This is the Kansas precedent which orders Scott Roeder's judge to order Roeder not to say a word to the jury about the only contested issue of his trial, which is also his only defense. This is the case which inspires lawyers to say Scott Roeder has no hope. Significant statements in the ruling are in blue. My comments are in red. - Dave Leach, November, 2009 AD

CITY OF WICHITA v. TILSON Kan. 911 Cite as 855 P.2d 911 (Kan. 1993) 253 Kan. 285 4. Criminal Law e'38 Justification by necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted in Kansas.
CITY OF WICHITA, Kansas, a municipal corporation, Appellant, v. Elizabeth TILSON, Appellee. No. 68575. Supreme Court of Kansas. June 28, 1993.

City brought action against abortion protester for criminal trespass. The District Court, Sedgwick County, Paul W. Clark, J., held that defendant was absolved by the justification by necessity defense. City appealed. The Supreme Court held that: (1) the defense of justification by necessity cannot be used when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred is in violation of the law, and (2) evidence on when life begins was irrelevant in action for criminal trespass on property of abortion clinic and thus admission was error.

Appeal sustained.

1. Criminal Law e-1I34(8)

Whether the "necessity" defense was recognized by state law and applied to defendant's criminal acts of trespass were questions of law subject to broad appellate review.

2. Criminal Law 8za330, 569

Necessity is generally considered to be affirmative defense that must be proved by defendant, usually beyond a reasonable doubt

3. Criminal Law 8=38

If recognized as defense in criminal case, justification by necessity defense only applies when harm or evil which defendant seeks to prevent by his or her own criminal conduct is legal harm or evil as opposed to moral or ethical belief of individual defendant. Abortion and Birth Control x.50

Ed: This is a false choice. No one is suggesting that any abortion prevention defendant be exonerated upon the basis of his individual moral or ethical belief, but upon the basis of facts established by the jury.

A woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter.

4. Criminal Law e-38

The defense of justification by necessity cannot be utilized when harm sought to be avoided is constitutionally-protected legal activity and harm incurred by defendant's acts is in violation of law.

I find neither reasoning nor case law, anywhere in this ruling, for this strange characterization of the nature of the Necessity Defense, which is so at odds with the history of this defense.

5. Trespass X88

In criminal prosecution for trespass upon property of abortion clinic, evidence of when life begins is irrelevant, and thus inadmissible.

Nor do I find precedent or reasoning for this harsh, heartless ruling. It really doesn't matter whether abortion is, in fact, genocide? It is "irrelevant"? The precedent which this ruling violates includes Roe v. Wade itself, which asserted that not only is "evidence of when life begins" "relevant", but if it points to conception, Roe itself must "collapse"!

Syllabus by the Court

1. In a criminal prosecution for trespass upon the property of an abortion clinic, wherein the defendant asserted the defense of necessity, the background, history, and elements of the common-law criminal defense of justification by necessity are discussed and considered.

This case law at least recognizes the existence of "the common-law criminal defense of justification by necessity", and opens the door to an evaluation of its history in order to understand what it ought to cover. Thus this ruling identifies "the background, history" as the foundation of its own interpretation, opening the door for us to examine that same foundation, to see if this ruling understands it correctly, and to recognize the error of this Court where it does not.

2. If recognized as a defense in a criminal case, the justification by necessity defense only applies when the harm or evil which a defendant seeks to prevent by his or her own criminal conduct is a legal harm or evil as opposed to a moral or ethical belief of the individual defendant.

Repetition. Still no reasoning or precedent.

3. The justification by necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted in Kansas.

In other words, Defense of Others, which is modeled after this ruling, was not enacted by the time of this ruling.

4. A woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 LEd.2d 147 (1973).

5. The defense of justification by necessity cannot be utilized when the harm

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sought to be avoided is a constitutionally protected legal activity and the harm incurred by the defendant's acts is in violation of the law.

This reasoning violates Roe v. Wade, which says the "constitutionally protected legal"ity of abortion must "collapse" as soon as abortion is established as, in fact, a harm.

6. In a criminal prosecution for trespass upon the property of an abortion clinic, the defense of justification by necessity is inapplicable and evidence of when life begins is irrelevant. The admission of evidence of when life begins in such an action was error by the trial court.

More repetition; still no reasoning or precedent.

Sharon L. Chalker, Asst. City Atty., argued the cause and Gary E. Rebenstorf, City Atty., was with her on the brief, for appellant.

Steven W. Graber, Hutchinson, argued the cause and was on the brief for appellee.

Louise Melling, of Reproductive Freedom Project, American Civil Liberties Foundation, of New York, New York, and Jim hawing, Wichita, were on the brief for amid curiae American Civil Liberties Union, et al.

Richard D. Cimino, and Raphael F. Hanley, of St. Marys, were on the brief for amicus curiae Right to Life of Kansas, Inc.

John E. Cowles, of McDonald, Tinker, Skaer, Quinn & Herrington, P.A., Wichita, was on the brief for amicus curiae Women's Health Care Services, P.A.

PER CURIAM:

The City of Wichita appeals from the trial court's ruling that the justification by necessity defense absolved the defendant, Elizabeth A. Tilson, of criminal liability for her actions in trespassing on property owned by the Wichita Family Planning Clinic, Inc., (Clinic) on August 3, 1991. This appeal is taken pursuant to K.S.A. 223602(bX3) on a question reserved by the City. We sustain the appeal.

The facts are not seriously disputed. On August 3, 1991, Elizabeth A. Tilson was arrested for trespassing on property of the Clinic located at 3013 East Central in Wichita, Kansas, The Clinic does not deny that it provides abortion services to some of its patients. Ms. Tilson and others were gathered at both entrances of the Clinic attempting to stop patrons from entering the Clinic. Ms. Deborah Riggs, administrator of the Clinic, asked the individuals to leave the premises. The protesters failed to respond to the request. Ms. Riggs then called Captain William Watson of the Wichita Police Department to the

scene. Ms. Riggs asked Captain Watson to request the individuals to leave the Clinic premises. The protesters made no response to his command.

Ms. Tilson was subsequently arrested by Officer Gary Smith for criminal trespass in violation of Section 5.66.060(a) (1992) of the Code of the City of Wichita which provides in part:

"Criminal trespass--is entering or remaining upon or in any land, structure, vehicle, aircraft or watercraft by a person who knows he/she is not authorized or privileged to do so, and:

"(a) Such person enters or remains therein in defiance of an order not to enter or to leave such premises [orJ property personally communicated to such person by the owner thereof or other authorized person;

"Any person who commits a criminal trespass within the corporate limits of the city of Wichita shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or imprisonment which shall not exceed six months, or by both such fine and imprisonment ((3rd. No. 39-765, § 1)."

