The Future of Abortion Law in the United States

Gerard V. Bradley

Abstract. In 1971, Judith Jarvis Thomson published what was then and still often is regarded as a trailblazing philosophical defense of a woman's right to have a lawful abortion. It is time to revisit Thomson's paper. The aim here is not to engage Thomson's pro-choice conclusions, which are indeed mistaken, but to show that her question—to what extent can abortion be morally justified, assuming that it is the deliberate killing of one person by his or her mother—is *the* question today in American law concerning abortion. Pro-life people and groups argue among themselves about the prudence of political efforts to roll back *Roe v. Wade* by personhood initiatives, that is, by seeking to enact laws expressly recognizing that a human being with an equal right not to killed comes to be at fertilization, thereafter to pursue abortion restrictions as a matter of equal protection for all against unjustified uses of lethal force. Many if not most pro-life activists and bodies oppose such efforts as precipitous and almost certainly politically counterproductive. This article argues that, on the contrary, the unborn are already recognized as persons with a right not to be killed, and that the constitutional question of equal protection of unborn persons is already in the courts. Thomson's question is, in other words, ripe and urgent, and it has been brought to the fore not by direct attack upon abortion rights, but indirectly by and through the many feticide laws enacted across the country since around the year 2000. *National Catholic Bioethics Quarterly* 16.4 (Winter 2016): 633–653.

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In what might still be the most famous moral philosophical defense of choosing to have an abortion, Judith Jarvis Thomson wrote in 1971 that she was "inclined to think … that we shall probably have to agree that the fetus has already become a human person well before birth." "By the tenth week," Thomson observed, the fetus "already has a face, arms and legs, fingers and toes; it has internal organs, and brain activity is detectable."[1] She denied that "the fetus is a person from the moment of conception." But Thomson granted that proposition, too, for the sake of arguing that women have a broad, but not unlimited, right to abortion.[2]

Thomson wanted to argue against pro-lifers on ethical, not metaphysical, grounds. She saw a tactical opportunity. "Opponents of abortion," she wrote, "commonly spend most of their time establishing that the fetus is a person, and hardly any time explaining the step from there to the impermissibility of abortion." But "it is by no means enough to show that the fetus is a person, and to remind us that all persons have a right to life—we need to be shown also that killing the fetus violates its right to life, i.e., that abortion is *unjust* killing*"* of a human person.[3]

It is time to revisit Thomson's article. The chief aim of this visit is not, however, to engage her conclusions about the scope of morally justified abortion. The main purpose is rather to show that Thomson's question—to what extent is abortion the morally justified killing of one person by another?—is *the* question today in American law.

But how could that be so? There are, after all, more than a million lawful abortions a year in the United States. In June 2016, the Supreme Court expanded the

1. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1.1 (Fall 1971): 47–48.

2. Ibid., 47. Thomson says very little about the reasons for her denial, save that she rejects what she described as the most common argument in favor of fetal personhood, a garbled version of what would now be called the no-substantial-change argument, which is most cogently developed and defended by Patrick Lee in *Abortion and Unborn Human Life.* Thomson's reply to it is brief and jejune. She incorrectly describes it as a slippery slope argument and lamely compares the assertion that Judith Thomson in 1971 is substantially the same as that entity that came into being inside her mother at the moment of fertilization to "the development of an acorn into an oak tree" (Thomson, "Defense of Abortion," 47). John Finnis wrote about this comparison in his 1973 critique of Thomson's article: "It is discouraging to see her relying so heavily and uncritically on this hoary muddle" (John Finnis, *Collected Essays,* vol. 3, *Human Rights and Common Good* [Oxford, UK: Oxford University Press, 2011], 304).

3. Thomson, "Defense of Abortion," 48, 57, emphasis added. Right-to-life advocates were hardly the only ones who concluded that if the fetus is a person, then abortion is unjust. When the Supreme Court decided *Roe v. Wade* two years after Thomson's essay appeared, the Justices, who were not pro-life, admitted that the case for abortion liberty collapses if the unborn count as persons within the protection of the Fourteenth Amendment, because the "fetus' right to life would be guaranteed specifically by the Amendment" (*Roe v. Wade*, 410 U.S. 113, 156–157 [1973]). If the unborn were recognized as constitutional persons, only abortions to save a pregnant woman's life could be justified killing, consistent with equal respect for the lives of unborn persons.

scope of abortion rights over against restrictive state regulation in *Whole Woman's Health v. Hellerstedt*.[4] Freedom to choose abortion seems to be a settled feature of our constitutional jurisprudence, with the rights of the fetus wholly subordinated to it.

Whole Woman's Health actually supplies one reason why Thomson's question is our question. That case will focus anti-abortionists' considerable political energies on the fetus as the bearer of a right not to be killed that is similar, if not identical, to the right enjoyed by other persons. This has already become a fruitful source of pro-life initiatives. Henceforth, it is likely to be the primary starting point for those seeking to legally limit abortion, notwithstanding the strong judicial headwind they will face. In fact, the constitutional law surrounding abortion, considered as a whole and especially including the Equal Protection Clause, reveals that this judicial resistance is itself unreasoned, an arbitrary stipulation favoring abortion, supported by raw power. So this paper argues. When reason supplants will in the relevant sector of constitutional law, we will discover that Judith Thomson's question lies at its core.

Depersonalizing the Fetus

The doctrinal innovation in *Whole Woman's Health* raised the bar of judicial review for state regulations of abortion grounded in concerns for maternal health—there, hospital admitting privileges for abortionists and the quality of the medical apparatus at abortion clinics. This holding will make sure that such maternal health regulations have crested, especially where they have been enacted, as many have, with a view not only to protecting women's health but to reducing the overall incidence of abortion. *Whole Woman's Health* appears to hold that even reasonable maternal health laws are unconstitutional where they substantially impede some women's access to abortion.

The constitutionality of abortion regulations for the sake of informing the woman's consent, such as those that require notification of available alternatives and facts about fetal development, was untouched by *Whole Woman's Health*. There is surely space for further refinement of these advices. But they too have reached a plateau as anti-abortion measures; future refinements will not yield dramatic decreases in abortion rates. It has long been settled law, moreover, that grown women have a unilateral right to choose abortion; fathers need not consent, and their notification may be required only when it does not threaten the woman's independence of decision. Even minors have at least a qualified right of unilateral access to abortion because courts have read the Constitution to require that states permit unemancipated minors to "bypass" legally mandated notice to parents by going to court for a judge's permission to proceed with an abortion. There is little potential here for creative and effective legislation to decrease the incidence of abortion.

