IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff	)	Case No. 09CR1462
	)	Division 7
vs.	)	
	)	Response to In Limine Motion
SCOTT P. ROEDER, Defendant	)	
	)	

RESPONSE TO IN LIMINE MOTION

Contents:

INTRODUCTION: REASONS TO ACCEPT THIS PRO SE FILING INTO THE RECORD DIRECTLY FROM THE DEFENDANT

A. KANSAS PRECEDENT ALLOWS A HYBRID DEFENSE

Although Defendant recognizes he cannot take turns with his Public Defender defending himself after the trial begins, there is no reason why pretrial proceedings cannot accommodate pro se motions filed by me, as well as, should I choose, my oral defense of them at hearings, according to State of Kansas v. Holmes, No. 90,420, Sept 21, 2007:

> The State responds that this issue is not properly before this court for two reasons: (a)

> Holmes was not entitled to hybrid representation...
>
> (a) Hybrid representation.
>
> While a party has the right to represent himself or herself or be represented by counsel, he or she does not have the right to a hybrid representation. *State v. McKessor*, 246 Kan. 1, 12, 785 P.2d 1332, *cert. denied* 495 U.S. 937 (1990).
>
> In the second suppression hearing, the court warned Holmes of the dangers of hybrid representation and that generally it was not allowed. However, the court made an exception for that hearing and allowed counsel to argue Holmes' **pro se motion** to suppress. The prosecution did not object to the trial court's decision.
>
> The State cites *State v. Ames*, 222 Kan. 88, 98-101, 563 P.2d 1034 (1977), in arguing that the defendant could have represented himself or been represented by counsel, but not both. However, *Ames* does not support the State's assertion. In *Ames*, **the trial court allowed the defendant to file a plethora of pro se motions at both pretrial and posttrial hearings and to argue some of those motions;** however, the court did not allow Ames to participate at the trial. **This court did not criticize the trial court for allowing the defendant to file pro se motions or hear those motions.** Rather, we found that the trial court did not abuse its discretion in limiting the defendant's participation in his defense. 222 Kan. at 101. In this case, the trial court allowed Holmes' pro se motion to be argued by counsel. As a result, the State's argument fails.

B. KANSAS PRECEDENT REQUIRES THAT THE DEFENDANT HAVE THE RIGHT TO PRESENT HIS DEFENSE

Every defendant has a right to present his theory of his defense. Although there may be procedural restrictions based on statutory and case law, there can be no "exclusion of evidence that is an integral part of that theory". That "violates a defendant's fundamental right to a fair trial." (State v. Walters, No. 92,592, Sept 21 2007)

> 1. Under the state and federal Constitutions, a defendant is entitled to present the theory of his or her defense, and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. (State v. Walters, No. 92,592, Sept 21 2007)

Although Defendant appreciates the assistance of his Public Defenders in other aspects of his trial, they have publicly given mixed signals about their willingness to represent me on the central theory of my defense, which is the only reason I maintain my innocence and demand a trial by jury, and was the only reason I took the action which got me here. They lack the capacity because they do not believe this defense even exists, "anywhere", Mr. Steve Osburn literally said according to a Wichita

Eagle staff editorial November 12. “There is nothing in the law of Kansas, or anywhere else, that allows this kind of defense.” Although Mr. Osburn and Rudy submitted a fine response to the prosecutor’s November 12 In Limine motion for its brevity, it does not assure me that they now believe the defense exists. They argue that excluding evidence relevant to Necessity would exclude evidence relevant to other defenses they are considering, which they do not yet want to reveal.

I realize the Court may very well share the view that Necessity does not exist, but American justice embodies the vision of the freedom of defendants to at least raise their defenses high enough to be shot down in a public forum *after* all sides are heard. The specter of a defendant’s principal defense censored from this fair forum by his own attorney, over defendant’s passionate objections, is repugnant to American justice.

C. FARETTA V. BROWN REQUIRES THAT COUNSEL SERVE AS “ASSISTANT” TO THE DEFENSE OF THE DEFENDANT’S CHOOSING, NOT A “MASTER” WHO CAN VETO DEFENDANT’S ONLY HOPE OF ACQUITTAL

It may seem overreaching to posit *any* hope for acquittal, but Defendant knows of no other strategies in his Public Defender’s arsenals which even pretend that goal. Defendant admits his hope of acquittal is not strong, but that is because his hope of having his arguments heard, considered, and squarely addressed is not strong, in the hostile legal environment in which he finds himself, in which his defense is called “fictional” by his own attorney before defendant’s arguments are even aired. If his own attorney, whose job is to be biased in favor of his client, at least outwardly, publicly scorns his theory of his defense, shall defendant entertain a strong hope of an unbiased hearing by those whose jobs prohibit bias in my favor?

> "There's no such thing as the necessity defense," said Steve Osburn, head of the Sedgwick County Public Defender's Office and Roeder's lead counsel. "This is a fictional defense made up by these people.” *By Ron Sylvester, The Wichita Eagle Wednesday, Nov. 11, 2009*
>
> Rudy cited stories published by The Eagle and other news outlets as contributing information that won't be allowed at trial, including Roeder confessing to Tiller's killing in a phone call to reporters. “That's one piece of information the jury isn't likely to hear,” Rudy

wrote, because "for tactical reasons, the State will not be seeking the admission of much of the material, including, his 'confession.'" *By Ron Sylvester, The Wichita Eagle Wednesday, Nov. 13, 2009*

The very word "counsel", which means "to offer advice, to help, to assist", suggests the superior authority of the defendant over the course of his trial.

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." *The 6th Amendment.*

The Supreme Court said in 1984, in *Faretta v. Brown,* 422 U.S. 806, 820-821:

> [The 6th Amendment] speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in may areas. Cf. Henry v. Mississippi, 379 U.S. 443, 451; Brookhart v. Janis, 384 U.S. 1, 7-8; Fay v. Noia, 372 U.S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Any characterization of this decision as limiting the input of the defendant to the initial selection of a lawyer runs counter to the paramount authority throughout the trial attributed to the defendant by this decision's very own footnote on the same page:

> Such a result, (making the counsel the master instead of the assistant) would sever the concept of counsel from its historic roots. The first lawyers were personal friends of the litigant, brought into court by him so that he might 'take counsel with them' before pleading. 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909). Similarly, the first 'attorneys' were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally. Id., at 212-213.

Any reluctance in the Court to accept this pro se brief into the record, directly from the defendant, would unnecessarily reduce the Defendant/Assistant relationship which is the bedrock of

American justice into the Master/Slave relationship which *Faretta v. Brown* prohibits.

D. PAST CANONS OF JUDICIAL ETHICS REQUIRE THAT THE ISSUES RAISED BY THE DEFENDANT BE SQUARELY ADDRESSED, NOT GLOSSED OVER, MUCH LESS DISMISSED OUT OF HAND.

About 1970, the Canons of Judicial Ethics were reduced in number from 26 to 7. The 26 are listed in the preface of Black's Law Dictionary, 4th Edition.

Let us hope the reason the 19 were deleted was because they were deemed to go without saying, and not that they raised an ethical standard which judges were no longer willing to meet!

Presuming, therefore, that the former standards still articulate what is ethical, number 19 would be relevant to any hesitation to receive defendant's pro se written arguments into the record directly from the defendant. It says judicial ethics require that all issues raised by the defense be squarely addressed, not summarily suppressed.

> Canon #19: In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.
>
> It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions....

Defendant pleads with this court, in the spirit of Canon 19, to not allow the Public Defender's readiness to dismiss defendant's arguments before knowing them, to set the tone for this trial.

It is not defendant alone who will suffer from such closed mindedness. Defendant did not invent these arguments in a vacuum. Estimates by Operation Rescue many years ago indicate the number approached 100,000, of otherwise law-abiding citizens, mostly Christians obeying Biblical teachings, who went to court for preventing abortions, and almost universally argued the Necessity Defense despite it being rejected by what emerged as the consensus of state supreme courts. The facts and

arguments motivating defendant are not the exclusive fabrication of wild eyed fringe kook radical fanatics, but are established by American leaders who include Congressmen, presidents, and Supreme Court Justices.

In fact, defendant's arguments find no fault with Roe v. Wade, or with any U.S. Supreme Court decision, but rather explain how the consensus of state supreme courts, on these issues, are in violation of Roe, and are outdated in light of recent federal law.

Courts simply have failed to squarely address questions about the legality of abortion to the satisfaction of even a majority of Americans. This case presents courts an opportunity to resolve those lingering disputes and heal America, which will end the violence. It is America Herself which will suffer, if Courts gloss over these unanswered questions one more time. Conscience's cry for justice will continue to press for satisfaction outside legal channels, as long as legitimate questions cannot be addressed *through* legal channels.

Do you think the defendant likes violence? Even when it is to stop greater violence? If you do, explain why he waited so many years, after understanding the magnitude of the violence he succeeded in stopping, to act! Defendant desires the violence to stop. On both sides. Defendant offers the rest of his life for the lives of the unborn whose murders he prevented, and now, through legal arguments, he prays for and works towards the end of all violence, on both sides.

Defendant realizes that the pressure of precedent upon this Court is enormous, even if it conforms neither to *Roe v. Wade* nor to recent federal law; but reminds the Court that history is full of reverses of well settled laws, and after such reverses, history judges those who resisted. Let the standard not be "we must keep doing as we have because we have been doing it so long that evidence of how wrong we are is irrelevant and obviously fictional."

> Proverbs 18:13 He that answereth a matter [judges a case] before he heareth *it,* [hears the evidence] it is folly and shame unto him.

ARGUMENTS ON THE MERITS

The prosecutor rests her entire case upon a 16-year-old ruling which has been superseded for several years by both U.S. Supreme Court precedent and the U.S. Code.

The Prosecutor asserts that Defendant has no right to present his theory of the Necessity Defense to the jury, because what was *in fact* unthinkable harm, which he *in fact* successfully prevented, by killing Dr. George Tiller, was not "unlawful", which is the only kind of harm which may justifiably be prevented according to *City of Wichita v. Tilson,* 855 P.2d 911 (Kan.), cert. denied, 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 420 (1993).

> (1) the defense of justification by necessity cannot be used when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred is in violation of the law, and (2) evidence on when life begins was irrelevant in action for criminal trespass on property of abortion clinic and thus admission was error.

Neither the prosecutor, nor *Tilson*, nor *Roe v. Wade* 410 U.S. 113 (1973), dispute the widespread allegation that abortion is *in fact* an unthinkable harm, and even genocide itself; they say only in its defense that it is *legal.* Thus prosecutor alleges that whether or not he was committing genocide, "George Tiller was not engaged in *illegal* conduct at the time of his murder." *Tilson*, actually contradicting *Roe v. Wade*, calls evidence that this conduct is, in fact, genocide, "irrelevant".

Kansas law likewise will not help a hero who saves thousands of lives, if the "cruel and unusual" slaying of those human souls is *legal:*

> **21-3211**(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of *unlawful* force.

In addition, several state supreme courts have asked, with *Tilson*, "How can a harm be legally [re]cognizable, if it is constitutionally protected?"

But all these precedents are out of date. Abortion has not been constitutionally protected since at least 2003. Abortion has been legally recognizable as a harm since 2005, the year *Roe* "collapsed".

LEGALITY OF TILLER'S ABORTIONS, EVEN BY POPULARLY ACCEPTED LEGAL STANDARDS, IS NOT SO CRYSTAL CLEAR

Prosecutor rests her entire In Limine motion on her insinuation that Dr. George Tiller's abortions were all legal. But she cannot even nurture that insinuation into a clear, unambiguous assertion. Even the Prosecutor carefully dances around the issue of whether George Tiller's abortions were legal by commonly accepted, understood, and applied legal standards! She writes,

> In the instant matter, the defense clearly has no applicability, even if the defense were recognized in Kansas. George Tiller was not engaged in illegal conduct at the time of his murder; he was serving his church as an usher. And while the victim's provision of lawful abortion services to women may be the motive behind the defendant's attack, those past or potential future services cannot serve as a legal justification for it. See, *Tilson*, supra.

Notice she wants to say "Tiller was not engaged in illegal conduct" categorically, but must qualify it with "at the time of his murder; he was serving his church as an usher." This is an oblique allusion to the Imminence requirement, addressed later. So we do *not* have, here, any kind of triumphant affirmation that "Tiller was not engaged in illegal conduct" *when he was killing babies!*

Next she glances at the hope that Tiller "provi[ded] lawful abortion services" exclusively, but she cannot spit it out. She chokes out that perhaps I was motivated by those of his abortions which *were* "lawful". Well, yes I was, but what really made me despair that the political alternatives had shut down were the abortions he did, the legality of which even much of the public doubted, and yet the law could not or would not touch him.

Prosecutor in short would like to assert before the Court that Tiller's abortions were all legal, by commonly applied law, but the closest she dares approach is to insinuate it. She bolsters her insinuation with quotes from *Tilson* which apply only if all of Tilson's abortions are legal, further supporting her *insinuation* that all of them were in fact legal, yet it all adds up to, at most, an insinuation.

This swings wide the door to a factual inquiry by the jury whether all of Tiller's abortions really

were legal by any standard. The problem for the prosecutor is that before this inquiry is settled, an inquiry which remained publicly unsettled at the time of Tiller's death, it cannot be glibly taken for granted that Tiller's abortions were all legal, in order to rule, before trial, that Kansas 21-3221(a) is not available to defendant.

Even if prosecutor had clearly stated the arguable proposition that all of Tiller's abortions were legal, the matter cannot be assumed before the jury speaks on it. A ruling for her In Limine motion would surely, therefore, be reversible error. But since there has been no clear statement even from the prosecutor that all of Tiller's abortions were legal, there really is little reason to take prosecutor's motion seriously. She hesitates to assert the facts which would make her case cites even relevant.

Part 1. ABORTION PREVENTION PRECEDENTS MUST BE UPDATED TO CONFORM TO RECENT FEDERAL LAW AND PRECEDENT.

a. "CONSTITUTIONAL PROTECTION" HAS DEPARTED FROM ALL ABORTIONS, AND ESPECIALLY FROM POST-VIABILITY ABORTIONS

Tilson's view that Abortion is constitutionally protected may have seemed true in 1993, but a Supreme Court justice explained in 2003 how that ceased being true in 1992. Here is from Justice Scalia's dissent in *Lawrence v. Texas* 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003), explaining how the Supreme Court, in 1992, abandoned Roe's position that the right of a woman to choose to hire someone to kill her unborn child was a "fundamental right", in *Planned Parenthood v. Casey:*

> We have since rejected Roe' s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U.S., at 876, 112 S.Ct. 2791 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); id., at 951-953, 112 S.Ct. 2791 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part)- and thus, by logical implication, Roe' s holding that the right to abort an unborn child is a 'fundamental right.' See 505 U.S., at 843-912, 112 S.Ct. 2791 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) (not once describing abortion as a 'fundamental right' or a

'fundamental liberty interest').

This reasoning withdraws "Constitutional protection" from abortion at *any* stage of gestation. Three appellate courts have withdrawn it at least after "viability". See, *People v. Berquist* 239 Ill.App.3d 906,*914, 608 N.E.2d1212,**1218, 181Ill.Dec.738,***744 (Ill.App. 2 Dist.,1993)("The abortions performed at Concord West were confined to the period up to 12 weeks gestation. No evidence was presented that the fetus is viable at this point. Thus, the abortions performed at Concord West were constitutionally protected."); See, also *Commonwealth v. Markum,* 373 Pa.Super. 341, 541 A.2d 347, 354-56 (1988) (Tamilia, J., dissenting)(defendants should have been permitted to adduce evidence of viability); *McMillan v. City of Jackson* 701 So.2d 1105, *1110 (Miss., 1997)(Smith, J., dissenting)(same).

Tilson, ibid, p. 917, gives a quote from *Markum* which makes it clear that *Markum* regarded only "*pre*-viability abortion [as] lawful by virtue of ... federal constitutional law":

> In Comm. v. Markum, 373 Pa.Super. 341, 541 A.2d 347, appeal denied 520 Pa. 615, Cite as 633 Pad 911 (Kan. 1993) 554 A.2d 507 ce'rt. denied 489 U.S. 1080, 109 S.Ct. 1533, 103 L.Ed.2d 837 (1988), the defendants were convicted of criminal trespass. They alleged that the crimes were justified to prevent the loss of a human life.
>
> The court held that the necessity defense was unavailable because a woman's right to obtain an abortion was protected by the United States Constitution.
>
> The court stated: "As we have noted, pre-viability abortion is lawful by virtue of state statute and federal constitutional law. The United States Supreme Court, from Roe through its progeny, has consistently held that the state's interest in protecting fetal life does not become compelling, and cannot infringe on a woman's right to choose abortion, until the fetus is viable. Roe [410 U.S.] at 163-64, 93 S.Ct. at 732. Appellants do not suggest that viability and conception are simultaneous occurrences. We find that a legally sanctioned activity cannot be termed a public disaster." Carp. v. Markum, 373 Pa.Super. at 349, 541 A.2d 347.

People v. Archer 143 Misc.2d 390, *397-398, 537 N.Y.S.2d 726,**730 - 731 (N.Y.City Ct.,1988) concluded that "abortion can still constitute a moral 'injury to be avoided', under § 35.05 of the Penal Law, because citizens of ordinary intelligence and morality remain free both as individuals and as jurors, to find it so notwithstanding the fact that the Legislature has made most abortions "justifiable" in relation to what would otherwise be a prohibited criminal act." *Id* at 400.

Stating that "the question is by no means free from doubt", *Id* at 403, the court reluctantly reasoned that *Roe v. Wade* 410 U.S. 113 (1973) had rendered any abortion that occurred in the first trimester a fundamental constitutional right, (this was 4 years before *Casey* abandoned this position) with which the State could not passively interfere by making a necessity defense available to those who believed it to be murder.[1] The Court went on to conclude that a first trimester abortion therefore could not constitute a harm at law.[2] It stated further, however, that he would allow the necessity defense to be presented at trial if the defendants were able to show evidence that the facility in question "was about to perform other than first trimester abortions on" the date of their protest." *Id* at 404-405.

It is clear that no abortion has enjoyed Constitutional Protection, in the view of the U.S. Supreme Court, since 1992, and it is even more clear that post-viability abortions (as opposed to the pre-viability abortions addressed in *Tilson*) have no Constitutional protection in the view of any court.

b. ABORTION LEGALLY COGNIZABLE AS A HARM SINCE 2005

1The Court also noted however, that the prosecutor had discretion not to prosecute abortion protestors, upon which "this State action argument would fail." *Id* at 403, FN 15 It is well worth noting further that such a view tellingly *presupposes* that allowing the defense would result in acquittal, and damningly illustrates the guilty conscience of the government. If the government is confident in its position that abortion is not mass murder on an unimaginable scale, soaking the collective hands of the nation in the blood of innocents, in which it is directly complicit by judicially protecting abortion, it should have no concerns that a jury of citizens will act to nullify the law. And of course if a conviction follows *despite* the allowance of a justification defense, there would be no sense, passive or active, in which the government could be accused of having "interfered" with any woman's constitutional right to choose (ostensibly by encouraging more conduct like the defendant's). The full might of the United States government is here employed in a shameful effort to ensure that a group of citizens is prevented from even *understanding* exactly what it is that goes on in abortion clinics. The defendant wants only to speak the truth. The government is terrified and profoundly ashamed of the truth, and will do anything to keep it from being revealed in front of a jury. This speaks volumes as to where the real guilt lies in this case.

2The "State actor" problem caused one court to come to a conclusion that arguably violated the defendant's rights. In *State v. Clowes* 310 Or. 686, *690, 801 P.2d 789,**791 - 792 (Or.,1990), "trial court found that defendants had proffered sufficient evidence on all the elements of the choice of evils defense, generally, to submit it to the jury. Nevertheless, the trial court granted the state's motion to exclude evidence of the defense on the ground that to admit such evidence would be inconsistent with *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).[FN4] ...FN4. Although the record is not entirely clear, it appears that the trial court concluded that allowing defendants to avail themselves of the statutory choice of evils defense would constitute state action, by which the state would be sanctioning defendants' interference with the pregnant women's federal constitutional privacy rights as recognized in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and subsequent cases." Affirmatively depriving a defendant of a constitutional right to present a defense that the court has ruled is available to him as a matter of law, in deference to a purely speculative concern about a possible passive or implicit interference with some unknown person's conflicting constitutional right, cannot be a correct course of action for any court.

Tilson's view that Abortion is not legally recognizable as harmful may have been true in 1993, but it ceased being true in 2005, when federal law codified the full humanity and personhood of the unborn, which met the condition laid out in Roe v. Wade for its own "collapse", which removed constitutional protection of abortion at *any* stage of gestation, while at the same time codifying the unborn as "persons" within the meaning of the 14th Amendment, which removed the power even of states to legalize it at any stage.

In 2005 abortion, at *any* stage, became de facto unlawful, and legally recognizable as unlawful, besides being a legally recognizable "harm" for the purpose of Necessity Defense analysis. The defendant is ready to prove to a jury that his belief that abortion is unlawful, especially since the passage of these two federal laws, is a belief which any reasonable person would find credible, who saw the evidence available to the defendant. Defendant is ready to prove to the Court that such belief is not only reasonable, but accurate.

Up until such time as courts declare laws unconstitutional, courts must conform their rulings to them. No court has declared this law unconstitutional, so Roe v. Wade, and the entire legality of abortion, has been reversed since 2005. It may not appear so now, but that is only because inconsistencies between law and case law are not resolved instantly; the only mechanism for resolving them is a case that requires those inconsistencies to be resolved. This is that case.

i. LACI AND CONNOR'S LAW

"LACI AND CONNOR'S LAW", 18 U.S.C. 1841, satisfied the criteria in Roe v. Wade for Roe's "collapse" by establishing, as a matter of fact as well as of legal recognition, the humanity of the unborn. A U.S. law is superior in authority to a U.S. Supreme Court decision, in the sense that the Supreme Court must obey it, until such point as the Court declares it unconstitutional. Not that there is any conflict between Laci's Law and Roe v. Wade, requiring courts and citizens to decide which to obey. The two are in harmony. Laci's Law does not attack Roe, but satisfies the conditions which Roe

invited fact finders to establish.

Laci's Law states that it should not be construed to outlaw abortion, but this statement should not be construed to prevent the "collapse" of Roe. The "collapse" of Roe will not outlaw abortion; it will only free *states* to outlaw abortion. Outlawing abortion is clearly a process with two distinct steps, and Laci's Law clearly takes only the first.

In 2004, Congress passed 18 U.S.C. 1841 , "Laci and Connor's Law", to provide legal redress for unborn children who did not survive an assault on their mothers. Laci's Law, in relevant part:

§ 1841(a): Defines killing of an unborn child as homicide.

(a)(2)(C): Provides that intentionally killing an unborn child is punishable under the federal murder statutes, for "intentionally killing.. .a human being".

(c) Provides an "abortion exception" clause which declines to penalize elective abortions.

(d): Defines terms in (a): "the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species Homo Sapiens, at any stage of development, who is carried in the womb."

In short, Laci's Law defines the humanity of unborn humans as equal with that of born humans, even though it does not penalize their murders equally.