On November 13, 1991, the defendant was found guilty in Wichita Municipal Court of criminal trespass in violation of the city ordinance. The court ordered her to pay a $1,000 fine, serve six months in the Sedgwick County Adult Detention Facility, and pay all court costs. On the same date, the defendant appealed her conviction to the Sedgwick County District Court.

On January 14, 1992, the district court held a pretrial conference to determine if the court would hear evidence on the issue of when human life begins. At the hearing, the defendant noted that she would be

asking the court to make hen life begins and at wh

has

life h constitutional protection. The trial court found that evidence of when life be- gins was relevant and would be admitted. On January 21, 1992, the court ruled that it would allow the defendant to present evi- dence on any common-law defense, includ- ing the defense of necessity.

when Co

At trial, the defendant admitted that she blocked the entrance to the Clinic but as- serted that her actions were excused by the necessity defense. Specifically, she claimed her actions were justified because "abortion takes the life of an unborn baby, and I wanted to prevent that, and I wanted to prevent the detrimental effect that hap- pens to the woman, the father of the baby, the grandparents and brothers and sisters involved." There was no evidence intro- duced, and no claim has been made by the defendant, that the abortions performed by the Clinic were illegal or that the Clinic was operating in any illegal manner. Defen- dant in her brief, as she did before this court, takes great umbrage with being re- ferred to as a "protester" and instead por- trays herself as being on a "rescue" mis- sion. By whatever name or designation she chooses to be known, it is admitted that she violated the criminal code of the City of Wichita.

On July 20, 1992, following a three-day bench trial, Judge Paul Clark held that the defendant had violated § 5.66.050(a) of the Code of the City of Wichita. He further held, however, that the defendant was ab- solved of any criminal liability for her ac- tions, based upon the necessity defense. Judge Clark, in a 25—page memorandum opinion, held that the doctrine of justifica- tion by necessity was recognized under Kansas law. He additionally held that the doctrine was applicable to the defendant's actions and justified her trespassing upon the Clinic property for the purpose of say- ing a human life. At trial, over the objec. tions of the City, the defendant was al- lowed to introduce expert testimony on the question of when life begins. The City did not attempt to controvert such evidence but instead took the position that the evidence was inadmissible because it was irrelevant

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the court and that the did not apply to the charges in this case.

Brave words, reflected in the Cincinnati Law Review article. But the fact is there is no possible

way to “controvert such evidence”. But what kind of cold, dark heart can call it “irrelevant” whether the “harm” under investigation is, in fact, the cruelest genocide?

Pursuant to K.S.A. 22-3602(b)(3), the City of Wichita timely appeals from the trial court's holding that the necessity defense was applicable to the defendant's act of criminal trespass on the property of the Clinic.

The issues as stated by the City in its docketing statement read:

"1. Did the District Court err in holding that the necessity defense was recognized by Kansas law on August 3, 1991?

"2. Did the District Court err in concluding that the necessity defense was applicable to the facts of this case there- by discharging the Defendant from criminal liability for her actions in violating Section 5.66.050(a) of the de of the City of Wichita?"

III The City contends that the trial court erred in concluding that the necessity defense was recognized by Kansas law and applied to defendant's criminal acts of trespass. These issues are questions of law subject to broad appellate review. State, ex rel., v. Doolin & Shaw, 209 Kan, 244, 261, 497 P.24 138 (1972).

Before turning to the specific issues on appeal, some background on the necessity defense is deemed advisable. Necessity is a common-law defense recognized in some jurisdictions, while in others it has been adopted by statute.

Again, this Court establishes the authority of “necessity [a]s a common-law defense”. Later this ruling passes on whether or not this defense ought to be recognized in Kansas, thus explicitly ruling out any argument that this ruling rules the defense unavailable in Kansas.

Several states which have no statute on the defense have not determined whether the common-law defense will be recognized. It has been referred to by various terms, including "justification." "choice of evils," or "competing harms." Depending upon the jurisdiction, various elements must be proven in order for a defendant to establish the defense. Section 3.02 of the Model Penal Code, adopted by a number of states and relied upon by the City, provides one formulation of the necessity defense:

"(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

the determination to the issues before at point in time necessity defense

(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; and

(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." Model Penal Code § 3.02 (1962), 10 U.L.A. 477 (1962).

Even by this formulation, (a) and (b) must be conceded by all, and regarding (c), there has certainly been no legislation in favor of abortion! To the contrary! All state legislation prior to Roe criminalized it! Unless this Court is saying what no Justice dares admit: that Courts have been “legislating”! But not even Roe v Wade expressed any “purpose to exclude the justification”. Roe did not say “whether or not abortion is murder, it is legal.” To the contrary, Roe said “if abortion is murder, Roe must collapse.” In other words, such a “purpose” plainly did *not* appear.

In his treatise on criminal law defenses, Professor Robinson explains the necessity defense another way:

"The lesser evils defense, sometimes called 'choice of evils' or 'necessity' or the general

justification defense, is recognized in about one-half of American jurisdictions. It is perhaps the best illustration of the structure and operation of justification defenses generally. It explicitly relies upon the rationale inherent in all justifications: while the defendant may have caused the harm or evil contemplated by an offense, given the justifying circumstances, he has not caused a net harm or evil and is therefore to be exculpated. The principle of this general justification defense may be stated as follows:

"Lesser Evils. Conduct constituting an offense is justified if.

"(1) any legally-protected interest is unjustifiably threatened or an opportunity to further such an interest is presented; and

Now pay attention. Here is where the Court's logic misses a cog. Consider that Life is a "legally protected interest. Notice this sentence unambiguously says what must be "legal" is the "interest" served by the defendant's action. In this case, human life. Human life is "legal", and saving it is "legal".

"(2) the actor engages in conduct, constituting the offense,

(a) when and to the extent necessary to protect or further the interest,

(b) that avoids a harm or evil or furthers a legal interest greater than the harm or evil caused by actor's conduct" (Italics in original.) 2 Robinson, Criminal Law Defenses § 124(a) pp. 45-46 (1984).

Again, notice it is the "interest" served by the defendant's action which must be "legal".

