus trace its origins to the English common law. It was a lesson well learned by Professor Wilson's former students, which included President George Washington, Vice President John Adams, and Secretary of State Thomas Jefferson.[323]

In 1818, in the case of *United States v. Palmer*,[324] a non-abortion case, the United States Supreme Court considered the meaning of the word "person." Chief Justice Marshall found that there was no difference in the meanings of person and human being. In interpreting a federal piracy statute, Chief Justice Marshall declared that the words "any person or persons" are broad enough to comprehend every human being" and "the whole human race." Nevertheless, Marshall noting that the legislation he was interpreting did not involve crimes against the human race, and confined the definition of person to those persons under the jurisdiction of the United

[320] The George and Richard, [1871] L. R. 3 Adm. & Ecc. 466.

[321] John Bouvier's *Law Dictionary* (1839) defined "quickening": "The motion of the foetus, when felt by the mother, is called quickening, and the mother is then said to be quick with child. This happens at different periods of pregnancy in different women, and in different circumstances, but most usually about the fifteenth or sixteenth week after conception. . . ."

[322] James Wilson, *Lectures on Law*, *in* The Works of James Wilson 597 (Robert G. McCloskey, ed., 1967).

[323] At http://www.lifeissues.net/writers/tay/tay_03foundingfather.html#a4.

[324] United States v. Palmer 16 U.S. 610 (1818).

States. Chief Justice Marshall cited no authority for the proposition that there was no difference in the meanings of "person" and "human being," because there was no need to. The common law already attributed legal personality to the unborn human being in probate, property, tort, and criminal law.

The common law historically protected the unborn child after quickening to the fullest extent possible in accordance with the medical knowledge of the day.[325] Prior to quickening, it was assumed the fetus was not alive because medical knowledge was not advanced enough to determine if a woman was in fact pregnant prior to perceived fetal movement.[326] The first American criminal law statutes, enacted between 1820 and 1840, prohibited only post-quickening abortions.[327] This was because the common law, as it existed at the time of the American colonies, criminalized abortion only after the time of quickening.[328]

In 1821, the state of Connecticut passed legislation to protect women from certain means of procuring abortion to protect a woman's health and to make it a felony to procure an abortion after quickening had occurred.[329] Illinois, and then New York passed similar laws. Other states followed suit. Twenty-five states modeled their laws after New York.[330] However, as scientific knowledge increased about when human life began in the womb, so did criminal laws that extended protection to the unborn prior to quickening, for quickening became an obsolete concept. The objective scientific evidence was irrefutable: from the time of conception, the new life in the womb was fully human and a living member of the human species.

In 1835, medical science began serious consideration of the evidence that suggested that human life began at conception.[331] In 1840, the state of Maine was the first American jurisdiction to pass legislation modeled after Lord Ellenborough's Act to ban the abortion of infants, whether quick or not.[332] The science of embryology was in its infancy and medical lecturers began teaching that human life began at conception, and not at quickening. In 1843, Dr. Martin Berry discovered that conception began when sperm entered an ovum. Human "conception" was observed under a microscope not long after, motivating physicians to become politically active against abortion.[333]

In 1847, the American Medical Association adopted its first code of medical ethics, and introduced the guidelines by declaring that religion and morality were

---

[325] Forsythe, *supra*, note 311.

[326] Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 203 (1989).

[327] *Id.*

[328] Grossberg, *supra*, note 313, at 160.

[329] At http://www.ppcentwa.org/history.htm.

[330] Scott, *supra*, note 277, at 259.

[331] Theodric & John Beck, *Elements of Medical Jurisprudence* (Albany: Webster's and Skinners 1835).

[332] At http://www.lifeissues.net/writers/tay/tay_03foundingfather.html#a4.

[333] At http://www.forerunner.com/forerunner/X0434_Defending_the_Right_.html.

at the foundation of medical ethics.[334] Between 1839 and 1855, Professor Hugh L. Hodge, University of Pennsylvania Medical School, and Professor David Humphreys Storer, Harvard Medical School, raised the awareness of medical students about the growing number of abortions and the advances of science that proved human life began at conception. Dr. Hodge taught that the unborn child was not a part of its mother's body, but was an independent being.[335] In 1853, Dr. Tracy maintained that a tiny embryo, no bigger than a grain of wheat, was "a human being," "one of the human family" and entitled to have its life "carefully and tenderly cherished."[336]

Dr. Storer's son Horatio Robinson Storer, who trained in medicine at Harvard and studied embryology, became the political leader in the battle against abortion. Dr. Horatio Storer blamed "ignorance prevalent in the community respecting the actual and separate existence of foetal life in the early months of pregnancy" for the rise in the number of abortions, especially among married Protestant women.

In 1857 Dr. Horatio Storer chaired a committee of the Massachusetts Medical Society that recommended legal reform to recognize the unborn child as the victim of an abortion, to upgrade the offense from a misdemeanor to a felony, and to establish that the offense was committed by any attempt to procure a miscarriage. In 1859, Dr. Horatio Storer published a series of nine papers in the *North American Medico-Chirurgical Review*. In his first article, he argued, according to moral law, that "the willful killing of a human being at any stage of its existence is murder." Advancing the proposition that fetal life exists before quickening has taken place, and that human life begins at conception, he urged that abortion was unjustifiable, and hence ought always to be a crime. Dr. Storer's collection of articles were published in a book entitled *Criminal Abortion in America*, and reviewed by the editors of the *Boston Medical and Surgical Journal*, who suggested physicians warn their patients as to the criminal nature of abortion and cautioned physicians not to become morally complicit lest they too be stained with the guilt of murder.

Dr. Horatio Storer also chaired the American Medical Association's Special Committee on Criminal Abortion. The 1859 Report of the AMA on Criminal Abortion took a firm stand against abortion, calling it the "unwarrantable destruction of human life."[337] Ignorance of when human life began remained a major reason why abortions were becoming common. The general population, including mothers, believed the unborn baby was not alive until after the period of quickening. Doctors were "careless" in their attitudes toward the fetus. The laws protecting and benefiting the unborn were inconsistent from state to state, and within states, too. The American Medical Association adopted a resolution calling upon state

---

[334] At http://www.ama-assn.org/ama/upload/mm/369/1847code.pdf.

[335] Hugh Hodge, Foeticide, or Criminal Abortion Philadelphia 9-10 (U. Penn. 1869), *cited in* Marvin Olasky, Abortion Rites: A Social history of Abortion 113 (1992).

[336] Stephen Tracy, *The Mother and Her Offspring* 108 (N.Y.: Harper 1853), *cited in* Olasky, *supra*, note 335, at 113.

[337] 12 Transactions of the Am. Med. Assn. 73-78 (1859).

legislatures to pass laws to protect unborn human life from the time of conception and urged state medical associations to lobby for change.

In 1871, the AMA's Committee on Criminal Abortion, referring to the unborn as "human life," offered a resolution that was adopted by the American Medical Association, which stated, "it be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of one respectable consulting physician, and then always with a view to the safety of the child, if that be possible."[338]

With objective science informing medical doctors that human life begins at conception, coupled with the political activism of the AMA, the doctors in turn more aggressively informed the public that human life begins at conception and that unborn human beings were in need of greater protection from abortion. By the time the Civil War was over, the same states that ratified the Reconstruction Amendments had overwhelmingly passed strong anti-abortion laws to protect unborn human beings from abortion.[339]

Francis Wharton, in *American Criminal Law*, writing in 1868, illustrates how medical science has informed the criminal law. As medical science advances, so has legal protection for the unborn:

> There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder. If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide, even though the child is still attached to the mother by the umbilical cord. It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law.
>
> * * *
>
> It appears, then, that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another. . . . [T]he infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards.[340]

Physicians and moral reformers in the United States who opposed abortion lobbied for the suppression of information about abortion.[341] These efforts culminated in 1873 with Congress passing the Comstock law that banned dissemination

---

[338] 22 Transactions of the Am. Med. Assn. 258 (1871).

[339] At http://tempknak.home.att.net/HAbort.html.

[340] Francis Wharton, A Treatise on the Criminal Law of the United States: Comprising a Digest of the Penal Statutes of the General Government and of Massachusetts, New York, Pennsylvania, and Virginia: With the Decisions on Cases Arising upon Those Statutes: Together with the English and American Authorities upon Criminal Law in General 210–16 (1846).

[341] Rhode, *supra* note 326, at 204.

of material pertaining to abortion.[342] By 1887, abortion, which in early America was not a crime prior to the fourth or fifth month of gestation when there was evidence of quickening, had now become a crime against unborn human beings regardless of the age or size of the fetus.[343]

XIII. When Feminists Opposed Abortion

Prior to the Civil War, the Supreme Court viewed women and minor children in some ways as much better off than slaves.[344] They belonged to a class of persons who were citizens. However, they were denied political and civil equality with men.

Lucretia Mott, a Pennsylvania Quaker, who hid fugitive slaves and publicly urged the abolition of slavery, attended the 1840 World Anti-Slavery Convention in London, England, where the conference organizers discriminated against her and other female delegates. Mott and another unhappy delegate, Elizabeth Cady Stanton of New York, joined forces and turned their attention to women's rights.

Under their leadership, in 1848, a group of women and men met in Seneca Falls, New York, to discuss women's grievances and issue a document modeled after the Declaration of Independence. The resulting Declaration of Sentiments complained of inequality, unfairness in law and marriage, and sought the vote for women. These early feminists believed in "the family of man" and claimed the position to which they were entitled "by the laws of Nature and of Nature's God." The Declaration stated in part: "We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Nowhere in the document was the right to an abortion asserted or even a superior status to that of the unborn. In fact, the feminists of the early 18th century were staunchly pro-life and detested abortion as another method by which men subordinated women.

The early feminists strongly opposed abortion and saw it as a threat to motherhood and marriage.[345] In 1792, Englishwoman Mary Wolstonecroft urged that women must respect nature and let pregnancy take its course, as it was the first duty of a woman not to destroy the embryo in her womb.[346] Elizabeth Cady Stanton, a leader of the American Women's Rights movement, declared, "It is a mother's sacred duty to shield her children from violence from whatever source it may come."[347]

---

[342] *Id.* The official name of the original Comstock Law was "An Act for the Suppression of, Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," Act of March 3, 1873, ch. 258, 17 Stat. 598–599 (making it a crime to sell, lend, give away, publish, or possess devices or literature pertaining to birth control or abortion).

[343] Lamb v. State, 10 A. 208, 208 (Md. 1887).

[344] Scott v. Sandford, 60 U.S. 393, 422 (1857).

[345] Rhode, *supra,* note 326, at 203.

[346] Mary Wolstonecroft, A Vindication of the Rights of Women, in A Vindication of the Rights of Men; with, A Vindication of the Rights of Woman, and Hints 228 (Sylvania Tomaselli, ed., 1995).

[347] Address by Elizabeth Cady Stanton on Woman's Rights, at http://ecssba.rutgers.edu/docs/ecswoman4.html (last updated July 12, 2001).

Stanton rejected the hypocrisy of men who complained of social and economic oppression and "played the tyrant" at home, over their women whom they treated as slaves.[348] Susan B. Anthony and Stanton dedicated their lives to emancipating women in Nineteenth Century America whom they viewed as depersonalized, for women were denied constitutional and legal equality to men.[349] Abortion was called "child murder" in Anthony's newsletter, The Revolution.[350] Stanton too opposed abortion, saying, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."[351]

XIV. Attempting to Restore the Rule of Law: The Fourteenth Amendment

According to the late professor Charles Black, the Reconstruction Amendments, together with the Ninth Amendment and the Declaration of Independence, were intended to provide a complete code of human rights protection that was intended to guarantee equal protection to all former slaves. The Thirteenth, Fourteenth and Fifteenth Amendments were adopted to give effect to President Abraham Lincoln's dream that human rights in America were finally here to stay and America was to experience a new birth of freedom. All forms of slavery are abolished, citizenship is acquired by all upon birth, every person has the right to life, liberty, and property that may not be taken without due process of law, and most significantly, every person is entitled to equal protection of the laws.

The word "person" in the Fourteenth Amendment is not qualified by words such as "born" or "unborn" or any equivalent language, leaving open the interpretation that the meaning of "person" includes all human beings, born or unborn. The abolition of human slavery and the abolition of abortion during the same era were consistent with society's quest for justice and basic human rights for all members of the human family.

In 1867, the same time it ratified the Fourteenth Amendment, Ohio made abortion at any stage of pregnancy illegal. The same year, Illinois also ratified the Fourteenth Amendment and passed laws stiffening penalties for committing abor-

---

[348] *Id.* and Address by Elizabeth Cady Stanton on Woman's Rights, at http://ecssba.rutgers.edu/docs/ecswoman5.html (last updated July 12, 2001).

[349] Susan B. Anthony voted in the 1872 presidential election. For that she was convicted of a crime. Her argument under the Fourteenth Amendment failed. Had she been a man, she would have been seen as fulfilling her civic duty and never would have been prosecuted. *See* Excerpts of Proceedings, United States v. Anthony, at http://www.pbs.org/stantonanthony/resources/index.html (last visited Nov. 16, 2003). *See also* Declaration of Sentiments (1848) Seneca Falls Convention *at* http://www.fordham.edu/halsall/mod/Senecafalls.html (last updated Nov. 1998).

[350] The Revolution 4(1):4 July 8, 1869. This was referenced by Serrin Foster, *The Feminist Case Against Abortion*, *at* http://www.feministsforlife.org/hot_topics/commonw.htm (last visited Nov. 16, 2003).

[351] Letter to Julia Ward Howe, October 16, 1863, recorded in Howe's diary at Harvard University Library. *See also* 10 The American Feminist 2 (2003).

tion. In 1869, in the same session that Florida ratified the Fourteenth Amendment, Florida also passed laws prohibiting abortion at any stage of gestation. Vermont and New York each passed laws that increased protection of unborn human beings after these states ratified the Fourteenth Amendment. By 1875, 16 of the 28 ratifying states had in place tough laws against abortion at any stage of gestation, allowing for abortion only when the life of the mother was in real danger. Congress complemented the action of the various states by enacting the Comstock Laws in 1873 to prevent the dissemination of literature that promoted abortion. The legal protection of unborn human beings at the time the Fourteenth Amendment was ratified was consistent with the guarantee of equal protection and the right to life, to every "person," whether born or unborn.

When considering the debates concerning the drafting of the Fourteenth Amendment, it may be assumed that there was no difference in meaning between the words "person" and "human being." Representative John A. Bingham, author of the Fourteenth Amendment made these remarks in the debates of the framers of the Fourteenth Amendment:

> The Constitution of the United States … declared that no person shall be deprived of life, liberty, or property without due process of law. By that great law of ours it is not inquired whether a man is free by the laws of England; it is only to be inquired if he is a man, … endowed with the rights of life and liberty. Before that great law the only question to be asked of a creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares all men are created equal. [352]

Representative James Brown put the matter plainly, equating the word "person" with a human being: "Does the term "person" carry with it anything further than a simple allusion to the existence of the individual?"[353] Senator Sumner earlier observed, "in the eyes of the Constitution, every human being within its sphere . . . from the President to the slave, is a person."[354] Representative Windom noted, "rights to life, liberty, and pursuit of happiness" are "rights of human nature," and the most basic right of human nature is "the right to exist."[355] Representative Thaddeus Stevens said, "equal rights to all the privileges of Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits."[356]

Representative Bingham explained to Congress that the meaning of the equal protection clause came from the 40th clause of the Magna Carta which states "to no one will we sell, to no one will we refuse or delay, any man right or justice."[357] It

---

[352] Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

[353] Cong. Globe, 38th Cong., 1st Sess 1753 (1864)

[354] Cong. Globe, 37th Cong., 2nd Sess. 1449 (1862)

[355] Cong. Globe, 39th Cong., 1st Sess. 1159 (1866)

[356] *Id.* at 74 (1865).

[357] Cong. Globe, 42nd Cong, 1st Sess. 83 (1871); Magna Carta, at http://www.cs.indiana.edu/statecraft/magna-carta.html .

was the Magna Carta, explained Bingham, that "when faithfully enforced," abolished slavery, "… in England … the moment a slave set foot upon her soil, his fetters turned to dust and he was free." By linking the *Sommersett* case and the Magna Carta to the equal protection clause, Bingham sent a clear message that the rule of law had finally arrived, and that the old bondage to human slavery and rule by law symbolized by the *Dred Scott* case was intended to be relegated to the dust bin of antiquity.

All natural human beings can be thus viewed within the meaning of "person" in the Fourteenth Amendment. To qualify as a person, all that was required was to be a living human being, born or unborn, a member of the species homo sapiens. All persons under the Fourteenth Amendment were equal. Justice and the rule of law had apparently been achieved, but not for long.

XVI. Artificial Persons Gain Protection Under the Fourteenth Amendment

In this part, I explore how corporations attained constitutional protection under the Fourteenth Amendment and identify the various legal tests developed by judges that must be passed before personhood is conferred. When these same tests are applied to unborn human beings, it becomes obvious that the unborn have a stronger case than corporations for personhood, and yet have not attained the same degree of protection that corporations enjoy. The unborn, who have no money, remain non-persons, and corporations, which have money, maintain their status as persons. Is this because there is one law for the rich and another for the poor? In examining the case law, it is apparent that the legal foundation for corporate personhood is flawed, as the Fourteenth Amendment was originally intended to benefit only natural persons, not artificial ones.

Inherited from the common law was the precedent that artificial persons known as corporations could be created by laws to achieve special societal and government purposes.[358] In *Dartmouth College v. Woodward*, Justice Storey described how these artificial persons have a life of their own and possess certain legal rights equal to that of a natural person:

> An aggregate corporation, at common law, is a collection of individuals, united under one collective body, under a special name, and possessing certain immunities, privileges, and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.[359]

---

[358] Blackstone, *supra*, note 268, at 119.

[359] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 667 (1819).

Justice Storey identified "aggregation" as a defining characteristic of an artificial person, for it was the "aggregate" of natural persons that constituted the components of the corporation.

Chief Justice Marshall also defined corporation as an artificial being, but differed from Justice Storey by identifying the element of "invisibility" as a feature of an artificial person: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[360]

While corporations were capable of immortality and perpetual succession of individuals, these artificial persons did not possess any inherent inalienable right to life, as do natural persons. Neither were corporations granted the status of citizenship under Section II, Article 4, of the Constitution, which entitled citizens of each state to "all the privileges and immunities of citizens of the several states."[361] Chief Justice Marshall declared, "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen. . . ."[362] While artificial persons could legally enforce property and contractual rights, the attributes of citizenship were denied to corporations until 1853 when Justice Grier created an exception and allowed corporations to be presumed citizens to establish jurisdiction needed to maintain and defend lawsuits.[363] In protest, Justice Campbell dissented vigorously, predicting future "doubt, contest and contradiction," for there was no telling of "when the mischief would end."[364] In the 1869 case of *Paul v. Virginia*, Justice Field acknowledged the Grier exception was necessary and reaffirmed the general rule that only natural persons were citizens within the meaning of the Constitution.[365]

That same year, 1869, in the case of *Steamboat Burns*, the Supreme Court for the first time grappled with a writ of error or appeal brought on by "anything but a human being, or an aggregation of human beings, called a corporation or association."[366] Mr. Justice Miller dismissed the writs, holding that "an inanimate object, without sense or reason, or legal capacity,"[367] did not have the ability to prosecute legal proceedings in federal courts, nor could this capacity be conferred by the States.

The ratification of the Fourteenth Amendment spawned litigation to determine the meaning of "citizen" and "person" in the Fourteenth Amendment. Most of the

---

[360] *Id.* at 636. This feature of invisibility is useful when comparing the position of fetuses to corporations.

[361] Bank of Augusta v. Earle, 38 U.S. 586 (1839); Paul v. Virginia, 68 U.S. 177 (1869).

[362] Bank of the United States v. Deveaux, 9 U.S. 61 (1809).

[363] Marshall v. Baltimore and Ohio Railroad Company, 57 U.S. 314 (1853).

[364] *Id.* at 353.

[365] Paul v. Virginia, 68 U.S. at 177-79.

[366] Steamboat Burns, 76 U.S. 237, 239 (1869).

[367] *Id.*

litigation revolved around the question of whether a corporation was a "person" and entitled to equal protection of the laws. This was despite the fact that the historical setting in which the Fourteenth Amendment was adopted after the Civil War had nothing to do with improving the plight of corporations and everything to do with establishing citizenship and equality for natural persons—descendents of African slaves.

In 1870, Circuit Court Judge Woods, in *Insurance Co. v. New Orleans*,[368] visited that question of the meaning of "person." A corporation created by the laws of the state of New York did business in the City of New Orleans, located in the state of Louisiana. The City imposed a $500 license tax on out of state insurance companies, and a $250 license tax on home companies. The New York corporation sued, arguing this unequal tax violated its rights as a person under the Fourteenth Amendment. The corporation further argued that the City's ordinance violated the state constitution of Louisiana, which required taxation to be equal and uniform. The City was discriminating against the corporation, and this was unfair, especially since it had paid a $1000 tax to the state, on the understanding that no further tax to the state or to any municipality would be paid. The application for injunctive relief was dismissed on every ground.

Judge Woods understood that since the passage of the Fourteenth Amendment, "citizenship in a state is the result and consequence of the condition of citizenship of the United States." The Amendment itself defined "citizen" to be "all persons born or naturalized in the United States." Woods concluded on a plain reading of the text that citizens of the United States must be natural and not artificial persons. This excluded corporations, which cannot be born or naturalized. Woods then turned to the question of whether corporations were "persons" within the meaning of the Amendment.

Justice Woods noted that the word "person" occurred three times in the Fourteenth Amendment. In the first two clauses, it was obvious a corporation had no claim to these rights for it did not possess the attributes contemplated by the Amendment: "Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded . . ."[369]

The last clause, "deny any person equal protection of the laws," was more challenging, for it was possible for "person" to have a "wider and more comprehensive meaning."[370] Woods concluded that this last clause meant a natural person too, to be consistent with the plain and evident meaning of person in the two prior clauses. In support of his textual interpretation, Woods referred to the "history of the submission by Congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal."[371]

[368] Insurance Co. v. New Orleans, 13 F. Cas. 67 (1870).

[369] *Id.* at 68.

[370] *Id.*

[371] *Id.* This analysis by Woods is helpful to establish the claim of the unborn human be-

In 1882, Justice Field of the Supreme Court, sitting as a Circuit Court Judge in California, expanded the meaning of person in the Fourteenth Amendment to include an artificial person. A corporation, the Southern Pacific Railroad, complained its tax treatment by San Mateo County was unfair and contrary to the equal protection clause. While conceding that the original purpose of the Fourteenth Amendment was to "protect the newly made citizens of the African race in their freedom,"[372] Justice Field utilized the generality of the language in the equal protection clause to extend protection to "persons of every race and condition."[373] Field emphatically rejected as "without force" the argument that "a limitation must be given to the scope of this amendment because of the circumstances of its origin."[374]

Oppression was the underlying evil that the Fourteenth Amendment was intended to combat. Inequality affected minorities that did not have the political power to remove discriminatory laws. Field predicted, "When burdens are placed upon particular classes or individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting."[375] The key to repealing unfair laws is to equally burden everyone, which results in political pressure for change.

A person of every condition was henceforth eligible for constitutional protection. Persons of every description were protected from "discriminating and hostile state action of any kind."[376] In expounding the meaning of person, Field gave it the broadest operation possible, just short of a construction that was "so obviously absurd or mischievous, or repugnant to the general spirit of the instrument."[377] Circuit Judge Sawyer agreed, observing that the equal protection clause was "protective and remedial, not punitive in character, and should, therefore, be *liberally*, not *strictly*, construed. No restriction should be put upon the term not called for by the exigencies of the case, or by the public interest; and it must be manifest that the public interest requires that the broadest signification be adopted."[378]

The Fourteenth Amendment was portrayed by Field "as a perpetual shield against all unequal and partial legislation by the states, and the injustice which fol-

---

ing to be a person within the meaning of the Fourteenth Amendment. A fetus is a natural person. It is flesh and blood, a human being that is a unique individual. If permitted to live, a baby will be born. At birth, it is conferred citizenship. It is not a fictitious artificial creation of law. In 1870, it would have made perfect sense for the unborn child to be included as a person under the Fourteenth Amendment, for it was in harmony with state laws criminalizing abortion.

[372] The Railroad Tax Cases; County of San Mateo v. Southern Pacific R. Co., 13 F. 722, 740 (C.C.D. Cal. 1882).

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.* at 741.

[378] *Id.* at 759.

lows from it, whether directed against the most humble or the most powerful …"[379] Railroad corporations, perceived as rich and powerful, were entitled "to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others."[380]

Artificial persons were "persons" within the meaning of the equal protection clause on the theory they were "aggregations of individuals united for some united purpose."[381] In addition, the courts as a matter of public policy "will always look beyond the name of the artificial being to the individuals it represents."[382] Just because an artificial person is invisible does not mean those who do business with a corporation do not deal with real natural persons.[383] Therefore the term "person" includes corporations, for the court "will look through the ideal entity and name of the corporation to the persons who compose it, and will protect them …"[384] Circuit Judge Sawyer concurred, adopting the language of Mr. Pomeroy, one of the counsel: "… metaphysical and technical notions must give way to the reality. The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators."[385]

The manner in which the railroad corporation was deprived of its Fourteenth Amendment rights further violated its rights to due process of law and aggravated the violation of equal protection before the law. The corporation was not given notice of a hearing for the proposed deprivation of property, and consequently was never given a chance for an opportunity to be heard. Field refused to condone this denial of natural justice that was as old as the Magna Carta: "the great principle that lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property without an opportunity to be heard against the proceeding."[386]

Sawyer concluded his opinion in the strongest possible language urging that all void laws be harmonized with the Fourteenth Amendment, "the crowning glory of

[379] *Id.* at 741.
[380] *Id.* at 730.
[381] *Id.* at 743.
[382] *Id.* at 744.
[383] *Id.* at 746.
[384] *Id.* at 748.
[385] *Id.* at 758.
[386] *Id.* The Field/Sawyer approach is interesting because their liberal definition of person is broad enough to include the unborn. An unborn human being is certainly in its developmental stages "a person of every condition." It is the humblest and poorest of all persons. As a class the unborn are oppressed and do not have the political clout to achieve equality on their own. There is one law for them and another for those who are born. A mother and her unborn child or children are also in a way an aggregation of individuals, united for a limited time for the specific purpose of gestation and birth. Even though the unborn are invisible to the naked eye, the courts ought to look through the skin of the mother and protect the unseen natural person or persons contained within the mother. Unlike other persons, the unborn are given no legal hearing, no notice, and no opportunity to be heard prior to deprivation of their life and liberty.

our national constitution." Sawyer rejected any notion that temporary inconvenience could excuse compliance with the Constitution: "If the life, liberty, property and happiness of all the people are to be preserved, then it is of the utmost importance to every man, woman and child of this broad land that every guarantee of our national constitution, whatever temporary inconvenience may be felt, be firmly and rigorously maintained at all times and under all circumstances."[387] Sawyer then quoted from the opinion of Justice Davis in *Ex Parte Milligan*[388] to emphasize his contention that equal protection before the law for all persons, including all classes of people, is sacred and immune from suspensions or exception, because equal treatment is foundational and integral to the rule of law:

> The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.[389]

In his concurring opinion, Judge Sawyer referred to *Insurance Co. v. New Orleans*, and without much discussion, refused to follow it:

> In Ins. Co. v. New Orleans, 1 Woods, 85, it was held on the circuit that a corporation is not embraced in the word "person," as used in the amendment under consideration, and the supreme court of California, upon the authority of that case, made a similar ruling in *C.P.R. Co.* v. *State Bd. of Equalization,* 8 Pac. Coast Law J. 1155. But notwithstanding their high character for ability, and my respect for the decisions of the judges taking that view, I am compelled to adopt a different conclusion. I think, both upon reason and authority, that the other is the better view. Again, with respect to corporate property, I adopt the language of counsel, which expresses my view accurately and clearly:
>
> The property of the corporation is in reality the property of its individual corporators. A state statute depriving a corporation of its property does deprive the individual corporators of their property. These clauses of the fifth and fourteenth amendments, and the similar clauses of the state constitution, apply, therefore, to private corporations, not alone because such corporations are "persons," within the meaning of that word, but also because statutes violating their prohibitions, in dealing with corporations, must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guaranties, corporations cannot be separated from the natural persons who compose them.[390]

On appeal to the United States Supreme Court, Chief Justice Waite saw no need to add to the analysis of Field and Sawyer and summarily expanded the

---

[387] *Id.* at 781.
[388] *Ex Parte* Milligan, 71 U.S. 2 (1866).
[389] *The Railroad Tax Cases*, 13 F. at 781.
[390] *Id.* at 760.

meaning of "person" in the Fourteenth Amendment to include corporations: "The court does not wish to hear argument on the question of whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion it does."[391]

In later cases, the Supreme Court, under the leadership of Justice Field, solidified its holding that corporations were persons. In *Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania*, Field stated, "the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose . . ." [392]

Field was no stranger to cases of discrimination under the Fourteenth Amendment, for earlier, sitting as a Circuit Judge, in *Ho Ah Kow v. Nunan*,[393] he held that the cutting off of the ponytail (or queue) of all Chinamen detained in custody was wanton cruelty and not a health measure under a state's police powers. The "Queue Ordinance" of San Francisco was enforced only against Chinese and no other persons. This practice was described as "torture," for it humiliated and disgraced the Chinese. The Circuit Court decided it was no different than force-feeding pork to Jewish prisoners. Justice Field and Judge Sawyer jointly held that "hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution."[394] The Court added, "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not stricken with blindness . . ."[395]

In *Pembina*, Field referred to other cases, the most notable being that of *Yick Wo v. Hopkins*,[396] decided in 1886, as to the meaning of the Fourteenth Amendment. Yick Wo's licensed Chinese laundry business of 22 years was destroyed when the City of San Francisco passed an ordinance requiring Yick Wo to obtain special consent from the board of supervisors, which he was unable to obtain. Of the 320 laundries in the city and county of San Francisco, about 240 were owned and operated by Chinese. All Chinese applications for a permit were denied and all those from Caucasians were granted, pursuant to the arbitrary will of the board of supervisors. The result was the relocation of Chinese laundries to remote loca-

---

[391] Santa Clara County v. Southern Pacific *et al*, 118 U.S. 394 (1886).

[392] Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania, 125 U.S. 181 (1888).

[393] Ho Ah Kow v. Nunan, 12 F. Cas. 252 (1879).

[394] *Id.* at 256.

[395] *Id.* at 255.

[396] Yick Wo v. Hopkins, 118 U.S. 356 (1886). The other cases mentioned were *Barbier v. Connelly*, 113 U.S. 27; *Soon Hing v. Crowley*, 113 U.S. 73; *Missouri v. Louis*, 101 U.S. 22, 30; *Hayes v. Missouri*, 120 U.S. 68.

tions outside the county, the closure of others, the prosecution and imprisonment of Chinese who defied the ordinance and continued to operate their business, and the monopoly of laundry establishments run by Caucasians. Circuit Court Judge Sawyer asked, "Can a court be blind to what must necessarily be known to every intelligent person in the state?"[397] In spite of this observation, contrary to his own views, Judge Sawyer dismissed Yick Wo's application for habeas corpus, remanding him back into custody. The Supreme Court unanimously reversed.

Justice Matthews noted that the ordinance in question violated the Fourteenth Amendment for it conferred a "naked and arbitrary power to give or withhold consent, . . . as to persons."[398] This tyrannical power over persons, conferred by law, gave unlimited authority to give or withhold consent over the life of each business, without reason, restraint or responsibility, pursuant to the untrammeled arbitrary will of the powerful over the helpless. The result was the division of businesses into two classes, the "wanted" run by Caucasians whose businesses were allowed to survive, and the "unwanted" owned by the Chinese, whose businesses were killed pursuant to the "mere will and pleasure" of the administrative authority.

Justice Matthews refused to accede to any arguments to dismiss the case on the basis that Yick Wo was an alien and a subject of the Emperor of China, for the Fourteenth Amendment was not confined to the protection of American citizens, but extends to every person within the territorial jurisdiction of the Court, without discrimination:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[399]

Justice Matthews then breathed life into the Supreme Court's narrow conception of the rule of law, which regained much of its lost meaning, when he broadly portrayed the rule of law to go beyond the idea of law and order to include natural justice. Matthews stated:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And law is the definition and limitation of power. . . . But the fundamental rights to life, liberty and pursuit of happiness, considered as

[397] *Yick Wo*, 118 U.S. at 356.
[398] *Id.* at 365.
[399] *Id.* at 369.

> individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of equal and just laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, *the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.* [400]

The San Francisco ordinance, even though on its face appeared to be benign and impartial, was inoperative and void, for it conflicted with the Fourteenth Amendment and denied equal justice, not only within the framework of the Constitution, but it also violated the rule of law. The discrimination against the Chinese was not justified, but illegal, and a denial of the equal protection of the laws.

It was thus in this context that Justice Field and the rest of the Supreme Court in *Pembina* noted that corporations, as a class of artificial persons, were like natural persons, entitled to be free from discrimination and entitled to equal protection of the laws. Citizenship was not a prerequisite to achieve protection under the Fourteenth Amendment. It was sufficient to be a natural person or artificial person created by law.

Over the next few years, the Supreme Court created a body of law sufficient to declare that the question of extending the scope of the equal protection clause of the Fourteenth Amendment to benefit artificial persons in the form of business corporations was "settled" jurisprudence. In *Missouri Pacific Railway Company v. Mackey*,[401] an 1888 opinion authored by Justice Field, he noted that counsel "conceded" that corporations were persons within the meaning of the Fourteenth Amendment. In 1889, relying on the *Pembina* and the *Santa Clara County* cases, Justice Field held in *Minneapolis and St. Louis Railway Company v. Beckwith*,[402] that corporations were persons within the meaning of the Fourteenth Amendment and entitled to equal protection of the law with regard to the enjoyment of property. In 1892, once again writing for the Court, Justice Field, in *Charlotte, Columbia and Augusta Railroad Company v. Gibbes*,[403] held, citing his prior decisions in *Santa Clara*, *Pembina*, and *Beckwith*, that private corporations were persons within the meaning of the Fourteenth Amendment. In 1896, Justice Harlan declared in *Covington & Lexington Turnpike Road Company v. Sandford*,[404] "It is now settled that corporations are persons within the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." In 1897, Justice Brewer, in *Gulf, Colorado and Santa Fe Railway Company v. Ellis*,[405]

---

[400] *Id.* at 369 (emphasis added).

[401] Missouri Pacific Railway Company v. Mackey, 127 U.S. 205 (1888).

[402] Minneapolis and St. Louis Railway Company v. Beckwith, 129 U.S 26 (1889).

[403] Charlotte, Columbia and Augusta Railroad Company v. Gibbes, 142 U.S. 386 (1892).

[404] Covington & Lexington Turnpike Road Company v. Sandford, 164 U.S. 578, 592 (1892).

[405] Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U.S. 150, 154 (1897).

stated it was "well-settled" that "corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States." In 1898, Justice Harlan in *Smythe v. Ames*,[406] reaffirmed yet again that corporations were persons within the Fourteenth Amendment. In all of these cases, the Supreme Court ignored the decision of Justice Woods in *Insurance Co. v. New Orleans*.[407]

In 1906 the Supreme Court drew a distinction between protections enjoyed under the Fourteenth Amendment by natural persons and artificial persons. In *Northwestern National Life Insurance Company v. Riggs*,[408] Justice Harlan held that "the liberty" referred to in the Fourteenth Amendment "is the liberty of natural, not artificial persons." A year later, in *Western Turf Association v. Greenberg*,[409] the Supreme Court affirmed that holding in *Riggs*, stating, "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." Justice Harlan also refused to permit corporations to enjoy the status of citizenship under the Fourteenth Amendment.

It was not until 1938, when Associate Justice Black of the Supreme Court wrote a strong dissent in *Connecticut General Life Insurance v. Johnson*,[410] that a justice of the Supreme Court declared that the Court should overrule its prior decisions holding that the word "person" in the Fourteenth Amendment included corporations. Justice Black relied upon the *Slaughter House Cases*[411] to demonstrate that the ratification and eventual adoption of the Fourteenth Amendment had nothing to do with granting rights to corporations. Justice Black disclosed that in 1882, counsel had argued to the Supreme Court, in *San Mateo County v. Southern Pacific Railroad*,[412] that a journal of the joint congressional committee that had framed the Fourteenth Amendment "indicated the Committee's desire to protect corporations by the use of the word 'person.'"[413] Such a secret purpose, reasoned Justice Black, "would not be sufficient" to expand the meaning of person to include a corporation.[414]

Justice Black concluded that the purpose of the Fourteenth Amendment is to protect the life and liberty of weak and helpless human beings:

> The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter House Cases, supra,* that 'by "any person" was meant *all* persons

---

[406] Smythe v. Ames, 169 U.S. 466, 522 (1898).