The opponents of §1841 recognized with perfect clarity that it necessarily abrogated Roe. For example, Mr. Nadler, opposing the law, stated:

> "(I)f the law recognizes that a fetus is a legal person from the moment of conception.....then the law must recognize and protect the rights of that person on a legal basis with the rights of the adult pregnant woman. If our laws recognize that, then there can be no right to choose, because, logically, terminating a pregnancy even in its earliest stages would be killing a fully legal person." *UNBORN VICTIMS OF VIOLENCE ACT OF 2003 150 Cong. Rec. H637-05, *H640*

Roe said one thing and did another. It expressly declined to hold that the unborn are not human persons, citing expert disagreement on the matter, but then ruled as if it had found thus by holding that early unborn life is expendable, at the unreviewable will of the mother. The cases Roe claimed "faced

the [personhood] issue squarely" (Roe at 15 , e.g,. Keller and Montana), did not actually so rule, but rather, like Roe, side stepped the core issue, and acted as if they had found one way or another, when they had not. Yet even Roe protected "viable" or "third trimester" children as whole legal human persons. No case finds that unborn life is not legal life. Since Laci's Law, no court *can* do this.

§ 1841 is squarely within the large historical continuum, and also in a more immediate legal heritage of common law era state fetal homicide laws. It is a prevalent fallacy that state fetal homicide laws "arose against a background of 'born alive' rules" (Cole and Kadetsky), as if the "born alive" laws had no consideration for unborn life. Numerous states with "born alive" laws concurrently penalize violent induced miscarriage as homicide (albeit manslaughter).

Keeler v. Superior Court, (87 Cal. Rptr. 481, 2 Cal. 3d 619,470 P.2d 617 [CA, 1970]) cited in Roe as ruling against legal personhood of the prebom in fact states the opposite; Keeler himself was freed solely for lack of notice that unborn death would be dealt with as homicide, and the California legislature was free to codify any unborn's intentional killing as a homicide.

Hughes v State, 868 P. 2d 730 (Okla Crim App 1994), State v Horne 282 S.C. 444, 319 S.E. 2d 703 (1984) and State v, Holcomb 956 S.W. 2d 286, 64 ALR 5th 901 (Mo Ct. App. W.D. 1997) came to similar conclusions. See also, Remy v. MacDonald 440 Mass. 675, 801 N.E. 2d 260 (2004) (defining a "viable fetus" as a "person" for purposes of state motor vehicle homicide statute)

Michigan v. Kurr, No. 228016, Oct 4, 2002, and Commonwealth of Pennsylvania v. Bullock (J-43-2006) said any intrauterine life is "living" and can perfect a corpus delecti, even if the court refrained from explicitly defining the unborn as persons.

In Kurr, defendant was specifically granted retroactive permission to use lethal force only because she was pregnant with quadruplets.

Bullock ruled as if the unborn were persons, punishing their killing as a homicide. The Court unanimously rejected an array of constitutional challenges to the Crimes Against the Unborn Child Act, 18 Pa. C.S. Sec. 2601 et seq., including claims based on Roe v. Wade and equal protection doctrine.

Although the law applies "from fertilization until birth," Bullock argued that Roe allowed such a law to apply only after viability. The Court said

> "to accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend on external conditions, namely, the state of medical technology (which, of course, tends to improve over time). . . viability outside of the womb is immaterial to the question of whether the defendant's actions have caused a cessation of the biological life of the fetus . . ."

In the 1989 case of *Webster v. Reproductive Health Services* (492 U.S. 490), the U.S. Supreme Court refused to invalidate a Missouri statute (Mo. Rev. Stat. 1.205.1) that declares that

> ...the life of each human being begins at conception...unborn children have protectable interests in life, health, and well-being [and that all state laws] 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 this state,

to the extent permitted by the Constitution and U.S. Supreme Court rulings. A lower court had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified this ruling, and held that **a state is free to enact laws that recognize unborn children,** so long as the state does not include restrictions on abortion that *Roe* forbids.

In *State v. Knapp*, 843 S.W. 2nd (Mo. en banc) (1992), the Missouri Supreme Court held that the definition of "person" in this law is applicable to other statutes, including at least the state's involuntary manslaughter statute.

Terence Chadwick Lawrence v. The State of Texas (No. PD-0236-07) unanimously rejected claims that the 2003 Prenatal Protection Act was unconstitutional for various reasons, including inconsistency with Roe v. Wade. In its summary of the case, the court explained that after learning that a girlfriend was pregnant with his child, defendant Lawrence "shot Smith three times with a shotgun, causing her death and the death of her four-to-six week old embryo." For this crime, Lawrence was convicted of causing the death of "more than one person . . during the same criminal transaction." The court said that the abortion-related rulings of the U.S. Supreme Court have

> no application to a statute that prohibits a third party from causing the death of the

> woman's unborn child against her will....Indeed, we have found no case from any state supreme court or federal court that has struck down a statute prohibiting the murder of an unborn victim, and appellant [Lawrence] cites none.

In State of Utah v. Roger Martin MacGuire, January 23, 2004, MacGuire argued that the law, which covered "the death of another human being, including an unborn child," was unconstitutional because the term "unborn child" was not defined. The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero. . ." MacGuire was also charged under the state's aggravated murder statute, which applies a more severe penalty for a crime in which two or more "persons" are killed; the court ruled that this law was also properly applied to an unborn victim and was consistent with the U.S. Constitution.

ii. LACI AND ROE INTERACT

The I.egislative/Judicial power struggle of the past forty-odd years is apostrophized in the tension between the Blackmun Clause about the conditions for Roe's "collapse", 410 US 113, at 156/7, and § 1841(c), the "abortion exception" clause of Laci's Law.

Each critical moiety of the Blackmun Clause and § 1841(c), and § 1841(d) in light of § 1841 (a) and (b), which edify it, must be examined.

iii. THE BLACKMUN CLAUSE

The Blackmun Clause has two components:

> "['texas argues] that the 'fetus' is a person.. .If this suggestion of personhood is established, the (pro-abortion] case, of course, collapses, for the right to life would then be guaranteed specifically by the [Constitution]. Roe v. Wade. 410 U.S. • 156/1

The second component is even more explicit in its invocation of future legislation: "[T]he unborn have never been recognized in the law as persons in the whole sense." Id. *162

The Clause is limited neither in time nor jurisdiction. Roe hinged on this stance.

2. §1841(d) If § 1841(d) does not satisfy the clear plain meaning and invitation of the Blackmun

Clause, then the Clause has no meaning, and then there is no reason to suppose that any part of c, including the holding, has any meaning. Federal law now recognizes the unborn "as persons in the whole sense". Roe therefore, by its own terms, "collapses". It must be overruled.

Those who clamor for the nullification of § 1841(d) certainly know this. Congressional debates on passage of §1841 are replete with frantic pro-abortion lawmakers insisting that it meant the end of Roe. See also Wilmering, R.R., Note, *Federalism, The Commerce* Clause 80 Tns . L_J. 1989 (2005); Speizer, E., *Recent Developments in Reproduction Health Law*....41 Cal. W.L. Rev. 507 (2005); Kole, T. and Kadetsky, L., *Recent Developments,* 39 Harvard Journal Legislation 215 (2002))

Others know it too. In *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-Exist Peacefully?*, 55 Syracuse L. Rev. 133 (2004) Amanda Bruchs states of § 1841:

> "....unborn children whether viable or not, will be considered as human beings, and therefore, whole as persons as victims of crime.... [Laci's Law] extension of legal personhood to a[n] [unborn child] is entirely unprecedented in the history of federal law... . [The Supreme Court] could be forced to what it has avoided for over thirty years: determine the ultimate value of the life interest and decide when that life begins."

The Supreme Court can determine no such thing. Congress has done it. The Court need only do its job and step out of the way of the law.

iv. § 1841(d) AND THE BLACKMUN CLAUSE

> "[Texas argues] that the 'fetus' is a person. **If this suggestion of personhood is established, the [pro-abortion] case, of course, collapses, for the right to life would then be guaranteed specifically by the [Constitution]**... [but] the unborn have never been recognized in the law as persons in the whole sense." Roe. * 156157,162 (emphasis added)

> § 1841(d) **"unborn child" means** a child in utero, and the term "child in utero" or "child, who is in utero" means **a member of the species Homo Sapiens, at any stage of development, who is carried in the womb.**

No formula of words could be more explicit than § 1841(d) in satisfying the Blackmun Clause. "Child," "Homo sapiens", "who," (not "what" or "which") "carried in the womb" are all words which apply solely to human beings. Moreover, 1841 (a)(2)(C) expressly provides that their intentional

slaying be punished as intentional murder of a "human being".

You cannot murder a turnip. The explicit codification of the sanction for § 1841(d) child murder clearly identifies the § 1841(d) child as a human being, a legal person whole and entire, upon whom devolves equal protection of the XIV Amendment. After §1841 it is impossible to treat ex-utero and intra-utero children differently without violating the XIV Amendment rights of one or the other.

§ 1841 (a) and (b) require (d), and Paragraph (d) requires (a) and (b). Together they constitute an organic whole. The Blackmun Clause and § 1841 are unqualified.

The Blackmun Clause is a doe in estrus, and § 1841 is a 20 point buck.

The Blackmun Clause sent out a mating call in 1973. It took 31 years for an answering call to come from the same species of law, other than being unmurky and unpenumbral, but it has now come.

v. § 1841(c) HAS NO POWER TO BIND STATE LEGISLATURES

§ 1841(c), the "abortion exception" clause states in relevant part "1. Nothing in this section shall be construed to permit the prosecution: a. of any person for conduct relating to an abortion for which consent of the pregnant woman...has been obtained."

But Nothing in those words hinders any state from criminalizing any item on that list. These words only say this U.S. Code section does not create penalties for these actions. Yet.

vi. THE HOMO SAPIENS CLAUSE IN LACI'S LAW SATISFIES THE BLACKMUN CLAUSE, NULLIFYING ROE WITHOUT LEGAL INSULT TO THE "ABORTION EXCEPTION" CLAUSE IN LACI'S LAW

1. The Blackmun Clause and § 1841(d) interact dynamically:

a. § 1841(a), (b), and (d) actuate the Blackmun Clause of Roe without legal injury to §1841(c).

b. Actuating the Blackmun Clause reverses Roe as an isolated, discrete event initiated by Roe itself through its own Blackmun Clause. This reversal would have no intrinsic connection to outlawing abortion, even if it might pave the way for exactly that by a state.

c. The reversal of Roe does not violate the plain meaning of § 1841(c), which does not prohibit the overruling of a statute limiting states rights to proscribe abortion. Any state resumption of abortion restrictions or outlawing is isolated from § 1841(c) or, for that matter, Roe reversal.

d. Members of Congress who voted for § 1841, are immunized from responsibility for any legal consequence of the reversal of Roe. Reversing Roe is in the hands of the Supreme Court. Outlawing abortion — or not – would then be in that case in the hands of the state legislatures which cannot be bound by a Federal law within the ambit of the 14th Amendment.

vii. The Laci's Law — Texas Firewall

§1841(c) on its face states that "Nothing in this section shall be construed" to create penalties for elective abortion. Reversal of Roe, according to precedents listed in Payne v. Tennessee and secondary to the straightforward, binding application of the Blackmun Clause to § 1841, does not per se outlaw abortion. It simply returns the matter to sovereign state legislatures.

Reversal of Roe would not break, but rather revert to the legal and historical continuum that was always there.

Obviously the Supreme Court has the power, which it has not chosen to use, to declare Laci's Law unconstitutional. The power of the Supreme Court to limit its own rulings ought to be equally acknowledged. The Blackmun Clause explicitly put a leash on Roe. Not even Blackmun, Roe's author, could stomach the thought of knowingly legalizing genocide.

In other words, the Roe Court made its own allegedly unreviewable powers reviewable under the legal personhood establishment clause that Roe itself defined.

§ 1841 is not binding on the states to compel them to permit abortion. That would require passage of the Freedom of Choice Act. There is a legal discontinuity between Roe reversal and a State outlawing abortion. Reversal of Roe and the hypothetical future possibility of states outlawing abortion are legally discrete events. § 1841(c) remains intact if Roe were reversed, and § 1841(c) cannot compel

state legislation.

3. § 1841 may obviate a sanction for abortion, but it doesn't undo § 1841 (a),(b), and (d) which define it as murder. *The effect of § 1841 in total is to define intentional unborn child killing as murder even if it extends an arbitrary immunity for those murders called elective abortions.* In so doing, it did not define elective abortion to involve some kind of "non-murder." The duty of the jury in a properly conducted abortion prevention case to establish where abortion is in fact murder is impelled to that conclusion by §1841's definition of unborn babies as human beings, and is not hindered from that conclusion by the fact that §1841 did not create equal penalties for murdering all of them.

This raises the question how to reconcile U.S.C. 18 §1841 (Laci's Law) with U.S.C. 18 §248 (FACE, Freedom of Access to Clinic Entrances, 1992). Regarding the jury's duty to establish the factual nature of abortion, the latter is irrelevant. It does not address the issue.

Nor does U.S.C. 18 §248 restrict the power of states to criminalize abortion which U.S.C. 18 §1841 creates. Just as Roe v. Wade prohibited states from protecting the unborn without asserting jurisdiction over individuals who protect the unborn, even so U.S.C. 18 §248 asserts jurisdiction over individuals who protect the unborn without limiting any state who chooses to protect the unborn.

The interaction of these laws and precedents may be illogical and embarrassing, but they are perfectly legal. But then, that epitomizes the history of abortion jurisprudence. Which should be no surprise, anytime anyone creates public policy concerning abortion who is unable to discern whether abortion is unthinkably barbaric genocide, or a tonsillectomy. Usually laws and precedents attempt to logically respond to relevant facts. So where laws or precedents are premised on the facts being irrelevant, there should be no surprise if the laws and precedents are an illogical response to them.

viii. HUMANITY AFFIRMED DESPITE DISPARATE TREATMENT

It may be objected that Congressional withholding of protection from the unborn

"human" children whose mothers arrange for their killing mirrors the kind of difference between legal treatment of born and unborn babies from which *Roe v. Wade* presumed laws historically treat only born babies as "persons in the whole sense".

The most obvious difference is that only Laci's Law explicitly defines an unborn baby as "a member of the species Homo Sapiens, at any stage of development, who is carried in the womb."

The difference in treatment, then, requires some other explanation, than that loved babies are human while unloved babies are tumors. There are many reasons laws treat equally deserving citizens differently.

Sometimes the difference reflects the realities of the limitations of government in recognizing when citizens equally deserve rights. For example, a law student one week before taking his bar exam may be equally qualified with the lawyer who took it a week ago, but Courts are unable to recognize their equality until students actually take it and pass it. Similarly, unborn babies before and after viability are equally "persons" and "humans" according to current federal law, but the justices of *Roe v. Wade* admitted they were "unable to speculate" whether that was the case.

Sometimes the difference is because of the difference in how criminal intent must be established. For example, no one says laws treat auto accident fatalities as less human than gunfight fatalities because drivers who kill with their cars are not penalized as greatly! The difference is one of intent, which is and should be an element of First Degree Murder. Similarly, *Roe* misunderstood the point of Exodus 21:22 when Roe (in a footnote) gave the passage as a possible reason for treating unborn babies as not fully human. It says when a pregnant woman finds herself in the middle of a fight between two men, and gets hit, causing her child to go into labor, then if the child is unharmed, a jury shall set damages. This does not suggest the baby is less than human; but only a jury can hear witnesses to establish how deliberate the punch to the womb appeared.

Sometimes the difference has nothing to do with merit, but with political reality. It would be absurd to conclude from repeal of prohibition, while marijuana criminalization increased, that drinking

is “not legally recognizable as a harm”! Or even that it is less harmful than marijuana! The disparity simply reflects political reality, and nothing else. The newspaper headlines and Congressional debate about Laci’s law proved beyond any reasonable doubt that the disparity of treatment of loved unborn babies, versus unloved unborn babies, had nothing to do with a finding of law that not being loved makes you less than human, and everything to do with the pro-death political machine.

To imagine any deeper significance in Laci’s Law’s disparate treatment would quickly lead to absurdity. To imagine the disparity was Congress’ choice, as opposed to the result of limitations beyond its control, would place Congress in a patently false, even absurd, and profoundly immoral theoretical position, where, to maintain any semblance of consistency when trying to explain the statute, it *must* concede that this statute implies that the right to life of an innocent human being depends purely on the will of its mother. Congress would have to posit that the slaying of an unborn human child is a non-harm under United States law, provided solely that his mother wants him dead.

Were this a correct interpretation of Laci’s Law, then, given its explicit equation of the humanity of the unborn with that of the born, mothers of older children who want them dead have a legal, if not Constitutional right to kill them.

Should this Court remain tempted to discount Laci’s Law’s establishment of the personhood of the unborn because of its “ambiguity” or “inconsistency”, let this Court first note again the unambiguous verbiage that the unborn are “homo sapiens”, and second not that the rule of lenity dictates, generally, that ambiguities in statues are to be resolved in favor of defendants.

> “The rule of lenity applies only if, after seizing everything from which aid can be derived,...we can make no more than a guess as to what Congress intended.’ ” Muscarello v. United States, 524 U.S. 125, 138, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998).

To interpret the facial contradiction between the two relevant parts of §1841 as “ambiguities” is to accuse Congress either of patent absurdity or monstrous immorality. This Court should construe the statute to intend, minimally, that, even if the killing of an unborn child is tolerated when the mother - but no one else - wishes to kill him, nonetheless, the overwhelmingly more important fact is that

Congress still expressly concedes that soon-to-be-aborted children are still just that - unborn children and human beings. Congress concedes this by not having written soon-to-be-aborted children out of its definition of "unborn child". From this, full 14th Amendment rights may be inferred by a reasonable person. From this, it may be inferred that defendant's stated belief cannot be known for sure to be unreasonable per se, especially when so great a constitutional right is at stake as the right to present a complete defense.

c. *ROE* ALONE SHOULD HAVE DISSUADED *TILSON* FROM SAYING GENOCIDE IS IRRELEVANT

Roe alone, without the help of Laci's Law, should have been enough to dissuade *Tilson* from saying the harm of abortion is "irrelevant." *Tilson* ignored *Roe v. Wade* in calling the genocidal character of abortion "irrelevant". Tilson brazenly stated,

> When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable, and evidence of when life begins is irrelevant and should not have been admitted.

Roe explicitly said if it can be proved that conception is "when life begins", Roe must "collapse". Yet the *Tilson* court, which was not greater than the Supreme Court, cared nothing for the evidence which *Roe* invited! *Roe* said if *in fact* abortion is murder, it cannot at the same time remain "constitutionally protected". The *Tilson* Court brazenly states that regardless of any amount of evidence that abortion is genocide, Roe can never be allowed to "collapse"!

d. PROTECTING HARMS DOESN'T RENDER THEM HARMLESS

Anything which is in fact harmful does not change its nature the minute lawmakers or courts decide they love it. Evil cannot be transformed into good by protecting it with laws. All that does is undermine the Rule of Law. In fact, any construction of the Constitution or any other law which interprets its original intent as perpetuation of evil would violate the "absurd result" rule. Therefore the legal status of the harm prevented by the Defendant is immaterial. If it is in fact harmful, no law can

rationally forbid preventing it. Whether it is in fact harmful is the responsibility of triers of fact to determine.

Kansas law says you can use force to prevent an "unlawful harm". But that is not a defense because Kansas law says it. It is a defense because it would be absurd not to accept that defense. Before Kansas law said it – before there was even a Kansas – it was a defense, because reason demands it.

It is the same when the harm prevented is lawful. If something is harmful, good citizens expect the right to prevent it, whether it is lawful or not. And what if it is horribly harmful? What if it is so harmful that a majority of Supreme Court Justices wring their hands over its brutality? Who will stand up and tell a good citizen that he may not prevent it, because a judge has said that it might be harmful – he isn't qualified to say, that being the business of Finders of Fact – but it is legal?

Since when is everything harmless that is legal?

It is said "but abortion is not a harm, as a matter of law." What does that mean? Who should that concern? If something is the worst kind of harmful – brutal, barbaric, cruel, horrific torture and genocide – *in reality: that is, in fact* – are good citizens not allowed to prevent it because a law hasn't been passed against it yet?

But let's take this farther. Let's observe that abortion is not only legal, but it has been decreed to be Constitutionally Protected. And yet at the same time it remains as inhumane as anything our U.S. prosecutors hung war criminals for at the Nuremburg trials. Does that make it suddenly a criminal action to prevent this barbaric, civilization-destroying harm? 90% of American citizens will say it does. Suddenly, with the shifting winds of a 1973 court ruling, what had been universally vilified is now respectable and legitimate. But this public reaction proceeds not from reason, or respect for the Rule of Law, but from Fear of Law.

The fact is that what *was* barbaric *remains* barbaric. Law lacks the authority to make evil good. To make the cruel tender. To make hate love. To make dark light. Laws change; facts do not.

When laws decree evil to be protected blessings, evil does not become good. All that happens is

that laws begin destroying themselves. Laws stop protecting liberty and instead bring tyranny. Instead of a Rule of Law from which lawmakers are not exempt, dictators are created who tyrannize the unfortunate.

Abortion was one of the crimes for which the Nuremburg Trials convicted and hung war criminals. The prosecution team was led by U.S. prosecutors. The precedent set is binding upon U.S. judges in this sense: it could become a precedent for a future international tribunal to prosecute U.S. judges, especially Supreme Court justices, for ordering and protecting abortions.

From the landing of the Pilgrims to the first shots of the American Revolution, our political and legal history is built upon the recognition that nations often fall into lawlessness, and when they do, the government agents responsible are held accountable, while those who intervene in violation of corrupt but positive law, are called heroes by history. This familiar American tradition presupposes the existence of a Higher Law which honorable men will always obey, even when it is violated by positive law.

Therefore whether a harm prevented is "lawful" or not, a status which often changes, is irrelevant. The only thing that matters is whether the harm is real. Laws which intentionally protect it are evil. Whether a harm is real is the responsibility of triers of fact to determine. Since it would be patently absurd to rule that the original intent of any law is to do evil, and since it would be evil to rule that Kansas law makes it a crime to prevent harms that happen to be lawful just because it fails to specify what to do when harms are lawful, to say harms may be prevented only if they are unlawful cannot be a correct construction of 21-3211.

2. RIGHT TO TRIAL BY JURY.

a. DEFENDANT'S RIGHT TO PRESENT HIS DEFENSE

Every defendant has a right to present his theory of his defense to the jury, according to the

Kansas Supreme Court. Although there may be procedural restrictions based on statutory and case law, there can be no "exclusion of evidence that is an integral part of that theory". That "violates a defendant's fundamental right to a fair trial." (State v. Walters, No. 92,592, Sept 21 2007)

> 1. Under the state and federal Constitutions, a defendant is entitled to present the theory of his or her defense, and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. (State v. Walters, No. 92,592, Sept 21 2007)

The prosecutor seeks to exclude not merely "evidence that is an integral part of that theory", but the whole theory. The prosecutor wishes not merely to "violate a defendant's fundamental right to a fair trial", but to deprive the defendant of any trial at all, at least by jury, of the only contested issue of the case.

