## Achieving the Restoration of Constitutionally Guaranteed Fetal Personhood

Catholic theologian, Sr. Sandra Schneiders, in an interview published in The Milwaukee Sentinel on July 1, 1989, p. 4 of Part 4 (google: "*Feminist Nun sees no alternative to Roe vs. Wade*"), stated that procured abortion, under any circumstances, is immoral. However, she then described herself as pro-choice, by which she meant that she does not advocate nullifying the 1973 U.S. Supreme Court decision of Roe v. Wade, which mandated constitutionally abortion by a physician up to (and in several circumstances past) "fetal viability". She said that neither the Federal Government, nor the several states should criminalize procured abortion for the following two reasons. 1) It will lead to more back alley abortions; and 2) it will maintain "the patriarchal control of women through compelled child bearing."

Regarding her first reason, it is certainly reasonable to conclude that if procured abortion were to be outlawed throughout the United States that back alley abortion would increase, but surely no more than a small fraction of the some 55 million abortions that have been performed in the United States since Roe v. Wade. Regarding her second reason, she provides no evidence for her bald contention that Anglo-American abortion laws were enacted, not to safeguard the unborn child living in the womb of his or her mother, but rather for men to control women through compelled childbearing.

In this article I provide explanations, examples, and references documenting that for nearly 700 years Anglo-American law clearly considered unborn children as persons under the law, deserving the same rights and protections as any other persons, and always prosecuted abortion as either murder or as a very serious crime. I will show that the Roe v Wade decision should be reversed because it arbitrarily took away fetal personhood that had existed under Anglo-American law for at least 700 years (and in doing so, related an utterly false Anglo-American abortion legal history, and because it failed to provide mandated due-process representation to Jane Roe's unborn child).

Our Constitution and colonial and state legal systems are all derived in substantial part from the English common law. As observed by the Supreme Court in Smith v Alabama (1888), 124 U.S. 465, 478: "The interpretation of the Constitution...is necessarily influenced by the fact that it's words are framed in the language of the English common law, and are to be read in light of its history."

I have documented nearly 700 years of the criminal prosecution of procured abortion and unborn child-killing as murder at the English common law if what was aborted was a "post-" embryonic fetus. There are also examples of English common law criminal prosecution of "pre-'" post-embryonic procured abortion, such as the case of R. v. Beare, Derby England, 1732, which I have reproduced with author's commentary in my book Roe v Wade: Unraveling the Fabric of America (2012) at pp. 70-82.

During the later part of the 16th Century unborn child-killing ceased to be prosecuted as common law murder (but was still prosecuted there as a heinous misdemeanor) unless the abortion-killed child was aborted alive before dying. This change in the law of unborn child-killing resulted from nothing more than a judicial error in interpreting an unborn child-killing case and another case that almost certainly was not even an actual case. (See Rafferty: Unraveling, in this order: pp. 105-108 (Haule's Case, London, 1321), pp. 126-142 (Bourtons's Case, 1326-1327), and pp. 143-148 (R. v. Anonymous, 1348). And see also www.parafferty.com: click on Roe v Wade: The Birth of a Constitutional Right (1992) and then scroll through pp. 472-765.

Those persons who lived under the jurisdiction of the English common law from well before the 12 Century to at least the mid-20th Century, including the Signers of the Declaration of Independence (1776), the Framers of our Constitution (effective in March 1789) – including its 5th Amendment Due Process Clause (1791) which in pertinent part, provides that "no person shall be deprived of his life without due process of law", considered the formed or post-embryonic fetus living in the womb of his or her mother as no less a person (or intact human being) than themselves, or walking around ones, or the newborn baby feeding at his or her mother's breasts.

Charles Leslie, in his Treatise of the Word Person p. 14 (1710), observed that a fetus or man

becomes “a *Person* by the Union of his Soul and [formed] Body...This, is the acceptance of a person among men, in all common sense and as generally understood.” Similarly, Walter Charleton, a fellow of the Royal College of Physicians, in his Enquiries into Human Nature p. 378 (1699), observed “That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree.” This union was then understood to occur at “fetal formation” (and not at “quickening” which is the pregnant woman's initial perception of the movement of her fetus). This understanding was not based on any religious belief, be it Catholic, Protestant, theistic, or otherwise, rather on the opinion or teaching of Aristotle as set forth in his Historia Animalium (Lib. 7, C.3, 4:583). That most celebrated American physician, Benjamin Rush (1745-1813), a founding father and signer of the Declaration of Independence, in his Medical Inquiries p. 10 (1789), observed: “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 1755 Dictionary of the English Language defined “quick with child” (as in “pregnant with a live child”) as “the child in the womb after it is perfectly formed”. All that was disputed here was whether the conceived pre-fetal product of human conception is also an intact human being. Charles Morton, a one-time president of Harvard College, in his Compendium Physicae p. 146 (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), and reproduced online at www.parafferty.com: click on Roe v. Wade: The Birth of a Constitutional Right (1992) and scroll through pp. 475-482]...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 union...of soul and body; but indeed it seems more agreeable to reason that the soul is infused [at]...conception.