[407] Justice Woods served on the Supreme Court from 1881 until his death on May 14, 1887.

[408] National Life Insurance Company v. Riggs, 203 U.S. 243, 255 (1906).

[409] Western Turf Association v. Greenberg, 204 U.S. 359, 363 (1907).

[410] Connecticut General Life Insurance v. Johnson, 303 U.S. 77 (1938).

[411] Slaughter House Cases, 16 Wall. 36 (1873).

[412] San Mateo County v. Southern Pacific Railroad, 13 F. 722, 740 (C.C.D. Cal. 1882).

[413] Connecticut General Life Insurance v. Johnson, 303 U.S. 77, 87 (1938).

[414] *Id.*

> within the jurisdiction of the State. No distinction is intimated on account of race or color.' Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings. [415]

In this manner, Justice Black equated the word "person" with "human being." A natural person was in fact any human being. Justice Black did not distinguish between unborn and born human beings. As long a human being was in existence, it was a person under the Fourteenth Amendment and entitled to equal protection of the law and to life and liberty.

Granted, the context in which Justice Black made these observations was not intended to deal with the question of abortion and the personhood of unborn human beings. However, his sweeping language makes it clear that "person" could be broadly interpreted and so includes embryos and fetuses.

Justice Black explained that the purpose of the Fourteenth Amendment was to "prevent discrimination by the states against classes or race." Again, he probably meant economic or social class, writing as he was during the Great Depression. However, the categories of class are not closed, for the future brings with it new ways to discriminate among human beings. Thus, to divide the born from the unborn is to create different classes of human beings. According to Justice Black's logic and reasoning, this is discrimination and a violation of the Constitution. It was ironic that in the first 50 years following its ratification, the Fourteenth Amendment became a powerful tool for corporations, and relatively unused by African Americans, for most were poor and helpless without the assistance of counsel.[416]

Eleven years later, Justice Douglas added his voice to the dissent of Justice Black. In *Wheeling Steel Corporation v. Glander*,[417] Justices Douglas and Black wrote that there was "no history, logic, or reason" to the Supreme Court's decisions since *Santa Clara County v. Southern Pacific Railroad Company* that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. For the first time, passages from the decision of Justice Woods in *Insurance Co. v. New Orleans,* that limited the meaning of "person" to human beings, were referred to and quoted from with approval by Justices Douglas and Black. Concluding that the *Santa Clara* case was wrong and should be overruled, Justices Douglas and Black urged their brethren that even old constitutional cases can be reversed.[418] If it were necessary to grant corporations equal protection under the Constitution, the way to accomplish this objective was by constitutional amendment, and not by judicial interpretation. [419]

[415] *Id.* (emphasis in original).

[416] In reviewing the cases alleging discrimination under the Fourteenth Amendment in the first fifty years following its adoption, Justice Black observed in more than half these cases, corporations sought to invoke the Amendment's benefits, while in less than one-half of one per cent, were the Amendment's benefits invoked by African Americans. *See* Connecticut General Life Insurance v. Johnson, 303 U.S. at 90.

[417] Wheeling Steel Corporation v. Glander, 337 U.S. 562, 577 (1949).

[418] *Id.* at 580.

[419] *Id.* at 581.

Justice Black's reasoning and logic is impeccable, and in my view correct. Since "person" is not defined in the Constitution, "person" must be interpreted "in light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."[420] I submit that under the Fourteenth Amendment, a person means the same thing as a human being. This approach is consistent with an originalist interpretation. The purpose of the Fourteenth Amendment is to protect weak and helpless human beings. This too is consistent with the historical context of the origins of the Fourteenth Amendment, but moves beyond African Americans to include any human being.

In my opinion, the Fourteenth Amendment is not limited to preventing discrimination based on race, but extends to any condition of vulnerability that makes a human being weak and helpless. Any condition would include disability, poverty, genetic make-up and bodily condition at any age. Depending on his or her age, a human being may be born or unborn. Being in an unborn state is a human condition. According to the Fourteenth Amendment, if a human being is unborn, it is a person. Once a person is born, that person attains citizenship by operation of law and remains a person. The unqualified language of the Fourteenth Amendment was not intended to be confined to benefit a particular class or condition of human beings; it was meant to equally protect all classes and conditions of human beings, born or unborn. In this respect, the dissenting judgment of Justice Swayne in the *Slaughter House Cases* was right: "The Protection provided was not intended to be confined to those of race or class, but to embrace equally all races, classes, and conditions of men."[421]

My interpretation advances the scope of the Fourteenth Amendment beyond its original intent, but is an interpretation that is capable within the plain meaning of the text.

XVII. Do Unborn Natural Persons Qualify Under the Corporate Personhood Tests for Protection Under the Fourteenth Amendment?

The interesting question remains whether the unborn may be defined as persons within the meaning of the Fourteenth Amendment using the corporate test for personhood. Distilled to its essential elements, the various principles and factors identified in the case law for conferring personhood to corporations under the Fourteenth Amendment may be identified as follows:

1. The generality of the language in the equal protection clause allows expansion of the meaning of person beyond that originally intended by the framers;
2. Oppression of a particular class of individuals is a factor that signals

[420] United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (Gray, J.).
[421] *Slaughter House Cases*, , 83 U.S. (16 Wall) 128, 129 (1873).

that person or class of persons is a minority that is in need of protection under the Fourteenth Amendment;

3. Human beings of every kind and description are persons within the meaning of the Fourteenth Amendment and qualify for equal protection of the laws;
4. The broadest, most liberal construction of "person" consistent with the general spirit of the intent of the instrument must be given, in the public interest to protect and remedy injustice;
5. Equal protection of the laws means the same law binds the most powerful and the weakest in society;
6. An aggregation of persons united for some common purpose constitutes a "person";
7. The court will look beyond the corporate image to discern and identify the invisible persons in order to protect natural human beings;
8. Equal protection and treatment of every human being in every condition in every class is foundational and integral to the rule of law;
9. Artificial persons are constitutional persons, for corporations cannot be separated from the natural persons who compose them;
10. Associations of individuals united for a special purpose qualify for personhood;
11. Equal protection under the Fourteenth Amendment is not limited to citizens;
12. Natural human beings have a stronger case for inclusion within the meaning of "person" than do artificial beings, such as corporations.

When evaluating these factors, it is arguable that the unborn have a stronger case for designation as a "person" under the Fourteenth Amendment than do corporations. The unborn are natural human beings. Their characteristic as a social and legal class is being unborn. Their condition is one of helplessness and dependency. Inside its mother's womb, the fetus and its mother are an aggregate being of two individuals (or more if there is more than one unborn child). The pregnancy stage is a temporary one, where there is a form of union for a special purpose. To the naked eye, one sees only the form of the pregnant woman, for the fetus is veiled from our site, yet visible through technology such as ultrasound. The fetus is unequal and inferior to other human beings who have constitutional protection.

In summary, not only do the unborn qualify for inclusion under the liberal test for granting personhood, it is a great irony that a corporation, which has no life or liberty interest, an artificial entity that is a legal fiction, enjoys equal protection under the Fourteenth Amendment, while an oppressed and discriminated class of human beings do not.[422]

[422] Other scholars have come to the same conclusion or have urged legal reform of constitutional

Even so, a judge like Justice Douglas, might distinguish the treatment of corporations from unborn human beings. Much time has elapsed since corporations achieved personhood status and since natural human beings were segregated into persons and non-persons. Jurisprudence has become settled and cultural expectations have become engrained. To unravel the jurisprudence of corporate personhood would cause legal chaos.

If corporate personhood is wrong, then why rely on the legal tests and apply them to the unborn? The reality is that it may be too late to reverse history and the idea of corporate personhood has become so engrained in society the concept has become part of American culture. On the other hand, maybe the courts got it right. After all, are not shareholders natural persons and united for the common purpose of doing business in an organized way? For these reasons, the tests are still valid and provide valuable guidance to justify the admission of any other claimant to constitutional personhood.

XVIII. Segregating Unborn Natural Persons From Born Persons Under the Fourteenth Amendment

One argument in favor of excluding unborn human beings from the meaning of "person" is based on the premise that the framers of the Fourteenth Amendment did not contemplate the unborn and hence excluded unborn children from the equal protection of the law. If this is true, then perhaps the unborn ought to be separate and unequal. Today the unborn are not just segregated from the constitutional rights to life, liberty and equality guaranteed by the Fourteenth Amendment: They are excluded. It is thus permissible to discriminate against the unborn individually and as a class, for until they are born, the unborn do not attain legal protection under the Constitution. It is only over time, with continued physical development, that children gain along with maturity and age, political, physical, social and legal power.

This kind of segregationist mentality is reminiscent of the reasoning of the majority of the Supreme Court in *Plessy v. Ferguson*.[423] Only this time, the discrimination is not based on race, but on age, condition, and status. Moreover, in the case of the unborn, there is no pretense that the unborn are equal. To understand the mentality that perpetuates this segregation of the unborn from the human family, it is instructive to review the 1896 *Plessy* decision.

In *Plessy*, Justice Brown ruled that enforced segregation of citizens by race did not deny the equal protection of the laws. Political equality, such as the right to serve on a criminal jury,[424] was constitutionally protected, unlike social or moral

protection of corporations. *See* Natasha N. Aljalian, *Fourteenth Amendment Personhood: Fact or Fiction*, 73 St. John's L. Rev. 495 (1999); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577 (1990).

[423] Plessy v. Ferguson, 163 U.S. 537 (1896).

[424] Strauder v. West Virginia, 100 U.S. 303 (1880).

equality that could not be attained without mutual voluntary natural affinities and consent. It was reasonable to provide for enforced segregation to promote public peace and societal order. Segregation laws enacted in good faith for the foregoing purposes were constitutional provided there was no covert attempt to oppress a particular class or bestow arbitrary and unjust discrimination upon the mere exercise of individual will.[425] Segregation alone did not imply a badge of inferiority, nor should it be assumed. If one race were inferior to the other, the Constitution could not rectify the imbalance.[426]

Applying these *Plessy* principles to the case of unborn children, it is plain that they are legally inferior human beings. Conferring constitutional legal equality to the fetus and removal of the live birth boundary that separates the classes would result in great social upheaval and protests, for abortions might no longer be legal if the unborn are protected by the Fourteenth Amendment. In the interests of maintaining public order and social stability, the present system of legally segregating the unborn from the born needs to be preserved to allow legal abortions. If this is discrimination and prejudice, then it is justifiable to permit the private exercise of liberty by pregnant women to dominate their unborn children.

The answer to this point of view is found in the dissenting opinion of the first Justice Harlan, who dissented in *Plessy*:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings. . . .[427]

On the facts before him, Justice Harlan considered the plight of an adult who was conferred citizenship under the Fourteenth Amendment. However, there is no reason why the noble principles he declared could not apply to the unborn human being. Why should there be a difference because of location—being in the womb? Are not the child in the womb and the child outside the womb both part of the human family? By what authority does the Constitution permit the creation of a caste system, whereby the life of the unborn human being is left to the choice of his or her mother? Are not all human beings persons, and equal before the law?

XIX. The Erosion of Legal Protection for the Unborn

The Fourteenth Amendment was passed by Congress on June 13, 1866 and ratified on July 9, 1868.[428] It was not until 1973 that the Supreme Court of the

---

[425] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[426] *Plessy*, 163 U.S. at 550.

[427] *Id.* at 559.

[428] National Archives at http://www.archives.gov/national_archives_experience/charters/constitution_amendments_11-27.html.

United States decided *Roe v. Wade* and ruled that the unborn child did not constitute a "person" under the Fourteenth Amendment. Why did the question take so long to get to the Supreme Court? The simple answer is that there was no pressing need for the Supreme Court to answer that question, because after 1868, as previously discussed, state legislation and the federal Comstock laws protected the unborn.

The common law also protected the rights of the unborn. For example, the Supreme Court of Texas followed the English common law to make sure a posthumous child would inherit from his deceased father, on the basis that an unborn child was a person in *rerum natura*, hence a surviving child.[429] However, all it took was one case before legal protection of the unborn in tort law began to unravel and erode, beginning decades of confusion, inconsistent decisions, and injustice.[430]

In 1884, while still a judge on the Massachusetts Supreme Court, Justice Oliver Wendell Holmes, in *Dietrich v. Inhabitants of Northampton*,[431] a case about the negligent infliction of pre-natal injuries, made a factual finding that "the unborn child was a part of the mother," and denied tort recovery to the mother of a 4-5 month old fetus who died a few minutes after it was prematurely born following a slip and fall by the mother. Holmes' decision did not take into account the developing science of embryology and disregarded the common law legal precedents that recognized the unborn fetus as a person. His opinion that an unborn child is part of the body of its mother prevailed despite several attempts by other judges to distinguish a mother from her fetus.

One of the more notable attempts to correct Holmes was Judge Boggs' dissenting decision in *Allaire v. St. Luke's Hospital*.[432] In this case, while hospitalized and waiting to go into labor, a pregnant mother and her unborn child were severely injured in an elevator accident caused by the defendant hospital. The child was born alive soon after the accident with permanent crippling injuries. The appeals court followed *Dietrich* and denied recovery to the infant, because at the time of the accident the child was not a "person" and was "a part of the mother." Only Judge Boggs emphatically rejected Holmes' theory, stating:

> Medical science and skill have demonstrated that at a period of gestation in advance of the period of parturition, the fetus is capable of independent and separate life, and that, though within the body of its mother, it is not merely a part of her body, for her body may die in all its parts and the child remain alive and capable of maintaining life, when separated from the mother. If at that period, a child is so advanced is injured in its limbs and members and is born into the living world, suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child but wholly to the mother?[433]

---

[429] Nelson v. Galveston, 78 Tex. 621 (1890).

[430] *See generally*, William J. Maledon, *Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Lawyer 349 (1971); Gregory J. Roden, *Prenatal Tort law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 St. Thomas U. L. Rev. 207 (2003).

[431] Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

[432] Allaire v. St. Luke's Hospital, 184 Ill. 359 (1900).

[433] *Id*. at 370.

Boggs, relying on Blackstone, argued that if an infant *en ventre sa mere* is "deemed as born for all purposes beneficial to the child," then the law must be consistent and not create a single exception to deny tort recovery to the born alive infant who sustained a pre-natal injury. More important than mechanically following unjust legal precedent was the idea that "natural justice" must prevail, so an infant could maintain an action for damages for "injuries so wrongly committed upon its person while so in the womb of its mother."[434]

In this manner, Judge Boggs advanced the proposition of fetal viability as a legal fiction meant to benefit the unborn child, so an infant could recover damages for pre-birth injuries. In doing so, Judge Boggs eroded the legal recognition of the unborn as a person, affirmed earlier in *Phillips v. Heron*,[435] which held that a child *en ventre sa mere* (or in utero) is a human being, without regard to any notion of "viability."

Why did these judges differ in their approach? Perhaps one explanation might be the underlying facts. Justice Holmes was faced with a situation involving a fetus that was not ready to be born. It was trauma that triggered the premature birth, and the baby was too young to be able to survive. The baby was beyond help. Judge Boggs had an entirely different case before him. He wanted to find a way to help a full term fetus that sustained injuries while in the womb, that was born and survived with serious permanent disabilities.

In 1923, the Louisiana Court of Appeal in *Cooper v. Blanck*,[436] permitted a tort action and recovery for the wrongful death of a viable eight month old unborn child which was prematurely born and died three days after being indirectly struck by falling plaster from a bedroom ceiling that hit its mother's abdomen. The court reasoned tort recovery was lawful, since it was murder to abort the unborn child at this age, then causing an injury to this unborn child was injuring a living human being.[437] This case did not consider *Dietrich*, and was decided pursuant to the civil code of Louisiana. Interestingly, the case was not released for publication until 1949, 26 years after it was decided. I don't know why.

It was not until 1946 that Justice Holmes' position in *Dietrich* was rejected. Judge McGuire in *Bonbrest v. Kotz*,[438] noted how the common law of negligence was inconsistent with the law of property and crime, as a result of Holmes' decision that an unborn child was part of the mother's body. Judge McGuire set out the inconsistencies:

> From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as human being, but as such from the moment of conception —which it is in fact.

---

[434] *Id*. at 372.
[435] Phillips v. Herron, 55 Ohio St. 478 (1896).
[436] Cooper v. Blanck, 39 So. 2d 352 (1923)
[437] *Id*. at 360.
[438] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Ct. 1946)

> Why a 'part' of the mother under the law of negligence and a separate entity and person in that of property and crime?
>
> Why a human being, under the civil law, and a non-entity under the common law?[439]

Referring to the decision of the Supreme Court of Canada in *Montreal Tramways v. Leveille*,[440] wherein Justice Lamont permitted tort recovery by a born alive child who sustained injuries at the age of 7 months while *en ventre sa mere*, Judge McGuire found the logic of Justice Lamont compelling and advanced the proposition that the law should be consistent and recognize the separate existence of the unborn child from the mother for all legal categories, whether tort or criminal, and in all jurisdictions, civil or common law.

Judge McGuire refused to be bound by *Dietrich*, and denounced the finding of Holmes that an unborn child was part of the mother as "a legal fiction, long outmoded."[441] In the opinion of Judge McGuire, what Justice Holmes did in *Dietrich* was to render the common law "static and inert" and make it an "arid and sterile thing" that resulted in "myopic and specious" behavior by judges who followed precedent, thereby denying justice and the attachment of responsibility.[442] Law is a "progressive science" that cannot hide behind the doctrine of precedents, for the cost is the establishment of mechanical and superficial judgments, which are nothing more than what Chief Justice Stone called "dry and sterile formalism."[443] The common law tradition is to be "elastic" to meet changing conditions, and the law is presumed to keep pace with the sciences.[444]

Judge McGuire refused to follow Holmes because he was more concerned with justice, integral to the rule of law, than injustice, a feature of rule by law. Holmes' cavalier attitude to justice is best illustrated by the quaint anecdote of an after lunch farewell conversation between himself and Judge Learned Hand. In his exuberance, Learned Hand bid adieu, calling out, "Do justice, sir, do justice!" whereupon hearing this, Holmes stopped the carriage and admonished his fellow jurist, stating, "That is not my job, sir. My job is to apply the law."[445]

Judge McGuire showed his awareness of recent developments that urged the relaxation of laws banning abortion, and expressed his disapproval of "therapeutic abortion," because the unborn child is an "individual human being" and is "no

---

[439] *Id.* at 140-41.

[440] Montreal Tramways v. Leveille, [1933] S.C.R. 456; *rev'd*, Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925 and Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753

[441] *Bonbrest*, 65 F. Supp. at 142.

[442] *Id.*

[443] *Id.*

[444] *Id.*

[445] Robert H. Bork, The Tempting of America 6 (1990).

unjust aggressor."[446] Judge McGuire held unborn children physically attached to their mother were distinct and separate legal persons from their mother.[447] He compared pregnancy to conjoined twins, who were one in flesh, but in law, separate and distinct persons.

This was perhaps not the best analogy. A viable unborn child, capable of independent existence once separated from the mother, makes a stronger case for personhood than conjoined twins, who, in spite of birth, are not always viable, for death may occur after surgical separation.[448]

Following the leadership of Judge McGuire, state courts in Rhode Island, New Hampshire, and Louisiana laid to rest the myth that the unborn fetus is a part of its mother's anatomy, bringing tort law into alignment with property and criminal jurisprudence, and objective truth in medicine and science.[449] Numerous court decisions restored the historical common position so that once again the unborn were recognized in common law as fully human and persons in the whole sense.[450] *Allaire v. St. Luke's Hospital* was eventually overruled in 1953.[451] Although *Dietrich* was not expressly overruled, in 1969 it was confined to its facts, and its holdings gave way to a substantial body of persuasive judgments that adopted the dissent of Judge Boggs over that of Justice Holmes.[452] Not only was tort recovery now possible for unborn children who were viable; recovery was extended to unborn children who were non-viable at the time of the injury, provided causation could be proven on a preponderance of the evidence.[453] Law was once again consistent with the objective truth of medicine that regarded the pregnant woman and her fetus as separate and distinct patients.[454]

---

[446] *Bonbrest*, 65 F. Supp. at n.13.

[447] *Id.*

[448] *See id.*

[449] Presley v. Newport Hospital, 117 R.I. 177, 187 (1976); Bennett v. Hymers, 101 N.H. 483,485 (1958); Johnson v. South N.O. Lt. & Traction Co., No. 9,048 (Orl. App. 1923), *cert. den*. No. 26,443 (La. 1924) ("We believe the infant is a child from the moment of its conception . . . ."); Danos v. Terry St. Pierre, 402 So. 2d 633 (La. 1981).

[450] Williams v. Marion Rapid Transit, 87 N.E. 2d 334 (Ohio 1949); Tucker v. Howard Carmichael & Sons, 65 S.E. 2d 909 (Ga. 1951); Woods v. Lancet, 102 N.E. 2d 691 (N.Y. 1951); Kelly v. Gregory, 125 N.Y.S. 2d 696 (N.Y.App. Div. 1953); Tursi v. New England Windsor Co. 111 A. 2d 14 (Conn. 1955); Mallison v. Pomeroy, 291 P. 2d 225 (Or. 1955).

[451] Amann v. Faidy, 415 Ill. 422 (1953).

[452] Keyes v. Construction Service, Inc. 340 Mass. 633 (1960).

[453]Hornbuckle v. Plantation Pipe Line Co. 93 S.E. 2d 727 (Ga. 1956); Barnett v. Hymers, 147 A. 2d 108, 110 (N.H. 1958) ("the fetus from the time of conception becomes a separate organism"); Smith v. Brennan, 157 A. 2d 497, 502 (N.J. 1960) ("It is not the fact that an unborn child is part of the mother, but rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality"); Sinkler v. Neale, 164 A. 2d 93 (Pa. 1960) ("the fetus is regarded as having existence as a separate creature from the moment of conception"); Daley v. Meier, 178 N.E. 2d 691 (Ill. App. Ct. 1961); Seattle-First National Bank v. Rankin, 367 P. 2d 835 (Wash. 1962); Sylvia v. Gobeille, 220 A. 2d 222 (R.I. 1966).

[454] *See* F. Gary Cunningham et al., Williams Obstetrics (20th ed. 1996).

XX. *Brown v. Board of Education*: A Model to Restore the Rule of Law

In the 1950's, the Supreme Court, in a decision authored by Chief Justice Warren, ruled in *Hernandez v. Texas*[455] that the protections of the Fourteenth Amendment were not confined to a two-class theory (white v. black), but extended to every distinct class of human beings that suffer discriminatory treatment caused by prejudice:

> But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. [456]

Brown v. Board of Education[457] soon followed and overruled the doctrine of "separate but equal" established in *Plessy v. Ferguson*.[458] In *Brown*, Chief Justice Warren authored a unanimous opinion that remarkably models the triumph of the rule of law over prejudice, discrimination and caste.

In approaching the difficult issue of how to overrule *Plessy*, Chief Justice Warren could not take an originalist position, because the history and suggested interpretations of the meaning of the Fourteenth Amendment pertaining to public education were at best "inconclusive"[459] and could not be determined "with any degree of certainty."[460] The Court held it "could not turn the clock back to 1868 when the Amendment was adopted or even to 1896 when *Plessy v. Ferguson* was written."[461] The plight of children who were segregated and denied equal opportunity for success in life in present day society was settled upon as the proper test to determine whether or not there was a deprivation of the equal protection of the laws.[462]

Vigorous efforts by the various defendant school districts during the course of this litigation to "equalize" in a tangible way, public school facilities, curricula, qualifications and salaries of teachers, were dismissed by Chief Justice Warren as not relevant to the ultimate question.[463] Instead, refusing to be diverted, Chief Justice Warren reached the rule of law issue underlying the doctrine of "separate

---

[455] Hernandez v. Texas, 347 U.S. 475, 478 (1954).
[456] *Id.*
[457] Brown v. Board of Education, 347 U.S. 483 (1954).
[458] Plessy v. Ferguson, 163 U.S. 537 (1896).
[459] Brown v. Board of Education, 347 U.S. at 489.
[460] *Id.*
[461] *Id.* at 492.
[462] *Id.*
[463] *Id.*

but equal" by examining the "effect of segregation itself."[464] Having neutralized the obstacle of tangible equality, Chief Justice Warren focused on the inherent immorality of segregation that harmed children by stamping them with a badge of inferiority "that may affect their hearts and minds in a way unlikely to ever to be undone."[465]

The Court then turned to modern science for an answer. Graciously excusing the *Plessy* Court from not having before it scientific knowledge available to the *Brown* Court, Chief Justice Warren took judicial notice that the effect of segregation, bolstered by the sanction of law, stunted the ability of black children to develop and reach their full potential as human beings.[466] This life altering harm to the destiny of innocent children was unjust and immoral. The proof of this permanent harm was rooted in truth, evidenced by the objective findings of trained reputable psychologists.[467] The Court concluded that segregation, in and of itself, amounted to inherent inequality.[468] Segregation in the public schools was thus declared unconstitutional, offending the Equal Protection Clause.

In the companion case of *Bolling v. Sharpe*,[469] the same Court ruled unanimously that segregation of public school children in the District of Columbia violated the Due Process Clause of the Fifth Amendment. Chief Justice Warren found implicit in the concept of due process the principle of fairness. When the Court finds unfairness in its moral judgment, it may prohibit unjustifiable discrimination that unconstitutionally constrains the exercise of liberty:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the *concepts of equal protection and due process, both stemming from our American ideal of fairness*, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, *discrimination may be so unjustifiable as to be violative of due process.*
>
> . . . Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it

---

[464] *Id.*

[465] *Id.* at 494.

[466] *Id.*

[467] *Id.* at n.11 (Citing K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer & Kotinsky, Personality in the Making ch. VI (1952); Deutscher & Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?* 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare 44-48 (MacIver, ed., 1949); Frazier, The Negro in the United States 674-81 (1949). *And see generally* Myrdal, An American Dilemma (1944)).

[468] *Brown*, 347 U.S. at 495.

[469] Bolling v. Sharpe, 347 U.S. 497 (1954).

> cannot be restricted except for a proper governmental objective. *Segregation* in public education is not reasonably related to any proper governmental objective, and thus it *imposes* on Negro children of the District of Columbia *a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause*. [470]

The line of cases that followed *Brown* continued the battle for racial equality and legitimized the birth of the civil rights movement of the 1960's led by Dr. Martin Luther King, Jr. and others that demanded that the rule of law in the form of desegregation be expanded without delay to all social conditions and contexts.[471] In one of these cases, *Green v. New Kent County School Board*, the Supreme Court unanimously rejected the school board's plan to give parents a "freedom of choice" plan so the school board could evade its responsibility under *Brown II* to achieve desegregation.[472] In three years of operation under the plan, not one white child "chose" to attend the all-Negro school.[473] Speaking on behalf of the entire court, Justice Brennan incorporated the opinion of Judge Sobeloff, who noted "freedom of choice" is "not a sacred talisman."[474] While "freedom of choice" may not be per se unconstitutional, its use could never justify or prop up the existence of a class system, and perpetuate segregation, discrimination and inequality among human beings. "Freedom of choice" is valid only if used as a means to attain equality and may not be used as a means to justify inequality. If "white supremacy" cannot be used to separate classes of people by the color of their skin,[475] "freedom of choice" should not be used in the name of gender equality to justify the segregation of unborn human beings from born human beings.

XXI. The Road to *Roe*: The Rise of Privacy, Unrestrained Personal Liberty and Fundamental Rights

It was not until the twentieth century that the goals of birth control and reproductive rights became a part of the eugenics agenda of Margaret Sanger's women's rights movement.[476] The liberalization of sexual mores, the political

---

[470] *Id.* at 499-500 (emphasis added).

[471] Brown v. Board of Education, 349 U.S. 294 (1955) (hereinafter *Brown II*); Cooper v. Aaron, 358 U.S. 1 (1958); Watson v. City of Memphis, 373 U.S. 526 (1963); Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964); Green v. New Kent County School Board, 391 U.S. 430 (1968); Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Keyes v. School District No. 1, Denver Colorado, 413 U.S. 189 (1973).

[472] Green v. New Kent County School Board, 391 U.S. 430. 437 (1968).

[473] *Id.* at 441.

[474] *Id.* at 439-40 (1968). "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" Bowman v. County School Board, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff , J., concurring opinion).

[475] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[476] Rhode, *supra* note 326, at 205. *See* Bernard Nathanson, Aborting America 32 (1979).

struggle for gender equality and the prominence of women in the workplace laid the groundwork for the use of contraceptives to be socially accepted as a private and personal decision of a woman.[477] Abortion was illegally practiced as a method of birth control, as women in their quest for equality with men sought control over their own destiny.[478]

Beginning in 1961, abortion laws were relaxed to accommodate abortions under the following circumstances: where the physical or mental health of the mother was in danger; where the unborn child had a serious physical or mental defect (such as a deformity like missing limbs as a side effect of the drug thalidomide, an anti-depressant medication); or where the child was conceived as a result of rape or incest.[479] In 1963, Betty Friedan, who in 1968 became a founder of the National Organization of Women (NOW), did not discuss the subject of abortion in the first edition of her book, the *Feminine Mystique*. Instead, her focus was on achieving liberation and equality for women, whom she believed suffered at home in "comfortable concentration camps" and were subjected to "progressive dehumanization." [480] According to obstetrician and gynecologist Dr. Bernard Nathanson, who in 1969 founded the National Association for Repeal of Abortion Laws (NARAL), it was a man, Lawrence Lader, who became the driving force behind the repeal of all legal restrictions of abortion.[481] Nathanson and Lader realized they had to recruit the feminists and allied themselves with Friedan.[482] Norma McCorvey and Sandra Bensing decided to join the battle to legalize abortion on demand and became known as the respective plaintiffs "Roe" and "Doe" in separate legal challenges to state laws that restricted abortion.[483]

In the 1960s, a series of test cases were filed in federal courts challenging the constitutionality of state laws restricting abortion.[484] While most states banned

---

[477] Rhode, *supra,* note 326, at 206–07.

[478] *Id.* at 207–208.

[479] *Id.* at 208.

[480] Betty Friedan, The Feminine Mystique 282-309 (1963).

[481] Nathanson, *supra* note 476, at xi, 29-32, 50-55. Lader, who in 1955 authored a biography of Margaret Sanger, advocated the idea that a woman had the right to control her own body. Although Sanger promoted birth control, she opposed abortion. Nathanson personally presided over 60,000 abortions and was at one time the director of the largest abortion clinic in New York City.

[482] *Id.* at 32, 49.

[483] Nathanson, McCorvey and Bensing (now known as Cano), are now all activists against abortion. See Shake the Nation, at *http://www.shakethenation.org/Factsheet.pdf* . McCorvey and Cano have filed legal actions seeking to reverse Roe v. Wade, *infra* note 484, and Doe v. Bolton, *infra* note 484. Both litigants face the hurdle of waiting too long to overturn these decisions. McCorvey's first attempt to re-open her case was unsuccessful. She wanted to introduce new scientific evidence to re-evaluate whether *Roe* was still good law. *See* McCorvey v. Hill, No. 3:03-CV-1340-N, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex. June 19, 2003). Cano claims the underlying facts in *Doe* were a fraud upon the court. *See* draft affidavit of Cano, in Cano v. Baker, Civil Action No. 13676, U.S. Dist. (N.D. Georgia) at http://www.operationoutcry.org/Affidavit%20--%20Sandra%20Cano%20Saucedo%20-%20KC%20Version.pdf.

[484] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Abele v. Markle, 351 F. Supp. 224

abortion, there were statutory exceptions in cases of rape, incest, and fetal abnormality. Calling themselves "pro-choice," abortion activists sought more liberal laws. Slogans like "my body, my choice" resurrected the ghost of *Dietrich* and revitalized the Holmes' opinion that an unborn child was part of the mother's body and that women had complete dominance and sovereignty over their body.

The Fourteenth Amendment of the U.S. Constitution became the battleground of "choice." It did not matter that "freedom of choice" entailed dual classes of persons, one born and the other unborn. Personal autonomy, personal privacy, and reproductive liberty were claimed to be fundamental rights, within the substantive meaning of the Due Process Clause. The decision to abort one's own child was argued to be part of one's constitutional right to unrestrained personal liberty conferred by the Fourteenth Amendment.

Griswold[485] revived the previously discredited doctrine of personal liberty made famous by *Lochner*[486] and believed put to rest by *West Coast Hotel*.[487] *Griswold* began the modern era of a constitutional right to privacy, which included the unrestrained personal liberty to make reproductive decisions about contraception. However, to understand *Griswold* more fully, a historical review is needed to demonstrate there had never been an unfettered constitutional right for an individual to harm an innocent human being, whether justified by personal privacy, choice, or liberty. In fact, the jurisprudence shows that until the cases of *Roe v. Wade* and *Casey*, the opposite has been true.

A. Historical Limits on Personal Liberty

In 1877, in *Munn v. Illinois*,[488] the U.S. Supreme Court grappled with the meaning of "deprive," as used in the Fourteenth Amendment, by resorting to the history of the common law of England. Chief Justice Waite noted that even though the American revolution changed the form of American government, its substance was unaltered, leaving intact the roots of American constitutional law all the way back to the Magna Carta.[489]

Chief Justice Waite rejected the idea that people had a constitutional right of unrestrained personal privacy that immunized one's conduct from government regulation when that conduct could injure or affect relations with others. Becoming a member of society requires a yielding of previously unregulated rights or privileges for the common good:

> When one becomes a member of society, he necessarily parts with some rights and privileges which, as an individual not affected by his relations to others, he might

(D.C. Conn. 1972); Bryn v. New York City Health & Hospitals Corp., 38 A.D. 2d 316 (N.Y. App. Div. 1972); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

[485] Griswold v. Connecticut, 381 U.S. 479 (1965).

[486] Lochner v. New York, 198 U.S. 45 (1905).

[487] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[488] Munn v. Illinois, 94 U.S. 113 (1877).

[489] *Id.* at 123-124.

> retain. . . . This does not confer power upon the whole people to control rights which are purely and exclusively private . . . *but it does authorize the establishment of laws requiring each citizen to so conduct himself*, and so use his own property, *as not unnecessarily to injure another. This is the very essence of government*, and has found expression in the maxim *sic utere tuo ut alienum non loedas*. From this source comes police powers. . . .[490]

A private right thus loses its "purely and exclusively" private nature the moment one's conduct becomes relational. Regulation of private personal choices becomes necessary for the public good when other people may become harmed or affected. As well, regulation of private property is necessary when it is used in a manner affecting the community at large or when there is a public consequence, thereby making once private property "clothed with a public interest."[491]

In *Lochner*, Justice Peckham asked whether New York State's regulation of the working hours of bakers in the interests of public health, safety, morals and welfare was "fair, reasonable and appropriate"[492] or "an unreasonable, unnecessary and arbitrary interference of the individual to his personal liberty."[493] Freedom to contract the hours of selling one's own labor was confirmed to be part of the liberty of the individual protected by the Fourteenth Amendment.[494] Significantly, Justice Peckham did not endorse unrestrained liberty at the cost of interfering with another individual's life or liberty.

In dissent, Justice Harlan referred to *Jacobson v. Massachusetts*[495] for the proposition that there was no such thing as unrestrained personal liberty, for there are "manifold restraints to which every person is necessarily subject for the common good."[496] Creating an era of unrestrained personal liberty would "cripple the power of the States to care for the lives, health and well-being of their citizens."[497]

The issue in *Jacobson* was whether compulsory smallpox vaccination was an unconstitutional invasion of personal liberty. Speaking for the majority, Justice Harlan upheld the state law and reasoned that unrestrained personal liberty was unconstitutional, leading to anarchy and harm to others:

> *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.* There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. *Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.* Real liberty

---

[490] *Id.* at 124-125 (emphasis added).
[491] *Id.* at 126.
[492] *Lochner* , 198 U.S. at 56.
[493] *Id.*
[494] *Id.* at 53; s*ee* Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[495] Jacobson v. Massachusetts, 197 U.S. 1 (1905).
[496] Lochner, 198 U.S. at 67 (Peckham, J., dissenting without a published opinion).
[497] *Id.* at 73.

> for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, *regardless of the injury that may be done to others.* This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' *Railroad Co.* v. *Husen*, 95 U.S. 465, 471; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U.S. 613, 628, 629; *Thorpe* v. *Rutland & Burlington R.R.*, 27 Vermont, 140, 148. In *Crowley* v. *Christensen*, 137 U.S. 86, 89, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. *Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.* It is then liberty regulated by law.' In the constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men.' The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts.[498]

Justice Harlan's interpretation of liberty is consistent with my view of the rule of law. Regulated liberty permits others to enjoy their constitutional rights and protects everyone's enjoyment of life and happiness. This is consistent with the rule of law, for liberty is promoted without injustice to others. Self-centered unrestrained personal choice in the guise of "liberty," that harms others, even if legally sanctioned by the state, is inconsistent with the rule of law. Injustice occurs when the powerful are granted a liberty license to act according to one's own will, without restraint and over the human rights of the weak and powerless, such as in the case of abortion.