[2) Necessity is generally considered to be an affirmative defense that must be proved by the defendant, usually beyond a reasonable doubt. State v. O'Brien, 784 S.W.2d 187, 189 (Mo.App.1989). Also, "[t)he burden of production for the defense of lesser evils (choice of evils, necessity) is always on the defendant" 2 Robinson, Criminal Law Defenses § 124(a) p. 47. However, some jurisdictions treat the defense as an "ordinary" defense that must be disproved by the prosecution beyond a reasonable doubt. See, e.g., Commonwealth v. Brugmann, 13 Mass.App. 373, 379, 433 N.E.2d 457 (1982).

[31 Regardless of what name is attached to the defense (and for the sake of simplicity we will refer to it as the necessity defense) one thing is clear: **The harm** or evil which a defendant, who asserts the necessity defense, seeks to prevent **must be a legal harm** or evil as opposed to a moral or ethical belief of the individual defendant,

See?

The City contends that there is no judicial decision in Kansas which expressly recognizes the necessity defense. It notes that the trial court relied upon State v. Taylor, 138 Kan. 407, 26 P.2d 698 (1933), for its determination that the defense was recognized under Kansas law. The City, however, correctly points out that the defense of necessity was not an issue in Taylor, nor did the case set forth the elements of such a defense.

? Necessity doesn't have to be an issue in a case, or be defined in detail, for its legitimacy to be acknowledged in passing.

In Taylor, the defendant was charged with shooting his estranged wife and her brother. The defendant attempted to remove one of his children from the home of his brother-in-law. The defendant alleged that he acted in self-defense in shooting his brother-in-law. Taylor, however, does not mention or recognize the necessity defense. The passage from Taylor relied upon by the trial court in its memorandum opinion has no bearing upon the defense of necessity. Taylor does not support the trial court's holding that the necessity defense is recognized under Kansas law.

Article:

Grammar So Bad it Literally Kills

"Scott Roeder can't expect the Necessity Defense to justify saving thousands of unborn babies by shooting the man planning to kill them, because abortion is legal." So says just about every American. Every Kansas lawyer will add, "and the Kansas 'defense of others' statute only lets you defend yourself or others from *'unlawful* force'."

Where does this idea come from, that the Necessity Defense can only apply where the harm prevented is unlawful? That even if you can prove to a jury that what you stopped was the most barbaric genocide, you have to let it keep on destroying people, as long as the laws of your country have made it "legal"?

The Kansas court precedent which says that got it not from sound legal reasoning, legal necessity, American legal history, the Constitution, our Founding Fathers, or common sense, but from a misunderstanding of grammar in 1993.

The case is based on a quote from "professor" Paul H. Robinson, who published a 2 volume set on Criminal Law Defenses in 1988. The problem is that the quote from Robinson says the opposite.

Kansas law and precedent says Necessity won't justify saving ourselves or others from *a harm* that is "legal".

Robinson says Necessity justifies saving ourselves or others from any harm whatsoever so long as *what we want to save* (in this case, human life) is legal. (In other words, Necessity wouldn't justify us killing an officer to save our marijuana crop. Marijuana is not a legal "interrest".)

Kansas law and precedent says whether or not a harm we want to prevent *is unthinkably harmful – even genocide itself* – is "irrelevant", so long as it is "legal". If it is "legal", we must stand aside and allow it to harm us and those we love.

Robinson says it is whether the harm *is "legal"* that is irrelevant. If it is *in fact* harmful, then (as long as what it is harming is legal), we may lawfully prevent it.

I am not a lawyer. I have nothing on my wall to allow me to understand obscure laws. But I have spoken English all my life, and I have a diploma that allows me to understand English grammar. I invite all Americans to "stop your knees from shaking" (Hebrews 12:12) and examine this grammar with me. I challenge all news reporters, whose credentials for understanding English grammar are equal to that of lawyers, to follow this reasoning with me and report it to the nation.

Not only does the 1993 Kansas case contradict the Robinson quote it claims for its basis, but (1) its characterization of the quote contradicts the quote, (2) its opening case summary contradicts the Robinson quote, and (3) its characterization of the Robinson quote contradicts its opening case summary!

Before I make my case for their irreconcilability, let's stare at them together for a few moments. And you tell me if they seem like the same statement to you. (Tell me at music@Saltshaker.US)

The Kansas law:

> Kansas **21-3211**(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's **imminent use of unlawful force. [**Or, a person is *not* justified if the force from which he defends others is *lawful.]*

Every Kansas lawyer you ask will tell you this Kansas law gives Scott Roeder no right to stop genocide itself, so long as genocide remains "legal".

Here is the summary from the 1993 case, *City of Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993):

> (1) the defense of justification by necessity cannot be used when the harm sought to be avoided is a *constitutionally protected legal activity* and the harm incurred is in violation

of the law, and (2) evidence on when life begins was irrelevant in action for criminal trespass on property of abortion clinic and thus admission was error.

(Translation: Abortion is not merely "legal", but "constitutionally protected". Evidence that abortion is brutal genocide is "irrelevant" and "inadmissible" in court. In other words, the defendant is ordered not to breathe a word to the jury about it. That would be "error", meaning if the jury found out about Roeder's defense, that would be so wicked to a judges as to constitute grounds for an appeals court to reverse the jury's acquittal and convict him.)

Now here is the quote from "Professor Robinson" given in the Tilson case, as Tilson's authority. Although other state supreme courts are quoted who appear to have reached the same conclusion as this case, other states are not necessarily "authority" for this court, and it is the Robinson reasoning which comes directly before, and appears to clinch, Tilson's conclusion that abortion is legal so it can't be legally recognized as the slightest "harm"::

In his treatise on criminal law defenses, Professor Robinson explains the necessity defense another way: ..."Lesser Evils. Conduct constituting an offense is justified if:

"(1) any **legally-protected interest** is unjustifiably threatened or an opportunity to further such an interest is presented; and...."

Let's slow down long enough to absorb these words before memory of them is lost in the rush of grammar stretching that follows.

Consider that Life is a "legally protected interest". Notice this sentence unambiguously says what must be "legal" is the "interest" served by the defendant's action. In this case, human life. Human life is "legal", and saving it is "legal". It may be arguable whether abortion's "threat" to human life is "unjustified", but it should not be arguable that "an opportunity to further" the "interest" of saving life was "presented" to Scott Roeder, and he acted on that opportunity. Robinson continues:

"(2) the actor engages in conduct, constituting the offense,

(a) when and to the extent necessary to protect or further the interest,

(b) that avoids a harm or evil or ***furthers a legal interest*** greater than the harm or evil caused by actor's conduct" (Italics in original.) 2 Robinson, Criminal Law Defenses § 124(a) pp. 45-46 (1984).

