

## **Roe v. Wade: A Scandal Upon The Court**

### **Part I: The Unsettling of Roe v. Wade**

By

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[1] “Mainstream” constitutional thinking (i.e., pro-*Roe* thinking) is that *Roe v. Wade* constitutes settled law.<sup>1</sup> Settled by whom? By Justice Kennedy, who voted to overrule *Roe* in the 1989, 5-4 *Webster v. Reprod. Health Svcs.*<sup>2</sup> decision upholding *Roe*, and who then – and without giving any intelligible explanation for his turnabout here – voted to uphold *Roe* in the 1992, 5-4 *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision?<sup>3</sup> What brought on this about-face by Kennedy? While Chief Justice Rehnquist was working on his majority opinion in *Casey* (to which Kennedy had committed to joining), *Roe* author Justice Blackmun spoke privately with Kennedy and showed to Kennedy letters that Blackmun had received from women “who spoke of how the right to choose abortion had been important in their lives.”<sup>4</sup>

[2] Kennedy does not, of course, believe that judicial fan mail can serve as a basis for constitutional interpretation (which is not to say that Kennedy did not succumb to Blackmun’s highly unethical attempt to have him change his vote here). Yet, our constitutional community

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> *Webster v. Reprod. Health Svcs.*, 492 U.S. 490 (1989).

<sup>3</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 833-34 (1992).

<sup>4</sup> See David G. Savage, *Roe’s Author Found Himself a Bystander in ’92 Abortion Fight*, L.A. TIMES, Mar. 4, 2004, at A25. See also LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 203 (2005)

would be better off if Kennedy maintained that belief instead of the following belief which he announced to over five hundred state and federal judges at an ABA dinner honoring the judiciary shortly after he voted to uphold *Roe in Casey*:

We, of course, are bound by the facts, the law, the rules of logic, legal reasoning and precedent . . . . But we are also bound by our own sense of morality and decency . . . . We must never lose sight of the fact that the law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be.<sup>5</sup>

[3] What happens to logic, the law, legal reasoning and precedent when they conflict “irreconcilably” with a justice’s own sense of morality, decency, and belief of “what the law should be?” The answer is that the former are tossed out of the decision-making process. Otherwise, justices could not make the law conform to their sense of morality, decency, and belief of “what the law should be.”

[4] Whether or not Kennedy realized this in making the above statements, he conveyed to our constitutional community that he rejects “the principle of the impartiality of the judiciary.”<sup>6</sup> Coke (1552-1634) states that “no man out of his own private reason ought to be wiser than the law.”<sup>7</sup> Blackstone (1723-1780) notes that the judge “is sworn to decide, not according to his own private judgment, but according to the known laws and customs of the land.”<sup>8</sup> Furthermore, although a party in making his or her case before the Supreme Court, can argue the facts, apply logic, cite precedent and present a reasoned legal argument, he or she nevertheless cannot possibly divine let alone argue the merits of such items as the various justices’ private or personal views on morality, decency, justice, and how they would contemplate “what the law should be.” Kennedy’s approach to constitutional interpretation contains, then, an unknowable

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<sup>5</sup> See R. Reuben, *Man in the Middle*, CALIFORNIA LAWYER, October, 1992, at 35. It is unclear who the “we” is to which Justice Kennedy is referring. Is it all of the nation’s judges, or just the Supreme Court justices?

and therefore hidden agenda. This violates procedural due process because litigants arguing before the court are not given “notice” of the contents of this hidden agenda.

[5] Suppose that the sole issue in *Roe* was not whether an unmarried woman possesses a Fourteenth Amendment due process clause right or liberty to an abortion, but whether a Federal statute, which forbids a pregnancy reprieve to any woman sentenced to death under federal jurisdiction, violates the Fifth Amendment’s due process clause, in that a condemned, pregnant woman’s formed fetus qualifies as a person for purposes of the due process clause. It is submitted that there is no question but that an informed application of the constitutional decision-making process (including the appointment of sagacious counsel to represent the fetus – which the Court, in *Roe*, neglected to do in the course of holding that the fetus does not so qualify) would have arrived at the decision that a “formed fetus” qualifies as a person under the Fifth and Fourteenth Amendment due process clauses.

[6] Justice Stevens noted that Supreme Court justices, in interpreting the text of the Constitution, “must, of course, try to read . . . [the] words [used by the framers of the

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<sup>6</sup> See quoted material from *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), *infra* note 8.

<sup>7</sup> 1 EDWARD COKE, COKE’S INSTITUTES 970 (2d ed. 1648) (1628).

<sup>8</sup> 1 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 69 (1765). See, e.g., *Roe*, 410 U.S. at 117 (“Our task is to resolve . . . [this Constitutional abortion] issue by Constitutional measurement, free of emotion and predilection.”); *Turner v. United States*, 396 U.S. 398, 426 (1970) (Douglas, J., dissenting) (“I reject the so-called ‘activist’ philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of ‘fairness and decency’ as they see fit.”); see also *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (“[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . .”).

Contrary to what Kennedy (and several of his fellow justices) evidently believe, from a constitutional standpoint, a judgment of the Court on a constitutional issue that is not based on constitutional criteria, remains subjective (and therefore also arbitrary), notwithstanding that it is referred to as an “independent” judgment. See, *Roper v. Simmons*, 125 S. Ct. 1183, 1230 (2005).

Constitution] in the context of the beliefs that were widely held in the late eighteenth century.”<sup>9</sup> Chas Leslie, in his *Treatise of the Word Person*, observed, a fetus or man becomes “a *Person* by the Union of his Soul and [formed] Body . . . . This, is the acceptance of a person among men, in all common sense, and as generally understood.”<sup>10</sup> Similarly, Walter Charleton (1619 – 1707), a fellow of the Royal College of Physicians, in his *Enquires into Human Nature*, observed “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.”<sup>11</sup> This union was then understood to occur at “fetal formation,” and not at “quickening” (the pregnant woman’s initial perception of the movement of her fetus). This understanding was not based on any religious belief, be it Catholic, Protestant, theistic, or otherwise, rather on the opinion or teaching of Aristotle as set forth in his *Historia Animalium*.<sup>12</sup> The American physician Benjamin Rush (1745–1813) observed, “No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported.”<sup>13</sup> Any disagreement here involved not fetal formation versus quickening, but fetal formation versus conception.

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<sup>9</sup> Justice John Paul Stevens, *Addresses: Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 20 (1985).

<sup>10</sup> CHAS LESLIE, TREATISE OF THE WORD PERSON 14 (1710). *See also* Stevens, *supra* note 9, at 9.

<sup>11</sup> WALTER CHARLETON, ENQUIRIES INTO HUMAN NATURE 378 (1697).

<sup>12</sup> ARISTOTLE HISTORIA ANIMALIUM lib. 7, c.3.

<sup>13</sup> 1 BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS 42 (3d ed. 1809) (1789). *See also* JOHN ASH, DICTIONARY OF THE ENGLISH LANGUAGE (1775) *sub tit*: Foetus (Foetus: the “child in the womb perfectly formed”); Philip A. Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* 136-147 (1992) (U.M.I. Dissertation Abstracts No. LD02339).

[7] Charles Morton, a one-time president of Harvard College, in his *Compendium Physicae* (the science textbook used by Harvard college students from 1687 to 1728), stated:

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 . . . condemns not the whore who destroys her [bastard] child for murder 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.<sup>14</sup>

[8] Contrary to what the Court maintained in *Roe*, at the English common law, and in eighteenth century United States, the “informed or accepted opinion” was that a pregnant woman becomes “quick with child” (i.e., pregnant with a live child or fetus), not at her quickening but rather as soon as her conception or embryo develops into a fetus or acquires a human shape.<sup>15</sup> Samuel Johnson, in his 1755 book *A Dictionary of the English Language*, defined “quick” as, “The Child in the womb after it is perfectly formed.”<sup>16</sup> George Mason, in his 1801 book *A Supplement to Johnson’s English Dictionary*, defined “quick” as, “pregnant with a live child.”<sup>17</sup> Also, in Hampshire, England in 1281, three men were convicted of the felonious homicide of an “eight-inch-long,” unborn child of an undeterminable sex, and “if of the age of one month” (“quasi etatis unius mensis”).<sup>18</sup> Similarly, in Wiltshire, England, in 1247, two men were acquitted of the felonious homicide of Amice Gunderwine’s five-inch-long unborn male child.<sup>19</sup>

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<sup>14</sup> CHARLES MORTON, *COMPENDIUM PHYSICAE* 146 (1680). See also Rafferty, *supra* note 13, at 68-71, 129, 144-46, 475-82.

<sup>15</sup> *Roe v. Wade*, 410 U.S. 113, 132, 134 (1973).

<sup>16</sup> 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755), sub tit: quick.

<sup>17</sup> GEORGE MASON, *A SUPPLEMENT TO JOHNSON’S ENGLISH DICTIONARY* (1801), sub tit: quick.

<sup>18</sup> *R v. Code, et al*, reproduced in Rafferty, *supra* note 13, at 551-52 nn.1-3.

<sup>19</sup> *Gundewine v. Warner*, reproduced in Rafferty, *supra* note 13, at 568-69.

The jurors stated the child died from Amice’s foolish behavior (“stultum gestum”), and not from the beating administered by the two men.<sup>20</sup> In a letter to the author, J.A. Simpson, then Co-Editor of the Oxford English Dictionary, corrected the dictionary’s “quick with child” entry:

From the discussion you present, it would seem reasonable to infer that the [“quicken”] entry in the *Oxford English Dictionary* for “quick with child,” while adequately representing the meaning that had come to be current in the 19<sup>th</sup> century, does not reflect the earlier history of the phrase, and its changing relationship with the term “quicken.” A revised entry might read something like:

Constr. With. a. quick with child, orig., pregnant with a live foetus [which is Latin for offspring or young child]; later [i.e., sometime during the course of the 19<sup>th</sup> century], at the stage of pregnancy at which the motion of the foetus is felt (infl. By Quickening vbl. Sb.). Now rare or Obs.<sup>21</sup>

[9] The Supreme Court observed in *Smith v. Alabama* that “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.”<sup>22</sup> In *Plyer v. Doe*, it was noted that, “The [Fifth Amendment] term person is broad enough to include any and every human being within the jurisdiction of the republic.”<sup>23</sup> To these observations can be added the observation that at the English common law, in Colonial America, and throughout the 18<sup>th</sup> century and 19<sup>th</sup> century United States, it was received or accepted opinion that the formed human fetus was a human being or person. Walter Charleton, in his *Natural History of the*

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<sup>20</sup> *Id.*

<sup>21</sup> Letter from J.A. Simpson, Co-Editor of the Oxford English Dictionary, to Philip Rafferty (1990) (on file with the author).

<sup>22</sup> *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

<sup>23</sup> *Plyer v. Doe*, 457 U.S. 202, n.11 (quoting *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896) (Field, J., concurring in part and dissenting in part)).

*Passions* stated, “Nothing can remain to divorce me from that common opinion which holds, that she [the human soul] *is created immediately by God, and infused into the body of a human Embryon, so soon as that is organized, formed and prepared to receive her.*”<sup>24</sup> Guy Holland, in his 1653 book, *The Prerogative of Human Nature*, observed: “We know God did not inspire Adam with a living spirit while he was a lump of clay, but when he had a face and body that was organically [organized or formed into a human body or shape], and not before . . . .”<sup>25</sup> The English physician and father of neurology Thomas Willis, observed in his 1672 book *De Anima Brutorum*:

[T]ho the Rational Soul itself . . . . is altogether ignorant of its Birth, we may affirm notwithstanding, what is Consonant to Holy Faith [i.e., the *Septuagint* version of *Exodus* 21:22-23, and probably also *Genesis* 2:7: “Yahweh God shaped man from the soil of the ground and blew the breath of life into his nostrils, and man became a living being.”], right Reason, and to the Authority of Divenes [virtually all of which accepted the opinion here of Aristotle], who were of chiefest note: That this immaterial Soul, for as much as it cannot be born, as soon as all things are rightly disposed for its Reception, in the Human formation of the Child in the Womb, it is Created Immediately of God, and poured into it.<sup>26</sup>

[10] Finally, consider the following observation set forth in Bartholomaeus Anglicus’ *De Proprietatibus Rerum* (written between 1230 and 1250) which was, during the later middle ages and possibly into the 17<sup>th</sup> century, the most-read book after the Bible:

This child is bred forth . . . in four degrees. The first is when the seed has a milk-like appearance. The second is when the seed is worked into a lump of blood (with the liver, heart and brain as yet having no distinct shape). The third is when the heart, brain and liver are shaped, and the other or external members [head, face, arms, hands, fingers, legs, feet and toes] are yet to be shaped and

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<sup>24</sup> WALTER CHARLETON, *NATURAL HISTORY OF THE PASSIONS* 60 (1674) (emphasis added).

<sup>25</sup> GUY HOLLAND, *THE PREROGATIVE OF HUMAN NATURE* 105-06 (1653). See also CHARLETON, *supra* note 24, at 95-96.

<sup>26</sup> THOMAS WILLIS, *TWO DISCOURSES CONCERNING THE SOUL OF BRUTES* 42 (Samuel Pordage trans., Scholars’ reprint 1791) (1683).

distinguished. The last degree is when all the external members are completely shaped. And when the body is thus made and shaped with members and limbs, and disposed to receive the soul, then it receives soul and life, and begins to move itself and sprawl with its feet and hands . . . In the degree of milk it remains seven (7) days; in the degree of blood it remains nine (9) days; in the degree of a lump of blood or unformed flesh it remains twelve (12) days; and in the fourth degree, when all its members are fully formed, it remains eighteen (18) days . . . So from the day of conception to the day of complete disposition or formation and first life of the child is forty-six (46) days.<sup>27</sup>

[11] Add to the foregoing observation (i.e., that fetal formation signals the infusion of the rational soul which equals a new human being) the fact that at the English common law, in Colonial America, and throughout the states of the United States from their inceptions, a pregnant woman, who is sentenced to death, but who is found by a jury of matrons or a physician to be “quick with child,” is granted a reprieve, so that her fetus or unborn child is not also executed.<sup>28</sup> In *Baynton’s Case*, the defendant, on being sentenced to death, “successfully pleaded her belly”:

Baynton: “I am with child.”

Court: “Let a jury of matrons be sent for. . . .”

Clerk (to the matrons): “enquire . . . whether . . . Baynton be with child, quick with child or not. . . .”

Court (to the matrons): “enquire whether this woman be quick with child: if she be with child, but not quick . . . give your verdict so; and if she be not quick with child, then she is to undergo the execution . . . .”

Court (to the matrons): “Do you find the prisoner to be with child, with quick child, or not?”

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<sup>27</sup> 1 ON THE PROPERTIES OF THINGS: JOHN TREVISIO’S TRANSLATION OF “BARTHOLOMAEUS ANGLICUS DE PROPRIETATIBUS RERUM”; A CRITICAL TEXT 296, 297 (Oxford 1975). Treviso’s translation was completed at Berkeley, Gloucestershire, in February 1398. *Id.* at xi. *See also* BATMAN UPON BARTHOLOME, HIS BOOKS AS PROPRIETATIBUS RERUM 71-72 (Thom. East 1582); Rafferty, *supra* note 13 at 136-37.

<sup>28</sup> For further discussion on the jury of matrons, *see* Rafferty, *supra* note 13, at 442 n.31.

Forewoman (to the Court): “Yes . . . she is quick with child.”<sup>29</sup>

In Massachusetts in 1778, the governing body that presided over Mrs. Spooner’s execution for her husband’s murder was, itself, looked upon as a child-murderer by its own citizenry when an autopsy of the body of Mrs. Spooner (she had claimed to be “quick with child”) revealed that she was then five months pregnant with a “perfectly formed child.”<sup>30</sup>

[12] But it is argued here, given the truth of the *Roe* Court’s observation that at English common law (and therefore also in Colonial America and in the states and territories of the United States well into the mid-19th century since both received the English common law) “pre-quick with child” abortion and “quick with child” abortion were recognized as rights or freedoms, then it hardly can be argued that the human fetus qualifies as a due process clause person. As observed by the Court in *Roe*:

All this [which represents nothing more than the *Roe* Court’s unremarkable observation that wherever else in the Constitution the word “person” is found, it has only a post-natal context or application], together with our observation [that at common law, in Colonial America, and in the states and territories of the United States to]...throughout the major portion of the 19<sup>th</sup> century, prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.<sup>31</sup>

[13] The problem with the foregoing argument is that there is no truth in the *Roe* Court’s observation that “pre-quick with child” abortion and “quick with child” abortion were recognized as freedoms or rights at common law (and therefore also in Colonial America and in the states

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<sup>29</sup> Baynton’s Case, 14 Howell St. Trials 598, 634 (1702).

<sup>30</sup> See 2 PELEG CHANDLER, AMERICAN CRIMINAL TRIALS 49-50, 53, 379-83 (1844), cited in Rafferty, *supra* note 13, at 235-36.

<sup>31</sup> *Roe*, 410 U.S. at 158 (1973). Corporations have neither a prenatal nor postnatal existence. Also, they do not figure into census taking under the Apportionment Clause. Yet they are recognized as due process clause persons. See, e.g., *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497, 558 (1844).

and territories of the United States until approximately the mid-19<sup>th</sup> century).<sup>32</sup> English case law as well as Colonial American case law hold the opposite. They were both crimes here.

[14] If anyone doubts that “pre-quick with child” abortion was a common law crime, then consider the 1732 English case of *Rex v. Beare*.<sup>33</sup> Eleanor Beare was convicted of (1) the misdemeanor offence of destroying, through deliberated abortion, the “foetus in the womb of Grace Belford” (it was not alleged, and no evidence was presented that Belford was quick with child), and (2) the misdemeanor offence of encouraging a husband to administer a poison to his wife.<sup>34</sup> Beare received two separate sentences of two days on the pillory and three years Imprisonment.<sup>35</sup> The “populace . . . gave her no quarter, but threw such quantities of eggs, turnips, etc., that it was thought she would hardly have escaped with her life.”<sup>36</sup>

[15] In 1747, in Windham County, Connecticut, John Hallowell was convicted of the “high handed [common law], misdemeanor offense of attempting to destroy . . . ‘the fruit of . . . [the]

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<sup>32</sup> See *Roe*, 410 U.S. at 140:

It is thus apparent that at common law [in Colonial America], at the time of the adoption of our Constitution, and, throughout the major portion of the 19<sup>th</sup> century . . . 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 [i.e., until *quickenning*], and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19<sup>th</sup> century.

*Id.* at 140-41.

<sup>33</sup> The *Beare* case is reproduced in Rafferty, *supra* note 13 at 672-683. See also *id.* at 192-93.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 676.

<sup>36</sup> *Id.* at 676-77.

womb' of Sarah Grosvenor.”<sup>37</sup> It was not alleged that Grosvenor was then “quick with child.” Hallowell fled the Court’s jurisdiction before he could be punished.<sup>38</sup> In 1683, in the Colony of Rhode Island and Providence Plantations, Deborah Allen pled guilty to fornication (resulting in the birth of a bastard child) and to attempting to destroy the child in her womb.<sup>39</sup> She was sentenced to be “severly [sic] wipped [sic] . . . with fifteen Stripes on the naked back.”<sup>40</sup> In 1652, in the Province of Maryland, William Mitchell, a captain in the militia, pled guilty to a four-count indictment charging him with blasphemy, adultery, the attempted murder (which at common law was only a misdemeanor) of Susan Warren’s unborn child, and living “in fornication with his now pretended wife Joane.”<sup>41</sup> He received a sentence to pay “five thousand pounds of Tobacco and Cask or the value thereof as a fine to the Lord Propriary, and to enter into bond for his good behavior.”<sup>42</sup> Again in Maryland, in July of 1663, John Lumbrozo, a physician, was charged with giving Elizabeth Wild (who was then “with child,” and as distinguished from being “quick or great with child”) a “phisick in order to destroy it.”<sup>43</sup> The disposition testimony

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<sup>37</sup> This case is related and discussed in detail in C.H. Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth Century New England Village*, 48 WILLIAM & MARY QUARTERLY, 19 (1991).