The whole theory of Defendant's defense rests entirely upon the nature of the facts of what his victim did, as framed by the Necessity Defense, and by the same principle embedded in the elements of the charges of First Degree Murder and Voluntary Manslaughter. Defendant does not challenge the physical facts alleged by the prosecutor, in the formal charges, that he did, as follows:

> "Count One....on or about the 31st day of May, 2009 A.D., one Scott P. Roeder did then and there unlawfully, intentionally, and with premeditation, kill a human being, to-wit: Dr. George R. Tiller, by inflicting injuries from which said Dr. George R. Tiller did die on May 31, 2009; [contrary to Kansas Statutes Annotated 21-3401(a), Murder In The First Degree, Off-grid, Person Felony, Count One] COUNT TWO and...did then and there unlawfully and intentionally place another person, to-wit: Gary L. Hoepner, in reasonable apprehension of immediate bodily harm, with a deadly weapon, to-wit: a handgun; COUNT THREE and...did then and there unlawfully and intentionally place another person, to-wit: Keith E. Martin, in reasonable apprehension of immediate bodily harm, with a deadly weapon, to-wit: a handgun; [Contrary to Kansas Statutes Annotated 21-3410(a), Aggravated Assault, Severity Level 7, Person Felony, Count Two – Contrary to Kansas Statutes Annotated 21-3410(a), Aggravated Assault, Severity Level 7, Person Felony, Count Three]

Defendant admits that he did "kill a human being", but denies that he did it "unlawfully", as he has explained previously. Defendant also admits that he "placed" two people "in reasonable apprehension of immediate bodily harm, with a deadly weapon, to-wit: a handgun", but denies that he did so "unlawfully".

Defendant also meets the element of Kansas 21-3403(b) Voluntary manslaughter, having an "honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211...." As for admitting that his "honest belief" is "unreasonable", he will trust the jury to make the right determination.

As argued already, abortion is no longer "constitutionally protected", and it is "legally cognizable as a harm". In fact it is "legally cognizable as" the very greatest of harms: genocide itself, having already murdered more people in the United States alone than the population of all but the 25 most populated nations. Therefore Kansas 21-3211(a) declares my actions lawful. No statute specifies otherwise; the only case law alleged to deny the lawfulness of my actions (1) pertained to pre-viability babies which at that time were "constitutionally protected", not to the post-viability babies which from the previous year were not; (2) pertained only to preventative actions where were relatively ineffective; and (3) is 16 years old and has been superseded by federal law.

Defendant's point is that this defense which the prosecutor would so glibly censor is his *only* defense. To grant prosecutor's motion would be a de facto directed verdict before the trial even begins; before opening statements commence; and most egregiously, before the jury is even seated.

> Not allowing "the jury to consider evidence to support theories that there was no crime or that (the defendant) had no criminal intent, the judge, in effect, (would be) direct(ing) a guilty verdict, for (the defendant) ha(s) already admitted participation." *Zemina v. Solem* 438 F.Supp. 455, *469 -470 (D.C.S.D. 1977)

Although defendant hopes the arguments here will succeed in moving the Court to allow him to present his defense to the jury, he is concerned that in previous abortion prevention trials, whose number approaches 100,000, in which the only contested issue was substantially the same as in the instant case, defendants were ordered not to say a word to the jury about their own defense, and the only contested issue of the trial.

Defendant is very concerned that the resulting pretense of Trial by Jury not be repeated in his case, wherein a parade of 182 witnesses testifies for possibly weeks to prove the actions taken by

Defendant which he freely admits, which are not contested, while the only contested issue of the trial is hidden from them. This practice deceives the jury. It makes them think they are participating meaningfully in the trial, when the truth is that the judge has directed a verdict before the jury even showed up for the introductory movie. It prejudices them against the defendant, because they assume the fact that the prosecutor is struggling so desperately to prove defendant shot the abortionist must mean the defendant disputes it, which seems to them foolish, given such overwhelming evidence which the defendant isn't even seriously trying to disprove. It is likely to make the jury hostile, since they don't get why they are having their time wasted like that.

The purpose therefore of defendant's admission to the alleged physical facts, and most of the elements of the charges, is to make such Parade of Deception formally irrelevant to any additional information the jury needs to make its determination, enabling defendant to object to the relevance of any argument or testimony in Court, designed to prove what defendant admits. Defendant's hope is that this will free the jury to focus on the contested issue of the trial

To take any other position would be a fiction unworthy of the jury's time, serving no purpose whatsoever unless it would somehow stroke the prosecutor's ego to take several weeks to prove the patently obvious.

That leaves what every plaintiff abortion-defending prosecutor and defendant Christian prolifer have understood in each of the 100,000 or so cases where otherwise law abiding citizens have attempted to prevent abortion: the only contested issue is the Necessity Defense, and the facts upon which it rests. Therefore, in every one of those 100,000 cases, to not allow this defense has been to not allow a Trial by Jury of the only genuinely contested issue. Where the jury is not even allowed to know the existence of the only contested issue of the trial, how can anyone say there has been any Constitutional right to trial by jury? The jury has no meaningful participation in the trial. People call that a "trial by judge", not a Trial By Jury.

Yes, of course, this reasoning shines light on the huge conflict which has existed since 1973

between the alleged Constitutional right to abortion, and prolifers' right to trial by jury which has been denied over 100,000 times in America. But I am not willing to waive my right to a trial by jury, in order to make this huge conflict go away, just to accommodate the alleged right of abortionists to make their living slaughtering millions more babies.

When the judge calls the sole contested issue of a trial "a matter of law", and decides it by himself, does the accused still have a constitutional right to a trial by jury?

How about when this "matter of law" rests on a fact pillar which *Tilson* calls "irrelevant" but which *Roe* calls relevant enough to "collapse" the entire legality of abortion? How about when *Roe* said no American judge is "in a position to speculate" about this fact (see Section 5) about which doctors and preachers are more qualified, and the future of abortion must be determined by its factual status?

In order to keep abortion "constitutionally protected" all these years, abortion preventers have been de facto denied their constitutional right to a trial by jury, all these years.

b. MORE PRECEDENTS FOR ALLOWING DEFENDANTS TO PRESENT THEIR DEFENSE TO THE JURY

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi* 410 U.S. 284, *294, 93 S.Ct. 1038, **1045 (U.S.Miss. 1973). "(D)efendants are entitled to present a defense even though the evidence they will present at trial is 'weak, insufficient, inconsistent, or of doubtful credibility.'" *U.S. v. Hill* 893 F.Supp. 1044, *1048 (N.D.Fla.,1994), quoting, *United States v. Opdahl,* 930 F.2d 1530, 1535 (11th Cir.1991). "(A) court may preclude an affirmative defense by motion in limine only where the court accepts as true the evidence proffered by the defendant and finds that the evidence proffered by the defendant, even if believed, would be insufficient as a matter of law to support the affirmative defense." *U.S. v. Baker* 438 F.3d 749, *753 (C.A.7 (Ill.),2006). Refusal to instruct a jury on the defense theory when such evidence exists is reversible error. *Zemina v. Solem* 438 F.Supp. 455, *469 (D.C.S.D.

1977) (finding reversible constitutional error in refusal to give jury instructions on defense of self or others amounting to justifiable homicide); *U.S. v. Goldson* 954 F.2d 51, *54 -55 (C.A.2 (N.Y.),1992) (reversing conviction for assault on a federal officer for failure to instruct jury on self-defense theory)

Even if abortion were "legal" or "constitutionally protected", as prosecutor alleges based on 16-year-old outdated precedent, that would be irrelevant because it is based on Roe's allegation that the humanity of an unborn child is unknowable. A judge can rule for an In Limine motion only after he can accept arguendo the defendant's fact allegation – that abortion is genocide – and still rule the defense inappropriate. The judge cannot call the factual nature of abortion "irrelevant" in order to uphold the In Limine motion, without violating the Due Process established in all other cases not involving abortion. The judge cannot substitute his impression that "abortion is not legally recognizable as a harm" (based on outdated precedent) for the requirement that he must accept arguendo the *fact* alleged by the defendant. The judge must be able to say "even if abortion is *in fact* the genocidal slaughter of innocent human beings whose souls cry out to God as their brains are being sucked out, there can be no defense for the man who dares to stop it!"

To say such a thing would violate *Roe* itself, which said at such time as it is established that the unborn are human beings, *Roe* must "collapse", rather than allow one more innocent baby to be slaughtered!

There are dozens of minor variations of the Necessity defense, from one jurisdiction to another. In none of them is it relevant whether a judge considers the harm prevented "legally recognizable as a harm". In all of them it is for a jury to determine whether the prevented harm was, *in fact,* a harm. The issue is whether a reasonable person, faced with the facts available to the defendant, could have agreed it was "necessary" to stop this unthinkable harm. This is a *jury question.*

c. JUSTIFICATION DEFENSES ALLOWED EVEN WHEN NOT PROVIDED BY STATE LAW

Justification defenses, such as a duress, coercion, necessity, self defense, and defense of another, are common law defenses which are valid under federal law. In *U.S. v. Bailey* 444 U.S. 394, 100 S.Ct. 624 (U.S.Dist.Col., 1980) the Supreme Court clearly stated that such defenses may be mounted as defenses to statutory crimes, *Id* at 408-409, 100 S.Ct. at 633-34, even where there is no mens rea requirement to the offense, and no statutory language providing for a common law defense. *United States v. Panter,* 688 F.2d 268, 271 (5th Cir.1982) (citing *Bailey*)

Baily states (ibid, 415) that *even when the defendant has admitted to every element of the crime, upon a "minimum" production of proof,* he may still raise these defenses. No federal court in any circuit rejects such defenses in principle.

d. THE IN LIMINE WOULD FORECLOSE DEFENSE ON THE ELEMENTS OF THE CHARGES.

As my public defenders state in their response to this In Limine motion, defenses overlap. They are not "neatly compartmentalized". A ruling that I cannot present any evidence in support of the Necessity Defense will also prevent me from defending myself against elements of the charges.

For example, how will I present evidence that I held an "honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211", in order to reduce my sentence at least to voluntary manslaughter?

An affirmative defense may or not be relevant to a given alleged set of facts. But will the Court rule that defendant is not permitted to defend himself from the elements of the charges against him? Are the elements of the charges "irrelevant" too? Can a substantive law defense be prohibited?

A plea of " not guilty" puts into issue every fact essential to constitute the offense, that is, the

elements of the offense. *See United States v. England,* 347 F.2d 425, 431 (7th Cir.1965).

> "Most defenses, such as self-defense, insanity, and entrapment, require factual determinations that the jury should make, rendering pretrial disposition inappropriate." *U.S. v. Smith* 866 F.2d 1092, *1096 (C.A.9 (Alaska),1989)

This is because a defense that tends to *negate* a mens rea element of the offense, unlike a duress or necessity defense, which tends to *excuse* the *conceded* and otherwise-criminal mens rea, can only be a question for the jury. A trial court may determine, in response to a motion in limine, whether a duress or necessity defense lies at law or not, if all facts proffered by the defendant are believed. But it invades the province of the jury for a trial court to rule on a similar motion when the defense asserted, if the proffered facts be true, *necessarily* lies at law. The negation of an essential element of the offense (by the defendant's successful defense that the element does not exist in his case) necessarily lies at law, because it does not hold a person *excused for* criminal conduct, but rather *innocent of* criminal conduct.

A "district court has broad discretion in ruling upon the relevancy and admissibility of evidence. *United States v. Kelly,* 888 F.2d 732, 743 (11th Cir.1989). This discretion, however, does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense. *Kelly,* 888 F.2d at 743; *United States v. Cohen,* 888 F.2d 770, 777 (11th Cir.1989). *U.S. v. Williams* 954 F.2d 668, *671 (C.A.11 (Ga.),1992) "The federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all." *U.S. v. Carranco* 551 F.2d 1197, *1200 (C.A.Colo. 1977) "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." *Nardone v. U.S.* 308 U.S. 338, *340, 60 S.Ct. 266, **267 (U.S. 1939). "(A)ll relevant evidence is admissible unless excluded by express provision of law, or the rules themselves." *Stockton v. U.S.* 1977 WL 5317, *3 (Ct.Cl.) (Ct.Cl.1977)

It is axiomatic that defense of another, by it very nature, constitutes the paradigm of a "justification or excuse", the *absence* of which is an element of murder. Therefore, "a determination of the defense of justifiable homicide- self-defense- is *exclusively* a jury question" *U. S. ex rel. Crosby v.*

Brierley 404 F.2d 790, *801 (C.A.Pa. 1968)(emphasis added)

The Supreme Court has long ago stated that, because self defense (and therefore defense of others) "repels the proof of malice", thereby negating an element of murder, "it is for the jury to say whether, on all the evidence before them, the malice....is proved or not." *Davis v. U.S.* 160 U.S. 469, *490-491, 16 S.Ct. 353,**359 "(B)ecause a defendant must possess a certain state of mind in order to be convicted of that crime, any evidence showing the absence of that state of mind is relevant and thus admissible to negate that element." *People v. Jung* 2001 WL 755380, *8 (Guam Terr.,2001)

3. STOPPING LEGAL HARMS IS JUSTIFIED

a. SAYING YOU CAN STOP *UNLAWFUL* HARMS IS *NOT* SAYING YOU *CAN'T* STOP *LAWFUL* HARMS

By justifying prevention of unlawful harms, Kansas 21-3211(a) does not bar justification of preventing *lawful* harms through other common law elements which do not happen to yet be codified.

Abortion is legally recognizable as an unthinkable harm, through federal law. But even if it weren't, saying you can stop *unlawful* harms is not saying you *can't* stop *lawful* harms. Kansas 21-3211(a) provides for harms that are unlawful, without suggesting that there are no harms which are lawful. Legal harms have not ceased being provided for by the Common Law, which has covered them for centuries and which governs everyday situations to this day. Fortunately Kansas lawmakers have fallen short of the absurd position that if something is legal, it cannot possibly be harmful.

It seems every lawyer, including my Public Defenders, is saying that because Kansas 21-3211(a) does not justify stopping what may *in fact* be harmful but which is legal, that means no other law does, either. But for this court to interpret 21-3211(a) as prohibiting acknowledgement of legal harms, which would require considerable liberties with its grammar, would violate the "absurd result"

rule. (State v. Kirkpatrick, No. 93,465, May 30, 2008)

In reaching my conclusions, I acknowledge that where the language of a statute is clear, our normal rule is that we are bound by it. A legitimate exception exists, however, when that language leads to absurd results. The United States Supreme Court agrees. See *Public Citizen v. Department of Justice,* 491 U.S. 440, 453, 454 n.9, 455, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989) (despite a "straightforward reading" of statutory language, absurd "that Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion and public oversight when a President or Cabinet officer consults with party committees concerning political appointments . . ."); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510-11, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989) (no matter how plain the text of Federal Rule of Evidence 609[a][1] may be, it "can't mean what it says"); *United States v. Brown,* 333 U.S. 18, 27, 92 L. Ed. 442, 68 S. Ct. 376 (1948) ("No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences.").

Nor is the "absurd result" rule applied by only a few justices belonging to a particular school of thought. Even a "textualist" jurist like Justice Scalia has done so. See *Green v. Bock Laundry Machine Co.*, 490 U.S. at 527 ("statute, if interpreted literally, produced an absurd result," thus justifying departure from the "ordinary meaning" of word "defendant" in Federal Rule of Evidence 609[a][1]) (Scalia, J., concurring).

Justice Kennedy has addressed potential critics who might argue that this exception could constitute inappropriate judicial activity:

"[T]his narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of the Congress, but rather demonstrates a respect for the coequal Legislative Branch, *which we assume would not act in an absurd way*." (Emphasis added.) *Public Citizen v. Department of Justice,* 491 U.S. at 470 (Kennedy, J., concurring).

Like the United States Supreme Court, the Kansas Supreme Court has applied the "absurd result" rule for many years. See, *e.g.*, *State v. Le,* 260 Kan. 845, 850, 926 P.2d 638 (1996) ("The legislature is presumed to intend that a statue be given a reasonable construction so as to avoid unreasonable or absurd results."); *Todd v. Kelly,* 251 Kan. 512, 520, 837 P.2d 381 (1992) (same); *State ex rel Beck v. Gleason,* 148 Kan. 1, 79 P.2d 911 (1938) (well-settled rule of construction that the letter of a statute will not be followed when it leads to an absurd conclusion).

Kansas has also applied the "contravention of the manifest purpose of the legislature" exception to plain language when, as here, the statutes are construed in pari materia. As we stated in *Todd v. Kelly,* 251 Kan. at 516,

"'[I]n order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act, but are required to consider and construe together all parts thereof *in pari materia.* When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, *the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law.*' *Kansas Commission on Civil Rights v. Howard,* 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975) (Emphasis added.)."

We construed several criminal statutes in pari materia in *State v. Le,* 260 Kan. at 850, and concluded: "Surely the legislature did not intend that recklessly causing the *death* of a law enforcement officer, would have a lesser penalty than reckless *aggravated battery* against a law enforcement officer." (Emphasis added.) (Dissent in State v. Kirkpatrick, No. 93,465, May 30, 2008)

To ask "if it is legal, how can it be harmful?" is patently absurd. Even to ask "how can it be harmful, if it is constitutionally protected?" feels a bit out of place amongst clear reasoning. It is a novel development in the history of logic, to suggest that anything which is legal is, *in fact,* harmless.

b. LEGALITY & HARMLESSNESS NOT COEXTENSIVE

U.S. v. Lynch 952 F.Supp. 167, *170 (S.D.N.Y.,1997) observes:

> "The Court is not persuaded by the Government's argument that there cannot or should not be any defense of justification or necessity merely because the conduct at issue i.e. abortion, is legal as a matter of positive law. Were a person to have violated a court order directing the return of a runaway slave when Dred Scott was the law, would a genuinely held belief that a slave was a human person and not an article of property be a matter the Court could not consider in deciding whether that person was guilty of a criminal contempt charge? And if so, what moral justification could be offered for trying government officials, including judges, for implementing the positive laws of Nazi Germany?" Id. at FN3

Illegality and harmfulness are not coextensive under federal case law. Of course, an illegal act is presumptively a harmful one. But it does not follow that every legal act is therefore, by definition, *not* a "harm" at law, and **still less does it follow that no defendant could believe the contrary (reasonably or otherwise)**. In *U.S. v. Hill* 893 F.Supp. 1048, *1049 (N.D.Fla.,1994), the court stated that, for the purposes of mounting a necessity defense in a case where an abortionist was shot, "the harm that the defendant chooses to avoid does not necessarily have to be illegal, but it must be a legally recognizable or cognizable harm."

That a legal activity may nonetheless be a legally cognizable harm under federal law, sufficient to ground a prima facie showing for justification defense purposes, cannot be disputed. In *U.S. v. Kpomassie* 323 F.Supp.2d 894, *898 -899 (W.D.Tenn.,2004) the defendant created a disturbance on a plane on which he had been placed for the purposes of a deportation that was both legal and lawful by any standard. The defendant claimed that he faced persecution in the country to which he was being deported, although this claim had already been discounted by the appropriate authorities acting properly under duly enacted statutes. Despite government urging that necessity or duress defenses were

therefore ipso facto unavailable to him, the court, in a carefully considered opinion stated: "This Court holds that the defense of duress and necessity may be raised by a defendant to an escape charge where the harm is deportation."

A similar situation arose in *United States v. Dagnachew,* 808 F.Supp. 1517 (D.Colo.1992). The defendant, claiming to fear for his life upon arrival in Ethiopia, after deportation, escaped from an INS holding facility. When arrested and charged with escape from the custody of the Attorney General,, he sought to bring up a duress or necessity defense. Over objection from the government on grounds similar to those of *Kpomassie, supra*, the court held that the duress and necessity defenses were available to him as a matter of law.

Thus, deportation, a completely legal and lawful activity, can constitute a legally cognizable "harm", that a defendant might be justified in committing a crime in order to avoid. He is not precluded, as a matter of law, from raising the defense and allowing a jury to decide on its merits.

State Courts have also come to the same conclusion. In *City of Chicago v. Mayer* 56 Ill.2d 366, 308 N.E.2d 601 (Ill. 1974), it was held that a necessity defense should have been made available to a third year medical student who interfered with officers performing their lawful function, preventing them from moving an injured man without a stretcher, whom the defendant reasonably believed would be harmed by the movement. Although the "harm" here consisted in a perfectly legal and lawful activity on the part of the officers, the defendant was entitled to a necessity defense. This defendant in the instant case is as well.

Free speech is constitutionally protected. Will anyone say it is never harmful? Courts create "bubble zones" around abortion clinics on the theory that it is indeed harmful.

Many things are legal, and even legally protected, yet can become so harmful that their prevention is justified.

Driving cars, and children crossing streets at crosswalks, are not only legal, but legally protected. Entire roads and crosswalks are built for them, mandated by law. But it is illegal for a man

to push aside people on the sidewalk, causing some to spill their coffee. And yet if a child darts in front of a car, a man is justified in racing through a crowd to stop traffic and pull the child to the sidewalk.

Pregnancy is not only legal, but legally protected. Many laws govern its medical treatment, work leave, etc. But when its inevitable medical attention-demanding contractions come too far from a hospital, threatening "serious injury", speeding is justified.

Keeping a dog on a chain in your yard is legally protected by regulations. It is illegal for your neighbor to trespass into your yard to club or shoot your dog. Yet if a toddler strays where he has no legal right to stray, and the dog attacks, the Necessity Defense protects anyone who rushes in to save the child's life, at whatever expense to the dog is necessary.

You can legally smoke in your own home. Your neighbor can't break down your door to stop you. But if your cigarette sets your house on fire, your neighbor can break down your door to save you.

In Israel it was hard work to rescue an ox who had fallen into a well. It was a crime to work on the Sabbath. But if an ox fell into a well on the Sabbath, it was not a crime to rescue it. Luke 14:5-6.

In all these examples, the harm prevented is legal, including the classic example of breaking down your neighbor's door to save him from a fire, the example typically given to illustrate the Necessity Defense. These examples show that it cannot be true that the Necessity Defense may only be invoked when the harms are not lawful, or even constitutionally protected.

c. THE ABORTION FACTOR: LEGAL, YET STILL HARMFUL

But their remains an important difference between all these examples and abortion.

The dog's right to run within his area is protected, but the harm of the dog eating the child is not specifically, directly protected. Nor is the harm of the baby being born in the car specifically, directly protected. Nor is the harm of cars running over children specifically, directly protected. Nor is the harm of a house fire burning your neighbor alive specifically, directly protected. But with abortion, it is the very harm of killing an unborn baby which is specifically, directly protected by Roe v. Wade.

However, the more aware we become of this difference, the more clear it becomes that this difference makes denial of legal recognition of the harm of abortion patently absurd.

What if the Supreme Court ruled specifically that children must be eaten by mad dogs, and must be run over by cars on busy streets? What if the Supreme Court ruled that mothers must give birth in slow cars, and people in burning houses must burn to death? Such a ruling would undermine the authority of the Court because it would be too obvious to too many people that such a ruling would flagrantly violate Justice. Such a ruling would undermine the Rule of Law because too many people would recognize it as a perversion of justice, a crime against Heaven, and a threat to their own safety from ultra legalistic state police.

d. ROE DOESN'T CONDONE APATHY ABOUT HARM

But that is what was alleged by several state Supreme courts that Roe did, before federal law superseded them. They alleged that Roe ordered not only that "fetuses" whose humanity and "personhood" is in doubt be killed without interference from states, but that human beings with a God-given right to life be murdered without interference by individuals.

Roe ordered no such thing! Roe did not, at least, *intend* to kill human beings who were "persons in the whole sense"! Roe declared its intent was just the opposite, when it invited triers of fact to determine whether "life begins" any earlier than viability, in which case it was Roe itself which declared that Roe should "collapse".

> If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. Roe v. Wade: 410 U.S. 113

Fortunately, the Supreme Court never ruled that *individuals* cannot protect the unborn. It only ruled that states cannot protect the unborn. It claimed jurisdiction to do even that, through the 14th Amendment, which is not binding upon individuals.

> "the Fourteenth Amendment 'erects no shield against merely private conduct, however discriminatory or wrongful.'" 334 U.S. 1, 13 (1948)

Yes, Roe is very different than any previous American law. It prohibits states from protecting, from being murdered, what almost every state had agreed were innocent human beings. Roe said we shouldn't take that into account because not all doctors and preachers are unanimously, 100% agreed about "when life begins".