That abortion kills someone with a right to life has become easier to see since *Roe v. Wade*. Progress in scientific research and medical practice has made both birth and viability unrealistic criteria for demarcating between human life, which demands moral respect, and merely "potential life," which does not have moral or

4. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016).

legal equivalency with maternal interest. The Eighth Circuit recently criticized the use of viability as a litmus test because it "tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn."[5] The near-ubiquity of sonograms has probably done more than intellectual arguments to convince the public that a real baby resides in the uterus by the tenth week of pregnancy. Earlier and earlier prenatal medical interventions on behalf of the unborn patient confirm this impression, and DNA indubitably substantiates that a fertilized embryo is biologically identical to the individual who is born nine months later and who has an undeniable right not to be killed.

Consequently, the future of the American anti-abortion movement lies in restrictions founded on the fetus's right to life. This is not to say solely that activists need to have something to do and that other avenues are blocked. Fetal right-to-life *should* be anti-abortionists' focus, because the fundamental and unvarying wrong in abortion is not slipshod medical practice or unintelligent assent—troubling as those contingent and common evils are—but *killing,* as Thomson well understood. Conscientious legislators and citizens will therefore continue to enact abortion restrictions premised on the personhood of the unborn. They will do so not because they are at a loose end, but because they believe it to be what justice requires. As a matter of fact, many American states have recently enacted two types of abortion restrictions for the sake of the unborn as rights bearers. One type involves prohibitions which recognize, as did Thomson, that the fetus is a person well before birth, and even before viability. Examples include bans after the points where a fetus feels pain (about twenty weeks' gestation) and where the fetal heartbeat begins (about eight weeks' gestation). Both sets of laws include exceptions for abortions that are necessary to preserve the life of the mother or her physical health against severe injury. They all represent attempts to more or less align abortion regulation with the scope of morally justified killing of one person by another.

The second type of recent pro-life legislation would ban entirely abortions sought for particularly unworthy reasons, such as the sex or race of the unborn child. These enactments establish a fetal-personhood beachhead, so to speak, by linking the unborn to the wider community of persons protected against unjust discrimination. By prohibiting abortions sought for a specified reason, these laws also link up with Thomson's amended question, which was (in her words) "the permissibility of abortion in some cases" but in no case "for the right to secure the death of the child."[6] That is, Thomson defended a woman's decision to evict someone (a renowned violinist) who would, uninvited, occupy her body for life support for nine months. Her defense of "unplugging" the violinist without intending to kill him explored the requirements of justice when a pregnant woman wants to eject a fetal squatter. Thomson asked whether it is morally justifiable to knowingly cause the death of an unborn person by and through an act undertaken for the purpose of *terminating a pregnancy.*

5. *MKB Management Corporation v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015).
6. Thomson, "Defense of Abortion," 66.

This was essentially the question raised by an Indiana statute recently enjoined by a federal judge. Indiana defended its prohibition of race- and sex-selective abortions by noting, *inter alia,* that women affected by the ban obviously did not object to being pregnant or to carrying a child to term. The only desire which these laws disrupted was a woman's wish to have a little girl rather than a little boy or vice versa. Women seeking a sex-selective abortion are obviously not aborting for the sake of ending a pregnancy. They are seizing the opportunity, which the prevailing law of abortion-on-demand affords them, to end the life of a child who happens to be of the wrong sex.[7]

Judges have so far enjoined the operation of almost all of these fetal-right-to-life abortion restrictions. They have done so, some with apparent regret, not on the strength of legal, ethical, scientific, or medical reasoning but on a quarter-century-old Supreme Court precedent, *Planned Parenthood v. Casey*, which affirmed what it called the central holding of *Roe*: women must have the ultimate authority to decide whether to continue a pregnancy.[8] But neither in C*asey* nor in *Roe* nor in any other case has the Supreme Court taken up the task of arguing, much less shown, that the victim of an abortion is not a homicide victim. Nowhere has the Supreme Court taken up the burden of arguing against the proposition that people really come into being at fertilization, notwithstanding the Court's recognition that whether they do decisively affects the constitutionality of abortion rights.

In *Roe*, the Court expressly declined to "resolve the difficult question of when life begins."[9] That case was decided on the curious basis that the state could not deny a pregnant woman all choice about abortion by imposing what the Court called "one theory of life" on her. For their own part, the Justices neither affirmed nor denied, in any clear or necessarily presupposed manner, any such theory. *Casey's* affirmation of *Roe* did not rest on ratification of *Roe's* reasoning, such as it was, but on social expectations enabled by the Court's 1973 ruling. The subscribers to the *Casey* joint opinion wrote that for two decades "people have organized intimate relationships and made choices" while relying on access to abortion in case contraception should fail.[10] The salient fact in *Casey* had nothing to do with the moral status of the fetus, a matter which the Court in that case studiously avoided analyzing. The salient fact had to do with the benefits of abortion for other people.

7. See *Planned Parenthood of Indiana and Kentucky v. Commissioner*, no. 1:16-cv -00763, slip op. at 12–14 (S.D. Ind. July 30, 2016).

8. "Although controlling Supreme Court precedent dictates the outcome in this case, good reasons exist for the Court to reevaluate its jurisprudence … [insofar as] the Court's viability standard has proven unsatisfactory because it gives too little consideration to the 'substantial state interest in potential life throughout pregnancy'" (*MKB Management Corporation*, 795 F. 3d at 773–774, quoting *Planned Parenthood v. Casey*, 505 U.S. 855, 876 [1992]). For a notable case in which the judge did not regret this use of precedence, see *Planned Parenthood of Indiana and Kentucky v. Commissioner*.

9. *Roe*, 410 U.S. at 159.

10. *Planned Parenthood v. Casey*, 505 U.S. at 856.

Lower courts since *Casey* have done little more than recite the depersonalizing phrase "potential life" when they consider the possibility that the unborn have a right to life that their mothers must respect. Some courts have even reasoned backward about abortion and fetal rights: first, posit lawful abortion; second, derive from that permission what one would have to say about the unborn to make lawful abortion something that a decent society would countenance. In 1998, then Seventh Circuit Chief Judge Richard Posner wrote that the conclusion that the fetus is not a person "follows inevitably from the decision to grant women a right to abort."[11] In other words, assume that abortion-on-demand as ordained by *Roe* is just; now, talk about the fetus. Exposure of unborn human beings to maternal violence has evidently become an axiom or a postulate of our constitutional law. It is as if the legal culture has turned Thomson upside down. She observed that some people say "pro-life" and presume that it means abortion is always wrong. Many people today say "pro-choice" and presume that it means the unborn are not persons. But being pro-choice establishes nothing about the true status and rights of the child in utero.

