Beyond Personhood: Abortion, Child Abuse and Equal Protection

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BEYOND PERSONHOOD: ABORTION, CHILD ABUSE, AND EQUAL PROTECTION

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In this article, I assume unborn human beings are constitutional persons within the meaning of the Fourteenth Amendment to the U.S. Constitution. Anticipating resistance to the prohibition of abortion, this article will examine the second generation of moral and jurisprudential arguments represented by various scholars, including Cass Sunstein and Eileen McDonagh. This article will also review DeShaney v. Winnebago County Department of Social Services1 in detail to determine whether it is an obstacle to the protection of unborn children by the State. I will conclude that an unborn person is protected by the Equal Protection Clause, which overrides any previous legal right to an abortion.

The attainment of constitutional personhood will not be the final chapter in the right to life of an unborn human being, but rather the beginning of a new book. Although fetuses and embryos will have a constitutionally guaranteed right to life under the Fourteenth Amendment, such a right may not necessarily protect the unborn from harm. If crede is given to emerging new views that justify the abortion of constitutional persons, then Justice Blackman’s suggestion in Roe v. Wade2 that the case for abortion collapses once the unborn human being attains constitutional personhood may prove premature.

Let us assume that one day the Supreme Court will use its power of judicial review to declare that “person” means human being and “human being” includes the unborn from the time of conception. The Fourteenth Amendment may then be interpreted as providing that no state shall

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deprive any *unborn* "person, of life, liberty, or property, without due process of law . . . ."³ The impact on abortion would be immediate because an embryo’s or fetus’s constitutional right to life would conflict with a mother’s right to privacy and personal liberty to choose an abortion.⁴

In this new era, no state shall deny the equal protection of the laws to any unborn person within its jurisdiction. Here, the word "protection" is of great importance, since unborn persons need protection from the violence of abortion. My textual interpretation of the Constitution does not read "equal treatment" of the laws, but rather reads "equal protection" of the laws. Since unborn human beings cannot protect themselves, their first line of defense from harm would logically rest on the Equal Protection Clause. Unlike the Due Process Clause, the Equal Protection Clause has no procedural qualifier to dilute the promised protection. I further contend that if all unborn human beings are constitutional persons, the Equal Protection Clause imposes a fiduciary relationship upon the federal and state governments to protect all unborn persons from abortion.

I. IS THERE AN AFFIRMATIVE GOVERNMENTAL DUTY UNDER THE FOURTEENTH AMENDMENT TO PROTECT UNBORN OR BORN PERSONS?

In 1989, the Supreme Court in *DeShaney* held that children do not have a constitutional right to protection by the State from abuse under the Due Process Clause.⁵ A severely injured child who suffered repeated physical abuse from his biological father advanced the claim against the State.⁶ Government social workers had reason to believe four-year-old Joshua needed protection, however, Joshua remained at risk, allegedly in violation of the State’s positive constitutional duty to protect young Joshua from domestic danger.⁷

Writing for the majority, Chief Justice Rehnquist characterized the claim as "invoking the substantive rather than the procedural component

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⁴. However, unborn persons are still not citizens, for only born or naturalized persons qualify for citizenship and all the privileges and immunities that attach to that status. I will come back to this point at the end of the discussion.
⁵. *DeShaney*, 489 U.S. at 189.
⁶. *Id.* at 191.
⁷. *Id.*
of the Due Process Clause." Petitioner’s brief to the Court raised for the first time the argument that Wisconsin’s child protection statutes entitled Joshua to receive protective services, but the court dismissed this argument without hearing it on the merits. An alternative argument based on the Equal Protection Clause was noticeably absent.

Predictably, Joshua lost his case. The Court held that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” This result makes sense only by understanding the political theory faithfully espoused by the Court. According to the majority of the Court, the purpose of the Due Process Clause is to protect persons from oppression originating from the government, in the form of “state action,” not harms caused by another individual. In other words, the Due Process Clause serves “to protect the people from the State, not to ensure that the State protect[s] them from each other.” The Court determined the responsibility to protect people from one another belongs to the “democratic political processes.” In this manner, the Supreme Court indicated that legislation could be passed to impose affirmative duties to protect the weak and vulnerable from the harm caused by physical violence.

The Court relied upon a body of jurisprudence to show an unbroken line of authority establishing the lack of an affirmative right to governmental aid to guard against the loss of life, liberty, and property – interests that the government itself may not take away without due process of law. The Court concluded that the State’s failure to protect Joshua against private violence did not constitute a violation of the Due Process Clause. Of significance is footnote three in the Court’s

8. Id. at 195.
9. Id. at 195 n.2.
10. Id. at 195.
11. Id. at 196.
12. Id.
13. Id.
14. Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (“As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders.”); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding the state has no obligation to fund abortion or other medical services under the Due Process Clause of the Fifth Amendment); and Lindsey v. Normet, 405 U.S. 297 (1980) (determining state law requiring tenant to pay rent accrued during pendency of litigation against landlord does not violate the Due Process Clause).
15. Deshany, 489 U.S. at 196.
16. Id. at 197.
decision, which noted the curious omission of the petitioner to argue that “[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”

The signal from the Supreme Court is clear: if born persons such as Joshua qualify as a disfavored minority and are vulnerable to physical abuse leading to grievous bodily harm or even death, then a claim based on the Equal Protection Clause may succeed on behalf of unborn persons, who qualify as a disfavored minority, and who are subjected to physical abuse resulting in their death by various methods of abortion.

