Roe v Wade and Constitutional Fetal Personhood

By Philip Rafferty
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I argue in a booklet "A Silver Bullet for Roe v Wade Revised II" (2016), on Roe v Wade's own grounds, that the human fetus is an (English common law based) Constitutional person. The Court in Roe v Wade, 410 U.S. 113 (1973) specifically states that if the fetus is a constitutional person, then the right to an abortion necessarily collapses (id. at 156-57). Silver Bullet and my other books and articles on abortion law can be read online for free from **www.parafferty.com**. Silver Bullet is available for sale online from Amazon and Barnes & Noble. Here are excerpts from my arguments that the fetus is a constitutional person.

Since Roe, some sixty-five (65) million human fetuses have been launched into eternity by pointy medical instruments. Roe and its progeny say that all this killing is constitutionally permissible because, in keeping with the English common law, the human fetus does not qualify as a due process clause person. What if the Roe justices got this wrong – for lack of a "working knowledge" of the status of the human fetus and abortion at the English common law? I demonstrate, through over 180 prosecuted abortion cases at the English common law from the 19th century going back as far as the 13th century, and a slew of important associated legal and medical articles and major reference works during the same time frame (see my baseline work, Roe v. Wade: The Birth of a Constitutional Right, Philip A. Rafferty (1992), 774 pages, Library of Congress permanent collection, catalog card number: 2006366203; and Roe v. Wade: Unraveling the Fabric of America, Philip A. Rafferty (2012), 236 pages), that the Roe justices certainly got this wrong. These English common law cases and other major works clearly recognize the human fetus as a human person. In Smith v. Alabama 124 U.S. 465, 478 (1888): The Court observed, "the interpretation of the Constitution . . . is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history". (Birth, pp.52, 233; Unraveling, p.51) All but six of these cases were not known to the court, and these six cases and abortion criminal prosecution history were misrepresented to the court at the time of the Roe decision. These six cases are listed and summarized in Birth, pp.120-121, and further explained in Birth from primary sources.

I contend that the Court in Roe destroyed the true fact that abortion was criminally prosecuted at the English common law (ECL) and created the utterly false one that abortion was recognized there as a pregnant woman's liberty. The court did this by uncritically adopting, and then putting its imprimatur on, two law review articles by Cyril Means, Jr., a New York Law Professor, pro-abortion activist, and counsel for NARAL (see Silver Bullet, p.1; Unraveling, endnote 18 at pp.205-210; Birth, pp.41-63). In Roe, the court related that its core holding, that a woman's right to procure an abortion of her nonviable fetus is fundamental, constitutionally speaking, is in accord with, and derives from the ECL law (Roe v Wade, 410 U.S. at 140-141 & 165). The exact opposite is true.

Here are corrections to two important errors in our modern perception of the prosecution of abortion at the English Common Law.

First correction: "*Quickening*" played NO role in Pre-19th Century ECL Abortion Law. (Silver Bullet, pp. 18-19; Unraveling, pp. 51-55, 63-80, 200-203, 230; Birth, pp. 136-192)

Here is a 1990 letter from J.A. Simpson, co-editor of the Oxford English Dictionary (OED), concerning a correction to the meaning of "quickening" under the English Common Law. This correction appeared in the later SOED or shorter version of the OED. Mr. Simpson granted permission to publish this letter:

> Dear Mr. Rafferty,
>
> Thank you for your letter of 13 November and for the enclosed material.
>
> From the discussion you present, it would seem reasonable to infer that the [*quickening*] entry in the Oxford English Dictionary for *quick with child*, while adequately representing the meaning that had come to be current in the nineteenth century, does not reflect the earlier history of the phrase, and its changing relationship with the term *quickening*. A revised entry might read something like:
>
> Constr. *With*.
>
> a *Quick with child*, orig., pregnant with a live foetus [sic: *child*: a pregnant woman, on experiencing *quickening*, announced: "I'm pregnant with a live child", and not: "I'm pregnant with a live fetus."]; later [*i.e.*, sometime during the course of the nineteenth century], at the stage of pregnancy at which the motion of the foetus [*sic*: child] is felt (infl. By QUICKENING vbl.sb.) Now rare or Obs.
> (Silver Bullet, p. 18; Unraveling, p. 201; Birth, p. 172, and Notes to Part IV, Note 146, p. 406)