The most compelling reason Thomson's question is our question is also the reason the prevailing regime of stipulation-and-avoidance cannot evade evidence and reason much longer. What Thomson granted for the sake of argument has become an established fact: the unborn are recognized as persons with a right not to be killed in thirty-eight states as well as in federal law. These statutes, commonly described as feticide prohibitions, accord the unborn the same or substantially the same right to life as everyone else, with the exception mandated by the Supreme Court in *Roe* for lawful abortion.

Some defendants in fetal homicide cases have challenged their convictions on constitutional grounds, chiefly, equal protection. They ask, how could it be that the norms of justified killing are never satisfied for the father, while they are never relevant for the mother, even when both act in the same way and for the same reasons? They assert that ambient norms of justification govern everybody, just as they protect everybody. These defendants raise a double-barreled challenge to the abortion status quo. They argue for equal protection under homicide laws for themselves and their interests, insofar as the law permits persons to use lethal force against other persons who threaten them. They say that justified use of force must be available to all on equal terms. However, this claim necessarily depends on a second equal-protection assertion, namely, that the law cannot constitutionally undermine the first equality by varying the personal status of the one against whom force is used. If the fetus is a person who can be unjustly killed by its father, then it must be protected from all aggressors, including pregnant women, even if the requirements of justice vary somewhat because of the female monopoly on pregnancy. Courts have so far not stepped up to answer these grave questions. It is not clear how they could without upsetting the current law of abortion.

These constitutional questions are more urgent because of the way the *Roe* Court defended its minting of abortion rights. Here the Court put aside legal and philosophical

11. *Coe v. County of Cook,* 162 F.3d 491 (7th Cir. 1998).

reasoning and turned to real-world experiences. But the Justices did not attach much significance to pregnancy. In fact, *Roe* listed seven types of detriment as reasons for abortions. One of them—the stigma of unwed motherhood—has since disappeared. Of the rest, only one, medically diagnosable harm during pregnancy, had apparently to do with carrying a child in the womb. The other detriments the Justices said justified abortion are gender neutral: they have entirely to do with the anticipated burdens of raising a child, burdens on which mothers have no monopoly. They include the prospect that "maternity, or additional offspring, may force upon the woman a distressful life and future." In addition, "psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[12] These burdens typically affect mothers more than fathers, but not always, and it is surely unreasonable to suppose that they do not often fall very heavily on expectant fathers.

The challenges of raising children are real enough. But no one maintains that those cited by the Court would be sufficient to justify killing burdensome children or, for that matter, anyone other than a fetus, as the Justices' concessions on the hypothesis of fetal personhood made clear.[13] Those challenges are not gender specific—men, just like women, have good reasons, often the same reasons, to delay becoming a parent, perhaps indefinitely. *Roe* thus supplied little material from which a response to feticide defendants' constitutional challenges could be assembled.

The unique physical dependence of a child in utero on his or her mother must be dealt with frankly in any honest account of the morality of abortion. But that does not mean that abortion calls forth a unique set of justificatory norms, or that its morality depends on *sui generis* evaluative criteria. Any claim about the singularity of choosing abortion would have to be defended on grounds consistent with equal protection under the laws. Thomson argued for a substantial abortion liberty by appealing to general norms governing the justified use of deadly force and to widespread intuitions and tutored reactions to those norms as applied to life-threatening situations.[14] She cited examples of moral duty and right involving grown-up, physically independent people, such as the Good Samaritan, burglars climbing in one's window, and a patient whose life can be saved only by the touch of Henry Fonda. Thomson reasoned about abortion the way that anyone should reason about the justified killing of one person by another: what is fair in light of all the relevant circumstances in which person A and person B find themselves. For Thomson, abortion presents a unique set of facts, but she sought to illuminate the relevant requirements of justice according to general principles governing the ethically appropriate use of deadly force against anyone,

12. *Roe*, 410 U.S. at 153.

13. See Thomson, "Defense of Abortion," 57.

14. Thomson argues specifically about ethics and does not really engage the matter of legal permission. For the sake of this paper, I take the scope of ethically justified killing of unborn persons to be basically symmetrical with legally justified killing of unborn persons. No doubt they are as a general rule. The modest differences between them in some situations, as well as the question of which, if any, there should be in the case of abortion, are left aside.

albeit applied to the peculiar circumstance of pregnancy. Thomson's question is finally this: what should be the scope of lawful abortion, where ordinary norms of justification are applied to the woman's decision based on difficulties distinctive to her pregnancy, to terminate it knowing that by doing so she will cause the death of another person with a right to life equal to hers?[15]

Asymmetrical Legal Treatment

Thirty-eight states as well as the national government have since 1973 enacted laws specifically against fetal homicide, or *feticide*: the unjustified killing of an unborn child. These laws identify the unborn child as a victim, wholly distinct in contemplation of law from his or her mother. Injury to the mother by one seeking to harm or destroy a child in utero constitutes a separate legal harm, a criminal offense in addition to that against the fetus. These laws must be distinguished, too, from laws that punish unlawful abortions—including self-abortion—for the sake of regular medical practice and maternal safety. These are usually misdemeanors, and are never punished so gravely as to make the prohibitions comparable to feticide.[16]

The unborn victim's description in these laws ranges from "child in utero" to "human being" and "person." They typically include an explicit immunity for women seeking to terminate their own pregnancies in lawful abortion.

The most widely known feticide prosecution in recent years involved Californian Scott Peterson, who was sentenced to two life-terms of imprisonment for killing his pregnant wife and their unborn son in 2002. The federal feticide law says that it

15. This whole notion of "terminating a pregnancy" is more conceptually distinguishable from terminating an unborn child than it is practically. No doubt there are some medical interventions which can accurately be described by those who choose them as "terminating a pregnancy," albeit where one certain effect of doing so is to kill the unborn child. Dealing with an ectopic pregnancy is an example, as is removing a cancerous womb. But these procedures might better be described as surgical procedures which are not "abortions." In any event, the vast majority of abortions, including those undertaken for reasons having to do with some unwanted aspect of pregnancy (say, to be rid of intolerable morning sickness) more than with the burdens of raising a child once born, terminate pregnancy precisely by actions—dismemberment, deprivation of nourishment, or (in the old days) by saline injection—intended to destroy the baby in utero. Subsequent discharge or removal of fetal remains is not and should not be described as constituting an "abortion," lest (among other reasons) every stillbirth be thus described. Thomson was at least working with an unstable distinction, and perhaps with one with practically no relevance to the choices women make when they have abortions.

