EQUAL PROTECTION AND THE UNBORN CHILD: A *DOBBS* BRIEF*

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* This Article brings together the authors' Amicus Brief filed in *Dobbs* on July 29, 2021, their subsequent Enhanced Amicus Brief in *Dobbs*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3955231, and their Supplement to an Enhanced Amicus Brief in *Dobbs*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973183. It retains the broad outline and (with minor corrections) the whole content of the filed Brief, while expanding it fourfold with historical material and analysis.

EDITOR'S NOTE: Due to the nature of this piece as an adapted amicus brief, the authors have elected to retain some in-text citations as opposed to footnotes in the ordinary Bluebook style.

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INTRODUCTION

Roe conceded that if, as Texas there argued, "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," the case for a constitutional right to abortion "collapses."[1] But then the Court hurdled over text and history to an error-strewn denial that unborn human beings are persons under the Amendment.

Scholarship exposing those errors has cleared the ground for a reexamination of Texas's position in *Roe*. While recalling that scholarship, this brief sheds fresh light on the Amendment's original public meaning, focusing on common-law and pre-Civil War history (including primary material) that previous scholarship has not adequately noted or explored. That history proves that prohibitions of elective abortions are constitutionally obligatory because unborn children are persons within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

SUMMARY OF ARGUMENT

The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court's recent landmark originalist rulings.[2] The sources marshalled in such decisions—text, treatises, common-law and statutory backdrop, and early judicial interpretations—here point in a single direction.

First, the Fourteenth Amendment, sustaining and going beyond the Civil Rights Act of 1866, guaranteed equality in the fundamental rights of persons—including life and personal security—as these were expounded in Blackstone's *Commentaries* and leading American treatises. The *Commentaries*' exposition *began* with a discussion

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1. Roe v. Wade, 410 U.S. 113, 156–57 (1973); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Both *Roe* and Texas overlooked a three-judge district court majority's cogent defense of fetal constitutional personhood in Steinberg v. Brown, 321 F. Supp. 741, 746–47 (N.D. Ohio 1970).

2. These rulings include *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Crawford v. Washington*, 541 U.S. 36 (2004).

(citing jurists like Coke and Bracton) of unborn children's rights as persons across many bodies of law. Based on these authorities and on landmark English cases, state high courts in the years before 1868 declared that the unborn human being throughout pregnancy "is a person" and hence, under "civil and common law, . . . to all intents and purposes a child, as much as if born."[3]

From the earliest centuries at common law, (1) elective abortion at any stage was to "no lawful purpose" and functioned as an inchoate felony for not just one but two felony-murder purposes, and (2) elective abortion was an *indictable* offense at least when the woman was "quick with child"—a phrase with shifting meanings identified below.[4] (And contrary to *Roe*'s potted history, the sources show that the common law's concern was to protect the child's life, not simply to outlaw procedures dangerous to the mother.[5]) By 1860, the "quick-with-child" prerequisite for indictments had been abandoned in a majority of states, because science had shown that a distinct human being begins at conception. Such obsolete limits to the common law's criminal-law protection of the unborn had been swept away in this cascade of statutes, in almost three-quarters of the states, leading up to the Amendment's ratification.

In the 1880s, the Supreme Court held that corporations are "person[s]" under the Equal Protection and Due Process Clauses.[6] The rationale—combining the Blackstonian understanding of persons (as natural or artificial) with a canon of interpretation first expounded by Chief Justice Marshall and central to originalism today—itself blocks any analytic path to excluding the unborn. Indeed, the originalist case for including the unborn is much stronger than for corporations.

These textual and historical points show that among the legally informed public of the time, the meaning of "any person"—in a

3. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257–58 (1834).

4. *See* discussion *infra* Section I.A.4.aa.

5. *See infra* note 87.

6. *See* Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

provision constitutionalizing the equal basic rights of persons—plainly encompassed unborn human beings.

Second, the only counterarguments by any Justice—and by the sole, widely discredited legal-historical writer cited in *Roe*—rest on groundless extrapolations and plain historical falsehoods subsequently exposed in scholarship that has never been answered, to which this Brief adds some new evidence.

Finally, acknowledging unborn personhood would be consistent with preserving the nation's long tradition of deference toward state policies treating feticide less severely than other homicides and guarding women's rights to pressing medical interventions that may cause fetal death. Nor would recognizing the unborn require unusual judicial remedies. It would restore protections deeply planted in law until their uprooting in *Roe*.

ARGUMENT

I. UNBORN CHILDREN ARE CONSTITUTIONAL PERSONS ENTITLED TO EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment bars States from depriving "*any person* of life . . . without due process of law" or denying "to *any person* . . . the equal protection of the laws."[7] It was adopted against a backdrop of established common-law principles, legal treatises, and statutes recognizing unborn children as persons possessing fundamental rights.[8]

7. U.S. CONST. amend. XIV, § 1 (emphasis added).

8. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 605–16 (2008) (interpreting original public meaning based on Ratification Era treatises, antebellum case law, and Civil War Era legislation).

A. The Common Law Considered Unborn Children to Be Persons.

Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to sustain and enhance[9]—prominently acknowledged the unborn as persons. Leading eighteenth-century English cases, later embraced in authoritative American precedents decades before ratification, declared the general principle that unborn humans are rights-bearing persons from conception. And even before a nationwide wave of statutory prohibitions of abortion in the mid-nineteenth century, the common law firmly regarded abortion as gravely unlawful from the moment—supposed to have been established by science—when there emerged a new individual member of the human species, a human being. The treatises, cases and statutes are identified and analyzed below, but it is not too early to state the three common-law criminal prohibitions that protected the unborn child's life, prohibitory rules that recur constantly in the exposition below. For at common law, century after century, any elective abortion engaged three indictable offences, three types of homicide:

[I] [*pre-natal* quasi-*felony-murder of the woman*] all attempts at elective abortion are so gravely unlawful when done that if they result in the death of the mother within a year and a day, they are murder;

[II] [*pre-natal* quasi-*felony-murder of the child*] all attempts at elective abortion are so gravely unlawful when done that if they demonstrably result in the child's death after being born alive, they are murder;

[III] every elective abortion is a serious misprision (near-felony) or very grave misdemeanor, *at least* when it results in the aborting of the pregnancy of a woman "quick with child."

9. Congress, though not limiting itself to this purpose, drafted the Fourteenth Amendment to sustain the Act of 1866. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018).

Protections [I] (quasi-felony murder of the mother) and [II] (murder by abortifacient of the child born alive) were generally left in place by the reforming statutes of the Ratification Era—the two decades before and after ratification of the Fourteenth Amendment. Those statutes focused on rule [III] (the crime of elective abortion as such). More or less unanimously, though with many differences of detail, they retained the position settled at common law by 1601: elective abortion as such, though a very serious crime, is not punished as murder or manslaughter, and the drawing of this distinction among kinds of unlawful killings is judged fully compatible with protecting the child in the womb as a person.

The distinction thus drawn between persons in the womb and persons partly or wholly outside the womb is in all our jurisdictions judged to be a distinction rationally and justly recognizing the unique situation of these two interdependent persons, the mother and her unborn child.

The common law and those reforming statutes agree that if the pregnant mother's life is threatened either by the presence of the unborn child or by a medical condition that cannot be relieved without termination of the pregnancy, such termination is fully lawful even though it foreseeably results in the death of the unborn child (just as, analogously, necessary measures of self-defense are fully lawful, and compatible with equal protection of the law, even when lethal). This Brief uses the term "elective abortion" to distinguish each of the three common-law rules, and their statutory successors, from such medical emergency cases.

Another relevant category of non-elective abortion—destruction of the child in the womb without the mother's consent—is given adequately distinct but also adequately balanced legal treatment only later than the Ratification Era. For although almost all the reforming statutes of that Era amend the common law by implicitly exempting the mother who consents to or requests abortion, it is, broadly speaking, only in the 20th century that closer reflection on just (equal) protection of the unborn impels many state legislatures to treat this other type of non-elective abortion as murder.

A final introductory note. Both the common-law cases and treatises, and then the countless statutes of the Ratification Era, speak almost without exception of "the (unborn) child," and almost never of "the fetus." This Brief accordingly speaks likewise. To follow the "fetus/fetal" usage common in legal circles today would to some extent, even if only subliminally, impede getting a clear view of the original public meaning of "deny to any person the equal protection of the laws" in the Equal Protection Clause ratified in 1868.

1. The Foundational Treatise

Blackstone's *Commentaries*, expressly teaching that unborn human beings are rights-bearing "persons," contributed enormously to the term's shared legal meaning in 1776–91 and 1865–68. Little wonder that when House Judiciary Committee Chairman James F. Wilson introduced the Civil Rights Act of 1866, he said:

> [T]hese rights . . . [c]ertainly . . . must be as comprehensive as those which belong to Englishmen . . . . Blackstone classifies them . . . as follows: 1. The right of personal security . . . great fundamental rights . . . the inalienable possession of both Englishmen and Americans . . . .[10]

Wilson was quoting Blackstone's *Commentaries*' first Book, "Of the Rights of Persons," and its first Chapter, "Of the Absolute Rights of Individuals." Wilson observed approvingly that the leading American treatise on common law—Kent's *Commentaries*—explicitly adopted Blackstone's categorization of these rights and description of them as "absolute"—natural to human beings.[11]

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10. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (March 1st, 1866).

11. *Id.* at 1118 (col. iii); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123 (stating that "absolute *rights*" are those that "would belong to their persons merely in a state of nature, and which every man is entitled to enjoy"). (Blackstone uses "man" synonymously with "human being.") In this usage, rights are called *absolute* because they are *not conditional* either upon recognition and specification by positive law (whether common law or statute, or Civil or other laws), or upon relationships entered into with other individuals. *Id.* The Amicus Brief of the United States

Blackstone's analysis, presented as uncontroverted and familiar to Wilson's listeners in Congress, begins with the "right of personal security"—"*a person's* legal and uninterrupted enjoyment of his life, his limbs, his body, his health . . . ." And Blackstone's unfolding of this right of persons opens, *immediately* after Wilson's quotation, with *two paragraphs* about the rights of the unborn:

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[12] For if a woman is

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rightly acknowledges the unequalled primacy of these pages of Blackstone as demonstrating the rights recognized "[a]t the Founding," precisely as "absolute rights" vested in persons "by the immutable laws of nature." Brief of the United States as Amicus Curiae Supporting Respondents at 22, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (citing pages *120, *125 and *130, but significantly omitting *129).

Present in the background is the fact rightly recorded in the Amicus Brief of the American Historical Association and the Organization of American Historians at 7, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392):

> Blackstone's "works constituted the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). James Wilson, who crafted the preamble to the U.S. Constitution, quoted and endorsed Blackstone's words in his seminal lectures of 1790: "In the contemplation of law, life begins when the infant is first able to stir in the womb." James Wilson, *Natural Rights of Individuals* (1790), *reprinted in* 2 THE WORKS OF JAMES WILSON 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).

The cited passage from Justice Wilson's 1790 lecture reads, more fully:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.
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> 2 THE WORKS OF JAMES WILSON 596–97 (Robert G. McCloskey ed., 1896).

12. BLACKSTONE, *supra* note 11, at *129–30 (footnote omitted). Nothing in Blackstone or Coke, Hawkins and other classic writers on the common law suggests that the phrase "able to stir" meant "felt by the mother to stir," as the Amicus Brief of the American Historical Association and the Organization of American Historians, *supra* note 11, asserts at 5 (opening paragraph of its Argument) and *passim*, erroneously stating: "At

> quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.(*o*)[13] But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.(*p*)

The penultimate sentence's footnote "(*o*)" quotes a line from Bracton in Latin about abortion as homicide; the final sentence's footnote (*p*) cites a passage in Coke's *Institutes* that ends by quoting the same line from Bracton.[14] (These two sentences about one ele-

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common law, as explained by authorities such as Coke and Blackstone, life was deemed legally to begin only when a pregnant woman sensed the fetus stirring in her womb." Nothing would have been easier to say, but Coke, Blackstone, and the others neither say nor imply it. From Bracton through the American founding era, common-law criminal law fixed its attention almost entirely on the unborn child's formation and animation—that is, its life as a distinct individual, and its consequent *ability* to move or stir—not on the mother's usually much later experiences of the child's making its presence felt by its stirring and kicking. *See infra* at notes 64, 66, 78.

13. American editions of 1 COMMENTARIES, based on Edward Christian's 1793 edition, here insert a note stating that if the child is born alive and dies from the abortion it will be murder, and those who administered the potion or advised the woman to take it will be liable as accessories before the fact to the same punishment. See for example the 1822 and 1860 editions mentioned *infra* note 14, or the 1818 edition by publishers in Boston, Philadelphia, Baltimore, Washington City, and Georgetown, D.C.

14. For the passage from Coke (3 INST. 50) and the sentence that both Coke and Blackstone quote from Bracton, see text *infra* after note 66. Note that the quotation above is from 1 COMMENTARIES's first edition, Oxford 1765, pp. 125–26; in its second edition, 1768, and thereafter the editions in Blackstone's lifetime—including the first American edition, Boston 1774—these paragraphs are at pp. 129–30 and the first paragraph's last sentence reads: "But *Sir Edward Coke doth not look upon this Offence* in quite so atrocious a light, but merely as a heinous misdemesnor" (emphasis added). (In later American editions such as the second American edition, Boston 1799, the 1822 New York edition, or George Sharswood's many editions, *e.g.*, Philadelphia 1860, it reads: "But the modern law doth not look on this offence in quite so atrocious a light, but merely as a heinous misdemeanor.") The change makes it evident that by 1768 Blackstone had decided that he would not articulate the "present" position in his own voice until his full treatment of homicide in vol. 4, the first edition of which was in 1769. There he deals with type [III] protection of unborn life not as a misdemeanor but, more serious, "a great

ment—type [III]—in the criminal law's protection of unborn children's right to life are closely analyzed below, along with the fuller, contextualized treatment that students using 1 *Commentaries* knew they would find in Blackstone's treatise on criminal law, 4 *Commentaries*.[15]) The second of Blackstone's two paragraphs on unborn children's rights follows immediately, on a canvas much wider than criminal law protections:

> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It[16] is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.[17]

These two paragraphs received intense and merited attention from American courts and lawyers. The *first* paragraph's first sentence concerns the natural right of a living individual possessing human nature.[18] Blackstone here points to *natural realities* calling for legal embodiment, and to a *doctrine of common-law* criminal law that constitutes such an embodiment. The doctrine he mentions here is not the only or even the most important doctrine recalled in these paragraphs to illustrate the rights of the unborn, but it is mentioned immediately, in view both of the section's topic (the right to *life*)

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misprision," and—as with types [I] and [II]—makes (unlike Coke) no reference to the quickness or otherwise of the unborn child. *See infra* note 31.

15. *See infra* section I.A.3.a, and notes 34, 85, 100.

16. Blackstone uses "it" of born children as well as unborn. *See* BLACKSTONE, *supra* note 11, at *300 ("[T]he child, by reason of its want of discretion . . . .").

17. *Id.* at *129–30 (some footnotes omitted). Footnote 11(s) reads, translated: "Those who are *in utero* are understood in Civil law to be 'in the real world' [*in rerum natura esse*], when it is a matter/question of their benefit" (citing Justinian's *Digest* 1.5.26, save the last five words, which in fact give the gist of 1.5.7). Blackstone has cut two words to universalize the principle, which had read: "in *almost* the whole [*toto paene*] of the Civil law."

18. *See id.* at *133 ("This natural life . . . cannot legally be disposed of or destroyed by any individual . . . merely upon their own authority.").

and of what may be inferred from the treatment of natural realities "in contemplation of law."

This last phrase, in Blackstone, signals legal fictions:[19] here, a legal doctrine's treatment of the infant's ability "to stir in the womb"[20] as the start of life for some purpose. Blackstone follows this first paragraph—about the criminal law's narrow, defendant-protective conception of homicide (requiring a "stir[ring]," perhaps partly for evidentiary reasons)—with a paragraph sketching laws that, *free* from artificial constraints, benefit all unborn humans. Thus he hints that the law bearing on rights of persons accommodates more than one "contemplation of law," more than one conception of the person, and may be refined.

For, quite generally and in all eras of our civilization, "person" can mean (1) a natural reality signified in our civilization by Boethius's definition ("an individual substance of a rational nature"), closely corresponding to the sense used in this foundational *Commentaries* text,[21] or (2) a social role signified by the term's root meaning *mask* or *assumed identity*—in which sense the law can deem anything a person (rights-bearing unit).

The Fourteenth Amendment uses "any person" (without qualifiers) paradigmatically in the first sense. Yet the Court, since the 1880s,[22] has also included corporations within "any person" because the meaning of "person"—in the then-prevailing linguistic-conceptual framework of a legally educated public brought up on Blackstone's *Commentaries*—linked under "the Law of Persons" (*the*

19. *See, e.g.*, *id.* at *270 ("[I]n contemplation of law [the King] is always present in court."). Legal fictions are found on a spectrum ranging from legally stipulated definitions close to ordinary-language conceptions of natural or other realities, through more or less technical and artificial terms of art, to outright contra-factual (fictive) propositions of law such as the one just quoted. See further *infra* section III.C.1 and notes 76, 129, 209, 213.

20. For the phrase, not then a legal term of art, see *infra* note 59.

21. *See* BLACKSTONE, *supra* note 11, at *130 (citing Coke for "reasonable creature"); *id.* at *300 (using that phrase for human being or person).

22. *See infra* section I.B.2.

topic of the whole of 1 *Commentaries*) both natural and artificial persons.[23]

Blackstone's *second* paragraph on unborn persons' rights states an even more pervasive common-law doctrine (construing common law broadly to include established equitable principles). Also essential to the legal context and meaning of "any person" in the 1868 Clauses, this doctrine treats the unborn as rights-bearing persons *from conception*, in many fields besides criminal law. It was developed and expounded in notable English cases adopted by leading state courts in the antebellum generation.

2. Status of Children in utero in American Civil Law

The leading case of *Hall v. Hancock*,[24] which cited many English cases, formulated this doctrine thirty-two years before the debates on the Civil Rights Act of 1866. The Massachusetts Supreme Judicial Court ruled unanimously, per Chief Justice Shaw:

> [A] child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth . . . . [T]he distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases [and] does not apply to cases of descents, devises and other gifts; and . . . a child will be considered in being, from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered. . . .
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> Lord *Hardwicke* says, in *Wallis v. Hodson*,[25] . . . that a child *en ventre sa mere* is a person *in rerum naturâ*, so that, both by the . . . civil and common law, he is to all intents and purposes a child, as much as if born in the [testator's] lifetime. . . .

23. *See, e.g.*, *id.* at *123, *467. 1 COMMENTARIES concludes with a chapter on the rights of "artificial persons," corporations.

24. 32 Mass. (15 Pick.) 255 (1834).

25. (1740) 26 Eng. Rep. 472, 2 Atk. 114, 116.

> *Doe v. Clarke*[26] is directly in point[,] . . . stat[ing] as a fixed principle, that wherever [it] would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born.[27]

This doctrine about the real and legal personhood of the unborn *from conception* was enunciated by an esteemed state chief justice not as a technical rule for one purpose but as a "fixed principle" "to all intents and purposes": the unborn is "a child, as much as if born" and "is a person *in rerum naturâ*."[28] The Georgia Supreme Court, too, in 1849, expressly applied that principle, paraphrasing Hardwicke and Shaw.[29]

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26. (1795) 126 Eng. Rep. 617; 2 H. Bl. 399.

27. *Hall*, 32 Mass. at 257–58.

28. *Id. See also in rerum natura*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In the nature of things; in the realm of actuality; in existence."). The idiomatic sense in these contexts often approximates to "in the ordinary world," for instance, the "world" outside the darkness and anonymity of the womb, where the child is in "a world of its own," even its sex unknown to all, and unable to communicate or be communicated with even in a rudimentary fashion. For more on this routine phrase, always kept, elusively, in a foreign language, see *infra* notes 69, 76, and especially 218.

Lord Hardwicke's parallel decision in *Millar v. Turner* (1748) 27 Eng. Rep. 971, 1 Vesey Sr 85, shows how these cases correct the inference, adverse to the unborn, that might be drawn from Coke's statement, at 3 *Inst.* 50, that children are accounted *in rerum natura* when born alive. Hardwicke cites 3 *Inst.* 50 to support his statement that an unborn child "is considered as *in esse*," "the destruction of him is murder; which shews the laws [*sic*] considers such an infant as a living creature." *Millar*, 1 Vesey Sr at 86. The deliberate doing of the destructive act, though completed while the child in *in utero*, is murder, subject only to a condition subsequent: that the child be living, however temporarily and unviably, when delivered.

29. *See* Morrow v. Scott, 7 Ga. 535, 537 (1849) (posthumous child's share in estate on intestacy). Following 1 COMMENTARIES *130, Kent and Hardwicke in *Wallis* and *Clarke*, and Shaw in *Hall v. Hancock*, the Georgia Supreme Court quotes from the latter the rule that "in general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered," and adds: "This rule is in accordance with the principles of justice, and we have no disposition to innovate upon it, or create exceptions to it. Let the judgment of the Court below be reversed." *Id.*

Given this general but pointed principle,[30] and the doctrinal architecture of Blackstone's *Commentaries* and thus of American legal education for the century preceding 1868, the original public meaning of "any person" in the fundamental-rights-regarding Equal Protection Clause included living preborn humans.

3. The Three Main Criminal Law Protections of the Unborn Child in American Common Law

a. In the Treatises

Blackstone's two sentences at 1 *Commentaries* *129–30 select just one of the three criminal law protections of the child *in utero* that he will expound at 4 *Commentaries* 198–201. There, in one sentence tracking the sentences from Coke that his first volume had cited at *130, Blackstone will affirm[31] that both [III] and [II] are grave offenses:

> [III] To kill a child in its mother's womb, is now no murder, but a great misprision : but [II] but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb it seems, by the better opinion, to be murder in such as administered or

30. *See* Botsford v. O'Conner, 57 Ill. 72, 76 (1870) (holding that a child *in ventre sa mere* is a "person" who "must have an opportunity of being heard, before a court can deprive such person of his rights"); *see also Wallis*, 26 Eng. Rep. at 473; Beale v. Beale (1713) 24 Eng. Rep. 373; 1 P. Wms. 244.

31. The context is Chapter 14, "Of Homicide," in BLACKSTONE, 4 COMMENTARIES (beginning at page *176). At page *188, sec. III., Blackstone explains that "[f]elonious homicide" is "the killing of a human creature, of any age or sex, without justification or excuse." Later, at page *194 and following, Blackstone discusses "deliberate and wilful *murder*.":

> In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. [fn. 1 Hawk. P. C. 79.] Further; the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war. [fn. 3 Inst. 50. 1 Hal. P. C. 433.] To kill a child in its mother's womb, ...
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> BLACKSTONE, 4 COMMENTARIES *197–98.

> gave them [fn. 3 Inst. 50. 1 Hawk. P. C. 80. *But see* 1 Hal. P. C. 433.].[32]

The passage treats the opinion of Coke (before Hale) and Hawkins (after Hale) as sounder, in this instance, than Hale's[33]—all three treatises being staple authorities in Blackstone's exposition of common-law criminal law. But Blackstone promptly goes on to affirm that [I] accidentally causing the death of the pregnant woman by consensual abortion is murder, and here a judicial ruling by Hale is his primary authority. Expounding homicide with implied or transferred malice, Blackstone says, about felony murder:

> And if one intends to do another felony and undesignedly kills a man, this is also murder.[fn. i 1 Hal. P. C. 465] Thus, if one shoots at A and misses *him*, but kills B, this is murder . . . The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.[fn. j Ibid. 466] So also, [I] if one gives a woman with

32. 4 COMMENTARIES (8th ed. 1778) 198. For the key passage here cited, 3 INST. 50, see *infra* p. 956.

33. SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 432–33 (1743) [hereinafter HALE, H.P.C.]:

> [T]he second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder or manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be [III] a great crime, and by the judicial law of Moses(*g*) was punishable with death, nor can it legally be known, whether it were kil[led] or not, [citation to Yearbook of Edward III] so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this [II] is not homicide [citation to an earlier Yearbook]. (emphasis added).

Hale's first two sentences do not deny that the child *in utero* is a person. They deny only that it is a person *of the kind* whose killing is homicide as distinct from [III] "a great crime" (Coke's great misprision). *See infra* text accompanying note 224. But the last sentence does deny that killing the child after abortion is a type [II] indictable homicide, and in this view Hale is virtually alone and will be explicitly rejected by all the subsequent authoritative eighteenth and nineteenth century treatises circulating in America. *See infra* at notes 70–73.

> child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.[fn. k Ibid., 429][34]

Notice: "a woman with child," that is, a pregnant woman—no reference to quickening. In this, Blackstone is following Hale, who—at the end of a vigorous argument concluding that physicians, even if unlicensed, are not guilty of homicide if the potion they give *intending to heal* in fact kills[35]—contrasts that position with the administration of abortifacients:

> But [I] if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but *unlawfully to destroy the child within her*, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder . . . [36]

"[M]ust take the hazard:" the real or pretended medical practitioner who engages in abortion does so at risk of being guilty of murder if his patient's death ensues, however skilfully he acted. For, as Hale's "unlawfully" only implies but Blackstone's exposition at 4 *Commentaries* *198 makes clear, this is a case both of felony murder—because destruction of the unborn child is *incipiently* felonious—and of transferred murderous malice ("malice aforethought")—because intent to destroy the unborn child is *incipiently* homicidal: if the aborted child is born alive and then perishes from the effects of the abortifacient, that is [II] murder.

The three types of criminal law protection of the unborn that are expounded by Blackstone were expounded both earlier and later in the criminal law treatises in use in America. The three offenses are set out economically in *Burn's Justice of the Peace*,[37] both the 1764

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34. 4 COMMENTARIES *200–01.

35. HALE, H.P.C., *supra* note 33, at 429.

36. *Id.* at 429–30 (emphasis added) (adding that he had given this ruling "at the assizes at *Bury* in the year 1670").

37. RICHARD BURN, JUSTICE OF THE PEACE, AND PARISH OFFICER (1764), 228–29.

English edition, and the 1792 American edition, *Burn's Abridgment, or The American Justice; containing the whole practice, authority and duty of justices of the peace; with correct forms of precedents relating thereto, and adapted to the present situation of the United States*,[38] addressed to justices in New Hampshire, Massachusetts, and Vermont and published in Dover, New Hampshire. The chapter on homicide, in its section on murder, treats the three offenses as a single unit: having set out Hale's ruling (H.P.C. 429) about lethal but not criminal medical mistakes, the section continues with Hale's ruling (H.P.C. 429) that [I] giving a potion "to destroy the child within her" is murder if it kills her; this is followed immediately by Coke's ruling (3 *Inst.* 50) that [III] "if a woman be quick with child, and by a poison or otherwise killeth it in her womb" this is "a great misprision but no murder;" and that is followed immediately by Coke's ruling that [II] it is murder if the child is born alive and dies from the abortifacient measure. A sub-paragraph reports Hale's opinion (1 H.P.C. 433) that it cannot "legally be known" whether the abortifacient killed the child or not, but gives the final word to Hawkins' (1 Hawk. 80) view that "it is clearly murder."

East's Pleas of the Crown. First published in London in 1803, Edward East's *Treatise of the Pleas of the Crown* was promptly published in Philadelphia in 1804 and 1806.[39] In the chapter on Homicide, after a terse but thoughtful presentation, in passing, of rules [II] and [III], there is an extensive discussion of *transferred* malice aforethought, including homicidal malice transferred from the unborn child to the pregnant mother, a discussion brought to bear on rule [I]:

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38. RICHARD BURN, BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE; CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE; WITH CORRECT FORMS OF PRECEDENTS RELATING THERETO, AND ADAPTED TO THE PRESENT SITUATION OF THE UNITED STATES (1792), 226 [misprinted 216]. An edition published in Boston in 1773 had referred only to Hale's opinion on types [II] and [III].

39. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN (Philadelphia 1806).

> [ch. V, sec. 17, margin note: *Malice to one which falls on another*] In these cases the act done follows the nature of the act intended to be done. Therefore *if the latter were founded in malice*, and the stroke from whence death ensued fell . . . upon a person for whom it was not intended, yet *the motive being malicious*, the act amounts to murder; . . .
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> . . . .
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> . . . [margin note: 1 Hale, 429] Hither also may be referred the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for *the acts were in their nature malicious* and deliberate, and necessarily attended with great danger to the person on whom they were practised.[40]

The skewers case (but not the potion case) is cited in the margin: "Marg[aret] Tinckler's case, 6th Nov. 1781 by all the judges [of England]", and East summarizes it from judges' notes.[41] The abortifacient acts of the accused abortionist (insertion of skewers and tossing up and down of the pregnant woman), though all consensual, were all criminal, and so constituted murder on [the fulfilling of the condition subsequent,][42] the death of the pregnant woman—which in this case happened to be after the birth of her child (alive, but dying instantly).

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40. *Id.* at 230 (emphases added).

41. *Id.* at 230, 354–56 (ch. V, sec. 124). Notice that though this case was tried before one of the King's judges on assize and was later considered by "all the judges," it is entirely unreported and would be unknown but for the (extensive) account of it in East's treatise.

42. For this analysis, see *infra* notes 28, 69, 73–74, 102, and pp. 989, 992.

East's discussion of the transferred malice in a consensual elective abortion is deployed in the affirmation of rule [I] by Russell's *Treatise On Crimes*,[43] perhaps the most important of the early 19th century English-American treatises.[44] Attempts to evade East and Russell and the major judicial ruling in *Tinckler's Case* will in 1971 play a large part in the desperate efforts of Means II (accepted uncritically by the majority in *Roe*) to avoid and efface the common law's many-faceted criminalization of elective abortion.[45]

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43. 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS (Lincoln's Inn, 1819). Its first American Edition was by Daniel Davis in his third decade as Solicitor-General of Massachusetts and published by Wells and Lilly of Court Street, Boston, in 1824. By 1841 it was in its fourth American edition, incorporating the notes, supplementations and excisions made by Davis, by Theron Metcalf (later a judge of the Supreme Court of Judicature), and by George Sharswood, and published in Philadelphia. 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS (Philadelphia 4th ed. 1841). The American editions use Russell's text and supplement or comment on it in footnotes.

44. Russell deals with [I] in Book III, ch. 1 (Murder), sec. IX, which begins on p. 759 with the general proposition that the rest of the section will particularize:

> If an action, *unlawful in itself*, be done deliberately, and with *intention of mischief or great bodily harm to particulars*, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.

Id. at 759 (emphasis added) (capitalization adapted).

Thus Russell moves abortion "felony-murder" into the context of transferred malice: the abortion was intended to do (lethal) mischief to one individual, the actual or supposed unborn child, but resulted in (lethal) mischief to another, the (actual or supposed) mother: result, murder. He continues on p. 760:

> [margin note: *Murder in attempting to procure an abortion*] So, where a person gave medicine to a woman to procure an abortion [fn. 1 Hale, 429], and where a person put skewers into the womb of a woman for the same purpose [fn. Tinckler's case, 1 East. P. C. c. 5, s. 17, p. 230, and s. 124, p. 354], by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the women was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.
>
> *Id.* at 760.

"The persons on whom they were practised" included, it seems, both the women and the unborn children they were or were believed to be carrying.

45. *See infra* text near note 170.

b. In State Court Cases

The Brief of the United States, intervening in *Dobbs*, rightly identifies Chief Justice Shaw's judgment for the Supreme Judicial Court of Massachusetts in *Commonwealth v. Parker*[46] as the appropriate representation of what *Roe* called the "received common law in this country."[47] Relying on Bracton-Coke-Blackstone, Shaw wrote that indictments for abortion must aver that the woman "was quick with child."[48] That is the dispositive ruling in the case, a ruling superseded by statute less than six weeks before it was given.[49] It was a conservative, defendant-favorable judicial ruling,[50] but it *explicitly*

46. 50 Mass. (9 Met.) 263, 267 (1845). The judgment, at 267, alludes in passing to *Hall v. Hancock*, in which the common-law rule reaffirmed in *Parker* was foundational in the unsuccessful argument (of Metcalf) for the appellant defendant, and was dealt with by Chief Justice Shaw thus: "We are also of opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered." Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257–58 (1834).

47. Roe v. Wade, 410 U.S. 113, 134 (1973).

48. *Parker*, 50 Mass. (9 Met.) at 265.

49. Massachusetts had made the question moot (for future litigation) on January 31, 1845, by a statute prohibiting any attempt to "procure the miscarriage of a woman." *An Act to Punish Unlawful Attempts to Cause Abortion*, ch. 27, Mass. Acts 406 (1845).

50. The Massachusetts Penal Code Commissioners who reported in February 1844, REPORT OF THE PENAL CODE OF MASSACHUSETTS (Boston 1844), had made it clear that, *in the common law* as they understood it, indictability or criminal liability for abortion did not depend on whether the woman was or was not "quick" with child. Their proposal retained the term "quick" only in relation to severity of punishment. Nothing related to maternal *perceptions* of the life and motion of the child made any appearance in their discussion, *id.*, ch. VII, at 19–20, of the common law, and even the word "quicken" appeared in that discussion only in relation to Bracton, where they twice use "quickened" to translate his word *animatum*. Nor is "quick[en]" part of their proposed definition of the offence of abortion, which prohibits the action of any one who:

> maliciously, without lawful justification, *with intent to cause the miscarriage* of *a woman then with child*, administers to her, or causes or procures to be administered to or taken by her, or knowingly aids or assists in administering to her, or causing or procuring to be administered to or taken by her, any poison or noxious thing, or shall maliciously use any instrument or other

declined to rule on the question "what degree of advancement in a state of gestation would justify the application of that description [quick with child] to a pregnant woman"—Shaw declined to hold that at common law a woman's "being quick with child" meant that she has "felt the child alive and quick within her."[51] He quoted with implied approval Bracton's ruling—in which *formatum et animatum* certainly did not allude to maternal sensations of fetal movement/kicking—and summarised it: until the fetus had "advanced

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means with like intent . . .

Id., ch. XIII at 1 (emphasis added).

The commissioners then go out of their way to re-emphasize that their provision states what they believe to be the existing common law: both in criminalizing elective abortion at all stages of pregnancy and in respecting the mother's need to terminate a pregnancy that threatens her life. For footnote (a) says:

> *This is a crime by the common law*. (Deac[on] Cr. Law [London 1831], 9; 1 Russ[ell *On Crime*,] 796, 8th Ed.[by Daniel Davis, S-G Mass., 1841]; 3 Chit[ty], Cr. Law, 798 [Mass. 1841]; [Daniel] Davis's Justice[s of the Peace, Boston 1828] 262; Bang's C[ase] 9 Mass, R. 387 [181]) . . . Where the potion is given, or other means of causing abortion are used, by a surgeon, *for the purpose of saving the life of the woman*, the case is free of malice and has a lawful justification, and so does not come within the above provision.

Id. n.(a) (emphases added).

Thus, at the time of Chief Justice Shaw's opinion in *Parker*, a significant section of legal opinion considered that the common law's type [III] rule was not tied to "quick with child" (let alone "quickening") but was concerned only with the existence of a child capable of being killed in the womb. The commissioners in effect sided with those—notably Daniel Davis, for more than 30 years Solicitor General of Massachusetts, who came to think that the *Bangs* ruling, *Commonwealth v. Bangs*, 9 Mass. 387 (1812), erred in requiring that indictments for abortion allege that the woman was quick with child. *See* DANIEL DAVIS, PRECEDENTS OF INDICTMENTS: TO WHICH IS PREFIXED A CONCISE TREATISE UPON THE OFFICE AND DUTY OF GRAND JURORS 34 n.3 (Boston, 1831) ("There is no authority referred to in [*Bangs*] . . ."); *id.* at 36 n.1 (form of indictment for administering savin-based drug to a woman "with child but not quick with child" with intent to procure miscarriage, taken from 3 Chitty, *Criminal Law* *798 "upon the presumption that the facts therein stated would amount to a misdemeanour at common law.").

51. *Parker*, 50 Mass. (9 Met.) at 267. The only authority that Shaw finds identifying "quick with child" with "quickened" in the maternal-perceptions sense is *Phillips* (*infra* note 62), interpreting "quick with child" "in the construction of this [English] statute."

to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," rule [III] abortion was not indictable.[52] Moreover, Shaw reaffirmed the common law rule [II] that if the child dies from abortion after being born alive, the abortifacient acts, however early in the pregnancy they were done, were murder.

A few weeks earlier the state's legislature had definitively swept away the whole debate about "quick with child," by making abortion at any stage punishable (variously but with at least one year's imprisonment).[53] It adopted the thrust of the Penal Code Commissioners' 1844 proposal, but rejected their suggestion that being "quick with child" be relevant to penalty, and instead made the severity of penalty depend upon whether or not the mother died (thus folding a mitigated rule [I] into the newly articulated rule [III]).

Parker's limitation of the common law rules [II] and [III] to attempts and abortions on a woman "quick with child" was rejected by the courts in Pennsylvania and Iowa.[54] It was accepted by the courts in New Jersey[55] and Maine,[56] but New Jersey's legislature instantly rejected the limitation.[57] Maine's legislature had criminalized abortion at all stages of gestation much earlier, in 1840, and so its court's 1851 ruling on the common law had little practical significance.[58]

4. The Unimportance of Quickening

The conclusion that the original public meaning of "any person" in the Equal Protection Clause included living preborn humans is not undermined by the (limited, shifting, under-determinate, and

52. *Parker*, 50 Mass. (9 Met.) at 266, 268.

53. *See supra* at note 49; *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85 (1858).

54. Mills v. Commonwealth, 13 Pa. 631, 632–33 (1850); State v. Moore, 25 Iowa 128, 135 (1868).

55. State v. Cooper, 22 N.J.L. (2 Zab.) 52, 54 (1849).

56. Smith v. State, 33 Me. 48, 51 (1851).

57. *Infra* note 87 (quoting State v. Murphy, 27 N.J.L. 112 (N.J. 1858)).

58. *Infra* note 200.

ultimately transient) relevance at common law of a child's or woman's being "quick" or "quickened."

a. Before the 1850s

Though crumbling by Blackstone's time, archaic views of human generation had some credence as late as the early nineteenth century. Such views, unchallenged from the 13th through the mid-17th centuries, mostly supposed that generation involved an unformed mass, first milky then fleshy, undergoing successive "formations" (receptions of new forms—vegetable, animal, etc.) until it was differentiated enough, at around six weeks, to acquire a distinctly human form, and substance, the *animation* of which by a rational soul (*anima*[59]) was considered to make it a *human* organism. Despite scientific advances, this widespread misunderstanding of gestation as marked by a discontinuity—by the emergence of a *human individual* at about six weeks from conception—was exacerbated in public discourse by linguistic instability and consequent further misunderstandings making the words "quick," "quicken," and their cognates unstable and ambiguous right down to the mid-nineteenth century. Although these uncertainties led some courts to leave reform of common law abortion offenses to legislatures,[60] they did not affect the *legal* question whether prenatal humans—*whenever* science showed they existed—were "person[s]" entitled to life and security. *All along, they have been*, as is demonstrated by near universal talk of unborn children (rather than fetuses) and by the shape of the

59. Scientists into the seventeenth century relied on ARISTOTLE, HISTORIA ANIMALIUM 7.3.583b (cited by *Roe* at 133 in its muddled footnote 22) for the view that, at approximately 40 days (at least for males) this mass becomes articulated and the first fetal movement occurs. (So too Blackstone's "able to stir in the womb.") Bracton probably held the view Aquinas contemporaneously articulated in SUMMA CONTRA GENTILES II c. 89, summarized in JOHN FINNIS, AQUINAS: MORAL, POLITICAL AND LEGAL THEORY 186 (1998): it takes about six weeks for generation to yield a body sufficiently elaborated (*complexionatum*) and organized (*organizatum*) for animation (receiving the rational, human soul). For the most widely read treatment contemporaneous with both Bracton and Aquinas, see *infra* note 64.

60. *Infra* note 86.

common law, in which *at least* type [I] homicide protection was entirely independent of quickening in any sense, and—as general opinion about gestation caught up with the science—courts and lawmakers fairly swiftly extended the long-standing type [II] and the even longer-standing type [III] protections by freeing them from any limiting notions of "quick," "quickened," etc.[61] The confusion was perhaps at its height during the half-century when one two-millennial paradigm was in the last phase of being definitively replaced by the new paradigm of continuous self-directed growth from conception.[62]

aa. THREE SENSES OF "QUICK[EN]"

To make sense of the legal history, three distinct senses of "quick[en]" must be kept in view:

61. *Infra* section I.A.3.b.

62. Crucial in fomenting if not initiating the final-phase confusion was *Rex v. Phillips* (1811) 3 Camp. 73, 77, 170 Eng. Rep. 1310. This seems to have been the first reported case of an indictment under that section of the 1803 English statute 43 Geo. III c. 58 which made abortion of a woman quick with child a capital offense. The medical witnesses, significantly, "differed as to the time when the foetus may be stated to be quick, and to have a distinct existence," and the woman swore "that she had not felt the child move within her before taking the [abortifacient] medicine, and that she was not then quick with child." The medical witnesses, despite their own (differing) medical views, "all agreed that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception." The trial judge, Lawrence J., said that this was the interpretation that must be put on the words *quick with child* IN THE STATUTE; and as the woman in this case had not felt the child alive within her before taking the medicine –- he directed an acquittal." The full account of the case in JOHN. A. PARIS & JOHN FONBLANQUE, 3 MEDICAL JURISPRUDENCE 86–90 (1823) (a treatise cited by counsel for the appellant in *Hall v. Hancock*) is followed immediately by the comment (90): "It cannot be necessary here to repeat that the popular idea of quick or not quick with child is founded in error." An edition of Campbell's Nisi Prius reports including *Phillips* was published in New York and Charleston, South Carolina, in 1821.

i. "quick with child" meant *pregnant*[63]—from pregnancy's start, conception—but was also sometimes used interchangeably with having
ii. "a quick child" (a *live child*), understood to emerge when embryonic development had yielded an individual sufficiently formed and differentiated and articulated to receive a *rational animating* principle (soul) and so from that moment be a truly human individual, "an infant" and one "*able to* stir in the womb";
iii. "quicken*ing*" (a "quickened child", etc.), from the pregnant woman's perception of a shift in the uterus's position or her child's movements, sometime between the twelfth and the twentieth week (or not at all), but normally about the fifteenth or sixteenth week.

It is essential to distinguish sense iii from sense ii (and from sense i so far as it matches sense ii). As stated in the previous paragraphs,

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63. *See* R v. Wycherley (1838) 173 Eng. Rep. 486, 8 C. & P. 263 (approved in FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 457 (2d ed. 1852)). Even *Wycherley*, however, having emphasized the primacy of sense i (as to a capitally-condemned pregnant woman's right to reprieve during pregnancy), confuses sense ii with iii. Bracton had stated the reprieve principle in terms of pregnancy: "If a woman has been condemned for a crime and is pregnant, execution of sentence is sometimes deferred after judgment rendered until she has given birth." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 429 (Thorne trans., 1968) (emphasis added). On such a "plea of pregnancy," the charge to the jury of matrons came to be expressed as determining whether the condemned was "quick with child," and in Blackstone's view the question evidently was not whether the mother or child had quickened in sense 3, but whether the child was quick in sense 2 such that, without reliance upon the mother's testimony or the use of ultra-sound or even a stethoscope, they could determine that there was present a *living* (not dead) child. *See* BLACKSTONE, 4 COMMENTARIES, *supra* note 32, at 395: "if they bring in their verdict *quick with child* (for barely, with child, *unless it be alive in the womb*, is not sufficient) execution shall be stayed . . ." (emphasis added). Hale, perhaps an outlier on this matter, had stated that the jury of matrons must find the condemned woman "with child of a quick child," and at the very end of the discussion of the peculiar case where she is mistakenly found to be in that condition but later becomes pregnant Hale indicates, in Latin, that the *foetus* is *vitalis* usually about 16–18 weeks though as medical opinions indicate it may be significantly earlier. *See* HALE, H.P.C., *supra* note 33, at 368–69.

"quick" in sense ii applied—in Bracton's mid-13th century,[64] Coke's late-16th to early-17th,[65] and the educated opinion of Blackstone's time[66]—from the sixth week of pregnancy.

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64. What Bracton meant by "formed and animated/ensouled" is made clear by the extremely influential encyclopedic work composed in the same decades as his own treatise on English law: *On the Properties of Things* [*De Proprietatibus Rerum*] by Bracton's contemporary Bartholomaeus Anglicus (between 1230 and 1250); the English translation made by John Trevisa in 1398/99 was first printed in 1497 and again in 1582 (thus linking Bracton's time and culture with Coke's): we can read the 1398/99 translation in modernized spelling in 1 ON THE PROPERTIES OF THINGS: JOHN TREVISA'S TRANSLATION OF "BARTHOLOMAEUS ANGLICUS DE PROPRIETATIBUS RERUM": A CRITICAL TEXT 296–97 (Oxford, 1975) (bk. 6, on the creation of the infant [*creatione Infantis*]):

> The child is bred forth . . . in four degrees. The first is when the seed has a milk-like appearance. The second is when the seed is worked into a lump of blood (with the liver, heart and brain as yet having no distinct shape). The third is when the heart, brain and liver are shaped [*formatis*], and the other or external members [head, face, arms, hands, fingers, legs, feet and toes] are yet to be shaped and distinguished. The last degree is when all the external members are completely shaped [*formantur*]. And *when the body is thus made and shaped* [*organizato*] with members and limbs, and disposed to receive the soul [*ad susceptionem animae*], *then it receives soul and life* [*vivificat*], *and begins to move itself* [*incipit se movere*] and sprawl with its feet and hands [better: kick with its feet: *peditu calcitrare*. . . .]
>
> In the degree of milk it remains seven (7) days; in the degree of blood it remains nine (9) days; in the degree of a lump of blood or unformed flesh it remains twelve (12) days; and *in the fourth degree, when all its members are fully formed, it remains eighteen (18) days*. . . .
>
> So from the day of conception to the day of complete disposition or formation [completionis] and first life of the child [vivificationis fetus] is forty-six (46) days. (emphases added).

At this point, the work refers to the biblical-theological significance that St. Augustine of Hippo, over eight centuries earlier, had found in the fact that the period of human formation consummated by animation was thus of 46 days (six-and-a half weeks) duration.

65. *See* Coke's contemporary WILLIAM SHAKESPEARE, LOVE'S LABORS LOST (c. 1593), V.ii.669-70, 673-74: "Fellow Hector, she is gone! She is *two months* on her way!. . . She's *quick*; the child brags in her belly already. 'Tis yours." (emphasis added). CRYSTAL & CRYSTAL, SHAKESPEARE'S WORDS: A GLOSSARY & LANGUAGE COMPANION 358 (2002) (*quick*: pregnant, with child; 490: *on one's way*: pregnant).

