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NO. 10-0450-2

STATE OF TEXAS

vs.

CLIFF ZARSKY

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IN THE COUNTY COURT

AT LAW NUMBER 2

NUECES COUNTY, TEXAS

**BRIEF FOR MOTION TO ALLOW EVIDENCE FOR THE DEFENSE OF THIRD PERSONS AND NECESSITY AND FOR LEAVE TO VOIR DIRE AS TO CERTAIN ISSUES**

Defendant herein is charged with trespass on abortion clinic property at 1901 Morgan Street in Corpus Christi, Texas, and presents this motion because Boushey v. State 804 S.W.2d 148 (Tex. Appeals Corpus Christi 1990. Pet. ref'd, U.S. Writ of Certiorari No. 91-5436 denied 1991) upheld the trial court's denial of evidence for the defense of a third person, and the necessity defense because the United States Supreme Court case of Roe v. Wade 410 U.S. 113 decision that unborn humans are not persons protected by the Fifth and Fourteenth Amendments.

The evidence for a third person defense and the defense of necessity was specifically denied in Boushey v. State *Id.* at 151.

The State of Texas filed a pre-trial motion in limine. This motion requested the trial court to order appellant not to refer to: 1) evidence concerning when life begins, development of the unborn, and the effects of an abortion upon the unborn; 2) testimony concerning abortions and related procedures; 3) testimony concerning abortion procedures, counseling, complications and "clinic's business practices"; 4) appellants testimony dealing with the reasons for her acts; 5) evidence concerning the unborn and their mothers; 6) any illustrations depicting the unborn before or after abortions; 7) evidence referring to protection of third persons, protection of life or health and the defense of necessity; and 8) testimony concerning religious or moral beliefs. The State argued that this evidence is irrelevant and should not be admitted. The trial court granted the motion in limine.

Defendant further alleges that he is denied due process and equal protection because the Texas criminal defense of third persons P.C. 9.33 would not be denied for the protection of unborn children under Texas P.C.19.03 "A person commits an offense if the person commits murder as defined in Section 19.02 (b)(1), and: (8) the person murders an individual under six years of age; and (9) (b) An offense under this section is a capital felony." Penal Code 1.07 Definitions (38) "Person" means an individual,

corporation or association, and (26) “‘Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” An exception for the murder of unborn children is provided in P.C. 19.06 Applicability to certain conduct. “This chapter does not apply to the death of an unborn child if the conduct charged is: (1) conduct committed by the mother of the unborn child: (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure.” (Section 3 and 4 omitted.)

“Appellant supported her contentions concerning these defenses on the purported invalidity of Roe v. Wade, 410 U.S. 113 (1973). This is the United States Supreme Court decision concerning the privacy of a woman’s decision on whether to abort her unborn child. This Court must reject appellant’s challenge to Roe v. Wade. . . Roe is still the law and has not, as yet, been overruled or modified to the extent that it would support appellant’s position.” Boushey v. State Id.149.

Justice Sandra O’Connor’s dissent in Akron V. Akron Center for Reproductive Health 462 U.S. 416 (1982) provides encouragement for present courts to re-examine Roe in light of prior Roe Supreme Court cases dealing with constitutional rights of unborn humans where she says: “The Roe framework, then is clearly on a collision course with itself...” and “In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”Brown v. Board of Education 347 U.S. 483 (1955) is a good example, and Justice Roberts In the 5-to-4 Citizens United v. Federal Election Commission, 558 U.S,\_\_\_\_ (2010) Supreme Court ruling dismantling the McCain-Feingold campaign law, joined with Justice Samuel Alito to issue a separate concurrence “to address the important principles of judicial restraint and stare decisis implicated in the case.”While Roberts conceded that “departures from precedent are inappropriate in the absence of a ‘special justification,’” he quickly added that “At the same time, stare decisis is neither an ‘inexorable command’... nor ‘a mechanical formula of adherence to the latest decision’ ... especially in constitutional cases,” noting that “If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.” Instead, under the “stare decisis” judicial doctrine of respecting past rulings, “When considering whether to re-examine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right.” The chief justice declared: “stare decisis is not an end in itself.”

Justice Harry Blackmun claimed in the Roe case “The word person, as used in the Fourteenth Amendment, does not include the unborn.” He came to this conclusion by asserting that “no case could be cited that holds that a fetus is a person within the

meaning of the Fourteenth Amendment, but conceded that if the “personhood of the fetus is established [the case for abortion], of course collapses, for the fetus’ right to life would then be guaranteed by the Fourteenth Amendment.” Roe, 410 U.S. at 156-157. Here is the evidence and cases that establish a fetus is a person within the Fourteenth Amendment, so the unborn human is entitled to the same due process and equal protection as all other persons, and the defendant should be allowed to present evidence for the defense of third persons and the defense of necessity.

The defendant requests the Court to approve the motion for presentation of evidence of fact and law for his defense and to question the jury on Voir Dire for peremptory challenges and challenges for cause whether prospective jurors have any prejudice against the applicable criminal law or the laws that permit a defense to the offense charged. Smith v State, 513 S.W. 2d 823, 826 (1974) verifies defendant’s rights. Unless the defendant qualifies the jury panel on expected defenses, there is no assurance of a non-prejudiced jury, and the defendant is denied a fair trial.

## REASONS FOR GRANTING THE MOTION TO ALLOW EVIDENCE FOR DEFENSES OF NECESSITY AND THIRD PERSONS

### I.

#### INTRODUCTION

The present case calls into question the validity of the holding in Roe v. Wade that unborn children are not “persons” possessing a right to life and to the equal protection of law under the Fourteenth Amendment. The rulings relied on Roe v. Wade in refusing to allow an unborn human being to be the beneficiary of efforts to save his life pursuant to the defense of third persons or necessity, even though such efforts would be allowed to save a newborn infant younger from conception than other unborn children still in the womb. Only the unborn among human beings, is decreed unworthy of such life-saving efforts. Indeed such efforts would be allowed in appropriate circumstances to save property or the life of an animal. The denial of the defense of third persons or necessity with respect to the unborn child is a grave injustice at odds with the norms of science as well as of common fairness. The refusal of the Court in Roe v. Wade to recognize the reality of unborn human life is anachronistic in the light of modern medical and technological developments. As a result Roe is rightly regarded as conferring a legal right to execute an innocent human being. Given the undisputed facts that life begins at conception and that every abortion kills a human being, it should be no wonder that Defendant and many others like him are willing to violate trespass laws in order to protect the lives of unborn children scheduled for execution. This Court should hold that statutes involved herein are unconstitutional if they exclude unborn human beings from the class of persons for whose benefit the justification defenses of necessity or protection of third persons may be asserted.

### II.

#### THE TERM ‘PERSON’ UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.

The Fifth Amendment in the Constitution of the United States provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. The Fourteenth Amendment to the Constitution of the United States provides that “[no] State shall. . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.” Id. amend. XIV, Section 1. This amendment secures protection for the basic, minimum human rights any state must respect. It is imperative that categories of human beings not be read out of the terms of this amendment without the clearest demonstration of justification for such exceptions.

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

#### A. THE “PERSONHOOD” OF THE HUMAN FETUS IS ESTABLISHED BY THE RULE OF PERPETUITIES.

Under the Common Law the principle that no interest in property is valid unless it vests not later than twenty-one years, plus the period of gestation, after some life or lives in being which exist at the time of the creation of the interest. The courts developed the rule during the seventeenth century in order to restrict a person's power to control perpetually the ownership and possession of his or her property after death and to ensure the transferability of property. The rule includes the period of gestation to cover cases of posthumous birth. If a testator transfers his property to his son for life, and then to his son's children, the children's interest is vested.

Under the rule, a future interest must vest within a certain period of time. This period is limited to the duration of a life or lives in being (the “measuring lives”) at the time the interest in the property is transferred, plus twenty-one years. The period of the rule can be extended by one or more gestation periods. For purposes of the rule against perpetuities, a person is in being at the time of conception if he or she is born thereafter. Therefore the measuring life, or lives, might be the life of a person who has been conceived at the time the instrument takes effect but who is born afterward. For example, a testator—one who makes a will—leaves property “to the descendants of Jones who are living twenty-one years after the death of my last surviving child.” Six months after his death, the testator's wife gives birth to their only child. This child is the measuring life, and the descendants of Jones who are alive twenty-one years after the death of the testator's child will take the property.

The period of gestation can also occur at the end of the measuring life or lives. A person conceived before but born after the death of a measuring life is considered to be in being for purposes of the rule. For example, a testator leaves his estate to his

grandchildren who attain the age of twenty-one. The testator's only child, William, is born six months after the testator's death. William himself has only one child, Pamela, who is born six months after William's death. The will provisions that leave the property to Pamela are valid, and she will inherit her grandfather's estate when she reaches twenty-one. This was the fact situation of McCarthur v. Scott 113 U.S.340 (1885). The basic fundamental right to inheritance property, a Fourteenth Amendment right was established and provided to unborn humans for the past four centuries at Common Law, and more recently by state law and statutes.

B. THE PERSONHOOD OF THE UNBORN HUMAN IS ESTABLISHED IN THE DECLARATION OF INDEPENDENCE PROVIDING THE RIGHT TO LIFE AND SECURED IN THE CONSTITUTION.

The rights of life, liberty and property are natural rights which pre-existed our state and federal governments, as affirmed in the Declaration of Independence. It is the states, not the federal government, which have the primary duty to protect those unalienable rights. As the Court stated in U.S. v. Cruikshank, 92,U.S. 542, 553 (1875):

The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States.

The very idea of freedom presupposes some objective moral law which overarches rulers and ruled alike. Subjectivism about values is eternally incompatible with democracy. We and our rulers are of one kind only so long as we are subject to one law. But if there is no law of nature, the ethos of any society is the creation of its rulers, educators, and conditioners; and every creator stands above and outside his own creation, so unless we hold to the objective values stated in the Declaration, we will perish.

Consequently, looking to the states to see if they held unborn children to be persons with justifiable rights is the correct constitutional methodology. (Emphasis added).

C. THE "PERSONHOOD" OF THE UNBORN HUMAN FETUS IS ESTABLISHED IN THE WORD "POSTERITY" OF THE PREAMBLE OF THE UNITED STATES CONSTITUTION.

For whom are inalienable rights secured in the term “Posterity”? Life has survival for its prime goal. In order to insure survival of the individual, that is the individual in general and not the particular, people have constituted governments to secure for themselves a measure of assurance that there will be a survival. But if the purpose of government is to secure survival of the individual, then the implication is that there is a limit on governmental action: not to do that which would frustrate the purpose for which the people established government.

In a democracy established by the people, our Founding Fathers held “...all men are created equal...” as a self-evident truth. The importance of the rights of the individual were first recognized in writing and extracted from the sovereign by force in the Magna Carta of 1215. With that first giant step in human liberty, man has pursued a course of history to ensure that a government protects the individual.

For government to achieve its goal of survival of the individual, the most basic duty which has devolved upon a state is: maintenance of law and order within the state, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, and protection of citizens abroad. “We hold these truths to be self –evident, that all men are created equal...with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness...That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed.”

These sentiments are expressed in the Preamble of the Constitution: “...to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty...”

We turn to the Constitution to know “Who established it?” “For what purpose?” and “What class of persons is protected?”

The Constitution Preamble declares that “We the People” do ordain and establish this Constitution. The people surrender nothing, and as they retain every thing they have no need of particular reservation, “we the people of the United States to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” The words “people of the Unites States” and “citizens” are synonymous terms, and mean the same thing and form the sovereignty, and who hold power and conduct the government through their representatives.

The government proceeds directly from the people and is declared to be ordained “in order to form a more perfect union, establish justice, insure domestic tranquility and secure the blessings of liberty....”