In *Buck v. Bell*, Justice Holmes misapplied *Jacobson* and justified the eugenic sterilization of Carrie Buck, an inmate of a mental institution.[499] Declaring "three generations of imbeciles are enough," Justice Holmes accepted the idea that if the public welfare in times of war could demand the lives of the best citizens, at the very least the idiots that give birth to future criminals or public charges could make the lesser sacrifice of submitting to compulsory sterilization to make the world a better place.[500] Personal liberty did not protect against bodily intrusion instigated by the

[498] Jacobson v. Massachusetts, 197 U.S. 1 (Citing Commonwealth v. Alger, 7 Cush. 53, 84) (emphasis added).

[499] Buck v. Bell, 274 U.S. 200 (1927).

[500] *Id.* at 207.

state for the purpose of eliminating the reproduction of an inferior segregated class of human beings. Such impeccable logic appealed to Nazi Germans and their ideals of white supremacy, whose reward was prosecution at Nuremberg for crimes against humanity that included forced sterilization and compulsory abortion.[501]

Ignored by Justice Holmes was the Supreme Court's earlier decision in *Meyer v. Nebraska* (wherein he dissented), which overturned the conviction of a teacher who taught a 10-year-old student in the German language at the Zion Parochial School.[502] Justice McReynolds took judicial notice of the scientific fact that learning a foreign language is easier at an early age,[503] and that mere knowledge of German was harmless to others.[504] In holding that the right to teach in the German language was included within the meaning of liberty under the Fourteenth Amendment, Justice McReynolds rejected the purpose of the state was to "foster a homogenous people with American ideals."[505] In determining the meaning of liberty under the Fourteenth Amendment, Justice McReynolds looked to the privileges recognized in the common law essential to the pursuit of happiness:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[506]

Significantly absent from this foregoing list of suggested fundamental rights is any right to infringe upon the rights of others for one's own personal gain or advantage.

Oregon, like Nebraska, sought to homogenize its schoolchildren by requiring compulsory public school attendance, which would put out of business parochial and military primary schools. Applying *Meyer v. Nebraska*, the Supreme Court, in a judgment delivered by Justice McReynolds, ruled in *Pierce v. Society of Sisters* that Oregon's state law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children."[507] The "fundamental theory of liberty excludes any general power of the State to standardize its children."[508] A compulsory public school education was unconstitutional, for "the child is not

[501] United States v. Griefelt, Trials of War Criminals Before the Nuremberg Military Tribunal, Vol. IV and V, 1946-1949, at http://www.ess.uwe.ac.uk/WCC/greifelt1.htm.

[502] Meyer v. Nebraska, 262 U.S. 390 (1923).

[503] *Id.* at 403.

[504] *Id.* at 400.

[505] *Id.* at 402.

[506] *Id.* at 399.

[507] Pierce v. Society of Sisters; Pierce v. Hill Military Academy, 268 U.S. 510, 534 (1925).

[508] *Id.* at 535.

the mere creature of the State."[509] It was up to those who "nurtured" the child, "directed" the child's destiny, and fulfilled their "high duty," "to recognize and prepare him for additional obligation."[510] Liberty here meant to act in the best interests of the child, for the benefit of the child, and to prepare that child to assume his or her future obligations. Liberty did not mean unrestrained choices to detrimentally affect any child.

In the meantime, *Lochner's* doctrine of unrestrained liberty, which promoted the economic theory of laissez faire capitalism, was coming to an end. Political and case pressure began to build in the Supreme Court in the 1920s and 1930s, for people needed a minimum wage to make a living,[511] people needed to buy food at affordable prices,[512] people needed mortgage relief to save their homes during the Great Depression,[513] and people needed protection from unscrupulous businessmen who cheated the consumer.[514] The fiction of assumed equal bargaining power between an employer and an employee could not hide the truth there was an unequal relationship. Law was required to restore fairness and justice to a society that had reverted to the exploitation of the weak and powerless. The unrestrained liberty experiment of *Lochner* had failed, and public welfare required a New Deal to restructure America.[515]

In *West Coast Hotel*,[516] the Supreme Court returned to the rule of law and recognized that liberty had to be restrained when it came to respecting human dignity and the rights of others. Deferring to the wisdom of the State of Washington, Chief Justice Hughes upheld the constitutional validity of its minimum wage laws, disagreeing with opponents who argued that law denied freedom of contract, thereby violating the right to liberty in the Fourteenth Amendment. Hotel chambermaid Elsie Parrish worked a 48-hour week and made less than thirty cents an hour.[517] Since she could not successfully persuade her employer to make up the difference, she sued.

In asking what was freedom of contract, Chief Justice Hughes instructed himself from the text of the Constitution and reasoned that liberty was subject to the restraints of due process:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable

[509] *Id.*

[510] *Id.*

[511] Adkins v. Children's Hospital, 261 U.S. 525 (1923); Moorehead v. New York, 298 U.S. 379 (1936); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[512] Nebbia v. New York, 291 U.S. 502 (1934).

[513] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

[514] United States v. Caroline Products Co., 304 U.S. 144 (1938).

[515] *See* New Deal Network, at http://newdeal.feri.org/index.htm.

[516] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[517] *Id.* at 388.

> liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. [518]

Chief Justice Hughes stressed there was no equality in Elsie's relationship with her employer, and in fact there were conflicting interests.[519] Even adults competent to make legal choices still needed the protection of state laws to shield them from those who would violate another's health, safety or welfare.[520] Identifying women as a vulnerable class, Chief Justice Hughes declared the legislature was entitled as a matter of public interest for the benefit of all of society to stop the exploitation of helpless women who were denied a living wage by unconscionable employers.[521]

In the years that followed, the idea of unrestrained personal liberty, at least in the area of economic activity, was presumed dead. The Supreme Court gave deference to state laws that were enacted for the benefit of society as a whole. State laws prohibiting abortion remained intact. In *Williamson v. Lee Optical*, Justice Douglas observed, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business or economic conditions, because they may be unwise, improvident or out of harmony with a particular school of thought."[522] The democratic election process was the remedy to correct legislative error.[523]

The Supreme Court reserved the right, however, to engage in strict judicial review whenever state or federal laws violated the Bill of Rights, or adversely affected the political processes, or when majoritarian democratic actions or omissions discriminated against religious, national, racial or discrete and insular minorities.[524]

---

[518] *Id.* at 391.
[519] *Id.* at 393-94.
[520] *Id.*
[521] *Id.* at 398-99.
[522] Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).
[523] *Id.*
[524] United States v. Caroline Products Co., 304 U.S. 144, n. 4 (1938), which states:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See* Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see* Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, *see* Near v. Minnesota *ex rel*. Olson, 283 U.S. 697, 713-714, 718-720, 722;

As well, the Supreme Court had been busy in criminal law cases considering the meanings of "due process" and "liberty" in the Sixth, Fifth and Fourteenth Amendments.

In *Powell v. Alabama*, Justice Sutherland inquired as to whether in a criminal case the deprivation of the right to counsel under the Sixth Amendment was "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" [525] Justice Van Devanter had earlier in *Hebert v. Louisiana*, a case involving jurisdictional and sentencing issues in dual federal and state prosecutions for illegally making moonshine, held that the due process clause required that "state action, whether through one agency or another, shall be consistent with the 'law of the land.'"[526] To be constitutional, state action had to conform to undefined "fundamental principles" which lie at the base of all of our civil and political institutions.[527]

After deciding the right to counsel was in fact such a fundamental right, Justice Sutherland concluded in *Powell v. Alabama* that the deprivation of the right to counsel in a hearing constituted a denial of due process within the meaning of the Fourteenth Amendment.[528] The necessary companion rule to the right to be heard by counsel was the right to have counsel appointed pursuant to the inherent power of the court.[529] The rule of law required nothing less than due process and the effective assistance of appointed counsel when a poor, illiterate human being is in jeopardy of losing one's life. To illustrate his point, Justice Sutherland described an extreme hypothetical case, to demonstrate in clear and convincing terms a circumstance where all could agree there is an obvious denial of the fundamental principles of liberty and justice:

> Let us suppose the extreme case of a prisoner charged with a capital offence, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with

---

Grosjean v. American Press Co., 297 U.S. 233; on interferences with political organizations, *see* Stromberg v. California, 283 US 359; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242; *and see* Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, *see* De Jonge v. Oregon, 299 U.S. 353, 365. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 284, or racial minorities, Nixon v. Herndon, *supra;* Nixon v. Condon, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Compare* McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n. 2, and cases cited.

[525] Powell v. Alabama, 287 U.S. 45, 67 (1932).

[526] Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

[527] *Id.*

[528] Powell v. Alabama, 287 U.S. at 71.

[529] *Id.* at 72.

> the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. *Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law*; and we venture to think that no appellate court, state or federal, would hesitate so to decide. [530]

Unlike the case of someone on trial for murder, where there is no disagreement that due process must be observed, there is sharp disagreement whether an unborn child deserves due process. Today there is no such agreement when it comes to the plight of the unborn human being, who plainly fits the above hypothetical example of gross injustice, offending against the rule of law. In America today, every unborn child who is aborted is denied due process of law. This result is evidence that the rule of law is absent from the Supreme Court's decisions in *Roe* and *Casey*. Only time will determine whether the Court's denial of the personhood of the unborn human being by degrading its status from human being to thing, will establish a successful defense to a future moral charge of judicially sanctioned murder. What emerges, despite whatever analogies may be drawn, is Justice Sutherland's focus on doing justice and the precedent the *Powell* Court establishes to ensure that the constitutional rights of the weak and helpless are not oppressed by the strong and powerful.

In *Snyder v. Massachusetts*, Justice Cardozo sent the message that harmless technical failure to comply with a constitutional guarantee, the breach of which does not affect the fairness of a trial, may be overlooked.[531] Otherwise, injustice would result by the setting free of a guilty defendant, thereby bringing the criminal law into public contempt.[532] Snyder, facing a death sentence, appealed his murder conviction, not on the basis of factual innocence, but on the grounds that the due process clause of the Fourteenth Amendment was violated, because the trial judge denied his motion to be personally absent when the jury and all counsel viewed the crime scene. Snyder lost his appeal.

Justice Cardozo took a very limited view of which rights reflected a fundamental principle of justice. He declared: "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[533]

In his opinion, Justice Cardozo did not find it to be a violation of a fundamental principle of justice to abolish trial by jury, to substitute an information by a public officer for an indictment handed down by a Grand Jury, or the removal of the privilege against self-incrimination and the accused compelled to testify as a state

---

[530] *Id.* (emphasis added).
[531] Snyder v. Massachusetts, 291 U.S. 97 (1934).
[532] *Id.* at 122.
[533] *Id.* at 105.

witness. On the matter before him, Justice Cardozo found no evidence to suggest due process was violated since the defendant received a fair and just hearing.[534]

Justice Cardozo warned that "the tyranny of labels"[535] was a "fertile source of perversion in constitutional theory."[536] The mechanical application of a general rule brought about by the pressure of a particular situation may not necessarily result in justice in every case. Due process required fairness, but "fairness is a relative, not an absolute concept,"[537] for fairness needed to be determined in the context of all the circumstances of a particular case. "What is fair in one set of circumstances may be an act of tyranny in others,"[538] observed Justice Cardozo. Justice was not to be lost in the honoring of fundamental privileges, for justice needs to be balanced between the accuser and the accused, for justice was due to both. The role of the court was to "keep the balance true," for "the concept of fairness must not be strained till it is narrowed to a filament."[539] The rule of law and the attainment of justice for all thus pervaded Justice Cardozo's reasoning.

In *Brown v. Mississippi*, the *Snyder* exception was invoked, because the state had offended fundamental principles of justice "rooted in the tradition and conscience of our people."[540] Chief Justice Hughes reversed convictions of murder that had been based on confessions extracted by torture that included simulated lynching and whipping the naked backs of black men whose bodies were repeatedly flayed open and cut to pieces by a leather strap with buckles on it wielded by white sheriff deputies.[541] Due process of law under the Fourteenth Amendment was violated, for a "trial by ordeal" was no "substitute for a jury trial," "the rack and torture chamber may not be substituted for the witness stand," and a rush to trial in circumstances of "mob domination" offended the fundamental principles of liberty and justice.[542] The whole proceeding was "a mask" that cried out for corrective process.[543] Things went so fundamentally wrong that the trial was mere pretense, rendering the convictions and sentences void at law.[544]

In *Palko v. Connecticut*, Justice Cardozo revisited the question of due process, in the context of a murder appeal, where the accused was convicted of first-degree murder and sentenced to death, in a second trial ordered by an appeal court.[545] In the first trial, the accused had been convicted of second-degree murder and was

---

[534] *Id.* at 108-09.
[535] *Id.* at 115.
[536] *Id.* at 114.
[537] *Id.* at 116.
[538] *Id.* at 117.
[539] *Id.* at 122.
[540] Brown v. Mississippi, 297 U.S. 278, 285 (1936).
[541] *Id.* at 281-82.
[542] *Id.* at 285-86.
[543] *Id.* at 278, 286.
[544] *Id.*
[545] Palko v. Connecticut, 302 U.S. 319 (1937).

sentenced to a life term. That result was reversed because the trial judge had made erroneous evidentiary rulings prejudicial to the prosecution and gave an erroneous instruction on the difference between first and second-degree murder to the jury.

In rejecting Palko's argument that his constitutional rights were violated by "double jeopardy," Justice Cardozo introduced the idea of "ordered liberty."[546] Even though certain trial procedures like trial by jury and immunity from prosecution may have "value and importance," "reflection and analysis" will lead the court to a "rationalizing principle which gives to discrete instances proper order and coherence."[547] Not all rights are part of the "very essence of a scheme of ordered liberty."[548] If the abolition or denial of a right means that justice will "perish," only then is there a violation of "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[549]

In *Palko*, justice would not perish by subjecting the appellant to an orderly inquiry free from legal error. A reciprocal error by the trial judge, to the detriment of the accused, would have equally resulted in a new trial for the benefit of the accused. Justice is symmetrical and applies evenly to all before the court.[550]

Five years later, the Supreme Court used the equal protection clause to rule unconstitutional the compulsory sterilization of a convicted chicken thief who had been convicted of three felonies involving moral turpitude.[551] Oklahoma's Habitual Criminal Sterilization Act permitted the state to sterilize both men and women who could become the parents of potentially socially undesirable children. Justice Douglas, in finding that the legislation offended against the equal protection clause of the Fourteenth Amendment, expressed concern that the power to sterilize without consent affected a fundamental civil right:

> We are here dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to whither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[552]

Chief Justice Stone concurred in the result, but decided the case using a due process analysis. It was unconstitutional to condemn all the members of the affected class without providing all of them the chance to be heard to prove they did not have genetic traits of criminal propensity that could be inheritable, before the

---

[546] *Id.* at 325.
[547] *Id.*
[548] *Id.*
[549] *Id.* at 326.
[550] *Id.* at 328.
[551] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[552] *Id.* at 541.

irreparable irreversible harm of compulsory sterilization was inflicted upon these human beings without their consent: "A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process."[553]

Justice Jackson agreed that the eugenic plan violated both the equal protection and the due process clauses of the Fourteenth Amendment. In particular, Justice Jackson recognized basic human rights were at stake, and that human beings possessed a dignity that required respect. There was a limit to what a constituted majority of human beings could do to the bodies of a minority of human beings. It did not matter if that minority was innocent or guilty of defined crimes. The question of whether or not biological experiments conducted at the expense of human beings was constitutional or not was never decided by Justice Jackson. But the way in which he posed the question left no doubt that he felt it was the duty of the Court to rescue defenseless human beings at whose expense other human beings are willing to benefit:

> There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would reserve judgment.[554]

B. Protecting Children Under the First Amendment

Historically, the Supreme Court restrained religious liberty when balanced against protection of the life and health of born and unborn children. In *Reynolds v. United States*, Chief Justice Waite rejected a claim by a polygamist of the Mormon faith that the First Amendment gave a constitutional right to engage in personal conduct exempt from legal regulation, so long as that conduct was exercised in accordance with the doctrines of one's religion.[555] Chief Justice Waite asked, "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[556]

---

[553] *Id.*

[554] *Id.* at 546-47.

[555] Reynolds v. United States, 98 U.S. 145 (1878).

[556] *Id.* at 166. This is a pertinent example, for in ancient times, newborn children in Israel were sacrificed to the god Molech by being burned alive as part of a pagan religious ritual. It was recorded by Moses in the Book of Leviticus that God hated this evil and sanctioned the death penalty against anyone who sacrificed his child: The LORD said to Moses, "Tell the Israelites: Anyone, whether an Israelite or an alien residing in Israel, who gives any of his offspring to Molech shall be put to death. Let his fellow citizens stone him. I myself will turn against such a man and cut him off from the body of his people; for in giving his offspring to Molech, he has defiled my sanctuary and profaned my holy name. Even if his fellow citizens connive at such a man's crime of giving his offspring to Molech, and fail to put him to death, I myself will set my face against that man and his family and will cut off

Chief Justice Waite subordinated an individual's constitutional right under the First Amendment to the free exercise of religion to laws that protected all the members of society. He drew a bright line between belief and practices: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[557] Perhaps he feared that if he upheld the supremacy of religious doctrine, the rule of law would disappear and be replaced by individual anarchy: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." [558]

By 1964, the law was settled that a mother, in the exercise of her constitutional rights to the free exercise of religion under the First Amendment, could not destroy the life of her unborn child.[559] Willimina Anderson, a devout member of the Jehovah Witnesses, refused blood transfusions that were needed to save her life and that of her 32 week-old unborn child. A hospital initiated court action to obtain a judicial order that would force Mrs. Anderson to receive the needed blood. A panel of five New Jersey appellate judges unanimously decided, "the unborn child is entitled to the law's protection,"[560] and ordered the transfusions. The New Jersey Supreme Court emphasized it had "no difficulty"[561] in its decision to protect the unborn child.

Curiously, this line of authority is still valid after *Roe v. Wade*. Courts in New York, Georgia, Florida, and the District of Columbia respectively dismissed one objection to blood transfusions and three objections to caesarian section deliveries primarily based on religious faith arguments relying on the First Amendment.

In *Jamaica Hospital*, even though the unborn child was not viable, the state court judge found that the State's interest in protecting the life of a mid-term fetus outweighed the patient's right to refuse a transfusion on religious grounds.[562] In ordering the transfusion, Judge Lonschein stated, "For the purpose of this proceeding, therefore, the fetus can be regarded as a human being."[563]

In *Jefferson v. Griffin Spalding County Hospital*, the Supreme Court of Georgia per curiam upheld an order compelling a competent adult who was an expectant mother in her 39th week of pregnancy to submit to a caesarian delivery.[564] Judge Hill found that the right of the mother to practice her religion and her right to refuse surgery on herself was outweighed by her unborn child's right to live, who faced

---

from their people both him and all who join him in his wanton worship of Molech. *Leviticus* 20:1-5 (New American Bible).

[557] *Id.*

[558] *Id.* at 167.

[559] Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421 (1964).

[560] *Id.* at 423.

[561] *Id.*

[562] In the Matter of Jamaica Hospital, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (1985).

[563] *Id.*, 128 Misc. 2d at 1008.

[564] Jefferson v. Griffin Spalding County Hospital, 247 Ga. 86 (1981).

almost certain death without the surgery.[565] Judge Smith concurred, and relied upon *Reynolds* for the proposition that liberty to follow one's personal religious faith is restrained by law when personal choices affect the life of an unborn human being: "Under these circumstances, I must conclude that the trial court's order is not violative of the First Amendment, notwithstanding that it may require the mother to submit to surgery against her religious beliefs."[566]

A balancing test was also employed in *Pemberton v. Tallahassee Memorial Regional Medical Center*, by federal Judge Hinkle, who considered the First, Fourth, Eighth, and Fourteenth Amendment rights of Laura Pemberton, who refused consent for a caesarian delivery even though her physicians believed that a natural home delivery would risk the death of her full term unborn child.[567] Judge Hinkle held that the life of the unborn child whose life was in danger was paramount to the constitutional rights of the mother.[568]

Judge Levie in the District of Columbia reached the same result in the case of Ayesha Madyun, a devout Muslim.[569] Citing the Supreme Court's decision in *Prince v. Massachusetts*,[570] Judge Levie stepped in to act on behalf of the unborn child's best interests, finding that the state had a "compelling interest" in the life of the unborn child, parental control, authority, and rights were limited, and ordered the hospital to take whatever steps were necessary to protect the birth and life of the fetus.

When courts deviated on two occasions from the balancing approach, and used a test of "substituted judgment," the mother's constitutional rights triumphed over her unborn child's interest in living, for the judge considered only the mother's self-interest and chose to ignore the interest of the unborn child.[571] So far, these deviations have not changed the general unbroken trend of using a balancing test in blood transfusion and obstetrical cases where the unborn child was regarded as a human being that has a right to life.

While the precedent of *Reynolds* restrains the religious liberty of the pregnant woman under the First Amendment in favor of the unborn child, the authority of *Prince v. Massachusetts* for a time restrained the liberty of parents under the due process clause of the Fourteenth Amendment. In *Prince*, a mother took her children with her to engage in street preaching to actively promote the teachings of the Jehovah Witness faith contrary to state labor laws that prohibited underage children from selling and distributing publications. In appealing her criminal conviction, Sarah Prince joined her defense of First Amendment religious liberty rights to a claim of

---

[565] *Id*. at 90.

[566] *Id*. at 91.

[567] Pemberton v. Tallahassee Memorial Regional Medical Center, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

[568] *Id*. at 1254.

[569] *In re* Madyun, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. July 26, 1986)

[570] Prince v. Massachusetts, 321 U.S. 158 (1944).

[571] *In Re* Baby Doe v. Mother Doe, 260 Ill. App. 3d 392 (1994); In Re A.C., 573 A.2d 1235 (D.C. 1990).

parental rights, secured by the due process clause of the Fourteenth Amendment.[572] Justice Rutledge, without using the word "privacy," described the mother's "sacred private"[573] due process interest as "authority in her own household and in the rearing of her children."[574] Competing with the mother's right are the "interests of society to protect the welfare of children,"[575] for "it is the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free well-developed men and citizens."[576]

Justice Rutledge concluded, "the family itself is not beyond regulation in the public interest."[577] State intrusion into family private life is justified to protect children, for "neither rights of religion nor rights of parenthood are beyond limitation."[578] Personal private family choices made by parents are limited when those choices affect the life or health of children. Parents thus do not possess unrestrained personal liberty under the Fourteenth Amendment to make decisions that harm their children.

Prince established that the state's authority over children is broader than over adults. If a competent adult decided to harm herself by exercising her liberty to do so, that was one thing; causing harm to a child who does not have a choice in the decision, is another: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[579]

Neither of the dissenting Justices found an unrestricted right in the parents to do whatever they wished. Justice Murphy saw no evil in the handing out of religious tracts in the public forum that was harmful to the children.[580] Justice Jackson agreed that there were limits to constitutional liberties which began when there was a collision with or an affect upon the constitutional rights of others: "I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[581] The conviction of Sarah Prince was affirmed.

C. Using Privacy to Justify Unrestrained Personal Liberty That Harms Others

In 1961, the Supreme Court revisited the issue of restrictions on the liberty of individuals to make personal and private choices under the due process clause. While the challenge to Connecticut's banning the use of contraceptives was dismissed

[572] Prince, 321 U.S. at 164.
[573] *Id.* at 165.
[574] *Id.*
[575] *Id.*
[576] *Id.*
[577] *Id.* at 166.
[578] *Id.*
[579] *Id.* at 170.
[580] *Id.* at 175.
[581] *Id.* at 177.

because it did not present a genuine controversy that was justiciable, the case of *Poe v. Ullman* signaled the beginning of a shift from the balance struck in *Prince v. Massachusetts* toward granting unrestrained liberty to married couples in matters of family planning.[582]

Justice Douglas dissented, for he wanted to decide the case on its merits and was willing to find a right of privacy in the meaning of liberty, taking judicial notice of the requirements of a free society, asserting, "the regime of a free society needs room for vast experimentation."[583] Raising the image of the police entering the inner sanctum of the marital bedroom to enforce a criminal law against the use of contraceptives, Justice Douglas denounced this as "an invasion of the privacy that is implicit in a free society."[584]

Justice Harlan too dissented, for he was troubled by the potential of the criminal prosecution of married persons who could not enjoy the privacy of their marital relations free of legal supervision.[585] Justice Harlan declared that the Connecticut laws violated the Fourteenth Amendment: "I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustified invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[586] According to Justice Harlan, the due process clause has substantive meaning that includes privacy, for since the Magna Charta, the guarantees of due process protected against arbitrary legislation, and the reach of due process embraces fundamental rights that belong to the citizens of all free governments.[587] Due process cannot be reduced to a formula, for the meaning of due process is derived from judgment and restraint.[588] The content of due process is derived from tradition, "a living thing" that strikes a balance between "respect for the liberty of the individual" and the "demands of organized society."[589] Liberty is more than specific points about selected topics, for liberty is "a rational continuum" in the context of history and purposes, and includes freedom from all "substantial arbitrary impositions and purposeless restraints."[590] In matters of marital privacy, the Court is obligated to use sensitivity and reasonableness and use "careful scrutiny" to decide whether personal freedom may be lawfully restrained.[591] When there is a novel claim, the Court must exercise "limited and sharply restrained judgment" and "follow closely well-accepted principles and criteria."[592]

---

[582] Poe v. Ullman, 367 U.S. 497 (1961).
[583] *Id.* at 517-18.
[584] *Id.* at 520-21.
[585] *Id.* at 536.
[586] *Id.* at 539.
[587] *Id.* at 541.
[588] *Id.* at 542.
[589] *Id.*
[590] *Id.* at 543.
[591] *Id.*
[592] *Id.* at 544.

Laws that reflect a collective legislative moral judgment that intrude into marital privacy ought to be subject to strict scrutiny.[593] The privacy of the home is not limited to the quartering of soldiers therein[594] or protection from search and seizure by agents of the state unless judicially authorized by a warrant.[595] The concept of privacy embodied in the due process clause "is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment."[596] Referring to the dissenting judgment of Justice Brandeis in *Olmstead v. United States*,[597] Justice Harlan expanded the scope of liberty from a spatial dimension to a spiritual, emotional and intellectual one that conferred upon an individual, as against the government, the "right to be let alone."[598] Justice Harlan envisioned a "bubble zone" of personal privacy grounded in liberty, free from government restraint and moral judgment that permitted the constitutional pursuit of happiness.

Justice Harlan was careful to confine his opinion to the intimacies of marriage between a husband and his wife.[599] He deferred to the authority of *Prince v. Massachusetts*, conceding that the family is not beyond state regulation and that "the right of privacy most manifestly is not absolute."[600] There is no sanctuary for criminal offenses committed against another person in the home.[601] The state has a rightful concern to protect the moral welfare of its people.[602] I agree. Prosecution for murder of one's child or spouse in the bedroom thus cannot be avoided by raising a constitutional claim of privacy and unrestrained personal liberty. Justice Harlan agreed with Justice Jackson in *Skinner v. Oklahoma* that there were limits to the extent a legislatively represented majority may conduct experiments at the expense of the dignity and personality of the individual.[603]

Poe v. Ullman predictably resulted in another test case to once again challenge Connecticut's laws banning the use of contraceptives.[604] Griswold, the Executive Director of the Planned Parenthood League in Connecticut, and Dr. Buxton, a professor of medicine at Yale Medical School, were found guilty of counseling married persons to use contraceptives. This time, Justice Douglas, in *Griswold v. Connecticut*, delivered the opinion of the Court. He found a constitutional right to privacy existed in the Constitution, which was implied in the "penumbras" of the various guarantees of the Bill of Rights, and which "give them life and substance."[605] Zones of privacy

[593] *Id.* at 548.
[594] U.S. Const. amend. III.
[595] U.S. Const. amend. IV.
[596] *Poe*, 367 U.S. at 549.
[597] Olmstead v. United States, 277 U.S. 438, 478 (1928).
[598] *Poe*, 367 U.S. at 550.
[599] *Id.* at 553.
[600] *Id.* at 552.
[601] *Id.*
[602] *Id* at 553.
[603] *Id.* at 555.
[604] Griswold v. Connecticut, 381 U.S. 479 (1965).
[605] *Id.* at 484.

are created by the various guarantees.[606] The state law was unconstitutional, being repulsive to the sanctity and privacy of the marriage relationship.[607]

Justices Goldberg, Brennan, and Chief Justice Warren concurred, agreeing, "that the concept of liberty protects those personal rights that are fundamental rights, and is not confined to the specific terms of the Bill of Rights." The concept of liberty includes the right of marital privacy, and this is a fundamental personal right that may be found in the Ninth Amendment. In deciding what is a fundamental personal right, the Court is not permitted to be influenced by its own personal predilections, but must follow an orderly inquiry, having regard to the principles established in jurisprudence:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . .' *Powell* v. *Alabama*, 287 U.S. 45, 67. 'Liberty' also 'gains content from the emanations of . . . specific [constitutional] guarantees' and 'from experience with the requirements of a free society.' *Poe* v. *Ullman*, 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas). n7. In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. . . .[608]

Not to protect marital privacy would permit the state to continue to regulate the future use of contraception, including compulsory birth control. Such control by the state could lead to the undesirable result of decreeing that "all husbands and wives must be sterilized after two children have been born to them."[609] Both scenarios are unacceptable invasions of marital privacy.

Justice Harlan concurred in the result, for the detailed reasons he earlier expressed in *Poe v. Ullman*, that the state's laws violated the basic values implicit in the concept of ordered liberty.[610]

Justice White based his concurrence on the deprivation of liberty under the due process clause of the Fourteenth Amendment. He was satisfied that the prior decisions of the Court in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner v. Oklahoma*, and *Prince v. Massachusetts*, all established that "'there is a realm of family life which the state cannot enter' without substantial justification."[611]

---

[606] *Id.*
[607] *Id.*
[608] *Id* at 493-94.
[609] *Id.* at 496-97.
[610] *Id.* at 500.
[611] *Id.* at 502.

Justice Black, in a strong dissent, stated unequivocally that there is no right to privacy in the Constitution.[612] He criticized his Brethren for resurrecting *Lochner's* ideology to empower the Court to decide which personal rights now qualify as fundamental constitutional rights encompassed within the meaning of liberty, and henceforward may not be interfered with by the state, as a matter of privacy.[613] The use of the due process clause to hold legislation unconstitutional, thereby substituting the Court's views for that of elected representatives, wrongly shifts the power from the people to the judiciary, which becomes a self-appointed super legislature, thereby upsetting the delicate balance in the separation of powers.[614] While judicial review has its proper place, the Court has a responsibility to exercise restraint and defer whenever possible to the legislative branch of government:

> I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have. [615]

Justice Black rejected the notion that the Court had a duty to keep the Constitution "in tune with the times."[616] If change must occur, there is an amending formula in the Constitution to follow.[617] While Justice Black admitted he liked his own privacy[618] and personally deplored the wisdom of Connecticut's law,[619] he saw his task to interpret the law, and not to exercise a self-anointed power of veto.[620] The government has a right to regulate private choices made by married couples "unless prohibited by some specific constitutional provision."[621]

---

[612] *Id.* at 508.
[613] *Id.* at 522-23.
[614] *Id.* at 520-21.
[615] *Id.*
[616] *Id* at 522.
[617] U.S. Const. Art. V.
[618] *Griswold*, 381 U.S. at 510.
[619] *Id* at 507.
[620] *Id* at 513.
[621] *Id* at 510.

Justice Stewart agreed with Justice Black, adding that it was not the function of the Court to decide cases based on community standards and that judges must subordinate their own personal views about the wisdom or folly of the impugned legislation.[622]

For all its importance in reviving judicial activism, and establishing a constitutional right to privacy, *Griswold* did not cross the line with respect to the impact personal choices made in the lives of others, for genuine contraception did not harm a third party. Assuming without deciding that there is a substantive due process right of personal privacy, this right in *Griswold* did not extend to an unfettered license to kill or enslave another human being. What the Court considered in *Griswold*, explained Justice Douglas years later in *Doe v. Bolton*, was "that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg."[623] There was no issue of taking the life of a newly created human being.

What *Griswold* accomplished was to move the Court to the brink of establishing a constitutional right to abortion. The precedent of a constitutional right to personal privacy in matters of reproductive choice set the stage for a departure by the Court from the rule of law to rule by law. The constitutional right to an abortion was now within reach.

The right to make reproductive choices was no longer to be the privilege of married couples, but the constitutional right of every individual, married or single. Most importantly, what women wanted was the right to choose not only to "beget" or "conceive" children, but the unfettered right to choose to "bear" or carry a child until its birth. In plain language, the right to "bear and beget" meant the right to conceive or abort another human being. These goals were attained in *Eisenstadt v. Baird*.[624]

William Baird was convicted of an offense under Massachusetts state law for giving away a package of Emko vaginal foam, a contraceptive, at the close of his lecture on contraception to a group of students at Boston College. It was against the law to give away any article used for the prevention of conception. Only married persons were eligible to obtain contraceptives from doctors or pharmacists on prescription. The social policy behind this law was to promote marital fidelity, deter premarital sex, and prevent the transmission of sexual diseases. Unlike *Griswold*, the use of contraception was legal in Massachusetts. The constitutional attack focused on the State's scheme of control and distribution.

The Supreme Court held that the legislative aims were unreasonable and that the statute, in its effect, was a prohibition on contraception per se.[625] Viewed from this perspective, the law was unconstitutional, for it violated the rights of single

---

[622] *Id* at 530-31.
[623] Doe v. Bolton, 410 U.S. 179, 217 (1973).
[624] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[625] *Id.* at 443.

persons under the equal protection clause of the Fourteenth Amendment.[626] Justice Brennan, in an opinion joined by Justices Douglas, Marshall, and Stewart, took this opportunity to stretch the doctrine of marital privacy and transformed it into individual privacy, for "a marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[627] Irrelevant was any biblical belief in the concept of indivisibility.[628]

Although it was unnecessary to resolve the dispute before the Court, Justice Brennan linked the right of contraception (henceforth a matter of personal individual choice free from government interference) to the right of abortion (that he implicitly predicted would become a matter of personal individual choice free from government interference). Justice Brennan declared that the right of privacy included the fundamental right to choose to "bear" a child, thereby extending an invitation to anyone to bring on a test case to establish a constitutional right to an abortion: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to *bear or beget* a child."[629]

According to Justice Brennan, the right to be let alone was the most important right needed to enable an individual to attain happiness. Free from government restrictions, any woman could prevent conception from occurring and now, could extinguish the new life within her.

The line established by Justice Jackson in *Prince v. Massachusetts* had now been crossed. Personal happiness could now be attained at the cost of another's life and future happiness. Personal liberty could be exercised without restraint, at the cost of trampling another's liberty to be let alone to mature and thrive.

Chief Justice Burger dissented, troubled by the Court's invasion of the constitutional prerogatives of the States by the use of substantive due process.[630] The Chief Justice's major concern was the extension of the constitutional right of privacy into a device to implement into law the personal biases and social policies of the Justices: "By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections."[631]

---

[626] *Id.*

[627] *Id.* at 453.

[628] "Have you not read that from the beginning the Creator 'made them male and female' and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? [Gen. 2:24] So they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate." *Matt.* 19:4-6 (New American Bible).

[629] Eisenstadt v. Baird, 405 U.S. at 453 (emphasis added).

[630] *Id.* at 467.

[631] *Id.* at 472.

Was there an agenda shared by some of the Justices to prepare the way for abortion rights? Justices Powell (who replaced Justice Black following his retirement and death) and Rehnquist took no part in the consideration or decision of the case. After all, the case could have been decided on narrow First Amendment grounds.[632] Baird's lecture on birth control was protected speech, and giving a contraceptive tool to a member of the audience was arguably an extension of the use of a visual aid, which constituted conduct permitted by the First Amendment. Justice Brennan and those who allied with him had a choice to avoid the topic of individual privacy and abortion. They did not. Instead, they extended the constitutional right of personal privacy to suggest an implied license to take the life of an unborn child, a right that has no mooring in the text of the Constitution, and is contrary to history and tradition.

D. The Conflict Between the First and Fourteenth Amendments

Justice Brennan's decision in *Eisenstadt* contradicted his own views on the constitutional rights of children expressed in *Wisconsin v. Yoder*.[633] In that case, Justice Brennan, in dissent, stated that minor children of school age have "constitutionally protectible" interests to control their own destiny and to have a say independent of their parents dictates, whether or not they wanted to attend high school, contrary to Old Amish religious practices and belief:

> These children are 'persons' within the meaning of the Bill of Rights. We have so held over and over again. In *Haley* v. *Ohio*, 332 U.S. 596, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault*, 387 U.S. 1, 13, we held that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' In *In re Winship*, 397 U.S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment. In *Tinker* v. *Des Moines School District*, 393 U.S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.... In *Board of Education* v. *Barnette*, 319 U.S. 624, we held that schoolchildren, whose religious beliefs collided with a school rule requiring them to salute the flag, could not be required to do so. ... On this important and vital matter of education, I think the children should be entitled to be heard. ... It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be

[632] In his concurring judgment, Justice Douglas viewed the controversy as a "simple First Amendment case." *Id.* at 455.