The significance of this is explained:

> There is but one reason why, in the context of in-womb child killing prosecution at the English common law, that sometime during the nineteenth century *quickening* came to [incorrectly] replace fetal formation as the common law criterion of when a pregnant woman can be said to be *quick with child* (i.e., pregnant with a live child): a subtle mistake in legal interpretation. In several abortion cases prosecuted during the period 1808-1832, English judges mistook *quickening* [when a woman senses movement of the child in her womb] for the definition of the term *quick with child* (which in its primary sense, as does the term *with quick child*, mean simply to be pregnant with a live child) … These judges mistook a then vulgar opinion of *when* a pregnant woman becomes *quick with child* for the definition of that term. [which simply means pregnant with a live child]. (See R v. Phillips (1811) (Silver Bullet, p.19; Unraveling, pp.155-158; Birth, pp.185-189, 328-329, 412))

Here is a another related ECL case. It is an aborted-alive, infant murder prosecution that leaves out quickening as an element of infant murder and occurred twenty years before the incorporation of the Fifth Amendment's (1791) due-process clause into the Fourteenth Amendment (1868). See Queen v. West (1848), 175 E.R. 329, wherein the trial court judge related the following to the jury:

> The prisoner is charged with murder: and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence, so weak that it died. This, no doubt, is an unusual mode of committing murder…; but I direct you in point of [the common] law, that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it

> is born in a such state that it is less capable of living, and afterward dies in consequence of its exposure to the external world [i.e., because it was aborted alive in a non-viable state], the person, who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder. (Unraveling, p. 125)

In another case, Beare's Case (1732), (Silver Bullet, pp. 7-8; Unraveling, pp. 70-82; Birth, pp. 672-683), an English ***pre****-quick with child* procured abortion prosecution, the trial judge, while instructing the jury on the procured abortion evidence presented by the prosecutor, told the jury that he had "never met with a case so barbarous and unnatural." The defendant, the person who performed the abortion, nearly died on the pillory from being pelted with a barrage of flying fruits and vegetables.

Fetal formation and not *quickening* (i.e., when a woman senses movement of the child in her womb) was the common law criterion of when a pregnant woman can be said to be *quick with child* (*i.e*., pregnant with a live child). It was based on the widely held consensus that fetal formation was the point at which an intact human person comes into existence. Fetal formation was understood to occur about 8 weeks from conception, in some documents as early as 45 days from conception. (Birth, pp.131-141) I believe I have demonstrated to a reasonable moral certainty that abortion of this unborn child, as well as the ***pre****-quick with child*, was prosecuted criminally at the ECL. This human person in the womb of its mother was fully protected by English common law. So, a formed fetus, (i.e., a human embryo that has acquired a human shape) must be deemed as a Fifth (Fourteenth) Amendment due process clause person. (Birth, pp.136-192, 232-235)

Justice Scalia in D.C. v. Heller 554 U.S. 570, 576 (2008) observed: The words in the Constitution "were used in their normal and ordinary meaning," Retired Supreme Court Justice Paul Stevens, widely recognized as one of the most liberal justices ever to sit on the USSC, in his Address: Construing the Constitution, 18 UC Davis L.R. 1, 20 (1985), observed: Supreme Court justices, in interpreting the text of the Constitution "must, of course, try to read ... [the] words [put forth there] in the context of beliefs that were widely held in the [late] eighteenth century."

