# Law and Personhood

## A Biblical and Medical Study from a Two Kingdoms Perspective

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"I'm not born yet! Am I a person? Can they abort me? Do I have a right to live?"[1]

## Introduction

WHAT DOES THE LAW SAY about personhood? More specifically, when does one become a person in the eyes of the law, endowed with the right to life and other rights that attach to personhood?

This article focuses on these questions. We will examine not only constitutional provisions, statutes, and cases that address the beginning of personhood but also the deeper principles of law that lead courts and legislators to these conclusions and the sources of these deeper principles of law.

Law and morality are inextricably related. Much law protects moral concepts such as the sanctity of and the right to human life, the right to private property, and the right to be secure in one's own person, even to the point of imposing criminal sanctions on those who violate the rights of others.

And morality is, to a large extent, based upon religious principles. Most Western societies recognize and protect the right of individual persons to believe what they choose in the realm of religion, to express those beliefs freely, and to act consistently with those beliefs, provided that in so doing, one does not violate the rights of others or otherwise violate social norms. But at the same time, Western societies protect rights and moral values rooted in one religion, the Christian religion, because, as we will demonstrate, the Christian religion and the Judeo-Christian Bible have influenced Western societies to a far greater extent than have other religions. These include rights like the right to life; we punish people criminally if they violate that right by unlawfully killing another person. While respecting freedom of conscience in religion, most Western societies still uphold the moral belief that human life is sacred and of infinite value, which is a religious belief, based upon the Holy Bible, Genesis 9:6 and Exodus 20:13.

Much of our Western legal tradition has been shaped by the Judeo-Christian tradition and by the book honored and read by Jews and Christians, the Bible. As far back as the year A.D. 890, Alfred the Great began his law code, the Book of Dooms, with the Ten Commandments.[2] On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible," and the President, Ronald Reagan, signed the bill into law. The opening clause of the bill is: "Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States…."[3]

Joshua Berman, Senior Editor at Bar-Ilan University, contends that the Pentateuch is the world's first model of a society in which politics and economics embrace egalitarian ideals. Berman states flatly:

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[4]

It is therefore entirely appropriate to look to the Bible as one of the basic sources of Western law concerning personhood.

Luther recognized the roles of both revelation and reason in matters of civil government. As he wrote in his *To the Christian Nobility of the German Nation*, "Surely, wise rulers, side by side with Holy Scripture, would be law enough."[5] He taught that some portions of the Old Testament are *gesetz* (natural law) and *recht* (natural justice) and are of universal application, others are *sachsenspiegel* (laws unique to Israel). The Ten Commandments are *gesetz*:

> Natural law is the Ten Commandments. It is written in the heart of every human being by creation. It was clearly and comprehensively put on Mount Sinai, finer indeed than any philosopher has ever stated it.[6]

Applying Luther's two-kingdom theology to an issue like abortion, a Christian might appropriately formulate his position based upon revelation (i.e., the Scriptures). But when he enters the secular arena of politics, he will come before people who do not necessarily honor the Scriptures. He need not leave the Scriptures behind because some in civil government will honor the Bible as the Word of God, and still others may recognize that the Bible contains human wisdom. But he must also be prepared to articulate his position in terms of reason and medical evidence.

In this article, we will examine, first, what the Bible says about the beginning of personhood and second, whether this Biblical view of the beginning of personhood is compatible with that of reason and medical science. [Note: We are examining two things: 1. What the Bible says… and 2. Whether this Biblical view is compatible.... For this reason, "examine" should come before "first" and "second."

## The Bible on Personhood: Biblical Passages Supporting the Personhood of the Preborn Child

THE AUTHORS BELIEVE THAT many passages of the Bible, taken together as a whole, point inescapably to the conclusion that personhood begins at fertilization.[7] We will examine those passages.

When Elizabeth, the mother of John the Baptist, came into the presence of Mary who was carrying Jesus in her womb, Elizabeth declared that "the babe leaped in my womb for joy" (Luke 1:44). That doesn't sound like a fetus or fertilized egg; that sounds like a child! It reminds us of Rebekah, of whom we read, "And the children struggled within her...." (Genesis 25:21-26). These preborn[8] children displayed traits that would follow them for most of their lives.

The original languages used in these accounts make no distinction between born and preborn children. Of all the Greek words used for child, *brephos* connotes a baby or very small child.[9] That's the word attributed to Elizabeth's baby: "The *brephos* leaped in my womb for joy." We see the same word in the next chapter: "Ye shall find the *brephos* wrapped in swaddling clothes, lying in a manger." Luke tells us in 18:15 that "they brought unto him also *brephe*, that he would touch them," clearly referring to children already born. And in II Timothy 3:15 Paul uses the same word: "From a *brephos* thou hast known the holy Scriptures...." The same word is used for a child in the womb, a child newly born, infants already born, and a child either still in the womb or sometime after birth.

Another Greek word used for "son" is *huios*.[10] In Luke 1:36 the angel tells Mary, "And, behold, thy cousin, Elizabeth, she hath also conceived a *huios*." And the angel tells Mary in Luke 1:31, "Thou shalt conceive in thy womb, and bring forth a *huios*." Two verbs, "conceive" and "bring forth," with the same direct object, a "son" or *huios*. And years later, when Jesus is a young man, God the Father says to Him, "Thou art my beloved *huios*" (Luke 5:22). Again, the same Greek word used for a preborn child, a newborn child, and a young man.