[633] Wisconsin v. Yoder, 406 U.S. 205 (1972).

> stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.[634]

If school age children are persons within the meaning of Fourteenth Amendment, and ought to have their interests in education protected by the state, then unborn children too are persons within the meaning of the Bill of Rights, if one accepts the premise that they have a vested interest in their future destiny, and deserve a say whether they will live or die.

But the force of this argument diminishes when one considers that the majority opinion in *Yoder* upheld the sole right of the parent on First Amendment grounds to decide the future education of Amish children. Chief Justice Burger exempted the Amish from state regulation intended to curb parental authority that was not exercised in the best interests of children, thereby blurring the previous bright line between action and belief:

> Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. *See*, *e. g., Gillette* v. *United States*, 401 U.S. 437 (1971); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. *E. g., Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. *Cf. Lemon* v. *Kurtzman*, 403 U.S., at 612.[635]

This was a major departure from *Reynolds*, which has since been reaffirmed by *Employment Div., Department of Human Resources Ore. v. Smith*.[636]

Presumably, if secular humanism is viewed as a religion and practice of abortion is one of the features of that religion, *Yoder* might be used to justify the practice of abortion as a necessary part of one's pursuit of happiness. After all, religion can be defined to be thoughts and actions that spring from a sincere and meaningful

[634] *Id.* at 243-46.

[635] *Id.* at 219-20.

[636] Employment Div., Department of Human Resources Ore. v. Smith, 494 U.S. 872 (1990).

belief based upon a power or being or faith, to which all else is ultimately dependent or to which all else is subordinate.[637] In a technologically advanced secular and godless society, abortion represents a form of modern day quasi-religious ritual conceivably characterizing a new orthodoxy institutionalizing feminist reproductive supremacy.[638]

According to Chief Justice Burger, *Yoder* should be restricted to its facts, for in that case, no child's life or welfare was in jeopardy: "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[639]

In another case involving the sexual abuse and exploitation of children, Justice White, speaking for the majority of the Supreme Court, stated, "It is evident beyond need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[640] Provided an unborn child survives the risk of abortion, legal protection awaits at the end of the nine month journey to birth.

E. Steinberg v. Brown*: The Precedent Ignored in* Roe

A collision was inevitable between the competing forces of segregationists whose goal was to promote inequality and remove the unborn from constitutional protection and those liberals with classical liberal beliefs who believe in equality for all human beings, regardless of age or condition.

Supporting equal protection for the unborn was the common law, history and tradition, and laws that generally outlawed abortion.[641] Until *Roe v. Wade*, abortion was never a fundamental right in American jurisprudence.[642] Uncontested Supreme Court jurisprudence existed holding that the term "person," whether used in the Fifth or Fourteenth Amendment, was "broad enough to include any and every human being under the jurisdiction of the republic."[643]

Opposing equal protection for the unborn is the new age secular humanist culture of hedonistic self-fulfillment, which is supported by legal arguments founded upon personal privacy, reproductive freedom, fundamental liberty and due process.

Acting on the Supreme Court's open invitation in *Eisenstadt* to challenge the constitutionality of state laws restricting abortion, Dr. Steinberg and others sought a declaratory judgment that Ohio's anti-abortion statute was unconstitutional. District Court Judge Don Young and Circuit Court Judge Weick dismissed the application.[644]

---

[637] United States v. Seeger, 380 U.S. 163 (1965).
[638] *See generally*, MARTIN, *supra*, note 168.
[639] Wisconsin v. Yoder, 406 U.S. at 219-20.
[640] New York v. Ferber, 458 U.S. 747, 756-757 (1982).
[641] Roe v. Wade, 410 U.S. 113, 171 n.2 (Rehnquist, J., dissenting).
[642] *Id.*
[643] Wong Wing v. United States, 163 U.S. 228, 242-43 (Field, J., dissenting).
[644] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Judge Young found the asserted privacy rights, even assuming they were located in the penumbras of the provisions of the Bill of Rights, conflicted with the Fifth and Fourteenth Amendments, which guaranteed that no person shall be deprived of life without due process of law.[645] There was a permanent gulf between the situations in *Griswold*, where the only lives involved are that of two competent adults, and here in *Steinberg*, where there is unborn human life incapable of defending itself or consenting to be killed.[646] Contraception is a private and personal decision that is "concerned with preventing the creation of a new and independent life."[647] The decision to use a contraceptive to prevent the union of egg and sperm is immune from government interference.[648] Citing the scientific evidence, Judge Young determined that once fertilization and conception has occurred, a new human life had begun in the womb.[649] On balance, the rights of the unborn human being to live and have an opportunity to survive are paramount to the claimed right of the mother or anyone else to abort the unborn child except in self-defense to preserve the mother's own life.[650]

This reasoning was premised on the objective truth and the laws of nature that human life begins at conception: "Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life just given."[651] In addition, Judge Young held that if the law conformed with science for the purpose of protecting property rights, then on the most important right of all, the right to life, without which no one could ever enjoy property or anything else, the law must also accord with science.[652] While Judge Young did not confront the meaning of "person" in the Fourteenth Amendment, he dealt indirectly with the matter by observing the State of Ohio never followed the error of Justice Holmes in *Dietrich* and the tort law always protected a child born alive that was injured prior to its birth.[653]

In dissent, Judge Ben Green failed to comment on whether the unborn human being was a constitutional person. Judge Green did not contest the biological facts, for it did not matter to Judge Green that a new human life was at stake.[654] Judge Green sided with the interests of the pregnant mother over that of non-viable embryonic human life, in which he found no "compelling state interest."[655] Judge Green unabashedly offered a personal opinion, and in doing so, adopted the

---

[645] *Id.* at 745-46.
[646] *Id.* at 746.
[647] *Id.*
[648] *Id.*
[649] *Id.* at 746-47.
[650] *Id.* 746.
[651] *Id.*
[652] *Id.* at 747.
[653] *Id.*
[654] *Id.* at 752.
[655] *Id.*

language of Justice Brennan in *Eisenstadt*, "that a woman has the private right to control her own person, which necessarily encompasses the fundamental right to choose whether to *bear* children."[656] Judge Green further offered the opinion that the choice to have an abortion in the early stages of pregnancy and at any time prior to viability, "should be a private matter between a woman and her physician."[657] Judge Green defined a viable unborn child "being one that would be capable of sustaining life if removed from the womb."[658]

XXIII. Rule by Law v. Rule of Law

The direct question of whether the unborn were persons under the Fourteenth Amendment arose in *Bryn v. New York City Health and Hospitals Corporation*.[659] Extensive examination of this case is merited, because the themes of rule of law and rule by law emerge in the approaches taken by the judges.

A. Bryn

Robert Bryn, by an *ex parte* order of a Supreme Court judge, was appointed guardian ad litem for the infant Roe and for the entire class of unborn infants aged less than 24 weeks who were scheduled to have their lives terminated by abortion in public hospitals operated by the Defendant. Bryn sought a declaratory judgment and permanent injunction to stop all abortions except those necessary to save the life of the mother. A motion for a preliminary injunction was granted on January 7, 1972 on the basis that there was a strong likelihood the plaintiff would ultimately prevail.

The Appellate Division of the Supreme Court of New York vacated the injunction. Judge Christ conducted a cursory review of the legal history of abortion and its regulation by New York State. He placed much general reliance on a law review article written by a young law professor, Cyril Means Jr. that was sympathetic to abortion rights activists.[660] Means argued that the intent behind abortion laws was to protect the health of mothers, not to save the lives of unborn babies. It was no coincidence that Means was legal counsel to NARAL, the National Association for the Repeal of Abortion Laws, at the time. At least one scholar has since debunked Means' article as a misleading revisionist history of the laws outlawing abortion.[661]

Judge Christ faced the substantial question of whether a human being that was less than 24 weeks old was a person within the meaning of the Fifth and Four-

[656] *Id.* at 759 (emphasis added).

[657] *Id.* at 760.

[658] *Id.* at 754.

[659] Bryn v. New York City Health and Hospitals Corporations, 38 A.D.2d 316 (N.Y. App. Div. 1972).

[660] Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common Law Liberty?* 17 N.Y. L. Forum 335 (1971).

[661] *See* Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before Roe v. Wade*, *in* The Silent Subject 183 (Brad Stetson ed. 1996); Clifford Stevens, *The Rights of the Unborn from Common Law to Constitutional Law*, at http://www.priestsforlife.org/government/stevens3.htm.

teenth Amendments to the Constitution. There were no factual issues, for all parties agreed, "in the contemporary medical view, the child begins a separate life from the moment of conception."[662] There was no case directly on point to assist the Court. From a review of tort and property cases affecting the rights of the unborn, Judge Christ concluded that "legal personality is not synonymous with separate and vital existence within the womb; that depending on the circumstances involved, public policy and other factors, legal personality will be accorded or withheld as these extrinsic considerations demand."[663]

In other words, if the court wanted to confer personhood, it could choose to do so. Implicit in Judge Christ's opinion was that designating an unborn child as legal person was a result-oriented decision that had nothing to do with principle and everything to do with personal predilection. This observation is completely at odds with the common law history discussed earlier in this article, which demonstrates that until the abortion cases of the 1960s, the law regarded the unborn human being from the time of its known existence as a legal person, and as scientific knowledge increased about when human life began, so did legal protection for the unborn.

Judge Christ failed to examine the history of the Fourteenth Amendment to see if the meaning of person included unborn human life. Without examining the debates of the framers of the Fifth Amendment, Judge Christ summarily concluded that he doubted whether there was any thought that an unborn child was a person within the meaning of that amendment.[664]

Applying the presumption of constitutionality, Judge Christ upheld the New York laws permitting abortion, deferring to the wisdom of the legislature to make a value judgment that determines at what point human life should be protected.[665]

However, Judge Christ recognized he was obliged to consider *Levy v. Louisiana*,[666] and to decide whether the State's laws constituted "invidious discrimination" against the unborn.

In *Levy v. Louisiana*, Justice Douglas dealt with the issue of whether illegitimate children were persons under the Constitution, and if so, whether state laws could exclude them from inheriting property. Justice Douglas had no difficulty deciding that a live human being was a "person" within the meaning of the equal protection clause of the U.S. Constitution:

> We start from the premise that illegitimate children are not 'nonpersons.' *They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.* While a State has broad power when it comes to making classifications (Ferguson v. Skrupa, 372 U.S. 726, 732),

[662] *Bryn*, 38 A.D.2d at 324.

[663] *Id.* at 329.

[664] *Id.* at 330.

[665] *Id.* This is the approach Justice Scalia advocated in *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992).

[666] Levy v. Louisiana, 391 U.S. 68, 71 (1968).

> *it may not draw a line which constitutes an invidious discrimination against a particular class*. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 -542. Though the test has been variously stated, the end result is whether the line drawn is a rational one. *See* Morey v. Doud, 354 U.S. 457, 465 -466.[667]

Had Judge Christ applied the test in *Levy v. Louisiana*, he could have easily concluded the unborn human being is a person.

Even in the case of pregnancy resulting from rape or incest, the *Levy* case provided guidance to protect the unborn from invidious discrimination, for the unborn cannot be blamed for any harm caused to the mother:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would. We conclude that *it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother*. [668]

Judge Christ skipped the question of whether the unborn child was a constitutional person. Instead, he moved directly to the question of whether the state law was rationally based. Judge Christ refused to engage the topic of invidious discrimination and simply concluded that the laws permitting abortion were rationally based.[669] In this manner, Judge Christ evaded the question before him regarding the personhood of the unborn child and ruled in favor of the defendant.

Bryn appealed to the full New York Court of Appeals and lost.[670] Cyril C. Means Jr. appeared as amici curiae for NARAL, the National Association for the Repeal of Abortion Laws. Relying on Means' article, Judge Breitel adopted Means' arguments, noting they were "evidently to protect the mother from injury and dangerous practices."[671]

Judge Breitel further suggested, "unborn children have never been recognized as persons in the law in the whole sense."[672] In one sentence he explained why, "In ancient days it was even said they [unborn children] were not *in rerum natura*."[673] As discussed earlier, this assertion is flatly wrong, for the history of the common law proves the opposite. Even if Judge Breitel were correct, he could have used the example of American women and the descendents of African American slaves as examples to prove the point that these classes of people were not barred from being recognized as persons under the Fourteenth Amendment even though historically these groups were once not persons in the whole sense of the word.

---

[667] *Id.* at 70-71 (emphasis added).
[668] *Id.* at 72 (emphasis added).
[669] *Bryn*, 38 A.D.2d at 330-31.
[670] *Id.*
[671] *Id.* at 200.
[672] *Id.*
[673] *Id.*

What ultimately matters more than history, indicated Judge Breitel, is modern science.[674] Judge Breitel conceded that as a matter of biology, "a fetus has its own independent genetic package"[675] and has the potential to mature into a full-fledged human being. The fetus has autonomy of development and character, although during gestation it is dependent upon its mother.[676] The fetus is human, because it is not anything other than human, and it is unquestionably alive.[677] The fetus therefore is a human life in being with potential to become fully matured.

Judge Breitel correctly concluded that the "real" legal question is whether a human entity, conceived, but not yet born, is and must be recognized as a person in the law.[678] If the answer is yes, then unborn human beings are entitled to constitutional protection. If the answer is no, then unborn children could be treated as any other article of property.

Is it sufficient to be human, be in being, and be alive, in order to constitute a legal person? Not so, according to the doctrine of rule by law, which Judge Breitel followed. If the law says a human being is a person, it is. If the law says a human being is no longer a person, then that same human being is not a person. It all comes down to circular reasoning, based purely on definition. A person may be defined in or out of personhood, and thus defined in or out of existence, at the will of the maker of the definition. Policies of inclusion or exclusion are subjective decisions bearing no resemblance to natural law and unconnected to the objective truth of science. Justice and morality are irrelevant to the entire process and result. All that matters is that the letter of the law is followed.

Judge Breitel's reasons demonstrate a classic rule by law mentality:

> *What is a legal person is for the law*, including, of course, the Constitution, *to say*, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g., Kelsen, General Theory of Law and State, pp. 93-109; Paton, Jurisprudence [3d ed.], pp. 349-356, esp. pp. 353-354 as to natural persons and unborn children; Friedmann, Legal Theory [5th ed.], pp. 521-523; Gray, The Nature and Sources of the Law [2d ed.], ch. II). *The process is, indeed, circular, because it is definitional.* Whether the law should accord legal personality *is a policy question* which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been 'legally' rendered. That the legislative action may be wise or unwise, *even unjust* and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that *it is a policy determination* whether legal personality should attach and *not a question of biological or 'natural' correspondence*.[679]

---

[674] *Id.*
[675] *Id.* at 199.
[676] *Id.*
[677] *Id.*
[678] *Id.* at 200.
[679] *Id.* at 201 (emphasis added).

Judge Breitel criticized guardian Bryn for his willingness to permit the killing of an unborn child to save the life of its mother, "for before the law, one life is as good as another."[680] If abortion was wrong, there must be no exceptions. The lives of all unborn children are innocent. If unborn children were persons, they were entitled to natural justice and constitutional due process:

> Necessity may justify in the law every kind of harm to save one's life, except to take the life of an innocent. Before the law one life is as good as another, saint or sinner, genius or imbecile, child or adult. Besides, if the contrary were true, should not the one to lose his 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? [681]

In conclusion, Judge Breitel held that the question of constitutional personhood of the unborn was not one for the appeal court to decide. The real issues were not justiciable or legal, being issues outside of the law.[682] Finding that the Constitution did not confer or require legal personality for the unborn, Judge Breitel suggested that the state legislature might confer full personhood or do something less, short of conferring full protection.[683] The appeal was dismissed.

Concurring, Judge Jasen targeted his remarks for the dissenting judges, Burke and Scileppi. Judge Jasen quoted from Justice Holmes to bolster the credibility of the majority opinion,[684] anticipating that its findings and opinions may be "shocking and novel" to those who believe that biological and legal life commence as an indivisible status at conception.

Dissenting Judge Burke's opinion joined issue on the question of constitutional personhood and took a model rule of law approach. His reasons may be summed up as follows. The rule of law forbids any state to be so supreme so as to destroy the inalienable right to life of a defenseless unwanted human being.[685] It is to natural law that positivist law must conform, not the other way around.[686] To exclude human beings from legal personhood conflicts with the Declaration of Independence and the belief there is a superior source of authority to which the government must submit and to which the Constitution must conform.[687] The right to life is inalien-

---

[680] *Id.* at 203.

[681] *Id.*

[682] *Id.*

[683] *Id.*

[684] "Thus, we are asked to choose, as a matter of law, between extreme positions and competing values that concededly may be metalegal, mindful of Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U.S 45, 76 (1905), that the Constitution 'is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *See id.* at 204.

[685] *Id.* at 205.

[686] *Id.*

[687] *Id.* at 208.

able and means just that.[688] It is genocide to classify any group of human beings as subjects fit for annihilation.[689] Abortion is not only immoral, but is irrational from a medical scientific objective basis.[690] The arguments of the majority are the same ones used by the Nazi lawyers to justify the actions of their clients at Nuremberg.[691] Laws that permit abortion violate the sanctity of life and establish a State religion that values hedonism over the value of human life.[692] To classify a living human being as a non-person is a suspect classification that cannot withstand strict scrutiny, as is accordingly unconstitutional.[693]

Judge Burke strongly disagreed with the majority that the conferring of legal personhood was a matter of policy or of legal definition. He stated:

> *This argument was not only made by Nazi lawyers and Judges at Nuremberg,* but also is advanced today by the Soviets in Eastern Europe. It was and is rejected by most western world lawyers and Judges because it *conflicts with natural justice* and is, in essence, irrational. To equate the judicial deference to the wiseness of a Legislature in a local zoning case with the case of the destruction of a child in embryo which is conceded to be 'human' and 'is unquestionably alive' is an acceptance of the thesis that the 'State is supreme,' and that 'live human beings' have no inalienable rights in this country. *The most basic of these rights is the right to live, especially in the case of the 'unwanted' who are defenseless.* The late Chief Judge Lehman once wrote of these rights: 'The Constitution is misread by those who say that these rights are created by the Constitution. The men who wrote the Constitution did not doubt that these rights existed before the nation was created and are dedicated by God's word. By the Constitution, these rights were placed beyond the power of Government to destroy.' In other words, what the Chief Judge was saying was that *the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform*, leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Carta to Judean Law. Human beings are not merely creatures of the State, and by reason of that fact, our laws should protect the unborn from those who would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise. Moreover, if there is a confiscation of property through a zoning law, it is 'constitutionally' invalid. Recently, the United States Supreme Court held that the taking of a life of a murderer by a State was constitutionally invalid, and in the words of one Justice, was found to be 'immoral and therefore unconstitutional' (*Furman* v. *Georgia*, 408 U.S. 238, 364-366 [Marshall, J., concurring]). [694]

The depersonalization and dehumanization of human beings so they can be aborted violates the core values of American constitutional law. In a free society,

---

[688] *Id.*
[689] *Id.*
[690] *Id.*
[691] *Id.* at 205, 211.
[692] *Id.* at 211.
[693] *Id.* at 212-13.
[694] *Id.* at 205-06 (emphasis added).

where there is liberty and justice for all, government by rule of law forbids human authority in any circumstances to deprive any class of human beings of their inalienable right to life. In his reasons, Judge Burke left out any constitutional interests of the pregnant woman, for the Supreme Court had yet to establish those rights, and instead focused on unborn embryos and fetuses. Judge Burke stated:

> The unconstitutionality stems from its inherent conflict with the Declaration of Independence, the basic instrument which gave birth to our democracy. The Declaration has the force of law and the constitutions of the United States and of the various States must harmonize with its tenets. The Declaration when it proclaimed "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" restated the natural law. It was intended to serve as a perpetual reminder that rulers, legislators and Judges were without power to deprive human beings of their rights.
>
> * * *
>
> We began our legal life as a Nation and a State with the guarantee that these were inalienable rights that come not from the State but from an external source of authority superior to the State which authority regulated our inalienable liberties and with which our laws and Constitutions must now conform. That authority alone establishes the norms which test the validity of State legislation. It also tests the Constitutions and the United Nations Convention against genocide which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation. In sum, there is the law which forbids such expediency. It is the inalienable right to life in the nature of the child embryo who is 'a human' and is 'a living being.' Inalienable means that it is incapable of being surrendered (Webster's Third New International Dictionary). Thus, the butchering of a foetus under the present law is inherently wrong, as it is an illegal interference with the life of a human being of nature. [695]

The alternative choice of an expedient pragmatic rule by law approach to give effect to abortion on demand sets a dangerous precedent, for a person's former inalienable rights become insecure, with the denial of natural law, like a transient entity that is here today and gone tomorrow.[696] If the state is supreme to decide who is a person and who is a non-person, the state no longer serves the individual, but the individual the state. The state's historic role in protecting and preserving human life is replaced by a new goal to permit legal persons to dominate the lives of non-persons.

Justice and morality were indispensable to the vision of Judge Burke. Equating the meaning of person in the Fourteenth Amendment with a live human being made perfect sense. To do otherwise violates the rule of law and transforms it into a kind of rule by law regime that characterizes fascist and communist governments. Failure

---

[695] *Id.* at 207-08.

[696] *Id.* at 209.

to conform to the rule of law results in judicially legislated inequality designed to legally justify mass genocide of innocent human beings who have no say in their destiny and whose lives are devalued by operation of law.

B. The Aftermath of Bryn

Bryn was followed a month later by U.S. District Court Judge McCune in *McGarvey v. McGee Womens Hospital*.[697] In denying the argument that the unborn were constitutional persons under the Fourteenth Amendment, Judge McCune noted that neither the debates pertaining to the Constitution or the Civil Rights Act passed after the Civil War suggested any intent to protect unborn children.[698] Instead, the recent decision by the U.S. Supreme Court in *United States v. Vuitch*[699] implied that the unborn were not entitled to constitutional protection.[700] To give the unborn a constitutional right to life would amount to judicial legislation, something that Judge McCune was unwilling to do.[701]

In *Vuitch*, the only issue that reached the Supreme Court was whether a law passed in 1952 by Congress that permitted abortion in the District of Columbia to preserve the life or health of the mother was unconstitutionally vague.[702] In upholding the legislation, the Court was silent on the issue of the unborn child's constitutional status.[703]

Even though the majority opinion in *Bryn* expressly stated that the state legislature could confer personhood upon the unborn, or do something less to provide limited protection by placing some restrictions on abortion, the U.S. District Court in *Abele v. Markle* disagreed:

> *The initial inquiry is whether the fetus is a person*, within the meaning of the fourteenth amendment, having a constitutionally protected right to life. If it is, then a legislature may well have some discretion to protect that right even at the expense of someone else's constitutional right. *But if the fetus lacks constitutional rights, the question then becomes whether a legislature may accord a purely statutory right at the expense of another person's constitutional right. Our conclusion*, based on the text and history of the Constitution and on cases interpreting it, *is that a fetus is not a person within the meaning of the fourteenth amendment.*

---

[697] McGarvey v. Magee-Womens Hospital, 340 F. Supp. 751 (W.D. Pa. 1972).

[698] *Id.* at 753.

[699] United States v. Vuitch, 402 U.S. 62 (1971).

[700] *See McGarvey*, 340 F. Supp. at 753. In Roe v. Wade, Justice Blackmun proved Judge McCune's intuition was right: "Indeed our decision in United States v. Vuitch . . . inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection." 410 U.S. at 159.

[701] *McGarvey* , 340 F. Supp. at 754.

[702] United States v. Vuitch, 402 U.S. at 72-73.

[703] *Id.* Justice Douglas dissented in part, finding that the statute was vague, not meeting the requirements of procedural due process. He raised the possibility that every unwanted pregnancy met the "health" precondition to a legal abortion, simply on the basis of the mother's anxiety. *Id*. at 78.

* * *

> If the fetus survives the period of gestation, it will be born and then become a person entitled to the legal protections of the Constitution. But its capacity to become such a person does not mean that during gestation it is such a person. The unfertilized ovum also has the capacity to become a living human being, but the Constitution does not endow it with rights which the state may protect by interfering with the individual's choice of whether the ovum will be fertilized. Griswold v. Connecticut, *supra*.
>
> *Of course, the fact that a fetus is not a person entitled to fourteenth amendment rights does not mean that government may not confer rights upon it.* A wide range of rights has been accorded by statutes and court decisions. These include the right to compensation for tortious injury, the right to parental support, and the right to inherit property. *But the granting of these rights was not done at the expense of the constitutional rights of others.* A tortfeasor has no constitutional right to inflict injury on a fetus. When government acts through legislation to confer upon a fetus the absolute right to be born contrary to the preference of a pregnant woman, it abridges her constitutional right to marital and sexual privacy. Whether it may do so cannot be established by the fact that other protections can be accorded which do not abridge another's constitutional rights. It is one thing to permit a legislature some discretion in adjusting conflicting rights between groups of people, each of whom has a claim to constitutional protection. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968). *It is altogether different to suggest that a legislature can accord a statutory right to a fetus which lacks constitutional rights when doing so requires the abridgement of a woman's own constitutional right*. No doubt a right to be born is of greater significance than the right to receive compensation for tortious injury or other pecuniary or property rights. But it is doubtful whether the constitutional right of the mother can be totally abridged by a legislative effort to confer even a significant statutory right upon a fetus which does not have any fourteenth amendment rights. [704]

The gist of Judge Newman's reasoning was that a woman's constitutional right to privacy established in *Eisenstadt* and *Griswold* included a right to abortion, and cannot be restrained by state laws regulating abortion. This is because there cannot be a compelling state interest to protect an inferior creature (an unborn child that is a non-person) that lacks constitutional rights. It is unfair to expect a superior creature (the mother that is a person) possessing constitutional rights to give them up in preference to imperfect and limited statutory rights conferred by state law upon an inferior being (the unborn child).

Roe v. Wade and *Doe v. Bolton* then followed. The Supreme Court now had before it the assistance of recent jurisprudence that clearly depicted the stark choice of siding with the rule of law and the opportunity to declare the unborn human being a person within the meaning of the Fourteenth Amendment, or to exclude an entire class of human beings from constitutional protection, leaving the unborn at the mercy of laws sanctioning their destruction in accordance with rule by law.

---

[704] Abele v. Markle, 351 F. Supp. 224, 228-30 (D.C. Conn. 1972) (emphasis added).

I contend there can be no rule of law when one class of human beings is legally empowered to play the role of gatekeeper to life or death to an inferior caste of human beings. The Constitution was never intended to bestow a constitutional right of privacy to legally permit one person to take the life of an innocent human being stripped of constitutional protection.

Justice Jackson reminded us in *Prince v. Massachusetts* that there are limits to constitutional liberties, which begin when there is a collision with or an effect upon the constitutional rights of other human beings. These limits can be removed by dehumanizing those other human beings by impersonal language (pre-embryo, embryo, fetus) and by legally redefining persons as non-persons. Once reclassified and removed from legal protection, the judiciary or the government is free to legislate and permit either a restricted or unrestricted license to kill or enslave an entire class of depersonalized human beings, just like any other class of non-persons, whether animal or vegetable. This is what happened in *Roe v. Wade*, when the Supreme Court ruled unconstitutional the criminal laws of the state of Texas which had prohibited abortion except when necessary to save the life of the mother. An era of unrestrained personal liberty had begun.

XXIV. Abandoning the Rule of Law: *Roe* and *Doe*

A. Roe

In *Roe v. Wade*, Justice Blackmun, joined by Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall, and Powell, abandoned the rule of law, holding "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[705] This was the central holding in the case. Remember what Justice Blackmun said. If the youngest of all human beings (the unborn) are persons within the meaning of the Fourteenth Amendment, the case for abortion collapses, for the right to life of the unborn human being will always take priority in a collision with the liberty rights of any other constitutional person, including the mother's right to privacy.[706] Not so fast, suggests Cass Sunstein, who makes the argument that the conferring of constitutional personhood upon the unborn will not necessarily be the end of legalized abortion.[707]

Repugnant to the rule of law, *Roe v. Wade* offends the natural laws and values that lie at the root of the Declaration of Independence. Once the unborn human being is no longer viewed as human being, but as a depersonalized "fetus" which has no greater legal status than an animal or tree,[708] it is easy for the Court to declare

---

[705] Roe v. Wade, 410 U.S. 113, 158 (1973).

[706] *Id.* at 156-57. In the Final Chapter, I take on the arguments of Cass Sunstein, who is representative of those who claim the conferring of personhood upon the unborn will not end the case for abortion, for there are other arguments that prevail in favor of abortion.

[707] Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 Colum. L. Rev. 1 (1992).

[708] Since trees and other natural things might have standing to sue in court for their own preser-

there is a constitutional right to an abortion, for no "person" is being killed in the private act of abortion.[709]

The Court held that the right of personal privacy includes the freedom of choice to terminate the life of an unborn baby.[710] Justice Blackmun cautioned this constitutional right to kill human life was not absolute: "this right is not unqualified and must be considered against important state interests in regulation."[711] While the Court founded this right to privacy in the concept of liberty and restrictions upon state action located in the Fourteenth Amendment, the Court left open the alternative possibility that the Ninth Amendment is broad enough to include the right to an abortion.[712]

Justice Blackmun's opinion borrowed extensively from the majority judgment in *Bryn*. Without engaging in much critical analysis, Justice Blackmun simply accepted Judge Beitel's conclusion that the unborn child was never a person "in the whole sense" of that word.[713] Justice Blackmun selectively relied on the biased scholarship of Professor Means, whose articles were part of his political agenda as counsel for NARAL to promote abortion on demand.[714] Like Judge Jasen in *Bryn*, Justice Blackmun attempted to deflect criticism by quoting from Justice Holmes, anticipating there would be shock and revulsion over his decision.[715]

Blackmun's opinion was riddled with errors and myth. He was wrong when he stated that at common law an unborn child was part of the body of its mother.[716] He was wrong when he stated that a live human being was merely "potential life," rather than a life with potential.[717] He was wrong when he stated there was no scientific consensus when human life began.[718] He was wrong when he concluded that the unborn were never legal persons "in the whole sense."[719] He was wrong when he failed to equate the unborn human being with full constitutional personhood.

The bestowing of any legal protection, however limited, upon a "non-person" was transformed from a basic human right to life into a value judgment determined by judicial opinion. In *Roe v. Wade*, the Court created judicial legislation that took

---

vation, presumably so would the unborn non-person. *See* Stone, *Should Trees have Standing? Toward legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), *cited in* Sierra Club v. Morton, 405 U.S. 727, 741-53 (1972) (Douglas, J. dissenting).

[709] Ultrasound technology reveals what happens in the darkness of the womb. See *Silent Scream*, at http://www.silentscream.org/video1.htm, a film by Bernard Nathanson, a founder of the National Abortion Rights Action League (NARAL) and now a repentant former abortion activist.

[710] Roe v. Wade, 410 U.S. at 154.

[711] *Id.*

[712] *Id.* at 153.

[713] *Id.* at 162.

[714] *Id.* at nn. 21, 26, 33, 47.

[715] *Id.* at 117.

[716] *Id.* at 134.

[717] *Id.* at 159.

[718] *Id.*

[719] *Id.* at 162.

the form of the now abandoned trimester system to arbitrarily divide the continuous development of the maturing unborn human being prior to its natural time to be born, into three equal segments.[720] In the first trimester, the mother may abort her child without interference from the state.[721] In the second trimester, state regulation of abortion is permitted, to preserve and protect maternal health.[722] In the third trimester, the state's interest in protecting "potential life" becomes "compelling" once the fetus becomes viable, when it "presumably has the capability of meaningful life outside the mother's womb."[723] Even after the point of viability, the mother retains her right to abort a viable fetus, so long as it is necessary to "preserve" her "life" or "health."[724] As to what is meant by "health," the Court indicated that the vagueness of the word was not a problem, for the Court will defer to the professional judgment of a physician who is entitled to take into consideration a mother's psychological as well as physical well being.[725]

The Court gave no explanation of what it meant by "meaningful" life. However, the use of the word "meaningful" sent a strong signal that a "quality of life" philosophy had replaced a "sanctity of life" ethic. The corresponding implied message was that the quality of life of the fetus was to be measured from the perspective of the mother, and not the viable living infant, whether in or out of the womb.

The dissent of Justice Rehnquist was weak and off the mark, for he failed to focus on the principal issue of personhood. Instead, Justice Rehnquist concentrated on the secondary issues, questioning the constitutional right to an abortion[726] and the impropriety of the Court to enact judicial legislation.[727] Justice Rehnquist must have agreed that the unborn were not persons under the Fourteenth Amendment, for he stated the majority's opinion "commands my respect,"[728] that he was in disagreement with only "those parts of it that invalidate the Texas statute in question,"[729] and he said nothing at all about constitutional personhood, the key to the outcome of the case.

Justice White's dissent was similarly weak.[730] He too said nothing about the question of constitutional personhood. While Justice White complained that the Court acted improperly, abusing its power of judicial review,[731] he did not complain

---

[720] *Id.* at 153.
[721] *Id.* at 163.
[722] *Id.*
[723] *Id.*
[724] *Id.*
[725] Doe v. Bolton, 410 U.S. 179, 191-92 (1973).
[726] *Roe*, 410 U.S. at 175-77.
[727] *Id.* at 173-74.
[728] *Id.* at 171.
[729] *Id.*
[730] Justice White's dissent in Roe v. Wade is published in *Doe v. Bolton*, 410 U.S. at 221-23 (White, J., dissenting).
[731] Doe v. Bolton, 410 U.S. at 222.

about abortion laws that permitted abortion to benefit women, to protect their life or health. What Justice White found obnoxious was the total absence of regulation in the first trimester that allowed abortion as a matter of pure personal convenience.[732] Justice White preferred that the legislatures, rather than the Court, decide the appropriate balance between the state's interest to protect human life and the mother's right to exterminate it.[733]

Not one Justice on the Court championed the case on behalf of the unborn.

B. Doe

In *Doe v. Bolton*, Justice Blackmun, joined by Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall, and Powell, confirmed that the Court had departed from the rule of law. In contrast to Texas, Georgia's legislature had enacted new abortion legislation modeled after recommendations made by the American Law Institute.[734] Despite this attempt to bring Georgia legislation into conformity with social reality, the new legislation was found unconstitutional.[735] Designed to ensure accountability and to prevent capricious or fraudulent justifications for abortion, procedures regarding hospital accreditation, abortion committee approval, documentation, two-doctor concurrence, and state residency were all struck down, and replaced by the judicial legislation decreed in *Roe v. Wade*. While an equal protection claim was raised, the Court saw no need to advance that ground once the Georgia legislation was invalidated.

Chief Justice Burger concurred. He did not believe abortion on demand would be the practical result of *Roe v. Wade* and *Doe v. Bolton*:

> I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand. [736]

Was Chief Justice Burger naïve? Since the decisions in *Roe* and *Doe*, 46,023,191 lives were terminated by abortion.[737] That is an awful lot of "considered" medical judgments.

Justice Douglas, on the other hand, was sympathetic to any mother who under Georgia law would meet the legal tests and be forced to have an unwanted child. He hinted that the qualified right to an abortion could be transformed into abortion on demand and suggested ways to curb the police powers of the States:

---

[732] *Id.* at 221 (1973).

[733] *Id.*

[734] *Id.* at 182.

[735] *Id.* at 201.

[736] *Id.* at 208.

[737] This figure does not include deaths of the unborn caused by contraceptives that destroy embryos, or the deaths of embryos in scientific or medical experiments or procedures. *See* http://www.nrlc.org/abortion/facts/abortionstats.html for updated numbers.

> The Georgia statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.
>
> * * *
>
> The 'liberty' of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be 'narrowly drawn to prevent the supposed evil,' *Cantwell* v. *Connecticut*, 310 U.S. 296, 307, and not be dealt with in an 'unlimited and indiscriminate' manner. *Shelton* v. *Tucker*, 364 U.S. 479, 490. And see *Talley* v. *California*, 362 U.S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties. [738]

Justice Douglas further cited with approval a passage from an article written by former Supreme Court Justice Clark, who disputed the biological fact a new human life began at conception.[739] Justice Clark suggested that social conventions and practices confirmed his belief: "The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. *No prosecutor has ever returned a murder indictment charging the taking the life of a fetus. This would not be the case if the fetus constituted human life*." [740]

When Justice Clark wrote his article, the California Supreme Court had recently held that a child must be born alive before a charge of homicide can be sustained.[741] Justice Clark would be astonished to learn that the Penal Code of California now includes a fetus as a potential victim of murder, unless the unborn child dies as a result of an abortion[742] and even more shocked to discover that a jury actually convicted a father of the second-degree murder of his already named unborn son.[743]

---

[738] Doe v. Bolton, 410 U.S. at 217.