<sup>38</sup> *Id.*

<sup>39</sup> See GENERAL COURT OF TRIALS: NEWPORT COUNTY 1671-1724 4 (Sept. 1683 Session). This volume is housed in the Phillips Memorial Library Archives sub. nom. Rhode Island Court Records Collection in Providence, Rhode Island. The case is also mentioned in LYLE KOEHLER, A SEARCH FOR POWER: THE “WEAKER SEX” IN SEVENTEENTH CENTURY ENGLAND 329, 336 n.132 (1980).

<sup>40</sup> GENERAL COURT OF TRIALS: NEWPORT COUNTY 1671-1724, *supra* note 39.

<sup>41</sup> Mitchell’s Case, 10 MARYLAND ARCHIVES 182-185 (1891).

<sup>42</sup> *Id.*

<sup>43</sup> Lumbrozo’s Case, 53 MARYLAND ARCHIVES 387-91 (1936).

was that Wild brought forth a “clod of blood from her [womb] as big as . . . [a man’s] fist.”<sup>44</sup>

The outcome of this case is not certainly known but probably was dropped or dismissed because Lumbrozo, after being presented or charged here by a grand jury, married Wild, thereby disqualifying the principal witness against him.<sup>45</sup>

[16] Although the outcome of the 1672 indictment in *R v. M.C. of E* remains unknown, its significance as a precedent lies in the fact that it was printed in three successive editions of the standard precedent book of indictments for use at the English Quarter Sessions:

The jurors for the lord king . . . present that on [May 4, 1672] . . . A., wife of a R.P., was then and there pregnant . . . nevertheless, M.C. of E . . . knowing A. to be . . . great with child (*gravida*) . . . assaulted [A.], and . . . against her will, so improperly `examined' (*enormiter lustravit*) . . . and ill treated her . . . (in order to have carnal knowledge of her) that he then and there slew a certain male child which . . . A., then . . . carried alive (*vivum*) in her womb, [and] by reason whereof . . . A . . . aborted the same male child, so that . . . M. feloniously slew [meaning: this homicide is alleged as a felony] the aforesaid male child.<sup>46</sup>

[17] If voluntary abortion was recognized as a right at common law, then how is it here that if a woman died in connection with a voluntary abortion procedure, she was deemed guilty of “felo de se,” (felony suicide, with the punishment being: an “ignominious [non-Christian] burial in the night at a crossroads with a stake driven through the torso and a stone on the face of the

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<sup>44</sup> *Id.*

<sup>45</sup> By way of analogy, see *Delaware v. Wood* in 8 COURT RECORDS OF KENT COUNTY, DELAWARE 1680-1705 145 (American Legal Records Series, 1959). In Delaware colony in 1699, John Wood was indicted for feloniously stealing from Sarah Prigg. *Id.* Sarah Prigg subsequently appeared in court and informed the Court that “she cannot prosecute, by reason her intermarriage since had with the said John Wood.” The grand jury then returned the following to the Court: “Wee of the grand Jury doe find ignoramus” [against John Wood; i.e., we find insufficient evidence to present him] . . . Whereupon the said John Wood being brought to the Barr, is discharged, payinge the fees.” *Id.*

<sup>46</sup> OFFICUM CLERICI PACIS 281 (3d ed. 1726) (1675). The quoted text has been translated from Latin for this article by Professor Sir John Baker of Cambridge University.

deceased,” and forfeiture of all goods and chattels),<sup>47</sup> and her abortionist was deemed guilty of murder?<sup>48</sup>

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<sup>47</sup> Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment – A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 930-31 (1987). See also Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986).

<sup>48</sup> See *R v. Jane Wynspere*, which transpired in 1503 in Nottingham, England and is reproduced in Rafferty, *supra* note 13, at 686-87:

On inquisition taken at Basford . . . before [coroner] Richard Parker . . . upon the view of the body of Jane Wynspere . . . by The oath of . . . [names of fourteen jurors omitted], who say Upon their oath that . . . Jane Wynspere . . . single woman, Being pregnant . . . drank . . . various . . . poisons in order to kill and destroy the Child in her body; from which the said Jane then and there died. And thus the same Jane . . . feloniously, as a “felo de se,” killed . . . herself.

See also *R v. Tinkler*, a Durham, England case from 1781, and which is reproduced in Rafferty, *supra* note 13, at 701-07:

(1<sup>st</sup> Count): The jurors present that on 1 July 21 Geo. III (1781) she (M. Tinkler) feloniously, wilfully and of her malice aforethought assaulted Jane the wife of Matthew Parkinson and did feloniously, wilfully and of her malice aforethought thrust and insert two pieces of wood of no value into and against the private parts and womb of the said Jane and wound, bruise, perforate and lacerate the private parts and womb of the said Jane, then and there giving the said Jane divers mortal wounds etc. of which she languished until 22 July and then died; and so the jurors say she feloniously, wilfully and of her malice aforethought did kill and murder the said Jane;

(2<sup>nd</sup> Count): [lays the same assault], and Jane feloniously, wilfully and of her malice aforethought kept the pieces of wood in the private parts during the time aforesaid and died as aforesaid, and that Margaret Tinkler before the said felony and self-murder committed by Jane viz. of 1 July, feloniously, willfully and of malice aforethought did counsel, incite, move, procure, and abet the said Jane to do the said felony and murder.

[Annotation:] puts. Guilty. To be hanged on Monday the 13<sup>th</sup> [of] August and afterwards dissected and anatomized.

(abstracted indictment supplied and translated from Latin by Sir John Baker). It should be noted that the *Tinkler* indictment does not allege that Jane was pregnant, let alone that she was “quick with child.”

[18] If abortion was a woman's right under English common law, then why did all those persons in England who became licensed to practice medicine, pharmacy, and midwifery<sup>49</sup> take an oath not to do abortions? English physicians took the "Hippocratic Oath," which included the following: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give a woman an abortive remedy."<sup>50</sup> The oath taken by women, upon being licensed to practice midwifery in England, included the following: "You shall not give any counsel, or minister any herb, medicine, or potion, or any other thing, to any woman being with child, whereby she should destroy or cast out that she goeth withal before her time."<sup>51</sup> The oath taken by English apothecaries included the following: "You shall not give to anyone, or exhibit, any poison that is improperly used, or any drug for the purpose of producing abortion or preventing conception."<sup>52</sup>

[19] If abortion was a woman's right at common law, then how is it that every person, who lived under the jurisdiction of the common law and who wrote on the subject of voluntary abortion, understood it to be an unspeakable crime and indistinguishable from murder or

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<sup>49</sup> Midwifery remained almost exclusively a woman's field until the eighteenth century, and was then defined in part as the "art of assisting nature in bringing forth a perfect foetus, or child, from the womb of the mother." 3 ENCYCLOPEDIA BRITANNICA: OR, A DICTIONARY OF ARTS AND SCIENCES, COMPILED UPON A NEW PLAN 205 (1771).

<sup>50</sup> ENCYCLOPEDIA OF BIOETHICS 1731 (Warren T. Reich ed., 1978). *See also* HAROLD J. COOK, THE DECLINE OF THE OLD MEDICAL REGIME IN STUART LONDON 144-45 (1986) (members of the Royal College of Physicians took an oath not to administer abortifacients).

<sup>51</sup> 2 RICHARD BURN, THE ECCLESIASTICAL LAW 514 (8th ed. 1824). These words were incorporated into a general ordinance in New York in 1716. *See* Rafferty, *supra* note 13, at 112.

<sup>52</sup> A HISTORY OF APOTHECARIES OF LONDON: VOLUME ONE: 1617-1815 353 (Cecil Wall ed., 1960-63).

infanticide? I am referring here to judges, legal commentators, medical-legal writers, physicians, philosophers, natural scientists, social commentators, and authors of midwifery books.<sup>53</sup>

[20] To date, well over one hundred English precedents can be set forth in support of the proposition that abortion is a crime at the English common law.<sup>54</sup>

[21] What, then, served as the basis for the *Roe* Court's conclusion that abortion was a common law liberty? The basis is ultimately nothing more than the *Roe* Court's decision to simply "uncritically" adopt or accept certain common law abortion conclusions set forth in two law review articles by Cyril Means, Jr., a now-deceased, New York law professor.<sup>55</sup> The fact

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<sup>53</sup> See Rafferty, *supra* note 13, at 215-225, 432 n.282.

<sup>54</sup> See Rafferty, *supra* note 13, at 459-765. *And see* R v. Haule reproduced in *id.* at 530-31. In the 1321 case of *Haule*, the defendant beat a woman in an advanced stage of pregnancy resulting in a premature birth "ten weeks before due time." *Id.* The child died immediately after birth. Haule was "launched into eternity" at the end of a rope. *Id.* See also Appendices 1-3, *infra*.

<sup>55</sup> See *Roe*, 410 U.S. at 135-36; see also *supra* note 26; Cyril Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Rise from the Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (Means II); Cyril Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) (Means I). Means I & II are unfit for publication and constitute two black marks against law review.

Means' arguments here are explained (and then exploded) in Rafferty, *supra* note 13, at 195-225. The chief case upon which Means relied is the so-called Twin-slayers Case, *R v. Richard de Burton* (1326-1327). This case, when fully set forth (the original indictment cannot be located), and properly analyzed holds the virtual opposite of what Means claimed that it held. See Appendix 1.

Means went so far as to (falsely) accuse Sir Edward Coke (1552-1634), Lord Chief Justice of England, of "deliberately" misstating the status of abortion as a criminal offence at the English Common law. See Means II at 346. Coke, in his day, "earned a reputation as the most learned, honest, and incorruptible of judges, the 'oracle of the law.'" Michael A.S. Newman, *Voice of Legal Scholar Coke, Circa 1600 Applies in 2005*, LOS ANGELES DAILY JOURNAL, Feb. 9, 2005, at 6. Means' absurd accusation here should have alerted the *Roe* Court that they may be dealing with a nut-case. Instead, the *Roe* Court went out of its way to note in its opinion that there may even be a basis in support of Means' accusation here. See *Roe*, 410 U.S. at 136 n.26:

Means "concludes that Coke . . . may have intentionally misstated the [common law on criminal abortion]." The author even suggests a reason: Coke's strong

that the *Roe* Court “uncritically” placed its imprimatur on Means’ impoverished attempt to vandalize the historical record of the common law on abortion certainly smacks of judicial bias, and not of judicial impartiality.<sup>56</sup>

[22] Neither Means nor the *Roe* Court could cite so much as a single English precedent (or even a secondary authority) in support of their following propositions: voluntary abortion (and particularly, “pre-quick with child” abortion) was not recognized as a crime at the English common law, and therefore was recognized there as a right. Contrary to what Means and the *Roe* Court would have one believe, even if the first proposition could be proved as true (but the opposite is the case), that would no more prove the truth of the second proposition than would, for example, the fact that adultery was not an offence at the English common law prove that adultery was recognized there as a right.<sup>57</sup>

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feelings against abortion coupled with his determination to assert common law (secular) jurisdiction to assess penalties for an offence that traditionally had been an exclusively ecclesiastical or canon law crime.

Under English law, “[p]ersuasive value attaches to decisions of the Supreme Court of the United States.” DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 979 (1980). In my opinion, because the Supreme Court bestowed its prestige both on Means’ attempted vandalism of the English common law on criminal abortion, and his patently false accusation that Coke intentionally misstated the common law on criminal abortion, the English judiciary would not be out of line if it tossed the weight it gives to the Supreme Court’s decisions into the deepest portion of the River Thames.

<sup>56</sup> See *Roe*, 410 U.S. at 135-36, 136 n.26.

<sup>57</sup> English law did not divide crimes into secular crimes and ecclesiastical or canon law crimes. What was divided (into the temporal and ecclesiastical) was the jurisdiction to try and punish crimes. The Court in *Reynolds v. United States*, 98 U.S. 145, 164-65 (1878) acknowledged as much. In *The History of the Common Law of England*, Sir Matthew Hale stated:

Now the Matters of Ecclesiastical Jurisdiction Are of Two Kinds, Criminal and Civil. The Criminal Proceedings extend to such Crimes, as by the Laws of this Kingdom are of Ecclesiastical Cognizance; as Fornication, Adultery . . . and the Reason why they have cognizance of those and the like offenses, and not of

[23] The *Roe* Court, in concluding that it is undisputed that at common law it was not an indictable offense to bring on an abortion deliberately as long as the pregnant woman had not

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others, as Murder, Theft, Burglary . . . is not so much from the Nature of the Offense (for surely the one is as much a Sin as the other . . . ). But the True Reason is, because the Law of the Land has indulged unto that Jurisdiction the Cognizance of some crimes and not of others.

SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 21-22 (C.M. Gray, ed., 1991) (1713).

Hence, even assuming that abortion was not indictable at common law (a patently false assumption), the fact would remain that in England until 1803 (at which time in England acts relating to abortion were initially made felonies by statute), abortion would not have been recognized as a common law right, if only for the reason that it would have been triable as a criminal offense under the binding criminal jurisdiction of the ecclesiastical courts. *See Rafferty, supra* note 13, at 427-75, 727-734 (discussing English ecclesiastical abortion prosecutions).

Means' statement that persons convicted in English ecclesiastical courts could simply "thumb their noses" at the spiritual judges upon receiving a sentence to perform some form of public penance is hilarious. *See Means II, supra* note 55, at 347. If such persons could have successfully done that, then they could have successfully done the same regarding ecclesiastical summonses. However, such contempt of court and refusal to do penance could have led to excommunication, which carried severe temporal ramifications, including: loss of rights to marry, inability to testify in a court of law, and the loss of the right to sue in a court of law. Furthermore, the performance of public penance, such as parading around in a white sheet, was no less humiliating than being set on the pillory.

For Cyril Means and the *Roe* Court to maintain that abortion was a right at common law because it was acknowledged as an offense exclusively within the "binding" state-recognized, criminal jurisdiction of the Roman-English Catholic Church (or in post-Reformation England, that arm of the State referred to as the criminal jurisdiction of the Church of England), is the equivalent of arguing that Californians have a state-recognized right to steal the mail because the prosecution and punishment for that offense is within the exclusive jurisdiction of the Federal Government. The former argument not only creates a false dichotomy between the then English State and the pre- and post-Reformation English Christian Church, but falsely ascribes to the then existing English criminal justice system the equivalent of a split personality.

A good argument in support of the propositions that our English ancestors did not consider abortion to be a right, and did in fact consider it to be a crime, is the apparent fact that in England, during a substantial period of the common law, the ecclesiastical courts enjoyed a nonexclusive, criminal jurisdiction to prosecute abortion whenever and however committed.

If, as Means argues, it is true that the English common law recognized that "abortion had always been an offense within the exclusive jurisdiction of the canonical courts," then it is illogical for Means to argue that access to abortion was a right guaranteed by the common law. *See Means II, supra* note 55, at 347. The common law cannot be said to have conferred a right regarding an act over which it possessed no jurisdiction.

*quicken*ed or was not *quick with child* (or *with quick child*), cited criminal abortion passages from the following four works which, almost from their inception, have been regarded as primary authority on the English common law: Coke's *Institutes* III, Hale's *The History of the Pleas of the Crown*, Hawkins' *Pleas of the Crown*, and Blackstone's *Commentaries* I & 4.<sup>58</sup> If one examines these passages in context, one will see that the question implicitly being addressed is: Under what circumstances, if any, does the intentional abortion (and its substantial equivalent, for example, a violent assault or battery on a woman *quick with child* resulting in a miscarriage) of the child in the womb constitute murder at common law? A question that is *not* being addressed in these passages is whether the intentional abortion of the pre-human being product of human conception is an indictable offense at common law. Hence, these authorities, in saying that the intentional abortion of the child existing in the mother's womb is murder at common law, or that it is not murder but borders thereon, as the case may be, are not saying so in connection with implicitly stating that the abortion of the pre-human being product of human conception is not an indictable offense at common law. Joel Prentiss Bishop expressed this view:

Some have denied that . . . [consented abortion] . . . is indictable at the common law, unless . . . [the pregnant woman] has arrived at the stage of pregnancy termed *quick with child*. And Hale has on this subject the expression "quick or great with child," and Coke, "quick with child"; but not in connections denying that the offense may be committed at an earlier stage of pregnancy.<sup>59</sup>

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<sup>58</sup> See *Roe v. Wade*, 410 U.S. 113, 134 n.21 (1973).

<sup>59</sup> JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES* 512 (5th ed. 1901) (citations omitted). See *Roe v. Wade*, 410 U.S. 113, 132 n.21 (1973); and see 1 COKE, *COKE'S INSTITUTES* 50-51 (2d ed. 1648); SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF CROWN*, 433 (Professional Books Limited 1971) (1736); WILLIAM HAWKINS, *PLEAS OF THE CROWN*, 1716-1721, 80 (Professional Books Limited 1973) (1788); and 1 WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES* 125-26; 4 WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES* 198 (1765).

[24] The authorities cited by the *Roe* Court in support of the proposition that the induced abortion of the pre-human being product of human conception is not indictable at common law are authorities for the proposition that the induced abortion of the child or human being existing in the womb is indictable at common law. Yet, the *Roe* Court cited these authorities for a proposition they do not even remotely support, and then rejected them for the very proposition they support. The science of legal interpretation can hardly sink lower than that.

[25] Let it be supposed for the sake of argument that there exists no common law precedent for the proposition that “pre-quick with child” abortion is an indictable offense at common law. Would such lack of precedent have any tendency to prove that pre-quick with child abortion is not indictable at common law? The answer is no.

[26] Chief Justice Mansfield, in the English case of *Jones v. Randall* (1774), observed:

The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1 (1189-1199) to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty’s sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself, much less the whole of the law. Whatever is contrary, *bonos mores est decorum* [literally: whatever is against good manners (or customs)] and seemliness (or propriety) [freely: whatever is against public morals], the principles of our law prohibit, and the King’s Court as the general censor and guardian of the public manners, is bound to restrain and punish.<sup>60</sup>

[27] Certainly the common law would have perceived pre-quick with child abortion as an inducement to, and a cover-up of such crimes as fornication, adultery, and incest, as well as an assault upon the institution of marriage and family. In an anonymous commentary on the case of *R v. Russell*, which involved (1) a judicial acquittal of murder prosecuted on a theory of

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<sup>60</sup> *Jones v. Randall*, 98 Eng. Rep. 706, 707 (1774).

accessory before the fact to self-murder by means of abortion, and (2) a subsequent guilty plea to statutory pre-quick with child abortion, the following is stated:

The act [of deliberated abortion] itself has a tendency to deprave the mind; and we scruple not to assert, that if sexual pleasures could be indulged with impunity, the bonds which hold society together would be broken asunder, and the most sacred and important of all human relations be treated with contempt. Supposing then, that abortion though feasible without any physical injury, be an act from which a delicate mind will shrink with disgust, which has a tendency in itself to corrupt the morals, which will frustrate, if not totally dispense with the institution of marriage, is it not a matter fit for the cognizance of the legislature.<sup>61</sup>

[28] The final item which the *Roe* Court relied on, in holding that due process does not apply to the human fetus is the Court's *Vuitch* decision.<sup>62</sup> The *Roe* Court stated: "Indeed, our decision in *United States v. Vuitch* inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of fetal life entitled to Fourteenth Amendment protection."<sup>63</sup> The *Roe* Court is saying here that it is Court policy not to give a statute an interpretation that would save it from a particular constitutional challenge if the statute, even as favorably so interpreted or construed, would still be unconstitutional. As judged by the *Roe* decision, the criminal abortion statute in *Vuitch*, as favorably construed by the Court so as to be upheld against a vagueness challenge, clearly would have infringed on a woman's *Roe*-defined constitutional right to an abortion. This is because the criminal abortion statute in *Vuitch*, even as favorably construed by the Court, outlawed what *Roe v. Wade* held to be constitutionally

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<sup>61</sup> *R. v. Russell*, 168 Eng. Rep. 1302 (1832). The *Russell* case is discussed in great detail in Rafferty, *supra* note 13, at 688-692. See also Shelley Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20, 29 (1984) (quoting Anonymous, *The Trial of William Russell at the Huntingdon Assizes*, 2 THE LEGAL EXAMINER 10, 12 (March, 1832)).