But what does that do for respect for the rule of law, or at least the laws of the Supreme Court, to decriminalize what even 50% of doctors, preachers, and Americans believe is murder? But the figure is far higher than 50%. Polls ask whether Americans believe abortion ought to be legal, and the results hover around 50%. Yet even most of those who want it legal will freely admit abortion kills a human being. Even Planned Parenthood said that. They said "An abortion kills the Life of a baby after it has begun. It is dangerous to your life and health." (*Plan Your Children For Health And Happiness,* Planned Parenthood Federation of America, 1963. A booklet.)

Yes, Roe is very different. But does it set aside Kansas' Necessity Defense? No. Fortunately the U.S. Supreme Court never ruled that individuals cannot protect the unborn. Furthermore, it is obvious, from Roe's statement that "we need not resolve the difficult question of when life begins...", that the Roe justices did not even anticipate that individuals might attempt to save the unborn. Roe was simply not crafted to address the "comparison of harms" of Necessity. The Roe justices plainly said they were not competent to do so.

> 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. (*Roe v. Wade:* 410 U.S. 113)

Roe never denied the unborn are precious human beings. They said they "couldn't tell", in the words of the Pharisees who similarly answered Jesus. (Matthew 21:23-27)

It may be argued that the reasoning here is not faithful to the *spirit* of the Roe decision, although it is strange to argue that the spirit of a ruling differs from the letter of a ruling. Probably Justice Blackmun, the author of *Roe*, never meant to allow individuals to save lives snuffed out by abortion,

whom he forbade states from saving. But if that is the case, this "spirit" of Roe conflicts with the most basic purpose of government according to America's founding document, which is to protect the right to life, liberty, and the pursuit of happiness. If *Roe's* "spirit" is the unrestricted killing of human life, it has no "spirit" worth being faithful to. Were the stakes not so high, we might politely assume, in honor of what we speculate might be the spirit of this ruling, that since it is wrong for states to save the unborn, then maybe it is wrong for individuals, too. But the lives of 50 million Americans have already been snuffed out over such words. The reasoning here is faithful to the *letter* of *Roe*, and that needs to be enough. (Besides the fact that federal law now meets the conditions for *Roe's* "collapse".)

Fortunately the Supreme Court has not ruled, yet, that preventing serious injury is no reason to break the letter of a law. The U.S. Supreme Court has not openly said "When we order innocent human beings murdered, it is a crime to save them." But not only has it not yet ruled thus, such a ruling would create a crisis in the Rule of Law even more serious than *Roe*. Kansas' Necessity Defense cannot be set aside, not even by *Roe*. It is centuries old. It was not invented by Kansas legislators, but only copied by them, from the inescapable requirements of reason.

The fact is, if you save thousands of legally innocent human beings from being tortured to death, at the thousand times smaller cost of killing their torturer, you are a hero, not a lawbreaker. What the Supreme Court thinks about the value of the lives you save is irrelevant. What matters is whether those babies are, *in fact,* human beings.

e. NECESSITY DEFERS FACTS TO JURIES

The courts' question – "how can something that is constitutionally protected be legally [re]cognizable as a harm?" – would make sense if the "comparison of harms" between the rescue action and the threatened "serious injury" were supposed to be decided as a matter of law, by a judge. But case law agrees with the requirements of reason that this is not a determination of law, for ivory tower legal experts, but a fact question for a jury which can apply "ordinary standards of reasonableness".

(Pursley v. State, 730 S.W.2d 250, 251 Ark. App. 1987)

Another way of saying it is "ordinary standards of intelligence and morality" (Oregon RS 161.200[l]b; also Missouri RSMo #563.026 1978).

> "The *accepted norms of society* determine the relative harmfulness of the two alternatives and the defense is allowed if the harm done by the defendant in choosing the one alternative was less than the harm which would have been done if he had chosen the other." (City of St. Louis v. Klocker, 637 S.W.2d 174 Mo.App. 1982)

Proving this in this case only requires defendant to show a reasonable person, faced with the evidence which was before him, would agree that his motive was to prevent a harm far greater than the harm defendant caused, and defendant had no adequate alternative. Defendant should be able to prove this by quoting governors, legislatures, and presidents, and even Supreme Court justices who have vilified the abortions performed by Dr. Tiller and who have declared the personhood of the unborn. Defendant can challenge the jury to find these American leaders not worthy of being considered "reasonable".

Unfortunately for tyrants, the necessity defense is more basic to sound law than the Constitution itself. Hardly anyone in the general public has even heard of the name "the necessity defense", but after a simple explanation ordinary people recognize it as obviously the everyday operation of legitimate law. Repeal it, and heroes become criminals. Everyone understands that it cannot be a crime to break down your neighbor's door, when it is to save your neighbor from a fire. I conclude that the general public is able to understand that any attempt by the Supreme Court to attack the necessity defense would be an attack on the rule of law itself.

This is what Wharton, the American legal pioneer who published his *Criminal Law* in 1846, (which is now in its 15th edition), was talking about when he said

> "The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right. It is therefore essential to self-defense that it should be a defense against a present unlawful attack, while necessity may be maintained through destroying conditions that are lawful." (*Criminal Law*, Section 126, 128.)

This is the opposite of how *Tilson* characterized Professor Robinson. But Robinson and Wharton are in agreement. We will come to that later.

f. THE BEDROCK ELEMENT

There are other elements of this defense, two of which will be addressed later, but this is the one upon which the others hinge. Is abortion the killing of unborn humans? Or merely the extraction of undesirable tissue with less status than animals? This is really the issue. It is virtually the only issue. No court dares to declare the unborn are not human. Indeed, virtually *no* one dares to declare the unborn are not human. Not even abortionists themselves. Many will say "we don't know". No one says "unborn babies are definitely not human."

Scripture is no longer accepted as legal authority in America, as it was at its founding. But a few verses can at least document how ancient the Necessity Defense is, because Jesus invoked it. A brief study of the origin of our Necessity Defense can also help us focus on what is most important in it.

There was no "imminent" harm, unless you count the fact that the harm of being crippled for 18 years would have continued for one more day had Jesus not acted on that very day.

There were alternatives to "breaking the Sabbath", which was a capital crime, but Jesus rejected them. He could have healed on *any* other day.

Jesus was on trial. The Supreme Court of the day, the Sanhedrin, was prosecuting Him for healing on the Sabbath, which they ruled was forbidden "work". The crowds around them served as the jury and as executioners by stoning, should they agree that Jesus was guilty as charged.

He invoked only one element of the Necessity Defense: "Is it lawful to do good?"

Jesus deliberately, consciously, unnecessarily broke the law to demonstrate the point that *no* law, no matter how great, must *ever* be used to stifle good! And to set us free from mindless servitude to the letter of the law that is used by tyrants to oppress good people in violation of the spirit of the law.

> And he entered again into the synagogue; and there was a man there which had a withered hand. 2 And they watched him, whether he would heal him on the sabbath day; that they might accuse him. 3 And he saith unto the man which had the withered hand, Stand forth. 4 And he saith unto them, Is it lawful to do good on the sabbath days, or to do evil? to save life, or to kill? But they held their peace. 5 And when he had looked round about on them with anger, being grieved for the hardness of their hearts, he saith unto the man, Stretch forth thine hand. And he stretched it out: and his hand was restored whole as the other. 6 And the Pharisees went forth, and straightway took counsel with the Herodians against him, how they might destroy him. Mark 3:1
>
> ...14 And the ruler of the synagogue answered with indignation, because that Jesus had healed on the sabbath day, and said unto the people, There are six days in which men ought to work: in them therefore come and be healed, and not on the sabbath day. 15 The Lord then answered him, and said, Thou hypocrite, doth not each one of you on the sabbath loose his ox or his ass from the stall, and lead him away to watering? 16 And ought not this woman, being a daughter of Abraham, whom Satan hath bound, lo, these eighteen years, be loosed from this bond on the sabbath day? 17 And when he had said these things, all his adversaries were ashamed: and all the people rejoiced for all the glorious things that were done by him. Luke 13:14-17
>
> 5 And answered them, saying, Which of you shall have an ass or an ox fallen into a pit, and will not straightway pull him out on the sabbath day? 6 And they could not answer him again to these things. Luke 14:5-6

The only legitimate purpose of law is to defend good and restrain evil. A law whose express purpose is to do evil violates the "absurd result" rule. Roe v. Wade cannot legally be interpreted as deliberately protecting genocide: not only does it expressly say that is not its intention because Roe should "collapse" before that happens, but even if it expressly admitted its purpose was to protect murder and genocide, that would be too absurd to be honored by anyone with any respect for the Roe court.

g. "POSITIVE LAW" IS NOT ALWAYS POSITIVE

Just because a law "positively" protects something, doesn't make the result positive.

The history of the Nuremberg trials stand for the principles that positive law cannot trump the Rule of Law, which means nothing else than Justice.[3] Might does not make right, even if an evil is expressly enshrined as a good in positive law. And it is uncontroversial to state that - all too often, in all

3 The mere recognition of justification defenses as valid demonstrates that there is a Higher Law that both underlies and transcends any mere code. To admit of justification defenses in principle is to admit that there is a Higher Law which ought to be obeyed, even if it means violating a code. Indeed, the whole code itself is based on the presumption of a Higher Law. Common law crimes such as murder and rape are not unlawful and wrong because they are legislated against. They are legislated against because they are already unlawful and wrong.

too many times and places - mere positive law can be squarely at odds with justice, with the Rule of Law. An unjust law is itself unlawful. In such a case, a strict obligation devolves upon anyone concerned, whether it be private individual, government official, or judge, to violate the unjust positive law rather than to do injustice and do violence to the Rule of Law.

The question was posed well in *Lynch, supra*, when the judge asked how, if the mere existence of a positive law necessarily precluded a justification defense, there could be found any moral justification "for trying government officials, including judges, for implementing the positive laws of Nazi Germany?" These men, after all, had been faithfully implementing duly enacted statutes created by a lawfully constituted legislative body. Under the government's view, they were therefore ipso facto blameless, and anyone who violated the positive laws of Nazi Germany was ipso facto criminally guilty, was not entitled to use a justification defense at any trial, and deserved his punishment.

The United States presided over a series of twelve trials held at the Palace of Justice in Nuremberg. During the third trial, the "Justice Case", various prosecutors and judges of the People's Court were accused of torture, persecution and murder [4]. They were charged with, among else, having enacted, enforced and given effect to statutes, orders and decrees which were "criminal in inception and execution".[5]

The defense counsel, a legal positivist, responded in words which are indistinguishable in substance from those of the government here[6]: "Only the written law, and not general ideas on morals and rights, constituted the directive of the administration of law and justice."[7] To no avail did the defendants argue that they were merely following the law, and thus were innocent. The principles that a

4 *3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council No. 10*, at 3 (U.S.Gov't Printing Office 1951)

5 *Id*, at 17.

6 The defendant anticipates an indignant disclaimer from the government as to this fact. But the words speak for themselves. It is incontrovertible that the government's argument is identical to that of the Nazi criminals. The defendant invites the government to demonstrate otherwise.

7 *Id*, at 108-109.

code can *itself* be criminal and unlawful, despite being duly enacted, and that adherence to an immoral, criminal, unlawful positive law imposes criminal liability, were vindicated in the outcome: ten of the fourteen defendants were convicted and imprisoned, some for life.[8]

In the eighth trial, fourteen persons were tried for, among else, implementing "laws" which included forced abortions as a means of "racial purification".[9] The defendants responded that the abortions were not forced, but voluntary.[10] There was abundant evidence to the contrary, but the prosecutor noted that, even assuming that "all abortions were voluntary, they still constitute a crime".[11] The crime, therefore, was not *merely* against the women forced into abortions. The "protection of the law was denied to the *unborn children* of the Russian and Polish women in Nazi Germany",[12] who were subjected to "murderous extermination"[13].

Of all of those persons and institutions now arrayed against the defendant, which of them is willing to state on the record that the Nuremberg findings and results were wrong?

h. JURIES DON'T RENDER "ANARCHY", BUT FREEDOM

The prosecutor perhaps will raise her hand, complaining that prosecuting people for obeying "the law", or exonerating people who break "the law", would "lead to chaos" and "sanction anarchy", as she quoted from *Tilson* in her Motion In Limine:

> To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.

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8 John A. Appleman, *Military Tribunals and International Crimes* 157-58 (1954).

9 *Id* at 196.

10 *4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council No. 10*, at 112. (U.S.Gov't Printing Office 1949) [hereinafter Trials, Vol. IV]

11 *Id* at 687.

12 *Id* at 1077. (Emphasis added)

13 *Id* at 609.

The Necessity Defense does not exonerate a man based on the sincerity of his personal beliefs, but based on the facts, and upon the reasonableness of the defendant's understanding of the evidence supporting his action, as established by the jury. We hardly call this "chaos". We call it "freedom".

While the prosecutor worries about the "anarchy" that will surely result if the mindless letter of the law is not scrupulously enforced even in situations where it causes great harm unintended by its framers, the result when it *is* mindlessly enforced is that "good Samaritans" draw their blinds.

Like nearly half a century ago, when the nation was shocked by the story of a rapist on a New York City sidewalk seen by hundreds of neighbors who just pulled their blinds and waited for it to pass. This incident must have been on the minds of the 1965 Court as it explained the tragic consequences of not admitting the Necessity Defense where it fits:

> Not only, on a matter of justice, should one "not be convicted of a crime if he selflessly attempts to protect the victim of an apparently unjustified assault, but how else can we encourage bystanders to go to the aid of another who is being subject to assault?" LaFave &Scott, *Substantive Criminal Law*, § 5.4(b), 631 (West Publishing, 1986) quoting State v. Fair, 45 N.J. 77, 211 A.2d 359, 368 (1965)

i. ABORTION WORSE THAN NUREMBURG CRIMES

A society may recover its soul from the evil imposed upon it by a ruthless government. But when the government induces its citizens to do the killing themselves, recovery will require deep, long repentance.

It is shocking and unconscionable that identically situated, completely helpless and innocent unborn children and human beings (as Congress now terms them) could have their very right to be free from unprovoked lethal assault depend exclusively on the all-but-unreviewable will of their mothers.

There are absolutely no other circumstances in U.S. law which tolerate the treating of one human being as the mere chattel of another, his very life being purely at the mercy of the whim of the chattel-holder. The most depraved condemned, self-confessed mass murderer cannot be treated so unjustly under U.S. law.

It is no novelty in the history of law to justify brutal treatment of some human beings by creating a distinct classification for them, defined as subhuman. A century and a half ago, it was having the wrong skin color. In Germany is was being a Jew, or a Christian who wouldn't look the other way. In Moslem nations being a Christian or a Jew makes men "apes and pigs". Today in the U.S. it's living inside a love-challenged mother.

But these legal stunts violate America's Christian-based legal system in which a classification based on nothing inherently distinct in the nature or behavior of human beings, but rather on some irrelevant extraneous factor like the raw will of the soon-to-be-killed unborn child's mother, is illegal.

j. GRAMMAR SO BAD IT LITERALLY KILLS.

The notion that defendant can't expect the Necessity Defense to justify stopping the most cruel, barbaric genocide, because the most cruel, barbaric genocide is "legal", originated not in sound legal reasoning, legal necessity, American legal history, the Constitution, our Founding Fathers, or common sense, but from a misunderstanding of grammar in 1993.

The case was *City of Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993). It based its authority on a quote from "professor" Paul H. Robinson, who published a 2 volume set on Criminal Law Defenses in 1988. (Although other state supreme courts are quoted who appear to have reached the same conclusion as this case, other states are not necessarily "authority" for this court, and it is the Robinson reasoning which comes directly before, and appears to clinch Tilson's conclusion.) The problem is that the quote from Robinson says the opposite.

Tilson says Necessity won't justify saving ourselves or others from *a harm* that is "legal".

Robinson says Necessity justifies saving ourselves or others from any harm whatsoever so long as *what we want to save* (in this case, human life) is legal. (In other words, Necessity wouldn't justify us killing an officer to save our marijuana crop, because marijuana is not a legal "interrest".)

Tilson says whether or not a harm we want to prevent *is unthinkably harmful – even genocide*

itself – is "irrelevant", so long as it is "legal". If it is "legal", we must stand aside and allow it to ravage us and those we love.

Robinson says it is whether the harm *is "legal"* that is irrelevant. If it is *in fact* harmful, then (as long as what it is harming is legal), we may lawfully prevent it.

I am not a lawyer. I have nothing on my wall to allow me to understand obscure laws. But I have spoken English all my life, and I have a diploma that allows me to understand English grammar. (I invite all Americans to "stop your knees from shaking" (Hebrews 12:12) and examine this grammar with me. I challenge all news reporters, whose credentials for understanding English grammar are equal to that of lawyers, to follow this reasoning with me and report it to the nation.)

Not only does Tilson contradict the Robinson quote it claims for its basis, but (1) its characterization of the quote contradicts the quote, (2) its opening case summary contradicts the Robinson quote, and (3) its characterization of the Robinson quote contradicts its opening case summary!

Before I make my case for their irreconcilability, let's stare at them together for a few moments. And you tell me if they seem like the same statement to you.

The Kansas law:

> Kansas **21-3211**(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's **imminent use of unlawful force. [**Or, a person is *not* justified if the force from which he defends others is *lawful.]*

Every Kansas lawyer you ask will tell you this Kansas law gives Scott Roeder no right to stop genocide itself, so long as genocide remains "legal". (But please remember my point that the explicit enactment of any portion of the Common Law does not repeal the remaining portions which are not yet enacted.)

Here is the opening summary from *City of Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993):

> (1) the defense of justification by necessity cannot be used when the harm sought to

be avoided is a *constitutionally protected legal activity* and the harm incurred is in violation of the law, and (2) evidence on when life begins was irrelevant in action for criminal trespass on property of abortion clinic and thus admission was error.

(Translation: Abortion is not merely "legal", but "constitutionally protected". Evidence that abortion is brutal genocide is "irrelevant" and "inadmissible" in court. In other words, the defendant is ordered not to breathe a word to the jury about it. That would be "error", meaning if the jury found out about Roeder's defense, that would be so wicked to a judge as to constitute grounds for an appeals court to reverse the jury's acquittal and convict him.)

Now here is the quote from "Professor Robinson" given in the Tilson case, as Tilson's authority. Although other state supreme courts are quoted who appear to have reached the same conclusion as this case, other states are not necessarily "authority" for this court, and it is the Robinson reasoning which comes directly before, and appears to clinch, Tilson's conclusion that abortion is legal so it can't be legally recognized as the slightest "harm"::

> In his treatise on criminal law defenses, Professor Robinson explains the necessity defense another way: ..."Lesser Evils. Conduct constituting an offense is justified if:
> "(1) any **legally-protected interest** is unjustifiably threatened or an opportunity to further such an interest is presented; and...."

Let's slow down long enough to absorb these words before memory of them is lost in the rush of grammar stretching that follows.

Consider that Life is a "legally protected interest". Notice this sentence unambiguously says what must be "legal" is the "interest" served by the defendant's action. In this case, human life. Human life is "legal", and saving it is "legal". It may be arguable whether abortion's "threat" to human life is "unjustified", but it should not be arguable that "an opportunity to further" the "interest" of saving life was "presented" to Scott Roeder, and he acted on that opportunity. Robinson continues:

> "(2) the actor engages in conduct, constituting the offense,
> (a) when and to the extent necessary to protect or further the interest,
> (b) that avoids a harm or evil or ***furthers a legal interest*** greater than the harm or evil caused by actor's conduct" (Italics in original.) 2 Robinson, Criminal Law Defenses § 124(a) pp. 45-46 (1984).

Again, notice it is the "interest" served by the defendant's action which must be "legal".

Now observe Tilson's conclusion from Robinson's quote:

> Regardless of what name is attached to the defense (and for the sake of simplicity we will refer to it as the necessity defense) one thing is clear: ***The harm*** or evil which a defendant, who asserts the necessity defense, seeks to prevent ***must be a legal harm*** or evil *as opposed to a moral or ethical belief of the individual defendant,*

Wait a minute. This doesn't sound either like Robinson or like Tilson's opening summary. Doesn't this say necessity *may* be used only if abortion is *legal*?

But didn't Tilson's opening statement say "necessity can*not* be used when [abortion] is...legal"?

> (1) the defense of justification by **necessity can*not* be used when** the harm sought to be avoided **is** a constitutionally protected ***legal*** activity and the harm incurred is in violation of the law....

And didn't Robinson say it doesn't matter if the *harm prevented* is legal – what matters is whether the *"interest" protected* is legal?

Let's cut out the extraneous words so the contrast is more clear:

Robinson: "Conduct constituting an offense is justified if...the actor...***furthers a legal interest*** greater than the harm or evil caused by actor's conduct."

Tilson's interpretation of Robinson: "The harm ... prevent[ed] ***must*** be a legal harm...

Tilson's opening statement: "...necessity **can*not*** be used when the harm...is...legal...."

You can see how simple it is to reconcile Tilson's opening statement with Tilson's interpretation of Robinson. All you have to do is add the word "not". Reconciling either statement with Robinson is a little more complicated.

Not only are we witnessing an utter failure to understand grammar through these discrepancies, but we see an attack on logic through the introduction of a false choice:

> "[The harm or evil which a defendant...seeks to prevent must be a legal harm or evil] ...as opposed to a moral or ethical belief of the individual defendant."

No one has suggested that any defendant's subjective "belief" should carry any weight whatsoever in a Necessity Defense trial. Necessity is decided, in courts of law, by the jury's objective

establishment of the facts.

(Maybe the Court confused the Necessity Defense with the "emotional outburst" defense, or the "sincere belief" defense, which trims a couple of years off a sentence if the jury can be persuaded the defendant's reasoning may have been the ravings of a crazy cult, but at least they were sincere.)

But back to Tilson's contradictory statements about Necessity. How can they be reconciled? What must go through a lawyer's mind who tries to trace the Court's reasoning?

First, *Robinson* says Necessity justifies any lawful purpose, or "interest" (like saving life); it is irrelevant whether the threat to that lawful purpose (abortion) is legal or not.

Second, *Tilson characterizes Robinson* as saying "necessity can*not* be used when [abortion] is...legal".

Third, *Tilson's opening statement* says not only can Necessity *not* be used because abortion is legal, but what is irrelevant is the harm it causes.

To state the contradiction another way, Robinson's quote, and Tilson's interpretation of the quote, use opposite tests of what must be "legal".

Robinson focuses on the *legality of the "interest"* "promoted" by the action. (It is legal to want human beings to live, so otherwise illegal action promoting that purpose is justified.)

Tilson focuses on the *legality of the harm* interrupted by the action. (It is legal to kill thousands of babies through abortion, so otherwise illegal action that obstructs that purpose is not justified.)

For example, let's take the classic illustration of the Necessity Defense: it's OK to break down your neighbor's door to save him from a fire.

Robinson would agree, saying your "interest" is in saving your neighbor, which is OK because *saving a human being* is a legal objective. It is irrelevant whether the *fire* is legal or illegal.

Tilson might agree, or it might not. Tilson would say it is irrelevant whether your neighbor is a human being. Tilson would inquire whether the *fire* is legal. If it was caused by an arsonist, or electrical wiring that wasn't up to code, then it is illegal, so it is OK to stop it, or to save things from its

destruction. But if it was caused by perfectly legal smoking, or wiring that had just passed inspection, then your neighbor must be left in it.

