IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	**CR. NO. 3:23-00117-JFA-1**
	)	
v.	)	
	)	**MOTION FOR ALLOWANCE**
STEVEN CLARK LEFEMINE,	)	**OF DEFENSE OF NECESSITY**
	)	
DEFENDANT.	)	
	)	

MOTION FOR ALLOWANCE OF DEFENSE OF NECESSITY

NOW COMES pro se Defendant Steven Clark Lefemine, and respectfully requests the Court for Allowance of a Defense of Necessity at trial.

"The Criminal Defense of Necessity"

"The defense of necessity may apply when an individual commits a criminal act during an emergency situation in order to prevent a greater harm from happening."

"[A]pplication" of a defense of necessity "is limited by several important requirements:"

1) "The defendant must reasonably have believed that there was an actual and specific threat that required immediate action"

2) "The defendant must have had no realistic alternative to completing the criminal act"

3) "The harm caused by the criminal act must not be greater than the harm avoided"

4) "The defendant did not himself contribute to or cause the threat"

[Source: JUSTIA, "The Necessity Defense in Criminal Law Cases", *Last reviewed October 2023* https://www.justia.com/criminal/defenses/necessity/]

On November 15, 2022, Defendant "believed that there was an actual and specific threat that required immediate action" at Planned Parenthood, 2712 Middleburg Drive, Suite #107, Columbia, SC 29204: the imminent intentional destruction of human life. Defendant had "no realistic alternative" to his act of interposition. Any "harm" caused by Defendant's act of interposition was far less than the much greater harm of the intentional destruction of human life in the womb Defendant was seeking to avoid. As expressed by South Carolina Supreme Court Justice John Few in Opinion No. 28127, Filed

January 5, 2023, "In other words, if the State were to pass a total ban on abortion – despite a complete invasion of a pregnant woman's right to privacy – the privacy invasion might be reasonable under article I, section 10, because "human life" has no countervailing interest; human life simply must be preserved." [Planned Parenthood South Atlantic, et al. v. State of South Carolina, et al., p. 77 (Pages 1, 2, 5, 75-81, 90, http://christianlifeandliberty.net/SC-Supreme-Court-Opinion-Heartbeat-Law-Jan-5-2023-pages-1-2-5-75-through-81-90.pdf)]

[Exhibit A]

Indeed, "human life" has no countervailing interest. Any "harm" caused by Defendant's act of interposition was far less than the much greater harm of the intentional destruction of human life in the womb.

And certainly, "[D]efendant did not himself contribute to or cause the [imminent] threat" to the intentional destruction of human life inside the wombs of mothers with "abortion" appointments at the Planned Parenthood "abortion" facility.

Having met the basic requirements for the application of a Defense of Necessity, Defendant respectfully requests the Court for Allowance of a Defense of Necessity, with supporting materials below.

I. DECLARATION OF INDEPENDENCE, AND U.S. SENATE JUDICIARY SUBCOMMITTEE CHAIRMAN'S REPORT ON HEARINGS ON THE HUMAN LIFE BILL (S.158) IN 1981

In this present case of weighing enforcement of the Freedom of Access to Clinic Entrances (FACE) Act versus protecting human life, if we can establish for purposes of the upcoming bench trial, that human life was indeed at risk of being destroyed, and if we agree that ' "human life" has no countervailing interest, that human life simply must be preserved', then the propriety of taking the just action of nonviolently interposing between the intended victims and their oppressors inside the Planned Parenthood "abortion" facility is clear.

Our country's 1776 Declaration of Independence is one of the organic laws of the United States, found at the beginning of the United States Code of Laws. The well-known second sentence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." So the organic law of the United States says we have a Creator Who has endowed us with the unalienable right to life, among others. It is a right which cannot be taken away by Government.

So when does that unalienable Creator-endowed life referred to in the Declaration of Independence begin ? By information, belief, and fact, Defendant believes human life begins at fertilization or conception.

And so did a United States Senate Judiciary Subcommittee in 1981, which conducted eight days of Hearings, and heard from 57 witnesses on The Human Life Bill S.158 [federal Personhood legislation, https://www.govtrack.us/congress/bills/97/s158/summary]. The Subcommittee Chairman's Report [Extract: http://christianlifeandliberty.net/Human-Life-Bill-S158-REPORT-US-Senate-Judiciary-Subcomm-Hearings-Apr-23-to-Jun-18-1981-16-pages-extract.pdf] [Exhibit B] presented an Amended version of the bill which included Congress' finding "that the life of each human being begins at conception" [p.1], and "that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception" [p.2], and "for this purpose "person" includes all human beings." [p.2].

The US Senate Subcommittee Report further stated:

"The purpose of S.158 is first, to recognize the biological fact that the life of each human being begins at conception; ..." [p.2].

The Report states, "The Declaration of Independence holds that the right to life is a self-evident, inalienable right of every human being. Embodied in the statement that "all men are created equal" is the idea of the intrinsic worth and equal value of every human life. The author of the Declaration, Thomas Jefferson, explained in later years that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." [p.2].

This US Senate Subcommittee Report answered the scientific question:
When does a human life begin, stating in part,

"The testimony of these witnesses and the voluminous submissions received by the Subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete." [p.7].

[Quotations from Dr. Jerome Lejeune, Dr. Watson Bowes, and Dr. Hymie Gordon,
on page 9 of the Chairman's Subcommittee Report.]

The Report continues, "The scientific consensus on the biological fact of the beginning of each human life has existed ever since the medical and scientific communities became aware of the process of conception in the mid-nineteenth century." [p.10].

Then on page 13, the Report states, "If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings."

II. PRESIDENT RONALD REAGAN'S PROCLAMATION 5761 OF JAN. 14, 1988 - 102 STAT. 4947 – NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988

[Exhibit C - https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg4947.pdf]

Ronald Reagan
40th President of the United States: 1981 - 1989
Proclamation 5761 — National Sanctity of Human Life Day, 1988
January 14, 1988
https://www.presidency.ucsb.edu/documents/proclamation-5761-national-sanctity-human-life-day-1988

By the President of the United States of America

A Proclamation [Excerpts]

"America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the **God-given, unalienable rights** possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe."

"One of those **unalienable rights,** as the **Declaration of Independence** affirms so eloquently, is **the right to life."**

"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 without due process of law."**

"Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, **do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, ..."**
[emphasis added]

Ronald Reagan
Presidential Library & Museum
Proclamation 5761 -- National Sanctity of Human Life Day, 1988
January 14, 1988
By the President of the United States of America
A Proclamation
https://www.reaganlibrary.gov/archives/speech/proclamation-5761-national-sanctity-human-life-day-1988

Constitution of the United States, Fifth Amendment
https://constitution.congress.gov/constitution/amendment-5/
"No person shall ...be deprived of life, liberty, or property, without due process of law; ..."

Constitution of the United States, Fourteenth Amendment
Section 1
https://constitution.congress.gov/constitution/amendment-14/
"...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

Constitution of South Carolina
ARTICLE I - DECLARATION OF RIGHTS
https://www.scstatehouse.gov/scconstitution/A01.pdf
SECTION 3. – "…nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

The 5th and 14th Amendments to the U.S. Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. Article I, Section 3. of the South Carolina State Constitution guarantees the same.

Based on science and law, the Defendant believes the human beings living within the wombs of women entering Planned Parenthood for "abortion" appointments are **natural persons,** and ought rightfully to be recognized BY THIS COURT as **legal persons.**

All human beings are **natural persons** by definition. Black's Law Dictionary (Ninth Edition) defines "person" firstly, as "A human being." "Also termed *natural person."* Defendant reasonably believes children living within the wombs of their mothers are natural persons based on his information, belief, and research, and that they ought rightfully to be recognized as **legal persons,** constitutionally protecting their God-given, unalienable right to life, BY THIS COURT.