<sup>62</sup> *United States v. Vuitch*, 402 U.S. 62 (1971).

<sup>63</sup> *Roe*, 410 U.S. at 159.

guaranteed: a woman's right to obtain a "pre-fetal viability" abortion not necessary to preserve her life or physical or psychological health.<sup>64</sup> By parity of reasoning to *Roe*'s reasoning from *Vuitch*, had the *Vuitch* Court thought the criminal abortion statute in question infringed upon any constitutional right of a woman to obtain an abortion, then the *Vuitch* Court would not have indulged in statutory construction favorable to upholding that statute. If the *Vuitch* Court had done so, it would have had the consequence of leaving on the books a criminal statute that infringes on an individual's fundamental constitutional right, in this case a woman's *Roe*-defined constitutional right to an abortion. Hence, by *Roe* inference, the Court in *Vuitch* held that a woman does not have a constitutional right to an abortion within the meaning of *Roe*. Chief Justice Warren Burger, who joined in the *Roe* majority opinion, implied as much at oral argument in *Roe*. He asked appellant's counsel, Sarah Weddington, whether the issues in *Roe* had not already been implicitly decided in *Vuitch*.<sup>65</sup> Chief Justice Burger should have asked Weddington if it is fair and just to hold that every human being recognized as the same in the late 18<sup>th</sup> Century United States shall remain so recognized today, except for formed human fetuses.

[29] The Court in *Roe* observed that if the fetus is a due process clause person, then the plaintiff's case "collapses."<sup>66</sup> Put another way, it would be a contradiction to hold both that a woman has a fundamental right to abort her fetus and that her fetus has a fundamental right to

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<sup>64</sup> See *Vuitch*, 402 U.S. at 67-68, 71-72.

<sup>65</sup> See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 26 (1986). See also Woodward, *infra* note 70. Justice Blackmun, in a pre-*Roe v. Wade* memorandum: "I would dislike to have to undergo another assault on . . . [a *Vuitch*-type abortion] statute based, this time on privacy. I . . . am willing to continue the approval of the *Vuitch*-type statute on privacy, as well as on vagueness [grounds] . . . ." See also BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 89-90 (1988).

<sup>66</sup> *Roe*, 410 U.S. at 156.

life or not to be aborted.<sup>67</sup> Justice Stevens, in his concurring opinion in *Thornburg* observed: if the human fetus qualifies as a due process clause person, [then] the “the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislature.”<sup>68</sup> The problem here is not so much that the *Roe* Court erred in concluding that the human fetus is not a due process clause person.<sup>69</sup> The real problem is that the consequences of this erroneous conclusion seem too enormous (probably, well over fifty million aborted fetuses to date) so as to admit the error.

[30] One can reasonably argue that the *Roe* opinion serves “only” to cover up an extreme act of judicial predilection. The *Roe* opinion, itself, proves as much when subjected to sound critical analysis. Further, *Roe* author Justice Blackmun admitted as much in a memorandum he wrote to the “Conference of Supreme Court Justices” concerning his proposed *Roe* opinion. He stated, “that the end of the first trimester is critical.” He added that “this is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.”<sup>70</sup> In the actual *Roe* opinion, Justice Blackmun arbitrarily substituted “fetal viability” in place of “the end of the first trimester” as the so-called critical point (i.e., as the point at which the state can outlaw doctor-

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<sup>67</sup> See *id.* at 156-57. If *Roe*'s holding that abortion is a woman's “fundamental right” is sound, then that fact alone would prove that the fetus is not a due process clause person. However, that holding is not sound. See *infra* notes 102-137, and accompanying text.

<sup>68</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists et al.*, 476 U.S. 747, 779 (1986).

<sup>69</sup> The *Roe* Court compounded this error by failing to appoint counsel to represent the human fetus. See, e.g., *Hall v. Hancock*, 32 Mass. 255, 257-58 (Mass. 1834) (noting that, at common law, the human fetus is generally considered to be “in being . . . in all cases where it will be for the benefit of such child to be so considered.”)

<sup>70</sup> See Bob Woodward, *The Abortion Papers*, WASHINGTON POST, JAN. 22, 1989; GREENHOUSE, *supra* note 4, at 95.

performed abortions).<sup>71</sup> Evidently, he made this switch on not much more than the urging of one Justice Marshall's law clerks (and all the while conveniently forgetting that constitutional due process exists to do away with governmental arbitrariness, be it legislative, executive, or judicial).<sup>72</sup> Moreover, there is a reason why Justice Blackmun could not deny that his selection here of fetal viability as the critical point is arbitrary. This reason is set forth in *Van Nostrand's Scientific Encyclopedia*:

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. It is not in any way a digital, step-wise process with distinct periods . . . .

Only for convenience in studying and teaching are certain rather fuzzily defined phases or stages of embryo and fetus development identified and given names . . . . The embryo and later the fetus is an individual entity, imbued with individualistic qualities [genes] which affects its rate of progress, much as later

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<sup>71</sup> *Roe*, 410 U.S. at 163.

<sup>72</sup> *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“We have emphasized time and again that the “touchstone of due process is protection of the individual [or state, vis-à-vis “federal action”] against arbitrary action of government . . . .”); *Oregon v. Mitchell*, 400 U.S. 113, 246 (1970) (Courts, no less than legislatures, “are bound by the provisions of the Fourteenth Amendment”). *And see* J. Rosen, *Inside the High Court: Justices Spend Little Time Debating the Constitution*, LOS ANGELES DAILY JOURNAL, June 23, 1993, at 6:

The *Roe v. Wade* [Marshall] file . . . includes a memo from a Marshall clerk [Mark Tushnet] urging the justice to ask Harry Blackmun to draw the line for abortions at fetal viability, rather than at the end of the first trimester. Marshall obliged, and after further urging from Brennan, Blackmun extended the deadline.

*See also* J.M. BALKIN, WHAT ROE V. WADE SHOULD HAVE SAID 251-254 (2005). Balkin notes an observation by Mark Tushnet, that the real (but nevertheless, covert) reason why fetal viability was substituted in place of the end of the first trimester as the so-called abortion cut-off point was Tushnet's belief “that many women, particularly young women in distressed circumstances, might deny to themselves and everyone else that they were pregnant until their pregnancies were reasonably well advanced.” *Id.* at 253.

Professor Chemerinsky, in the course of defending the *Roe* decision, observed (although erroneously) that “the [*Roe*] Court's decision was limited to that which could be justified as being principled . . . and not arbitrary.” Erwin Chemerinsky, *Rationalizing the Abortion Debate*, 31 BUFFALO L. REV. 107, 132 (1982).

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 human life.<sup>73</sup>

[31] Contrast Justice Blackmun's observation in the foregoing memorandum with this observation of the Court in *Village of Belle Terre v. Borass*: "When it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."<sup>74</sup> It is noted here that in *Roe* the Court expressly conceded that the state's interest in protecting unborn human life is reasonable, legitimate, real and important from the very point of conception.<sup>75</sup> Furthermore, Laurence Tribe observed: "Nothing in the [*Roe*] opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to fetal viability."<sup>76</sup>

[32] There exists virtual unanimity among *Roe* legal commentators that the *Roe* opinion does not justify the *Roe* decision. Fried described *Roe* as "twisted judging," and Posner called the *Roe* opinion "unprofessional."<sup>77</sup> Philip Bobbitt, an anti-*Roe* opinion, pro-*Roe* decision legal commentator referred to the *Roe* opinion as "a doctrinal fiasco" and questioned whether the *Roe*

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<sup>73</sup> VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 4 (Douglas M. Considine ed., Von Nostrand Reinhold Co., 5th ed. 1976). See also *id.* at preface ("The editors . . . have attempted to stress the proven, generally accepted descriptions 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.").

<sup>74</sup> *Village of Belle Terre v. Borass*, 416 U.S. 1, 8 n.5 (1979).

<sup>75</sup> See *Roe*, 410 U.S. at 163.

<sup>76</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1349 (Foundation Press 2d ed. 1988) (1978).

Court believed in its own opinion.<sup>78</sup> What Bobbitt and every one of the anti-*Roe* opinion, pro-*Roe* decision legal commentators are saying, in effect, is that the Court need not reconsider *Roe* (i.e., and unlike the legislative and executive branches of government, the Court need not be accountable) because they have come to the Court's aid by developing sound constitutional supports for *Roe*. These commentators have conveniently overlooked a crucial fact that it is the Court, and not the commentators, who decide whether or not those supports are sound. However, the Court cannot make such a determination without reconsidering *Roe*.

[33] Hence, it may be fairly concluded that such commentators do not have confidence in the soundness of their pro-*Roe* arguments, or they do not trust the Court to consider impartially their pro-*Roe* arguments. Also, these commentators, in not calling on the Court to reconsider *Roe*, undermine the principle that “the authority of the Court’s construction of the Constitution ultimately ‘depends[s] altogether on the force of the reasoning [i.e., the Court’s written opinion] by which it is supported.’”<sup>79</sup> More specifically, Justice Brennan observed:

[I]n our legal system judges have no power to *declare* law . . . That, of course, is the province of the legislature. Courts *derive* legal principles, and have a duty to explain *why* and *how* a given rule has come to be. This requirement . . . restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful.<sup>80</sup>

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<sup>77</sup> CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRST HAND ACCOUNT* 75 (1991); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995). *See also* Rafferty, *supra* note 13, at 12-14.

<sup>78</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 157 (3d ed., 1984) (1982).

<sup>79</sup> Justice William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986).

<sup>80</sup> *Id.* The *Roe* majority (which included Brennan) did not even pretend to derive *Roe*’s “fetal viability” principle.

[34] The *Roe* opinion is devoid of integrity. That the reasoning and premises set forth there do not begin to dictate the *Roe* decision is universally recognized by informed persons.

Therefore, it cannot be legitimately maintained that the *Roe* decision constitutes “settled law.”

[35] Until these anti-*Roe* opinion, pro-*Roe* decision legal commentators call on the Court to reconsider *Roe*, their pro-*Roe* arguments are not fit to be addressed. Their numerous and varied arguments (twenty-five or so) serve merely as pro-choice propaganda.<sup>81</sup> Also, even when their arguments are defeated, there is reason to believe they still would not call on the Court to reconsider *Roe*. They would simply cook up another batch of pro-*Roe* arguments, as Professor Tribe is fond of doing. Bopp and Coleson observed of Tribe that he “is the embodiment of the confusion created by *Roe*’s poor reasoning. He has developed and discarded several alternative justifications for *Roe* in the past thirteen years.”<sup>82</sup> One could reasonably argue that Harvard’s Alan Dershowitz has contributed to this same confusion. In 1991 he stated that “[he] expects and hopes the Court will overrule *Roe v. Wade*,” and that abortion is an issue that should be

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<sup>81</sup> See Rafferty, *supra* note 13. I suggest to these anti-*Roe* opinion, pro-*Roe* decision legal commentators that they make an argument along the following lines. As Justices O’Connor, Kennedy and Souter so insightfully observed in their lead opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992): “At the heart of [14<sup>th</sup> Amendment guaranteed] liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Now, one way for a pregnant woman to deal with the mystery of the life of her unborn child is to simply destroy it, thereby possibly saving the child from a stressful life. In making such an argument none of the following three questions need be addressed: (1) Why, from a constitutional standpoint, is the State’s interest in safeguarding conceived, unborn human life “non-compelling” relative to the mother’s interest in destroying it; (2) what is the constitutional criterion for determining whether a woman’s interest in having access to physician-performed abortion qualifies as a fundamental constitutional right; and (3) why is the true history of the status of the fetus and of abortion in English and American law suddenly not relevant in determining either whether the formed fetus qualifies as a due process clause person or whether abortion qualifies as a woman’s fundamental right?

<sup>82</sup> James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 *BYU J. Pub. L.* 181, 189 (1989).

“returned to the people [because] there is nothing in the Constitution” about abortion.<sup>83</sup> Before making that observation, Dershowitz had nearly twenty years to contemplate the legitimacy of *Roe*. Yet, in his *Supreme Injustice*, Dershowitz offered this observation on *Roe*: “[N]o one can reasonably accuse the justices who voted for *Roe* of cheating. *Roe* was the entirely predictable culmination of a long process of articulating and expanding rights of privacy and reproductive freedom.”<sup>84</sup> This so-called “long process of articulating and expanding rights of privacy and reproductive freedom” consists of nothing more than *Griswold*, a marital privacy case.<sup>85</sup> *Griswold*, like *Roe*, held that the Constitution recognizes a right of privacy.<sup>86</sup> The *Roe* Court then “retroactively” applied that holding to reinterpret prior fundamental rights cases (to procreate, marry, and raise children, etc.), so that those cases act would as precedents for *Roe*’s right of privacy holding. This constitutes cheating.

[36] It is a known fact that Justice Powell, who cast his vote with the *Roe* majority, cheated in *Roe*. Powell, after retiring from the Supreme Court, admitted to NPR’s legal analyst, Nina Totenberg, that he entered into the *Roe v. Wade* decision-making process with a pro-abortion bias, and also that this bias compromised his impartiality because it “strongly” influenced how he voted in *Roe*.<sup>87</sup>

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<sup>83</sup> G. Bush, *Dershowitz A Big Draw At Temple*, LOS ANGELES DAILY JOURNAL, Jan. 30, 1992, § II, at 16.

<sup>84</sup> ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE COURT HIJACKED ELECTION 2000* 50 (2001). See BALKIN, *supra* note 72 for the most recent defense of the *Roe* decision.

<sup>85</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>86</sup> *Id.* at 486.

<sup>87</sup> Transcript: *Nightline: Anatomy of a Decision: Roe v. Wade*, 6 (ABC television broadcast, Dec. 2, 1993) (on file with the author). Powell also engaged in judicial deceit by concealing this strong bias from the *Roe* litigants.

[37] Here is what Totenberg related on the December 2, 1993 episode of “Nightline,” regarding how Powell compromised his duty to decide impartially in *Roe*:

“Lewis Powell . . . told me that one of the things that had influenced him strongly in his decision to join *Roe v. Wade* was an experience he’d had when he was a Richmond, VA senior partner in a . . . law firm . . . [H]e got a call one night from one of his office boys, and went back to the office to find this young man in tears, distraught. The kid [had been] living with . . . an older woman. She had become pregnant and, acting on her instructions, the office boy had aborted her using a coathanger. She had hemorrhaged, and he had run to . . . Powell, for help. The two men . . . found her dead . . . Powell had to turn his office boy into the local prosecutor, but he persuaded the prosecutor not to bring charges.

Powell told me . . . [that]: ‘Ever after that, I thought this was not the business of the government. This was the business of private choice.’”<sup>88</sup>

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<sup>88</sup> *Id.* Powell’s admission here is also revealed in JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 346-47 (1994). See also David Savage, *Roe Ruling: More Than Its Author Intended*, LOS ANGELES TIMES, September 14, 2005, at A1 (“Powell . . . firmly supported a woman’s right to abortion. He urged Blackmun to say it directly [which Blackmun subsequently did], rather than attack [the states’ criminal abortion] laws as vague.”).

Assuming the absence of laches, and given that Powell compromised his obligation to judge impartially in *Roe*, then, is not Texas (Wade, in *Roe v. Wade*, was the then Attorney General for the State of Texas) constitutionally entitled to a rehearing in *Roe*? In *Gray v. Mississippi*, the Court observed: “[T]he impartiality of the adjudicator goes to the very integrity of the legal system.” 481 U.S. 648, 668 (1987). It may be argued that Texas would be unable to prove that it was prejudiced in *Roe* because, even if Powell had recused himself there, the *Roe* decision would have stood at 6-2. The fallacy in that argument is that it assumes the truth of what can never be proved to our constitutional community: Any *Roe* decision-making discussions Powell might or may have had with his fellow justices did not influence how those justices voted there. This would remain true even if it could be certainly proved that an experience of the resurrection (I am not talking about mere resuscitation) of aborted fetuses would not have caused so much as one of the *Roe* majority justices to have changed positions there.

Suppose that, in a state requiring only nine of twelve jurors to convict, defendant X is convicted on a 10-2 vote. Suppose further that one of those majority jurors admitted to harboring a bias and that this bias directed this juror to vote for conviction. Given that the give-and-take among jurors is an absolute, then no person could reasonably argue that due process does not command that defendant X is entitled to a new trial.

Given that the give-and-take among Supreme Court justices is also an absolute given, then the due process principle of “the impartiality of the judiciary” would seem to command that Texas is entitled to a rehearing in *Roe*.

[38] Unlike a police department, a prosecutor's office does not contain a jail cell. So Powell did not turn over his law clerk to the local prosecutor.<sup>89</sup> Also, Powell, the local prosecutor, and perhaps the local coroner, committed a felony if they conspired to conceal a criminal homicide.

[39] Totenberg did not realize what she was disclosing here, because she did not present Powell's decision to join *Roe* as an instance of applied judicial bias, but rather as a courageous justice voting from his conscience as formed from a personal experience.

[40] Also, Justice Blackmun, in stating in a memorandum to the *Roe* justices that his selection of "fetal viability" as the so-called abortion cut-off period is arbitrary, necessarily admitted to cheating in *Roe*.<sup>90</sup> Finally here, if the answer to Chief Justice Burger's *Vuitch* question posed to *Roe*'s counsel, Sarah Weddington, at oral argument in *Roe*<sup>91</sup> is yes (and it appears so), then one can reasonably argue that all of the justices who voted for *Roe* cheated.

[41] A word of caution is offered to these pro-*Roe* decision, legal commentators: Lest they would, in effect, compose an essay in support of *Roe* entitled "Fifty or So Places in the Constitution Where Abortion Is Guaranteed," they should settle on one pro-*Roe* argument and discard the rest. One such argument, if sound, necessarily cancels the rest. Otherwise, the unwritten part of our Constitution would be rendered superfluous forty-nine times over. It will now be argued that one time over is too much.

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<sup>89</sup> See *supra* note 88 and accompanying text.

<sup>90</sup> See *supra* notes 70-72 and accompanying text.

<sup>91</sup> See *supra* notes 62-65 and accompanying text. There is an independent reason for concluding here that all of these *Roe* justices cheated (i.e., they allowed their private or personal opinions in favor of legalized abortion to dictate how they voted in *Roe*). As observed by Mark Tushnet, who was clerking for Chief Justice Marshall when the Court was considering *Roe* stated, "All [the *Roe* majority and concurring justices] wanted was to get those laws off the books." Savage, *supra* note 88.

## **Part II: Roe v. Wade and the Do-Nothing Constitutional Right to Privacy**

[42] Almost by definition, an implied constitutional right cannot operate superfluously. The Court in *Faretta v. California*<sup>92</sup> observed, “The inference of [Constitutional] rights is not, of course, a mechanical exercise . . . . An implied right must arise independently from the design and history of the constitutional text . . . .”<sup>93</sup> This means that neither explicit constitutional rights nor the design or structure of the constitutional text can generate an implied right that is without effect. It follows that if the so-called right to privacy does not constitutionally establish, effectuate, protect, or better secure one or more constitutional rights, then this right cannot be constitutionally implied.