16. Compare the case of a mother who was sentenced to nine to eighteen months in jail for helping her sixteen-year-old daughter perform a self-abortion, with that of Airman Boie or John Welden, discussed below, who were sentenced to thirteen years and life, respectively, for feticide (though Welden finally pleaded guilty to a lesser charge). On the criminal proceeding against the mother of the teenager, see Emily Bazelon, "A Mother in Jail for Helping Her Daughter Have an Abortion," *New York Times Magazine,* September 22, 2014, https://www.nytimes.com/.

may also be referred to as "Laci and Conner's law," in remembrance of Peterson's two victims.

The federal Unborn Victims of Violence Act (UVVA) of 2004 is the most prominent example of these laws protecting unborn lives. In pertinent part it says that whoever "causes the death of, or bodily injury … to, a child who is in utero" is guilty of an offense apart from any accompanying offense against the women carrying the child. This distinct offense is subject to the same punishment as would be the identical misconduct if it were committed against the "unborn child's mother," which would be the same punishment as if the offense were committed against anyone else. A "child in utero" is defined as a "member of the species homo sapiens, at any stage of development, who is carried in the womb."[17]

There have been many prosecutions under this law. One of the most recent is that of John Andrew Welden. On May 14, 2013, he was indicted by a federal grand jury for violating the UVVA, in that he "intentionally caused the death of … the unborn child in utero of R.L."[18] The baby was his. R.L., who was later publicly identified as Remee Jo Lee, was Welden's girlfriend.

Welden faced life in prison without possibility of parole for the murder. An educated twenty-eight-year-old from a large, prosperous (but broken) family, Welden was steadily employed. When he learned of his girlfriend's pregnancy, he was "shock[ed] and fright[ened]." The prospect of being a father not only scared him. It caused "sadness, guilt, hopelessness, and worthlessness," effects perhaps abetted by his underlying tendency toward depression. Welden was also romantically involved with Tara Fillinger, who said that she and Welden were "discussing marriage." In no recondite or technical sense, Welden was unprepared and unwilling to assume the obligations of being a parent. Notwithstanding that Lee assured Welden that she would raise the baby herself "without [making] any demands of" him, he resolved to kill their unborn child.[19]

Welden did so in a manner that, save for his deception of Lee, would be indistinguishable from a medical (as opposed to surgical) abortion. Welden ordered some misoprostol from an out-of-state pharmacy. He affixed to the abortion pills a pharmacy label indicating that they were amoxicillin, a common antibiotic. Welden then convinced Lee that she needed to take the pills to treat an infection that he falsely said had been diagnosed by his father, a doctor who specialized in fertility treatments. Lee took the pills that day. Next morning, she miscarried. Welden soon confessed.

17. Unborn Victims of Violence Act, Pub.L. 108-212, 118 Stat. 568, 569 (2004).

18. *United States v. John Andrew Welden*, no. 8:13-cr-00252 (M.D. Fla. May 14, 2013), indictment, count 2.

19. Elaine Silvestrini, "Abortion Pill Defendant Brings up *Roe v. Wade*," *Tampa Tribune*, June 14, 2013, http://www.tbo.com/. See also *U.S. v. Welden* (M.D. Fla. May 29, 2013), transcript at 8. Lee never said that she consented to the chemical abortion. She told the court during a March hearing, though, that Welden remained her "best friend and that she loved him in spite of what … he had done to her," as quoted in Silvestrini.

He was arrested, and eventually pleaded guilty to lesser charges, netting him thirteen years' imprisonment.

A similar scenario played out in the case of Airman First Class Scott Boie, who was charged with intentionally killing his unborn child.[20] Boie married his girlfriend shortly after learning that she carried their child. But he was never happy about the pregnancy and soon asked her to have an abortion. When his wife declined, Boie bought some misoprostol. He ground the drug into a powder and secretly put some of it into his wife's food and drink on four different occasions. She soon miscarried. Boie confessed, and eventually pleaded guilty under the federal Unborn Victims of Violence Act to the lesser offense of attempting to kill his child. Boie was dishonorably discharged and sentenced to nearly ten years in prison.

In Boie's and Welden's cases, an unborn child's father effectively performed an abortion by the same means and for the same sorts of reasons that the child's mother could have chosen to abort as a matter of right. Exercising her constitutional right would require professional assistance, since self-abortion is illegal in approximately forty states. But nothing about the course of the proceedings against either man would have been different if he in fact had been a physician.

Consider now the case of a seventeen-year-old Utah girl, described in court documents because of her age as J.M.S., and the twenty-four-year-old man whom she hired to abort her unborn child. J.M.S. had no objection to being pregnant or, it appears, to having a child, save that her boyfriend threatened to break up with her if she did not have an abortion. Lawful abortion was not readily available to her because of the advanced state of her pregnancy and the scarcity of abortion-performing doctors in her vicinity. J.M.S. therefore hired Aaron Harrison after they met at a 7-Eleven store. She accompanied him to his parents' home, where Harrison kicked her in the stomach five times in an unsuccessful attempt to cause a miscarriage. She paid Harrison $150.[21]

Harrison was convicted and sentenced for attempted murder. Notwithstanding that Utah law exempted women from prosecution for murder in cases of abortion, J.M.S. too faces criminal penalties. The Utah legislature had amended its criminal homicide statutes in 1983 to include anyone who "intentionally … causes the death of another human being, including an unborn child at any stage of development."[22] Abortion was an exception, and in no circumstance could a woman be charged for obtaining an abortion. But "abortion" was defined as postfertilization "procedures" to "kill a live unborn child,"[23] which the Utah Supreme Court interpreted to include only *medical* procedures. Kicking a pregnant woman in the stomach did not qualify.

20. *See United States v. Boie*, 70 M.J. 585 (A.F.Ct. Crim. App. 2011).

21. Melinda Rogers, "Man Gets Prison in Pay-to-Miscarry Beating Case," *Salt Lake Tribune*, October 27, 2011, http://archive.sltrib.com/. See also *State v. J.M.S.*, 280 P.3d 410 (Utah 2011). J.M.S. gave birth a few months later, and the baby was subsequently adopted by a relative.

22. Utah Code Ann. §76-5-201(1)(a) (2008), quoted in *J.M.S.*, 280 P.3d at 415.

23. Ibid., §76-7-301(1) (2008), quoted in *J.M.S.*, 280 P.3d at 412.

The attorney for J.M.S. argued that any assault on a fetus at the mother's request amounted to an abortion. The court disagreed.[24]

The distinction between criminal homicide and lawful abortion in this case was not based on any difference in mental state, for both Harrison and J.M.S. wanted, that is, intended, to kill the same unborn child. Nor was the difference rooted in the pregnant woman's consent, because Harrison had it. The legally decisive difference was the nature of the procedure employed. Because J.M.S. sought an abortion by amateurish means, the state high court concluded that she could be charged with solicitation to commit murder.[25] Thus, for what it is worth, J.M.S. turned out to lack the degree of control over her body that she desired.