The most important purpose is “For whom the Constitution is established?”, and the meaning of the fundamental objectives found in the phrase “for ourselves and Our Posterity.” There are two classes of beneficiaries created: a present generation and a future generation. But if that is so, then we must ask what is the nature of the latter class, and whether or not it would be void for violating the rule against perpetuities.

What is the Proper Interpretation of the Constitution? No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. Words and terms are to be taken in the sense they were used and common law at the time the constitution and amendments were adopted. Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred.

The function of the Preamble is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. It does define for whom the constitution was created, and where sovereignty resides.

The classes of persons protected “to ourselves and our Posterity” should turn to the meaning commonly understood at the time of the adoption to determine its extent and application. The phrase in question begins with the preposition “to”. As so used, it marks the object for which the purposes were secured.

“Ourselves” is a pronoun, the plural of “our self”, and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to “we” or “us”. “Ourselves” is therefore synonymous with “We, the people of the United States”, and therefore also “citizen”. Its purpose is to include “Posterity” on an equal footing with and the same rights as, “our selves”.

There are three points in time when one could cross the threshold of being “our selves” (present interest) from “posterity” (Presently enforceable future interests): conception, at birth, at the age of capacity.

As persons who have not reached the age of capacity could not consent, it would appear that adults are of the class “our selves,” and all others of the class “Posterity.”

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a guardian ad litem, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he be a part, or by the State acting in Parens patriae. Thus, it is clear that at common law that at least those members of Posterity who were born had a presently enforceable right.

Whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. The unborn was a life in being for purposes of the rule against perpetuities, and it does not appear that common law barred tort actions for prenatal injuries which could be brought by a representative.

It thus appears that in view of the known object and intent of the framers that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include the unborn conceived fetus within the class of persons protected.

The State of Texas Court of Criminal Appeals in 1915 held an abortion conviction met the statutory requirements and commented that most states decisions held that under common law abortion was criminal any time after conception. Gray v. State, 77 Tex. Cr. R. 221 (1915).

In Goldberg v. Kelly, 397 U.S. 254,264-65 (1970) the Supreme Court held welfare benefits were a fundamental right, requiring a full application of the Fourteenth Amendment Due Process prerequisites and "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" (Emphasis added). The fundamental right to be heard then is as applicable to "ourselves" as to "our Posterity," (not "ourselves and other **persons**." ) If the unborn are not to be recognized as persons, then they must be recognized as "Posterity" for Fourteenth Amendment protection.

The United States Supreme Court, the Texas Supreme Court, and Texas legislation have held unborn children are "persons " for Fourteenth amendment due process and equal protection, and therefore legalized abortion by Texas Penal Code 19.06 is unconstitutional and defendant should not be denied the defense of unborn third persons, regardless of who the murderer is.

The Fifth Amendment provides "no person shall be ...deprived of life...without due process of law." As a fetus is a person, neither a state nor the federal government may allow anyone to take innocent life without due process of law. Assuming that the fetus is a human life, it has the right to representation to be heard on the question as to whether its life should be terminated.

A zygote (early fetus) is viable (able to live and grow), in contradistinction to the ovum and sperm which are not. Whether or not it can be ascertained at any point in time that it is human is an absurd question, since it possesses 46 chromosomes which identifies a human being, and assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable outside the womb does not negate the fact of life. It is no more dependent than the born child, and becomes the child if it is provided the same needs of the born child, which is a residence and nutrition.

Also the courts should take judicial notice the advance of science in making possible test tube babies, and transfer from one womb to another, all clear proof of the presence of life from biological beginning.

The terms “ensoulment”, “psych”, “free will”, and when they “manifest themselves”, are not relevant. We are concerned with Posterity, and it cannot be denied that Posterity includes all future generations, with the conceived having a presently protectable interest. Therefore the fetus is a life which may not be taken without due process of law, and a compelling, legitimate government interest.

#### D. THE “PERSONHOOD” OF THE HUMAN FETUS IS ESTABLISHED BY THE CONGRESS OF THE UNITED STATES BY DEFINITION OF THE WORD “PERSON” TO INCLUDE INDIVIDUALS.

If there is any term whose broad scope demands unconditional respect, it is the term “person.” For whoever is not a person lacks not only the privileges of citizenship, but even minimum human rights and is no better off than property, entirely subject to the whim of the owner and whatever regulations the state may impose. The Constitutional authority to determine who is a “person” for fourteenth amendment protection is the Congress of the United States, and the world authority to determine who is a “person” entitled to human rights protection is the United Nations.

Congress was given the constitutional authority under Section 5 of the Fourteenth Amendment to enforce by legislation the provisions of the amendment and has defined a “person” for fourteenth amendment protection in 1 United States Code 1, as an “individual”, and has no requirement of birth or any stage of development for inclusion as a “person” or an “individual” for fourteenth amendment inclusion: ‘. . .In determining the meaning of any Act of Congress, unless the context indicates otherwise. . . the words ‘person’ and ‘whoever’ include . . . individuals.’

Individuals are defined in Webster’s Third New International Dictionary (1981) as “. . .A single or particular being. . . a single human being. . . a particular person. . . product of a single fertilization. . . .”

As Chief Justice John Marshall stated in Marbury v. Madison 5 U.S. (1 Cranch) 137, 163 (1803), “The very essence of civil liberty certainly consists in the right of every individual (emphasis added) to claim the protection of the laws, whenever he receives an injury. . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”

Sox v. United States, 187 F. Supp. 465 (E.D. S.C. 1960). Sox was an “Action against United States under Federal Torts Claims Act for prenatal injuries allegedly

sustained when the automobile in which plaintiff's mother was a passenger was struck by United States Army automobile driven by a military policeman." The court awarded her \$260,000, with no discussion of prior case law, no reasoning for or against allowing actions, no discussion of the modern trend in the law or any controlling federal precedent...nothing! One can only assume that by 1960 the court believed a recovery for prenatal injuries under the Federal Tort Claims Act to be uncontroversial.)

Simmons v. Howard University (D.C. Cir. 323 F. Supp. 529 1971) The court was considering whether an action could be maintained on behalf of a stillborn child under the District of Columbia's wrongful death statute. In a memorandum a scant two paragraphs long, the court declared "The increasing weight of authority supports the proposition that a viable unborn child, which would have been born alive but for the negligence of defendant, is a 'person' within the meaning of the wrongful death statute." Thereby adding the District of Columbia to the fifteen state jurisdictions which allowed actions on behalf of stillborn children.

The Texas Penal Code 1.07(a) (38) ". . . 'person' means an individual, corporation, or association", and 1.07 (a)(26) ". . . 'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." The Texas Penal Code definition expresses the intention of Texans to include the unborn for full protection of every human being, but to express this intention without violating the Roe decision Texas Penal Code 19.06 was made as an exclusion to capital murder 19.03 (a) (8), and (b). Exclusion for abortion by the mother or her doctor by TPC 19.06 is unconstitutional because it denies Equal Protection by invidious class based legislation. Plyler v Doe 457 U.S. 202,213 (1982.), (illegal alien children are persons entitled to Texas education), and unborn individuals are protected by Congress as "persons' and "individuals" in 1 USC 1, and therefore Defendant should be allowed the defense of third persons

#### E. THE "PERSONHOOD" OF THE HUMAN FETUS IS ESTABLISHED IN THE UNITED NATIONS 1959 'DECLARATION ON THE RIGHTS OF THE CHILD.

The United Nations is the world authority to determine who is a "person" entitled to human rights protection in the United Nations. The United Nations has included the unborn human as a "person" for legal protection: "**Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.**" United Nations 1959 Declaration on the Rights of the Child.

"The Declaration is as solid a moral framework for children's right today as it was thirty years ago." United Nations 1989 Declaration on the Right of the Child. (Adopted unanimously by the United Nations General Assembly on 20 November, 1989.)

## F. THE “PERSONHOOD” OF THE HUMAN FETUS IS ESTABLISHED BY COURT DECISIONS THAT UNBORN FETUSES ARE “PERSONS” FOR INCLUSION IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In the U.S. Supreme Court’s case of Roe v. Wade, Justice Harry Blackmun claimed, “The word person, as used in the Fourteenth Amendment, does not include the unborn.” He came to this conclusion by asserting that “no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment, but conceded that if the “personhood” of the fetus “is established [the case for abortion], of course, collapses, for the fetus’ right to life would then be guaranteed by the ‘Fourteenth Amendment. Roe, 410 U.S. at 156-157.

A 1885 Supreme Court case clearly establishes the “personhood” of the fetus. The Supreme Court upheld the right to due process for preborn persons in the womb in McArthur v. Scott 113 US 340,440 (1885), holding that any court case is “null and void” unless all of the parties to the controversy are represented in court, because a person must have the opportunity to present their side of the story in court. Id.387,391.

Preborn children in the womb were cut out of a probated will without proper representation in court. The Supreme Court ruled in their favor, since their right to due process was violated: “A decree annulling the probate of a will is not merely irregular and erroneous but absolutely void, as against persons interested in the will and not parties to the decree, and as the parties these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under the will.” Id.404. Where a court fails to grant the fundamental right of representation to any party whose rights are being decided upon, that case is void for lack of due process. The Court also held that preborn persons in the womb can hold vested rights, not just rights “contingent upon live birth,”id.384, and therefore the class of preborn in the womb “Posterity” are included in the standard legal definition of a person “one (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties” (Merriam-Webster’s Collegiate Dictionary, 11<sup>th</sup> ed. The applicable Latin maxim is *coram no judice*, and this was the basis for the Court’s decision in McArthur v. Scott, 404. Since the Court denied a motion for a guardian ad litem to join in the arguments in Roe, Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *cert denied* 409 U.S. 817 (1972), so too should Roe v. Wade be considered null and void by this rule of law per McArthur v. Scott.

Neither abortion “survivor” children nor unborn children threatened and endangered by abortion were represented before the U.S. District Court or the U.S. Supreme Court in Roe. Abortion “survivor” children born in this country are U.S. citizens

(with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortion death or lack of care. Unborn children, with well recognized legal postures under the laws of the United States of America, Texas and other States, are killed outright by abortion. Abortion “survivors” and unborn children are persons or entities with legal personalities under the due process clause of the 5<sup>th</sup> Amendment to the U.S. Constitution. The Judgment’s of the U.S. District Court and the Supreme Court in Roe, rendered without any representation of such victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivation of life, liberty and property without due process of law, in violation of the 5<sup>th</sup> Amendment. Accordingly, such Judgments are unconstitutional and void as to them. McArthur v. Scott, 113 U.S, 340, 391-392, 404 (1885) (unborn children); Pennoyer v. Neff, 95 U.S.714,733-734 (1878) (U.S. citizens).

Neither the U.S. District Court, nor the Supreme Court had personal jurisdiction over such abortion “survivor” or unborn children in Roe. Yet each such category of children was affected vitally by those proceedings, and had a right to be before the Courts, therefore, were unconstitutional and void as to them. Ibid.

Moreover, this deficiency operated to divest the U.S. District Court and the Supreme Court of authority to pronounce judgment affecting them personally. Accordingly, the Judgment of such Courts, rendered without personal jurisdiction over the Infant Victims of abortion, are void as violative of fundamental principles of personal jurisdiction. The unborn children who were conceived and killed by abortion after Roe could not be affected jurisdictionally by Roe in their rights posture, yet they die from Roe. Id at 391,392, 404.

In McArthur v. Scott, the Supreme Court recognized the due process rights of preborn persons in the womb which is the essence of personhood, and is in keeping with the Supreme Court’s own historic understanding of the word “person.” In United States v. Palme, 14-17 U.S. 607, (1818), Chief Justice John Marshall stated, “The words ‘any person or persons,’ are broad enough to comprehend every human being.” Justice Stephen Field stated in Wong Wing v. United States, 163 U.S.228, 242 (1896), “The term ‘person’ is broad enough to include any and every human being within the jurisdiction of the republic...This has been decided so often that the point does not require argument.”