[739] *Id.* at 218.

[740] Tom Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loy. L.A. L. Rev. 1, 9-10 (1969) (emphasis added).

[741] Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617 (1970).

[742] California Penal Code Section 187 (a) (b), at http://caselaw.lp.findlaw.com/cacodes/pen/187-199.html.

[743] Connor Scott was murdered at the age of eight months. He had not yet been born. Pondered a leader of the National Organization for Women, Mavra Star, "If this is murder, well, then anytime a late-term fetus is aborted, they should call it murder." *See* Cal Thomas, *The Scott Peterson Conundrum*, April 22, 2003 at http://www.townhall.com/columnists/calthomas/printct20030422.shtml. On November 12, 2004 Scott Peterson was convicted of the first degree murder of his pregnant wife and the

Justice Douglas deferred to Justice Clark's advice that the answer to the question of when human life begins ought to be primarily left to medical experts.[744] This reliance on Justice Clark's article suggests that that Justice Douglas did not believe that human life began at conception. This may be a possible explanation why Justice Douglas did not fight for the civil liberties of the unborn. Would he have changed his position in light of today's medical knowledge? He might have, given his opinion that the answer to the question of when human life began ought to be left to medical experts.

XXV. Defending the Rule of Law for Murderers

Leaving the innocent unborn human being to the mercy of others willing to take its life is a glaring contrast to the moral certainty exhibited by the exact same Court when it blocked the death penalty from being carried out on convicted murderers and rapists who deserved punishment.[745] Less than a year before *Roe* and *Doe*, in *Furman v. Georgia*, the same Court decided that the imposition and the execution of the death penalty violated both the Eighth and Fourteenth Amendments.[746]

The Eighth Amendment, ratified in 1791, presumably applied then and now to all human beings, slave or free, person or non-person. The text of the Eighth Amendment omits any reference to "person": "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment."[747] Is it cruel and unusual punishment for the judiciary in *Roe* and *Doe* to impose the death penalty upon innocent human beings because they are still too young to be born? Not at all, because, under the Fourteenth Amendment, the Court stripped the unborn of personhood. However, could not the unborn human being claim the protection of the Eighth Amendment, since it contains no stipulation that protection from cruel and unusual punishment is limited to persons or citizens?

Any comparison must keep in mind that the Eighth Amendment applies only to punishment and was intended to act as a shield against oppressive state action.

---

second-degree murder of his unborn son Connor. He now faces the death penalty, having been found guilty of murdering his son, while committing a felony, the murder of Conner's mother, 27 year-old Laci. *See Scott Peterson Convicted of Murder: First Degree Verdict Could Bring Death Penalty* at http://www.msnbc.msn.com/id/6385208/. For a discussion of fetal homicide laws, *see* Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?* 25 Hastings Const. L.Q. 457 (1998); Katherine B. Folger, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder* in People v. Davis, 29 U.S.F.L. Rev. 257 (1994).

[744] Doe v. Bolton, 410 U.S. 410 U.S. at 220.

[745] Furman v. Georgia, 408 U.S. 238 (1972).

[746] *Id.* at 239 (1972). Eventually, the death penalty was reinstated in states where legislation was passed to require consideration of special aggravating and mitigating circumstances. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976) and Jurek v. Texas, 428 U.S. 262 (1976). Recently the Supreme Court decided it was unconstitutional to execute anyone under the age of 18. *See* Roper, Superintendent, Potosi Correctional Center v. Simmons, unreported, No. 03-633, Feb. 28, 2005.

[747] U.S. Const. amend. VIII

For those reasons, there is only limited jurisprudential utility in examining what the Justices said in Fur*man v. Georgia*. What is useful is to discover the moral values expressed by the Justices against discrimination, the outcasts of society, and the need to always respect the inherent dignity of the human being.

Justice Douglas left no doubt that due process forbids cruel and unusual punishment. The Constitution forbids both the legislature and the judiciary from imposing a cruel and unusual punishment,[748] with or without due process. It was intended that the privileges and immunities of citizens protect them from cruel and unusual punishments.[749] What about human beings that are not so privileged? After all, the history of the Eighth Amendment suggests that its forerunner, the English Bill of Rights of 1689, was enacted to ban "arbitrary and discriminatory penalties."[750] Is not abortion an arbitrary and discriminatory penalty exacted upon the innocent for the mere fact of their existence?

At a minimum, a cruel and unusual punishment includes barbaric treatment of another human being. There is more to the meaning of that expression, for it contemplates the idea that the outnumbered unpopular outcasts of society endure suffering that the rest of society would not accept for them. Justice Douglas observed:

> The words "cruel and unusual" certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. [751]

Equal protection is implicated when the Eighth Amendment is violated against people in an arbitrary and discriminatory way.[752] The desire for equality was the impulse behind the desire for the Eighth Amendment.[753] Judges and juries in criminal cases exercised their freedom of choice to execute unwanted members of the human race, and revealed in their prejudice the existence of castes in American society:

> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. [754]

---

[748] Furman v. Georgia, 408 U.S. at 241.
[749] *Id.*
[750] *Id.* at 242.
[751] *Id.* at 244-45.
[752] *Id.* at 249.
[753] *Id.* at 255.
[754] *Id.*

Justice Douglas concluded that discretionary death penalties were unconstitutional in their operation, for they were "pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[755]

Concurring, Justice Brennan rejected a narrow historical interpretation of the Eighth Amendment, holding that the imprecise words and dynamic scope of the Clause draws meaning from the evolving standards of decency that mark a maturing society.[756] The interpretation of the clause is "progressive," and acquires meaning as "public opinion becomes enlightened by humane justice."[757] The basic concept at the foundation of the Clause is respect for the inherent dignity of man. Where there is justification for punishment, that punishment must meet civilized standards of decency and humaneness. Justice Brennan summarized the purpose and meaning of the Clause:

> At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity. [758]

The evil that is the target of the Eighth Amendment goes beyond the infliction of horrible pain and suffering. It is the dehumanization of the victim that most deeply offends against human dignity and respect for members of the human family. Justice Brennan deplored the treatment of human beings as non-humans who were things to be abused and killed:

> More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like,' are, of course, 'attended with acute pain and suffering.' *O'Neil* v. *Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. *The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.* They are thus inconsistent with the fundamental premise of the Clause that *even the vilest criminal remains a human being possessed of common human dignity.* [759]

If the vilest criminal deserves to be given common human dignity, why is there no respect for the dignity of the unborn human being that is the victim of abortion? Not one Justice raised the possible application of the moral case for human dignity in the cases of *Roe* and *Doe*. Why not? After all, the case of *Furman v. Georgia* was fresh off the press.

---

[755] *Id.* at 256-57.
[756] *Id.* at 269-70.
[757] *Id.*
[758] *Id.* at 270.
[759] *Id.* at 272-273 (emphasis added).

The fact remains that the same Court that so nobly stopped judges from making their choice to impose the death penalty upon the guilty imposed the death penalty upon the innocent. A court so conscious of the rule of law in one case sacrificed it upon the altar of rule by law in another.

XXVI. The Imposition of Rule by Law: *Casey*

After *Roe* and *Doe* there began a series of case law authorities emanating from the Supreme Court that stopped numerous attempts by various states to restrict abortion.[760] Legal scholars became immersed in the abortion controversy and wrote countless articles and books either denouncing[761] or praising[762] the Court's imprimatur of a constitutional right to an abortion. Other scholars wrote about the vexing issue of personhood and examined why in various circumstances the law allowed some things to become persons, and how some people could become things.[763] One scholar urged the Court to develop a comprehensive theory of personhood to meet future challenges posed by the possible development of a transgenic humanoid species.[764] Others took up the Court's challenge and answered the question of when human life begins.[765] Another group of scholars deplored the inconsistency of

[760] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down informed consent and mandatory reporting requirements); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (striking down spousal and parental consent); Belotti v. Baird, 432 U.S. 622 (1979)(striking down dual parental consent without judicial bypass); Hodgson v. Minnesota, 457 U.S. 417 (1990); Ohio v. Akron Center for Reproductive Health, 457 U.S. 502 (1990)(striking down parental notification unless judicial bypass available). *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), came closest to revisiting the constitutional validity of the right to an abortion in Roe, but the opportunity slipped by when the majority of the Court decided to reaffirm or declined to deal with that issue.

[761] *See* J. Noonan, A Private Choice: Abortion in America in the Seventies (1979); J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973); W. Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 Duke L. J. 1677; Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 Regent U. L. Rev. 67 (2001-2002)

[762] J. Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989); Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979); Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); R. Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom (1994); L. Tribe, The Clash of Absolutes (1990); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 Colum. L. Rev. 1 (1992).

[763] J. Rebenfeld, *supra*, note 59; Elizabeth G. Patterson, *Human Rights and Human Life: An Uneven Fit*, 68 Tulane L. Rev. 1527 (1994); Kahan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DePaul J. Health Care L. 703 (1999); *Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harvard L. Rev. 1745 (2001); Jean R. Schroedel, Is the Fetus A Person? (2000).

[764] Michael D. Rivard, *Toward A General Theory Of Constitutional Personhood: A Theory Of Constitutional Personhood For Transgenic Humanoid Species*, 39 U.C.L.A. L. Rev. 1425 (1992).

[765] Kelly J. Hollowell, *Cloning: Exposing Flaws in the Pre-Embryo/Embryo Distinction and Redefining*

how the law treats the unborn as persons in various circumstances, including under 42 U.S.C. §1983.[766] A constitutional amendment to reverse *Roe* was promoted by advocates for the unborn.[767]

One thing was for sure: by deviating from the rule of law, the Supreme Court in *Roe* and *Doe* made a real mess of the law and created such passion, civil disobedience, and division in society not seen since the Vietnam War and the Civil Rights movement of the 1960s.[768] Despite predictable denials by both Democrats and Republicans, the litmus test for future appointments to the Supreme Court has become the candidate's position on *Roe v. Wade*.[769]

It was widely expected, because of new judicial appointments by Republican Presidents, that the Court in *Casey* would reverse *Roe*. It didn't happen, thanks largely to the newly appointed Justice Souter.[770]

Recalling that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential coerced obedience* is the defining characteristic in a "rule by law" society, Justices O'Connor, Souter and Kennedy chose to entrench rule by law. There was no longer to be any "jurisprudence of doubt"[771] on the issue of whether there is a realm of personal liberty in which the government may not regulate the abortion of unborn children. To end the national controversy over abortion, the Court invoked in the name of the rule of law that it was setting the "mother of all precedents" to forever end the doubt over the right to an abortion.[772] Acknowledging that the pressure to overrule *Roe* had "grown more intense" since 1973,[773] the Court chose not to re-examine the rightness or wrongness of its decision to deny personhood to the unborn and instead resolutely proclaimed its right to be wrong: "We are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding."[774] Something more than being wrong is required before the Court is compelled to overrule itself: "a decision to overrule should rest on some special reason over

---

When Life Begins, 11 Regent U. L. Rev. 319 (1998-1999)

[766] Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide and Abortion Cases*, 22 Pepp. L. Rev. 933 (1995); William E. Buelow III, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 Temple L. Rev. 963 (1998); Julie E. Rice, *Fetal Rights: Defining Person Under 42 U.S. C. § 1983*, 1983 U. Ill. L. Rev. 347.

[767] Bopp, Jr. *supra*, note 158.

[768] For a history of the Operation Rescue Civil Rights Movement of the 1980's and 1990's, see http://www.forerunner.com/forerunner/X0408.html.

[769] *Bush Dismisses Court Speculation*, November 6, 2004, at http://www.cnn.com/2004/ALLPOLITICS/11/05/bush.court/.

[770] Michael Stokes Paulsen, *Government Lawyering: Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Prob. 83 (1998)

[771] "Liberty finds no refuge in a jurisprudence of doubt." *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 843 (1992).

[772] *Id.* at 867.

[773] *Id.* at 869.

[774] *Id.* at 871.

and above the belief that a prior case was wrongly decided."[775] Arrogant prideful obedience to legal precedent (the doctrine of *stare decisis*) substituted for a humble self-examination of whether justice was done in *Roe*. Form of law triumphs over the substance of law. *Roe* and *Doe* survive not because they were "just" or morally righteous decisions, but because the *Casey* Court demands deferential obedience. This is nothing less than rule by law. Professor Michael Stokes Paulsen agrees, for he concludes, "For the *Casey* Court, the rule of law is obedience—obeisance—to the authoritarian rule of the Court."[776]

Public pressure to overturn *Roe* was resisted, for the Court was more concerned with forcing social consensus by wielding its power to quell dissent. It was unthinkable now to tell women they had been legally wrong to abort their babies and to give up a lifestyle of equality with men in economic and social life, made possible by their new constitutional right to control which of their children should live or die. Personal autonomy, bodily integrity and personal liberty are all part of the same package of privacy rights that a new generation now come of age has assumed is part of their god-given (read Court given) rights as Americans.[777]

In *Casey*, the Court judicially amended its abortion legislation; substituting in place of the trimester system a value judgment that fetal respiratory viability marks the end of a mother's unrestrained right to an abortion.[778] Even after viability, the mother may override the state's interest in protecting human life if an abortion is "necessary, in appropriate medical judgment, to preserve the life or health of the mother."[779] The state is permitted to enact regulations throughout the pregnancy so long as these laws do not impose "an undue burden" on the liberty of the mother to choose an abortion.[780] An "undue burden results when a state regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."[781] The "means" selected by the State to further its interest in human life must be designed to assist the woman to make an "informed choice" (or informed consent) and not to "hinder" it.[782] An undue burden means an undue constitutional burden.[783]

---

[775] *Id.* at 864

[776] Michael Stokes Paulson, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1037-38 (2003).

[777] *Casey*, 505 U.S. at 860.

[778] *Id.* at 860, 873.

[779] *Id.* at 879.

[780] *Id.* at 874.

[781] *Id.* at 877.

[782] *Id.* This idea has not taken root in tort law. New Jersey Superior Court Judge Amy Chambers held lack of informed choice is proper medical practice when it comes to giving informed consent for an abortion. Rose Acuna sued Dr. Sheldon Turkish after aborting her baby because she was very upset when she discovered he had lied to her. She had asked, "is there a baby (meaning "human being" or "life") in there?" to which he relied, "Don't be stupid, its only blood." Acuna v. Turkish, 808 A. 2d 149, 150 (N.J. Super. Ct. App. Div. 2002); Damon Adams, *New Jersey Obstretician-Gynocologist Wins Informed Consent Case*, AMEDNEWS.COM, at http://www.ama-assn.org/amednews/2004/01/05/prsc0105.htm (Jan. 5, 2004).

[783] *Casey*, 505 U.S. at 877.

All these rules serve two fundamental principles: one, "there is a realm of personal liberty which the government may not enter;"[784] and two, "our obligation is to define the liberty of all, not to mandate our moral code."[785] As non-persons, the unborn are off the radar screen when it comes to defining the liberty of all constitutionally recognized persons. Even as it allowed the immoral genocide of non-persons to continue, the Court preached it was not in the business of making moral judgments or imposing its own morality.[786]

Applying these rules in *Casey*, the Court struck down the legislative scheme for spousal notification as an undue burden.[787] No longer was having a child an intimate family decision involving the father of the child: it was an exclusive decision to be made by the member of the female sex. The Constitution shields the mother from both the influence of the State and from the private influence of individual members of society, and in particular, her own spouse. The mother is now insulated in her own bubble zone of privacy, exercising her right to choose the death of her unwanted child, from the unwanted free speech of her own untrustworthy spouse.[788]

The Court now called abortion a legitimate form of contraception[789] to be used when regular contraception fails.[790] Abortion, the birth control pill, condoms, jellies, foams, and implanted devices share the same goals of family planning and birth control. The distinction between the use of devices or chemicals to prevent the creation of new life and the destruction of new life was ignored and abandoned. The central holding of *Roe* was not disturbed. Unborn human beings remained non-persons.

As before, not one Justice became the champion of the unborn, for the cornerstone of *Roe* and *Doe*, the denial of constitutional personhood to the unborn, remained undisturbed. Justice Scalia, the great hope of moral conservatives, greatly disappointed many, for he shied away from any bold pronouncement that fetuses were unborn human beings and constitutional persons. He suggested that the answer to the question of whether a fetus was a human life was not a matter of law, but a value judgment that was the responsibility of the elected representatives of government. The legal status of the fetus could thus vary with the prevailing reasonable views of those in power. For adopting such a position, Justice Scalia was criticized for his "frightening moral and epistemological agnosticism."[791]

---

[784] *Id.* at 847.

[785] *Id.* at 850.

[786] Justice Scalia years later criticized this posture, arguing that law is based on notions of morality and moral choices are integral to both judicial decisions and legislation. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

[787] *Casey*, 505 U.S. at 895.

[788] This result is consistent with the Court's suppression of free speech by peaceful sidewalk counselors outside of an abortion clinic and distortion of First Amendment jurisprudence. *See* Hill v. Colorado, 530 U.S. 703 (2000); Charles Lugosi, *The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand*, 79 Denver U.L. Rev. 91 (2001).

[789] *Casey*, 505 U.S. at 852.

[790] *Id* at 856.

[791] Nathan Schlueter, *Constitutional Persons: An Exchange on Abortion*, First Things, Jan. 2003, at 28-36.

XXVII. How Segregation Works: *Cruzan*

In contrast to non-persons, persons like Nancy Cruzan, who in the prime of her life became mentally incompetent as a result of oxygen deprivation, after being discovered by paramedics following a car accident face down in ditch without breathing or a heart beat, are protected by the Constitution from the "substituted judgment" of her mother, who went to court for the right to end Nancy's life.[792] Chief Justice Rehnquist relied on *Union Pacific R. Co. v. Botsford*[793] as authority to protect the "sacred" bodily integrity of Nancy from any interference from others.[794] Like unborn human life, an incompetent human being in a diagnosed persistent vegetative state, is not free to make an informed and voluntary choice to live or die.[795] No one has the liberty under the Due Process Clause to substitute their judgment to choose life or death for another person, even if the quality of life of that person is considered hopeless, meaningless or even degrading.[796] Such a choice belongs exclusively to that incompetent individual.[797] Since the wrong decision to terminate life is not capable of correction, an elevated standard of "clear and convincing evidence" must be met before an application is granted to discontinue nutrition and water from a person diagnosed to be in a permanent vegetative condition.[798]

The legal difference between the two situations is that Nancy is (was) a person and is (was) protected by the Constitution, and the unborn human being is not a person after *Roe* and is not protected by the Constitution. The biological difference between these two situations is that without intervention, Nancy would (and did) die, and the unborn human being, without intervention, will likely live, be born and normally live a healthy and happy life.

In Nancy's case, the Court tread carefully, making the not so surprising bland observation that a mistaken decision to withdraw medical intervention is not capable of correction.[799] In the case of the unborn human being, once a mother has aborted her baby, it is too late to change one's mind.

Chief Justice Rehnquist noted it was "undisputed" that the Due Process Clause "protects an interest in life."[800] Nancy's life was protected by the Constitution. Moreover, her right to life was not limited by the same test established in *Casey* of respiratory viability. Because she was a constitutional person, the loss of Nancy's respiratory viability did not mean the paramedics gave up. They hoped that they could revive her, for they assumed brain death had not yet happened. This is be-

---

[792] Cruzan v. Missouri Dep't of Public Health, 497 U.S. 26, 266, 286 (1990).
[793] Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891).
[794] *Cruzan*, 497 U.S. at 269.
[795] *Id.*
[796] *Id.* at 286.
[797] *Id.*
[798] *Id.* at 284.
[799] *See id.* at 283.
[800] *See id.* at 281.

cause in America, to facilitate organ transplantation, brain death is today's bioethical benchmark for the end of life.

It seems logical that the Court would be consistent in adopting the same benchmark, the presence of brain waves, to determine the beginning of life, and the absence of brain waves, to determine the end of life. This causes a major problem for anyone wanting an abortion, because it moves the time of viability so far back along the timeline of fetal development, that the right to an abortion becomes meaningless. This is because a woman discovers she may be pregnant when she misses getting her period in her menstrual cycle, about 28 to 40 days after having sexual intercourse, which is the same time her baby's brain and heart are functioning.[801] If

---

[801] The following sources are old and are deliberately not updated to reflect the fact that when the Supreme Court made abortion a constitutional right in 1973, some of the following evidence was available to the Court:

> *When does the heart begin to beat?*
>
> At 18 days [when the mother is only four days late for her first menstrual period], and by 21 days it is pumping, through a closed circulatory system, blood whose type is different from that of the mother. J.M. Tanner, G. R. Taylor, and the Editors of Time-Life Books, *Growth*, New York: Life Science Library, 1965
>
> *When is the brain functioning?*
>
> Brain waves have been recorded at 40 days on the Electroencephalogram (EEG). H. Hamlin, "Life or Death by EEG," *JAMA*, Oct. 12, 1964, p. 120
>
> Brain function, as measured on the Electroencephalogram, "appears to be reliably present in the fetus at about eight weeks gestation," or six weeks after conception. J. Goldenring, "Development of the Fetal Brain," *New England Jour. of Med.*, Aug. 26, 1982, p. 564
>
> *When does the developing baby first move?*
>
> "In the sixth to seventh weeks. . . . If the area of the lips is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a 'total pattern response' because it involves most of the body, rather than a local part." L. B. Arey, *Developmental Anatomy* (6th ed.), Philadelphia: W. B. Sanders Co., 1954
>
> At eight weeks, 'if we tickle the baby's nose, he will flex his head backwards away from the stimulus.' A. Hellgers, M.D., 'Fetal Development, 31,' *Theological Studies,* vol. 3, no. 7, 1970, p. 26
>
> Another example is from a surgical technician whose letter said, 'When we opened her abdomen (for a tubal pregnancy), the tube had expelled an inch-long fetus, about 4-6 weeks old. It was still alive in the sack. "That tiny baby was waving its little arms and kicking its little legs and even turned its whole body over."' J. Dobson, *Focus on the Family Mag.*, Aug. '91, pg. 16
>
> *When are all his body systems present?*
>
> By eight weeks (two months). Hooker & Davenport, *The Prenatal Origin of Behavior,* University of Kansas Press, 1952
>
> *When does he start to breathe?*
>
> 'By 11 to 12 weeks (3 months), he is breathing fluid steadily and continues so until birth.

fetal viability is determined by the presence of a living brain, as a practical matter, the right to choose an abortion would be frustrated and denied.

XXVIII. The Conservatives Retreat

In 1997, in *Washington v. Glucksberg*, the Supreme Court upheld state laws prohibiting assisted suicide. In reviewing the applicable Fourteenth Amendment jurisprudence, Chief Justice Rehnquist, and Associate Justices O'Connor, Scalia, Kennedy, and Thomas, unanimously agreed that "we have held that in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the rights to … an abortion, *Casey*, *supra*."[802] With the apparent capitulation of the conservative members of the Court to the reality of the Court's prior holding in *Casey* that abortion was a fundamental constitutional right, the judicial debate over the right to an abortion appeared to be over.

XXIX. The Turning Point: Public Outrage Over Partial Birth Abortion

With the reaffirmation of *Casey* in *Glucksberg*, the abortion industry flourished. Physicians aggressively pushed past the viability time constraints by relying on the legal loophole "to preserve the health of the mother," and began to push the boundary of abortion from inside the womb to outside the womb, by killing unborn viable children in a Dilation and Extraction (D & X) procedure, commonly referred to as partial birth abortion.[803] Partial birth abortion is feared to be the next incremental step to legal infanticide, prompting efforts to outlaw this procedure.

> At birth, he will breathe air. He does not drown by breathing fluid with-in his mother, because he obtains his oxygen from his umbilical cord. This breathing develops the organs of respiration.' 'Life Before Birth,' *Life Magazine*, Apr. 30, 1965, p. 13
>
> 'Maternal cigarette smoking during pregnancy decreases the frequency of fetal breathing by 20%. The "well documented" higher incidence of prematurity, stillbirth, and slower development of reading skill may be related to this decrease.' 80 F. Manning, 'Meeting of Royal College of Physicians & Surgeons,' *Family Practice News*, March 15, 1976
>
> 'In the 11th week of gestation fetal breathing is irregular and episodic. As gestation continues, the breathing movements become more vigorous and rapid.' C. Dawes, 'Fetal Breathing: Indication of Well Being,' *Family Practice News*, Mar. 16, 1976, p. 6
>
> Episodic spontaneous breathing movement have been observed in the healthy human fetus as early as ten weeks gestational age. Conners et al., 'Control of Fetal Breathing in the Human Fetus,' Am J. OB-GYN, April '89, p. 932
>
> And 11 weeks (9 weeks post-fertilization). Cunningham, Wm. *Obstetrics*, 1993, p. 193

See Dr. and Mrs. J.C. Willke, *Why Can't We Love Them Both*, Ch. 12, Fetal Development, at http://www.abortionfacts.com/online_books/love_them_both/why_cant_we_love_them_both_12.asp#How%20early%20do%20some%20organs%20form?

[802] Washington v. Glucksberg, 521 U.S. 702 (1997).

[803] Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 Wm. & Mary J. Women & L. 255 (2003).

Nurse Brenda Shaffer, in testimony before members of Congress, gave this description of the procedure:

> The mother was six months pregnant (26 1/2 weeks). A doctor told her that the baby had Down Syndrome and she decided to have an abortion. She came in the first two days to have the laminaria inserted and changed, and she cried the whole time. On the third day she came in to receive the partial-birth procedure. Dr. Haskell brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beating. As Dr. Haskell watched the baby on the ultrasound screen, the baby's heartbeat was clearly visible on the ultrasound screen. Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp. I was really completely unprepared for what I was seeing. I almost threw up as I watched the doctor do these things. Mr. Chairman, I read in the paper that President Clinton says that he is going to veto this bill. If President Clinton had been standing where I was standing at that moment, he would not veto this bill. Dr. Haskell delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw that baby in a pan, along with the placenta and the instruments he'd used. I saw the baby move in the pan. I asked another nurse and she said it was just 'reflexes.' I have been a nurse for a long time and I have seen a lot of death—people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed anything like this. The woman wanted to see her baby, so they cleaned up the baby and put it in a blanket and handed the baby to her. She cried the whole time, and she kept saying, 'I'm so sorry, please forgive me!' I was crying too. I couldn't take it. That baby boy had the most perfect angelic face I have ever seen. I was present in the room during two more such procedures that day, but I was really in shock. I tried to pretend that I was somewhere else, to not think about what was happening. I just couldn't wait to get out of there. After I left that day, I never went back. These last two procedures, by the way, involved healthy mothers with healthy babies. I was very much affected by what I had seen. For a long time, sometimes still, I had nightmares about what I saw in that clinic that day. [804]

Even when the facts of partial birth abortion were publicly exposed and drew national attention resulting in political opposition, the Supreme Court in *Stenberg v. Carhart* nevertheless resolutely held its ground, applied *Casey*, and struck down Nebraska's law prohibiting this form of abortion. [805]

[804] *Statement of Brenda Pratt Shafer, R.N.: Hearing Before the Subcommittee on the Constitution Committee on the Judiciary*, 104th Cong. 2nd Sess. (Mar. 21, 1996) (Statement at the hearing on The Partial-Birth Abortion Ban Act (H.R. 1833)), at: http://www.priestsforlife.org/testimony/brendatestimony.html.

[805] Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

Speaking for the majority of the Court, Justice Breyer, with the technical precision of a surgeon, clinically and meticulously described in detail the methods of abortions. All abortions are violent and gruesome, and commonly involve systematic dismemberment, bleeding to death, poisoning, skull crushing, and sucking the brains out of a living human being, without so much of a painkiller given to the unwilling victim.[806] Many abortion service providers prefer the D & X method of killing an intact baby, for its advantages include the diminished risk of retained fetal tissue and the incidence of a "free floating head" inside the mother's womb.[807] Expert evidence of this kind convinced the Court that the D & X procedure qualified as a medically appropriate judgment beneficial to the mother's health that would not be second-guessed by the Court.[808] The *Casey* requirement of preserving the health of the mother was satisfied.[809] The Nebraska law that prohibited this procedure for both viable and non-viable fetuses placed an undue burden on the constitutional rights of the mother and was struck down in its entirety.[810] No exception for the health of the mother was allowed by the legislation.[811]

Concurring, Justice Stevens did not see any rational reason to contest one gruesome method of abortion over another.[812] Abortion was legal and was the constitutional right of the mother. Thirteen out of seventeen judges in the 27 years since Roe had endorsed that finding.[813]

Justice Ginsburg also concurred, and relied upon the opinion of Seventh Circuit Judge Posner in *Hope Clinic v. Ryan*[814] for the proposition that laws that have a purpose to restrict abortion, including partial birth abortion, pose a threat to the private choice of the mother to have an abortion.[815] Judge Posner had earlier found that the statutory expression of hostility to a mother's choice was sufficient to find that law an unconstitutional burden.[816]

In dissent, Justice Scalia called for the overruling of *Casey*.[817] Justice Kennedy and Chief Justice Rehnquist found that Nebraska's law passed strict scrutiny dictated by a proper understanding of *Casey*.[818] Justice Thomas identified the biggest problem of all: the words in *Casey* that purportedly permitted states to pass laws to protect human life were an illusion.[819] The lip service paid to the State's "important and

[806] *Id.* at 924-29, 938-46.
[807] *Id.* at 936.
[808] *Id.* at 937.
[809] *Id.* at 938.
[810] *Id.* at 945-46.
[811] *Id.* at 948 (O'Connor, J., concurring).
[812] *Id.* at 946-47.
[813] *Id.* at 946.
[814] Hope Clinic v. Ryan, 195 F. 3d 857, 881 (7th Cir. 1999)(dissenting opinion).
[815] Stenberg v. Carhart, 530 U.S. at 952.
[816] *Id.* at 952 (quoting Judge Posner, *Hope Clinic*, 195 F. 3d at 881).
[817] *Id.* at 955-56.
[818] *Id.* at 957.
[819] *Id.* at 982-83.

legitimate interest in potential life" was exposed in *Stenberg* to the reality that the Court allows abortion on demand:

> In striking down this statute—which expresses a profound and legitimate respect for fetal life and which leaves unimpeded several other safe forms of abortion—the majority opinion *gives the lie to the promise of Casey* that regulations do no more than 'express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the women's exercise of the right to choose' whether or not to have an abortion. 505 U.S. at 877. Today's decision is so obviously irreconcilable with *Casey's* explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, *a reinstitution of the pre-Webster abortion on demand era* in which the mere invocation of 'abortion rights' trumps any contrary societal interest. If this statute is unconstitutional under *Casey*, then *Casey* means nothing at all, and the Court should candidly admit it.
>
> * * *
>
> As if this state of affairs were not bad enough, the majority expands the health exception rule articulated in Casey in one additional and pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is 'necessary' for a woman's health, the majority concludes that a procedure is 'necessary' if it has any comparative health benefits. . . . But such a health exception requirement eviscerates *Casey*'s undue burden standard and imposes *unfettered abortion-on-demand*. The exception entirely swallows the rule. In effect, no regulation of abortion procedures is permitted because there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable.[820]

The Court dropped all pretense abortion was a limited right. The constitutional right to an abortion has become a fundamental right. History and tradition did not make it so: rather, the Court's expansion of substantive due process and its use of judicial review made it so. If the right to an abortion is judicially sanctioned murder, then the Court has lost its moorings to the rule of law. Only blind loyalty to rule by law, a progeny of its own making, remains.

All this is the consequence of the Supreme Court's loyalty to the new orthodoxy. This explains why stare decisis is not used in a principled way. For example, public outcry by the moral majority in *Casey* was a good reason to deny the overruling of *Roe* and *Doe*, but public outcry by the gay minority was sufficient in *Lawrence* to legalize sodomy and open the back door to legalize same sex marriage.[821] Rather than using stare decisis as a tool to advance the rule of law, stare decisis is used as a tool to dismantle it.

The doctrine of stare decisis is not the rule of law; it is its servant. Abused, it is used to prop up rule by law.

---

[820] *Id.* at 982-83, 1012 (emphasis added).

[821] "[W]hen stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it . . . . Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as 'intensely divisive' as the issue in *Roe*, is offered as a reason in favor of overruling it." Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J. dissenting).

XXX. The Revival of Human Slavery

If unborn human beings were not people, or persons, they still had to be "something." The result is the relegation of embryos and fetuses to property status as "things." In *Roe* the Supreme Court laid the foundation for the legalization of the slavery of unborn human beings who could potentially be legally and commercially exploited, consumed or destroyed as a by-product of well-intended scientific research designed to benefit the rest of humanity.

As biological subjects, the unborn are not able to give informed consent for clinical experimentation, nor is it ethically possible for anyone to give this consent on their behalf for any purpose that does not confer a direct therapeutic benefit. The unborn are coerced, subject to the will of another, and considered as property. These features are the defining characteristics of a human slave.[822] At any time, the option to terminate exists by simply destroying and disposing of embryos and fetuses that have outlived their usefulness or have become unwanted as a matter of "choice."

Roe v. Wade deprived unborn human beings of membership in the human family by drawing a legal boundary between unborn human beings and born alive human beings. The result was the creation of a class system that discriminates between human life forms on the basis of age, size, and economic and political power. The arbitrary point at which human life is legally vested with the constitutional right to life is the complete emancipation of the fetus from the body of its mother at birth.[823] Until that occurs, unborn human beings, who are biologically tethered and contained in their mothers, will remain as a matter of law "separate and unequal."

The rule of law requires that the legal distinction between "person" and "human being" must be abolished if there is to be true equality among all members of the human family. Justice requires that there be respect for the life of all human beings, from the very beginning to the very end of life. The alternative is to classify unborn human beings as non-persons who are mere objects over which to exercise dominion and control, to treat as a property to be harvested and grown for commercial, humanitarian or scientific purposes, to be disposed of at will, or used as a means to an end. Scientists have an obligation to act morally and adhere to proper ethical standards even if domestic law and technology permit otherwise.

> The embryo cannot be reduced to an 'object' or 'instrument' of experimentation. *No matter how great the utility or how noble the intention of an experiment, it must not*

---

[822] Davis, *supra*, note 131, at 31.

[823] Arguably, an embryo, which is created outside the body of its mother in a Petrie dish or extracted from the womb of its mother, may have a constitutional right to life. The Supreme Court has yet to decide this question. Still undecided is whether causing the death of embryos outside of the womb constitutes homicide. If these embryos are human beings, criminal liability may be imposed on doctors and others who kill or harm embryos used in medical research. *See* Forsythe, *supra* note 311, at 501. For another overview of the current legal status of the human embryo at this time, *see* Daniel Avila, *The Present Standing of the Human Embryo in United States Law*, 1 Nat'l Catholic Bioethics Q. 203 (2001).

> *reduce a being having the 'value of an end in himself' to a 'value of utility.'* This is true in every phase of the prenatal life, even in the simplest and most miniscule, as in the first two weeks, in which period today embryonic experimentation rages, at the price of an enormous spending of human lives. *This is an exploitation and a crime which the active and passive complicity of positive law cannot dissimulate.*[824]

The emergence of a new class of non-persons is evidence there is diminishing respect for human life. The temptation to use unborn human beings as human research subjects is great. Cloning and embryonic stem cell research represents the new frontier of human slavery.

A. Cloning

Doctors Panos Zavros and Severino Antinori were in a race to see if they could produce the first cloned baby ahead of the Raelinians.[825] "Details of the first hybrid human embryo clone have been released," proclaimed the BBC World Service on June 18, 1999.[826] The cloning occurred the previous November, but Advanced Cell Technology ("ACT") delayed release of this information.[827] The news story reported the world's first cloned human embryo was derived from a cell from a man's leg and a cow's egg.[828] The embryo was allowed to develop for twelve days before it was deliberately destroyed.[829] Dr. Robert Lanza, director of tissue engineering for ACT, said the embryo "could not be seen as a person before 14 days."[830]

On November 25, 2001, ACT once again made headlines, this time in a far more dramatic way, announcing that the company had succeeded in creating the world's first cloned human embryos derived from human eggs.[831] These embryos lived only for a few hours, long enough for one embryo to advance to the six-cell stage.[832] Ronald Green, chair of the company's ethics advisory board, preferred the term "activated egg" to "embryo," in order to describe ACT's creation of a new form of human life "never before seen in nature."[833] Green disagreed with the suggestion that this cloned embryo be given the same degree of respect and protection as a human being, even though he conceded the potential for this "activated egg" to

---

[824] Cozzoli, *supra* note 61, at 289 (emphasis added).

[825] See *Race is on to Send in the Clones for the Desperate*, The Australian, Aug. 6, 2001, at 11.

[826] *Details of Hybrid Clone Revealed*, BBC News, *at* http://news.bbc.co.uk/1/hi/sci/tech/371378.stm (June 18, 1999).