Later in the ruling Tilson displays more Grammar Magic. Tilson decides that whether your "interest" is "legal" matters after all, but only after determining whether it is, by whether the harm you stop is: although "saving lives" may be a legal "interest", Tilson says that isn't really what the defendant cares about. The defendant's *real* interest is "preventing abortion", which is *not* a legal "interest" *because abortion is legal.*

> We therefore conclude that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed on complainant's property in order to interfere with the rights of others....
>
> Abortion in the first trimester of pregnancy is not a legally recognized harm, and, therefore, prevention of abortion is not a legally recognized interest to promote.

Let's work that into our example.

Tilson would say it may be relevant, after all, whether your neighbor is a human being. What must first be established is whether the fire was legal. If the fire is illegal, you are fine. You may save your neighbor because he is a human being. But if the fire was perfectly legal, then you cannot say your "interest" is saving life; nay, your purpose must be put down as "preventing a legal fire", which is plainly illegal. Evidence that your neighbor is a human being is "irrelevant". Evidence that the fire is killing a human being in the most cruel manner is "not legally cognizable".

k. CIVIL DISOBEDIENCE AND MAGIC GRAMMAR

Tilson's Motive Magic, of decreeing that the defendant's real motive is not to save life but "prevention of abortion" and "to interfere with the rights of others", encourages Tilson to invoke Robinson again, this time where Robinson explains how Necessity is not always available to justify "civil disobedience".

> The evil, harm, or injury sought to be avoided, or the interest sought to be promoted, by the commission of a crime must be legally cognizable to be justified as necessity. "[I]n

> most cases of civil disobedience a lesser evils defense will be barred. This is because as long as ***the laws or policies being protested*** have been lawfully adopted, they are conclusive evidence of the community's view on the issue." 2 P. Robinson, Criminal Law Defenses § 124(d)(1), at 52. *Abortion in the first trimester of pregnancy* is not a legally recognized harm, and, therefore, prevention of abortion is not a legally recognized interest to promote. (Page 917-918: (Quoting State v. Sahr)

How important a judge's words are! If he says you were "saving lives", you walk. If he says you practiced "civil disobedience", you go to jail! Same actions, two life-altering descriptions!

But did Robinson distinguish between saving lives and "civil disobedience"?

When you break down your neighbor's door to save him from a fire, or speed to the hospital because your wife is delivering a baby in the back seat, no one calls it "civil disobedience". No one is "protesting" any "laws or policies". Lives are, in fact, being saved, and laws are the last concern on anyone's mind.

"Civil disobedience" invokes news stories about vandalism by priests at nuclear missile sites, and sitting in "whites only" seats on buses and in restaurants. There are no lives in imminent danger. Serious injury is not imminent. The conduct does not "further a legal interest", or at least the connection between the action and any furtherance of the goal is very indirect, uncertain, and foggy.

Vandalism at a nuclear site does not directly disarm a single weapon. Sitting in a "whites only" presented no certainty of softening a single white heart. But Scott Roeder's action directly saved 2,000 babies from being killed by Dr. Tiller, just between the time of his death and the time of Roeder's trial; hundreds of whom, based on studies done by Operation Rescue, were saved not only for the short time it took to reschedule their murders, (which was long enough to justify saving them), but long enough to be born to mothers with hearts softened to love them.

No wonder "most Civil Disobedience" is not justified by the Necessity Defense!

In the case of racial discrimination, the harm may certainly be taken as imminent, and in hindsight we can say the strategy worked, but at the time the strategy seemed more desperate than pragmatic. Yet to the extent it worked, it raises questions about Robinson's reasoning for the

unavailability of Necessity even for Civil Disobedience cases. Robinson says the very existence of laws, however cruel, proves the public approves of them and cannot accept what they protect as the least bit harmful. But what the public approved of was turned upside down by the spectacle of people standing for what was right, even at great personal cost.

What the public approves of must be acknowledged a fickle standard. Fickle because it changes every few years, and fickle because it is no sure guide to what is true or just.

But to the extent public approval is appropriately weighed in determining a man's guilt in a court of law, English law since the Magna Carta establishes the jury, not the judge, as the expert on what the public approves. No judge has any business opining what the public approves, while a jury waits outside his chambers to hear the issues of the trial.

Again, Roeder's action is about saving lives, not "protesting" anything, so the issue of "protesting" in the following sentence is inapplicable. But Robinson's reasoning is inapplicable also because the passage of Roe v. Wade is not, in any reasonable person's view, "conclusive evidence of the community's view".

> "...as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view..."

Who will say the opinions of 9 unelected justices, who do not even face a retention vote, "are conclusive evidence of the community's view" even when they overturn the laws of elected congressmen, elected state lawmakers, and elected state governors, as Roe v. Wade did? May we not put down any attempt to apply that reasoning to abortion as patently absurd?

But even if "the community's view" held that cruel, barbaric genocide doesn't hurt anyone, that would not change the *fact* that it does, and that America's Rule of Law is teetering on the edge of national destruction so long as laws allow an eighth of the population to be slaughtered without due process of law.

As Benjamin Rush wrote to David Ramsay in 1788, "nothing deserves the name of law but that

which is certain and universal in its operation upon all the members of the community."

The jury was wisely made the best representative of "the community's view", because the jury represents not just unbiased citizens, but citizens who are very well educated before they decide anything, if the lawyers and judge do their jobs well.

This issue is an issue of grammar. Lawyers are supposed to be good with grammar, but in this arena news reporters are their equals. News reporters may need to defer to lawyers on technical legal issues requiring broad legal knowledge, but when an issue boils down to grammar, news reporters are on their own turf, and have every right to understand, and report on, this error of grammar which has been so instrumental in the wanton destruction of so much human life.

l. EVEN CIVIL DISOBEDIENCE TRIALS ALLOW NECESSITY

Even though there is, in civil disobedience trials compared with abortion prevention trials, far *less* reason to allow the Necessity Defense to go to juries, it is far *more* likely to go to a jury there. This is further evidence of a Due Process violation in abortion prevention trials.

Contrary to the impression given in *Tilson,* many State courts and at least one federal court *have* permitted evidence tending to support necessity defenses to be at least heard by the jury, and often also instructed the jury on the theory.

United States v. Kroncke, 459 F.2d 697, 699 (8th Cir. 1972) (court permitted numerous experts to testify over government's objection and reserved ruling on government's motion to strike until after close of evidence, at which point evidence was stricken); *People v. Chachere*, 104 Misc. 2d 521, 523, 428 N.Y.S.2d 781, 782 (Dist. Ct. 1980) (allowing testimony of witnesses who had spoken with defendant about construction defects at nuclear power plant prior to crime). *Applying the Necessity Defense To Civil Disobedience Cases* 64 N.Y.U. L. Rev. 79, *112; *People v.. Heyer*, Nos. 83-101221 to 83-101225, slip op. at 5 (Mich. Dist. Ct. Apr. 9, 1984) (order allowing necessity defense); *People v. Jones*, Nos. 83-101226 to 83-101228, slip op. at 4-5 (Mich. Dist. Ct. Mar. 2, 1984) (opinion and ruling

denying prosecutor's motion to exclude defense of duress); Portion of Jury Charge in Trial by Jury at 4-5, *Id* at FN 135; *People v. Lagrou*, Nos. 85-000098 to 85-000100, 85-000102, slip op. (Mich. Dist. Ct. Mar. 22, 1985), reprinted in 42 Guild Practitioner 126 (1985) (defendants charged with trespass at nuclear manufacturer in protest of weapons development permitted to present necessity defense in bench trial and were acquitted). *Id*, at FN 90; *State v. Keller*, No. 1372-4-84 (Vt. Dist. Ct. Nov. 17, 1984) (defendants charged with trespass for sit-in at senator's office in protest of United States foreign policy in Central America; judge allowed jury instruction on necessity and jury acquitted defendants). *Id* at FN 88; *People v. Block* Crim. Nos. 3235 to 3245 (Cal. Sacramento County Mun. Ct. Aug. 1979) (necessity defense allowed at first trial which ended with hung jury; at new trial, district attorney dropped case after judge indicated defense would again be allowed). *Id* at FN 143; *Chicago v. Streeter* (Ill. Mun. Ct. May 17, 1985), reprinted in 42 Guild Practitioner 110-11 (1985) (protest against apartheid); *People v. Jarka*, Nos. 002170, 002196, 002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985), reprinted in 42 Guild Practitioner 108 (1985) (protest against United States involvement in Central America and arms build-up);*Id*, at FN 167;

4. ROE BARS JUDGES FROM RULING ON THE HARMS TRIGGERING NECESSITY

Judges are not qualified to evaluate whether the harm prevented by the defendant was in fact harmful, according to Roe v. Wade. After the majority of Supreme Court justices declared their inability to determine this fact, it would be the height of arrogance for a mere District Court Judge to presume to understand what Supreme Court justices could not. In fact the Court did not disqualify merely itself, but all judges, ruling that "the judiciary [which includes every judge in America] ...is not in a position to speculate as to the answer."

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest

> in protecting that life from and after conception. 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. Roe v. Wade: 410 U.S. 113.

It is the height of arrogance for state supreme court justices to declare themselves competent to decide what the Roe justices admitted they were incompetent to decide, it is the height of ignorance for them to maintain that the Roe justices already decided it. It violates Roe to assume authority over an issue which Roe ruled "the judiciary...is not in a position" to address.

Therefore the only authority competent to weigh this issue is the Jury, the Triers of Fact.

5. REASONABLE PEOPLE HORRIFIED BY TILLER'S ABORTIONS.

A majority of America's highest legal authorities are on record declaring that the abortions done by Dr. George Tiller were harms to a barbaric level. Were they on this jury, they would have to conclude that the heinous harms prevented by the defendant were justifiably prevented. It is really difficult to imagine finding a jury of 12 reasonable persons who could say, beyond a reasonable doubt, that the harms perpetuated by Tiller were not serious enough to merit preventative action. Especially when the last time a judge allowed the Necessity Defense in a Kansas abortion case, he acquitted. Therefore the Necessity Defense cannot be kept from the jury's knowledge on the ground that it is frivolous, or irrational, or unpersuasive to reasonable people. Censoring it must raise suspicion of abuse of judicial discretion motivated by something other than fair administration of justice.

When an ordinary man listens to his nation's President, and even Supreme Court justices, identifying a single practice as one of the most gruesome in human history, how indignant can we be if he sees an opportunity to do something about it, and acts?

President George Bush said, as he signed the Partial Birth Abortion Ban Act of 2003,

> " a terrible form of violence has been directed against children ... The best case against partial birth abortion is a simple description of what happens and to whom it

> happens. It involves the partial delivery of a live boy or girl, and a sudden, violent end of that life. Our nation owes its children a different and better welcome....the practice is widely regarded within the medical profession as unnecessary, not only cruel to the child, but harmful to the mother, and a violation of medical ethics. ...*The facts about partial birth abortion are troubling and tragic, and no lawyer's brief can make them seem otherwise. ...* [We need] compassion and the power of conscience..... This right to life cannot be granted or denied by government, because it does not come from government, it comes from the Creator of life. ...We're asked to honor our own standards, announced on the day of our founding in the Declaration of Independence. We're asked by our convictions and tradition and compassion to build a culture of life, ...when we look to the unborn child, *the real issue is not when life begins, but when love begins.*

Supreme Court justices have written less blistering accusations of Tiller's grisly methods.

Justices Stevens and Ginsburg, concurring with the majority, wrote:

> "[I doubt if the abortion method used by George Tiller is] more brutal, more gruesome, or less respectful of "potential life" than the equally gruesome procedure [which the law still allows]." (Stenberg v. Carhart (99-830) 192 F.3d 1142)

Justice Scalia, in his dissent, wrote

> "The method of killing a human child -- one cannot even accurately say an entirely unborn human child -- proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."

Justice Kennedy, dissenting, wrote

> "The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as 'transcervical procedures,' '[o]smotic dilators,' 'instrumental disarticulation,' and 'paracervical block,' may be accurate and are to some extent necessary, ... but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient."

Justice Thomas, dissenting, wrote

> "Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe."

The point of all this is that when the "procedures" protected by the majority are attacked so maliciously as the most barbaric infanticide, and the Supreme Court majority agrees, while the minority makes not the slightest effort to deny it, the Supreme Court unanimously concedes, in effect, that indeed, *as a matter of fact*, the abortions it defends *are* infanticide; they are the most cruel murder of

innocent human beings.

That is the answer for state supreme courts who question how abortion, being legal, can be "cognizable as a harm". The very ruling which legalizes the most barbaric of abortions, itself recognizes it as a *great* harm.

Even five of the justices in Stenberg v. Carhart, were they on the jury of this trial, and were they given the necessity defense, would have to agree that what the defendant prevented was at least a "serious injury". Who will say the defense is not even valid enough to present to the jury?

Here are a few more of America's foremost legal authorities who would probably not survive the voir dire of this trial:

The Missouri Supreme Court thought a Public Proclamation by President Reagan concerning the personhood of the unborn was relevant, even though it has no jurisdiction outside the federal government and even though it did not enact anything. As if the opinion of reasonable persons, not legal authorities, was relevant in discussing when life begins:

> "'all medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality -- that they in fact are persons...' and the President has proclaimed the 'unalienable personhood of every American, from the moment of conception until natural death'. President Reagan also affirmed the compelling Interest of the several states to protect the life of each person before birth, and the unalienable right to life is found not only in the Declaration of Independence but also In the Constitution that every President is sworn to preserve. protect and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, due process of law.... In the 15 years since the Supreme Court's decision in Roe v. Wade, however, America's unborn have been denied their right to life." (State v. O'brien, 84 S.W.2d 187, 189 Mo. App. 1989, quoting Public law 5761 of January 14, 1988, Federal Register Vol. 53, #ll)

Missouri lawmakers would have been removed for cause from my jury, at least the ones still there from 1986 when they enacted Missouri #1.205, R.S.Mo.1986, which states:

> "1) The life of each human being begins at conception"; 2) "unborn children have protectable interests In life, health, and well being"; and 3) Effective January 1, 1988 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 this state..."

Louisiana lawmakers are equally suspect.

> LSA-R.S. 40:1299,35.0 reads “it is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this state. Further, the Legislature finds and declares that the longstanding policy of this State Is to protect the right to life of the unborn child from the time of conception by prohibiting abortion permissible only because of the decision of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed. or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.” LSA-R.S. 14:2(7) defines "person" as "...a human being from the moment of fertilization and implantation."

And keep a sharp eye out on those Nebraskans!

> Nebraska 28-325. R.R.S. 1943, says "(1) That the following provisions were motivated by the LEGISLATIVE INTRUSION of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but it is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to PROVIDE PROTECTION FOR THE LIFE OF THE UNBORN CHILD WHENEVER POSSIBLE; (2) That the members of the Legislature expressly DEPLORE the destruction of the UNBORN HUMAN LIVES which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973." !!!!!

That’s the most indignation I’ve ever seen in a law! But when that indignation is directed against the U.S. Supreme Court by an entire state legislature, what does that say about the threat to the Rule of Law posed by Roe?

There is no way anyone as “reasonable” as Justice Dimond of the Alaskan Supreme Court could survive the voire dire in my case. He wrote, in Cleveland v. Municipality of Anchorage, Alaska, 631 P.2d 1073, 1084:

> I empathize with the defendants’ sorrow over the *loss of human lives* caused by abortions. I believe the United States Supreme Court *burdened this country with a tragic decision* when it held in Roe...that the word “person”, as used in the fourteenth amendment, does not include the unborn..., and that states cannot “override the rights of the pregnant woman” by “adopting one theory of life.”

I do not agree with the Court's conclusion that a state's Interest in potential life does not become "compelling" until the fetus has attained viability. It stated its explanation for this conclusion as follows:

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." (410 U.S. at 163, 93 S.Ct. 731-32, 35 L.Ed.2d at 183) As Professor Tribe indicates, "One reads the court's explanation several times before becoming convinced that nothing has inadvertently been omitted." (Tribe, Forward to "The Supreme Court 1972 Term", 87 Harv.L.Rev. 1. 4 (1973](footnote omitted]). I agree with Professor Tribe when he states, "Clearly, this [analysis] mistakes a definition for a syllogism, and offers no reason at all for what the Court has held." (Id., quoting Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade.", 82 Yale L.J. 920, 924 (1973](footnotes omitted]).

("Syllogism" is defined in its best sense as a specific process of reasoning where bits of evidence are assembled into a conclusion, and in its worst sense as "subtle, tricky, or specious reasoning". "Specious" means intelligent sounding baloney, which must be what the justice meant since he said the syllogism offered no reason for its existence. He is saying Roe's statements seem, well, connected, yet when you arrive at the end of them you wonder why it still doesn't quite make sense.)

(Justice Dimond, continuing:) "In effect, the Supreme Court held that because there is no consensus as to *when* human life begins it can't act as if it were proven that human life does not begin until birth so as to preserve to women the right to make their own decision whether an abortion takes a human life or not. It would make more sense to me if, in the face of uncertainty, any error made were side in favor of the fetus, which many believe to be human life.

The development of a zygote into a human child is a continual, progressive development. No one suggests that the born child is not a human being. It seems undeniable, however, that human life begins before birth. As Professor Curran states:

"[T]he fetus one day before birth and the child one day after birth are not that significantly or qualitatively different – in any respect. Even outside the womb the newborn child is not independent but remains greatly dependent on the mother and others. Birth in fact does not really tell much about the individual as such but only where the individual is--either outside the womb or still inside the womb." (C. Curran, Transition and Tradition in Moral Theology 209 (1919]). Similarly, viability does not mark the beginning of the truly human being.

[V]iability again indicates more about where the fetus can live than what it is. The fetus immediately before viability is not that qualitatively different from the viable fetus. In addition viability is a very inexact criterion because it is intimately connected with medical and scientific advances. In the future It might very well be possible for the fetus to live in an artificial womb or even with an artificial placenta from a very early stage in fetal development.

> I join with those persons who believe that truly human life begins sometime between the second and third week after conception....

6. ROE RULED THAT THE POST-VIABILITY BABIES SLAIN BY TILLER ARE HUMAN BEINGS

a. ROE ESTABLISHED CONSENSUS FROM EXPERT WITNESSES

Roe does not authorize abortions after viability. Roe excuses itself from knowing exactly "when life begins" before viability, alleging less than 100% consensus among the Court's expert witnesses: preachers and doctors. But Roe documents 100% consensus that "life" has "begun" at least by viability, which is the only reason Roe allows the unborn their Right to Life after viability but not before. This makes it clear that Roe's refusal to recognize an unborn baby as a "'person' within the language and meaning of the Fourteenth Amendment" does not apply to post viability babies.

This is not mere moral support, or dicta, but the central thrust of the ruling. Although Roe's companion case, Doe v. Bolton, obstructs state protection of post-viability babies, nothing in Doe v. Bolton mitigates the ruling of Roe that only pre-viability babies may be slain.

Roe identifies fact finders like preachers and doctors, not legal authorities like themselves, as the world's expert witnesses on when babies become "persons in the whole sense", which is what finders of fact must determine before they can determine whether abortion is a harm.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, [on pre-viability humanity], the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. (Roe v. Wade: 410 U.S. 113)

Preachers, in turn, identify their Expert Witness as God, speaking through the Bible.

Roe acknowledged that Christian theologians lean upon the Bible for their knowledge when Roe said "Augustine...may have drawn upon Exodus 21:22."

In building its case partly upon the statements of theologians, during which Roe cited a specific passage from the Bible which Roe takes for support of its ruling, Roe has certainly "opened the door" for the jury to consider whether this Supreme Court-identified Expert Witness lends all the support for pre-viability abortions that the Court alleges, especially since the Court ruled themselves, and all other judges, unqualified to evaluate these matters with certainty.

Indeed, in the quest for the consensus of "reasonable people" on whether abortion is a harm, it is poor legal reasoning to censor the position of the world's most widely read book, the Bible, in which a majority of perfectly reasonable Americans profess their faith. Were it not for the Bible telling us that those cute unborn baby bodies have human souls attached to them, there would be no abortion controversy in America today. What other authority would counter the belief within some New Age circles that the soul doesn't attach to the body until about birth?

The Bible, as a source of moral authority for reasonable people, comes highly recommended by America's most prestigious lawmakers, the U.S. Congress. This was enacted by a joint session of Congress, and approved by the President – the powers who appoint the Supreme Court justices:

> Congress recognizes "both the formative influence the Bible has been for our nation, and our *national need to study and apply* the teachings of the *Holy* Scriptures." Public law 97-280, October 4, 1982, 96 Stat. 1211.

But what really "opens the door" for discussion of what the Bible says about "when life begins" is that Roe v. Wade builds its case upon Scripture. It did so in a footnote, as if almost in passing, but the Justices had to understand that for millions of American Christians, that little allusion to Exodus did more to throw the opposition off balance than all the rest of the ruling. Because for Bible believing Christians, one obscure indirect comment from God carries more weight than the lengthiest rulings of all the Supreme Courts in the world. The majority of Americans, who revere the Scriptures, deserve an answer.

(Footnote 22, Roe v. Wade: 410 U.S. 113)

Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, *Hist. Anim.* 7.3.583b; *Gen. Anim.* 2.3.736, 2.5.741; Hippocrates, *Lib. de Nat. Puer.*, No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at animation, and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between embryo inanimatus, not yet endowed with a soul, and embryo animatus. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, *De Origine Animae* 4.4 (Pub. Law 44.527). See also W. Reany, *The Creation of the Human Soul*, c. 2 and 83-86 (1932); Huser, *The Crime of Abortion in Canon Law* 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country. (VI.3.1)

Discussion of Roe's gloss of Exodus 21:22 is almost immaterial to this case, since for all Roe's rejection of the virtual consensus among Bible believers today that "life begins at conception", Roe agrees that there has been Christian consensus that "life begins", (or "quickening", or "animation"), if not at conception, at least by 1-3 months. Which is why Roe authorizes abortion only before "viability". Protection of abortion through birth, like the gruesome procedures of Dr. George Tiller, is accomplished through Roe's companion case, Doe v. Bolton, which offers no pretense that abortion

after viability is not murder but only further obstructs state protection of the unborn at any stage with vague language (which it would be "absurd" to think was intentional) about an exception for a mother's health. Therefore there is nothing in either case to challenge the assertions of reasonable American leaders that abortion at least after viability (including the abortions of Dr. George Tiller) is murder, and Roe actually supports that position. Not only with moral support, but Roe has ruled that this is the case. Not just with dicta, but this is the central thrust of its ruling.

Therefore defendant anticipates little time will be needed to review relevant Scripture, there being no significantly contested issue, since Roe agrees with Scripture about the destruction of human life through post-viability abortions, and post-viability abortions were the most egregious harm prevented by defendant.

Nevertheless Roe's gloss of Exodus 21:22 has misled many reasonable persons to question whether the Bible speaks to the humanity of the unborn unambiguously enough to counter New Age assertions claiming to be more definite, which would support abortions through, if not after birth. This doubt could cause the jury to question whether a reasonable person, faced with such ambiguous evidence, could justify so decisive an action to prevent such questionable harms. So a brief review may be in order of the consensus of commentaries on the passage, to show that if Augustine did rely upon it as the Court speculates, Augustine's reliance was not well informed in the view of the theologians of following centuries, because the passage does not contradict evidence like Psalm 139:13-16, Jeremiah 1:5, Psalm 58:3, Galatians 1:15-16, Luke 1:15, 42-44.

b. PARTIAL BIRTH TERMED "HOMICIDE" BY ROE JUSTICE.

Roe's limitation of abortion's unqualified legality to pre-viability babies is dramatically highlighted by oral arguments during Roe v. Wade, where partial birth abortion was discussed. One of the justices frankly called it "homicide" and no one disputed it.