Black's Law Dictionary (2009): Person = "A Human Being"
http://christianlifeandliberty.net/2013-12-11-Blacks-Law-Dictionary-2009-Person=A-Human-Being.pdf

III. SIR WILLIAM BLACKSTONE, Esq. *COMMENTARIES ON THE LAWS OF ENGLAND*

Blackstone's *Commentaries* were used before, and for approximately 100 years after, the American Revolution (1775-1783) to train lawyers in the United States, including at the University of South Carolina (USC) School of Law during part of the Reconstruction Era (1867-1877) after the USC Law School opened in 1867.

Sir William Blackstone, Esq.
***Commentaries on the Laws of England,* Book the First (1765)**
INTRODUCTION, SECTION 2: Of the Nature of Laws in General

[Exhibit D - https://lonang.com/wp-content/download/Blackstone-CommentariesBk1.pdf - pages 25 - 27]

"Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." [p.27]

"The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures." [p.27]

"To instance in the case of murder; this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation in foro conscientiae [in the court of conscience] to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine." [p.27]

Such is the case with "abortion", which is child-murder.

Blackstone's instruction on the nature of laws in general is that all human laws rightly depend upon these two foundations: "the law of nature and the law of revelation". He states "the revealed or divine law" is "to be found only in the holy scriptures."

God's Word says, "Thou shalt not kill (murder). Exodus 20:13, KJV. The Lord Jesus Christ says, "Thou shalt do no murder." Matthew 19:18, KJV. The Defendant believes "abortion" is murder, and he believes God commands all men everywhere not to commit it. Surely America would be a safer place if more people obeyed the Sixth Commandment of the Ten Commandments.

In Proverbs 6, God's Word lists seven things which He hates and which are an abomination to Him, including hands that shed innocent blood. The Defendant believes when an abortionist destroys a living human being in the womb of a pregnant woman that the abortionist is shedding judicially innocent blood. The Defendant believes God hates that and that it is an abomination and an offense to Him.

IV. UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW HISTORY NARRATIVE

[Exhibit E - https://christianlifeandliberty.net/USC-Law-School-History-Narrative-received-from-Coleman-Karesh-Law-Library-USC-School-of-Law-Feb-4-2016.pdf - pages 1, 2]

UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW HISTORY NARRATIVE
(PREPARED BY A FORMER ASSOCIATE DIRECTOR FOR ADMINISTRATION OF THE COLEMAN KARESH LAW LIBRARY, UNIVERSITY OF SOUTH CAROLINA)

[Excerpts]

"The University of South Carolina School of Law was established as one of ten academic schools when South Carolina College was reorganized as the University of South Carolina in 1865 and 1866. The Board of Trustees elected twenty-seven year old South Carolina attorney Alexander Cheves Haskell as the first professor of law and the law school opened on October 7, 1867. Professor Haskell developed his own system of leading the junior class through a course in **Blackstone's Commentaries** and the senior class through a course on Stephens' Pleading." ... "Haskell resigned the law professorship in November [1868], closing the law school for the remainder of the academic year." [emphasis added]

"From the opening of the law school in October 1867 until the death of Professor Melton on December 4, 1875, classes were held in the University Library, now the South Caroliniana Library, and DeSaussure College."

"The Board of Trustees chose Franklin J. Moses, Sr., the Chief Justice of the Supreme Court of South Carolina, as Melton's successor. Under Moses the curriculum of the law school was modified to place a heavy emphasis on **Blackstone's Commentaries** and Kent's Lectures. When Moses died on March 6, 1877, the law school ceased to function." [emphasis added]

Having met the basic requirements for the application of a Defense of Necessity, Defendant respectfully requests the Court for Allowance of a Defense of Necessity, with materials in support outlined in the previous paragraphs as follows:

I. DECLARATION OF INDEPENDENCE, AND U.S. SENATE JUDICIARY SUBCOMMITTEE CHAIRMAN'S REPORT ON HEARINGS ON THE HUMAN LIFE BILL (S.158) IN 1981

II. **PRESIDENT RONALD REAGAN'S PROCLAMATION 5761 OF JAN. 14, 1988 - 102 STAT. 4947 – NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988**

III. **SIR WILLIAM BLACKSTONE, Esq.**
COMMENTARIES ON THE LAWS OF ENGLAND

IV. **UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW HISTORY NARRATIVE**

CONCLUSION

Defendant respectfully moves this Court for Allowance of a Defense of Necessity, with materials in support as outlined above.

Respectfully submitted,

/s/ Steven C. Lefemine

STEVEN C. LEFEMINE
Defendant
PO Box 12222, Columbia, SC 29211
(803) 760-6306 * CP@spiritcom.net

Columbia, South Carolina
February 13, 2024

Exhibit A

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Planned Parenthood South Atlantic; Greenville Women's Clinic; Katherine Farris, M.D.; and Terry Buffkin, M.D., Petitioners,

v.

State of South Carolina; Alan McCrory Wilson, in his official capacity as Attorney General of the State of South Carolina; Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; Anne G. Cook, in her official capacity as President of the South Carolina Board of Medical Examiners; Stephen I. Schabel, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; Ronald Januchowski, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; George S. Dilts, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Dion Franga, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Richard Howell, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Theresa Mills-Floyd, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Jennifer R. Root, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Christopher C. Wright, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Scarlett Anne Wilson, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; Byron E. Gipson, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and William Walter Wilkins III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, Respondents,

&

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G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; and Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, Respondents-Intervenors.

Appellate Case No. 2022-001062

IN THE COURT'S ORIGINAL JURISDICTION

Opinion No. 28127
Heard October 19, 2022 – Filed January 5, 2023

RELIEF GRANTED

M. Malissa Burnette, Kathleen McColl McDaniel, and Grant Burnette LeFever, of Burnette Shutt & McDaniel, PA, of Columbia, for Petitioners.

Julia A. Murray and Hannah Swanson, of Washington, DC; for Petitioners Planned Parenthood South Atlantic and Katherine Farris, M.D.

Genevieve Scott and Astrid Ackerman, of New York, NY; for Petitioner Greenville Women's Clinic and Terry Buffkin, M.D.

Jacquelyn S. Dickman, Ashley Caroline Biggers, and William Marshall Taylor, Jr., of Columbia, for Respondent Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control.

Samuel Darryl Harms, III, of Greenville, for Amicus Curiae Elliot Institute.

Henry Wilkins Frampton, IV, and Denise M. Harle, of Leesburg, VA; for Amici Curiae American Association of Pro-Life Obstetricians and Gynecologists and Dr. Christine Hemphill.

Larry Shawn Sullivan, of Sullivan Law Group, LLC, of Myrtle Beach, and John G. Knepper, of Law Office of John G. Knepper, LLC, of Cheyenne, WY; for Amicus Curiae Alliance for Hippocratic Medicine.

JUSTICE HEARN: Today we consider whether The Fetal Heartbeat and Protection from Abortion Act ("the Act") violates a woman's constitutional right to privacy, as guaranteed in article I, section 10 of the South Carolina Constitution. We hold that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman's right to privacy. While this right is not absolute, and must be balanced against the State's interest in protecting unborn life, this Act, which severely limits—and in many instances completely forecloses—abortion, is an unreasonable restriction upon a woman's right to privacy and is therefore unconstitutional.[1]

FACTUAL/PROCEDURAL BACKGROUND

In 2021, the General Assembly passed the Act, which prohibits an abortion after around six weeks gestation. *See* S.C. Code Ann. § 44-41-680 (Supp. 2022). This is before many women—excluding those who are trying to become pregnant and are therefore closely monitoring their menstrual cycles—even know they are pregnant. *See* Amici Curiae Br. of Am. Coll. of Obstetricians & Gynecologists, et. al. The Act requires physicians to scan for "cardiac activity…within the gestational

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[1] As a point of clarity, today a majority of this Court—Chief Justice Beatty, Justice Few, and myself—agrees the Act violates our state's constitutional right to privacy. There are two dissents: Justice Kittredge, while believing that our state's right to privacy is broader than searches and seizures, does not find it implicated here. Justice James believes article I, section 10 only applies within the search and seizure context. While each member of the Court has written an opinion, this is considered the lead opinion.