To the skein so far sketched of identity of choice, intention, act, and harm to the unborn should now be added the same norms of justification. Jaclyn Kurr stabbed her boyfriend, Antonio Pena, to death. She was convicted after trial, despite her contention that she killed Pena after he "punched her two times in the stomach and that she warned Pena not to hit her because she was carrying his babies."[26] Evidence at the trial indicated that Kurr had recently become pregnant, but the court nonetheless denied her request that the jury be instructed about justification. Her proposed instruction was the standard one, commonly used in every American jurisdiction.[27]

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24. See *J.M.S.*, 280 P.3d at 413. An Indiana appellate court recently (July 22, 2016) adopted the contention (pressed by a woman convicted of feticide) that all actions undertaken with the pregnant woman's consent to end a pregnancy constitute "abortions." These abortions could be lawful or unlawful. But in no case may a woman be prosecuted for procuring her own abortion. Nor may a consenting woman be prosecuted under Indiana law, according to this court, for feticide, which the court defined as extending to third-party acts against the expectant mother *without* her consent. *See Patel v. Indiana*, case no. 71A04-1504-CR-166 (Ind. App. July 22, 2016). The court in this case threw out the defendant's convictions for feticide and for the highest grade of criminal neglect of her child, who was, in fact, born alive and died after his mother deposited him in a trash dumpster. The court entered a judgment of conviction for a lesser felony criminal neglect. The court reasoned throughout its opinion about the coherent meaning of the relevant Indiana statutory framework, and did *not* say or imply that any of its conclusions were due to the pull of constitutional considerations, including those found in the Supreme Court's abortion jurisprudence.

25. The case of J.M.S. is one of several in which women have been found liable for killing their unborn children. However, see also the case of Erica Basoria, who was pregnant with twins by Gerardo Flores. By the time she decided to have an abortion, it was too late. Her doctor said that neither he nor any other local doctor could safely perform the procedure. Testifying at Flores' trial for capital murder, Basoria said that she asked him to terminate her pregnancy by stepping on her abdomen. He did so, but only after, as the appellate court testimony recounts, Basoria repeatedly asked him to. The court, which affirmed Flores' convictions, wrote, "By the last week of her pregnancy, she was striking herself every day." Basoria subsequently delivered stillborn twins. Flores was sentenced to life in prison. *Flores v. State*, 254 S.W.3d 432, 434 (Tex. Crim. App. 2008).

26. *People v. Kurr*, 654 N.W.2d 651, 652 (Mich. Ct. App. 2002).

27. *Justification* "involves conduct which would otherwise be criminal, but which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure. … Thus, burning a field in order to create a firebreak preventing a raging

Kurr asked that the jurors be told that her use of lethal force against Pena was justified if she had a reasonable fear that he was going to kill or cause serious bodily harm to her or to her unborn babies.

Kurr's conviction was overturned on appeal. The higher court held that Michigan's Prenatal Protection Act of 1998 established that deadly force was justified in defense of an unborn child of any age; indeed, "she may, under the appropriate circumstances, use deadly force to protect her fetus even if she does not fear for her own life." This holding undoubtedly extends to third parties, too. A friend or stranger who happened upon Pena assaulting Kurr could have justifiably killed him based on a reasonable fear that he was going to kill Kurr or her baby in utero. To the obvious challenge that this reasoning would justify anti-abortion protesters' use of force to interrupt an imminent abortion, the *Kurr* court limply cited *Roe* for the proposition that *that* sort of imminent harm to another's life was lawful.[28]

It is already apparent that, notwithstanding access to lawful abortion mandated by *Roe,* unborn children from the moment of fertilization are not merely potential life. So far considered, judges like Posner who say that abortion rights imply that the unborn are not and cannot be persons are mistaken. The unborn are indeed persons with a right not to be killed on a par with that of everyone else, save for the anomalous case of lawful abortion.

Barry Holcomb was convicted of strangling his girlfriend Laura Vaughn to death. Her unborn child perished with her, and Holcomb was convicted of first-degree murder for the child's death as well as for Vaughn's. Holcomb knew Vaughn was pregnant, and prior to the murders he had threatened to kill both of them. Under Missouri law, the location of a homicide victim in utero made absolutely no difference to Holcomb's criminal liability, and he received consecutive life sentences without possibility of parole.[29]

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fire from reaching nearby homes," conduct which would otherwise be criminal mischief, is justified (Wayne R. LaFave, *Criminal Law*, 5th ed. [St. Paul, MN: West Academic, 2010], 471, quoting Paul Robinson). Using lethal force against and even killing—both ordinarily serious crimes—are justified when done in self-defense or in defense of *another*. *Justification* is very different from *excuse*. *Excuse*, on the other hand, pertains to situations where the misconduct is criminal and morally reprehensible, but where holding a particular person criminally responsible for the misconduct is judged to be inappropriate. Criminal acts are excused, not on the basis of the net value of any act, but because of characteristics of the actor, usually some sort of extraordinary stress or diminished capacity. Robinson explains that "'justified' conduct is correct behavior that is encouraged or at least tolerated. . . . An excuse represents a legal conclusion that the conduct is wrong, undesirable" but that punishment is inappropriate. "Excuses do not destroy blame" (LaFave, *Criminal Law,* 473). They do, however, reduce or eliminate criminal liability. Whether pregnant women could properly be excused, *as a class*, for the unjustified killing of their unborn children by abortion is an important question of law and social policy, which I do not consider in this paper.

28. *Kurr*, 654 N.W.2d at 655.

29. *State v. Holcomb,* 956 S.W.2d 286 (Mo. App. W.D. 1997).

Holcomb appealed his convictions. He stated the challenge that emerges from these pages plainly: "All intentional and unjustified killings of pre-born children must be treated the same."[30] The Missouri appellate court nonetheless upheld his conviction for killing his own unborn child, where the victim was expressly declared to be simply a person for purposes of the state murder law. The *Holcomb* court observed that "it is basic doctrine of *Roe v. Wade*, and it is understood by persons on all sides of the abortion controversy, that *Roe* limited to the mother the legal right to consent to the destruction of her unborn child."[31] For the rest of the world, the destruction of an unborn child is criminal homicide.

Yes, that is the prevailing positive law. But why? On what critical grounds can it be adequately defended? The asymmetry of legal treatment in these cases requires some reasonable defense, which cannot be found in the phrase "a woman's control over her body" unless constitutional law affirms that a mother may take the occasion of pregnancy to end the life of another person whose existence might become unwelcome to her sometime later. Indeed, that phrase "control over her body" has become a kind of totem when discussing the justice of abortion. When used by apologists for *Roe v. Wade,* it usually signals that no satisfactory answer is forthcoming, will be attempted, or is felt to be worth the effort.