[43] In *Roe*, the Court held that the right to privacy (alleged to be implicit in the Fourteenth Amendment’s concept of “ordered liberty”), can guarantee or protect “only” fundamental rights, rights that pre-exist, or those already found in the Fourteenth Amendment’s concept of “ordered liberty.”<sup>94</sup> This holding has been affirmed in a host of cases. So, abortion is not recognized as a fundamental right because it is said to fall within the right to privacy; rather it is because abortion is said to be a fundamental right that it can claim the protections of a constitutional right to privacy.<sup>95</sup>

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<sup>92</sup> 422 U.S. 806 (1975).

<sup>93</sup> *Id.* at 818-820 n.15.

<sup>94</sup> *See Roe*, 410 U.S. at 152. *See also*, *Paul v. Davis* 424 U.S. 693, 713 (1976):

[o]ur . . . ‘right of privacy’ cases . . . deal . . . with the substantive aspects of the Fourteenth Amendment. In *Roe*, the Court pointed out that the . . . rights found in the guarantee of . . . privacy must be limited to those which are ‘fundamental’ or ‘implicit in the concept of ordered liberty’ as described in *Palko v. Connecticut*.

<sup>95</sup> *See id.* *See also*, *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977); *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973); *Jed Rubenfield, The*

[44] Can the so-called constitutional right to privacy give something to a fundamental right that the latter would not otherwise possess? It cannot. By virtue of its fundamentality, a fundamental right possesses a lien on “strict scrutiny analysis.” This is the highest form of

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*Right of Privacy*, 102 HAR. L. REV. 737, 751 n.83 (1989) (“The Court has repeatedly made clear that [the status of] . . . ‘fundamentality’ must be present in the conduct at issue *before* the right of privacy will apply.”) (emphasis added).

The Court, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.76 (1973), stated: “*Skinner* applied the standard of close scrutiny [or strict scrutiny analysis] to a state law permitting forced sterilization of ‘habitual criminals.’ Implicit in the Court’s opinion is the recognition that the right of procreation is among the rights of . . . privacy protected under the Constitution. *See Roe v. Wade.*” That statement was offered in support of *Rodriguez*’s dubious, if not also hilarious, holding that the criterion of a fundamental right for strict scrutiny purposes is whether the claimed right is explicitly or implicitly guaranteed by the Constitution. *Rodriguez* is in effect stating here that procreation and abortion are fundamental rights precisely because they are implicit in the constitutional right to privacy. This particular interpretation of *Roe*’s right to privacy holding squarely contradicts *Roe*’s holding that abortion is implicit in the right to privacy “precisely” because it can be deemed as a fundamental right. It is double-talk for the Court to state expressly that the right to privacy can embrace or protect only “given” fundamental rights, e.g., *Roe*, and then to mutter under its next breath in *Rodriguez*. that access to physician-performed abortion is a woman’s fundamental right because it is implicit in the constitutional right to privacy.

Insofar as *Rodriguez* states that fundamental rights are implicit in the constitutional text (i.e., by virtue of their fundamentality they become implicit in the constitutional concepts of due process or “ordered liberty”), it is undoubtedly correct. However, insofar as *Rodriguez* states that the criterion of a fundamental right is whether the claimed right is somehow constitutionally guaranteed, it is undoubtedly incorrect. The *Rodriguez* majority reasoned that because fundamental rights are constitutionally guaranteed, the criterion of whether a claimed right is fundamental is therefore whether it is constitutionally guaranteed. That is the equivalent of arguing that because human beings are animals, the criterion of humanity is therefore animality.

The Fifth Amendment provides in part that a person cannot be held to answer for certain felonies except upon a presentment or indictment of a grand jury. U.S. CONST. amend V. Yet, in *Hurtado v. California*, 110 U.S. 516, 537-38 (1884), the Court held that this particular Fifth Amendment right is not implicit in the due process clause of the Fourteenth Amendment because the right, although constitutionally guaranteed against federal infringement, is not fundamental. *See also* *U.S. v. Miller*, 471 U.S. 130, 134-35 (1985). The fact of the matter is: the traditional criterion for determining whether a claimed right is implicit in the concepts of Fourteenth Amendment due process or liberty is precisely whether the claimed right can be deemed fundamental.

constitutional protection any right can possess.<sup>96</sup> Furthermore, by virtue of its fundamentality or

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<sup>96</sup> Strict or close scrutiny analysis, in the context of substantive due process analysis, provides that when state action infringes on the exercise of a fundamental right, it is unconstitutional unless the state can demonstrate all of the following: (1) the state action is “necessary” (i.e., no reasonable “less drastic means” are available) to realize or protect (2) a real (as opposed to a contrived) legitimate state interest that is, on balance, (3) “compelling” (i.e., “overriding” or more important than the exercise of the fundamental right on which it is infringing). According to *Roe*, the Constitution implicitly dictates that the state’s concededly real and legitimate interest in safeguarding human life in womb does not override a pregnant woman’s fundamental right in ridding herself of it until “fetal viability.” *Roe*, 410 U.S. at 113. Even here, the state’s interest ceases to be overriding when a physician-performed abortion may be necessary to preserve the pregnant woman’s (undefined) physical or psychological health. Yet, there are no known constitutional criteria to determine whether a fundamental right is more important than a real and legitimate state interest. And so it is that *Roe*’s author, Justice Blackmun, admitted that his selection of “fetal viability,” as the so-called abortion cut-off point, is not constitutionally based, and derived from nothing more than an unconstitutional (because it is “arbitrary” and, therefore, lacking in due process) judicial exercise in arbitrariness. See *supra* text accompanying notes 70-76. Furthermore, in his concurring opinion in *Illinois State Bd. of Elections. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J. concurring), Justice Blackmun denied ever knowing how to constitutionally distinguish a “compelling” state interest from a “non-compelling” state interest: “I have never been able...to appreciate just what a compelling state interest is . . . I feel, therefore, and always have felt, that these phrases are . . . not . . . helpful for constitutional analysis. They are too convenient and result oriented.”

And then there are these three contradictory (one and two contradict three) statements by Justice O’Connor: (1) in the context of strict scrutiny analysis, the state “must show that an unusually important interest is at stake whether that interest is denominated *compelling*, *of the highest order*, or *overriding*,” *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O’Connor, J. dissenting); (2): “I do . . . remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-66. The state has compelling interests . . . in protecting potential human life, and these interests exist ‘throughout pregnancy,’” *Thornburg v. American College of Obstetrics and Gynecologists*, 476 U.S. 747, 828 (1986) (O’Connor, J. dissenting); and (3): “Before viability, the state’s interests are not strong enough to support a prohibition of abortion.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (O’Connor, J. concurring).

Finally, there are these contradictory statements adopted by Justice Kennedy, “[W]e do not see why the state’s interest in protecting potential human life should come into existence only at the point of viability . . . . ‘[T]he state’s interest, if compelling after viability, is equally compelling before viability.’” *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989). “Before viability, the state’s interests are not strong enough to support a prohibition of abortion.” *Casey*, 505 U.S. at 856.

The pre-*Roe* version of strict scrutiny analysis did not authorize the Court to engage in any such balancing act. The Court, in *United States v. Robel*, stated:

It has been suggested that this case should be decided by “balancing” the governmental interest . . . against the First Amendment rights asserted by the

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appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important . . . than the other.

389 U.S. 258, 268 n.20 (1967). *See, also* Richardson v. Ramirez, 418 U.S. 24, 55 (1974), and Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980).

Given that one of the State's primary reasons for existing is to secure and facilitate the exercise of fundamental rights, then it is a contradiction to maintain that the State can have a legitimate interest in defeating its very reason for even existing. Therefore, the fact that a legitimate state interest and a fundamental right collide on a constitutional plane is conclusive proof of either or both of the following: (1) either the alleged legitimate state interest is not legitimate or the alleged fundamental right is not fundamental, or (2) neither one is what it is alleged to be.

A strong argument can be made that, under *Roe* and its progeny, physicians can abort viable fetuses with impunity. In medicine a viable fetus refers to a fetus which, if it is removed from its mother's womb, stands a "reasonable chance or potential" of surviving with or without the aid of neonatal services. *See, e.g.*, GARY CUNNINGHAM, ET AL., WILLIAMS OBSTETRICS 505 (18<sup>th</sup> ed., 1989). In *Roe v. Wade* the Court adopted the foregoing definition of fetal viability: "the fetus becomes viable, that is, potentially able to live outside the mother's womb, albeit with artificial aid . . . at about . . . (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160 (citing GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 493 (14<sup>th</sup> ed., 1971)). Given this definition of fetal viability, then the following observation of the Court in *Planned Parenthood v. Danforth*, is, in pertinent part, unintelligible:

It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the . . . attending [i.e., aborting] physician.

428 U.S. 52, 64 (1976).

The above *Danforth* statement was affirmed in *Colautti v. Franklin*, 439 U.S. 379, 388-89, 396 (1989). The *Danforth* and *Colautti* Courts overlooked the fact that the *Roe*-adopted, medical definition of potential fetal viability takes into consideration that particular or actual fetal viability varies from pregnancy to pregnancy. *See Andera v. Floyd*, 440 U.S. 445, 445 (1979); and *Colautti*, 439 U.S. at 392.

In any event, given the foregoing *Danforth* proposition that the physician, who performs the abortion, must be the "sole" judge of whether or not the fetus he or she aborted was then potentially viable, then such a physician, in the absence of his or her guilty plea, could not be convicted of violating a statute that makes it a criminal offence for a physician to perform a non-therapeutic abortion on a woman who he knows, or upon a reasonable and diligent investigation, would have good grounds for knowing, is pregnant with a viable fetus. If the physician-defendant has a monopoly on fetal viability evidence, then the prosecution can never prove its case, even when the fetus survives being aborted, because the prosecution will forever lack the only evidence that can be "constitutionally" used to prove the element of fetal viability. Such a

status as a constitutional right, a fundamental right can simply generate any needed constitutional zone of privacy, much as, for example, the First Amendment rights of free speech and peaceful assembly generate a right of free association (and much as the latter generates the right to associate in private).<sup>97</sup> It simply degrades the complimentary fundamental rights of marriage,

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physician could always assert his privilege against self-incrimination. Also, even if he waived the privilege and confessed that he aborted a viable fetus, the fact remains, at his criminal trial he could assert the *corpus delicti* rule. This rule states that in order for a defendant's confession or admission to an element or elements of the charged offense to be considered as evidence, the prosecution must prove by a "reasonable probability" or produce evidence that permits "the reasonable inference" that some person committed the charged offense. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 489, n .15 (1963); *Opper v. United States*, 348 U.S. 84, 89-93 (1954); *People v. Alcalá*, 685 P.2d 1126, 1136 (1984); and Maria Crisera, *Reevaluation of the California Corpus Delicti Rule*, in LOS ANGELES DAILY JOURNAL REPORT, July 26, 1991, at 18.

Since the physician-abortionist has a monopoly on fetal viability evidence, the prosecution would be unable to present any evidence that could raise a "reasonable probability" of fetal viability. It would appear, then, that in *Danforth* and *Colautti* the Court in effect overruled the following statement in *Roe v. Wade*: "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-64. So much for Justice Blackmun's observation in his dissenting opinion in *Webster v. Reproductive Health Services* that the viability standard "establishes an easily applicable standard for regulating abortion." *Webster*, 492 U.S. at 553-554. So much also for the legal principles that the elements of a crime cannot vary depending upon the players, and that criminal law does not enforce itself, but demands the assistance of evidence.

It is generally accepted by physicians that potential fetal viability is achieved at 23-24 weeks fertilization age or 25-26 weeks gestational or LMP (LNMP) age. *See, e.g., F.P. ZUSPAN, OPERATIVE OBSTETRICS* 179 (1988); and *Webster*, 492 U.S. at 554 n.9 (1989) (Blackmun, J. dissenting). So, it seems doubtful there would be a constitutional defect in a statute that (1) makes it criminal offence for a physician to abort a potentially viable fetus when he knows, or upon a called-for, diligent investigation, would have reason to know (a) that the fetus is potentially viable and (b) that the abortion is not necessary to preserve either the life or the health of the mother, and (2) creates a "permissible inference" fact-finder instruction (similar to the .08% or .10% blood alcohol level, driving under the influence, permissible inference instruction) to the effect that a fetus, whose estimated fertilization age is 24 weeks (or 23 or 25 weeks, as the case may be) is viable. *See, e.g., Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) (permissive inference going to an element of an offence does not violate due process of law unless "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury"); and *Ginsberg v. New York*, 390 U.S. 629, 643-44 (1968) (rejected a First Amendment-Fourteenth Amendment, due process challenge to a statute prohibiting the sale of obscene materials to minors if the seller has "reason to know" that the materials are obscene).

procreation, and child-rearing to maintain that they are dependent on a right to privacy.

Degradation of these rights occur by maintaining that they are somehow dependent on an independent right to privacy for their full and proper constitutional exercise. Fundamental rights can simply generate any needed privacy (or any other form of constitutional protection) from governmental interference. Constitutional privacy is always, and simply, an attribute of certain given or established fundamental (or constitutional) rights.

[45] Hence, based on the *Roe* Court's own grounds, the constitutional right to privacy is superfluous. The *Roe* Court qualified the right to privacy out of constitutional existence. It is an empty and useless concept, that should be banished from the vocabulary of the constitutional decision-making process. Constitutional law scholar David O'Brien observed: "the necessity [in *Roe*] of invalidating the abortion statutes on the basis of a constitutional right of privacy . . . remains imperceptible. Justice Blackmun surveyed constitutionally protected privacy interests in order to conclude that "only rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy."<sup>98</sup>

[46] The inescapable conclusion is that the *Roe* Court, in its passion to add a new star (a woman's right to undergo a physician-performed abortion) to our constitutional constellation, unwittingly proved the nonexistence of the constitutional right to privacy. It is this right that the Court sought to link to the abortion interest. That fact alone should qualify the *Roe* opinion as the most ill-conceived opinion in the history of constitutional law. Many will find this

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<sup>97</sup> See, e.g., *Griswold*, 381 U.S. at 482-84.

<sup>98</sup> DAVID O'BRIEN, *PRIVACY, LAW AND PUBLIC POLICY* 189 (1979). And see, Peter Westen, *On Confusing Ideas: Reply*, 91 *YALE L.J.* 1133, 1153 (1982) ("Any concept in law . . . that is empty . . . should be banished as an explanatory norm.").

unintended *Roe* consequence difficult to accept. Thomas Huxley insightfully observed that:  
“There is no sadder sight in the world than to see a beautiful theory killed by a brutal fact.”<sup>99</sup>

[47] Although it is not expected that the Court will act humbly and admit that the right of privacy holding in *Roe* is, at best, a product of much judicial bias and nonsense. Nevertheless, it may be said with reasonable certainty that the Court will never again invoke the right of privacy in an individual rights case or in any other case. If there was ever a case where the Court might have invoked its *Roe* right of privacy holding, it occurred in the homosexual sodomy case of *Lawrence v. Texas*.<sup>100</sup> Yet, the Court did not do so there, notwithstanding that it held that the practice (in private, i.e., in one’s home) of homosexual sodomy is an aspect of Fourteenth Amendment guaranteed liberty.<sup>101</sup>

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<sup>99</sup> JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 537 (17th ed. 2002) (1833).

<sup>100</sup> 539 U.S. 558 (2003).

<sup>101</sup> *Id.* at 578-79. See also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 n.7 (1990) (“Although many state courts have held that [the common law-based] right to refuse [medical] treatment is encompassed by a generalized constitutional right to privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest”).

The various constitutional right to privacy theories (specifically, the *Griswold*-penumbras of Bill of Rights theory, *Griswold*’s “fraternal-twin” privacy theory, i.e., the theory that certain rights, such as to marry, procreate, and raise children, implicit in the Fourteenth Amendment’s concept of “ordered liberty,” give rise to an independent or general right to privacy, and the Ninth Amendment, common law-based theory of a right to privacy are explained (and then are exploded on their own grounds) in Rafferty, *supra* note 13 at pp. 30-39. In *Whalen v. Roe*, the Court stated that *Roe*’s privacy holding is based on *Griswold*’s fraternal twin privacy theory. 429 U.S. 589, 598 n.23 (1977). In *Paul v. Davis*, the Court stated that *Roe*’s privacy holding is based on the *Griswold* theory. 424 U.S. 693, 712-13 (1976). In *Maher v. Roe*, the Court stated that *Roe*’s privacy holding derives from all three right of privacy theories. 432 U.S. 464, 471-72 (1977).

One who would search the English common law for a general right to privacy is in for a big disappointment. Consider here the following picture of 17<sup>th</sup> century, English family and social life as set forth in G.R. QUAIFFE, *WANTON WENCHES AND WAYWARD WIVES: PEASANTS AND ILLICIT SEX IN EARLY SEVENTEENTH CENTURY ENGLAND* 15-16 (1979):

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The adult male was head of the household with, in theory, near absolute power over his wife, children and servants. This hierarchical concept, which emphasized obedience to the male master, was supported by the state, who saw it as a microcosm of the nation's obedience to the King, and by the Church as a manifestation of the Fifth Commandment [i.e., "Honor your father and your mother."]. In practice this authority was supervised, and often curbed, by the active interference of the community in almost every aspect of family and economic life. There was no privacy. This was an alien concept. Every aspect of family life was subject to public scrutiny and amelioration, either informally through popular pressure, or through the formal channels of the secular and ecclesiastical jurisdictions activated through local tithing-men, constables, or church-wardens. The community intervened when its concept of social harmony was endangered.

But the greatest disappointment here is reserved for the one who would look to Fifth Amendment for a right to privacy. In looking here, one would discover that not only does the Fifth Amendment neither explicitly nor implicitly contain a right to privacy, but neither does the Fourteenth Amendment. Putting this another way: If Fifth Amendment due process, guaranteed liberty does not include a right to privacy, then it should follow that Fourteenth Amendment liberty does not include a right to privacy. This is because, practically speaking, the content of individual liberty in each of these amendments is identical. The Court in *Ingraham v. Wright*, stated, "The Due Process Clause of the Fifth Amendment . . . [was] incorporated into the Fourteenth [Amendment]," 430 U.S. 651, 672 (1977), and in *Paul v. Davis*, stated "The Fourteenth Amendment [due process clause] imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts." 424 U.S. 693, 702 n.3 (1976)

The Fifth Amendment is a specific constitutional guarantee. However, in *Paul v. Davis*, the Court noted: "There is no 'right of privacy' found in any specific [Bill of Rights] guarantee." *Id.* at 712. *Paul v. Davis*, then, stands for this proposition: Fifth Amendment liberty does not include a right to privacy. The Court in *Griswold v. Connecticut* implied as much: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." 381 U.S. at 484. Had the *Griswold* Court thought that Fifth Amendment liberty includes a right to privacy, then that Court would not have strained to look to the Fifth Amendment right against self-incrimination as a source of the right to privacy. The right against self-incrimination obviously does not protect what an individual may know, or an individual's inner feelings or thoughts, such as malice and specific intent. It only prevents proof of them through non-immunized, incriminating, testimonial compulsion. This, and not privacy, is its real concern. *See, e.g.*, *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975) ("The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be . . . private . . . but unless it is . . . protected by the Amendment . . . it must be disclosed.").

The Ninth Amendment neither serves to acknowledge the existence of certain rights implicit in the rights enumerated in the Bill of Rights, nor serves as an independent source of constitutionally guaranteed rights. This amendment serves simply to inform the federal

[48] In *On Reading the Constitution*, Tribe and Dorf observed that “whether to designate a right as fundamental poses perhaps the central substantive question of modern constitutional law.”<sup>102</sup> The question in *Roe* then remains, was abortion legitimately deemed a woman’s fundamental right? The *Roe* Court conveniently neither “articulated” nor “justified” the standard it employed in concluding that access to abortion is a woman’s fundamental right. That the *Roe* Court would play “hide and seek” with the standard it employed in resolving this “pivotal issue” creates, of course, the reasonable inference that the *Roe* Court’s holding that access to abortion is a woman’s fundamental right rests on nothing more than judicial predilection or arbitrariness.

