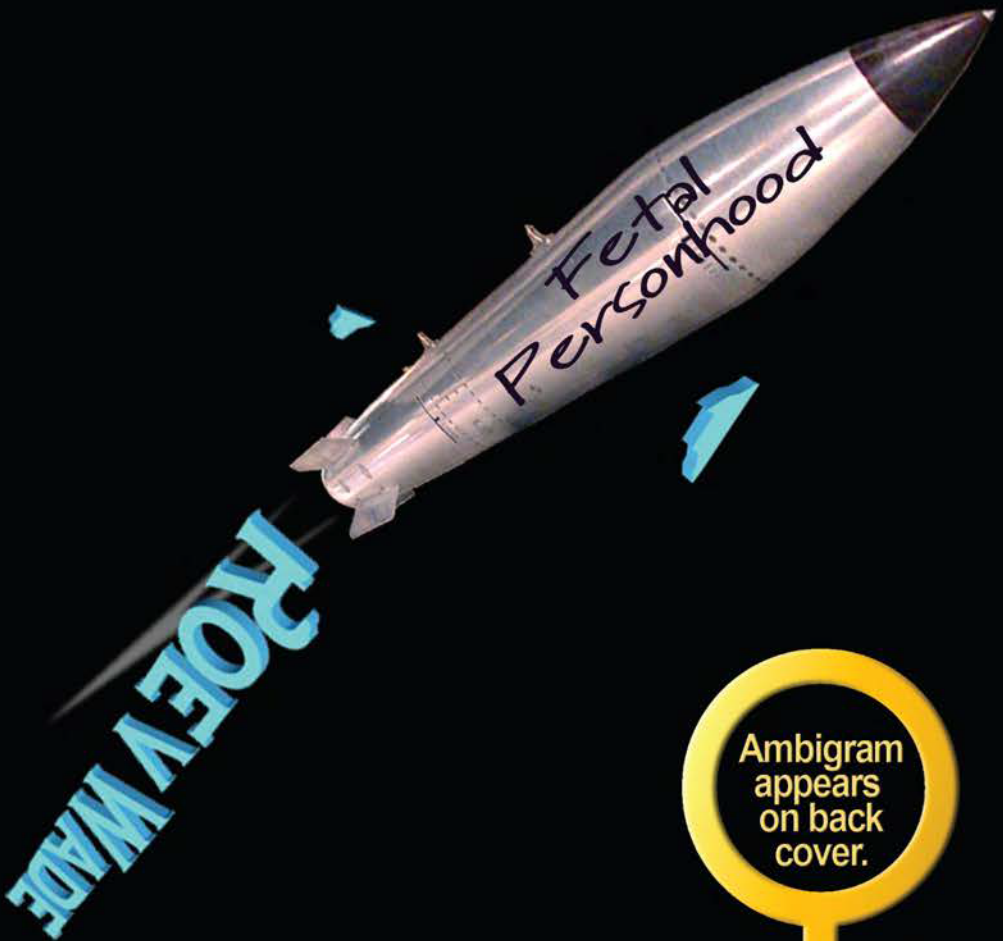


A Silver Bullet for Roe v Wade

PHILIP A. RAFFERTY

REVISED 2





"If Roe v Wade is knocked upside down, then its opposite central ruling becomes binding constitutional law: the Human Fetus becomes a constitutionally recognized due process clause person. Rafferty's Silver Bullet booklet gives birth (as rendered on the back cover) to Fetal Personhood. What the contents of the booklet accomplish with seemingly irrefutable legal history, constitutional interpretation, and logic, the booklet's front and back covers illustrate through graphic art. Knocking down Roe v Wade does no more than returning to the several states of the USA the constitutionally recognized authority either to allow or outlaw procured abortion, whereas knocking Roe v Wade upside down, constitutionally compels every such state to 1) outlaw procured abortion, and 2) employ all reasonably available governmental means for safeguarding the Child-Person living in the womb of his or her mother."

Lawyer and author, Ken R. Hughey

Philip Rafferty is a criminal defense lawyer in private practice (for some 40 plus years) in Southern California.

Notice: Not proving that an intact human person is so at his conception is no stumbling block to proving that he becomes a 5th (14th) amendment due process clause protected person at his conception. (*See infra*, pp. 4-5, 13-14 &, 18.) The USSC sits only as a review of law court; and so lacks jurisdiction to decide *disputed questions of fact*. (Google: “Wikipedia question of fact.”) Therefore, no pro-life person should fault the USSC in Roe v Wade for refusing to decide if an intact human being (person) is in existence at his conception. However, the Roe Court should be heavily faulted for implying that the USSC might, in the future, decide when an intact human being comes into existence. *See Roe v Wade*, 410 U.S. 113, 159: “We need not resolve the... question of when [an intact human person begins his] life... When those trained in... [medical science], philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point in man’s knowledge, is not in position to answer [that question].” Preliminarily, the USSC no more has the jurisdiction to decide factually when an intact human person comes into existence than does it have the jurisdiction to decide factually whether life exists on Mars. Furthermore, this is not a theological question. Theology’s question is how a person should live the life that God gives him. And it is hard to say that it is a philosophical question because philosophy must borrow heavily from medical science, and there is no consensus in philosophy as to whether an intact human person has a soul. (The existence of the human soul is not a proper subject matter of medical science.) One thing is certain here: There exists an undisputed medical science consensus that an intact human being is so at the moment of his or her conception. (*See* the two VNSE quotes and the Williams Obstetrics quote, *infra*, at p. 20. And see also Roe v. Wade: Unraveling the Fabric of America (2012), pp. 27-29 in [www. parafferty.com](http://www.parafferty.com). And see the Hammond v Schappi quote, *infra*, p.2.). This brings us to Roe v Wade’s most insidious fault: 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.*

This two-part argument is unlawful legal argument: In accord with *federalism* (*see Addington v Texas* (1979), 441 U. S. 418, 431), a majority of Americans want the legality of abortion to be returned to the several states; but given there is no precedent for fetal personhood, then, that *absence* proves as much. Popular opinion is, in no sense whatsoever, the measure of what is constitutional law; and the *absence of precedent* is not law period. (*See Rafferty, infra*, pp.21-22 at pp. 198-203.) What’s more, that no USSC justice has said that the human fetus is a constitutionally recognized person is less law than is the absence of precedent (if that is even possible), and has no tendency in reason to prove that the fetus is not such a person. Only a very tiny number of USSC justices (nine out of some one hundred and twelve) have even been positioned to rule on the issue of constitutional fetal personhood.