Again, notice it is the "interest" served by the defendant's action which must be "legal".

Now observe Tilson's conclusion from Robinson's quote:

Regardless of what name is attached to the defense (and for the sake of simplicity we will refer to it as the necessity defense) one thing is clear: ***The harm*** or evil which a defendant, who asserts the necessity defense, seeks to prevent ***must be a legal harm*** or evil *as opposed to a moral or ethical belief of the individual defendant,*

Wait a minute. This doesn't sound either like Robinson or like Tilson's opening summary. Doesn't this say necessity *may* be used only if abortion is *legal*?

But didn't Tilson's opening statement say "necessity can*not* be used when [abortion] is...legal"?

(1) the defense of justification by **necessity can*not* be used when** the harm sought to be avoided **is** a constitutionally protected ***legal*** activity and the harm incurred is in violation of the law....

And didn't Robinson say it doesn't matter if the *harm prevented* is legal – what matters is whether the *"interest" protected* is legal?

Let's cut out the extraneous words so the contrast is more clear:

Robinson: "Conduct constituting an offense is justified if...the actor...***furthers a legal interest*** greater than the harm or evil caused by actor's conduct."

Tilson's interpretation of Robinson: "The harm ... prevent[ed] ***must*** be a legal harm...

Tilson's opening statement: "...necessity **can*not*** be used when the harm...is...legal...."

You can see how simple it is to reconcile Tilson's opening statement with Tilson's interpretation of Robinson. All you have to do is add the word "not". Reconciling either statement with Robinson is a

little more complicated.

Not only are we witnessing an utter failure to understand grammar through these discrepancies, but we see an attack on logic through the introduction of a false choice: "[The harm or evil which a defendant...seeks to prevent must be a legal harm or evil] ...as opposed to a moral or ethical belief of the individual defendant." No one has suggested that any defendant's subjective "belief" should carry any weight whatsoever in a Necessity Defense trial. Necessity is decided, in courts of law, by the jury's objective establishment of the facts.

(Maybe the Court confused the Necessity Defense with the "emotional outburst" defense, or the "sincere belief" defense, which trims a couple of years off a sentence if the jury can be persuaded the defendant's reasoning may have been the ravings of a crazy cult, but at least they were sincere.)

But back to Tilson's contradictory statements about Necessity. How can they be reconciled? What must go through a lawyer's mind who tries to trace the Court's reasoning?

First, *Robinson* says Necessity justifies any lawful purpose, or "interest" (like saving life); it is irrelevant whether the threat to that lawful purpose (abortion) is legal or not.

Second, *Tilson characterizes Robinson* as saying "necessity can*not* be used when [abortion] is...legal".

Third, *Tilson's opening statement* says not only can Necessity *not* be used because abortion is legal, but what is irrelevant is the harm it causes.

To state the contradiction another way, Robinson's quote, and Tilson's interpretation of the quote, use opposite tests of what must be "legal".

Robinson focuses on the *legality of the "interest"* "promoted" by the action. (It is legal to want human beings to live, so otherwise illegal action promoting that purpose is justified.)

Tilson focuses on the *legality of the harm* interrupted by the action. (It is legal to kill thousands of babies through abortion, so otherwise illegal action that obstructs that purpose is not justified.)

For example, let's take the classic illustration of the Necessity Defense: it's OK to break down your neighbor's door to save him from a fire.

Robinson would agree, saying your "interest" is in saving your neighbor, which is OK because saving a human being is a legal objective. It is irrelevant whether the fire is legal or illegal.

Tilson might agree, or it might not. Tilson would say it is irrelevant whether your neighbor is a human being. Tilson would inquire whether the fire is legal. If it was caused by an arsonist, or electrical wiring that wasn't up to code, then it is illegal, so it is OK to stop it, or to save things from its destruction. But if it was caused by perfectly legal smoking, or wiring that had just passed inspection, then your neighbor must be left to it.

Later in the ruling Tilson displays more Grammar Magic. Tilson decides that whether your "interest" is "legal" matters after all, but only after determining whether it is, by whether the harm you stop is: although "saving lives" may be a legal "interest", Tilson says that isn't really what the defendant cares about. The defendant's *real* interest is "preventing abortion", which is *not* a legal "interest" *because abortion is legal.*

> We therefore conclude that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed on complainant's property in order to interfere with the rights of others....
>
> 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.

Let's work that into our example.

Tilson would say it may be relevant, after all, whether your neighbor is a human being. What must first be established is whether the fire was legal. If the fire is illegal, you are fine. You may save your neighbor because he is a human being. But if the fire was perfectly legal, then you cannot say

your “interest” is saving life; nay, your purpose must be put down as “preventing a legal fire”, which is plainly illegal. Evidence that your neighbor is a human being is “irrelevant”. Evidence that the fire is killing a human being in the most cruel manner is “not legally cognizable”.

CIVIL DISOBEDIENCE AND MAGIC GRAMMAR

Tilson’s Motive Magic, of decreeing that the defendant’s real motive is not to save life but “prevention of abortion” and “to interfere with the rights of others”, encourages Tilson to invoke Robinson again, this time where Robinson explains how Necessity is not always available to justify “civil disobedience”.

> "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 cognizable 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 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. (Page 917-918: (Quoting State v. Sahr)

How important a judge’s words are! If he says you were “saving lives”, you walk. If he says you practiced “civil disobedience”, you go to jail! Same actions, two descriptions!

But did Robinson distinguish between saving lives and “civil disobedience”?

When you break down your neighbor’s door to save him from a fire, or speed to the hospital because your wife is delivering a baby in the back seat, no one calls it “civil disobedience”. No one is “protesting” any “laws or policies”. Lives are, in fact, being saved, and laws are the last concern on anyone’s mind.

“Civil disobedience” invokes news stories about vandalism by priests at nuclear missile sites, and sitting in “whites only” seats on buses and in restaurants. There are no lives in imminent danger. Serious injury is not imminent. The conduct does not “further a legal interest”, or at least the connection between the action and any furtherance of the goal is very indirect and uncertain.