[49] A fundamental right is not defined or applied in the abstract. The Court, in *West Coast Hotel Company v. Parrish*, stated: “Liberty in each of its phases has its history and

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government that the rights explicitly and implicitly set forth in the preceding eight amendments of the Bill of Rights do not necessarily set forth all of the rights “retained by the people.”

It may be that many of the rights to which the Ninth Amendment refers (probably: (1) inalienable rights as defined by 18<sup>th</sup> century natural law principles, (2) rights “long recognized at the English common law as essential to the orderly pursuit of happiness by free men,” and (3) certain rights guaranteed in the original constitutions of the states that ratified the Constitution) are implicit in some of the Bill of Rights guarantees. It may be also the case that all of these “unenumerated, retained rights” are implicitly guaranteed by Fifth and Fourteenth Amendment due process clauses. However, if these rights are so guaranteed, it is not because the Ninth Amendment refers to them.

Our constitutional scheme of government certainly forbids the federal government from infringing upon Ninth Amendment “unenumerated retained rights.” However, as the Tenth Amendment implicitly affirms, the reason is because the federal government can operate only within the means of its constitutionally delegated powers. The Ninth Amendment clearly implies that a power to infringe on the exercise of these “unenumerated retained rights” has not been delegated to the federal government. Hence, it would be an unconstitutional act (which the Court would have the legitimate power to strike down as being unconstitutional) for the federal government to infringe upon these “unenumerated retained rights.” The reason, however, is not because the Ninth Amendment “guarantees” them against federal infringement, but is precisely because the Constitution does not delegate to the federal government the power to infringe upon them. An additional or independent reason would come into operation here if the particular right infringed upon is also implicit in a particular Bill of Rights provision, such as the Fifth Amendment’s due process clause.

<sup>102</sup> LAWRENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 72-73 (1991).

connotations.”<sup>103</sup> More specifically, the Court, in *Smith v. Organization of Foster Families*, stated: “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought . . . in intrinsic human rights, as they have been understood in this ‘Nation’s history and tradition.””<sup>104</sup> A review of English-American legal history on abortion does not reveal that abortion has been recognized as essential to the orderly pursuit of liberty. However, and as previously demonstrated, such a review of legal history does reveal that abortion has been recognized there as a serious threat to the orderly pursuit of liberty. To include the claimed right of a woman to undergo a physician-performed abortion within the definition or scope of a so-called fundamental right not to bear a child (or fundamental right to reproductive freedom or individual privacy), would sever that right from its historic roots and purposes. This the Court cannot do. The Court, in *Faretta v. California*, observed: “Such a result [i.e., to thrust counsel upon an accused, against his considered wish’] would sever the concept of [the right to the assistance of] counsel from its historic roots.”<sup>105</sup>

[50] According to the Court, fundamental rights represent that class of rights that the English-American system of jurisprudence (or the “collective conscience of the English-American peoples”) has traditionally regarded as of the very essence of the concepts of justice and ordered liberty.<sup>106</sup> They “have at all times been enjoyed by the citizens of the several states which

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<sup>103</sup> 300 U.S. 379, 391 (1936).

<sup>104</sup> 431 U.S. 816, 845 (1977).

<sup>105</sup> 422 U.S. 806, 820 n.16.

<sup>106</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

compose this Union from the time of their becoming free, independent, and sovereign.”<sup>107</sup> They are “those intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.”<sup>108</sup> They are “enshrined in the history and the basic constitutional documents of English-speaking peoples,”<sup>109</sup> and they include those rights “long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>110</sup>

[51] What source or sources does the Court look to in order to ascertain the “collective conscience” of the English-American peoples concerning the claimed right? The chief source has always been the laws under which the English-American peoples have chosen to conduct the way they live in society. The Court, in *Snyder v. Massachusetts*, stated: “The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law.”<sup>111</sup> Similarly, the Court in *Stanford v. Kentucky*, stated: “‘First’ among the ‘objective indicia that reflects the public attitude toward’ . . . [recognition of the claimed right] are statutes [on the subject] passed by society’s elected representatives.”<sup>112</sup> *Roe* author Justice Blackmun, in his concurring opinion in *McKeiver v. Pennsylvania* (holding that Fourteenth Amendment due process does not guarantee trial by jury in juvenile delinquency proceedings), observed:

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<sup>107</sup> *Maxwell v. Dow*, 176 U.S. 581, 588-89 (1900).

<sup>108</sup> *Smith*, 431 U.S. at 845.

<sup>109</sup> *Ingraham v. Wright*, 430 U.S. 651, 673 n . 42 (1977).

<sup>110</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>111</sup> *Snyder*, 291 U.S. 97, 122 (1989).

<sup>112</sup> *McKeiver*, 492 U.S. 361, 369 (1989) (holding that Fourteenth Amendment due process does not guarantee trial by jury in juvenile delinquency proceedings).

The fact that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” It is therefore of more than passing interest that at least 28 states and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these. The same result is achieved in . . . (five additional) states by judicial decision.<sup>113</sup>

[52] Practically speaking, from approximately the mid-19<sup>th</sup> century to the advent of *Roe*, nearly every (if not every) state “statutorily” outlawed abortion except when necessary to preserve the mother’s life. In *McKinney’s Consolidated Laws of New York Annotated: Penal Laws*, the following is observed:

Dating well back into the nineteenth century, fifty-two American jurisdictions (the fifty states plus the District of Columbia and Puerto Rico) possessed laws establishing abortion as a crime. As of 1965, forty-nine of these jurisdictions limited its legal justifications for performance of an abortion to virtually a single ground, namely necessity of preserving the life of the female. In the other three jurisdictions (Alabama, Massachusetts, and the District of Columbia), preservation of the female’s health was also a ground of justification.<sup>114</sup>

And contrary to what the *Roe* Court would have one believe, virtually every one of these jurisdictions had criminal abortion statutes that were designed in substantial part to protect the human fetus. It is virtually impossible for an unbiased and informed person to conclude that these 19<sup>th</sup> century, criminal abortion statutes or statutory schemes were not designed in substantial part to safeguard unborn human life. To conclude otherwise – and this is precisely what the *Roe* Court did here – a person would have to cast aside common sense, logic, the background against which these statutes were enacted, the known legislative history of some of these statutes, the many state court appellate opinions announcing the purposes of these statutes, the plain meaning of the words and elements contained in these statutes, as well as virtually

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<sup>113</sup> 479 U.S. 186, 191-94 (1971) (Blackmun, J. concurring).

<sup>114</sup> N.Y. PENAL LAW § 125.00 (McKinney 1975) comment., p. 375.

every other rule of statutory construction or interpretation known to English-American law. The *Roe* Court, taking a cue from Cyril Means, Jr., and in an obvious display of judicial bias, cited one case in support of the proposition that “all” of our states’ criminal abortion statutes were designed to protect the pregnant woman’s physical health (and not the child in the womb). The Court ignored no less than forty-four cases that held that these statutes were designed in substantial part to safeguard the child in the womb.<sup>115</sup>

[53] Furthermore, both “pre-quick with child” and “quick with child” abortions were criminal offenses at the English common law, and, therefore, also were criminal offenses in Colonial America and the states and territories of the United States to the mid-19<sup>th</sup> century— since both colonies and states received or adopted the English common law on criminal abortion. Hence, from a constitutional standpoint, abortion should be deemed the virtual opposite of a fundamental right.

[54] But it is argued that a close reading of the *Roe* opinion reveals that here the Court rejected the traditional, fundamental rights methodology, and implicitly announced a new fundamental rights methodology: the importance of the claimed right to the individual from the perspective of the severe detriment that the state would, or might, cause to the individual by prohibiting him or her from exercising the claimed right. That this is so, or so this argument goes, is demonstrated by the fact that in *Roe* the Court stated the following almost immediately after expressly holding that the constitutional right to privacy can protect or include only certain given fundamental rights:

This right of privacy . . . is broad enough to encompass a woman’s decision . . . to terminate her pregnancy. The detriment . . . the State would impose upon the

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<sup>115</sup> See *Roe*, 410 U.S. at 151-52. The forty-four cases are set forth in Rafferty, *supra* note 13 at 330 n.137. See also Rafferty, *supra* note 13, at 63-79 for related discussion.

pregnant woman by denying this choice . . . [except when necessary to save the pregnant woman's life] is apparent. Harm medically diagnosable . . . may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>116</sup>

[55] Assuming, without conceding, that the foregoing argument is valid, then the following questions demand to be answered before this argument can continue. What is the precise “constitutional basis” for rejecting the traditional fundamental rights methodology, and what is the precise “constitutional basis” for adopting this new fundamental rights methodology? Additionally, what rule of the common law or constitutional decision-making processes dictates that the Court can arbitrarily adopt or reject any particular methodology of fundamental rights? Justice Marshall, in his dissenting opinion in *San Antonio Independent School District v. Rodriguez*, stated: “And I certainly do not accept the view that the [process of determining which interests are fundamental] . . . need necessarily degenerate into an unprincipled, subjective ‘picking-and-choosing’ between various interests or that it must involve this Court in creating [substantive] . . . ‘constitutional rights’ . . . .”<sup>117</sup> If it is true, as stated by the Court in *Bigelow v. Virginia*, that the “‘State cannot foreclose the exercise of constitutional rights by mere labels’”<sup>118</sup> (as, for example, by labeling as “compelling” a certain state interest), then it should be equally true that the Court cannot deny to a state the power to outlaw abortion simply by labeling as fundamental a woman’s claimed interest in undergoing a physician-performed abortion.

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<sup>116</sup> 410 U.S. at 153.

<sup>117</sup> 411 U.S. at 102.

<sup>118</sup> 421 U.S. 809, 826. *See also* *Granfenonciera v. Nordberg*, 492 U.S. 33, 61 (1989).

[56] The Court has repeatedly rejected the notion that the importance of a claimed interest to an individual or individuals is a valid fundamental rights criterion or methodology. David Chambers observed “A liberty is ‘fundamental’ in the Court’s view not because of its subjective importance to the individual, but rather because it finds a place in the provisions of the Constitution or in the scheme of social organization the Constitution is believed to have sought to protect.”<sup>119</sup> The Court, in *Ingraham v. Wright*, observed:

We have repeatedly rejected “the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke . . . the Due Process Clause.” [citation omitted] Due Process is required only when a decision of the State implicates an interest within the protections of the Fourteenth Amendment. And “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.”<sup>120</sup>

[57] The Court had previously stated in *Rodriguez* that “[T]here is no inconsistency between our recognition of the vital significance of public education and our holding that access to [public] education is not [fundamental or] guaranteed by the Constitution.”<sup>121</sup> The Court, in *Leis v. Flynt*, stated: “As important as this interest [in discharging his responsibility for the fair administration of justice in our adversary system] is, the suggestion that the Constitution assures the right of a lawyer to practice in the courts of every State . . . flies in the face of the traditional authority of . . . [the state courts] to control who may be admitted to practice in the courts before them.”<sup>122</sup> One could easily add here: The *Roe* decision “flies in the face of the traditional authority of the states” to regulate or prohibit abortion.

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<sup>119</sup> David Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1155 (1972).

<sup>120</sup> 430 U.S. 651, 672 (1977).

<sup>121</sup> *Rodriguez*, 411 U.S. at 78 n.7 (1973).

<sup>122</sup> 439 U.S. 438, 444 n.5 (1979).

[58] No one could seriously dispute that a person has an important interest in retaining his or her driving privilege. Just as during an earlier day in our nation, travel by horseback was recognized as important to the fundamental right to individual mobility, so in our nation today, access to automobile travel is recognized as important to individual mobility or to the fundamental rights to intrastate and interstate travel. The Court, in *Delaware v. Prouse*, stated: “Automobile travel is . . . often [a] necessary mode of transportation to and from one’s home, workplace, and leisure activities. . . . Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.”<sup>123</sup> Yet in several decisions, the Court, in not having subjected certain state laws that mandated the suspension of a person’s privilege to drive an automobile within the state to “strict scrutiny analysis,” implicitly rejected the claim that a person’s extremely important interest in retaining his or her driving privilege qualifies as a fundamental right.<sup>124</sup>

[59] When the meringue is sliced away from the Roe Court’s foregoing exercise in abortion advocacy, this advocacy amounts to no more than the following: In rare instances physical harm can occur to a woman who is denied a physician-performed abortion. And it is possible here (although not provable) that psychological harm (including the prospect of a distressful life and future) might occur to a woman denied an abortion.

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<sup>123</sup> 440 U.S. 648, 662 (1979).

<sup>124</sup> See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 10 (1979); *Dixon v. Love*, 431 U.S. 105, 112-13 (1977); and *Bell v. Burson*, 402 U.S. 535, 539 (1971).

[60] The *Roe* Court would have a person believe that pregnancy and childbirth are more an illness than a natural process.<sup>125</sup> However, just as one individual cannot make himself or herself a better individual simply by finding fault with another individual; so also, abortion cannot be converted into a fundamental right simply by denigrating pregnancy and childbirth.

[61] Medically induced abortion is rarely indicated to preserve the mother's life or physical health. As is stated in *Principles of Medical Therapy in Pregnancy*:

Most major medical centers have the expertise to handle most major medical problems during pregnancy. Exceptions are rare and are restricted to such conditions as primary pulmonary hypertension, Eisenmenger's syndrome [pulmonary hypertension with reversal of shunt], active systemic lupus erythematosus with cardiac or renal involvement, and rapidly progressing diabetic retinopathy.<sup>126</sup>

[62] What can be said of the *Roe* proposition that pregnancy and unwanted motherhood "may" cause (i.e., can cause, in the sense that this has been sufficiently proven, and as distinguished from being only theoretical or within the realm of possibility) psychological harm to the mother? The Court in *Roe* did not indicate that the trial court record in *Roe* contained sufficient evidence of the existence of data upon which psychologists or psychiatrists reasonably may rely in rendering an opinion that a woman can or will suffer psychological harm if denied an abortion. The Court also did not indicate that this record contained sufficient evidence that proved that there exists within the disciplines of psychiatry or psychology generally accepted criteria by which it can be determined to a reasonable probability or certainty (1) that a woman who is

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<sup>125</sup> Jennifer Tachera has observed, "For thousands of years, babies were delivered at home with the help of midwives. Pregnancy was not considered an illness or disease." Jennifer Tachera, *A Birth Right: Home Births, Midwives, and the Right to Privacy*, 12 PAC. L. J. 97 (1980).

<sup>126</sup> Norbert Gleicher, Uri Elkayam, *Fertility Control in the Female Patient with Medical Disease*, in, *PRINCIPLES OF MEDICAL THERAPY IN PREGNANCY 2* (N. Gleicher ed., 1992) (1985). See also *id.* at 5-8, 13 ("improved medical management [of pregnancy] almost guarantees maternal . . . survival").

denied a desired abortion will suffer psychological harm, and (2) that the woman would not suffer psychological harm if she were to have an abortion, or that the harm she would suffer would be less than that caused by the denial of an abortion.<sup>127</sup> Former Surgeon General of the United States, C. Everett Koop, stated the following in a January 9, 1989 letter to President Ronald Reagan describing Koop's findings regarding a presidential directive to the Surgeon General "to prepare a report on the health effects of abortion":

There are almost 250 studies reported in the scientific literature which deal with the psychological aspects of abortion. All of these studies were reviewed and the more significant studies were evaluated by staff in...agencies of the Public Health Service against appropriate criteria and were found to be flawed methodologically. In their view and mine, the data do not support the premise that abortion does or does not cause or contribute to psychological problems. Anecdotal reports abound on both sides. However, individual cases cannot be used to reach scientifically sound conclusions. It is to be noted that when pregnancy, whether wanted or unwanted, comes to full term and delivery, there is a well-documented, low incidence of adverse mental health effects.<sup>128</sup>

[63] The *Roe* Court conveniently ignored one of the most elementary principles in English-American law. This principle was articulated by the Court in *Hammond v. Schappi Bus Line*: "Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decisions should be definitely found by the lower courts upon adequate evidence."<sup>129</sup> The Court cannot take judicial notice of a disputed

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<sup>127</sup> See, e.g., *United States v. Christophe*, 833 F.2d 1296, 1299-1300 (9th Cir. 1987); *Richardson v. Merrell*, 857 F.2d 823, 829 (D.C. Cir., 1988); *People v. Shirley*, 723 P.2d 1354, 1375 (Cal. 1982); and *People v. Stoll*, 783 P.2d 698, 709 (Cal. 1989).

<sup>128</sup> Taken from Koop's letter to President Reagan, as reproduced in *Documents: A Measured Response: Koop on Abortion*, 21 (No. 1) FAMILY PLANNING PERSPECTIVE 31, 31 (January/February, 1989). For an analysis of Koop's *Report on Abortion*, see James R. Kelly, *The Koop Report and a Better Politics of Abortion*, 162 (no. 21) AMERICA 542-546 (June 2, 1990). AMERICA is a weekly magazine published by the Jesuits of the United States and Canada (American Press, Inc., N.Y., N.Y.).

<sup>129</sup> 275 U.S. 164, 171-72 (1927).

proposition or fact that is reasonably subject to dispute. That is to say, the Court cannot find that what is being advanced or contended is true or that a disputed fact is undeniably fact, without requiring that the contention or disputed fact be established by legally sufficient evidence. It is common knowledge that psychiatric or psychological diagnosis is steeped in uncertainties. So, the conclusion seems inescapable that the *Roe* Court, through an erroneous application of the doctrine of judicial notice, simply converted highly disputed contentions or facts into indisputable truths. That, of course, helped to provide the way to where the Court in *Roe* was bound and determined to go.

[64] Regarding the *Roe* contention that maternity or additional offspring may force upon the woman a “distressful life and future”<sup>130</sup>, it is noted that the fact that a child will pose an obstacle to his or her mother’s future plans does not mean that those plans are forever beyond the mother’s reach. Taxes and death are distressful to human beings. Yet, no one could reasonably argue that a person has a fundamental, natural, or alienable right not to die or to pay just taxes.

[65] Regarding the *Roe* Court’s concern for the effect of the unwanted child on the “all concerned”<sup>131</sup> (presumably, the members of the mother’s immediate family), it is noted that the Court showed no concrete concern for the husband in *Planned Parenthood v. Danforth*, which gave a wife a unilateral right to abort her and her husband’s child.<sup>132</sup> Furthermore, these “all

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<sup>130</sup> *Roe*, 410 U.S. at 157.

<sup>131</sup> *Id.* at 153.

<sup>132</sup> 428 U.S. 52, 69 (1976). *See also* *Caban v. Mohammed* 441 U.S. 380, 389 (1979) (holding that “an unwed father may have a relationship with his children fully comparable to that of the mother”).

concerned” were not parties, and were not granted “standing” in *Roe*. Also, Jane Roe was not granted standing to represent the interest of these “all concerned.”

[66] Regarding the *Roe* Court’s concern for the effect of the unwanted child on “a family already unable, psychologically and otherwise, to care for it,”<sup>133</sup> consider that there are no known sociological or psychological criteria for predicting that a new family member will adversely affect a family, or that a family is psychologically and otherwise unable to care for a new family member. Thus, the Doe “family” was not granted standing in *Roe*.<sup>134</sup>

[67] If having what one wants is a valid criterion of good mental health, then, and for example, parents are well advised to spoil their kids rotten. It may be that over one-half of the population of the United States have “unwanted” jobs. Yet, no one could reasonably argue that, therefore, over one-half of our nation’s working population is psychologically ill. Regarding the concern for the stigma of unwed motherhood, consider this:

Evansville, Ind. (AP) [1984]: Vanderburgh Christian Home, for 114 years a discreet haven for girls “in trouble”, is closing its doors, forced out of business by the growing acceptability of unwed motherhood . . . .

Directors of the home, believed to be the nation’s oldest facility of its kind, say illegitimate births have increased to the point that few young women find sufficient shame in unwed pregnancy to go into hiding from their friends and families.

