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A Due Process Compliant Pathway to Restore Constitutional Fetal Personhood and to Reverse Roe v Wade

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Part 1
A Due-Process Compliant Pathway
to Restore Constitutional Fetal Personhood
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“The power of the modern state [including one of its arms, such as its highest 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)

This article demonstrates, from a legal - historical standpoint which is supported by primary and unassailable legal authority, that contrary to Roe v Wade (and also to Roe’s most formidable enemy, J. Scalia), there is no question that the unborn human fetus qualifies as a 5th (1791) and 14th (1868) Amendment due process clause “person.”

Did not the United States Supreme Court (USSC), in Roe v Wade, state expressly and explicitly that its core holding (that a pregnant woman enjoys a “fundamental” constitutional right to have her non-viable fetus aborted) is in accord with, and is, in no small part, derived from the English common law? (See Roe v Wade (1973), 410 U.S. 113, 140-141 & 165). Well, the “exact opposite” is true, and this truth is proved by a slew of unassailable “primary” English common law legal authorities. One of which is this one, as related by the English trial court judge to the jury (some twenty years before the incorporation of the 5th Amendment’s (1791) due process clause into the 14th Amendment (1868)) in the case of Queen v West (1848), Cox's C.C. 500, 503; 2 Car & K 784 785; 175 Eng. Rpt. 329:
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 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.

This essay seeks to translate into layman's language “how” the Roe v Wade Court's express reasoning 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 (1986), 476 US 747 779 (& its fn.8): “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 [5th and] 14th Amendment[s].”

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.” Such a mentality would, no doubt, be deemed as insane. But that exact mentality was necessarily superimposed or inflicted upon the mentality of our Founding Fathers by the Roe Court.

The truth or aptness of the foregoing analogical illustration is proved by the fact that no person can even begin to justify constitutionally a “yes” vote in favor of upholding the constitutionality of the statute set forth in the following hypothetical constitutional question on fetal personhood as put forth in Philip A Rafferty, *Roe v Wade: Unraveling the Fabric of America* (2012) at pp. 50-54 (available for free viewing online at [www.parafferty.com](http://www.parafferty.com), and hereinafter cited as *Unraveling*).

Suppose that a federally condemned woman was impregnated by her prison guard eight (8) weeks to the day before her scheduled date of execution, and that the dirty deed was uncovered through a DNA analysis of semen contained in a used prophylactic found in her bedding on the eve of her scheduled date of execution. Suppose further that the condemned woman does not request 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 the exception of the person's inability to appreciate that his or her death is imminent) all reprieves, violates the 5th Amendment's due process clause (enacted in 1791), in that the condemned woman's live fetus qualifies as a 5th Amendment, due process clause person. Who would argue or vote to uphold the statute barring the granting of a fetus's petition for a stay of his mother's execution so that he may have a chance to live his or her life just as you and yours do?
Would, for example, the ACLU argue or vote to uphold the statute? I think not.

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 18th Century to well into the 19th Century. The USSC, in *Smith v Alabama* (1888), 465, 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 English common law. Hardly! There exists unassailable “primary” legal authority establishing each of the following observations on the prosecution of procured abortion at the English common law: 1), If a person unintentionally or accidentally killed a woman in the course of performing an abortion on her, then her abortionist was capitally hung (*see Unraveling, Appendix 3*, pp. 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 at pp.53 & 159-163 – Appendix 6*); and 3), procured abortion was prosecuted criminally, irrespective of whether the woman was even pregnant in fact, or deemed pregnant with a live or “quick” child, or had “quickened,” or had experienced “quickening” (*see Unraveling at Appendix 1* (pp.70-82), *Appendix 6* (pp.159-163), and pp. 199-203-n.13). In the foregoing Appendix 1 case (a 1732 English, “pre-quick with child” 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 this essay 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 an unthought-of righteous legal play for the constitutional recognition of fetal personhood. 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 which can be exercised only by destroying the constitutional rights of others (i.e., unborn ones), including, of course, the conceived-borns’ 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.

The significance of this short essay is not only in its presenting an unthought-of, doable legal play, which can be repeated indefinitely until the USSC grants a hearing on the fetal personhood issue, but also as demonstrating that Roe v Wade truly is a far worse decision than is Dred Scott, which is widely recognized as the worst of all USSC decisions. This is because, although the Dred Scott decision produced a result which can be described only as a morally reprehensible result, the Scott decision was, nevertheless, a constitutionally sound one, and its core holding (that slaves lack constitutionally recognized citizenship status and so, they 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. The Founders wanted unity and independence, and felt certain that if they prohibited slavery, then there could be no real union of, and strength in, the several states.