The Constitution, in accord with common law (which rules by “objective” rules of interpretation), is law that unfolds without becoming a judicial interpretation free for all. Tragically, our Constitution has become so: There is a plethora of USSC precedent overruling its own precedent. *See, e.g., Lawrence v. Texas* (2003), 539 U.S. 558 (reasonable state moral prohibition is unconstitutional, notwithstanding countless cases, extending over a thousand years, that have accepted this truth laid in Jacobson v. Massachusetts (1905), 197 U.S. 11, 30-31: A *reasonable* state law protecting the public health, the public morals, or the public safety is immune from judicial attack. Legal insanity is the inability to judge morally right from wrong. Has Lawrence bred cultural insanity into the USA?

A Silver Bullet for Roe v. Wade - Revised 2 -



Philip Rafferty

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DEDICATION

To the memories of my father and mother, Owen and Lilly Rafferty,
my godfather, Harry Flynn and to my friends, Sherilyn Patrick, Stephen Price,
Anne Gardiner, James Hanink, Melba Conde, Greg Harren, and Theresa Bouvier.



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An Open Letter to Justice Antonin Scalia on His Take on Fetal Non-Personhood: In Rejecting Constitutional Fetal Personhood, You Reject Your Own Method of Constitutional Interpretation (“Original Intent”)

Justice Scalia: I am no Leslie Stahl, so I have this question for you: Would Pontius Pilot have launched Jesus Christ of Nazareth into eternity via the cross had he the perspective of Him, say, from that of His mother Mary (the Mother of God), or His beloved disciple John, or Peter, or Paul? On the question of the constitutionalism of Fetal Personhood, you answer that question, not by what you know, but only by what you don't know or possess: 1) a working knowledge of the prosecution of procured abortion and unborn child-killing at the Anglo-American common law, and 2) a working understanding of this true historical fact: In late eighteenth century Europe (and beyond), and also the United States, it was an undisputed general or common opinion that a human being is so (i.e., an intact one, no less than a newly born one) just as soon as the human embryo acquires a recognizable human shape.

Silver Bullet calls out all those persons in search of the lack of truth in the opinion of Roe v. Wade. Law *has its own integrity* and, so, it ought not be judged, compromised, or attacked other than *on its own grounds*; which is not to say, that law should not, or ought not, *be attacked and felled* legitimately and morally on other grounds, such as by, say, a constitutional amendment. And so said Gary L. McDowell on the constitutional law in Roe v. Wade: “If the opponents of Roe expect to see it overruled, they had better learn to speak the language of the Court. They must exchange their impassioned moral rhetoric for the rather more sterile language of Constitutionalism.” Silver Bullet, *in sterilized*, constitutional language, buries Roe v. Wade on its *own grounds*, and not on mine; and, then, demonstrates (to the degree that reasonable minds cannot deny) that those Roe grounds dictate the following exact opposite of Roe's killer, non-fetal personhood holding: Constitutionalized 5th (14th)

Amendment due process guaranteed *Fetal Personhood*. It contains *everything* that an anti-Roe person needs to know (and cannot, not know) about the constitutional validity of Roe v. Wade.

Roe's central holding is that the unborn child existing really, or only potentially, in his mother's womb does not qualify as a 5th (14th) Amendment due process clause person. Any person who asserts that Roe's central holding is that a pregnant woman's right to an abortion is fundamental, constitutionally speaking, makes a false assertion, because implicit in such a fundamental rights holding is a holding that an unborn child's right not to be aborted is not a fundamental one because the exercise of one person's fundamental right can never cancel the exercise of one by another person. Fundamental or unalienable rights are, by definition, always complementary, and so, are never in true conflict on a constitutional plane. And so revealed the One Who created them, and then passed them on in the Declaration of Independence.

Roe v. Wade incorporates, what the Anglo-American rules governing judicial interpretation of Law have always expressly and explicitly rejected: The injection of the adjudicator's private or personal moral or political views into his or hers judicial decision-making process. Otherwise, men (and women) are ruled by other men and women, and not by the *rule of law*; and the cornerstone of interpretive law (*the impartiality of the adjudicator*) is broken in two. Silver Bullet undresses Roe's thinking only to find that, lo and behold, it too has no clothes.

Silver Bullet adheres to every method of constitutional interpretation employed by all nine justices who participated in your 2nd Amendment, right of a person to possess a gun case, D.C. v. Heller; and which is to say, that Silver Bullet proves the constitutionalism of *Fetal Personhood*, not on my grounds, but only on your own grounds. There is no mode of constitutional interpretation employed by any Supreme Court justice, past or current, that does not employ, or adopt, or accept, or embrace the one employed in my Silver Bullet. Still, you, Justice Scalia (and being a person who accuses our founding fathers of valuing gun ownership far more than unborn children) will reject my Silver Bullet hit on Roe v. Wade; but not because you will be able to put a material dent in its truthfulness; but only because you *fear* the political

consequences that such a holding would usher in; one of which, is an utter rejection of what your colleague, Justice Ginsburg so desperately wants not to see happen in The Land of the Free: It would usher into post-natal existence the kind of persons she and her ilk “do not want to have too many of.” (See Unraveling, *supra*, Notice page, at pp.42 (the Kengor quote) and 191-192.) Do, here, an about-face on your rejection of the constitutionalism of 5th (14th) Amendment, due process fetal personhood. Adopt this truism so dear to the heart and intellect of Saint Thomas of Aquinas: “Life must be lived truly even by those who fear to live it so.” So, step outside of “a politician’s manipulative people thinking” (people must always, and only, be thought of, and treated as, *persons*) so that truth will not be hidden, which is truth’s only fear.



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1

Roe v. Wade Destroyed Legal Historical Facts, and Made up False Ones

“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)

In Roe v. Wade (1973), the U.S. Supreme Court (USSC) 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. (See, Philip A Rafferty, Roe v. Wade: Unraveling the Fabric of America (2012), endnote 18 at pp. 205-210; and hereinafter cited as Unraveling, and available for free online viewing at www.parafferty.com.) The court went on to create the following *unproven* facts, as proven ones, from a three judge federal district trial court record *utterly void* of any facts period. See Roe v. Wade, 113, 152:

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 [no family was granted *legal standing* in Roe] 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.

See, Clarke D. Forsythe, Abuse of Discretion: The Inside Story of Roe v. Wade (2013), 339-342 & Forsythe, The Medical Assumption at the Foundation of Roe v.