In *Yick Wo v. Hopkins*, the Supreme Court denounced any untrammeled arbitrary power wielded at will by the powerful over any weak person. Writing for the Court, Justice Matthews held that the Fourteenth Amendment protects every person, not just citizens. This is significant because, although unborn persons are not citizens, they may still fall within the protection of the Fourteenth Amendment. In considering the “nature and theory of our institutions of government,” Justice Matthews determined there was no “room for the play and action of purely personal and arbitrary power.” In light of this statement, it is arguable that Joshua DeShaney’s case may have succeeded had it been framed as an equal protection claim. Domestic violence that harms a child amounts to purely personal and arbitrary power that violates the rule of law and Joshua’s constitutional entitlement to equal protection. Similarly, the arbitrary will and power of the mother to abort unborn human life within her fits this description of “personal and arbitrary power.”

The rule of law requires nothing less than “just and equal laws” to secure the fundamental rights of “life, liberty, and pursuit of happiness.” Indeed, without equal protection available to the weak to guard against oppressive and discriminatory conduct from the strong, there can never be justice as required in a rule of law society.

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17. Id. at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).
19. Id.
20. Id. at 369-70.
21. Id. at 370.
22. Id.
characterize rule by law, and this is the position taken by the Court in *DeShaney*.\textsuperscript{24}

Having failed to rest their case upon equal protection, the petitioners in *DeShaney* contended alternatively that "even if the Due Process Clause imposes no affirmative obligation on the State to protect the general public from private harm such a duty may arise out of certain 'special relationships'" created on an individual basis.\textsuperscript{25} In Joshua's case, the petitioners argued there was such a special relationship due to the State's knowledge that Joshua's father abused him.\textsuperscript{26} In addition, the petitioners also argued that by undertaking to protect Joshua from this danger, the State's abdication of protection amounted to a violation of a fundamental right under the Due Process Clause for misconduct that "shock[ed] the conscience."\textsuperscript{27}

The Court rejected this argument. The cases relied on by the petitioner were not helpful,\textsuperscript{28} since the government never took Joshua into its custody and deprived him of his liberty.\textsuperscript{29} Only in circumstances in which the government deprives a person of liberty does it have an affirmative duty to protect against an individual's inability to look after himself.\textsuperscript{30} Therefore, because Joshua was not in jail or in a mental hospital against his will, he was presumably able to care for his basic needs, including his safety.

The Court did not address how a four-year-old boy could look after his own safety. Instead, the Court focused on the fact that Joshua's father was not an agent of the State.\textsuperscript{31} Therefore, the State had no role in the creation of the dangers that faced Joshua and had done nothing to

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\textsuperscript{26} *Id.* at 197.

\textsuperscript{27} *Id.* (quoting Rochin v. *California*, 342 U.S. 165 (1952)).


\textsuperscript{29} *DeShaney*, 489 U.S. at 200-01.

\textsuperscript{30} *Id.* at 200-01.

\textsuperscript{31} *Id.* at 201.
increase his vulnerability to harm.\textsuperscript{32} If Joshua had been removed to a foster home operated by state agents and then suffered harm, he would have been in a comparable situation to being jailed or institutionalized. In this situation, the State would possibly have had an affirmative duty to protect Joshua.\textsuperscript{33}

In addition, the Court suggested other ways the case may have been successfully framed. For instance, tort law may impose a duty to protect where the State voluntarily assumes to protect children such as Joshua from abusive parents.\textsuperscript{34} In such case, the State’s negligent failure to provide adequate protection could result in liability.\textsuperscript{35} In addition to tort law, state legislatures and courts may impose an affirmative common law duty upon state agents to protect children.\textsuperscript{36} However, the Court cautioned that the Due Process Clause of the Fourteenth Amendment “does not transform every tort committed by a state actor into a constitutional violation.”\textsuperscript{37}

In his dissent, Justice Brennan argued that governmental inaction could be just as oppressive as action because both avenues could lead to governmental abuse that violates the Due Process Clause.\textsuperscript{38} In his view, “oppression can result when a State undertakes a vital duty and then ignores it.”\textsuperscript{39} Justice Blackmun also dissented, urging the Court to “adopt a ‘sympathetic reading’ [of the Due Process Clause], one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”\textsuperscript{40}

Perhaps the legacy of \textit{DeShaney} is what the Court did not decide, rather than what the Court actually decided. The Court held itself captive to the least persuasive legal argument raised by the legal representatives of young Joshua. \textit{DeShaney}, however, should not stand in the way of the protection of embryos and fetuses that may acquire constitutional personhood. Instead, it should serve as a lighthouse to warn future litigants away from substantive due process and instead

\begin{itemize}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 201 n.9.
\item \textsuperscript{34} \textit{Id.} at 201-02.
\item \textsuperscript{35} \textit{Id.} at 202 (citing \textsc{Restatement (Second) of Torts} § 323 (1965)).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.} at 212.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 213.
\end{itemize}
shine its light to the path of equal protection that may provide a safe harbor against private violence toward the unborn.