Charles Leslie, in his Treatise of the Word Person (1710), p. 7, observed that a fetus or man becomes "a Person by the Union of his Soul and [formed] body ... is the acceptance of a person among men in all common sense and as generally understood." This same widely held and accepted belief was noted also by Walter Charleton, a fellow of the Royal College of Physicians, in his Enquiries into Human Nature (1699), p. 378: "That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree". And so said Benjamin Rush (1745-1813), foremost recognized eighteenth century American physician, founding father, and signer of the Declaration of Independence (1776), in his Medical Inquiries (1789), p. 42: "No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported". Samuel Johnson, in his A Dictionary of the English Language (1755) (vol. 2, sub. tit.: *quick*) defined quick (as in *quick with child*) as "the child in the womb after it is perfectly formed." George Mason, in his A Supplement to Johnson's English Dictionary (1801) (sub. tit.: *quick*) defined quick (as in *with quick child*) as "pregnant with a live child." (Silver Bullet, p.16)

Sir William Blackstone (1723-1780), the foremost legal authority on the English Common Law in late eighteenth-century America in his Commentaries on The Laws of England (1765), 1 Commentaries, 129 observed:

> This natural life [*i.e.*, the life of a human being or person] begins in contemplation of

> law as soon as an unborn infant is able to stir [*i.e.* is organized into a recognizable human form and which is able to stir whether the mother can sense movement or not], as was before observed, the immediate donation [the human soul] of the great Creator, cannot legally be disposed of or destroyed by any individual [particularly by its own mother] merely upon their own authority. …Whenever the Constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical. (Silver Bullet, pp.14-15; Birth, p.135)

There is nothing contained in Blackstone's Commentaries I & IV abortion passages that is inconsistent with the consensus at the time: Fetal formation proves fetal animation, and the former establishes the ability of the human fetus in the womb to stir. Quickening refers to the initial perception by the pregnant woman of the stirrings of her fetus. In the absence of a demonstration that in England in Blackstone's day it was received opinion among informed persons that the fetus in the womb only begins to exercise its motor functions when its mother initially perceives its movements, it can hardly be said that quickening is the quick-with-child criterion that should be read into Blackstone's Commentaries I & IV abortion passages. (Birth, pp.177, 118, 148, 153, 176)

What of the argument that in the context of abortion, the common law eventually came to reject fetal formation, and to adopt quickening as the criterion of whether a woman was pregnant with a live child, because it came to be accepted that in the absence of proof of quickening, it could not be sufficiently proved that the stillborn, aborted child was alive when the abortional act was committed, or, if the child was alive, that it was killed as a proximate result of the abortional act. This argument or unproved theory, which originally was articulated in the nineteenth century in certain American appellate opinions, has been advanced by several modern commentators on the history of the status of abortion as a criminal offense at the English common law. One element of the common law crime of the in-womb destruction of an existing child was that the stillborn, aborted product of human conception was an existing human being when it was destroyed. It has been shown that in 18th-century England it was received opinion that the product of human conception received its human soul as soon as it achieved fetal formation. The conclusion, then, seems inescapable that, at the 18th century English common law, proof that a particular product of human conception had achieved fetal formation would have constituted sufficient proof both that the aborted product of human conception was once a human being, and that it had acquired the capacity to stir or move by itself by virtue of having been animated or ensouled. Proof of fetal formation could have been obtained by testimony relating that a visual inspection of that product confirmed that it was a formed fetus. (Birth, pp. 179-181)

The then-existing Anglo-American common law opinion that a human person begins his or her existence as an intact one at the completion of the process of his or her fetal formation, while virtually unanimous, was not so entirely. Charles Morton, president of Harvard College, in his Compendium Physicae (1680), the science textbook used by Harvard college students from 1687 to 1728, stated (p. 146):

> Here a question may be moved: at what time the soul is infused? It has been formerly thought not to be till the complete organization of the body…And here the law of England [i.e., 21 Jac. (Jas.) 1, c. 27 (1623/24), and reproduced online at ***www.parafferty.com*** : download Roe v. Wade: The Birth of a Constitutional Right and scroll to pp. 475-482] … condemns not the whore who destroys her [bastard] child for murther unless it appears that the child was perfectly formed. Upon this supposal: that till then there is no union … of soul and body; but indeed it seems more agreeable to

reason that the soul is infused [at] … conception.