The hypocrisy in Roe is finally recognized in this: It is impossible to further the common good without acknowledging and defending the right to life, upon which all other inalienable rights of individuals are founded and from which they develop.

The Roe decision asserted “no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.” But there are several cases

cited herein and more that clearly hold unborn humans are protected by the Fourteenth Amendment, and that any decision denying due process and equal protection to the unborn is null and void. Is it not the duty of the trial and appellate courts to accept the stare decisis of the highest court protecting the right to life guaranteed in the Fifth and Fourteenth Amendment? That would be more relevant in this case, because the cases relied upon herein by the Defendant were unknown and not considered by the Supreme Court in Roe, and seven of the Justices agreed that if “personhood of the fetus is established, the case for abortion] of course collapses, for the fetus’ right to life would then be guaranteed by the Fourteenth Amendment.” How could any court hold that the “personhood” of the unborn human has not been established by the multitude of cited cases? Justice Stephen Field stated in Wong Wing v. United States, 163 U.S. 228, 242 (1896), “The term ‘person’ is broad enough to include any and every human being within the jurisdiction of the republic...This has been decided so often that the point does not require argument.”

In Steinberg v. Brown 321 F. Supp. 741 (N.D. Ohio, 1970) the court rejected a challenge to Ohio’s abortion laws, holding that the implied right to privacy must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law. The difference between this case and *Griswold* (overturned a ban on the use of contraceptives) is clearly apparent, for here there is an embryo of a fetus incapable of protecting itself.” *Id.* 745-46.

As the court in Steinberg explained, “a new life comes into being with the union of human egg and sperm cells,” *Id.* at 746, and “[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it,” *Id.* 746-47. As a legal matter, an absence of case support is irrelevant and there may well not be cases holding new-born infants or other classes of humans are persons which would not mean they are beyond the scope of the Fourteenth Amendment.

Nelson v. Galveston, 14 S.W. 1021, Supreme Court of Texas 1890 held in agreement with Lord Hardwicke, “that a child in the mother’s womb is a person in *rerum natura*, and that by rules of the civil and common law “she [the child] was to all intents and purposes a child. . . and is to be considered as living for all purposes.” The court ruled that a posthumous child may recover damages for the father’s death.

Gray v. State, 77 Tex Cr. R. 221 (1915), involves the review of Gray’s indictment for producing the abortion of Sadie Moore’s child. Though the indictment was tested to see if it complied with state statutes, the court examined the common law before doing so (and affirming the conviction) said most states held abortion can be criminally prosecuted any time after conception.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, Supreme Court of Texas, 1967 upheld Nelson v. Galveston above, that a viable infant born alive would have had a cause of action for prenatal injuries sustained in an automobile accident had the infant survived.

Wagner v. Finch, 413 F3d 267 Fifth Circuit (1969) held that a child of deceased father, born after the father's death is sufficiently in being to be capable of living with it's father at the time of his death, and the fact that the worker died before birth of the child already "in being" is no legal or equitable reason to prohibit child from social security benefits.

Raleigh Fitkin-Paul Morgan Memorial Hospital v Anderson 201 A.2d 537,538 (N.J. 1964) held that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge.

McArthur v. Scott's holding, and other cases following that holding of the procedural right to due process, is a right that is the fundamental law of the land, and a right without which all other rights would be unenforceable. If the rule of law means anything, any court would be justified under our Constitution in disregarding Roe and following McArthur v. Scott, and with the super abundance of other evidence of personhood of the unborn there is a legal and moral mandate to uphold the preborn human in the womb as a "person" under the Fifth and Fourteenth amendments of the United States Constitution.

G. THE "PERSONHOOD" OF THE HUMAN FETUS IS ESTABLISHED BY THE SUPREME COURT TEST FOR INCLUSION IN THE FOURTEENTH AMENDMENT AS: "LIVE, HUMAN AND HAVE THEIR BEING."

There is no doubt that citizens of hostile nations, children under eighteen, convicted, comatose or mentally disabled individuals are each a class of persons. This is so, not because members of each class can prove their inclusion under the fourteenth amendment, but because they are included by virtue of their humanity. They are humans, live, and have their being. Levi v. Louisiana, 391 U.S. 68, 70 (1968) (discussing illegitimate children). The Court held illegitimate children are clearly 'persons' because they are "human, live and have their being." These are all biological qualifications that the Court acknowledged and accepted that the illegitimate children possessed without any facts presented or questions asked by the Court. Why did the Levi Court hold the illegitimate children were clearly 'persons'? No proof of any kind was required. It was self evident truth to the Levi Court.

In what way are unborn children not "human, live and have their being"? There is no reference to the Levi case in Roe , but Levi has not been reversed, and therefore

must be presumed to be the Supreme Court test for “personhood.” The Levi Court did not refer to any evidence presented for the children, so it is apparent they accepted as judicial knowledge that the children were “human beings, live, and had their being” and the same judicial knowledge should apply to all classes of human beings including the class of unborn humans.

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

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

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

But Defendant does not rely only on the purported invalidity of Roe for the defense of third persons under the TPC 9.33 Defense of Third Person:

A person is justified in using force or deadly force against another to protect a third person if: (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Defendant is entitled to the defense of third persons based on Texas Statutory definitions of “Person” 1.07(a)(38) “. . .an individual, corporation or , association; “1.07 (a)(26) “Individual” “means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” And 1.07 (a)(48) “unlawful” means

criminal or tortuous or both and includes what would be criminal or tortuous but for a defense not amounting to justification or privilege.”

Defendant requests evidence be allowed by medical experts to show evidence of genetic proof that the unborn fetus is a human, and that he or she is differentiated as a single “individual” human being, possessing all of it’s individual characteristics as the same human being it is throughout its life. It will be shown that genetic proof is approved in many other courts for relevant proof for the identity of persons. Such evidence is relevant to Defendant’s defense because it meets the United States Supreme Court test of personhood as established in Levy v. Louisiana, 391 U.S. 71, 72, (1968), which is that the entity be “human”, “live” , and “have their being”, and that the test of personhood is a “biologic” test. Glon v. American Guarantee and Liability Inc. Co. 391 U.S. 73 (1968), and that any entity possessing those factors are clearly “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment. This proof of genetic knowledge fulfills the test of the Supreme Court in Levi v. Louisiana, supra for personhood and fulfills the requirement made by Roe, 156, that if pre born human is a person, abortion is unlawful, and therefore TPC 19.06 which exempts mothers and their abortionist from capital murder TPC 19.03 (a)(8) and (b) is unconstitutional. “The fourteenth amendment. . .undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty. . . but that equal protection and security should be given to all under like circumstances, that they should have like access to the courts of the country for the protection of their persons. . .that no impediments should be interposed to the pursuit of any one, except as applied to the same pursuit by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same condition.” Barbier v. Connoly 113 U.S. 27,31 (1884).

The Defendant’s genetic evidence further meets the test for the definition of “person” by the U.S. Congress, who alone has the power to enforce the Fourteenth Amendment of the Constitution in Section 5: “The Congress shall have he power to enforce by appropriate legislation, the provisions of this article.”, and Congress has defined “persons” in 1 USC 1:

In determining the meaning of any Act of Congress, unless the contest indicates otherwise. . . the words “person” and “whoever” include . . . individuals.

The Defendant’s genetic evidence meets the test of the United States Supreme Court, and Congress, and the Constitutional authority to determine “personhood” and should entitle him to the defense of protecting unborn humans as “third persons” from “unlawful force”.

H. THE SUPREME COURT HAS ESTABLISHED THE TERM “PERSON” SO BROADLY TO INCLUDE LEGAL FICTIONS THAT IT IS INVIDIOUS DISCRIMINATION TO EXCLUDE INNOCENT HELPLESS UNBORN HUMAN BEINGS.

The Supreme Court has held that the fictitious entity of a corporation is a “person” for Fourteenth Amendment equal protection, Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886) and for due process protection in Minneapolis and St. Louis Railway Co. Beckwith, 129 U.S. 26 (1889). These cases stand for nothing if they do not stand for the principle that the word “person” in the fourteenth amendment is not to be construed in the strictest or narrowest sense. There is no reference in the constitution that fictional legal entities should be included as persons for constitutional protection, whereas unborn humans are specifically referred to in the Preamble of the Constitution, “. . . (to) secure the blessings of liberty to ourselves and our posterity...” and presently existing unborn humans are unquestionably living posterity. There can be no pretense of consistency unless and until this Court holds that a corporation is not a person or that an unborn human child is.

The denial of right to life for unborn children does not support such categorical denial of constitutional protection to such children. As the Court emphasized in Brown v. Board of Education, 349 U.S. 294, 300 (1955) (Brown 11), “the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.” If the state in fact is denying due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class.

I. THE “PERSONHOOD” OF THE HUMAN FETUS IS ESTABLISHED BY FEDERAL STATUTE TITLE 18 U.S.C.A. SECTION 3596: “A SENTENCE OF DEATH SHALL NOT BE CARRIED OUT UPON A WOMAN WHILE SHE IS PREGNANT.”

This means that any federal execution carried out in Texas, or any state, would require a suspension of the sentence on a pregnant woman until she delivers the child regardless of state law. And, the Supreme Court has already determined that these types of procedures are to protect the life of the unborn child. “The writ de ventre inspiciendo, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.” Union Pacific R. Co. v Botsford, 141 U.S. 250,253 (1891).

### III

THERE IS NO JUSTIFICATON FOR EXCLUDING FROM THE TERM “PERSON” THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In Roe v Wade, 113,158, a majority of the Court read into the term “person” in the fourteenth amendment an exception for unborn children. There is no valid justification for the creation of such an exception. Roe v. Wade gave no valid basis for creating an exception for unborn children, and none of their arguments withstands analysis.

#### A. ROE V. WADE GAVE NO VALID BASIS FOR CREATING AN EXCEPTION FOR UNBORN CHILDREN.

The Roe Court made several arguments to support its conclusion that the word “person” does not include the unborn. None of these arguments withstands analysis.

##### 1. ALLEGED ABSENCE OF PRECEDENT

First, the Court observed that “no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment” 410 U.S. at 157. This observation is incorrect as a matter of fact, which has been demonstrated herein. However, as a legal matter, an absence of case support is irrelevant, and there may well not be cases holding new-born infants or other classes of humans are persons which would not mean they are beyond the scope of the Fourteenth Amendment.

##### 2. POSTNATAL APPLICATION OF OTHER CONSTITUTUTIONAL PROVISIONS.

The Roe Court noted that the use of the word person in “nearly all” other parts of the Constitution “is such that it was application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application.” 410 U.S. at 157 (footnote omitted). Such exclusions obviously do not imply that those excluded (e.f. with respect to Representatives, those under age twenty –five are not persons.) Obviously Constitutional postnatal applications are not applied to corporations, for they can never be counted in any census, or be a representative, senator or president. The unborn human is not a fictional entity as a corporation, requiring an artificial extension of the meaning of “person”, but are real creatures of flesh and blood, whose brains are working, whose hearts are pumping, and whose legs are kicking. Granting constitutional protections to legal fictions and denying such protections to unborn human beings is invidious discrimination.

##### 3. THE ARGUMENT OF APPARENT INCONSISTENCY OF STATE ANTI –ABORTION LAWS WITH PERSONHOOD OF UNBORN.

The Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

[I]f the fetus is a person who is not to be deprived of life without due process of law, ...does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command?...

...If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for an abortion and first degree murder] 410 at 157n.54.