41-450(A) (2018)). As justification for this restriction on a woman's opportunity to have an abortion, *Roe* itself—as referenced above—recognized a state's "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162, 93 S. Ct. at 731, 35 L. Ed. 2d at 182. The twenty-week bill specifically recites this interest as a "compelling state interest in protecting the lives of unborn children from the stage of viability." S.C. Code Ann. § 44-41-420(13) (2018). Separate from and in addition to that interest, the twenty-week bill also recites "a compelling state interest in protecting the lives of unborn children from the stage at which . . . they are capable of feeling pain." § 44-41-420(12). In pursuit of these interests, the General Assembly imposed the twenty-week ban on abortion.

Unlike the 1974 Act, however, the "twenty-week bill" was highly controversial. Many South Carolina citizens contended then and contend now that the restrictions the 2016 Act placed on a woman's opportunity to have an abortion are unreasonable. Nevertheless, from a legal standpoint, even though we recognize the political views of others may be different, this Court recognizes that the law provides no basis for overriding the legislative policy determination underlying the "twenty-week bill." In other words, the twenty-week restriction on a woman's opportunity to have an abortion is not—as a matter of law—an unreasonable invasion of privacy.

As these examples illustrate, we may not find the Fetal Heartbeat Act violates article I, section 10 unless we find its restrictions on a pregnant woman's opportunity to have an abortion are—as a matter of law—an unreasonable invasion of her privacy.

V.

This brings me to the 2021 Fetal Heartbeat Act, or "six-week bill." In enacting the legislation, the 124th General Assembly necessarily considered the evidence it deemed important and balanced the State's important interests against any countervailing interests that may exist.

A. State Interests

First, it is important to stress what is not a State interest that justifies the "six-week bill." For years, a minority of the General Assembly attempted to enact legislation banning abortion altogether. *See, e.g.*, S. 129, 121st Gen. Assemb., Reg. Sess. (S.C. 2015). Those "personhood bills"—based on what would have become a legislative finding that human life begins at conception[53]—consistently failed to gain majority

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[53] S. 129 of 2015, for example, would have added a new section to Title 1 of the Code—"Administration of the Government"—providing, "The right to life for each

support.[54] This year, the House of Representatives passed a near-total ban on abortion. *See* H. 5399, H.R. Journal, 124th Leg. Sess., at ____ (S.C. Aug. 30, 2022). Like its predecessors, H. 5399—had it passed the Senate—would have been based on the finding, "It is undisputed that the life of every human being begins at

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born and preborn human being vests at fertilization." S. 129, 121st Gen. Assemb., Reg. Sess. (S.C. 2015).

[54] *See, e.g.*, S. 1335, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (proposed but not adopted legislation adding a new section to Title 16—"Criminal Code"—providing, "The right to life for each born and preborn human being is inherent and unalienable beginning at fertilization"); H. 5401, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (proposed but not adopted legislation adding a new section to Title 16—Criminal Code—providing, "The General Assembly finds that a human being is a person at fertilization"); S. 381, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); H. 3568, 124th Gen. Assemb., Reg. Sess. (2021) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); H. 3289, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a unique person, a distinct person . . . from fertilization forward, and therefore asserts a compelling state interest in the protection of the rights to life, due process, and equal protection, from fertilization forward"); H. 3920, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); S. 485, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization, and . . . asserts a compelling state interest in the protection of the rights to life, due process and equal protection, from fertilization forward"); S. 217, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); H. 3530, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017) (proposed but not adopted legislation adding a new section to Title 1 providing, "The right to life for each born and preborn human being vests at fertilization").

conception." H. 5399, § 2(4). Had H. 5399 become law, the State may have had a good argument there is no countervailing interest that could render unreasonable the State's use of a total ban on abortion to protect human life from the point of conception. In other words, if the State were to pass a total ban on abortion—despite a complete invasion of a pregnant woman's right to privacy—the privacy invasion might be reasonable under article I, section 10, because "human life" has no countervailing interest; human life simply must be preserved. But the General Assembly failed to pass the personhood bills, and this year the Senate refused to pass H. 5399. S. Journal, 124th Leg. Sess., at ____ (S.C. Oct. 18, 2022). Thus, despite consistent efforts, there is no legislative policy determination that human life—"personhood"—begins at conception, and there is no such State interest that justifies enacting the six-week bill.

There are—of course—other important State interests advanced by the six-week bill. Certainly, the restrictions on a woman's opportunity for an abortion contained in the six-week bill advance the State's legitimate interest—as acknowledged in *Roe*—in "protecting the potentiality of human life." 410 U.S. at 162, 93 S. Ct. at 731, 35 L. Ed. 2d at 182. As it did in the 2016 twenty-week bill, the General Assembly specifically recited this interest in the six-week bill, stating, "South Carolina has legitimate interests from the outset of a pregnancy in protecting . . . the life of the unborn child who may be born." Fetal Heartbeat Act, sec. 2(7), 2021 S.C. Acts at 3. These interests are advanced by the simple fact that—given the shorter time frame for choosing to continue a pregnancy under the six-week bill—fewer women will make the choice to not continue a pregnancy.[55] By reducing the number of women who choose to have an abortion, the six-week bill advances these legitimate State interests.

B. Countervailing Interests

The State interests advanced by the six-week bill, however—unlike the State interest that might have justified a total ban—are not absolute. Rather, they necessarily contemplate countervailing interests, such as a woman's right to privacy. The six-

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[55] *See* Margot Sanger-Katz & Claire Cain Miller, *Legal Abortions Fell Around 6 Percent in Two Months After End of Roe*, N.Y. TIMES: THE UPSHOT (Oct. 30, 2022), https://www.nytimes.com/2022/10/30/upshot/legal-abortions-fall-roe.html ("In states with bans and restrictions, there were about 22,000 fewer abortions in July and August, compared with the baseline of April, before the decision.").

week bill itself identifies another countervailing interest: "informed choice." The General Assembly provided the following in the "legislative findings" section of the bill,

> The General Assembly hereby finds, according to contemporary medical research, . . . :
>
> . . .
>
> (8) in order to make an informed choice about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat.

2021 S.C. Acts at 3.[56]

With the General Assembly's codification of a woman's right "to make an informed choice about whether to continue a pregnancy" as a countervailing interest, the six-week ban on abortion raises several concerns. First, in an apparent effort to advance this interest of "informed choice," the General Assembly included in the six-week bill what is now codified at section 44-41-640 of the South Carolina Code (Supp. 2022), which provides,

> If a pregnancy is at least eight weeks after fertilization, then the abortion provider who is to perform or induce an abortion . . . shall tell the woman that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear and shall ask the woman if she would like to hear the heartbeat. If the woman would like to hear the heartbeat, then the abortion provider shall . . . make the fetal heartbeat of the unborn child audible for the pregnant woman to hear.

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[56] The legislative findings section of the 2021 six-week bill was not codified, unlike the legislative findings of the 2016 Pain-Capable Act, which are codified at section 44-41-420 of the South Carolina Code (2018). The 2021 findings are included in an "Editor's Note" to the codification of the Fetal Heartbeat Act. S.C. Code Ann., tit. 44, ch. 41, art. 6 editor's note (Supp. 2022).

This requirement that the abortion provider give the pregnant woman an opportunity to hear the fetal heartbeat makes no apparent sense because if the pregnant woman can hear the fetal heartbeat, then her opportunity to "make an informed choice" has already expired. Thus, it is difficult to understand how the General Assembly's recited interest of "informed choice" is advanced by the six-week bill.

The second concern is how much time a woman actually has to make such a choice. This concern is heightened by the fact the common name "six-week bill" can be misleading. The 2016 "Pain-Capable Act"—twenty-week bill—prohibits an abortion at the point in time the General Assembly found an unborn child is capable of feeling pain. This point in time is generally thought to be twenty weeks "post-fertilization." *See* § 44-41-420(11) (finding "there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty weeks after fertilization"). Thus, the operative section of the twenty-week bill provides, "No person shall perform . . . an abortion upon a woman when it has been determined . . . that the probable post-fertilization age of the woman's unborn child is twenty or more weeks." § 44-41-450(A). The important point is the line in the twenty-week bill after which no abortion may take place is drawn from fertilization.