Roe v Wade, on the other hand, employed a scandalous method of judicial procedure and
interpretation, or rather, a total lack thereof, and one packed full with flagrant, judicial prejudice and a seemingly incredible amount of judicial incompetence, in order to arrive at an equally disastrous and morally reprehensible result: The Roe justices removed from the protections of the Constitution (and they unwittingly began this removal process before even beginning their pretentious ruling on the issue of whether the human fetus qualifies as a constitutionally recognized person) a class of persons (conceived, unborn human ones) whom our Founding Fathers almost certainly, unanimously understood to be fully intact ones, *i.e.*, as constituting beings who lack nothing which is generally recognized or considered as essential to being deemed as human persons. *(See Unraveling, at pp. 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 our Founding Fathers is that they at least acknowledged openly that slavery was utterly morally reprehensible. We, on the other hand, as a people, seem to 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 our elitist and intellectual betterst, and self appointed caretakers, such as the ACLU), know full well that if it is ever admitted that abortion is utterly morally reprehensible, then, *Roe v Wade* and all of its progeny will fall.

There is a surefire legal play to force the USSR to reconsider the constitutional validity of *Roe v Wade*, and especially, its express holding that the fetus does not qualify as a 5th (14th) Amendment, due process clause person. The first thing to do, for those states desirous of outlawing procured abortion and in favor of a National Fetal Personhood Amendment, is to enact, simultaneously, or as nearly so as is possible, virtually identical criminal statutes explicitly outlawing abortion and with the express statutory purpose of each one being to comply with the 5th (14th) Amendment due process clause truth that the human fetus qualifies there as a person. This would be in direct and open defiance of *Roe v*
Wade; but it can be demonstrated that this is not unconstitutional, because there exists a specific provision in the Declaration of Independence (which the Constitution, itself, implicitly recognizes as an authority greater than itself) that authorizes such state or federal action, as the case may be.

Once these statutes are attacked in federal court, the defendant states should each move to have all these attacks combined or consolidated before a single federal trial court judge. If there is a sufficient number of such united states, among the several states, then that becomes a voice too big for the Court to credibly refuse to hear. Maybe a person such as Senator, and potential U.S. President, Rand Paul could be enlisted to help establish a sufficient number of such states.

The state federal trial court briefs must, among other items, contain these irrefutable or unassailable legal points: 1) Roe v Wade, itself, holds explicitly and expressly that if the human fetus qualifies as a due process-clause person, then, not only does Roe fall in its entirety, but the states (and this is an implicit Roe holding) would be compelled constitutionally to outlaw procured abortion; 2) Roe’s fetal non-person holding is “void ab initio” along the lines of the Court’s holding in Burgett v Texas (1967),389 U.S. 101, 113-116 (denial of due process guaranteed right to counsel in an alleged prior conviction makes said prior conviction “void ab initio” and, so, subject to being attacked “collaterally). Jane Roe’s fetus was not given a due process-mandated opportunity (let alone a “meaningful” one) to be heard on the question of its personhood status and right to live. This means, in no uncertain terms, that constitutionally speaking, the Roe-decided question on fetal personhood becomes, once again, an open, undecided, and “unsettled” one, and which the several states are therefore constitutionally permitted or free to act on a yes answer they may give to this now newly opened, vital constitutional question; 3) there can be no question that the fetus qualifies as a 5th and therefore, also as a 14th Amendment, due process clause person: See Unraveling at pp. 49-54, including all the “primary” and secondary authorities cited in those pages.
What gave rise to this new legal play thinking was a realization that, contrary to a near universal opposite belief, the Supreme Court, in *Dred Scott's Case* (1857) held “implicitly” (and which is no less binding than is an explicit one) that the negro slave, Dred Scott, constitutes a *5th Amendment* due process clause “person”; for otherwise Scott would not have been afforded (which he was so afforded) the due process guaranteed right, which is given only to constitutionally recognized “persons”, to a “meaningful opportunity” to argue in federal court that he was a citizen and, therefore, could indeed sue in federal court. And if, here, a person should argue 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, alone, 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 *5th Amendment* due process liberty right to vote in a national election. Neither freedom from slavery nor women's suffrage were “originally” constitutionally guaranteed. It must be understood that “law has its own integrity.”

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 final conclusion 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. No court in the entire annals of Anglo-American legal history has committed a more egregious error and gross injustice. And so, no one can argue credibly that *Roe’s* fetal non-person holding complied with the dictates of procedural due process. And without such a backing, *Roe’s* fetal non-person holding can carry no more weight than that of the tail feathers of a humming bird. As the Court, itself, reiterated in *Wisconsin v Constantineau* (1971),400 U.S., 436: It is the constitutional guarantee of
procedural due process that secures rule, by the rule of law, and not by judicial fiat. And such process is always “personal” to the person entitled to it. There is no such thing (such as a friend of the court brief) as a valid or legitimate constitutionally recognized substitute for being afforded due process of law.