Unlike the Due Process Clause, the Equal Protection Clause may impose a positive duty on the State to protect unborn persons. *DeShaney*, when properly understood, does not block the legal protection of unborn constitutional persons. Since the Court elevated abortion to a constitutional right, unborn children as a class have been the victims of invidious discrimination and violence. As persons, they are members of a politically disenfranchised, discrete and insular minority. Joshua, as a born constitutional person, had a fundamental right to his life and to his security. Arguably, the Equal Protection Clause imposed an affirmative positive duty upon the government to protect him because he was in a position of inequality to someone much stronger. Unfortunately, no such argument was made on his behalf, and so his claim failed.

The Supreme Court revisited *DeShaney* in 2005 when it decided the case of *Town of Castle Rock v. Gonzales*. Jessica Gonzales sued the police department for failing to respond to her persistent calls to arrest her estranged husband for violating a state divorce court’s restraining order that prohibited him from being within 100 yards of her home or to be with their three daughters, aged ten, nine, and seven, unless advances were made with a reasonable notice for a visit. On Tuesday, June 22, 1999, Jessica’s children went missing from her front yard around 5:30 p.m. In response to Jessica’s complaint, two police officers met with Jessica after 7:30 p.m. They then were shown the court’s order and exercised their discretion to do nothing, assuming that the girls would return home by 10:00 p.m. At 8:30 p.m., Jessica talked by cell phone to the girls’ father who told her the girls were out of town at an amusement park in Denver, Colorado. Suspicious, Jessica called the police and asked them to investigate. The request was denied. When the children were still not home at 10:00 p.m., Jessica pleaded with the police to enforce the court order and was told to wait until midnight.

42. *Id.* at 2800-01.
43. *Id.* at 2801.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 2802.
48. *Id.*
49. *Id.*
When midnight arrived, a desperate Jessica went to the girls' father's apartment and found no one there.\textsuperscript{50} At 12:50 a.m., Jessica filed an incident report at the police station, filed a complaint with a police officer, and then went out for a meal.\textsuperscript{51} At 3:20 a.m. the girls' father showed up at the police station with a gun he had bought hours earlier and opened fire.\textsuperscript{52} The police shot back and killed him.\textsuperscript{53} Outside in the father's pick-up truck were the bodies of the three missing girls, who had been murdered by their father earlier that night.\textsuperscript{54}

Jessica's attorney filed suit under 42 U.S.C. § 1983, alleging that the city's lax enforcement of the restraining order (in fact non-enforcement) created a federal cause of action for violation of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{55} The claim asserted that Jessica had a property interest in the enforcement of the restraining order and that she was deprived of this property without due process.\textsuperscript{56}

In dismissing the case, the Court, in an opinion written by Justice Scalia, cited \textit{DeShaney} for the proposition that the substantive component of the Due Process Clause does not "requir[e] the State to protect the life, liberty and property of its citizens against invasion by private actors."\textsuperscript{57} The Court emphasized that in \textit{DeShaney}, the complainant had not been able to raise the argument that child protection statutes created an entitlement to receive protective services within the language of the statute, and thus qualify for a due process protection.\textsuperscript{58} The Court stated that the procedural component of the Due Process Clause does not protect all conceivable benefits, but only those where there is legitimate claim of entitlement attached that is derived from an independent source, such as a state law.\textsuperscript{59} A benefit is not an entitlement if government officials have the authority to exercise discretion.\textsuperscript{60} In the case of a restraining order issued by the state of Colorado, the discretion

\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id. at 2803.}
\item \textsuperscript{57} \textit{Id.} (quoting \textit{DeShaney v. Winnebago County Dep't of Soc. Servs.}, 486 U.S. 189, 195 (1989)) (alteration in original).
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\end{itemize}
of the police officer is preserved, and accordingly, Jessica was not entitled to an automatic enforcement of the order.\textsuperscript{61}

Assuming for the sake of argument that there \textit{was} an entitlement at law, it was unclear to the Court whether an individual's entitlement to enforcement of a restraining order constituted a property interest for the purposes of the Due Process Clause, as no money was involved and this was an unconventional, intangible form of property interest.\textsuperscript{62} Fatal to the "property interest" argument was the determination by the Court that the alleged property interest arose incidentally and indirectly out of a traditional government function - that of criminal law enforcement - and thus did not amount to a deprivation of any interest protected by the Due Process Clause.\textsuperscript{63} For this reason, Jessica did not have a property interest in police enforcement of the restraining order.\textsuperscript{64}

Taken together, the \textit{DeShaney} and \textit{Castle Rock} decisions stand for the proposition that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."\textsuperscript{65} These decisions are consistent with the Court's reluctance to permit the Fourteenth Amendment to be used as a "font of tort law."\textsuperscript{66} The \textit{Castle Rock} Court suggested an alternative remedy, namely that police departments in Colorado are potentially accountable financially to victims of crime under state common law and statutory claims, for general statutory immunity can be lost when a government employee acts or fails to act because of conduct that amounts to wanton disregard and deliberate indifference to another's civil rights.\textsuperscript{67}

In contrast, Justice Stevens and Justice Ginsburg, in dissent, found Jessica did have a property interest that was protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{68} Of particular interest was their observation that "neither the Federal Constitution itself, nor any federal statute, granted respondent or her

\textsuperscript{61} "The creation of a personal entitlement to something as vague and novel as enforcement of restraining order cannot 'simply go without saying.'" \textit{Id.} at 2809.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.} at 2809-10.