Another widely held belief was the English common law (ECL) rule that the human fetus, beginning at its initial conception in the womb of his mother, "is generally considered to be in being [i.e., is considered to be in full and complete intact existence as a human person] in all cases where it will be for the benefit of such child to be considered so." (Hall v. Hancock, 32 Mass. 255, 257-258 (1834). (Silver Bullet, p.22; Birth, pp.235, 440, (Notes to Part V, note 28 to p.235))

In Roe v. Wade, 410 U.S. at 162, the court stated explicitly that the state's interest in safeguarding the fetus is important throughout the gestational process. And so say the slew of strong anti-abortion laws passed by more than 2/3 of U.S. States before and after the time the Fifth Amendment (1791) due process clause was incorporated into the Fourteenth Amendment (1868), and many of which adopted and extended the protections of unborn children under English common law, from the gestational period of fetal formation to include conception, based on advancing medical knowledge. (Google: NCSL number of states with fetal homicide statutes) (Silver Bullet, p.24; Birth, pp.63-66, 67, 68-100)

Modern medicine, which is rigorously secular, and fact based, has further solidified the views of earlier notables such as Charles Morton.

> "Our knowledge of fetal development, function, and environment has increased remarkably. As an important consequence, the status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we have long given the pregnant woman" (Williams Obstetrics, 17th ed., 1985, p. 39). (Silver Bullet, p.24; Unraveling, pp.170, 218; Birth, pp.238,306,335…)

See also, Van Nostrand's Scientific Encyclopedia (VNSE), 5th ed., 1976, at p. 4 (the Preface for which states: "The editors … have attempted to stress the proven, generally accepted description of both new and old … concepts. In soundly controversial areas, however, where two well-grounded schools of thought may be arguing while awaiting the results of further investigations and experimentation, both sides of such questions are given"):

> "The creation of an embryo and development of a fetus and finally the birth of an infant is a continuous physiological process commencing with conception and ending with the cutting of the umbilical cord…. The embryo and later the fetus is an individual entity, imbued with individualistic qualities [genes] which affects its rate of progress, much as later the progress of the infant to a mature adult will be determined by individualistic qualities. From a purely scientific standpoint, there is no question but that abortion represents the cessation of [a] human life." (Silver Bullet, p.25; Unraveling, pp.39, 64…; Birth, pp.238, 306, 439…)

See, also, VNSE (7th ed., 1989): "the moment the sperm cell … meets the ovum of the female and the union results in a fertilized ovum (zygote), a new [human] life has begun." (Silver Bullet, p.25; Unraveling, p.189; Birth, p.444)

Since the embryo at the point of conception, is deemed a unique, intact, human being it must be deemed as a Fifth (Fourteenth) Amendment due process clause person. (Birth, pp.234-235)

We also now know much more about fetal movement from progress in medicine. In Progress in Obstetrics and Gynaecology (1984), the following is stated: "with most conventional real-time, ultra-

sound equipment, movement of the human embryo may be recognized as early as the seventh post-menstrual week [or fifth post-fertilization week], approximately one week after fetal heart pulsations first become apparent."

Second correction: that the ECL (USA-Adopted) Fetal Born Alive Rule (No Fetal Murder if aborted Stillborn) is founded solely on Sir Edward Coke's (1552-1634) Erring in Judicial Interpretation. (Silver Bullet, p.21; Unraveling, pp.126-139; Birth, pp.193-195, 511-530)