[827] *Id.*

[828] *Id.*

[829] *Id.*

[830] *Id.*

[831] Press Release, Advanced Cell Technology, *Advanced Cell Technology Reports Publication of Results of Human Somatic Cell Nuclear Transfer and Parthenogenesis* (Nov. 25, 2001), *at* http://www.advancedcell.com/2001-11-25.htm.

[832] Jose B. Cibelli *et al., The First Human Cloned Embryo*, ScientificAmerican.COM, at http://www.grg.org/ACTSciAmer.htm_(March 8, 2005).

[833] Ronald M. Green, *The Ethical Considerations*, ScientificAmerican.COM, at http://www.sciam.com/article.cfm?articleID=000CE1B1-CC78-1CF4-93F6809EC5880000 (Nov. 24, 2001).

develop into a full human being.[834] Green viewed this new biological entity not as a person, but as an organism that could be manipulated to harvest stem cells and ultimately result in the discovery of scientific knowledge that might save or prolong the lives of adults and children. In justifying his conclusion, Green noted that the "activated egg" possessed none of the attributes of humanity; it had no organs, it could not think or feel, and it was a cluster of cells "no bigger than the period at the end of this sentence."[835]

Claude (Rael) Vorilhon, leader of a religious cult that supports Clonaid and a competitor of ACT, claimed in a news interview that cloning human embryos was old news, having already been successfully achieved by Clonaid.[836] He declined for security reasons to divulge the whereabouts of Clonaid's laboratory and present research developments.[837]

Clonaid announced that the world's first cloned baby was born on December 26, 2001, at a secret location outside of the United States.[838] The news has been greeted with much skepticism,[839] but also with great concern.[840]

The religious goal of the "Raelians" and their corporate partner Clonaid is not only to produce the world's first cloned human being, but also to enable an individual to live eternally through several human bodies by "downloading" a donor's memory and personality to its clone.[841] ACT scientists believe that cloning stem cells for use in medical research is ethical and moral, and draw an ethical boundary between themselves and the reproductive goals of the Raelians.[842]

The resulting global controversy over the creation of a cloned embryo has quickly brought strong condemnation against ACT by various opponents, such as the National Right to Life Committee, which has denounced ACT for engaging in immoral and unethical conduct that must be stopped.[843]

---

[834] *Id.*

[835] *Id.*

[836] Reuters, *Canadian Cult Says It was First to Clone Embryos*, The Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements, at http://www.rickross.com/reference/raelians/raelians21.html (Nov. 26, 2001). *See also Controversy Over Human Embryo Clone*, BBC News, *at* http://news.bbc.co.uk/2/hi/science/nature/1676234.stm (Nov. 26, 2001). Korean scientists are also in the running for the distinction of creating the first human clone. "In December 1998, researchers at Kyunghee University in South Korea claimed to have produced the world's first human embryo clone. The scientists involved said they destroyed the object soon after seeing it divide several times." *Id.*

[837] Reuters, *supra* note 836.

[838] *Cloned Baby Claim Met with Doubt*, BBC News, at http://news.bbc.co.uk/2/hi/health/2608655.stm (Dec. 27, 2002).

[839] Michael Lasalandra, *Clone Claim Stirs Doubt,* Boston Herald, Dec. 28, 2002, at 1. *See also* Deborah Smith, *To Humankind, a Clone-or a New-Born Fraud*, Sidney Morning Herald, Dec. 28, 2002, http://www.smh.com.au/articles/2002/12/27/1040511177310.html.

[840] *Human Cloning: 'One Shouldn't DoThis,'* CNN.Com, at http://www.cnn.com/2002/HEALTH/12/27/clones.ethics.legal (posted on Dec. 27, 2002).

[841] Reuters, *supra* note 836.

[842] Joannie Fischer, *The First Clone,* U.S. News & World Rep., Dec. 3, 2001, at 61 (discussing the inside story on how American scientists have made history by creating lifesaving embryo cells).

[843] *US Looks to Outlaw Human Cloning*, BBC News, at http://news.bbc.co.uk/1/hi/sci/tech/1676025.

Who is right? Does it matter that ACT's goal is therapeutic (to grow embryos for a few days and then destroy them in the process of harvesting human stem cells for use in research)[844] or that Clonaid's goal is reproduction (to grow embryos to adulthood to create the possibility of eternal life on earth)? After all, morally there is no difference between these companies, since both are in the business of cloning and destroying an embryo in the process of cloning.

B. Embryonic Stem Cell Research

Was President George W. Bush's decision to permit limited federal funding for embryonic stem cell research a step in the wrong direction?[845] A year after his historic speech to the nation, federally financed researchers have discovered they are permitted by an unpublicized ruling to study new stem cell lines derived from embryos provided that the private money that pays for these experiments are not commingled with federal funds.[846] At least one scholar has persuasively argued that the use of human embryos violates the Thirteenth Amendment, which forbids human slavery.[847]

In sharp contrast, Germany passed the *Embryo Protection Act* in 1991.[848] It is very helpful to listen to what German scientists, sensitive to the evil potential of human medical experimentation, now say after the lessons of the Nazi regime:

> The determination of the beginning of human life by another human being cannot be objective as this determination is a function of an individual value system and what that individual believes to be essential. The description of the human embryo in terms of a successively differentiating cell mass does not mean that this model can be used in the same way for questions involving moral judgment. Ethical statements always include the point of view and the value system of the person making the statement. To answer the question about the beginning of personal dignity does not mean describing a natural phenomenon but deciding on value in moral and ethical terms. Biological realities do not include moral standards. The status of an embryo is a dignity, which is bestowed on it. It is not based on its own inner quality but on an attitude towards the embryo from autonomous subjects.

---

stm (Nov. 25, 2001). The following statement was issued by NRLC in response to the report by persons associated with Advanced Cell Technology, a Massachusetts biotech firm, that they have created human embryos by cloning. NRLC Legislative Director Douglas Johnson stated, "this corporation is creating human embryos for the sole purpose of killing them and harvesting their cells . . . . Unless Congress acts quickly, this corporation and others will be opening human embryo farms." *Id.*

[844] *See* Kyla Dunn, *Cloning Trevor*, ATLANTIC MONTHLY, June 2002, at 31–52. (providing a sympathetic and emotional story that promotes the therapeutic uses of human cloning).

[845] George W. Bush, Remarks by the President on Stem Cell Research (Aug. 9, 2001), at http://www.whitehouse.gov/news/releases/2001/08/print/20010809-2.html.

[846] Sheryl Gay Stolberg, *Ruling by U.S. Widens Study Of Stem Cells*, N.Y. TIMES, Aug. 7, 2002, at A1.

[847] Esther Slater McDonald, *Patenting Human Life and the Rebirth of the Thirteenth Amendment*, 78 NOTRE DAME L.REV. 1359 (2003).

[848] H. W. Michelmann & B. Hinney, *Ethical Reflections on the Status of the Preimplantation Embryo Leading to the German Embryo Protection Act*, 1 SCI. & ENGINEERING ETHICS 145 (1995).

> . . . In Germany, the general opinion is, however, that despite the existence of different values and interests, unborn human life has an inalienable right to human dignity and protection. Because this dignity is not a fact which can be determined empirically, it is not bound to certain abilities or value judgments. Human dignity cannot be divided and is of value in principle from the very beginning. [849]

There is no need to push ahead with embryonic stem cell research if the same scientific goals may be accomplished without immoral methods. Adult stem cell research has proven to be successful and, in the judgment of some scientists, offers just as many, if not more, possibilities of healing human diseases and conditions than embryonic stem cell research.[850] On this basis, the best news of all is that no embryo needs to die to advance stem cell research.

I contend that it is wrong to participate in immoral scientific and medical research, even if the knowledge gained from such activities may ultimately bring positive effects. Human beings are not reducible to a mere sum of their biological parts. Prudence suggests when it comes to irreversible decisions of life and death it is better to be morally safe now than sorry later.[851]

C. Vaccines

We must not underestimate how quickly we can unwittingly become participants in immoral conduct simply by benefiting from medical science that offers us life and health. Today, in many American states, a child is not permitted to go to public school without proof of being vaccinated against chicken pox.[852] What many parents do not know is that the chicken pox vaccine was made from a cell line that originated from an aborted fetus.[853] It is argued that it is morally acceptable

---

[849] *Id.* at 147-48.

[850] *See, e.g.,* Yuehua Jiang et. al., *Pluripotency of Mesenchymal Stems Cells Derived from Adult Marrow,* 418 NATURE 41, 41–49 (2002), at http://www.nature.com/cgi-taf/DynaPage.taf?file=/nature/journal/v418/n6893/full/nature00870_fs.html. Adult stem cell research holds far more promise to benefit humanity than embryonic stem cell research. Moreover, adult stem cell research is ethically and morally uncontroversial. Adult stem cells may be the ideal source for the therapy of inherited or degenerative diseases. *Id.* Kathyjo A. Jackson et. al., *Regeneration of Ischemic Cardiac Muscle and Vascular Endothelium by Adult Stem Cells,* 107 J. CLINICAL INVESTIGATION 1395, 1395–1402 (2001); Nadia N. Malouf et al., *Adult-Derived Stem Cells from the Liver Become Myocytes in the Heart in Vivo,* 158 AM. J. PATHOLOGY 1929, 1929–1935 (2001); A.P. Beltrami et al., *Evidence That Human Cardiac Myocytes Divide after Myocardial Infarction,* 344 NEW ENG. J. MED. 1750 (2001).

[851] Ludger Honnefelder, *The Concept of a Person in Moral Philosophy, in* SANCTITY OF LIFE AND HUMAN DIGNITY 139, 155 (Kurt Bayertz ed., 1996).

[852] *See* Pat Etheridge, *Pediatricians Push For Mandatory Chicken Pox Vaccine*, CNN, at http://www.cnn.com/2000/HEALTH/children/01/11/chicken.pox.vaccine/ (Jan. 11, 2000).

[853] Matthew D. Staver, *Compulsory Vaccinations Threaten Religious Freedom*, Liberty Counsel, at http://www.lc.org/OldResources/compulsory_vaccinations_threaten_religious_freedom.htm (last visited Oct. 11, 2003).

> During the Rubella epidemic of 1964, some doctors advised pregnant women who were exposed to the disease to abort their children. The resulting virus strain became known in the science world as RA/27/3. R stands for Rubella, A stands for Abortus, 27 stands

to use cell lines from aborted fetuses because the abortions would have happened anyway, without contemplation of future vaccine production.[854] The problem with this view is that moral culpability extends to the fruits of the underlying evil. Moral complicity cannot be wished away.

After Osama Bin Laden's September 11, 2001, attack on America, President George W. Bush took steps to purchase smallpox vaccine to prepare for the possibility of biological war. The first contract to produce millions of doses of this vaccine was awarded to a company that has tested ways to make smallpox vaccine from a cell line originating from an aborted fetus.[855] Historically, the vaccine used to rid the world of this terrifying plague was made from non-human sources.[856] The Center

---

> for the 27th fetus tested, and 3 stands for the 3rd tissue explant. In other words, there were 26 abortions prior to finding the right "species" with the active virus. The Rubella vaccine was then cultivated from the 27th aborted baby on the lung tissue of yet another aborted infant, WI-38. WI-38 (Wistar Institute 38) was taken from the lung tissue of an aborted baby at 3 months gestation in the 1960s. A second human cell line known as MRC-5 was derived from a male at 14 weeks gestation in the 1970s. These two aborted cell lines have been used to provide an ongoing source for many widely-used vaccines, including Hepatitis-A and chicken pox. The chicken pox vaccine is known as Varivax. This vaccine was developed with the use of aborted fetuses. It uses both the human cell lines, known as WI-38 and MRC-5.

Id. *See* L. Hayflick & P. S. Moorhead, *The Serial Cultivation of Human Diploid Cell Strains*, 25 Experimental Cell Res. 585 (1961); *see also* L. Hayflick, *The Limited In Vitro Lifetime of Human Diploid Cell Strains*, 37 Experimental Cell Res. 614 (1965); J.P. Jacobs et al., *Characteristics of a Human Diploid Cell Designated MRC-5*, 227 Nature 168 (1970).

[854] Daniel P. Maher, *Vaccines, Abortions and Moral Coherence*, 2 Nat'l Catholic Bioethics Q., 51, 59 (2002).

[855] *New Smallpox Vaccine May Use Aborted Fetal Cell Line, MRC-5*, Free Republic, at http://www.freerepublic.com/focus/fr/564123/posts (posted Nov. 5, 2002).

> The Washington Post announced the award of a contract for the development of a new smallpox vaccine to Oravax/Acambis Corporation. The proposal presented to the CDC and FDA would encompass using 'human fibroblasts.'
>
> We checked the proposed ingredients through the CDC and found they intend to use aborted fetal cell line MRC-5 as the cell substrate for growing the virus. The CDC report also stated that other established animal substrates such as chick embryo (used in Rabies vaccine), Vero Cell Lines and FRHL-2 Cell lines were viable alternatives as well. Children of God for Life spoke with the FDA and they have verified the reports, but also indicated they would most likely use more than one manufacturer and no final decisions have been made. We do know that testing has already begun using MRC-5 in Phase 1 trials.

Id.

[856] Steven R. Rosenthal et al., *Developing New Smallpox Vaccines*, 7 Emerging Infectious Diseases 921 (Nov.-Dec. 2001), at http://www.cdc.gov/ncidod/eid/vol7no6/rosenthal.htm.

> The only commercially approved smallpox vaccine available for limited use in the United States is Wyeth Dryvax. This vaccine is a lyophilized preparation of live *Vaccinia virus* (VACV), made by using strain New York City calf lymph (NYC_CL), derived from a seed virus of the New York City Board of Health (NYCBH) strain of VACV that underwent 22

for Disease Control has adopted a utilitarian separatist philosophy in its goal to develop the most effective, least toxic, vaccine at the right price, even if it means exploiting cell lines derived from aborted fetuses.[857]

We may one day soon have to choose between sticking to our ethics and saying no to a life-saving medical treatment and face the certainty of death, or choosing to be willfully blind or hypocritical and participate as beneficiaries of morally repulsive conduct. Unless we act in the very near future to abolish forever the exploitation of non-persons, there may soon be no alternatives to medical treatments or cures derived from the involuntary sacrifice of non-persons.

The abortion issue is at the core of the moral debate over exploitation and the enslavement of non-persons. That is where the future battle against human slavery will continue to be fought and ultimately won. Either the unborn are human beings and are constitutional persons or they are not. How this question is ultimately answered will determine how our society will be judged by future generations. It remains to be seen whether civil libertarians who are segregationists will continue to abdicate their role as the guardian of all the oppressed and accept the challenge to abolish the laws that have revived a new form of human slavery: "Whoever saves one, saves the whole human race; whoever kills one, kills mankind."[858]

XXXI. International Law

A. Expanding the Class of Depersonalized Humans

The class of non-persons appears to be expanding. The Twenty-first Century is not only the beginning of a new millennium, but also a new era in history when

---

> to 28 heifer passages. The vaccine consists of lyophilized calf lymph containing VACV prepared from live calves. The animals were infected by scarification, and the skin containing viral lesions was physically removed by scraping. The lyophilized calf lymph type vaccine is reconstituted with a diluent containing 50% glycerin, 0.25% phenol, and 0.005% brilliant green. Vaccine prepared by this traditional manufacturing technique of harvesting VACV from the skin of cows (and sheep) was used in most regions of the world during the smallpox eradication campaign. The facilities, expertise, and infrastructure required for producing the virus in this way are no longer available. Wyeth Laboratories discontinued distribution of smallpox vaccine to civilians in 1983.

Id. at 920.

[857] *See generally id.*

> The Food and Drug Administration (FDA) has licensed live-virus vaccines, such as varicella and rubella, prepared in diploid cell substrates (e.g., MRC-5, WI-38). *Recently, MRC-5 was used as a cell substrate for the preparation of an experimental smallpox vaccine under a Phase 1 trial.* Another diploid cell strain, FrhL-2, has been used as a cell substrate for rotavirus vaccine and other live-virus vaccines tested in human clinical trials. The FDA experience in evaluating live-virus vaccines prepared in these diploid cell substrates makes the selection and use of such cell substrates potentially suitable for manufacture of a smallpox vaccine.

Id. at 921–22 (emphasis added).

[858] Edmund Cahn, The Moral Decision: Right and Wrong in the Light of American Law 71 (1955).

a person may be downgraded to the status of a non-person. Being born alive is no longer a guarantee of escaping a destiny of being deliberately put to death. For example, disabled infants may lose their status as persons and join the ranks of the non-persons.[859]

In the case of the conjoined twins from Malta, the English Court of Appeal decided to permit physicians to take the life of "Mary," one of the twins, over the objection of her parents, who opposed an operation to separate the twins that would kill "Mary." The Court permitted the operation to go ahead, deciding "Mary's" "parasitic living" made her "designated for death" and she had "little right to be alive."[860] Being born and acquiring personhood was not enough to save "Mary," who was depersonalized and dehumanized by the judges. Mary's doctors, once they obtained legal protection from the Court of Appeal, knowingly and intentionally killed Mary, to extend the life of her twin sister, "Jodie." Utilitarian values triumphed over Mary's civil liberties. The result was the legalized judicial murder of someone who had once been a person and was no longer thought of as human.

In the United States, Princeton University's Bioethics Professor Peter Singer told an audience in Concord New Hampshire that it was morally acceptable to terminate the lives of severely disabled newborns. "I do think it is sometimes appropriate to kill a human infant."[861] Utilitarian philosophy that rationalized abortion now condones the deliberate killing of a newborn baby. Singer's views are not as radical as they once seemed, as the case of Mary and Jodie suggests.

It was not long ago that European Jews were legally defined as non-persons in law and murdered in the Holocaust or forced to be subjects in Nazi medical experiments.[862] In the United States, descendents of liberated slaves suffered harm despite their legal status as persons. In Tuskegee, white doctors deliberately withheld medication that could have cured African-American males suffering from syphilis.[863] Both of these historical events resulted in public outrage and the creation of ethical codes of conduct to prevent these kinds of unethical conduct from happening

---

[859] This trend actually began in the Twentieth Century. *See* Doe v. Bloomington Hosp., 464 U.S. 961 (1983) and other Baby Doe cases.

[860] *In Re* A (Children) (Conjoined Twins: Surgical Separation), [2000] 4 All E.R. 961, 1010 (C.A.); and Charles I. Lugosi, *Playing God: Mary Must Die So Jody may Live Longer*, 17 Issues in Law & Med. 123 (2001).

[861] Harry R. Weber, *Bioethicist Gets Respectful Reception*, Foster's Online, at http://premium1.fosters.com/2001/news/october2/05/nh1005g.htm (October 5, 2001). If the status of personhood no longer offers legal protection from murder, how soon will it be until disabled adults are also found wanting in the balance and condemned to death as "parasites?" Philosophers like Singer are not afraid or embarrassed to use clear words like "kill" to describe what could otherwise be more softly described as a "termination." *Id.*

[862] *See Medical Experiments*, Jewish Virtual Library, at http://www.us-israel.org/jsource/Holocaust/medtoc.html (Sept. 10, 2003); The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation (George J. Annas & Michael A. Grodin eds., 1992).

[863] James H. Jones, Bad Blood: The Tuskegee Syphilis Experiment (1993).

again. The *Nuremberg Code*[864] responded to the Nazi experiments, and the *Belmont Report*[865] responded to the Tuskegee experiment.

Despite these ethical and legal precedents, some doctors continue to be complicit in doing harm to non-persons and persons alike. Dr. Leroy Carhart achieved notoriety as a pioneer in partial birth abortions.[866] Dr. Wang Guoqi testified before Congress on June 27, 2001, about how he skinned alive a dying prisoner who was legally executed and had his organs harvested for profit.[867] Dr. Josef Mengele no doubt also believed he was acting professionally when he performed, without consent, cruel and inhuman experiments on little children in the name of advancing the

---

[864] 2 Trials of War Criminals Before the Nuernberg Military Tribunals 181–82 (1949), at http://ohsr.od.nih.gov/nuremberg.php3.

[865] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, at http://ohsr.od.nih.gov/mpa/belmont.php3 (Apr. 18, 1979).

[866] Stenberg v. Carhart, 530 U.S. 914, 922–29 (2000).

[867] *Organs For Sale: China's Growing Trade And Ultimate Violation Of Prisoners' Rights: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 107th Cong. 116–18 (2001), at http://commdocs.house.gov/committees/intlrel/hfa73452.000/hfa73452_0.htm.

> Before execution, I administered a shot of heparin to prevent blood clotting to the prisoner. A nearby policeman told him it was a tranquilizer to prevent unnecessary suffering during the execution. The criminal responded by giving thanks to the government.
>
> At the site the execution commander gave the order, 'Go,' and the prisoner was shot to the ground. Either because the executioner was nervous, aimed poorly or intentionally misfired to keep the organs intact, the prisoner had not yet died, but instead lay convulsing on the ground. We were ordered to take him to the ambulance anyway where urologists Wang Shifu, Zhao Qingling and Liu Qiyou extracted his kidneys quickly and precisely.
>
> When they finished, the prisoner was still breathing, and his heart continued to beat. The execution commander asked if they might fire a second shot to finish him off, to which the county court staff replied, 'Save that shot. With both kidneys out, there is no way he can survive.'
>
> The urologists rushed back to the hospital with the kidneys. The county staff and executioner left the scene, and eventually the paramilitary policemen disappeared as well. We burn surgeons remained inside the ambulance to harvest the skin.
>
> We could hear people outside the ambulance, and, fearing it was the victim's family who might force their way inside, we left our job half done. The half dead corpse was thrown into a plastic bag onto the flatbed of the crematorium truck. As we left in the ambulance, we were pelted by stones from behind.
>
> After this incident, I have had horrible, reoccurring nightmares. I have participated in a practice that serves the regime's political and economic goals far more than it benefits the patients.
>
> I have worked at execution sites over a dozen times and have taken the skin from over 100 prisoners in crematoriums. Whatever impact I have made in the lives of burn victims and transplant patients does not excuse the unethical and immoral manner of extracting organs.

Id.

racial purity of the Aryan Super Race.[868] While these medical doctors acted legally, the repulsive nature of the acts they performed upon non-persons highlight their ability to detach their professional role from morally humane conduct, which was no doubt reserved for persons.

B. Political Correctness: The Canadian Model

The law is in a state of disarray.[869] The confusion in the law results from the lack of a consistent theory of the person. Case law abounds with judicial holdings that distort precedents to avoid undermining the right to an abortion. The problem is not confined to the United States and extends to other Anglo-American jurisdictions where there is a legal right to an abortion. Canada is a prime example.

In 1988, the Supreme Court of Canada affirmed a woman's right to abortion and struck down, as unconstitutional, provisions in the Criminal Code that regulated abortion.[870] Since then, that same Court has decided that a mother is not liable for the pre-birth injuries sustained by her born-alive child as a result of her own negligence.[871] The Supreme Court of Canada also absolved a midwife found guilty of criminal negligence causing death, since the victim was a baby that was not fully emerged from the birth canal when it died.[872] There was no criminal liability because an unborn baby is excluded from the definition of a human being in the Criminal Code. The Supreme Court of Canada also found it was unconstitutional to make an order restricting the liberty of a pregnant mother who was addicted to a chemical substance that was harming her fetus.[873] All these cases provoked public outrage and brought the administration of justice into disrepute in the opinion of those who favor the best interests of the child to prevail.

Canada has a shameful history of excluding people from legal personhood. The Canada Indian Act of 1880 stated, "person means an individual other than an Indian."[874] The Canada Franchise Act of 1885 defined a person as "a male person, including an Indian and excluding a person of Mongolian or Chinese Race."[875] In 1912, the British Columbia Court of Appeal held that women were not persons and therefore not eligible to enter the legal profession.[876] In 1928, the Supreme Court of Canada excluded women from the definition of "person" and held that women were not eligible for appointment to the Senate of Canada.[877] Justice was not done

---

[868] *See* Eva Mozes-Kor, *The Mengele Twins and Human Experimentation: A Personal Account, in* THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 53–59 (1992).

[869] Note, *What We Talk About When We Talk About Persons, supra*, note 763 at 1759.

[870] R. v. Morgentaler (No. 2), [1988] 1 S.C.R. 30 (Can.).

[871] Dobson v. Dobson, [1999] 2 S.C.R. 253 (Can.).

[872] R. v. Sullivan, [1991] 1 S.C.R. 489 (Can.).

[873] Winnipeg Child and Family Servs. v. G., [1997] 3 S.C.R. 925 (Can.).

[874] Indian Act of 1880, S.C. 1880, ch. 28.

[875] Electoral Franchise Act, S.C. 1885, ch. 40.

[876] *Re* Mabel French, [1912] 17 B.C.R. 1.

[877] In the Matter of a Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1967, [1928] S.C.R. 276. (Can.).

until 1930 when the Privy Council of England reversed the Canadian Supreme Court.[878] Lord Sankey observed the burden of proof falls on those who would deny personhood to prove their case.[879] This arguably means there is a presumption that the unborn are persons and members of the human family unless proven otherwise. When the Supreme Court of Canada held in 1989 that a fetus was not a human being and denied personhood to the fetus, it did so without considering the method of proof suggested by Lord Sankey.[880]

C. Universal Human Rights

The preamble to the 1948 *Universal Declaration of Human Rights* provides that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[881] The Declaration eloquently articulates that fundamental human rights apply universally without discrimination to every member of the human family. Article 2.1 provides, "*Everyone is entitled to all the rights and freedoms set forth* in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*."[882] There is no limitation to the definition of "everyone." Presumably, "other status" could include embryos and fetuses.

Article 3 provides, "*Everyone has the right to life*, liberty and security of person."[883] Article 4 states, "No one shall be held in slavery or servitude; *slavery* and the slave trade *shall be prohibited in all their forms*."[884] Article 5 reads, "*No one shall be subjected to* torture or to *cruel, inhuman or degrading treatment* or punishment."[885] Article 6 proclaims, "*Everyone has the right to recognition everywhere as a person* before the law."[886] Article 7 says, "*All are equal before the law and are entitled without any discrimination to equal protection . . . against any discrimination* in violation of this Declaration and against any incitement to such discrimination."[887]

The *American Convention on Human Rights* signed at the Inter-American Specialized Conference on Human Rights, in San José, Costa Rica, on November 22, 1969, defines "person" in Article 1.2 as "every human being."[888] Article 4.1 grants every person the "right to have his life respected . . . from the moment of conception."[889]

---

[878] Edwards v. Att'y Gen. for Canada, [1930] D.L.R. 98 (P.C.)

[879] *Id.* at 138.

[880] Daigle v. Tremblay, [1989] 2 S.C.R. 530. (Can.).

[881] *Universal Declaration of Human Rights*, *in* International Instruments of the United Nations 85 (Irving Sarnoff ed., 1997), at http://www.un.org/Overview/rights.html.

[882] *Id.* (emphasis added).

[883] *Id.* (emphasis added).

[884] *Id.* (emphasis added).

[885] *Id.* (emphasis added).

[886] *Universal Declaration of Human Rights*, *supra* note 880.

[887] *Id.* (emphasis added).

[888] Inter-American Commission on Human Rights, Organization of American States, American Convention on Human Right (Nov. 22, 1969), at http://www.cidh.oas.org/Basicos/basic3.htm.

[889] *Id.*

Article 3 provides that "every person has the right to recognition as a person before the law."[890] Article 6.1 forbids slavery "in all [its] forms."[891]

The 1959 *Declaration on the Rights of the Child* recognizes in its preamble that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*."[892] Every child is to "enjoy special protection, and shall be given the opportunit[y] . . . by law . . . *to develop physically*, mentally, morally, spiritually and socially *in a healthy and normal manner* and in conditions of *freedom and dignity*."[893] The "*best interests* of the child shall be the paramount consideratio[n]" in the creation of laws to give each child this special protection.[894] Every child, without exception, is to enjoy these rights without "distinction or discrimination [because of] . . . *birth or other status*."[895] "[M]ankind owes to the child the best it has to give."[896] The subsequent 1989 *Convention on the Rights of the Child*, "bearing in mind" the child's need for special protection before as well as after birth, declared in Article 6.1 "that every child has the inherent right to life" and in Article 6.2 that "States Parties [sic] shall ensure to the maximum extent possible the survival and development of the child."[897]

It may be argued that these international covenants were never intended to apply to embryos and fetuses. Even if that is so, the plain meaning of the text is there and may be interpreted in a manner consistent with protection of the unborn. Considering that before any of these foregoing international laws were enacted, it was a crime against humanity to order an involuntary abortion,[898] there is a case to be made that voluntary abortion is a crime against humanity. International law and war crime tribunals will look beyond domestic definitions of persons and defenses based on obedience to domestic law.[899] Declaring something legal in one nation does not necessarily make it moral and immune from international law, judgment and punishment.

---

[890] *Id.*

[891] *Id.*

[892] *Declaration on the Rights of the Child*, *in* International Instruments of the United Nations (Irving Sarnoff ed., 1997) (emphasis added), at http://www.unhchr.ch/html/menu3/b/25.htm.

[893] *Id.* at 217 (emphasis added).

[894] *Id.* (emphasis added).

[895] *Id.* (emphasis added).

[896] *Declaration on the Rights of the Child*, *supra* note 892.

[897] *Convention on the Rights of the Child*, *in* International Instruments of the United Nations 232–33 (Irving Sarnoff ed., 1997) ("Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 *entry into force* 2 September 1990, in accordance with article 49"), at http://www.unhchr.ch/html/menu3/b/k2crc.htm.

[898] IV Trials of War Criminals Before the Nuremberg Military Tribunals 608 (1949); and V Trials of War Criminals Before the Nuremberg Military Tribunals 109 (1950).

[899] For an international survey of how governments around the world regulate abortion, *see* Anita L. Allen, *Abortion: Contemporary Ethical and Legal Aspects*, *in* Encyclopedia of Bioethics 16–26 (Warren Thomas Reich ed., 1995).

XXXII. The Moral Imperative to Protect Human Life from Conception

There is a moral imperative to affirm and constitutionally confer the status of personhood upon all living human organisms from the time of conception. This moral imperative represents our society's rejection of inequality and all forms of human slavery. Extending constitutional protection to all members of the human family is consistent with liberal equality. Civil libertarians must not hesitate when it comes to speaking out on the ethics of destroying and exploiting innocent unborn human beings. Not to do so, is sheer hypocrisy.

Pro-choice feminists reject discrimination against all women on the basis of sex, yet they engage in wholesale discrimination against unborn human beings, including females, on the basis of age, size and power. Feminists love freedom and hate having their fate decided by the discriminatory choices of others. Yet, these same women insist the decision whether or not to abort their unborn children is a matter of choice belonging exclusively to the mother and no one else.[900]

Women who do not understand that an abortion terminates the life of a human being cannot exercise "choice" responsibly and cannot give legally valid informed consent to an abortion. On October 29, 2002, in *Acuna v. Turkish,* the Appellate Division of the Superior Court of New Jersey allowed a common law tort claim for emotional distress by a twenty-nine-year-old mother of two children who gave her doctor consent to abort her eight-week old fetus.[901] When the pregnant woman asked her doctor "if there was a baby already in [her,]" she received the answer, "don't be stupid, it's only blood."[902] At trial, the doctor testified, "a seven-week pregnancy is not a human being."[903] Rose Acuna's lawsuit against Dr. Sheldon Turkish was eventually dismissed by Superior Court Judge Amy Chambers, who ruled in November of 2003 that informed consent did not extend to answering a patient's question about whether she was about to terminate the life of a living human being.[904]

Does a pregnant woman who knows she is carrying unborn children have the legal right to kill someone who is attempting to harm her fetuses?[905] In *People v. Kurr,* Jaclyn Kurr was seventeen weeks pregnant with quadruplets when she stabbed and killed her abusive boyfriend who unlawfully punched her twice in the stomach during an argument over his cocaine use. She suffered a miscarriage a few weeks

---

[900] Rosemary Bottcher, *Pro Abortionist Poison Feminism, in* Pro-Life Feminism: Different Voices 45 (1985).

[901] Acuna v. Turkish, 808 A.2d 149, 150 (N.J. Super. Ct. App. Div. 2002).

[902] *Id.* at 152.

[903] *Id.* The plaintiff's claim for wrongful death was dismissed, because the Court followed *Roe* and denied personhood to the aborted fetus. *Id.*

[904] Damon Adams, *New Jersey Obstetrician-Gynecologist Wins Informed Consent Case: The Doctor was Not Negligent for Failing to Explain the Psychological Risks of Terminating a Pregnancy*, Am. Med. News, Jan. 5, 2004, at amednews.com, *at* http://www.ama-assn.org/amednews/2004/01/05/prsc0105.htm.

[905] People v. Kurr, 654 N.W.2d 651, 653 (Mich. Ct. App. 2002).

later. In Michigan, a person may kill someone in lawful defense of another. At trial, the judge withheld from the jury Kurr's defense of protecting "another," on the basis that her fetuses were not viable and therefore not human beings. She was convicted of voluntary manslaughter.

On October 4, 2002, the Court of Appeals ordered a new trial because Kurr was wrongfully denied the defense of protecting another, and was thereby deprived of her constitutional right to due process.[906] The appeals court held non-viable fetuses are entitled to protection from unlawful assault, although not from a lawful assault as permitted by *Roe* during a medical abortion.[907]

Permitting Kurr this defense is consistent with the public policy behind Michigan's fetal protection statute.[908] The case has been appealed to the Michigan Supreme Court, which may hear arguments as to when human life begins.[909]

In the final analysis, all of us are compelled to return to biology to answer the question of when a human being is created. To not answer this question is itself an answer and places the power of life and death with those people who hold values inconsistent with equality and respect for the sanctity of all living human beings. This is an invitation to social, political, and cultural disaster. Even the death of one unborn child makes a difference.[910]

The United States Supreme Court will hopefully not squander another opportunity to declare that constitutional personhood begins at the time of concep-

---

[906] *Id.*at 657.

[907] *Id.*at 656.

[908] *Id.*at 657.

[909] Jeff Goldblatt, *Court May Tackle Question of When Life Begins*, FOX NEWS.COM, at http://www.foxnews.com/story/0,2933,70997,00.html (Nov. 21, 2002).

[910] Francis Marsden, *Credo For Catholic Times* (Jan. 1, 2000), at http://stjosephs1.homestead.com/files/Ctime453__Holy_Family_Sunday.htm. Consider the following case histories:

> 1. [There is] a preacher and wife who are living in dire poverty. They already have 14 children. Now the wife [discovers she is] pregnant [again]. Considering their strained [financial] circumstances and the excessive world population, would you [recommend] an abortion?
>
> 2. A [man] is sick with syphilis. [His wife] has [tuberculosis]. They have four children. The first is blind, the second was stillborn, the third is deaf, and the fourth has TB. [Now their mother is] pregnant again. Given the high probability that the baby will be born congenitally handicapped, would you recommend abortion?
>
> 3. A teenage girl, 14-15 years old, is pregnant. [She is] not married. Her fiancé is not the father of the baby, and [he is] very upset. Would you [recommend] an abortion?
>
> How did you answer? In the first case, if you said yes, you have just killed John Wesley, a great evangelist of the 18th century and founder of Methodism. In the second case, you would have killed Ludwig van Beethoven. If you said yes in the third case, you [would have] consented to the [death] of Jesus Christ.

Id.

tion. This time, the Court ought to appoint a legal guardian to advocate for the civil liberties of the unborn.[911]

If bioethicists like Peter Singer are successful in persuading Americans to maintain and expand the membership of non-persons to attain utilitarian objectives, the cost will be the abandonment of those civil libertarian values upon which this nation was founded.

There is a moral imperative for all true civil libertarians to reject all attempts to classify human beings according to personhood criteria. "Quality of life" is no substitute for the "sanctity of human life." Sanctity of life offers the best approach to protect our civil liberties and to ensure dignity and respect for all persons—as I define persons.[912] The most practical and effective first step to reach this goal is to vigorously defend the right to life of the unborn human being.

The protection of the individual human being has to be uniform during all its stages, in the same manner, and from the very beginning. It must not depend on phases of development, so-called "degrees of humanity," because then they would be criteria of selection based on utilitarian, genetic, morphological, or race-ideological points of view. Created life must always and under all circumstances have the right to be born.[913]

The unborn are human beings *and* persons from the time of conception. The legal distinction between a person and human being must be abolished if we are to live in a society of equals. In a free and democratic society like America, there is no place for a human class of non-persons. Constitutional personhood and protection of all human beings must begin from the time of their creation and continue until natural death.