Wade, 71 Wash. & Lee. L. Rev., 827 (2014). Unlike the Clarke Forsythes of the world (who virtually refuse to cite me on Roe v. Wade) and our founding fathers, I refuse, categorically, to compromise any person, be he an unborn one, or a once-chained negro person. Clarke Forsythe argues for an overruling of Roe; but only to the extent it holds that the Constitution has a monopoly over the compelled legality of procured abortion. He refuses to make a case against Roe's holding that the unborn child or fetus is not a Fifth (Fourteenth) Amendment, due process clause person. (See (1st) Forsythe, supra, at pp. 339-342.) In doing so, Forsythe has helped tremendously to create the schism (state rights v. fetal personhood rights) in the pro-life cause. And a cause divided against itself is a for sure lost cause. Our founding fathers compromised both their Creator-God and the chained negro person because they concluded very implicitly that their Creator-God created him as less equal to every other person He created; including unborn ones, fetal or otherwise. (See, infra, pp. 9-19.)

The Roe court's *fetal-scapegoating* or parading of *potential horribles* facing a woman denied access to procured abortion violated a fundamental rule of USSC review as articulated in Hammond v. Schappi, 275 U.S. 171-173 (1927): "Before any of the questions suggested, which are of 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."

The central principle of rule *by the rule of law* is *ascertainable legal standards*. The central question of modern constitutional law is the legal standard for determining whether an asserted or claimed right qualifies as a *fundamental right*. The Roe opinion held that access to abortion is a woman's fundamental right. But, and contrary to a near universal belief, it did not do so by holding that abortion access falls within the constitutional protections of the right to privacy. It holds expressly the exact opposite: In order for abortion access to qualify for protection under the constitutional right to privacy, it must firstly and independently qualify as a fundamental right (410 U.S. 113, 152: See, Philip A. Rafferty, Roe v. Wade: A Scandal Upon the Court, 7 RJLR No.7.1 (2005) at paragraphs 42-71). That holding is, of course, just so much nonsense since, almost by definition, a fundamental right can simply generate all the privacy protections that it may need. There is simply no person under God's good sun who can

demonstrate what legal standard, if any (and I maintain that no such standard period) was employed by the USSC in Roe to conclude that procured abortion qualifies as a fundamental right. The same is equally true relative to Roe's holding that the state's admittedly *legitimate and important interest* in safeguarding conceived unborn human life from being aborted is *non-compelling* until fetal viability. (See, Roe v. Wade, 410 U.S. at 162.) Hence, one may reasonably maintain that the USSC, in Roe v. Wade, initiated the ruination of constitutional law by rejecting rule *by the rule of law*.

This booklet seeks to demonstrate, from a legal-historical standpoint that is supported by primary legal authority that, contrary to Roe v. Wade, and also to Roe's most formidable enemy, Justice Scalia, the unborn human fetus qualifies as a Fifth (1791) and Fourteenth (1868) Amendment due-process-clause *person*, and to show a due-process-compliant pathway to restore constitutional fetal personhood and reverse Roe v. Wade.

Justice Scalia maintains that Fifth and Fourteenth Amendments' due-process-clause protected persons are limited to "walking around ones – you don't count pregnant women twice [to which one can reply, but you can easily count pregnant mom as one, and her unborn child or fetus as another one], and there is nothing in the legislative histories [and everything in the word *person* used in those two amendments themselves] ... which implies that their framers intended there to include, unborn ones," and those in the process of becoming so. (Google: Justice Scalia's Interview with Leslie Stahl on 60 Minutes, April 27, 2008). Furthermore, the same can be said also of newly born ones feeding at the breasts of their mothers. And I assure the reader that if Justice Scalia were to employ to the question of whether the unborn child qualifies as a due-process-clause person the historical-legal approach to constitutional interpretation that he employed in the D.C. v. Heller, Second Amendment individual gun rights case (554 U.S. 570 (2008)), then he would be compelled to hold that the unborn child qualifies so. I will in this booklet explode Justice Scalia on fetal non-personhood with this observation of his in Heller (*id.* at 576, and citing U.S. v. Sprague): The words in the Constitution "were used in their normal and ordinary meaning." I refuse to believe that our founding fathers thought of a person possessing

a firearm worthy of constitutional protection, but not an unborn child. *See, infra*, pp. 12-13 & 21-22.

In Roe, the court related that its core holding, that a woman's right to procure an abortion of her nonviable fetus is *fundamental*, constitutionally speaking, is in accord with, and derives from the ECL law (Roe, 410 U.S. at 140-141 & 165). 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 *quickenings* (*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), 175 E.R. 329, wherein the trial court judge related the following to the jury:

The prisoner is charged with murder: and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence, so weak that it died. This, no doubt, is an unusual mode of committing murder...; but I direct you in point of [the common] law, that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a such state that it is less capable of living [meaning that the child "became nearer to death and farther from life"], and afterward dies in consequence of its exposure to the external world [*i.e.*, because it was aborted alive in a non-viable state], the person, who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.

2

Roe v. Wade Conceals the True Method It Employed in Rejecting Fetal Personhood

This booklet seeks to translate into layman's language *how* the USSC's Roe v. Wade *express* reasoning (as in: nowhere in the Constitution where the word "person is found does this word "person" explicitly or implicitly include unborn ones) in deciding the issue of fetal personhood was done in a manner so as to keep covert precisely how, in fact, this issue was really decided there. It is important to understand this because of this constitutionally true statement put forth by retired Supreme Court Justice Paul Stevens in his concurring opinion in Thornburg v. ACOG, 476 U.S. 747, 779 (1986): "The permissibility of terminating the life of the fetus could scarcely be left to the will of the state [and the federal] legislatures [if] a fetus is a person within the meaning of the [Fifth and] Fourteenth Amendment[s]." *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984): By virtue of the doctrine of *parens patriae*, the State ... has a duty of the highest order to protect [all] ... children.

Here, by way of analogy, is how the fetal personhood issue was really decided in Roe v. Wade. It is as if a public institution or agency, such as a police department, were to say this to a pregnant woman: "We are providing you with full security and protection, but none for the child which you are carrying inside you; and this is being done out of respect for your English common law-derived, fundamental constitutional right to obliterate that child through procured abortion." That mentality was superimposed or inflicted upon the mentality of our founding fathers by the USSC in Roe v. Wade.