Vandalism at a nuclear site does not directly disarm a single weapon. Sitting in a “whites only” presented no certainty of softening a single white heart. But Scott Roeder’s action directly saved 2,000 babies from being killed by Dr. Tiller, just between the time of his death and the time of Roeder’s trial; hundreds of whom, based on studies done by Operation Rescue, were saved not only for the short time it took to reschedule their murders, but long enough to be born to mothers with hearts softened to love them.

No wonder most “Civil Disobedience” is not justified by the Necessity Defense!

In the case of racial discrimination, the harm may certainly be taken as imminent, and in hindsight we can say the strategy worked, but at the time the strategy seemed more desperate than pragmatic. But to the extent it worked, it disproves Robinson’s reasoning for the unavailability of Necessity for Civil Disobedience cases. Robinson says the very existence of laws, however cruel, proves the public approves of them and cannot accept what they protect as the least bit harmful.

But what the public approved of was turned upside down by the spectacle of people standing for what was right, even at great personal cost. What the public approves of must be acknowledged a fickle standard. Fickle because it changes every few years, and fickle because it is no sure guide to what is true or just.

But to the extent public approval must be weighed in determining a man’s guilt in a court of law, English law since the Magna Carta establishes the jury, not the judge, as the expert on what the public approves. No judge has any business opining what the public approves, while a jury waits outside his chambers to hear the issues of the trial.

Again, Roeder’s action is about saving lives, not “protesting” anything, so the issue of

"protesting" in the following sentence is inapplicable. But Robinson's reasoning is inapplicable also because the passage of Roe v. Wade is not, in any reasonable person's view, "conclusive evidence of the community's view".

> "...as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view..."

Who will say the opinions of 9 unelected justices, who do not even face a retention vote, "are conclusive evidence of the community's view" even when they overturn the laws of elected congressmen, elected state lawmakers, and elected state governors, as Roe v. Wade did? May we not put down any attempt to apply that reasoning to abortion as patently absurd?

But even if "the community's view" were that cruel, barbaric genocide doesn't hurt anyone, that would not change the *fact* that it does, and that America's Rule of Law is teetering on the edge of national destruction so long as laws allow an eighth of the population to be slaughtered without due process of law.

As Benjamin Rush wrote to David Ramsay in 1788, "nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community."

The jury was wisely made the best representative of "the community's view", because the jury represents not just unbiased citizens, but citizens who are very well educated before they decide anything, if the lawyers and judge do their jobs well.

This issue is an issue of grammar. Lawyers are supposed to be good with grammar, but in this arena news reporters are their equals. News reporters may need to defer to lawyers on technical legal issues requiring broad legal knowledge, but when an issue boils down to grammar, news reporters are on their own turf, and have every right to understand, and report on, this error of grammar which has been so instrumental in the wanton destruction of so much human life.

[41 The City then observes that the only reported case in Kansas which discusses but failed to

recognize the necessity defense is State v. Greene, 5 Kan.App.2d 698, 623 P.2d 933 (1981). In Greene the defen-

dants, protesters at the Wolf Creek nuclear power plant, asserted that the compulsion defense set forth in K.S.A. 21-3209(1) relieved them of criminal liability. The Kansus Court of Appeals held that the defendants were not entitled to an instruction regarding the compulsion defense because **the defense did not apply to acts which the legislature had expressly concluded not to be criminal**.

This certainly isn't the case with abortion, where Roe expressly did NOT conclude abortion is not murder. They said they didn't know. They said they were unqualified to know: that fact finders are more qualified than they.

In Greene the issue involved the applicability of the statutory compulsion defense which may be related to or synonymous with the necessity defense in some jurisdictions and/or under certain circumstances. In considering the compulsion defense as it applied to activities of the defendants, who were opposed to nuclear power, at the Wolf Creek nuclear power plant, the court did discuss several cases wherein the defense had been asserted at nuclear power plants, but it did not recognize the necessity defense as viable in Kansas. In fact, the defendant conceded in her brief, "State V. Greene, 5 Kan.App.2d 698 623 P.2d 933 (1981), does not apply. It does not address the justification defense."

Additionally, amicus curiae Right to Life of Kansas, Inc., asserts in its brief, "We concur with the Appellant's statement that Kansas has never expressly adopted or recognized the necessity defense."

Our own research confirms that the parties and amicus are correct and that the necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted or recognized in Kansas.

It doesn't matter whether ND was "recognized". To not recognize it, where relevant, where enforcement of the letter of a law would enable unthinkable harm, would violate the "Absurd Result" test.

Nor do we find it necessary in the resolution of this appeal to make such a determination.

Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day.

In other words, this case does not call itself a precedent for dismissing the Necessity Defense as unavailable in Kansas.

The issue before us is simply whether the necessity defense, if it were recognized, even applies at all in a case such as this one.

Although we decline to specifically determine whether the necessity defense should be adopted or recognized in Kansas, to decide the issue before us it is necessary to consider the issue in light of the necessity defense and its applicability to the charges in this case.

In other words, this case is a precedent for treating the Necessity Defense as valid, at least arguendo, long enough to decide whether it would justify the defendant *if it were* valid.

[5] It is established, beyond any argument, that since 1973 a woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

In that case the Supreme Court held: "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in

promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(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 it is necessary, in medical judgment,for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65, 93 S.Ct. at 732.

The City maintains that because no legal harm is caused by an abortion, "the harm caused by the defendant's criminal acts exceeds the harm sought to be prevented by the City's ordinance."

? "no legal harm is caused by an abortion"? Here's that contradictory grammar again! The Court means "no legal[ly recognized] harm is caused by an abortion". The words they wrote say the opposite: that abortion is an illegal harm!

The City notes that defendants in several jurisdictions have raised the necessity defense in situations involving trespass or public protest, including those against abortions, and that the 'overwhelming majority of jurisdictions have rejected the defense."

Numerous courts have considered whether the necessity defense applies to abortion trespass cases. See Annot., "Choice of Evils," Necessity. Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest, 3 A.L.R.5th 521.