66. *See, e.g.*, *Embryo*, *in* EPHRAIM CHAMBERS, CYCLOPAEDIA (1728) (defining "embryo" as the beginning of an "animal" before it has "received all the Dispositions of Parts

necessary to become animated: which is supposed to happen to a Man on the 42nd day"); *see also id.*, *Animation*:

> *Animation*, signifies the informing of an animal Body with a Soul. Thus, the Foetus in the Womb is said to come to its *Animation* when it begins to act as a true Animal; or after the Female that bears it is quick, as the common way of Expression is. See FOETUS. The Common opinion is that this happens about 40 days after conception. But *Jer. Florentinus*, in a Latin treatise, *Homo Dubius, Sive de Baptismo Abortivorum*, shows this to be very precarious.

Since Florentinus's cited treatise argued embryologically that children are fully human persons as from conception, Chambers is warning readers that the "common opinion" presupposed by Bracton and Coke may move, under pressure of evidence, toward recognizing animation/personhood from conception.

Tracking Bartholomaeus Anglicus's treatise, and probably the most available source of *popular* information (and misinformation) about the child's ante-natal formation, in the period 1684 to c. 1840, was the pseudonymous work misleadingly entitled *Aristotle's Masterpiece*, first published in London in 1684 and going into hundreds of editions on both sides of the Atlantic. Early American editions usually resemble ARISTOTLE'S COMPLETE MASTERPIECE . . . DISPLAYING THE SECRETS OF NATURE IN THE GENERATION OF MAN, 44–46 (Worcester [Mass.] 1795), near-identical to pp. 43–44 of the same title printed in London in 1702:

> *How the Child . . . groweth up in the Womb of the Mother, after Conception.* . . . As to the formation of the child, it is to be noted, that after coition the seed lies warm in the womb for SIX DAYS without any visible alteration . . . In THREE DAYS after it is altered from the quality of thick milk or butter, and it becomes blood, or at least resembles it in colour, nature having now begun to work upon it. In the NEXT SIX DAYS following, that blood begins to be united into one body, grows hard, and becomes a little quantity, and to appear a round lump. And as the first creation of the earth was void, and without form, so in this creating work of divine power in the womb, THIS SHAPELESS EMBRIO lies like the first mass [*scil.* of the universe]. But IN TWO DAYS AFTER, the principal members are formed by the plastic power of nature . . . THREE DAYS AFTER the other members are formed . . . FOUR DAYS AFTER THAT, the several members of the whole body appear, and as nature requires, they conjunctly and separately do receive their perfection. And so in the appointed time, the whole creation hath that essence which it ought to have in the perfection of it, receiving from God A LIVING SOUL, therewith putting into his nostrils THE BREATH OF LIFE. Thus have I shown the whole operations of nature in the formation of the child in the womb, . . . By some others more briefly, but to the same purpose, the forming of the child in the womb of its mother is thus described; THREE DAYS in the milk, THREE DAYS in the blood, TWELVE DAYS FROM THE FLESH, and EIGHTEEN THE MEMBERS, and FORTY DAYS AFTERWARDS the child is inspired with life, being endued with an immortal living soul.

The importance of these meanings and of the distinctions between them derives largely from the passage of Coke that Blackstone cited to illustrate the unborn child's right to life. It is from the *Institutes*' chapter on murder, in the section about who can be murdered (answer: "*a reasonable creature, in rerum natura*"):

> [III] If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but [II] if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive. . . . And so horrible an offense should not go unpunished. And so was the law holden in Bracton's time, *Si aliquis qui mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; et maxime si fuerit animatum, facit homicidium.* [trans.: Anyone who strikes a pregnant woman, or gives her a poison by which he induces abortion, commits [III] homicide if the infant/fetus was already formed, and especially if it was animated [ensouled].] And herewith agreeth Fleta . . .

Thus Coke at 3 *Inst.* 50 summed up his statement of rule [III] and [II] by arching back to the Bracton passage later quoted by Blackstone. And by appealing to Bracton's proposition, Coke emphasizes that when he says that "it"—the "child" with which the woman was "quick"/pregnant—is, when born alive, "accounted a reasonable creature, *in rerum natura*," he means that it is counted/treated as having been alive and capable of being murdered *at the time when the lethal act was done to it*, that is, when it was unborn (at any stage of pregnancy when it was sufficiently formed to be capable of being injured in a manner reliably detectable after its live birth).

Roe uncritically reported Cyril Means's view that "Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law."[67] That "abortion case", *R v.*

67. *Roe*, 410 U.S. at 135 n. 26 (citing "Means II", where the passages relied on by *Roe* are at 345–48).

Sims, actually goes far to disproving the charge. For there it was not Coke as prosecuting or intervening Attorney General but the King's Bench itself that authoritatively stated the unborn-child-protective principles at issue and the corresponding rule [II] in a form ("born alive") shaped by evidential considerations:[68]

> for if it be dead born, it is no murder, for *non constat* [it is not provable] whether the child were living at the time of the battery or not, or if the battery were the cause of the death.

Coke, in the passage (3 *Inst.* 50) recalled by Blackstone (and depreciated by Means and *Roe*), did no more than unpack and restate the two rules. Rule [II] was stated in *Sims* but rule [III] was implicit in—or assumed by—the King's Bench's decision, because the act that would be murder if the child was born alive (and died as a result of the act) must have been felonious or quasi-felonious (misprision *as distinct from misdemeanor*) when it was done. That act occurred in all cases of attempted elective abortion, whether done by the mother or by someone else—any act done so as to kill the unborn child (whether quickened in sense iii or not). Provided the child survived to be born alive, however briefly alive, the sequence of events—beginning with that act and ending with the born child's death because of that act—counted as murder. Once born, the child was in the public realm ("*in rerum natura*"), but it had been "a reasonable creature" at the time when the lethal act was done (perhaps soon after conception) or at any rate as soon as it was formed and animated ("quick" in sense ii). In other words, the lethal act when done was murder subject to a condition subsequent: that the child

68. (1601) Gouldsb. 176, 75 Eng. Rep. 1075, 1076. Chief Justice Popham and Justice Fenner authoritatively stated the rule that it is [II] murder to strike a woman "great with child" (pregnant) if the child is born living but succumbs from injuries that can "be proved" to have been caused by the battery with a view to causing a miscarriage. The Court of King's Bench went on to emphasize the evidential rationale of the rule, by observing that "when it is born living, and the wounds appear in his body, and then he die, the Batteror may be arraigned of murder, *for now it may be proved whether these wounds were the cause of the death or not*, and for that if it be found, he shall be condemned" [of [II] murder].

be born alive.[69] To repeat: the foundation for imposing this condition subsequent was, *Sims* had ruled, an evidential one. And quickening in sense iii is nowhere alluded to.

Moreover, rule-[III] indictable abortion was not merely implicit in *Sims*, awaiting Coke's articulation of it at 3 *Inst.* 50. It was part of the working common law throughout his lifetime, increasingly as the ecclesiastical courts declined. The Means-*Roe* allegation or insinuation that he invented it is baseless.[70]

Hale became an outlier in relation to rule [II] (and perhaps also rule [III]), by taking the *Webb* evidential concerns to an extreme, as if they were a definitional part of the common law:

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69. Mark S. Scott, *Quickening in the Common Law: The Legal Precedent* Roe *Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199 (1996) makes telling criticisms of *Roe* but errs (a) in accepting with little or no nuance that "quick" always referred to "quickening" in the sense deployed in *Roe*; (b) in interpreting [I] murder of the mother by abortion and [II] murder by abortion of the child-born-alive as deploying a "retroactive attribution of humanness" (p. 235) (back to the point of quickening, Scott says; but neither [I] nor [II] treats "quick with child" as a necessary condition of indictability). In truth, Coke and Hale were clear that the unborn child is human all the way through, or at least from completed formation c. day 40; a fiction such as retroactive attribution is foreign to their line of thought, and in no way compelled by Coke's phrase "accounted a reasonable creature, *in rerum natura*, when it is born alive;" that phrase conveys, rather, that from that point on any intentionally death-dealing act will be murder without having to fulfill any condition subsequent (other than the normal year-and-a-day rule)—so from birth the child will be treated (accounted) like everyone else, viz., as being not only a reasonable creature (as it was all along, at least from formation and animation) but also *in rerum natura*, in the ordinary social world.

70. Means II more or less expressly (at 344) and *Roe* by innuendo (at 135 n.26) claim that *Sims* either opposes or does not imply/assume rule [III], and that Coke invented it (sometime in the 33 years between 1601 and his death in 1634) in 3 *Inst.* 50 (first published 1644). Means and *Roe* ignore all the evidence that [III] abortion was an indictable offense fairly often prosecuted at common law: JOHN KEOWN, ABORTION, DOCTORS AND THE LAW, 6–9 (1988), points to *R. v. Lichefeld* (1505), *R. v. Webb* (1602), *R. v. Beare* (1732); JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 193 (2006) gives a corrected translation of *Webb*; at 202 cites further 16th century [III] abortion convictions from 1530/31 and 1581 (twice); and at 194 gives evidence that "English courts prosecuted abortions fairly routinely under the early Stuarts" (before Coke's death), citing abortion [III] convictions in 1615, 1616 (twice), 1617, and 1622, and indictments recorded without indication of outcome in 1615, 1618 and 1629.

> The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give any potion to make an abortion, or if a man strike her, whereby the child within her is kil[led], it is not murder or manslaughter by the law of England, because it is not yet *in rerum natura*, tho' it be [III] a great crime, and by the judicial law of Moses was punishable by death, NOR CAN IT LEGALLY BE KNOWN, WHETHER IT WERE KIL[LED] OR NOT [citation to Yearbook of Edward III]. So it is, if after that child were born alive, and baptized, and after die of the stroke given to the mother, this [II] is not homicide [citation to an earlier Yearbook]. (emphasis added)[71]

The argument proves too much and was rejected, perhaps even by Hale himself,[72] certainly by Blackstone and all the American editions of criminal law treatises before and after him.[73]

Hale's robust rule [I], on the other hand, was universally followed: causing death by elective, consensual abortion, even when

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71. HALE, H.P.C, *supra* note 33, at 429–30.

72. MATTHEW HALE, PLEAS OF THE CROWN, OR A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, 53 (1678):

> If a Woman quick with Child take a potion to kill it, and accordingly [III] it is destroyed without being born alive, a great misprision but no Felony; but [II] if born alive and after dies of that potion, it is Murder.

Both this work and the better known *History* were published posthumously (this work in 1678, the *History* in 1736), and it cannot now be determined which gave Hale's final view of [II] and [III].

73. Hawkins had led the way: WILLIAM HAWKINS, 1 PLEAS OF THE CROWN 80 (1716), where abortion is treated in the chapter on Murder:

> *Sect.* 15. As to the third Point, *viz.,* Who are SUCH PERSONS BY KILLING OF WHOM A MAN MAY COMMIT MURDER; it is agreed, that the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder. *Sect.* 16. And it was anciently holden, that [III] the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: but at this Day, it is said to be a great Misprision only, and not Murder, unless [II] the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions [*scil.* Hale] to the contrary.

skillfully performed by a registered physician, is always murder. The rule made no reference at all to quickness. Moreover, the rule implicitly deployed a condition-subsequent doctrine of murder, analogous to Coke's rule [II]: attempting abortion, at any stage of gestation, is—by transfer of homicidal malice from unborn child to mother—murder subject to the condition subsequent that the mother die from its effects. And, contrary to Means II's wild claim[74] that Hale invented it in a fit of "Restoration gallantry" towards women endangered by unskilful abortionists, rule [I] had been established and applied for centuries—as far back as Bracton's time—when Hale articulated it.[75]

What was the significance of Coke's and Blackstone's quotation of Bracton, as witness to the "ancient law"?[76] Bracton's sentence

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74. Means II at 363.

75. DELLAPENNA, *supra* note 70, at 206 n.184, cites convictions in 1281, 1288, 1589, 1591 and 1600, besides the case Hale himself tried at assize in 1670, and acquittals in 1249, 1292, 1313, 1330 and 1652.

76. As to the shift from the "ancient law" (stated in Bracton) to Blackstone's "present" law (stated by Coke): C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person"*, 26 TEX. REV. L. & POL. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3870441, asserts at 69 that by this shift "the unborn were removed from the category of persons in being, and were therefore outside the protection of the law against homicide." But there is no trace of shift from "the unborn are persons" to "the unborn are not existing persons;" rather, the shift is in legal opinion about the degree of safely cognizable injustice involved in acts lethally impacting on the child *in ventre sa mere*, whether acts of strangers to whom the child was invisible, or of the mother involved intimately with it. Bernstein's claim about the shift is refuted also by a leading work intermediate between Coke and Blackstone, HAWKINS, 1 PLEAS OF THE CROWN 80, where abortion is treated in the chapter on Murder:

> *Sect.* 15. As to the third Point, *viz.*, Who are SUCH PERSONS BY KILLING OF WHOM A MAN MAY COMMIT MURDER; it is agreed, that the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder. *Sect.* 16. And it was anciently holden, that the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child was Murder: but at this Day, it is said to be [III] a great Misprision only, and not Murder, unless [II] the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary.

plainly addresses "quick"-ness in the *second* sense—a supposedly not-yet-human entity's change (by formation) into an organism and (by animation) into a human organism, "an individual" as Blackstone would say.[77] By quoting Bracton, both Coke and Blackstone were effectively teaching that abortions were common-law heinous misdemeanors (as *sui generis* homicides, neither murder nor manslaughter) from the sixth week of pregnancy.[78]

There is in Hawkins (like the other classical common-law authorities) not the slightest suggestion that unborn children were shifted from being—as "anciently holden"—"Persons by killing of whom a Man may commit Murder" to being non-persons. Rather, with the changed liability-rule, they were persons in a new liability-category: persons by killing of whom a man commits murder if—however long after his malicious actions—they succumb from his actions after living outside the womb for however short a time, while if they do not live outside the womb the doer of those same actions is guilty of a lesser but still near-capital "great misprision" (less than capital felony but more than misdemeanor).

In other classic common-law authorities, this sub-category of persons, a sub-category forged in tandem with the newly nuanced liability rule, is marked by saying that they are not persons *in rerum natura* (literally, "in the nature of things," idiomatically more like "in 'reality'," meaning the visibly shared world, the ordinary world) or *in esse* (same meaning idiomatically; literally, "in being/existence"). Keeping these phrases in the foreign tongue signalled the presence of a fiction deployed in service of the moral and/or pragmatic judgment that justice would be better served by introducing the acknowledgement of appropriate difference in the severity of the crime and its fitting scale of punishment, and the matching sub-category of persons: rational creatures like the rest of us, but not yet sharing our public world, publicly distinct from and partly inter-dependent with their mothers, who are persons whom one can point to and name.

77. *See supra* pp. 935–39.

78. Further compelling evidence that the standard pre-1800 common legal understanding of "quick with child" was not dependent on a mid-pregnancy, maternally-felt "quickening" is Blackstone's treatment of the plea of pregnancy in stay of execution: "the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child,* UNLESS IT BE ALIVE IN THE WOMB, is not sufficient) execution shall be stayed generally till the next session . . ." 4 COMMENTARIES, *supra* note 32, at 395. So she is quick with child if the special jury can detect fetal *life*. (The problem of the dead fetus, not to mention that of the mole or tumor, has a large part in the evidentiary caution that made successful prosecution for elective abortion difficult whatever the stage of gestation at which the unlawful acts charged were done.) *See also* HAWKINS, 2 PLEAS OF THE CROWN 464 (1721), where the final sentence of the discussion of the plea is: "Also it is said both by *Staundforde* and

Roe contradicts this, launching its discussion of the common law (and of quickening in sense iii) by citing Coke and Blackstone for its claim that

> [I]t is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.

False. Again, Coke and Blackstone cited only Bracton, who was referring to a living child, quick in sense ii, animated by a human form or soul, months before the mother would feel "recognizable movement" around the "16th to the 18th week."[79]

Roe, later in the Court's opinion, returned to Bracton and, by relying on an English translation while ignoring the Latin, made one of its worst and most damaging errors. Having correctly observed (410 U.S. at 133–34) that early common law focused on formation and animation as defining the time from which abortion would be homicide, and that there were uncertainties about when the completion of formation by animation occurred, the Court (at 134) lurched into stark error:

> Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of

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Coke, that a Woman can have no Advantage from being found with Child unless she be found quick with Child." The footnote to this sentence cites ten authorities (treatises and abridgements), but the only two quotations are: "it is expressly said, that the Inquiry was whether the Woman were *enseint* [pregnant] with A LIVE CHILD or not" and "'tis said only, That the Woman was found *enseint* or pregnant." Likewise, American criminal law treatises: see for example, CONDUCTOR GENERALIS, 214 (New York, 1749) ("Jury of Matrons. You the Fore-woman of this jury shall swear, That you shall search the Prisoner at the Bar, whether she be quick with Child OF A LIVING CHILD. . ."); 371 ("You as Fore-Matron of this Jury, shall swear, that you shall search and try the Prisoner at the Bar, whether she be quick with Child of a QUICK CHILD. . . ."); 372 ("[B]ut if they find that she is not quick with Child of a quick Child, she shall be hanged presently, for it will not avail her to be young with Child.") (emphases added).

79. Roe v. Wade, 410 U.S. 113, 132 (1973).

> the two first principles of life, Bracton focused upon quickening as the critical point.

But Bracton, writing in Latin, spoke only of the fetus being formed and animated. "Quick[ened]" is just the term unhappily chosen by Samuel Thorne, a few years before *Roe*, to translate Bracton's *animatum*.[80] So *Roe*'s claim that Bracton was providing a resolution to uncertainties about "animation" by opting to focus on something else (or on some other term), "quickening," is simply absurd. And the absurdity gives *Roe* an illegitimately easy way to ignore sense ii of "quick" entirely, and giving sense iii and the 15–16-week stage an illegitimate primacy or monopoly in its picture of the common law.

Roe's generalization that the common-law offense [III] required perceptible movement is not well defended by citing *State v. Cooper*.[81] It is true that New Jersey's high court, after holding that abortion involves a woman "quick with child," appeared to take sides (though it was not in issue) on when this occurs, answering: "when the embryo gives the first physical proof of life, no matter when it first received it."[82]

Yet *Cooper*'s framing of the question about "offense against the person"—as concerning when a human child is "*in esse*" (in being)—itself tells in favor of the principle that a prenatal human individual warrants protection from its first moment of existence (a principle *Cooper* acknowledges the evidence for, and does not rebut).[83] And *Cooper* made clear that it neither contested that a new

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80. The absurdity of the argument *Roe* is developing here is only compounded by the fact that its footnote 23 quotes, besides Thorne, the Twiss translation, "if . . . formed and animated, and particularly if it be animated."

81. 22 N.J.L. (2 Zab.) 52, 54 (1849) (cited in *Roe*, 410 U.S. at 135 n.27).

82. *Id.* at 53–54.

83. *Cooper*, 22 N.J.L. at 54. The court, quoting Bracton's line, rightly admitted that it "at first view might seem to favor a different conclusion." *Id.* at 55. Then, assuming precisely what is here in dispute (the sense of "quick with child"), the court appealed

human life begins before the mother perceives movement,[84] nor questioned the other legal protections for children at those early developmental stages.[85] It also explicitly chose to leave reform to the legislature,[86] and New Jersey lawmakers promptly abolished the distinction between pre- and post-"quickening" and extended prohibition of this "offense against life" to begin when a woman is "pregnant with child"—*i.e.*, conception.[87]

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to "the unanimous concurrence of all authorities, that that offence could not be committed unless the child had quickened." *Id.* The court relies on *Commonwealth v. Parker* while failing to note that on the very point for which the New Jersey court is arguing, the Massachusetts court declined to state an opinion. *See id.* at 57. Thus throughout its argumentation the New Jersey court begs the very question left open by *Parker* and *assumed* precisely what needed to be demonstrated, *viz.* that "quick with child" at common law meant "with sense (3) quickened child" rather than "with live child" or perhaps even "with child".

84. *See id.* at 54 ("It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception . . . . *In contemplation of law* life commences at the moment of quickening.").

85. *See id.* at 56–57. But it entirely fails to acknowledge the authoritative statements of principle, collected in *Hall v. Hancock*, undergirding those protections. The handling of authorities is uncertain throughout; for example, Blackstone, 4 COMMENTARIES 395 is cited at 57 to support the claims that "quick with child" and "with quick child" are synonymous, that both phrases "import that the child had quickened in the womb," and that that was when "the life of the infant, in contemplation of law, had commenced." In fact, though Blackstone there treats "quick with child" and "the child was quick" as equivalent, he does use "quickened" or "quickening," and seems most concerned with the question whether the child is or alive ("quick") rather than dead: see *supra* notes 63, 78.

86. *Id.* at 58 (finding "legislative enactments" "far better" on "this . . . debatable" matter, when courts must give "the accused" the benefit of "reasonable doubt").

87. Act for the Punishment of Crimes (1846, s. 103 Supp., enacted March 1st 1849 (Session Laws 1849, po.199)); State v. Murphy, 27 N.J.L. 112, 114 (1858) ("The statute. . . was cotemporaneous [sic] with that decision [*Cooper*]. An examination of its provisions will show clearly that the mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of The State v. Cooper."). Against *Roe*'s faulty history, *Cooper* itself clearly confirmed that common law protected the child's right long before "viability," *no later* than the perception of movement four or five months before birth, during which time any "act tending to its destruction" was an indictable offense, a homicide. *See Cooper*, 22 N.J.L. at 56, 58, 55. Note that the Chief Justice, stating the opinion of the court in *Murphy*, says—with some roughness of phrasing—that the common law was defective in that it was concerned entirely with the life

b. Antebellum and Ratification Eras

The high-water mark of treating quick*ening* (felt movement) as relevant was the early nineteenth century[88]; by the last third, that line was virtually gone as it was always destined to be—denounced by the medico-legal treatises as groundless because formation and animation occur at conception.[89] The same treatises also regarded the old Bracton-Coke-Blackstone version of "quick with child"

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of the unborn child, *not the health of the mother*; so the statute, by contrast, treats the acts of the abortionist as having the same degree of culpability whether or not they harm or kill the child, whether or not "it has quickened," and so also whether or not the mother had actually ingested the abortifacient supplied by the appellant defendant abortionist, the degree of culpability and applicable scale of punishment under the statute is affected only if the mother dies. *See Murphy*, 27 N.J.L. at 114. (In fact, of course, the 1849 legislation was very much concerned with the life of the child, too: as noted in the text above, offenses under it were committed only if the woman was in fact "then pregnant with child.")

88. PHILIP A. RAFFERTY, *ROE V WADE*: THE BIRTH OF A CONSTITUTIONAL RIGHT 179–180 (1992) argues that it is at best unproven that the common law ever made proof of quickening a criterion of criminal liability, and that the thesis that it did "originally was articulated in the nineteenth century in certain American appellate opinions . . . ." Be that as it may, it was understandable, though not logically ineluctable, that the fact that the introduction — beginning with Lord Ellenborough's Act, 43 Geo. 3 c. 58 (1803) — of statutory type-[III] prohibitions of abortion from conception was accompanied in some jurisdictions (such as England under that Act) of different punishments depending on whether or not the woman was "quick with child" or "with quick child" had the side-effect that in the abortion context the word "quick" came quite generally to be assimilated to "quickened, "quickening," and cognates. For the American jurisdictions with such differentiation of penalties, see James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 34–36 (1985).