The truth and aptness of the foregoing analogy is easily demonstrated by asking any person if he can justify, constitutionally, a *yes* vote in favor of upholding the constitutionality of the statute set forth in the following hypothetical, constitutional

issue on fetal personhood as put forth in Unraveling, *supra*, p. 1 at 50-54 (available for viewing online at www.parafferty.com):

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 court is whether a federal statute, which bars, without exception (other than a person's inability to appreciate that his death is imminent) all reprieves, violates the Fifth Amendment's due-process clause (1791), in that the condemned woman's fetus qualifies as a person there.

Who would argue to uphold the statute barring the granting of a fetus's petition for a stay of his mother's execution so that he may live his life just as you, and yours do? Not the ACLU.

3

True English Common Law (ECL) on Procured Abortion and Related Crimes

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 USA and its territories from the late eighteenth century to well into the nineteenth century. The USSC, in Smith v. Alabama, (1888), 465 U.S. 478, observed: “The interpretation of the Constitution ... is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history.” There is a widespread, popular misconception, fueled largely by agenda-oriented, and ideologically driven, pro-Roe law professors, legal historians, and organizations such as the ACLU, Planned Parenthood and Catholics for Choice, *et al* (and all of whom should know better), that procured abortion was recognized as a right at the ECL law. Hardly! There exists unassailable *primary* legal authority establishing each of the following observations on the prosecution of procured abortion at the ECL: 1) if a person unintentionally killed a pregnant woman in the course of performing an abortion, then her abortionist was capitally hung (*see*, Unraveling, *supra*, p. 1 at 89-101); 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; (*see*, Unraveling, *id.* at 53 & 159-163); and, 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 *quicken*ed, or had experienced *quicken*ing. (*See*, Beare’s Case (1732), *id.* at 70-82, 159-163, and at 199-203). In the foregoing Beare 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 nearly died on the pillory from being pelted with a barrage of flying fruits and vegetables.

The reader should be careful not to read into Silver Bullet ideas which are not at all being put forth, such as a push for states’ rights. What is being offered to the targeted states, among the several states, is an opportunity to transcend federalism, and bring into existence a legal play for the constitutional recognition of fetal personhood at the federal level. Only as a secondary purpose is it being offered as a public undressing of certain past and current justices of the USSC for their overreaching in establishing or keeping secured a new and odd kind of a constitutional right: One that can be exercised only by destroying the constitutional rights of others, *i.e.*, unborn ones, including their Declaration of Independence (1776), implicitly recognized *unalienable* right to live out their lives. These justices have appointed themselves as our nation’s roving problem-solvers in the sky. They need to be brought back down from their skies on high.

4

Doable Legal Proceedings for Restoring, Constitutionally, Fetal Personhood

This booklet presents a doable legal play, which can be repeated indefinitely until the USSC grants a hearing on the fetal personhood issue, and also argues that Roe v. Wade truly is a far worse decision than Dred Scott, widely recognized as the worst of all USSC decisions. This is because, while Scott produced a result that can be described only as morally reprehensible, it was, nevertheless, a constitutionally sound one because its core holding that slaves lack constitutionally recognized citizenship status, and so cannot sue in federal court, was arrived at in accordance with constitutionally sound judicial procedure and interpretation.

Our founding fathers made it more than abundantly clear that the Constitution was not being enacted in any sense whatsoever as a forward step towards doing away with slavery. They desired unity and independence, and felt certain that if they prohibited slavery, then there could be no real or true union of, and strength in, the several states.

The decision in Roe v. Wade, when compared to the one in Dred Scott, is quite arguably far more morally reprehensible because Roe employed a scandalous method of judicial procedure and interpretation, or rather, a total lack thereof, and one packed full with unconstitutional, judicial prejudice, particularly by Justice Powell, who admitted publicly that his *pro-abortion vote* there was *strongly influenced* by his then past experience of having seen a freshly killed pregnant woman, who had just been killed by his law clerk's botched abortion; and whom he saved from even being (rightly) prosecuted for murder or manslaughter. (See, Unraveling, *supra*, p.1 at 61-62 & 216-217.)

The Roe justices removed from the protections of the Constitution a constitutionally recognized class of persons, conceived, unborn human ones.

Incredibly, they unwittingly began this removal process *before* even beginning their ruling on the issue of whether human fetuses constitutionally qualify as persons. (See, *infra*, pp. 24-25.) Our founding fathers almost certainly, unanimously understood this class of persons, to be fully intact ones, *i.e.*, as constituting beings who lack nothing that is generally recognized or considered as essential to being deemed as human persons. (See, *Unraveling*, *supra*, p. 1 at 51-52.) Our founding fathers looked at access to the insidious practice of procured abortion just as we look back on the insidious practice of slavery. The fundamental difference here, between us and them, is that they at least acknowledged openly that slavery was utterly morally reprehensible. We, on the other hand, lack the moral courage to at least acknowledge the same relative to the insidious practice of procured abortion. And this seems to be so, in no small part, because the powers that be, such as the oh!- so many information medias, our elitist and intellectual betters, *i.e.*, the oh!- so many university and college professors, certain religious leaders, many *ABA*, and also, *AMA* members, *bendy politicians*, *bendy judges and justices*, and self-appointed caretakers, such as the *ACLU* and *Planned Parenthood*, know full well that if it is ever admitted that abortion is an insidious practice (medically or otherwise) and one morally reprehensible, then, *Roe v. Wade*, and all of its progeny, get aborted from the Constitution.

There is a doable legal play to rightly put moral pressure on the USSC to reconsider the validity of *Roe v. Wade*'s fetal non-person holding. States in favor of a *National Fetal Personhood Amendment* should enact, simultaneously, criminal statutes outlawing abortion because the fetus is a due-process-clause person. Such open defiance of *Roe v. Wade* is not necessarily unconstitutional, because the Declaration of Independence authorizes such action.

