Legal arguments for court-proofing a state law against abortion

Now that all five categories of court-recognized finders of facts have unanimously ruled that human life (with constitutional rights) begins at conception/fertilization, with not one American legal authority affirming that it begins any later, it is impossible for any fact to be any more legally "established". If courts *still* "are not in a position to speculate" about "when life begins"*,* [phrases from *Roe*], it is impossible for courts to know *anything.*

This model brief is a glimpse of how a state law making abortion a crime can not only survive in court, but shine a spotlight no judge can dodge, on the legal recognizability of abortion as the legal and moral equivalent of murder.

Abortion law won't fall alone. When the "abortion is legal" mask is ripped off, many who never meant to support the ethics of Hell will leave the party and the anti-religions feeding it.

This process can *begin* not just after the law is enacted and survives the courts, but before the bill is even introduced, as it is proposed and discussed as a campaign issue in the summer.

But for that to happen, the legal arguments able to court-proof the law will need to be previewed in the "findings of facts" of the bill itself.

The history of abortion precedents is a history of judges avoiding that evidence that abortion kills real humans/persons. Lower appellate courts have misrepresented *Roe v. Wade* as having made abortion so absolutely "constitutionally protected" as to make irrelevant whether it is murder.

Roe said the opposite: it challenged fact finders to "establish" "when life begins", and if that is at conception then "of course" states must outlaw abortion. But how much "establishment" is enough? The Supreme Court has been ducking *that* question since 1973. Now that all five categories of court-recognized fact finders are unanimous, nothing can be more "enough".

Roe doesn't even have to be overturned, to stop abortion. It's "collapse" clause just needs to be obeyed by lower courts. That clause is still in force. No alternative rationale can nullify it. It states what will always be obvious.

This model defense contains suggestions for any lawyer or lawmaker serious about outlawing abortion, and anyone else who doesn't see how it could be possible but wants it to be possible badly enough to investigate a proposal. Although this brief is long, in order to attack abortion's alleged legality from every possible angle, you only need to read a couple of pages to glimpse its irrefutability.

This glimpse of a courtroom defense of a law against abortion is tailored to Iowa law, but adaption to the laws of other states will require little change.

(The interesting stuff starts on p. 5 [after 7 unnumbered pages]. The suggested law starts on p. 1. The contents tell you the subjects covered. This model legal brief is laid out somewhat like a Supreme Court appeal. State Attorney Generals defend state laws challenged in court.)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

State of Iowa, Petitioner

vs.

Planned Murderhood of Baser Iowa, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE 8th CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Attorney General of Iowa

Des Moines, Iowa

Footnotes explain the need for separate laws for contraception than for surgical abortion. The recognition of life from conception that will topple surgical abortion will topple contraception.	Question for the Court: "Has the fact that all unborn babies are humans/persons been sufficiently established by juries, expert witnesses, state legislatures, individual judges, Congress, and the absence of any contrary affirmation, to invoke Roe's ruling that state legislatures and courts should now protect their 14th Amendment rights?"

Attorney for the Respondent:
Bay B. Killer, Planned Murderhood, Corporation (a "person")
Jen O. Side Unltd., Attorney for the Killer

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the 8th Circuit Court of Appeals appears at Appendix A to the petition and is reported at Planned Parenthood v. Iowa, #123456. The date the highest federal court decided the case was October 24, 2017. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(b). The trial court entry of judgment is in Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Iowa's arguments are based on and involve the Preamble to the U.S. Constitution, 14th Amendment "equal protection", and 5th Amendment "Due Process". The text of these is in Appendix C. The text of the Iowa law challenged here is as follows: (the underlined and stricken portion is challenged. The unmarked portion is the previous law which is unchallenged.)

> Iowa Code 707.7 Feticide.
> (a) Findings of Fact: The Iowa Legislature finds itself obligated by the 14th Amendment "equal protection of the laws" to protect the Right to Life of all unborn babies since 18 U.S.C. § 1841(d) triggered the "collapse" clause of Roe v. Wade, ending the constitutional protection of abortion, by finding that all unborn babies at all stages of gestation are members of the species homo sapiens. Iowa finds that

SCOTUS recognizes Congress' authority to find facts, and that all precedent including Roe agrees that all humans are persons, and that all legal authorities, and all five categories of court-recognized fact finders – juries, expert witnesses, individual judges, and state legislatures as well as Congress – to the extent they have taken a position on the subject, find unanimously that all unborn babies are humans/persons from conception. Not one American legal authority has ever said *any* unborn baby is *not* a human/person, including Roe which said "we are not in a position to speculate", which is the closest SCOTUS has ever come to ruling on the humanity/personhood of the unborn. In view of this overwhelming, uncontradicted consensus, Iowa must comply with the 14th Amendment by criminalizing abortion; at this point Iowa's legal liability from noncompliance with the Constitution appears to be greater than any legal liability from taking corrective action in advance of a confused SCOTUS.

(b) 1. Any person who intentionally terminates a human pregnancy at any stage of gestation, with the knowledge and voluntary consent of the pregnant person, ~~after the end of the second trimester of the pregnancy~~ where death of the fetus results commits feticide. Feticide is a class "C" felony.[1]

2. Any person who attempts to intentionally terminate a human pregnancy at any stage of gestation, with the knowledge and voluntary consent of the pregnant person, ~~after the end of the second trimester of the pregnancy~~ where death of the fetus does not result commits attempted feticide. Attempted feticide is a class "D" felony.[2]

3. Any person who terminates a human pregnancy at any stage of gestation, with the knowledge and voluntary consent of the pregnant person, who is not a person licensed to practice medicine and surgery or osteopathic medicine and surgery under the provisions of chapter 148, commits a class "C" felony.

4. This section shall not apply to the termination of a human pregnancy performed by a

physician licensed in this state to practice medicine or surgery or

1 Because this section requires proof that a "fetus" has died, it can't physically be the charge when the baby is only days old – too small for humans to detect a corpse, or even to establish that there ever was a body – so even though the verbiage says "at any stage of gestation" the charge can't be made regarding birth control. If birth control is ever to be criminalized it would have to have separate legislation, probably regarding sale, distribution, and/or possession rather than its use or results, which are virtually impossible for human courts to prove. This section would not likely succeed in prosecuting for death by RU486, because confirmation of death can't be 100% certain since pregnancy tests are not 100% reliable; the charge could be attempted murder, but without proof that a baby was killed it could not be murder.

2 This section would criminalize distribution of RU486. Because even if the existence of a baby can't be proved absolutely, the law criminalizes mere intent.

osteopathic medicine or surgery when in the best clinical judgment of the physician the termination is performed to preserve the life ~~or health~~ of the pregnant person or of the fetus and every reasonable medical effort not inconsistent with preserving the life of the pregnant person is made to
preserve the life of a viable fetus. [R60, §4221; C73,...]

STATEMENT OF THE CASE[3]

The Iowa Legislature outlawed abortion in January of its 2017 session. Iowa's governor signed the bill on Sunday, January 22, the 44th anniversary of *Roe v. Wade.* Iowa's law was immediately enjoined from taking effect by a single federal judge. In his expedited ruling, the judge did not address the defense for Iowa's law embedded in section (a). He instead refuted arguments Iowa had not made, that were unrelated to Iowa's actual defense, about what he called "religious" statements made by some lawmakers during the legislature's deliberations.

In uncharacteristically expedited action, the 8th Circuit Court of Appeals ruled on October 24, 2017, leaving the deadline for Iowa's petition before SCOTUS to fall on the 45th Anniversary of Roe v. Wade.

It was never challenged in court that Iowa's law would save unborn human beings. Nor was it ever denied that unborn babies of human mothers

3 Since this is a model defense for a case which has not yet occurred, this section, stating what has happened in the case so far, is of course fiction. However, it contains elements from past cases, and may be prophetic. In this scenario the state law is challenged in Federal court; but state laws are challenged as well in state courts.

are humans, but neither was it ever acknowledged. That was the "element in the room".

Neither the judge nor the Opinion Below rules on whether 18 U.S.C. § 1841(d)[4] legally establishes Iowa's view – that unborn babies of humans are humans/persons – as correct and controlling. Or on Congress's authority to determine this fact. Or on Iowa's reliance on the statute. The record outside Iowa's own briefs omits any mention of 18 U.S.C. § 1841(d).

No federal judge ever acknowledged Iowa's key defense, its fact issue, or its reliance upon federal law, or on Iowa's reliance on Roe v. Wade's "collapse" clause. Iowa is still waiting for a court to rule on the facts and arguments that Iowa has *actually* presented, instead of the straw man which judges have substituted, such as:

> ...a good deal of the evidence at trial dealt with Iowa's religious beliefs, which we find irrelevant in a nation which is not a theocracy.

The alleged "evidence" of "Iowa's religious beliefs" was not submitted *by Iowa* at trial, but by Planned Murderhood, presumably to divert the court's attention from the federal law upon which Iowa relies. Iowa never cited the Bible or any "religious belief" to back any element of its defense.

One doesn't have to be religious to realize that the babies of humans are

4 18 USC§1841(d) ...the term "preborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

humans. One only needs respect for U.S. human law. We are in a land where every legal authority which has taken a position on the subject has unanimously agreed they are.

REASONS TO GRANT THE WRIT

Judges are forcing Iowa to violate the Constitution. The most urgent reason SCOTUS must grant Iowa's writ is that the injunctions of federal judges are forcing Iowa to violate the 14th Amendment of the Constitution, according to *Roe v. Wade.*

> "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

Since the 14th Amendment directly obligates states to protect these rights, preventing a state from protecting these rights is an unacceptable situation in which to place any state. It is tragic enough that Iowa has been out of compliance with the Constitution since at least 2004. For a state to finally realize its noncompliant condition, and promptly make itself compliant, only to be prevented by federal courts from obeying the Constitution and avoiding any further liability for noncompliance, is unfathomable error which must be corrected immediately. How can there be a more "important question of federal law that has not been, but should be,

settled by this Court"?[5]

Lower courts violate Roe by misapplying Roe. A second reason to grant the writ is to correct a long line of appeals courts precedents whose conflict with *Roe v. Wade* was spotlighted by the 2004 federal law, and which continue to prevent states' compliance with the Constitution.

The contrast between *Roe* and the long line of lower appellate court decisions about abortion could not be greater.

Lower courts said that *Roe* made abortion so absolutely constitutionally protected that it is irrelevant whether abortion is in fact murder. *Roe* said the opposite: that if it is proved to be in fact murder, then it is *Roe* that "of course" must become irrelevant.

Roe professed inability to determine "when life begins", thus treating it as a fact question upon which doctors and preachers have more expertise than themselves.[6] Because of SCOTUS' inability to resolve the question, *Roe* invited fact finders to do so, and said abortion's continued legality would hinge on what they "establish"[7].

There are two lines of lower appellate decisions in conflict with

5 Supreme Court rule 10c.

6 "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." Roe v. Wade 410 US 113, 159

7 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

SCOTUS. There are reviews of state laws that have imposed conditions on access to abortion, [ie. parental consent, clinic safety, partial birth] and there are criminal cases where individuals prevented abortions, and argued in their defense that unborn babies are humans/persons, which makes the defense that they were saving lives legally recognizable.

In the latter category, courts said *Roe* made abortion so irreversibly "constitutionally protected" as to make irrelevant all factual evidence of its harm to infant humans/persons, so juries should not hear the evidence or be encouraged to think it matters.

What makes analysis of these criminal cases relevant to Iowa's case is that both categories of cases share in common the manner in which lower courts have ruled irrelevant the fact inquiry which *Roe* said was dispositive.

ARGUMENT IN SUPPORT OF THESE REASONS

Iowa has no more authority to legalize abortion than slavery. The 14th Amendment restrains states from depriving any discrete [distinct, identifiable] class of humans/persons of "equal protection" of their rights, and especially of their *fundamental* rights, beginning with the *most* fundamental right: life. Unborn babies are such a class, according to every American legal authority who has ruled on the question.

It was a finding of Congress which was the final piece of evidence that

turned *Roe's* alleged doubt about "when life begins" into a demand that Iowa obey the 14th Amendment by outlawing abortion. Congress said what Roe said must be said to end abortion. Federal law since 2004 "establishes" the unborn as being legally recognizable as humans/persons:

> 18 USC §1841(d) ...the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

Here is where *Roe* said what must be said for legal abortion to end:

> "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

According to *Roe v. Wade*, now that federal law has "established" that all unborn babies, "at all stages of gestation", are humans/persons, "the fetus' right to life is [now] guaranteed specifically by the [14th] Amendment." That is, it is the constitutional responsibility of states to "guarantee" "the fetus' right to life"; and any state which fails to do so violates the Constitution.

All fact finders agree. 2004 is not when the conflict started; it is when the final category of court-recognized Finders of Facts – Congress, whose fact finding is especially deferred to by SCOTUS[8] – added its voice to the growing

8 ...the existence of facts supporting the legislative judgment is to be presumed...not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators....the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. ...But by their very

consensus of all court-recognized finders of facts that all unborn babies are humans/persons from conception/fertilization, with not one legal authority in America affirming that they are not.

Juries. Although challenges to state laws restricting abortion are not tried by juries, the jury verdicts in criminal abortion prevention [most of which were for blocking doors and trespassing] are relevant records of the consensus of those few juries invited to rule, that human "life [and human fundamental rights] begins at conception/fertilization".

The issue was invoked through the defense claimed in tens of thousands of abortion prevention trials. That defense, often called the Necessity Defense, (In Iowa it is "Compulsion", Iowa 704.10), says what is normally against the law is not, when it saves lives. The contested fact issue, therefore, was only rarely what the defendant did at the abortion doors; it was, rather, whether unborn babies count as lives that merit saving.

That was almost always the *only* contested issue of the trial, and it was a fact issue, and its submission to fact finders was invited by *Roe,* and yet after several jury acquittals, judges stopped allowing defendants to tell juries about their only defense. But before judges started doing that, those early jury

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nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. *U.S. v. Carolene Products,* 304 U.S. 144, 152 (1938)

acquittals established the consensus of juries that all unborn babies are humans/persons.

Is the consensus of Triers of Fact enough to "establish" the fact?

> After the court ruled that it would allow the [Necessity] Defense to go to the jury, the Women for Women Clinic dropped the prosecution. If the defense is permitted, evidence is introduced that life begins at conception. This evidence is rarely contradicted by the prosecution, which is merely proving the elements of criminal trespass. Rather than risk such a precedent, many clinics prefer to dismiss. In fact, defense counsel have admitted that their intent is to bring the abortion issue back before the United States Supreme Court to consider the very question of when life begins, an issue on which the Court refused to rule in Roe... *("Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic",* 48 U.Cin.L.Rev. 501 (1979), in a footnote on page 502. The *Cincinnati Law Review* footnote analyzes the case *of Ohio v. Rinear,* No. 78999CRB-3706 (Mun. Ct. Hamilton County, Ohio, dismissed May 2, 1978)

By calling the goal of triggering Roe's "collapse" clause through jury verdicts and appeals an "admission", this law review author treats the resort to our court system as some sort of nefarious scheme which the clever author has finally exposed. The readiness of juries to acknowledge harm to occupants of wombs is described here as a threat grave enough to justify keeping juries from involvement in jury trials.

This article documents the readiness of juries, informed of their right to do so, to "establish" the fact that unborn babies are humans/persons – a pattern otherwise difficult to survey because juries seldom explain their

verdicts, and because few juries were ever informed of the contested issue.

This is like the John Peter Zenger trial of 1735,[9] in which Zenger wasn't allowed to submit evidence that his "zingers" aimed at the royal New York governor were the truth. "Truth is not a defense against libel", the judge told him. In fact, proving those zingers were true would only make them sting worse, the judge explained, making them doubly "libelous".

Zenger's lawyer told the jury there ought to be no law against telling the truth. (Had the jury been censored from hearing the legal argument too, we might not have Freedom of the Press today.) But how could Zenger persuade the jury that his zingers were the truth, with his evidence ruled irrelevant? "The suppressing of evidence ought always to be taken for the strongest evidence", he told them. The jury agreed, and acquitted, giving us Freedom of the Press.

Today we may similarly reasonably infer, from the routine judicial suppression from juries of evidence about the nature of the unborn, in abortion prevention trials, that judges generally agree that juries, if allowed and informed, would virtually always find that unborn babies of humans are humans/persons.

The Cincinnati article only makes that inference official. This inferred

9 Apparently the only record of the trial was the one published by Zenger himself.

expectation, we may take for evidence in addition to the handful of jury acquittals where juries *were* allowed to rule on the fact question, that the consensus of Triers of Fact is that the unborn are humans/persons.

Expert witnesses. Another category of court-recognized fact finders is expert witnesses. As the preceding Cincinnati Law Review article reported, it was typical of abortion prevention trials to bring in a doctor to testify how profoundly fully distinct human life begins from conception. No one ever disputed it. Well, the article says it was "rarely contradicted", implying sometimes it *was* contradicted; but since Iowa is unaware of any physical medical evidence in support of any later time "when life begins" than conception/fertilization,[10] Iowa presumes that if any such evidence has been contradicted, the contradiction was not to the merits of the claim.

Of tens of thousands of abortion prevention trials, thousands featured expert witnesses documenting the reality that unborn babies of humans are humans, long after judges stopped allowing juries to hear them. These offers of proof, of thousands of expert witnesses, in abortion prevention trials, were uncontested.

Is their unanimous, undisputed testimony enough to establish that unborn babies are humans/persons, requiring states, according to *Roe v.*

10 See #10, appendix G, for the closest Iowa could find to such a contradiction.

Wade, to protect babies' fundamental right to life?

Genetic evidence is routinely not merely tolerated but required by courts to prove both that a human was there, and which individual human it was. In these cases, the existence of human genetic material is taken as proof that a human was there. So far, every unborn baby of a human mother has been discovered to contain human genetic material.

This mountain of unrefuted evidence in abortion prevention trials fulfills the test of the Supreme Court in *Levi v. Louisiana,* supra for personhood and fulfills the requirement made by Roe, 156, that if preborn humans are persons, abortion is unlawful.

State legislatures. "At least 38 states", a Constitutional Majority,[11] "have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception."[12] *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012)

Most of them incorporated findings of facts about the humanity of the unborn, and most of them have had their constitutionality challenged: all survived. In addition, a few states have enacted stand-alone personhood laws outside the context of Unborn Victims of Violence laws.

No state has affirmed that "when life begins" is later than conception.

11 Am I making up a term? Anyway, 38 is the 3/4 of the states needed to ratify a Constitutional Amendment.
12 Hamilton v. Scott's basis: "See State v. Courchesne, 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n.46 (2010) ("'[As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, Fetal Homicide Laws (March 2010) (alterations in Courchesne))

Individual judges. Although SCOTUS ruled itself incompetent to determine "when life begins"[13], and it is hard to imagine any other court more competent than SCOTUS to judge the matter, and in fact no appellate court has taken a position on the matter either way except to say *Roe* made the matter irrelevant which it did not, a handful of individual judges have ruled that "life", meaning human life, which merits protection of its fundamental rights beginning with the Right to Life, "begins at conception/fertilization".

No American judge has ever ruled that unborn babies are *not* human persons, which makes the finding unanimous among all judges who have taken a position.

Wichita District Judge Paul Clark ruled for Elizabeth Tilson in 1992:[14]

> I will find Mrs. Tilson's evidence proffered through witnesses Lejeune, Hilgers, McMillan and Rue relevant to the issue here. ... life in homo sapiens begins at conception; and harm is the result of termination of life under most circumstances. That opinion...has always been foundation for the public policy in Kansas.

Judge Clark conceded that SCOTUS let

> "a pregnant woman...make a decision whether to terminate her pregnancy without governmental interference...." [and]
> "Any corporation authorized to do business and its clientele still have a right to do lawful business without interference...."

BUT "*Roe* and its progeny" did not reverse

13 "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." Roe v. Wade 410 US 113, 159

14 July 21, 1992, Case No. 91 MC 108, "Memorandum of Opinion Following Bench Trial". (The complete ruling is posted at www.Saltshaker.US/SLIC/PaulClark)

> "the public policy of the state of Kansas that the voluntary act of prematurely terminating a pregnancy...is a wrongful act." [Thus it's wrong to say abortion "cannot be a harm because it is legal."

That is, the Supreme Court stopped *states* from outlawing abortion. But the Court could not make abortion *harmless* (in fact *Roe* explicitly declined to rule on whether abortion is a "harm") – and thus *Roe* has no effect on the right of *individuals,* through the Necessity Defense, to prevent abortions. The "harm" of abortion is legally recognizable as serious enough to justify stopping it. In fact, the Bill of Rights, in whose "penumbra" the *Roe* court imagined they spotted a right to kill babies,

> ...is law that protects the people from their government. [It] was [not] meant to protect people from fellow citizens.

Justice Dimond, on the Alaskan Supreme Court, has emphatically denounced the error of Roe and declared the unborn to be both human and persons. In *Cleveland v. Municipality of Anchorage,* Alaska, 631 P.2d 1073, 1084, he wrote:

> (Concurring:) I empathize with the defendants' sorrow over the *loss of human lives* caused by abortions. I believe the United States Supreme Court *burdened this court with a tragic decision* when it held in Roe...that the word "person, as used in the fourteenth amendment, does not include the unborn...", and that states cannot "override the rights of the pregnant woman" by "adopting one theory of life."
>
> I do not agree with the Court's conclusion that a state's Interest in potential life does not become "compelling" until the fetus has attained viability. It stated its explanation for this conclusion as

follows:

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." ~ "(410 U.S. at 163, 93 S.Ct. 731-32, 35 L.Ed.2d at 183) As Professor Tribe indicates, "One reads the court's explanation [of the magic line called "viability"] several times before becoming convinced that nothing has Inadvertently been omitted." (Tribe, Forward to "The Supreme Court 1972 Term", 87 Harv.L.Rev. 1. 4 (1973](footnote omitted]). I agree with Professor Tribe when he states, "Clearly, this (analysis] mistakes a definition for a syllogism", and offers no reason at all for what the Court has held. (Id., quoting Ely, 'The Wages of Crying Wolf: A Comment on Roe v. Wad.', 82 Yale L.J. 920, 924 (1973](footnotes omitted]).

[A "syllogism" is a series of statements which seem somehow connected, yet when you arrive at the end of them you wonder why they still don't quite make sense.]

In effect, the Supreme Court -held that because there is no consensus as to when human life begins it can act as if it were proven that human life does not begin until birth so as to preserve to women the right to make their own decision whether an abortion takes a human life or not. It would make more sense to me if, in the face of uncertainty, any error made were side in favor of the fetus, which many believe to be human life.

The development of a zygote into a human child is a continual, progressive development. No one suggests that the born child is not a human being. It seems undeniable, however, that human life begins before birth. As Professor Curran states:

"[T]he fetus one day before birth and the child one day after birth are not that significantly or qualitatively different-in any respect; Even outside the womb the newborn child is not independent but remains greatly dependent on the mother and others. Birth in fact does not really tell much about the individual as such but only where the individual is--either outside the womb or still Inside the womb.' (C. Curran, Transition and Tradition in Moral Theology 209 (1919]). Similarly, viability does not mark the beginning of the truly human being.

> [V]iability again indicates more about where the fetus can live than what It is. The fetus immediately before viability is not that qualitatively different from the viable fetus. In addition viability is a very inexact criterion because it is intimately connected with medical and scientific advances. In the future It might very well be possible for the fetus to live in an artificial womb or even with an artificial placenta from a very early stage in fetal development.
>
> I join with those persons who believe that truly human life begins sometime between the second and third week after conception....

A dissent by Justice Mahoney said

> Until the Court decides when a fetus is a person, I see no reason to deny the defense of necessity to those who believe that the fetus is viable and is a person...At least it would get the issue squarely before the U.S. Supreme Court...." *Detwiler v. Akron,* C.A. No. 14385 at 22 (9th App. Dist. 1990)

All the votes are in. They are unanimous and undisputed. It is not possible for any fact to be any more overwhelmingly legally recognized in America. If *any* "establishment" of this life-and-death fact can satisfy SCOTUS, *this* must, because no greater legal "establishment" of a fact is possible than the unanimous, undisputed concurrence of all court-recognized fact finders.

Not even one single court-recognized fact finder positively asserts that unborn babies are *not* humans/persons.

Of course, according to this brief history of the consensus of court-recognized fact-finders, the fact that all unborn babies are humans-persons, triggering the legal obligation of states to protect their fundamental right to

life, was "established" well before 2004. But Congress' vote settles it.

If the unanimous consensus of all five categories of court-recognized fact finders is not enough to "establish" a fact, then it is impossible for courts to establish any fact. If courts still "cannot tell" (Matthew 21:27 allusion) that aborticide is murder, it is impossible for courts to know anything.

Since courts obviously know many things with far less consensus among fact finders, we must infer that courts *can* tell "when life begins" now; and because Iowa's defense turns on that fact, this court must address the evidence, if this court is to rule rationally.

It is impossible to know any fact with more certainty than the unanimous findings of all court-recognized categories of fact finders. Everyone must now know that abortion is the moral and practical equivalent of murder, and our Constitution requires that Iowa criminalize it.

The dozens of appellate courts which have ruled, contrary to *Roe,* that *Roe* made all this overwhelming evidence irrelevant in abortion cases, are a long line of cases in which appeals courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court".[15]

Congress, Guardian of the 14th Amendment, decides who it protects.

15 Supreme Court rule 10c.

> 18 USC §1841(d) ...the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

Roe said the "penumbra" of the 14th Amendment[16] is what gives women the right to kill whatever that is in their wombs, although if it is ever "established" that what that is, is a human/person, then "of course" that same 14th Amendment must require states to protect those humans/persons by outlawing abortion.[17]

Congress was given the constitutional authority under Section 5 of the Fourteenth Amendment to enforce by legislation the provisions of the amendment. This is besides the SCOTUS-recognized authority of Congress to find facts. This authority certainly extends to defining whose rights the Amendment protects, for the benefit of anyone who alleges they cannot tell.