In Roe, on oral reargument, it was determined that Texas already had a law on its books against

what we now call partial birth procedures, and that Jane Roe's attorney Sarah Weddington left it unchallenged. Justice Thurgood Marshall then questioned whether such a procedure would in fact be an "abortion" and then dissented saying that, whatever the case, "It would be homicide."

TRANSCRIPT

The relevant excerpt from the transcript of oral reargument, held October 11, 1972 in Roe v. Wade, as heard at approximately 36 minutes into the audio version and forward, is presented as below:

Attorney Mr. Robert C. Flowers represented the State of Texas.

MR. FLOWERS: Here's what 1195 says–provides: "Whoever shall, during the parturition of the mother, destroy the vitality or life in a child in a state of being born, before actual birth and before actual birth–which child would have otherwise been born alive, which–shall be confined to the penitentiary for life, or not less than five years."

JUSTICE MARSHALL: What does that statute mean?

MR. FLOWERS: Sir?

JUSTICE MARSHALL: What does it mean?

MR. FLOWERS: I would think that–

JUSTICE STEWART: That it is an offense to kill a child in the process of childbirth?

MR. FLOWERS: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.

JUSTICE MARSHALL: Which is not an abortion.

MR. FLOWERS: Which is not–would not be an abortion, yes, sir. You're correct, sir.

JUSTICE MARSHALL: It would be homicide.

The Oyez Project transcript misattributes that statement to Texas' attorney Robert Flowers. But listening to the actual audio makes it clear that it is Justice Marshall himself who concedes that it would be "homicide" to perform what are now known as partial birth procedures. This means Roe did not preempt a justification defense in cases where partial birth procedures are being performed, such as in

the instant case of the shooting of George Tiller by the defendant.

AUDIO: http://www.oyez.com/sites/default/files/audio/cases/1972/70-18_19721011-reargument.mp3 OYEZ PROJECT TRANSCRIPT: http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument

7. DENYING NECESSITY VIOLATES DUE PROCESS

a. SUBSUMING A FACT QUESTION UNDER A "QUESTION OF LAW" VIOLATES THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS.

It would be clearly reversible error in any criminal case where abortion is not involved.

Yet that is exactly what happened in *City of Wichita v. Tilson,* 855 P.2d 911 (Kan.), cert. denied, 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 420 (1993) and in several other state supreme courts. The heavily contested fact question of the Necessity Defense was subsumed under a "question of law" which the jury is not then permitted to know about. In any other Affirmative Defense case where abortion is not involved, there is no factual dispute between the parties over whether those being saved are human beings. At least not since the Dred Scott disaster was resolved by the Civil War.

In every other affirmative defense case, "a question of law" means a question for the judge, whether the alleged facts, if true, support the parameters of the defense as defined in law. The jury decides whether the alleged facts are true. This it how all other trials are processed, and this should be the process due in abortion prevention trials also. It is fundamentally unfair to hide the only defense, and the only contested issue, which is a fact issue, from the jury, just because a man is on trial for saving unborn human beings.

The problem is not the classification of the Necessity Defense as a question of law, by the normal rules of that classification. If the defendant says "I plead the Necessity Defense, because I was insane when I shot him", it is appropriate for the judge to rule, "Uh, the Necessity Defense doesn't cover the facts which you allege. 'Insanity' is the defense you mean to raise."

The problem is the judge deciding the fact question as well as the law question in Necessity Defense cases involving abortion. And then leaving the jury to "decide" the facts about what the defendant did, which no one even contests, in order to provide the public with an appearance of a trial by jury.

Normally the facts decided by the jury are whether the actions of the accused were meant to prevent a genuine threat to human life. Only when abortion is involved, is the contested issue not whether lives were threatened, which all admit, but whether they were human, which the defendant believes and about which the prosecutor holds no opinion other than that if they are human, they are irrelevant humans. The dispute is whether the life or lives saved count as "life", or as "human life", or as "persons in the whole sense".

The factual nature of what the defendant stopped is a fact question just as much as what the defendant did. When one fact question is admitted and the other is contested, it is an outrageous denial of Due Process to give the jury the one that is admitted, and withhold from their knowledge the one that is contested!

The alleged "constitutional protection" of abortion is irrelevant to the jury's legal duty to judge the factual reality of killing unborn babies. The legal status of an action is irrelevant to what that action accomplishes in fact. No onslaught of laws, constitutions, or rulings can change any class of human beings into something lower than human beings, although every generation has seen it tried. It is common knowledge that Roe v. Wade declined to rule on whether the babies whose murders it authorized were "human life" or "persons in the whole sense". It is common knowledge that Roe left this issue to fact finders, and anticipated Roe's collapse, should fact finders rule that conception is

"when life begins". These facts about Roe are commonly cited to explain the need of a "Personhood Amendment" before Congress. To say Roe provides legal authority for hiding any fact question from the jury is to stand Roe on its head and to violate it.

The Due Process practiced in all other cases, and accepted by all as fundamentally fair, is for the judge to rule on the applicability of affirmative defenses on the basis of whether the facts, as alleged, were true, then would the defense apply to those facts? If they would, then he lets the jury establish the facts. He should not weigh a fact dispute whether the persons defended by the defendant were human beings with any Right to Life who merits being defended.

Whether the insanity defense applies is appropriately classified as a "question of law", because the judge is not judging a fact question. If the defendant pleads insanity but says he is more sane than the judge, the judge may disallow the defense based on the defendant's own allegations, but the judge will defer any fact determination to the jury.

Whether necessity applies is classified appropriately as a "question of law" in any other case besides abortion, because there is no contested fact upon which the judge is ruling by himself. There is normally no fact dispute whether the person saved from serious injury or death is a human being.

Only in abortion interruption cases does it occur to any judge to decide a disputed fact in the course of ruling on what he has categorized "a question of law".

Only in abortion interruption cases does one party say "the life saved was that of a human being" while the other party says "the life saved was not human".

Well, that's not exactly what courts say, is it? No one, no court, no abortionist, no political candidate, dares to assert that the unborn slain by abortion are not human, or human beings. Not even Roe dared to say that. Roe said, "we can't tell."

So state supreme courts ask "how can something which is constitutionally protected be legally recognized as a harm?"

There are several more ways to state what is embarrassing about this logic.

It assumes that no law or ruling has ever protected evil. What an odd thing to assume, considering that about a third of the justices on any Supreme Court can be counted on in their dissents to accuse the majority ruling of facilitating evil.

OR, it assumes that by definition, nothing is "evil" once it is "legal". If that be so, by what reasoning do courts ever nullify laws? If a law against something makes it, in fact, evil, while a law protecting something makes it, in fact, good, then reversing a law that protects good and punishes evil would then punish good and protect evil. Therefore every time a judge reverses a law, he commits unspeakable evil.

Or does the passage of a law change reality itself, changing good into evil and vice versa? I would think that the fact that courts often nullify laws, not to mention create new ones, suggests that justices actually do not think that "legal" = "good".

OR, it assumes that whether the result of a trial is to actually perpetrate unthinkable evil should not be of the slightest concern to any judge or jury. Only the letter of the law matters. But I don't think judges think that, either, from reading their dissents. They accuse each other all the time, often quite bitterly, of turning the letter of the law in an evil direction, as if such a thing is possible, and ought to matter.

OR it fails to distinguish between "legal recognition", the province of the judge, and "factual condition", the province of the jury. How far can this go? If the fact question of *whether the folks saved from dismemberment are human beings* can be called a law question, and hidden from the triers of fact, what other fact questions might also be called a law question for the judge alone to decide?

This reasoning, which has the appearance of respect for Roe, actually defies the reasoning of Roe which treats "when life begins" as a fact issue about which the experts were preachers and doctors, not judges; and which foresees the possibility that fact finders might establish that conception is "when life begins", at which point Roe should "collapse".

When courts ask "how can something we protect be harmful?" Americans need to demand

"how did something this harmful come under your protection?" Justices flatter themselves, to say abortion is protected by the Constitution, rather than by themselves. It is amazing that legal writers actually say things like "abortion has been protected by the Constitution since 1973", as if it occurs to nobody that from the period 1789-1973, to the period after 1973, the Constitution was never amended regarding abortion. The only thing that changed was the Supreme Court's mood. Where was Stare Decisis when we needed it? It is self flattery of the Court to say its ruling can make the Constitution protect things which it never protected a minute before the ruling. It is like believing that making something "legal" is the power to make something "good", even something which, before being made "legal" and "good", was in fact the ultimate evil of genocide itself.

We're not discussing a small evil! We're talking about 50 million Americans dead! This is a fact! America's senior citizens who allowed this evil are now facing a collapse of their government retirement system for want of 50 million able bodied workers able and willing to support them in their own age. God has offered to replace them with immigrants so senior citizens don't have to be deported to Mexico where they can live on social security checks slashed by 90%, but we're turning down that offer too.

We're talking about a violation of Due Process of Law. When abortion interruption cases suffer a different set of rules than apply to any other type of case, that is a violation of Due Process of Law.

Let's add up the ways abortion preventers suffer a different set of rules:

In every other kind of case, in particular every other kind of affirmative defense case, judges let juries decide fact issues.

In every other affirmative defense case where abortion is not involved, judges do not subsume fact disputes under questions of law in order to keep them hidden from juries.

In every other affirmative defense case, stipulations to the prosecutor's alleged facts are encouraged in order to save court time and money, and to help narrow the focus of the trial to the actual disputes.

In no other affirmative defense case, where abortion is not involved, does any judge hide from the jury the only contested fact issue.

"Fundamental fairness" is a description of procedural due process. Fair means "according to the rules". "Synonym: fair, the general word, implies the treating of both or all sides alike, without reference to one's own feelings or interests [a fair exchange]". *Webster's new World Dictionary and Thesaurus.*

Due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)*

When you can list four ways in which hiding the fact pillar of the Necessity Defense from juries differs from routine procedure in every other affirmative defense case not involving abortion, you have to consider whether this practice violates the Due Process clause of the 5th and 14th Amendments.

Now, you might say, "So what if this practice violates the Due Process clause? We've been violating Due Process for 37 years now, so we have to keep on doing it because of Stare Decisis."

Stare Decisis is the same rule that won't let us stop slaughtering unborn human babies.

According to the rule of Stare Decisis, if abortion is *in fact* genocide, that fact is irrelevant because genocide has been going on for such a long time that *stopping* the genocide will be too disruptive. People are so used to slaughtering each other that it will undermine mental health to make mothers stop murdering their offspring.

According to Stare Decisis, preserving the status quo is more important than stopping genocide. How the Civil Rights movement ever overcame the hurdle of stare decisis, I'll know when I get to Heaven. I don't think stare decisis ever comes up when *judges* are ready to change laws and reinterpret Constitutions. It just comes up when you ask judges to change *their* rulings.

SHOWING AN EQUAL PROTECTION VIOLATION

To deny the defendant a justification defense would grossly violate his 14th Amendment rights

to equal protection. The Fourteenth Amendment prohibits "unequal treatment of similarly situated defendants concerning a fundamental right." *U.S. v. Enjady* 134 F.3d 1427, *1433 (C.A.10 (N.M.),1998).

The right to present a defense is such a fundamental constitutional right. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi* 410 U.S. 284, *294, 93 S.Ct. 1038, **1045 (U.S.Miss. 1973) "(C)lassifications affecting fundamental rights .are given the most exacting scrutiny." *Clark v. Jeter* 486 U.S. 456, *461, 108 S.Ct. 1910, **1914 U.S.Pa.,1988)

In order to make a prima facie showing that granting the prosecutor's motion in limine entails an Equal Protection violation, the defendant perceives, from cases not quite like his own, that he must do three things: First, he must define a class of persons usually denied a fundamental constitutional right which is usually granted to others. Second, he must prove his inclusion in that class. Third, he must show how the class is disadvantaged by granting motions such as the prosecutor's. *Lumpkin v. Ray* 977 F.2d 508, *510 (C.A.10 (Okl.),1992); *See also, U.S. v. Baker* 197 F.3d 211, *215 (C.A.6 (Ky.),1999)[14]

The class of persons usually denied a fundamental constitutional right is those who prevent abortions, by taking action against the doors, the buildings, or the persons of abortionists, and who rely on the affirmative defense called Necessity, which is ruled inadmissible, which is a de facto directed verdict before the jury is even seated, and a de facto denial of the Constitutional Right to a Trial by Jury of the only defense and the only contested issue of the trial. The others usually not denied their constitutional right to a trial by jury are those who raise affirmative defenses in cases not involving abortion, in which all fact questions are treated as fact questions, and are acknowledged as relevant, and are given to juries.

14 In the event that the defendant has not articulated the correct analytical standard, he reserves the right to demonstrate how his situation meets that standard, once it is drawn to his attention.

In all other affirmative defense cases other than abortion, it is irrelevant whether a 3rd party wanted the people to die which the defendant saved. That would not be legally cognizable as a reason to deny the defendant his Constitutional Right to a Trial by Jury.

In all other affirmative defense cases other than abortion, it is irrelevant whether a judge hesitates to recognize the people saved from destruction as human beings. Any such judicial hesitation would not become a reason to deny the defendant his Constitutional Right to a Trial by Jury. Were he unsure, he would recognize that as an issue for triers of fact.

In all other affirmative defense cases other than abortion, it is irrelevant whether saving people serves some secondary purpose, like influencing legislation or "protesting" something. Any speculation that saving a life might have some secondary purpose would not become a reason to deny the defendant his Constitutional Right to a Trial by Jury. But where abortion is involved we hear:

> We therefore conclude that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed on complainant's property in order to interfere with the rights of others. *Tilson*, supra.

The only people relevant in any other affirmative action trial besides abortion, are the person(s) saved, anyone from whom they were saved, and the person who saved them.

From the point of view of the unborn child, the threat and peril is identical in each case: his or her life is about to be taken without provocation, and he or she is utterly helpless to defend himself or herself. Both assailants of the unborn child are acting with the identical end in mind: the death of the unborn child.[15] Above all, both defendants claim to be acting with the same intent on indistinguishable sets of relevant facts: to prevent the killing of the unborn child. Here, as in Jones' case, the defendant will present evidence that there was at least one unborn child who was under credible threat of death at the hands of Dr. Tiller, and that he acted to avert this harm, by the conduct he is now charged with.

The only fact which distinguishes the two scenarios is that in this case, the mothers had hired

15"(T)he purpose of abortion is to destroy the fetus." Pritchard, J. & Mcdonald, P. *Williams Obstetrics*, Appleton-Century-Crofts, New York, 1980, P.610

Dr. Tiller, ostensibly willingly[16], to kill her unborn child, while the mother in the Jones case ostensibly had not hired her child's assailant.[17] But, as noted above, the mother and her wishes are not legally relevant in either case for Fourteenth Amendment purposes. Neither Jones nor the present defendant need rely on whether a mother wants her unborn child killed or wants her unborn child not to be killed. All that is legally relevant in a 14th Amendment analysis is that is that both *defendants* are similarly situated. And this defendant and the hypothetical Jones are identically situated. Both claim, as their defenses to charged crimes, to have used force to prevent the killing of an unborn child, without reference to the mother one way or the other.

Therefore the defendant asserts that there is a class of persons which is legally relevant and cognizable: defendants who claim to have used force to prevent injury to, or the death of, an unborn child, and assert a right to mount some form of justification defense when criminally charged with that use of force. That this class exists cannot be doubted. Several federal cases in the past 10 years demonstrate that beyond dispute, where the slaying of the child was to have taken place at the hands of an abortionist. *U.S. v. Hill* 893 F.Supp. 1048, *1049 (N.D.Fla.,1994)(necessity defense precluded)[18]; *U.S. v. Waagner* 104 Fed.Appx. 521, 2004 WL 1595193, **1 (C.A.6 (Ohio (C.A.6 (Ohio),2004) (same)[19]

16But the defendant will offer evidence proving that many, possibly most, supposedly "chosen" abortions are de facto coerced upon frightened, panicked, uninformed mothers who genuinely believe that they have no real choice. This concept is not foreign to federal law, which allows in principle for such things as guilty pleas taken under oath, with careful allocutions from the judge, which nonetheless are involuntary as a matter of law and fact. *U.S. v. Couto* 311 F.3d 179, *181 (C.A.2 (N.Y.),2002)(ineffective assistance of counsel rendered plea involuntary and unknowing) The bare fact that a woman has signed a consent form for an abortion does not prove conclusively that her choice was truly voluntary.

17But under the posited hypothetical scenario, it is impossible to know whether this is true, as the mother cannot communicate.

18 Interestingly, the necessity defense was explicitly not precluded as a matter of law, but as a result of the judge not finding enough evidence that had been adduced by the defendant to warrant presenting the defense to a jury. *Id* at 1047-1048.

19 It is unclear whether Waagner was allowed to present evidence during the trial itself that might have supported a necessity defense. On the one hand, it is said that Waagner objected on appeal to the District Courts's denial of his "motion to assert a necessity defense at trial", *Id* at 523. On the other hand, it is said that he claimed "that the district court erred in failing to instruct the jury regarding his necessity defense". *Id*.

It is also the case that there have been persons who claim to have used force to defend an unborn child from the sort of assault that underlay the drafting of §1841, the murders of Laci and Conner Peterson by Scott Peterson. There are few federal cases extant on this subject that the defendant can find. The defendant speculates that the reason for this is twofold.

Firstly, the use of force to protect unborn children (outside of the context of abortion) typically involves situations such as violent quarrels among relatives or acquaintances, or situations like street confrontations that turn violent. These situations are far more likely to be related to State than to federal laws. Since §1841 is a relatively recent statute, it appears that there have been few if any prosecutions under it, let alone defenses based on it. Still, it cannot be ingenuously claimed that such defendants are overly hypothetical, or that federal law categorically excludes "defense of others" defenses with respect to unborn children outside of an abortion context.

Secondly, where evidence supports the notion that the user of force did so in order to defend an unborn child (often his own, as in the case of a man defending his family from a "home invasion" type robbery) it is rare that he will even be prosecuted. Therefore few of these persons ever even become defendants. The use of force is so thoroughly and obviously justified when it is undertaken in defense of a helpless and innocent unborn child, that it rarely even *needs* to be stated in court, and rise to the level of a formal defense.

Nonetheless, there are extant federal and State cases which make clear that the class includes persons who claimed to have used force to defend an unborn child from death other than by abortion, and that, when criminally charged for that use of force, those defendants were permitted to mount their defense and, if appropriate, receive jury instructions on it.[20] In *U.S. v. Medrano* 1990 WL 121884, *1 (C.A.9 (Wash. (C.A.9 (Wash.),1990), defendant was allowed to present evidence at trial "that she was 'scared' for herself and her unborn child", although the judge ultimately declined to instruct the jury on

20 For now, of course, the defendant is only arguing that he should be permitted to place his evidence in front of the jury during trial, without yet addressing the question of jury instructions.

the defense. *See also*, *Graves v. U.S.* 554 A.2d 1145, *1148 (D.C.,1989) (reversing murder conviction where trial court refused to give instructions on defense of third persons, including unborn child). *People v. Kurr* 253 Mich.App. 317, 654 N.W.2d 651 (Mich.App.,2002)(reversal of manslaughter conviction finding deprivation of constitutional right to present a defense in trial judge's failure to instruct jury on "defense of unborn child" defense); *People v. Armstrong* 106 Cal.App.2d 490, *496, 235 P.2d 242, **245 (Cal.App. 3 Dist.1951)(finding that jury instruction gave "sufficient prominence to the appellant's right to defend and protect his home, his wife and unborn child."); *State v. Shanahan* 712 N.W.2d 121, *142 (Iowa,2006)(allowing in principle for "defense of unborn child" as defense to homicide charge, in case where such evidence had been presented to the jury, but finding that since jury had rejected defendant's claim of justification with regard to her own self defense, failure to give additional jury instruction on defense of her unborn child was not reversible error.); *Tyner v. State* 2003 WL 21962447, *3 (Tex.App.-Dallas) (Tex.App.-Dallas,2003)(allowing duress defense to be presented to jury where defendant claimed he committed armed robbery when rival drug dealers threatened the life of himself, his wife and unborn child); *Thompson v. Olson* 711 N.W.2d 226, *232 (N.D.,2006) (finding no error in trial court's finding that defendant did not commit domestic violence on plaintiff, where defendant was acting to defend herself and her unborn child, and where such acts are excluded by statute from being characterized as domestic violence)

The defendant further asserts that he belongs to this class. This latter fact is so obvious that it scarcely needs belaboring. If there is one thing that all parties to this case agree on, it is that this defendant claims to have acted to prevent the killing of what Congress has termed an "unborn child" and a "human being". By all accounts, it is the sole reason why he is before this Court at all. If necessary, the defendant will provide abundant evidence to this effect at the Court's behest.

To discriminate against the defendant by denying him the opportunity to present a defense which would unquestionably be legally available to similarly situated defendants except for the Abortion Factor, and which has demonstrably been made available to other actual defendants, would be

to trample his Due Process and Equal Protection rights to mount the same defense as would be allowed to a similarly situated defendant. The distinction would be purely arbitrary, and an arbitrary distinction violates the Due Process Clause of the Fifth Amendment. *Chapman v. U.S.* 500 U.S. 453, *465, 111 S.Ct. 1919, **1927 (U.S.Ill. and Wis.,1991).

It would be purely arbitrary because, rationally, it could only hinge upon the ostensibly differing wills of the mothers. But surely the consent of a mother to the killing her own child cannot, at law, be sufficient grounds for precluding a defense which states that the defendant sought to save the life of a child.

This is especially so in light of the fact that the Supreme Court now believes that the right of a woman to choose to hire someone to kill her unborn child is *not* a "fundamental right", *Lawrence v. Texas* 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003), while the right to present a defense *is* a fundamental right. *Gilmore v. Taylor* 508 U.S. 333, *343-344, 113 S.Ct. 2112,**2118 - 2119 (U.S.,1993) It is axiomatic that a less than fundamental right must give way before a fundamental one.

By indisputable logic, if *any* "member of the species homo sapiens, at any stage of development, who is carried in the womb", §1841 (d), is an "unborn child", and a "human being", when attacked by a Scott Peterson, and thus worthy of protection from murder under the law[21], whether by a private citizen or law enforcement officer, then surely *every* member of the species homo sapiens, at any stage of development, who is carried in the womb, is equally an unborn child and a human being. Those defendants who claim to have acted to prevent the killing of *any* unborn child are thus similarly situated for the purposes of 14th Amendment analysis.[22]

21 18 USC §1841(C) punishes the intentional killing of an unborn child "under sections 1111, 1112, and 1113 of this title for intentionally killing...a human being." In other words, the law treats the intentional killing of an unborn child as frank murder.