Here the Roe Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children. A state, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons. This fundamental obligation does not disappear, however, simply because a state fails to comply with it. In Brown v. Board of Education, 347 483 (1954), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented constitutional violation. Similarly the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in Brown v. Board of Education 349 U.S. 294, 300 (1955) (Brown II) "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state in fact is denying due process of equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class. To hold otherwise would be to deny the possibility of unconstitutional action by state and to turn civil rights litigation upside down.

#### 4. ALLEGED LAXITY OF NINETEENTH CENTURY ABORTION LAWS.

The Court cited its "observation " that "throughout the major portion of the 19<sup>th</sup> century prevailing legal abortion practices were far freer" than in 1973, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the Fourteenth Amendment did not regard unborn children as human persons.

On this point the Roe opinion refutes itself. The Fourteenth Amendment was adopted in 1868, precisely at the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. See 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19<sup>th</sup> century") *Id* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period") see also *Id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and anti-abortion laws at the time of the adoption of the fourteenth amendment.

## B. NO OTHER BASIS EXISTS FOR CREATING AN EXCEPTION FOR UNBORN CHILDREN.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term “person” as used in the fourteenth amendment, and no valid justification appears from other sources. On the contrary, history, science, logic, law and justice all reject such arbitrary limitation on personhood as birth or viability.

### 1. THE FRAMERS OF THE FOURTEENTH AMENDMENT DID NOT DISTINGUISH BETWEEN “HUMAN BEINGS” AND “PERSONS”

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they were human beings. 410 U.S. at 159 (“We need not resolve the difficult question of when life begins”) Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment. Examples are legion to demonstrate the basic assumption of the framers and their contemporaries that “in the eyes of the Constitution, every human being within its sphere...from the President to the slave, is a person.” Cong. Globe, 37<sup>th</sup> Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).

There is no basis from the framers of the fourteenth amendment for the conclusion that a class of human beings might be excluded from the persons protected under the Fourteenth Amendment. As forcefully stated by Representative Joshua R. Giddings:

Our fathers, recognizing God as the author of human life, proclaimed it a “self-evident” truth that every human being holds from the Creator an inalienable right to live...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that all men without respect to complexion or condition hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders? Cong. Globe, 35<sup>th</sup> Cong., 1<sup>st</sup> Sess. App 65-66 (1858).

### 2. SCIENCE REJECTS THE EXCLUSION OF UNBORN CHILDREN FROM THE CLASS OF HUMAN BEINGS

Science does not purport to identify the value society should place upon human life, but shows indisputably that each individual human organism begins life at the moment of fertilization. Thus science offers no valid basis for excluding prenatal human life from the category of “persons” protected under the fourteenth amendment.

However one answers the metaphysical or theological question whether the fetus is a “human being” or the legal question whether it is “person” as that term is used in the Constitution, one must at least recognize first, that the fetus is an entity that

bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Thornburgh v. American College of Obstets. & Gyne., 476 U.S. 7474, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

The facts stated by Justice White are scientifically indisputable, and although science cannot identify a spiritual soul or assign a moral value to a given creature, science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term “person.”

### 3. LOGIC REPUDIATES THE CREATION OF AN EXCEPTION FOR UNBORN CHILDREN IN THE TERM “PERSON”.

According to Roe v. Wade, unborn children are non-persons, and abortion of such children is a constitutional right. But it is plain absurd to draw such an indefinite a border as birth (or, for that matter, viability) between what is constitutional liberty and what is homicide. The point of detachment from the mother—whether by normal birth, induced delivery, or abortion—fails as a logical point for creating an exception to personhood, because for a considerable period before birth, the unborn child is viable, and thus capable of surviving premature delivery. The children residing in the material womb is essentially indistinguishable from the child of identical age who has been born prematurely. The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, “scheduled” deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within the womb. Birth changes where the person is, not what the person is. Viability is no better concept for drawing constitutional lines because the unborn is the same biologically and genetically before as after viability. Justice White, in his dissent in Thornburgh, elaborated upon this point with regard to state interest in protecting human life:

The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State’s interest is in the fetus as an entity in itself, and the character of the entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State’s interests, if compelling after viability is equally compelling before viability. 478 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted).

The same rationale applies to constitutional personhood, i.e. the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

#### 4. LEGAL CONSISTENCY IS NOT SERVED BY THE EXCLUSION OF UNBORN CHILDREN FROM THE PROTECTION OF THE FOURTEENTH MENDMENT.

The integrity of the law is not served, but rather is harmed by the arbitrary exclusion of unborn children from constitutional protection. The history of legal developments of the last century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. In 2003 the Texas Legislature redefined the term "Individual" in Penal code 1.07 (26) "means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth" and "Person" in Penal Code (38) "Means an individual, corporation or association." As Chief Justice John Marshall stated in Marbury v. Madison, 5 U.S.137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every **individual** to claim the protection of the laws, whenever he receives an injury. . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." The Congress in 1 U.S.C. 1 and the Texas Legislature and Chief Justice John Marshall have defined that a "person" and "individual" means every human being who is alive.

The exception of legalized abortion to the fourteenth amendment represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law. Courts recognize the right of a live child to recover for prenatal injuries, even if inflicted prior to viability, and allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. A majority of states now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb.

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. Roe embraced the very same distinctions that the law of torts (and to a lesser extent, crime) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife' child may be convicted of homicide, Texas Penal Code 19.03 a (8), but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion clinic may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to

compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from non-viability, or prematurity from pregnancy simply cannot support the differences between constitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. It is beyond reason that an unborn child should have a constitutional right to be protected from injuries but have no right to life. If the term "person" in the fourteenth amendment can be construed broadly enough to admit a nonhuman fictional entity such as a corporation into its protection, it also can and should be read to include flesh and blood unborn humans. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fourteenth amendment.

##### 5. JUSTICE DEMANDS THE INCLUSION OF UNBORN CHILDREN WITHIN THE TERM "PERSON".

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has every right. But no one except a person has any rights. Thus Roe v. Wade asked the wrong question when it queried whether unborn children were "recognized in the law a persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of humans rights: "the right to survive on a basis of equality with human beings generally," Rosen v. Louisiana State Bd. Of Medical Examiners, 318 F. Supp. 1217, 1226 (E.D., La. 1970), vacated 412 U.S. 902 (1973). The law prior to Roe had generally accorded that much recognition, and more to the child in the womb. And in so doing, the laws recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference, then relates to the inherent dignity of man. Personhood is what characterizes the collection of diverse entities that together compose the human race. As Justice Brennan put it in another contest,

At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty).

If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent helpless baby growing in the womb. The answer to the fundamental moral issue, moreover, is clear: society “must treat its members with respect for their intrinsic worth as human beings,” for “if the deliberate extinguishment of human life has an effect at all, it more likely tends to lower our respect for life and brutalize our values.” *Id.* At 270, 303 (Brennan, J. concurring).

#### IV.

STATE PROTECTION OF UNBORN HUMANS AS “PERSONS” IN THE FOURTEENTH AMENDMENT IS SANCTIONED BY COMMON LAW, THE FEDERAL TENTH AMENDMENT, AND THE 1845 TEXAS ANNEXATION ACCORD.

The second sentence of Section 1 of the Fourteenth Amendment reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Section 5 of the Fourteenth Amendment provides, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

The Supreme Court of course maintains that the Fourteenth Amendment empowers congress to correct state action that is prohibited under the amendment, but not so with private acts not tied to the state. Per the Court in the Civil Rights Cases, 109 U.S. 3, 11 (1883): “It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject- matter of the amendment.” The Court went on to explain:

It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. *Id.*

Congress may of course enact legislation corrective of state action, “To adopt appropriate legislation for correcting the effects of such prohibited state law and state

acts, and thus to render them effectually null, void, and innocuous.” *Id.* Such legislation could be enacted only with regards to the particular state laws or state action which are adverse to the rights of citizens under the amendment. But again, the reach of congress only extends so far:

Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. *Id.* at 13.

States have always maintained exclusive jurisdiction over their municipal law; law concerning the “rights of life, liberty, and property (which include all civil rights that men have).” *Id.* Accordingly, state law is the subject of the congressional regulation established by the Fourteenth Amendment. So when Blackmun stated in *Roe* that the test of personhood was whether “the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment,” logically the phrase “language and meaning of the Fourteenth Amendment” refers to the body of state municipal law, the very subject of the amendment. As congress cannot enact a code of municipal law of state law under the Fourteenth Amendment, the phrase “language and meaning of the Fourteenth Amendment” cannot be referring to law enacted under federal jurisdiction.

With this in mind, it is of great importance that the text of the Equal Protection Clause refers to “*any* person within *its* jurisdiction”; “its” referring to the state. The Supreme Court has consistently held that “the Fourteenth Amendment was designed to afford its protection to *all* within the boundaries of a State,”<sup>1</sup> as the Court confirmed in *Plyler v. Doe*, 45 U.S.202,212 (1982). This is true of both equal protection and due process. Furthermore, states are prohibited by the Court from using the phrase “within its jurisdiction” to exclude any “subclasses of persons” from the protective umbrella of the Fourteenth Amendment.<sup>2</sup> Ergo, “a ‘person’ within the language and meaning of the Fourteenth Amendment” necessarily refers to human beings within the boundaries of a state, with the state law pertaining to that person being the subject of the amendment’s regulation.

Texas state municipal law (Penal Code 1.07 (38) “‘Person’ means an individual, corporation, or association.” Penal Code 1.07 (26) “‘Individual’ means a human being who is alive, including an unborn child at every state of gestation from fertilization until birth.” Texas law defines unborn children to be persons within Texas jurisdiction. All one need do to discover an enormous wealth of case law holding unborn children to be natural persons is to read the cases and articles Blackmun cited supposedly to support

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<sup>1</sup> *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (emphasis added).

<sup>2</sup> *Ibid.* at 213.

his opinion in *Roe*, particularly those from the state of Texas. An early example is the case *Nelson v. Galveston H. & S. A. Ry. Co.*,<sup>3</sup> an action by a posthumous child seeking recovery for his father's death under a wrongful death statute. Gustave Nelson was born five and a half months after his father's death and his mother, as his next friend, brought suit on his behalf under the statute. The defendant claimed "that at the time of the death of the plaintiff's father, on the 25th April, 1882, the plaintiff was not in being, was unborn and unknown, and an unheard-of quantity, having no legal existence, and no right of action for the injuries complained of."<sup>4</sup> The court rejected this argument, recounting "Lord Hardwicke, discussing the same question [in *Wallis v. Hodson* (1740)], held that a child in the mother's womb is a person in *rerum natura*, and that by the rules of the civil and common law 'she [the child] was, to all intents and purposes, a child, as if born in her father's life-time.'"<sup>5</sup>

The Supreme Court of Texas then made note of the "[m]any old English cases" that held unborn children were understood to be included in the term "children born" under probate and property law. Using these principles, the court reasoned:

Had the expression "surviving children" been used in a will in the same connection as in the statute, and had it been for the benefit of the posthumous child to take, under the authorities cited it would be held to apply to him.... We conclude, therefore, that it was manifestly the purpose of the legislature to give the right of action, in a case like the present, to all of the surviving children of the deceased. We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was *in being*, and one of his surviving children.<sup>6</sup>

*Nelson v. Galveston* employed two phrases to denote the unborn child as a natural person: that the child was "in being," and "a person in *rerum natura*."<sup>7</sup> Black's Law Dictionary, defines *in rerum natura* as "In the nature of things; in the realm of actuality; in existence."<sup>8</sup> As the Supreme Court of Massachusetts stated in *Hall v. Hancock*, "Lord Hardwicke says, in *Wallis v. Hodson*... that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in his father's lifetime."<sup>9</sup>

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<sup>3</sup> *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 761, 14 S.W. 1021 (1890) (cited in W. Prosser, *The Law of Torts*, 336 n.20 (4th ed.), see *Roe*, 410 U.S. at 161-62, n.63, n.64, n.65).