Matthew Bullock and Lisa Hargrave were expecting a baby. Hargrave was twenty-two to twenty-three weeks pregnant on New Year's Eve 2002 when she and Bullock consumed some alcohol and cocaine at a party. After returning to their apartment, Hargrave did some more cocaine. Bullock asked her to stop for the baby's sake.[32] When Hargrave ignored his request, they argued, and according to Bullock's statement to the police, he blacked out. Next thing he knew, he was on top of Hargrave, strangling her. Because he feared that Hargrave would call the police on him, Bullock bound and gagged her. After she struggled to break free, Bullock returned and strangled her to death. Their unborn child died, too, as a result.[33]

The Pennsylvania Supreme Court affirmed Bullock's multiple convictions, including one for voluntary manslaughter of his unborn child. Bullock appealed and mounted the same challenge as Holcomb, in much the same language. The *Bullock* court responded that "the mother is not similarly situated to everyone else, as she alone is carrying the unborn child."[34] This is true in an important but limited sense: the presence of a child within the mother's body gives rise to possibilities of justified use of force that arise for no one else. Ordinary principles of justification would thus permit her to terminate her pregnancy and to knowingly end the unborn child's life if she reasonably feared her own death or serious bodily injury. General principles

30. Ibid. at 292.

31. Ibid.

32. Several women have been successfully prosecuted for harming or killing their unborn children by consuming illegal drugs during pregnancy. Each individual has turned out to lack the desired control over her body.

33. *Commonwealth v. Bullock,* 913 A.2d 207, 210–211 (Pa. 2006).

34. Ibid. at 216.

of justification would not go much beyond that, as a glance at any state's criminal provisions governing homicide and the justified use of deadly force shows.

The *Bullock* court also asserted that "the statutory language does not purport to define the concept of personhood or establish when life as a human being begins and ends."[35] Pennsylvania's lawmakers had, however, described the manslaughter victim in *Bullock* as an unborn child, which they defined as a member of the species *Homo sapiens*, that is, according to any standard dictionary, one of humankind, a human being.

Relying on language from an earlier feticide appeal, the court added that "whether an embryo is a human being … [is] irrelevant to criminal liability under the statute."[36] Quoting from another case, *Bullock* said that "the statute only requires proof that, whatever the entity within the mother's womb is called, it had life and, because of the acts of the defendant, it no longer does."[37] The Armed Forces appellate court that heard Boie's case adopted all this language and concluded that the issue was "whether the embryo … had the properties of life and whether [Boie] attempted to end that life [or at least to destroy those properties] by poisoning" his wife's food.[38] But, leaving aside whatever exactly "properties of life" in this space denotes and how a being with those "properties" differs from a person, the question pressed by Bullock, Holcomb, and Boie remains unanswered: How could the father of a child do what his wife could do for the same reason, with the same motives, and to the same effect on properties of life yet be imprisoned for life while she is not even questioned by the law?

Justice Max Baer concurred in the *Bullock* result. Writing separately to "emphasize certain matters implicit" in the Pennsylvania Supreme Court decision, he concluded that, although the conviction was in all respects indistinguishable from that of killing the deceased mother, it "should not, and cannot, be interpreted as an attempt in any way to define, generally, a fetus as a life-in-being or as endorsing the notion that the interruption of the reproductive process is the killing of human life."[39]

How so? We have already seen that this assertion was contrary to the plain language of the Pennsylvania statute. Even if granted, however, it would have solved nothing unless Baer was prepared to defend the proposition that the personal status of the unborn as a homicide victim varies depending on the motives and interests of the individual who would do the killing. On this line of thought, one would not ask in the case of *Dudley and Stephens* whether consuming the sickly cabin boy was justified or at least excusable homicide.[40] One would rather ask if the defendants were so hungry that their ailing victim ceased to be a person at all!

35. Ibid. at 212.

36. Ibid. at 213, quoting the Minnesota Supreme Court in *State v. Merrill,* 450 N.W.2d 318, 324 (Minn. 1990).

37. Ibid., quoting *People v. Ford,* 581 N.E.2d 1189, 1201 (Ill. App. Ct. 1991).

38. *Boie*, 70 M.J., slip op. at 6.

39. *Bullock*, 913 A.2d at 219–220.

40. *R. v. Dudley and Stephens*, 14 Q.B.D. 273 D.C. (1884).

Baer concluded that "*Roe* and its progeny remain the law in this nation and any attempt based upon the legislature's choice of language … to undermine its constitutional imperative, is unavailing." This bold declaration indicates a steely determination to retain the abortion liberty established by *Roe*, but it surely does not tend to critically justify the asymmetric abortion regime inaugurated by that case.

Baer's resolve gave slightly larger expression to the curt denial that a US district judge delivered to the attorney for John Welden. Todd Foster asserted at an early hearing that there were some tensions between *Roe v. Wade* and the prosecution of his client for feticide. According to the news report of the hearing, Judge Richard Lazzara was flabbergasted. His reply, in total, was this: "That argument will not fly."[41]

Why not?

One might think these judges should stand by abortion rights because they are members of inferior courts and the Supreme Court has continued to affirm the central holding of *Roe.* However, this contradicts the fundamental role of a judge, no matter the level of his court. Every judge in America is sworn to uphold the Constitution, and every litigant is entitled to judgment according to the Constitution. The Supreme Court has never taken up the dilemma posed by litigants such as John Welden, Scott Boie, Barry Holcomb, and Matthew Bullock. So judges are not following the Supreme Court when they decide these men's cases as they have decided them. They are rather improvising answers by, it seems, declaring their undiluted allegiance to something very much like abortion-on-demand. But that is a stance, not an argument.

Ultimately, abortion rights amount to a stipulated exception to the law of justified killing of one person by another, for it surely cannot be the case that the personal status of the fetus or of anyone else could vary depending on whether it is struck by a fist from outside the womb, severed by a scalpel inserted into the womb, or killed by misoprostol taken either unwittingly or on the instructions of a doctor or a layman. It is even more unreasonable to conclude that the acts and intentions of other persons could reduce the fetus from a person with an equal right not to be killed to a nonentity that is utterly invisible to the law.

Re-centering Abortion Jurisprudence

The most obvious response available to Baer, Lazzara, and other like-minded judges is to roll back fetal personhood so that the unborn cannot be murder victims. The alternatives can scarcely be entertained. One alternative would be to admit fetal personhood but expand the ordinary norms of justification so that distraught fathers, perhaps also ambushed by contraceptive failure or deceit, could lawfully kill their unborn children. Besides the difficulty of aligning such a license with the mother's well-being and choices, any such expansion of justification could not be limited to cases of parents and unborn children. Admitting fetal personhood while stipulating that distress short of a reasonable fear for one's life could justify killing another person would put everyone in peril.