XXXIII. Restoring the Rule of Law

Thirty years after *Roe*, *Casey*, and *Stenberg*, there is a generally held assumption by the new generation of students entering law school today that the word "person"

---

[911] *See* Re: Guardianship of J.D.S., Wixtrom v. Dept. of Children and Families, No. 5D03-1921, Jan. 9, 2004, 2004 Fla. App. Lexis 161 (C.A. Fla 5th Dist.). In denying the appointment of a guardian for the fetus of a legally incompetent mother pregnant with a viable fetus, Justice Orfinger observed: "If a fetus has rights, then all fetuses have rights. And, if a fetus is a person, then all fetuses are people, not just those residing in the womb of an incompetent mother. If we recognize a fetus as a person, we must accept that the unborn would have the rights guaranteed persons under the Constitutions of the United States and the State of Florida." *Id*. at 19. In dissent, Judge Pleus stated that a trial court has full authority to appoint a plenary guardian for an unborn child because that child is a minor, and because the State has a compelling interest in the health, welfare and life of the unborn child. Only a court appointed guardian that is independent and impartial pursuant to a fiduciary relationship can protect the unborn from being at the mercy of others who may have interests conflicting with the unborn's presumed desire not to be aborted. Judge Pleus predicted that Roe v. Wade will one day be overturned and that the courts will no longer turn a blind eye to the reality that the unborn are persons from the moment of conception. *Id*. at 33-44.

[912] To repeat, I define a person as "a living organism of the species *Homo sapiens*, whether created inside or outside a womb."

[913] Michelmann & Hinney, *supra,* note 849 at 150.

in the Fourteenth Amendment applies only to human beings that are born alive. Personhood is identified with citizenship, which is conferred upon natural human beings by operation of law at birth. Those who are members of this new generation born after 1973 are all abortion survivors, for they all could have been aborted, except that they were chosen for birth. As survivors, they have been indoctrinated by the legacy of *Roe*, *Doe,* and *Casey*. They assume a human being becomes a person and a citizen only upon birth. No thought is given to the fact that at one time, an unborn human being was at common law a person too. The very suggestion of the idea upsets some students and evokes hostility from others.

In today's society, some pregnant women deny the biological fact that they are mothers until their baby is born. Late term abortion is justified as a form of self-defense to get rid of involuntary servitude and a form of slavery caused by pregnancy.[914] No longer is health the reason why abortion is justified:

> The notion of involuntary servitude makes clearer than the notion of self-defense why late-term abortions are morally acceptable, and why the new ban on them is wrong. It does not matter how long one has been in involuntary servitude —two months, or eight—nor does it matter that one's involuntary servitude has helped the purple silk fetishist achieve inner peace or personal development. The servitude is wrong because it is involuntary. Similarly, if a woman does not wish to be pregnant; if her condition pushes her beyond the limit she is willing to go and she changes her mind about the risks involved in pregnancy; or if she is no longer willing to put her body in servitude to the fetus, she should have a right to terminate the pregnancy. [915]

As non-persons, the unborn today have less legal protection than did African American slaves prior to the adoption of the Fourteenth Amendment. It is both tragic and ironic that after the passage of the Fourteenth Amendment, not only has the Supreme Court with the *Roe*, *Doe* and *Casey* decisions permitted the substitution of one form of slavery for another, it has granted legal immunity to those who kill the unborn with impunity. Legal immunity, once granted, is politically dynamite to revoke.

For the restoration of the rule of law, there is no alternative. Faithfulness to the Constitution demands nothing less. Nothing in the text of the Constitution gives anyone the private unrestrained liberty to violently override another human being's inalienable inherent right to life. Abortion is not yet beyond the reach of the law, but may well soon be.[916] Consensus among extremists on both sides of the abortion debate may be possible if reason prevails and a common denominator is agreed upon, such as the desirability of living in a society governed by the rule of law. The

---

[914] Nancy J. Hirschmann, *Subversive Legacies: Learning From History/Constructing the Future: Abortion, Self-Defense and Involuntary Servitude*, 13 Tex. J. Women & L. 41 (2003)

[915] *Id.* at 53.

[916] Charles E. Rice, *Abortion, Euthanasia, and the Need to Build a New 'Culture of Life*,' 12 N.D. J. L. Ethics & Pub Pol'y 497, 509-12 (1998)

political theory that makes America the envy of the world is its commitment to the principles of justice, equality and human rights. But when rule by law does violence to those principles, society pays the price and injustice triumphs. Once opponents of the personhood of the unborn recognize the truth that the only hope is to abide by the Golden Rule,[917] and to conform to the rule of law so that "human being" and "person" once and for all mean the same thing, will the social war on abortion among Americans be resolved.[918] In 1842, Hambley, counsel for the Commonwealth of Pennsylvania, prophetically predicted the Civil War was inevitable, unless the Golden Rule was observed: "Let the south and the north remember, that he who lives by the sword today, may die by the sword tomorrow. Then indeed we may read the Constitution in the benign spirit of the golden rule, to do 'unto others, as we would that they should do unto us.'" [919]

If one class of human beings can be deprived of personhood, why not another class, say over the age of 75? Those who advocate abortion today may find themselves the victim of involuntary euthanasia tomorrow. Unless unborn human beings are recognized as constitutional persons, the immediate future promises the continuation of abortion, the patenting and ownership of human life, the creation of chimeras, and the destruction of embryos to serve the surging demand for embryonic stem cell research and human clones to serve as organ donors. Prospects for the future enslavement of the unborn appear real.[920]

Even members of the personhood class have reason to fear. Does not lack of respect for the human rights of the unborn leads to the same lack of respect for the human rights of those who are born? In America and Canada, babies that survived an attempted abortion and were born (the dreaded complication) were abandoned with the intent that they die.[921] Children up to the age of 12, who are in pain or disabled, are unwilling victims of euthanasia in Holland.[922]

---

[917] This is a universal model code all people in a diverse and pluralistic society can support, for it transcends religious affiliations. "Do to others whatever you would have them do to you." *Matthew* 7:12 (New American Bible)(Christian); "Hurt not others in ways that you yourself would find hurtful." *Udana-Varga* 5,1 (Buddhist); "This is the sum of duty; do naught to others what you would not have them do to unto you." *Mahabharata* 5, 517 (Hindu); "No one is a believer until he desires for his brother that which he desires for himself." *Sunnah* (Muslim); "What is hateful to you, do not do to your fellow man." *Talmud, Shabbat 3id* (Jewish) See *The Universality of the Golden Rule in World Religions*, at http://www.teachingvalues.com/goldenrule.html.

[918] *See* Robert P. George, *Group Conflict and the Constitution: Race, Sexuality and Religion: Public Reason and Political Conflict: Abortion and Homosexuality*, 106 Yale L.J. 2475 (1997)

[919] Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539, 607 (1842).

[920] Esther Slater McDonald, *Patenting Human Life and the Rebirth of the Thirteenth Amendment*, 78 Notre Dame L. Rev. 1359 (2003)

[921] One infant that survived an attempted abortion won an $8 million dollar settlement. Ximena Renaerts v. Vancouver General Hospital, No. C937086, Dec. 4, 1998 at http://www.courts.gov.bc.ca/scripts/search/Qfullhit.htw?CiWebHitsFile=/jdb-txt/sc/98/20/s98-2042.txt&CiRestriction=ximena%20renaerts&CiQueryFile=/scripts/search/queryhit.idq&CiUserParam3=/search/search.asp&CiHiliteType=Full; *Ximena Renaerts* at http://www.vanderbilt.edu/SFL/renaerts.htm; Celeste McGovern, *The Dreaded Complication*, Feb. 22, 1999 at http://www.geneticcleansing.org/bcwomens1.html.

[922] Toby Sterling, *Netherlands Hospital Euthanizes Children*, Nov. 30, 2004, at http://apnews.myway.

These developments are consistent with the views of some of the greatest names in philosophy, law and jurisprudence. Ethics professor Peter Singer, of Princeton's Center for Human Values, publicly supports the killing of disabled infants.[923] Professor Ronald Dworkin has defended abortion rights and argued fetuses are not constitutional persons.[924] So has the late Professor John Rawls, who tersely dismissed the unborn from his theory of justice.[925] One survey of philosophers found that those who support abortion also support infanticide.[926] Michael Tooley is representative of this school of thought.[927] If these giants of academia have their way, birth will no longer be the safe harbor it once was.

Learned scholars have rebutted many of these segregationist arguments,[928] but the propaganda, media, cultural, and court battles appear to be won by those opposing the personhood of the unborn. Public pressure for embryonic stem cell research and cloning is stronger than ever.[929]

In 1842, Attorney Hambly, in a valiant losing effort in *Prigg v. Commonwealth of Pennsylvania*, eloquently stated, "But even great names cannot sanctify wrong; time cannot supply the want of constitutional authority."[930] That observation is as valid now as it was then. It took time for slavery to be abolished and equality restored to the African-American. It will take time for abortion to be abolished and for the killing to stop. Once the constitutional personhood of the unborn is recognized, abortion and its derivative evils, cloning and embryonic stem cell research will all be illegal. Professor Dworkin concedes, "If a fetus is a constitutional person, then states not only *may* forbid abortion but, at least in some circumstances, *must* do so."[931]

---

com/article/20041130/D86MEAA80.html.

[923] Peter Singer, Practical Ethics 169-74 (2d ed. 1993). *See* Statement of Marca Bristo, Chairperson, National Counsel on Disability Regarding the Hiring of Peter Singer, Apr. 17, 1999, at http://www.ncd.gov/newsroom/testimony/ncd_4-17-99.html.

[924] Ronald Dworkin, *supra,* note 98.

[925] In the early stage of a woman's pregnancy, Rawls states, "the political value of a woman is overriding." He says nothing about the moral worth of the fetus. It would be "cruel and oppressive" to the *woman* to deny her the right to an abortion. John Rawls, Political Liberalism 243 n.32 (1993); s*ee generally*, John Rawls, *supra*, note 110.

[926] Don Marquis, *Why Abortion is Immoral*, 86 J. Phil. 183, 195-201 (1989).

[927] Michael Tooley, *Abortion and Infanticide*, 2 Phil. & Pub. Affairs 37 (1972).

[928] *See* Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 Md. L. Rev. 289 (1997). Professor Stith suggests that Professor Dworkin "has perhaps done more [than anyone else] to advance human inequality in the law. 'The less profitable effort invested in each human being, the less regrettable the killing of that being' paraphrases an inegalitarian notion that Dworkin applies long after as well as before birth." Richard Stith, *supra*, note 803.

[929] On Nov. 2, 2004, California residents overwhelming supported a referendum, Proposition 71, to spend $3 billion in public funds to pursue embryonic stem cell research. Jonathan Knight, *California Says Yes to Stem Cell Research*, Nov. 3, 2004, at http://www.nature.com/news/2004/041101/full/041101-11.html.

[930] Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539, 607 (1842).

[931] Ronald Dworkin, supra, note 98 at 398-99.

Among Western European nations, Germany's Constitution guards against devaluing the dignity of the unborn human being.[932] The Basic Law of Germany is a "rule of law" constitution that can serve as a working model for the United States:

> Thus, we can conceive of the Basic law as a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, *rooted in justice and equality*, that are designed to restore the centrality of humanity to the social order and thereby secure a stable democratic society on this basis. These values are *not to be sacrificed* for the exigencies of the day, as they had been during the Nazi time. Thus the Basic law provides a new avenue of substantive *moral vision to check human passion and self-interest*. . . ."[933]

In Germany, humans are to be treated always as ends in themselves, never as means to an end.[934] Every person is entitled to equal worth as a matter of basic human dignity and equality.[935] The guarantee of human dignity is inalienable.[936] In Germany, the constitutional right to life and physical integrity begins for each human being from the time of conception.[937] Where human life exists, human dignity attaches, for human dignity does not depend on birth or a developed personality, and life is a continuum from conception.[938] This model is commendable in theory, but fails in practice.

Current German laws permit abortion after mandatory counseling and a three day waiting period.[939] This scheme was a political compromise necessitated by the re-unification of Germany.[940] Rather than criminalizing abortion, German law focuses on counseling, employment security, social welfare and financial support to persuade pregnant women to give birth to their children.[941] In this way, German law successfully achieves some degree of protection for the unborn by obtaining

[932] "The right to life is guaranteed to everyone who 'lives;' no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life." Judgment of the First Senate of the 25th Feb., 1975, 39 BverfGE 1, *aff'd*, Judgment of the Second Senate of the 28th of May, 1993, 88 BverfGE 203, *trans. in* Robert E. Jonas and John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 Marshall J. Pract. & Proc. 605 (1976). *See* Donald Kommers, *The Constitutional Law of Abortion in Germany: Should Americans pay Attention?* 10 J. Contemp. Health L. & Pol'y 1 (1994); Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 349-56 (1997); Gerald Neumann, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273 (1995); Edward J. Eberle, Dignity and Liberty: Constitutional Visions in Germany and the United States (2002); Mark Chase McAllister, *Human Dignity and Individual Dignity in Germany and the United States As Examined by Each Country's Leading Abortion Cases*, 11 Tulsa J. Comp. & Int'l L. 491 (2004).

[933] Edward J. Eberle, *supra*, note 932 at19 (emphasis added).

[934] *Id.* at 45.

[935] *Id.* at 50.

[936] *Id.* at 42.

[937] *Id.* at 52; *see* BVerfGE 269 (1973).

[938] Edward J. Eberle, *supra*, note 932 at165-66.

[939] *Id.* at 172-73.

[940] *Id* at 172.

[941] *Id.* at 174-75.

voluntary recognition of personal responsibility and respect for the personhood of the unborn.

The German experience demonstrates how the rule of law may exist in form, but not in substance, for abortion is permitted and fairly routine. Perhaps many Americans who seek an acceptable political compromise will look to the German model, but I reject it. If unborn human life merits dignity and respect, effective legal protection of life must follow, for otherwise the Constitution is not worth the paper it is written on.

Those who advocate constitutional protection for the unborn often claim to speak on behalf of those who cannot speak for themselves. In the case of abortion, that is generally true. It is time to put to rest the speculation and theorizing of what the unborn might have to say if they had a choice to be recognized as persons.

In 1977, at seven months of gestation, Gianna Jensen survived an attempted abortion. She managed to live to adulthood, and is sufficiently recovered from her devastating birth injuries to think clearly and deeply on the treatment of the unborn by society and to articulate her views. Her existence alone earns her the right to speak on behalf of over 45 million unborn children who have died. I have reproduced the unedited speech in full because I am not aware of any other survivor of an attempted abortion who has the ability to speak in an articulate manner. Testifying before a committee of Congress on the Born Alive Infants Protection Act of 2000, she had this to say:

> My name is Gianna Jessen. I would like to say thank you for the opportunity to speak today. I count it no small thing to speak the truth. I depend solely on the grace of God to do this. I am 23 years old. I was aborted and I did not die. My biological mother was 7 months pregnant when she went to Planned Parenthood in southern California and they advised her to have a late-term saline abortion. A saline abortion is a solution of salt saline that is injected into the mothers womb. The baby then gulps the solution, it burns the baby inside and out and then the mother is to deliver a dead baby within 24 hours. This happened to me! I remained in the solution for approximately 18 hours and was delivered ALIVE on April 6, 1977 at 6:00 am in a California abortion clinic. There were young women in the room who had already been given their injections and were waiting to deliver dead babies. When they saw me they experienced the horror of murder. A nurse called an ambulance, while the abortionist was not yet on duty, and had me transferred to the hospital. I weighed a mere two pounds. I was saved by the sheer power of Jesus Christ. Ladies and gentleman I should be blind, burned—I should be dead! And yet, I live! Due to a lack of oxygen supply during the abortion I live with cerebral palsy. When I was diagnosed with this, all I could do was lie there. 'They' said that was all I would ever do! Through prayer and hard work by my foster mother, I was walking at age 31/2 with the help of a walker and leg braces. At that time I was also adopted into my wonderful family. Today I am left only with a slight limp. I no longer have need of a walker or leg braces. I am so thankful for my Cerebral Palsy. It allows me to really depend on Jesus for everything.

> **When the freedoms of one group of helpless citizens are infringed upon, such as the unborn, the newborn, the disabled and so called "imperfect," what we do not realize is that our freedoms as a NATION and Individuals are in great peril**. I come today in favor of this Bill, in favor of the Protection of Life. I come to speak on behalf of the infants who have died and for those appointed to death. Learned Hand, a well respected American Jurist (within our own century) said: 'The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near 2000 years ago, taught mankind that lesson *it has never learned, but has never quite forgotten;* that there is a kingdom where the least shall be heard and considered side by side with the greatest.'
>
> Where is the soul of America? Members of this committee: where is YOUR heart? How can you deal with the issues of a nation without examining her soul? A murderous spirit will stop at nothing until it has devoured a nation. Psalm 53:1-3 says: '*The fool has said in his heart "there is no God"; they are corrupt, and have done abominable iniquity; there is none who does good. God looks down from heaven upon the children of men, to see if there are any who understand, who seek God. Every one of them has turned aside; they have together become corrupt; there is none who does good, no, not one.'* Adolph Hitler once said: '*The receptive ability of the great masses is only very limited, their understanding is small; on the other hand their forgetfulness is great. This being so, all effective propaganda should be limited to a very few points which in turn, should be used as slogans until the very last man is able to imagine what is meant by such words.'* Today's slogans are: 'a woman's right to choose' and 'freedom of choice,' etcetera. There was once a man speaking from hell (recorded in Luke 16) who said 'I am tormented in this flame.' Hell is real. So is Satan, and the same hatred that crucified Jesus 2000 years ago, still resides in the hearts of sinful people today. Why do you think this whole room trembles when I mention the name Jesus Christ? It is because He is REAL! He is able to give grace for repentance and forgiveness to you and to America. We are under the judgment of God—but we can be saved through Christ. Romans 5:8-10 'But God demonstrates his own love towards us, in that while we were still sinners, Christ died for us. Much more then, having now been justified by His blood, we shall be saved from wrath through Him. For when we were ENEMIES we were reconciled to God through the death of His Son, much more having been reconciled, we shall be saved by His life.'
>
> Death did not prevail over me . . . and I am so Thankful!! [942]

The most significant part of her speech, from the rule of law perspective, is her intuition that there needs to be a moral component to law and that the freedoms of one class of helpless human beings is invaded by another. Interestingly, Gianna

[942] *Testimony of Gianna Jessen, Hearing on H.R. 4292, the "Born-Alive Infants Protection Act of 2000, House Judiciary Subcommittee on the Constitution*, 106th Cong. 2nd Sess. (July 20, 2000) (emphasis in original) (emphasis added in bold font), at http://www.house.gov/judiciary/jess0720.htm.

Jensen sees no distinction between the unborn, the newborn, the imperfect and the disabled, using the term "citizen" for all these classes. If her voice symbolically represents the collective voice of all those who have died from abortion, it confirms we are on the right track if our goal is to restore the rule of law.

XXXIV. When Judicial Review Fails

What happens when the Supreme Court abuses the doctrine of judicial review? In *In re Winship*, Justice Black warned the "law of judges" would replace the rule of law:

> Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that *the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase 'due process of law.'* The many decisions of this Court that have found in that phrase a blanket authority to govern the country according to the views of at least five members of this institution have ignored the essential meaning of the very words they invoke. *When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the 'law of the judges.'*[943]

The prophecy of Justice Black has become true. Can the power of judicial review be used constructively as a tool to restore the rule of law, instead of as a tool to destroy it? The Supreme Court was intended to be the least dangerous branch of government to the political rights of the Constitution,[944] not the most dangerous branch as arguably it has now become.[945] What options are there when the Supreme Court perverts justice and destroys the rule of law with regard to the unborn? The judicial branch put itself above the rule of law and has denied equal protection of the laws to an entire class of human beings by defining them out of constitutional existence. Unless the Court demonstrates a willingness to overrule itself, Congress and the President must explore ways to achieve justice for the unborn in spite of the Court.

The Supreme Court is not the only branch of government entrusted to preserve and protect the U.S. Constitution; the executive and the legislative branches of government share this same trust. Former Attorney General Edward Meese III contended that constitutional interpretation is the business of all branches of government, not just the judicial branch.[946] Judicial supremacy is a myth.[947] Chief

---

[943] In re Winship, 397 U.S. 358 (1970) (emphasis added).

[944] Alexander Hamilton, Federalist, No. 78.

[945] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L. J. 217 (1994); *but cf*. Martin, *supra*, note 168.

[946] Louis Fisher, American Constitutional Law 492 (5th ed. 2003).

[947] *See* Michael Stokes Paulsen, *Judging Judicial Review: Marbury in the Modern Era: The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003).

Justice Marshall never claimed judicial supremacy: "The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land 'anything in the constitution or laws of any State to the contrary notwithstanding.'" [948]

The Supreme Court is vulnerable to revocable appellate jurisdiction. It has irrevocable original jurisdiction in limited cases, but Congress controls the Supreme Court's appellate jurisdiction "with such exceptions and under such regulations that Congress may make."[949] The precedent for this has been established.[950] There is nothing stopping a Republican controlled Congress and a Republican President from removing from the Court's jurisdiction the power to define who is a "person" within the meaning of the Fourteenth Amendment. Congress may define "person" to be a living human organism that is in being from the time of conception, genetically 100% of human origin, whether conceived in or outside of a human womb. In a future case involving abortion, the Supreme Court may find itself bound by a definition of "person" thrust upon it by Congress.

Congress can also remove jurisdiction from the Supreme Court by elevating the question of constitutional personhood above any "case or controversy" disputed by litigants. The Supreme Court has no power where there is no case or controversy to resolve.[951] It is a fundamental political question whether or not one class of human beings will have their physical integrity invaded for the selfish purposes of another class of human beings. Assuming that equality is a fundamental foundational element integral to the political garment of America, it may not be stripped away by Justices swayed by contemporary expedient social practices under the guise of personal liberty. A political question is non-justiciable—outside of the jurisdiction of the Court. "Questions in their nature political . . . can never be made in this court."[952]

Congress also has the power to determine the size of the Supreme Court.[953] If the Supreme Court refuses to abdicate its "rule by judges" and refuses to voluntarily

---

[948] McCulloch v. Maryland, 17 U.S. 316, 406 (1819).

[949] The Exceptions Clause is set out in Article III, U.S. Const. "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

[950] *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506. *See* William W. Van Altyne, *A Crticial Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973); The "Francis Wright," 105 U.S. 381, 385 (1881)(appellate jurisdiction is "confined to within such limits as Congress may prescribe"); United States v. Bitty, 208 U.S. 393, 399-400 (1908) (the establishment of exceptions and regulations must give "due regard to all the provisions of the Constitution."); *Creation of the Federal Judiciary*, Sen. Doc. 91, 75th Cong., 1st Sess., 269-73 (1938); Robert H. Jackson, The Supreme Court in the American System of Government 11(1955). *See generally*, Fisher, *supra*, note 946 at 474-77.

[951] Jackson, *supra*, note 950 at12.

[952] Marbury v. Madison, 5 U.S. 137, 170 (1803) (Marshall, CJ.); *cf*. Baker v. Carr, 369 U.S. 186 (1962).

[953] Judiciary Act, 1789, 1 Stat. 73, Ch. XX as amended. Originally there were five associate members of the court and one Chief Justice. The size of the court has fluctuated over time, with the last change made in 1869, setting the number at nine. Fisher, *supra*, note 946 at 116-18.

return to the rule of law, and thereby promote equality and justice, Congress has the authority to expand the number of Justices by another 10 Justices, if that is what it takes to stop the present judicial runaway train. In 1937 President F.D. Roosevelt (FDR) embarked on this course until he met with stiff political opposition[954] and the swing in position by Justice Roberts in *West Coast Hotel Co. v. Parrish,* was "the switch in time that saved nine."[955] Unfortunately, this technique of "court packing" is a double-edged sword, for it can, and has been used, to reverse a court intent on preserving the rule of law.[956]

Another option is to press ahead with a renewed attempt to pass an updated version of the Human Rights Bill pursuant to Article 14(5) of the Fourteenth Amendment. That provision states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[957] In 1981, attorney Stephen Galebach argued before the Senate Committee on the Judiciary that Congress has the power to enforce the Fourteenth Amendment by declaring that unborn children are constitutional persons too. Relying on the narrowest construction of Congress's power under 14(5), advanced by Justice Harlan in *Katzenbach v. Morgan*, at the very least Congress may make legislative findings of fact that may be binding on the Supreme Court: "To the extent 'legislative facts' are relevant to a judicial determination, Congress is well-equipped to investigate them, and such determinations are entitled to due respect." [958]

The most expansive interpretation of Congress' power under 14(5) is to exercise equivalent powers to the "necessary and proper" clause granted under Section 8 of Article I to the Constitution: "To make all Laws which shall be necessary and proper for the carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [959]

One would thus expect today's Supreme Court to give heed to Chief Justice Marshall's wisdom in *McCulloch v. Maryland*, wherein he gave deference to Congress to enact laws most beneficial to all the people consistent with the letter and spirit of the Constitution:

> But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers

---

[954] The Senate Judiciary Committee saw through the superficial reasons offered by FDR to add members to the Court, and denounced the court packing scheme as a threat to the independence of the judiciary and an attack on the rule of law, "Its ultimate operation would be to make this government one of men rather than one of law." S. Rept. No. 711, 75th Cong. , 1st Sess. (1937), *quoted in* Fisher, *supra*, note 946 at 474.

[955] Fisher, *supra*, note 946 at 470.

[956] Erwin Griswold, *The Colored Vote Case in South Africa*, 65 Harvard L. Rev. 1361 (1952).

[957] U.S. Const. amend. 14, § 5.

[958] Katzenbach v. Morgan, 384 U.S. 641, 668 (1966).

[959] U.S. Const. Art. I, § 8. For an expansive interpretation of Congress' power, see opinion of Justice Brennan in *Katzenbach*, 384 U.S. at 650-51.

> are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. [960]

If Congress were to enact legislation pursuant to 14(5) to protect the unborn, this law would be consistent with the fundamental precept of American justice that "all men are created equal" which is the breath that fans the spirit of the Constitution. Such a law would "enforce" Congress' remedial power under 14(5)[961] and "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion."[962] The power under 14(5) is there to enforce the equal protection of the laws and to guarantee due process to all persons, not just to those who for the moment are defined as persons. The Constitution is "intended to endure for ages to come" and is "to be adapted to the various crises of human affairs."[963] In considering the powers of Congress, "we must never forget that it is a constitution we are expounding."[964]

In *Tennessee v. Lane*, Justice Stevens further explained the Court's view of Congress' power under 14(5):

> This enforcement power, as we have often acknowledged, is a 'broad power indeed.' *Mississippi Univ. for Women* v. *Hogan,* 458 U.S. 718, 732, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), citing *Ex parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1880). It includes 'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' *Kimel*, 528 U.S., at 81, 145 L. Ed. 2d 522, 120 S. Ct. 631. We have thus repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.' *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-728, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003). See also *City of Boerne* v. *Flores,* 521 U.S. 507, 518, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).
>
> . . . When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause. [965]

One purpose of the Constitution is to secure for the people and "to their posterity" the blessings of liberty.[966] As a nation, America has denied blessings of

---

[960] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).
[961] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
[962] *Ex parte* Virginia, 100 U.S. 339, 345-46 (1880).
[963] McCulloch v. Maryland, 17 U.S. at 415.
[964] *Id.* at 407.
[965] Tennessee v. Lane, 541 U.S. 509, 518-20 (2004).
[966] *See* McCulloch v. Maryland, 17 U.S. at 403-04.

life, liberty and the pursuit of happiness "to their posterity." Another purpose is to "establish justice." With the denial of equal justice for the unborn, there is no "domestic tranquility," another goal of the hope for a "more perfect union." Conferring constitutional personhood upon the unborn certainly conforms to the text of the Fourteenth Amendment, whereby all persons are guaranteed equal protection and due process.

XXXV. Summary of the Case for Constitutional Personhood

The denial of personhood to the unborn has to rank as the costliest human life sacrifice in American history, when one considers the 46 million deaths caused by abortion are far more than the 1,234,882 Americans who died from all causes in the Civil War, World War I, World War II, Korea, and Vietnam.[967] Where there have been other unacceptable social problems created by the judiciary, the country has on four prior occasions responded by passing a constitutional amendment pursuant to Article V to reverse the Supreme Court.[968]

Congress ought also to be wise to recognize that the elimination of one serious problem must not to lead to another. In anticipation of the reversals of *Roe*, *Doe*, and *Casey*, legislation needs to be passed to care for the needs of pregnant mothers and their families, so that no one will be lacking in medical care, shelter and nutrition. Government is with the consent and for the benefit of the people, and the people are our national treasure.

There is no doubt that for anyone who values equality and respect for the inherent dignity of all human beings, that the need for the word "person" to mean all human beings, including unborn human beings from the time of conception, is "the defining constitutional controversy of our age and one that affects all other aspects of our jurisprudence, much as slavery was the defining constitutional issue of nineteenth century America."[969]

The national government has an obligation to ensure that it carries into effect all the rights and duties imposed on it by the Constitution. The Fourteenth Amendment, properly interpreted, is America's Magna Carta.[970] Its language is unqualified in its scope.[971] A plain reading of "person" is broad enough to encompass all living human beings, in every state and condition, born and unborn, within the jurisdiction

---

[967] *American War Dead*, at http://users.erols.com/mwhite28/warsusa.htm.

[968] U.S. Const. Art. V. The Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (granting states immunity from lawsuits); the Fourteenth Amendment overruled *Scott v. Sandford*, 60 U.S. 393 (1857) (granting citizenship to former slaves); the Sixteenth Amendment overruled *Pollock v. Farmers' Home and Trust Co.*, 158 U.S. 601 (1895) (granting Congress the power to collect income tax); and the Twenty-Sixth Amendment overruled *Oregon v. Mitchell*, 400 U.S. 112 (1970) (granting the right to vote to 18 year-olds).

[969] Michael Stokes Paulson, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1002 (2003).

[970] *Slaughter-House Cases*, 83 U.S. (16 Wall) 125 (1873) (Swayne, J., dissenting).

[971] *Id.* at 128 (Swayne, J., dissenting).

of the United States.[972] The Supreme Court must "execute the law, and not make it." The Court had no constitutional authority to "interpolate a limitation" on the meaning of "person" that is "neither express nor implied."[973] The Court did a great evil when it used the Fourteenth Amendment as an "engine of oppression" instead of a "bulwark of defense."[974]

Equal protection of the laws and due process of law belong to all human beings, not just legally defined persons: "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. *Beyond that line lies the domain of usurpation and tyranny*." [975]

The Supreme Court has crossed that line. It is long overdue that the Court exercises self-restraint and restrains the liberty of mothers to forever end the tyranny of abortion and the usurpation of the constitutional rights of unborn human beings.

It would be prudent for the Supreme Court to reconsider the matter of overruling *Roe*, *Doe* and *Casey* before other avenues are implemented by Congress to overrule the Court. Granting certiorari to hear one more case like *New Jersey v. Loce*[976] and conferring constitutional personhood upon the unborn is all that the Court needs to restore the rule of law, so that "human being" and "person" will finally mean the same thing in Fourteenth Amendment jurisprudence.

If the experience of *Brown v. Board of Education* means anything, it at least means that when used properly, judicial review can restore the rule of law when the Supreme Court has grievously erred in a prior case. In the aftermath of *Brown*, Yale Law Professor Alexander Bickel in 1962 approved the Supreme Court's use of judicial review to restore justice to the law.[977]

It can happen again. Law is intended to serve justice; injustice must never define or serve the law.

XXXVI. When Human Being and Person Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence: Equal at Last

Opinion of this Honorable Court

Before this court are cases that arise in different ways, premised on different facts and unique personal circumstances. A common legal question justifies their consideration together in this consolidated opinion.

---

[972] *Id.* at 128-29.

[973] *Id.* at 129.

[974] *Id.* at 128.

[975] *Id.* at 127 (emphasis added).

[976] New Jersey v. Loce, 267 N.J. Super. 102, 630 A.2d 843 (N.J. Super. Ct. Law. Div. 1991), *mod. & aff'd* 267 N.J. Super. 10, 630 A.2d 792 (N.J..Super. App. Div. 1993), *cert. denied* State v. Loce, 134 N.J. 563, 636 A.2d 520 (1993), *cert denied sub. nom*. Loce v. New Jersey, 510 U.S. 1165, 114 S. Ct. 1192 (1994).

[977] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 237-38 (2d ed.1962).

In each of these cases, embryos and fetuses, unborn members of the human race, through their legal representatives, seek the right to life and admission to birth, which carry with them the conferring of citizenship and legal personhood. In each case, the unborn are denied the right to life, and face the risk of death, depending on whether the unborn are chosen for birth.

Until birth, the unborn are segregated from the rest of the human race, and are inferior to those who have been born, because of their pre-born physical condition, stage of biological development, and denial of constitutional rights. Until birth, the unborn are not only separate, but also are also unequal to those already born, who exercise their constitutional rights of liberty to decide the fate of the unborn. This segregation prior to the time of birth is alleged by the plaintiffs to deny them equal protection of the law, and the right to life contrary to the Fourteenth Amendment of the United States Constitution.

In previous cases, notably *Roe*, *Doe*, and *Casey*, this court has denied relief to the unborn on the basis they are not persons and thus do not merit protection under the United States Constitution. The court has justified denying relief to the plaintiffs on the basis of abortion law jurisprudence that recognizes a right to privacy in the pregnant woman that gives her preferential legal rights over any person and over any non-person child that she carries within her womb. This right to privacy, together with the right to liberty, grants the pregnant woman in effect the legal license to kill her unwanted unborn human progeny for any or no reason at all. The uncertainty of unborn human beings to the continuation of their existence until birth is common to all the unborn that are similarly situated. In this respect, the law treats all the unborn equally.

The plaintiffs contend that human life prior to birth in a state of "separate and unequal" is immoral, contrary to the inherent dignity of every human being, and violates the spirit of the Declaration of Independence, which declares that people are "created" equal, and not merely "born" equal. Because of the importance of this issue, this court assumes jurisdiction to consider whether the unborn are to be granted constitutional personhood pursuant to the Fourteenth Amendment.

In approaching this problem, we cannot turn the clock back to 1868 when this Amendment was adopted, or even to 1973 when *Roe* and *Doe* were decided. We must consider the status of the unborn in light of scientific knowledge of when human life begins. We also need to recognize the millions of deaths caused by abortion, in vitro fertilization, cloning and contraceptives, and the present place of the biotechnological industry in American society that utilizes live fetal tissue harvested from abortions and the mass destruction of embryos for stem cell research, the development of new vaccines, and cloning.

Does the segregation and unequal treatment of unborn human beings deprive the unborn of the right to life and equal opportunity to be born? We believe that it does. . . .

We conclude that in this matter of human dignity and respect for others, there is no place for the doctrine of "separate and unequal" to discriminate against the unborn, to take their lives prior to birth, and to treat their bodies as the property of others to be utilized for the advancement of science and for the betterment of those already born. Only by conferring constitutional personhood from the moment of conception until natural death, will all human beings enjoy the equal protection of the laws guaranteed to all persons. This disposition makes it unnecessary to determine whether being "separate and unequal" violates the Due Process Clause of the Fourteenth Amendment.

"All truths are easy to understand once they are discovered; the point is to discover them."[978]

Let us hope the Supreme Court of the United States discovers the truth, equates the meaning of human being with person in the Fourteenth Amendment, and conforms to the rule of law.

XXVII. Beyond Personhood

While it is beyond the scope of my discussion on the attainment of personhood to comprehensively examine in detail a post-personhood world, it is prudent to outline in a general way future anticipated battles over the practice of abortion.

Lest anyone think the abortion question is once and for all resolved when unborn human beings are recognized as persons, sober reflection is called for. Attaining constitutional personhood will not be the final chapter in the right to life of the unborn human being, but the beginning of a new book. Yes, fetuses and embryos will have a constitutionally guaranteed right to life under the Fourteenth Amendment. But even a right to life may not necessarily protect the unborn from harm. Justice Blackmun may have been premature in suggesting the case for abortion collapses once the unborn human being attains constitutional personhood, if credence is given to emergent new views that justify the abortion of constitutional persons.

Let us assume that one day the Supreme Court will use its power of judicial review to declare that "person" means human being, and "human being" includes new human life from the time of conception. On a plain textual interpretation, the Fourteenth Amendment could be understood to mean that all unborn human beings are now constitutional persons. Henceforth, no state shall deprive any unborn human being, of life, liberty or property, without due process of law. The impact on abortion would be immediate, for an embryo's or fetus's constitutional right to life would conflict with a mother's privacy right and personal liberty to choose an abortion. When one contemplates the millions of unused frozen embryos stored awaiting implantation, scientific use or fatal disposal, these practices may have to end because they violate an embryo's right to liberty. I use the word "liberty' because these embryos are confined to an unnatural state that prevents them from developing into maturity.

---

[978] Galileo Galilei, at http://www.brainyquote.com/quotes/authors/g/galileo_galilei.html.