89. *See, e.g.*, THEODRIC ROMEYN BECK & JOHN B. BECK, 1 ELEMENTS OF MEDICAL JURISPRUDENCE 464–66, 468 (12th ed. Philadelphia, 1863) ("[N]o other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception. . . . [W]e must consider those laws which exempt from punishment the crime of producing abortion at an early period of gestation, as immoral and unjust."); WILLIAM GUY, PRINCIPLES OF MEDICAL JURISPRUDENCE 133–34 (1st Am. ed. 1845) ("[T]he absurd distinction formerly made between women quick and *not* quick is done away with . . .").

(around six weeks) as equally ridiculous.[90] With modern scientific embryology, that Bracton test was compelled, by its own rationale, to recognize personhood from conception even in the cramped, defendant-solicitous criminal law.[91] Thus, the influential and widely circulated 1803 textbook *Medical Ethics* explained that "to extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man."[92]

What these treatises taught about the unborn—many describing their destruction as murder or indistinguishable from infanticide[93]—was vigorously promoted and re-asserted in professional medical associations, legal education, and state legislatures. The American Medical Association in 1859 dismissed the fiction "that the foetus is not alive till after the period of quickening" and urged correction of any "defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth as a living being."[94]

The leading American treatise on criminal law mocked the pegging of legal protection to felt quickening and effectively buried the

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90. BECK & BECK, *supra* note 89, at 466–68 (calling the six-week criterion "absurd," "injurious," and "wholly unsupported either by argument or evidence," and going on to denounce as "no less absurd" the "popular belief" and laws, including English and, implicitly, American law, "denying to the foetus any vitality until after the time of quickening" by "consider[ing] life not to commence before the infant is able to stir in its mother's womb," and declaring (against *both* understandings of "quick/quickening") that non-perception of "motions" is "no proof whatever that such motions do not exist.").

91. *Cf.* FINNIS, *supra* note 59, at 186 (explaining why, had Aquinas "known of the extremely elaborate and specifically organized structure of the sperm and the ovum . . . and the [embryo's] typical, wholly continuous self-directed growth and development . . . from the moment of insemination of the ovum," he would have located "personhood {*personalitas*: ScG IV c. 44 n.3}" at conception).

92. THOMAS PERCIVAL, MEDICAL ETHICS 135–36 (Chauncey D. Leake ed., 1975) (1803), *quoted in* Ohio's 1867 S. Comm., *infra* note 112.

93. *See* BECK & BECK, *supra* note 89; JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW 23–24, 38–39, 179–80 (1988) (citing treatises).

94. *Roe*, 410 U.S. at 141 (citing 12 TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 73–78 (1859)).

Bracton-Coke quickening-as-animation criterion. *Wharton's Criminal Law*, from its first edition in 1846, argued that the criminal law of offenses against unborn persons should be aligned with the law of property, guardianship, and equity[95] as expounded in cases such as *Hall v. Hancock*, adopting authoritative English equity precedents, which recognized unborn rights at *all* stages of development.

Thus, by 1866 Chief Justice Tenney of the Maine Supreme Court could accurately report that "the [quickening] distinction . . . has been abandoned by jurists in all countries where an enlightened jurisprudence exists in practice."[96]

c. Constants

Whatever the confusions about "quick" and "quickening," the common law indisputably, always and everywhere, made any attempted abortion a serious indictable offense from *at least* 15 weeks (give or take three). The Ratification Era's virtually unanimous legislative,[97] professional, and public support for this part of the nation's tradition of ordered liberty, *and* for following the science and removing any temporal limit in the criminal law's protection, has been extensively documented by scholars since *Roe* and *Casey*.[98]

95. WHARTON, *supra* note 63, at 308 (1846); 2 WHARTON at 653 (6th ed. 1868) ("It has been said that [abortion] is not an indictable offence . . . unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with medical experience, nor with the principles of the common law. The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation."); *see also* J.P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 386 (2d ed. 1858) (reviewing cases and preferring the view that abortion is indictable at common law without allegation that the mother was quick with child).

96. 5 TRANSACTIONS OF THE MAINE MEDICAL ASSOCIATION 38 (1869).

97. *See infra* section I.B.1.

98. *See* DELLAPENNA, *supra* note 70, at 213–28 (2006) (concluding "that English law regarding abortion was fully received in the [American] colonies, and that the purported 'common law liberty to abort' is a myth"); *see also id.* at 263–451 (for all aspects from Independence down to c. 1900).

This confirms that "any person" in the fundamental-rights-regarding Equal Protection and Due Process Clauses includes all unborn human beings.

So does the fact that, while prevailing (though not universal[99]) nineteenth-century common law made only post-"quickening" abortion indictable, the common law *always* regarded pre-quickening abortion as "an act done without lawful purpose," as Chief Justice Shaw mildly put it in 1849,[100] such that abortions (however skillfully performed) that accidentally cause the consenting mothers' death constituted murders. As has been shown above, even pre-quickening abortion was always a kind of inchoate felony for [I] felony-murder purposes,[101] as well as always constituting the *actus reus* with *mens rea* for the crime of [II] murder subject to a condition subsequent: that the child die, however soon, after being born alive.[102]

And all along, every involvement in elective abortion was unlawful in the broader sense that was signaled by its liability to other legal penalties. Contracts for elective abortion services were void for illegality; any place used for elective abortion or for "offering medicines to destroy a child"[103] was liable to summary closure as a

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99. Limitation to post-"quickening" attempts and abortions was rejected by the courts in Pennsylvania and Iowa. *See* Mills v. Commonwealth, 13 Pa. 631, 632–33 (1850); State v. Moore, 25 Iowa 128, 135 (1868).

100. *Parker*, 50 Mass. (9 Met.) at 265. Hale puts it more straightforwardly: the abortifacient is given "*unlawfully to destroy her child within her*, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder." *R v. Anonymous* (1670), *reported and endorsed in* HALE, H.P.C., *supra* note 33, at 429–30 (emphasis added); the passage is cited by Blackstone to verify his own statement, in which abortion is his third example of felony-murder: "And if one intends to do another felony, and undesignedly kills a man, this is murder. . . . And so, if one gives A WOMAN WITH CHILD a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." 4 COMMENTARIES, *supra* note 32, at *200–01.

101. That is clearly stated by Blackstone: see the previous footnote.

102. That too is clearly stated by Blackstone. *See* 4 COMMENTARIES 198, quoted *supra* text at note 32. Like [I] (the abortion quasi-felony murder of the mother), [II] was not questioned by any American authority.

103. HAWKINS, 1 PLEAS OF THE CROWN 262 (6th ed. 1788).

disorderly house, on pain of criminal penalty for non-compliance; advertising or publicly offering abortion services so described was criminal per se or a conspiracy *contra bonos mores*. The "openness" with which abortions were available in some places throughout the relevant era, an openness vaunted by pro-choice modern scholars, was analogous to the openness with which other criminal or unlawful practices were available and even respectable among some classes in some areas: to take an extreme case, of the open visitations by the Ku Klux Klan at some times and places, or at the other end of the spectrum, the availability in many places of pornography or forbidden drugs, or of alcohol under local or national prohibition.

B. Antebellum Statutes and Post-Ratification Precedents Confirm This Status.

1. State Abortion Statutes

The Union in 1868 comprised 37 States, of which 30 had statutory abortion prohibitions.[104] Most were classified as defining "offenses against the *person*,"[105] with 28 applying before *and* after quickening in senses ii and iii—protecting, in other words, the child from conception.[106] And Congress, legislating for Alaska and the District of

104. *See* Witherspoon, *supra* note 88, at 33.

105. *See id.* at 48.

106. *See id.* at 34 (finding, however, that in Nebraska, and possibly Louisiana, the statutory prohibition did not at that time extend to abortion by use of instruments). The various shifting arguments made by Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921358, to the effect that "28" [or 27] here should read "16" [or 15] are refuted in all their strongly different versions from September 13 to September 30, 2021 by the authors of this article in *Indictability of Early Abortion c. 1868*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940378. The latter identifies over 50 serious historical errors in the relevant 40 pages of Tang's many-times revised article; the replies he incorporated in his latest revisions, on October 11 and December 15, 2021 contest none of the 50+ identified errors directly, accept many of our charges silently, indefensibly ignore many, confess to a couple, and replace some abandoned errors with new ones the answer to which will easily be supplied by readers of the debate. (These counts of states do not include the

Columbia shortly after ratification of the Fourteenth Amendment, referred to unborn children as "person[s]."[107]

Many such statutes were adopted or strengthened within a year or two of the Amendment's ratification, as in New York,[108] Alabama,[109] and Vermont.[110] In Florida, Ohio, and Illinois, the very legislatures ratifying the Amendment also banned abortion at all stages.[111] About a month after ratifying the Amendment, Ohio's senate committee concluded that given the "now . . . unanimous opinion that the foetus in utero is alive from the very moment of conception," "no opinion could be more erroneous" than "that the life of the foetus commences only with quickening, that to destroy the embryo before that period is not child murder."[112]

Thus, state legislators not only viewed these laws as consistent with the Fourteenth Amendment, but also—like any legally informed reader—would have understood equality of fundamental rights for "any person" to include the unborn. In relation to none of the state legislative proceedings to reform the common law of abortion, beginning at latest in New York's 1829 statute and running through to 1883 (when the 43rd of the states to do so prohibited abortion at all stages), has any suggestion been recorded that

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territories of Washington (1854), Colorado (1861), Montana (1864), Idaho (1864) and Wyoming (probably 1864, alternatively 1869), which from the dates just mentioned had statutes criminalizing abortion at all stages of gestation.)

107. Act of Jan. 19, 1872, 1872 D.C. ACTS 26–29; Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253–54 (1899).

108. *See* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856–68; Act of May 6, 1869, ch. 631 1869 N.Y. LAWS 1502–03.

109. *See* Act of Feb. 23, 1866, 1866 ALA. PEN. CODE, tit. 1, ch. 5, § 64, at 31 (*codified* ALA. CODE § 3605 (1867)).

110. *See* Act of Nov. 21, 1867, no 57, 1867 VT. ACTS 64–66.

111. *See* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3 §§ 10–11, ch. 8, §§ 9–11, 1868 FLA. LAWS 64, 97; Act of Feb. 28, 1867, 1867 ILL. LAWS 89; Act of Apr. 13, 1867, 1867 OHIO LAWS 135–36.

112. 1867 OHIO SEN. J. APP'X 233. Yet the law proposed by the committee and enacted by the legislature aligned with none of the three elements in *Roe*'s notion (at 157 n.54) that acknowledging and acting on the personhood of the unborn requires that the woman be treated as a principal or accomplice, that abortion be punished as murder, and that it be prohibited even when medically necessary to save the life of the mother.

any legislator considered that these statutes were abolishing a common-law right or liberty possessed by women since colonial times. The allegation by Cyril Means and *Roe*, now made even more recklessly by Professor Aaron Tang,[113] is that that was precisely—and momentously—what the legislatures were doing. It is an allegation so devoid of evidence and historical plausibility that it appears in only a carefully muted, somewhat chastened form in the present Historians' brief for the respondents in this case (retreating, tacitly, from the utterly discredited[114] Historians' briefs in *Webster* and *Casey*).

2. Precedent Interpreting the Fourteenth Amendment: The Case of Corporations

The original public legal meaning of "persons" encompassed *all* human beings. On this, the legal meaning fixed by treatises and cases was confirmed by rapid early-to-mid-1800s expansions of prenatal protections. And—even apart from the latter evidence—under the *Dartmouth College* principle giving legal meaning primacy over drafters' motivating concerns, the inclusion of children *in utero* could not have been blocked except by wording (easily available, but neither proposed nor adopted) such as "any person wherever born."

The plain legal meaning and sweep of a constitutional provision "is not to be restricted" by the "existing" problem it was "designed originally to prevent."[115] So declared Justice Field, on circuit in *Santa Clara County v. Southern Pacific Railroad Co.*, soon affirmed by the Supreme Court itself in its holding (in the headnote) that corporations are persons under the Due Process and Equal Protection Clauses. Field quoted Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:

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113. *See supra* note 106.

114. *See* John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3 (2006).

115. Santa Clara County v. S. Pac. R.R. Co., 18 F. 385, 397 (C.C.D. Cal. 1883) (opinion of Field, J.), *aff'd*, 118 U.S. 394 (1886).

> It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to . . . say that, had this particular case been suggested, the language would have been so varied as to exclude it . . . . The case being within the words of the rule, must be within its operation . . . .[116]

As Marshall had explained in *Dartmouth College*, it may be:

> more than possible, that the preservation of rights of this description was not particularly in the view of the framers . . . . But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, [absent] plain and strong reason for excluding it . . . .[117]

The plain and original meaning of the constitutional text extended to the case, though its application had not been envisaged.[118] (Nor was there any "sentiment delivered by its contemporaneous expounders, which would justify us in making" any exception.[119]) This principle remains an axiom of constitutional (especially originalist) interpretation today.[120]

Here it controls. As a matter of plain original meaning to educated lawyers, just as the college charter considered by Marshall fell under the Contract Clause, and the railroad considered by Field was a "person" under the Equal Protection Clause, so too, but *more*

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116. *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644–45 (1819) (opinion of Marshall, C.J.)). In applying this by assessing what falls "within the words of the rule" (the Equal Protection Clause), recall that the ratification in 1868 was not by "the American people" but by legislatures, that these included many lawyers whose basic instruction in legal language was through studying Blackstone, and that legislative reforms to remove common-law criminal law's reference to "quick with child" or "quickening" were in full swing, had prevailed in more than two-thirds of the states and all the territories, and would within 15 years be virtually universal.

117. *Dartmouth College*, 17 U.S. (4 Wheat.) at 644.

118. *See id.* at 645.

119. *Id.*

120. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 787 (2010) (rejecting argument that "the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights").

certainly, prenatal humans are "persons" under the Clause, whether or not its drafters and ratifiers specifically had that in mind.[121]

Inclusion of the unborn is *more* certain because of their foregrounding in the discussion of fundamental rights to life and security in Blackstone's *Commentaries*, the formative text for educated lawyers of 1776–89 and 1866–68 (in Congress and nationwide), invoked in the introduction of a civil rights bill prefiguring or supported by the Amendment.[122]

Given the evil they aimed to cure, the Amendment's ratifiers may not have subjectively had in mind that the Equal Protection Clause would affect established antebellum Union rules and institutions at all.[123] But if a state in, say, 1870 had legislated to permit all elective

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121. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 23 n.34 (2013) (explaining the argument that the unborn should be held to enjoy constitutional protection "for the same interpretive methodological reason that corporations properly can be understood as legal persons—that that was conventional term-of-art legal usage, and thus bears heavily on what the legal meaning of the term 'person' was at the time") (emphases omitted).

122. *See supra* section I.A.

123. That reasoning synthesizes the judicial rationale of several restrictive assumptions about the Equal Protection Clause between 1871 and 1888. *See, e.g.*, Insurance Co. v. New Orleans, 13 F. Cas. 67, 68 (C.C.D. La. 1870) (holding that corporations are not Fourteenth Amendment persons); Bradwell v. State, 83 U.S. 130, 139 (1872) (females and the practice of law); Bartemeyer v. Iowa, 85 U.S. 129, 133 (1873); The Slaughter-House Cases, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]."); Strauder v. West Virginia, 100 U.S. 303, 304 (1879); The Civil Rights Cases, 109 U.S. 3 (1883); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188–89 (1888) (finding that Fourteenth Amendment equal protection is concerned with protecting any class "singled out as a special subject for discriminating and hostile legislation").

For example, the litigants in *Bradwell*, fighting discrimination against women practicing law, appealed to the Amendment's first sentence but never its Equal Protection Clause. That is inexplicable except based on early assumptions about that Clause's application that would also have blocked early appeals to the Clause by those seeking to bolster fetal protections. These blocking assumptions, when articulated by courts,

abortions, the reasonable ratifier would have agreed that the Amendment's terms entitled guardians ad litem to obtain equitable relief for unborn children.[124] This could have been denied only on some Fourteenth-Amendment-limiting theory[125]—*e.g.*, of the Amendment's race-specific motivating goals[126]—long and rightly

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proved to concern not the meaning of "any person" but the import of "deny . . . the equal protection of the laws." Some of these restrictions were soon rejected; others lingered more or less unchallenged for over a century. *See* John Finnis, *Unborn Persons: Why Equal Protection Slept 102 Years*, FIRST THINGS (Mar. 30, 2021), www.firstthings.com/web-exclusives/2021/03/unborn-persons-why-equal-protection-slept-102-years [https://perma.cc/YLJ9-WYKG]. Under the corrected understanding of "equal protection," plus the public meaning that the Clause's "any person" phrase always had, the Clause protects the unborn against state laws permissive of elective abortion.

124. On guardians of the unborn, *see* 1 BLACKSTONE, quoted in text *supra* at note 17; *see also* WHARTON, quoted *supra* note 95. Ratifiers, in this counterfactual 1870 scenario, would find their willingness to understand the Equal Protection Clause as protecting the unborn against novel and lethal discrimination enhanced by the robust feminists of the day, whose near unanimous condemnation of elective abortion as murder is painstakingly documented in DELLAPENNA, *supra* note 70, at 267–68 ("[T]he leading feminists of the time were virtually unanimous in *demanding* the criminalization of abortion."); *id.* at 324 ("The leading feminists of the time were, if anything, more emphatic [than the medical men] in demanding harsh punishment for abortion, and on precisely the same grounds as the male dominated organized medical profession"); *id.* at 345 ("Women—particularly the founding mothers of feminism—also took the lead in these nineteenth century legislative battles. [footnote omitted]. And women physicians in the nineteenth century took a particularly strong leading role in the 'crusade' against abortion." [footnote omitted]); *id.* at 372, 374 ("[P]erhaps the most impressive demonstration of the new consensus on the nature of human generation [footnote omitted] was its emphatic embrace by all leading feminists of the period when the abortion statutes were being enacted. Feminist leaders, as a result, were explicit and uncompromising, and virtually unanimous, in condemning abortion as 'ante-natal murder,' 'child-murder,' or 'ante-natal infanticide.'"). *See also id.* at 375, 380, 381–82, 384–85, 387, 392, 404.

125. The Civil Rights Cases of 1883 had stressed that the amendment bears only on "State legislation" or "State action" that impairs privileges or immunities or injures persons in life, liberty, or property or denies to any one of them the equal protection of the law. The implicit baseline for identifying a singling-out, an impairment, an injury, or a denial was the common law and the long-established legal institutions accepted in 1866 in the states that had been loyal to the Union. That baseline, and the strong limitation it imposed on the equal protection clause, was not definitively left behind (repudiated) until *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954).

126. Such as prevailed from 1871 until 1886: *see supra* note 123.

rejected by the Supreme Court as inconsistent with the original and plain public meaning of the words of the Equal Protection Clause.

II. *ROE*'S AND *CASEY*'S ARGUMENTS AGAINST FETAL PERSONHOOD ARE UNSOUND.

A. Justice Stevens' Defense in Casey *has Absurd Implications.*

Since *Roe*, the only Justice to defend *Roe*'s denial of constitutional personhood—Justice Stevens—clung to a single plank: *Roe*'s claim that unborn children's right to guardians *ad litem* to protect their property interests is no recognition of personhood because those interests are not perfected until birth.[127]

This plank is no affirmative case, merely a response to one counterargument, and still it fails—attempting to drum up a constitutional principle from one narrowly stated[128] sub-constitutional technical rule[129] while ignoring others that reflect the principle declared

127. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 912–13 (1992) (Stevens, J., concurring in part and dissenting in part).

128. Too narrowly, because the *vesting* of rights often counts at least as much as their "perfecting." The present procedural rights of unborn children to have guardians *ad litem*, like their substantive right to receive income or other property by inheritance or intestate succession, get an injunction against waste, or to *parens patriae* or other protection against their mothers (or the mother's representatives) (*see infra* note 132), are rights each sufficiently vested ("perfected") to serve the child's interests appropriately and in seamless continuity with the substantive rights as he or she enjoys them after birth and eventually after infancy.

129. Also unavailing is *Roe*'s reliance on a defunct tort doctrine rejecting liability for prenatal injuries. Justice Holmes invented that doctrine well after the Amendment's ratification, in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16–17 (1884), based on the fictions that the unborn child is "not yet in being" and so is merely "part of the mother." (State and federal courts gradually exposed those fictions until 1953, when New York's appellate court followed the "clear[]" "biological" reality "that separability begins at conception." Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (App. Div. 1953). By 1971 Prosser could write that almost all jurisdictions have allowed recovery for pre-viability injuries. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 337 (4th ed. 1971). He had approvingly called rejection of Holmes's fictions "the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Id.* § 56, at 354 (3d

by Blackstone and Shaw, and by the Lord Chancellors whose rulings they cited: the unborn child "is a person *in rerum naturâ*" under "the civil and common law" and "to all intents and purposes[.]"[130]

Thus, the child *in utero* has had substantive rights to receive income or other property by inheritance or intestate succession, and to get an injunction against waste, rights sufficiently vested to serve her seamlessly through birth and infancy.[131] Then there are the vested rights of the unborn, enforced by courts against their parents' competing rights-claims, in *parens patriae* cases ordering blood transfusions, etc.[132] The latter civil rights to life—which could hardly override parental rights unless the unborn were themselves persons—had to be ignored by *Roe* and verbally denied[133] by Justice Stevens. Similarly ignored were the ongoing prosecutions and convictions, now as then, for violations of unborn children's right to life as enforced in state feticide laws.[134]

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ed. 1964). A.A. White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L.REV. 383, 394–400 (1952) (written just before the Holmes doctrine sank beneath the waves), surveys various insufficient policy or precedential reasons for the doctrine's denial of liability (denial that the unborn infant was a person in the eyes of the law), and shows (399) that "the courts denying recovery for prenatal injuries have not effectively escaped the implications for tort law of the recognition by the criminal law and other fields of the civil law of the infant's prenatal existence." This recognition was induced by physical/physiological facts.

130. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 258 (1834).

131. *See id.*, where Chief Justice Shaw adopts "the principal reason" of Lord Hardwicke's opinion in Wallis v. Hodson, 2 Atk. 117 (Ch. 1740), a reason that Lord Hardwicke promptly exemplified: "on Behalf of such an Infant [*en ventre sa mere*], a Bill might be brought, and an Injunction granted to stay Waste."

132. *See* Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964), *cert. denied* 377 U.S. 985 (1964); *see also* Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 844–48 (1973) (collecting cases); Ex parte Phillips, 287 So.3d 1179, 1251-1253 (Ala. 2018) (Parker, J., concurring specifically) (collecting cases).

133. "Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'" Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

134. *See generally* Gerard V. Bradley, *The Future of Abortion Law in the United States*, 16 NAT'L CATH. BIOETHICS Q. 633 (2016).

B. Roe*'s Grounds for Denying That "any person" Included Unborn Children Are Utterly Untenable.*

Roe's counterarguments merit no deference, *Roe* having disqualified itself from constitutional-settlement status by refusing to appoint a guardian *ad litem* or hear the contemporaneous Illinois appeal involving an unborn child so represented[135]—and its points fail anyway.

Roe produced three reasons not to recognize unborn humans as persons. Its textual reason, that "person" as used elsewhere in the Constitution gave no "assurance" of "pre-natal application," was concededly inconclusive, and in fact subverts itself by proving too much.[136] Its pragmatic reason was so implausible that it was framed in questions, not propositions.[137] And its historical reason was a cluster of gross errors drawn solely from two articles by Cyril Means. His first article (called by the Court "Means I") was written while he was general counsel of National Abortion Rights Action League, and had already been refuted.[138] The second ("Means II") was so recent that no scholar had yet examined its sources, was so

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135. Doe v. Scott, 321 F. Supp. 1385, 1387 (N.D. Ill. 1971); *see also* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 1, 8–9 (1979).