The common law "born alive rule" also derived from another error in judicial interpretation (from a defectively reported case) by the greatest of all English common law lawyer/ justices, Sir Edward Coke (1552-1634) and his predecessor, William Staunford (1509-1558), and later picked up by William Hawkins (1673-1746) and Sir William Blackstone (1723-1780). Coke, commented, *300 hundred years after the fact*, upon the following words in a fourteenth-century yearbook report (a very incomplete report) of a then unidentified double murder case (1327/8), sometimes referred to as the "Twins Slayer" case, (since identified as Rex v Richard de Bourton) wherein the defendant received a pre-trial King's Pardon. Coke construed them to mean that the homicide of an unborn child (in Bourton, one child died in-womb, and the other immediately after being born alive) was not a capital offence, except when born alive, according to Coke, but not Staunford: "And for the reason that the Justices were unwilling to adjudge this thing as felony" [the beating of and trampling upon a woman then being pregnant with fraternal twins who died in connection with their mother being beaten and trampled upon], the accused was released to mainpernors" (bailors). Coke mistook a critical or material element of the offense of murder (committed "feloniously" or maliciously) for the punishment for the act of homicide. Only malicious or felonious homicides, here, were capital, non-bailable, and non-pardonable. And only the sheriff or coroner, and not the Justices, had the legal authority to release the accused to mainpernors if he found, preliminarily, that the homicide (homicides) were not done intentionally, or were not done maliciously or feloniously. So, the forgoing "not to be adjudged as being committed in felony" meant no more than that the killings were accidental or were not committed with malice aforethought, i.e., they were not committed in felony. The Bourton facts could infer accidental killings. The question of whether in-womb child killing is a (capital) felony at common law was not even put in issue in Bourton's Case.

Other cases in the same period relate a true history of the English common law on abortion or unborn-child killing being prosecuted as a capital offense. Kyltavenan (1311), Rex v. Haule (London, 1321), Hansard (1329), Skotard (1330, and Mondson (1361). This misinterpretation is wholly responsible for a reversal in the common law on unborn child killing: What was murder, ceased to be so, unless the aborted fetus died after first being expelled alive. (See Unraveling, pp.105-108 & 125-154, and particularly pp.149-150; Birth, pp.512-530)

Summary:

The problem is not just that the Roe Court committed arguably the most egregious error and gross injustice in the history of Anglo-American law in concluding that the human fetus, or unborn child, does not qualify as a due process-clause person. The real problem may be that the consequences of this grave injustice seem too enormous (the destruction of some sixty-five (65) plus millions of constitutional persons since Roe), so as to admit the error. And there are powerful interests who believe that all this killing is justified. They have allowed themselves to be blinded to the reality of the humanity and personhood of the unborn child. Man's capacity to deceive himself (or to be deceived) in the name of humanity transcends humanity. So said W. H. Auden: "Everything turns away – Quite

leisurely from the disaster." (Silver Bullet, p.22).

I also argue, contrary to a commonly expressed opinion, that this is NOT a States Rights issue. This is a fundamental, personal right to life issue at the highest level of English and American law, and God given human rights. If the fetus is a person under the Fifth and Fourteenth amendments, then a state has an affirmative duty to protect it. They could no more allow abortion here, then they could allow murder or manslaughter.

Supreme Court Justice Paul Stevens in his concurring opinion in Thornburg v. ACOG, 476 U.S. 747, 779 (1986): "The permissibility of terminating the life of the fetus could scarcely be left to the will of the state [and the federal] legislatures [if] a fetus is a person within the meaning of the [Fifth and] Fourteenth Amendment[s]." See, e.g., Palmore v. Sidoti, 466 U.S. 429, 433 (1984): By virtue of the doctrine of parens patriae, the State … has a duty of the highest order to protect [all] … children. (Silver Bullet, p.5; Unraveling, p.196, footnote 3 to page 50)

Chapter 4 of Silver Bullet contains my "Doable Legal Proceedings for Restoring, Constitutionally, Fetal Personhood." I argue that existing Constitutional fetal personhood should be a key element of state laws being passed to protect the unborn and to truly protect the health of women in defiance of the invalid Roe v Wade decision. These state laws should be as simultaneous as possible and consolidated to create a groundswell that the USSC hopefully cannot ignore.

I am aware of only one person attempting to disprove my relation of the history of the criminal prosecution of procured abortion and unborn child-killing at the English common law. He is Wolfgang Mueller, professor of medieval legal history in his, The Criminalization of Abortion in the West: Its Origins in Medieval Law (Cornell 26 U P, 2012). His analysis is a re-incarnation of Cyril Means Jr. I have addressed his arguments. (Silver Bullet, pp.25-27; Unraveling, pp.29-30, 149-150).