\textsuperscript{64} \textit{Id.} at 2810.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.} (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)).

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.} at 2813, 2824-25 (Stevens & Ginsberg, JJ., dissenting).
children any individual entitlement to police protection." 69 Significantly, this statement omitted any reference to the Equal Protection Clause and was provided in the context of the very narrow question framed by these Justices, which was limited to the Due Process Clause. 70

II. APPLICATION TO ABORTION

If one accepts the premise that abortion is the ultimate form of child abuse because it violently takes the life of an unborn person, then the DeShaney and Castle Rock cases and their negative rights theory may be relied upon by those who argue that the case for abortion is still valid. Supporters of abortion might argue that the Fourteenth Amendment does not impose an affirmative duty upon the states to defend the lives of unborn persons because DeShaney held that the job is left to the various states. Depending on the state, abortion may remain legal if liberal states like New York choose not to impose affirmative duties of care and protection upon its agents. Thus, majoritarian politics will initially determine which states will attempt to keep abortion legal or ban it altogether.

Abortion supporters might also refer to DeShaney for the proposition that unborn persons cannot rely upon substantive due process in the Fourteenth Amendment for protection. Conversely, abortion abolitionists could argue the DeShaney opinion is wrong, and the unborn person is entitled to positive protection under both the Equal Protection Clause and the Due Process Clause. The abolitionists may argue that the DeShaney opinion is an affirmation of the theory of the Supreme Court’s decision in the Slaughter-House Cases 71 which accepted John Calhoun’s view of state’s rights over the “new birth of freedom” envisioned by President Abraham Lincoln. 72 In this new era, states can no longer pass laws that deny equal protection or deny life or liberty to oppressed persons.

At the root of the negative rights theory espoused by the Supreme Court in DeShaney is a disregard of the context in which the Fifth Amendment was adopted in 1789, and the context in which the

69. Id. at 2813.
70. Id.
Fourteenth Amendment was passed in 1868. The Court in *DeShaney* wrongly “manipulate[d] the original understanding of the fourteenth amendment due process clause by construing it in light of the history of the fifth amendment due process clause.” The Fifth Amendment was intended to limit the power of the federal government to intervene in the private lives and choices of persons, consistent with a negative rights theory that allowed slavery to flourish. On the other hand, the Fourteenth Amendment was intended to give the federal government the power to protect the fundamental human rights of persons from infringements of life and liberty by both the various states and private parties, consistent with a positive rights theory that imposed an affirmative duty upon the government to protect human beings.

Thus, the Fourteenth Amendment radically altered the American constitutional law structure by authorizing federal protection of life and liberty, consistent with the abolition of slavery and, arguably, consistent with equal protection for the unborn person. Even though the Supreme Court eviscerated the Privileges and Immunities Clause in 1873 by its decision in the *Slaughter-House Cases*, that clause applied only to citizens. The basic structure of the Fourteenth Amendment remained unaltered and it demanded a positive interpretation to enforce the right to life for all persons, whether based on equal protection or due process.

Section 5 of the Fourteenth Amendment supplies evidence that its central purpose is affirmative action to protect equality by giving Congress the power to enforce the provisions of Section 1. For example, after the Civil War, Congress acted to pass legislation designed to protect newly freed African American slaves from being terrorized by private persons who belonged to the Ku Klux Klan, in response to several states’ failure to protect blacks from losing their lives to private violence. This kind of direct action against private individuals was opposed by the Supreme Court, which initially limited federal jurisdiction to the supervision of state laws. This left the common law

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73. *Id.* at 426. “The two due process clauses have different histories, different framers and rely on different conceptions of federalism.” *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 417.
78. U.S. CONST. amend. XIV, § 5.
as the sole remedy to resolve harm inflicted by one private party upon another.

However, the Court indicated in *DeShaney* that it would reach a different determination in situations where a victimized person is unable to defend himself or herself against discrimination and violence inflicted by a private party - and is denied government protections (e.g., laws barring murder) that other persons receive.\(^81\) The Supreme Court also held that Congress possesses the power under Section 5 of the Fourteenth Amendment to bar conduct that interferes with the exercise of Fourteenth Amendment rights. Thus, Congress could conceivably use its Section 5 powers to prevent or remedy the kind of violation of Equal Protection Clause rights briefly described in footnote three of *DeShaney*: It may prevent discriminatory failure of a state to protect unborn persons against lethal action.

