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# Constitutional Fetal Personhood

**Abstract**: There is no science of constitutional law unless it consists of an ordered and logical body of knowledge. *Roe v. Wade* goes a long way in destroying the science of constitutional law. *Roe v. Wade's* most insidious fault is that it assumes as fact that the unborn child is not a human being. The existence in *Roe* of that ungodly assumption is easily demonstrated: All human beings have a fundamental right to life and liberty. The unborn child does not, according to *Roe v. Wade*, enjoy a fundamental right to life and liberty. Therefore, the unborn child is not a human being (person). The *Roe* majority justices did not answer to the objective rules of constitutional interpretation. They did not answer to logic and human reasoning. And they did not answer to history. They answered only to the tune of their own twisted thinking. Only minds enslaved by certain ideologies that have no bearing on constitutional law will deny constitutional fetal personhood. Chief among these ideologies is this one: Being opposed to abortion shows a lack of compassion for women. (And chief among these ideologists is none other than Justice Kennedy, who violated his oath of office by presuming that "he is wiser

than the law." See infra (*Birth*-fn.5) at pp. 283–84, n. 5; and infra (*Unraveling* at fn. 9) at pp. 65–66.) The several states have an absolute duty under our Declaration of Independence to stand up to the United States Supreme Court (hereinafter USSC) when it comes to sanctioning procured abortion under our Constitution. Unborn children are no less constitutional persons than are walking around persons, and must be protected according to our Declaration of Independence. "When . . . government becomes destructive of securing and protecting [a fundamental or unalienable right], it is the Right [and Absolute duty] of the People to alter or to abolish it." The absolute only hope of securing constitutional fetal personhood is for the pro-life states and organizations to revolt non-violently against the USSC when it comes to procured abortion. They should not give an inch; the unborn constitutional person is not to be compromised period.

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"A full understanding of truth is to understand the errors it corrects." Mortimer Adler

# I. Introduction

The *Roe* majority and concurring justices appointed themselves as our nation's roving problem-solvers in the sky. (Says *Roe*: "Our holding, we feel, is consistent with the . . . demands of the profound problems of the modern day.")[1] They need to be brought down from their skies on high. And here is my opening volley: All human beings living under the jurisdiction of the United States of America, or a state therein are entitled to due process of law—the right to be heard in an impartial adjudicatory proceeding.[2] There is no due process of law afforded an unborn child in an adjudicatory proceeding (on the question of whether he or she qualifies as a due process clause person) if he is not appointed a representative or a spokesperson (i.e., a *guardian ad litem*). How else can he be heard? And the *Roe* Court failed here to appoint Jane Roe's unborn child a *guardian ad litem* for hearing purposes. (And note here that although Dred Scott's case (1856) was

[1] Roe v. Wade, 410 U. S. 113, 165 (1972).
[2] Plyer v. Doe, 457 U. S. 202, 212, n.11 (1982); See also Paul v. Davis, 424 U. S. 693, 702, n. 3 (1976); and Ingraham v. Wright, 430 U. S. 651, 692 (1977).

dismissed because he was deemed not to be a citizen, at least he was given a chance to argue for his liberty. Jane Roe's unborn child was denied his right to argue for his very own life. So, *Roe v. Wade* is worse, by far, than the Dred Scott Case.)[3] To reiterate: If the conceived unborn child, on the question of his status as a constitutional person, is denied his "personal" right to be heard through a *guardian ad litem*, then he must be deemed a non-constitutional person since all constitutional persons are entitled to due process of law. That failure to appoint Jane Roe's fetus a *guardian ad litem*, in real effect, "assumed" that her unborn child is not a due-process-clause person; for otherwise, the *Roe* Court would have appointed him a *guardian ad litem* for hearing purposes. And an assumed outcome logically cannot prove itself. Whether or not Jane Roe's fetus was a constitutional person, the fact remains, he was denied his due process right to argue that he is. That makes *Roe*'s fetal non-person holding a non-holding, empty, meaningless, and constitutionally non-binding. So, the question of constitutional fetal personhood remains an open question; meaning: nothing in *Roe*'s fetal non-personhood discussion constitutionally prohibits a state from enacting a law declaring that the unborn child qualifies as a Fifth (Fourteenth) Amendment due-

