## On Roe v. Wade's Two Independent Holdings (One Explicit, and the Other Implicit) that the Human Fetus Does Not Qualify as A Person, Constitutionally Speaking

I maintain that, contrary to the Roe opinion, our Founding Fathers thought of the (post-embryonic) fetus living in the womb of his mother as no less an "intact" human being (person) than themselves or walking around ones, and therefore is entitled to the security for his life that the Constitution and "the rule of law" can provide. I maintain further that our Founding Fathers were of the opinion that this same "security for his life" is guaranteed equally to the pre-fetal product of human conception by virtue of the American-received English common law "fetal benefit" and "parens patriae" doctrines. See, e.g., Hall v. Hancock 1834, 32 Mass. 255, 257-58 (the unborn child – whether an actual one or only a potential one – is generally considered to be "in being [in post-natal existence] … in all cases where it will be for the benefit of such child to be so considered"), and Palmore v. Sidoti (1984), 466 U.S. 429, 433 (by virtue of the doctrine of parens patriae "the State … has a duty of the highest order to protect … children").

## 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 another. Thus, the following Roe holding (410 U.S. 113, 152-53) that a pregnant woman enjoys a (5th) 14th Amendment (due process clause) guaranteed fundamental or unalienable right to destroy her unborn child by a physician-performed abortion holds (implicitly) also 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 14th Amendment person ( since the (14th Amendment-and the 5th as well- obviously cannot be construed so as to confer upon one person a right to kill another innocent person):

> [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.

This foregoing Roe statement, for several reasons, has to 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 in even as so much as a single occasion 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 unalienable rights", 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 is not a "protecting" right (e.g., being secure against governmental intrusion into the privacy of one's home is a "protected" right; but the "protecting right " is not a so-called right to privacy, but rather the 4th Amendment's guarantee against warrant-less or unreasonable governmental intrusions into the privacy of one's home. (See online, Philip A. Rafferty, Roe v. Wade: A Scandal Upon the Court, 7.1.1 R JLR at paras. 42-47 (2005).

Secondly, the Roe Court's parading of "potential horribles" facing a woman denied access to procured abortion violated a fundamental rule of appellate review as articulated in Hammond v. Schappi, 275 U.S. 171-173, 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."

Not even one of these "potential horribles" facing a woman denied access to physician-performed abortion was found "period" by the Roe lower court (which consisted of a federal panel of three district court judges) because the Roe plaintiffs did not even bother with trying to present so much as a single dot of evidence that so much as one of them even existed. The Roe trial court record is void of any form of factual or opinion evidence, and in fact of any kind of evidence or testimony period. (See Roy M. Mersky & Gary R. Hartman, A Documentary History of the Legal Aspects of Abortion in the United States: Roe v. Wade, Littleton, CO: F.B. Rothman, 1993.)

Thirdly, this implicit Roe holding that the human fetus does not qualify as a due process clause person because its mother has a due process clause guaranteed right to dispose of it is void ab initio (of never having enjoyed any legally binding effect period) because it was arrived at without providing the defenseless and incapable fetus with a due process mandated "meaningful opportunity to be heard." Hence, no one can say credibly that this holding was arrived at through "due process of law".

Fourthly, the Roe Court's conclusion that access to physician-performed abortion is a woman's fundamental or unalienable right was arrived at by arbitrarily excising from the "fundamental rights equation" any consideration for the fetus, and any thought of whether abortion kills an intact or actually existing human being. That is the equivalent of arguing that a concern for human safety can be arbitrarily excised from the building equation for a new superhighway. With that consideration removed, nothing, here, is left really to even consider. And it is that judicial mindset which undoubtedly caused the Roe majority justices to commit monumental, prejudicial due process error in failing to appoint constitutionally mandated legal representation to Roe's fetus in the deciding of the issue of whether it (the human fetus) qualifies as a 5th (14th) Amendment, due process clause person.