Professor Gerard Bradley, responding to Professor Ronald Dworkin’s book, *Life’s Dominion*, also speculated about the future of abortion if and when unborn human beings became constitutional persons.\(^82\) In his opinion, the Due Process Clause offers little hope for real change, since most abortions are of a private nature and the state action required for triggering the Due Process Clause would be absent.\(^83\) Even if the state action requirement were met, Bradley noted that the right to life of the unborn human being would only be conditionally protected, for the state could presumably deprive a fetus of its life so long as procedural due process was observed.\(^84\)

Bradley concluded that the key to the elimination of abortion is through the Equal Protection Clause, for once a fetus is a constitutional person, that fetus is equal to all human beings, whether born or unborn, and thus is protected from harm by state laws against homicide.\(^85\) The State’s failure to enforce homicide laws against those who would abort an unborn human being would be a constitutional violation of the Fourteenth Amendment.\(^86\) In this manner, abortion becomes tantamount

\(^{81}\) *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 486 U.S. 189, 197 n.3 (1989).


\(^{83}\) Id. at 344.

\(^{84}\) See id.

\(^{85}\) See id. at 344-45.

\(^{86}\) Id. at 345.
to murder, and abortion is viewed as illegitimate violence against a discriminated class of constitutionally protected persons.

The writing is already on the wall: currently twenty-seven states treat the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy.\(^{87}\) So far, these statutes have withstood constitutional attacks, with the result that even a non-viable embryo is accorded protection from a criminal assault.\(^{88}\) Complementing these statutes are fetal endangerment laws that protect unborn human beings from drug and alcohol abuse by their mothers. So far, the courts have upheld validity of these unborn child endangerment laws.\(^{89}\)

Professor Bradley's analysis coincides with mine to the extent that the eventual abolition of abortion will find its constitutional source in the Equal Protection Clause. Just as *Brown v. Board of Education*\(^{90}\) moved society past the doctrine of "separate but equal," and eradicated legal segregation, I predict there will be a future case that will not only grant all human beings constitutional personhood and the fundamental right to life, compelled by the authority of the Equal Protection Clause, but there will also be a corresponding remedy fashioned to protect the bodily integrity and life of the unborn person from the violence to the unborn by the state prosecution of abortionists and their accomplices. A constitutional right without a remedy is no right at all.

There is more at stake here than simply freedom from discrimination and the fundamental right to life. To permit the continued oppression and extermination of an unwanted class of unborn human beings violates the bedrock trust upon which government is founded. That trust is the duty to make decisions wisely in order to benefit not just the citizens of today, but also the citizens of tomorrow. That trust is violated when the government permits the deaths of millions of its future citizens, and the massive deprivation of their talents, personalities, and contributions. The government is the trustee and guardian of society's unborn children. It is this fiduciary relationship with unborn human beings that demands equal protection now for those who cannot speak for themselves. Justice and fairness require nothing less.

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III. THE "NEW" MORAL CASE FOR ABORTING A CONSTITUTIONAL PERSON

Anticipating that one day unborn human beings may attain constitutional personhood, contemporary advocates of abortion have discarded the old moral arguments of choice, privacy, autonomy, and liberty in favor of a right to self-defense "against the nonconsensual invasion, appropriation, and use of [a mother's body] by an unwelcome fetus . . . "91 Taking the scholarship of Judith Jarvis Thomson to a more sophisticated level, Eileen McDonagh constructs an argument that morally justifies the taking of another person's life, regardless of whether that other person is a constitutional equal.92 It follows from her argument that if life trumps liberty, self-defense trumps constitutionally protected life itself. This strategic shift is presumably required to avoid capitulating to the concession made by counsel and the dicta of Justice Blackmun in Roe v. Wade93 that if a fetus were to acquire constitutional personhood, the legal case for abortion would collapse.94

The case for abortion against an unborn person rests upon the assumption that an unwanted pregnancy is a harm "tantamount to a noncriminal assault."95 A pregnant woman, therefore, has the moral right to destroy her unborn child because it will act as a parasite to use and appropriate her body.96 The pregnant woman will suffer physical, chemical, and emotional changes that all carry a risk, however remote, of both temporary and permanent harm.97 Just as a pregnant woman is entitled to defend herself from an external assault, she is equally entitled to defend herself from an internal assault.98 It does not matter that the attacker is a human being or a constitutional person.99 The only thing that matters is self-defense.100 The right to life of unborn persons is

92. McDonagh, supra note 91.
94. Id. at 156-57.
95. West, supra note 91, at 2117.
96. Id.
97. McDonagh, supra note 91, at 1073.
98. West, supra note 91, at 2123.
99. McDonagh, supra note 91, at 1075.
100. See id.
subordinate when it comes to self-defense.\textsuperscript{101} Since the State has a responsibility to protect its people from danger and unborn persons threaten the bodily integrity of pregnant women, presumably the State is obliged to fund abortions.\textsuperscript{102} Abortion is the principal means of self-defense.\textsuperscript{103}

A key component to this new abortion rights theory is the question of consent. The argument is that just because a woman may consent to sexual intercourse, it does not follow that she implicitly consents to becoming pregnant.\textsuperscript{104} Pregnancy is more than a natural condition; rather it is "an institution, obligation, and condition"\textsuperscript{105} requiring "full and voluntary consent."\textsuperscript{106} By analogy, women do not consent to lung cancer, even if they choose to start smoking.\textsuperscript{107} Women do not consent to being eaten by a grizzly bear, even if choosing to trespass upon a grizzly's territory.\textsuperscript{108} Women do not consent to losing their home to a hurricane by choosing to live in a place where there is a high risk of hurricanes.\textsuperscript{109}

In theory, this argument bears some weight. One does not consent to harm even though he or she may choose to jump from an airplane not knowing of a faulty parachute. One does not consent to harm by choosing to ride a Harley Davidson without a helmet on the interstate and losing control on a slippery patch of oil. As well, one does not consent to harm if he or she gains weight or dies at an early age of a heart attack from choosing to eat Big Macs. More important than the self-evident wisdom or stupidity of actions is the interrelationship between "choice" and "consent." Is consent not just a code word for choice?