It no longer has the stigma it once did, said Dorothy Winter, the home’s 73-year-old director.<sup>135</sup>

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<sup>133</sup> *Roe*, 410 U.S. at 153.

<sup>134</sup> *Id.* at 127-128.

<sup>135</sup> LOS ANGELES HERALD EXAMINER, October 18, 1984, Part A., at 11. *See also* LOS ANGELES TIMES, Thursday, June 22, 1989, at 2, col.5, (“Two of every five American women giving birth to their first children were not married when they became pregnant, a rise over the last two decades, the Census Bureau said.”).

It is, therefore, no wonder that *Roe* holds that a woman's right to physician-performed abortion is not even contingent upon a showing of detriment.

[68] What can be said of the following fundamental rights methodology employed by Justice Stewart in his concurring opinion in *Roe*:

“Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to a private school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923).” *Abele v. Markle* 351 F. Supp. 224, 227 (D.C. Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jan Roe is [fundamental and, therefore, is] embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.<sup>136</sup>

[69] Justice Stewart's fundamental rights methodology, if adopted by the Court, would greatly simplify the Court's task in determining which claimed individual interests can be deemed as fundamental. To decide whether or not a claimed fundamental interest qualifies as a fundamental right, the Court would not have to bother with interpreting constitutional law. It would simply determine which of the established fundamental or constitutional rights is the least significant and would then determine if the claimed fundamental interest compares in significance with this least significant fundamental right. If the claimed fundamental interest is found to be as significant as the least significant fundamental right, then the former becomes no less a fundamental right than the latter.

[70] The most insignificant fundamental or constitutional right is of course, the right to watch legally obscene or pornographic movies in the privacy of one's home. This is because, by

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<sup>136</sup> 410 U.S. at 170 (Stewart J., concurring).

constitutional definition, pornography has no human value.<sup>137</sup> It follows, therefore, that under Justice Stewart’s fundamental rights methodology, virtually every claimed individual interest under the sun would qualify as a fundamental right.

[71] Fortunately, a Court majority in *San Antonio Sch. Dist. v. Rodriguez* (of which Justice Stewart was a member), rejected Justice Stewart’s unprincipled approach to constitutional interpretation. The *Rodriguez* Court stated: “The key [to] discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as [for example] the [fundamental] right to travel.”<sup>138</sup>

### **Part III: Some Observations on the Question: When Does a Human Being Begin Its Existence as the Same**

[72] In California (and in several other states, such as Arizona, Illinois, Louisiana, Minnesota, North Dakota, Texas, and Utah), a fetus, whether or not it is viable, is protected under a murder statute, except where the mother of the fetus consents to his or her destruction.<sup>139</sup> One can argue that a rational person is extremely hard pressed to maintain that the killing of a fetus ceases to be an inhumane act simply because the mother (who should be its greatest protector) consents to his or her obliteration. An argument can be made that *Roe v. Wade* has bred contradiction (if not

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<sup>137</sup> See *Osborne v. Ohio*, 495 U.S. 103, 108 (1990); *Pope v. Illinois*, 481 U.S. 497, 503 (1987) (holding that jurors could consider whether magazines were utterly without redeeming social value); and *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the First Amendment protects the right to possess obscene materials within one’s home).

<sup>138</sup> 411 U.S. at 33.

<sup>139</sup> See, e.g., *People v. Davis*, 872 P.2d 591, 598 n.1 (Cal. 1994) (citing the penal codes of Arizona, Illinois, Louisiana, Minnesota, North Dakota, Texas and Utah); and *People v. Valdez*, 23 Cal. Rptr. 3d 909 (Cal. Ct. App. 2005).

schizophrenia) into our law. After all, it was precisely Scott Peterson's willingness to kill not only his wife but also their unborn fetus that qualified him for the death penalty.<sup>140</sup>

[73] A person may reasonably or fairly state that in his or her opinion a human fetus (or embryo) is not a human being. However, every honest person must admit "that for all he or she really knows," every time a doctor aborts a fetus (or embryo) an innocent, defenseless human being is thereby killed. Therefore, every doctor who performs an abortion demonstrates a willingness to kill an innocent human being. And every person who would argue or vote for, etc., legalized abortion condones this willingness to kill an innocent human being. "That a conclusion satisfies one's private conscience does not attest to its reliability."<sup>141</sup> To which I add: the pure question of whether the human fetus is a human being is no more a matter of conscience (or morality or religious belief) than is the question of whether life exists on Mars. And neither science nor medicine offer solace to the pro-choice conscience: "From a purely scientific standpoint, there is no question but that abortion represents the cessation of a human life."<sup>142</sup> And: "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

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<sup>140</sup> See *infra* text accompanying notes 162-63. And then there is the Texas case wherein an unwed, pregnant (with twins) teenager solicited her teenage boyfriend (and father of the twins) to help her murder the twins. He did, and now stands charged with two counts of murder. The mother, on the other hand, is exempted from prosecution under Texas' murder statute (and probably out of a "misplaced" fear (*see* *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975)) of running afoul of *Roe v. Wade*). See Lisa Falkenberg, *Teen Couple Who Killed Fetuses Test New Texas Law*, LOS ANGELES DAILY JOURNAL, March 10, 2005, at 4.

<sup>141</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter J., concurring).

<sup>142</sup> VAN NOSTRAND, *supra* note 73 and accompanying text.

should be given the same meticulous care by the physician that we long have given the pregnant woman.”<sup>143</sup>

[74] The traditional, Western civilization definition of a human being is: an organized human body endowed with rational life or a human soul. Many so-called modern intellectuals smile at the concept of a human soul, and particularly at the concept of an incorporeal human soul. They simply dismiss it as a religious belief or as an item not fit for real thought, since it cannot be empirically verified. They conveniently confuse philosophy with religion, and then also conveniently forget that the Aristotelian concept of the human or rational soul had nothing to do with religious beliefs, Christian or pagan. They also conveniently neglect to try and empirically prove their philosophical (and “non-scientific”) premise that empirical verification is the only valid criterion for establishing a claimed fact as an actual fact or truth. In any event, the Court, in *Paris Adult Theater I v. Slaton* (1973), observed: “We do not demand of legislatures ‘scientifically certain criteria of legislation’”; and, “Nothing in the Constitution prohibits a State from reaching . . . [a] conclusion [in this case, that obscene materials have a tendency to debase society and to produce anti-social behavior], and acting on it legislatively, simply because there is no conclusive evidence or empirical data.”<sup>144</sup>

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<sup>143</sup> WILLIAMS OBSTETRICS 139 (17<sup>th</sup> ed., 1985).

<sup>144</sup> 413 U.S. 49, 60, 63 (1973). See also, R.P. Lockwood, *Science not scientism*, OUR SUNDAY VISITOR, August 7, 2005, at 17:

The issue that we never address in these alleged debates between science and religion is that the argument is really over “scientism,” not science. Scientism is a pseudo-ideology that applies philosophical notions to scientific fact or theory. It is the [pseudo-philosophical and non-scientific] belief that science can explain humanity and create answers to questions of the meaning and purpose of human life – often with disastrous results.

[75] Nevertheless, for the sake of argument, it will be assumed that in properly defining a human being, a legislative body must do so without reference to the concept of a human or rational soul. The law is then left with this definition of a human being: an organized human body endowed with life. A living human fetus fits this definition of a human being.

[76] To argue, for example, that the unborn fetus is not a human being because its organs (particularly its brain) are not yet fully developed, or because the fetus is non-viable, or because it has not yet developed the capacity to reason, is like arguing, respectively, that a newborn is not a human being because its brain is not yet fully developed; that a young girl is not a human being because her breasts are not yet developed; that no living creature can be deemed the creature that it is unless it can live independently of its currently essential environment; and that a newborn is not a human being because it has not yet realized its capacity to reason.

[77] Justice Stevens, in his concurring opinion in *Thornburg v. American College of Obstetricians* stated:

Unless the religious view that a fetus is a ‘person’ [or human being] is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference between a fetus and a human being, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.<sup>145</sup>

[78] Preliminarily, the reader would do well to recall an earlier observation by Justice Stevens, who noted that Supreme Court justices, in interpreting the text of the Constitution, “must, of course, try to read . . . [the] words [used by the framers of the Constitution] in the context of the beliefs that were widely held in the late Eighteenth Century.”<sup>146</sup> And as discussed earlier, in the late eighteenth century in Colonial America, and in the United States from its conception at the

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<sup>145</sup>*Thornburg v. American College of Obstetricians*, 476 U.S. 747, 778-79 (1986).

<sup>146</sup> *See supra*, note 9 and accompanying text.

time of the adoption of the Constitution (and of the Fifth and Fourteenth Amendments), and in the view of the common law, and until well into the Twentieth century (or to about the advent of the pro-abortion movement in the mid-1960s), it was generally, if not universally believed or opined (and this was a philosophical, not a religious belief), that a formed fetus in the womb was no less a human being than were his parents and his grandparents.<sup>147</sup>

[79] Note that Justice Stevens neither articulated the so-called “fundamental difference” between a formed human fetus and a live-born human being nor identified the persons or bodies of thought that recognize this difference as a “fundamental” difference. Furthermore, the so-called religious view or opinion that Justice Stevens has in mind is not a religious view or opinion. It is a “philosophical” opinion. It states that the human soul is infused into the product of human conception at conception (“immediate animation”) or at the completion of the process of fetal formation (“mediate or delayed animation”), depending on the particular opinion. But further, Justice Stevens is presupposing here (and also in his concurring opinion in *Webster*,<sup>148</sup> where he makes an impoverished attempt to elaborate on his *Thornburg*<sup>149</sup> statements) a certain definition of what constitutes a human being. Then, without articulating that definition (which means that all a person can infer from this unarticulated definition is that both the formed and unformed human fetus would not fall within this definition), he commences to argue that the Constitution dictates that this unarticulated definition of a human being is the only definition that

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<sup>147</sup> See *supra*, notes 9-26 and accompanying text. See also the works cited in Rafferty, *supra* note 13. See also Goldenring, *Development of the Human Brain*, 307 N. ENG. J. MED. No. 9 (August 26, 1982), at 564,

<sup>148</sup> See 492 U.S. at 566-69.

<sup>149</sup> *Thornburg*, 476 U.S. at 778-79 (1986).

can pass constitutional muster.<sup>150</sup> Any definition of a human being that would be broad enough to include the human fetus would be, to that extent, only religiously based, and therefore would run afoul of the First Amendment's Establishment Clause.

[80] Contrary to what Justice Stevens, the *Roe* Court, Laurence Tribe, Ronald Dworkin, and many others evidently believe, no Christian denomination, including the Roman Catholic Church, has ever had, as one of its doctrines or faith and morals, the opinion or belief that the human fetus, or the pre-fetal product of human conception, as the case may be, is a human being.

The late Jesuit theologian John Connery stated, respectively:

There is no truth in the [*Roe*] Court's statement that the Aristotelian theory of mediate animation continued to be "official Roman Catholic dogma" until the middle of the nineteenth century and that immediate animation is now the "official belief of the Catholic Church." The Church has never declared such a dogma or belief. Her consistent condemnation of abortion has always been independent of the question of the beginning of human life. . . .

Distinctions the Church makes, or does not make, in regard to [canon law crimes, such as "formerly" distinguishing between the "unformed fetus" and the "formed fetus" as a victim of homicide] [and to the] penalties [set forth for the commission of canon law offenses], do not constitute Church teaching. So, while it is true that the Church today penalizes abortion at any stage, it would be wrong to conclude from this that it teaches immediate animation or infusion of a rational soul . . . This it has never done.<sup>151</sup>

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<sup>150</sup> See 492 U.S. at 566-69 (Stevens J., *concurring*) (attempting to elaborate his statement in Webster).

<sup>151</sup> Respectively: John Connery, *Ancients and Medievals on Abortion*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 129-30 (Dennis Horan et al. eds., 1987); see also JOHN CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC* 212 (1977). See also *id.*, at 304-306. And see *ENCYCLOPEDIA OF THEOLOGY: THE CONCISE SACRAMENTUM MUNDI* 848 (Karl Rahner ed., Seabury Press 1982) ("The question as to the exact moment of the animation of the human embryo has not been decided by the magisterium of the Church." (citation omitted)); and JOHN PAUL II, *THE THEOLOGY OF THE BODY: HUMAN LOVE IN THE DIVINE PLAN* 541 (Paperback ed., 1997):

Furthermore, what is at stake is so important that, from the standpoint of moral obligation, the mere probability that a human person is involved would suffice to justify an absolutely clear prohibition of any intervention aimed at killing a human embryo. Precisely for this reason, over and above all scientific debates

[81] According to the Court's own decisions, the Court "must" accept as true the statement of the Roman Catholic Church to the effect that the Church has never decreed as a matter of faith or morals that a new human being comes into existence at conception, fetal formation, or at any other point during the gestation process. The Church is the ultimate or final interpreter of its own moral law and faith.<sup>152</sup> The Church knows full well that the pure question "when does a human being begin its existence as the same," is no more a religious or moral question than is the question of whether life exists on Mars.

[82] Whether or not abortion should be legalized may involve a religious question, a moral question, a political question, a social question, a health question, or all of those questions. However, the pure question, "when does a human being come into existence as the same," involves none of those questions. Furthermore, it is no more a judicial question than is the question, for example, of whether vaccination is preventive of smallpox.<sup>153</sup> This question is

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*and those philosophical affirmations to which the Majisterium has not expressly committed itself, the Church has always taught, and continues to teach that the result of human procreation, from its first moment of existence, must be guaranteed that unconditional respect which is morally due to the human being in his or her totality and unity as body and spirit. (emphasis added.)*

<sup>152</sup> See, e.g., *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-709, 713-716 (1976).

<sup>153</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905) ("[W]e do not decide, and cannot decide, that vaccination is preventive of smallpox."). See also *People v. Lepine*, 263 Cal. Rptr. 543, 548-549 (Cal. Ct. App. 1989) ("[W]e will not, and cannot, arbitrate scientific disputes.").

One of the few things the *Roe* Court got right in its opinion was its refusal to decide the question, at what point, if any, during the gestational process, does the conceived, unborn product of human conception begin its existence as a human being. Yet, even here the *Roe* Court managed to confuse matters further. The Court should have given as its reason for refusing to decide this question, the following: The question is simply a "non-justiciable" one. Instead, the Court threw in here the following:

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We need not resolve the difficult question of when life begins. When those trained in the . . . 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.

410 U.S. at 159.

Preliminarily, this question is no more a theological question than is the question, for example, whether life has ever existed on Mars. In any event, as is stated in Joseph Needham's *A History of Embryology* from the 14<sup>th</sup> century, "the further course of embryological theology...runs in every century parallel with true scientific embryology." JOSEPH NEEDHAM, *A HISTORY OF EMBRYOLOGY* 94 (1959). And if it is a proper question for (medical) science, then it has already been answered here. As is stated in *Van Nostrand's Scientific Encyclopedia*, "From a purely scientific standpoint, there is no question but that abortion represents the cessation of a human life." See *supra* note 73 and accompanying text.

Texas was not even asking the *Roe* Court to decide the question, when does a new human being come into existence. Texas, in the context of trying to demonstrate to the Court the existence of a "compelling interest" in outlawing abortion (because it destroys human beings, albeit, unborn ones), was simply offering a factual basis in support of its request that the *Roe* Court "judicially notice" that abortion destroys live human beings.

When a court states that it "need not" decide an otherwise justiciable question, it is saying that the resolution of the question is not material or necessary to arriving at a correct decision in the case at hand. It does not, in any sense, imply that the court lacks the jurisdiction or competence or wherewithal to decide the question if it is properly raised, and if it is otherwise material to the case at hand. Yet, the *Roe* Court gave as its reason for refusing to decide the question when does a human being come into existence, not, that the question poses a "non-justiciable" question (which was the only valid reason for refusing to decide the question), but rather that the Court is not in a position to resolve the question when the medical, philosophical, and theological authorities have yet to arrive at a consensus on an answer to the question. However, as every competent lawyer and judge knows, in law there is no such animal as a material or justiciable question that is too difficult for a court to competently decide. The reader should be relieved to know that our courts lack the jurisdiction to duck deciding a material, justiciable question or issue, no matter how complex the issue really is. Our courts can "never" claim judicial incompetence here, not even in the guise of humility, and particularly not because of a need for more knowledge or for some kind of a consensus on how such an issue should be resolved. Our courts, as well as all other rational bodies that have ever existed, have always resolved questions ("properly" put before and "rightly" before them) on the basis of currently available knowledge.

Furthermore, the reasons given by the *Roe* Court in support of the refusal to decide the question, when does a human being begin its existence as the same, are, in addition to being nonsensical and irresponsible, highly misleading, to say the least. They, in truth, covered up a material and legitimate issue that the *Roe* Court was duty-bound to decide. The result of this unartful issue-dodging was that this legitimate, judicial issue was in effect decided against the State of Texas. The legitimate issue here was the following: whether Texas, in seeking to demonstrate the existence of a "compelling interest" in the context of "strict scrutiny analysis," made, or on a remand to the trial court, could make a sufficient factual showing that the fertilized

simply and “only” a philosophical question. The discipline of philosophy, or a legislative body, in an attempt to answer that question, can, of course, rely on such items as the discoveries and findings of the life science communities. Given the foregoing traditional definition of what constitutes a human being (i.e., an organized human body endowed with life or the potential to reason) then, it seems quite reasonable (i.e., without having to resort to religious belief) to conclude that there is no fundamental difference between a formed human fetus and a newborn child. Indeed, for two thousand or so years, in Western civilization, the Aristotelian opinion that the “formed fetus” is a human being was virtually undisputed. All that was disputed here was whether the “unformed fetus” is properly recognized as not being a person.

[83] To persist, then, in arguing that the position or opinion that the human fetus is a human being reflects “only” a religious belief, is to persist in the practice of anti-religious bigotry (which is no less an evil than is racial bigotry). And, of course, a person of faith or a religious body (such as the Roman Catholic Church) has no less a free speech right (than, for example, the

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human ovum, or the human embryo, or the human fetus, as the case may be, is a human being. By way of analogy, the Court in *Bernal v. Fainter*, 467 U.S. 216 (1984), stated the following in the course of rejecting the argument of Texas that its statute forbidding a resident alien from being a notary public serves or furthers the State’s “compelling interest” in insuring the availability of a notary’s testimony:

This justification fails because the State fails to advance a factual showing that the unavailability of notaries’ testimony presents a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State’s asserted interest lacks the weight we have required of interests properly denominated as compelling.

*Id.* at 226-227.

Finally, the *Roe* opinion, without setting forth the constitutional basis for so proceeding, proceeds on the conveniently unarticulated premise that the conceived, unborn product of human conception is not a human being. *See, e.g., Roe*, 410 U.S. at 163 (“With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability.”). *See also Casey*, 505 U.S. at 846 (“[T]he State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.”).

ACLU) to advance Constitutional arguments so long as they are not grounded or dependent on doctrines, beliefs, or opinions on which faith or religion has a monopoly.

### Conclusion

[84] The *Roe* Court, in concluding its opinion, stated that its abortion holding “is consistent with . . . the demands of the profound problems of the present day.”<sup>154</sup> Who appointed the Supreme Court’s justices as our nation’s roving problem-solvers in the sky? The Court, in *Addington v. Texas*, observed: “The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.”<sup>155</sup>

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<sup>154</sup> 410 U.S. at 165.

<sup>155</sup> 441 U.S. 418, 431 (1979). And obviously, and contrary to what justices Kennedy, O’Connor, and Souter evidently believe, the Supreme Court justices are also not our nation’s roving peacemakers in the sky. In their lead opinion in *Casey* those three justices put forth this extra-judicial statement: We now call upon “the contending sides of . . . [our] national [abortion] controversy to end their national division by accepting a common mandate rooted in the Constitution.” *Casey*, 505 U.S. at 867. I, for one, refuse to accept that “unreasoned injustice” is rooted in the Constitution.