136. Roe v. Wade, 410 U.S. 113, 157 (1973). For none of the Constitution's uses of "person" gives any indication of *when* one becomes a person, or entails that one becomes a person only at birth. *See* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 550–52 (2017). And any reading that excludes the unborn from the Equal Protection Clause's "any person" because most uses of "person" elsewhere in the Constitution cannot apply to them (voting, becoming President, and so forth) applies *a fortiori* to corporations, yet the Court from 1886 has unflinchingly included them within equal protection and due process guarantees for "any person."

137. It asked how to square unborn personhood with (i) not penalizing the mother who consents to elective abortion, (ii) not penalizing operations that save the life of the mother but terminate her pregnancy, or (iii) penalizing abortion less severely "than the maximum penalty for murder." *Roe*, 410 U.S. at 157 n.54. *But see* Craddock, *supra* note 136, at 562–66.

138. *See* GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 382–92, 395, 434 (1970).

flawed that it was known to "fudge" the history even by counsel for Jane Roe who cited it,[139] and abandoned key theses of the first. Once scrutinized, its sources crumbled, as did *Roe*'s consequent assertion of a historic common-law "right to terminate a pregnancy."[140] Two key elements in Means I and II are selected for examination below, exemplifying the articles' gross errors and manipulations.

History "disposes of any claim that abortion was a 'common law liberty;'"[141] the common law and statutory history above already shows the claim to be preposterous, and will be supplemented in the next section. And *Roe*'s astonishing "doubt[]" that post-quickening abortion was "ever firmly established as a common law crime"[142] contradicts the precedents and authorities since before Bracton in the 1200s. Means's attempt to explain away those precedents, an attempt repeated by *Roe*,[143] was soon refuted, not least by original records underlying the inaccurate printed accounts used by Means.[144]

C. *By Following Means I and II,* Roe *Caricatured the Common Law and the Reforming Statutes.*

In this section we make only two of the many points that could be made about the analyses (sharply differing but overlapping in

139. A 1971 memorandum circulated among Roe's legal team said Means's "conclusions sometimes strain credibility" and "fudge" the history but "preserve the guise of impartial scholarship while advancing the proper ideological goals." DELLAPENNA, *supra* note 70, at 143–44, 683–84.

140. *Roe*, 410 U.S. at 140–41.

141. DELLAPENNA, *supra* note 70, at 1056; *see also id.* at 336, 351–54, 374–75, 409–10 n.175.

142. *Roe*, 410 U.S. at 136.

143. *See id.* at 134–36.

144. DELLAPENNA, *supra* note 70, at 146–50; *see also id.* at 134–43.

error) in Means I[145] and Means II.[146] One point concerns the putative common law liberty of—or right to—re-quickening abortion (the version in Means I) or abortion up to birth (the version in Means II). The other concerns the misuse, in both articles, of *State v. Murphy*[147] as principal, indeed almost sole evidence for the articles' fantastic proposition that the mid-19th century reforming statutes had *no purpose* of rejecting that imagined liberty (in either of its versions) to destroy the unborn ("fetuses"), but instead the *exclusive* purpose—now obsolete, needless and therefore unconstitutional—of protecting women against procedures dangerous to their health or life.

1. The Invented "common law liberty to abort"

To make even the semblance of a case that there was a common law liberty to abort—whether at all stages or only at pre-quickening stages—Cyril Means had to surmount the settled doctrine of all the treatises used by America's front-line criminal courts, the justices of the peace. That doctrine, to repeat (see *supra* Sections I(A)(1)–(3)), had three stable and unchallenged elements:

(i) causing the death of the mother by consensual elective abortion measures at any stage of pregnancy is murder (*see* Hale, Hawkins, Blackstone, *Conductor generalis*, the *American Justice*, East, Russell, the draft Massachusetts Penal Code, Chief Justice Shaw in *Parker* . . .);

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145. Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. F. 411, 418–28 (1968) [hereinafter Means I]. Pages 418–28 were cited by *Roe* at 132 n.21 (quickening, etc.), and pages 411-12 were cited by *Roe* at 134 n.22 (canon law). The whole was cited by *Roe* at 151 n.47 (purpose of state statutes).

146. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N.Y. L. F. 335 (1971) [hereinafter Means II]. The whole was cited by *Roe* at 135 n.26 (no established common law prohibition) and 151 n.47 (statutory purpose(s)). Pages 375–76 were cited by *Roe* at 139 n. 33 (state statutes) and pages 381–82 at 148 n.42 (purpose of state statutes).

147. 27 N.J.L. 112 (Sup. Ct. 1858).

(ii) causing the death of the child after its birth by elective abortion measures at any stage of pregnancy is murder (*see* Coke, Hawkins, *Conductor generalis*, the *American Justice*, the draft Massachusetts Penal Code, Chief Justice Shaw in *Parker*. . .);

(iii) any elective consensual abortion measure is a serious misdemeanor at least if it is taken while the mother was "quick with child" and causes the death of the child in the womb; many authorities (including probably Hale himself and certainly the Massachusetts Penal Code commissioners and American treatises such as Wharton and Bishop) treat it as a serious misdemeanor at *all* stages of pregnancy, at least if it causes the death of the child in the womb.

Means I: Falsified by Hale

Means's 1968 article (Means I) focused[148] on Coke's 3 *Inst*. 50 statement of [III] and [II]. Here Means was concerned to assert, without argument, that Coke's opening words, "If a woman be quick with child. . ." "witnessed" that

> [a]t some point between the thirteenth and seventeenth centuries, English common law developed along the line suggested by Bracton's distinction between formation and animation. In so doing, it postulated the latter event as occurring at the time of quickening (*i.e.*, toward the end of the fourth or the beginning of the fifth month of pregnancy), as witnessed by the statement of Sir Edward Coke[]. . .[149]

Means never gave any argument or evidence for the highly improbable claim that Coke was referring to "quickening," in the sense of an event of maternal perceptions "towards the end of the fourth or the beginning of the fifth month."[150] (Nor consequently did *Roe*, which simply changed the just-quoted assertion in Means I into the even more egregiously implausible claim that the common law's adoption of maternally perceived quickening occurred

148. Means I, *supra* note 145, at 418–28 (cited by *Roe*, 410 at 132 n.21).
149. *Id.* at 420.
150. *See id.*

in the famous sentence of Bracton itself.[151]) It is highly probable that Coke like everyone else between 1250 and 1650 regarded the woman as *quick with child*, if not from the beginning of her pregnancy, then at the time when the c. six-week formation of the conceptus into a child was completed and followed, distinctly but presumptively immediately, by the distinct though secret event of animation, generally accepted as occurring at about the 40th, 42nd or 46th day after conception.[152]

On this almost universally accepted schema, Bracton's distinction between *formatum* and *animatum* would be read as disambiguating *formatum*, "formed," which on its own could refer to any point in an 18-day period between the 28th and 46th day. "Quickening" in the sense that interested some nineteenth-century judges, Means, and the Historians' Brief in *Dobbs*, was irrelevant to those for whom, like Bracton and Coke, the key question always was and is: From when are we dealing with *a distinct human being* in the womb?

Means I's grand division of theories into "immediate animation," "mediate animation" and "birth," and the declaration of Means I at 418 (where *Roe* begins to cite Means) that "the only one of the three theories that explains absolutely nothing in our legal system is immediate animationism,"[153] totally overlooks the two different ideas of "mediate": ensoulment at c. 40 days, and maternally perceptible movement at c. 105 days. Means I proceeds, at 420, to derive from the quoted passage of Coke the proposition "an abortion *before* quickening, with the woman's consent, whether killing the foetus while still within the womb, or causing its death after birth alive, was . . . not a crime at all." This is what Means I (by contrast with Means II) will mean by "ancient common-law liberty."[154]

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151. *See supra* text accompanying note 52, text after note 76, and text after note 80; for the Bracton sentence, *see supra* text after note 66. *See also* notes 59, 64, and 66.

152. *See supra* notes 64–66.

153. Means I, *supra* note 145, at 418 (cited by *Roe* at 132 n.21).

154. *See id.* at 452, 453, 462; *cf. id.* at 438 ("[T]he common law *tolerated* abortion on request *before* quickening." (his emphasis)).

But that passage in Coke (and Blackstone and the rest) dealt only with rules [III] and [II], not at all with [I], the liability of the provider of an elective abortion for murder if the mother dies from it. *Means I admits that this liability is incurred even though the abortion was done or attempted before quickening*.[155] The article does not raise the rule [I] issue at all until it has purportedly completed its demonstration that pre-quickening consensual abortion was no crime either in the woman or in her provider, and has passed on to a consideration of the subordinate question whether the consent of the husband was needed if the not-yet-quickened pregnant woman was married. (Answer: there is no evidence that it was, and the article does not for even a moment consider how improbable its liberty thesis is in relation to a "patriarchal" society—or indeed any society with a serious conception of marriage—insofar as it proposes that the common law made no objection to the married woman's secret or defiant destruction of her husband's son and heir.)

This sequencing allows Means I to argue in a vicious circle: the provider of a pre-quickening abortion was acting lawfully because

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> So fond was [the common law] of liberty, that it allowed the pregnant woman to run the risk of death on the operating table, at a time when this risk was real and substantial, if she chose to rid herself of the foetus *before quickening*; yet so fond was it also of life that, if she did not survive the operation or its aftermath, he who performed it was hanged.

Id. at 437 (emphasis added).

The same page explained that if the purpose of the operation was to save the life of the woman, then the operation would be *with* lawful purpose, in which case, even if the patient died, the physician would not be guilty of any offense, let alone murder. The therapeutic exception was thus already present in the common law, not in the domain of pre-quickening abortion—for all such abortions were noncriminal, provided the patient consented, *and survived*[!]—but rather in the domain of murder as imputed to the abortionist whose patient died.

In this confused passage, Means I admits *at least* that the lawfulness of the pre-quickening elective abortion cannot be determined until the patient has "survived" the abortion and its aftermath. Incidentally, we have not observed in Means I and II anything as mistaken as Professor Aaron Tang's notion that rule [I] merely penalized "botched abortion." *See* John M. Finnis & Robert George, *Indictability of Early Abortion c. 1868*, at 23–24 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940378.

the passage quoted from Coke shows that "[a]bortion before quickening was not an offense at common law at all (unless the patient died)."[156] But that passage from Coke dealt only with rules (ii) and (iii), and it neither stated nor implied that *abortion was lawful* if the mother was not yet quick with child: it merely said that if she *was* quick with child, abortion was a great misprision and was murder if the child born alive died from it.[157] Means took care to evade the implications of holding the abortionist guilty of murder if "the patient [mother] died," by avoiding—navigating around—Hale's statement of the rule, which *describes the abortion as unlawful*—"unlawfully to destroy the child within her, and therefore, he that gives a potion to this end must take the hazard . . . ."[158] It is because *the procedure is unlawful* that the abortionist, however skilful, "must take the hazard" of being liable for murder if the mother dies.[159]

Hale is here making clear that there is no common law liberty of abortion. For if the abortionists are guilty of murdering the consenting woman if she dies from the abortion, the murderous acts were none other than their abortifacient conduct perhaps many months before her death. The common law knew nothing of an act that is lawful when and as done—involves neither *actus reus* nor *mens rea*—but becomes criminal on the happening of some subsequent event. What it does recognize is *unlawful* acts that constitute criminal homicide if and only if some subsequent harm happens to result from that act.

So Means I deals with the issue by quoting two American judgments (*Parker* in 1845 and *Smith* in 1851) in which the judges do not quote Hale, and instead of his term "unlawfully to destroy the child" use the softer phrase "without lawful purpose" (a phrase that Means I proceeds to treat as concerned only with the common

156. Means I, *supra* note 145, at 440 n.64.

157. *See id.*

158. Means I, *supra note* 145, at 446; Means II, *supra* note 146, at 362, quoting the passage from Hale.

159. *Id.*

law's implied permission of therapeutic life-saving abortion).[160] The fact that one of the judgments cites Hale is buried in a footnote, without identifying the citation beyond "a posthumously published (1736) treatise by Sir Matthew Hale (1609-1670)."[161]

Means II: Extremist Escape from its Author's Dilemma

So Means was obliged to take seriously, and tackle, the problem concealed by Means I. He did so in Means II, with new boldness but a familiar technique.

The new boldness is part of the radical shift in stance between Means I and Means II. Quickening, the heart of Means I, has been moved almost off-stage: the liberty proclaimed is not of pre-quickening elective abortion; it is "English and American women's common-law liberty of abortion at will," that is, to "terminate at will an unwanted pregnancy" "at every stage of gestation."[162] Correspondingly, the rule [I] issue is contained within the question with which Means II, on its second page, frames its whole discussion: "Did an expectant mother *and her abortionist* have a common-law liberty of abortion *at every stage of gestation*?"[163]

The familiar technique, already deployed in Means I, is to postpone all mention of rule [I] until after the discussion has reached the essential conclusion that—in the Means II version—the woman did indeed have (in England until the statute of 1803, in America "until 1830") a common-law liberty of elective abortion just as much after as before quickening. Only then is the question about "her abortionist" raised and rule [I] reconsidered.[164] The answer that Means II will give to its framing question from p. 336 is delayed until p. 373, and it is an answer dividing the position of "the expectant mother" from the position of "her abortionist:"

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160. *See* Means I, *supra* note 145, at 435.
161. *Id.* at 435 n.56.
162. Means II, *supra* note 146, at 335-36, 375.
163. *Id.* at 336 (emphasis added) (capitalization adapted).
164. *Id.* at 373.

> During the late seventeenth, the whole of the eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints, ecclesiastical as well as secular, in regard to the termination of unwanted pregnancies, at any time during gestation. During virtually the same period (*i.e.*, starting with Hale's decision in 1670), however, the common law had imposed a new risk on the woman's abortionist: he became the insurer of her survival. . . . [T]he common law said[:] . . . if your patient die, you will hang for her murder. If she survive [sic], you will have committed no offense.[165]

On the preceding page, 372, Means II states that last proposition more radically: "In Massachusetts when Shaw wrote [in *Parker*], therefore [since there was no ecclesiastical jurisdiction, only secular common law], *it would have been false to say that an abortifacient act was done 'unlawfully'*; it merely lacked 'lawful purpose.'"[166]

But in the very same sentence, Shaw had said: "the consent of the woman cannot take away the imputation of malice, any more than in the case of a duel, where, in like manner, there is the consent of the parties."[167] What is the "malice" of the provider of a consensual abortion? Means II ignores the question at this critical point (just as Means I had ignored it entirely). But earlier Means II had tried to tackle it, by casting doubt (unwarranted, as we shall soon see) on what East says about transferred malice in the justly influential passage (1 East 230) discussed above.[168] Means I and II needed to deny or evade, and did deny or evade, the fact that for Hale, East, and Chief Justice Shaw, *the malice of the consensual abortion was against the unborn child*.

Shaw's comparison with dueling[169] helps make sense of the whole question whether the abortionist was acting unlawfully even before

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165. *Id.*

166. *Id.* at 372 (emphasis added).

167. Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 265 (1845).

168. Means II, *supra* note 146, at 363–72. East is discussed *supra* pp. 945–47; *infra* pp. 986–89.

169. *Parker*, 50 Mass. (9 Met.) at 265.

any mother died from his elective procedures. It helps to bear in mind that the common law did *not* operate with a principle or general doctrine that an attempt to commit a crime (felony, misprision, misdemeanor) is itself an indictable crime.[170] But it did operate with a principle or general doctrine that there had to be an *actus reus*, the doing of which with *mens rea* defined the time and place of the committing of the offense, even if the offense's indictability depended upon a subsequent event such as a death.[171] What was done before the fulfilling (if ever) of that condition subsequent was, of course, unlawful and in a broad, important sense, criminal.[172]

How did Means II evade and disguise the implications of East's discussion? First by pretending that 1 East 230 was not a general statement of principle and law, but a commentary on *Tinckler's Case*, in which both the mother and the baby (born living for a few moments) died—allowing Means to claim that, since the defendant abortionist was not prosecuted for murdering the baby, and East did not allude to the murder of the baby, he and the Crown prosecutors and the trial judge and all the "Twelve Judges of England" must have rejected the doctrine in Coke (3 *Inst.* 50) that [II] the abortion-caused death of the aborted baby born alive is murder.[173] The whole argument is absurd (and entirely characteristic of the argumentation of Means I and II), for the following three reasons.

(1) As is reported on 1 East 355, a page which Means II quotes in its entirety, the baby when born was proved by the surgeons to be "perfect."[174] So there was no ground for prosecuting Tinckler for murder under rule [II], and all Means's inferences from that nonprosecution, and all his rhetorical flourishes in stating them, are entirely worthless. Means simply ignores what he has transcribed about the fact ("was perfect") that would have made it impossible

170. *See* 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 222–23 (London, MacMillan & Co. 1883).

171. *Id.*

172. *Id.*

173. Means II, *supra* note 146, at 367–71.

174. *Id.* at 364.

to establish the causal link between abortive measures and death that is one of the two requirements of rule [II].

(2) 1 East 230 is not, as Means II claims,[175] a commentary on *Tinckler*.[176] It is a general exposition of a legal rule, of which *Tinckler* is one appropriate illustration. But, as the page makes unambiguously clear, *Tinckler* is only the second of two different illustrations, two precedents explicitly identified as different, the first being an unidentified case of giving an abortifacient potion causing the death of the mother (with no suggestion of a born-alive baby or a possible rule [II] murder).

(3) Means II's insistent claim that East probably disapproved of Coke's rule [III] because he certainly (says Means) disapproved of Coke's rule [II][177] is disproved not only by its illogic as a fallacious *and* groundless argument from silence (about Tinckler's baby's unprosecuted death), but above all by the plain fact, unaccountably ignored by Means, that only two pages earlier in the same discussion of homicidal malice, 1 East 227 explicitly approved and adopted precisely both of Coke's rules![178] Indeed, for good measure,

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175. *Id.* at 366–67.

176. Means II even claims that the marginal note citing 1 Hale 429 expresses East's preference for Hale over Coke and for Hale's denial of Coke's rule [II] and non-affirmation of rule [III]. Means II, *supra* note 146, at 367. But neither of those rules was relevant to 1 East 230, which concerns only rule [I], never expounded by Coke—and places the citation to 1 Hale 429 not alongside the skewers case but at the very beginning of the paragraph expounding the transferred malice principle's application to abortion as illustrated by two cases. Presumably that is why Means II, when using East's marginal note to 1 Hale 429 as its first ground for inferring that East disapproved of Coke, takes care to cite not the marginal citation of "1 Hale 429" at 1 East 230—where East is actually discussing rules—but only the marginal note "(1 Hale, 429)" in the quasi-report of *Tinckler* at 1 East 353, at the point where the trial judge's ruling is given: "[Nares J.] was clearly of opinion it was murder [of the mother], on the authority of Lord Hale." Rule (i) in action in 1781. (The divided opinions of "all the judges" concerned only the question of admitting dying declarations of an accessory without corroboration. *See* 1 East 356.)

177. Means II, *supra* note 146, at 368.

178. EAST, 1 PLEAS OF THE CROWN 227 (London 1803, Philadelphia 1806) (citing in the margin Coke (3 *Inst.* 50) and his supporters Hawkins and Blackstone).

1 East 228 pointed out that *both* Hale *and* Staundford (Means II's hero in the article's struggle to discredit rule [III]) *agreed with rule [III]* even though they rejected rule [II] for reasons that East, like almost everyone else, goes out of his way to say were unsound.[179]

After and seemingly because of these blunders or misfeasances, Means II simply ignores the references to malice that appear prominently in the authorities he approves: *Russell On Crimes*,[180] Shaw in *Parker*,[181] and the Maine court in *Smith* (1851).[182] Notably, Means II's commentary on *Parker* focuses entirely on Shaw's low-key phrase "without lawful purpose," ignoring what Means I had said about the same passage, and instead implausibly taking it as a sign that Shaw thought Hale treated abortion as only an ecclesiastical offense.[183] The whole commentary functions to diverting readers' attention away from the real premises and logic of Shaw's argument: the consensual abortion is a malicious act, the "imputation of malice" is no more cancelled by the woman's consent than it is in the case of a duel, and the upshot is that the procedure however skillful is not just a homicide but a murder.

The failure of Means II's extended discussion of rule [I] further illustrates the extravagant baselessness of the article's rejection of rules [II] and [III], with its accompanying attempt to remove from the common law of abortion everything that was affirmed by Coke

179. *Id.* at 277–81 ("But to kill a child in its mother's womb is no murder, *but a great misprision*: and Staundford and Lord Hale are of the same opinion, even where the child is born alive and afterwards dies by reason of the potion or bruises it received in the womb: which opinion they seem to ground on the difficulty of ascertaining the fact: certainly not a satisfactory reason, where the fact is clearly established: and according to all other opinions the latter is murder."). "[T]he latter" is the case of the [II] aborted child born alive and dying from the abortifacient measures; the implicit "former" is the [III] aborted child who dies in the womb. Note in passing the absence of any reference to quickening; the governing phrase "kill a child" necessarily implied that the child was quick in the sense of formed, ensouled and alive (which is long before "quickening").

180. Means II, *supra* note 146, at 371.

181. *Id.* at 372.

182. *Id.*

183. *See id.*

and by all who followed him, including Blackstone and all the treatises recalled above.

2. The Reforming Statutes' Rationale: *Murphy* Mishandled

To recall: both Means I and Means II ascribed extraordinary, indeed unique importance to *State v. Murphy*.[184] They treated a single sentence in the New Jersey Supreme Court's opinion as their principal, indeed almost their sole evidence for their proposition that mid-19th century reforming statutes in dozens of states had *no purpose* of rejecting the (imaginary) common-law liberty (in either of its versions) to destroy the unborn ("fetuses"), but instead the *exclusive* purpose of protecting women against procedures dangerous to their health or life. The articles were entirely unconcerned with the *decision* in *Murphy*. It was only ever one single, oracular sentence that these articles quoted; they made not the slightest reference to the facts or the issue in the case, or to the context of the sentence in the New Jersey Supreme Court's opinion. Here is the sentence:

> The design of the [New Jersey] statute [of 1849] was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.[185]

About this sentence, Means I and Means II made the same incredible claim:

> Until now [1968!], this observation, in *State v. Murphy*, had been the sole piece of contemporary evidence as to why the legislatures enacted these statutes abridging the liberty to abort before quickening, a right which women enjoyed at common law for centuries. It remains the sole *judicial* exposition of such a statute contemporary with its enactment.[186]

Towards the end of Means I, the author doubles down:

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184. *See supra* text accompanying note 147.

185. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

186. Means I, *supra* note 145, at 452 (emphasis in original).

> The New York Revisers' Report of 1828 and the New Jersey decision of 1858 in *State v. Murphy* are literally the only known contemporary authoritative texts explaining the reason for the enactment of any of these novel prohibitions of abortion before quickening. Both point to the life and health of the pregnant woman as the *sole* objective in legislative view.[187]

And Means II repeats all this:

> The only contemporaneous judicial explanation for the enactment of any of the pre-Lister [scil. 1867 or 1884][188] abortion statutes—a decision of 1858 construing New Jersey's first such statute passed in 1849—contains the [sentence above quoted].[189]

Despite the effrontery of these false claims, they had the desired effect. They were swallowed whole by *Roe*.[190] The Court makes a show of saying that it is merely describing what "parties challenging state abortion laws" "claim" and "argue."[191] But the argument and the evidence for it is simply what Means I and Means II says about *Murphy*, and by the end of this key passage the Court is simply embracing it:

> Pointing to the absence of legislative history to support the contention [that a purpose of these laws, when enacted, was to protect prenatal life], [parties challenging state laws] claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[fn. See discussions in Means I and Means II.] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the

187. *Id.* at 507 (emphasis in original).