Every appellate court to date which has considered the issue has held that abortion clinic protesters, or "rescuers' as they prefer to be called, are precluded, as a matter of law, from raising a necessity defense

when charged with trespass. See Allison v. City of Birmingham, 580 So.2d 1377 (Ala.Crim.App.1991), cert. denied 580 So.2d 1390 (Ala.1991); Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Pursley V. State, 21 Ark.App. 107, 730 S.W.2d 250 (1987), rev. refused July 22, 1987; People v. Carziano, 230 Cal.App.3d 241, 281 Cal.Rptr. 807, rev. denied August 1, 1991, cert. denied — U.S. —, 112 S.Ct. 659, 116 L.Ed.2d 750 (1991); State v. Clarke, 24 Conn.App. 541, 590 A.2d 468, cert. denied 219 Conn. 910, 593 A.2d 135 (1991); Gaetano v. United States, 406 A.2d 1291 (D.C.1979); Hoover v. Stale, 198 Ga. App. 481, 402 S.E.2d 92 (1991); People v. Krizka, 92 III.App.3d 288, 48 111.Dec. 141, 416 N.E.2d 36 (1980); Sigma Repro. Health Cen. v. State, 297 Md. 660, 467 A.2d 483 (1983); State v. O'Brien, 784 S.W.2d 187 (Mo.App.1989); State v. Cozzens, 241 Neb. 565, 490 N.W.2d 184 (1992); People v. Crowley, 142 Misc.2d 663, 538 N.Y.S.2d 146 (1989); State v. Thomas, 103 N.CApp. 264, 405 S.E.2d 214, cert, denied 329 N.C. 792, 408 S.E.2d 528 (1991); State v. Sahr, 470 N.W.2d 185 (N.D.1991); Kettering v. Berry, 57 Ohio App.Jd 66, 567 N.E.2d 316 (1990); State v. Cfowes, 310 Or. 686, 801 P.2d 789 (1990); Corn. v. Wall, 872 Pa.Super. 534, 539 A.2d 1326, appeal denied 521 Pa. 604, 555 A.2d 114 (1088); State v. Morton, 1991 WL 80204 (Tenn.Cr. App.) (unpublished op.), appeal denied (1991); (jrabb v. Stale, 754 S.W.2d 742 (Tex.App.1988), cent. denied 493 U.S. 815. 110 S.Ct. 66, 107 LEd.2d 32 (1989); Buckley v. City of Falls Church, 7 Va.App. 32, 371 S.E.2d 827 (1988).

The only reported case which we have found that recognized the necessity defense in an abortion clinic/trespass case is a Rochester, New York, city court case. People v. Archer, 143 Mise.2d 390, 537 N.Y.S.2d 726 (1988). The decision in Archer was limited to late-term abortions, and in its opinion the court recognized that "Roe prohibits the State statutory necessity defense whenever there are intentional interruptions which interfere with the performance of first trimester abortions." 143 Misc.2d at 403, 537 N.Y.S.2d 726. Archer is not persuasive on any issue before this court and is inapplicable to the facts here.

But it does apply to the facts of Roeder's case.

161 The courts have invoked several different rationales in rejecting application of the defense.

The majority of courts reason that because abortion is a lawful, constitutionally protected act, it is not a legally recognized harm which can justify illegal conduct.

In State v. O'Brien, 784 S.W.2d 187 (Mo. App.1989), the defendant was charged with trespass at an abortion clinic and, as in our case, asserted the necessity defense, contending she was on a rescue mission to save and protect unborn children. She attempted, as defendant did here, to introduce evidence of when life begins in support of her defense. "The Missouri court stated:

"Since abortion remains a constitutionally protected right, the defense of necessity must be viewed in that context.

"Viewed in that setting every court which has considered the defense of necessity has for various reasons, rejected it when asserted in trespass-abortion proceedings....

"In short, 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." 784 S.W.2d at 192.

Another court has reasoned:

'Through judicial decision and legislative determination denying abortion recognition as a harm, the law has preempted the central inquiry of the necessity defense: whether the activity sought to be stopped or the criminal conduct employed to stop it is the 'greater harm.' By denying abortion classification as a harm the law has determined that the greater harm per se is in the criminal conduct. The defense of necessity which has been created by the law may not, therefore, be employed to justify or excuse it." Kettering v. Berry, 57 Ohio App.3d at 68-69, 567 N.E.2d 316.

What legislative action takes a position on whether something is in fact a harm? Is this Court just assuming that whatever is legal is harmless? For example, that where lying is not prosecuted, it harms nobody? The only time state laws actually take positions on facts is when the introduction to a section of law articulates a "legislative purpose". But such statements are not even "laws" in the sense they proscribe nothing which may be enforced. They serve only as guide to a judge in any ambiguity about the intent of a law.

But in this case it violates Roe to imagine it denies abortion classification as a harm, when Roe explicitly said it takes no position on whether abortion is the most barbaric, cruel harm.

In Con:. v. Markurn, 373 Pa.Super. 341, 541 A.2d 347, appeal denied 520 Pa. 615,

 554 A.2d 507 ce'rt. denied 489 U.S. 1080, 109 S.Ct. 1533, 103 L.Ed.2d 837 (1988), the defendants were convicted of criminal trespass. They alleged that the crimes were justified to prevent the loss of a human life.

The court held that the necessity defense was unavailable because a woman's right to obtain an abortion was protected by the United States Constitution. The court stated: "As we have noted, pre-viability abortion is lawful by virtue of state statute and federal constitutional law. The United States Supreme Court, from Roe through its progeny, has consistently held that the state's interest in protecting fetal life does not become compelling, and cannot infringe on a woman's right to choose abortion, until the fetus is viable. Roe [410 U.S.] at 163-64, 93 S.Ct. at 732. Appellants do not suggest that viability and conception are simultaneous occurrences. We find that a legally sanctioned activity cannot be termed a public disaster." Carp. v. Markum, 373 Pa.Super. at 349, 541 A.2d 347.

By what authority does this Court "find that a legally sanctioned activity cannot be termed a public disaster", when Roe explicitly said it could? Not Roe! Roe explicitly said the ruling was made in a vacuum of knowledge of whether the activity it sanctioned was a public disaster, and invited fact finders to establish whether it was. It furthermore handed fact finders this authority: "If you find out

that this ruling is a public disaster, this ruling needs to ‘collapse’.”

In People v. Krizka, 92 IILApp.3d 288, 48 III.Dec. 141, 416 N.E.2d 36, the defendants were charged with trespass on medical center property to prevent abortion. The defendants asserted the necessity defense based upon their contention that life begins at conception and that they were attempting save lives. The court stated: "Defendants here so contend that they had to commit the acts of criminal trespass in order to prevent the deaths of fetuses, which they perceived as the greater injury. We disagree with defendants' contention because the 'injury' prevented by the acts of criminal trespass is not a legally recognized injury." 92 II].App.3d at 290, 48 Ill.Dec. 141, 416 N.E.2d 36.