In the so-called six-week bill, however, the actual line is not drawn from fertilization but is determined according to "whether the human fetus the pregnant woman is carrying has a detectable fetal heartbeat." S.C. Code Ann. § 44-41-650(A) (Supp. 2022).[57] Because this point in time is generally thought to be six weeks after a woman's last menstrual period, the Fetal Heartbeat Act has been commonly referred to as the "six-week bill." If the common name of the Fetal Heartbeat Act were constructed in the same way as the common name "twenty-week bill"—by length of time post-fertilization—the Fetal Heartbeat Act would be named the "four-week bill," as it is generally thought there is a detectable heartbeat at four weeks post-

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[57] Justice Hearn and Chief Justice Beatty address what they contend is a misuse of terms in the Fetal Heartbeat Act, particularly the term "fetal heartbeat." This does not concern me. Regardless of the term used, the Fetal Heartbeat Act—particularly subsection 44-41-610(3)—identifies a circumstance that medical professionals can recognize with certainty. The disagreement over what to call that circumstance is not significant.

fertilization. *See* (Resp't Att'y General Br. 6).[58] In considering the General Assembly's focus on "informed choice about whether to continue a pregnancy," therefore, *and* in considering a woman's right of privacy, it is important to understand that under the six-week bill, a pregnant woman's choice must be made—and carried out—within *four* weeks of the time she becomes pregnant.

Although the Fetal Heartbeat Act recognizes the interest of "informed choice," a woman's interest in choice is not dependent on this portion of the Act. The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10. The General Assembly's codification of "informed choice" as an interest to be valued here simply recognizes this obvious fact that abortion is a private choice. The article I, section 10 right of privacy, therefore, in this context, includes choice.

C. Balancing of Interests

Once the competing interests have been identified, they must be balanced. *See Hooper*, 334 S.C. at 293-95, 513 S.E.2d at 364-66 (explaining article I, section 10 privacy interests are "not absolute" but must be balanced against the State's interests). This necessity of balancing interests may shed light on a comment I made in subsection V.A., which might otherwise have seemed counterintuitive. I remarked that "if the State were to pass a total ban on abortion—despite a complete invasion of a pregnant woman's right to privacy—the privacy invasion might be reasonable under article I, section 10." Justice Kittredge explains this well in his dissent when he points out that when the State criminalizes rape and child abuse—crimes which usually occur in private—the associated invasion of privacy is reasonable, and thus, there is no article I, section 10 issue. This is true because when the applicable privacy interests are balanced against the State's compelling interest in preventing crime, the balancing clearly supports the criminalization of private actions. Similarly, if the General Assembly were to make the policy determination that human life begins at conception—that a newly-conceived fetus is in fact a person entitled to all the rights due to persons already born—then the hypothetical

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[58] The Attorney General's brief states the six-week bill "allows an abortion prior to the detection of a fetal heartbeat (which can be detected at approximately six weeks) to occur." To support this point, the Attorney General cites an affidavit from its expert stating, "Cardiac activity . . . can be detected . . . 4-5 weeks post-conception." (J.A. at 305).

balancing of that compelling interest against the privacy interests implicated by a total ban on abortion may come out in favor of the State's action. In this case, however, the interests to be balanced are different, and the balancing is not hypothetical. The State's interest in "protecting . . . the life of the unborn child" must be balanced against the countervailing interests of privacy and meaningful choice. This balancing should begin in the General Assembly. *See S.C. Dep't of Soc. Servs. v. Gamble*, 337 S.C. 428, 434-35, 523 S.E.2d 477, 480 (Ct. App. 1999) (studying the constitutionality of a statute, reciting the competing interests, and finding the statute constitutional because, "The statute at issue balances these rights").[59]

D. Fact-Dependent Policy

I now turn to a somewhat unique circumstance we face in the analysis of the constitutionality of the Fetal Heartbeat Act. Whether a pregnant woman is given an opportunity to make a meaningful choice and whether the invasion of her privacy by restricting her opportunity for an abortion is unreasonable each depend on the answer to one particular factual question: Can a pregnant woman even know she is pregnant in time to engage in a meaningful decision-making process and—if her choice is to not continue the pregnancy—make the necessary arrangements to carry out an abortion? On one hand, it would be difficult to argue the Fetal Heartbeat Act is an unreasonable invasion of a pregnant woman's privacy if almost all women know they are pregnant in time to give the question sufficient deliberation and prayer necessary to making a meaningful choice; to have meaningful discussions with family,

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[59] I appreciate Justice Kittredge's affirmation of our privacy rights, but he misses a key point. His analysis is applicable only to an unwritten privacy interest arising through substantive due process, as was the issue in the federal cases he discusses. He overlooks the fact the State constitution has a written privacy right. He incorrectly contends the mere existence of legitimate State interests automatically overrides any countervailing interest unless a countervailing interest is a "deeply rooted" right "implicit in the concept of ordered liberty." While his contention is valid under the theory of substantive due process, it is incorrect under article I, section 10. Thus, the majority of Justice Kittridge's discussion really has nothing to do with this case. Under article I, section 10, the competing interests must be balanced, and if the State interest does not justify denying the countervailing interest, the privacy invasion is unreasonable. Of course, the article I, section 10 balancing must begin in the General Assembly, and we may reject its policy judgment only if we find the invasion of privacy is unreasonable as a matter of law.

more strict than a rational relationship test, *see Luckabaugh*, 351 S.C. at 139-40, 148, 568 S.E.2d at 346-47, 351, it is certainly not a "strict scrutiny" analysis.

Second, the State and the dissenting Justices argue the article I, section 10, "unreasonable invasions of privacy" provision does not encompass a "right to abortion." I wholeheartedly agree. With my vote the argument holds a majority position. However, the argument is not on point. The question before us is whether the Fetal Heartbeat Act violates a pregnant woman's right to "privacy." By not enacting a total ban on abortion, the State thereby preserved its longstanding statutory "opportunity" for abortion.[65] When the State seeks to regulate or restrict that opportunity—as it is undoubtedly entitled to do—the restrictions implicate a pregnant woman's privacy interests. Under article I, section 10, the State may not unreasonably invade those privacy interests. The right at issue here is "privacy."[66]

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[65] The State argues that until 1970 all abortion was illegal in South Carolina—a common law and then statutory total ban. Justices Kittredge and Hearn contend abortion was illegal historically only after "quickening." Regardless of who is correct, it was the General Assembly that enacted a statutory right to abortion in 1970, although in very limited circumstances. Act No. 821, 1970 S.C. Acts 1892, 1892-93. In 1974—in response to *Roe*—the General Assembly enacted an expansive statutory right to abortion, making any abortion legal up to the end of the second trimester of pregnancy. Act No. 1215, 1974 S.C. Acts 2837, 2838-39. That statutory right to—or opportunity for—abortion is actually still the law. *See* § 44-41-20(a)-(b).

[66] As I explained in section II, article I, section 10 is clear that it includes all forms of privacy. The dissent's suggestion in this case—that Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), informs us on the scope of the right of privacy under article I, section 10—takes Justice Black's comments largely out of context. To the extent they do relate to this case, however, Justice Black's comments support my position the term privacy is "broad but clear." Justice Black's argument was that by substituting the word "privacy" for the words actually used in the Bill of Rights, the Court could (1) limit, as he hypothesizes, the Fourth Amendment to instances in which "property . . . [is] seized privately and by stealth," 381 U.S. at 509, 85 S. Ct. at 1695, 14 L. Ed. 2d at 530 (Black, J., dissenting), or (2) expand, as he accuses the *Griswold* majority of doing, the freedom of speech protection of the First Amendment to all forms of privacy. The root of Justice Black's criticism of the *Griswold* majority is that by defining the scope of First Amendment protections according to what the *Griswold* majority calls "the zone of privacy created by several fundamental constitutional

Exhibit B

Calendar No.

[COMMITTEE PRINT]

Congress Session	SENATE	REPORT No.

[Misc pubs]

THE HUMAN LIFE BILL—S. 158 . . .

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

TO THE

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

[U.S. Congress]

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

DECEMBER ——

U.S. GOVERNMENT PRINTING OFFICE
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Calendar No.