41. Silvestrini, "Abortion Pill Defendant Brings up *Roe v. Wade*."

Any attempt to limit the revised justificatory license to mothers and fathers for a limited catalogue of specific emotional, psychological, and financial trials would simply raise again the questions of equal protection and justice we have explored throughout this paper. For example, why should a severe disability justify killing an unborn person but no other person? Why should the stigma of unwed motherhood always be a sufficient reason for a woman to abort the person in her womb, but never for the child's father or for the woman's mortified father who lost face in his religious community because of his daughter's sexual sins?

The only practical alternative to centering abortion law on Thomson's question is to preserve the status quo by declaring that the unborn simply are not persons. One prerequisite or personal qualification for advocating this path would be that an individual conscientiously believe, on the strength of evidence and argument, that persons do not come to be until birth or, at least, viability, after which point an advocate might agree that abortion should be permitted only where objectively justified. This position is improbable and, in my judgment, unreasonable. In any event, good faith is a precondition, because lying about such an important matter would be wrong. The lie would be made worse by its consequences: a whole class of persons whom one silently believes possess a right to life could be killed with impunity. Good faith is a prerequisite because the Posnerian option simply restates the arbitrary position this path is supposed to bypass. Saying that the unborn are not persons because that is what one has to say if one is pro-choice is exactly the evasion this alternative to Thomson is meant to overcome.

The judicial heavy lifting involved in pursuing this depersonalization option would extend far beyond invalidating all feticide statues and reversing the convictions of Scott Peterson et al. In mid-2016, an Indiana federal judge invalidated that state's newly enacted requirement that fetal remains be disposed of in a humane manner according to the legal norms governing the treatment of human corpses generally. Not even applying the legal test which the Supreme Court prescribes for this sort of law—the undue burden standard of *Casey* as refashioned in *Whole Woman's Health*—the court concluded that the implied characterization of an unborn child as a human person, or something close enough, is simply excluded from the law by the Supreme Court's abortion jurisprudence.[42] This court relied on the earlier Posner opinion, which concluded that the license issued to women by *Roe* signifies that the Supreme Court resolved what it called the "difficult question of when life begins" to mean at least viability and probably birth.[43] Again, this is no argument against fetal personhood or in favor of the justice of abortion.

This reading of *Roe* suffers in any event from insurmountable difficulties. One is that it flies in the face of the Supreme Court's explicit declaration that it did not resolve the difficult question of when life begins, a question which the Court rightly recognized was not a narrow or technical question of legal reasoning or usage, like the question about what the Court called constitutional personhood, but about

42. *Planned Parenthood of Indiana and Kentucky*, slip op. at 18.

43. *Roe*, 410 U.S. at 159.

reality. That ontological problem lies, the Justices opined, within the provinces of philosophers and scientists. Not only did the Court pass on the question; it said that the judiciary was not competent to answer it. The Court here was at least pitifully naive, and possibly intentionally evasive. Nonetheless this professed incompetence was essential to the holding in *Roe.* We should at least presume that the Court meant what it said, and that it understood the nature of implication and entailment.

In *Roe*, the Supreme Court affirmed three propositions about the status of unborn children as human persons. The first proposition is that the unborn are not constitutional persons, that is, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[44] This conclusion is important because, as the Court plainly stated, the case for abortion liberty would otherwise collapse, and "the fetus's right to life would then be guaranteed specifically by the Amendment."[45] The Court concluded that if the unborn were recognized as constitutional persons, only abortions to save a pregnant woman's life could be consistent with equal respect for the life of the unborn.

Writing for the *Roe* Court, Justice Harry Blackmun treated the constitutional-person question as one about past legal usage, an inquiry about a technical term whose meaning in *Roe* depended on how it was understood in the nineteenth century. He considered two kinds of historical evidence.[46] Critical to his reasoning were the twenty or so uses of "person" in the Constitution, such as "no person shall be elected to the office of the President more than twice." Blackmun concluded that none of these usages indicate "with any assurance, that it has any possible pre-natal application. All this, together with our observation … that throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today," Blackmun added, "persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[47]

This first proposition affirmed by the *Roe* Court had no connection to the subject matter of the second and third. These latter two affirmations had to do with whether the unborn really are persons. The common concern of these two propositions is the

44. Ibid. at 158.

45. Ibid. at 156–157.

46. Blackmun did not explore the most probative historical evidence bearing on the relationship between constitutional personhood and real personhood, namely, the proposal and ratification of the Fourteenth Amendment itself. If Blackmun had done so, he would have readily discovered abundant confirmation that the constitutional text and structure strongly suggests they are the same. The historical record overwhelmingly supports the proposition unequivocally rejected by the *Roe* Court and by every member of that Court since, namely, the term constitutional persons includes everyone who is really a person, every genuine human being, all of God's children. Everyone who in truth is a person is a constitutional person. See Gerard V. Bradley, "Constitutional and Other Persons," *Quaestiones Disputate* 5.2 (Spring 2015): 61–85, doi: 10.5840/qd20155221.

47. *Roe*, 410 U.S. at 157–158.

question, when do persons truly begin? Do they really begin at conception or at any other time before live birth?[48]

"Texas urges," Blackmun wrote in *Roe*, "that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy." Texas further argued that "only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail." On this view, the state has a compelling interest—indeed, a duty—to "protect prenatal life from and after conception."[49] The sources of this duty no doubt included Texas's constitutional obligation to accord all persons within its borders the equal protection of the laws.

The *Roe* Court neither affirmed nor denied the state's proffered answer to the question about when persons begin. The Court instead declared its incompetence in the matter: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." This is the second proposition about unborn persons affirmed by the *Roe* Court: persons, or in the Court's phrase, "life, as we recognize it,"[50] may truly begin at conception or at some later time before birth. But it is not for the judiciary to say that they do, or that they do not.

The third proposition affirmed in *Roe* had to do with whether legislators and other competent political authorities are similarly disabled from judging authoritatively when persons begin. *Roe* implicitly but surely determined that they are not so incompetent. The evidence that *Roe* affirmed proposition three is not limited to the Court's silence, that is, to the fact—and it is a fact—that nowhere in *Roe* does the Court say that legislators, for example, may not judge when persons truly begin. The Court also reviewed various areas of law where legislators predicated valuable rights of the unborn child.[51] The Court questioned none of these legal regimes. The majority concluded only that "the unborn have never been recognized in the law as persons *in the whole sense*," that is, in every respect or to the extent that adults, for example, are so recognized. The Court did not expressly reject the predicate of Texas's contention that it bore a duty to ban abortion because persons begin at conception. The Court sidestepped the predicate while denying the conclusion: logically, the state's interest in protecting the unborn "need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth."[52]

48. The Supreme Court assumed that the Constitution settles that personhood begins no later than birth. The Justices were mistaken, however, and thus never showed how or why a human being becomes a person when he or she is born, but not before or at any other time between fertilization and death.