Tacked on to each of those statutes should be this: There exists a fact-based showing that an intact human being is so at his conception in the womb of his mother. By constitutional definition, a "fact-based" compelling state interest nullifies any exercise of a fundamental right that undermines a compelling state interest. (See, *e.g.*, *Bernal v. Fainter* (1984), 467 U.S. 326, 227-228.) Whoever qualifies as a Fifth Amendment due process person qualifies also as a Fourteenth Amendment due process clause person. (See, *Paul v. Davis* (1976), 424 U.S. 693, 702, n.3; and *Ingraham*

v. Wright (1977), 430 U.S. 651, 692.) The word “person”, in the Fifth Amendment’s due process clause, is universal in the sense that it includes every single human being who is under the jurisdiction of the United States of America. (See, Plyler v. Doe (1982), 457 U.S. 202, 212 n. 11; and Cong. Globe, 39th Cong. 1st sess. 1091 (1866) (quoting Congressman John Bingham, author and primary sponsor of the Fourteenth Amendment’s due process clause: The rights guaranteed by the Fourteenth Amendment apply to every human being). Every human being has “essential dignity and worth.” (Gertz v. Welch, Inc. (1974), 418 U.S. 323, 341. Any state can easily prove that it very well may be that an intact human being is so at his or her conception in the womb of his mother. (See the two VENSE quotes, *infra*, p.20.) And should either a federal district court judge or the USSC rule, here, that a fact-based showing has not been made, the fact remains, that whatever is in a fertilized human ovum is either greater than an intact human being (because it produces an intact human being) or is of worth equal to the human being that it becomes. And no less so than are an uncut large diamond and a find of a ten billion barrels of unrefined oil of significantly less value than the cut and polished large diamond and ten billion barrels of refined oil. When these statutes are attacked in federal courts, the defendant states should move to have them consolidated. A sufficient number of such states, then becomes a voice too big for the court to refuse credibly to hear.

The state briefs or *points & authorities* must contain these legal points: 1) Roe, itself, holds that if the fetus qualifies as a due-process-clause person, then, not only does Roe fall in its entirety, but the states (and this is implicit in Roe) would be compelled, constitutionally, to outlaw procured abortion; 2) Roe’s fetal non-person holding is *void ab initio* (not legally enforceable) per the Court’s holding in Burgett v. Texas, 389 U.S. 101, 113-116 (1967) that the denial of a due-process mandated right to counsel in an alleged prior conviction case makes that prior *void ab initio* and so, subject to being attacked, not only directly in the court that handed down the conviction; but also *collaterally*, *i.e.*, in any court case wherein the prosecutor tries to use the prior against the person who suffered it. Jane Roe’s fetus was not given a due-process-mandated opportunity, let alone a *meaningful* one, to be heard on the question of his personhood status and right to live. So, constitutionally speaking,

the Roe-decided question on fetal personhood becomes, once again, undecided and unsettled. So, the several states are now permitted, constitutionally, to act on a yes answer they may give to this undecided constitutional question; and 3) the fetus qualifies as a Fifth (Fourteenth) due-process-clause person. (*See, Unraveling, supra*, p. 1 at 49-54.)



5

Roe v. Wade Is Worse Than the Dred Scott Case

What gave rise to this legal play thinking was a realization that, contrary to a near universal belief, the Supreme Court, in Dred Scott's Case (1857) held *implicitly* that the negro slave, Dred Scott, constitutes a Fifth Amendment due-process-clause person. Otherwise Scott would not have been afforded, and he was (at least for the purpose of deciding whether he qualifies as a citizen), the due-process procedural right, a *meaningful opportunity* to be heard, *i.e.*, to argue in federal court that he was a citizen and, therefore could indeed sue. (*See, infra*, pp. 24-25.) An *implicit* USSC holding is no less binding than is an explicit one. And if, here, a person argues that if that is true, then it must surely follow that Scott was denied his liberty without due-process of law, then the response would be this: Logic dictates that a person cannot be denied what he or she had no *constitutionally recognized* right to possess in the first place; and no more than could it be *then* said that an adult white woman was denied her Fifth Amendment due-process right to vote in a national election. *See, WCH v Parrish* (1937), 300 U.S. 379, 391 ("Liberty in each of its phases has, its history and connotation"); and Minor v. Happerset (1875), 88 U.S. 162 (no 14th Amendment right of female suffrage).

Unlike Scott, the slave, who was at least given the due-process-mandated opportunity to argue that he was a citizen and entitled to his freedom, Jane Roe's fetus was never afforded an opportunity to argue for his very own life. Throughout the entire Roe v. Wade legal proceedings (*i.e.*, from its beginning in a federal trial court to its finality before the USSC), no attorney, and no *guardian ad litem* was ever appointed to argue on behalf of Jane Roe's incompetent, defenseless, helpless fetus. (*See, infra*, pp. 24-25.) Thus one can argue credibly that Roe v. Wade's fetal non-person holding did not comply with the dictates of procedural due process. And

without such a due-process backing, Roe's fetal non-person holding can carry no more weight than the tail feathers of a humming bird. See Wisconsin v. Constantineau, 400 U.S. 436 (1971): It is the constitutional guarantee of procedural due process that secures rule, by the rule of law, and not by judicial fiat. Such process is always *personal* to the person entitled to it. There is no such thing, such as a friend of the court brief or attorney that can serve, constitutionally, as a substantial equivalent to being afforded due process of law.

Finally, if it be said that the legal or doable play proposed here is an outright, frontal attack on the Constitution, the response should be that our Declaration of Independence grants to the states, or to the People, the authority to make just such an attack: “We hold these truths to be self-evident: ... all men are created equal, [and] ... are endowed by their Creator with certain Unalienable Rights, that among these are Life [which begins, said Blackstone - the foremost *primary* legal authority on the English common law (ECL) in late eighteenth century America (*see, Unraveling, supra* at p. 1 at 51-52) ‘in contemplation of law, as soon as the ... [fetus] begins to stir [*or, as an embryo*, develops into a recognizable human shape.’] ... That to secure these rights, Governments are instituted among men ... that whenever any Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it.”

6

The ECL Adjudges Roe as the Epitome of Judicial or Governmental Tyranny

Blackstone deems our Constitution, including Roe (and Casey, 505 U.S. 833 (1992)), which affirmed Roe 5 to 4 after bendy Justice Kennedy switched sides on the authority of pro-Roe judicial fan mail: *See, Unraveling, supra*, p. 1 at 65-66) as being tyrannical to the highest degree (1 Commentaries, 129 (1765)):

This natural life [*i.e.*, the 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 it receives its human or rational soul: *see, Unraveling, supra*, p. 1 at pp. 51-52], 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 very own mother: *see, Unraveling, id.* at p. 53] ... 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.