These justices are in effect, and for example, telling abortion opponents that they should not seek to nullify *Roe* by constitutional amendment.

All that these three justices have demonstrated, in making the foregoing extra-judicial statement, is that they remain woefully ignorant of the two principles and beliefs that motivate *Roe*’s opponents: (1) an utter disdain for judicial power grabs under the guise of detached constitutional analysis (and which is what initially ignited, and continues to fuel our nation’s abortion controversy) (*see infra*, note 167 and accompanying text), and (2) the fundamental moral imperative to seek to protect the most defenseless of beings belonging to the human family.

No reasonable person would maintain that the foregoing two (2) principles and beliefs lack a firm foundation in reason and human experience. Yet, every informed person, who looks at the *Roe* opinion, is forced to conclude that it serves simply as one more monument to humanity’s infinite capacity to deceive itself, in the name of humanity, as always, of course. Unreason rules in *Roe v. Wade*.

[85] The Court also stated here that its “holding . . . is consistent with the . . . [lessons and examples of medical and legal history and] . . . with the lenity of the common law.”<sup>156</sup> The opposite is, of course, the case here. The *Roe* Court, again taking a cue from Cyril Means, would have one believe that it was simply restoring to women their fundamental, common law abortion liberty, which had been reluctantly abolished by nineteenth century state and territorial legislative bodies through the enactment of criminal abortion statutes designed not to protect the fetus in the womb, but rather to protect pregnant women from the then perceived dangers of abortion, particularly surgical abortion. What complete nonsense! Paris and Fonblanque have observed: “It is hardly necessary to remark that . . . [a surgical abortion] operation, unless performed by a skillful surgeon, will . . . endanger the life of the female.”<sup>157</sup> The only perceived defect here (but on erroneous perception) was the failure of the English common law to protect the so-called “unquickened” fetus from being destroyed through abortion. For example here, the Massachusetts Supreme Court, in *Commonwealth v. Wood*, stated the following in response to a defense argument that an indictment under Massachusetts’ original or 1845 abortion statute must allege that the fetus was quick, so that at common law it would constitute an indictable offense: The argument “misconceives the purpose of the statute, which was intended to supply the defects of the common law, and to apply to all cases of pregnancy.”<sup>158</sup> Similarly, the Maine Supreme Court, in *Smith v. State*, stated the following in commenting on Maine’s original or 1840 criminal abortion statute: “[T]here is a removal of the unsubstantial distinction, that [at common

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<sup>156</sup> 410 U.S. 165.

<sup>157</sup> 3 JOHN AYRTON PARIS & J.S.M. FONBLANQUE, MEDICAL JURISPRUDENCE 96 (1823).

<sup>158</sup> 77 Mass. (11 Gray) 85, 92 (Mass. 1858).

law] it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child . . . It is now equally criminal to produce abortion before and after quickening.”<sup>159</sup>

[86] The *Roe* Court, in taking the foregoing cue from Cyril Means, unwittingly played Means’ fool here. As one Means critic observed:

Means’ ‘own conclusions sometime strain credibility: in the presence of manifest public outcry over fetal deaths just prior to the passage of New York’s 1872 [criminal] abortion statute, Means disclaims any impact upon the legislature of this popular pressure (even though the statute itself copies the language of a pro-fetal group). [Nevertheless], [w]here the important thing is to win the case no matter how . . . [then], I suppose I agree with Means’ technique: begin with a scholarly attempt at historical research; if it doesn’t work, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.’<sup>160</sup>

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<sup>159</sup> 33 Me. 48, 57 (Me. 1851).

<sup>160</sup> David Tundermann in a report to Roy Lucas, *quoted in* DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 891-92 n.41 (Paperback ed., 1998). Tundermann is critiquing Means I, *supra* note 55. *See also* *Roe*, 410 U.S. at 151 (and 148-49), and *Roe*’s companion case, *Doe v. Bolton*, 410 U.S. 179, 190 (1979).

Furthermore, and despite what the *Roe* Court would have one believe (*see* *Roe*, 410 U.S. at 151-52, and *Roe*’s companion case, *Bolton*, 410 U.S. at 190), the incorporation of the term “quick with child” (which means “pregnant with a live child,” but which the *Roe* Court misunderstood to mean “quickening”) into many of our states’ nineteenth century, criminal abortion statutes absolutely did not reflect legislative recognition of a received medical opinion that an abortion performed in an advanced stage of pregnancy posed “greater health hazards to the woman than did an early abortion.” In nineteenth century, American medical thought, it seems to have been a generally received opinion that surgical abortion, when performed early in pregnancy, posed “more” danger to the life and health of the pregnant woman than when performed late in pregnancy. The American physician Amos Dean, in his *Principles of Medical Jurisprudence*, stated:

The other local and violent means consist in *the introduction into the uterus of an instrument for the purpose of rupturing the membranes, and thus bringing on premature action of the womb.*

In some cases, where this villainous practice has been resorted to, abortion has been produced by means of it, while in others, the child has been born alive; and in all of them, the mother’s life has been either sacrificed or greatly endangered. The object has generally been to rupture the membranes, and thereby induce a premature action of the uterus, by means of which its contents would be expelled. This is of more difficult accomplishment the earlier it is undertaken. It

[87] Hannah Arendt observed that “the power of the modern state makes it possible for it to turn lies into truth by destroying the facts which existed before and by making new realities to conform to what until then had been ideological fiction.”<sup>161</sup> That is the United States Supreme Court in *Roe v. Wade*. And as long as that decision continues to stand, it may be reasonably or truly maintained that the United States is governed or ruled by judicial dictators, and not by laws or the rule of law.<sup>162</sup>

[88] In *Roe* the Court expressly acknowledged that society’s interest in safeguarding conceived, unborn human life is legitimate and “important” throughout the entire period of gestation.<sup>163</sup> So, in a real sense, *Roe* stands for the anarchical proposition that constitutional liberty allows every person (or at least every woman) to make (and act on) her own standards on matters of conduct in which society as a whole has important interests. But as observed by the Court in *Wisconsin v. Yoder*: “the very concept of ordered liberty precludes allowing every

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is in such cases, that the uterus has generally been seriously, and often fatally, injured.

AMOS DEAN, *PRINCIPLES OF MEDICAL JURISPRUDENCE* 136 (1850) (emphasis added).

<sup>161</sup> Quoted in W. Pfaff, *Refugees: the Beast of Unreason Stirs Again*, LOS ANGELES TIMES, July 8, 1979, Pt. V (Opinion), at 3.

<sup>162</sup> Robert H. Bork, in an understatement, referred to *Roe v. Wade* “as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 116 (1989). At his confirmation hearings, Bork stated that the Constitution does not recognize a general right to privacy period. Because Bork spoke the truth here, this more-than-highly-qualified justice failed the Senate’s litmus test for confirmation.

<sup>163</sup> See *Roe*, 410 U.S. at 163 (“With respect to the state’s important and legitimate interest in potential life, the compelling point is at [fetal] viability.”).

person to make his own standards on matters of conduct in which society as a whole has important interests.”<sup>164</sup>

[89] Abortion achieved the status as a fundamental right (which, almost by definition, is particular to every human being, and not to a particular class or group of human beings, such as women) through the most poorly reasoned opinion in the history of English or American law. In other words, abortion achieved the status as a fundamental, constitutional right only because the *Roe* Court made a complete mockery of the rules of constitutional interpretation. The *Roe* opinion confirms the saying that “bias is impervious to reason.” As Jon Franklin observed: “People do things for reasons . . . and people give reasons for things they do. But the reasons they do them and the reasons they give frequently are not the same.”<sup>165</sup>

[90] The Court, in *Lawrence v. Texas*,<sup>166</sup> in the course of overruling its no-fundamental-right-to-engage-in-homosexual-sodomy case of *Bowers v. Hardwick*,<sup>167</sup> observed: “criticism of *Bowers* has been substantial, and continuing, disapproving of its reasoning in all respects, not just its historical assumptions.” Compared to the “unanimous” and “universal” criticism directed at the *Roe* opinion, the criticism directed at the *Lawrence* opinion is less than minuscule. And, of course, the only reason why the *Roe* Court cannot be accused of “intentionally” misrepresenting the history of the status of the fetus and of abortion at the English common law is because judicial bias cannot be ruled out here (“Bias is impervious to reason”). Yet, notwithstanding

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<sup>164</sup> 406 U.S. 205, 215-216 (1972).

<sup>165</sup> Email from Dr. Jon Franklin to Philip A. Rafferty (November 16, 2005) (on file with the author).

<sup>166</sup> 539 U.S. 558 (2003).

<sup>167</sup> 478 U.S. 186 (1986).

having repeated opportunities here, the Court has never acknowledged that its *Roe* opinion has been universally condemned. What hypocrisy!

[91] I say that the *Roe* opinion has begun the ruination of constitutional law. If this is doubted, then consider all of the following items. Items 1 & 2: *Roe* has made “fundamental rights analysis” and “compelling interest analysis” utterly incomprehensible to reasonable thinking persons. Item 3: Without even so much as an explanation, let alone a comment here, *Roe* failed to appoint sagacious counsel to represent the conceived unborn in course of depriving them of the only thing they do or will possess: human life. Item 4: *Roe* literally butchered the rules of statutory construction in declaring that our states’ 19<sup>th</sup> century criminal abortion statutes were designed “only” to protect pregnant women, and not their unborn children. Item 5: *Roe* covertly, and unconstitutionally, “judicially noticed” facts not subject to judicial notice. Item 6: *Roe* unwittingly proved the nonexistence of the very constitutional right (privacy) to which it sought to link a right to abortion (The only real reason *Roe* even conjured up a right of privacy was because the *Roe* justices knew that, unlike the complementary, fundamental rights to marry, procreate, and raise children, abortion, in all of its inhumanity, cruelty, death, ugliness, and violence, could not hope to stand on its own in its quest for “fundamentality.” So, the *Roe* justices wrapped abortion in an attractive package: individual privacy and respected doctors in their white gowns.). Item 7: *Roe*’s reliance on *Vuitch*, in support of its fetal-non-person holding, actually proves far more than *Roe* wanted to prove: This *Vuitch* reliance, necessarily, equally contradicts the very holding in *Roe*. Item 8: If professor Mark Tushnet is to be believed, then everyone of the seven *Roe* majority and concurring justices cheated there (and also violated their oaths of office) in allowing their private views in favor of legalized abortion to dictate how they voted in *Roe*. In no uncertain terms these *Roe* justices “polluted” the Constitution by

“implicitly” enacting into it their personal – and therefore constitutionally arbitrary – views favoring the compulsory legalization of abortion. Item 9: The *Roe* justices, in allowing the private opinion of Justice Marshall’s law clerk, Mark Tushnet, to covertly dictate *Roe*’s fetal viability holding, in effect, made the states of the United States (and all the people thereof) subject to being ruled by a law clerk. Item 10: *Roe*, in no uncertain terms attempted to vandalize the true history of the status of the fetus and abortion at the English common law. Item 11: The many constitutional law commentators and law professors, who have taken up the role as “keepers of the truth in judicial, constitutional decision making,” in continuing to defend the lie of *Roe v. Wade*, are, in effect, tossing the principle of “judicial accountability” out of the constitutional, decision making process.

[92] The “Beast of Unreason” has infiltrated the constitutional decision-making process, and its appetite for “unreasoned injustice” is insatiable. Yet, great hordes of individuals and organizations are falling over themselves in a frenzy to feed this Beast. I am referring to all of the following (and many more not mentioned here): The post-*Roe* justices (the Kennedys, the Stevens, and the O’Connors, etc.), legal scholars and law school professors (the Tribes, the Chemerinskys, and Balkins, etc.), senators (the Spectors, Kennedys, Bidens, Kerrys, and Feinsteins, etc.), state governors (the Cuomos, etc.), virtually all of the editors of our nation’s leading newspapers (together with virtually the entire news and information media and major book publishers), as well as certain special interests groups, such as the ACLU, N.O.W., and Planned Parenthood.

[93] All this lunacy – all in the name of abortion which, until relatively very recent times has been known as one of the worst crimes known to the law.<sup>168</sup> And as David Gelernter so clearly observes:

The abortion issue is a catastrophic wound in U.S. cultural life. It has inflicted unending battles on American society ever since the Supreme Court seized control of the issue from state legislatures in 1973 – in one of the grossest power grabs American democracy ever faced.<sup>169</sup>

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<sup>168</sup> See *State v. Alcorn*, 64 P. 1014, 1019 (1901).

<sup>169</sup> David Gelernter, *Let's Take Abortion Away from the Court*, LOS ANGELES TIMES, September 23, 2005, at B13.

## APPENDIX 1

### Rex v. Richard de Bourton, a.k.a. The Twin-Slayer's Case (1327-1328)<sup>170</sup>

#### Uncorrected, Incomplete Year Book Report Of Richard de Bourton<sup>171</sup>

A writ issued to the sheriff of Gloucestershire to apprehend one D. who, according to the testimony of Sir G[eoffrey] Scrop[e] is supposed to have beaten a woman in an advanced stage of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop[e], and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing as felony,<sup>172</sup> the accused was released [by the sheriff on the recommendation of the

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<sup>170</sup> Bourton was indicted on two counts of felonious homicide; the felonious destruction of an unborn child and the felonious destruction of a live born child, who died almost immediately after birth from prenatal injuries. Bourton was arraigned on, and pleaded not guilty to, these two counts of felonious homicide. The matter was set for trial, but Bourton failed to show, so the *Bourton* court issued a writ for his arrest. Bourton, at some time after his arraignment, successfully applied for release on mainprise.

The year book report of *Bourton's Case* represents the form in which this case was known to such common law commentators as Staunford, Coke, Hale, Blackstone, Hawkins, and all modern common law abortion and homicide commentators. All of these persons apparently have assumed or formed the opinion that this case, as it is set forth in the year book or in manuscripts, stands for essentially the following: Since the *Bourton* justices expressly held that the facts as alleged in the *Bourton* indictment do not constitute felonies at common law, and since at common law all unlawful homicides constituted felonies, it follows that an unborn child (including one that is born alive and then dies in connection with being aborted or injured while in the mother's womb) is not recognized as a potential victim of common law criminal homicide.

<sup>171</sup> Y.B. Mich. 1 Edw. 3, fol. 23, pl. 18 (1327) (bracketed insertions at text are the author's).

<sup>172</sup> The use of the word "felony" in this context almost certainly means that it appeared to the Justices from a relation or examination of the facts or circumstances of the homicides that they were not committed "feloniously" or with "felony or malice aforethought" and therefore the defendant would almost certainly be pardoned. "Felony" in this context most likely did not connote that the factual allegations in the indictment did not amount to capital felonies or that the alleged victims are not persons under the common law of felonious homicide. To maintain that

Bourton justices?]<sup>173</sup> to mainpernors [a form of pre-trial release or bail],<sup>174</sup> and then the argument was adjourned sine die [i.e., the case remained unresolved].<sup>175</sup> [T]hus the writ issued, as before stated, and Sir G. Scrop[e] rehearsed the entire case, and how he [D.] came and pled.

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the *Bourton* justices, in using in effect the words “[no] felony” (in “unwilling [not minded] to adjudge [treat] this thing as felony”) meant “nonfelonious” or “without felony or malice aforethought” is not to maintain also that this was a highly unusual employment of the word “felony.” For example, in the unborn child homicide case of *R v. Cheney and Clerk* (Eyre of Herfordshire, 1278), Cheney was acquitted because the jury found that Cheney “did not do this [killing] by felony aforethought.” *R. v. Cheney and Clerk*, reproduced in Rafferty *supra* note 13, at 556. Chapter 9 of the Statute of Gloucester (1278) distinguished homicides in terms of homicide by self-defense, misadventure, and by felony. See 1 STATUTES OF THE REALM, pt. 1, at 49 (1810). See also HURNARD, *infra* note 185, at 281. Hurnard stated that the word felony was used so in deciding whether defendants, who were indicted for felonious homicide, should be granted bail pursuant to bail applications brought through writs for special inquisitions. HURNARD, *infra* note 185, at 281 n.2. Bracton, in the course of describing unlawful homicide, stated: it is committed “in premeditated assault and felony.” BRACTON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 438, n.155 (G.Woodbine ed., S. Thorne trans., 1986). Pollack and Maitland observed: “In the thirteenth century the chancery is beginning to contrast a homicide by misadventure, which deserves a pardon, with homicide which has been committed *in feloniam et per malitiam praecogitatum*.” SIR FREDERICK POLLACK & FREDERIC MAITLAND 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 468 (2d ed., 1968) (1898).

<sup>173</sup> See W.A. MORRIS, THE MEDIEVAL ENGLISH SHERIFF 232-233 (1927); *R. v. Richard Abbot of Pisford* 97 SELDEN SOCIETY 181, 218 (1329). In *R v. Pisford* the defendant was indicted for felonious homicide. One justice was of the opinion that the deceased was the cause of his own death. Justice Scrope, felt the case was one of self-defense. The report of the case contains the following entry:

[Scrope] told the prisoner to have the record sent to Chancery, for in such a case the Chancellor could grant a charter of pardon without consulting the king. Later a friend of the prisoner’s appeared and asked that he might be released by mainprise. Scrope, C.J.: “We cannot do that. But ask the sheriff to do it.” He did so, and obtained his release.

97 SELDEN SOCIETY 181 (1997)

<sup>174</sup> Thomas Green observed, “Because of the infrequency of the eyres . . . homicide defendants frequently obtained orders for special inquisitions into the circumstances of the alleged slaying. Upon a finding of excusable [or nonfelonious] homicide, the defendant might be either pardoned or bailed until the next eyre.” THOMAS GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL JURY 1200-1800 422, n.34 (1985) (citing HURNARD, *infra* note 185, at 37-42, 50).

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise of such place, who said, that the same fellow was taken by the mayor of Bristol, but of the cause of this arrest we are wholly ignorant.<sup>176</sup>

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<sup>175</sup> I do not suspect that this “no felony” entry in the year book is defective. More to the point, it can be demonstrated that this *Bourton* year book entry is not at all in conflict with the following three *Bourton* plea roll entries: (1) “the foregoing matters [i.e., the alleged felonious homicides] still remain undetermined before ourself; and . . . [Bourton] had . . . [an assigned] day before us . . . for hearing the jury of the country . . . on the felony aforesaid [but he failed to appear]”; (2) “The jury . . . to make recognition . . . whether . . . Bourton . . . is guilty of the death of Joan . . . feloniously slain . . . whereof he has been indicted;” and (3) “Richard [Bourton] came and proffered a . . . pardon of the aforesaid felony.” See *infra*, notes 180-182 and accompanying text.

<sup>176</sup> The then existing English laws and legal customs concerning bail authorized bail in nearly all felonies or capital offences. The major exceptions were “felonious house-burning,” “counterfeiting the King’s seal,” “making counterfeit money,” “Treason touching the King,” and unlawful homicide – except when preliminarily judged to be based on “light suspicion” or as “nonfelonious” or through misadventure (i.e., excusable, accidental, non-malicious, in self-defence, or not done in the course of committing a serious or dangerous felony). See 15 Statute of Westminster I (3 Edw.1) (1275), in 1 STATUTES OF THE REALM pt. 1, 26, 30 (1810); HURNARD, *infra* note 185; GREEN, *supra* note 173, at 425 n.50. But see 57 SELDEN SOCIETY LXXXIII (1938) (ordinarily no bail in an appeal of homicide). Now the foregoing *Bourton* year book entry clearly implies that the *Bourton* justices would “not” have allowed Bourton to be bailed if they had found “felony,” which they did not find. So, if the absence of “felony” means here the absence of a capital offence or the absence of a form of common law criminal homicide, then the *Bourton* justices betrayed a fundamental misunderstanding of then existing English laws and customs on bail in felony cases. The misunderstanding would be the notion that such laws and customs forbid bail in felony cases.