49. *Roe*, 410 U.S. at 150, 156, 159.

50. Ibid. at 159, 161.

51. Ibid. at 161–162.

52. Ibid. at 150, 162, emphasis added.

And a woman's interest in abortion generally outweighed that state interest, whatever it might be.

The stated reasons for abortion liberty supply further evidence of *Roe's* affirmation of proposition three. The Court stated that legislators may affirm what they wish about the unborn so long as they do not, "by adopting one theory [of when] life [begins], override the rights of the pregnant woman that are at stake."[53] Those rights were rooted neither in a judicial conclusion about when persons begin (proposition two) nor in a denial of legislative competence in the matter (proposition three). The ground of the abortion liberty articulated in *Roe* is, instead and unquestionably, the seven detriments we considered earlier in this paper, which the state would, according to the Court, "impose" on the pregnant woman by denying her the abortion option.

Proposition three was confirmed and more explicitly articulated by the Supreme Court in its 1989 *Webster v. Reproductive Health Services* decision. Missouri's legislators declared that the "life of each human being begins at conception." They defined unborn children to include "all … offspring of human beings from the moment of conception until birth at every stage of biological development." They mandated that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of the state," subject only to federal constitutional limitations, chiefly, those found in *Roe* and its progeny. The Supreme Court upheld all these provisions, interpreting its prior cases to mean "only that a State could not 'justify' any abortion regulation *otherwise* invalid under *Roe v. Wade* on the ground that it embodied the State's view" of when people begin.[54]

Proposition two was essential to *Roe's* legitimacy. The *Roe* majority opinion begins with an argument not about abortion or about the personhood of the unborn, but about the Court's peculiar competence to resolve this "sensitive and emotional" question, one plagued by "vigorous opposing views," and to end a debate marred by "the deep and seemingly absolute convictions that the subject inspires." The Court's warrant, so to speak, lay precisely in its capacity "to resolve the issue by constitutional measurement, free of emotion and predilection."[55] Such was the *Roe* Court's self-described task.

This special competence depended on the Justices' detachment from the philosophical issues raised by abortion, that is, the aloofness expressed by proposition two. This detachment allowed and equipped them to resolve the divisive abortion question in a uniquely credible and authoritative way. That way was free of emotion, partisanship, and either side's absoluteness. That way was a third way, a distinct path between the warring sides' moral arguments. As the *Casey* Justices said in 1992, "Men and women of good conscience can disagree about the profound moral and

53. Ibid. at 162.

54. *Webster v. Reproductive Health Services.*, 492 U.S. 490 (1989), emphasis added.

55. *Roe*, 410 U.S. at 116.

spiritual implications of terminating a pregnancy." The *Casey* plurality added, "Our obligation is to define the liberty of all, not to mandate our own moral code."[56]

The combined effect of these *Roe* propositions is paradoxical at least. Propositions one and two mean that even if the unborn really are human persons who would obviously benefit from legal protection against being killed, they are still not persons whose lives are protected by the Constitution. Proposition three means that legislators may recognize the unborn as real persons with the same right not to be killed as everyone else, save that what would be considered unjustified homicide by anyone else requires no articulated justification at all by the unborn person's mother.

This is to say that Richard Posner and those following him are mistaken when they assert that *Roe* implies that fetuses cannot be real persons. Although the *Roe* Justices probably did not consciously consider what to do about Barry Holcomb et al., they quite studiously built into the foundation of abortion rights all the conditions and predicates that make their challenges possible and rationally compelling. It so happens, then, that these men's challenges expose the fact that *Roe* is a house built on sand. Posner and Baer et al. are legally entitled, in a sense, to take the pro-abortion side in the ensuing debate. They are not morally or juridically entitled to do so by their own edict. They are under a duty, in fact, to critically justify their stance according to the canons of reasoning incumbent on judges in constitutional cases.

Abortion as Doctrine

Courts have so far denied the feticide defendants' appeals with little more articulated reason than the obvious fact that granting these claims would rattle the structure of abortion rights in place since 1973. So they might: that is exactly what it would mean to consider Judith Thomson's question. But these muscular judicial refusals to engage the constitutional and moral questions raised by the feticide defendants compound the naiveté and evasiveness of *Roe.* They take the Court's tragic deficiencies to a new level, one where urgent questions about the lawfulness of killing are simply suppressed.

But suppressing the question is risky as a short-term strategy, and in the long run it will not do at all. Even now, conscientious legislators easily see the truth that people come to be at fertilization. They just as easily see that courts do not refute the claims of justice which these lawmakers make on behalf of the unborn so much as the courts ignore them. As the truth about unborn persons lodges itself more securely in our law and culture—by and through, among other mechanisms, feticide prosecutions like those we have explored here—the gravely anomalous character of abortion rights will become more, not less, obvious and disturbing. Lawful abortion will become more, not less, divisive politically and socially. The alienation of so many pro-life persons from the basic governing structures of their society will increase over time, not decrease. Graver impositions on them will be needed to keep the incumbent abortion regime intact.

56. *Casey*, 505 U.S. at 850.

Continued suppression of Thomson's question—*the* question about abortion as critically justified killing of a person—could eventually deliver abortion to the status once occupied in American law by slavery: a deeply divisive social practice contrary to natural justice, maintained only by dint of positive law, which elites preserved from criticism by suppressing dissent and protected from constitutional danger by making it a master principle of law. Slavery became the sun around which the surrounding legal culture orbited.[57] But at least slavery was arguably countenanced by the Constitution's text, and respectable principles of federalism were mustered to give it a veneer of further constitutional sanction. *Roe*, on the other hand, claimed no textual or even close precedential support. It abrogated a federalistic approach to abortion. Such a fateful course for abortion law—a decline into dogma enforced by sheer judicial and political power—should not, however, be presumed, or lightly anticipated.

57. Supreme Court Justices, among many others, commonly lament that abortion has effected a Copernican revolution in constitutional law. Justice Thomas is the latest in this long line of dissenters. In *Whole Woman's Health*, he wrote about how the Court manipulates doctrine in abortion cases "to achieve its desired result" (*Whole Woman's Health v. Hellerstedt*, slip op. at 12 [Thomas, J., dissenting]).