188. *See* Means II, *supra* note 146, at 391. "Lister" is shorthand for the use of antiseptics in surgery.

189. Means II, *supra* note 146, at 389–90. Means adds a couple of sentences emphasizing how distinguished and well-informed the *Murphy* court was.

190. Roe v. Wade, 410 U.S. 113, 151 (1973).

191. *Id.*

> woman's health rather than in preserving the embryo and fetus. [fn. See, *e.g.*, *State v Murphy*, 27 N.J.L. 112, 114 (1858).][192]

These claims by Means I and II—that *Murphy* was the only judicial decision before 1867/1884 (Lister) or 1968 ("now" in Means I) that identified the legislative purpose of a state abortion statute—were untenable, to put it mildly. Within a year of *Murphy*, the Massachusetts Supreme Court authoritatively—and not as mere dictum—identified the purpose of that state's 1845 statute,[193] and the Vermont Supreme Court identified the purpose of that state's 1846 statute.[194] And, tellingly though unsurprisingly, neither court saw

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192. *Id.*

193. See *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85 (1858), which upheld the trial judge's direction

> that *although at the common law*, as held in this commonwealth, it was no offence to procure an abortion, unless it was alleged and proved that the mother was "quick with child"—that being the stage of pregnancy which, by the common law, was considered to be the commencement of the child's life—yet that under the statute of 1845, c. 27, it was not necessary to allege in the indictment or to offer affirmative proof that the child had life. (emphasis added).

The appellate court added:

> The [trial] court was also requested to instruct the jury that a lawful justification "would exist if the child with which Sarah Chaffee was pregnant was not a live child." If by this was meant that the mother had not reached the stage of pregnancy in which she would be "quick with child," and when to procure an abortion would be an offence at common law, the prayer in our opinion misconceives the purpose of *the statute*, which *was intended to supply the defects of the common law, and to apply to all cases of pregnancy*.

Id. at 93 (emphasis added).

194. See *State v. Howard*, 32 Vt. 380 (1859), where the primary question was whether the prosecution need prove that the child was alive in the womb at the time of the unlawful inducing of miscarriage. After comparing the state's 1846 statute with the English criminal abortion statutes of 1803, 1837 and 1851, the State Supreme Court held:

> [U]nder our statute it is expressly required, to constitute the offence, that the attempt be to procure the miscarriage of a woman "then pregnant with child."
>
> . . .
>
> . . . So that the only new question arising under our statute is, whether it is essential to the pregnancy or "being pregnant with child," that the child

any reason to mention maternal health. Each court, independently of the other, identified the legislative purpose as filling in the gap in the common law's protection of the unborn child—the "quick with child" requirement of rule (iii).

Equally untenable was the other main claim made by Means I and II about *Murphy*: that it held or declared that protection of unborn life was not even *one* purpose of New Jersey's 1849 statute. Even read in isolation, the key words of the quoted sentence are "not to prevent the procuring of abortions, *so much as to* guard the health. . . ."; the words here italicized imply, unquestionably, that preventing the procuring of abortions was *a purpose*, though not the primary one. But context is a primary determinant of meaning, and the sentence's context, totally ignored by Means and *Roe*, shows that "not to prevent the procuring of abortions" meant far less than appears in isolation. It was not intended to contrast preventing destruction of unborn life with preventing damage to maternal health, but rather to contrast what the court took to be the common law's *exclusive* focus on the fate of the unborn with the legislature's *additional* concern to protect women from the dangers presented by the activities and solicitations of abortionists and suppliers of abortifacients.

For the sole issue in *Murphy* was whether it was a defense to a charge of supplying abortifacient drugs that the woman had not

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should be still alive. IT IS NOT CLAIMED THAT IT IS NECESSARY THE EMBRYO SHOULD HAVE QUICKENED. THE GENERAL FORM OF EXPRESSION "PREGNANT WITH CHILD," SEEMS TO HAVE BEEN USED TO ESCAPE ALL QUESTION OF THIS KIND AND HAVE IT CLEARLY APPLY TO EVERY STAGE OF PREGNANCY, FROM THE EARLIEST CONCEPTION; and if so, we see no reason why it should not extend through its entire term, until the expulsion of the *foetus*.

Id. at 400 (emphasis added).

If the legislative purpose in Vermont or Massachusetts had been protection of women's health *rather than* the child's life, the statutes would have abolished the requirement of proving pregnancy, and would have penalized abortifacient measures on women only believed or feared to be pregnant. For all that is said by the New Jersey supreme court in *Murphy*, the same should be said about the New Jersey statute in that case (see *infra* pp. 992–97).

swallowed them. The court's answer is No. That answer was obvious from the words of the statute, but the court launched itself into a redundant and convoluted justification. The mischief tackled by the statute is supply of means of inducing abortion or, more generally, is *the activities of abortionists*. Those activities endanger maternal health, *whether or not* a particular woman supplied with an abortifacient (and/or solicited to use it) did in fact incur the danger to herself [not to mention to "the embryo and fetus"!] by actually using it.

So the emphasis in the sentence selected and quoted by Means I and II was really on *procuring*, here meaning: actually bringing about an abortion. Procuring is being contrasted with *attempting* to procure, and/or with *facilitating* abortion:

> [T]he mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of The State v. Cooper, viz., that the procuring of an abortion, *or an attempt* to procure an abortion, with the assent of the woman, was not an indictable offence, as it affected her, but only as it affected the life of the *fœtus*. The design of the statute was not to prevent the *procuring* of abortions, *so much as to* guard the health and life of the mother against the consequences of such *attempts*. *The guilt of the defendant is not graduated by the success or failure of the attempt.* It is immaterial whether the *fœtus* is destroyed, or whether it has quickened or not. *In either case* the degree of the defendant's guilt [under the statute] is the same.[195]

For reasons best known to itself, the court further complicates its opinion with another concern: to make clear that the statute, in saying "if any person . . . shall administer . . . or prescribe . . . or direct . . . ," was criminalizing only the activities of abortionists, not of their clients. The court contrasts all this with the common law, focused as it was and is on the life of the unborn child: Unless the child was quickened and then destroyed, the actions of both mother

195. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858) (emphases added).

and abortionist are unindictable at common law, however damaging they are to the woman. (The court neglects rule [I].)

Some of these defects of the common law would have been remedied had the common law incorporated a functioning general principle that it is an indictable offense to attempt or incite an offense. But not only did it lack such a principle,[196] but by its exclusive focus on the formed or quickened child, it also failed (leaving aside the mother's death and rule (I)) to penalize either successful or attempted abortions early in pregnancy, even though such acts and attempts were just as dangerous, at least to the mother, from conception onwards, and even if there had in fact been no conception. As the court put it:

> At the common law, the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, *unless the woman were quick with child*.[197]

Thus, the legislature's remedy had two aspects: The statute criminalized, regardless of quickening,[198] (1) all elective abortifacient facilitations and incitements, regardless of their outcome (including

196. This is not contradicted by the court's remark that—where the common law does recognize a crime of attempt—"[m]ere words do, at the common law, constitute such overt act as amounts to an attempt to commit a crime." *Id.* at 115.

197. *Id.* at 114 (emphasis added).

198. But, *nota bene*, only if there is an unborn child in existence! The statute said:

> If any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman *then pregnant with child,* shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged

actual consumption of abortifacients), and (2) unlike the common law,

> the statute [does not] make it criminal for the woman to swallow the potion, or to consent to the operation or other means used to procure an abortion. No act of hers is made criminal by the statute. Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child. The offence of third persons, under the statute, is *mainly* against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment.[199]

None of this in any way suggests that the statute had cancelled either the common law abortion offenses or the common law's concern for the child.[200] The "mainly" here, like the "so much as" in the sentence quoted by Means I and II, suggests instead that the statute's reforming priority was that such protective concern for the child be *extended* so as to protect the life and health of women *more adequately than before*.[201]

> guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both.

A further supplement to an act entitled "An act for the punishment of crimes": Penalty for causing or procuring miscarriage (approved Mar. 1, 1849), *in* ACTS OF THE SEVENTY-THIRD LEGISLATURE OF THE STATE OF NEW JERSEY (Phillips & Boswell, 1849).

199. *Murphy*, 27 N.J.L. at 114–15 (emphasis added).

200. It is certain that in states that retained common-law criminal law at all, abortion statutes could be, and were, regarded as supplementing the common law. *See, e.g.*, Smith v. State, 33 Me. 48, 51 (1851).

201. The New Jersey Supreme Court revisited the 1849 statute and *Murphy* in 1881, in *State v. Gedicke*, 43 N.J.L. 86, 89–90 (Sup. Ct. 1881):

> [T]he act of March 1st, 1849 . . . was passed to remedy an adjudged defect in our law, that to cause or procure abortion before the child is quick was not a criminal offence at common law or by any statute of our state. *State v. Cooper, 2 Zab. 52*. As soon as the question was raised and the doubt suggested, this act was passed to punish the offence. The design of the statute was not so much to prevent the procuring of abortions, however offensive these may be to morals and decency, as to guard the health and life of the female against

But, absurd though it was, the Means I and II thesis that the legislative purpose of dozens of state statutes could be demonstrated by pointing to one decontextualized sentence in a single, convoluted, debatable court opinion was, as shown above, essentially adopted in *Roe*. Before long, but too late, the thesis was demolished by James Witherspoon's exhaustive survey of those statutes' actual features, and his unfolding, as exemplar, of the legislative history of Ohio's reforming statute of 1868.[202] The lively concern for the child in the womb so amply displayed in the Ohio statute's particular legislative history was present and manifested in numerous features of the design and enacting of overwhelmingly many other reforming statutes in other states (not least in the New Jersey statute under discussion in *Murphy*)—Witherspoon listed and exemplified in detail no fewer than twelve such features, and identified all the statutes that embodied them.[203] In doing so, he also showed that the legislators' pervasive concern for children *in utero* was always

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> the consequences of such attempts. The guilt of the defendant is not determined by the success or failure of the attempt; but the measure of his punishment is graduated by the fact whether the woman lives or dies. *State v. Murphy, 3 Dutcher 112*. This law was further extended March 26th, 1872 . . . to *protect the life of the child also*, and inflict the *same* punishment, in case of its death, as if the mother should die. (emphasis added).

This final sentence (though still inexplicably minimizing the 1849 statute's in fact gapless protection of the life of the unborn child) shows—even without going further afield than New Jersey—how erroneous was *Roe*'s claim, in the opinion's above-quoted sentence citing (only) *Murphy*, that "[t]he few state courts called upon to interpret their laws *in the late 19th and early 20th centuries* did focus on the State's interest in protecting the woman's health *rather than* in preserving the embryo and fetus." Roe v. Wade, 410 U.S. 113, 151 (1973). Means II had quoted and celebrated *Gedicke*'s sentence repeating *Murphy* (in decontextualized and over-simplified form) but had—shamelessly—withheld the following sentence, about the 1872 statute's putting the child's death on a par with the mother's. *See* Means II, *supra* note 146, at 381–82. Relying on Means rather than reading the cases on which he purported to rely, *Roe* fell headlong into this advocate-activist's snare.

202. Witherspoon, *supra* note 88, at 61–69 (1985).

203. *Id.* at 70.

entirely compatible with, indeed reinforcing, and reinforced by, an equivalent lively concern for the health of women.

III. IN FOUNDING AND RATIFICATION ERA LEGAL THOUGHT, CONSTITUTIONAL STATUS AS A PERSON TRANSCENDED NARROW DOCTRINES AND LEGAL FICTIONS.

A. A Preliminary Warning Example: Roscoe Pound

The attempt by Justice Stevens to narrow the constitutional-level understanding of "any person" by appeal to technical rules or doctrines inverts the logic of constitutional thought. It does so by neglecting the meanings that were public (shared) among Founding and Ratification Era constitution-makers and ratifiers, meanings conveying (and taken by those makers and ratifiers to convey) the very framework of legal thought and of the legal system. That framework they took to be articulated, in broad and solid terms, by Blackstone's *Commentaries*, deeply based as these were not only on case law, statutory developments and classic treatises, but also on prior attempts such as Matthew Hale's[204] to grasp the system of

204. *See* MATTHEW HALE, ANALYSIS OF THE LAW 1–4 (1st ed. 1713). Hale died in 1676: "*The Analysis of the Law*. Sect. 1. Of the Civil Part of the Law (in general). The Civil Part of the Law concerns, 1. Civil Rights or Interests . . . Now all Civil Rights or Interests are of Two Sorts: 1. *Jura Personarum,* or Rights of Persons . . . The Civil Rights of Persons are such as do either, 1. Immediately concern the Persons themselves: . . . As to the Persons themselves, they are either, 1. Persons Natural; Or 2. Persons Civil or Politick, *i.e.* Bodies Corporate. Persons Natural are consider'd Two Ways: 1. Absolutely and simply in themselves . . . In Persons Natural, simply and absolutely considered, we have these several Considerations, *viz.* 1. The Interest which every Person has in himself . . . 1st, The Interest which every Person has in himself, principally consists in three Things, *viz.* 1. The Interest he has in the Safety of his own Person. And the Wrongs that reflect upon that, are, 1. Assaults . . . And all Persons are (presum'd) able in either . . . Taking or Disposing. . .which [persons] by Law are not disabled: and those that are so disabled come under the Title of *Non-ability*, though that Non-ability is various in its Extent, *viz*., To some more, to some less (as in the several instances following): . . . 4. Infants: here of the Non-ability of Infants. . . ." The *Oxford Dictionary of National Biog-*

English law as a whole. Legal thought and language so framed took as foundational natural realities such as those that in 1 *Commentaries* *129–30 Blackstone takes as a starting point for that seminal passage's exposition of the natural person's right to life.

An analogous inversion is exemplified by Roscoe Pound's ambitious legal-theoretical treatment of Persons and legal personality in his final magnum opus, *Jurisprudence*.[205] Pound's discussion is full enough to make clear the doctrinal or analytical incoherence that results from giving doctrines and fictions priority over realities such as the continuous identity of an individual person both before and after birth, notwithstanding birth's reasonable social and legal importance.

In Section 127, "BEGINNING AND TERMINATION OF LEGAL PERSONALITY," Pound commences with the seemingly authoritative proposition: "Beginning of natural legal personality is conditioned by birth. The Romans held, and this has been adhered to ever since, that this means complete separation of a living being from the mother." There follows a page of references to various relevant points of difference between classical Roman law and later German, French, Spanish and other doctrines or enactments. After two dozen lines of this we read: "At common law the requirement is that the child be born alive." But the only authority cited to verify this is "Coke, Third Inst. (1644) 50."[206]

At this point it is obvious that Pound's discussion of "persons" in law has come adrift. A technical rule of criminal law *about murder*, established in 1601 and related by Coke in a paragraph about murder without the slightest theoretical pretension, is being treated as

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raphy entry for Hale (2004) says: "[Hale's] *Analysis* . . . was borrowed by William Blackstone with minimal modification and therefore provides the structure of Blackstone's *Commentaries*." On Blackstone's own *Analysis* as derivative from Hale's and forerunner of the *Commentaries*, see J. M. Finnis, *Blackstone's Theoretical Intentions*, 12 NATURAL L. F. 63, 64–67 (1967).

205. ROSCOE POUND, 4 JURISPRUDENCE ch. 25 (1959).

206. For the text of 3 INST. 50, *see supra* note 32. Pound's footnote cites seven other English precedents on related points of detail and further cases illustrative of a dispute or difference between Kentucky and older and newer English views.

if it were (or made manifest) a general principle of law and building-block of juristic thought. Pound's misuse of Coke is refuted by Blackstone's treatment of the unborn across the whole sweep of the law in 1 *Commentaries* *129–30, examined above throughout Section I.A.1.

One page further on, he suddenly admits that Roman law had a rival principle, opposite to the *not-a-person-until-birth* principle he had canonised. Now he says: "[U]nborn children are in almost every branch of the civil law regarded as clearly existing"! Pound discusses technical exemplifications of this, but makes no effort to reconcile it with the position (principle? rule? doctrine? definition?) announced without qualification at the beginning.

Pound gets to the truth of the matter when he broadens his discussion of persons and personhood, to engage with human realities, benefits and harms, not mere jigsaw pieces of old (and mostly foreign) legal rules and maxims:

> In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights. They were not property. But they could scarcely be called legal persons. . . . At common law there was civil death—loss of legal personality in one naturally alive.
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> . . .
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> But there came to be a steady expansion of legal personality, a recognition of the human being as a moral and so a legal unit and extension of legal capacity, so that in the era of natural law legal personality was thought of as an attribute of the individual human being. The human being had certain qualities whereby he was naturally entitled to have certain things and do certain things and so was the subject of natural and therefore legal rights.

Pound does not pause to note that this "natural law" thinking—subordinating legal doctrines and fictions to *truths* about the "attributes" and "qualities" that belong to "the human being" *prior* to a society's laws—is integral to the thinking we find crystallized in the Constitution and again in the Due Process and Equal Protection

Clauses. Instead Pound goes straight on, taking for granted that academic progress has "eliminated" all that attention to natural realities and consequent moral, pre-legal responsibilities:

> With the natural-law basis eliminated, there remained for analytical jurisprudence the definition [of person]: "A subject of legal rights and duties."[207]

But though you expel nature with a pitchfork it comes back in by the rear door, and so we find him soon admitting, indeed on the following page, that:

> [A]nalytical jurisprudence has had to take account of idiots, *unborn children*, babes in arms, in Roman law children under seven years, and those lunatics whose mental disease inhibits exercise of will. *All these are commonly accounted natural persons and certainly would today be legal persons*.

In short: The part of Pound's work on persons that is of constitutional relevance is the part where natural realities are acknowledged as informing the law's most fundamental (constitutional) building blocks and prescriptions, not the part where axioms articulating legal fictions adopted in former legal systems or former doctrines of our own system are taken—too quickly, without sufficient reason—to be truths of legal ("analytical") philosophy.

B. Constitutional Terms: Neither "common sense" nor "common law" but Meanings Shared by Drafters/Ratifiers

C'Zar Bernstein's forthcoming article "Fetal Personhood and the Original Meanings of 'Person'"[208] argues that an originalist interpreter, considering the original meaning of "person" in the Constitution, must choose between the original "ordinary meaning" and the original "common-law meaning." The former provides a route to acknowledging that the unborn are within the meaning of "any person" in the Fourteenth Amendment (which would, as Bernstein himself quite reasonably thinks, be the better solution in terms of

207. *Id.* at 193–94.

208. Bernstein, *supra* note 76.

policy or justice). But that route is blocked if the appropriate original meaning is the common-law meaning, which Bernstein seeks to identify across about 40 pages, mostly concerning "the Born-Alive Rule" in criminal law, law of torts, and succession: In all three areas (though not with certainty in the law of succession), the born-alive rule (Bernstein argues) excludes fetuses from the scope of "person." Investigating his article's treatment of the material can shed light on our Brief's argument, and the failure of his article's good-faith critique of fetal personhood provides reassurance of the solidity of our Brief's position.

The case for holding that unborn children are persons within the original meaning of the Fourteenth Amendment *does not look to either of Bernstein's alternatives*. On the one hand, it does not inquire after an unfocused "ordinary meaning" or "ordinary understanding," or "ordinary-language public meaning," though it agrees with Bernstein about what his inquiry yields: that *person* in the Equal Protection Clause refers to any "'member of the human species,' a category that includes the unborn." The better focus of inquiry is into the *meaning of "person" that was shared or "ordinary" among legally informed members of the drafting and ratifying legislatures*, when they were considering documents intended for legal deployment, including constitutional text, sub-constitutional legislation, and related judicial and administrative usage. In that context they neither excluded nor gave priority to how their electorates understood the term. The legally informed members of the relevant drafting and ratifying bodies were thoroughly familiar with the highly prominent use of the word "person" to structure the treatises foundational to their entire formation first as students and then as, in many instances, practitioners of law.

On the other hand, however, that foundational usage of "persons" as a primary building block in the thought and discourse of the *Commentaries* cannot be rightly understood as "the common-law meaning of 'person'." For:

1. *There is and was no single common-law meaning of "person," no common-law definition of "person*," but rather a variety of rules and stated principles identifying the categories of persons that are the subjects or objects of specific rules and doctrines, rules and doctrines that were shaped and adopted to do *justice*-according-to-law as conceived by judges, practitioners and treatise-writers (with constant reference to corrective legislation) at particular periods. These justice-seeking rules and principles have drawn major (but not unchanging) distinctions between the born and the unborn. And that line drawing was appropriate in principle, for two reasons. One reason was the uncertainty that used to prevail, more or less insuperably until birth, about whether a particular unborn human entity was one, two or many, alive or dead, a creature of a rational nature or a hydatidiform mole, or male or female. Another reason was and is the social significance of attitudes and customs that have their root in the change that birth made and still to some extent makes: from darkness and uncertainty to the daylight of the visible, ordinary world. Some of the law's justice-seeking rules do not count the unborn among their objects or subjects, but other rules—notably, those *essential to preserving the basic interests of the unborn* at least prior to birth – *do*, or (on the rights-theory of our Constitution), *should* count the unborn the same as or very much like other persons.

2. Members of the drafting and ratifying community did not consider themselves bound to particular common-law judgments, rules, and doctrines, where these collided with their own judgments about justice and practicality. As was outlined in Section B.1 above, the generation that drafted and ratified the Equal Protection Clause was the generation that most profoundly and extensively reformed and replaced the common law's forms of criminal-law protection of the unborn—always increasing the level of protection. For that generation of state legislators, by and large, regarded that historic set of rules and doctrines as in some respects profoundly unsatisfactory—that is, inadequate to the truth about human beings precisely as objects of the law's protection.

1. Common-law Succession Rules

Bernstein forces the common-law rules and doctrines onto a Procrustean bed (what he calls "the Born-Alive rule"), in which personhood is never attributed to the unborn until they are born alive, at which point it is attributed to them *by a fiction* as having been enjoyed prior to birth. So, for example, Bernstein says:

> In the succession context, there are two legal fictions. First, the legal fiction that the unborn do not exist. Second, the legal fiction that persons already born were born before they were in fact born. This second fiction—the relation of birth back to conception—was necessary only because the first fiction existed and so is evidence of the lack of legal personality of the unborn at common law.

This way of formulating the common law's rules is starkly opposed to the language and thought of 1 *Commentaries* *129–30 and of *Hall v. Hancock*. Bernstein's article never mentions *Hall v. Hancock*, though he labors on some of the cases and dicta collected in Shaw's judgment there.[209] The opposition between Bernstein's im-

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209. On Bernstein's understanding of the "common-law meaning" of "person, and the related common-law rules," the following six indented and enumerated propositions (the whole set of relevant propositions) in Shaw's judgment (*supra* at nn. 24–28; where not quoted in the text there, the propositions are stated on pp. 257–58 of the report there cited) should all have been phrased differently:

> [1] We are also of opinion, that . . . generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered . . . .

On Bernstein's fictionalist view, Shaw should have said "a child, if born alive, will be treated as if it had been in being from conception . . . ."

> [2] . . . the Court are of the opinion, that a child *en ventre sa mere* is to be considered a child living, so as to take a beneficial interest in a bequest, where the description is "children living."

Shaw should, on Bernstein's view, have said "a child born alive is to be considered as if it had been living when the testator died while it was *en ventre sa mere*."