Finally, if it be said that the legal 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, that all men are created equal, that they are endowed by their Creator with certain Unalienable Rights, that among these are Life [and which, and according to Blackstone - the foremost “primary” legal authority on the English common law in late 18th century America, see Unraveling at pp. 51-52] begins, in contemplation of law, as soon as the... [human embryo] begins to stir, i.e. 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.”

Blackstone 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 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 at pp. 51-52, (including the endnote 13 on pp.199-203), and 234-236] 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 at text
accompanying note 16]....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 constitutionally undisputed that the USSC has no authority whatsoever to interpret or write-out of the Constitution any person, or class of persons, such as illegal aliens, derelicts, slackers, addicts, white trash, impoverished ones, criminals, terrorists, gang-bangers, people of color, physically deformed ones, mentally deficient ones, communists, atheists, homosexual ones, transgender ones, radical feminists, PETA members, vegans, corporate ones, or newly born ones. For a person to argue otherwise is to run the risk of writing himself right out of the Constitution.

Retired Supreme Court Justice Paul Stevens (widely recognized as one of the most liberal justices ever to have set 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 eighteenth Century.” One such then widely held belief was this observation made by Chas. Leslie in his Treatise of the Word Person 7 (1710): 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 378 (1699): “That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree”. And so said Benjamin Rush (1745-1813) (foremost recognized 18th Century American physician, a Founding Father and signer of
the Declaration of Independence (1776) in his Medical Inquiries 42: “No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported”. Another widely held belief was the English common law 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 so considered.” (Hall v Hancock (1834), 32 Mass. 255, 257-258, and quoting Blackstone: widely recognized as the foremost legal authority on the English common law in late 18th Century America). The problem, here, then, is not so much that the Roe Court committed an egregious error and gross injustice in concluding that the human fetus does not qualify as a due-process clause person (a lie no less than 55 plus million times greater than any lie ever uttered by our late President Richard M. Nixon). The real problem is that the consequences of this erroneous conclusion seem too enormous (the destruction of some fifty-five plus million constitutional persons) so as to admit the error. Man's capacity to deceive himself in the name of humanity does truly transcend humanity. And no one has ever put this better than W. H. Auden: “Everything turns away – Quite leisurely from the disaster.”

Part 2

Procured Abortion as Constituting an Act of Implied Malice

In deciding whether abortion fits into the “fundamental rights equation,” the Roe v Wade Justices arbitrarily excised the fetus from consideration and, thereby, unwittingly injected “implied malice” into that equation. To maintain implicitly, as did the Roe justices, that a concern for whether abortion kills an intact human being can be arbitrarily excised from the “fundamental constitutional rights equation” is the exact equivalent of arbitrarily excising a concern for human safety from the
building equation for new super highway.

Express malice murder is an unjustified or unmitigated intent to kill. “Implied malice” equals express malice murder, and consists of acts which, although not committed with an intent to kill, are so malignant or morally outrageous, and carry such a high risk of another’s death that, if committed with “conscious awareness” of their deadly danger, translate as an express intent to kill. Deliberately shooting into an unoccupied house or abandoned homeless encampment (or so the shooter thought) is an act constituting implied malice.

The nature of an act cannot be changed simply by relabeling it. So, if abortion is homicide, then it remains so when relabeled as a fundamental right. A reasonable person wants to know well that to which he gives his support. He should be made aware, then, that, in supporting access to procured abortion, he is supporting also the mentality of a murderer. Notice that I am “not” saying he is supporting murder, rather only the mentality of a murderer.

Great moral outrage exists over allegations that baby night herons were mangled to death in a botched wood-chipping incident. (LA Times. May 14, 2014, p.AA4). Equal such outrage exists over an alleged willful killing of the lowly (rodent) opossum (Times, supra, March 22, 2008, p.B4). But unfortunately, for many, there exists no such outrage over the deaths of some 55 plus million “aborted ones” since the advent of Roe v Wade (1973). Words of W. H. Auden come to mine here: “Everything turns away, quite leisurely from the disaster.”

Just as the person who, thinking erroneously that the house or homeless encampment into which he is shooting is abandoned, retains his mentality of implied malice, so also do the aborting doctor and his patient retain theirs.

Every aborted human fetus either was once an intact human being 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, and 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 must concede also that, for all it may be known reasonably, every procured abortion results in the death of an intact human being. And until the advent of Roe v Wade, never in the history 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, the Court stated explicitly that the State’s interest in safeguarding the fetus is “important” throughout the gestational process: 410 U S 113, 162 ) And so said President Obama: “In matters of life and death we are partners with God.” (Google that quote.) 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 139; 17th ed., 1985.) And so says more than two thirds of the states of the United States. (Google: NCSL number of states with fetal homicide statutes.)