97TH CONGRESS 1st Session | SENATE | REPORT No. 97-

THE HUMAN LIFE BILL—S. 158

DECEMBER ——

Mr. EAST, from the Subcommittee on Separation of Powers, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 158]

The Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, to which was referred the bill, S. 158, to recognize that the life of each human being begins at conception and to enforce the fourteenth amendment by extending its protection to the life of every human being, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. AMENDMENT IN THE NATURE OF A SUBSTITUTE

Strike out the enacting clause and all after the enacting clause and substitute in lieu thereof the following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

CHAPTER 101

SECTION 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the

Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose "person" includes all human beings.

SEC. 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

SEC. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: *Provided*, That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.

SEC. 5. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance that protects the rights of human beings between conception and birth, or which adjudicates the constitutionality of this Act, or of any such law or ordinance. The Supreme Court shall advance on its docket and expedite the disposition of any such appeal.

SEC. 6. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

II. PURPOSE OF THE PROPOSED ACT

The purpose of S. 158 is first, to recognize the biological fact that the life of each human being begins at conception; second, to affirm that every human life has intrinsic worth and equal value regardless of its stage or condition; and third, to enforce the fourteenth amendment by ensuring that its protection of life extends to all human beings.

III. NEED FOR THIS LEGISLATION

To protect the lives of human beings is the highest duty of government. Our nation's laws are founded on respect for the life of each and every human being. The Declaration of Independence holds that the right to life is a self-evident, inalienable right of every human being. Embodied in the statement that "all men are created equal" is the idea of the intrinsic worth and equal value of every human life. The author of the Declaration, Thomas Jefferson, explained in later years that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." [1]

Today there is a strong concern among many citizens that government is not fulfilling its duty to protect the lives of all human beings. Since 1973 abortion has been available on demand nationwide,[2] resulting in more than one and one-half million abortions per year. Yet this abrupt and fundamental shift in policy occurred without any prior inquiry by any branch of the federal government to determine whether the unborn children being aborted are

[1] Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809) *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 472–73 (14th ed. 1968).

[2] The state of the law allowing abortion on demand is explained at pp. 5–6, infra.

living human beings. Nor has any branch of the federal government forthrightly faced the question whether our law should continue to affirm the sanctity of human life—the intrinsic worth and equal value of all human life—or whether our law should now reject the sanctity of life in favor of some competing ethic. Only by determining whether unborn children are human beings, and deciding whether our law should and does accord intrinsic worth and equal value to their lives, can our government rationally address the issue of abortion.

A government can exercise its duty to protect human life only if some branch of that government can determine what human life is. It can afford no protection to an individual without first ascertaining whether that individual falls within a protected class. The principal author of the fourteenth amendment, Congressman John A. Bingham of Ohio, recognized this truism when he stated that, in order to decide whether an individual is protected under the law of our land, "the only question to be asked of the creature claiming its protection is this: Is he a man?" [3] Since the fourteenth amendment expressly confers on Congress the power to enforce the protections of that amendment, including the protection of life, it is appropriate for Congress as well as the Supreme Court to ask whether a particular class of individuals are human beings.

Some branch of government, as a practical matter, *must* have power to answer this basic question. Otherwise, the government would be unable to fulfill its duty to protect each individual that *is* a human being. When the individual under consideration is an unborn human child, the basic question becomes, "When does the life of each human being begin?" Only by examining this question can the government determine whether unborn children are living human beings. Only after addressing this issue can a government intelligently decide whether to accord equal value to the lives of unborn children and whether to protect their lives under the law.

In its hearings on S. 158, the Subcommittee has exhaustively addressed all questions relevant to the protection of lives of unborn children under the fourteenth amendment. Through these hearings we have also come to recognize that the fundamental question concerning the life and humanity of the unborn is twofold. Not only must government answer the biological, factual question of when the life of each human being begins; it must also address the question whether to accord intrinsic worth and equal value to all human life, whether before or after birth.

These two questions are separate and distinct. The question of when the life of a human being begins—when an individual member of the human species comes into existence—is answered by scientific, factual evidence. Science, however, is not relevant to the second question; science cannot tell us what value to give to each human life. This second question can be answered only in light of the ethical and legal values held by our citizens and expressed by the framers of our Constitution.

The two congressional findings contained in section 1 of S. 158 correspond to these two distinct questions. The congressional finding in section 1(a) of the bill addresses the first question and rests on a factual, scientific determination. The congressional finding in section 1(b) of the bill reflects the conclusion of the Subcommittee

[3] CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867).

that the fourteenth amendment answers the second question by affirming the intrinsic worth and equal value of all human lives.

Much confusion has arisen in the Subcommittee's hearings and in public debate over S. 158 because of the failure to distinguish between the two basic questions. Those, on the one hand, who claim that scientific evidence can resolve the abortion issue ignore the significance of the second question. They fail to see that even if unborn children are human beings, government must decide whether their lives are of such value that they should be protected under the law. Those, on the other hand, who deny that science has any relevance to the abortion issue generally focus only on the second question and refuse to acknowledge the possibility of answering the first. They ignore the role science plays in informing us that a particular individual is a member of the human species, a separate individual whose life we must decide either to value or not.[4]

The Subcommittee has taken pains to separate its consideration of the two questions. In this report we shall often refer to the "scientific question" and the "value question" as a convenient shorthand. We have analyzed the testimony of various witnesses and sources of public record as they relate to each question separately. And we report separately our conclusions on each question.

We emphasize that both questions must be answered by some branch of government before the abortion issue can be fully and rationally resolved. The need for Congress to investigate both questions stems partly from the self-professed institutional limitations of our federal judiciary. The Supreme Court, in its 1973 abortion decision, declared itself unable to resolve when the life of a human being 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, 159 (1973). The Court went on to explain that a "wide divergence of thinking" exists on the "sensitive and difficult" question of when a human life begins, *id.* at 160; hence, the judiciary is not competent to resolve the question.

As a result of its self-professed inability to decide when the life of a human being begins, the Supreme Court rendered its 1973 abortion decision without considering whether unborn children are living human beings. And because the Court did not consider whether unborn children are living human beings, it was able to avoid an explicit decision on whether our law accords intrinsic worth and equal value to the life of every human being regardless of stage or condition. The Court thus declined to address either of the crucial questions relevant to protecting unborn children under the law: the Court addressed neither the scientific question nor the value question. The Court's entire 1973 opinion concerning the power of states to protect unborn children—including the Court's

[4] For instance, the medical and scientific witnesses who testified against S. 158 universally argued that the question when human life begins is a "moral, religious or philosophical" question rather than a scientific one. In context, it is clear that they were interpreting the question, "Is it a human being?" not as an inquiry about whether a certain being is an individual member of the human species, but as a value question concerning what rights ought to be given to such a creature. *See* pp. 10–15, *infra*. Similarly, the doctors who responded to a questionnaire sent by Senator Baucus tended to regard "human being" as a semantic construct presupposing a conclusion that the being in question is entitled to certain rights, rather than as a designation for all individual members of the human species.

ruling on personhood of the unborn—must be read in light of this failure to resolve the two fundamental questions concerning the existence and value of unborn human life.

That a judicial decision addressing neither of these fundamental questions has led to a national policy of abortion on demand throughout the term of pregnancy is a great anomaly in our constitutional system. It is important to examine the judicial reasoning that led to this result. The Court held that "the right of personal privacy includes the abortion decision," but added that "this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. Because it did not resolve whether unborn children are human beings, the Court could not make an informed decision on whether abortions implicate the interest and duty of the states to protect living human beings. Still, without purporting to know whether unborn children are living human beings, the Court stated by fiat that they are not protected as persons under the fourteenth amendment.[5]

Then the Court created judge-made rules governing abortions. 410 U.S. at 163–65. During the first three months of an unborn child's life, the states may do nothing to regulate or prohibit the aborting of the child. In the next three months of the unborn child's life, the states may regulate only the manner in which the child is aborted; but abortion remains available on demand. In the final three months before the child is born, the states may prohibit abortions except when necessary to preserve the "life or health of the mother." *Id.* at 165.