The very purpose of the 14th Amendment was to restore to Congress the power to clarify who should receive constitutional protection, after the Supreme Court had ruled that black slaves shouldn't.[18]

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16 The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,... *Roe v. Wade,* 410 U.S. 113, 129 (1973)

17 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

18 *Scott v. Sandford,* 60 U.S. (19 How.) 393-394 (1856) "6. The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves. 7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. ...9. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered

(Congress had passed the Civil Rights Act in 1866, along with the 13th Amendment which abolished slavery except for punishment for a crime. So the Southern states simply made it a crime to do, if you are black, what free white folks do all the time, and then pressed blacks back into slavery as the penalty for their "crime". So Congress passed the 14th Amendment which said all laws have to apply to everyone equally, in order to close that loophole and set all slaves free.)

2004 was a banner year for personhood because not only did Congress make the consensus of court-recognized finders of fact unanimous, but Congress' authority to find facts is well regarded by SCOTUS,[19] and Congress is given authority by the 14th Amendment to clarify who merits its protection.

The §1841(c) Delusion

§1841(c) doesn't make unloved babies less human. It has been objected that although §1841(d) defines all unborn babies as humans/persons, §1841(c) exempts abortion from the penalties of §1841(a). But law contains many disparate penalties for disparate situations, for many reasons, without any

now according to its true meaning and intention when it was formed and adopted.

19 ...the existence of facts supporting the legislative judgment is to be presumed...not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators....the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. ...But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. *U.S. v. Carolene Products,* 304 U.S. 144, 152 (1938)

implication that people in less protected situations have less value. Or are not "persons in the whole sense".

For example, causing someone's death is not "first degree murder" if it is proved to be an accident. No one thinks this "exception" proves the legislature thinks people killed accidentally are not "persons in the whole sense".

§1841(d) is a categorical finding of fact. It establishes a fact. Laws, or their absence, do not change facts. §1841(c) says nothing about facts. It is only about penalties. Penalties do not alter facts, and facts unfortunately are often ignored when humans enact penalties.

The difference in treatment, then, requires some other explanation, than that loved babies are human while unloved babies are tumors. There are many reasons laws treat equally deserving citizens differently.

Sometimes the difference reflects the realities of the limitations of government in recognizing when citizens equally deserve rights. For example, a law student one week before taking his bar exam may be equally qualified with the lawyer who took it a week ago, but Courts are unable to recognize their equality until students actually take it and pass it. Similarly, unborn babies before and after viability are equally "persons" and "humans" according to current federal law, but the justices of Roe v. Wade admitted

they were “unable to speculate” whether that was the case.

Sometimes the difference is because of the difference in how criminal intent must be established. For example, no one says laws treat auto accident fatalities as less human than gunfight fatalities because drivers who kill with their cars are not penalized as greatly! The difference is one of intent, which is and should be an element of First Degree Murder. Similarly, *Roe* misunderstood the point of Exodus 21:22 when *Roe* (in a footnote) gave the passage as a possible reason for treating unborn babies as not fully human. It says when a pregnant woman finds herself in the middle of a fight between two men, and gets hit, causing her child to go into labor, then if the child is unharmed, a jury shall set damages. This does not suggest the baby is less than human; but only a jury can hear witnesses to establish how deliberate the punch to the womb appeared.

Sometimes the difference has nothing to do with merit, but with political reality. It would be absurd to conclude from repeal of prohibition, while marijuana criminalization increased, that drinking is “not legally recognizable as a harm”! Or even that it is less harmful than marijuana! The disparity simply reflects political reality, and nothing else. The newspaper headlines and Congressional debate about Laci’s law proved beyond any reasonable doubt that the disparity of treatment of loved unborn babies,

versus unloved unborn babies, had nothing to do with a finding of law that not being loved makes you less than human, and everything to do with the pro-death political machine.

To imagine any deeper significance in Laci's Law's disparate treatment would quickly lead to absurdity. To imagine the disparity was Congress' choice, as opposed to the result of limitations beyond its control, would place Congress in a patently false, even absurd, and profoundly immoral theoretical position, where, to maintain any semblance of consistency when trying to explain the statute, it must concede that this statute implies that the right to life of an innocent human being depends purely on the will of its mother. Congress would have to posit that the slaying of an unborn human child is a non-harm under United States law, provided solely that his mother wants him dead.

Were this a correct interpretation of Laci's Law, then, given its explicit equation of the humanity of the unborn with that of the born, mothers of older children who want them dead have a legal, if not Constitutional right to kill them.

Should this Court remain tempted to discount Laci's Law's establishment of the personhood of the unborn because of its "ambiguity" or "inconsistency", let this Court first note again the unambiguous verbiage that

the unborn are "homo sapiens", and second note that the rule of lenity dictates, generally, that ambiguities in statues are to be resolved in favor of defendants.

> "The rule of lenity applies only if, after seizing everything from which aid can be derived,...we can make no more than a guess as to what Congress intended.' " Muscarello v. United States, 524 U.S. 125, 138, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998).

To interpret the facial contradiction between the two relevant parts of §1841 as "ambiguities" is to accuse Congress either of patent absurdity or monstrous immorality.

This Court should construe the statute to intend, minimally, that, even if the killing of an unborn child is tolerated when the mother – but no one else – wishes to kill him, nonetheless, the overwhelmingly more important fact is that Congress still expressly concedes that soon-to-be-aborted children are still just that - unborn children and human beings. Congress concedes this by not having written soon-to-be-aborted children out of its definition of "unborn child". (See Appendix G, #3 for more about this reasoning from *Roe.*)

§ 1841(c) doesn't keep states from outlawing crime. The "abortion exception" clause states in relevant part

> "1. Nothing in this section shall be construed to permit the prosecution: a. of any person for conduct relating to an abortion for which consent of the pregnant woman...has been obtained."

It is imagined that these words somehow hinder states from defending their own laws against abortion from the fact "established" in 1841(d). But nothing in §1841(c) hinders any state, or Congress itself, from later criminalizing anything. These words only say *this* U.S. Code section does not create penalties for consensual abortion. Yet. They are not an exception to 1841(d), defining consensual abortion as some kind of "non murder". Facts do not change into opposite realities depending on which section of law you are reading. No matter what section of the U.S. Code you are reading at any time, all unborn babies remain "members of the species homo sapiens".

Even if Congress *meant* to bar states from outlawing consensual abortion, Congress has no such authority. States do not need Congress' permission to create penalties for crimes.

Neither does 18 U.S.C. §248 turn humans into blobs. §248 [F.A.C.E., Freedom of Access to Clinic Entrances] restricts individuals from saving babies from abortionists. It does not restrict states from saving those same lives, any more than *Roe v. Wade,* which restricted *states* from saving those same lives, restricted *individuals* from saving those same lives. (Although most courts have erroneously assumed *Roe* did.)

The interaction of these laws and precedents may be illogical and embarrassing, but they are perfectly legal. But then, that epitomizes the

history of abortion jurisprudence. Which should be no surprise, anytime anyone creates public policy concerning abortion who is unable to discern whether abortion is unthinkably barbaric genocide, or a tonsillectomy.

Usually laws and precedents attempt to logically respond to relevant facts. So where laws or precedents are premised on the facts being irrelevant, there should be no surprise if the laws and precedents are an illogical response to them.

Why a personhood challenge is ripe for Iowa though it wasn't for Rhode Island or Missouri

Iowa's "personhood" challenge is not that of a single state. It is the challenge of all expert witnesses, state legislatures, and judges that have taken a position on the humanity/personhood of the unborn, all juries that were allowed to learn the single contested issue of most criminal abortion prevention trials, and Congress.

Iowa's constitutional obligation to criminalize abortion is demanded by unanimous American legal authority. Though it has always been unanimous, fewer authorities had ruled by the time of Rhode Island and Missouri's cases.

Only one state challenged abortion's legality with a criminalization of abortion – Rhode Island, just weeks after *Roe*: *Doe v. Israel,* 358 F. Supp. 1193 (1973) – and SCOTUS declined to hear it. *Doe v. Israel,* 1 Cir., 1973, 482

F.2d 156, *cert. denied,* 416 U.S. 993.

Rhode Island. Just weeks after *Roe* alleged uncertainty about the unborn because "the unborn have never been recognized in the law as persons in the whole sense",[20] Rhode Island enacted that recognition.

> The Rhode Island legislature apparently read the opinion of the Supreme Court in *Roe v. Wade* to leave open the question of when life begins and the constitutional consequences [**12] thereof. *Doe v. Israel,* 358 F. Supp. 1193, 1199 (1973)

Rhode Island "established" the fact more than Texas had, in the sense that the Rhode Island legislature and governor made official, in law, what Texas Attorney General Wade had only alleged as a legal argument in court as a fact so universally accepted that it never occurred to the legislature that anyone would need to have it spelled out.

District Judge Pettine didn't just respond "well, that's a little more of the 'establishment' courts will need before we outlaw abortion again, but that's still not enough." He went far beyond SCOTUS, saying *all the evidence in the world* was irrelevant.

> I neither summarize nor make any findings of fact as to their testimony [about whether unborn babies of human mothers are humans/persons]. To me the United States Supreme Court made it unmistakably clear that **the question of when life begins needed no resolution by the judiciary as it was not a question of fact.** As will be discussed infra, I find it all irrelevant to the issues presented for

20 Roe v. Wade: 410 U.S. 113, 161

adjudication. *Doe v. Israel,* 358 F. Supp. 1193, 1197

(1) "The question of when life begins needed no resolution by the judiciary as it was not a question of fact"? If it wasn't a question of fact, then why did *Roe* say doctors and preachers are more qualified to resolve the "question" than SCOTUS?! Did Judge Pettine think doctors and preachers are more qualified to decide questions of law than Supreme Court justices?![21]

(2) Did Judge Pettine think "the question of when life begins" *was* "resolved" by *Roe?* Is that how he reads *Roe's* "we are not in a position to speculate"?

(3) "The question of when life begins needed no resolution by the judiciary as it was not a question of fact"? Pettine says judges don't need to address "when life begins" because it is a question of law? If he doesn't want *judges* to decide questions of law, who does he think *law* questions *are* resolved by?

SCOTUS never said the "question of when life begins" had been resolved by *Roe,* or that the "question" was irrelevant, or that it was a question of law and not fact finders, or that state legislatures are not court-recognized fact finders any longer, so it was reasonable for Rhode Island to

21 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. *Roe v. Wade*, 410 U.S. 113, 159

essentially ask SCOTUS, "is *this* enough more establishment?"

Roe had only said that the Texas Attorney General's assertion in court wasn't enough to establish that "life begins at conception", since his statement lacked the backing of even the state legislature in an explicit law. Which begs the question, what if *two* states affirm the claim? What if the second one, once informed that SCOTUS didn't already know it, affirms it with a crystal clear law enacted by its legislature and signed by its governor? Is *that* enough? SCOTUS' reply: *Doe v. Israel,* 1 Cir., 1973, 482 F.2d 156, *cert. denied,* 416 U.S. 993.

So far, Rhode Island has been the only state which has placed that question squarely before the courts. Missouri almost did, 16 years later, but they added an abortion exception to their otherwise strong personhood law, which let SCOTUS respond "we *still* don't need to decide."[22] SCOTUS heard Missouri's challenge only to point out that Missouri's challenge didn't actually prevent any abortions so it wasn't ripe for review. No SCOTUS ruling has made any attempt to decide unborn personhood, or to consider what triers of facts say about it, or even treat it as a a topic of interest.

22 *Webster v. Reproductive Health Services,* 492 US 490 (1989) said the impact of a state's "personhood" law on Roe's "collapse" clause was not properly before the Court. The issue was not ripe. "...until...courts have applied the preamble to restrict appellees' [abortionists] activities in some concrete way, it is inappropriate for federal courts to address its meaning." Sandra Day O'Conner concurred: "This Court refrains from deciding constitutional questions where there is no need to do so....When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of Roe, there will be time enough to reexamine Roe, and to do so carefully." (Quoting from the syllabus.)

At least that ruling affirmed the *possibility* that a state's finding that "life begins at conception/fertilization" *might* be enough to satisfy SCOTUS and successfully challenge *Roe*.

Webster left the impression that when SCOTUS finally decides if one state's affirmation is enough, it could go either way. Now 38 states concur with Missouri. Is *that* enough to satisfy SCOTUS? So far, no one knows. SCOTUS won't say.

Was Roe's "collapse" clause nullified when Roe was gutted by Casey?

What if Roe v. Wade is no longer what sustains abortion's legality? Did SCOTUS, in Casey,[23] say it no longer matters whether the unborn are humans/persons because the rationale that "we cannot tell"[24] has been replaced with "women are so used to killing them now"?

Fortunately not. Neither the opinion nor the dissent addressed the "we cannot tell" rationale. No evidence of human life was presented, discussed, or rejected.

However, an unidentified "outer shell of Roe" was discussed.[25]

Iowa submits "we cannot tell" is that "shell", upon which legal abortion

23 Planned Parenthood v. CASEY, 505 U.S. 833

24 See footnote 27.

25 "The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case.... Roe continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality." Planned Parenthood v. Casey, 505 U.S. 833, 945, 954 (1992) (Concurrence/dissent of Rehnquist, White, Scalia, Thomas)

continues to “hang”, and without which any new rationale must “collapse”.

To say a thing “hangs” on another thing is to suggest that without the *other* thing, the thing would “collapse”. So what today sustains abortion’s legality must still be defined by Roe’s “collapse” clause.

The later dissent in Casey reminds us of “the whole [ignored] argument”:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer Roe came up with after conducting its “balancing” [between women’s “privacy” and “potential life”] is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. *Planned Parenthood v. Casey*, 505 U.S. 833, 982 (1992) (Concurrence/dissent of Scalia, White, Thomas)

But this dissent overlooks the possibility of establishing unborn personhood as fact; it says it can’t be determined as law, but it is a personal “value judgment” – a subjective judgment made independently of law or fact.

> There is, of course, no way to determine [whether the unborn are human] as a legal matter; it is, in fact, a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so. (Ibid, following paragraph)

Whether I am a human being is a “value judgment”? Not a question for fact finders? Is our Right to Life any safer at the mercy of whether we are “wanted” by decision makers than if our humanity is “legally recognized”?

We already have "death panels" running health care. We already pull plugs on semi-conscious patients like Nancy Cruzan and Christine Busalacchi.

Only one thing holds up *Roe, Casey,* and all in between: alleged uncertainty whether unborn babies of human mothers are humans. Smash that "shell" with legally recognized *certainty* that the unborn are human, and let's see how long that "reliance interests" sophistry can stand, all alone! Once abortion is "established" as genocide, "women's schedules" are exposed as a barbarically trivial excuse for it.

Even Justices Scalia and Thomas, noting the life-and-death importance of the question in their dissents, avoid affirming their own certainty that the unborn are humans/persons, or even that the question can be objectively resolved. Nor do they acknowledge the growing evidence that unborn babies of human mothers are humans. Taking no position as SCOTUS justices is consistent with their theory that the right to kill babies is a "value judgment"[26] for states. The logical difficulty with that approach is that that "value judgment" won't be surrendered to states as long as SCOTUS' professed inability to tell "when life begins" remains unchallenged, leaving the rights of the unborn less clear than the allegedly constitutional "woman's right to choose". (For more about "reliance interests", see Appendix G, #1.)

26 *Planned Parenthood v. Casey*, 505 U.S. 833, 982 (1992) (Concurrence/dissent of Scalia, White, Thomas)

As late as *Stenberg v. Carhart* 530 U.S. 914, 920-921 (2000) SCOTUS still had no position on whether the unborn are humans/persons. It dismisses the belief of many "that life begins at conception and consequently that an abortion [causes] the death of an innocent child" as a "point of view" which is "irreconcilable" with, and apparently canceled by, the "view" that murder is OK. As for Roe's "speculation" whether abortion is murder, or Casey's claim that women are used to killing, "We shall not visit these legal principles."

Even Stenberg's dissents avoid a position. Whether the unborn are "human life or [merely] potential human life" is "depending on one's view".[27] It "dehumanizes the fetus and trivializes human life", not because it wantonly *takes* human life, but because it *"approaches* infanticide".[28] Whether to save lives "is a value judgment, dependent upon how much one respects (or believes society ought to respect)...life...."[29]

A "value judgment"? Is it only sophistry to claim what Scalia and Thomas would not, that the consensus of all court-recognized fact finders represents something more objective than a "value judgment"?

It may be conceded that when many of those fact-finding authorities made their determination, they did not explain their reasons. However,

27 *Stenberg v. Carhart,* 530 U.S. 914, 980 Dissent by Thomas, Rehnquist, Scalia.
28 *Stenberg v. Carhart,* 530 U.S. 914, 1006 Dissent by Thomas.
29 *Stenberg v. Carhart,* 530 U.S. 914, 954 Dissent by Scalia

thousands of expert witnesses, and a few judges, did. And many reasons are given in the record of legislative debates. Many more would be more readily available in court records had courts expressed any interest in the evidence.

Note: a review of all that evidence could be helpful at this point. The author of this model brief does not have access to that information, however, or the time to process and condense it.

At the risk of slighting valuable evidence that will not fit in less than a page, Iowa proposes these considerations:

1. There is no nonarbitrary line between birth and conception distinguishing "humans/persons" from "nonpersons".

2. Without such a line, there can be no stage of gestation at which the deliberate killing of a baby can be legally distinguished from murder.

3. The failure of some adults to grasp the humanity of babies at any given stage is a dangerous basis for permitting killing, since as many adults fail to grasp the humanity of quite a number of discrete groups of born persons.

4. The capacity to choose between good and evil – to choose to behave either as an angel or as a demon – is a capacity that distinguishes humans from animals. It is not related to brain size, since animals with much larger brains lack this capacity, while babies with much smaller than adult brains

demonstrate this capacity. No physical process accounts for this ability, supporting the almost universally accepted belief that a soul attaches to the body whose capacity for discerning good from evil, and choosing between them, and being harmed by evil and blessed by good, is not limited to physical body size.

5. Luke 1 says John, at 6 months' gestation, leaped for joy at the sound of a righteous voice, which shows capacity to prefer good over evil. The same chapter describes Jesus' conception, and the presence of Jesus, Who was God, overshadowing the growth of His physical body from conception to birth.

It is true that the finding that a soul accompanies the body from conception is peculiarly Christian/Jewish, but no more so than all American laws. Freedom of Speech and Religion, and a vote for every family, along with many other legal principles we follow today, was pioneered in the Bible and is encouraged in no other religion. Our freedom is founded on the majestic revelation that God created each of us in His Image. That is the foundation for equal protection of the laws of each of us. We chip away that foundation at peril to our own freedoms. (See Appendix G, #12, for more about the Biblical roots of America's laws and rights.)

But to whatever extent the objectivity of "life begins at conception" may be limited by the incompleteness of knowledge available to humans, the fact

remains that all five categories of court-recognized finders of facts have "established" the fact, while no American legal authority has said it begins any later, including SCOTUS. No pretense of rationality can clothe any further insistence that judges are still "not in a position to speculate" about the fact. If judges still cannot know this, they can know nothing.

Roe's "Collapse".

> "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

This short "collapse" clause tells us five things:

(1) "establishment" of the unborn as humans/persons, to an extent that SCOTUS will legally recognize it, is *possible*, and will transfer "constitutional protection" from baby killers to babies;

(2) the unspecified authority/agency of this "establishment" is not SCOTUS;

(3) what must be "established" is a fact question about which the Roe court is in doubt – not a question of American law, upon which SCOTUS is the world's expert;[30]

30 Also: "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." *Roe*

(4) fact finders (ie. juries, legislatures, or expert witnesses) are invited to "establish" this fact if they can – *SCOTUS' alleged ignorance cannot rationally or legally be made an obstacle to letting fact finders "establish" this fact* - although we are not told which of them, or how many of them, must agree before SCOTUS will consider the fact established "enough"; and

(5) abortion's legality and aura of "constitutional protection" can continue only in the absence of this "establishment" - *only as long as uncertainty is alleged whether the unborn babies of human mothers are humans.*

Many abortion supporters hope, and prolifers fear[31], that even after our nation's laws and courts officially acknowledge that abortion is the legal and moral equivalent of murder – that the babies abortion kills are humans/persons, it will be possible, even likely, that other rationales than SCOTUS' alleged ignorance about "when life begins" will step forward to replace *Roe's.* Appendix G deals with some of them inside and outside case law and shows this is simply impossible. It is just as obvious today as when Roe's "collapse" clause began with "of course", that SCOTUS can't decide who lives and dies as a question so exclusively of law as to render irrelevant

v. Wade 410 US 113, 159 Roe would not defer to doctors and preachers as their superiors on a question of law!

31 A leader of this fear is Clark Forsythe: http://www.saltshaker.us/SLIC/AULmissingOpportunity.pdf

the unanimously acclaimed fact that abortion is the moral and legal equivalent of murder.

The 14th Amendment "equal protection of the laws" is for all who are *in fact* humans/persons. **Had it been only for those who are *legally recognized* as human, we could still have slavery simply by declining to legally recognize a discrete class of people as fully human.** All that pro-slavery judges would need to do would be to rule that blacks are only 3/5 human by law. Or that immigrants dehumanized as "illegals" are not legally recognized as fully human.

All "humans" are "persons"

1 U.S.C. 1 §8. **"Person", "human being", "child", and "individual" as including born-alive infant**

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual"" shall include every infant member of the species homo sapiens who is born alive at any stage of development....

(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section.

"The fourteenth amendment. . .undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty. . . but that equal protection and security should be given to all under like circumstances, that they should have like access to the courts of the country for the protection of their persons. . .that no impediments

> should be interposed to the pursuit of any one, except as applied to the same pursuit by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same condition." Barbier v. Connoly 113 U.S. 27,31 (1884).

Abortion debate is clouded by the legalistic claim that 18 USC §1841(d) doesn't trigger Roe's "collapse" clause because it uses a different word for unborn baby: the former says "homo sapiens" and the latter says "persons". However, not only are the terms equated in the definitions of the U.S. Code, but *Roe v. Wade* itself acknowledges that babies who are "recognizably human" are "persons":

> These disciplines variously approached the question [of when life begins] in terms of the point at which the embryo or fetus became 'formed' or recognizably human, or in terms of when a 'person' came into being, that is, infused with a 'soul'... Roe v. Wade 410 U.S. 113, 133 (1973)

That statement needs to be remembered along with the quote from *Roe* (below) which leads to the common belief that *Roe v. Wade* took the position that there are human beings who are not "persons", so that it is necessary to enact "personhood" laws to add legal recognition of unborn babies as "persons" to the "humans" already on the vitae of the unborn before abortion's legality can be questioned:

> ...no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment....the word "person", as used in the Fourteenth Amendment, does not include the unborn. Roe, 410

U.S. at 156-157.

In this quote, Blackmun wrote that the "fetus" is not a person; but in his "collapse" clause he conceded that maybe the "fetus" is a person after all, which may one day be "established". These quotes together demonstrate that the confusion Blackmun alleged was not whether unborn human beings were "persons"; it was whether unborn babies are "recognizably human" when they are very tiny, at which point Dorland's evolution-based medical charts (2nd paragraph after the preceding quote) discuss the similarity between human and fish embryos.

That is why Congress' finding of this fact, that all unborn babies are humans "at all stages of gestation", is so authoritative: Roe's trigger is "recognizably human", and Congress legally recognized unborn babies as human; this is a more relevant "establishment" than an outdated visual recognition or failure thereof.

Roe v. Wade is not the only authority equating "human" and "person". The two are equated throughout U.S. law.

"Persons" in the Constitution and Declaration. The 5th and 14th Amendments say "[n]o person shall be deprived of life...without due process of law" and "[no] State shall. . . deprive any person of life, liberty, or property,

without due process of law". The word "person" must be taken in these protections to include all human beings,[32] or no human being can be safe from arbitrary exclusion from them by hearts hardened against recognizing in others the value they want recognized in themselves. This amendment secures protection for the basic, minimum human rights any state must respect. It is imperative that categories of human beings not be read out of the terms of this amendment without the clearest demonstration of justification for such exceptions. There has never been a clear, persuasive line in the abortion jurisprudence or discussion separating those babies whose right to live is at the whim of their mothers, and those whose rights are established in law.

Precedents equating "person" with "human". If there is any term whose broad scope demands unconditional respect, It is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even minimum human rights and is no better off than property, entirely subject to the whim of the owner and whatever regulations the state may impose.

Even more dangerous than driving any invidious class of human beings

32 The following section on the unborn being humans is condensed and adapted from a widely circulated brief by Cliff Zarzky. His contact information: Clifford L. Zarsky, JD, Texas Bar 22250000, 5202 Wooldridge, Corpus Christi, Texas 78413. Telephone: home office 361- 991-7465 Cell phone 361-765-1461 Fax: 361-993-9339. Rather than delete the arguments relating to abortion prevention by an individual, which is not a factor in a challenge to a state law against abortion, I have just greyed them out.

out from under the term "persons" in the 5th and 14th Amendments, is reading them out from under the term "men" in the legal foundation of our Constitution: the Declaration of Independence, which says:

> "all men are created equal, and are endowed by their Creator with certain unalienable rights, among which are life..."

A legalistically narrow reading of "men" designed to exclude any human beings who are not "men" from this acknowledgment of God-given rights would not stop with babies, but would include children and women in its sweep. Obviously such a reading occurred to none of its authors. The absurdity of this result proves that "all human beings" are the meaning of the term "men" in this clause. It would be as absurd to think not all human beings are meant by "persons" as used by a government founded on this declaration of rights. That our government was founded on this declaration is stated by this Court in U.S. v. Cruikshank, 92,U.S. 542, 553 (1875):

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed."

This opinion continues by noting the obligation of *states* to secure these rights:

> The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their

> boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States.

The very idea of freedom presupposes some objective moral law which overarches rulers and ruled alike. Subjectivism about human value is eternally incompatible with democracy. We and our rulers are of one kind only so long as we are subject to one law. But if there is no "law of nature", the ethos of any society is the creation of its rulers, educators, and conditioners; and every creator stands above and outside his own creation, so unless we hold to the objective values stated in the Declaration, we will perish. "The laws of nature and of nature's God" contain no value distinctions between one invidious class of humans and another, any implications in Roe notwithstanding, which we will address later.

This Court has ruled that "the fetus is a person" often enough to call into question the statement in Roe that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment". Roe, 410 U.S. at 156. As a double check against the possibility they were overlooked, we would mention a few.