The organ donor argument is worthy of consideration. If a mother has the moral right to refuse donating a body part for an organ transplant to benefit her born child, then a pregnant woman must have a moral right to refuse to host an unborn child in her body.\textsuperscript{110} No one would seriously contest any person's right to refuse organ donation. We do not live in a

\begin{flushleft}
101. See id.
102. See id. at 1090.
103. See id. at 1075.
104. Id. at 1091-92.
105. Id. at 2120.
106. Id.
107. West, supra note 91, at 2123.
108. Id.
109. Id.
110. McDonagh, supra note 91, at 1098.
\end{flushleft}
society where organs may be harvested without the consent of the living. Even incompetent persons who lack the ability to give consent are not compelled to serve as a living warehouse of body parts,\textsuperscript{111} except perhaps in the extraordinary case where a court determines there is substantial evidence that an organ donation is in the donor’s best interest.\textsuperscript{112}

However, there is a moral difference between inaction (refusing to consent to permanently donating a body part to extend the life of an unhealthy person physically external to you) and a premeditated action (terminating the life support of a healthy person - an unborn baby - that requires temporary accommodation for about forty weeks). It is one thing for a donor, a mother, to voluntarily sacrifice a body part, even at the risk of death, and give the gift of life to another born person. It is another thing for that same donor to give the gift of death - an abortion - and demand that her unborn child give up its life, without its full and informed consent, to accommodate the wish of the mother who refuses to consent to remain pregnant. In \textit{Prince v. Massachusetts}, the Court recognized this distinction stating that, “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”\textsuperscript{113}

The consent theory falls apart when one considers the fact that consent is not exclusive to the pregnant woman as there are two legal persons involved. In the case of organ donation, it makes sense that the donor is not coerced into making a bodily sacrifice to benefit a potential recipient who is born alive but unhealthy. Similarly, in the case of abortion, the healthy potential recipient also must not be coerced into making a bodily sacrifice, especially the ultimate sacrifice of life.

Just as the burden of proof may shift in trial on an evidentiary issue, the burden of consent may shift from the donor to the recipient. In the case of organ donation between a minor child and a parent, no coercion is present if the mother willingly consents and the minor child willingly accepts the organ donation. However, the burden of consent shifts in the case of voluntary abortion. The mother is willing to give the gift of death, and the minor unborn child, unprotected without the status of

\textsuperscript{111} \textit{In re Guardianship of Pescinski}, 226 N.W.2d 180, 181 (Wis. 1975).
\textsuperscript{112} \textit{Strunk v. Strunk}, 445 S.W.2d 145, 149 (Ky. 1969).
constitutional personhood, is coerced into losing its life, liberty, and very existence. Personhood changes everything. The rule of law will not tolerate a situation where one person is coerced into giving up his or her life so another person may escape the responsibility that comes with motherhood.

Where is the evidence that any fetus ever consented to an abortion? Any suggestion that a fetus would give its free and voluntary consent to a possibly painful and horrible death is nothing but fanciful speculation and rationalization. In the absence of any indication of consent to abortion, the fetus might be presumed to prefer the status quo of life. Remember, the fetus did not ask to be conceived. It did not choose to invade the bodily integrity of its mother. The presumed lack of consent from the fetus renders any aggressive act by the mother as an assault because the act of abortion is an invasion of a fetus’s bodily integrity that cannot be physically resisted. The unborn person, like an incompetent minor child, viable or not, cannot consent to being aborted. There is no clear and convincing evidence of a fetus’s wishes in this situation.

Furthermore, no substituted consent is possible, either on the basis of due process\textsuperscript{114} or equal protection. Normally, the natural bonds of affection between a mother and her unborn child lead to the mother making decisions that are in the best interests of her unborn child.\textsuperscript{115} However, parental discretion ends when child abuse begins, and at that point the law intervenes to protect the lives and health of young persons.\textsuperscript{116} For these reasons, the fetus, as a constitutional person, should be entitled to rely upon the Equal Protection Clause of the Fourteenth Amendment to protect it from the fatal abuse inherent in the act of abortion.

Also, the consent theory utterly collapses when considering the case of a pregnant woman who consents to sex \textit{and} consents to pregnancy. Do consensual pregnancies not pose equal harm to the health of pregnant women as do non-consensual pregnancies? When regarded in this way, it becomes immediately apparent that the real issue is not consent to the risk of pregnancy, but whether the unborn child is wanted or not. In other words, the issue reverts back to a simple matter of choice. In the end, this new feminist theory of consent is a recycled theory of \textit{choice},

dressed up to circumvent the constitutional right to life of unborn persons.