The apparently restrictive standard for the third trimester has in fact proved no different from the standard of abortion on demand expressly allowed during the first six months of the unborn child's life. The exception for maternal health has been so broad in practice as to swallow the rule. The Supreme Court has defined "health" in this context to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Doe* v. *Bolton*, 410 U.S. 179, 192 (1973). Since there is nothing to stop an abortionist from certifying that a third-trimester abortion is beneficial to the health of the mother—in this broad sense—the Supreme Court's decision has in fact made abortion available on demand throughout the pre-natal life of the child, from conception to birth.

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[5] The Court devoted very little analysis to its holding that the word "person" in the fourteenth amendment does not include the unborn. Justice Blackmun noted first that of the *other* uses of the word "person" in the Constitution—such as the qualifications for the office of President and the clause requiring the extradition of fugitives from justice—"nearly all" seem to apply only postnatally, and "[n]one indicates, with any assurance, that it has any possible pre-natal application." 410 U.S. at 157. As Professor John Hart Ely has pointed out, the Court might have added that most of these provisions were "plainly drafted with *adults* in mind, but I suppose that wouldn't have helped." Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 YALE L. J. 920, 925–26. (1973). Justice Blackmun also noted that "throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today. . . ." 410 U.S. at 158. This statement seems not to reflect an awareness that the relatively permissive attitude toward abortion prior to quickening that prevailed in the *early* nineteenth century was overwhelmingly rejected by the very legislatures that ratified the fourteenth amendment. It was these same legislatures which adopted strict anti-abortion laws. These laws in turn resulted from the consensus in the medical profession, based on recent scientific discoveries, that the unborn child was a human being from the moment of conception. *See* pp. 10, 24–25, *infra*. Although Justice Blackmun mentioned these political and scientific developments in an earlier portion of his opinion, 410 U.S. at 138–142, he did not discuss their relevance to an understanding of the consensus at the time of the adoption of the fourteenth amendment on whether the word "person" includes the unborn.

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Statistics such as those of the District of Columbia showing that more children are aborted than are born alive demonstrate the availability of abortion on demand.[6] The news media have reported some of the shocking results of abortion on demand during the third trimester, including the purposeful killing of babies who survive an abortion procedure. *See* Jeffries & Edmonds, "Abortion: The Dreaded Complication," *Philadelphia Inquirer*, Aug. 2, 1981, Today Magazine, at 14. Whether the Supreme Court intended such an extreme result is not clear.[7]

Roe v. *Wade* has been widely criticized by constitutional scholars; it is frequently cited as the most extreme example of a case in which the Supreme Court substituted its own judgment for the judgments of elected legislatures. *See, e.g.*, Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975); Ely, *supra* note 5. While some critics assailed the decision on the ground that unborn children are human beings who ought to be protected by law, the majority of the constitutional scholars who attacked *Roe* made it clear that they personally favored permissive abortion laws, but objected to the Court's decision on the ground that under our Constitution legislatures rather than the federal courts have the power to make abortion policy. In the words of Professor Ely, *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." Ely, *supra* note 5, at 947.

Not the least of the problems with *Roe* v. *Wade* was that it did not adequately explain either the constitutional or factual bases for its holdings or their precise scope. For instance, it has been suggested that the court's holding that the states may not protect unborn children rests not on the Court's uncertainty about when life begins, but on the Court's endorsement of a rule of constitutional law to the effect that the class of "fourteenth amendment persons" does not necessarily include all human beings. *See The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings on S. 158*] (May 21 transcript at 94–95) (testimony of Professor William Van Alstyne). *See also* note 5, *supra*. Under this analysis, even if there were a universal consensus to the effect that unborn children are human beings, they would have no constitutional rights and could not be protected by law. If this was actually the holding of *Roe* v. *Wade*, then the possibility that new classes of human beings will be held not to be "fourteenth amendment persons" gives the decision profound and disturbing implications beyond the abortion context.

A congressional determination that unborn children are human beings and that their lives have intrinsic worth and equal value will encourage the Court to reexamine the results and the reason-

[6] At hearings before another Subcommittee of the Senate Committee on the Judiciary, Dr. Irwin M. Cushner, who testified against restrictions on abortion, stated that no more than two percent of induced abortions are performed "for clinically identifiable reasons," and that no more than one percent are performed to save the life of the mother or for any other purpose related to physical health. Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, October 14, 1981.

[7] Chief Justice Burger, for example, stated in a separate opinion that the Court was not endorsing a constitutional right to abortion on demand. *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

ing of *Roe* v. *Wade*. In *Roe* the Court expressed a desire to decide the abortion issue "consistent with the relative weights of the respective interests involved . . . ." 410 U.S. at 165. The Court's view of the relative weight of the interests of the unborn child was necessarily influenced by the Court's professed inability to determine whether the unborn child was a living human being. It is difficult to believe that the Court would again balance the respective interests in such a way as to allow abortion on demand, if the Court were to recognize that one interest involved was the life of a human being.

IV. THE SCIENTIFIC QUESTION: WHEN DOES A HUMAN LIFE BEGIN

During the course of eight days of hearings, fifty-seven witnesses testified on S. 158 before the Subcommittee. Of these witnesses, twenty-two, including world-renowned geneticists, biologists, and practicing physicians, addressed the medical and biological questions raised by the bill. Eleven testified in support of the bill and eleven in opposition.

The testimony of these witnesses and the voluminous submissions received by the Subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete. Until the early nineteenth century science had not advanced sufficiently to be able to know that conception is the beginning of a human life; but today the facts are beyond dispute.

Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being—of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings. Extensive quotation from such writings would be unnecessarily redundant except for the strenuous efforts by some parties to deny or obscure this basic fact. The following are only a limited sample from the scientific literature:

> *Zygote.* This cell results from fertilization of an oocyte by a sperm and is *the beginning of a human being.*
>
> * * * * * * *
>
> *Development begins at fertilization,* when a sperm unites with an oocyte to form a *zygote* (from the Greek *zygotus,* meaning "yoked together"). Each of us started life as a cell called a zygote.

K. Moore, *The Developing Human* 1, 12 (2d ed. 1977).

> In this first pairing, the spermatozoon has contributed its 23 chromosomes, and the oocyte has contributed its 23 chromosomes, thus re-establishing the necessary total of 46 chromosomes. The result is the conception of a unique individual, unlike any that has been born before and unlike any that will ever be born again.

M. Krieger, *The Human Reproductive System* 88 (1969).

> [A]ll organisms, however large and complex they may be when full grown, begin life as but a single cell.

This is true of the human being, for instance, who begins life as a fertilized ovum . . . .

I. Asimov, *The Genetic Code* 20 (1962).

It is the penetration of the ovum by a spermatozoon and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of *fertilization* and marks the initiation of the life of a new individual.

B. Patten, *Human Embryology* 43 (3d ed. 1968).

The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or *zygote*, which definitely marks the beginning of new individual.

L. Arey, *Developmental Anatomy* 55 (7th ed. 1974).

A human being originates in the union of two *gametes*, the ovum and the spermatozoon.

J. Roberts, *An Introduction to Medical Genetics* 1 (3d ed. 1963).

Bisexual reproduction is characteristic of all vertebrates, and *gametogenesis* (the production of *germ cells*) is its first phase. The next phase, the beginning of the development of a new individual, is the fusion of two germ cells (*gametes*) of different nature; one, the *spermatozoon* from the male parent; the other, the *ovum* from the female parent. The result of this fusion is the formation of the first cell of the new individual, the *zygote*.

W. Hamilton & H. Mossman, *Human Embryology* 14 (4th. ed 1972).

The zygote thus formed [by the moving together of two sets of chromosomes] represents the beginning of a new life.

J. Greenhill & E. Friedman, *Biological Principles and Modern Practice of Obstetrics* 23 (1974).

The zygote is the starting cell of the new organism

S. Luria, *Thirty-Six Lectures in Biology* 146 (1975).

A new individual is initiated by the union of two gametes—a male gamete, or *spermatozoon*, and a female gamete, or *mature ovum*.