> [3] A child *en ventre sa mere* is *taken to be a person in being, for many purposes*. He may take by descent; by devise . . . or under the statute of distributions, . . .

agined common law discourse and the real discourse of the common law is illustrated in note 209 above. To repeat: The real common law goes with the grain of reality, tracking the common-sense and scientific truth that birth, while momentous as entry into a public social world, is not at all the beginning of the child's life as a person, a life which began many months earlier. The common law's fictions, where they are adopted, run in the direction of *enhancing protection* of the unborn *in utero*—by treating them for many purposes *as if* they were born—while simplifying the disposition of the affairs and interests of the born by treating those unborn who

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> and generally for all purposes where it is for his benefit.

Shaw should on this view have said "a child born alive is for many purposes taken, by fiction, to have been in being while *en ventre sa mere*."

> [4] Lord *Hardwicke* says, in *Wallis v. Hodson,* the principal reason I go upon is, that [4] *a child en ventre sa mere is a person in rerum naturâ,* so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime.

The correct common-law way of speaking would, on Bernstein's view, have been "a child *en ventre sa mere* is NOT a person *in rerum natura,* but if born alive is treated as if he had been, and is NOT a person for any purposes at all, unless he is born alive."

> [5] And *Buller* J., in delivering his opinion, in *Thellusson v. Woodford,* 4 Ves. 324, after citing various cases, says, the effect is, that [5] *there is no difference between a child actually born and a child en ventre sa mere*.

Buller and Shaw should have said "there is all the difference in the world between a child actually born and a child *en ventre sa mere* unless the child is actually born, in which event it will by fiction of law be treated, for some purposes (but not others), as having had some existence before birth."

> [6] [I]t was stated [in *Doe v. Clarke,* 2 H. Bl. 399] as [6] *a fixed principle*, that wherever such consideration would be for his benefit, *a child en ventre sa mere shall be considered as absolutely born*.

No, Hardwicke and Shaw should have said that "the fixed principle is that a child *en ventre sa mere* is not a person and has no being or existence unless born alive, in which case it will then be treated as if it had been born at the time of its conception, if so treating it will be for the benefit of the born child."

These inversions are, each and all, absurdly unnecessary, and out of line with the common law's willingness to acknowledge human beings in their reality and be ready to adjust the degree, forms and limits of the protection it affords the life and property interests of the unborn, for the sake not least of avoiding needless complexity and uncertainty in complex family and other property interrelationships.

emerge from the womb *dead* (and thus incapable of being benefited) *as if* they had never existed.

Bernstein can point to a couple of decisions in which judicial dicta speak of the unborn as if they were only fictitiously existent, or fictitiously persons. Thus the Chancellor of the Chancery Court of New York in *Marsellis v. Thalhimer* said:

> [T]he existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive, and be capable of enjoying those rights which are thus preserved for it in anticipation.[210]

But though the case is not reported to have been cited to the court in *Hall v. Hancock*, Shaw's piling up of statements of principle looks as if it was aimed against this talk of fiction, and was concerned to emphasise that *the existence of the infant as a real person from conception to birth is acknowledged by the law, with two qualifications: (1) the protection afforded to the unborn infant's interests in life and property is afforded for its benefit only and cannot be deployed in defining the property interests of others unless and until the child is born; and (2) these protections terminate if it is born dead (or otherwise dies before birth)*, and for the future the law's rules apply to those concerned (who might have benefited had it been born alive) *as if the child had never lived*.

The dicta about fiction in *Marsellis* were entirely unnecessary to the decision,[211] which itself and in its essential reasoning and treatment of authority is fully in line with the cases deployed four years

210. 2 Paige Ch. 35, 40 (N.Y. 1830).

211. The ruling in *Marsellis* is that a still-born child does not count as having been born alive for the purposes of the rule that *if a child is born of a marriage*, the surviving spouse has a life estate ("in curtesy") in property in respect of which the deceased spouse was seised of an inheritable estate (whether or not the child had predeceased the deceased spouse). That was a conventional and proper application of doctrine, even though the doctrine of estates in curtesy would not have been subverted had the ruling gone the other way; the ruling in the case is the neater solution, avoiding difficult potential problems of defining whether and when, for the purposes of the curtesy rule, a

later in *Hall v. Hancock*. All that needed to be said was said elsewhere in the judgment and in all the authorities including *Hall v. Hancock*: The law's acknowledgement of the reality and existence of the unborn human being/person is, pending birth, *for the benefit of that infant only*. It is not for the benefit of others, and so does not count for purposes of defining those others' property/succession entitlements.

Similarly with Bernstein's other succession authorities, first *Gillespie v. Nabors*,[212] which states:

> From the citations above,[213] it results that although an unborn child is treated as having an existence for certain purposes beneficial to it, yet, this existence is conditional and imperfect, and confers no rights of property, until it is born alive. When that event happens, to preserve successions, and to prevent forfeitures, it becomes, by relation and legal fiction, a separate, individual person having personal and property rights, dating back to the time of conception, when such backward step is necessary to protect a descent or devise. If, however, the fœtus is never born alive, then it is treated as if it never had an existence.[214]

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child miscarried or born dead had indeed been present and living in the womb as a fruit of the marriage.

212. 59 Ala. 441, 442–44 (1877).

213. The first of these citations is the above-discussed passage in *Marsellis*, with the sentences following that: "The rule has been derived from the civil law; . . . . although by the civil law of successions, a posthumous child was entitled to the same rights as those born in the life-time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. . . . Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived." *Marsellis*, 2 Paige Ch. at 40–41 (cited at *Gillespie*, 59 Ala. at 443–44). Notice that the latter fiction is deployed only *after* the death of the unborn, when all need for protecting *that child's* interests (benefit) has ceased.

214. *Gillespie*, 59 Ala. at 444–45.

This is an outlier, not a convincing or representative analysis or explanation. The claim that the *existence* of the unborn is "conditional and imperfect" and that on birth the "unborn child"/"foetus" "becomes, by relation and legal fiction, a separate, individual person" is *one way* of expressing the conditionality of, and limitations upon, the law's acknowledgement and protection of the unborn person's rights and interests. But it is neither the only way, nor the best way, which is the way adopted by the weightier line of authority and exposition, exemplified by *Hall v. Hancock* and the cases it relied upon: The child *in utero* is to be considered a person entitled to legal protections, while, *in utero*, as a distinct individual with rights—subject, however, to a condition subsequent, *viz.* that if he or she is stillborn, those prenatal rights (or many of them) are treated *as if* they had never been.

Bernstein's remaining relevant authority is Justice Field's dictum for the Supreme Court in *Knotts v. Stearns* (decided in 1875):

> The posthumous child did not possess, until born, any estate in the real property of which his father died seized which could affect the power of the court to convey the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion.[215]

But Bernstein does not mention what the Court's opinion also says, later on the same page: a statement (quoted below) that supports the directly contrary premise (for reaching the same conclusion). This statement cancels every possible implication that the Court has set its face against acknowledging either the existence of the unborn child or that child's capacity while unborn to possess an estate or interest in land (even if that possession or interest could not be counterposed to the power of conversion):

> But there is another answer to the objection. Assuming that the child, before its birth, whilst still en ventre sa mere, possessed

215. Knotts v. Stearns, 91 U.S. 638, 640 (1875) (cited in Bernstein, *supra* note 76, at 65 n.323).

> such a contingent interest in the property as required his representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties.[216]

In short, the Court here showed itself to be quite free of the dogmatic fictions of fetal non-existence that Bernstein asserts were "the common-law."

In sum: rather than awaiting birth and then *backdating* to conception the personhood and existence of the child born alive, the common law ascribes to the unborn child—from its actual conception and all the way along its gestation *in utero*—the status and legal protections that the child will possess once born, making just two adjustments in view of birth's significance.

The common law ascribes to the unborn child the status and protections the child will have from birth (a) to the full extent (and only to the extent) that this status and those protections are for *that child's* benefit and (b) subject to a condition subsequent: that if the child is never born alive, that status will—for many purposes *but not all*—be treated as if it had never been in place. Not all, because electively aborting the unborn child, at least once it had attained the definite individuality connoted by "quick" in sense ii, remained a serious offense, just below *capital* felony, even when the child is never born alive; and in cases where the aborted child, *even though not "quick,"* died after birth or where the mother died from the elective abortion (however skilfully and carefully performed), the inchoate felony status of the abortive acts *when done* entailed that the abortion provider was guilty of murder.

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216. *Id.* at 640–41.

2. Common-law Criminal Law

Bernstein's extended treatment of the common-law criminal law is less adequate than his treatment of succession (where he commendably acknowledges that some of the decisions of the great Lord Chancellors can be read as opposed to his fictions). He misunderstands the classic treatises by under-estimating their subtlety, he truncates and consequently distorts their key formulations, and he misreads *Sims*. We have already, in note 76 *supra*, addressed the central, strategic claim Bernstein makes in this discussion; what follows is supplementation.

(i) Not unreasonably, Bernstein focusses on Coke's treatment of homicide and abortion. Bernstein quotes the passage from 3 *Inst.* 50 quoted above at page 29 but he omits Coke's affirmation that what has just been said agrees with the Bracton sentence (which Coke then quotes in full) and comments:

> [1] The important point from that passage is . . . that abortion COULD NOT COUNT AS MURDER precisely because the law did not regard the unborn AS PERSONS YET IN EXISTENCE [citation to a 1674 Chancery case citing this page of Coke] unlike all other natural persons (those listed [by Coke] above).
>
> The evidence of this is as follows. [2] First, Coke addresses each element of murder in turn, including the element that the entity killed BE A PERSON IN EXISTENCE. [3] Second, both the list of natural persons within that concept's extension and his statement of the Born Alive Rule are included under his exposition of THIS ELEMENT. Third, the discussion about abortion and the Born Alive Rule follows immediately after his list of examples of NATURAL PERSONS IN EXISTENCE. [4] Fourth, the obvious reason to include feticide here is to distinguish fetuses from the other natural persons listed and to clarify that FETICIDE, unlike killing more generally, COULD NOT count as murder at common law, because it could not satisfy this element. [5] Putting all this together, Coke AFFIRMS THAT ABORTION is wrong and for that reason is criminalized, but it COULD BE NO MURDER—and this is the crucial point—BECAUSE

> "in law" the fetus IS NOT "accounted a reasonable creature, in [EXISTENCE], [UNTIL] it is born alive."[217]

Each of the sentences we have enumerated miscarries.

[1] Nothing in Coke's passage says abortion *cannot* or *could not* be murder, and indeed the whole or a large part of the point of the passage is to affirm that abortion (or what Bernstein also calls feticide) *is* murder when the aborted child's death follows, however closely, its live birth. The reason why Bernstein has things so back-to-front emerges in point [5].

[2] Again Bernstein uses the phrase "a person in existence," and he will continue to do so. But the element in the definition of murder that Coke is expounding in this passage is neither "person" nor "in existence," but rather "reasonable creature" and "*in rerum naturae*." "Reasonable creature" is close in its reference (denotation) to "(human) person," but like Blackstone a century and a half later it keeps in view both (a) all creaturely (*i.e.*, created) life's dependence on a Creator and (b) the distinction between human nature and the nature of other animals. Both "person" and "rational animal/reasonable creature" smoothly include the unborn human child, but the latter perhaps a shade more obviously. As for "in existence," if it were a fully safe translation of *in rerum natura* it would surely have been used by Coke, Hale, Blackstone, and all; but it is not, so they didn't. Literally "in-the nature-of things," it is obviously used here in an idiomatic sense, as a term of art, signifying being in a condition to participate in the *ordinary world*, in the palpable social world as a distinct individual of known sex, appearance, ability to communicate even if inarticulately, and so forth.[218]

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217. Bernstein, *supra* note 76, at 39 (emphases added and omitted).

218. Lord Hardwicke uses this phrase deliberately differently, to mean simply in reality. *See supra* notes 28, 209. Aquinas, writing in the era of Bracton but still read in the age of Coke, uses the phrase 185 times. Reading through these sequentially, in context, with the aid of an electronic contextualized concordance, it is clear that though the phrase can often be safely translated "actually" or "in actuality" or "really", it is rarely if ever used to contrast with "potentially" (as distinct from "actually"), and its central

By substituting "person in existence" for Coke's actual terms, Bernstein makes it seem as if Coke and the common law use "person" as a building block in the law's definitions or trains of reasoning. Instead, "person" functions in Coke's discourse (when it is used at all) in much the same untheorized way as "child" (as in "child in the womb").

[3] and [4] use the same problematic verbal substitutions as [1] and [2]; and [4] makes the same entirely mistaken claim as [1]—that abortions cannot be murder.

[5] Here the verbal substitutions are within the framework of a syntactic inversion which helps obscure Coke's point from Bernstein. Coke is telling us that abortifacient blows or ingestions *are* murder whenever they result in the child's death after being

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sense is something very like our rather informal phrase "in reality" in the sense of "in the real world." In the context of Coke and his antecedents such as Staundford and his successors like *Russell On Crimes*, the phrase has a narrower but related sense, for none of these writers thought that the unborn child (say a week or a month or six months before birth) was not real or part of the real world, so what they (as distinct from, later, Lord Hardwicke) meant by "not yet *in rerum natura*" was "not yet part of that human, 'social' world of interpersonal communication that everyone enters by birth and (whether or not we are immortal and headed for heaven or hell) leaves by death."

To illustrate Aquinas' usage with one example: in his *Commentary on the Sentences of Peter Lombard* lib. 3 d. 20 q. 1 a. 5 qc. 2c, speaking about judgments in the ordinary sense of historical or scientific or common-sense ["This email is a genuine email from my boss"] affirmations or denials, Aquinas says:

> [A] judgment about something is unconditional [*absolutum*] when that something is considered precisely as actually [*actu*] existing [*existens*] in the real world [*in rerum natura*]; and it is considered in that way when it is considered with all the circumstances pertaining to it [*cum omnibus circumstantiis quae sunt in ipsa*].
>
> [Super Sent., lib. 3 d. 20 q. 1 a. 5 qc. 2 co. Ad secundam quaestionem dicendum, quod judicium absolutum est de re, quando consideratur ipsa secundum quod est actu in rerum natura existens; et hoc est quando consideratur cum omnibus circumstantiis quae sunt in ipsa. Sed quando consideratur res secundum aliquid quod in re est sine 1010onsideration aliorum, illud judicium non est de re simpliciter, sed secundum quid.]

born alive, and he gives us the reason why this is conceptually possible: "for in law it is accounted a reasonable creature *in rerum natura*"—that is, it falls within *that* element in his definition of murder—"when it is born alive." For of course, *every* child *is* a reasonable creature *in rerum natura* when the child is born alive, but the law *counts* the child who is murdered by abortion—the child who was born briefly alive despite the abortion—as *having been* a reasonable creature when the lethal deed was done to it while it was still in the womb.

The problem that confronts Coke, and all his readers who are following the legal argument he develops across his entire exposition of the law of murder, is that *actus reus* and *mens rea* must coincide (he articulates the related classic axiom *actus non facit reum nisi mens sit rea* only four pages later). *When* the death occurs is not a problem, provided it is within a year and a day of the lethal act done with "malice aforethought;" and *when the death occurs* we can say that the murder victim *was murdered* at the time when that act—the murder!—was done, perhaps many months before the victim's death. And this holds good also in the special case of the unborn child murdered by abortion, whose death occurred after his or her live birth but who must have satisfied—and in contemplation of law did satisfy—the relevant element of the definition of murder *at the time of the lethal act—the murder*—a time when that child was in the womb. And that relevant element is, in Bernstein's phrasing: being an existing person; and in Coke's: being a reasonable creature *in rerum natura*—in the ordinary world.

So Coke owes his readers an explanation of why murder by abortion is subject to a limiting condition subsequent—that the child be born alive—since that state of affairs does not relate, whether chronologically nor causally, to either the lethal abortifacient act or the death. He was well placed to provide the explanation that Hale provides, at precisely this point in *his* exposition of why abortion though a great and lethal crime is not murder:

> The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom

> shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder or manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime . . . NOR CAN IT LEGALLY BE KNOWN, WHETHER IT WERE KILLED OR NOT [citation to Yearbook of Edward III]. so it is, if after that child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide [citation to an earlier Yearbook].[219]

As we have said, in that last sentence Hale speaks as an outlier whose opinion his successors Hawkins and Blackstone (see 4 *Commentaries* 198), and everyone subsequently, decline to follow.[220] Hale, if not blindly following the two highly questionable[221] Yearbook authorities he cites, is following the logic of his general explanation of why abortion is not homicide: not that the unborn child is not a person, or not a reasonable creature, or is non-existent, but that he or she is not yet *in rerum natura*, and that "it cannot legally be known, whether it were kil[led] or not." And that was the explanation that Coke himself, so it seems, elicited (as prosecuting or intervening Attorney-General) from Chief Justice Popham and Justice Fenner in King's Bench in *Sims*—the evidential considerations[222] quoted above at note 68. It is perhaps surprising that Coke neglects to give the explanation here, in its appropriate place, 3 *Inst.* 50. Perhaps he harbored (but did not act upon) the doubt that Hale did act upon (but perhaps in the wrong direction): the evidential argument seems to "prove too much," for if causality

219. HALE, H.P.C., *supra* note 33, at 433 (some emphases added).

220. *See supra* notes 71–73.

221. *See* DELLAPENNA, *supra* note 70, at 143–50, 189, giving full translations of the court documents underlying (and changing the sense of) the brief YB reports.

222. Similarly framed evidential concerns, similarly crystallized into a rule of law, underlie the year-and-a-day rule for murder: "for if he die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or if a natural death; and in case of life the rule of law ought to be certain." 1 *Inst.* 53.

can be proved in the case of the victim of abortion born alive, why not in the case of the victim of abortion born dead?

Bernstein mishandles this passage of Hale in more ways than one. Immediately after point [5] in his passage about Coke, above, he goes on (p.40):

> Sir Matthew Hale was as explicit and clear on this point. [fn. omitted] [1] Here is how he describes the essential element in the law of homicide that the victim be an entity the law considers as a person: "The second consideration, that is common both to murder and manslaughter, is, *who shall be said a person*, the killing of whom shall be said murder or manslaughter." [fn. omitted] [2] Immediately after Hale describes this essential element of homicide, he says that abortion "is not murder nor manslaughter by the law of England, *because* [the fetus] is not yet *in rerum natura*." [fn. omitted] [3] According to Hale, then, the unborn fetus is not an entity "who shall be said a person" in the law against homicide. [fn. omitted] [4] It follows that the criminal law counted a natural person (in the ordinary sense) as in existence only if it is born alive, and the lesser offense of which one might be guilty for killing a fetus involved an offense against an entity lacking the legal personality that inhered in other natural persons. [fn. omitted]

Again, the propositions we have enumerated all misfire.

[1]. Here Bernstein takes Hale to be working with a theorem or premise of the form "Only persons can be murdered," as if he were setting up the syllogism that continues: "But fetuses are not persons. Therefore fetuses cannot be murdered." But once Hale's now obsolete system of punctuation is allowed for, we can see that his thought is not that the unborn are *not persons* (as Bernstein wrongly truncates his thought in paraphrase) but that they are *not persons the killing of whom is murder*[223]—a thought for which Hale

223. Bernstein not rarely abbreviates sentences with the result that their meaning is substantially or even radically changed (as here). Another incidental example occurs when he quotes the second of Blackstone's paragraphs on *129 quoted and discussed above at note 17—the one beginning "An infant . . . in the mother's womb, is supposed

gives two reasons, neither of them in any way suggesting that the unborn are not persons or are non-existent persons: they are (a) human beings not yet *in rerum natura* and (b) human beings the cause of whose death is hidden in the profound darkness of the womb (was this dead child alive when the blow or potion went to work?).

[2]. Bernstein helps his misinterpretation on its way by inserting "the fetus" where Hale had an "it" that looked back to the beginning of the very same sentence: "the child within her." It is harder to deny that human beings are persons with (as Blackstone will say) a right to life if you are calling them children, sometimes located here, sometimes there, rather than using the term "fetus" (shared with sub-rational animals; depersonalised). Hale's English does not include "fetus" in any of its spellings.

[3]. Again Bernstein mistakenly assumes that Hale or his readers are in search of the class each of whose members is an "entity 'who shall be said a person.'" Hale's concern is with the class of *persons whose killing is criminal homicide at common law,* and identifies the class: those persons who are in *rerum natura*: persons born alive.[224] Persons not yet born are protected by other rules of criminal law, one or more rule(s) punishing their killing as such, one or more punishing their killing or attempted killing whenever it results in their mother's death, and so on.

[4]. Though Bernstein does not formally deny this, Hale neither says nor implies that the unborn lack legal personality. He is concerned to delineate murder or homicide, and in this context he does not use "person" as his categorising tool. *The term is here used*

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in law to be born for many purposes . . .", and says: "Professor Finnis says of this passage that it establishes that 'the law treats [unborn children], even at [conception], *as equal to a born child*.'[fn. omitted] This is mistaken." Bernstein, *supra* note 76, at 55. But what Finnis in fact says at the place cited is quite different: "For some purposes (guardianship, for example) the law treats such an individual, even at that beginning stage, as equal to a born child." John Finnis, *Abortion is Unconstitutional*, FIRST THINGS (Apr. 2021), https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional [https://perma.cc/VN2Z-GYWZ].

224. *See also supra* note 33.

not as a term of art deployed in legal rules, but as a scarcely theorised way denoting human beings including infants or children both before and after birth, a legally significant line but not one bearing upon personhood as he conceives it.

Much more could be said about Bernstein's efforts to construct a common-law doctrinal denial of fetal personhood. But there is little need, since they err in the same sorts of ways as are on display in the two passages we have discussed. We note only, in parting, that he entirely misses the evidential concerns at the core of *Sims* (*supra* note 68) (and of Hale's passage quoted *supra* note 33).

In sum: common-law rules rarely use "person," and dictionaries of the common law that Bernstein cites to define other terms include no definition of person(s). The term is used in high-level analytical syntheses such as Hale's or Blackstone's *Analysis of the Law* (*supra* note 204). Though it is there extended to corporations conceptualized as artificial persons, its use in relation to natural persons is all but identical to common-language use. In these uses, which display law's most general purpose or rationale, to serve the wellbeing of natural persons (human beings in all their similarities and dissimilarities), the term "person" is used by the great scholarly and judicial exponents of the common law (and makers or ratifiers of constitutions in its mould) in a manner that approximates closely to the common-sense and common-speech use that other parts of Bernstein's article successfully affirm and show *includes unborn human children*.

IV. *DOBBS* AMICUS BRIEFS OF THE UNITED STATES AND ASSOCIATIONS OF HISTORIANS FAIL AT ALL RELEVANT POINTS.

The *amicus curiae* Brief of the United States makes a number of submissions that contradict or cut across the positions proposed in the present Brief. In reviewing and rebutting those submissions, we will also respond shortly to relevant assertions in the Historians' Brief in this case.

A. The United States Brief never confronts the thesis of this article, that Roe *could and should be overruled on the ground that the object and victim of an elective abortion is entitled, precisely as a person within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to constitutional protection against such a procedure (accepted by* Roe *itself as a ground that—if sound—"collapses" its entire holding and rationale).*

For on the basis of that ground, the "absolute" or natural rights to life, limbs, and bodily integrity (and consequent rights of self-determination) that are urged by the United States at 23-26 (mainly on the sound basis of Blackstone's representative recital of them) cease to be decisive or even weighty in favor of *Roe* and its progeny. Those rights then instead entail a position essentially like that of Texas in *Roe*: elective abortions violate the corresponding absolute and constitutional rights of the child who is their object and victim, while non-elective terminations of pregnancy vindicate the absolute and constitutional rights of the pregnant woman even when they unavoidably cause the child's death.