<sup>4</sup> *Nelson v. Galveston*, 14 S.W. at 1022.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 1023 (emphasis added).

<sup>7</sup> In *Leal v. C. C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820 (Texas 1967), the Supreme Court of Texas granted a right of action under the state's wrongful death statute, on behalf of a viable child, six to seven months of gestation, as a "person," who suffered injuries in a motor vehicle accident, was born prematurely, and died two days later.

<sup>8</sup> *Black's Law Dictionary*, 714 (5th ed. 1979).

<sup>9</sup> *Joseph Hall, Judge of Probate &c. v. John Hancock*, 32 Mass. 255, 258; 1834 Mass. LEXIS 13, 6; 15 Pick. 255, 258 (1834).

The common law, of England and as adapted by the states, has always held unborn children to be natural persons for the purposes of property law, using the phrases “in being” or “in esse.” An example of this is the Rule Against Perpetuities, which disallows transfers of property that do not vest within the life of a natural person “in being,” plus twenty-one years afterwards. With regards to family transfers, the Rule essentially allows transfers to children and to grandchildren, as grandchildren are necessarily conceived within the life of the child of the person making the transfer. Accordingly, the Rule recognizes children in the womb, “*en ventre sa mere*,” as natural persons. The U.S. Supreme Court recited the Rule approvingly in Scott (1884):

To come within the rule of the common law against perpetuities, the McArthur v. Scott estate, legal or equitable, granted or devised, must be on which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother’s womb as in being) and twenty-one years afterwards.<sup>10</sup>

One article Blackmun referred to in Roe makes this bold declaration, “The state of the law in American courts is fairly well summed up in In re Holthausen’s Will, where a New York court states that: ‘It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is ‘born’ and ‘alive’ for all purposes for his benefit.’”<sup>11</sup> The common law Latin phrase for this concept is *posthumus pro nato habetur*, meaning, “A posthumous child is regarded as born-before the death the father.”<sup>12</sup> Again from Hall v. Hancock:

[A] child is to be considered *in esse* at a period commencing nine months previously to its birth, and where there is no evidence to rebut the presumption, it is conclusive. We are also of the opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.<sup>13</sup>

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<sup>10</sup> McArthur v. Scott, 113 U.S. 340, 381-82 (1884) (emphasis added). The Rule was also cited with approval in Hopkins v. Grimshaw, 165 U.S. 342, 355 (1897).

<sup>11</sup> Louisell, “Abortion, The Practice of Medicine and the Due Process of Law,” 16 *U. C. L. A. L. Rev.* 233, 236 (1969), citing In re Holthausen’s Will, 175 Misc. 1022, 26 N.Y.S.2d 140 (Sur. Ct. 1941), a decision which in turn contains numerous case citations.

<sup>12</sup> *Ballentine’s Law Dictionary: Latin Phrases-Maxims*, 379 (1916), *Bouvier’s Law Dictionary*, 2154 (8th ed. 1914). See Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918).

<sup>13</sup> Hall v. Hancock, 32 Mass. 255, 257-58; 1834 Mass. LEXIS 13, 5; 15 Pick. 255, 257-58 (1834).

Yet, this last quote raises a key question: what about the quickening standard and the criminal law? Let's look at another Texas case, this one cited directly by Blackmun in Roe, Gray v. State. This case involved the review of M. E. Gray's indictment under a Texas statute for producing the abortion of a child. Though the indictment was tested to see if it complied with state statutes, and the court examined the common law before doing so (and affirming the conviction):

A careful review of the authorities indicates that at [English] common law abortion could not be produced upon a woman, unless and until the child was "quick" within her womb. The courts of our various States differ as to this, most of them holding that an abortion can be produced at any time after conception and before the woman was "quick" with child.<sup>14</sup>

First, let's not let one subtlety escape our eye. Note how the word "abortion" is used. It is used as a name for a crime, as one would use murder, rape, assault, robbery, etc. This was a common use of "abortion," even the Supreme Court utilized the word "abortion" in this fashion.<sup>15</sup>

Second, we see that it was alleged that under English common law terminating a pregnancy was not criminal prior to quickening (cases such as Rex v. Eleanor Beare,<sup>16</sup> holding abortion to be criminal prior to quickening, notwithstanding). But, after quickening—after the unborn child starts to move—it was criminal under the English common law.

Third, the Court of Criminal Appeals of Texas asserts that most of the state courts did not follow the quickening rule and held abortion to be criminal "at any time after conception." Even Blackmun's *Roe* opinion notes two state cases that held abortion to be criminal post-conception rather than post-quickening.<sup>17</sup> Obviously, the states were free to change the English common law as they saw fit. After all, the states won the War of Independence and earned their sovereignty on the battlefield.<sup>18</sup> So too, the states were free to replace the common law in part or completely, and most of them did so with regards to abortion, holding it to be criminal at any time after conception as Blackmun noted in footnote 2 of Roe.

<sup>14</sup> *Gray v. State*, 77 Tex. Cr. R. 221, 223-24 (1915) (see 410 U.S. at 136 n.27).

<sup>15</sup> *U.S. v. Holte*, 236 U.S. 140, 145 (1915).

<sup>16</sup> See <http://www.abortionessay.com/files/beare.html> (last visited April 15, 2009); Gregory J. Roden, "Roe's Abortion Mythology," 31 *Human Life Review*, no. 4, 65 (Fall 2005).

<sup>17</sup> 410 U.S. at 136 n.27: "*Contra, Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *State v. Slagle*, 83 N.C. 630, 632 (1880)."

<sup>18</sup> Yet, even before the War of Independence, the colonies held even pre-quickening abortions to be criminal. J. Dellapenna, *Dispelling the Myths of Abortion History*, 220 n.283 (Carolina Academic Press 2006) (citing *Commonwealth v. Lambrozo*, 53 *Md. Archives* 387-91 (1663); *Commonwealth v. Brooks*, 10 *Md. Archives* 464-65, 486-88 (1656)).

Yet, as the states have sole jurisdiction over the criminal law,<sup>19</sup> how did Blackmun justify overturning these laws in Roe? Blackmun imposed a contrived understanding of the English common law upon the states. Blackmun posited a theory under which abortion, even after quickening, was not criminal under the English common law. Blackmun derived this theory from the alleged scholarship of NARAL's counsel, Cyril Means, and NARAL's founder, Lawrence Lader. Blackmun then fixed his theory of the English common law upon the states, even though all the state case law he cited held abortion to be criminal at least after quickening.<sup>20</sup> As Blackmun announced in Roe: "In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law."<sup>21</sup> Blackmun concluded, "[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus."<sup>22</sup>

This is perhaps the most radical constitutional deviation contained in Roe. As the Court had always maintained, "No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies."<sup>23</sup> And, as the states are free to change or reject the common law,<sup>24</sup> the Supreme Court defers to the states for its interpretation of its law. The Supreme Court has always rejected the idea that the English common law was to be fixed upon the states like a "straight jacket."<sup>25</sup> One year before the Roe opinion, the Court reaffirmed this rule, "This construction of state law is, of course, binding on us."<sup>26</sup> As the states have sole jurisdiction over their municipal law, and they were and are free to adopt, interpret, amend, or dismiss the English common law.

In deference to state municipal law, the Supreme Court upheld the rights of unborn children in two cases prior to Roe. In McArthur v. Scott, the Court upheld the

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<sup>19</sup> See *United States v. Morrison*, 529 U. S. 598 (2000) (Congress may not regulate noneconomic, violent intrastate crime); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) ("Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but no general right to punish murder committed within any of the States.").

<sup>20</sup> *Roe*, 410 U.S. at 135 n.27.

<sup>21</sup> *Ibid.* at 138.

<sup>22</sup> *Ibid.* at 136.

<sup>23</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

<sup>24</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65-68 (1996) (Justice Souter, with whom Justice Ginsburg and Justice Breyer joined, dissenting) ("Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. The New Jersey Constitution of 1776, for instance, provided that 'the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law.' Just as the early state governments did not leave reception of the common law to implication, then, neither did they receive it as law immune to legislative alteration.")

<sup>25</sup> *Twining v. State of New Jersey*, 211 U.S. 78, 101 (1908).

<sup>26</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972).

property rights of unborn persons acquired by inheritance under Ohio law.<sup>27</sup> And, in Weber v. Aetna Casualty & Surety Co., the Court upheld an unborn person's rights to Louisiana workmen's compensation benefits accruing at the death of his father in a Fourteenth Amendment Equal Protection case.<sup>28</sup> Likewise, the federal courts have routinely upheld the rights of unborn persons to Social Security Child's Survivor Insurance benefits. In another case from the state of Texas, Wagner v. Finch, the Fifth Circuit Court of Appeals reversed a Northern District court of Texas decision that a posthumous illegitimate child, conceived shortly before her father's death, was not the "child" of the "insured individual as that term is defined by the Social Security Act." In its reversal, the Court of Appeals declared, "[W]e agree that the illegitimate child of a deceased father, conceived before, but born after, the father's death, is sufficiently 'in being' to be capable of 'living with' the father at the time of his death."<sup>29</sup>

Moreover, there are some limited jurisdictional instances wherein the federal government has the ability to enact municipal laws, such as in the District of Columbia. Here too the federal law has mirrored state law in recognizing the rights of unborn children as persons. The federal courts have held unborn children to be persons for recovery due to prenatal torts in the District of Columbia,<sup>30</sup> under the District of Columbia's wrongful death statute,<sup>31</sup> and for prenatal injuries under the Federal Torts Claims Act.<sup>32</sup>

In all of these Supreme Court and federal cases, the courts have fulfilled their duty to protect the vested rights of unborn persons. As Chief Justice John Marshall stated in Marbury v. Madison: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."<sup>33</sup> On the other hand, where a court fails to grant the fundamental right of representation to any party whose rights are being decided upon, that case is void for lack of due process. The applicable Latin maxim is *coram non iudice*, and this was the basis for the Court's decision in McArthur v. Scott.<sup>34</sup> Since the Court denied a motion for a guardian

<sup>27</sup> McArthur v. Scott, 113 U.S. 340 (1884).

<sup>28</sup> Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) ("We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child, which the Louisiana statutes fail to do.").

<sup>29</sup> Wagner v. Finch, 413 F.2d 267 (5th Cir. 1969).

<sup>30</sup> Bonbrest v. Kotz, 65 F. Supp. 138 (1946).

<sup>31</sup> Simmons v. Howard University, 323 F. Supp. 529 (1971).

<sup>32</sup> Sox v. United States, 187 F. Supp. 465 (1960).

<sup>33</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>34</sup> McArthur v. Scott, 113 U.S. 340, 404 (1884) ("[A] decree annulling the probate of a will is not merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree, and as these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under

ad litem to join in the arguments in *Roe*,<sup>35</sup> so too should *Roe v. Wade* be considered null and void by this rule of law per *McArthur v. Scott*.

Yet, Blackmun summarized his disingenuous examination of personhood under municipal law with this, “In short, the unborn have never been recognized in the law as persons in the whole sense.”<sup>36</sup> (Emphasis added). The phrase “persons in the whole sense” was never used by the Court before *Roe*.<sup>37</sup> Blackmun did not offer an explanation for the term nor did he provide any citations to support the use of the phrase.<sup>38</sup> It can only mean he created a subclass of persons to which the Fourteenth Amendment does not apply. By doing so, he “undermined the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.”<sup>39</sup>

In *McArthur v. Scott*, the Court recognized the due process rights of preborn persons. Personhood of preborn persons naturally follows from them being the holders of such rights. Duties can also be shown to be owed to unborn children. A standard legal definition of the word “person” can be found in *Black’s Law Dictionary*, from the version in print at the time *Roe* was decided: “The person is the legal subject or substance of which the rights and duties are attributes. An individual human being considered as having such attributes is what lawyers call a *natural* person....” *Gray, Nature and Sources of Law*.<sup>40</sup> *McArthur v. Scott* and other property law cases illustrate that preborn children were indeed the holders of *rights*. If unborn children could be the holders of rights, are there duties owed to them as well?