Abortion precedents. In *Steinberg v. Brown* 321 F. Supp. 741 (N.D. Ohio, 1970) the federal district court rejected a challenge to Ohio's laws against abortion. It treated an "embryo of a a fetus" as having a right to life

which no abortionist or mother had any right to remove. It said the implied right to privacy

> ...must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law. The difference between this case and Griswold [the Supreme Court decision that legalized contraceptives] is clearly apparent, for here [in this case] there is an embryo of a fetus incapable of protecting itself. There, [in Griswold] the only lives were those of two competent adults. Id. 745-46.

This case is acknowledged in Roe, at 155, where no error is identified in it. Seven more such cases are acknowledged in the same paragraph of Roe. We mention this case not to inform this Court of what you already obviously know, but to ask how, in light of this case, it can still be true that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment"?

> 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. Although this is a definite beginning, there is no assurance in any particular case as to how long the life thus begun will continue. It may endure only a few hours or days, or it may continue in excess of a century, so far as human life is concerned. In other life forms it may continue for many measurable centuries, or even for an immeasurable and endless period. Thus when a new life comes into being with the union of human egg and sperm cells, it may terminate, or be terminated, at any moment after it commences, and before, at, or after the particular developmental process called "birth" takes place. Such terms as "quick" or "viable", which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning, and hence irrelevant to the problem here presented. Id at 746, and "[o]nce

> human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it." Steinberg *v. Brown,* Id 746-47.

This case says so precisely what Roe says that "no case" says, that we would expect Roe to have to expose something fundamentally erroneous about it to put it in the category of not being a case. Roe identified no such error.

Gray v. State, 77 Tex Cr. R. 221 (1915), involves the review of Gray's indictment for producing the abortion of Sadie Moore's child. Though the indictment was tested to see if it complied with state statutes, the court examined the common law before doing so (and affirming the conviction) and said *most states held abortion can be criminally prosecuted any time after conception.* This case was also mentioned in Roe, in footnote 27, with several other cases. But it is listed as supporting a statement which seems quite different than how we have just summarized it:

> ...most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was *not* criminal under their received common law, 27 … (emphasis added)

SCOTUS' "Personhood" Test: "humans, live, and have their being".

There is no doubt that citizens of hostile nations, children under eighteen, convicted, comatose or mentally disabled individuals are each a class of persons. This is so, not because members of each class can prove their inclusion under the fourteenth amendment, but because they are included by

virtue of their humanity. They are “humans, live, and have their being.”

> 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. *Levi v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children).

“Humans, live, and have their being” is a biological test, and a very simple, fundamental one for doctors today.

There are two simple ways to determine whether a creature is “human”: one is to check its DNA. An even simpler way is to see if the creature is living inside the womb of a human.

SCOTUS’ test of personhood is a “biologic” test. Glona *v. American Guarantee and Liability Inc. Co.* 391 U.S. 73, 75 (1968). Any entity possessing those factors are clearly “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

The Court held illegitimate children are clearly ‘persons’ because they are “human, live and have their being.” These are all biological qualifications that the Court acknowledged and accepted that the illegitimate children possessed without any facts presented or questions asked by the Court. Why

did the Levi Court hold the illegitimate children were clearly 'persons'? No proof of any kind was required. It was self evident truth to the Levi Court.

In what way are unborn children not "human, live and have their being"? There is no reference to the Levi case in Roe , but Levi has not been reversed, and therefore must be presumed to be the Supreme Court test for "personhood." The Levi Court did not refer to any evidence presented for the children, so it is apparent they accepted as judicial knowledge that the children were "human beings, live, and had their being" and the same judicial knowledge should apply to all classes of human beings including the class of unborn humans. Especially since Congress' "establishment" of the fact that all unborn babies are humans, in 2004.

At present the only approved test for "personhood" by the Supreme Court is "human, live and have their being," Therefore, "[t]hey are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." Id. Human offspring conceived but not yet born are likewise "humans, live and have their being." Justice White joined by Rehnquist, CJ dissenting in *Thornburgh v. American College of Obstets., & Gyne*. 476 U.S. 7474,792 (1986) explains more clearly the genetic and biologic test of the Levi Court:

However one answers the metaphysical or theological question

> whether the fetus is a human "human being" or the legal question whether it is a "person" as is used in the Constitution, it must be at least recognized first, that the fetus is an entity that bears in its cell all the genetic information that characterizes a member of the species homo sapiens, and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or indeed from an adult human being.

They are "a form of human life," *Webster v. Reproductive Health Servs.* 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. They do not need to overcome any additional hurdle in order to establish their right to presumptive inclusion within the term "person" as used in the Constitution, and there is no justification for the arbitrary exclusion of such children from the protection of basic human rights under the Constitution.

Direct statements that all "humans" are "persons". In *United States v. Palme*, 14-17 U.S. 607, (1818), Chief Justice John Marshall stated, **"The words 'any person or persons,' are broad enough to comprehend every human being."** Justice Stephen Field stated in *Wong Wing v. United States,* 163 U.S.228, 242 (1896), "The term **'person' is broad enough to include any and every human being** within the jurisdiction of the republic…This has been decided so often that the point does not require argument."

In 1971 an action was maintained on behalf of a stillborn child.

The increasing weight of authority supports the proposition that a

> viable unborn child, which would have been born alive but for the negligence of defendant, is a 'person' within the meaning of the wrongful death statute. *Simmons v. Howard University* D.C. Cir. 323 F. Supp. 529 (1971)

This was the kind of case Roe dismissed with:

> In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. 65 Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Roe at 162.

But if that Court saw no human worth in the stillborn child apart from "the parents' interest", wouldn't that be the same "interest" the law would have, had another's negligence killed a fine horse or dog? It is hardly necessary, to vindicate a plaintiff's "interest", to classify the thing or creature destroyed as a "person" if it is in fact not. There was absolutely no rational reason for the Court to call the baby a "person" if the Court did not in fact believe the baby was. Shouldn't this case, therefore, be brought forward to balance Roe's contention that

> ...no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment....the word "person", as used in the Fourteenth Amendment, does not include the unborn. Roe, 410 U.S. at 156-157.

Probate. The classification of the unborn as "persons" in probate law is uncontested.

> The preamble [of Missouri's personhood law] does not, by its terms, regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do no more than offer protections to unborn children in tort and probate law, which is permissible under *Roe v. Wade, supra,* at 161-162. *Webster v. Reproductive Health Services* (492 U.S. 490, 491), 1989.

Nelson v. Galveston, 14 S.W. 1021, Supreme Court of Texas 1890 held in agreement with Lord Hardwicke,

> ...that a child in the mother's womb is a person in rerum natura, [in the nature of things] and that by rules of the civil and common law "she [the child] was to all intents and purposes a child. . . and is to be considered as living for all purposes.

The court ruled that a posthumous child may recover damages for the father's death. The case is not mentioned in Roe. "She was to all intents and purposes a child" certainly says, directly, that this finding of fact is not limited to probate, but would have been considered by SCOTUS as just as true in any 5th or 14th Amendment case. It would appear to undermine Roe's statement that "...no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment...."

Here is how Roe justified acknowledging "personhood" of the unborn only in probate but not in other law – notice its failure to dispose of this Court's broad assertions of unborn personhood throughout all law:

> Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at

> most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and *have been represented by guardians ad litem.* 66 Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense. Roe at 162.

Guardian ad litems for the unborn. But is there not an internal inconsistency in the preceding logic? If the rights of the unborn are only at the mercy of the parents' interest, why isn't the lawyer for the parents the best representation for that interest? What legal purpose is served by a guardian ad litem for the baby, if the baby has no protectable interest of his own independent of the whims of some relative?

We are unsure of what significance Blackmun found in saying "Perfection of the interests involved, again, has generally been contingent upon live birth", since the death of a plaintiff in any lawsuit profoundly reduces if not eliminates his claim. How do courts of equity treat adults differently than unborn babies, in that regard?

Shouldn't, therefore, probate cases requiring guardian ad litems for the unborn be brought forward to counter Roe's contention that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment"?

Especially cases such as *McArthur v. Scott* 113 US 340, 440 (1885), not mentioned in Roe, which said preborn children in the womb should not have been cut out of a probated will without proper representation in court.

> A decree annulling the probate of a will is not merely irregular and erroneous but absolutely void, as against persons interested in the will and not parties to the decree, and as the parties these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under the will. Id.404

This Court said a person must have the opportunity to present their side of the story in court. Id. 387,391.

If it be argued that the plaintiffs are "persons" with representation rights only since their birth, this Court also held that preborn persons in the womb can hold vested [not just potential or expected, but fully realized] rights, not just rights "contingent upon live birth,"id. 384.

> it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.

If it be argued that it had to be a guardian ad litem for the baby to represent the testator's interest since the testator had died, we must point out that the normal representative of the interest of the testator would be the executor through his lawyer – not the baby's lawyer, if the baby has no

protectable interest other than the testator's interest. There is simply no rational reason to appoint a guardian ad litem for the unborn, by a court which considers the beneficiary to have no greater legally protectable rights than those wished by the testator; such as in a will for the maintenance of a dog. No court has appointed a guardian ad litem to represent the interests of a dog. At least we hope not.[33]

Not only does *McArthur v. Scott* join those cases which would counter Roe's claim that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment", but its ruling would declare *Roe* null and void, because the lower courts in Roe denied a motion for a guardian ad litem to join in the arguments. Roe, Doe v. Scott, 321 F. Supp. 1385 (N.D. III. 1971), cert denied 409 U.S. 817 (1972).

The Fifth Amendment provides "no person shall be …deprived of life… without due process of law." As a fetus is a person, neither a state nor the federal government may allow anyone to take innocent life without due process of law. Especially now that federal law defines every unborn baby "at all stages of gestation" as a human life, it has the right to representation to be heard on the question as to whether its life should be terminated, and every

33 Apparently a judge's ruling April 21, 2015 is the closest any court has come to regarding animals as "persons". The judge allowed guardian ad litems to represent two chimpanzees in a habeas corpus proceeding, implying their status as "persons". http://www.theguardian.com/world/2015/apr/21/chimpanzees-granted-legal-persons-status-unlawful-imprisonment. Here is a 2002 article about the push for guardian ad litems to represent animals: http://www.proaviculture.com/guardian.htm. Here is a 2011 push: http://www.bradenton.com/2011/05/24/3218278/animals-to-get-guardians-in-court.html

court ruling affecting their fundamental rights in which they are not allowed representation is null and void.

The Judgments of the U.S. District Court and the Supreme Court in Roe, rendered without any representation of such victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivation of life, liberty and property without due process of law, in violation of the 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. *McArthur v. Scott,* 113 U.S, 340, 391-392, 404 (1885) (unborn children); *Pennoyer v. Neff,* 95 U.S.714,733-734 (1878) (U.S. citizens). Neither the U.S. District Court, nor the Supreme Court had personal jurisdiction over such abortion "survivor" or unborn children in Roe. Yet each such category of children was affected vitally by those proceedings, and had a right to be before the Courts, therefore, the rulings were unconstitutional and void as to them. Ibid.

Unborn baby's interest *greater* than mother's interest. *Raleigh Fitkin-Paul Morgan Memorial Hospital v Anderson* 201 A.2d 537,538 (N.J. 1964) held that the interest of the unborn child was *greater* than the interest of the mother. This is *profoundly* contrary to Roe's contention that unborn babies have *no* protectable rights better established than whatever rights the mother *chooses* to grant.

The mother, a Jehovah's Witness, refused consent to any future blood transfusions which her hospital had advised will probably be necessary to save her and her baby. The hospital sued to require a transfusion if her doctor determines it is necessary, and a unanimous state Supreme Court agreed.

This doesn't technically contradict the verbiage of Roe, which supposedly allows states to restrict 3rd trimester abortions. But it certainly contradicts the jurisprudence since Roe, which throws impossible obstacles before states trying to restrain killing an unborn baby up to the moment of delivery and in some cases after, so long as the mother so chooses. Even the partial birth restriction, *Gonzales v. Carhart*, 550 U.S. 124 (2007), restricts only one method of abortion up to the moment of live delivery.

It would certainly be interesting to see how this case can be squared with the assertion that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment".

Corporations. The Supreme Court has established the term "person" so broadly that it includes legal fictions. The fictitious entity of a corporation is a "person" for Fourteenth Amendment equal protection, *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886) and for due process protection in *Minneapolis and St. Louis Railway Co. Beckwith*, 129 U.S. 26 (1889).

These cases stand for nothing if they do not stand for the principle that the word "person" in the fourteenth amendment is not to be construed in the strictest or narrowest sense.

There is no reference in the constitution that fictional legal entities should be included as persons for constitutional protection, whereas unborn humans are specifically referred to in the Preamble of the Constitution, ". . . (to) secure the blessings of liberty to ourselves and our posterity…" and presently existing unborn humans are unquestionably living posterity. There can be no pretense of consistency unless and until this Court holds that a corporation is not a person or that an unborn human child is.

Executions of pregnant women. Women on death row can't be executed while they are pregnant, according to 400 years of U.S. law.

> The writ de ventre inspiciendo ["to inspect the body"], to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother. *Union Pacific R. Co. v Botsford,* 141 U.S. 250, 253 (1891).

The prohibition was codified in the U.S. Code in 1994 (if not before) by HR3355. It now reads:

> 18 U.S.C. §3596 (b) Pregnant Woman.-A sentence of death shall not be carried out upon a woman while she is pregnant.

Blackmun might have seen, in the 1891 case just cited, confirmation of

his theory that our ancestors didn't attach as much human worth to first trimester babies (which in his mind was the same as babies before quickening) since in the common law the protection didn't kick in before quickening. (When the baby's kicks can be felt by someone holding their hand on the mother's womb.) But it should be obvious to anyone with legal experience that the quickening trigger was necessitated by prosecutorial necessity, regardless of what anyone thought about the value of preemies. Quickening was the only pregnancy test they had in those days. Before delaying an execution they would of course want proof that the woman was pregnant rather than just take her word for it that she craves pickles and ice cream. Without a proof requirement, any woman would make the claim – even though no woman could really be sure either – to buy a few more months.

The codification of this prohibition changes "quick with child" to "pregnant". In other words, current law stops the execution as soon as the woman tests positive, which is as close as modern science can get to the time of conception.

Surely prosecutorial considerations explain other common law distinctions in penalties before and after quickening, too. Before quickening, prosecutors had no evidence that there was a live human being who was

killed, not to mention the absence of a dead body to document death. The situation was the legal equivalent of attempted murder: even where the attempt can be proved, the existence of a victim cannot be. Perhaps rather it was the legal equivalent of contraception today; where not even the mother knows if there will be a pregnancy: her action is taken to prevent a live birth. If this theory is correct then, far from any implication from the lower penalties for killing preemies than for killing "quick" babies, that preemies are of less value, the existence of any penalties at all are what America's Founders would impose on today's women for "mere" contraception.

Slavery & abortion were outlawed together. There was a concurrence of 14th Amendment ratification, and stronger criminalization of abortion before conception. Despite the prosecutorial hurdle (a prosecutor's only proof of pregancy before quickening was to ask the mother if she had missed a period and to hope she would incriminate herself) states passed stronger penalties against pre-quickening abortion, during the same time that they ratified the 14th Amendment.

This tightening of penalties by almost all states was in response to lobbying of The American Medical Association, which had been assembling evidence of distinct, unique human life from the moment of conception.

The fact that almost all states tightened their penalties from conception

in response to evidence of human individuality from that point, proves that states adopted the position, if they didn't already hold it but had withheld penalties because of courtroom reality, that all babies from conception are humans/persons. The fact that they simultaneously ratified the 14th Amendment with its "equal protection of the laws" clause protecting all humans/persons and invalidating any law that gives less protection to humans of any invidious class through some legal fiction, proves that they believed the 14th Amendment obligated states to protect the unborn.

The purpose of the 14th amendment was to close a loophole in the 13th that had allowed slavery to continue. In other words the national consciousness that increasingly protected unborn babies was the same national consciousness that was nailing down slavery's coffin. So the national consciousness favored by Roe was that of the era of slavery, over that of freedom for all.

Past denial of rights doesn't legalize future denial of rights. Getting away with crime doesn't make crime legal. There is a limit to Stare Decisis. A past denial of rights doesn't justify the irrelevance of an earlier deprivation of fundamental rights to the legality of such deprivation today.

There are enough cases unaccounted for by "no case could be cited that holds that a fetus is a person" to support a review of whether the Stare

Decisis of 44 years of legal abortion is as compelling as the Stare Decisis of 400 years of American criminalization of abortion.

Especially since Stare Decisis has no power to perpetuate any deprivation of fundamental rights. The fact that the fundamental rights of sixty millions have been cut off for 42 years cannot turn the Constitution into the executioner of sixty million more.

The Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (Brown 11), "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them"; how much more **these constitutional principles must not be allowed to yield simply because of violation of them!** If the state in fact is denying due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class.

The following is an example in Roe of this kind of irrelevant history:

> VI - It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century. [410 U.S. 113, 130]
>
> It was not until after the War Between the States that legislation

> began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. ….
>
> Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased.…
>
> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. [410 U.S. 113, 139-141]

Roe might just as well have argued that since slavery was not a crime through most of human history, until right after the Civil War, we ought to end our current legal harshness towards slave holders because of the stare decisis of millennia of legalization of slavery in order to recognize the right to one's slaves in the Penumbra of the 14th Amendment. The argument above would reach that result so well, that perhaps we may recognize within it some whispered suggestions of the ghosts of the Dred Scott court.

Roe's observation that *abortion from conception* was not a crime until after the Civil War is no more an argument that we should return to those happier days before it, than is the fact that *slavery* was not a crime until after the civil war. And in the case of abortion, Roe's observation takes the difference between penalties pre and post quickening out of the context of (1)

the difficulty of proving the existence of a body before quickening; (2) legislation against abortion before that seemed about as important as legislation against jumping off a cliff, since chances of survival were about the same: surgical abortion was rare and reckless before the Hegar Dilator of 1879 which allowed a D&C; (3) the increased penalties were the logical response to current science. Now that that knowledge is out, Americans can't be expected to tolerate abortion again until that knowledge is lost again.

Errors in abortion prevention cases.

What makes the following analysis of abortion prevention criminal cases relevant to Iowa's case is that both categories of cases share in common the manner in which lower courts have ruled irrelevant the fact inquiry which *Roe* said was dispositive. Since the only Iowa precedent was in this category, we had better address it.

These cases are actually more relevant to Iowa's case than reviews of state laws that have imposed conditions on access to abortion, [ie. parental consent, clinic safety, partial birth], because none of those cases addressed the growing evidence of what *Roe* had ruled would "collapse" legal abortion.

One error in *Planned Parenthood of Mid-Iowa v. Maki* 478 N.W.2d 637 (1991) was that the Court did not address her defense. Her defense was that

she invoked the Necessity Defense for actions necessary to save human lives. The Court completely ignored that defense and substituted, for it, someone else's defense which Maki did not raise, which Maki considered as ridiculous as everyone else thought it was: that Maki invoked the Necessity Defense "to excuse criminal activity by those who disagree with the policies of government."

> In October 1990, Planned Parenthood filed a petition seeking to permanently enjoin Maki from trespassing upon its property, disrupting its business, and interfering with its patients. Maki contends that her acts do not constitute a trespass but instead are justified based on the defense of necessity. We apply the necessity defense only in emergency situations where the threatened harm is immediate and the threatened disaster imminent; the individual must be stripped of all options available to avoid both evils. State v. Walton, 311 N.W.2d 113, 117 (Iowa 1981). The necessity defense is generally **not available to excuse criminal activity by those who disagree with the policies of the government.** United States v. Kabat, 797 F.2d 580, 591 (8th Cir.1986). Thus, we do not believe the necessity defense has been established here to excuse Maki's repeated trespasses. NOW v. Operation Rescue, 747 F. Supp. 760, 770 (D.D.C.1990).

Did the justices think that because there might be another reason for doing something than the reason that justifies it, that it isn't justified? So that an ambulance driver, rushing a trauma victim to a hospital, may not be excused for going through a red light "because he likes fast cars"?

A second problem with the ruling is that although it correctly names elements of the Necessity Defense, as the threat of "disaster", "harm", and

"evil", it does not explain how the elements are not met. Stating them, while saying the defense isn't met, *implies* the elements are not met. But many reasonable people thought they were.

A third problem was giving Planned Parenthood standing to sue for the injunction against Maki. When a plaintiff in a lawsuit is at least partly responsible for the harm the suit seeks to correct, the plaintiff does not have the "clean hands" needed for standing to sue. When abortion is legally recognizable as the legal and moral equivalent of murder, then Planned Parenthood, as an office of murderers, has no legal right to sue anybody for interfering with their murder. The Court should have considered Maki's evidence that human life/personhood begins at conception. She offered plenty of it. It was not irrelevant.

A fourth problem with the ruling was that it so misapplied the *Kabat* case as to reach the opposite result that *Kabat* sought while citing Kabat as its authority for it. *Kabat*, a case about protesters at a nuclear missile site, said Necessity can't name, as a "harm", what elected legislatures have fixed as necessary and good; for a court to reverse such a designation would be for a court to reverse a legislature, which courts must never do. [34]

34 That's right, Kabat actually said "the necessity defense was never intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government: in such cases the "greater harm" sought to be prevented would be the course of action chosen by elected representatives, and a court in allowing the defense would be making a negative political or policy judgment about that course of action. Judgments of that type, however, are not the province of judge (or jury) under the separation of powers established by our Constitution. [797 F.2d 592]

But when the "harm" invoked is abortion, that is a harm which has been so designated by almost all legislatures including Iowa's, a designation reversed by Iowa courts in violation not only of the Iowa law, but also SCOTUS, since *Roe* ruled itself "unable to speculate" whether abortion is actually murder and invited juries to solve the puzzle. See Appendix F for more analysis of errors in criminal abortion prevention cases.

The error's in Roe's legislative history. To the consensus of all court-recognized fact finders *since* Roe that the babies of humans are humans/persons from conception, must be added the evidence, and near-consensus of scholars, that court-recognized fact finders *before* Roe concurred with those after. Roe's history of them to the contrary, which was Roe's justification for doubting unborn personhood, was erroneous.

Much of the rationale for Roe was that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. But Roe's legislative history has been seriously criticized by scholars. For as long as this history is made the basis for deciding who gets to live, shouldn't SCOTUS revisit this history, address criticisms, and make any warranted corrections?

The existence of this scholarly discussion is so well known that I will include just a sample of it in Appendix D from a 2012 Alabama case. This

criticism vindicates Rehnquist's dissent in *Roe* that "the right to an abortion is not so universally accepted as the appellant would have us believe." *Roe v. Wade:* 410 U.S. 113, 174

Here is where Roe says its legislative history was much of the basis for its alleged doubt about "when [the right to] life begins":

> "...the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn ...[exceptions] would appear to be [designed] to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. ...In short, the unborn have never been recognized in the law as persons in the whole sense. *Roe v. Wade:* 410 U.S. 113, 161.

Any history relied on to decide life and death is "an important question of federal law that has not been, but should be, settled by this Court".[35] The criticism of legal scholars merits a response. The blood of millions cries out for a serious answer.

The errors in Roe's review of religions' positions.

Some of the rationale for Roe's alleged ignorance of "when life begins" was that "those trained in...theology are unable to arrive at any consensus...." *Roe v. Wade* 410 US 113, 159. Yet not one single Bible verse was analyzed in reaching this conclusion. How is it possible to assess the position of any religion, while treating its Scriptures as irrelevant?

35 Supreme Court rule 10c.

Roe's characterization of the position of Protestantism and Judiasm on when babies become humans/persons was not decided by anything resembling a thoughtful study, yet it was made part of Roe's basis for deciding when it is legal to kill them. This makes the relevant Scriptures an "important federal question" that has been "decided...in a way that conflicts with relevant decisions of this Court",[36] a situation in which I would think lower courts would not want to remain.

Claiming the endorsement of religion without quoting a single Bible verse produced an inescapably egregious distortion. SCOTUS must either carefully analyze the relevant Scriptures that are its basis for legalizing baby killing, or abandon Roe's characterization and concede that the position of Protestantism and Judiasm concerning the unborn does not interest SCOTUS as SCOTUS decides who lives and who dies.

SCOTUS should at least analyze the passages, and their implications, which I have placed in Appendix F.

No Roe backup is possible. Several wannabe replacement rationales wait in the wings to take *Roe's* place when it "collapses". But none of them can survive "establishment" that all unborn babies of humans are humans/persons.

36 Supreme Court rule 10c.

They are:

1. Even if it *is* murder, moms rely on it
2. We can't know if the unborn or the elderly are human
3. The unborn are't human – proved by our cruelty to them
4. SCOTUS' credibility would tank if it returned to reality
5. Babes may be human, but they are momnappers
6.Babes should die for breaking and entering
7. Babes are human but moms can't be forced to nurture them
8. Kill babes, save ourselves – there's such difference between us
9. Kill born children – are they more human than unborn babes?
10. Handicapped babes would rather be tortured to death
11. Medical evidence DOESN'T say unborn babes are human
12. Oppose all laws whose origins are exclusively Christian

> "Indeed, our decision in United States v. Vuitch, 402 U.S. 62 (1971), inferentially is to the same effect, for we 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." – Roe v. Wade

In oral arguments in Roe v. Wade, Justice Potter Stewart asked Sarah Weddington "If it were established that an unborn fetus is a person, you would have an almost impossible case here, would you not?" Weddington audibly laughed and acknowledged "I would have a very difficult case." Stewart pursued, "This would be the equivalent to after the child was born...if the mother thought it bothered her health having the child around, she could have it killed. Isn't that correct?" Weddington answered, "That's correct."

This exchange is what presumably promoted Justice Blackmun to write "[If the] suggestion of personhood is established, the case, of course, collapses,

for the fetus' right to life is then guaranteed specifically by the [14th] Amendment."

Is it true that abortion's fragile "legality" must "collapse" along with Roe? Can it be sustained, after Roe's burial, by SCOTUS rationales added after Roe, to Roe's "outer shell"?

> The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case. (Rehnquist, joined by White, Scalia, and Thomas, in Planned Parenthood v. Casey, 505 U.S. 833 (1992)

What is Roe's "outer shell"? Can any rationale hanging on it stand alone, without it?

Since it does not appear to be identified anywhere, it must be taken as a metaphor of whatever it is about Roe that keeps abortion legal despite the shifting sands of legal rationales for it.