In this new era, no state may deny to any unborn human being within its jurisdiction, the equal protection of the laws. Of great importance, is the word "protection." This is significant, because the unborn persons need protection in a very real way from the violence of abortion. My textual interpretation of the Constitution does not read "equal treatment' of the laws, but "equal protection" of the laws. Given the vulnerable condition of unborn human beings, who cannot defend themselves, and their need to be protected from violence in the womb or birth canal, the first line of defense from harm would logically rest on the Equal Protection Clause, which unlike the Due Process Clause, has no procedural qualifier that may dilute the promised protection.

A. Is There an Affirmative Government Duty Under the Fourteenth Amendment to Protect Unborn or Born Persons?

In 1989, the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*,[979] decided a Wisconsin case based on the right to liberty in the Due Process Clause. The claim was advanced by a severely injured child who suffered repeated physical abuse from his biological father who had custody of him. Four-year old Joshua was known to government social workers as a child in need of protection, and was left at risk, in violation of an alleged positive constitutional duty to protect young Joshua from domestic danger.

Writing for the majority, Chief Justice Rehnquist characterized the claim as "invoking the substantive rather than the procedural component of the Due Process Clause."[980] An additional argument that Joshua was entitled to receive protective services in accordance with Wisconsin's child protection statutes was raised for the first time in the petitioner's brief to the Court and was dismissed without being heard on the merits.[981] Noticeably absent was any argument based upon a denial of equal protection.

Joshua lost his case. The Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[982] This result makes sense only by understanding the political theory faithfully espoused by the Court. According to the prevailing majority of the Court, the purpose of the Due Process Clause is to protect persons from oppression originating from the Government, not from harms caused by one individual to another. In other words, the Due Process Clause is "to protect the people from the State, not to ensure that the State protected them from each other."[983] The responsibility to protect people from one another was left to the various legislatures, and the democratic political process.[984] In this manner, the

[979] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
[980] *Id.* at 195.
[981] *Id.*
[982] *Id.* at 195.
[983] *Id.* at 196.
[984] *Id.*

Supreme Court signaled that legislation could be passed to impose affirmative duties to protect the weak and vulnerable from the harm caused by physical violence.

The Court relied upon a body of jurisprudence[985] to show there is an unbroken line of authority establishing that there is no affirmative right to governmental aid to guard against the loss of life, liberty and property—interests that the Government itself may not take away without due process of law. The Court concluded that a State's failure to protect an individual against private violence did not constitute a violation of the Due Process Clause.[986]

Of significance is footnote 3 in the Court's decision, which flagged the curious omission and failure of the petitioner to argue that "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." The message is clear. If born persons, such as Joshua, qualify as a "disfavored minority," (as do aliens and racial minorities) and are vulnerable to physical abuse leading to grievous bodily harm or even death, a claim based on equal protection may succeed.

In *Yick Wo*, the Supreme Court denounced any untrammeled arbitrary power wielded at will by the powerful over any weak person. Speaking for the Court, Justice Matthews held that the Fourteenth Amendment protected every person, not just citizens.[987] This is significant because unborn persons are not citizens, and fall within the protection of the Fourteenth Amendment. Having regard to the "nature and theory of our institutions of government," Justice Matthews held there was no room for "the play and action of purely personal and arbitrary power."[988] This is also significant, because abortion fits this description of "personal and arbitrary power."

Had Joshua DeShaney's case been framed as an equal protection claim, it is possible he could have succeeded. Domestic violence that harms a child amounts to "purely personal and arbitrary power" that violates the rule of law and Joshua's constitutional entitlement to equal protection.

The rule of law required nothing less than "equal and just laws"[989] to secure the fundamental rights to "life, liberty and pursuit of happiness."[990] Indeed, without equal protection available to the weak person to guard against oppressive and discriminatory conduct from the strong person, there can never be justice as

---

[985] Harris v. McRae, 448 U.S. 297 (1980) (A state has no obligation to fund abortion or other medical services under Due Process Clause of the Fifth Amendment); Lindsey v. Normet, 405 U.S. 297 (1980) (A state has no obligation to provide adequate housing under Due Process Clause of the Fourteenth Amendment); and Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders").

[986] *DeShaney*, 489 U.S. at 197.

[987] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1879).

[988] *Id.*

[989] *Id.*

[990] *Id.*

required in a rule by law society.[991] Strict adherence to known legal rules and self-imposed blindness to justice characterize rule by law, a position taken by the Court in *DeShaney*.[992]

Not having rested their case upon the Equal Protection Clause, the Petitioners contended in the alternative that even if the Due Process Clause did not impose an affirmative obligation on the State to protect the general public from private harm, such a duty may arise from "special relationships" created on an individual basis.[993] In Joshua's case, it was argued there was a special relationship, for the State was aware that Joshua was being abused by his father, and having undertaken to protect Joshua from this danger, its abdication of protection amounted to a violation of due process that "shocked the conscience."[994]

This argument was rejected. The cases relied on by Joshua's attorneys were not helpful,[995] for Joshua was never taken into governmental custody and deprived of his liberty. Only these circumstances would have triggered an affirmative action to protect, to substitute for an individual's inability to look after himself, resulting from the government's decision to deprive a person of liberty.[996] Since Joshua was not incarcerated in jail or confined to a mental hospital against his will, but simply residing at home with his family, he was presumably able to care for his basic needs, including his safety.

How a four year old boy could look after his own safety was not addressed by the Court. Instead the Court focused on the fact that Joshua's father was not an agent of the state, the state had no role in the creation of the dangers that faced Joshua, nor did the state do anything to increase his vulnerability to harm.[997] Had Joshua been removed to a foster home operated by state agents where he might have suffered harm, he would then have been in a comparable situation to being jailed or institutionalized, resulting in an affirmative duty to protect.[998]

Again, the Court sent a signal there was another way the case could have been successfully framed. Under tort law, a duty to protect Joshua may exist where the

---

[991] A minimum requirement for establishment of rule by law is equality among all persons. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 13 (1996).

[992] This philosophy is followed by Justice Scalia. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[993] *DeShaney*, 489 U.S. at 197. Reliance was placed upon *Martinez v. California*, 444 U.S. 277 (1980), which was dismissed on the grounds of remoteness, leaving open the implication there might be an affirmative duty to protect in appropriate circumstances.

[994] *Id*.

[995] *Id*. (Citing Estelle v. Gamble, 429 U.S. 97 (1976) (state required to provide medical care to incarcerated prisoners); Youngberg v. Romeo, 457 U.S. 307 (1982) (state is required to protect the safety of institutionalized mental patients); Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983) (suspects injured while being apprehended by police and held in police custody are entitled to medical care)).

[996] *Id*. at 200.

[997] *Id*. at 201.

[998] *Id*.

state voluntarily assumes to protect Joshua from his father.[999] Failure to provide adequate protection could result in liability where the state was negligent. In addition to tort law, the state legislature and the courts may impose an affirmative common-law duty upon its agents to protect children.[1000] The Court cautioned that the Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation."[1001] Once again, the Court drew counsel's attention to the fact that the wrong ground was chosen to advance Joshua's petition for redress.

In dissent, Justice Brennan argued that governmental inaction could be just as oppressive as action, for both avenues could lead to governmental abuse that violates the Due Process Clause.[1002] A state may not undertake to perform a vital duty and then ignore its responsibilities.

Justice Blackmun too added his dissent, urging a sympathetic reading of the Due Process Clause that accorded with fundamental justice, for compassion need not be irrelevant to judicial decision-making.[1003]

Perhaps the legacy of *DeShaney* is not so much what the Court actually decided, but what it did not decide, for the Court held itself captive to the least persuasive legal argument raised by the legal representatives of young Joshua. *DeShaney* does not stand in the way of the protection of embryos and fetuses who may acquire constitutional personhood; rather it serves as a lighthouse to warn future litigants away from the rock of substantive due process and shines its guiding light to the path of equal protection that provides a safe harbor against private violence toward the unborn.

The Fourteenth Amendment imposes a positive duty to protect unborn persons. *DeShaney*, when properly understood, does not block the legal protection of unborn constitutional persons. The Equal Protection Clause imposes an affirmative government duty to protect unborn persons. Since abortion was elevated to a constitutional right, unborn children as a class have been the victim of invidious discrimination and violence. As persons, they are members of a politically disenfranchised discrete and insular minority.

Joshua, as a born constitutional person, had a fundamental right to his life and to the security of his person. The Equal Protection Clause imposed an affirmative positive duty upon the government to protect him, for he was in a position of inequality to someone who was far stronger than him, who could not be resisted. Unfortunately, no such claim was made on his behalf, and so his claim failed.

---

[999] *Id.* at 201-02.
[1000] *Id.* at 202.
[1001] *Id.*
[1002] *Id.* at 211-12.
[1003] *Id.* at 213.

B. Application to Abortion

If one accepts the premise that abortion is the ultimate form of child abuse (for it violently takes the life of an unborn person), then the *DeShaney* case and its negative rights theory will be relied upon by those who wish to argue that the case for abortion is still valid. Supporters of abortion argue that the Fourteenth Amendment does not impose an affirmative duty upon the states to defend the lives of unborn persons, for the *DeShaney* Court held that it is left to the various states. Depending on the state, abortion may remain legal, if liberal states like New York choose not to impose affirmative duties of care and protection upon its agents. Majoritarian politics will initially determine which states will attempt to keep abortion legal, or ban it altogether.

Abortion supporters may attempt to rely upon *DeShaney* for the proposition that unborn persons cannot rely upon substantive due process in the Fourteenth Amendment for protection. Abortion abolitionists will argue that the *DeShaney* opinion is wrong, and that the unborn person is entitled to positive protection under both the Equal Protection Clause and the Due Process Clause.

The abolitionist's argument may go something like this. The *DeShaney* opinion is an affirmation of the theory of the Supreme Court's decision in *Slaughter-House* that accepted Calhoun's view of state's rights over the "new birth of freedom" envisioned by President Abraham Lincoln. In this new era, states can no longer pass laws that deny equal protection or deny life or liberty to oppressed persons.[1004]

At the root of the negative rights theory espoused by the Supreme Court in *DeShaney* is a disregard of the context in which the Fifth Amendment was adopted in 1789 and context in which the Fourteenth Amendment was passed in 1868.[1005] The *DeShaney* Court wrongly manipulated the original understanding of the Fourteenth Amendment's Due Process Clause by "construing it in light of the history of the Fifth Amendment Due Process Clause."[1006]

The Fifth Amendment was intended to limit the power of the federal government to intervene in the private lives and choices of persons, consistent with a "negative" rights theory that allowed slavery to flourish. On the other hand, the Fourteenth Amendment was intended to give the federal government the power to protect the fundamental human rights of persons from infringements of life and liberty by both the various states and private parties, consistent with a "positive" rights theory that imposed an affirmative duty upon the government to protect human beings.

Thus, the Fourteenth Amendment radically altered the American constitution by authorizing federal protection of life and liberty, consistent with the abolition

---

[1004] Michael J. Gerhardht, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution,* 43 VAND. L. REV. 409, 422 (1990).

[1005] "The two due process clauses have different histories, different framers and rely on different conceptions of federalism." *Id*. at 426.

[1006] *Id.*

of slavery, and arguably consistent with equal protection for the unborn person. Even though the privileges and immunities clause was eviscerated in 1873 by the Supreme Court in *Slaughter-House*, that clause applied only to citizens. Unaltered was the basic structure of the Fourteenth Amendment, which demanded a positive interpretation to enforce the right to life for all persons, whether based on the Equal Protection Clause or the Due Process Clause.

If evidence is needed that the central purpose of the Fourteenth Amendment is affirmative action to protect equality, Article 14(5) supplies proof of that intent, by giving Congress the power to enforce the provisions of Article 14(1). For example, action was taken by Congress after the Civil War to pass legislation designed to protect newly freed African American slaves from being terrorized by private persons who belonged to the Ku Klux Klan, for several states failed to protect blacks from losing their lives to private violence.[1007] This kind of direct action against private individuals was opposed by the Supreme Court, which initially limited federal jurisdiction to the supervision of state laws.[1008] This left the common law to resolve harm inflicted by one private party upon another.

Eventually the Supreme Court, when faced with repeated situations where a victimized person could not defend himself or herself against discrimination and violence inflicted by a private party, held that Congress possessed the power under 14(5) to punish purely private conduct that interfered with the exercise of Fourteenth Amendment rights.[1009] In 1994 (when fetuses were not constitutional persons), the Supreme Court decided that private individuals who conspired to block access to abortion providers, to deny women their constitutional right to have an abortion, were subject to federal criminal laws.[1010] Presumably, the reverse would be true, once fetuses attain constitutional standing as persons, so that criminal laws designed to protect the unborn person's constitutional right to life will prevail over a claim of unrestrained liberty by its mother. If the Fourteenth Amendment was once (and presumably still is) available to remedy state and private discriminatory action against persons based on race in earlier times, then at some future date, when the constitutional personhood of the unborn become a reality, the Fourteenth Amendment may be used as a sword (as opposed to a shield) to prevent discriminatory lethal action against unborn persons.

[1007] Civil Rights Act of 1875, 18 Stat. 335, §§1 & 2 (1875).

[1008] United States v. Stanley, et al., 109 U.S. 3 (1883) (Civil Rights Cases).

[1009] United States v. Guest, 383 U.S. 745, 782 (1966) (Clark, J., concurring) (Congress may punish purely private conspiracies to violate the Fourteenth Amendment). *See also* United States v. Price, 383 U.S. 787 (1966) (collaboration with public officials); Griffin v. Beckenridge, 403 U.S. 88 (1971) (upholding civil remedy against purely private conduct for conspiracy to deny equal protection of the laws).

[1010] National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

C. The "New" Moral Case for Aborting a Constitutional Person

Anticipating that one day unborn human beings may attain constitutional personhood, some contemporary advocates of abortion have discarded the old moral arguments of choice, privacy, autonomy and liberty in favor of a right to self-defense against "the non-consensual invasion, appropriation, and use" of a mother's body by an unwelcome baby.[1011] Taking the scholarship of Judith Jarvis Thomson to a more sophisticated level are Eileen McDonagh and Robin West, who construct an argument that morally justifies the taking of another person's life, even if that other person is a constitutional equal.[1012] If life trumps liberty, then self-defense trumps constitutionally protected life itself.

This strategic shift is required to avoid capitulating to the concession made by counsel and the dicta of Justice Blackmun in *Roe v. Wade* that if a fetus were to acquire constitutional personhood, the legal case for abortion would collapse.[1013]

The case for abortion against an unborn person rests upon the assumption that unwanted pregnancy is a harm that is "tantamount to a non-criminal assault."[1014] A pregnant woman thus has the moral right to destroy her unborn child, for it will act as a parasite to use and appropriate her body. For the pregnant woman will suffer physical, chemical and emotional changes that all carry a risk, however remote, of harm, both temporary and permanent. Just as a pregnant woman is entitled to defend herself from an external assault, she is equally entitled to defend herself from an internal assault. It does not matter that the attacker is a human being or a constitutional person. The only thing that matters is self-defense.

The right to life of unborn persons is subordinate when it comes to self-defense. Since the state has a responsibility to protect its people from danger, the state is presumably obliged to fund abortions, for unborn persons threaten the bodily integrity of pregnant women. Abortion is the principal means of defense. The amount of the funding remains a policy question determined by the state.

A key component to this new abortion rights theory is the question of consent. Just because a woman may consent to sexual intercourse, it does not follow that she implicitly consents to becoming pregnant. Pregnancy is more than a natural condition; it is "an institution, obligation, and condition"[1015] that requires a "full and voluntary consent."[1016]

By analogy, women do not consent to lung cancer, even if they choose to start smoking. Women do not consent to being eaten by a grizzly bear, even if choosing to

---

[1011] Robin West, *Liberalism and Abortion*, 87 Geo. L. J. 2117 (1999).

[1012] Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 Alb. L. Rev. 1057 (1999).

[1013] Roe v. Wade, 410 U.S. 113, 156-157 (1973)

[1014] West, *supra,* note 1011.

[1015] *Id.* at 2120.

[1016] *Id.*

trespass upon a grizzly's territory. Women do not consent to losing their home to a hurricane, by choosing to live in a place where there is a high risk of hurricanes.

In theory, I suppose all that is true. I do not consent to harm, even though I may choose to snorkel in the Florida Keys and get attacked by a shark. I do not consent to harm by refusing to wear a motorcycle helmet when I choose to ride my Harley Davidson on the Interstate and have bad luck, and lose control on a slippery patch of oil. I do not consent to harm if I get fat from choosing to eat Big Macs and die at an early age of a heart attack.

More important than the self-evident wisdom or stupidity of actions is the interrelationship between "choice" and "consent." Is not consent just a new code word for choice? I will return to this point later on.

Worthy of serious consideration is the organ donor argument. Just as a mother has the moral right to refuse donating a body part for an organ transplant to benefit her born child so does a pregnant woman have a moral right to refuse to host an unborn child in her body. No one would seriously contest any person's right to refuse organ donation. We do not live in a society where organs may be harvested without the consent of the living. Even incompetent persons who lack the ability to give consent are not compelled to serve as a living warehouse of body parts,[1017] except in the extraordinary case where an organ donation is presumed to be for the donor's benefit.[1018]

However, there is a moral difference between inaction (refusing consent to permanently donating a body part to extend the life of an unhealthy person physically external to you), and a violent premeditated act (terminating the life support of a healthy person—an unborn baby—that requires a temporary accommodation for about 40 weeks). It is one thing for a donor—a mother—to voluntarily sacrifice a body part, even at the risk of death, and give the "gift of life" to another born person. It is another thing for that same donor to give the "gift of death"—an abortion—and demand that her unborn child give up its life, without its full and informed consent, to accommodate the wish of the mother who refuses consent to remain pregnant.

Such a distinction has long been recognized as a matter of law: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." [1019]

The above discussion is distinguishable from the case of inaction when a mother chooses to do nothing when her unwanted child accidentally suffers a potentially fatal allergic reaction to peanuts, and deliberate action taken by a mother to stab and kill her unwanted child. In these last two examples, I suggest there is no moral

---

[1017] In Re Guardianship of Pescinski, 226 N.W. 2d 180 (Wis. 1975).

[1018] Strunk v. Strunk, 445 S.W. 2d 145 (Ky. 1969).

[1019] Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (Rutledge, J.).

difference, for the mother has intent to cause death, and the method of accomplishing death in the first case is inaction, and in the second case, is action.

The consent theory falls apart when one considers the fact that consent is not exclusive to the pregnant woman, for there are two legal persons involved. In the case of the gift of life, it makes sense that the donor is not coerced into making a bodily sacrifice to benefit a potential recipient, if born, alive and unhealthy. In the case of the gift of death, the healthy potential recipient also must not be coerced into making a bodily sacrifice, especially the ultimate sacrifice of death.

Just as the burden of proof may shift in a trial on an evidentiary issue, the "burden of consent" may shift from the donor to the recipient. In the case of organ donation between a minor child and a parent, leaving aside the practical concerns of compatibility which may render this event highly unlikely, no coercion is present if the mother willingly consents and the minor child willing accepts the gift of life. However, the burden of consent shifts in the case of voluntary abortion, a very common occurrence. The mother is willing to give the gift of death, and the minor unborn child is, without the protection of constitutional personhood, coerced into losing its life, liberty and very existence. Personhood changes everything. The rule of law will not tolerate a situation where one person is coerced into giving up his or her life so another person may escape the responsibility that comes with motherhood.

Where is the evidence that any fetus would ever consent to an abortion? Any suggestion that a fetus would give its free and voluntary consent to a possibly painful and horrible death is nothing but fanciful speculation and rationalization. In the absence of any indication of consent to abortion, the fetus ought to be presumed to prefer the status quo of life. Remember the fetus did not ask to be conceived. It did not choose to invade the bodily integrity of its mother. The presumed lack of consent from the fetus renders any aggressive act by the mother as an assault, for the act of abortion is an invasion of a fetus's bodily integrity that cannot be physically resisted. The unborn person, as an incompetent minor child, either viable or not viable, cannot give consent to being aborted. There is no clear and convincing evidence of a fetus's wishes available in this situation.

No substituted consent is possible, either on the basis of due process[1020] or equal protection. Normally, the natural bonds of affection between a mother and her unborn child lead to decisions that are in the best interests of her unborn child.[1021] However, parental discretion ends when child abuse begins, for at that point the law intervenes to protect the lives and health of young persons.[1022] For these reasons, the fetus as a constitutional person is entitled to rely upon the Equal Protection Clause of the Fourteenth Amendment to protect it from the fatal abuse inherent in the act of abortion.

[1020] Cruzan v. Missouri Dep't of Public Health, 497 U.S. 26, 286 (1990).

[1021] Parnam v. J. R., 442 U.S. 584, 602 (1979).

[1022] Wisconsin v. Yoder, 406 U.S. 205 (1972), and *Prince*, 321 U.S. at 158.

This result is consistent with the Supreme Court's decision in *Washington v. Glucksberg*,[1023] the leading case on assisted suicide. Since it is currently unlawful to kill a born person who wants to die, a compelling case can be made that it is also unlawful to kill an unborn person who presumably does not want to die.

The consent theory utterly collapses when considering the case of the pregnant woman who consents to sex *and* consents to pregnancy. Are not consensual pregnancies just as potentially harmful to the health of pregnant women as are non-consensual pregnancies? When regarded in this way, it becomes immediately apparent that the real issue is not consent to the risk of pregnancy, but whether the unborn child is wanted or not. In other words, the issue reverts back to a simple matter of choice. In the end, this "new" feminist theory of "consent" is the recycled "old" theory of "choice," dressed up to circumvent the constitutional right to life of unborn persons.

D. The Jurisprudential Argument

Constitutional law scholar Cass Sunstein recognizes that there are serious problems with grounding the right to an abortion in privacy theory and offers an alternative legal model based on equal protection.[1024] His argument rests on the observation that without the right to an abortion, women's bodies are co-opted for the protection of fetuses, women's reproductive capacities are appropriated for use and control of others, and no similar disability is forced upon men.[1025] The advantage of framing the issue of abortion in this way is that there is no need to take a position on whether the fetus is a person or even a human being. Abortion is then not the murder of an unborn person, but a simple refusal to provide assistance to an unwelcome intruder. Even if the law required benevolent bodily assistance to the unborn, it is unfair that this entire burden rests upon women by sheer genetic determination of sexual identity. Consequently, any law that prohibits abortion is unconstitutional, due to the cumulative effects of sexual discrimination and other related factors.[1026]

Sunstein argues that motherhood ought to be chosen, not destined by biological assignment.[1027] He maintains that parents are not forced to donate a kidney to save the life of their born children.[1028] Compelled organ donation offends personal autonomy,[1029] for there is no legal obligation to be a Good Samaritan. He raises the distinction between murder and the failure to give aid, and the baselines upon which these distinctions turn.[1030] Abortion is perceived as murder, only if one ac-

[1023] Washington v. Glucksberg, 521 U.S. 702 (1997).

[1024] Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

[1025] *Id*. at 31-32.

[1026] *Id*. at 32.

[1027] *Id*. at 33.

[1028] *Id.* at 34.

[1029] *Id*.

[1030] *Id*. at 35.

cepts the constitutionally impermissible stereotype that a women's role is to bear children.[1031] Just as a compulsory military draft that excludes women is unconstitutional, so should compulsory pregnancy, argues Sunstein, who concedes, "To be sure, nothing is quite like pregnancy."[1032]

The case for abortion rests on the idea of sexual equality. Laws protecting unborn persons from abortion impact only women. This is sexual discrimination. The burden of bodily cooptation falls entirely upon women. Even if the fetus is a human being and a future constitutional person, the bodies of women cannot be conscripted to protect the fetus.

Women are not normally conscripted to have sex. Even so, let us analogize to the case of the male soldier who is conscripted against his will to serve in the army. He faces a risk of harm from injury or death itself—events he does not consent to. The soldier is expected to defend those under his protection from the enemy. It would be unthinkable and a crime for him to kill those very persons he has been conscripted to defend.

The best test of the soundness of the Sunstein theory is pregnancy occasioned by non-consensual sex, the classic case of forcible rape. The rape itself is unquestionably a criminal assault. But is the resulting pregnancy a continuation of that invasive assault?

Arguably, the unborn person may be seen as a new perpetrator, who picks up the previous assault where the rapist left off. In this manner, there are two persons who are part of a continuous assault, one born, being the rapist, and the other, unborn, being the fetus. Is not abortion justifiable under these conditions, even if the fetus is a constitutional person with its own independent right to life?

The difference lies in the guilt of the rapist and the innocence of the fetus. Why should an innocent person suffer the death penalty for the crime of a guilty person? There is no legal principle that permits punishing the innocent for the crime of the guilty. This result would never occur in a society governed by the rule of law. There can never be justice or the rule of law if the law punished the factually and morally innocent.[1033]

To be fair, Sunstein's argument in favor of a general right to abortion in the case of rape assumes the fetus is not a constitutional person. If the unborn were constitutional persons, Sunstein would have to admit that unborn children would have "a claim of inequality sufficient to override the imposition upon women."[1034] As much as women are politically vulnerable and biologically conscripted to bear the burden of pregnancy, Sunstein acknowledges "no group is as politically weak or generally vulnerable as unborn children."

[1031] *Id.*

[1032] *Id.* at 43-46.

[1033] *See generally*, Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice,* 12 Geo. Mason U. Civ. Rts. L. J. 233 (2002).

[1034] Sunstein, *supra*, note 1024, at 41.

If in the case of non-consensual sex there is no moral justification to kill the fetus, then in the case of consensual sex, there is also no moral justification possible. Getting pregnant is an inherent risk of engaging in sexual intercourse. Can self-defense be seriously argued, when the aggressor is identified as a morally innocent person that has no capacity to form any intent to cause any sort of harm? The rule of law forbids the imposition of a death sentence without due process upon any innocent person. Why should there be any distinction in this respect between born and unborn persons? With the attainment of personhood, an unborn human being is not a "thing" that can be removed just like an invasive cancerous tumor.

The second branch of Sunstein's argument is the demand by women to be treated the same as men under the Equal Protection Clause of the Fourteenth Amendment. What matters is equality between the sexes. Just as a man has a right to defend himself from the physical appropriation of his body or a part thereof, so does a woman. Equality demands equal treatment of both men and women from bodily invasions.

There are serious problems with this argument. The Constitution lacks a provision declaring equality between persons of the male or female sex. Even after the adoption of the Fourteenth Amendment, sexual equality did not follow, for personhood did not guarantee political or occupational equality.[1035] In 1920, the Nineteenth Amendment conferred the right to vote upon women, but did not grant equal rights to women on a global basis. An attempt to rectify this under a proposed Equal Rights Amendment in the 1970's failed to obtain enough support for ratification. Illustrating the resistance to full equality was the Supreme Court's decision in *Geduldig v. Aiello*,[1036] which acknowledged there are biological differences between men and women, and the fact that only women could get pregnant did not amount to invidious discrimination requiring a constitutional remedy. So long as men and women are not similarly situated with regard to the capacity to beget and bear children, the Supreme Court can be expected to adhere to established precedent that discriminates between men and women on the basis of sex.[1037] For this reason, even in the case of consensual sex, men may suffer criminal sanctions, while women may escape criminal liability, for they assume the risk of pregnancy and its consequences. Sunstein agrees there is no viability to this line of argument, "With respect to the capacity to become pregnant, women and men are not similarly situated. An equality argument is therefore unavailable."[1038]

[1035] Bradwell v. State, 83 U.S. 130 (1873) (denial of admission to bar to practice law); Minor v. Happersett, 88 U.S. 162 (1874) (denial of right to vote in state elections).

[1036] Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnant women were not entitled to disability benefits, for pregnancy is a normal physical condition, not meriting a remedy under the equal protection clause).

[1037] Michael M. v. Superior Court, 450 U.S. 464 (1981) (criminal liability for statutory rape exclusively imposed on males is constitutionally permissible, for pregnancy consequences fall primarily on the female party to the consensual sex).

[1038] Sunstein, *supra*, note 1024 at 42.

The way around this, suggests Sunstein, is to discard male biological capacity as the baseline to measure equal treatment between the sexes.[1039] Recognizing the reality of abortion as a social practice that has existed since time immemorial may be a more appropriate baseline to answer the question of whether laws prohibiting abortion constitute sexual discrimination and offend against the Equal Protection Clause.[1040] The practical results of prohibiting abortion will return society to a time when pregnant women may die from unsafe illegal abortions or are forced to travel to a jurisdiction where abortion is both safe and legal.[1041]

Conclusion

The rule of law does not demand equal treatment between the sexes, if that treatment results in injustice and oppression of the weakest members of society. What matters to unborn persons, is not equal treatment with their mothers, but equal protection so that their lives and bodily integrity are saved from abortion. The moral and jurisprudential arguments that attempt to legitimate abortion against unborn persons must be rejected, for no person, born or unborn, is then safe from a claim of self-defense.[1042]

It is not the role of the state government to protect pregnant women from alleged private violence represented by the biological condition of pregnancy. Even if it can be successfully argued that pregnancy must be consensual for it to be permitted to continue, the *DeShaney* case has closed the door to any substantive due process claim that pregnant women are constitutionally entitled to rely on the state to protect them from private violence within their womb.

[1039] *Id*. at 43.

[1040] *Id*. at 43-44.

[1041] Sunstein relies upon Lawrence (Larry) Lader, *Abortion* 3 (1966); and Richard H. Swartz, *Septic Abortion* 7 (1968) to suggest that 5,000–10,000 women died annually from abortion related deaths prior to Roe v. Wade. This figure is flatly repudiated by Dr. Bernard Nathanson, who together with Larry Lader founded NARAL, the National Association for the Repeal of Abortion Laws: "How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000 to 10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose the others did to [sic] if they stopped to think about it. But in the morality of our revolution, it was a *useful* figure, widely accepted, so why go out of our way to correct it with honest statistics? . . . In the last year before the Blackmun era began, 1972, the total was only 39 deaths." Bernard Nathanson, Aborting America 193 (1979). The estimated number of aborted fetuses is much higher, from 200,000 to 1.2 million per year, throughout the 1950's and 1960's, according to a report issued by the Alan Guttmacher Institute, a non-profit pro-choice advocacy organization. *See Lessons from before Roe: Will Past Be Prologue*? at http://www.agi-usa.org/pubs/ib_5-03.html.

[1042] If healthy unborn persons constitute a threat to the well-being of other persons, there is the potential of harm from other classes of persons too. For example, disabled persons may also be perceived to constitute a form of threat to the security of persons who do not wish to assume the responsibility of a caregiver. It is conceivable that a form of self-defense argument may be raised to justify both passive and active euthanasia too.

The reality is that pregnancy is not a criminal assault, and therefore is not a crime. Normally pregnancy is not a disease either, for it is the reproductive phase in the life of a healthy expectant mother.[1043] Pregnancy is a naturally occurring physical condition that is normal, for reproduction is integral to the human condition and essential to the survival of humanity.

If there is any future potential for advancing the case for abortion, it may perhaps be found in the difference between the constitutional status of a person and a citizen. Birth still marks the boundary when an unborn person acquires the privileges and immunities of a citizen. Unborn persons are still not citizens, for only born or naturalized persons qualify for citizenship, and all the privileges and immunities that attach to that status.

In the meantime, by virtue of the Equal Protection Clause of the Fourteenth Amendment, the unborn person will have a superior claim to life over any existing moral or jurisprudential argument in favor of abortion.

[1043] An ectopic pregnancy may be considered a disease. Pregnancy may also be an unwelcome complication in a woman ill from cancer. Some women have chosen to risk death rather than abort their child, and have left an example of unselfish love for the children they have given their lives for. See the story of Gianna Beretta Molla, a physician and mother who gave up her life to save her unborn daughter, *Saint Gianna Beretta Molla,* at http://catholicinsight.com/online/saints/printer_stmolla.shtml and the sacrifice of Rita Fedrizzi, who saved her son, *Catholic Church Praises Woman Who Refused Cancer Treatment, Abortion,* at http://66.195.16.55/nat1151.html.

As Presented at the ***Association of American Physicians and Surgeons*** 62nd Annual Meeting

Stem Cell Research

Featuring:

David A. Prentice, Ph.D.

Family Research Council and Georgetown Medical School

Washington, D.C.

Do ***embryonic stem*** cells hold more potential for medicine than ***adult stem cells***? Dr. Prentice examines ***unsubstantiated claims*** regarding embryonic stem cells and ***cloning*** in regenerative medicine.

Broken Bones and Broken Families

Featuring:

Marvin Miller, M.D.
geneticist for Children's Medical Center, Dayton, Ohio

Francine Yurko and Tammy Crowe Fourman
parents

These three presentations examine the ***causes and consequences*** of ***false accusations*** of child abuse. Dr. Miller looks at the differential diagnosis of multiple unexplained fractures. Ms. Yurko and Ms. Fourman tell their ***personal tales of false accusation.***

TO ORDER: ***VISIT WWW.SHOPAAPS.COM*** **for quick ordering and delivery.**

or fill out the form below and mail with check or credit card information to:

AAPS, 1601 N. Tucson Blvd. #9, Tucson, AZ 85716 or fax (520) 325-4230

Name: _____

Address: _____

City: _____ State: _____

Zip: _____ Phone: _____

Credit Card # _____ Exp. _____

Stem Cell Research	___CD ($15.00)	___DVD ($30.00)
Broken Bones and Broken Families	___CD ($15.00)	___DVD ($30.00)
Other Presentations Available:		
Illegal Aliens and American Medicine	___CD ($15.00)	___DVD ($30.00)
Shaken Baby Syndrome	___CD ($15.00)	___DVD ($30.00)
How Government Corrupts Science and Medicine	___CD ($15.00)	___DVD ($30.00)
Politics of Pain Management	___CD ($15.00)	___DVD ($30.00)
Beyond Biology as Ideology - Is Darwin's theory good science?	___CD ($15.00)	___DVD ($30.00)

www.aapsonline.org AAPS **1 (800) 635-1196**

Be Informed— Stay Informed!

This journal—like few others—concentrates on the ethical and legal problems of today's medical care. Shouldn't you be reading it regularly?

Three times each year, *Issues in Law & Medicine* devotes itself to such vital topics as abortion, assisted suicide, end of life care, and stem cell research. Because of its sharp, specific focus, this journal is cited by more than twenty research or abstracting services, including *Index Medicus*/Medline, LEXIS-NEXIS, and Westlaw. It has simply become too influential for you to ignore.

To subscribe, send a check—$59 for individual rate, $99 for institutional rate—to the address below, or ask for a sample copy. You'll be relieved to find a journal that is, as you are, facing today's tough questions.

ISSUES IN LAW & MEDICINE
3 South 6th Street
Terre Haute, IN 47807-3510

A Publication of the National Legal Center for the Medically Dependent & Disabled, Inc., and the Horatio R. Storer Foundation, Inc.

ISSUES IN LAW & MEDICINE

SOLICITATION OF MANUSCRIPTS

This is a solicitation of original manuscripts for publication. Submissions are welcome from professors, attorneys, health care professionals, and students. Manuscripts must demonstrate critical analysis of current literature and/or court decisions, original thought and logical development of the author's point of view, with relevant general and pinpoint citations. Manuscript text and endnotes must be double-spaced.

Topics of particular interest include abortion ethics and law; AIDS: ethics, duty to treat, and risks to health care professionals; anencephaly and the ethics of organ transplantation; assisted suicide; brain death guidelines for children and adults; treatment decisions for persons who are comatose, in a persistent vegetative state, or otherwise incompetent; conscience clauses for health care personnel; discrimination against persons who are disabled in medical treatment decisionmaking; ethics committees and their role in treatment decisions; euthanasia and decisions to terminate life-sustaining care; genetic counseling; cloning, embryonic stem cell research, adult stem cell research, genetic research and its implication for people with disabilities; genetic testing and screening; genetic therapy; health care ethics; health care allocation and rationing; the human genome project; infanticide and decisions to withhold life-preserving treatment; informed consent and informed refusal of treatment for the incompetent patient; advantages and disadvantages of living wills; ethics of human experimentation and organ transplantation; autonomy and paternalism in physician/patient relationships; quality of life as a standard for treatment decisionmaking; withholding and withdrawal of life-sustaining treatment; withholding and withdrawal of nutrition and hydration; and suicide.

Issues does not cover medical, legal, or ethical issues relating to contraception or surrogate motherhood.

Issues in Law & Medicine is the peer-reviewed publication of the National Legal Center for the Medically Dependent & Disabled, Inc. The National Legal Center is a not-for-profit national support center for persons who are medically dependent or disabled. Issues is devoted to providing technical and informational assistance to attorneys, health care professionals, educators, and administrators concerned with severely disabled persons of all ages who may be subjected to discrimination in the delivery of medical care. Issues is listed in 25 periodical services, including the Index of Legal Periodicals and Index Medicus.

Manuscript and curriculum vitae should be sent to Barry A. Bostrom, J.D., Executive Editor, Issues in Law & Medicine, 3 South 6th Street, Terre Haute, Indiana 47807-3510, or email at bbostrom@bopplaw.com.