To answer that, we need to examine exactly how rights and duties work together as legal concepts. Rights are essentially the human interests that are entitled to societal protection, and duties are the obligations of other persons to forbear conduct harmful to those rights. This concept of rights and duties are discussed in insightful detail in the legal classic *Nature and Sources of Law* by John Chipman Gray, cited in the above quote from *Black’s Law Dictionary* on “person.” John Chipman Gray was a renowned professor of law at Harvard University, teaching there from 1869 to 1913.

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the will.”).

<sup>35</sup> *Doe v. Scott*, 321 F. Supp. 1385 , 1387(N.D. Ill. 1971), *cert. denied* 409 U.S. 817 (1972).

<sup>36</sup> 410 U.S. at 162.

<sup>37</sup> From a case cited elsewhere by Blackmun, the Court of Appeals of New York stated, “But unborn children have never been recognized as persons in the law in the whole sense.” *Byrn v. New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972). The only citation the Court of Appeals used to justify this conclusion was an article by NARAL’s counsel, Cyril Means. Means, “The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,” 17 *N.Y.L.F.* 335 (1971).

<sup>38</sup> And after *Roe*, the only time it was used at all was when Justice Stevens quoted from *Roe* in his separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).

<sup>39</sup> *Plyler v. Doe*, 457 U.S. 202, 213.

<sup>40</sup> BLACK’S LAW DICTIONARY 1300 (4th ed. 1951).

And, coincidentally, he was the half-brother to Justice Horace Gray who wrote the McArthur v. Scott opinion.

In his book, Professor Gray explained that the very purpose of human society and government is the protection of human interests, “Human intercourse in all stages of civilization above the lowest condition of savagery (if even that be an exception) assumes that there is a difference between right and wrong, and that men ought to do right and to refrain from doing wrong.” An important aim of society then is to protect individuals and their rights “to an extent to which they could not protect themselves.” Society is thus empowered to compel individuals to act in observation of another person’s rights. Gray then concludes, “The full definition of a man’s legal right is this: That power which he has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons.”

Duty owed to another person plays a key role in tort law, which concerns wrongful or negligent acts between private citizens. If one person violates a duty of care towards another, and some harm comes of it, then they could be held liable in a lawsuit. At the time Roe was decided, nearly all states recognized a legal duty of care to refrain from harmful conduct to a preborn child. If that child was harmed in the womb, a lawsuit could be brought on the child’s behalf after it was born. All of these states recognized that the fetus was a legal entity, a person, separate from the mother. For example, the Pennsylvania Supreme Court in Sinkler v. Kneale (1960) allowed recovery for injuries suffered to a child in the first month of pregnancy, and said “the foetus is regarded as having existence as a separate creature from the moment of conception.”<sup>41</sup> And William Prosser, in an article cited by Blackmun, stated that all legal writers had maintained “that the unborn child in the path of an automobile is as much a person in the street as the mother” and urged “that recovery should be allowed.”<sup>42</sup>

But, all of these cases were concerned with prenatal injuries for which the child survived until birth. What about in those situations where the injury was so severe that death occurred in the womb? In those cases the child is stillborn, i.e. the child is never born alive, and so the question of whether or not the unborn child was a “person” in the womb is particularly crucial to the success of the lawsuit.

Blackmun understood this in Roe, and that is why he wrote: “In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents’ interest and

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<sup>41</sup> 401 Pa.267 (1960)

<sup>42</sup> Prosser 4th ed. 336.

is thus consistent with the view that the fetus, at most, represents only the potentiality of life.”<sup>43</sup>

Here, Blackmun seems to have successfully finessed the issue. He alleges that although “some states” allow recovery for stillborn children, the legal community opposes this new development in the law. Going further out the limb, Blackmun then assures us that when recoveries are allowed, it is the parents’ personal loss that is being compensated. Blackmun even cites articles which supposedly support this claim. Yet, even a casual examination of the articles Blackmun cites disprove so clearly his claims that the only reasonable conclusion is that Blackmun made an intentional misstatement of the law in this crucial area.

First of all, Blackmun’s statement that “some states allow recovery for stillborn children” is disingenuous. The majority of states that had considered the question had found for recovery. This is an undeniable fact looking at two federal cases from the articles Blackmun cited, Wendt v. Lillo (D.C. Iowa 1960)<sup>44</sup> and Gullborg v. Rizzo (3rd Cir. 1964).<sup>45</sup> Federal courts must first look to state law for guidance in making their decisions. In both cases, the states in question, Iowa and Pennsylvania, had not yet considered and made a decision. So, the federal court in each case used a simple majority rule standard: they counted those states that had held unborn children to be persons in these types of cases and those that had not, and found the majority of states, as early as 1960, had allowed recovery for the estates of the stillborn child.

Secondly, Blackmun’s claim that permitting actions on behalf of a stillborn child was “generally opposed by the commentators” is erroneous because a number of the cases permitting such actions cite legal articles in support of their holdings. Additionally, the very articles by William J. Maledon and William Prosser that Blackmun cited to support this claim are not opposed to permitting actions. We have already read of Prosser’s general opinion on prenatal torts. And Maledon specifically supports recoveries on behalf of stillborn children, stating that it was “inconsistent” to allow recoveries for injuries to children born alive while denying them when the injuries are so severe as to cause death in the womb.<sup>46</sup>

Lastly, the idea that actions permitting recovery on behalf of a stillborn child is a vindication of “the parents’ interest” is specifically refuted by an article Blackmun cited in the legal reference books *ALR*. The article does allow that “personal injuries resulting in miscarriage” are actionable. Yet, the article firmly denies that such actions “for the physical and mental sufferings *occasioned* by the miscarriage” may include damages

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<sup>43</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973).

<sup>44</sup> 182 F. Supp. 56 (D.C. Iowa 1960) (*cited in ALR*, Maledon).

<sup>45</sup> 331 F.2d 557 (3rd Cir. 1964) (*cited in ALR*, Maledon).

<sup>46</sup> William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 *Notre Dame Law* 349, 360 (1971)

for the death of the child—“it is generally held that recovery cannot be had for the death of the unborn child.”<sup>47</sup> Likewise, Prosser also noted, “The mother’s action does not, however, include damages for the loss of the child.”<sup>48</sup> Consequently, there were no states that allowed a parent’s personal tort claim to include compensation for the death of a stillborn child. That is to say, the law always treated parents’ miscarriage tort claims and wrongful death actions for stillborn children as entirely separate claims. And, where any trial court did allow a parent to recover for a stillborn child in their own personal injury claim, it was always reversed by the state supreme court. Mixing a parent’s personal tort claim with a recovery for a stillborn child, as Blackmun did, was always held to be reversible error—“clearly erroneous” as one court termed it.<sup>49</sup>

All the recoveries for stillborn children were based on the finding that the child was a “person” under wrongful death and survivor statutes. Such statutes allow either a relative or the estate of a dead person to recover for damages as a result of their death. Under the common law, when a person was killed by negligence, no recovery could be had as the common law held the cause of action died with the plaintiff—the Latin phrase describing this is *actio personalis moritur cum persona*. The wrongful death and survivor statutes corrected this by creating a survivor’s interest in the decedent’s tort claim. But, the decedent’s tort claim is always with regards to their loss of life, not the emotional suffering or other personal loss of the survivors. This has always been the understanding of wrongful death and survivor statutes, which the Supreme Court had already recognized in Van Beeck v. Sabine Towing Co., a case written 64 years before *Roe*. Hence, Blackmun’s claim these recoveries were a vindication of “the parents’ interest” is totally without basis in legal theory.

Contrary to Blackmun’s disingenuous claims in *Roe*, society did indeed recognize legal duties owed to unborn children. The protection of individuals by the enforcement of duties owed to them is a fundamental purpose of government. Without this protection, we degenerate from the rule of law to the law of the jungle in the blink of an eye. This is the real tragedy of *Roe*, the denial of societal protection owed to the unborn as persons on the basis of Blackmun’s “clearly erroneous” misrepresentation of the law.

As opposed to the broad breadth of state municipal law concerning the rights of state citizenship, the federal rights and privileges of national citizenship are rather limited. The Court has listed some of these rights in the past: “the right to pass freely from state to state; the right to petition Congress for a redress of grievances; the right to vote for national officers; the right to enter the public lands; the right to be protected against violence while in the lawful custody of a United States marshal; and the right to

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<sup>47</sup> ALR 1005.

<sup>48</sup> Prosser, 338 n.35 (*citing* *Occhipinti v. Rheem Mfg. Co.* 1965, 252 Miss. 172, 172 So.2d 186).

<sup>49</sup> *Tunnicliffe v. Bay Cities Consol. Ry. Co.*, 61 N.W. 11, 12 (1894).

inform the United States authorities of violation of its laws.”<sup>50</sup> As none of these rights ordinarily pertain to the circumstances of unborn children, we should not expect any federal case law holding unborn children to possess these national rights and privileges.

So when Blackmun made a superficial examination of the Constitution in Roe and held “the use of the word [person] is such that it has application only postnatally,”<sup>51</sup> this was a red herring given the limited scope of substantive rights of national citizenship. Blackmun does not even get any points for originality; he borrowed this argument from the General Counsel for NARAL, Cyril C. Means, Jr.<sup>52</sup> Of course, Blackmun omitted the Preamble to the Constitution from his analysis, which clearly proclaims the purpose of the Constitution is also to protect the interests of those who are not yet born:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and *our Posterity*, do ordain and establish this Constitution for the United States of America. Consider too the origin of federal power. In its early decisions, when the Court was not so far removed in time from our nation’s founding, it was common knowledge that the federal constitution was derived from the sovereign states,<sup>53</sup> who in turn received their power of government from the people.<sup>54</sup>

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.” The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal

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<sup>50</sup> *Twining v. State of New Jersey*, 211 U.S. 78, 97 (1908).

<sup>51</sup> 410 U.S. at 157.

<sup>52</sup> See Means, “The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,” 17 *N.Y.L.F.* 335, 401-410 (1971) [hereinafter “*The Phoenix*”].

<sup>53</sup> *Federalist*, No. 32:

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a *partial* union or consolidation, the State governments would clearly *retain all the rights of sovereignty* which they before had, and which were *not*, by that act, exclusively *delegated* to the United States (emphasis added).

<sup>54</sup> E.g. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885) (“Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”)

order, improvement, and prosperity of the State. (Emphasis added)(Federalist 45 by James Madison).

Our federal government is one of limited, unenumerated powers—powers granted to it from these states.<sup>55</sup> Logically then, the federal government could only receive from the states the powers the states had to give.

Hence, if the federal government has a power, then the states must likewise have the same power currently, or have held said power at one time.<sup>56</sup> So, to argue the federal government has the power to decide who is or is not a person is to argue that the states hold the same power, or at least held it at one time. The analysis then becomes an inquiry into whether the states have granted all, part, or none of their power in this particular area to the federal government. Where then in the Constitution do the states grant the federal government the power to declare who is or who is not a person? The answer is nowhere... not even in part. (Emphasis added). Consequently, this power is still retained by the states under the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,” and federal government was not given concurrent jurisdiction in the 14<sup>th</sup> amendment so there is no jurisdiction conflict.