Here the grammar morphs a bit. Before they said abortion is not a “legal harm”, and here they add what I did in brackets: abortion “is not a legally recognized injury.”

After briefly discussing Roe and its progeny, the court continued: "We therefore conclude that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed on complainant's property in order to interfere with the rights of others....

Aaargh! Sloppy language! The Court probably doesn’t mean this as bad as it sounds. The court is not really maligning intentions, as its plain words suggest, but concluding what the right classification is. Or, what the formal charge or verdict ought to be. The Court probably did not mean “the defendants had no intention of facing a choice of evils; all they cared about was trespassing and interfering with the rights of others.” But that’s the way it came out, isn’t it? And I would guess that after the justices noticed that’s how it came out, they didn’t mind.

By adding “in order to interfere with the rights of others”, we know the justices didn’t mind intentionally maligning the defendants. That grammar says it was the defendant’s *intention* to “interfere with the rights of others”. There is nothing in the stated record to support the notion that the intent of the defendant’s was to interfere with the rights of others, and I think all “reasonable persons” must agree that such an accusation is patently absurd.

The FACT is, which should be obvious to everybody, that the defendants would not have taken any action at all had they not perceived a “choice of evils”. They, subjectively, intended to take the high road in making that choice; even though that choice, a blessing to many unborn babies, cost them personally, dearly.

Not that a subjective perception or an honorable intention of the defendant meets the criteria of the Necessity Defense. The jury has to agree that such perception and intention is what a “reasonable person” would conclude, faced with the same evidence. In other words, the jury has to confirm the perception is objectively correct.

(P. 917, column two)

Under Roe, an abortion during the first trimester of pregnancy is not a legally recognizable injury, and therefore, defendants' trespass was not justified by reason of necessity.

"Defendants attempt to circumvent the effect of Roe and to bolster their defense of necessity by arguing that they reasonably believed that they acted to prevent the destruction of human life. They point to language in Roe in which the court declined to speculate on when human life begins. [Citation omitted.] Defendants argue that life begins at the time of conception, and that they were denied due process of law because the trial court refused to admit evidence which was proffered to support this contention.

' True, in Roe, the court acknowledged the existence of competing views regarding the point at which life begins. However, the Court declined to adopt the position that life begins at conception, giving recognition instead to the right of a woman to make her own abortion deci sion during the first trimester. [Citation omitted.] We do not believe that the Court in Roe intended courts to make a case-by-case judicial determination of when life begins. We therefore reject defendants' argument."

92 III.App.8d at 290-91, 48 Ill.Dec. 141, 416 N.E.2d 36.

The Tilson Court invents a motive in Roe which Roe does not remotely suggest in any of its wording, and ignores the alternative motive found explicitly in Roe.

Tilson says Roe didn't want "courts to make a case-by-case determination of when life begins." How do the Tilson justices know this? They can't cite Roe, because Roe says nothing on the subject. It should be obvious to everybody that the Roe justices *did not anticipate* that individuals might invoke the Necessity Defense to defend the lives which Roe ordered states not to defend. The Roe justices *did not think through* the effect of their ruling on the historical right of individuals to save human lives.

But there is one motive explicit in Roe: that Roe should "collapse" – should not continue in force – if it is established that conception is "when life begins". Roe did *not* want to be responsible for cruel, barbaric genocide.

If the Roe justices thought through the special legal authority of juries to establish the "fact" of "when life begins", then they indeed realized that juries do tend to establish facts "case by case". Just as case law is not established by appellate courts with a single case that then prevails across the nation for all time, but by a series of cases with somewhat competing arguments and "precedent" is sort of an average of them, juries likewise establish facts, and the acceptability of various arguments, not unanimously but like a scattergun, and it is their average which guides prosecutors and defense teams in calculating what strategies will work, and what claims of facts juries will accept.

Therefore the very opposite of Tilson's claim is true. Roe *does* invite the Triers of Fact – juries – to establish the Facts of "when life begins" in the only way possible: case by case.

In State v. Sahr, 470 N.1V.2d 185 (N.D. 1991), the court was faced with an abortion-trespass case in which the defense was, again, the same as that asserted by the defendant in the present case.

The defendants in Sahr asserted the necessity defense based upon their beliefs that life begins at conception and their actions were justified to save innocent human lives. The court discussed at some length the necessity defense and, having done so, stated:

"As a result, we conclude that we need not determine the precise scope of the necessity defense available in this state. In our view, the defendants' criminal trespasses at medical clinics to prevent legal abortions may not be justified under any reasonable formulation of the necessity defense.

"The evil, harm, or injury sought to be avoided, or the interest sought to be pro-

rooted, by the commission of a crime must be legally cognizable 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 Defenses § 124(d)(1), at 52.

The quote from Robinson is about Civil Disobedience.

Scott Roeder's shooting has nothing to do with Civil Disobedience, and everything to do with saving the lives of innocent human beings.

Well known examples of Civil Disobedience are vandalism at nuclear missile sites, and the Civil Rights movement which began with blacks sitting in bus seats designated for whites, and sitting in restaurants where blacks were not to be served, and ended with laws and court rulings outlawing such discrimination.

Civil Disobedience does not directly accomplish the good it envisions. Vandalism at a nuclear site does not directly disarm a single weapon. Sitting in a "whites only" presented no certainty of softening a single white heart. But Scott Roeder's action directly saved 2,000 babies from being killed by Dr. Tiller, just between the time of his death and the time of Roeder's trial; hundreds of whom,

based on studies done by Operation Rescue, were saved not only for the short time it took to reschedule their murders, but long enough to be born to mothers with hearts softened to love them.

The Necessity Defense generally requires that the harm be imminent, and that there be a reasonable expectation that the action taken will prevent the harm. Vandalism at nuclear sites fails both these requirements.

In the case of racial discrimination, the harm may certainly be taken as imminent, and in hindsight we can say the strategy worked, but at the time the strategy seemed more desperate than pragmatic. But to the extent it worked, it disproves Robinson's reasoning for the unavailability of Necessity for Civil Disobedience cases. Robinson says the very existence of laws, however cruel, proves the public approves of them and cannot accept what they protect as the least bit harmful.

But what the public approved of was turned upside down by the spectacle of people standing for what was right, even at great personal cost. What the public approves of must be acknowledged a fickle standard. Fickle because it changes every few years, and fickle because it is no sure guide to what is true or just.