It is undisputed that the USSC has no authority whatsoever to interpret or write out of the Constitution any person, or class of persons, such as you the reader, narcissistic justices, who think that, what they think is the measure of law, is the law because they think it, WASPS, Jews, Catholics, Fundamental Christians, Jehovah Witnesses, Mormons, Muslims, arch enemies of constitutional rights, such as members of the ACLU, Planned Parenthood, NARL, Catholics for Choice, pro-Roe politicians, and those, such as Sister Sandra Schneiders and Kathleen Kennedy, who adhere to the ideology of *radical feminism*, politically correct or incorrect persons, lawyers, liars, illegal or legal aliens, derelicts, slackers, rats, beggars, homeless ones, women with too many children, fatherless children, addicts, white trash, impoverished ones, criminals, terrorists, gang-bangers, people of color, colorless people, physically deformed ones, mentally deficient ones, communists, atheists, prostitutes, their johns, pimps, child molesters, all-around rat bastards, homosexual ones, transgendered

ones, cross-dressers, transvestites, good or evil persons, PETA members, vegans, corporate ones, members of the information medias (or at least those ones who live only to create unproductive (other than financially productive) controversy, newly born ones, and most importantly, unborn ones. To argue otherwise is to run the risk of writing oneself out of the Constitution. Or, if, as Roe holds, a pregnant woman can arbitrarily, or otherwise, rid herself of an unwanted, unborn child (because the child would drain her), then, why cannot the State arbitrarily rid itself of virtually all of the above undesirable drainers?

Retired Supreme Court Justice Paul Stevens, widely recognized as one of the most liberal justices ever to sit on the USSC, in his Address: Construing the Constitution, 18 UC Davis L.R. 1, 20 (1985), observed: Supreme Court justices, in interpreting the text of the Constitution “must, of course, try to read ... [the] words [put forth there] in the context of beliefs that were widely held in the [late] eighteenth century.” One such widely held belief at that time was that an intact human person comes into its existence just as soon as it achieves fetal formation in the womb of its 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*, 492 U. S. 302, 330 (1989): “At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted.” (Contrary to a near universal belief, *quickenings* 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), p. 7, observed that a fetus or man becomes “a Person by the Union of his Soul and [formed] body ... is the acceptance of a person among men in all common sense and as generally understood.” This same widely held and accepted belief was noted also by Walter Charleton, a fellow of the Royal College of Physicians, in his Enquiries into Human Nature (1699), p. 378: “That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree”. And so said Benjamin Rush (1745-1813), foremost recognized eighteenth century American

physician, founding father, and signer of the Declaration of Independence (1776), in his Medical Inquiries (1789), p. 42: “No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported”. Samuel Johnson, in his A Dictionary of the English Language (1755) (*vol. 2*, sub. tit.: *quick*) defined *quick* (as in *quick with child*) as “the child in the womb after it is perfectly formed.” George Mason, in his A Supplement to Johnson’s English Dictionary (1801) (sub. tit.: *quick*) defined *quick* (as in *with quick child*) as “pregnant with a live child.”



Quickening Played NO Role in Pre-19th Century ECL Abortion Law

In a 1990 letter, J. A. Simpson, co-editor 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 with child*, while adequately representing the meaning that had come to be current in the nineteenth century, does not reflect the earlier history of the phrase, and its changing relationship with the term *quickening*. A revised entry might read something like:

Constr. *With*.

a *Quick with child*, orig., pregnant with a live foetus [*sic*: *child*: a pregnant woman, on experiencing *quickening*, announced: "I'm pregnant with a live child", and not: "I'm pregnant with a live fetus."]; later [*i.e.*, sometime during the course of the nineteenth century], at the stage of pregnancy at which the motion of the foetus [*sic*: *child*] is felt (infl. By QUICKENING vbl.sb.). Now rare or Obs.

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 is taken from Bartholomaeus Anglicus, De Proprietatibus (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 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.

The above quote is reproduced from On the Properties of Things: John Treviso's Translation of Bartholomaeus Anglicus, De Proprietatibus Rerum: A Critical Text 296-297 (Oxford 1975). Treviso's translation was completed at Berkeley, Gloucestershire, in February, 1398. *Ibid.* at xi.

There is but one reason why, in the context of in-womb child killing prosecution at the English common law, that sometime during the nineteenth century *quickening* came to replace *fetal formation* as the common law criterion of when a pregnant woman can be said to be *quick with child* (i.e., *pregnant with a live child*): a subtle mistake in legal interpretation. In several abortion cases prosecuted during the period 1808-1832, English judges mistook *quickening* for the definition of the term *quick with child* (which in its primary sense, as does the term *with quick child*, mean simply *to be pregnant with a live child*). They did this because in their day it was a common expression among pregnant women to refer to themselves as being *with quick child* or *quick with child* at their *quickening*. These judges mistook a then vulgar opinion on when a pregnant woman becomes *quick with child* for the definition of that term. See, e. g., R v. Phillips (1811), reproduced in Unraveling, *supra*, p.1 at pp. 155-158. The Philips judge erroneously instructed the jury that the statutory phrase *then being quick with child* refers to the pregnant woman's *quickening*. That is the equivalent of a State of California judge instructing a jury that a defendant is not guilty of DUI – alcohol unless, while driving, he was *then* in the state of drunkenness. “Then being” is a state of existing in such a such state throughout the full period of that state, whereas *quickening* is a single or one-time event occurring while in that state. So, if the Philips judge was correct here, then, his interpretation of “then being quick with child” creates this absurd result: Any abortion not occurring simultaneously with the pregnant woman's *quickening* is exempt from prosecution.

8

The ECL (USA-Adopted) Fetal Born Alive Rule (No Fetal Murder if Stillborn) Is Founded Solely on Coke's Erring in Judicial Interpretation

Unlike the USSC which refuses to abide by its own decisions, the ECL binds itself so. (See, *infra*, pp. 27-28) Coke, in his Institutes 3 at pp.S0-51 (2nd edition., 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. 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? 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 the 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 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. (*See*, *Unraveling*, *supra*, p. 1 at pp. 105-108 & 125 – 154, and 149 – 150).

9

The Consequences (the Obliteration of Some Sixty Million Infant Deaths) of Admitting that Roe’s Fetal Non-Personhood Holding Is Wrong Are Too Enormous to Admit

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

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

Another widely held belief was the English common law (ECL) rule that the human fetus, beginning at its initial conception in the womb of his mother, “is generally considered to be in being [*i.e.*, is considered to be in full and complete intact existence as a human person] in all cases where it will be for the benefit of such child to be considered so.” (Hall v. Hancock, 32 Mass. 255, 257-258 (1834), and quoting Blackstone, widely recognized as the foremost legal authority on the ECL in late eighteenth century America.)

The problem is not that the Roe Court committed the most egregious error and gross injustice in the history of Anglo-American law in concluding that the human fetus does not qualify as a due-process-clause person. The real problem is that the consequences of this grave injustice seem too enormous (the destruction of some sixty (60) plus millions of constitutional persons), so as to admit the error. Man’s capacity

to deceive himself (or to be deceived) in the name of humanity transcends humanity. So said W. H. Auden: “Everything turns away – Quite leisurely from the disaster.”