The 5th Amendment due process clause (1791) was incorporated into the 14th Amendment (1868). And it cannot be reasonably denied that whoever is deemed as a 5th Amendment person is deemed necessarily also as a 14th Amendment due process clause person. (See Unraveling, supra, at pp. 49 and 196 at endnote 1). In Plyer v Doe, 457 U.S. 202, 212 n.11 (1982), the Supreme Court expressly affirmed the proposition that every human being living within the jurisdiction of the Republic constitutes a 5th Amendment person. And let us not overlook this observation of retired Supreme Court Justice, Paul Stevens: Supreme Court Justices in interpreting the Constitution, “must, of course, read the words [used by the framers of the Constitution] in the context of beliefs that were widely held in the late 18th Century”. (Justice Paul Stevens, Address: Construing the Constitution, 18 UC Davis L.R.1, 20 (1985).)

In spite of all this, there are some persons, even some pro-life constitutional lawyers and scholars (and not to mention Justices Scalia and Thomas), who argue that there is nothing in the wording or legislative history of the 5th (14th) Amendment(s) to indicate that their Framers meant to include the unborn post-embryonic fetus within the meaning of the word person in those two due process clauses. True enough. But the same can be said of newborn babes feeding at their mother's breasts. So, in light of the foregoing quote from Justice Stevens, is it not the burden on such persons who say that the unborn child does not qualify as a due process clause person to demonstrate that the framers of these two amendments specifically meant to exclude the unborn child as being a constitutional person? And that, of course, could never be demonstrated.

I maintain that, contrary to the Roe v Wade opinion, our Founding Fathers (the Signers of the

Declaration of Independence, and the Framers of our Constitution, including its 5th Amendment Due Process Clause) thought of the (post-embryonic) fetus living in the womb of his mother as no less an "intact" human being (person) than the newborn babe feeding at her mother's breast, or themselves, or a walking around person, and therefore the human being in its fetal stage of development 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, which provide, respectively, as follows: Hall v. Hancock (1834), 32 Mass. 255, 257-58: at the English common law 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").

In the course of concluding their Roe opinion, the Roe majority justices stated "our holding that a woman has an unfettered "fundamental," constitutionally guaranteed right to procure an abortion of her non-viable fetus]...is consistent with the lenity of the [English] common law on [abortion.]" (See Roe v. Wade, 410 U.S. at 165). The exact opposite is the common law truth. I have documented nearly 700 years, from 1200 to 1850, of primary English common law legal authorities or precedents that prove that aborting the unborn fetus was always prosecuted as murder or as a very serious crime. Here is but one of over a hundred such documented cases. It states that what Roe held to be a "fundamental right" because it was recognized as such at the English common law (and therefore is established as one of the most sacred of all constitutionally guaranteed rights), was in fact murder (a hanging offense) at the English common law. The case is Queen v West (1848) (20 years before the adoption of the 14th Amendment). The following quote is the West trial court judge instructing the jury on the 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 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.

Sir William Blackstone (1723-1788) was an English jurist and legal compiler and commentator. His 4 volume Commentaries is to this very day recognized as a primary authority on the English common law. A primary authority is as authoritative as a common law case. Blackstone's Commentaries (1765-1769) are often quoted as definitive of what was the common law on a particular legal point or issue. For example, Roe v Wade's author, Justice Blackmun, quoted Blackstone (at 1 Commentaries *129) in his concurring opinion in O'Bannon v TCNC (1980), 447 U.S. 773, 803 n.11: "Blackstone, whose vision of liberty unquestionably informed the Framers of the Constitution's Bill of Rights,...wrote that the "right of personal security consists in a person's legal and uninterrupted enjoyment of his life."

Blackstone, in no uncertain terms, has, from his grave, deemed our Constitution (which includes the Court's holdings in Roe and in Casey) as tyrannical to the highest degree (1 Blackstone Commentaries 129 (1765):

> This natural life [i.e. the life of a human being, 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: see Unraveling, supra at p. 52 at text accompanying note 13, and also at pp.199-203 at endnote 13] 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 at p. 53, and at that text accompanying note 16, which appears on p. 204]….merely upon their own authority....Whenever the Constitution of a state vests in any man [or woman], 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.

The Roe Justices "arbitrarily excised" from the fundamental rights equation it employed to conclude that a woman's interest in procured abortion is a "fundamental" right (constitutionally speaking) any consideration of whether abortion kills an intact human being, or whether it is unreasonable to conclude that it may very well do just that, or whether it is the substantial equivalent of the same. That is the equivalent of arguing that a concern for human safety can be arbitrarily excised from the building equation for a new super highway. And, what is far worse, those same justices, in the course of deciding the question of constitutional fetal personhood, failed to provide Jane Roe's fetus with a due process-mandated opportunity to argue for its life on the grounds that it is indeed a 5th (14th) Amendment due process person. Jane Roe's fetus was not appointed a guardian ad litem and an attorney to argue on its behalf. So, no one can say that Roe's fetal non-person holding complies with the dictates of due process of law and "the rule of law." Even Dred Scott the slave, in the Dred Scott Case, was given an opportunity to argue before the Court that he was entitled constitutionally to be relieved of his status as being a slave.