But to the extent public approval must be weighed in determining a man's guilt in a court of law, American law, and English law since the Magna Carta, establishes the jury, not the judge, as the expert on what the public approves. No judge has any business opining what the public approves, while a jury waits outside his chambers to hear the issues of the trial.

Again, Roeder's action is about saving lives, not "protesting" anything, so the issue of "protesting" in the following sentence is inapplicable. But Robinson's reasoning is inapplicable also because the passage of Roe v. Wade is not, in any reasonable person's view, "conclusive evidence of the community's view".

"...as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view..."

Who will say the opinions of 9 unelected justices, who do not even face a retention vote, "are conclusive evidence of the community's view" even when they overturn the laws of elected congressmen, elected state lawmakers, and elected state governors, as Roe v. Wade did? May we not put down any attempt to apply that reasoning to abortion as patently absurd?

But even if "the community's view" were that cruel, barbaric genocide doesn't hurt anyone, that would not change the *fact* that it does, and that America's Rule of Law is teetering on the edge of national destruction so long as laws allow an eighth of the population to be slaughtered without due process of law. As Benjamin Rush wrote to David Ramsay in 1788, "nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community."

The jury was wisely made the best representative of "the community's view", because the jury takes unbiased citizens, and educates them about an issue before they decide it.

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.

This alludes back to the statement of Robinson that the Necessity Defense justifies protecting any "legal interest".

Interesting how a statement can seem either obvious or dubious depending on how it is framed. I wrote earlier that human life is a legal interest, so Robinson's formula allows the Necessity Defense to protect human life. This ruling does not characterize the "interest" protected as "human life", or "protecting human life", but "preventing abortion".

"The Necessity Defense justifies you if your only purpose is to protect human life" sounds reasonable, but so does its opposite, if you frame it "the Necessity Defense does not justify you if your only purpose is to prevent abortion."

But what is the difference between the two statements? If there is any difference at all, the Court is right. In fact, if the Court can prove that there is any difference at all, then from that point no

Christian will ever again *want* to prevent abortion, or impede it in any way, and abortion will cease to be a moral or political issue in America.

But if there is no difference between the two statements – if, *in fact,* "preventing abortion" *is* "protecting human life", then the "interest" in doing either one is "legal". To classify "protecting human life" as the violation of *any* law would violate the Supreme Court's "absurd result" test.

But *is indeed* "preventing abortion" and "protecting human life" one and the same? Obviously this is a fact question, which can only be resolved, legally, by the Triers of Fact which this Court declares should never see this question. Just as obviously, and indeed explicitly, this Court refuses to recognize them as one and the same. The humanity of the unborn is "not legally recognizable", this court declares, which it can do with a clear conscience after having dismissed Elizabeth Tilson's *evidence* that they are *not* one and the same as being "irrelevant" to anything this Court cares about.

In other words, the position of this court is "don't confuse me with facts. My mind is already made up."

So when the Court says "prevention of abortion is not a legally recognized interest to promote", after saying

they mean they don't recognize them as the same, haven't been confinced, but after refusing to care about evidence. Don't confuse me with facts; my mind is already made up.

"The element of a legally cognizable injury for the necessity defense has been identified repeatedly in decisions on other criminal attempts to protest abortions at medical clinics.... In sum, a claim of necessity cannot be used to justify a crime that simply interferes with another person's right to lawful activity." 470 N.W.2d at 191-192.

The only way this is painted as "simple" is by imagining all "lawful activity" is harmless; by ignoring the fact that Roe invites fact finders to establish "when life begins"; by misunderstanding Professor Robinson's grammar when he talks of a "legal interest"; and by equating "legal harm" with "legal[ly recognized] harm.

Finally, in Corn. v. Wail, 372 PaSuper. 534, 539 A.2d 1325, the court was faced with the same arguments and after reviewing the necessity defense the court held the necessity defense did not apply in an abortion-trespass setting. The court found that the defendants had failed to establish any of the requirements to justify a necessity defense. Having done so, the court went on to state:

"Despite the above [the appellant's inability to satisfy any of the elements of the necessity defense], appellant nevertheless insists that he was justified in violating the law in this case because his actions were motivated by higher principles. To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos. In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs, whether another person may exercise her constitutional rights and then allow that individual to assert the defense of justification to escape criminal liability.

This must be where Lee Thompason gets his quote. But that was a bench trial. There was no jury. Where there is a jury, the Necessity Defense does not exonerate a man based on the sincerity of his personal beliefs, but based on the facts established by the jury. We hardly call this "chaos". We call it "freedom".

We recognize that, despite our proscription, some individuals, because of firmly held and honestly believed convictions, will feel compelled to break the law. If they choose to do so, however,

they must be prepared to face the consequences. Thus, such private attempts to circumvent the law with the aim to deprive a pregnant woman of her right to obtain an abortion will not be tolerated by this Court.

Amazing, that this Court will not tolerate anyone's "aim" to keep a mother from cruelly murdering her baby, but will tolerate barbaric genocide, and will rule "irrelevant" any evidence that that is what it is.

Accordingly, for the reasons set forth above, we conclude that the trial court properly determined that appellant was not entitled to raise the justification defense." 372 Pa.Super. at 543-44, 539 A.2d 1325.

We concur with the statements of the Pennsylvania court and others cited herein. To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.

the Necessity Defense does not exonerate a man based on the sincerity of his personal beliefs, but based on the facts established by the jury. We hardly call this "chaos". We call it "freedom".

[7] Defendant argues that as she had expert medical testimony that life begins at conception, the necessity defense must be allowed. We do not agree. When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable, and evidence of when life begins is irrelevant and should not have been admitted.

This case brazenly defies Roe, which explicitly said if it can be proved that conception is "when life begins", Roe must "collapse". Yet this court, which is not greater than the Supreme Court, cares nothing for the evidence which Roe invited! Roe said if in fact abortion is murder, it cannot at the same time remain "constitutionally protected". This Court brazenly states that regardless of any amount of evidence that abortion is genocide, Roe can never be allowed to "collapse"!

While we could review the myriad of other cases on the specific issue before us, nothing would be gained by doing so. As stated earlier, all of the appellate court decisions hold that the necessity defense is not applicable in abortion-trespass criminal prosecutions. We again point out that our opinion should not be construed as an indication that we recognize or adopt the necessity defense as the law in Kansas. We make no such determination here. Defendant has wholly failed to demonstrate that the necessity defense would apply to this case even if the defense was recognized.

The appeal is sustained.