On whether procured abortion fits into the *fundamental rights equation*, the Roe Justices, disregarding even a semblance of due-process analysis, arbitrarily excised the fetus from consideration. To 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.

Roe’s express holding that abortion qualifies as a *fundamental or unalienable right* is an implicit holding that the unborn child does not qualify as a due-process-clause person and so, does not enjoy a fundamental or unalienable right not to be aborted. So, a court holding that such a child does qualify so would be an implicit holding of no fundamental right to an abortion. And so says Roe v. Wade, 410 U.S. at 157). Fundamental rights are complementary, and are never in conflict. (See, Philip A Rafferty, 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, in www.parafferty.com).

The nature of a criminal act cannot be changed into a fundamental liberty simply by relabeling it as one (except when you go constitutional rights window shopping with Justice Breyer who, in Washington v. Gluckberg (1997) argued that the true crime of assisting suicide, becomes a fundamental right when relabeled as *dying with dignity* (521 U.S. 702, 790)). So, if abortion is recognized as homicide (and not a dignified medical procedure), as is shown consistently in *primary* English common law legal authorities over the past 700 years (see, Unraveling, *supra*, p. 1 at pp 70-164.), then, it remains so when re-labeled as a fundamental right (to kill another). See, Washington v. Gluckberg (1997), 521 U.S.702, 711 (no fundamental or unalienable right to assisted suicide because for over 700 years in Anglo-American common law it was criminally prosecuted). Furthermore, a reasonable person wants to know well that to which he gives his support.

Moral outrage exists over allegations that baby night-herons were mangled in a botched wood-chipping incident. (LA Times, May 14, 2014, p. AA4). Such outrage

exists also over an alleged willful killing of the lowly (rodent) opossum (LA Times, *supra*, March 22, 2008, p. B4). There exists no such outrage over the post-Roe deaths of some 60 plus million *aborted ones*.

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?) that *in our opinion what was aborted was not an intact human being*. 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 its reliability” (JAFRC v. McGrath, 341 U.S. 123, 171 (1951)). They should concede also that, for all it may be known reasonably, every procured abortion results in the death of an intact human being / person. (One can also say reasonably that procured abortion is akin to shooting at an inhabited dwelling hoping that it is 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 2nd 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 Supreme Court in Wisconsin v. Yoder, 406 U.S. 205, 215-216 (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.”

In Roe v. Wade, 410 U.S. at 162, the court stated explicitly that the state’s interest in safeguarding the fetus is *important* throughout the gestational process. And so said President Obama: “In matters of life and death we are partners with God.” (2009). (For a full citation, Google that phrase). And so says Western medicine: “Our knowledge of fetal development, function, and environment has increased remarkably. As an important consequence, the status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we have long have given the pregnant woman” (Williams Obstetrics, 17th ed., 1985, p. 39). And so says more than two-thirds of the states of the USA. (Google: NCSL number of states with fetal homicide statutes). So says also Western science which, by definition, is

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

The creation of an embryo and development of a fetus and finally the birth of an infant is a continuous physiological process commencing with conception and ending with the cutting of the umbilical cord.... The embryo and later the fetus is an individual entity, imbued with individualistic qualities [genes] which affects its rate of progress, much as later the progress of the infant to a mature adult will be determined by individualistic qualities. From a purely scientific standpoint, there is no question but that abortion represents the cessation of [a] human life.

See, also, VNSE (7th ed., 1989): "the moment the sperm cell ... meets the ovum of the female and the union results in a fertilized ovum (zygote), a new [human] life has begun." And so, as Mother Teresa stated, "We must not be surprised when we hear of murders, of killings, of war, of hatred. If a mother can kill her own child, what is left but for us to kill each other."

Under English law *persuasive authority* attaches to USSC decisions (D.M. Walker, Oxford Companion to Law (1980), p. 979). Because the USSC, in its Roe v. Wade decision, bestowed its prestige on Cyril Means' vandalization of the history of the criminal prosecution of procured abortion and unborn child-killing at the English common law, and on Means' lie that Coke "intentionally" misrepresented that law (Coke did unintentionally misrepresent that law, but in the opposite way Means says: What Coke said "was not" murder was in fact murder), then, the English judiciary would not be out of line in throwing the weight it gives to USSC decisions into the deepest waters of the River Thames. Only one person has attempted to disprove my relation of the history of the criminal prosecution of procured abortion and unborn child-killing at the English common law: He is a reincarnation of Cyril Means Jr. (*see, supra*, p. 1) whose new name is Wolfgang Mueller, a professor of medieval legal history whose credentials would fill a large book. His failed attempt is in his, The Criminalization of Abortion in the West: Its Origins in Medieval Law (Cornell

(aka: Corny) U P, 2012). It took me all of two (2) pages to explode his argument, and re-reincarnate him as a runt bull put out to pasture in the wilds of the great state of Montana. (See my Unraveling, *supra*, p. 1 at 149-150 & 29-30.) To date, no one who has articulated a single dot of a material flaw in my relation of the criminal prosecution of procured abortion and unborn child-killing at the English common law.

A person who is transgendered retains his/her status as Fifth Amendment *person* (a concept ushered into existence by the Catholic Church, and is not be confused with the concept of an *individual*), notwithstanding that the Fifth Amendment's composers had no intent of including one as a person there for the reason that a transgendered person was then inconceivable. (And it is conceivable today only if genes count for nothing.) Just so, does an unborn child retain the same such status, notwithstanding that he remains unborn. He is in possession of a human shape, and therefore, is in receipt, from his Creator, of his human soul, which was, throughout all of late eighteenth century Europe, and the USA, the generally, if not unanimous, understanding of what constitutes an *intact person*. See, Philip A Rafferty, Roe v. Wade: The Birth of a Constitutional Right (1992), pp. 136-37: available for free online viewing in www.parafferty.com). *And, see, U.S. v. Sprague, supra*, at 3. If Justice Scalia contradicted his *original intent* philosophy by casting the fifth vote in a 5 to 4 USSC holding that ones who have been transgendered (who were unknown to our founding fathers) qualify as intact persons (an objectively true holding), then he would be reluctantly hailed as a champion of persons' rights; whereas, if he did not contradict that unconstitutional philosophy (philosophy period is not a rule of Anglo-American judicial interpretation) in casting the fifth vote in a 5 to 4 USSC decision holding that the unborn fetus qualifies as an intact person (also objectively true), then he, and four of his fellows, would be summarily impeached, and ordered forthwith to ascend to the roof of the USSC Courthouse; and from there, to be launched into the Potomac River.