[3] 60 U.S. 393.

process-clause person. And he certainly qualifies so. And that, and so says *Roe v. Wade*, would surely spell the end of procured abortion in the United States.[4]

The USSC cannot write out of the Constitution any person or class of persons protected by the due process clauses. (Per the Fifth and Fourteenth Amendments: "Nor shall any 'person' be denied life, liberty or property without due process of law.") The unborn child is such a person; and he was written out of the Constitution by *Roe v. Wade*. And here is one of two ways to reestablish due-process-clause fetal personhood: Suppose that a federally condemned woman was impregnated by her prison guard eight weeks before her date of execution, and that the dirty deed was uncovered through a DNA analysis of semen contained in a used prophylactic found in her bedding on the eve of her execution. Suppose further, that the condemned woman does not petition for a stay of execution until the birth of her child, but that an obstetric ultrasound or a fetal dating scan confirms the existence in her womb of a live, walnut-size newly formed fetus. Finally, suppose that the sole issue before the USSC is whether a federal statute, which bars, without exception (other than the exception of a person's inability to appreciate that his death is imminent) all reprieves, violates the Fifth Amendment's due-process clause (1789/1791), in that the condemned woman's fetus (assisted by

[4] *See infra*, text accompanying notes 5, and 10–19. And *see* Roe at 157–58.

an appointed *guardian ad litem*, of course) qualifies as a person there.[5] Who would argue to uphold the statute, barring the granting of the fetus' petition for a stay of his (her) mother's execution, so that he may live his life just as do you and yours?

## II. TRUE ENGLISH COMMON LAW (ECL) ON THE CRIMINAL PROSECUTION OF PROCURED ABORTION AND RELATED CRIMES

The United States Supreme Court, in *Smith v. Alabama* (1888), observed: "The interpretation of the Constitution . . . is necessarily influenced by the fact that the provisions are framed in the language of the English common law (ECL), and are to be read in light of its history."[6] Generally speaking, and with certain exceptions not relevant to this discussion, the English common law was the dominant law in, and throughout, Colonial America, and the United States and its territories from the late eighteenth century to well into the nineteenth century. In *Roe*, the court related that its core holding, that a woman's right to procure an

[5] *See* Mrs. Sponers's Case (1778), reproduced in part in PHILIP A. RAFFERTY, ROE V. WADE: THE BIRTH OF A CONSTITUTIONAL RIGHT 235–236, and 441 at n.29. (Hereinafter cited as BIRTH and available for a free online read at www.parafferty.com.)

[6] 124 U. S. 465, 478.

abortion of her nonviable fetus is fundamental or unalienable, constitutionally speaking, is in accord with, and derives from the ECL law.[7] The *exact opposite* is true, and is proved so, by a slew of unassailable *primary* ECL legal authorities, one of which is an aborted-alive, infant murder prosecution that leaves out *quickening* (i.e., a pregnant woman's *initial* perception of fetal movement) as an element of infant murder, and occurred twenty years before the incorporation of the Fifth Amendment's (1791) due-process clause into the Fourteenth Amendment (1868). See *Queen v. West* (1848) wherein the trial court judge related the following to the jury:

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

[7] 410 U. S. at 140–41, 165.