## Roe's Explicit Holding that the Human Fetus Does Not Qualify as A Due Process Clause Person

Each and every item which the Roe Court cited in support of its explicit and express holding that the fetus does not qualify as a (5th) 14th Amendment, due process person is exploded in Rafferty, supra at paras. 12-29. The whole of the Roe Court's stated reasons in support of this explicit holding that the human fetus, alive in the womb of his mother, does not qualify as a (5th) 14th Amendment, due process clause person is wholly contrived. The Court arrived at that holding independently of, and without reference to its preceding (express and explicit ) holding that the mother of an unborn child enjoys a fundamental or unalienable right to have her child destroyed so that it cannot be brought forth alive into the world. Since, almost by definition, fundamental or unalienable rights are complementary, and cannot cancel out or contradict each other, then, the very fact that a mother's right to destroy her unborn child qualifies as a fundamental right, alone suffices to establish conclusively that her unborn child has no right period not to be aborted. The problem here is that the Roe Court's explicit holding, that a woman's claimed right to have an abortion is unalienable or fundamental , is even more contrived than the Roe Court's holding that the fetus, alive in the womb of its mother, does not have a due process guaranteed right not to be aborted (i.e., it does not qualify as a (5th) 14th Amendment, due process clause person). See Rafferty, supra, at paras. 42-71.

In relevant part the Fifth Amendment provides that "no person shall be deprived of life … without due process of law". If it can be demonstrated that the "formed" (i.e., the post-embryonic) human fetus (and also the pre-fetal product of human conception by virtue of the "fetal benefit " and "parens patriae " doctrines as discussed, supra ) qualify as a Fifth Amendment, due process clause persons, then it should follow that the formed and the unformed human fetus qualify also as a (5th) Fourteenth Amendment, due process clause persons. (See, e.g., Malinski v. New York (1945), 324 U.S. 401, 415, J. Felix Frankfurter concurring: "To suppose that due process of law meant one thing in the 5th Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.") And if that is the case, then not only does Roe v. Wade and all of its progeny fall (and Roe holds so explicitly: 410 U.S. at 156-57), but it would now violate Fifth and Fourteenth Amendment due process (which, in essence, protect a person from arbitrary or unreasonable (federal action,

and from arbitrary state action, respectively) for the federal government and the states to fail to enact laws safeguarding the formed and the unformed human fetus from being aborted. As observed by Justice Stevens: "The permissibility of terminating the life of a fetus could scarcely be left to the will of the state [and federal] legislatures [if] a fetus is a person within the meaning of the [Fifth and] Fourteenth Amendment[s]." (Thornburg v. ACOG (1986), 476 U.S. 747, 779 (including n.8) (J. Stevens concurring).)

Roe's explicit holding that the fetus does not qualify as a Fourteenth Amendment, due process clause person is void ab initio for the simple reason that the Roe Court, in its rush to judgment, forgot to appoint independent, sagacious counsel (let alone, a guardian ad litem) to represent the fetus in the course of holding that the fetus has no right to life or to be born under the Fourteenth Amendment's due process clause.

Suppose that a "federally" condemned woman was impregnated by her prison guard eight (8) weeks to the day before her scheduled 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 scheduled date of execution. Suppose also that the condemned woman does not request a stay of execution until the birth of her child, but that an obstetric ultrasound or dating scan confirms the existence in her womb of a live, walnut-size, formed fetus. Finally, suppose that the "sole" issue (I repeat: "sole" issue - meaning that issue-dodging is prohibited here) before the Court is whether a federal statute, which bars, without exception (other than the exception of the person's inability to appreciate that his or her death is imminent), all reprieves, violates the Fifth Amendment's due process clause (enacted in 1791), in that the condemned woman's live fetus qualifies as a Fifth Amendment, due process clause person. Who would cast a "yes" vote in favor of upholding the constitutionality of this statute barring the granting of a fetus's petition for a stay of his mother's execution?

No one period, here, can credibly cast a "yes" vote. And the reasons why this is so true are put forth specifically and pointedly in Rafferty, supra, at paras. 5-30 and in Philip A. Rafferty, Roe v. Wade: Unraveling the Fabric of America (2012) at pages 49-54 (and accompanying nn.).

What Roe held is a "fundamental right" because it was recognized as so at the English common law (and therefore is established as one of the most sacred of all constitutionally guaranteed rights), was "murder" at the English common law. And the trial court judge ruled so in Queen v. West (1848), Cox's C.C. 500, 503: 2 Car & K 785, 175 English Rpt. 329), in the course of instructing the jury on the English common law crime of the murder of a non-viable human fetus or human being:

> 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 of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder…; but I am of the opinion, and I direct you in point of [the common] law, that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a such state that it is less capable of living [meaning that the child "became nearer to death or farther from life"], and afterwards dies in consequence of its exposure to the external world [i.e., because it was aborted alive in a non-viable state], the person who, by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.