IV. THE JURISPRUDENTIAL ARGUMENT

Constitutional law scholar Cass Sunstein recognizes the serious problems with grounding the right to an abortion in privacy theory and offers an alternative legal model based on equal protection.\textsuperscript{117} Sunstein contends that “a prohibition on abortion [is] invalid because it involves a cooptation of women’s reproductive capacities into something for the use and control of others. No parallel disability is imposed on men.”\textsuperscript{118} The advantage of framing the issue of abortion this way is that there is no need to take a position on whether the fetus is a person or even a human being.\textsuperscript{119} Abortion is then not the murder of an unborn person, but rather a simple refusal to provide assistance to an unwelcome intruder.\textsuperscript{120} Even if the law required benevolent bodily assistance to the unborn, it is unfair that this entire burden rests upon women by sheer genetic determination of their sexual identity.\textsuperscript{121} Consequently, a law prohibiting abortion is unconstitutional due to the cumulative effects of sexual discrimination and other related factors.\textsuperscript{122}

Sunstein argues that motherhood should be a choice, rather than a consequence of biological assignment.\textsuperscript{123} He maintains that parents are not forced to donate a kidney to save the life of their born children.\textsuperscript{124} Compelled organ donation offends personal autonomy\textsuperscript{125} because there is no legal obligation to be a Good Samaritan. In addition, Sunstein raises the distinction between murder and the failure to give aid and the baselines upon which these distinctions turn.\textsuperscript{126} According to Sunstein, abortion is perceived as murder only if one accepts the constitutionally impermissible stereotype that a woman’s role is to bear children.\textsuperscript{127}

\textsuperscript{118} \textit{Id.} at 31-32.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 32.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 32, 44.
\textsuperscript{123} \textit{Id.} at 33.
\textsuperscript{124} \textit{Id.} at 34.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 35.
\textsuperscript{127} \textit{Id.}
as a compulsory military draft excluding women is unconstitutional, so should compulsory pregnancy, argues Sunstein, though he concedes, "To be sure, nothing is quite like pregnancy."  

In this context, the case for abortion rests on the idea of sexual equality. Laws protecting unborn persons from abortion impact women only. This is sexual discrimination because the burden of bodily cooptation falls entirely upon women. Thus, Sunstein contends that "[e]ven if the fetus has all the status of human life, the bodies of women cannot under current conditions, be conscripted in order to protect [the fetus]." What Sunstein fails to discuss is that women are not normally conscripted to have sex. Even so, let us analogize to the case of the male soldier who is conscripted to serve in the army. He faces a risk of harm from injury or death itself - events to which he does not consent. The soldier is expected to defend those under his protection from the enemy. It would be unthinkable and a crime for him to kill those very persons he has been forced to defend.

The best test of the soundness of the Sunstein theory is pregnancy occasioned by non-consensual sex, the classic case of forcible rape. The rape itself is unquestionably classified as a criminal assault. But is the resulting pregnancy a continuation of that invasive assault? Arguably, the unborn person may be seen as a new perpetrator who picks up the assault where the rapist left off. In this manner, there are two persons who are part of a continuous assault - one born (the rapist) and one unborn (the fetus). Is abortion not justifiable under these conditions, even if the fetus is a constitutional person with its own independent right to life?

The difference lies in the guilt of the rapist and the innocence of the fetus. Why should an innocent person suffer the death penalty for the crime of a guilty person? There is no legal principle that permits punishing the innocent for the crimes of the guilty. This result would never occur in a society governed by the rule of law. There can never be justice if the law punished the factually and morally innocent.

To be fair, Sunstein's argument in favor of a general right to abortion in the case of rape assumes the fetus is not a constitutional person. If the unborn were constitutional persons, Sunstein would have to admit that

128. Id. at 34.
129. Id. at 39.
130. Id.
131. Id. at 40.
unborn children have "a claim of inequality sufficient to override the imposition on women." 132 As far as women are politically vulnerable and biologically conscripted to bear the burden of pregnancy, Sunstein acknowledges "[n]o group is as politically weak or generally vulnerable as unborn children." 133

If no moral justification to kill the fetus exists, then it follows that there is no justification in the case of consensual sex. Getting pregnant is an inherent risk of engaging in sexual intercourse. Can self-defense seriously be argued when the aggressor is identified as a morally innocent person who has no capacity to form any intent to cause any sort of harm? The rule of law forbids the imposition of a death sentence without due process upon any innocent person. Why should there be any distinction in this respect between born and unborn persons? With the attainment of personhood, an unborn human being is not something that can be removed just like an invasive cancerous tumor.