> consequence of its exposure to the external world [i.e., because it was aborted alive in a non-viable state], the person, who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.[8]

There exists primary ECL authority that procured abortion was prosecuted criminally as follows: 1) if a person killed a woman in the course of performing an abortion upon her, or attempting to abort her, then her abortionist was capitally hung; 2) if a woman killed herself in the course of attempting to self-abort, then she was adjudged a deceased capital felon, and received, among other punishments, a non-Christian burial; 3) procured abortion was prosecuted criminally, irrespective of whether the woman was even pregnant, let alone pregnant with a live or *quick child*, or had quickened, or had experienced *quickening* (*Beare*'s Case (1732). In the *Beare's* Case, (an English *pre-quick with child* procured abortion prosecution), the trial judge, in the course of instructing the jury on the procured abortion evidence presented by the prosecutor, told the jury that he had "never met with a case so barbarous and unnatural." The defendant

[8] 175 E.R. 329.

nearly died on the pillory from being pelted with a barrage of flying fruits and vegetables.[9]

Now is presented a harder way to prove constitutional fetal personhood. This complies with all the various methods of constitutional interpretation employed by all nine justices in the U.S. Supreme Court's 5–4, Second Amendment gun rights case of *D.C. v. Heller* (2008), wherein this observation is put forth (quoting *U.S. v. Sprague* (1931): the words and phrases of the Constitution "were used in their (then: 1789/1791) normal and ordinary meaning."[10] To say that our Founding Fathers valued gun possession worthy of constitutional protection, but not so the unborn child living in the womb of his mother is beyond extraordinary. It degrades the morality of our Founding Fathers.

Retired Supreme Court Justice Paul Stevens, widely recognized as one of the most liberal justices ever to sit on the USSC, in his "Address: Construing the Constitution," observed: "Supreme Court justices, in interpreting the text of the Constitution must, of course, try to read . . . [the]words [put forth there] in the context of beliefs that were widely held in the [late] eighteenth century."[11] One such widely held belief at that time was that an intact human person comes into his

[9] *See* PHILIP A. RAFFERTY, ROE V. WADE: UNRAVELING THE FABRIC OF AMERICA (Hereinafter: UNRAVELING) (2012), (available for a free online read at www.parafferty.com), at pp.89–101, 53, and 159–163. Beare's Case (1732), is cited in *id.* at 70–82, 159–163, and 199–203.
[10] 554 U.S. 570, 576; Spraque is cited as 286 U.S. 716, 731.
[11] 18 UC DAVIS L, R. 1, 20 (1985).

full existence just as soon as he achieves fetal formation in the womb of his mother. So, a formed fetus (i.e., a human embryo that has acquired a human shape) must be deemed as a Fifth (Fourteenth) due-process-clause person. *See*, by way of analogy—and one fully and compellingly applicable: *Penry v. Lynaugh*, (1989): "At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted."[12] (Contrary to a near universal belief, *quickening* played no role in the prosecution of procured abortion or unborn child-killing at the pre-nineteenth century ECL.) Charles Leslie, in his *Treatise of the Word Person* (1710), observed that a fetus or man becomes "a Person by the Union of his Soul and [formed]body . . . is the acceptance of a person among men in all common sense and as generally understood."[13] This same widely held and accepted belief was noted also by Walter Charleton, a fellow of the Royal College of Physicians, in his *Enquiries into Human Nature* (1699): "That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree."[14] And so said Benjamin Rush (1745–1813), foremost recognized eighteenth-century American physician, founding father, and signer of the

[12] 492 U.S. 302, 330.
[13] p. 7.
[14] p. 378.

Declaration of Independence (1776), in his *Medical Inquiries* (1789): "No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported."[15] Samuel Johnson, in his *A Dictionary of the English Language* (1755), defined *quick* (as in *quick with child*) as "the child in the womb after it is perfectly formed." George Mason, in his *A Supplement to Johnson's English Dictionary* (1801), defined *quick* (as in *with quick child*) as "pregnant with a live child."[16]

The then-existing opinion that a human being begins his existence as the same at the completion of the process of fetal formation, while virtually unanimous, was not so entirely. For example, Charles Morton, a one-time president of Harvard College, in his *Compendium Physicae* (1680) (the science textbook used by Harvard College students from 1687 to 1728), stated:

> Here a question may be moved: at what time the soul is infused? It has been formerly thought not to be till the complete organization of the body. . . . And here the law of England [i.e., 21 Jac. (Jas) 1, c.27 (1623/24)]. . . . condemns not the whore who destroys her [bastard] child for murther unless it appears that the child was perfectly formed. . . Upon this supposal: that till then there is no

[15] p. 42.
[16] (Samuel Johnson) vol. 2, sub. tit.: quick, (George Mason) sub. tit. quick.

union . . . of soul and body; but indeed it seems more agreeable to reason that the soul is infused [at] . . . conception.[17]

## III. THE ECL ADJUDGES ROE AS THE EPITOME OF JUDICIAL OR GOVERNMENTAL TYRANNY

William Blackstone deems our Constitution, including *Roe* (and also *Casey*, which affirmed *Roe* 5 to 4 after bendy Justice Kennedy switched sides on the authority of pro-*Roe* judicial fan mail) as being tyrannical to the highest degree.[18]

> This natural life [i.e., this life of a human being or person, which "begins in contemplation of law as soon as an unborn infant is able to stir: or is organized into a recognizable human form —at which stage he receives his human or rational soul], being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by an individual [particularly by its very own mother.] . . . merely upon their own authority . . . . Whenever the Constitution of a state vests in any man, or body of

[17] p. 146.
[18] UNRAVELING, *supra* 9 at 65–66. *Casey* is cited at 505 U. S. 833 (1992).

> men, a power of destroying at pleasure, without the direction of laws, the lives of members of the subject, such constitution is in the highest degree tyrannical. [19]

The only way to conclude that Blackstone understood the criterion of when a woman becomes *quick with child* to be *quickening*, and not at the completion of the process of fetal formation, is if one reads backwards, the history of the use of the term "quick with child."

The onset of fetal stirring (not to be confused with 'quickening, which refers to the pregnant woman's initial perception of this fetal stirring) was then understood to coincide with fetal formation. The following is a great example of this understanding. It's taken from Bartholomaeus Anglicus's *De Proprietatitbus* (1230–1250), which was, during the later Middle Ages and quite possibly into the seventeenth century, the most read book after the Bible.

> This child is bred forth . . . in four degrees. The first is . . . . The last [or fourth] degree is when all the external members are completely shaped. And when the body is thus made and shaped with members and limbs and disposed to receive the soul, then it receives soul and life, and begins to move itself and sprawl with its feet and

[19] 1 Commentaries 125–26 [&129] (1765).

> hands. . . . In the degree of milk it remains seven (7) days; in the degree of blood it remains nine (9) days; in the degree of a lump of blood or unformed flesh it remains twelve (12) days; and in the fourth degree, when all its members are fully formed, it remains eighteen (18) days. . . . So, from the day of conception to the day of complete disposition or formation and first life of the child is forty-six (46) days.[20]

## IV. QUICKENING PLAYED NO ROLE IN PRE-NINETEENTH-CENTURY ECL ABORTION LAW

In a 1990 letter (on file with the author), J. A. Simpson, coeditor of the *Oxford English Dictionary* (OED) corrected (which appears in the later SOED or shorter version of the OED) that dictionary's quick with child entry (and I am grateful to Mr. Simpson for his permission to publish this letter):

> From the discussion you present, it would seem reasonable to infer that the [quickening] entry in the *Oxford English Dictionary* for quick

[20] ON THE PROPERTIES OF THINGS: JOHN TRAVIS'S TRANSLATION OF BARTHOLOMEAU'S ANGLICUS (Oxford, 1975).

with child, while adequately representing the meaning that had come to be current in the nineteenth century, does not reflect the earlier history of the phrase, and is changing relationship with the term *quickening*. A revised entry might read something like:

> Constr. With.
>
> Quick with child, orig., pregnant with a live foetus [sic: child: a pregnant woman, on experiencing quickening, announced: "I'm pregnant with a live child."]; later [i.e., sometime during the course of the nineteenth century], at the stage of pregnancy at which the motion of the foetus [sic: child] is felt. infl. By QUICKENING vbl.sb.)/ Now rare or Obs.