Blackstone, in no uncertain terms, has, from his grave, deemed our Constitution (which includes the Court's holdings in Roe and in Casey v. Planned Parenthood (1992) – which ratified Roe by a vote of 5 to 4) as tyrannical to the highest degree (1 Blackstone Commentaries [125-26 &] 129 (1765):

> This natural life [i.e., the life of a human being (person), which "begins in contemplation of law as soon as an infant is able to stir" or is organized into a recognizable human form – at which stage it receives its human or rational soul] being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual [particularly by its own mother] … merely upon their own authority….Whenever the Constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical.

Roe v. Wade serves as nothing more than one more confirmation of the following description of the power of the modern state put forth by German-American political-theorist and philosopher, Hannah Arendt (1906-1975): "The power of the modern state [and the United States Supreme Court is but an arm of our Federal Government] makes it possible for it to turn lies into truth by destroying the facts which existed before [such

as the truth that both pre-fetal and fetal (or both "quick with child"(formed) and pregnant-but not as yet "quick with child "(not yet formed)) procured abortion were indeed criminally prosecuted at the English common law-which I have proven by producing "primary" English common law legal authority-see Rafferty ( Rutgers ), supra at paras. 14-20, and Rafferty (Unraveling), supra, at pp. 53 (and nn.) and 70-163)], and by making new realities [such as Roe's "parade of horribles" confronting the pregnant woman who is denied access to physician-performed abortion] to conform to what until then had been ideological fiction".

The problem is not so much that the Roe Court erred in concluding that the human fetus is not a due process clause person. The real problem is that the consequences of that erroneous conclusion seem too enormous (the destruction of some fifty-five million constitutionally protected persons) so as to admit the error.

If what I am saying is true (specifically: from the perspective of our Founding Fathers-the Signers of our Declaration of Independence and the Framers of our Constitution, including its 5th Amendment Due Process Clause: "Nor shall any person …"), and in accord with Blackstone, supra, they thought of the human being in its fetal or in-womb stage of development, as no less a person than themselves or walking around ones, and if our Supreme Court continues in its refusal to put back into our Constitution this right, then, and barring the utterly highly unlikely enactment of a constitutional amendment that would do the same, is there a means for upholding (these) truth(s). The Declaration of Independence says that, indeed, there is: "whenever Government becomes destructive of these ends [one of which is the unalienable right of the fetus to be safeguarded by its Government from being aborted], it is the Right of the People to alter or to abolish it."

It is said that due process of law comes in two forms: 1) "procedural due process"- providing a personal or person-specific, "meaningful opportunity to be heard," and 2) "substance due process," which refers to one or more contents or aspects of a person's life, liberty, or property. Here is a far-out (because it occurred outside of a law or administrative court), but probably valid example for helping to explain the difference between these two (2) forms of due process of law (one procedural, and the other taking in

substance or content): The 13th & 14th Amendments were the procedural due process means by which slave owners were relieved of, and were prevented from re-acquiring their theretofore constitutionally protected property – consisting of lawfully purchased or acquired slaves.

No governmental judicial, legislative, or executive act period that more than incidentally infringes on a given aspect of a person's right to live his life, or to exercise his liberty, or to use, own or dispose of his property can be considered as constitutionally valid and legally binding – enforceable period, when it cannot be said to comply with "procedural due process" or executed according to the established and known "rules and customs of law." And the very essence of procedural due process is being afforded or given a "meaningful opportunity to be heard". Now, in Roe v Wade, one judicial act which occurred consisted of a Court ruling or decision or holding that Jane Roe's fetus (who evidently stood for, or represented all fetuses living under the jurisdictions of the respective several states, and of the Republic of the United States) is not a (5th) 14th Amendment person. But, and in contrast to his mother, Jane Roe, the fetus of Jane Roe went down in Roe v Wade without firstly being given or afforded any opportunity period to be heard on the issue decided there of whether or not he or she qualifies as a due process clause person. Hence, no one can say credibly that Roe's fetal non-person holding complies with constitutionally-mandated procedural due process of law. Putting this another way – but nonetheless quite literally and fully truthful: no one can argue credibly that the Roe Court's fetal non-person holding qualifies as anything more than as a bald and rank judicial exercise in vigilante justice.

Respectfully submitted,

Philip A. Rafferty
330 East Ellis Avenue
Inglewood, California 90302-1316
Phone: (310) 415-7680
Email: philiparafferty1@gmail.com