Looking at it from another perspective, the rights of life, liberty and property are natural rights which pre-existed our state and federal governments, as affirmed in the Declaration of Independence. It is the states, not the federal government, which have the primary duty to protect those unalienable rights. As the Court stated in U.S. v. Cruikshank:

The rights of life and personal liberty are natural rights of man. “To secure these rights,” says the Declaration of Independence, “governments are instituted among men, deriving their just powers from the consent of the governed.” The very highest duty of the States, when they entered into the Union under the Constitution, was to protect *all persons within their boundaries* in the enjoyment

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<sup>55</sup> *United States v. Morrison*, 529 U. S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Gregory v. Ashcroft*, 501U.S. 452, 457-458 (1991); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 320 (1851), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.”).

<sup>56</sup> *Ware v. Hylton*, 3 U.S. 199, 231 (1796) (Chase, J., seriatim) (“The proof of the allegation that Virginia had transferred this authority to Congress, lies on those who make it; because if she had parted with such power it must be conceded, that she once rightfully possessed it.”); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 320 (1851) (Curtis, J.) (“It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states.”)

of these “unalienable rights with which they were endowed by their Creator.” Sovereignty, for this purpose, rests alone with the States.<sup>57</sup>

Consequently, looking to the states to see if they held unborn children to be persons with justifiable rights is the correct constitutional methodology. (Emphasis added).

The method of looking to the states to see if they concede legal rights to the unborn as persons was an approach used by Blackmun in *Roe*.<sup>58</sup> Blackmun noted that the unborn had legal rights under criminal, tort, wrongful death, and property law. Although, in examining these areas of the law, Blackmun disingenuously denigrated the status of the unborn under them. This deception allowed Blackmun to conclude that unborn children were not “persons in the whole sense.” However, the articles and cases Blackmun cited do not support his conclusion. Quite to the contrary, the articles and cases actually show how unborn children were treated as persons under criminal,<sup>59</sup> tort,<sup>60</sup> wrongful death,<sup>61</sup> and property law<sup>62</sup> at the time *Roe* was decided. Ergo, the *Roe* holding that unborn children were not persons is a false conclusion born of false premises. As the text of the Constitution does not support *Roe*’s holding on personhood nor does the historical understanding and practice, *Roe* itself is unconstitutional. (Emphasis added). *Printz v. U.S.*, 521 U.S. 898 (1997). Per *Printz*, there needs to be text or historical justification for federal power to establish personhood. Per the *Roe* opinion itself, the states had always assumed the power over establishing personhood. *Roe* was a clear usurpation of that power.

The legal effect of *Roe*—assuming it to be a lawful and constitutional decision—operated to revive, as law in Texas certain Texas anti-abortion law which was in effect when Texas first enacted (in 1854) it’s first specific statutory anti-abortion law. The 1845 Texas anti-abortion law is of supremacy status under Art. VI of the U.S. Constitution because it was carried forward into the laws of the State of Texas by the 1845 Annexation Accord between the Republic Of Texas and the United States, presented below:

By the Act of December 21, 1836, 54 , 1 Gam., The Laws of Texas, pp. 1247,1255, the Republic of Texas adopted as law those offenses under the common law

<sup>57</sup> *U.S. v Cruikshank*, 92 U.S. 542, 553 (1875) (emphasis added).

<sup>58</sup> *Roe v. Wade*, 410 U.S. 113, 161 (1973).

<sup>59</sup> Gregory J. Roden, “*Roe* Revisited: A Grim Fairy Tale,” 30 *Human Life Review*, no. 2, 49 (Spring 2004) (hereinafter “*Roe* Revisited”); Roden, “*Roe v. Wade*, and the Common Law: Denying the Blessings of Liberty to our Posterity,” 35 *UWLA Law Review* 212 (2003).

<sup>60</sup> “*Roe* Revisited”; Roden, “Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence,” 16 *St. Thomas L. Rev.* 207 (2003).

<sup>61</sup> *Ibid.*

<sup>62</sup> Roden, “Unborn Children as Constitutional Persons,” 16 *TrinityL. Rev.* \_\_\_\_ (2009), Gregory J. Roden, “Unborn Persons, Incrementalism, & the Silence of the Lambs,” 33 *Human Life Review*, no. 4, 22 (Fall 2007).

of England which were not covered elsewhere in that Act. Since abortion was not so covered, the Act adopted the English proscriptions against abortion. These were either English statutory and-abortion provisions 9 Geo. IV, ch. 31 XIII (1821) or the English common law proscriptions. The common law proscriptions were:

.murder if the female in question died as a result of the abortion [e.g., Margaret Tinkler's case (c.1781), 1 East, A Treatise of the Pleas of the Crown (Phil., 1806, .pp. 230, 354-356];

.murder if the child in question was born alive and died as a result of the abortion [Ill Coke, Institutes on the Lawes of England (pub. Posthumously c. 1649), pp. 500-51; see Sims's Case, 75E. Repts. 1075 (Q.B., 1601)]' and

heinous misdemeanor if a live unborn child, i.e., one who "was able to stir in the mother's womb," was killed by the abortion [I Blackstone, Commentaries on the Laws of England (c.1765, p. 129). (Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." Schick v. United States, 195 U.S. 65.69 (1904).

Shortly after statehood, the Supreme Court of Texas declared that "The common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic and is still the law."(Emphasis added). Grinder v. The State, 2 Tex., 339,340 (S. C. Tex., 1847.

The Texas anti-abortion law which the U.S. Supreme Court held unconstitutional in Roe was the outgrowth of abortion legislation which "Texas first enacted---in 1854" (410 U.S. at 119). This meant—assuming Roe to be a lawful decision (which it is not)—that the 1854 and subsequent abortion enactments in Texas were void and, under the well recognized doctrine of revival, the prior Texas law embracing the subject of abortion was revived as law in Texas. This law is either the 1828 English enactment or the common law proscriptions against abortion, supra, as adopted by statute in 1836 and carried forward into the laws of the State of Texas by the 1845 Annexation Accord. Further, this law is of supremacy stature 'under Art. VI of the U.S. Constitution insofar as the United States and Texas are concerned because it was part of the laws carried forward into the law of the State of Texas by the 1845 Annexation Accord between the United States unenumerated rights of the people, as guaranteed by the 9<sup>th</sup> Amendment to the U.S. Constitution, and the Division of Powers Concept, as guaranteed by the 10th Amendment to such Constitution. See Erie R.Co. v. Thomkins, 304 U.S. 64, 77-78 (1938)

In view of the above, it is the defendant's position that Blackmun's Roe opinion is clearly erroneous as a matter of substantive reasoning and null and void as a matter of procedural law. Accordingly, for any court to abide by Roe would be "manifestly

unconscionable.” Hazel-Atlas Glass Co. v. Hartford-Empire, 322 US 238 (1943). Lastly, the defendant has demonstrated that Roe is opposed by the text of the Constitution, is in conflict with other Supreme Court decisions, and is repudiated by the law of the State of Texas. As such, “The justices of these courts are bound by their oaths to uphold the constitution and the law of the United States and the State of Texas as it exists” and cannot follow Roe and fulfill said oaths. In other words, the justices have sworn an oath to the constitution, not to Roe v. Wade.

A similar argument is applicable to the denial of the necessity defense in Boushey (“immediately necessary to preserve” any person’s “life in an emergency.”): The necessity defense in Boushey relies on Roe v. Wade, not on “the constitution and the law of the United States and the State of Texas as it exists.” In view of the above arguments, it was a necessity to trespass as the most appropriate response to create a legal challenge to the “manifestly unconscionable” treatment of unborn persons. Hazel-Atlas Glass Co. v. Hartford-Empire, 322 US 238 (1943). Consequently, it is the defendant’s position that the necessity defense is available.

## V.

THE “PERSONHOOD” OF THE HUMAN FETUS IS INCREMENTALLY ESTABLISHED BY COURT EXPANDED CONSTITUTIONAL PROTECTION FOR THE UNBORN THROUGH ITS DECISIONS SINCE ROE TO THE EXTENT THAT IT SUPPORTS FOURTEENTH AMENDMENT PROTECTION TO THE EARLY BEGINNING OF HUMAN LIFE .

It is the defendant’s position that since the Boushey decision, Roe has been significantly modified by Casey-which was decided two years after Boushey-and by several other cases working in conjunction with Casey. Consequently, the defendant argues that Roe has been overruled and modified to the extent that it would support defendant’s position. It is also the defendant’s position that Blackmun’s Roe opinion is clearly erroneous, and so to the extent that Casey rests on Roe it would be “manifestly unconscionable” not to reexamine Roe and Casey. Hazel-Atlas Glass Co. v. Hartford-Empire, 322 US 238 (1943). Lastly, it is the Defendant’s position that Roe is opposed by the text of the Constitution, is in conflict with other Supreme Court decisions, and is repudiated by the law of the State of Texas. As such, “The justices of these courts are bound by their oaths to uphold the constitution and the law of the United States and the State of Texas as it exists” (Boushey), and cannot follow Roe and fulfill said oaths.

A. THE SUPREME COURT NO LONGER USES THE “POTENTIAL LIFE” EUPHEMISMS, ASSERTED A MORE SUBSTANTIAL STATE INTEREST IN

PRENATAL LIFE, AND RESOLVED THE “DIFFICULT” QUESTION OF WHEN LIFE BEGINS.”

In Roe, the Court held that abortion was a “fundamental” right of “privacy.” Roe v. Wade, 410 U.S. 113, 152-55 (1973) (Roe). Roe established a rigid trimester framework to govern abortion regulations under which almost no state regulation were permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, were permitted during the second trimester; and, during the third trimester, when the fetus is viable, prohibitions were permitted provided the life or health of the mother was not at stake. Roe, 163-166, Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833, 872 (1992) (Casey). Subsequent cases decided that any regulation touching upon the abortion decision had to survive strict scrutiny and would only be sustained if drawn in narrow terms to further a compelling state interest. Casey, 871, citing Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427 (1983) (Akron I).

In Casey, the Court dropped the fundamental right of privacy/strict scrutiny/trimester reasoning because it did not grant enough deference to the substantial state interest in potential life throughout pregnancy: “A logical reading of the central holding in Roe itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all pre-viability regulation aimed at the protection of fetal life.” Casey, 874. In its place, Casey substituted the idea that abortion was a “constitutional liberty to choose” under the Fourteenth Amendment. Casey, 920. Casey implemented an undue burden standard to regulate this liberty. (emphasis added) “Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” Casey, 874.

The state interest in protecting prenatal life was shown even more respect by the Court in Gonzales v. Carhart, 550 U.S. 124, (2007) (Gonzales). As Justice Kennedy stated in his opinion, “Whatever one's views concerning the Casey joint opinion, it is evident a premise central to its conclusion--that the government has a legitimate and substantial interest in preserving and promoting fetal life--would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.” Interestingly, all cases prior Gonzales used the phrase “potential life,” or a similar derivation (e.g. “potential human life,” “potentiality of human life,” “potential life of the fetus”) in keeping with Roe's holding that the beginning of prenatal life could not be determined, “We need not resolve the difficult question of when life begins.” Instead, Blackmun denoted unborn persons as only having “potential life.” See Addendum I. Additionally, the “potential life” euphemisms were part and parcel of the denigration of the state interest in prenatal life. As Blackmun stated in Roe:

Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential life* is involved, the State may assert interests beyond the protection of the pregnant woman alone. Roe, 410 U.S. at 150.

The “less rigid claim” to potential life accorded with a less substantial state interest in prenatal human life. Significantly, the Court in Gonzales dropped the use of the “potential life” euphemisms at the same time it asserted a more substantial state interest in prenatal life. Indeed, the Court went far beyond this and resolved “the difficult question of when life begins.”