Another branch of Sunstein's argument is the demand by women to be treated the same as men under the Equal Protection Clause of the Fourteenth Amendment. 134 What matters is equality between the sexes. 135 Just as a man has a right to defend himself from the physical appropriation of his body or a part thereof, so does a woman. 136 Equality demands equal treatment of both men and women from bodily invasions. 137

There are serious problems with this argument. The Constitution lacks a provision declaring equality between persons of the male or female sex. Even after the adoption of the Fourteenth Amendment, sexual equality did not follow because personhood did not guarantee political or occupational equality. 138 In 1920, the Nineteenth Amendment conferred the right to vote upon women, 139 but it did not grant equal rights to women on a global basis. An attempt to rectify this under a proposed equal rights amendment in the 1970's failed to obtain

132. Id. at 41.
133. Id.
134. Id. at 31-32.
135. Id. at 32.
136. See id.
137. See id.
139. U.S. CONST. amend. XIX.
enough support for ratification.\textsuperscript{140} Illustrating the resistance to full equality was the Supreme Court’s decision in \textit{Geduldig v. Aiello},\textsuperscript{141} which acknowledged that there are biological differences between men and women, and also noted that the fact that only women could get pregnant did not amount to invidious discrimination requiring a constitutional remedy.\textsuperscript{142} So long as men and women are not similarly situated with regard to the capacity to bear children, the Supreme Court can be expected to adhere to established precedent that discriminates between men and women on the basis of sex.\textsuperscript{143} For this reason, Sunstein recognizes the Supreme Court’s view that, “With respect to the capacity to become pregnant, women and men are not similarly situated. An equality argument is therefore unavailable.”\textsuperscript{144}

Sunstein suggests disregarding male biological capacity as the baseline to measure equal treatment between the sexes.\textsuperscript{145} Could recognizing the reality of abortion as a social practice that has existed since time immemorial be a more appropriate baseline to answer the question of whether laws prohibiting abortion constitute sexual discrimination and offend against the Equal Protection Clause?\textsuperscript{146} According to Sunstein, the practical results of prohibiting abortion will return society to a time when pregnant women may die from unsafe illegal abortions or are forced to travel to a jurisdiction where abortion is both safe and legal.\textsuperscript{147}

\begin{footnotesize}
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\item[140.] \textsc{Paul Brest et al., \textit{Processes of Constitutional Decisionmaking}} 1196 (5th ed. 2006).
\item[142.] \textit{Id.} at 494.
\item[143.] \textit{See generally} Michael M. \textit{v. Superior Court}, 450 U.S. 464 (1981) (finding that criminal liability for statutory rape exclusively imposed on males is constitutionally permissible, and noting that pregnancy consequences fall primarily on the female party to the consensual sex).
\item[144.] Sunstein, \textit{supra} note 117, at 42.
\item[145.] \textit{Id.} at 43.
\item[146.] \textit{Id.} at 43-44.
\item[147.] Sunstein relies upon \textsc{Lawrence (Larry) Lader, Abortion 3} (1966) and \textsc{Richard H. Swartz, Septic Abortion 7} (1968) to suggest that 5,000 - 10,000 women died annually from abortion related deaths prior to \textit{Roe v. Wade}. \textit{Id.} at 37. This figure is flatly repudiated by Dr. Bernard Nathanson, who together with Larry Lader founded the National Association for the Repeal of Abortion Laws (“\textsc{N.A.R.A.L.”}):
\end{itemize}
\end{footnotesize}

How many deaths were we talking about when abortion was illegal? In \textsc{N.A.R.A.L.} we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was
V. CONCLUSION

The rule of law does not demand equal treatment between the sexes if that treatment results in injustice and oppression of the weakest members of society. What matters to unborn persons is not equal treatment with their mothers, but rather equal protection so that their lives and bodily integrity are saved from abortion. The moral and jurisprudential arguments that attempt to legislate abortion against unborn persons must be rejected because no person, born or unborn, is safe from a claim of self-defense. If healthy unborn persons constitute a threat to the well-being of other persons, why draw the line at the unborn? Would not disabled persons also constitute a form of threat to the security of persons who do not wish to assume the responsibility of a caregiver?

It is not the role of the state government to protect pregnant women from alleged private violence represented by the biological condition of pregnancy. Even if it can be successfully argued that pregnancy must be consensual, the DeShaney case has closed the door to any substantive due process claim that pregnant women are constitutionally entitled to rely on the State to protect them from private violence within their womb.

The reality is that pregnancy is not a criminal assault, and therefore it is not a crime. Pregnancy is also not a disease; rather, it is the reproductive phase in the life of a healthy expectant mother. Pregnancy is a naturally occurring physical condition that is normal. Reproduction is integral to the human condition and essential to the survival of mankind as a species. If there is any future potential for advancing the abortion case, it may perhaps be found in the difference between the

always “5,000 to 10,000 deaths a year.” I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the “morality” of our revolution, it was a useful figure, widely accepted, so why go out of our way to correct it with honest statistics? . . . In the last year before the Blackmun era began, 1972, the total was only 39 deaths.

BERNARD NATHANSON, ABORTING AMERICA 193 (1979). Throughout the 1950s and 1960s, the estimated number of aborted fetuses is much higher, from 200,000 to 1.2 million per year according to a report issued by the Alan Guttmacher Institute, a non-profit pro-choice advocacy organization. Guttmacher Institute, Lessons from Before Roe: Will Past Be Prologue? (Mar. 2003), http://www.agi-usa.org/pubs/ib_5-03.html (last visited Sept. 16, 2006).
constitutional status of a person and a citizen. Birth still marks the boundary when an unborn person acquires the privileges and immunities of a citizen. In the meantime, by virtue of the Equal Protection Clause of the Fourteenth Amendment, the unborn person will have a superior claim to life over any existing moral or jurisprudential argument in favor of abortion.