22 This of course leaves out of the question the far more atrocious violation of the Fourteenth Amendment rights of the unborn children themselves, which has been addressed in the defendant's affirmative Motions in Limine. It is shocking and unconscionable that identically situated, completely helpless and innocent unborn children and human beings (as Congress itself terms them) could have their very right to be free from unprovoked lethal assault depend exclusively on the all-but-unreviewable will of their mothers. There are absolutely no other circumstances in U.S. law which tolerate the treating of one human being as the mere chattel of another, his very life being purely at the mercy of the whim of the chattel-holder. The most depraved condemned, self-confessed mass murderer cannot be treated so unjustly under U.S. law. But here is

Discriminating against the defendant in this way would *deny* him the fundamental right to have a fair opportunity to defend himself to the prosecutor's accusations, while a similarly situated defendant (except for the Abortion Factor) would *have* that opportunity, and the defendants in the above cited cases *did* have that opportunity.[23] If the prosecutor's motion is granted, this defendant, and all defendants who claim to have been justified in acting to save an unborn child from killing by abortion would be "put in a solitary class with respect to" fundamental constitutional due process rights. *Romer v. Evans* 517 U.S. 620, *627, 116 S.Ct. 1620, **1625 (U.S.Colo.,1996). Although other defendants are allowed to present evidence that they used force to protect an unborn child, this defendant, and others in his class who tried to defend themselves against criminal charges by claiming that they acted to prevent the killing of an unborn child by abortion, would not be. It would be exactly analogous to allowing the defense to be raised - some 150 years ago - if a defendant claimed he interfered with the murder of a free African-American person, but prohibiting it if he claimed he sought to prevent the murder of an African-American slave whose master wanted the slave killed. Not allowing "the jury to consider evidence to support theories that there was no crime or that (the defendant) had no criminal intent, the judge, in effect, (would be) direct(ing) a guilty verdict, for (the defendant) ha(s) already admitted participation." *Zemina v. Solem* 438 F.Supp. 455, *469 -470 (D.C.S.D. 1977) A ruling in favor of the government would "withdraw from (such defendants), but no others, specific legal protection" guaranteed by the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution. *Romer*, *supra*, at 627.

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addressed solely the Fourteenth Amendment violation of the rights of similarly situated *defendants*.

23 It is possible that there are actually two discrete classes of defendants: those who claim to have used force to prevent the killing of an unborn child by means of abortion, and those who claim to have used force to prevent the killing of an unborn child by any means *other* than abortion. It is hard to see how this would change the legal analysis, except that it would involve arbitrary discrimination between members of two similarly situated classes, instead of arbitrary discrimination between two similarly situated members of the same class. Indeed, a classification based on nothing inherently distinct in the nature and behavior of the two classes, but rather on a thoroughly irrelevant extraneous factor (the raw will of the soon-to-be-killed unborn child's mother), would itself probably be an illegal classification.

EQUATING STIPULATION WITH CONFESSION VIOLATES DUE PROCESS.

The Public Defenders and others indicate it may be impossible to offer, in this case, a stipulation to the facts which is routine in every other affirmative action case not involving abortion. Apparently the mindset from overwhelming state supreme court precedent that the Necessity Defense is unavailable in abortion prevention cases "as a matter of law" is so rigid that stipulating or admitting to the alleged facts cannot be comprehended as a confession of guilt.

To the extent what they anticipate is what will happen, it is highly irregular and an eggregious violation of Due Process.

Normally, stipulations are encouraged by courts.

> Courts look with favor on stipulations because they save time and simplify the matters that must be resolved.... parties to an action can stipulate as to an agreed statement of facts on which to submit their case to the court. *West's Encyclopedia of Law*

The Necessity Defense is called an "Affirmative Defense". Wikipedia explains that the very reason it is called an "affirmative defense" is because the defendant usually must "affirm that the facts asserted by the plaintiff are correct".

> Affirmative defenses operate to limit, excuse or avoid a defendant's criminal culpability...even though the factual allegations of the plaintiff's claim are admitted or proven. In fact, the defendant usually must affirm that the facts asserted by the plaintiff are correct in asserting his own defense; hence, "affirmative" defenses. (Sorry I don't have such a clear explanation from a more official source, but it is consistent with more official sources.)

Not only MAY the prosecutor's facts be admitted without foreclosing a trial, but often facts MUST be admitted before there can BE a trial! Here is how the Journal of the American Academy of Psychiatry and Law Online puts it:

> ...an affirmative defense, such as not guilty by reason of insanity or self defense, requires the defendant to admit to the facts of the alleged crime, it nonetheless disputes the prosecution's claim that a crime has been committed. The government still must prove its case beyond a reasonable doubt." (http://www.jaapl.org/cgi/content/full/36/1/143)

Here's how a news article at TheStreetSpirit.org puts it:

> To prove oneself not guilty by reason of necessity, the defendant admits he violated the law but proves by a preponderance of the evidence that this happened: (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. (http://www.thestreetspirit.org/June%202005/arcata.htm)

Affirmative Defenses are where you tell "the REST of the story". You say, "Judge, everything the prosecutor said I did is absolutely correct. But it is only half the story. Let me tell you about a few more facts which the prosecutor wasn't in the mood to mention."

Here is how the Law Encyclopedia puts it:

> "Any one of these affirmative defenses must be asserted by showing that there are facts in addition to the ones in the [charges] and that those additional facts are legally sufficient to excuse the defendant."

Here is how Wikipedia puts it: "...an affirmative defense requires an assertion of facts beyond those claimed by the plaintiff..."

Here is how Black's Law Dictionary, 4th Edition, puts it:

> New matter [facts beyond those alleged by the prosecutor] constituting a defense; new matter which, assuming the complaint to be [factually] true, constitutes a defense to it." Carter v. Eighth Ward Bank, 33 Misc. 128, 67 N.Y.S. 300

Can a judge indeed answer, "I do not want to *hear* any other facts; ergo, there *are* no other facts. You may now make your pre-sentencing statement"? The judge would have to break a lot of well worn habits. It is routine for a Necessity Defense trial to *begin*, not to *end*, by admitting to the prosecutor's factual allegations.

The legal effect of the mitigating facts is awkward enough to put into words, that nearly opposite descriptions, of the legal effect of the mitigating facts, are correct: from "the defendant must admit his guilt" to "there is no guilt". So here are two definitions of the operation of the Necessity Defense that sound like they contradict each other. The first is found in a news article. The second is found in Black's Law Dictionary:

"To prove oneself not guilty by reason of necessity, the defendant admits he violated the law but ..." (http://www.thestreetspirit.org/June%202005/arcata.htm)

Black's Law Dictionary, 4th Edition: (listed in the alphabetical order of the Latin)

> Necessity is not restrained by law; since what otherwise is not lawful necessity makes lawful. Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. 2 Inst. 326.
>
> Necessity overrules the law. Necessitas vincit legem. Hob. 144; Cooley, Const. Lim. 4th Ed. 747.
>
> Necessity overcomes law; it derides the fetters of laws. Necessitas vincit legem; legum vincula irridet. Hob. 144.

The prosecutor has accused me of the following:

> "Count One....on or about the 31st day of May, 2009 A.D., one Scott P. Roeder did then and there unlawfully, intentionally, and with premeditation, kill a human being, to-wit: Dr. George R. Tiller, by inflicting injuries from which said Dr. George R. Tiller did die on May 31, 2009; [contrary to Kansas Statutes Annotated 21-3401(a), Murder In The First Degree, Off-grid, Person Felony, Count One] COUNT TWO and...did then and there unlawfully and intentionally place another person, to-wit: Gary L. Hoepner, in reasonable apprehension of immediate bodily harm, with a deadly weapon, to-wit: a handgun; COUNT THREE and...did then and there unlawfully and intentionally place another person, to-wit: Keith E. Martin, in reasonable apprehension of immediate bodily harm, with a deadly weapon, to-wit: a handgun; [Contrary to Kansas Statutes Annotated 21-3410(a), Aggravated Assault, Severity Level 7, Person Felony, Count Two – Contrary to Kansas Statutes Annotated 21-3410(a), Aggravated Assault, Severity Level 7, Person Felony, Count Three]

I am advised from all sides not to admit to these things, even though everyone knows I did them, and will look at me as some kind of lying clown if I seriously object that I did not. Instead, I am advised to shut up and enjoy the parade of 182 witnesses to prove what everyone already knows, whose only purpose that I can discern is to assure the public that I am receiving my constitutionally promised "right to trial by jury", even if the jury has no idea upon what issue the prosecutor and I disagree. They will know it has something to do with abortion, but if I try to say more the judge will interrupt with righteous indignation and the jury will roll their eyes at yet another rebellious outburst on behalf of some obscure point which cannot make sense.

And for what benefit to me? How does it benefit me to accept a role in a charade? No one has explained what I have to lose, that is not lost already.

I did just what the prosecutor wrote in those charges.

I am innocent, because of the additional mitigating relevant legal facts alluded to in this brief, although the factual evidence must wait for the jury.

I demand a jury trial of the contested issue of the case.

To deny these simple basic rudiments of justice would be to egregiously deny my 5th and 14th Amendment Due Process rights. Not that I feel singled out. It has happened 100,000 times before.

8. IMMINENCE. Hernandez killed Randy just before 11 am, the time when Randy had threatened to go inside and punish his wife, who was Hernandez' sister. Given Randy's past violence, Hernandez feared murder. But the Court wasn't convinced.

> "Although the term imminent describes a broader time frame than immediate, the term imminent is not without limit. The danger must be near at hand." *State v. Hernandez,* 253 Kan. 705, 861 P.2d 814 (1993)

Although the Court probably made the right decision in this case, it did so for a strange reason. Murder had been threatened that very morning. How much longer could Hernandez have waited to prevent it? Surely the justices had different reasons than the lack of "imminence" which they alleged. Such as the lack of certainty that murder would have happened, or the failure to use a less violent alternative, such as finding a plain clothes policeman to wander through the area at the threatened time. Or advising his sister to leave work and go to the police station. Here's what happened:

> The evidence revealed that the murder victim and his wife–the defendant's sister–were in the process of obtaining a divorce after considerable domestic fighting. Among other things, 3 days before the victim's death he had on two occasions yelled at his wife at their factory workplace and pushed her. The day before his death he was with her in her car yelling, banging his fists, and screaming that he would get his gun and blow her brains out.
>
> The day of the victim's death, he told his wife at work that she had until 11 a.m. that morning to make up her mind and that he "hope[d] like hell" she would make the right decision. 253 Kan. at 707. Her brother, who worked at the same factory, was informed of these episodes. He then retrieved a gun from his car and invited the victim outside to talk. When they walked outside, the brother asked the victim what was going on. When the victim

> replied that what he did to the sister was none of the brother's business and started forward, the brother shot him three times. He testified that several shots were to stop the victim from going after his sister, *e.g.*: "[T]he whole time my mind was on my sister . . . . I thought maybe he was gonna take me down and then go in [the adjoining factory] after my sister." 253 Kan. at 708-09. *State v. White, No. 95,621, Sept 21 2007*

It may be useful, in logically applying the imminence requirement, to remember its purpose. Or to recreate a purpose from common sense, if no one can remember any purpose articulated by its original creators. For example, where the "imminence" of violence after speech is a requirement for convicting the speaker of inciting to violence, Justice Brandeis created a rationale:

> ...no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If time exists for more speech, "the remedy to be applied is more speech, not enforced silence." Whitney, 274 U.S. at 372, 377.

In other words, "imminent" means not "right this second", but "too near in time for alternatives to be possible."

Similarly, we may conjecture rational purposes for an imminence requirement before an actor may set aside the letter of a law in order to save someone. In State v. White, had White acted a month earlier, that would have definitely ruled out the "lack of less violent alternatives" as a defense. It also would have exponentially added to his burden of proving that any harm at all was certain.

Following Brandeis' example, we may recreate rules out of these factors which explain *how* imminent the harm must be. Like "the harm must be imminent enough to foreclose less violent alternatives." Or, "The harm must not be so distant that its certainty is impossible to prove."

Or as I have proposed, it is the closing of the window of opportunity to prevent serious harm that must be near in time, or imminent.

"Imminence" is so vaguely defined in some case law that if you broke down your neighbor's door to save him from a fire, some prosecutor would say you should have waited until the fire had actually started burning his hair. You should at least have waited until the fire was in the room! You should have waited until unthinkable harm was at least *that* "imminent".

But if anyone cares about saving lives, which is supposed to be the purpose of the Necessity Defense, then "imminence" needs to be defined in a way that permits lives to be saved *when there is opportunity* to save lives. Requiring Scott Roeder to wait until the next day when the abortions were resuming only requires Scott Roeder to wait to act until the window of opportunity for acting has closed, because Tiller's office was a fortress. Imminence therefore should be defined as the nearness in time to the closing of the window of opportunity to prevent serious harm. Scott Roeder's window of opportunity was extremely brief. He saved lives the only time he could.

Certainty of the inevitability of the attack and the futility of lesser means of defense are what are essential to, and lie at the heart of, the justifiability of using force in defense of self or others. Thus, the following scenario is posited by LaFave & Scott, §5.7(d), 656, *citing* 2 P. Robinson, Criminal Law Defenses § 131(c)(1)(1984):

> "Suppose A kidnaps and confines D with the announced intention of killing him one week later. D has an opportunity to kill A and escape each morning as A brings him his daily ration. Taken literally, the *imminent* requirement would prevent D from using deadly force in self-defense until A is standing over him with a knife, but that outcome seems inappropriate. *** The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively."

Since neither Kansas statute nor case law objectively defines "imminence", its definition must be judged by reasonable persons on the jury. Defendant will argue that measuring "imminence" in minutes is mindless legalism which may or may not make sense in a given situation. To say, for example, that murder must be less than 10 seconds away before preventing it can be justified (as nonlegal writers have said), is inconceivable as a moral principle but serves well as an excuse to condemn unborn life savers, since unborn lives cannot be saved under such a restriction.

Nearness in time to the harm prevented is not an useful criteria of imminence, to anyone who cares about saving lives. But there are two sensible tests: (1) the inevitability of harm if it is not prevented, and (2) nearness in time of the *window of opportunity* to prevent the harm.

Surely the Kansas Supreme Court justices will agree that had Hernandez' *window of opportunity* to save his sister had been about to close, and had there been absolutely certainty that had not Hernandez acted, his sister would have been brutally murdered, and had there been evidence that Hernandez could not have saved his sister any other way, the Court would have given Hernandez relief.

Measuring "imminence" only as the seconds between prevention of harm and the coming harm, without considering the *window of opportunity* to prevent harm, is a groundless, mindless legalism whose only purpose can be to accuse those who save lives. If the Court cares about saving lives, it must adopt a sensible test of "imminence" that permits lives to be saved.

In this case, defendant will be able to prove easily that he took the only window of opportunity available, and that had he not acted, the killing of hundreds of babies every week would have continued with undeniable certainty, as it had for decades.

IMMINENCE PRECEDENTS

Stevens was a narcotics case where the defendant claimed that he had been coerced into attempting to sell drugs. *U.S. v. Stevens*, 985 F. 2d 1175, 1182. The underlying conspiracy to sell appears to have lasted at least 10 months. Notwithstanding this fact, the trial court permitted the defendant to present all his duress evidence to the jury, and in fact instructed the jury on the duress defense. While the jury understandably did not find it credible, the fact remains that the duress defense was available *as a matter of law* to a defendant who claimed, at most, a generalized fear which lasted ten solid months, during which time he was not said to have been living under the physical control of the man he accused of coercion, and thus had ample opportunity to seek help from the police, flee, or otherwise avoid committing the offense. It was properly left *to the jury* to assess the credibility of his claim that he was under duress for ten months. The jury evidently concluded that stretching the concept of imminence out some ten months, during which time he could easily have exercised alternatives to committing a crime, did indeed stretch that concept beyond the breaking point. The crucial thing to note is that it was the *jury* which made this finding, not the trial court acceding to a pre-trial

prosecutor's motion. *Stevens* demonstrates that at least in that jurisdiction, a claimed "imminence" spanning 10 months is adequate to allow a duress defense to go before a jury, and indeed to generate jury instructions.

The facts in the instant case far more strongly support the availability of the defense, insofar as both specificity of the threat and imminence are concerned. That the threat was specific cannot be denied. Abortions are almost sui generis in this respect; with the exception of a frank contract murder, there are almost no threats as definite and specific. Indeed, the threat from an abortion is more specific than a contract murder, since - as the defendant can readily prove - an abortion is *always* scheduled in advance for a precise time on a precise day, while in a typical contract murder, the act is agreed upon, but there is considerable doubt, at the time of the contract, when exactly the murder will take place. And there is less certainty that it will succeed. The defendant can offer evidence that he reasonably believed, and that it was true, that Dr. Tiller had been killing unborn children on a very precise and predictable schedule for many years in a row. He can further prove that he reasonably believed, and that there were in fact, several abortions scheduled for the morning after the shooting. That is, at least a verbal contract had been made between the mother and Dr. Tiller's agent contracting for the killing of her unborn child at a particular place and time. The threat was specific.

As to imminence, the harm that was threatened was only *hours* away. The defendant will provide evidence that less than one day later, he would have been killing unborn children. But more importantly, defendant will prove that the *Closing of the Window of Opportunity* for saving lives was only minutes away, if not seconds. It is for a jury to decide whether, at the time of his conduct, he had a well founded fear of a specific, imminent threat to an innocent third party.

Several precedents agree in allowing various forms of justification defenses to go to a jury when the harm was not *instantly* imminent. Imminence is to be understood in the larger context of the facts surrounding the charged offense. This is particularly true when the threatened harm involves a contract to kill. This is a continuing threat of harm, *always* imminent or "impending" while the contract

stands.

In *U.S. v. Gomez* 92 F.3d 770, *775 -777 (C.A.9 (Cal.),1996) the court vacated a felon-in-possession conviction. Gomez had voluntarily informed the government that he had been solicited for murder-for-hire by a fellow inmate, Mir. He became an informant for the government, but the government mistakenly revealed his name to Mir, whom it was prosecuting for trying to murder witnesses in another case. Mir put out a contract on Gomez' life. Gomez repeatedly sought help and protection by legal means, going to federal and local police officials, to Churches, and even to the media, but to no avail. Finally, Gomez provided himself with a gun to defend himself. When the government discovered this, it prosecuted him. The trial judge refused to permit a justification defense, on the grounds that, as a matter of law, "the danger was not immediate enough because no one was holding a gun to the defendant's head, most of the threats were received over the phone or through other people, and all were two or more days old." *Id* at 775.

On appeal, the government pressed its claim in its brief that "imminent" must always mean something like "right this second": "The defendant contends in his brief that when there is a professional contract out on someone's life and there is no possible means of escape, "the threat is always 'immediate.' " A.O.B. 15.

The defendant argued in his appeal brief that "there is no question but that there existed, and most likely still exists, a contract out on the life of Mr. Gomez... *Such a contract causes the threat to be ever present, immediate*. It is totally illogical to force a citizen, under these circumstances, to wait until it is too late." UNITED STATES OF AMERICA, Plaintiff/Appellee, v. Steven Paul GOMEZ, Defendant/Appellant. ()(emphasis added) The defense also observed:

> The trial court has ruled basically that in order to be "immediate," the killer must be coming through the window before the citizen can arm himself. The absurdity of such a notion is exacerbated by the present circumstances where there is an actual contract for a professional "hit" out on the citizen's life. A professional killer coming through the window would in all likelihood know what he is doing and arming one's self at that fatal moment would indeed be a futile act. All that the Appellant is asking the Ninth Circuit is for the opportunity to present the evidence to a jury of his peers for their independent decision. *U.S.*

v. Gomez, supra

The 9th Circuit agreed with Gomez and reversed. It reasoned that Gomez was dealing with a man, Mir, who "had amply demonstrated his willingness to kill...by hiring... a hit man." *Id* at 776. He had "already given the order to murder witnesses, made all necessary arrangements and even made a down payment on a contract." *Id*. "Gomez thus faced more than just 'vague threats of future harm'; he 'had reason to believe that [Mir] would carry out his threats.'" *Id*. The court carefully distinguished more ordinary cases where imminence has a different application:

> "In a barroom brawl, for example, once one of the parties leaves, there is little continuing risk of harm....Here it was unlikely Mir would cool off and lose interest in Gomez. Gomez had already received numerous threats over an extended period of time; that he hadn't been threatened in the last hour or the last day didn't mean the danger had abated. Mir obviously meant business." *Id*.(internal cites and quotes omitted)

Moreover, "Mir's existence and murderous intentions were well known to the authorities," *Id* at 776, who nonetheless declined to intervene to protect a defenseless person. He was privileged to act "because a history of futile attempts revealed the illusionary benefits of the alternatives." *Id* at *777 -778 *See also*, *U.S. v. Gant* 691 F.2d 1159, *1164 (C.A.Tex.,1982)(articulating same principle of futile attempts)HILL

The court concluded that, "(u)nder the facts alleged by Gomez, the danger was present and immediate enough to satisfy this element of the justification defense." *Id* at 776-777.

There are striking applications to the instant case. Like Gomez, this defendant was dealing with a menace coming from someone who had amply demonstrated his willingness to kill over the course of some 17 years of regularly scheduled killings of unborn children. Like Gomez, the defendant knew that the murderous intentions of Dr. Tiller toward the children were well known to the authorities, who had nonetheless militantly refused to protect these defenseless persons. Like Gomez, the defendant had a long history teaching him the futility of attempts by lesser means to save identically threatened (albeit different individual) unborn children. Like Gomez, the defendant was aware of the fact that contracts had been entered into under the terms of which Dr. Tiller had once again agreed to kill several more

children a few hours hence, contracts no one has suggested he was in the habit of breeching. All necessary arrangements had been made. This was far more than a vague threat of future harm. He had every reason to believe that Dr. Tiller would carry out the threatened harm. It was highly unlikely that Dr. Tiller would lose interest in his proposed course of action. Like Mir, Dr. Tiller obviously meant business.[24]

Gomez is far from being the only case where "imminence" is understood to be a flexible, context-specific, and relative element. In *U.S. v. Haynes* 143 F.3d 1089, *1091 (C.A.7 (Wis.),1998), the court noted that "the idea behind the 'imminence' requirement [is that] if the threat is not imminent, a retreat or similar step avoids injury."[25]

In *United States v. Contento-Pachon,* 723 F.2d 691 (9th Cir.1984), the court reversed a conviction because the trial court had abused its discretion in granting a government motion in limine like the one now before this Court. The defendant smuggled drugs under duress, he said, because he had been threatened three weeks prior *Id* *696 (*Coyle, dissenting*) by someone who

> ...had gone to the trouble to discover that Contento-Pachon was married, that he had a child, the names of his wife and child, and the location of his residence...*Id* at 694.

The District court ruled that the threats were not immediate enough because "they were conditioned on defendant's failure to cooperate in the future and did not place defendant and his family in *immediate* danger", *Id* at 694.

Although the defendant had offered nothing to substantiate his claim that he was under surveillance for at least part of that time, the appellate court ruled

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24 By contrast, if the threat is, so to speak, "stale" as opposed to ongoing, it cannot be found to be imminent enough. *U.S. v. Wofford* 113 F.3d 977, *981 (C.A.9 (Cal.),1997)("last specific threat against [defendant] was at least five months old, and nothing indicated it was continuing and 'present'.") There was nothing stale about the threatened harm to the unborn children at issue here.

25Some commentators have suggested that to "interpret 'imminence' to mean 'immediacy' undermines the rationale behind the defense. Once a harm is recognized as inevitable, the necessity defense allows the commission of the 'lesser evil' if it is the only effective means to fend off the greater harm. Requiring immediacy places the actor in a catch-22 situation; the longer the actor waits in order to satisfy the immediacy requirement, the less likely the action reasonably can be expected effectively to avert the harm, thus failing to satisfy another element of the defense. *Applying the Necessity Defense to Civil Disobedience Cases* 64 N.Y.U. L. Rev. 79, *97

> (t)hese were not "vague threats of possible future harm", and the threatened harm was immediate enough to ground a prima facie claim of duress[26]. *Id* at 694.

In *U.S. v. Haney* 287 F.3d 1266, *1273 (C.A.10 (Colo.),2002), a prison inmate was allowed to present a third-party duress defense to a jury although the threat had occurred two weeks prior to his conduct. The imminence of the threat was left to the jury.