## V. THE ECL (USA-ADOPTED) FETAL BORN-ALIVE RULE (NO FETAL MURDER IF STILLBORN) IS FOUNDED SOLELY ON COKE'S ERRING IN JUDICIAL INTERPRETATION

Coke, in his *Institutes* (1648), and citing a monumentally defective report version or upside-down version of the case of *Rex v. Bourton* (1327), wrote that in

his day at the ECL the unborn child qualifies as a victim of murder only if born alive, notwithstanding that prior to his day said child qualified so even if born stillborn.[21] Coke, without explanation, and without knowing that he was citing a highly defective report of *Bourton*, accepts and rejects this very authority he cites. The true version of *Rex v. Bourton*, states that an unborn child qualifies as a murder victim whether born alive or stillborn. The defective version of *Bourton* states the exact opposite. How, then, at the ECL did what was a murder victim (an unborn child killed in his mother's womb) cease to be so, if the ECL cannot be rejected or overruled by the ECL?[22] The born-alive rule derived from an error in judicial interpretation by the greatest of all ECL compliers, lawyers, and justices, Sir Edward Coke (1552–1634). Coke, in commenting upon the following words in a yearbook utterly defective report of *Bourton's Case* (an unborn fraternal twins homicide case, wherein one fetus was stillborn and the other live-born, and wherein the defendant received a pre-trial King's Pardon), construed them to mean that the homicide of an unborn child is not a capital felony, except when the child dies from abortion act "subsequent" to being born alive: "And for the reason that the Justices were unwilling to adjudge this thing as felony [the killing of unborn fraternal twins], the accused was released" on bail. Coke mistook a material

[21] Pp. 50-51 (2nd ed. 1648).
[22] *See*, Philip A. Rafferty, A Silver Bullet for Roe V. Wade Revised 2 (available for free online reviewing in www.parafferty.com) at p. 27.

element of the offense of murder (committed "in felony" or "feloniously" or "maliciously") for its punishment (as a capital felony). Only malicious or felonious homicides in Bourton's day, were capital, nonbailable, and non-pardonable. And "only" the sheriff or coroner had the legal authority to release the defendant on bail if he found, preliminarily, that the homicide was not done "in felony." So, the foregoing "not to be adjudged as being committed in felony" meant no more than that the killings of the unborn twins were unintentional, and were not committed with malice or felony aforethought.[23]

The pre-fetal product of human conception is no less a due process clause-protected person than is the fetal product of human conception. This is so because there existed at the ECL this rule: The unborn child, beginning at his initial conception in the womb of his mother, is generally considered to be in being [i.e., is considered to be in full, complete and intact existence as a human person] in all cases where it will be for the benefit such child to be considered so."[24]

[23] *See* UNRAVELING, *supra* note 9 at 105–108, 125–154, and 149–150.

[24] Hall v. Hancock, 32 Mass.255, 257–58 (1834) and quoting Blackstone widely recognized throughout eighteenth-century America as the foremost legal authority.

## VI. ON ROE'S "IMPLICIT" HOLDING THAT THE HUMAN FETUS DOES NOT QUALIFY AS A DUE PROCESS CLAUSE PERSON

Almost by definition *fundamental* or *unalienable* rights are complimentary, and never act in contradiction to each other. Thus, the following *Roe* holding that a pregnant woman enjoys Fifth (Fourteenth) Amendment due-process-clause guaranteed *fundamental* or *unalienable* right to destroy her unborn child by a physician-performed abortion holds (implicitly) that her unborn child does not possess a *fundamental* or *unalienable* right not to be aborted by his mother, and does not qualify as a Fifth (Fourteenth) Amendment due-process-clause person. Obviously, these two clauses cannot be construed so as to confer upon one person (a mother) a right to kill an innocent person, her unborn child. Here is what *Roe* implicitly has to say on this subject:

> [O]nly personal rights that can be deemed "fundamental". . . are included in this [constitutionally] guarantee[d] [right] of . . . privacy.
>
> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The

> detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[25]

The foregoing *Roe* statement, for several reasons, will go down as the most revealing statement on appellate court incompetence in the entire annals of Anglo-American legal history.