Similarly, the position advanced by the United States at 24 that *Roe* and *Casey* simply cannot be *grievously* wrong stands and falls with its hidden premise: that *Roe* succeeded in rebutting Texas's assertion of the Fourteenth Amendment rights of the unborn child. In accepting, unequivocally, that if that assertion was sound, the case for the rule established in *Roe* collapses, the Court in *Roe* was accepting, inevitably and rightly, that if it was going wrong in rejecting Texas's assertion, it was going *grievously* wrong and licensing a substantial and ongoing violation of the absolute and constitutional right always acknowledged *first*, to life.

Nor does the position change when the United States' denial of *grievous* error is given its full formulation: a woman's liberty "to have some freedom to terminate her pregnancy . . . . is so closely related to bodily integrity, familial autonomy, and women's equal

citizenship" that "*Roe*'s and *Casey*'s core holding that the Constitution protects some freedom to terminate a pregnancy cannot be *grievously* incorrect."[225] For, rhetoric and emphases aside, those interests in bodily integrity, familial autonomy and equal citizenship were amply present to the mind of the *Roe* Court when it acknowledged that if the unborn are Fourteenth Amendment persons, its position collapses. And as soon as the destruction of *another person's* bodily integrity is acknowledged as implicated in a woman's decision to terminate her pregnancy, the ambiguity in the phrase twice used by the United States, "some freedom to terminate," becomes vividly evident and clarification becomes an inescapable responsibility. The phrase "elective abortion" is a compressed summary of the needed disambiguation: The pregnant woman unquestionably has an "absolute" (natural) and constitutional freedom—closely connected with bodily integrity—akin to the legitimate freedom of self-defense in situations in which exercise of that liberty-right does not become illegitimate even when foreseeably lethal. So she would indeed retain, unimpaired but measured (like ordinary self-defense) by inter-personal fairness, a real "freedom to terminate" if *Roe* and *Casey* were overturned on account of the legitimate constitutional right of her child. But just as the Equal Protection Clause prevents her interest in familial autonomy and/or equal citizenship being the constitutionally legitimate basis of a right to infanticide, so too, analogously, the Clause prevents those interests from being the constitutionally legitimate basis or measure of a right to *elective* abortion.

It scarcely needs saying that in the perspective developed in our Brief, the phrase "state interests" (deployed in a customary way by the United States on 24–25), though of course retaining the relevance it has to the state's upholding of other individuals' rights to life, ceases to be an adequate articulation of the interests and the "absolute" and *federal constitutional* rights of the person whose life is at stake in her mother's choice of elective abortion.

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225. Brief of the United States as Amicus Curiae, *supra* note 11, at 24.

Similarly, the argument advanced by the United States at 25–26, that overruling *Roe* would threaten the Court's decisions in *Griswold*, *Loving*, *Lawrence*, and *Obergefell*, has no force if the ground for overruling *Roe* is recognition of the neglected countervailing rights of constitutional persons erroneously denied that status. For no such denial of personal status or countervailing rights was involved in any of the cases just mentioned.

B. At 26–27 the United States makes a number of historical and legal-historical claims that this Brief shows to be mistaken, along with constitutional claims that a more accurate history rebuts.

At 26, going immediately to the critical issue, the United States asserts on the authority of *Roe*, 410 U.S. at 134, that at common law "there was agreement" that the fetus in the early stages of pregnancy was to be regarded as "part of the woman." But in its very next sentence, *Roe* bases both the meaning and the truth of its assertion on perhaps the most absurd of the errors in its error-strewn opinion: it says that "[d]ue to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point"—and thus quickening, "appearing usually from the 16th to the 18th week of pregnancy" (132), "found its way into the received common law in this country" (134). But, as noted above (at notes 76–80 *supra*), this asserted clarification of the law by Bracton is fantasy. For Bracton, writing in Latin, said nothing whatsoever about quickening, let alone quickening in the sense naively taken for granted by *Roe*: he spoke only of the unborn infant becoming "formed and *animatum*," where *animatum* means nothing either more or less specific than ensouled, animated in the sense of endowed with *anima*, a human soul. Nor do Bracton, Coke, Hale, Hawkins, or Blackstone speak of the pre-"quick" fetus or embryo as "part of the mother," or concede that she is entitled to treat

it as simply a part. The very occasional uses of the term "part" (usually as *pars viscerum matris*) are by outlier authorities.[226]

But the United States, in its next sentence on 26, rightly identifies Chief Justice Shaw's judgment in *Parker* (*supra* at notes 46–58) as the appropriate representation of what *Roe* called the "received common law in this country," and summarizes it:

> Until the fetus had "advanced to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," abortion was not prohibited. *Commonwealth v Parker*, 50 Mass. (9 Met.) 263, 266, 268 (1845).

But at 50 Mass. 268 the court said only that the acts set forth in the indictment, without averment that the woman had been "quick with child," "are not punishable at common law." At 265, having defined the issue before the court, Shaw recalls one of what our Brief has shown was many ways which "abortion" was "prohibited" in the sense of unlawful even when not itself per se indictable/punishable at common law: he reaffirms the rule that if the child dies from abortion after being born alive, the abortifacient acts, however early in the pregnancy they were done, were murder.

And at 50 Mass. 266 itself, Shaw illustrates what "separate and independent existence" means by not merely citing but quoting Bracton saying that abortion is homicide if the unborn infant is formed and *animatum*. The only authority that Shaw finds identifying "quick with child" with "quickened" in the *Roe* sense is *Phillips* (*supra* note 62), interpreting "quick with child" "in the construction of this [English] statute." And Shaw immediately (267) declines to rule on ("decide") the question "what degree of advancement in a state of gestation would justify the application of that description," *scil.* "quick with child," "to a pregnant woman," at common law. Nor did he ever have to, since a few weeks earlier the state's legislature had definitively swept away the whole debate about "quick

226. Notably *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884), a case now discredited and abandoned, *see supra* note 129, and cases following it such as *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 367 (1900).

with child," by making abortion at any stage punishable (variously but with at least one year's imprisonment).[227]

It follows that the next sentence of the United States Brief is mistaken in citing *Parker* at 267 to verify its claim that "at common law, the fetus was generally considered to have a legally 'separate existence' [only] after quickening—when the woman could feel its movement in utero."[228] More pointedly: the only common-law authority advanced by the United States to support *Roe*'s entire "quickening" doctrine is, if anything, an authority against it.

And even if that were not so, the definitive evolution or rectification of Massachusetts law in the same early months of 1845 is a sign of the constitutional irrelevance of quickness in any but its central sense, the child's being alive. That evolution in Massachusetts, subsequent to New York, Ohio, Maine, Alabama, and Iowa (and on one view Illinois), manifested a reform (accomplished completely by the end of 1868 in 27 states and substantially in 28) that is of more immediate constitutional significance than the common law, whose entrapment in unresolved uncertainties concerning ambiguous sources and physiologically explored concepts obscured its basic and enduring recognition of the unborn child's status as a person with a right to life—the status implicit in Bracton's word *homicidium*, killing of a human being, so carefully and otherwise needlessly *quoted* by Coke, Blackstone, and Shaw along with the same Bracton sentence's focus not on maternal perceptions but on the fetus/child's reality as *formatum et animatum.*

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227. *See supra* note 46; Commonwealth v. Wood, 77 Mass. (11 Gray) 85, 86 (Mass. 1858).

228. At 27 n.4, the Brief of the United States again cites *Parker* at 267 mistakenly for the proposition that abortion was "often legal at least before a fetus could be considered legally separate from the pregnant woman." *See* Brief of the United States as Amicus Curiae, *supra* note 11, at 27 n.4. What is said at 267 subtracts nothing from what *Parker* said at 235 to remind readers that even when it is not indictable, elective abortion early or late is always "done without lawful purpose"—was never "legal"—and is murder whenever, however skillfully performed, it happens to result in the death of the woman who while pregnant had consented to it.

In retailing, in its Brief's next sentence on 26, *Roe*'s preposterous claim that it is doubtful whether abortion of a quick child "was ever firmly established at common law" and *Roe*'s associated assertion of the "paucity of common-law prosecutions for post-quickening abortion," the United States overlooks the probable relative rarity of abortions until the early 19th century (a rarity established with some clarity in the affirmations made and sources quoted and cited not only by Joseph Dellapenna's Amicus Brief in *Dobbs* at 13–16)[229] but also by *Parker* itself, an appeal from just such a prosecution and conviction and referring to a Massachusetts conviction (similarly overturned on appeal for reasons found obscure by Shaw) in 1810.

Conspicuously, the United States does not repeat *Roe*'s central claim that at common law there was a legal "liberty" or "right" to early abortion; it makes the already-noted assertions, refuted by its chosen authority *Parker*, that such abortion was "legal," and for the rest limits itself to the vague and dubious social-historical claims that "women generally could terminate an abortion" (27) or "abortion was generally available" (27n.4).

C. Similarly, the Historians' Brief in this case marks a notable retreat from some of the most confidently advanced legal errors in its predecessor Amicus Briefs—signed by individual historians, unlike the present one (signed by counsel)—errors made by those predecessors in endorsing Roe*'s invented common-law "liberty" and "right."*

As to the historic law relating to abortion, the present Historians' Brief rightly abstains even from the word "free," let alone "liberty" or "right." The most it will venture are the hazy formulations "opportunity to make this choice" (3, quoting *Roe*) and "under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move." (7) (This is the same

229. Brief of Joseph W. Dellapenna as Amicus Curiae in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

"could" as the United States ventured while scrupling to add the equivocal and misleading "at her discretion.")

Instead, the Historians offer a new, romanticized version of the common law as focused upon an alleged "female-centric principle" (5), a "subjective standard decided by the pregnant woman alone," and a legal standard "not considered accurately ascertainable by other means" (2). The evidence offered for this last proposition proves on inspection to be no evidence at all: a sentence quoted (6) from Taylor's *Medical Jurisprudence* (1866) with the innuendo that it concerns evidence for ascertaining and determining the fact of quickening for legal purposes turns out on inspection to be in a section of the book entirely concerned with informing clinicians for clinical purposes. The sentence relied upon has nothing whatever to do with law or legal proceedings, actual or potential. The Brief undeniably misuses it.

The footnote on the same page (6) misuses *Russell On Crimes* (1841) almost as severely, quoting a proposition that asserts that "quick with child" means "the woman has felt the child within her" as if it were the author's affirmation of a common-law principle—the Historians come up with no other affirmation comparably clear—when in fact it is no more than a marginal note summarising (as a kind of running index for rapid readers) the content of the adjacent paragraph, which is transcribing the reported trial direction in *Phillips* (*supra* note 62). Simply for brevity (as throughout the volume), the marginal note (in no case offered to make an authorial affirmation) omits the essential qualification made by the trial judge: that his interpretation of "quick with child" is for the purposes of applying the English statute (Lord Ellenborough's Act) of 1803. About the common law neither the judge nor the author/editor of the marginal note said anything.

The Historians' Brief, at 9, offers an inept formulation of "the common law principle" said to be "consistently enunciated" by "legal treatises:"

> Like Blackstone, these sources explained that the reason for this principle was the legal belief that a fetus was not considered a cognizable life for purposes of the law until quickening. *See, e.g*, [*Roscoe on Evidence*, 3rd ed 1846 p. 652 [in fact 694]]. ("A child in the womb is considered *pars viscerum matris* . . . and not possessing an individual existence, and cannot therefore be the subject of murder.")

The proposition in *Roscoe on Evidence*, being about "a child in the womb," manifestly does nothing to verify "until quickening" in the previous sentence. Nor does it manifest a "legal belief," but only a legal fiction. Nor does it say anything about "a cognizable life for purposes of the law." The fiction is merely to account—in the non-explanatory way that fictions do—for the legal rule that abortion, even when a serious criminal offense,[230] is not murder or manslaughter. And this fiction is particularly inept, because it leaves the criminality of abortions, at least when done to a woman "quick with child," entirely unexplained.

Seeking to discredit Wharton, whose treatises on criminal law, like those of Joel Bishop, were of greater weight than those cited with approval by the Brief, the Brief alleges (10) that he "opposed allowing any abortion." But in fact Wharton writes, in his chapter on abortion at common law: "Of course it is a defence that the destruction of the child's life was necessary to save that of the mother."[231]

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230. The Historians' Brief, misspelling misprision, erroneously equates it to misdemeanor. *See* Amicus Brief of the American Historical Association and the Organization of American Historians, *supra* note 11, at 5–6.

231. FRANCIS WHARTON, 2 A TREATISE OF THE CRIMINAL LAW OF THE UNITED STATES sec. 1230 (7th ed. 1874). The footnote to the sentence quoted cross-refers to section 90 *b*, actually 90 *c*, a short section on killing "by necessity" as acknowledged by natural law, canon law, and French and German jurists, and promising a fuller discussion in sections 1013 and 1028. Section 1013 is irrelevant, and the reference is evidently to section 1019, the first of several sections on "Homicide from necessity in defence of a man's own person or property, or of the persons or property of others." Section 1028 discusses self-defence in situations of necessity where both parties are innocent, such as two persons on a plank in the shipwreck. Section 1029 discusses "Sacrifice of life in childbed

The later parts of the Historians' Brief continue at the same low level of accuracy, balance and coherence.

V. RECOGNIZING UNBORN CHILDREN AS PERSONS ENTITLED TO EQUAL PROTECTION COHERES WITH THEIR MOTHERS' SIMILAR ENTITLEMENT, AND REQUIRES NO IRREGULAR REMEDIES OR UNJUST PENALTIES.

Recognizing unborn personhood would be a natural exercise of courts' power to bind parties to a case by applying the law to the facts, disregarding unconstitutional laws, directing lower courts, and enjoining unlawful executive actions.[232] Such a holding would bar lower courts from enjoining prosecutions or vacating convictions of abortionists. Injunctions would lie against officials asked to facilitate elective abortions, as in cases like *Garza v. Hargan*,[233] where guardians *ad litem* could be appointed for the unborn with a view to protecting them against elective abortion, as before *Roe*.[234]

While state homicide laws would need to forbid elective abortion,[235] here too courts would be limited to customary remedies. Most States have laws tailor-made for "feticide;"[236] any carve-outs

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[*scil.* in obstetric emergency], where either the mother or the child must die, because (he writes) 19 out of 20 Caesarean operations to save the child result in the death of the mother. "The dictates of humanity, and, in consequence, those of the law, call for the sacrifice of the child." (cross-citation to secs. 942 and 1230). Section 942 is the general treatment of the born-alive rule for murder under the doctrine articulated in *Sims*, *supra* note 68, and by Coke, 3 *Inst*. 50, *supra* note 32.

232. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 n.8 (2020).

233. 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018).

234. *See, e.g.*, David W. Louisell & John T. Noonan, Jr., *Constitutional Balance*, *in* THE MORALITY OF ABORTION 220–260 at 244–45, 255 (John T. Noonan ed., 1970); and *supr*a note 132.

235. *Cf.* People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (reinstating rape charges against a husband despite a statutory marital-rape exception after holding that the exception violated equal protection and failed rational basis review).

236. *See* Bradley, *supra* note 134.

for elective abortion would be disregarded by courts as invalid.[237] New laws, or prosecutorial practice, that reduced criminal-law protection of the unborn below the constitutionally mandated minimum would face legal challenge like any statute *today* that decriminalized homicides of some class—say, the cognitively disabled.[238]

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237. *See* John Finnis, *Born and Unborn*: *Answering Objections to Constitutional Personhood*, FIRST THINGS (Apr. 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood [https://perma.cc/ZE2K-ZLS8]. For example (sec. III) (emphasis added below):

> NY Penal Law, as amended in 2018 to strip out remaining references in section 125.00 to "abortion" and to the "unborn child," says in that section: "Homicide means conduct which causes the death of a person under circumstances constituting murder or. . . . " Section 125.05 says that "'person,' when referring to the victim of a homicide, means a human being who has been born and is alive." Then section 125.25 defines second-degree murder as causing the "death of a person" with "intent to cause the death of" that person or "another person." Abortion is now dealt with exclusively in the state's Public Health Law [which is fully compliant with *Roe* and *Casey*].
>
> Equal protection entails (as *Roe* conceded) that these NY Public Health Law provisions would fall, just like California's, and therefore that Penal Law section 125.05—since it operates quite bluntly to deny to unborn persons the protections they would have as born persons, say ten seconds later—would expressly or by implication be declared inoperative. *Thus the default position would be that most abortions would be murder.* New York, if dissatisfied with the applicability here of the defenses of excuse and justification available to anyone charged with murder, would thus be strongly incentivized to enact new legislation making a fair accommodation between the rights of mother and child, recognizing both their basic and constitutional recognized equality as persons and their significantly differing situations and legitimate interests.

238. Unlike suicide and consensual euthanasia, elective abortion is a zero-sum affair, in which one person's choice extinguishes another person's life without the latter's consent. The courts cannot stand idly by when either state law or state or local prosecutorial policy systematically neglects to protect one class of persons against denial of the right to life at the hands of other persons. The courts are reluctant to interfere with prosecutorial discretion, and their rule against improper selective prosecution is usually invoked as (or for purposes of) a defense against prosecution, rather than to require prosecution. But the general rules articulated by the Supreme Court since *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), certainly extend in principle to judicial action against nonprosecution. Thus *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996):

> [A] prosecutor's discretion is "subject to constitutional constraints." *United States* v. *Batchelder,* 442 U.S. 114, 125 (1979). One of these constraints, imposed

State regimes invalidated for denying minimal prenatal protection would, absent amendment, revert to the default, general homicide law; states would thus have strong incentives to establish a just balance—a balance consistent with the constitutional command of equal protection of the laws.

Equal protection allows States to treat different cases differently, for legitimate ends.[239] States may consider degrees of culpability as mitigating factors or altogether immunize from prosecution certain participants in wrongful killings. Here such policy choices serve legitimate purposes by taking fairly into account ("balancing") the child's humanity and her unique physical dependence and impact on her mother, another person entitled to equal protection. By analogy with the right of self-defense, the mother's constitutional rights could require States to allow urgent or life-saving medical interventions even when these would unavoidably result in the child's death.[240]

If States failed in their duties of protection or enforcement, a responsibility would also fall to Congress, which could follow a personhood holding with proportional legislation under Section 5 of the Amendment to protect the unborn.[241]

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by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373 (1886).

239. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997).

240. *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

241. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

CONCLUDING POSTSCRIPT

The Amicus Brief that this Article expands and supplements is cited in footnote 24 of the Opinion of the Court in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), in relation to the "debate[d]" question that the Opinion frames as one about "the exact meaning of 'quickening'." As we demonstrated in the Brief and have shown again here, the debate is really about whether the common-law term "quick," as in "quick with child" or (less commonly) "with quick child," should be taken to have referred at all to quickening in the sense intended by the Opinion. But in any event, the Court in *Dobbs* judged that it had no need to "wade into this debate."

More important was the prominence that the Opinion—on the way to its fundamental ruling that "a right to abortion is not deeply rooted in the Nation's history and traditions"—gives to what the Brief (at pp.

3, 22) called "a kind of inchoate felony for felony-murder purposes" (rule [I]), and the Opinion at page 2250 suitably refers to as "a proto-felony-murder rule:"

> That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule.

This finding, like the associated findings about the common law in parts 2a, 2b and 2c of the Opinion, is supported by the many authorities cited in the Brief, including the main authorities we cited for rule [I]. It is a very significant finding, disposing decisively of the myths of "abortional freedom" that were so assiduously cultivated in Means I and Means II, in *Roe,* and in the Historians' Brief and the Brief for the United States in *Dobbs*. It is a finding not challenged in the *Dobbs* dissent.

Our Brief's main thesis, about the constitutionally proper and original public meaning of "any person" in the Equal Protection Clause, was dismissed in footnote 7 of the dissent ("a revolutionary proposition: that the fetus is itself a constitutionally protected 'person,' such that an abortion ban is constitutionally *mandated*") and

rejected in the concurring opinion of Justice Kavanaugh ("Some *amicus* briefs argue that the Court today should . . . hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. . . . But [the position is] wrong as a constitutional matter, in my view.").

What about the Opinion of the Court? Between the two actual parties in *Dobbs*, it was common ground that the Constitution does not require states (or Congress) to prohibit even elective abortions.[242] That common ground allowed the Court to remain silent about the question, and it did, neither affirming nor questioning that common ground. Even the Court's declaration that it is "return[ing] the power to weigh those [policy] arguments to the people and their elected representatives" does not strictly entail that it is affirming Justice Kavanaugh's position (in a concurrence joined by no other Justice) that the Constitution is neutral about abortion. "Our opinion is not based on *any* view about if and when prenatal life is entitled to any of the rights enjoyed after birth" (emphasis added).[243]

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242. Transcript of Oral Argument at 43, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392):

> JUSTICE KAVANAUGH: And to be clear, you're not arguing that the Court somehow has the authority to itself prohibit abortion or that this Court has the authority to order the states to prohibit abortion as I understand it, correct?
>
> MR. STEWART [Solicitor General of Mississippi]: Correct, Your Honor.
>
> JUSTICE KAVANAUGH: And as I understand it, you're arguing that the Constitution is silent and, therefore, neutral on the question of abortion? In other words, that the Constitution is neither pro-life nor pro-choice on the question of abortion but leaves the issue for the people of the states or perhaps Congress to resolve in the democratic process? Is that accurate?
>
> MR. STEWART: Right. We're -- we're saying it's left to the people, Your Honor.

243. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2261 (2022) That statement is affirmed in the Opinion twice, *verbatim,* and represents the settled position of the Opinion, counter-balancing two incautious declarations. The first is the approving quotation of Justice Scalia's phrase "permissibility of abortion:"

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade

The Court's verbally unqualified rhetoric of return to the people is silently subject to qualifications it articulates elsewhere in the Opinion: for example, the people's legislature must have a rational basis for thinking its enactments serve legitimate state interests.[244] Nowhere, however, does the Opinion articulate anything to qualify the appearance it gives of mistakenly assuming that prenatal children are not persons protected by the Equal Protection Clause. Nevertheless, the judgment of the Court, in which the Chief Justice too concurred, makes no finding or ruling on the matter, *and neither depends nor could depend on the mistaken assumption*. For the decision in Dobbs was to reverse the Fifth Circuit and require courts to uphold Mississippi's prohibition of abortion after 15 weeks' gestation. The Court's position that that prohibition is constitutionally valid is not, and could not conceivably be, supported by the proposition that unborn children are not entitled to Equal Protection.

Without departing from the strict rules of *stare decisis*, therefore, a future Court could (as it should) hold that prenatal children are constitutional persons, protected by the Equal Protection Clause, without challenge to anything in *Dobbs* save the breadth of the logically superfluous, constitutionally overbroad rhetoric of entirely returning abortion's permissibility to the people. A future decision of the Supreme Court could adopt everything that, on the arguments of our Brief and this Article, is required by fidelity to constitutional text and history in order to do justice to the rights

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> one another and then voting." That is what the Constitution and the rule of law demand.

Id. at 2243 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)). The second is the equally sweeping declaration that "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Id.* at 2265.

244. Note, incidentally, that in articulating this qualification, the Court heads up its non-exhaustive list of "legitimate interests" with: "respect for and preservation of prenatal life at all stages of development [and] the protection of maternal health and safety . . . ." *Id.* at 2284 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007)).

given constitutional status in 1868, rights (as we have argued) both of persons prior to their birth and of their mothers.