There is only one skeletal sustaining principle Iowa can think of in Roe, to which a succession of rationales may attach in turn: *alleged uncertainty whether the unborn babies of human mothers are human.*

This alleged uncertainty is articulated in Roe's "collapse" clause where it is explicitly identified as Roe's sustaining principle, in the sense that without it, Roe cannot stand.

This uncertainty as a matter of law cannot still seriously be alleged.

Granting that the unborn babies of humans are humans, making their killing murder, will this Court still insist their murder is some kind of "private and personal right", a "sacred choice" with which courts and lawmakers ought not interfere? Once this "outer shell" of alleged uncertainty who is human "collapses", no rationale attached to it can stand by itself.

Let us be clear that Roe does not merely "collapse". The terms of Roe's "collapse" clause make it clear that Roe becomes unconstitutional, along with every law and court ruling which violates the 14th Amendment by obstructing protection of the Right to Life in the course of protecting abortion's fragile "legality". Yet there are wannabe Roe replacements.

These wannabe replacements are analyzed in Appendix G.

Summary: Abortion on trial. It is not possible to invalidate Iowa's law without getting off the fence about whether abortion is murder. The defense for abortion must prove that Iowa's law will *not* save human lives. To say only "we cannot tell" if abortion is murder, is a pretty pathetic defense of abortion's continued color of legality, while Iowans can certainly tell.

Every court-recognized legal authority in America, and every court-recognized fact finding authority in America, which has taken a position on it, has unanimously found that unborn babies are humans/persons from conception. No legal authority or court-recognized fact finding authority has

said the unborn are *not* humans/persons. Will SCOTUS be the first? Will SCOTUS finally say, after all these years, say they are not? How long can SCOTUS' alleged uncertainty whether SCOTUS created genocide, when no other authority is uncertain, be SCOTUS' reason to perpetuated genocide another 42 years?

Abortion, and its sustaining rationale that we can't tell if babies of humans are humans, threatens more than unborn babies. By successfully dehumanizing millions of persons over a term like "fetus", Roe demonstrates the device of denying defensible rights to any group the state considers "unwanted" (ie. PVS, seniors, mentally ill, or prisoners) by simply alleging inability to define certain elements of humanity or personhood.

SCOTUS' insistence that it need not decide, yet,[37] whether it legalizes murder, meets the definition of "arbitrary power and oppression", as Virginia put it. Tolerance of which is "absurd, slavish, and destructive of the good and happiness of mankind" according to the American spirit that created our Constitution.

> "...the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." - *The report from the ratifying conventions to the U.S. Constitution of Virginia, Sept 17, 1787; Maryland, April*

37 *Webster v. Reproductive Health Services,* 492 US 490 (1989) "This Court refrains from deciding constitutional questions where there is no need to do so...." (Quoting O'Conner concurrence from the syllabus.)

29, 1788; North Carolina, August 2, 1788; also the Constitutions of New Hampshire, 1784, Tennessee Art. 1 §2; and North Carolina, Nov 21, 1789.

"...all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life.....--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...." - The Declaration of Independence

Questions reasonably asked but never answered don't just go away.

Suspicion can't help but grow that the reason they are not answered is that they are irrefutable, *and* they are a window to a reality that entrenched powers would rather shut.

But to return to the narrower scope of traditional legal discussion, and to conclude: It is impossible for a "right to privacy", which gives mothers jurisdiction over the lives of unborn babies, to exist in the "penumbra" of the 14th Amendment, once legal recognition is "established" that these babies are "persons", which Roe equates to "recognizably human", requiring 14th Amendment protection of their Right to Life.

This impossibility is declared in Roe's "collapse" clause. The trigger of Roe's "collapse" clause was pulled by 18 U.S.C. 1841(d).

Roe, by its own order, has "collapsed". No legal rationale, whether attached by SCOTUS to its "outer shell", or waiting in the philosophical

wings, can stand in its place. No matter how far and wide, or how desperately, you cast your net for a Roe substitute, none can stand, except to the extent we as a people allow our Constitution to "collapse", and eventually, with it, civilization.

To the extent our Constitution stands, Roe cannot.

CONCLUSION. Iowa wants to stop the murder of thousands of Iowa humans every year. Iowa wants to comply with the 14th Amendment which requires Iowa to protect them. Iowa asks this Court to save all still in danger, by granting Iowa's petition for a writ of certiorari to affirm that the babies Iowa would save are humans and persons, and abortion's legality has "collapsed".

Respectfully submitted, _____ Tom Miller, Iowa Attorney General

April 1, 2017, the 13th anniversary of the law that said what Roe said must be said for "legal" abortion to end.

Appendix A (The Ruling of the 8th Circuit Court of Appeals)

Appendix B (The federal trial court entry of judgment)

Appendix C Constitutional and Statutory Provisions: text

Preamble to the U.S. Constitution: *We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves **and our Posterity,** do ordain and establish this Constitution for the United States of America.

14th Amendment, § 1, sentence 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction **the equal protection of the laws.**

18 U.S.C. § 1841(d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

Appendix D: Roe's legislative history scrutinized by Alabama

Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012)

A. Roe misstated the protection of the unborn child under the common law.

Roe 's viability rule was based, in significant part, on an incorrect statement of legal history. The Supreme Court in Roe erroneously concluded that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. Roe also referred to "the lenity of the common law." 410 U.S. at 165. However, scholars have repeatedly pointed to inaccuracies in Roe 's historical account since Roe was decided in 1973.[38] "[T]he history embraced in Roe would not withstand careful examination even when Roe was written." Joseph Dellapenna, Dispelling the Myths of Abortion History 126 (Carolina Academic Press 2006).

Sir William Blackstone, for example, recognized that unborn children were persons. Although the Court cited Blackstone in Roe, it failed to note

38 See generally Joseph Dellapenna, Dispelling the Myths of Abortion History (Carolina Academic Press 2006); John Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge University Press 1988). See also Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub.L.Rev. 15 (1993); Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, Two Ships Passing in the Night: An Interpretavist Review of the White–Stevens Colloguy on Roe v. Wade, 6 St. Louis U. Pub.L.Rev. 229, 230 n. 8, 241 n. 90 (1987); James S. Witherspoon, Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 70 (1985) ("In short, the Supreme Court's analysis in Roe v. Wade of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous."); and Robert Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L.Rev. 807 (1973).

that Blackstone addressed the legal protection of the unborn child within a section entitled "The Law of Persons." It also ignored the opening line of his paragraph describing the law's treatment of the unborn child: "Life is an immediate gift of God, a right inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England *129.[39] As Professor David Kadar noted in 1980, "Rights and protections legally afforded the unborn child are of ancient vintage. In equity, property, crime, and tort, the unborn has received and continues to receive a legal personality." David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L.Rev. 639, 639 (1980) (footnotes omitted).

B. Roe misstated the protection of the unborn child under tort law and criminal law.

Professor Kadar and others have pointed out "the mistaken discussion within Roe on the legal status of the unborn in tort law." Kadar, 45 Mo. L.Rev. at 652. The Court's discussion in Roe of prenatal-death recovery "was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v. Wade." 45 Mo. L.Rev.

39 See Dellapenna, at 200:"[M]odern research has established that by the close of the seventeenth century, the criminality of abortion under the common law was well established. Courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion. The only difference among these authorities had been the severity of the crime (misdemeanor or felony), an uncertainty that, under Coke's influence, began to settle into the pattern of holding abortion to be a misdemeanor unless the child was born alive and then died from the injuries or potions that led to its premature birth."

at 652–53. See also William R. Hopkin, Jr., Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy, 47 Temp. L.Q. 715, 723 (1974) ("[I]t must respectfully be pointed out that Justice Blackmun has understated the extent to which the law protects the unborn child.").

Roe 's adoption of the viability standard in 1973 did not reflect American law. Viability played no role in the common law of property, homicide, or abortion. Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L.Rev. 563, 569 n. 33 (1987). And there was no viability standard in wrongful-death law because the common law did not recognize a cause of action for the wrongful death of any person. Farley v. Sartin, 195 W.Va. at 674, 466 S.E.2d at 525 ("At common law, there was no cause of action for the wrongful death of a person."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) ("The common law not only denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependants or heirs for their own loss at his death.").

The viability standard was introduced into American law by Bonbrest v. Katz, 65 F.Supp. 138 (D.D.C.1946), the first case to recognize a cause of action for prenatal injuries. Bonbrest implied that such a cause of action

would be recognized only if the unborn child had reached viability. 65 F.Supp. at 140.

Viability was initially adopted by courts in prenatal-injury law, but its influence was waning by 1961. See Daley v. Meier, 33 Ill.App.2d 218, 178 N.E.2d 691 (1961) (holding that an infant born alive could recover damages for injuries suffered before viability); see also Note, Torts—Extension of Prenatal Injury Doctrine to Nonviable Infants, 11 DePaul L.Rev. 361 (1961–62). One thorough legal survey of prenatal-injury law a decade before Roe was decided concluded that "[t]he viability limitation in prenatal injury cases is headed for oblivion. Courts are coming to realize that it is illogical and unjust to the children affected and not readily amenable to scientific proof." Charles A. Lintgen, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. Pa. L.Rev. 554, 600 (1962).

....Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined. Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells,

incapable of independent life, merge to form a single, individual human entity.[40] Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception.[41] An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

40 See, e.g., Bruce M. Carlson, Human Embryology and Developmental Biology 3 (1994) ("Human pregnancy begins with the fusion of an egg and a sperm ."); Ronan O'Rahilly & Fabiola Muller, Human Embryology and Teratology 8 (2d ed. 1996) ("Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. This remains true even though the embryonic genome is not actually activated until 4–8 cells are present, at about 2–3 days."); Keith Moore, The Developing Human: Clinically Oriented Embryology 2 (8th ed. 2008) (The zygote "results from the union of an oocyte and a sperm during fertilization. A zygote or embryo is the beginning of a new human being."); Ernest Blechschmidt, The Beginning of Human Life 16–17 (1977) ("A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."); C.E. 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."); and Clinical Obstetrics 11 (Carl J. Pauerstein ed. 1987) ("Each member of a species begins with fertilization—the successful merging of two different pools of genetic information to form a new individual.").

41 See Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub.L.Rev. 15, 120–137 (1993) ("Appendix C: The Legal Consensus on the Beginning of Life," citing caselaw and statutes from 38 states and the District of Columbia stating that the life of a human being should be protected beginning with conception).

Appendix E: Scriptures SCOTUS must address before saying Christianity supports abortion.

Introduction: Roe accepted validation of its alleged ignorance of whether unborn babies of human mothers are humans from the fact that many savage religions of ancient times had no problem murdering unborn babies. Which seems an undesirable precedent for a free people, since those religions had no problem with murdering adults, either, or savagely "sacrificing" them. But Roe thought its ignorance vindicated by elements within Christianity and Judiasm too.

> 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....There has always been strong support for the view that life does not begin until live birth....It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[42] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[43] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. Roe v. Wade, 410

42 Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed.1967).

43 Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

U.S. 113, 159-161

Roe's treatment of Christianity and Judiasm notes how men choose to respond to the Truth, and ignores what the Bible says is true.

Neither Judaism nor Christianity are understood by taking a poll of how well Christians and Jews *live up to* their standards. They are understood by reading the Scriptures they claim *are* their standards. (I hope the views of "secular Jews" who reject Jewish Scriptures is not part of Roe's evidence of Jewish positions!)

Limiting understanding of any religion to human opinion is like a judge not looking up a law or a case for himself but taking lawyers' word for what it says. It is like hearsay, compared with cross examining an eyewitness. Citing a book about The Book, as Roe did, is a poor substitute for reading The Book.

You will find varying opinions in various churches about how Christians ought to respond to abortion. But you will not find, even where those statements conflict, *significant* disagreement about what various verses say about the unborn. Those who base their positions on a careful reading of Scripture pretty much agree. Those who don't, are no guide to understanding Christianity. SCOTUS can't rule analysis of the Bible irrelevant, and expect to understand the religions who revere it.

Iowa will be totally surprised if SCOTUS conducts an appropriate

analysis of Scripture in order to correct Roe's vague reliance on religion for its alleged uncertainty whether the babies of human mothers are humans/persons. But this analysis must be done or SCOTUS must retract any implication that its legalization of abortion finds any support in any religion.

Psalm 139 says David's human life began before his tiny body had arms and legs. *Before* conception.[44] He was God-recognized before he was legally recognized.

> Psalm 139:13-16 You created every part of me; you put me together in my mother's womb. I praise you because you are to be feared; all you do is strange and wonderful. I know it with all my heart. When my bones were being formed, carefully put together in my mother's womb, when I was growing there in secret, you knew that I was there---you saw me before I was born. and in thy book all *my members* were written, *which* in continuance were fashioned, when *as yet there was* none of them. GNB/KJV

Luke 1 says that in the womb, a baby (1) can hear voices; (2) can sense the difference between a voice sweet with blessing and a voice coarse with cursing; and (3) can choose which kind of voice to get excited about. In other words, (4) an unborn baby can choose between good and evil.

> Luke 1:39 And Mary arose in those days, and went into the hill country with haste, into a city of Juda; 40 And entered into the house of Zacharias, and saluted Elisabeth. 41 And it came to pass, that, when Elisabeth heard the salutation of Mary, the babe [John the Baptist] leaped in her womb; and Elisabeth was filled with the Holy

44 Jeremiah 1:5 likewise affirms that our souls begin *before* conception: "Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, *and* I ordained thee a prophet unto the nations."

> Ghost: 42 And she spake out with a loud voice, and said, Blessed *art* thou among women, and blessed *is* the fruit of thy womb. 43 And whence *is* this to me, that the mother of my Lord should come to me? 44 For, lo, as soon as the voice of thy salutation sounded in mine ears, the babe leaped in my womb for joy. KJV

A few verses before that tell us that even from the womb, a baby has a soul for the Holy Spirit to fill:[45]

> Luke 1:15 For he shall be great in the sight of the Lord, and shall drink neither wine nor strong drink; and he shall be filled with the Holy Ghost, even from his mother's womb.

Saline abortions, which burn babies alive with acid that blackens over half their skin while eating out their lungs, are our cultural equivalent of the pagan god Molech, into whose red hot brass arms worshipers threw their children, whose screams were covered by the priests' drums. Today we similarly have what was given as the name of the first video of an ultrasound of an abortion: "The Silent Scream." God said this is so barbaric that He never even imagined such a thing. This is a remarkable idea for those who believe God foresees every detail of what evils men will do, but all translations and commentators seem to agree that's what the verse means. Of no other evil in the entire Bible does God say this was so evil that He did not foresee it.

> Jeremiah 32:35 And they built the high places of Baal, which *are* in the valley of the son of Hinnom, to cause their sons and their daughters to pass through *the fire* unto Molech; which I commanded them not, neither came it into my mind, that they should do this

45 This, along with Jeremiah 1:5, supports the capacity of an unborn baby to choose good or evil.

abomination, to cause Judah to sin.

God also has something to say about *how we should respond* to abortion. This verse was in Operation Rescue's masthead, until 1993 when the first abortionist was shot. The scenario is where murderers have so much power over their victims that they can "lead them away" to kill them where they choose, and by a schedule known to others. That pretty much limits the scenario to government-protected murders.

> Proverbs 24:10 If you faint in the day of adversity, your strength is small. 11 Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter. 12 If you say, "Behold, we did not know this," does not he who weighs the heart perceive it? Does not he who keeps watch over your soul know it, and will he not repay man according to his work? ESV

The only citation of any Bible verse in Roe is to Exodus 21:22, in footnote 22. Roe says the verse *"may* have" influenced Augustine! What was the point of adding such a speculation if it can't even be documented that Augustine *thought* about it? Was it an attempt to stick a verse into the record that some have thought minimizes the value of the unborn, even though most do not? Cults use obscure, ambiguous verses as a wedge to get Doubt's foot in the door. Here is the verse:

> Exodus 21:22 And when men fight, and they strike a pregnant woman, and her child goes forth, [literally "so her children come out" according to an NLT note] and there is no injury, being fined he shall be fined. *As much as* the husband of the woman shall put on him,

> even he shall give through the judges. [That is, he can sue in a court of equity and a jury will decide any award.] (Literal Translation of the Holy Bible)

The uncertainty is whether "there is no injury" means "no injury to either the mother or the child", or only "no injury to the mother – who cares about the child?" Commentator John Gill (1690-1771) notes places in the talmud that say the verses are concerned only for women, but he says the verse itself applies also to babies:

> **and yet no mischief follow**: to her, as the Targum of Jonathan, and so Jarchi and Aben Ezra restrain it to the woman; and which mischief they interpret of death, as does also the Targum of Onkelos; but it may refer both to the woman and her offspring, and not only to the death of them, but to any hurt or damage to either.... *John Gill's Exposition of the Entire Bible*

Adam Clark (1715-1832) understands it to protect mother and child alike:

> But if mischief followed, that is, if the child had been fully formed, and was killed by this means, or the woman lost her life in consequence, then the punishment was as in other cases of murder - the person was put to death.... *Adam Clark's Commentary on the Bible*

The Bible Knowledge Commentary is emphatic that the child's life is revered as much as the mother's. Commentaries since 1973 take a position on abortion.

> 21:22–25. **If … a pregnant woman** delivered her child prematurely as a result of a blow, but both were otherwise uninjured, the guilty party

was to pay compensation determined by **the woman's husband** and **the court**. However, **if there** was **injury** to the expectant mother or her child, then the assailant was to be penalized in proportion to the nature of severity of the injury. While unintentional life-taking was usually not a capital offense (cf. vv. 12–13), here it clearly was. Also the unborn fetus is viewed in this passage as just as much a human being as its mother; the abortion of a fetus was considered murder.[46]

Wiersby sees no uncertainty that the unborn are as revered as the born:

> Verses 22–23 are basic to the pro-life position on abortion, for they indicate that the aborting of a fetus was equivalent to the murdering of the child. The guilty party was punished as a murderer ("life for life") if the mother or the unborn child, or both, died. See also Ps. 139:13–16.[47]

Tyndale's commentary sermonizes about it:

> In the case of mothers and children, special laws were given to protect the helpless and innocent (21:22–25). If a man caused a woman to give birth prematurely but the infant was not harmed, then a simple fine was to be levied. If the child or mother was harmed, then the law of retaliation was applied. Punishment was restricted to that which was commensurate with the injury. In these verses God shows clear concern for protecting unborn children, a concern that people today would do well to heed. Surely the abortion of millions of unborn babies will fall under God's condemnation.[48]

But the *Faithful Life Bible* seems to be pro-abortion:

> **21:22 as the judges determine** Describes a situation where the woman who is injured survives the attack but her child does not. The penalty in such a case is a fine. However, v. 23 says that if the woman is killed, the death penalty is prescribed. Consequently, the life of the

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46 Hannah, J. D. (1985). Exodus. In J. F. Walvoord & R. B. Zuck (Eds.), *The Bible Knowledge Commentary: An Exposition of the Scriptures* (Vol. 1, p. 141). Wheaton, IL: Victor Books.
47 Wiersbe, W. W. (1993). *Wiersbe's Expository Outlines on the Old Testament* (Ex 21:12–36). Wheaton, IL: Victor Books.
48 Hughes, R. B., & Laney, J. C. (2001). *Tyndale concise Bible commentary* (p. 39). Wheaton, IL: Tyndale House Publishers.

> adult woman was deemed of greater value than the contents of her womb. This passage is frequently used to justify abortion: the woman was viewed as a person; the child was not.[49] [Wow!]

The Hebrew text simply doesn't specify whether "if there is no injury" applies to both child and mother, or to only one of them. Nor does the Hebrew say whether "the baby comes out" means healthy or dead. The disagreement of translators and commentators is possible because of this textual ambiguity. Commentaries since 1973 face societal pressure to stay out of Roe's way. Ancient Talmud entries likewise faced the social pressure of the ever present Molech worship surrounding Israel, and too frequently invading Israel. Jesus' metaphor for Hell was the "valley of Tophet" just outside Jerusalem where children were once burnt alive to Molech.

I would submit that while the *text* may be unclear, the *context* is certainly clear. From "be fruitful and multiply", Genesis 1:28, to "As arrows in the hand of a mighty man, so *are* the sons of the young. Blessed *is* the man who has filled his quiver with them....", Psalm 127:4-5, and all the laws in between about the importance of descendants, it is inconceivable that any jury in Moses' time could be apathetic about an unnatural miscarriage! The translations that leave this idea implied but not specified are MKJV, RV, YLT, GW, ISV, JPS, KJV, ABP, ASV, ESV, NLT, NIV84, NASB95, HCSB,

49 Barry, J. D., Heiser, M. S., Custis, M., Mangum, D., & Whitehead, M. M. (2012). *Faithlife Study Bible* (Ex 21:22). Bellingham, WA: Logos Bible Software.

NCV, TNIV, CPB, NirV. However, these translations limit concern to the mother: BBE, “causing the loss of the child, but no other evil comes to her”; CEV, if she “suffers a miscarriage” but “isn’t badly hurt”; DRB “and she miscarry indeed, but live herself”; ERV “If the woman was not hurt badly”; and Message “so that she miscarries but is not otherwise hurt”. As noted before, “miscarriage” is a poor translation since the Hebrew word as easily means a healthy birth.

The Brenton translation expresses concern *only for the baby:* “And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty....”

Theologians are less likely than lawyers to consider in this verse the difficulty of assessing criminal intent in this situation. Two men are fighting, and a woman gets hit. What is she doing there? What responsibility did she have for getting out of the way? When the man hit her, was he actually aiming at her or was he just struggling against the other man? If he deliberately hit her, was he just defending himself against her attack, or was he deliberately aiming at the womb? These are questions for a jury. They are factors that could make a penalty greater for harm to the mother than for the child, *or vice versa,* depending not on their relative human worth but on where any culpability was focused.

Appendix F:
Errors in abortion prevention cases.

The opinion below documents how universally courts in abortion prevention cases wrongly think *Roe* says abortion's "constitutional protection" makes irrelevant any facts established by court-recognized fact finders about who abortion harms.

> "The rationale utilized by '[t]he majority of courts. . . [was] that because abortion is a lawful, constitutionally protected act, it is not a legally recognized harm which can justify illegal conduct.'" (p. 19 of Opinion Below, quoting *City of Wichita v. Tilson,* 855 P.2d 911 (Kan. 1993)

Error #1: ***Tilson* ignored *Casey* which had ruled just the year before.**

Casey[50] abandoned "constitutional protection" for abortion in 1992.[51]

Error #2: ***Tilson* ignored *Roe's* open door to fact finders, and closed it.**

Didn't Roe say in so many words "we can't even *speculate* whether these babies we let mothers kill are humans/persons – of course if that is ever *established*, then we will stop it"?[52] By saying doctors and preachers know

50 Planned Parenthood v. Casey, 505 U.S. 833, 945, 954 (1992)

51 Justice Scalia's dissent in *Lawrence v. Texas* 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003), explaining how the Supreme Court, in 1992, abandoned Roe's position that the right of a woman to choose to hire someone to kill her unborn child was a "fundamental right": "We have since rejected Roe' s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U.S., at 876,....-and thus, by logical implication, Roe' s holding that the right to abort an unborn child is a 'fundamental right.'

52 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

more about it than SCOTUS, didn't Roe defer to fact finders,[53] treating personhood as a fact question?

Certainly by the principle "actions speak louder than words" it is reasonable for courts below, and Americans in general, to infer that SCOTUS has ruled that unborn babies are in fact *not* human beings and have no value other than for their "potential" to *become* human beings. Or that their personhood is irrelevant. But aren't SCOTUS's *words* also important? Haven't these courts "decided an important federal question in a way that conflicts with relevant decisions of this Court"?[54]

Error #3: **Roe never said abortion's *legality* makes its *reality* irrelevant.** Tilson assumes "saving the lives of unborn humans/persons" was made legally unrecognizable by *Roe,* but the reality is that *Roe's* "collapse" clause makes unborn lives a strong enough legally recognizable interest to not only "justify" saving them, but to "collapse" the entire abortion industry.

> "The evil, harm, or injury sought to be avoided, or the interest sought to be promoted, by the commission of a crime must be legally cognizance [should be "cognizable", or recognizable] **to be justified as necessity.** '[I]n most cases of civil disobedience a lesser evils defense will be barred. This is because as long as the laws or policies being **protested** have been lawfully adopted, they are conclusive evidence of *the community's view* on the issue.' 2 P. Robinson, *Criminal Law*

53 "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." *Roe v. Wade* 410 US 113, 159

54 Supreme Court rule 10c.

> *Defenses* 124(d)(1), at 52. Abortion in the first trimester of pregnancy is not a legally recognized harm, and, therefore, prevention of abortion is not a legally recognized interest to promote." (*City of Wichita v. Tilson,* 253 Kan. 295) quoting *State v. Sahr,* 470 N.W.2d 185, 191 (1991)

Error #4: ***Tilson* quoted *Robinson* out of context.** *Robinson* explained why the Necessity Defense shouldn't be invoked by protesters against nuclear missile sites, at which there is no certainty that even one life will be harmed if the action is not taken, there is no danger is "imminent" by any definition, and there is time and real opportunity for more peaceful alternatives.

Error #5: ***Tilson* labeled as the "community view' the view that every community had criminalized.** *Tilson*, quoting *Sahr* and *Robinson,* labeled as a "community view" what almost all state legislatures had criminalized since their founding but were forced to legalize by eight unelected men who said they were "in no position to speculate" on the position now being labeled "the community view".

It is circular reasoning for courts to force all states to legalize what they had criminalized since their founding, forcing communities across America to reverse their definition of abortion as murder, under protest more vigorous than America saw during the Civil Rights Movement, and then say it is only honoring "the community view" to rule that abortion cannot be recognized as murder!

A lesson from Nazi Germany is that some things which are legal are evil. Murder can be made legal, but not harmless. The slaughter of millions whose only offense is their existence has often been encouraged by laws, and justified by ruthless governments based on ruthless religions, but never justified by American legal principles or by the religion after which they were patterned.

Another lesson is the power of evil laws to intimidate "the community" into tolerating terrible evils which poison its "community values" into what "the community" itself recognizes as an abomination, both before, after, and even during the reign of those laws. One measure of how far laws depart from historical "community values" is the number of martyrs compelled to act by the departure.