Furthermore, if the “absence of felony” means here the absence of a capital offence or the absence of a form of common law criminal homicide, then the *Bourton* justices also betrayed a misunderstanding of the then existing common law on criminal homicide. Other cases clearly show that there is no question that for well over a hundred years before, and for at least some thirty years (if not for more than two hundred and twenty-five years) after the *Bourton* case, fetal victims were recognized by the English judiciary as potential victims of common law criminal homicide. See, e.g., Rafferty, *supra* note 13, at 504-576.

So, a person who would continue to maintain that the *Bourton* case stands for the proposition that the fetal victims described in the *Bourton* indictment are not potential victims of common law criminal homicide, must implicitly adopt each of the following three premises: (1) The three foregoing *Bourton* “felony” plea roll entries represent defective entries; (2) The *Bourton* justices did not understand the then existing common law on bail in felony cases; (3) The *Bourton* justices did not understand, or what is far more culpable, refused to apply the then

**Corrected, Incomplete Year Book Report Of R v. Richard de Bourton**<sup>177</sup>

A writ issued to the sheriff of Gloucestershire to take one D., who, by the testimony of Sir Geoffrey Scrop, is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan,<sup>178</sup> but died two days later from the injury which the child had; and the indictment was returned before Sir Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat<sup>179</sup> this thing as felony, the indictee was released on mainprise and then the matter remained without day, and so the writ was issued as above, and it said that [by testimony of] Sir Geoffrey Scrop [etc., and] recited the whole case [as above], and

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existing common law on criminal homicide. The *Bourton* case, then, when correctly interpreted, actually supports the proposition that both of the fetal victims described in the *Bourton* indictment are potential victims of common law criminal homicide. *Bourton* has been recognized as the leading case in support of the proposition that at common law a child that is destroyed in the mother's womb is not a potential victim of criminal homicide. Hence, but for the fact that *Bourton* was so fundamentally misinterpreted, there is every reason to believe that at the English common law such a child would have continued to be recognized as a potential victim of criminal homicide. For a case similar to the *Bourton* case, see Appendices 2-3.

<sup>177</sup> Notes and corrected translation from the French supplied by Professor Sir John Baker. Baker remarked:

I was greatly puzzled by the appearance of Herle C.J. (of the Common Pleas) in this text, and by some of the wording, and so I compared the printed text with four MSS. These all agree with each other and make better sense, especially in omitting the name of Herle (which must have resulted from some misreading). [This corrected]...translation is from the MS. Text, indicating the chief variations from the printed editions: Lincoln's Inn MS. Hale 72, at fo.86v; Lincoln's Inn MS. Hale 116, at fo.3; Lincoln's Inn MS. Hale 137(2), at fo.11; Bodleian Library Oxford MS. Bodl. 363, at fo.9v.

Professor Baker, in a letter to Philip A. Rafferty (December 12, 1985) (on file with the author).

<sup>178</sup> John in print, and some MSS. The record shows Joan to be correct.

<sup>179</sup> *d'agarder* (i.e., to award) in MSS. *adjudge* only in print.

how he came and pleaded etc., [and that the sheriff should have caused his body to come etc.]<sup>180</sup>

And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in question had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. [Therefore, a writ issued to the mayor of Bristol to cause the body to come, together with the cause etc.]

**Translation of the Plea Roll Record for Mich. (1327)**<sup>181</sup>

Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by the grace of God king of England, lord of Ireland and duke of Aquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children (*grossam doubus pueris pregnantem*), and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feet so trampled upon the ground [sic] that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury (*de malo*) aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of John le Taverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and

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<sup>180</sup> Garbled in print, with mention of Herle C.J.

<sup>181</sup> KB 27/270, Rex m.9 (Mich. Term, 1327). Reference and translation from the Latin supplied by Professor Sir John Baker.

on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since that mainprise, and detained in our prison of Bristol, on account of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainperners who mainprise to have him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile delivered from prison by the mainprise aforesaid. And have you there the names of those mainperners, and this writ. And if the same Richard is indicted for any other felonies or trespasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14<sup>th</sup> day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he commanded Everard Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourton, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtele the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a fortnight from St. Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or trespasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not or would not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed to them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or trespasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John de Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespicer, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he

should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also, the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and trespasses before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

**Translation of the record for Easter term, 1328**<sup>182</sup>

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king caused to come before him [in connection with Bourton's petition for a pardon?; insertion mine]) is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all the jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which he heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc., he should put in as many and such etc. and have them before the king at the said term etc.

**Translation of the record of Octave of St. John, 1328**<sup>183</sup>

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<sup>182</sup> K.B. 27/242, Rex m. 9 (Easter term, 1328). Reference and translation from the Latin supplied by Professor Sir John Baker.

<sup>183</sup> K.B. 27/273, Rex m. 12d (Octave of St. John, 2 Edw.III). Reference and translation from the Latin supplied by Professor Sir John Baker.

Gloucestershire. The jury at the suit of the lord king to make recognition whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted – as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has caused to come before [himself] etc. – is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. And let the aforesaid Richard meanwhile be released by the mainprise which he previously found, from day to day etc. Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of the present king. Therefore, he [is to go] thereof without day etc [i.e., the indictment against Bourton is dismissed, and the defendant is discharged].

**Comments by Professor Sir John Baker on the *Bourton* case:**<sup>184</sup>

[I]t appears from the patent roll (Cal. Patent Rolls 1327-30, p.113: Pat. 1 Edw. III, pt. 2, m. 17) that Bourton was included in the general pardon of 29 May 1327, but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. The others were evidently ordinary felons conscripted into the army.

The pardon is not to be found in the roll for Hil. 1 Edw. III, which is defective. The following fragmentary entry alone remains, ‘verba. Edwardus dei gracia rex Anglie dominus . . . is justic’ ad placita coram nobis tenenda assign . . . Glouc’ de Richardo de Burton et Lucia . . . nuper rex Anglie pater noster per breve suum . . . -nto predicto ulterius inde quod justum . . . --M . . . .’<sup>185</sup>

This looks more like a writ for removing the indictment than a preliminary to entering a pardon, though perhaps the pardon was tacked on (the lower two-thirds or so of the roll is missing).

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<sup>184</sup> Letter from Professor Sir John Baker to Philip A. Rafferty, *supra* note 176.

<sup>185</sup> *Id.* (citing K.B. 27/267, m. 4a (or perhaps 4d.)).

Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb, [and] (2) for causing the death of the other (christened Joan). We do not . . . have the indictment, though as summarized . . . [in the year book report and in the plea roll record for Mich., 1327] it does seem that the words of felony applied to both children. In [some of] the later [plea roll] entries, the offence is described only as the killing of Joan, but that may have been clerical shorthand.

The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two gaol deliveries in Gloucestershire in the 1320s, but the indictment is not recorded There (KB 27/247, Rex m. KB 27/255. Rex m.24).

Bourton pleaded not guilty, and was released on mainprise to appear at some time before Michaelmas term 1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause. Apparently [Bourton was released on mainprise] because, according to the year book, the judges were not minded to treat it as felony. It seems to me that this was not a final determination of that question – indeed the record says that the issue of felony was still pending in 1328 – but related only to the bail application.<sup>186</sup>

Scrop C.J. reopened the case in the time of Edward III, and the new king sent a writ on 14 July 1327 to the sheriff of Gloucestershire to take mainprise from Bourton to appear in the quindene of Michaelmas (October next). At that day the sheriff returned that the bailiffs of Bristol informed him that B. had been arrested by the mayor. So the King's Bench sent a writ to the mayor, to take mainprise & c. to appear in the quindene of Hilary [1328]. At that day the mayor returned that B. would not find mainprise and so they had done nothing. He was amerced 40s. for not returning the cause of B.'s detention in Bristol etc., and the sheriff was now ordered to enter the liberty and take the mainprise himself, for an appearance in the quindene of Easter. The next plea roll shows that in Easter term (April 1328) the jury was respited till the octave of St. John (July) because no jurors showed up, the defendant being released on the same mainprise. . . .

I have searched for [the Bourton indictment] . . . without success In the King's Bench rolls for Michaelmas term 1326 (KB 27/266), Trinity term 1326 (KB 27/265), Easter term 1326 (KB 27/264), Hilary term 1326 (KB 27/263),...Michaelmas term 1325 (KB 27/262), [and Easter term 1324 (KB 27/256)]. There is no obvious stopping point, since we do not know the date of the offence]. I am not sure how much further it is worth going, though it would indeed be helpful to find the indictment. . . .

As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb and another (Joan) which died after birth and baptism; that he pleaded not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered

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<sup>186</sup> It certainly was not a final determination. See NAOMI D. HURNARD, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307* 110 (1965).

the facts alleged to amount to felony or not, except insofar as the case was continued through several terms on the basis that it was felony. . . .

It is therefore the yearbook report which remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as felony. The status and meaning of this pronouncement still seem to me less than clear. For one thing, it seems contrary to the [plea roll] record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of felonious killing. . . . That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that Bail was not thought to be grantable for [a charge of] murder [or felonious homicide] in medieval times (YB 25 Edw.III, fo.85; EDWARD COKE, TREATISE ON BAIL & MAINPRISE; Staunford P.C. 72a), it seems to have been allowable for felony. It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the [plea roll] record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.<sup>187</sup>

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<sup>187</sup> There was a chance that the *Bourton* indictment could be in surviving Chancery files. Part of the procedure for applying for a pardon involved sending the court record into Chancery. On my behalf, Ella Bubb kindly searched the Chancery files, and certain other files, for the *Bourton* indictment, petition for pardon, and possible writ for special inquisition. She was unable to locate any of those items. Letter from Ella Bubb to Philip A. Rafferty (Nov. 15, 1991) (on file with the author).

## APPENDIX 2

### Rex v. Scot (Eyre of London, 1321)<sup>188</sup>

In the 19<sup>th</sup> year [1290] of the aforesaid reign of King Edward [I], John de Vinite, clerk, then being coroner, and Thomas Romayn and William de Layre then being sheriffs, Alice the wife of Roger the Spicer, perceiving a certain John the Scot to be pursuing the aforesaid Roger her husband with a certain stick in order to beat him, wanted to close the door of her house so that the same John should not get in, and she went so quickly to close the said door and closed it, and the aforesaid John pushed the said door with such force that the aforesaid Alice fell on a certain mortar, with the result that she gave birth to Margery and Emma, certain daughters of hers, before the [due] time of birth [*Tempus pariendi*], who immediately after birth and baptism died. And the aforesaid John fled immediately after the deed; he is suspected of wrong. Therefore let him be exacted and outlawed.<sup>189</sup> He had no chattels, and was not in any ward because he was a vagrant. The four neighbours have died.

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<sup>188</sup> JUST 1/547A, m. 22. Translation from the Latin supplied by Professor Sir John Baker. See also Harold N. Schneebeck, Jr., *The Law of Felony in Medieval England from the Accession of Edward I Until the Mid-Fourteenth Century*, 238 (1973) (unpublished Ph.D. dissertation, University of Iowa, 1973).

<sup>189</sup> BLACK'S LAW DICTIONARY 904 (Bryan A. Garner ed., 7th abridged ed. 1999), gives the definition of "outlawry": "Hist.: The act or process of depriving someone of the benefit and protection of the law." This means, in effect, that an outlawed person could be killed on sight. In outlawry the defendant or appellee had to be exacted or solemnly called to come forth at separate sessions of the County Court, and was only outlawed after four failures. Outlawry applied only to felony or capital offences. See 5 SELDEN SOCIETY, YEAR BOOKS OF EDWARD II THE EYRE OF KENT 6 & 7 EDWARD II A.D. 1313-1314 94 (1910) ("If one be indicted of some matter too small to bring him in danger of judgment of life and limb, even though he come not, yet shall he not be outlawed.").

### APPENDIX 3

#### Case No. 1: R v. Wodlake (Middlesex, 1530)<sup>190</sup>

##### Indictment: Rape, and Murder of an Unborn Child

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the twentieth day of May in the seventeenth year [1525] of the reign of King Henry VIII, with force and arms (namely knives etc.) at the aforesaid parish of St. Clement, assaulted Katherine Alaund, then a girl of fourteen years of age, and then and there violently and against her will feloniously raped her and carnally knew her, against the peace of the lord king etc.

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the tenth day of November in the eighteenth year [1526] of the reign of King Henry VIII, by the instigation of the devil, knowing that a certain Katherine Alaund was pregnant with a child [*cum puero esse pregnatam* (sic)], with dissembling

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<sup>190</sup> KB 9/513/m.23. Translation from Latin supplied by Professor Sir John Baker. The *Wodlake* chronology is as follows: (1) the indictments were found true on December 9, 1529; (2) on April 29, 1530, the King's Bench issued a writ to remove the *Wodlake* indictments from the Middlesex Justices to the King's Bench in Westminster; (3) on July 9, 1530, the indictments were delivered to the King's Bench. The Controlment Roll remembrance indicates that Wodlake died before the end of April, 1531.

I asked Dr. Baker about his following comment on the *Wodlake* abortion indictment: "since the defendant was also indicted for raping the mother, we can infer from the dates that the foetus was eight months old at the time of the alleged abortion." Baker responded to my inquiry as follows:

I was wrong in my Selden Society volume to . . . [infer] that the pregnancy was a result of the rape for which Wodlake was also indicted. Henry VIII's regnal year changed on 22 April, and so the interval between the rape and the abortion was 18 months. I did not have a full transcript at the time of writing.

Professor Sir John Baker in a letter to Philip A. Rafferty (April 24, 1984) (on file with the author).

words gave the same Katharine to drink a certain drink in order to destroy the child then being in the said Katharine's body [*dictum puerum in corpore dicte Katerine existentum*], and desired and caused her the said Katharine to drink the selfsame drink, by reason of which drink the same Katharine was afterwards delivered of that child [*puero*] dead: so that the same William Wodlake feloniously killed and murdered the child [*puerum*] with the drink in manner and form aforesaid, against the peace of the lord king etc.

### **Endorsement of the Indictments**<sup>191</sup>

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Cheseman, John Brown, Richard Hawkes and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, trespasses and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary [December 9] in the twenty-first year [1529] of the reign of King Henry VIII, by the oath etc. of . . . jurors [of the grand jury] delivered before the lord king on the Saturday [July 9, 1530] next after the quindene of St. John this same term, by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

### **Mandamus for removal into the King's Bench**

[Sewn to the bill, in the King's Bench file, is a writ dated 29 April 22 Hen.VIII [1530], ordering the justices of the peace for Middlesex to send before the lord king in the octave of Trinity all indictments concerning William Wodlake. The writ, tested by Chief Justice Fitz

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<sup>191</sup> KB 9/513/m.23d.

James, is endorsed by Sir John More to the effect that he has sent in all the indictments wherein William Wodelake is indicted, according to the tenor of the writ.]<sup>192</sup>

**Record in the Controlment Roll of the Clerk of the Crown**<sup>193</sup>

Middlesex. William Wodlake (dead) of the parish of St Clement Danes in the county aforesaid, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders and misdemeanours of which he is indicted, [as appears] by the Baga de Secretis. Afterwards, in Hilary term 22 Hen. VIII [1531], he is to be taken [and brought here] in the quindene of Easter: at which day [the sheriff returns that] he is dead. Therefore let the process against him here totally cease.<sup>194</sup>

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<sup>192</sup> Letter from Professor Sir John Baker to Philip A. Rafferty (April 24, 1984) (on file with the author). In this same letter, Baker remarked that it is unclear why the writ was issued to remove the *Wodlake* indictments from Middlesex to the King's Bench in Westminster. *Id.* He suggested that one possible reason is that the *Wodlake* abortion indictment may have been technically defective for failing to state the place of the murder. *Id.* However, he added: "that would not explain the removal of the rape indictment." *Id.* Baker also stated that the reason may have been simply routine: "many Middlesex cases were tried at bar in Westminster Hall." *Id.*

<sup>193</sup> KB 29/162/m.11d. (Trin. 22 Hen. VIII).

<sup>194</sup> Letter from Professor Sir John Baker to Philip A. Rafferty, *supra* note 192. In the letter, Dr. Baker stated:

(This roll) is not strictly a record, but rather a remembrance made by the clerk of the Crown. This explains the note form, which is extended here to give the sense. The "Baga" is the file in which the indictment still remains (KB 9/513). The remembrance indicates that a *capias* was issued for Wodlake's arrest in Trinity term, and another was issued in Hilary term 1531, but that Wodlake died before Easter term 1531 (which began at the end of April) and before his appearance in the King's Bench.

**Case No. 2: R v. Lichefeld (Nottinghamshire, 1505)**<sup>195</sup>

**Indictment**

Nottinghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord [Jan. 5] in the nineteenth year [1504] of the reign of the present lord king, at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant [*puerperal: perhaps in labour*], on the twelfth day of December in the year above mentioned at Basford aforesaid, being inspired by the devil [*ex spiritu diabolico*] drank various bad [*corrupta*] and polluted [*inmaculata*]<sup>196</sup> potions in order to kill and destroy the child in her body [*infantem in corpore suo*], and took them into her body, as a result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a *felo de se* slew and poisoned herself and the child in her body [*infantem in corpore suo*]; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed the said felony [i.e., the murder of the unborn child] in form aforesaid, then and there feloniously harboured the said Jane . . . .

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<sup>195</sup> KB 27/974, Rex m.4 (Hilary term, 1505). Reference and translation from the Latin supplied by Professor Sir John Baker.

<sup>196</sup> Baker made the following comment on his translation of the word *inmaculata*: "This word really means the reverse, and I am not happy with it, but I cannot make it read anything else: there are six minims before the "a." Perhaps the "in-" is not used as a negative here, but connotes a putting in, i.e., "in the potion." Letter from Professor Sir John Baker to Philip A. Rafferty (July 6, 1985) (on file with the author).

On the Thursday after the quindene of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged *sine die*.<sup>197</sup>

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<sup>197</sup> *Sine Die*: the indictment is dismissed without defendant having to stand jury trial. *Id.* In this indictment Lichefeld is charged with being an accessory after the fact to one of two felonies committed by the deceased principal Jane Wynspere. But which of the two felonies is the indictment alleging here? It is logically impossible for Lichefeld to have been an accessory after the fact to Wynspere's crime of felony-suicide. Wynspere's crime of self-murder was not committed or completed until she died. At common law one cannot receive or harbor a dead person. See by way of analogy, the 1702 case of *Cooper v. The Hundred of Basingstoke*:

[I]f the murder be indicted, and the indictment shows that the stroke was upon one day, and the death upon another, and it concludes, that so he murdered his upon the former day; it is ill, because no felony was committed till the death. [B]ut if it concludes that so he murdered him the day of death, it is good. 4 Co. 42. So if a mortal wound be given, and the party languish for a month, and A knowing thereof receives the murderer, or if constables arrest him, and permit him to escape, and then the person wounded dies; the receivers are not accessory [after the fact] to felony, nor are the constables felons. II Hen. 4.12.b.

*Cooper v. The Hundred of Basingstoke*, reprinted in 2 Ray. Rptr. 826, 827 (1775).

The only other crime mentioned in the *Lichefeld* indictment is Wynspere's abortion-destruction of her unborn child. Now, at the English common law it was not an indictable offence to be an accessory after the fact unless the principal's offence was a capital felony. Hale stated, respectively:

This kind of accessory after the fact is where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon.

This, as has been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly out to ensure . . . .

If A has his goods stolen by B, and C, knowing they were stolen, receives them, this simply of itself makes not an accessory, because it imports not felony, but only a trespass or misdemeanor punishable by fine and imprisonment . . .

1 MATHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 618, 619-620 (1776) (citations omitted). See also Vaughan's Case reprinted in 2 Hawkins Pleas of the Crown, c.29 §§ 2-3 (1716)

Hence, it may be reasonably argued that the *Lichefeld* indictment implicitly stands for the proposition that at the early 16<sup>th</sup> century, English common law, it was a capital felony to deliberately destroy an unborn child.