In *U.S. v. Kpomassie* 323 F.Supp.2d 894, *900 -901 (W.D.Tenn.,2004), where a defendant was arrested for creating a disturbance on a flight to avoid deportation for fear of persecution in his home country to which he was being returned, the government urged against allowing a necessity defense because the

> Defendant cannot show that he was under any immediate or non-generalized threat, because his flight to Togo had stops in Atlanta and Paris, and because no Togolese government officials were present during Defendant's alleged commission of the crime.

The court was unpersuaded:

> Truly, were Defendant to have begun his flight, in the custody of DHS officers, a ball would have been set in motion that would have ended inexorably in his return to Togo. That any persecution of or danger to Defendant was not physically present at the precise moment when he allegedly caused the disturbance leading to his removal from the airplane does not preclude a prima facie showing on this prong....Whether the evidence is sufficient to prove imminence is a question for the jury, as the Court cannot say as a matter of law that the unlawful threat to Defendant was not immediate**.** *Id*.

The court referred to *U.S. Dagnachew,* 808 F.Supp. at 1521, which, it stated, held that a

> "successful presentation of the necessity defense required the defendant to show persecution or personal harm awaiting the defendant upon deportation, thereby effectively *replacing the imminence prong* of the defense", *Id*

When defendants claiming "Battered Women's Syndrome" plead duress, state and federal courts have increasingly understood that the concept of imminence, while an element to the defense, is not always to be understood to mean "right this second".

It is increasingly understood that a battered woman lives under a *continual* threat, that her abuse has established "a dynamic where the threat of abuse hovers over every interaction between the individuals, even if such threat is not always articulated" *U.S. v. Marenghi* 893 F.Supp. 85, *95

26 To the extent that any given circuit's elements of duress or necessity defenses include an imminence requirement, that requirement is always treated in the same analytical manner, regardless of the title of the defense.

(D.Me.,1995), and that she may be so effectively dominated as to be psychologically incapable of meeting the "reasonable alternatives" or "opportunity to escape" prongs of various justification defenses. She may also be incapable of meeting the "imminence" prong, if that prong is wrongly understood to mean "right this second", such that she may still assert a defense of duress where she obeyed a command from her tormentor to commit a crime, even though there was no overt threat at that particular moment. *Marenghi, supra*. See also, *Moran v. Ohio* 469 U.S. 948, *954, 105 S.Ct. 350, **354, 83 L.Ed.2d 285 (U.S.1984)(*Brennan, dissenting* from denial of cert in case where woman was allowed to assert self-defense although she killed abusive husband while sleeping); *McNeil v. Middleton* 344 F.3d 988, *992 (C.A.9 (Cal.), 2003)(reversed on other grounds, *Middleton v. McNeil*, 542 U.S. 433, 124 S.Ct. 1830, 158 L.Ed.2d 701)(woman who killed abusive husband while he was cooking at stove allowed to argue self defense to jury)

In some State legislatures, the understanding of imminence as inextricably tied up with knowledge of inevitability and lack of reasonable alternatives has been expressly codified into the defense. For instance, the comment appended to the Missouri statute states:

> [I]t must be remembered that what constitutes 'emergency measure' and 'imminent' does not depend solely on the interval of time before the injury sought to be prevented will occur. Additional circumstances of the particular fact situation must also be evaluated. Thus, if under the circumstances, the mere passage of time is such that a reasonable man would perceive no viable alternatives to his present course of conduct, the fact that the injury sought to be prevented will not take place for some time hence . . . will not prevent the use of the defense .Mo. Ann. Stat. ' 563.026 (Vernon 1979) (comment to 1973 proposed code). *Cited in, Applyinng the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, *112 FN 115

It is not surprising that courts and legislatures understand imminence in this way. The Supreme Court has spoken definitively on the precise meaning of imminence:

> The meaning of this [imminence] timing restriction is plain: An endangerment can only be "imminent" if it "threaten[s] to occur immediately,"....(T)his language implies that there must be a threat which is present *now,* although the impact of the threat may not be felt until later.".*Meghrig v. KFC Western, Inc*. 516 U.S. 479, *485-486, 116 S.Ct. 1251,**1255 (U.S.,1996) (emphasis in original) (internal cites and quotation marks omitted)

In *Meghrig*, the Supreme Court cited approvingly to *Price v. U.S. Navy* 39 F.3d 1011, *1019

(C.A.9 (Cal.),1994), which unequivocally stated:

> A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm... *citing, Environmental D efense Fund, Inc. v. Environmental Protection Agency,* 465 F.2d 528, 535 (D.C.Cir.1972)(internal quotes omitted)

In yet another context, the Supreme Court has found that "on the eve of" an event is "imminent" to it. Speaking of a lawyer making prejudicial public statements "imminently" before trial, the Court declared:

> A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. *Gentile v. State Bar of Nevada* 501 U.S. 1030, *1044, 111 S.Ct. 2720, **2729 (U.S.(Nev.),1991)

In a recent Supreme Court case, dealing with the allocation of burden of proof in a duress defense, Justice Breyer noted in his dissent the inextricable link between imminence and alternative recourses for avoiding the harm:

> A defendant may find it difficult, for example, to show duress where the relevant conduct took place too long before the criminal act...That is because the defendant must show that he had no alternative to breaking the law....And that will be the more difficult to show the more remote the threat." *Dixon v. U.S.* 126 S.Ct. 2437, *2454 (U.S.,2006)(*Breyer, dissenting*)

U.S. v. Bailey 444 U.S. 394, *410-411, 100 S.Ct. 624,**635 (U.S.Dist.Col.,1980) also directly linked imminence to reasonable alternatives. "Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, *given the imminence of the threat*, violation of § 751(a) was his only reasonable alternative."(emphasis added)

In short, many federal courts, including the Supreme Court on several occasions, as well as State Courts and legislatures, have rejected the notion that imminence must always mean "right this second". Consonant with the reasoning in *Mehgrig, supra,* the impact of the threat to the unborn children might not have been felt until a few hours later, had the defendant not acted, but the threat was "present *now*".

Conceptually, this understanding of imminence makes perfect sense. Imminence is not something which is capable of being objectively quantified, and of standing alone. It is rather the *ordinary route* by which a person is able to become subjectively certain that the danger is genuine and inevitable, *and* that he has no choice but to respond with force if he would avert the harm to himself or another.[27] It is, however, not the *only* route, and in some cases "imminence" in the sense of "right now" becomes irrelevant. Imminence of danger is inextricably bound up, even theoretically, with the notions of inevitability, subjective certainty on the part of the intervenor, and opportunity to choose lesser means. If one attempts to isolate and quantify imminence when looking at a given danger, one quickly becomes engaged in a reductio ad absurdum. Is it imminent enough if an attack is one second in the future? Two seconds? Five seconds? Ten seconds? Ten minutes? Ten hours? Taken in pure isolation, the only way to set a time limit on imminence would be some purely arbitrary standard.[28]

If someone sets the time at, say, ten seconds, and is asked why he thinks that is a good number, he will *necessarily* have to respond that it is because that is the time at which it becomes certain that the attack is really going to happen, and that that is the time at which it becomes clear that there is no other recourse but forceful intervention. There is no other possible answer that does not depend on caprice or whimsy.

But of course the important thing is not the ten seconds. The important things are the intervenor's subjective certainty that the attack is indeed inevitable, and the fact that no reasonable and effective options to the force (or whatever conduct is at issue) remain, if the harm is to be avoided. And those things need not *necessarily* occur at 10 seconds - or 10 hours, or 10 days - prior to the threatened harm. In cases, such as those discussed above, where the certainty, and inevitability, and lack of

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27 The cases cited above have focused more on the latter issue, but clearly the defendant's reasonable belief is equally inextricably related to imminence in an "ordinary" defense of self or others scenario, as is expressly stated in the Missouri justification statute.

28Moreover, it would be an impossible standard to meet, even theoretically. It is impossible to know in advance, even if a deranged man is waving a gun around and threatening to shoot, whether his act will take place 5 seconds from that time, or 10 minutes, or never. Some deranged men never do pull the trigger.

alternatives can be established absent "right this very second"-type imminence, courts have not hesitated to find that even months of time between the alleged threat and the charged conduct may present imminence as a triable issue of fact for a jury.

One final misunderstanding about imminence should be addressed, which also pertains to the next section about Alternatives: it has been said, too often, that there is no urgency about saving lives scheduled to be slaughtered an hour later, or a day later, since there are alternatives like lobbying Congress to pass a Personhood Amendment, or electing Presidents who will appoint justices ready to overturn Roe.

Defendant appreciates all who dedicate their lives to these important efforts to save babies who will be scheduled to be slaughtered years later, but that reasoning shows no love for the babies whom defendant saved, who would have been slaughtered *this* year. George Tiller publicly stated he had slain 60,000 infants over his 39 years as an abortionist. (He began in 1970, following in his father's footsteps, 3 years before it was legal.) That means he killed 1538 a year, or 128 a month. That means had not defendant offered his freedom (indeed he did not know if he would be giving his life also) for Tiller's victims, Tiller would have killed 961 souls just in the time between Tiller's death and defendant's scheduled trial. 961 souls, and the hundreds following, are a lot of innocent human beings not to care about.

ALTERNATIVES.

Many will say there were alternatives. I should carry a sign, which of course I have, often. I should write legislators, which I have. I should do everything but actually save the lives of those already scheduled to be slain, which Proverbs 24:10-12 commands me to rescue.

"...the defenses of duress and necessity will not apply where the defendant had reasonable, legal alternative to violating the law" stated *U.S. v. Bailey*, 444 U.S. 394 (1980).

Necessity was denied to "abortion clinic protesters", who were said to have had lawful means of educating women, *U.S. v. Turner*, 44 F. 3d at 902, or "persuading women not to have abortions", *Zal v. Steppe*, 968 F. 2d at 929.

Actions which might have served to educate women and persuade them not to have abortions would have saved only a fraction of the souls defendant saved. After many heartbreaking years of educating and persuading women, defendant directly acted to guarantee the safety of the children. No cases even remotely demonstrate that the defendant had reasonable legal alternatives that would have guaranteed the safety of those particular threatened unborn children. All they demonstrate is that there are legal means generally to educate women and dissuade them from abortions, which is not at issue here.

Actually the *Bailey* cite above applies poorly to abortion prevention cases. It is about prison escapes. And yet even in that context, with alternatives raining down out of the sky like stimulus promises, the Court left the door open a crack:

> "Clearly, *in the context of prison escape*, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of §751(a) was his only reasonable alternative." *Id* at 410-411

The Court somewhat wearily declined to extend its analysis to the contours of necessity defenses generally. *Id*.

Of course, to whatever extent "alternatives" is a factor in the instant case, it is purely a fact issue for the jury. No legal theory offers to substitute itself for this fact inquiry.

Should defendant be challenged to do so, he is prepared to demonstrate that legal, less drastic means than disabling the doctor, far from being reasonable alternatives which would still allow him effectively to avoid the harm, were only rarely successful. Trying to counsel the women, while a most desirable activity in general, could not begin reasonably to guarantee the safety of the victims, whose mothers were free simply to walk away and ignore his pleas, and were ordinarily hustled beyond his reach by angry boyfriends and escorts, and who, under increasingly restrictive laws, were often entirely

inaccessible to him for counseling purposes. Calling the police was of course out of the question as a reasonable alternative, as it is incontrovertible that the police would refuse to interfere with the killing of the unborn children.

Lesser *unlawful* means were also inadequate to avoid the harm. A clinic blockade, for instance, has some chance of being successful in avoiding the killing of unborn children for at least a day, but it depends for its success upon a large group of persons being willing to participate. Since the passage of the FACE Act, virtually no one has been willing to accompany the defendant on such a blockade. A solo blockade would obviously not have avoided the harm, the killing of those particular children, but would probably have been merely have an empty symbolic gesture, as the defendant would have been promptly arrested, and the whole "blockade" would have lasted no longer than it took for the police, and possibly Federal officials, to come and drag him off to jail.

In *U.S. v. Hill* 893 F.Supp. 1044, *1047 -1048 (N.D.Fla.,1994), the court stated:

> But a lurking question may remain as to whether such legal alternatives are viable alternatives to the perceived imminent harm.....If the identified alternatives are illusionary, then there may well be no legal alternative. A defendant, in demonstrating that he had no reasonable legal alternative, must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative....In the case of abortion, the efficacy of legal alternatives could arguably be questioned as to the likelihood of their success. As a general proposition, evidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury. (internal cite and quotes omitted)

Finally, it is crucial to remember that someone who acts in defense of others is permitted to do in defense of those others *at least* all that would have been permissible for the threatened party to do in self defense. It flies in the face of all law, reason and humanity to state that, if an unborn child *could* somehow defend himself, he would be committing an unlawful act if he did defend himself against an abortionist. Who does not wish that little Connor Peterson could have somehow shot Scott Peterson before he had the chance to butcher him? Is there anyone who would say that the baby had acted *criminally* or *unlawfully* in doing so, that he had no *right* to self defense? No one would posit such

arrant nonsense.

It simply cannot be argued without falling into rank absurdity that little Connor Peterson would have had the right to defend himself, and therefore an intervenor would have had the right to act in his place and defend him, yet also claim that a child menaced by an abortionist does not have the identical right to self defense, and thus to have an intervenor defend him. Is the prosecutor prepared to say that a child has *no right at law* to defend himself when it is his own mother who has contracted for his killing, and *for that reason*? "That way madness lies"[29] .

From the point of view of the intended victims of Dr. Tiller, whom he had contracted to kill in a mere few hours' time, had the defendant merely approached their mothers and attempted to educate or dissuade them in the few seconds' time he might have had with them, or organized a legal protest march, or written a well-worded letter to his Congressman about the matter, the defendant would not have been doing *nothing* effective to protect them. If they could speak, they might well have bitterly reproached him for claiming that he was trying to defend them, but doing nothing more than make clearly futile gestures. If the defendant wanted to make *sure* that those children were not killed the morning of June 1, 2009, he had to do something far more drastic, and he was *entitled*, morally and at law, to do whatever they would have been permitted to do to defend themselves.

What, previously, has not been tried to stop Dr. George Tiller? Yet what has succeeded? He was regularly picketed over the years. Thousands came in the summer of 1991 and submitted to arrest outside his clinic, but a federal judge resorted to unprecedented sentences and strategies to reopen the clinic. On 2001, the tenth anniversary, thousands more protested. Two grand juries were convened after citizen-led petition drives, but prosecutors chose the least winnable of the charges and he was acquitted. What other doctor's medical license has hinged on a successful political campaign against a prosecutor (Phil Kline) ready to act against him, along with large contributions to the county prosecutor and the state's governor? Yet none of that was enough to stop Tiller.

29Shakespeare, King Lear, Act III, Sc.iv.

Blood made Tiller rich! A reasonable estimate is an average $5,000 per abortion, including the fees for his "funerals" and "baptisms", in which he would pay his preacher to mix a bit of amniotic fluid from his victims with "Holy Water". At $60,000 abortions, that comes out to $300,000,000 over the years, or just under $8 million a year. Much of that went to feed his political champions, including my prosecutor, Nola Foulston. (I mention this as common knowledge, it having been the subject of newspaper headlines.)

Governor Sibelius was among the recipients of Tiller's patronage. Tiller's money replaced the Kansas attorney general, Phil Kline, who had dared prosecute him. Tiller freely used the very abortion procedure which made Supreme Court justices wretch. What realistic hope awaited down the political road?

In 1993, Rachelle Shannon thought, "if I can get close enough to put a bullet in each arm, surely that will be enough to keep Tiller from ever doing another abortion, and killing him will be unnecessary." But *even that wasn't enough!* Tiller testified at trial how the two bullets struck his arms at such an angle that in each arm, the bullet hugged the bone, spiraling around it, cleaving muscle from bone – and yet even with all that pain and disability, he could not even take one day off to recuperate. He was back the very next day. He testified that to reduce the pressure, he would take breaks where he would put his hands up, on the door sill. Then he would go back to "work".

Arguing that Scott should have waited until the medical board finished – which few expected would finally stop Tiller, or until Congress passed a Personhood Amendment, is about the same as arguing that Scott could have waited for Tiller's abortions to be stopped by his natural death. It shows little regard for the hundreds Tiller killed every month of waiting for these remedies. By the time Roeder's trial begins, if it begins January 11, over 2,000 babies will not have been killed by Dr. Tiller who would have been, had Scott not acted.

Defendant should have no difficulty, once the "harm" of Tiller's abortions is established, proving he had no alternative to killing Tiller.

10. THE CONSTITUTION EXPLICITLY PROTECTS THE UNBORN

The previous arguments do not challenge Roe's legitimacy but in fact accept it, arguendo, for its confirmation that the fact question of the Necessity Defense is the jurisdiction of juries, contrary to the unanimous consensus of state supreme courts. Some of the arguments use Roe to establish the consensus among expert witnesses that, as a matter of fact, the post viability babies killed by George Tiller are "persons in the whole sense" with full Constitutional rights. Even the Laci's Law argument accepts, arguendo, Roe's legitimacy from its inception through Laci's Law's passage.

The following argument challenges Roe as unconstitutional from its inception.

The Constitution was written for "ourselves and our posterity", according to its preamble. Thus half of the purpose of the Constitution is to protect the rights of "our posterity".

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, **provide for the common defense,** promote the general welfare, and **secure the blessings of liberty to ourselves and our posterity,** do ordain and establish this Constitution for the United States of America.

"Posterity" means "Descendants; children, children's children, &c. indefinitely" according to Noah Webster's original 1828 dictionary. This obviously includes children already born, children conceived but not yet born, and children not yet conceived. "Liberty" obviously presumes life, since life is required before "the blessings of liberty" can be of any benefit.

All the benefits of the Constitution are to be as fully conferred upon "our posterity" as upon "ourselves", according to this preamble. Just as we "ourselves" have the right not to be dismembered by government-protected doctors without due process of law, even so our posterity have that right. Just as we "ourselves" have the right to defend ourselves and to receive assistance doing so, even so our posterity have a Constitutional right to receive assistance in their self-defense against those who would kill them without due process of law.

This requirement of Due Process of Law is not satisfied by a law saying a certain group of

people may legally receive "cruel and unusual punishment" who are not even charged with a crime. Due process of law means fairness. It requires laws applied equally to all. Not just to all who are born, but, as the Preamble specifies, those also who are unborn.

Roe finds the mother's right to an abortion in the "penumbra" of the Constitution. But found in the clear words of the very purpose of the Constitution are the rights of our "posterity" to not be slain without Due Process of Law, and to self defense from the doctors hired by their mothers.

It does not weaken this argument to observe that the Preamble does not specify that our "posterity" are "persons", "persons in the whole sense", "homo sapiens", or "human beings" while in the womb. Even if our "posterity" were in fact, and "legally cognizable" as, tomatoes during their period of gestation in the womb, they enjoy Constitutional Protection from the time they enter it, according to the Preamble.

"A common defense" (for "our posterity") is an explicitly listed purpose of the Constitution. In addition to meaning military readiness. it also means, insofar as federal involvement is appropriate, defense against criminals, and against any who would do violence against "ourselves and our posterity". If we "ourselves" have a right to be assisted in our self defense when a Barbarian attacks us with a tomahawk while we are helpless on our sick bed, "our posterity" have a right to assistance when a doctor attacks them with a scalpel, while they are helpless in the womb. Just as I have a Constitutional right to defend you as you would defend yourself if able, I have a Constitutional right to defend "our posterity" not yet born.

If it is argued that aborted babies are not "our posterity" because they are aborted before they can be born and take their place in our family trees, there are two answers: (1) It is common to recognize stillborn babies on tombstones, and miscarried babies are often given names, grieved over as lost family members, and noted in family records. Even George Tiller sold "baptisms" of and funerals for his victims; (2) the unfortunate fact that some of our posterity will be murdered does not erase them from being our posterity. All of our posterity will die, (unless Jesus returns first), which does not cross

them off our family trees.

Roe v. Wade did not deny that the unborn are "persons in the whole sense", but said whether that is true was unclear to "the judiciary"; while the Preamble could not say more clearly that the unborn have the same Constitutional Rights which we "ourselves" have. The clear statement of the Preamble is challenged by a murky statement in Roe. A clear statement should not be counted as challenged by an unclear statement, and the Preamble should not be counted as overturned by a "prenumbra". If any challenge to the Constitution can be imagined, a huge burden of proof must be demanded of its challenger. But this challenger, Roe, offers no proof whatsoever, being "in no position to speculate" whether the unborn have the Constitutional rights established by the Preamble.

Roe conflicts with the Constitution, not backed by any law, reasoning, or evidence, but apparently in ignorance of the conflict. Since stare decisis favors laws which have been on the books the longest, and the Preamble is six times as old as Roe v. Wade, Roe must now be acknowledged as never having been Constitutional.

Conclusion: The first Chief justice of the Supreme Court, John Jay, said

> "[I]t must be observed that ... you [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. ... [B]oth objects are lawfully, within your power of decision." State of Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

Judge's instructions today may deny Jay's ruling that juries have a right to judge the law, but they always acknowledge that juries still have a right to judge the facts. Therefore, to rule for state's In Limine motion, to withhold from the jury's knowledge the only contested issue of this case, which is a fact issue, will, beyond all the errors detailed heretofore, violate the most basic standard instructions of virtually every judge in America today, including the instructions this court will surely issue. The state's motion invades the province of the jury and attempts to remove a statutory defense from this defendant. For these reasons, the State's motion must be denied.

As Scrooge, shown the suffering festering with the blessing of his apathy, shown the joy cast roughly aside by his own selfishness, begged "Spirit, tell me these judgments are but shadows which it is not too late for me to erase", I pray along with God's spiritual army that the terrible natural consequences prophesied for crimes as great as America's need not fall any harder than they already have. I pray America will turn from kicking the roses barefooted (Acts 9:5) to cradling the bruised but still fragrant roses, allowing the bloodshed to stop on all sides.

What suffering has been the natural consequence of hearts hard enough to slay 50 million of our own offspring! Unfaithfulness. Divorce. Domestic violence. Child abuse. Crime. An economic black hole at hand, created by political corruption added to a depleted workforce from abortion and the turning away of immigrant labor. Are we bloody enough yet to be ready to stop kicking?

"Every child a wanted child", indeed! Every mother was once a loving mother, and parents learned how to love each other. In 1890 the divorce rate was 1%. "God is love" used to be a reason to *love God,* not an argument against God's existence raised by a culture whose vast technology cannot approach the intelligent design found in a single cell of God's gifts to us!

Yet today 50 million of our own posterity are crushed and flushed with but a furrow of Uncle Sam's brow, while the 4th flushing of a baby crusher (besides 4 other fatalities) makes Uncle Sam jump up and down and scream with rage that a few thousand of those millions were spared!

It is not my prayer that a single future Christian will feel the pressure I did to intervene in the slaughter of America's most innocent. But rather, that America's judiciary will update its abortion prevention precedents to conform with the vacation of "constitutional protection" of abortion in *Planned Parenthood v. Casey,* 1992, the "collapse" of *Roe* through the 2005 establishment of the unborn as "homo sapiens", the constitutional protection of the unborn specified in the Preamble for six times as long as *Roe* has existed, and will stop denying the constitutional rights of Due Process and Trial by Jury to champions of the unborn.

It is not my vision that America's judiciary will walk still in the dark footsteps of *Dred Scott*

until reversed by a civil war, carrying this scar until America ceases as a nation, but that this time courts will reverse the evil which they initiated and lead our nation in righteousness.

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Scott Roeder, Defendant, pro se (only with respect to the submission of this brief)

Proof of Service: Two copies are sent for the judge and the prosecutor to

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