Even apart from the poison of evil laws, the history of slavery that necessitated the 14th Amendment should remind us that not all "communities" have "values" that always protect the least among us. America is founded on higher law than "community values". The Declaration of Independence, which officially articulates the foundation of American Freedom, explains some of the Fundamental Rights embedded in that Higher Law, and Who gave it, and the right of the people to alter, as necessary, usurpations of it.

Another device common in abortion prevention precedents is Straw Man arguments: substituting, for the actual defense of the defendant – saving life, something way easier to ridicule – like "interfering with another person's lawful activity".[55]

Below is another "straw man" replacement of "saving lives" with "interfere with the exercise of constitutional rights by others", followed by the misguided assumption that *Roe* prejudices the inquiry whether abortion is in fact a "significant evil":

> "Appellants **may not criminally interfere with the exercise of constitutional rights by others,** and then escape punishment for their criminal conduct by asserting the defense of necessity....A **pregnant woman's decision to exercise her right under the Constitutions** of the United States and of the State of California to terminate a pregnancy is not and cannot be held to be a 'significant evil.'" *People v. Garziano* 230 Cal. App. 3d 242 (1991) 244

This next case characterizes an acquittal of abortion preventers as allowing "strangers" to deprive mothers of their right to kill. But the defendants only asked that their case be judged by a jury. By calling juries "strangers", the judge deprived defendants of a trial by jury.

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55 Tilson summarized several other appellate rulings which employed the same Straw Man, such as: "...the 'injury' prevented by the acts of criminal trespass is not a legally recognized injury." *People v. Krizka*, 92 IILApp.3d 288, 48 III.Dec. 141, 416 N.E.2d 36, "... a claim of necessity cannot be used to justify a crime that simply interferes with another person's right to lawful activity." *State v. Sahr,* 470 N.W.2d at 191-192. *Krizka* is correct, if the "injury prevented" is merely abortions of unloved soul-less "blobs of tissue" whose humanity is uncertain. Krizka is cruelly corrupt, if the "injury prevented" is the mass slaughter of human beings who are "persons in the whole sense" as documented by triers of fact! *Sahr* is precise, if the only reason for breaking a law is to "interfere with another person's right to lawful activity". *Sahr* is foolishly sad, if saving human lives was the real reason a relatively minor law was broken, and it was to obscure that real reason that *Sahr* contracted with a Straw man.

> "If the legislature cannot delegate a 'veto power' to the patient's ... spouse .... we think it unlikely that a state court could delegate such a 'veto power' to strangers, to be exercised in such an obstrusive manner." *Cleveland v. Municipality of Anchorage,* 631 P.2d 1073, 1080 n. 15 (1981) [This was essentially quoted in] *Pursley V. State*, 21 Ark.App. 107, 730 S.W.2d 250 (1987), rev. refused July 22, 1987

Is the "equal protection" clause of the 14th Amendment violated by assembling the historically ambiguous elements of the Necessity Defense in abortion prevention contexts in a way that makes it illegal to save the lives of a discrete class of persons?

Can "imminence", in the context of self defense or defense of others, be defined as a given number of minutes or seconds away, even in situations where the window of opportunity to save life is farther away than that, making it impossible to both save life and comply with that definition? Or is it enough that the window of opportunity to prevent absolutely certain harm is about to close with no less alternative use of force in view?

Numerous courts say Roe said abortion is "constitutionally protected" so its harmfulness can't be "legally recognized" as a question of law, which is the opposite of Roe's statement that abortion is "constitutionally protected" *only until its harmfulness is "established"* as a *fact* question about which "the judiciary...is not in a position to speculate...." *Roe v. Wade* 410 US 113, 159. For example:

> "...the justification defense [is still] unavailable because abortion is lawful by virtue of the United States Constitution." *Allison v. City of Birmingham,* 580 So. 2d 1377 (1991)
>
> "...the defense of necessity asserted here cannot be utilized when the harm sought to be avoided (abortion) remains a constitutionally protected activity and the harm incurred (trespass) is in violation of the law."[56] *State v. O'Brien,* 784 S.W.2d 187, 192 (1989)
>
> "Because the harm sought to be prevented is not recognized as an injury under the law, the defense of necessity is insufficient as a matter of law and the court properly refused to allow the defendant to raise it." *State v. Clarke*, 24 Conn.App. 541, 590 A.2d 468, cert. denied 219 Conn. 910, 593 A.2d 135 (1991);

Or, abortion is constitutional, which makes irrelevant the evidence that *Roe* says would challenge its constitutionality. The opposite is true. The legality or "constitutional protection" of abortion is entirely irrelevant to legal recognizability of abortion as a "harm", because Roe specifically said[57] its ruling was without prejudice[58] to that fact question. Roe says saving lives trumps abortion's "constitutional protection", once a conflict is "established". Roe's "of course" treats the fact as important, implicitly demanding that triers of fact be heard.

Lower courts say Necessity's "comparison of harms"/"choice of evils" is subject to Roe v. Wade as a matter of *law*, making factual evidence irrelevant. This violates Roe, which made *itself* subject to future factual evidence of

56 The opinion also says abortion harms no legally protected interest. Isn't human life a legally protected interest?

57 In its "collapse" clause

58 Roe of course didn't use the phrase "without prejudice", but the effect of Roe's "collapse" clause has precisely the same meaning and effect. It specifically declares the absence of a decision on the merits of "when life begins" and leaves future defendants free to litigate the matter in subsequent cases, as if *Roe* had never been decided.

personhood. *Roe invites* fact finders to resolve "when life begins". Roe's invitation is blocked by lower courts saying Roe *prohibits* triers of facts *from even learning there is a question.*

It would be presumptuous, and odd, for any lower court to say they can know something that SCOTUS said no court is qualified to know,[59] but no lower court has weighed in on whether abortion is in fact a "harm", either, other than, ignoring *Roe*, to rule the fact "irrelevant" to Necessity's "comparison of harms".

Not all authorities agree with Wharton and Robinson that Necessity is available when the threat to the harm prevented is legal. But not every past formulation of Necessity elements fits the facts before us today.

Any formulation of legalisms for a particular situation that make it a crime to save lives of a discrete class of human beings[60] violates the "equal protection" clause, and fails the "absurd result" test[61] and the "smell" test.

Our ultimate litmus ought to be what is right, and what is good. "Is it lawful to do good...or to do evil? to save life, or to kill?" a great lawmaker once

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59 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. Roe v. Wade, 410 U.S. 113, 160

60 Discrimination against a discrete class is a civil rights violation. Dehumanization to the extent of alleged uncertainty whether people are "persons" and thus protected from slaughter by our laws is the ultimate discrimination.

61 "...where the language of a statute is clear, our normal rule is that we are bound by it. A legitimate exception exists, however, when that language leads to absurd results. The United States Supreme Court agrees. See *Public Citizen v. Department of Justice,* 491 U.S. 440...." [The rest of the quote is found in *State v. Kirkpatrick*, Kansas, No. 93,465, May 30, 2008)]

asked.[62]

We are talking about the most controversial ruling in the United States since slavery. We are talking about a ruling based on alleged ignorance of the factual nature of the unborn, whose humanity/personhood, over the past 43 years, have been unanimously affirmed by court-recognized finders of fact. This exposes formulations of Necessity that make it impossible to save millions of lives as legalistic quibbling, at the most charitable.

The "choice of evils" has the character of an equitable inquiry, where statutes do not specifically apply, yet justice must be discerned. It perverts the defense to attach book definitions/elements to the defense which were not designed for the situation at hand, and treat them as if they were inviolable statutes.

The longer any question reasonably raised remains unanswered, the more potential it acquires to undermine confidence in those questioned. Especially when it involves the very legal definition of which Human Beings have a right to live long enough to ask.

62 Mark 3:4, Luke 6:9

Appendix G:
No backup for Roe is possible

This section reviews several of the wannabe replacement rationales waiting to take Roe's place when it "collapses", to show that none of them can survive Roe's "collapse".

They are:

(Supreme Court and lower appellate rationales:)

1. Even if it *is* murder, moms rely on it 102
2. We can't know if the unborn or the elderly are human 107
3. The unborn *aren't* human – proved by our cruelty to them 109
4. SCOTUS' credibility would tank if it returned to reality 112

(Rationales from outside case law:)

5. Babes may be human, but they are momnappers 114
6.Babes should die for breaking and entering 124
7. Babes are human but moms can't be forced to nurture them 131
8. Kill babes, save ourselves – there's such difference between us 133
9. Kill born children – are they more human than unborn babes? 136
10. Handicapped babes would rather be tortured to death 137
11. Medical evidence DOESN'T say unborn babes are human 138
12. Oppose all laws whose origins are exclusively Christian 142

> "Indeed, our decision in United States v. Vuitch, 402 U.S. 62 (1971), inferentially is to the same effect, for we 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." – *Roe v. Wade*

In oral arguments in Roe v. Wade, Justice Potter Stewart asked Sarah

Weddington "If it were established that an unborn fetus is a person, you would have an almost impossible case here, would you not?" Weddington audibly laughed and acknowledged "I would have a very difficult case." Stewart pursued, "This would be the equivalent to after the child was born...if the mother thought it bothered her health having the child around, she could have it killed. Isn't that correct?" Weddington answered, "That's correct."

This exchange is what presumably prompted Justice Blackmun to write "[If the] suggestion of personhood is established, the case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment."

Since 2004, the "suggestion of personhood" was "established" by federal law. The 14th Amendment right to life of unborn human beings has been "guaranteed". Abortion has been no longer legal.

These facts can certainly be ignored. They cannot be squarely addressed and still refuted.

Is it true that abortion's fragile "legality" must "collapse" along with *Roe*? Can it be sustained, after *Roe's* burial, by SCOTUS rationales added after *Roe*, to *Roe's* "outer shell"?

> The joint opinion, following its newly minted variation on stare decisis, retains the **outer shell** of Roe v. Wade, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case.

> (Rehnquist, joined by White, Scalia, and Thomas, in Planned Parenthood v. Casey, 505 U.S. 833 (1992)

What is Roe's "outer shell"? Can any rationale hanging on it stand alone, without it?

Since it does not appear to be identified anywhere, it must be taken as a metaphor of whatever it is about Roe that keeps abortion legal despite the shifting sands of legal rationales for it.

There is only one skeletal sustaining principle Iowa can think of in Roe, to which a succession of rationales may attach in turn: *alleged uncertainty whether the unborn babies of human mothers are human.*

This alleged uncertainty is articulated in Roe's "collapse" clause where it is explicitly identified as Roe's sustaining principle, in the sense that without it, Roe cannot stand.

This uncertainty as a matter of law cannot still seriously be alleged. Granting that the unborn babies of humans are humans, making their killing murder, will this Court still insist their murder is some kind of "private and personal right", a "sacred choice" with which courts and lawmakers ought not interfere? Once this "outer shell" of alleged uncertainty who is human "collapses", no rationale attached to it can stand by itself.

Let us be clear that *Roe* does not merely "collapse". The terms of Roe's

"collapse" clause make it clear that *Roe* becomes unconstitutional, along with every law and court ruling which violates the 14th Amendment by obstructing protection of the Right to Life in the course of protecting abortion's fragile "legality". Yet there are wannabe Roe replacements. Here is our first:

1. **Should abortion remain legal, even after legal personhood of the unborn is established, because women have come to "rely" on murder?**

Planned Parenthood v. Casey explains that mothers have for two generations relied on the right to kill their babies in order to advance their careers, so it would simply be too costly to mothers to suddenly punish them for killing the human beings whom they so urgently want to kill.

> The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. *(Cont'd)*

Translation: We have to look into the terrible cost of outlawing abortion to mothers who have come to reasonably rely on the legal right to kill their own babies.

> Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see Payne v. Tennessee, [505 U.S. 833, 856] supra, at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of Roe. *(Cont'd)*

Translation: since the "reliance interests" principle has peviously been

applied only to laws that affect business contracts, where businessmen need to be able to rely on a contract in order to plan, we shouldn't be surprised that some folks think the principle has no application to "reliance" on the right to kill.

> While neither respondents nor their amici in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. (Cont'd)

Translation: Although even prolifers agree women have come to rely on legal abortion, it wouldn't be hard to argue what a stretch it is to give that any legal weight.

> Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for Roe's holding, such behavior may appear to justify no reliance claim. (Cont'd)

Translation: The only way you can argue that women rely on Roe is if you can believe Roe is the only reason they fornicate, which creates the babies which mothers need to kill. The increase in fornication caused by Roe might not seem like a strong justification to continue the killing.

> Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be de minimis. [minimal] This argument would be premised on the hypothesis that

> reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. (Cont'd)

Translation: even if abortion could be justifed because women have gotten so used to fornication, prolifers would say that is a weak argument since as soon as abortion is outlawed, women are able to immediately stop fornicating.

> To eliminate the issue of reliance that easily, however, one would need to limit [re]cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that, **for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.** See, e.g., R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed. [505 U.S. 833, 857]

Translation: But if that objection to killing the babies of fornication were a good argument, it would be an argument against killing babies of fornication, but married couples should still be free to kill their babies. The fact is now that "murderer" has now become Americans' self image. It is Who We Are. That is a sacred trust which law ought never violate, to self-identify as whatever you want. The Constitution allows no discrimination against any

adult for how he sees himself – murderer, rapist, terrorist, sexually undecided, little child – so long as he doesn't see himself as a Christian. Crime even helps Americans become rich, and we can't just dismiss that economic benefit of legalized killing.

Americans United for Life summarizes this argument:

> The *Casey* plurality ultimately justified its adherence to *Roe* and *Doe* on the foundation of the "reliance on the availability of abortion in the event that contraception should fail."...The bottom-line rationale of *Casey* is that "reliance interests" in abortion—as a backup to failed contraception—justified retaining the rule of *Roe*. ... The assertions of the plurality opinion in *Casey*, its reliance interests justification, and its "undue burden" standard were adopted by the majority in *Stenberg v. Carhart* in 2000.120 (An argument found at http://www.trolp.org/main_pgs/issues/v10n1/Forsythe.pdf.)

Such reasoning can only escape public ridicule to the extent it remains uncertain whether unborn babies of human mothers are humans. This issue, upon which abortion's legality hangs, has still not been addressed by any court.

Roe acknowledged a balance between the mother's right to *privacy*, and the baby's right to life. *Casey* alleged the mother's *"reliance interests" but not* the baby's right to life. Here is *Roe's* statement:

> As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly. (Roe v.

Wade)

Now that the humanity of the unborn is established as a matter of undisputed, unchallenged, unanimous legal recognition, it is impossible to credibly argue that we need to be able to rob or enslave any group of American humans if it will benefit us, once we "have come to rely on" oppressing them "in order to achieve...equality". If the legal right to rob or enslave any human group is repugnant to American sensibilities, how much more the legal right to brutally kill them?

No doubt it will be hard for some mothers to break their habit of murdering human beings even after learning it is legally "established" that that is what they will have been doing.

But most Americans still, fortunately, find it unthinkable to *knowingly* murder. Most Americans, upon learning that the right to kill human beings has no legal justification and in fact is murder, will back away from any thought of such behavior as readily as a child backs away from pouring pop in the fish tank upon learning that it kills a living goldfish. They will back away from political parties founded on murder. They will impeach and vote out judges who continue to protect murder.

Legal abortion, after legal establishment of the humanity of those

aborted, is legally unthinkable under any pretense, because of its unacceptable cost: reversal of our 14th Amendment, and of our laws against murder.

The *Casey* reasoning was only possible before federal law legally established the fact that all unborn babies are human beings. The "reliance interests" of mothers to kill can't stand against federal establishment of the fact that those whom mothers "rely" on killing are human beings with full 14th Amendment Rights to Life. Fortunately no Court has said otherwise.

Were that indeed to become the Court's formal position, let the courts say so! Let them put in writing that even though the unborn are human beings, so that aborting them is infanticide – the legal and moral equivalent of mass murder, mothers have developed such a habit of murdering them – such a blood lust – that the blood letting must go on! Such a ruling would very likely cause its injustice and error to become so apparent to everyone, that political solutions [i.e., voting against state judges and impeaching federal judges] would find more support.[63]

63 (Second dissent in Planned Parenthood v. Casey): "As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here - reading text and discerning our society's traditional understanding of that text - the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality, our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, Lee v. Weisman, 505 U.S. 577 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value [505 U.S. 833, 1001] judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school - maybe better."

Also see Matthew 23:21-27.

Americans will no more tolerate the doctrine that getting into the habit of depriving others of fundamental rights creates a Constitutional Right to legal protection while you do so, than they will tolerate a ruling that America must again permit slavery. Again, to set aside the 14th Amendment outlawing of murder, would definitely set aside its outlawing of slavery. But if Iowa is wrong – if Americans are truly ready to legalize murder and slavery again – Ezekiel 3:18-20 still requires that Americans be clearly informed that that is where they are going.

Now that federal law has legally recognized the fact that the unborn are just as human as blacks, a northern state like Iowa that still knowingly, deliberately, consciously permits, protects, and even funds abortion can no more be tolerated than a southern state whose laws still protect slave owners.

2. We have to keep abortion legal because it is impossible to know whether the unborn or the elderly are human beings.

> There is, of course, no way to determine [whether]...the human fetus is in some critical sense merely potentially human...as a legal matter; it is, in fact, a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so. (Planned Parenthood v. Casey, dissent by Scalia, White, Thomas.)

This fatalistic view that there is "no way to determine" who is human "as a legal matter" undoubtedly did not foresee 18 U.S.C. 1841(d), since it was

articulated before the first efforts to insert Personhood language into the U.S. Code.

But for the sake of argument let's suppose the argument fails, that 18 U.S.C. 1841(d) has resolved Roe's alleged uncertainty about unborn humanity, and instead there is a future precedent that indeed it *is* impossible to know whether the unborn or the elderly are human beings. That excuse for such critical ignorance would just as easily stretch to include Blacks, Jews, Christians, or "illegals", and/or return us to the days of slavery, so long as the majority within a state vote for it.

This is not so remote a danger in the case of "illegals", where there is a significant movement in Congress and in conservative media to redefine who is under the "jurisdiction" of state laws. For centuries the word has indicated those whom state police can arrest. Some want it to mean some sort of undefined "allegiance" to America, which is measured by one's place of birth rather than by one's actions and is judged by people who have never met the people whose "allegiance" is questioned. No one has recommended enslaving "illegals" yet, fortunately, but legalization of slavery would be the direct legal effect of that redefinition, since it was that "jurisdiction" clause in the 14th Amendment which closed the loophole in the 13th Amendment through which slavery continued.

The doctrine that it is "impossible to know" who is human "as a legal matter" must be driven out of our legal discourse, where it threatens all our freedoms.

Roe acknowledged the 14th Amendment Right to Life of all human beings, at least with lip service. Many believe that through Roe's alleged uncertainty about who is human, judicial disregard of human life has become *implicit*. To whatever extent that may be so, *we cannot allow judicial disregard of human life to become explicit.*

3. We need to keep abortion legal because the unborn are not human, as proved by how cruelly we mistreat them.

What if someone argues that lack of protection of a group of humans proves they are not, in fact, humans after all? That is very close to what *Roe v. Wade* argued. Roe argued, "In short, the unborn have never been recognized in the law as persons in the whole sense. (So why should the law so recognize them now?)"

How different is that from the reasoning that blacks are 3/5 of a person so they have no fundamental right to freedom, and that's how it's been from America's founding? (That wasn't the Scott v. Sandford reasoning. That ruling described blacks as "persons" but noted two clauses in the Constitution

in which they were treated as property.)[64]

Roe reasons that if certain population groups have been dehumanized in past centuries, that raises doubt whether they ever have been, in fact, human. Who is safe from that caliber of "justice"? "Illegal" immigrants today are objects of discrimination. In America's past, it has been Catholics, blacks, Chinese, Japanese, Slavs, Southern Europeans, Irish, and Germans.

It is theoretically impossible to make any *progress* against discrimination, to the extent we embrace *Roe's* reasoning that objects of past dehumanization are actually not "persons in the whole sense" so they are actually "endowed by their Creator" with no rights whatsoever.

One example of *Roe's* "evidence" was that Texas' law criminalizing abortion had an exception when the pregnancy threatened the life of the mother. (As if SCOTUS was unaware of the legal principle of "self defense.")

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. [There is always at least an exception] for the purpose of saving the life of the mother.... But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the ... exception appear to be out of line with the Amendment's command?" (Roe v. Wade, Footnote 54 of the

64 *Scott v. Sandford,* 60 U.S. (19 How.) 393-394 (1856) "6. The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves. 7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. ...9. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

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Not that striking the exception for the "life of the mother" would make a law against abortion court-proof. As justice Rehnquist pointed out,

> If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in Williamson, supra. (Dissent by Rehnquist, section II)

It is hard to be sure whether to take Blackmun's logic seriously, or as some kind of sarcasm, in view of the eminent sense which the "life of the mother" exception makes. Our Necessity Defense barely *allows* a hero to save others, typically at considerable risk to his own freedom if not to his life; we have no law which *requires* people to be life-saving heroes. We admire parents who put themselves in harm's way for their children. We are not about to require it as a matter of law!

On the other hand, maybe Blackmun was right. Actively killing somebody whose threat to you is only his existence, goes beyond normal self defense scenarios. But to whatever extent Blackmun was right, it was evil hypocrisy for him to use America's abandonment of a percent of a percent of America's babies as his pretext for forcing Americans to abandon all of them.

Another example of Blackmun's evidence against considering unborn babies "persons" is that penalties against mothers who abort are historically

lighter than penalties for murdering adults. It does not overstate the strangeness of his argument to say he literally argues that legal mistreatment of a group of people casts doubt, not on whether laws and courts are just, but on whether their victims are even human.

We can't deny fundamental rights to people, and then take our own wicked mistreatment of them as proof that they are not people after all so we are free to enslave them, as we used to treat blacks. Or torture and kill them, as we still treat over a fifth of our unborn babies.[65] That is not the kind of reasoning that has made America a "shining city on a hill". It is the tarnish that has reduced the brightness God made available to us.

4. No one would ever believe the Supreme Court again, if they suddenly got in touch with reality after so many decades away.

> (i) Overruling Roe's central holding would not only reach an unjustifiable result under stare decisis principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in Roe, its decision has a dimension not present in normal cases, and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. *Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover,*

65 " The abortion rate for 2012 was 13.2 abortions per 1,000 women aged 15–44 years, and the abortion ratio was 210 abortions per 1,000 live births." http://www.cdc.gov/reproductivehealth/data_stats/

> *the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves.* **A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law.** Pp. 864-869. *[Casey, 505* U.S. 833, 836]

It would end America's "Rule of Law" to correct error?!!

America would suffer "loss of confidence in the judiciary" if it ruled correctly?

The American public has so much confidence in the justice and lawfulness of the Supreme Court now, that any deviation from its rulings towards reality would be a blow to "the Court's legitimacy"?!!

Of course this firm stand would make sense if it were on principle – if it were limited to positions based on reality, with a readiness to withdraw support of positions shown to be wrong. But this opening statement in *Casey* pledges commitment to positions even after they are exposed as wrong, and says that is necessary to preserve confidence in the Supreme Court. That is crazy talk.

ALTERNATIVES TO SCOTUS RATIONALES

A number of analogies have arisen in the veritable cottage industry of Roe replacement wannabes, offering to supplant Roe's rationales when they

fall, in order to keep abortion's fragile "legality" on life support.

Care must be taken before using an analogy as the basis for obstructing the 14th Amendment Right to Life of millions of unborn U.S. citizens, who are called "posterity" by the Constitution's Preamble. Care must be taken that both legs of the analogy, the illustration and the reality, at least match. Otherwise law limps along, as described in Proverbs 26:7 "The legs of the lame are not equal: so is a parable in the mouth of fools."

5. **We should kill unborn babies for kidnapping mothers.**

Judith Jarvis Thomson wrote *"A Defense of Abortion".* She published this in 1971, justifying infant murder before it was cool. This summary is taken from "Abortion: the Irrepressible Conflict" by Eric Rudolph.[66]

> ...M.I.T. Philosophy Professor Judith Jarvis Thomson['s] "A Defense of Abortion" is probably the most talked about pro-abortion essay. Using a series of examples, Thomson insists that a woman has an unqualified right to an abortion, even if the fetus is a human being. ...Because even if a person, **the fetus has no right to use a woman's body without her consent.** To make her argument, Thomson asks you to imagine waking up in a hospital back-to-back with a famous violinist, who has a fatal kidney ailment. Because you are the only one with a matching blood type, the Society of Music Lovers has kidnapped you and hooked you up to the famous fiddler to "extract the poisons from his blood." The hospital director tells you it will be another nine months before the violinist's kidneys are in good shape and they can unhook you. Even though it was immoral for the Society of Music Lovers to kidnap you and put you in this predicament, unhooking you, the hospital director says, would be doubly immoral, because it would kill the violinist.

66 That's right, *the* Eric Rudolph, the one still in a Colorado prison for bombs, who managed to elude federal officers for years in a forest. The summary in his book of *Roe* wannabe rationales is a lot more scholarly than his manner of addressing the problem.

Judith Jarvis Thomson, "A Defense of Abortion," in *The Abortion Controversy: Twenty-Five Years After Roe v. Wade,* *(Belmont, CA: Wadsworth Publishing, 1998) Poijman And Beckwith ppl. 117-118*

The first problem with this parable is that mothers are not kidnapped into having babies. The analogy should have begun with you volunteering to hook yourself to the violinist, in return for the most exhilarating pleasure as you are being hooked up.

Even in the case of rape or incest, the analogy should emphasize that the violinist was an unwilling, unwitting participant in the scheme. The baby is as innocent as the violinist. If anyone merits retribution, it would not be the baby.

Second, the parable leaves out the consolation prize of the 9 months' "captivity": the sweetest music imaginable! Babies are even more adorable than violinists!

In fact, way more, because there are many people who don't like violins, but there is nobody who doesn't like babies. Well, if there actually are, it is questionable whether they are "persons in the whole sense."

Now if the analogy had featured a trumpet player, it would have been a different matter. But it is too late now to mend mistakes: we are stuck with a violinist, and no violinist is pretty, compared with a baby. Unless of course it is a baby violinist. Babies cry and wet, but they also smile smiles of purer joy

than any adult can comprehend, reminding young adults newly free from parents and from the overwhelming influence of peers in school, how to love. How to really love. How to glimpse Heaven.