J. Brash, *Human Embryology* 2 (1956).

Fertilization is significant in that new life is created, but specifically the cardinal features of fertilization are that (1) the diploid number of chromosomes [46] is reconstituted and (2) the sex of the conceptus is designated chromosomally.

J. Thomas, *Introduction to Human Embryology* 52 (1968).

A new individual is inaugurated in a single cell (zygote) that results from the union of a male gamete (spermatozoön) with a female gamete (ovum or egg).

T. Torrey, *Morphogenesis of the Vertebrates* 47 (3d ed. 1971).

> The fertilized egg cell—or zygote—contains nuclear material from both parents. It marks the beginning of the life of a new human being and is a useful focal point for presenting all the diverse aspects of organic reproduction.

G. Simpson & W. Beck, *Life: An Introduction to Biology* 139 (2d ed. 1965).

Many witnesses who appeared before the Subcommittee reaffirmed the scientific consensus on this point. Dr. Jerome Lejeune of the Université René Descartes in Paris, discoverer of the chromosomal disease which causes mongolism, testified that, "[l]ife has a very, very long history, but each individual has a very neat beginning—the moment of its conception."[8] *Hearings on S. 158* (April 23 transcript at 18).

Similarly, Dr. Watson Bowes, Professor of Obstetrics and Gynecology at the University of Colorado School of Medicine, stated, "If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception—that is to say, the time at which a human ovum is fertilized by a human sperm." *Id.* at 61. Dr. Bowes ended his prepared statement as follows: "In conclusion, the beginning of a human life from a biological point of view is at the time of conception. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals." *Id.* at 65.

Dr. Hymie Gordon, Professor of Medical Genetics and physician at the Mayo Clinic, affirmed this consensus and recognized the distinction between the scientific question and the value question:

> I think we can now also say that the question of the beginning of life—when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.

Id. at 31–32.

Dr. Gordon further observed:

> I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.

Id. at 52.

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[8] Various possible biological nuances on this fact do not detract from the scientific facts relevant to this subcommittee's findings. One witness testified that cases in which twins arise from a single embryo suggest that the individual has not yet been "stably constituted" until the point when twinning occurs. Hearings on S. 158 (May 20 transcript at 19) (testimony of Dr. Clifford Grobstein). But even in such exceptional cases of "homozygous" twins, there is a being in existence from conception who is alive and human. That we can describe the formation of twins merely emphasizes that even at the earliest stages after conception we can have scientific knowledge of the existence of distinct, individual human beings.

The same witness also described the experimental process of the fusion of nonhuman embryos. *Id.* But such experiments have never been successfully performed on human beings, and even in other species, such as mice, fusion cannot be performed except within minutes of conception. Hearings on S. 158 (April 23 transcript at 22) (testimony of Dr. Lejeune).

Dr. Micheline Matthews-Roth, a principal research associate in the Department of Medicine at the Harvard Medical School, after reviewing the scientific literature on the question of when the life of a human being begins, concluded her statement with these words:

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 41–42.

The scientific consensus on the biological fact of the beginning of each human life has existed ever since the medical and scientific communities became aware of the process of conception in the mid-ninteenth century. In 1859 a committee of the American Medical Association unanimously reported its objection to the widespread unscientific belief "that the foetus is not alive till after the period of quickening." The committee unanimously recommended a resolution for the Association to protect against all abortions as an "unwarrantable destruction of human life," except when performed to preserve the life of the mother. 12 American Medical Association, *The Transactions of the American Medical Association* 75–78 (1859). The committee emphasized that the true nature of abortion was not a "simple offense against public morality and decency," nor an "attempt upon the life of the mother" but rather the destruction of her child. The committee therefore called upon the Association to recommend to governors and legislators of the states that they protect human life, by law, from the time of conception. During the second half of the nineteenth century, following the formation of a consensus in the medical and scientific community on the beginning of each human life, the overwhelming majority of the states came to protect the lives of unborn children from the time of conception rather than the time of quickening. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 827–33 (1973).

Until recent years, no serious challenge was made to the straightforward scientific fact that the life of a human being begins at conception. As recently as 1963, Planned Parenthood Federation of America, now a strong proponent of legalized abortion in Congress and before this subcommittee, published a pamphlet entitled *Plan Your Children for Health and Happiness*, which acknowledged: "An abortion requires an operation. It kills the life of a baby after it has begun."

The biological consensus that conception marks the begining of the life of a human being has recently been confirmed by the process of creating a new human life outside the mother: the "test-tube baby." *See Hearings on S. 158* (April 23 transcript at 22–23) (testimony of Dr. Lejeune).

It may at first seem difficult to reconcile the existence of such a broad consensus with the testimony of some witnesses opposing S. 158 before this subcommittee who emphatically denied that it is possible to determine when a human life begins. If the facts are so

clear, it is crucial to understand how, for example, one noted professor of genetics from Yale University School of Medicine could say that he knows of no scientific evidence that shows when actual human life exists.[9]

Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in the existence of the two distinct questions identified above, the scientific question and the value question. We must consider not only whether unborn children are human beings but also whether to accord their lives intrinsic worth and value equal to those of other human beings. The two questions are separate and distinct. It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings.

Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are "human beings," insofar as the term is used to mean living beings of the human species.

Instead, these witnesses invoked their value preferences to redefine the term "human being." The customary meaning of "human being" is an individual being who is human, *i.e.*, of the human species. This usage is that of the medical and scientific writers quoted above and of all the medical textbooks to which the Subcommittee has been referred; of Doctors Lejeune, Gordon, and Matthews-Roth, who testified before the Subcommittee; of the American Medical Association in 1859; and of Planned Parenthood in 1963. In this sense a "human being" is something that can be identified by science. Whether a living being is human is thus, in the words of Dr. Lejeune, a matter of "plain experimental evidence." *Hearings on S. 158* (April 23 transcript at 25). Disregarding the customary scientific definition of human being, some witnesses sought to make "human being" and "humanness" into undefined concepts that vary according to one's values. They took the view that each person may define as "human" only those beings whose lives that person wants to value. Because they did not wish to accord intrinsic worth to the lives of unborn children, they refused to call them "human beings," regardless of the scientific evidence.

This technique of argument has been openly advocated by one commentator who writes that "[w]hether the fetus is or is not a human being is a matter of definition, not fact; and we can define any way we wish." Hardin, *Abortion—or Compulsory Pregnancy?* 30 J. of Marriage & the Family 246, 250 (1968). This line of argument does not refute the consensus answer to the scientific question; instead it evades the scientific question by focusing solely on the value question. By adopting this line of argument, some witnesses appearing before the Subcommittee, notably Dr. Rosenberg, were able to testify that they knew of no scientific evidence showing

[9] Hearings on S. 158 (April 24 transcript at 24) (testimony of Dr. Leon Rosenberg).

when actual human life exists. That he was speaking only to the value question is evident from his explanation that "science, per se, doesn't deal with the complex quality called 'humanness' any more than it does with such equally complex concepts as love, faith, or trust." *Hearings on S. 158* (April 24 transcript at 25).

A careful examination reveals the true nature of this line of argument. By redefining "human being" according to one's value preferences, one never has to admit believing that some human lives are unworthy of protection. Conveniently one can bury the value judgment that some human lives are not worth protecting beneath the statement that they are not human beings at all. An editorial in the journal of the California Medical Association has explained why this line of argument appeals to those who reject the traditional ethic of the sanctity of human life, which accords intrinsic worth and equal value to all human lives:

> Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970).

The Subcommittee rejects as misleading semantic efforts to manipulate the English language and to redefine "human being" according to particular value preferences; instead we adhere to the customary meaning of "human being" as including every living member of the human species. S. 158 embodies the Subcommittee's finding, in accordance with the overwhelming consensus of scientific authority, that the life of a human being begins at conception. Our analysis of the leading works on embryology and fetal development indicates that witnesses who disputed that the life of a human being begins at conception reflect not scientific judgment, but rather the value preference of certain members of the scientific community[10] against protecting the life of unborn human beings.[11]

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[10] A recent survey by a disinterested insurance company found that the two groups in society most favorable toward abortion were the scientific and medical community and the legal profession. While 65 percent of the general public believe that abortion is immoral, only 25 percent of doctors and other scientists and only 25 percent of lawyers express such a belief. THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE 80s 219 (1981).