Firstly (and this explains fully why the Court has not invoked the right of privacy in the forty years since *Roe* was decided), the *Roe* court, in stating expressly and explicitly that the right of privacy can guarantee only "given or already established constitutionally guaranteed or fundamental unalienable rights,"

[25] 410 U. S. at 152–53.

unwittingly qualified the so-called "implied" constitutional right of privacy right out of constitutional existence. By definition, the exercise of a fundamental or unalienable right is not dependent upon some other right. If it needs privacy, then it simply generates it. Privacy is a "protected" right, and it is not a "protecting" right.[26]

Secondly, the *Roe* Court's parading of "potential horribles" (not a one of which was even remotely proved, and even if proved they would have no bearing on whether access to procured abortion is a woman's "fundamental right") facing a woman denied access to procured abortion violated a fundamental rule of appellate review as articulated in *Hammond v. Schappi* 275 U.S. 171 (1927): "Before any of the questions suggested, which are both novel and of far reaching importance are passed on by this Court, the facts essential to their decisions should be definitely found by the lower courts upon adequate evidence." [27]

[26] *See* Philip A. Rafferty, "Roe V Wade: A Scandal Upon the Court", 7.1.1.RJLR at paras. 42-47 (2005) available for a free online read in www.parafferty.com. On the "fundamental rights equation," *see* BIRTH, supra footnote 5, Part II, 41–100. And *see infra,* paragraph preceding textual footnote 30.

[27] 275 U.S. 164, 171–72. *See* BIRTH, *supra* note 26 at 81–82. And *see* Ingraham v. Wright (1977), 430 U. S. 651, 672: "We have repeatedly rejected the notion that any grievous loss visited upon a person by the state is sufficient to invoke. . . the Due Process Clause."

> "The power of the modern state [including its high court] makes it possible for it to turn lies into truth by destroying the facts which existed before, and by making new realities to conform to what until then had been ideological fiction."
>
> Hannah Arendt, *The Origins of Totalitarianism* (1951)

## VII. ROE V. WADE DESTROYED LEGAL HISTORICAL FACTS, AND MADE-UP FALSE ONES

In *Roe v. Wade* (1973), the U. S. Supreme Court destroyed the true fact that abortion was criminally prosecuted at the English common law (ECL) and created the utterly false one that abortion was recognized there as a pregnant woman's liberty. The court did this by *uncritically adopting in total, and then putting its imprimatur on*, two law review articles by the highest of a lowest, radical pro-abortionist, Cyril Means, Jr.[28] The court went on to create the following *unproven*

[28] *See* UNRAVELING, *supra n. 9* at endnote 18, 205–210 (available for free online viewing at ww.parafferty.com).

facts, as proven ones, from a three-judge federal district trial court record *utterly void* of any facts period:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned [not a one of which was even granted legal standing in Roe], associated with the unwanted child, and there is the problem of bringing a child into a family psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties, and continuing stigma of unwed motherhood may be involved.[29]

On whether procured abortion fits into the fundamental rights equation (and as can be seen from the above *Roe* quote), the *Roe* justices, disregarding even a semblance of due-process analysis, arbitrarily excised the fetus from consideration (i.e., from the fundamental rights equation). To

[29] 410 U. S. at 152.

maintain that a concern for whether abortion kills an intact human person can be arbitrarily excised from the *fundamental rights equation* is the equivalent of arbitrarily excising a concern for human safety from the building equation for a new super highway.