Calling it "captivity" brings us to the third problem. Mothers do not lose their freedom just because they are pregnant. Most pregnancies cause almost no curtailment of activity for the whole nine months. Certainly nothing remotely as restrictive as being hooked up to a violinist!

In those few pregnancies where doctors advise mothers to remain in bed much of the time or risk losing the baby, it remains the mother's legal choice whether to follow that advice, partly because any doctor's analysis of the precise limits to mom's activities which are safe for the baby is a guess: no one would accuse the mother of killing the baby if she had to get up and work.

And even in the most medically risky cases, the mother probably won't even know she is pregnant for several weeks, and at about 7 months the child could be surgically removed and still live, with less medical risk to the mother, not to mention the child, than that of an abortion in a clinic which courts have protected from modern medical standards – so even the worst case would probably involve 6 months of voluntary restricted activity.

Fourth, to keep Thompson's analogy honest, our alternative is not to merely detach the violinist and walk away, leaving him at the mercy of God to

perhaps heal him. No, we must chop the violinist into tiny pieces, and then lay the pieces on a table and count them to be sure we did not miss any. And should our plans be interrupted by the violinist's miraculous healing before we can take our first slice, we must not let him walk away unscathed, but must strap him down and finish chopping.

When a man is dying and it is time to give up on the tubes and monitors, we just withdraw them as gently as we can and let the man die as peacefully as we can. We don't rip out the plastic like we are pulling kittens out of a house fire, and then go in with machetes, acids, and poison gas to dispatch the poor slob as brutally as we can! American law calls that "cruel and unusual punishment". How dare this Thomson woman compare very real, very prevalent, and very brutal infanticide with the peaceful separation of the mythical violinist!

Fifth, the violinist is a "parasite" in a true sense, which no baby can be. God gave me my kidney for my sole use. I *may choose* to lend it out or give it away, but no one would imagine an *obligation* to encumber my body in this way.

By contrast, the baby is using an organ for which the mother has absolutely no personal use. The organs the baby is using were made specifically for another person besides the woman to use. The baby is not "out

of place" in her body. He is exactly where unborn babies belong. A woman's body, in a way quite unlike a man's body, is not "hers". It is specifically engineered to act as temporary life support for the exact kind of being that is threatened by an abortion. She sees her kidneys as thus "mine" and "for me" in a way that her uterus is not.

Sixth, if the duty of a mother to nourish the Gift of God whom she has received into her Heaven-designed life support system cannot be presumed, what duty of any mother can be presumed? What duty is greater? Can the care of a born toddler be half as urgent, when the toddler is so much more capable of living safely with others? Can faithfulness to a husband be half as urgent, when her faithlessness will not cause her husband to die? Can financial responsibility seem a fraction as important? Can obedience to laws and court rulings be said to be one speck of her responsibility for her baby?

No! Telling a mother she owes no responsibility to nourish the life cradled within her is telling her she owes no responsibility to anyone for anything! She may, with no pang of conscience, no legitimate legal consequences, kill her toddler, her husband, her creditors, and her judge! Any defense of abortion is a legal theory of Anarchy!

Seventh, the violinist is not "mine" in any sense, but a baby is "mine" to its mother, genetically, built from the very substance of her own body and

blood. We owe a higher level of responsibility towards what we call “mine”, than to a stranger. It is not as much that we “owe” more responsibility to our “own”, but that when our laws side with those whose hearts can’t motivate them to forbear destroying the most precious thing that is “theirs”, we should not be surprised when hearts harden to the laws that govern our legal responsibilities to strangers. As the will to take and to hurt rises, so does the cost of security and the losses from lawlessness.

Eighth, in the case of rape, the child of rape is the good that God draws out of evil. To destroy the child is to reject the incredible mercy and generosity God has shown.

Far from showing that God either does not love, or is not powerful, the child of rape is the whisper of God, “Look how powerful and good I am! Even out of this supreme horror for you, dear woman, I can create a dazzling miracle of joy: another human being, whole and entire, made in my likeness, made to praise and glorify and love and be loved by Me, who will console you for your suffering in his conception!”

Rape victims who bear their babies are offered the gift of healing through them. Indeed, it is the more horrible when a rapist is sterile, so that the abuse is “for nothing”.

Ninth, in healthy societies, even during the pregnancy, the miracle of

motherhood is universally celebrated as a source of joy for the mother, the siblings, the father, the extended family, the neighbors, and the community, as expressed in customs like “Baby Showers”, passing out cigars (is that still legal?), “It’s a boy/girl!” balloons, infant dedication ceremonies in churches, and the “new baby” section of Hallmark Card displays. What sickness, what ingratitude, can spin this Gift from Heaven into “kidnapping” and “imprisonment”?

Much in our culture establishes this joy as beginning during pregnancy. “Baby showers” are celebrations, not times of mourning – not wakes. Broad happy smiles are often seen on expectant mothers as they announce their Gift from God to friends. Mothers prepare by reading books about how to be the best mother possible. They hold Mozart up to their bellies to begin their child’s education early.

The tenth problem with this parable is that, personal notions of morality aside, under a world government which socialists like Thomson dream about, the secret police would hook you up to the fiddler, or more likely, the dictator, and no one would complain. (Publicly.) Instead, you would be publicly admired, and counted as fortunate to be so valuable to the State! “The State” would as easily hook you up to anyone else, for its own alleged best interests, calculating your value by your benefit to it.

What keeps America from falling headlong into this nightmare government scenario is the Laws of God that proclaim our liberty. But these are the same Laws of God which proclaim life and liberty for the unborn. The same Laws of God which protect the unborn, protect the born.

History is full of states abandoning God's Laws, after which states have no restraint against enslaving and murdering whomever they please, whether babies or violinist donors.

In fact, the farther American law "evolves" away from God's Laws in which it is an unthinkable crime to destroy your own baby, Jeremiah 19:5, the *less* legal right you will have to unhook yourself.

Thompson wants our support for unhooking the violinist to extend to support for killing our baby. But it is our recession from God's laws that will make it illegal to unhook ourselves, while it will remain legal to kill our babies; the protection she wants for the right to unhook ourselves comes from God whose Laws against our own kidnapping also outlaw us murdering others.

"Duty to Assist" laws, and mothers' responsibilities

The loss of freedom a mother experiences through pregnancy is infinitesimal compared to the kidnap victim in Thomson's analogy; but is even an hour's loss of freedom an unreasonable expectation of a mother? In

other words, is there any precedent in law for forcing anyone, in any situation, to be a Good Samaritan?

Yes, according to "Good Samaritan" laws:

> Good Samaritan statutes in the states of Minnesota and Vermont do require a person at the scene of an emergency to provide reasonable assistance to a person in need. This assistance may be to call 9-1-1. Violation of the duty-to-assist subdivision is a petty misdemeanor in Minnesota and may warrant a fine of up to $100 in Vermont. At least five other states, including California and Nevada, have seriously considered adding duty-to-assist subdivisions to their good Samaritan statutes. (Wikipedia, under "Good Samaritan", 2011)

A "Duty to Assist" is most clear when one's actions have contributed to the dependency which another now has upon you. For example, hitting and injuring someone with your car will not send you to jail if you can prove you could not help it; but if you "hit and run" in any state, the penalties will be severe.

Of course, in 98% of cases, the mother's participation in conception is voluntary. Her actions have contributed to the dependency of her baby.

American laws - indeed, the laws of what we call "civilization" - are full of "duties to assist". But especially in America.

If we have a retail store, we don't have a legal right to pick and choose which customers we want to serve, refusing to serve racial groups we don't want.

We can't put up a sign, "Every customer a wanted customer", as a pretext for throwing out customers we don't "want" because of their color, IQ, religion, weight, legal training, looks, etc.

Public school teachers don't have a right to stop teaching students who don't learn fast, or who challenge teacher patience. No principal, no school board, has a legal right to refuse education to any remotely educable child.

Hospitals can't turn away patients based on whims, to let them die because they aren't "wanted". Federal law requires hospital emergency rooms to care even for undocumented immigrants rather than let them die on the hospital doorsteps. Nursing homes can't put residents out on the curb who are not "wanted" any longer.

Landlords can't instantly remove tenants who won't pay, or who even damage property! Landlords must give tenants a reasonable time to find other housing.

No parent has a legal right to simply stop caring for a child because the parent doesn't like the child any longer. Minor child neglect that causes no harm to the child is grounds for removing the child and severing custody, and placing the parent on the Child Abuse Registry which bars that parent from future employment involving children. Neglect that causes injury is grounds for criminal charges that put parents in jail.

Contracts require commitments which must be kept even if a party to the contract no longer "wants" to keep their end of the bargain.

Thomson's logic fails. Our laws simply do not recognize any absolute right not to help those who depend on us. If her logic governed our laws, the same logic would end everyone's responsibility to whoever becomes dependent upon them to be responsible.

In no human relationship is a human being more dependent on another human being who has done more to create the dependency, than in childbirth.

The bonds of responsibility that bind together what we call "Western Civilization" would dissolve into utter anarchy, if responsibilities less than those of mothers for their unborn babies were stripped of legal support!

We can at least be grateful that Jarvis confines her logic to babies, so that it does not take the entire rest of civilization down with the unborn. For now.

5. **Babies should die for breaking and entering.**

Here is another analogy of Judith Jarvis Thompson, again summarized by Eric Rudolph:

> Thomson says even where sex was consensual, the child's right to use his mother's body is still dependent on the mother's consent. ...If you opened your window "to let the air in" (had sex for pleasure) and a burglar (baby) climbed in instead, are you obligated to let him stay? What if you "installed burglar bars" (contraception) on your windows

> and a burglar came through anyway? A mother is no more obligated to let the unwanted child stay in her womb than the homeowner is obligated to let the burglar stay in his home. It may be "indecent and self centered" to deny the child the use of her body "for one hour," but it's not "unjust." Ibid, p. 129-130. "It would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if a fetus is in her seventh month, and she wants the abortion just to avoid the nuisance of postponing a trip abroad." Such an abortion would be immoral. The state, however, has no legal basis to interfere. Rudolph, Ibid,, p. 130.

To make this analogy honest, the "burglar bars" need to be made out of tissue, to reflect the well known failure rate of contraception, and there needs to be a vacuum in our bedroom so powerful that innocent, unwilling, unwitting babies minding their own business outside are sucked in without any action on their part.

What callousness, to compare a Messenger from Heaven with a "burglar"! What anarchy, to see no responsibility to honor even humanity's most sacred of trusts!

Thomson at least acknowledges that this logic applies as well after birth! As it inevitably must.

But it really applies far longer than that! It applies to an adult guest in your home. Thomson would have us free to boot out a guest into the cold, even if the guest is sick and needs hospitalization!

Orlando Depue was awarded damages after he was literally kicked out

> in the cold. It was a cold January night in Minnesota - we're talking Eskimo weather. Depue had eaten dinner with a couple, the Flateus. Feeling sick after the dinner, he asked the couple if he could sleep over. But the Flateus refused to give him board and told him to leave. Too sick to drive, Depue was forced to sleep in the backseat of his car. In the morning his fingers were popsicles, and later had to be amputated. ...The Court said:... "The law as well as humanity required that he not be exposed in his helpless condition to the merciless elements." [John T. Noonan, "How to Argue About Abortion," in Morality in Practice(Belmont, CA: Wadsworth Publishing, 1998) p. 150] An obligation is assumed once you "understand and appreciate" the conditions of your fellowman, even if he is a stranger. What goes for strangers goes double for family members. (Rudolph, Ibid.)

Thomson's logic applies to a tenant whom you, the landlord, no longer "want", and justifies you breaking the law if you don't "want" to give him time to leave safely.

Thomson's logic justifies a prisoner who no longer "wants" to remain in jail, and thinks he can be free by killing a few guards. Sure, the guards had a "right to life", and it was "immoral" to kill them, but the prisoner was under no "obligation" to permit his body to be "kidnapped" any longer.

How about the husband who no longer "wants" his wife? And who sees no reason to give her time to pack?

How about the guy who doesn't "want" anyone traversing his sidewalk in winter anyway, so what harm is there if he does not shovel it?

How about the guy who WANTS junk in his yard? Or ragweed in his

front lawn?

If Thomson is willing to open up a law firm to defend every criminal which her logic justifies, she is going to be busy!

What about a surgeon who, half way through surgery, decides he doesn't "want" to stay in medicine and quits?

Is a man a murderer who refuses to hold out his hand, allowing another man to drown? The facts may be difficult to establish: would the man indeed have been saved? Or was it at least reasonable to have anticipated he would have been? Did the defendant know that? Did the defendant have any better reason, than hatred of the deceased, to not hold out his hand? But to the extent such facts are clear, the defendant is likely to be prosecuted in civil court, if not criminal. But Thomson will at least visit him in jail, if not marry him.

What if the police no longer "want" to protect people in a particular slum? And what if the city council approves that policy, and voters agree?

What if society no longer wants to protect the 14th Amendment fundamental rights of "Illegal Aliens", and votes to sell them into slavery to meet the "legitimate state purpose" of balancing the budget? Or authorizes citizens to enslave any Illegal Alien whom they can find and catch?

What if a state no longer "wants" to be subject to the U.S. Supreme

Court?

> We are all little sovereign autonomous entities with no prior social obligation. We dole out rights on a voluntary basis. But we don't owe anybody anything, says Thomson.... Libertarian liberals like Thomson get their current definition of individual liberty from John Stuart Mill. Back in 1859, Mill wrote a book entitled On Liberty. Its purpose was to expound the principle that "the sole [justification for] interfering with the liberty of action of any [citizen] is self protection... The only purpose for which power can be exercised over any member of a civilized community, against his will, is to prevent harm to others. ...the conduct from which it is desired to deter him must be calculated [by him] to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is to which concerns others. In the part which concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign." (Rudolph, p. 77, 75, characterizing Thomson. His quote from Mill comes from John Stuart Mill, Autobiography, (Penguin Classics, 1989) pp. 66-69)

Iowa would not recommend any deference to this policy to any Supreme Court justice who would like his rulings to be obeyed! In addition to all the previously mentioned disregard of laws Thomson's legal principles would cause, courts would no longer be able to compel witnesses to testify! Subpoenas would be ignored! Because Thomson thinks we have no responsibility to help anyone who depends on us, so long as we do not actively hurt them. (But if they are babies we can actively hurt them.) Setting a murderer free to resume his spree, by refusing to testify against him, is not *actively* hurting anybody!

In fact, if a woman is free to hire a butcher to carve up her own flesh and blood, because she has no obligation to help her own flesh and blood, how much less does a witness have a moral obligation to obey a subpoena to help strangers, which in a notorious case or where defendants are threatening, is dreaded more than the birth pangs of ten babies?!

My recommendation to the Supreme Court is that if Thomson ever wants to go to law school and apply to your bar, reject her! She is going to be trouble!

This reasoning is as applicable to aborting a nation's Rule of Law as it is to aborting a Gift from God! Our "rule of law" means our American legal principle that laws are applied to everybody equally. No lawmaker, and no voting majority, is exempt from the laws imposed on a minority. Even if the minority is not yet born. "Rule of law" prohibits laws protecting dismemberment of a fifth of the unborn population, from which voters, lawmakers and judges are exempt.

In American law, the Rule of Law is most succinctly encapsulated in our 14th Amendment: "No State shall ...deny to any person within its jurisdiction the equal protection of the laws."

The model for that was God's principle that a nation must "have one manner of law, as well for the stranger [immigrant], as for one of your own

country", Leviticus 24:22. Also Exodus 12:49.

Incredibly, Thomson knows babies are human beings with a Right to Life. She does not dispute babies are made in the Image of God.

It is irrational for anyone with this knowledge to say mothers can pull babies into their homes and then butcher them rather than wait until the baby can depart in peace and safety, because mothers have a sovereign choice whether to help another whose life depends on their help; but then to say it is unlawful for a nursing home to stab Grandma to death or put her out on the street in December, because the nursing home no longer "wants" her and does not want to wait until another home, or charity, can take her in peace and safety!

It is irrational to say a mother has no responsibility towards her most sacred obligation and occasion for joy, and then to say any other citizen has any responsibility whatsoever towards infinitely lesser societal obligations which occasion far less joy!

It is irrational for anyone who knows babies are human beings to believe in both a Right to Abortion, and the Rule of Law. Both because Thomson's reasoning undermines obedience to any law defining our responsibilities towards each other, and because Rule of Law, by definition, does not impose burdens upon one group of human beings, such as the unborn, from which

other groups are exempt. All of us were residents in our mothers' wombs: we lay upon the unborn burdens we are not willing to touch with one of our fingers, Luke 11:46, if we deprive our successors of the legal protection from maternal responsibility which we insist was properly binding upon our own mothers.

7. **Unborn babies are humans but don't force moms to nurture them.**

Lawrence Tribe is Professor of Constitutional Law at Harvard Law School. He is a frequent guest on network television and National Public Radio. (According to the back of his book, "Abortion: The Clash of Absolutes". Norton & Company, 1992.) One normally takes such credentials as a measure of intelligence.

But here is how he offers to solve the Infanticide madness:

> ...perhaps the Supreme Court's opinion in Roe, by gratuitously insisting that the fetus cannot be deemed a "person," needlessly insulted and alienated those for whom the view that the fetus is a person represents a fundamental article of faith or a bedrock personal commitment. Perhaps, as Yale Law School Dean Guido Calabresi has suggested, the Roe opinion for no good reason said to a large and politically active group, "[y]our metaphysics are not part of our Constitution." The Court could instead have said: Even if the fetus is a person, our Constitution forbids compelling a woman to carry it for nine months and become a mother. (p. 135)

What? "Even if the fetus is a person", a mother can slaughter her infant

limb from limb? That's a *solution?*

Let's expose the Straw Men here. The mother who doesn't want to be "burdened" with a Gift from God has an alternative to brutally torturing him to death: when the baby is big enough to show very much, and cause very much discomfort, the baby will be big enough to be delivered safely and grow to maturity, safely, in a maternity ward, until the baby can go home to a loving adoptive family. It may be an expensive way to do it, and it isn't the best for the health of the baby, but it's a lot healthier than tearing him limb from limb, and thousands of parents are in line for the opportunity to pay all those bills in return for their own Gift from God!

Tribe imagines he can solve the world's problems by authorizing the slaughter of legally recognized Human Beings "even if the fetus, no less than Judith Thomson's violinist, is regarded as a person"! (Rudolph, ibid)

Tribe tells how the famous Infanticidist Kate Michelman, in 1970, at 33, was pregnant with her 4th child when her husband left her for another woman. No car, no credit because she hadn't worked, no child support because she didn't know where he was, her only choice was to murder her fourth, in order to have a shot at providing for the other three. Tribe overlooks the Adoption Option: instead of going deeper in debt to hire a hit man, she could have found adoptive parents who would have paid her bills

with a handsome bonus that would have helped her other children!

Why is it that resisting murder never seems to enter the minds of these people, as they go over their options?

8. Abortion should remain legal, while keeping murder of ourselves illegal, because there is such a clear line between us and them.

The myth that there is a clear line of humanity distinguishing us adults from our unborn offspring is the same charade slave owners once played with Blacks.

It is funny to follow **Mary Ann Warren's** creative criteria of "personhood" by which unborn babies are *not* "human" or "persons", but she *is*. From her book, "On the Moral and Legal Status of Abortion":

> (1) Consciousness (of objects and events, external and internal to the being, and the capacity to feel pain);
> (2) reasoning (the developed capacity to solve new and relatively complex problems);
> (3) self-motivated activity (activity that is relatively independent of either genetic or direct external control);
> (4) the capacity to communicate, by whatever means, messages of indefinite variety of types, that is not just with an indefinite number of possible contexts, but of many possible topics;
> (5) the presence of self-concepts, self-awareness, either individual or racial, or both. Mary Ann Warren, "On the Moral and Legal Status of Abortion," in The Ethics of Abortion,(New York: Prometheus Books, 2001) Baird and Rosenbaum

Well, #4 (capacity to communicate on many topics) rules out children

younger than 4, depending on how fussy you are about clarity of communication. Newborn babies can communicate about many topics with eye movements, smiling, and crying. Experiments are done with babies in the womb, trying to give them an educational head start. The younger the child, the more perceptive the adults must be to communicate. The Bible records a time when a 6-month unborn baby leaped at the sound of the voice of Jesus' mother in a clear communication of joy. Luke 1:39-44. Will that testimony persuade Mary Ann Warren if we tell her?

#5, the presence of self concepts or self awareness, how would you test that in a child much under 7? Even then it could be difficult. It's one thing to be self aware; it's quite another thing to convince a skeptic that you are! And that is what Warren demands before she relinquishes her right to kill you! If there is a test available to prove a newborn is self aware, I would like to see it prove that a preborn is not!

#3 self-motivated activity free of genetic control; until we can get scientists to agree how much of *adult* behavior is genetic, maybe we better lop off the "free of genetic control" and stick with "self-motivated activity". One would think the attempts of preborns to escape scalpels and suction machines, documented in the very first ultrasound video titled "Silent Scream", is pretty overwhelming evidence of their capacity for self-motivated activity.

#1, Consciousness is proved by the reactions of preborns to many stimuli; from the suction machine to loving educational information. Ability to feel pain by 20 weeks is clearly enough established to be a threshold in Nebraska law, since 2010, beyond which abortion is a crime – not that anyone has proved that preborns feel no pain before that.

#2, reasoning that can "solve...complex problems" kind of rules out the author.

Had she settled for "ability to *think about* ...relatively complex problems" she might have escaped. But she had to insist on the "ability to *solve* ...relatively complex problems". I think everyone can agree her essay argues against her being human.

Warren criticizes Thomson for allowing that murdering your own baby to avoid postponing a trip might at least be immoral: "...it would not, in itself, be immoral, and therefore it ought to be permitted." Ibid.

Having assumed she has satisfied skeptics that the unborn are not human but she is, she next switches to an analogy that assumes everyone accepts Roe's view of the unborn as merely "potential life". As if there are people who insist on constitutional protection for life before conception which is only "potential", she sets out to refute these fanatics.

Warren's bizarre analogy has space aliens capturing you to clone your

body. Is it right for you to escape, when that would keep innumerable people from being created out of you? "...one ACTUAL person's right to liberty outweighs whatever right to life even a hundred thousand POTENTIAL persons have." Ibid.

The contested issue was never whether "potential life" has any constitutional rights. It was always, in *Roe's* world, whether life in the womb is human or merely "potential". So Warren's analogy is irrelevant to abortion of human beings after conception. So where *is* such a strange analogy relevant?

Well, perhaps it could justify laws against pimps forcing women into prostitution where pregnancies recur continually. Perhaps it could justify laws against Moslems *forcing* their daughters into marriage. Perhaps it could justify laws against rape.

Oh, wait, we already have those laws.

Warren's analogy doesn't fit much of anything, so it is difficult to imagine how to repair it. The mother would be pregnant by the normal human means, and then the picketers outside Planned Barrenhood were actually space aliens in disguise, who beamed her up as she was headed inside and strapped her down to keep her from killing her own child. That would make a lot more sense. Aliens could provide us a much needed service by

doing that.

9. **Abort born children, where personhood is almost as much in doubt.**

> **[Michael] Tooley's** definitions of personhood are pretty narrow. He admits that "even newborn humans do not have the capacities in question....it would seem that infanticide during a time interval shortly after birth must be viewed as morally acceptable." Michael Tooley, *"In Defense of Abortion and Infanticide," in* The Ethics of Abortion, *(New York: Prometheus Books, 2001),* [and] Mary Ann Warren - adopt a very narrow definition of personhood, which allows them to deny the unborn child's humanity, and therefore exclude him from legal protections. Their narrow definitions don't hold water though because they end up excluding most of mankind, both born and unborn. *[As reported in "Abortion: The Irrepressible Conflict" by Eric Rudolph.]*

10. Wouldn't handicapped babies rather be tortured to death?

> Surely a handicapped baby does not want to live! Surely he or she would be grateful for assisted suicide! Of course, since the baby is "incompetent" to express his own wishes, the decision must be made by the baby's legal guardian, the mother. Right? To assume, as a matter of law, that a baby would want to live, even with a handicap, is surely "establishing religion" "because it enforces a particular religiously inspired moral choice and lacks a countervailing secular justification". (Edward Rubin, writing for the Vanderbilt Law Review[67]. He argues for assisted suicide for adults; his argument is applied here to abortion.)

Fortunately, our laws still charge a guardian of a handicapped person with murder, who kills his dependent, and it isn't a defense to say "my dependent was unable to express his preference, so I assumed on his behalf that since she was handicapped, she would rather I kill her."

A website for the disabled says the greatest pressure on them is not the

67 http://www.vanderbiltlawreview.org/2010/04/assisted-suicide-morality-and-law-why-prohibiting-assisted-suicide-violates-the-establishment-clause/

disability, but the attitude among the rest of us that surely handicapped people would rather be dead.

> The challenges faced by people who experience forms of disabilities are influenced more by negative social expectations and tacit ideas concerning disability than by any emotional, physical, or cognitive impairment a person may experience. Each day, organizations work to educate the public about what life with a form of disability is like. For these organizations, that often times means assisting non-disabled neighbors and friends to understand that people with disabilities are not ill and that **our lives are not without happiness or meaning.**
>
> The fact is - research on disability and depression has consistently shown that when people with disabilities report dissatisfaction with their lives they are not nearly as concerned with things such as reliance on machines or medications as they are with their relationships, financial security, or difficulties while at work. Despite this, the social message repeatedly presented is that life with a form of disability is miserable and when the people around us believe that without questioning it, it may become very hard for people with disabilities to think anything different. - *http://www.disabled-world.com/disability/awareness/suicide.php*

11. Medical evidence does NOT suggest "life begins at conception."

Although expert witnesses in court are settled that "life begins at conception", a few outliers, whose credentials afford them no court-recognized legal value, grumble their dissent.

One example is Arthur Caplan, *When does life begin?,* Council for Secular Humanism, July 10 2014.[68]

Part of his quibble is that the word "conception" is not precise enough.

68 https://www.secularhumanism.org/index.php/articles/5639

If we are going to give an embryo constitutional rights, we need to know whether to do so when the sperm reaches the egg, or when it penetrates, or when genes start to recombine:

> Put aside the fact that those who advocate for personhood never say when personhood precisely begins—when a sperm reaches an egg, when it penetrates the egg, when genetic recombination begins, or when a new genome is formed. There is plenty about personifying an embryo that makes no empirical sense.