In Gonzales v. Carhart, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 (the “Act”). The Act provides that any physician who “knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.” Congress used very specific words in the language of the Partial-Birth Abortion Ban Act because the Court struck down Nebraska’s similar ban of partial-birth abortions for lack of “sufficient definiteness” in Stenberg v. Carhart, 530 U.S. 914 (2000). In Stenberg v. Carhart, it was held that the Nebraska statute lacked the specificity to inform the doctor with some certainty that his actions were unlawful.

Consequently, the Act contains a vital scienter requirement that the abortionist knows the fetus is *alive*, as the Act does not punish an intact D&E of a fetus which is already dead. Likewise, the Act employs for specificity the phrases “deliberately and intentionally vaginally delivers a living fetus,” and “for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.” In the Court’s discussion of this scienter requirement in Gonzales, there is a radical departure from the “potential life” euphemisms:

[T]he person performing the abortion must “vaginally delive[r] a *living* fetus.” The Act does not restrict an abortion procedure involving the delivery of an expired fetus.... The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. (emphasis added) See, e.g., Planned Parenthood, 320 F. Supp. 2d, at 971-972. We do not understand this point to be contested by the parties. Gonzales v. Carhart, 550 U.S. 124, (2007).

The Act punishes someone who “knowingly performs a partial-birth abortion and thereby kills a *human fetus*.” Specifically, the human fetus must be a “living fetus,” i.e. one that is not “expired.” In view of this, the Court observed, “by common

understanding and scientific terminology, a fetus *is a living organism* while within the womb, whether or not it is viable outside the womb.” The importance of “viability” in abortion jurisprudence is now eclipsed by whether or not the fetus is living. Lastly, this simple truth, that a fetus is alive before and after viability, is no longer open for debate—“We do not understand this point to be contested by the parties.”

This agreement about the beginning of human life came about from the pro-abortionists using much the same arguments against the Act in Gonzales as they did in Stenberg; i.e. that the Act could also be understood to prohibit standard D&E procedures and was therefore “void for vagueness.” In taking aim at the Act’s stipulation that it only applied to a “living fetus,” the pro-abortionists sought to bolster their arguments by admitting that a standard D&E procedure may also involve a “living fetus.” So, in a lower court decision leading up to Gonzales, Planned Parenthood v. Ashcroft, the United States District Court for the Northern District of California, in its “Findings of Fact,” made this definitive statement, “The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction and may be considered a ‘living fetus’.” Planned Parenthood v. Ashcroft, 320 F.Supp.2d 957, 971 (N.D. Cal. 2004). (Emphasis added).

Accordingly, all parties to the abortion controversy now agree that vital signs, such as “a detectable heartbeat,” are determinate of at least the latest time at which life begins—“We do not understand this point to be contested by the parties.” (Emphasis added) Moreover, “the difficult question of when life begins” has been held to be legally determinable under the Constitution. *Roe*, and the cases following it, kept this “difficult question” in the category of a “mixed question of fact and law,” under which the Supreme Court maintained control of answering the question. Yet, the Court conveniently refused to answer despite the duty it had imposed on itself as the arbitrator of mixed questions of fact and law. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954); Dyer v. Sims, 341 U.S. 22, 29 (1951); Union Pacific R. Co. v. Public Service Comm'n, 248 U.S. 67, 69 (1918). But now, “the difficult question of when life begins” is a proper factual inquiry in which it is permissible to use the existence of fetal vitality as evidence. Furthermore, questions of legal fact are normally decided conclusively at the trial level and are not overturned on appeal unless clearly erroneous. United States v. Penn Foundry & Mfg. Co. 337 U.S. 198 (1948); United States v. United States Gypsum Co. 333 U.S. 364 (1948); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937). Ergo, the Boushey ruling denying “evidence concerning when life begins” can no longer stand. The court not only needs to accept evidence concerning when life begins, it must also make a factual determination of whether the lives of the unborn children in question have begun. And, in doing so, the states may not adopt a theory of when life begins other than that allowed by the Supreme Court. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444 (1983). As Gonzales has decided that life begins when there

is evidence of vitality, i.e. no later than the presence of a “detectable heartbeat,” so must the state of Texas.

B. THE *BOUSHEY* DENIAL OF DEFENCE OF NECESSITY AND THE DEFENSE OF THIRD PARTY IS OVERRULED BY *Gonzales v. Carhart*.

“Penal Code § 9.34, like the defense of ‘third person defense,’ allows the actor to use force or deadly force to assist a person. The United States Supreme Court has said that the unborn are not persons under the Fourteenth Amendment. Roe v. Wade, 410 U.S. at 158, 93 S.Ct. at 729.” The Texas Penal Code concerns the state interest in life and was enacted under the state’s powers of police. As the Court stated in *Roe*, “In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.” Roe, 410 U.S. at 150. The state’s powers of police were reserved to the states under the Tenth Amendment and were not taken away by the Fourteenth Amendment. As the Court stated in Terrace v. Thompson, 263 U.S. 197, 216-17 (1923):

The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution. Barbier v. Connolly, 113 U.S. 27, 31, 5 S. Sup. Ct. 357; Mugler v. Kansas, 123 U.S. 623, 663, 8 S. Sup. Ct. 273; Powell v. Pennsylvania, 127 U.S. 678, 683, 8 S. Sup. Ct. 992, 1257; In re Kemmler, 136 U.S. 436, 449, 10 S. Sup. Ct. 930; Lawton v. Steele, 152 U.S. 133, 136, 14 S. Sup. Ct. 499; Phillips v. Mobile, 208 U.S. 472, 479, 28 S. Sup. Ct. 370; Hendrick v. Maryland, 235 U.S. 610, 622, 623 S., 35 Sup. Ct. 140. And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

This police power of government includes the power of the state to protect human life. The Court explicitly held that a state has an “unqualified interest in the preservation of human life.” Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Cruzan v. Director, 497 U.S. 261, 282 (1990). As Chief Justice Rehnquist stated in Cruzan v. Director, “Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.” Cruzan, 497 U.S. at 280 (Rehnquist, C.J.). Rehnquist immediately went on to state, “As a general matter, the States - indeed, all civilized nations - demonstrate their commitment to life by treating homicide as serious crime.” *Id.* Consequently, the applicable standard for the third

party defense is whether or not there is a human life to protect under the state's interest in life—that inquiry is now guided by Gonzales v Carhart.

## V. CONCLUSION

The denial of the right to life of more than fifty one million innocent helpless children since 1973 and continuing with over three thousand more killings every day demands that legal abortion be stopped so the minimum justice of the innocent helpless unborn human's right to life may again be the reality it was before Roe v. Wade.

The Supreme Court denied black people liberty from slavery and provided slave owners a superior right of property ownership of slaves, but the people showed they would not accept the courts denial of liberty to any class of human beings by the force of civil war, and the Thirteenth and Fourteenth Amendments. For thirty seven years the Supreme Court has denied the right to life of the class of unborn children by a superior right of liberty to the mother which destroys all the rights of one human being at the will of another human being. The Nuremburg trials and executions of Nazi defendants by United States prosecutors were based on the human right to life and no man made law could justify killing innocent human beings.

Roe is a radical departure from Fourteenth Amendment case law in that it is the only case that destroys the state power to enforce common-law *malum in se* crimes. Roe is truly an exercise of raw judicial power. It is an abuse of power by the Supreme Court that calls not just for reform of the result, but also for reform of the very process by which the Supreme Court reached its decision. For if the Supreme Court can remove the power historically enjoyed by the states to enforce common law /*malum in se* crimes, then the Supreme Court simply has too much power. The Supreme Court has demonstrated by Roe that it cannot wield this power over the states responsibility. Rather by Roe v. Wade, the Court has made a mockery of the rule of law. A majority of states are in the process of correcting the injustice to the unborn of their state by referendum and legislation to establish "Personhood" constitutional amendments, simply by defining a "person" as an "individual" and an "individual" is a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

Pro-life advocates have tried to use the law of the land through the judiciary for thirty seven years, without violence, that unborn humans are "persons" for constitutional protection, and will never stop, because every day over 3,000 innocent human babies are being slaughtered by authority of the judiciary and with the approval of the executive and legislative branches of government.

In Federalist 45, James Madison assured critics of the Constitution that "the power reserved for the several states will extend to all the objects which in the ordinary

course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.”

It is highly doubtful that the Constitution would have been ratified had the people known that the Constitution would lack the legal and political competence, as Madison said “in the ordinary affairs” to protect the unborn human from being denied the right to life, or to keep the invalid, aged and unwanted humans from being killed by physicians which the Courts decisions on abortion, euthanasia and moral social standards continue in the federal courts by abrogating democratic self-governance guaranteed by the Constitution.

Whether the Court acted rightly or wrongly, many believe no damage was done to the common good because the Court was only acting slightly ahead of the legislative curve. But the historical record does not support this view. Rather, legal abortion came into existence much the same way physician-assisted euthanasia is coming into existence today; by the federal judiciary in direct opposition to the will of the citizens in the states.

Less than two years after the citizens of Washington voted by referendum to uphold the state’s prohibition of physician-assisted suicide, a federal judge invalidated the statute as unconstitutional. In Roe v. Washington, 1994, Judge Barbara A. Rothstein cited the Supreme Court’s definition of liberty In Planned Parenthood v. Casey (1992): “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.” It is probably inevitable that the definition of “liberty” in Casey would not remain an inert piece of legal dictum but would begin to move “liberty” as the super constitutional value.

However, over the course of six decades, whenever the new principle of liberty elucidated in the Casey decision has been placed before the people for a vote, the people have rejected it. The principle has migrated from issue to issue, but it is always the same principle and it always meets with the same result, from state bans on artificial contraception, legal abortion, legal suicide, legal euthanasia, anti sodomy laws and same sex marriages. Even in the middle of the sexual revolution, states did not willingly relinquish their authority to exercise moral police powers in those matters.

The American people have not approved such judicial “rights.” Whenever the people have had a chance to exercise their judgment, whenever the terms of the debate are clear and not hidden behind judicial proceedings, the people have not and still will not buy the Judicial “rights.”

The idea that the federal courts have merely facilitated the social and political agenda of the people is a myth. Regrettably, the courts continue to overlook the most obvious and historically consistent datum: namely the abrogation of the people’s

legislative judgment by federal courts. Before Americans are condemned for moral decline, the judicial violation of the political order must be fully considered. Whatever injustice and moral harm is done to the unborn and terminally ill, the political harm done by the federal courts is unforgiveable, and must be corrected, and return to the people the freedom of self-governance.

The Supreme Court of the United States has shown in Brown v. Board of Education that they can use will and wisdom to correct an unjust denial of due process and equal protection of segregated education, but we also know the Supreme Court can continue to deny equal protection to the class of the unborn humans, as they did to the class of the slaves. We pray that they would use wisdom, courage and the law of the land to uphold their oath of office to provide constitutional protection of due process and equal protection for the right to life of all innocent humans.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should recognize the right to life and equal protection of all those who are in fact human beings, regardless of age, size, health, or condition of dependency. The Texas statutes providing for defense of necessity and protection of third persons are unconstitutional if they exclude unborn human beings from the class of persons for whose protection those defenses may be recognized. Because Defendant in the present case acted to save the lives of unborn babies subjected to the ultimate denial of their rights in the abortion clinic where he intervened, his motion to present defense of necessity evidence and to protect third persons should be granted because the "personhood" of the unborn human is established and the right to life is guaranteed by the Fourteenth Amendment.

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Credit is gratefully given to Dr. Charles Rice, Professor of Law at Notre Dame Law School, and to Mr. Gregory J. Roden JD , Constitutional lawyer. Both of these lawyers have made great contributions with their many pro-bono legal pro-life writings and efforts in support of unborn humans and other helpless persons.