Man's capacity to deceive himself (or to be deceived) in the name of humanity transcends humanity. And so said W. H. Auden: "Everything turns away—Quite leisurely from the disaster."[30]

Under English law persuasive authority attaches to U.S. Supreme Court decisions.[31] Because the U.S. Supreme Court, in its *Roe v. Wade* decision, bestowed its prestige on Cyril Means's vandalization of the history of the criminal prosecution of procured abortion and unborn child-killing at the English common law, the English judiciary would not be out of line in throwing the weight it gives to U.S. Supreme Court decisions into the deepest waters of the River Thames.

The great evil in procured abortion is not so much that it is an act of homicide; it is that it shows a willingness to commit voluntary or willful homicide. An aborted human fetus (or embryo or zygote) either was once an intact human being/person or never was such. The physician and patient can state (reasonably?)

[30] Musee des Beaux Arts.
[31] D.M Walker, OXFORD COMPANION TO LAW, 79 (1980).

that *in our opinion what was aborted was not an intact human being or person.* But, being reasonable persons, they must concede that what they think is true is not the measure of what is true simply because they believe so. Justice Felix Frankfurter observed, "That a conclusion satisfies one's private conscience does not attest to it reliability."[32] They should concede also that, for all it may be known reasonably, every procured abortion results in the death of an intact human being or person. One can say reasonably that procured abortion is akin to shooting at an inhabited dwelling hoping that it was uninhabited, when it was inhabited as proved by the shooting to death of a person then dwelling there. It is implied malice as that term is used in second degree murder. And until the advent of *Roe v. Wade*, never in the history of Western Civilization has a state turned over, or has been compelled to turn over, to any person's private conscience the supreme rule over communal matters of life and death. And so said the USSC in *Wisconsin v. Yoder* (1971), "The very concept of ordered liberty precludes allowing every person to make his own standards on matters in which society as a whole has important interests."[33]

There is every good reason to adopt the opinion that the unborn child is a human being/person. And so says *Williams Obstetrics*: "Our knowledge of fetal

[32] JAFRC v. McGrath, 341 U.S. 123, 171 (1951).
[33] 406 U.S. 205–215-16.

development, function, and environment has increased remarkably. As an important consequence the status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we long have given the pregnant woman."[34] And so say more than two-thirds of the states of the United States.[35] And so says Western science, which, by definition, is rigorously secular. *See,* Van Nostrand's *Scientific Encyclopedia* (1976), (the Preface for which states: "the editors. . . have attempted to stress the proven, generally accepted description of both new and old . . . concepts. In soundly controversial areas, however, where two well-grounded schools of thought may be arguing while awaiting the results of further investigations, and experimentation, both sides of such questions are given):

> The creation of an embryo and development of a fetus and finally the birth of an infant is a continuous physiological process commencing with conception and ending with the cutting of the umbilical cord. . . . The embryo and later the fetus is an individual entity, imbued with individualistic qualities [genes] which affects its rate of progress, much as later the progress of the infant to a mature adult will be determined by individualistic qualities. From a purely scientific

[34] 17th ed., 1985, p. 39.
[35] Google: NCSL number of states with fetal murder statutes.

> standpoint, there is no question but that abortion represents the cessation of [a] human life.[36]

And here is how *Mosby's Medical Dictionary* defines fetus (and without denying that the human zygote and human embryo are also human beings): "the human being in utero after the embryonic period."[37]

## VIII Conclusion

Let it be supposed that a state legislature passes the following law: Notwithstanding current law to the contrary, an unborn daughter born within ten months of the death of her father shall no longer be recognized as her father's issue for testate purposes or for intestate succession. Who would argue that a then existing unborn daughter does not have a constitutional due process right to be appointed a *guardian ad litem* to argue that her state is constitutionally forbidden to deprive her of her designated or undesignated share in the distribution of her deceased father's property: How much more so, then, is she constitutionally entitled to the appointment of a *guardian ad litem* to argue for her very own life.

[36] 5th ed., (1976) at p.4.
[37] 9th ed., (2013) at p.691.