“The wise [in contrast to the unwise] change their minds when they perceive that they have been in error.” (Mark Twain, Joan of Arc, p. 88, Ignatius Press, 1989 paperback edition.) “On profound moral issues, such as procured abortion, either those on the right or those on the left have made themselves unwise because their prejudices,

which are, by definition, invariably unreasonable and unconscious, have made them impervious to seeing the error in their thinking.” (Anonymous Philosopher.)

Just as the constitutional basis of Roe v. Wade’s abortion rights holding (the Roe created right of an undefined, general constitutional right to privacy, which no longer exists: see supra, p.2: Rafferty Rutgers citation) derived it birthing from a law review article (Samuel Warren & Louis D Brandeis, The Right to Privacy, 4 Harv. L. R. 193, 1890), so do the alleged extinctions of the primary English common law legal authorities (PECLLA), such as Coke, Blackstone, Hale, and Henry Bracton, et al., on the criminal prosecution of procured abortion and unborn child-killing derive from yet another mere law review article (Means, supra, p.1). By definition, PECLLA cannot overrule itself, let alone can it be overruled by the USSC, English justices or judges, or the ranting of a fanatical abortion rights advocate. It can never be overruled as such. It can be made nonbinding within English jurisdiction only by the Supreme Court of the United Kingdom, and to a lesser extent, by the English House of Lords. For that reason alone, the USSC, in Roe v. Wade, was bound to legally and morally abide by the relating of the PECLLA on procured abortion by PECLLA’s “primary authority” on procured abortion, and not by the ranting of an abortion rights, nutcase professor (Cyril Means, Jr.), or his non-nutcase reincarnation in the form of Professor Wolfgang Mueller, professor of medieval legal history. Putting this another way: Every dot of PECLLA on procured abortion (and crimes related to it, such as killing a pregnant woman in a botched abortion) holds that procured abortion is subject to criminal prosecution, and is never a common law liberty. PECLLA, by definition, means that there be no such entity as a PECLLA that can overrule the same or another PECLLA. Therefore, any attempt to deconstruct PECLLA on procured abortion as a liberty, and not a crime, can result only in a relation of unadulterated legalized (by Roe v. Wade) historical nonsense. See, Ashford’s Case (1818), Walter Thornbury, Old Stories Re-Told (1879) (new ed.), Chatto & Windus: Lord Ellenborough for the court: “However obnoxious [one finds] ... trial by battle, it is the mode of trial which we ... are bound to award. We are delivering the law [of the land] as it is, and not as we wish it to be. We must pronounce our judgement that the battle must take place.”

Almost by definition, an “entrenched mentality” is impervious to seeking or accepting truth and to listening to reasonable arguments that reject that mentality. Virtually all pro-abortion access persons suffer from this entrenched mentality: “What a pregnant woman does with her uterus is none of your, mine or society’s business.” Virtually all pro-lifers suffer from this entrenched mentality: It is an undisputed fact that the human zygote, et al, is an intact human being/person. Here is a thought that cannot be ruled or enslaved by any entrenched abortion mentality: If a live human zygote is not an intact human being/person, then, what is operating (aka: the operator) in the human zygote to unfold it into an intact, born alive human being/person is necessarily far and away greater than the human person it (the human zygote) becomes because its operator makes or produces a miracle: A new human person. If what is operating in the human zygote is mother nature, then, shame on virtually all mother nature conservationists since, in supporting abortion access, they are, in effect, advocating for the destruction of mother nature at her finest. Similarly, if what is operating in the human zygote is the Creator-God spelled out in the Declaration of Independence, then, any person who is supportive of abortion access, thereby, rejects his Creator and the Declaration of Independence.

And who’s to say that being aborted is no business of the to-be-aborted fetus or unborn child? Or, who (besides those Roe v Wade upside down majority justices) can say that our Declaration of Independence-Creator God spelled out implicitly there that the unborn child has no constitutional, procedural due process, unalienable or fundamental right to have a say, say through a guardian ad litem (and the latter’s attorney) on whether or not he is to be relegated to mere medical waste? It might be that substantive due process of law does not recognize the fetus or unborn child as a person. But at an absolute minimum, procedural due process demands that said child be given a say on whether he is so. Otherwise, and to his utter detriment (loss of his life), he is denied (procedural) due process. And that makes Roe’s fetal non-person holding *void ab initio*.

If the reader remains convinced that in Roe v. Wade, the Court complied with the dictates of 5th Amendment due process (which binds the USSC no less than it binds the executive and legislative branches of the federal government), then, try and

rebut constitutionally, this statement: All persons “must” be afforded (procedural) due process of law which, in its essence, means simply, to be given or afforded a meaningful opportunity to be heard in an impartial forum when the state takes action that may or may not impinge upon a person’s “life, liberty, or property.” The Roe Court, in “not acting” to afford Jane Roe’s fetus a right to be heard before deciding if he is a constitutionally protected due process clause person did, by that “inaction”, already decide that Jane Roe’s fetus is not such a person. (The virtual reverse is not true: A human fetus cannot be said, constitutionally, to be a due process clause person simply because the Court afforded, in the manner afforded Dred Scott, the fetus procedural due process in deciding whether he is such a person.) So, the Roe Court’s written-out fetal non-person holding cannot even qualify as a holding, let alone one that binds a state or person, *et al.* Constitutionally speaking, what has already been decided finally in a Court decision cannot be re-decided in that same opinion or decision. So, Roe’s fetal non-person holding can’t even qualify as a process, let alone as a constitutionally legitimate one. It’s no more than a constitutionally illegitimate judicial act of presupposing the very disputed issue it is duty bound to decide reasonably and impartially as required by the dictates of 5th Amendment due process of law in a written Court opinion. So, and I repeat: Whatever the Roe Court articulated in support of it fetal non-person (alleged) holding, doesn’t even qualify as support, let alone does that articulated holding even qualify as a holding, since the Court already decided that issue before deciding it in a written opinion. And if that is true (and it is), then, no person can say that the Roe Court’s “inaction” here complies with the 5th Amendment’s “procedural” due process clause mandates. And, of course, no state or person is bound by a federal action (including an action by the USSC) that cannot be said to meet either the requirements of the 5th Amendment’s due process clause or the constitutional requirements of being deemed a legitimate constitutional judicial act.