[11] Practical realities sometimes make it impossible for pro-abortion doctors to evade the fact that unborn children are living human beings. The *Philadelphia Inquirer*, in its Today magazine section on Sunday, August 2, 1981, ran a cover story by Liz Jeffries and Rick Edmonds entitled "Abortion: The Dreaded Complication." The "complication" described in the article, and so dreaded by abortionist doctors, is that some babies will survive an abortion procedure and be born alive. The article describes one instance in which a live two and one-half pound baby boy survived an abortion procedure: "Dismayed, the second nurse . . . . deposited it . . . on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. . . . '[The patient's physician] told me to leave it where it was,' the head nurse testified later, 'just to watch it for a few minutes, that it would probably die in a few minutes.' " *Id.* at 14.

The Subcommittee is appalled that some in the medical profession show such disdain for the value of a human life. But such tragic events do make it impossible to ignore that the unborn

If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings. The hearings before this subcommittee show that this fact is not seriously in doubt; it is questioned only by means of efforts to redefine "human being" in a purely subjective manner. No governmental body that approaches the abortion question with honesty can accept semantic gymnastics that obscure the real issue. Accordingly, we turn next to the real issue in dispute, whether to accord intrinsic worth and equal value to all human lives regardless of stage or condition.

V. THE VALUE QUESTION: SHOULD WE VALUE ALL HUMAN LIVES EQUALLY?

The answer to the scientific question casts the value question in clear relief. Unborn children are human beings. But should our nation value all human lives equally? Scientific evidence is not relevant to this question. The answer is a matter of ethical judgement.

Deeply engrained in American society and American constitutional history is the ethic of the sanctity of innocent human life. The sanctity-of-life ethic recognizes each human life as having intrinsic worth simply by virtue of its being human. If, as a society, we reject this ethic, we must inevitably adopt some other standard for deciding which human lives are of value and are worthy of protection. Because the standards some use to make such decisions turn on various qualities by which they define which lives are worthy of protection, the alternative to the sanctity-of-life ethic is often termed the "quality-of-life ethic." A sharp division exists today between those who affirm the sanctity-of-life ethic and those who reject it in favor of the quality-of-life ethic. The Supreme Court has never purported to decide which ethic our Constitution mandates for valuing the lives of human beings before birth. Nevertheless, deciding which ethic should apply is fundamental to resolving the abortion issue under the Constitution.

A few proponents of abortion have conceded that the real issue at stake is the intrinsic value of human life. The California Medical Association journal California Medicine, for exampe, has recognized the relationship between the rejection of the sanctity-of-life ethic and the advocacy of abortion:

> In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right, and even necessary.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970). Similarly, some witnesses who appeared before the Subcommittee to oppose S. 158 tacitly rejected the sanctity of human life. For example, one witness stated that "[a]t some point as the amazing chain of events that results in a fertilized egg becoming a human being unfolds, we acquire the basis for those attributes that make us humans, but precisely when I cannot say." *Hearings on S.*

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children being aborted today are human beings. Other medical realities further confirm this fact. For example, babies within their mothers' wombs can now be treated to alleviate various disorders. The doctors treating them do not try to redefine them as non-human. When doctors or scientists deny in selected contexts that unborn children are human beings, their statements should be recognized as evasions of facts by those for whom the facts are inconvenient.

Exhibit C

Proclamation 5761 of January 14, 1988

National Sanctity of Human Life Day, 1988

By the President of the United States of America
A Proclamation

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. 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. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. 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 without due process of law.

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. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout the land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several

states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

RONALD REAGAN

Proclamation 5762 of January 21, 1988

American Heart Month, 1988

By the President of the United States of America
A Proclamation

For more than half of this century, diseases of the heart and blood vessels, collectively called cardiovascular diseases, have been our Nation's most serious health problem. Last year, these diseases claimed 973,000 lives, and they caused serious and sometimes permanent illness or disability in still more Americans. Within this family of diseases, the leading killers remained coronary heart disease, which accounted for 524,000 deaths, and strokes, which accounted for 148,000 deaths.

Grim though these statistics may be, other statistics indicate that a corner may have been turned in 1965. Since then, mortality rates for all cardiovascular diseases, and especially for the two leading killers—coronary heart disease and stroke—have been moving steadily downward. For example, since 1972, mortality rates for all cardiovascular diseases combined have fallen by 34 percent, and those for coronary heart disease and stroke have declined by 35 percent and 50 percent respectively.

One major reason for the decline in cardiovascular mortality rates is that more and more Americans are modifying their habits in the direction of better cardiovascular health. Research has identified factors that increase vulnerability to premature coronary heart disease or stroke, and millions of Americans are acting on that knowledge to

Exhibit D

COMMENTARIES ON THE LAWS OF ENGLAND

BOOK THE FIRST (1765)

WILLIAM BLACKSTONE, Esq.

Based on the first edition, together with the most material corrections and additions in the second edition.

Translation of greek, latin, italian and french quotations (with some modifications) by J. W. Jones, Esq. (1823)

Footnotes have been converted to chapter end notes.
Spelling has been modernized.

Table of Contents

SECTION 2

Of the Nature of Laws in General

Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again - the method of animal nutrition, digestion, secretion, and all other branches of vital economy - are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.

This then is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior.

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid

down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as be is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian[1] has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its inseparable companion. As therefore the creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other-It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life: by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his

understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, has been pleased, at sundry times and in diverse manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their Intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder; this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation *in foro conscientiae* [in the court of conscience] to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject,[2] is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law, to regulate this mutual intercourse, called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts,

Exhibit E

Reconstruction Era (1867-1877)

The University of South Carolina School of Law was established as one of ten academic schools when South Carolina College was reorganized as the University of South Carolina in 1865 and 1866. The Board of Trustees elected twenty-seven year old South Carolina attorney Alexander Cheves Haskell as the first professor of law and the law school opened on October 7, 1867. Professor Haskell developed his own system of leading the junior class through a course in Blackstone's *Commentaries* and the senior class through a course on Stephens' *Pleading*. By November there were four students in the Law School's two classes. The first student of the law school was Arthur Moore of Columbia. He was joined by C. Pinckney Sanders (Walterboro), Jefferson Warren, and John T. Sloan (both of Columbia). Entrance requirements for the law school were no higher than for other schools and the course of study was not on the graduate level. Moore and Sloan completed the course in nine months and received the first bachelor of law degrees granted by the University on June 29, 1868. Haskell resigned the law professorship in November, closing the law school for the remainder of the academic year.

The Board of Trustees elected South Carolina attorney Cyrus David Melton to the professorship of law on July 12, 1869. Professors T. N. Roberts, Henry J. Fox, and Richard T. Greener, the first African-American faculty member at the University of South Carolina, assisted Melton with his teaching duties in the law school. The course of study was arranged to be completed in two academic years, though a student could enter both classes and complete the course in one year. Tuition for the law school's nine-month academic year was $50.00. From the opening of the law school in October 1867 until the death of Professor

Melton on December 4, 1875, classes were held in the University Library, now the South Caroliniana Library, and DeSaussure College.

During Melton's tenure, the University, including the law school, was integrated in October 1873. Walter Raleigh Jones was the first African-American to enroll in the law school on October 13, 1873. By the end of that October, five African-Americans had enrolled in the law school. On June 30, 1874, Jones earned the distinction of being the first African-American graduate of the law school. The Board of Trustees chose Franklin J. Moses, Sr., the Chief Justice of the Supreme Court of South Carolina, as Melton's successor. Under Moses the curriculum of the law school was modified to place a heavy emphasis on Blackstone's *Commentaries* and Kent's *Lectures*. When Moses died on March 6, 1877, the law school ceased to function. A Joint Resolution of the South Carolina General Assembly closed the law school on June 7, 1877. The Reconstruction-Era Law school had graduated thirty-nine students between 1868 and 1876, including eleven who were African-American.