The "problem" is irrelevant to any legal need we have today because we do not have the technology anyway to monitor when any of these changes occur. We can't even tell for several more days if there is a body there at all, and we have to wait longer to be sure.

We are like the situation of our ancestors, so poorly understood by *Roe,* in which "quickening" – the baby's first kicks that the mother can feel – was the first mothers could be certain they were pregnant. Before that, their clues were missed periods and nausea, but those could have been caused by other things; the kicks were the first proof. Before there was evidence of a human life, how could there be legal penalties for murder? The only possibility of penalties was for intent, not for actual killing. *Roe* completely missed this point and wrongly assumed that because penalties were less before quickening than afterward, therefore babies before quickening were not

considered “persons in the whole sense.”

> It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions.... In short, the unborn have never been recognized in the law as persons in the whole sense.

Caplan also quibbles that while every adult human began at conception, whenever that is, not every baby survives to adulthood or even birth.

> Those who argue that personhood begins at conception base their claim on the assertion that every human life begins with conception. That is true. But what they fail to acknowledge is that conception does not always create an embryo life, much less a baby. In fact, it usually does not.

? Is that an argument for denying human beings fundamental rights until they *do* die? Caplan continues the same puzzling point for a page:

> The biggest empirical problem with the view that personhood begins at conception is the scientific fact that a large percentage of embryos lack the capacity, under any circumstances, to become human beings. During the period of embryonic development that begins with fertilization and ends a few days later with successful implantation of the blastocyst into the uterine wall—the period known as “preimplantation development”—up to 50 percent of human conceptions fail to survive, most likely due to genetic errors in the embryo.
>
> Miscarriage is the most common type of pregnancy loss, according to the American College of Obstetricians and Gynecologists. Studies show that anywhere from 10 to 25 percent of all clinically recognized pregnancies (meaning that an embryo has implanted) end in miscarriage, depending in part on the age of the woman.
>
> The biological facts don’t tell us where to draw the line as to when personhood begins. But they do show that many embryos that result

> from conception—indeed, the majority of them—lack the capacity to become living human beings. They do not produce disabled humans. They cannot produce any sort of human life. Science and medicine know this. They are simply too intimidated to say so.

Caplan's alternative view of "when life begins":

> When a fetus has developed a brain that can support its basic biological functions, probably at around six months of life, it can be reasonably argued that personhood has begun.

But would Caplan outlaw abortion *then?*

What about Chimeras?[69] Where fraternal twins – separate eggs fertilized by separate sperm – combine into a single person? If they were two "persons" at fertilization, what happened to the other one? Does the combined "person" have *double* Constitutional rights? How about identical twins, where there is one fertilization that results in two persons? Are each of them half a "person"?

These objections are as silly as they sound. As Psalm 139 says, God knits us together in our mother's wombs and knows all our members before there are even any. If God wants to be especially creative with some of us, that is no justification for the rest of us to become murderers.

Although any concession is legally unnecessary, perhaps we prolifers may concede, if it will help these doubters understand our position, that when

69 https://en.wikipedia.org/wiki/Chimera_(genetics)

we say “life begins at conception/fertilization”, we mean this as a precise legal position, but we do not mean it as an encylopedic review of all the ways God creates “in secret”, as the Psalm says – that is, where we cannot monitor.

Our legal position is that we must stop destroying what God creates. Whether through contraception that kills before implantation, or pills that kill weeks afterward, or surgery that kills months afterward. Whether God makes two persons out of one, or one person out of two, is irrelevant to our legal duty to welcome and protect every person that God sends us.

12. Shouldn’t we oppose all laws whose origins are exclusively Christian?

Reverence for all human life has a “religious motivation”. In fact, it has a specifically Christian “religious motivation”. Only Judeo-Christianity, of all the world’s religions, asserts that God made *all* men in His own image, Genesis 1:27, making the killing of *any* legally innocent man “murder”. Other religions worship idols – all kinds of images other than human, but Judeo-Christianity directs our reverence to human life itself, regarding it as a terrible thing to divert our reverence to anything less.

Certainly reverence for human life (as opposed to some kind of “self” obscured by the human body) is not found in Hinduism, which asserts that human life is not worth living, and the goal of a Hindu is to deaden his desire

to every good thing on Earth so when he dies he won't have to come back.

It is not found in the B'hagavad Gita, where Arjuna is told by Krishna that he must fight and kill even though the other side is largely his own family, because he is a Kshatria, a warrior by birth, so it is his "duty" to do the work of the class into which he was born; and besides, killing people doesn't hurt their souls anyway. It just sets them free from their bodies.

Certainly man as "the image of God" is not found in Islam which dehumanizes "disbelievers" as "the worst of men" (Surah 98:6) and Christians and Jews as "apes and pigs". (2:63-66; 5:59-60; 7:166)[70]

And certainly not in Atheism, where there is no God, no God-given human rights beyond what you can seize for yourself, whose Darwinian and Marxist religious principle is "survival of the fittest", justifying whatever raw lawless power is available.

Only Judeo-Christianity demands "equal protection of the laws", as our 14th Amendment calls it, or "no respect of persons", as the Bible calls it, for even society's least influential – as epitomized in the Bible, the orphans, widows, poor, and immigrants ("strangers"). Jesus calls them "the least of these my brethren (brothers)" in Matthew 25:39-46, where He warns that mistreating these "least" is mistreating God, and will send you to Hell. This

70 For a little more detail, http://unravelingislam.com/blog/?p=113

theology certainly violates Hinduism's "caste system" with its brutal oppression of "untouchables". Or Islam's slaughter of "disbelievers".

The day "religious motivation" becomes grounds for overturning America's laws, respect for human life must disappear. Our "due process" and "equal protection" clauses will wither. What "secular purpose" do they serve?

What will keep us from enslaving "illegals"? Or executing everyone with a life sentence? Or abandoning "unwanted" or orphaned children? Or letting people die whose medical treatments would be expensive?

Will not a wit too dull to see the connection between (1) what reverence for life is left in our laws, and (2) the economic landscape our laws make possible in which brains are free to create, invent, and serve without fear of snipers, government torturers, etc., justify an unlimited central government (dictatorship) as more "efficient"?

What "legitimate state purpose" is served by The Due Process clauses and the Equal Protection clause which ended slavery? Only in retrospect is it clear that peace and freedom for all are the foundations of national prosperity, but what "legitimate state purpose" does national prosperity serve? Democrats openly argue that "the rich" are a national evil and must be accordingly taxed. Democrats also argue that wealth itself is evil, at least insofar as it is built upon energy consumption whose fumes will destroy our

ecosystem in a century or two. The Population Control wing argues that human life itself is an evil, and must be reduced by two thirds to restore Mother Earth's ecosystem. Communists say "the rich" are such a national evil that they must be killed, and their goods confiscated and distributed.

What "legitimate state interest" can be asserted in opposition to these philosophies, without resorting to Judeo-Christian reverence for all human life as having equal value? Should not the Due Process and Equal Protection clauses be repealed? Are they not inconsistent with a "secular" legal system? What "legitimate state interest" do they serve?

Why do we need a Constitution? Why do we need courts? Dictators, preferred by atheists, don't need them. Justice just gets in their way. It is too "inefficient".

"Globalists" are a breed of people who do not even think the survival of America as a sovereign, autonomous government is good, because the world will be better under a "world government", or a "New World Order". Against such thinking, who can justify Freedom as a "legitimate state interest" without resort to principles which are exclusively Judeo-Christian?

The "Lemon Test" utterly, tragically, ignorantly fails to address these questions.

> ...the *Lemon* test, which provides that a statute is constitutional only

> if it has a secular purpose, neither advances nor inhibits religion as its primary effect, and does not foster excessive government entanglement with religion." (From Edward Rubin's article)

This "test" does not resolve the issue whether prosperity, freedom, or national security itself are a "legitimate state interest", in opposition to the prevalent political philosophies and world religions which say they are not.

This "test" does not resolve whether legal values such as giving the right to vote to every adult, or freedom of speech even to criticize either church or state, count as a "secular purpose" even though they are supported by no world religion or anti-religion other than Judeo-Christianity.

The earliest record of a "Republic" in which all the people elect representatives to govern them was not in 600 BC in Athens, as encyclopedias say, but in about 1460 BC when Moses confirmed the "judges" whom the people elected.

> Numbers 1:16 These were the tribal leaders elected from among the people.
> Deuteronomy 1:9, 13 At that time I told the people...choose some men from each tribe who are wise, experienced, and understanding, and I will appoint them as your leaders. (The Book translation)

Josephus makes this interpretation explicit.

> *"[the leaders were] such as the whole multitude have tried, and do approve of, as being good and righteous men". Antiquities of the Jews,* Book 3, Chapter 4, Section 1.

An 1828 translator's note adds that this selection followed campaign speeches, and then an election, making Moses' government the first Republic, or representative Democracy.

> *"This manner of electing the judges and officers of the Israelites by the testimonies [campaign endorsements] and suffrages [votes] of the people, before they were ordained by God, or by Moses, deserves to be carefully noted, because it was the pattern of the like manner of the choice and ordination of bishops, presbyters, and deacons, in the Christian church."*

Calvin's *Institutes of the Christian Religion* corroborate in detail the elections of Christian church leaders for several centuries.[71] Here is Calvin's analysis of elections in the New Testament:

> 15. The next question is, Whether a minister should be chosen *by the whole Church*, or only by *colleagues* and *elders*, who have the charge of discipline; or whether they may be appointed by the authority of one individual? 546546 See chap. 4 sec. 10, 11; chap. 5 sec. 2, 3. Also Calv. in Acts 6:3, and Luther, tom. 2 p 374. Those who attribute this right to one individual quote the words of Paul to Titus "For this cause left I thee in Crete, that thou shouldest set in order the things that are wanting, and ordain elders in every city" (Tit. 1:5); and also to Timothy, "Lay hands suddenly on no man" (l Tim. 5:22).
> But they are mistaken if they suppose that Timothy so reigned at Ephesus, and Titus in Crete, as to dispose of all things at their own pleasure. They only presided by previously giving good and salutary counsels to the people, not by doing alone whatever pleased them, while all others were excluded. Lest this should seem to be a fiction of mine, I will make it plain by a similar example. Luke relates that Barnabas and Paul ordained elders throughout the churches, but he at the same time marks the plan or mode when he says that it was done by suffrage. The words are, Χειροτονήσαντες (Gr: hand stretcher, or voter) πρεσβυτέρους κατ᾽ ἐκκλησίαν (Acts 14:23). They therefore

71 Calvin's *Institutes,* Book 4, Chapter 3 and 4.

> selected (creabant) two; but the whole body, as was the custom of the Greeks in elections, declared by a show of hands which of the two they wished to have. Thus it is not uncommon for Roman historians to say, that the consul who held the comitia elected the new magistrates, for no other reason but because he received the suffrages, and presided over the people at the election. Certainly it is not credible that Paul conceded more to Timothy and Titus than he assumed to himself. Now we see that his custom was to appoint bishops by the suffrages of the people. *Calvin's Institutes of the Christian Religion, Book 4, Chapter 3, Section 15*

"The Works of John Robinson", about 1,000 pages published by the pastor of the "Pilgrims" (specifically, the Separatists) trace the Scriptural origins of the Pilgrim vote given to every man, beginning with the signature of every man on the Mayflower on the 1620 Mayflower Compact, Western Civilization's first instrument of self-government. In a world where the freest existing government gave a vote to maybe 5% of the population, the vote in Plimoth was not only for the church members, but all men; not only free men, but servants. And when Elizabeth Warren became head of household in 1627 upon the death of her husband Richard, she was authorized to vote.[72]

Freedom of Speech to criticize both church and state was recognized as extending even to the right to respectfully criticize leaders of both church and state, creating the first expression of our First Amendment in a thousand years:

72 See documentary at www.1620.US.

> "[In our Prophesying Service we are] briefly to speak a word of exhortation as God enableth, and ... **questions also about things** delivered, [**preached**] and with them, **even disputations,** as there is occasion, being part, or appurtenances of that exercise. Acts xvii. 2 and xviii. 4. *(Book 3, Chapter 8, "On the Exercise of Prophecy", Argument Tenth.) [We all prophesy to/reason with each other so] that things* ***doubtful*** *arising in teaching may be* ***cleared****, things* ***obscure opened****, things* ***erroneous*** *convinced [****refuted****]; and lastly, that as by the beating together of two stones fire appeareth, so may the light of the truth more clearly shine by* ***disputations, questions, and answers modestly had*** *and made, and as becomes the church of saints, and work of God.† Luke ii. 40; iv. 31, 32; Acts xvii. 2; xviii. 24, 26, 28.*

It is legally reckless to allow a precedent for overturning a law to proceed one inch, just because it happens to conform with exclusively Judeo-Christian principles to the detriment of competing principles, before examining how much of our laws and constitutions would be left were such a precedent turned loose.

What if it is proved that the very institution of courts of law was established only in the Bible and not in the governments surrounding Israel where kings acted as lawmaker, judge, jury, and executioner? What if the very concept of "rule of law", or "lex rex" itself – meaning "the law is king" - with rules equally binding upon everyone from whom not even the lawmakers are exempt, as opposed to "rex lex" where the king is the law, was established by Christians during the Reformation out of their Bible studies of the political

governments of Moses and the church governments of Jesus and is found in no other world religion?

In that case, any precedent for justifying abortion as constitutionally protected because prohibiting it would "establish religion", turned loose, would eventually close down all courts of law and replace our freedoms to vote, speak, and worship, with the form of government which preceded the Bible: dictatorship.

Our "rule of law", applying to everyone equally, came from Ex 12:49, Lev 24:22, Num 15:15-16.

Corroborating witnesses came from Deu 17:6, 19:15, 18:16, 2 Cor 13:1, 1 Ti 5:19, Heb 10:28.

Sequestering witnesses was implied in the Bible but made explicit in Susanah, a 1st to 2nd century BC apocryphal book usually appended to the beginning of Daniel, a history cited in *Virgin Islands v. Edinborough*, 25 F.2d 472, footnote 3. Sequestering witnesses had to be practiced at Jesus' trial; that assumption is the only explanation for why the witnesses had such difficulty agreeing. Mark 14:59.

American law has until now favored Biblical legal precedents which not only "disfavor" the legal systems of competing systems like Sharia law, the human sacrifices of the Mayans and Aztecs, and some other Native

Americans, etc., but make criminals of their practitioners. Shall we abandon American law for that reason?

This is not an idle question. A growing number of Muslims in America want their communities, if not all America, to be ruled by Sharia law. If we are afraid to officially discern that American law, regardless of the extent to which it favors Biblical principles over competing systems, is better for America and for Americans and indeed for the whole world than any alternative, we will give it away and our children will read about it only in underground history books whose reading makes them traitors to the state, criminals worthy of torture and death, as it is in many countries in the world today.

> Deuteronomy 4:5 "I have taught you all the laws, as the LORD my God told me to do. Obey them in the land that you are about to invade and occupy. 6 Obey them faithfully, and this will show the people of other nations how wise you are. **When they hear of all these laws, they will say, 'What wisdom and understanding this great nation has!'** 7 "No other nation, no matter how great, has a god who is so near when they need him as the LORD our God is to us. He answers us whenever we call for help. 8 **No other nation, no matter how great, has laws so just as those that I have taught you today.** 9 Be on your guard! Make certain that you do not forget, as long as you live, what you have seen with your own eyes. Tell your children and your grandchildren. (GNB)

Edward Rubin argues that reverence for all human life should be dismissed as "represent[ing] a choice of the traditional morality of higher

purposes [than any individual's changing feelings about right and wrong] over the modern morality of self-fulfillment". Such laws should be suspect when "The traditional morality thus favored is specifically Christian".

"Self fulfillment" is the morality of Psychiatry, which in many respects is a religion[73] which is state-established.(It is given police powers in cases of adoption, alleged insanity or child abuse, and in criminal investigations. Its practitioners are given access to children in school.)

William Daubert, et ux., etc., et al., Petitioners v. Merrell Dow Pharmaceuticals, Inc., No. 92-102, 61 LW 4805. This case changed the courtroom definition of a scientific discipline whose practitioners may qualify as "expert witnesses" from whether its articles are published in peer-reviewed journals to whether the findings are testable, saying, "One can sum up all this by saying that the criterion of the scientific status of a theory is its falsifiability, or [in other words] refutability, or testability." The Court's footnote on that quote was to a book[74] that gives psychoanalysis as an example of a pseudo-scientific [scientific in appearance only] discipline that is more like religion than science – more like astrology than astronomy.

But if "self fulfillment", the goal of psychiatry, is a "modern morality"

73 See http://saltshaker.us/BibleStudies/PsychologyVBible.htm for a comparison of seven fundamental incompatibilities between psychiatry and the Bible.

74 Karl R. Popper, Conjectures and Refutations (The Growth of Scientific Knowledge) published by Routledge, London and New York, 1963. For selections from Popper's book, see www.Saltshaker.US/American Issues/ChildAbuse/ Popper.htm.

which is a fit foundation for law, how can any law against narcotics be Constitutional? Or smoking, or consensual sex with minors, or children skipping school, or sitting down when the judge enters the courtroom? Or disobeying a court ruling which does not satisfy or "fulfill" a litigant? Where are any bounds to such a legal theory?

Edward Rubin says:

> "...arguments...that...prohibitions on abortion should be struck down because of their religious origins...have foundered on the awkward fact that many laws originate in religious thought.129 No one would argue that we should hold that laws against murder violate the Establishment Clause because the prohibition is found in the Ten Commandments, or that we should declare the prohibition of slavery unconstitutional because it was first advanced by the Quakers and carried forward by evangelical Christians....
>
> "The argument advanced in this Article does not rely on a general claim that laws against assisted suicide have religious origins. Rather, it rests on an analysis that in this society, at this historical time, these laws are based on one particular, specifically religious concept of morality and specifically reject rival concepts of morality. They thus align with one side in an ongoing debate within society and employ the coercive force of the state to impose that side's view upon the other. This is simply not true for laws against murder or slavery."

Edward Rubin thus argues that it's OK to retain those laws supported by all religions; it's just the laws whose origins are exclusively Judeo-Christian which we should jettison. Rubin's ignorance of the exclusively Judeo-Christian origins of most of our laws, institutions, and freedoms is shared by most Jews and Christians, but it is still ignorance. His ignorance is,

literally, breath-taking.

Moslems own slaves! Moslems justify “honor killings”, [ie. if your daughter is raped and pregnant, or worse yet converts to Christianity, you kill her to preserve the family “honor”] conducted by families and mobs without investigation by police or courts. These “honor killings” are lawful, by Sharia Law. By American law, they are are murders.

Hindus burned widows alive on their husbands’ funeral pyres as part of their religion until restrained by Christian Englishmen! Hindus have a “caste system” by which, in India, especially in rural areas to this day, a huge portion of the population are “untouchables” and treated as badly as slaves. (It exists less in cities, which are more likely to enforce the Indian Constitution’s prohibition of the caste system, which exists because of Ghandi, whose autobiography says half his religious inspiration came from Christianity.)

The mass murders and “labor camps” of Atheism’s Communism are legend. Only Communism, of the world’s despotisms, has slain more adults during its bloody career than Americans have slain their babies. (That doesn’t count the unborn babies slain under Communism.) Communist China’s slave labor keeps some of our prices low. Atheism offers no rationale against it, (that has any authority for any other atheist other than the power of one’s

personal opinion), and much for it.

Slavery, as practiced anywhere outside ancient Israel, was a crime by Moses' laws,. "Manstealing" was a capital crime, and the closest to slavery under Moses' laws was "bondservice" where someone works a maximum of 6 years to pay off a debt, (a little like our multi-year contracts for teachers, athletes, actors, soldiers, etc.,) during which time a permanent injury caused by the master is grounds for immediate release. Prisoners of war could be "enslaved" a maximum of 49 years, and they were kept in the custody of Levites who were in charge of enforcing the laws against cruelty to slaves. Exodus 21:16, 26-27, Leviticus 25

American laws against slavery and murder definitely "are based on one particular, specifically religious concept of morality and specifically reject rival concepts of morality. They thus align with one side in an ongoing debate within society and employ the coercive force of the state to impose that side's view upon the other." If this is to become the basis for repealing American law, out must go our laws against murder and slavery.

Here is the real problem: life *is* sacred, at least in the sense that it is profoundly in our own best interests to treat it so. "Western civilization" as we know it rests on the foundation of this truth which is affirmed exclusively by Judeo-Christian Scriptures. Civilization must inevitably regress into

Barbarism to the extent this foundation is discarded.

One who seeks to move our laws outside the bounds of "due process" laid out in those same Scriptures and reflected fairly accurately in American law, doesn't understand life's purpose, or lacks faith in God to realize it.

It is serious enough when occasional individuals don't understand. But for society to heartily join such ignorance threatens the fabric of society.

This purpose is found in Christianity and nowhere else. Hinduism doesn't teach that life is sacred, but profane, and our purpose is to escape its cycles, and indeed to escape individual consciousness for all eternity. Hinduism's "self realization" turns out to be the "oblivion" sought by drunks – the complete cessation of anything left of "self".

But the fact human purpose as understood in America is not understood outside Christianity does not make it any less true, than the fact that Freedom of Speech, religion, and a vote for all are Biblical principles found nowhere else, makes these institutions unfit for American experience.

Abortion therefore, besides its irreconcilability with current American law, ravages the very foundation of civilization. It has brought America to the brink of collapse, and given enough more time, will inevitably finish her off.

Appendix H:
Judge Clark's Case against Abortion

First, a summary of the ruling: then, several pages of excerpts. For the complete ruling, see www.Saltshaker.US/SLIC/1992 -07-20PaulClarkWichita.pdf

SUMMARY: Judge Clark said the evidence of Elizabeth Tilson's world-renowned expert witnesses established that life begins at conception, so that killing life before birth is a great harm:

> I will find Mrs. Tilson's evidence proffered through witnesses Lejeune, Hilgers, McMillan and Rue relevant to the issue here. The entire evidence of her experts is admitted. The evidence proves that the medical and scientific communities dealing with the subject matter on a daily basis are of opinion that life in homo sapiens begins at conception; and harm is the result of termination of life under most circumstances.
>
> That opinion—as a proposition based on intuition in earlier years—has always been foundation for the public policy in Kansas (*State vs. Harris, Supra; Joy vs. Brown, Supra).*

Judge Clark conceded that "*Roe* and its progeny" made a woman's choice to kill her baby legal, and gave a killing corporation a right to do its business without interference.

> P. 8: Roe vs. Wade (401 U.S. 113, 35 L.Ed 147, 93 S.Ct. 705) set the law whereby the Constitution guarantees a right whereby a pregnant woman, during the first trimester, may make a decision whether to terminate her pregnancy without governmental interference in that decision.
>
> P. 10: The City of Wichita's ordinance prohibiting "criminal trespass" (Ex. 4, Supra) protects the right of a corporation and its business invitees to do lawful business without interference.

> P. 20-21: Roe, Supra, and Doe, Supra, declared a qualified constitutional right protecting a woman "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," (Casey vs. Planned Parenthood....
>
> P. 24: Any corporation authorized to do business and its clientele still have a right to do lawful business without interference under the law of this state.

BUT "*Roe* and its progeny" did not reverse the policy of Kansas, that abortion other than to save the life of the mother is a "wrongful act", making termination of pregnancy normally a "harm".

> [P. 23] Neither *Roe vs. Wade, Supra;* its companion case *Doe vs. Bolton, Supra*; nor their progeny (*Webster vs. Reproductive Services et al, Supra; Casey vs. Planned Parenthood of Southeastern Penn., Supra)* worked to abrogate the public policy of the state of Kansas that the voluntary act of prematurely terminating a pregnancy without qualifications is a wrongful act.

[That is, none of those cases undermined Kansas' policy that abortion is a "wrongful act" - a "harm" - except when it is to save the life of the mother.]

> (Cont'd) Those federal cases only qualified that policy by constitutionally guaranteeing to each woman in Kansas or elsewhere a "qualified right" (Roe, Doe, Webster, Casey) to decide whether to terminate her pregnancy.

[That is, those cases gave women a legal right to do it, but it's still legally recognizable as wrong.]

In other words, just because it is legal, that doesn't make it harmless. Harms are made legal all the time.

> The City argues (Page 4, above) that *Roe vs. Wade, Supra,* declares that the voluntary termination of pregnancy cannot be a harm because it is legal. That is too broad an application.

In other words, the Supreme Court made abortion legal – the Court stopped *states* from stopping abortion with criminal laws. But the Court could not make abortion *harmless* (in fact *Roe* explicitly declined to rule on whether abortion is a "harm", saying the justices were "in no position to speculate" about that) – and thus *Roe* has no effect on the right of *individuals* to prevent abortions. The "harm" of abortion is legally recognizable as serious enough to justify stopping it.

Another argument for the inapplicability of *Roe* to the restraint of individual life-saving is that the Bill of Rights, in whose "penumbra" the *Roe* court imagined they spotted a right to kill babies, has not one provision that restrains any *individual*. All its provisions protect *individuals* from their *government!*

> P. 9-10: The Bill of Rights, federal and state, is law that protects the people from their government. Neither was meant to protect people from fellow citizens (Burdeau vs. McDowell. 41 S.Ct. 574, 65 L.Ed. 1048, 256 U.S. 465).

So the Necessity Defense justifies Tilson's interruption of the corporation's business, *without affecting the law that makes that business legal.*

> [P. 25] Mrs. Tilson's wrongful act is forgiven in the eyes of the law under the doctrine of justification by necessity. She is discharged from further responsibility in the case.
>
> The City's ordinance is still the law....

Judge Clark disposed of the objection that Elizabeth Tilson had political alternatives to breaking the law to save lives:

> She has peacefully assembled to petition her government for a redress of what she felt to be a grievance. She has exhausted her alternative remedies. The City's point is not well taken.

Although Judge Clark doesn't develop the point, he insinuates that the abortionist does not have "clean hands" in the matter, being himself beyond the protection of *Roe v. Wade:*

> I will find that the City's evidence (Through Ms. Riggs) meant to show that the corporation's services were sold only to those pregnant women in the first trimester of pregnancy is not credible. The same is disbelieved.

FAIRLY COMPLETE EXCERPTS:

Excerpts from Wichita District Judge Paul Clark's ruling in favor of Elizabeth Tilson, July 21, 1992, Case No. 91 MC 108, "Memorandum of Opinion Following Bench Trial". (The complete ruling is posted at www.Saltshaker.US/SLIC/PaulClark)

(While blocking the abortionist's doors) she did not say nor do anything except perhaps participate in a song of praise for or a prayer to the same "Supreme Judge of the World" upon which Messrs. Hancock, Adams, Jefferson, Franklin, Clark and their colleagues at Philadelphia in 1776 relied

"for the rectitude of [their] intentions..." (The Declaration of Independence, Kansas and United States Constitution Pg. 159 @ 160, 1988). The police say that they heard such activity....

Mrs. Tilson takes umbrage at any attempt to label her an "abortion protester." She says that she was not there to protest anything. Her goal was to "rescue" the unborn, their progenators and the families of both from the ill effects that might follow termination of pregnancy.

...She admits [what she did but] asks for a ruling of not guilty, however, claiming at Page 3 of her trial brief that:

> "...she was justified to go on the property ... as such entrance was necessary to protect human life and health. ... such entry ... is a lesser evil than either the taking of the lives of the babies ... or the potential harm to the mothers, and other affected persons ..."

The defense of justification relieves her of criminal responsibility under the facts here, she says.

The city contests the applicability of the defense of justification by necessity. At page 12 of its trial brief, the reason is stated in this way:

> "... because the harm (abortion) sought to be prevented is not a legally recognized injury ..., there were legal alternatives available to the defendant. ... the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime. ..."

At common law, justification by necessity developed as a doctrine

whereby under certain factual situations, the perpetrator is forgiven an act otherwise criminal.

The mindset supporting the doctrine is set out in a part of Magna Carta (15 June 1215) where those men, who for one brief moment of time were charged with administering the government, reaffirmed by mutual agreement that:

> "No free man shall be seized, or imprisoned or dispossessed, or outlawed, or in any way destroy; nor will we condemn him, nor will we commit him to prison excepting by the legal judgment of his peers, or by the law of the land. To none will we sell, to none will we deny, to none will we delay right or justice."

The first ten amendments to the Constitution of the United States (25 September 1789) are but affirmation of these basic principles of freedom following more than 500 years of practice. All 16 amendments following find root there.

...The common law is whence our jurisprudence evolved in North America. In Kansas our Supreme Court said:

> "From the beginning of our history, the common law of England has been the basis of the law... and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state." ....

In Perkins on Criminal Law (Foundation Press, Inc., 1957) at Page 848,

justification by necessity is explained in this manner:

> "Where the act done was necessary or reasonably seemed to be necessary, to save life or limb or health, and did not in itself in any way endanger life or limb or health, the exculpatory effect of the necessity is too clear for argument; but where the offense charged is not one of particular gravity, the courts have not hesitated to recognize necessity as an excuse where the danger, or apparent danger to be avoided was less serious in its nature. Thus one unavoidably caught in a traffic jam is not guilty of violating the law which forbids stopping at that place, and a carrier has not violated the statute which requires a specified coach if the failure to provide that coach on a particular trip was due to an unavoidable accident which ordinary prudence could not have guarded against. These are not situations, it should be noted, where no choice was possible. The driver elected to stop rather than proceed until his vehicle was brought to a halt by actual contact with the one ahead, and the carrier could have avoided sending the train without the specified coach by sending no trial [sic] at all. The harm threatened in these cases, moreover, is not to life or limb or health. The motorist is excused for stopping even if proceeding so slowly that the bumper-to-bumper contact would cause neither personal injury nor appreciable property damage, and the carrier would have suffered only only financial loss by complying with the letter of the law. In another case, it may be added, the court reversed a conviction of killing a deer in violation of the game laws because it was shown this killing was reasonably necessary to prevent substantial damage to defendant's propertly."

The federal courts recognize the doctrine (U.S. v. Simpson, 460 F.2d 515, 9th Cir. 1972; U.S. vs. Seward, 687 P.2d 1270, 10th Cir. 1983)

Neither party cites Kansas case law treating the doctrine....

[P. 7] The City claims that "the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime...."

(Page 12, trial brief) At closing argument, the City pointed to H.B. 2646 Sec. 6(a)(2) where the legislature did in part define criminal trespass as:

> "...(2) entering or remaining on private and or structure in a manner that interferes with access to or from any health care facility ..."

That law (H.B. 2646) is effective from and after July 1, 1992. It does not have the effect on this case that the City would give it.

[P. 8] I will this day hold that the doctrine of justification by necessity was legally recognized in the State of Kansas on August 3, 1991. The roots are anchored in common law. The purpose is to protect the people from their government by an assurance that in all matters right will be done and justice rendered.

The doctrine is found at A.L.I. Model Penal Code Sec. 3.02. It is instructive as a guide for practical application. These are the elements:

> "(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

As aforesaid, Mrs. Tilson admits violation of the ordinance. No "legislative purpose to exclude" the offense is applicable to this set of facts.

No exceptions or defenses are set out in the ordinance or other law.

The provisions of (b) and (c) above contain no exclusion of the doctrine. We will then turn to the provisions of (a).

The "harm or evil" sought to be avoided by Mrs. Tilson through her violation of law on August 3, 1991 was the premature termination of pregnancy and the harm that may flow therefrom.

The City argues that premature termination of pregnancy is not "harm or evil" nor is it a wrong to be compared with Mrs. Tilson's defiance of a police order because Roe vs. Wade (401 U.S. 113, 35 L.Ed 147, 93 S.Ct. 705) set the law whereby the Constitution guarantees a right whereby a pregnant woman, during the first trimester, may make a decision whether to terminate her pregnancy without governmental interference in that decision.

Those are the positions. To resolve the issue, we need to explore some general concepts of constitutional law, the history of law in Kansas and apply the same to the facts.

Every female at the sige of occurrence on August 3, 1991 had a right to make an individual decision whether to terminate pregnancy (Roe vs. Wade, Supra). Any member of the public there that day had a right to purchase a service from the corporation.

The corporation had a right to do business there on that day. It was so

authorized by the State of Kansas.

Mrs Tilson had a 1st Amendment (United States Constitution) and Section 11 (Kansas Constitution) right to express her opinion on any subject concerning governmental action or nonaction. Her opinion could be expressed by action, nonaction or words (Texas vs. Johnson, 491 U.S. 397, 105 L.Ed.2d 342, 109 S.Ct. 2533; U.S. vs. Eichman, et al, 496 U.S. , 110 L.Ed.2d 287, 110 S.Ct.).

None of these individual rights are subservient to others. As with all constitutionally protected rights, each here involved has parameters (Burson vs. Freeman, 504 U.S. , 119 L.Ed.2d 5, 112 S.Ct. Decided May 26, 1992; Michigan Department of Police vs. Sitz, et al, 496 U.S. , 110 L.Ed.2d 412, 110 S.Ct. (1990); Roe vs. Wade, Supra; State vs. Cleveland, 205 Kan. 426, 469 P.2d 251; State vs. Great American Theatre, 227 Kan. 633, 608 P.2d 951; State vs. Crouch, 192 Kan. 602, 389 P.2d 824). The Bill of Rights, federal and state, [P. 10] is law that protects the people from their government. Neither was meant to protect people from fellow citizens (Burdeau vs. McDowell. 41 S.Ct. 574, 65 L.Ed. 1048, 256 U.S. 465).

The City of Wichita's ordinance prohibiting "criminal trespass" (Ex. 4, Supra) protects the right of a corporation and its business invitees to do lawful business without interference. In this particular case, the ordinance

can be viewed as establishing parameters on Mrs. Tilson's right to be on business property for the purpose of expressing an opinion.

When Mrs. Tilson remained on the corporate property "in defiance of an order ... to leave such premises ... personally communicated to ..." her by the police, she violated the law. The question then becomes is her violation excused by the doctrine of justification by necessity under the facts here presented?

Mrs. Tilson points out that her act of defiance "did not in itself in any way endanger life, limb or health" (Perkins, Supra).

The City's evidence proves that the corporation did busines on August 3, 1991, but only after Mrs. Tilson was removed by the police.

The defense evidence shows that the corporation lost business that day, perhaps indirectly by Mrs. Tilson's conduct. A Ms. Tina McLaughlin gave evidence at trial. She said that she went to the scene of the occurrence on the day Mrs. Tilson was there. She was a member of the public, there to have a medical procedure done for the purpose of terminating her pregnancy. Ms. McLaughlin left scene because of the activity there before she had the medical procedure. She later made contact by telephone with Mrs. Tilson's colleagues and [P. 11] made an appointment to talk. After the talk, she reversed her decision to terminate her pregnancy prematurely. Her pregnancy went to

term, whereupon a normal, healthy girl was delivered. The girl is named Destiny. She sat on her mother's lap during the testimony of her mother.

The overall evidence proves that those members of the public there that day as business invitees were at the least inconvenienced and at the most, obstructed because of Mrs. Tilson's act. No one was prevented from carrying out a decision to terminate a pregnancy that day, so far as the evidence shows.

Mrs. Tilson was on that day a housewife and mother from Wichita, Kansas, whose formal education terminated prior to the 12th grade, but who has been awarded a Kansas State High School Equivalencey Diploma (K.S.A. 72-4530; K.A.R. 91-10-1). Her training in obstetrics and gynecology is limited to the practical gained through experiences as a mother and woman, so far as the evidence here shows. As to the field of human genetics and histogenesis of homo sapiens while en ventre sa mere, her knowledge comes from a magazine article (Life Before Birth, ULifeU, April 30, 1965; Defense Exhibit B). Practical experience gained by personal actions and observations in human relationships constitute her pychological knowledge. So far as the evidence here proves, she probably has limited knowledge of and little interest in concepts of constitutional law evolving as American jurisprudence from the common law of England.

She sees through her heart. Her inner voice tells her that the premature

termination of pregnancy by surgical procedure terminates life. By intuition, she maintains that it can also cause great psychological harm to "the woman, the father of the baby, the grandparents, and brothers and sisters involved." It was intuition that drove her actions on August 3, 1991. She did what she thought was right, but it is the law of the land from where the light comes to judge whether or not her actions were justified under law.

To prove her point that the service offered by the corporation on that day terminated life, she offered the testimony of experts. From Paris, France, she called to testify one Dr. Jerome Lejeune. He holds doctorate degrees in medicine and science. He has for the last 40 years divided his time between the practice of medicine and research of human genetics in a teaching environment. His credentials prove that he is at this time recognized by the scientific community as the world's expert in the field of human genetics. Pathology of the chromosome is his particular specialty.

Dr. Lejeune is of the opinion that human beings (homo sapiens) begin life at conception. He gave as reason for his opinion certain scientific facts. A few are set out here. When the ovum donated by the woman is fertilized by the sperm from the man, all ingredients and all instruction necessary to make a human being are therein contained. The new human has a unique genetic organization. The mother is the sole source of shelter and vital fluids for the

term of the pregnancy. This need not be the biological mother; any woman's body will do so long as the recipient's body is in the same stage of ovulation as the donor. The new being forms all its own body systems, to include circulatory. It is "a little man in a space capsule," Dr. Lejeune says.

[P. 13] In further support of his opinion, Dr. Lejeune points out that tests done after the fertilized ovum has divided one time shows the protein of the new being is distinct from its progenitors.

The "D.N.A. bar code" - now popular in criminal identification (K.S.A. 1991 Supp. 21-2511) is present after the eighth division from fertilization. At 90 days from fertilization, all systems are fully developed. The fingerprints and palmprints are present and could be taken and recorded at that time. Those will be the same forever. Growth of the new being and its various organs continue for 25 years after fertilization, the doctor testified.

Dr. Thomas Hilgers was called from Nebraska to give evidence. He is a medical doctor, certified as trained in obstetrics and gynecology. His specialty is reproductive medicine. He has 20 years experience in his profession. He has authored several books and scientific papers of significance in his field.

Dr. Hilgers opines that life for the human being begins at conception. Through him, certain exhibits were brought as evidence, meant to prove his point.

Exhibit D is a video tape made by the witness. It was nine years in production. It depicts scenes meant to demonstrate development of homo sapiens in utero from conception through a few minutes after normal, live birth. Sonogram is the primary tool used for the depiction of Exhibit D. All the subjects where sonography is used are live patients, pregnant at the time. It shows, among other things, considerable embryonic movement before the mother can feel it within her body. It shows fertilization, then heart beat at 16 days following.

[P. 14] The witness says that brain waves have been demonstrated at 42 days after fertilization in humans. His experience is that 12 weeks from fertilization, all normal, well-baby reflexes are present in the new being and at approximately 22 weeks gestational (20 weeks after fertilization) the body of the mother is not necessary for further life of the new human being, given modern medical techniques, Dr. Hilgers explains.

Vincent Montgomery Rue, Ph.D. was called by Mrs. Tilson. His qualifications fill 13 pages (Defendant's Exhibit O). He is recognized in his field as one of the world's leading experts on the post-psychological ramifications, diagnosis of mental illness arising therefrom and treatment therefore of those persons so affected following the voluntary premature termination of pregnancy. His patients over the years have included mothers,

fathers, siblings and grandparents suffering in the symptoms ascribed to a diagnosis of post-traumatic stress disorder (D.S.M. 111 309.81 Axis IV (Pg. 26) – Physical Injury or Illness as a Stressor). It follows a feeling of guilt or a sense of loss, Dr. Rue says, both natural occurrences in the psyche of human beings.

From Jackson, Mississippi, Mrs. Tilson called a physician named Beverly McMillan, who specializes in obstetrics-gynecology. She has performed numerous procedures that result in the premature termination of pregnancy. By testimony and demonstrative is, [sic] she explained the four medical procedures used to terminate pregnancy. She testified that each procedure results in termination of life at the time or within minutes of the time of the procedure. According to Mrs. Tilson, the purpose of this evidence is to show the threatened harm she was [P. 15] trying to stop was imminent.

What Mrs. Tilson has proven by her witnesses LeJeune, Hilgers and McMillan is that genetically, histologically, obstetrically, and gynecologically, the scientific community is of opinion that life in homo sapiens bgegins at conception and continues on for an average life span unless interrupted by trauma or disease.

With witness Rue, Mrs. Tilson roves the scientific community is of opinion that great harm can occur to any number of persons joined in interest

following termination of pregnancy other than by natural birth.

This scientific evidence of Mrs. Tilson's demonstrates that the scientific community has proved throug research and discovery what Mrs. Tilson believes by intuition.

The City's objection thereto is that this evidence is not relevant to the issue being litigated (K.S.A. 60-401(b)). **The City does not contest the truth thereof.**

To determine the relevancy of Mrs. Tilson's evidence, as well as the validity of her defense, it is necessary to note the law applicable on August 3, 1991 at the place of occurrence, particularly that pertaining to the issue of whether or not the voluntary premature termination of pregnancy is a wrong or harm with which Mrs. Tilson's defiance can be compared.

The voluntary premature termination of pregnancy was at common law deemed a criminal act. William Blackstone (1723-80) wrote that:

> "To kill a child in its mother's womb is now no murder, but a great misprision..." (W. England 198).

At 1 Hale's P.C. 429 (cited in State vs. Harris, 90 Kan. 807, P.), the law of England in the year 1670 is stated in this way at Page 812:

> "But if a woman be with child and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder ..."

The Kansas Supreme Court in State vs. Harris was interpreting a statute thathad been the law of Kansas since territory days whereby the legislature made "it a misdemeanor willfully to administer to any pregnant woman any medicine, drug or substance or use any instrument or means with intent thereby to produce abortion or the miscarriage of such woman, unless necessary or medically advised to be necessary to preserve her life," (Terr. Stat. 1855, Ch. 48, Sec. 39; G.S. 1868 Ch. 31, Sec. 44; R.S. 1923 21-437; G.S. 1949 21-437).

Our Supreme Court reasoned in Harris that the act of intentionally terminating a pregnancy was one mala in se. [Evil all by itself, even if it weren't illegal.] In support of such reasoning, other cases were cited with the opinion. Here is a part:

> "The act was not only immoral, violative of the law of nature and deliberate in character, but reckless of life and wrongful per se" (At Page 814)
>
> "**At common law life is not only sacred but it is inalienable.** To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother."

[P. 17] It is instructive to note the court's reference to the beginning of life at Page 817:

> "The arbitrary refusal of the common law to regard the fetus as alife in such cases until quick was based on no sound physiological principles. Beck makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most diastrous consequences to the mother must have already been suffered (1 Beck Medical Jurisprudence 464-467).

Mrs. Tilson's scientific evidence seems to prove what the Supreme Court of Kansas believed in 1913.

The same statutory law interpreted in Harris, Supra, became G.S. 1923, 21-437.

Here is the statute defining Kansas state policy:

> "Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug or substance whatsoever or shall use or employ any instrument or means whatsoever with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars or by both such fine and imprisonment."

The same state policy was codified at G.S. 1949, 21-437.

The Supreme Court of Kansas in 1953 at Joy vs. Brown (173 Kan. 823, 252 P.2d 889 @ Page 839) noted that the above statute was one of three enacted:

> "For the purpose of protecting the life not only of the unborn child,

but that of the mother ..."

"The state has a vital interest" in both, the court said [P. 18] in the same opinion.

The statute was repealed in 1969 (Chap. 180, Page 503, 1969 Ses. Laws of Kansas).

July 1, 1970 (Ses. Laws of Kan. 1969, Chap. 180, Sec. 21-3407) is the effective date of the legislative enactment that replaced G.S. 1949 21-437, Supra. The replacement statute provided that:

> "(1) Criminal abortion is the purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth. (2) A person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregancy resulted from rape, incest or other felonious intercourse; and either: (a) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the hospital licensed by the state board of health and accredited by the joint commission on accredidation of hospitals where it is to be performed or in such other place as may be designated by law; or (b) an emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother. (3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child (2) Of this section all illicit intercourse with a female under the age of sixteen (16) years shall be deemed felonious. (5) Criminal abortion is a class D felony."

K.S.A. 65-443 is of interest. It goes to the general policy of the State of

Kansas. There it is provided that:

> "No person shall be required to perform or participate in medical procedures which result in the termination of a pregnancy and the refusal of any person to perform or participate in those medical procedures shall not be a basis [P. 19] for civil liability to any person. No hospital, hospital administrator or governing board of any hospital shall terminate the employment of, prevent or impair the practice or occupation of or impose any other sanction on any person because of such person's refusal to perform or participate in the termination."

Another statute illustrative of state policy in the area is K.S.A. 65-2837. That part pertinent here is this:

> "(b) 'unprofessional conduct' means:
> (5) performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion."

The statute applies to all persons licensed by the State Board of Healing Arts (K.S.A. 65-2812).

In 1972 the United States District Court for the District of Kansas declared (339 F.Supp.986) Section 2(a) of K.S.A. 21-3407 violative of the equal protection clause of the 14th Amendment to the U.S. Constitution.

It is not necessary t decide here what, if any, ramifications the federal district court's opinion may have had on prosecutions for violation of the statute in Kansas, because in January, 1973, the Supreme Court of the United States handed down Roe vs. Wade, Supra, and its companion case, Doe vs. Bolton, (410 U.S. 179, 35 L.Ed.2d 201, 93 S.Ct. 739, reh den 410 U.S. 959,

35 L.Ed.2d 694, 93 S.Ct. 1410).

Insofar as concerns the resolution of the issue here, the ruling in Roe is best summarized by the reporter of decisions at Page 155, Paragraph 3, where it is written that:

> "State criminal abortion laws, like those involved here, that except from criminality only [p. 20] a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot ovride that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. ...(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may if it chooses, regulate and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Doe, Supra, rendered unconstitutional any attempts by the legislature to impose into the decision to terminate a pregnancy the concurrence of physicians or groups other than the pregnant woman's personal physician and herself.

When K.S.A. 21-3407 is viewed in light of Doe, Supra, with the guidance of that rule of statutory construction laid down in State vs. Trudell (243 Kan. 29, 755 P.2d 511) where, in part, at Syl. 2, the court said that "... a criminal

statute with its punitive effect must be strictly construed against the state ..." it is clear that the statute is unconstitutional on its face.

The legal history of Kansas teaches that as a matter of public policy, the act of voluntarily terminating a pregnancy prior to term has been considered a wrongful act except when done under strict guidelines. The purpose is to protect the life of the unborn child and the mother (Joy vs. Brown, Supra). Roe, Supra, and Doe, Supra, declared a qualified constitutional right protecting a woman "from unduly [P. 21] burdensome interference with her freedom to decide whether to terminate her pregnancy," (Casey vs. Planned Parenthood of Southeastern Penn., et al, 1992 W.L. 14546, decided June 29, 1992); but left the state government with a legitimate interest in both the woman and the premature life during the entire period of pregnancy (Roe, Supra; Webster vs. Reproductive Health Serv., 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989); Casey, Supra; see also Joy vs. Brown, Supra).

It may be said that on August 3, 1991, a pregnant woman in the state of Kansas had an unqualified right to undergo a medical procedure meant to terminate her pregnancy at any time prior to term. Roe vs Wade, Supra, and Doe vs. Bolton, Supra (1973) rendered K.S.A. 21-3407, Supra, constitutionally void. Perhaps that is why there were no reported cases of prosecution thereunder during the 20 year life of the statute. The legislature took no

action during the 18 years following. The Supreme Court of Kansas, during the same time period, did not act on the particular issue but did find that the unborn are not human being at any stage of pregnancy so far as the law of criminal homicide is concerned (State vs. Green, 245 Kan. 398; 781 P.2d 678; State vs. Trudell, Supra).

Mrs. Tilson says that this unqualified right to terminate a pregnancy at any stage contradicted the state's historical public policy. That is the wrong with which her defiance ofhe City's criminal trespass ordinance must be compared, she maintains.

In addition to the argument that the woman's right to terminate is not a wrong, the City argues (Tr. brief, Supra) that alternatives to law-breaking were available to Mrs. Tilson on that day. [P. 22]

Mrs. Tilson's evidence on that point proves that she had, prior to August 3, 1991, made contact with the legislature, federal and state, by telephone, writing and lobbying. She has protested the government's action in Roe vs. Wade, Supra, and the Kansas state government's nonaction following. **She has peacefully assembled to petition her government for a redress of what she felt to be a grievance. She has exhausted her alternative remedies. The City's point is not well taken.**

I will find that the City's evidence (Through Ms. Riggs) meant to show

that the corporation's services were sold only to those pregnant women in the first trimester of pregnancy is not credible. The same is disbelieved.

I will find Mrs. Tilson's evidence proffered through witnesses Lejeune, Hilgers, McMillan and Rue relevant to the issue here. The entire evidence of her experts is admitted. The evidence proves that the medical and scientific communities dealing with the subject matter on a daily basis are of opinion that life in homo sapiens begins at conception; and harm is the result of termination of life under most circumstances.

That opinion—as a proposition based on intuition in earlier years—has always been foundation for the public policy in Kansas (State vs. Harris, Supra; Joy vs. Brown, Supra).

The City argues (Page 4, above) that Roe vs. Wade, Supra, declares that the voluntary termination of pregnancy cannot be a harm because it is legal. That is too broad an application.

[P. 23] Neither Roe vs. Wade, Supra; its companion case Doe vs. Bolton, Supra; nor their progeny (Webster vs. Reproductive Services et al, Supra; Casey vs. Planned Parenthood of Southeastern Penn., Supra) worked to abrogate the public policy of the state of Kansas that the voluntary act of prematurely terminating a pregnancy without qualifications is a wrongful act. *[That is, none of those undermined Kansas policy that abortion is a*

"wrongful act" - a "harm" - unless it is to save the life of the mother.] **Those federal cases only qualified that policy by constitutionally guaranteeing to each woman in Kansas or elsewhere a "qualified right" (Roe, Doe, Webster, Casey) to decide whether to terminate her pregnancy.** ***[That is, those cases gave women a right to do it, but it's still wrong.]***

The act of termination of pregnancy without qualification, always violative of state policy as mala in se, was not by statute prohibited on August 3, 1991, given the peculiar state of affairs caused by the action of federal government (Roe vs. Wade), combined with the inaction of the state government.

The wrongfulness of the act (i.e. unqualified termination of pregnancy) is what must be compared with the wrongfulness of Mrs. Tilson's act of interfering with the right of a corporation and its invitees to engage in lawful business.

The courts in Kansas by tradition have been a place where citizens find a forum at which all with grievances can be heard, their actions measured by proper application of law, under an assurance that right be done and justice administered in every instance.

I will find that the doctrine of justification by necessity is applicable to the facts of this case. The facts of the case must be viewed in light of the law

on August 3, 1991.

[P. 24] The doctrine is applied by weighing the two wrongs, while comparing the harm each seeks to avoid. The weighing must be done while balancing constitutionally guaranteed activites associated with these acts. The weighing and balancing must be done in light of the peculiar facts of the individual case.

The legislature of our state has acted since and perhaps in part because of Mrs. Tilson's defiance. It has by House Bill No. 2646 (effective July 1, 1992) reaffirmed the state's policy discussed above by exercising control of and regulating the act of voluntarily terminating a pregnancy prior to live birth. The legislature addressed the situation where citizens might do the same act as Mrs. Tilson did here.

Since Mrs. Tilson's defiance, the Supreme Court of the United States has reaffirmed the constitutional right of a woman to "decide whether to terminate her pregnancy," (Casey, Supra) prior to viability of the new life.

Any corporation authorized to do business and its clientele still have a right to do lawful business without interference under the law of this state.

Insofar as concerns the present matter, keeping the tradition that in all matters, right be done and justice administered, Mrs. Tilson's wrongful act done by violating the ordinance (Supra) was done to prevent a greater "harm"

to society at large than that harm those running the city government for a time sought to prevent by enactment and enforcement of the ordinance.

[P. 25] Mrs. Tilson's wrongful act is forgiven in the eyes of the law under the doctrine of justification by necessity. She is discharged from further responsibility in the case.

The City's ordinance is still the law, even though certain application of it may be subject to interpretation in light of the provisions of H.B. 2646, but that is a subject for another day.

As in all legal matters, this case is decided on the peculiar facts of this particular case. It is not dispositive of any other matter whatsoever.

The length of this opinion can be attributed to the important [sic] of the subject matter addressed.

Judge Paul W. Clark, July 20, 1992.