The same is true of the Old Testament Hebrew. The same word used for the preborn children in Rebekah's womb, *bne*, is also used for Ishmael when he is 13 years old (Genesis 17:25) and for Noah's adult sons (Genesis 9:19).[11] And Job says in his anguish, "Let the day perish wherein I was born, and the night in which it was said, There is a man (*gehver*) child conceived" (Job 3:3).[12] The Old Testament uses *gehver* 65 times, and usually it is simply translated "man." Job 3:3 could be accurately translated as "There is a man conceived."

The Biblical authors identify themselves with the preborn child. In Psalm 139:13, David says, "Thou hast covered me in my mother's womb." Isaiah says, "The Lord hath called me from the womb" (49:1). And in Jeremiah 1:5 we read,

“before thou camest forth out of the womb I sanctified thee, and I ordained thee a prophet unto the nations.” They don’t say “the fetus that became me”; that person in the womb is “me.”

Job wishes he could have died before he was born: “Wherefore then hast thou brought me forth out of the womb? Oh that I had given up the ghost, and no eye had seen me!” (10:18). How can the preborn child die if he or she is not alive?

And David says, “Behold, I was shapen in iniquity, and in sin did my mother conceive me” (Psalm 51:5). There was nothing sinful about the act of David’s conception; this passage establishes that the preborn child has a sinful nature. How can a non-person have a sinful nature? And while other verses establish the child’s personhood before birth, this passage shows his or her humanity all the way back to conception!

Clearly the Bible, especially in its original languages, treats the preborn child the same as a child already born. The Bible knows nothing about “potential human beings”; to the authors of Scripture, there are only human beings with potential.

So the Bible, taken as a whole, teaches that the preborn child is a living human being.

## Objections: Bible Passages That Some Use to Oppose the Personhood of the Preborn Child

Abortion supporters generally shy away from Scripture, because numerous Bible passages demonstrate that the preborn child is a human person. But grasping at straws, they sometimes point to two passages that they think support the pro-abortion position (The authors decline to use the term pro-choice because the baby isn’t given a choice). They cite Genesis 2:7, claiming that this passage proves that life begins at birth rather than at fertilization, and Exodus 21:22-25, claiming that this passage proves that Hebrew law did not provide legal protection for preborn babies. In this section we will demonstrate that these passages, when properly translated and interpreted, strongly support the pro-life position.

### Genesis 2:7: The Breath of Life?

The terms translated “living soul” in the King James are *nephesh* and *neshemah*,[13] which mean person or living being. Various translations say “living soul” (World English), “living being” (New International), “living soul” (Aramaic Bible), “living creature” (Literal Standard Version), “and the man began to live” (Good News Translation), “and the man started breathing” (Contemporary English Version), and others.

Some argue from this passage that one isn't fully a human person until he takes that first breath, but an analysis of this verse does not support that position.

First, this is a one-time event. The formation of Adam does not answer the question whether human life begins in the womb, because Adam was never in a womb. He was the first man, and he was formed out of the dust as an adult, mature human being. Obviously God had to give him a soul/spirit, because there was no other way he could get one. Never has anyone else been formed out of dust; not even Eve, who was formed out of Adam's rib (Genesis 2:21-24). Adam was formed out of inorganic matter, the dust of the earth, but Eve was formed out of organic matter, Adam's rib. Before God breathed into Adam the breath of life, Adam was something like a clay statue. This has been true of no one else since the time of Adam, and God has not breathed into anyone else the breath of life.

Second, even if we concede that one must breathe air in order to be human, the fact remains that the preborn child uses oxygen. He just takes it in through a placenta rather than through his mouth and nostrils. There are certain medical procedures by which air is inserted into the womb, and occasionally the preborn child will take a gulp of air during that procedure. Does that mean the child then becomes a person, even temporarily?

Birth is simply a dramatic change of environment by which the child begins to breathe for himself. This by no means makes him any more a person than he was before.

### Exodus 21:22-25: Legal Protection for Preborn Children?

In the King James Version, the passage reads:

> If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him: and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.

The key phrase is in verse 22, and the King James translation is essentially accurate: "her fruit depart from her." Abortion defenders read this as saying that she has a miscarriage, and they take it that damages are owed for injury to the mother but not for the death of the preborn child. Therefore, they reason, the life of the preborn child is entitled to no legal protection under Biblical law.

But an analysis of the Hebrew words used in this passage demonstrates that the word rendered "fruit" is *yehled*,[14] which is found 89 times in the Old Testament. In every other passage in which the term is used for child, it refers to a normal childbirth. In no other passage does it refer to anything less than a human person.

The word for "depart" is *yatsah*.[15] Wherever this word is used in reference to childbirth (Genesis 25:23-26, 38:28-30, Ecclesiastes 5:14, Jeremiah 20:18), it refers to a normal childbirth, with the possible exception of Numbers 12:12 where it may refer to a stillbirth but not a miscarriage.

Most translations recognize this. These include the New Living Translation ("gives birth prematurely"), Berean Study Bible ("her child is born prematurely"), Geneva ("her childe depart from her"), Holman Christian Standard Bible ("so that her children are born prematurely"), Brenton Septuagint Translation ("her child is born imperfectly formed"), Coverdale Bible ("ye frute departe from her"), New International Version ("she gives birth prematurely but there is no serious injury"), and many others. The original 1971 New American Standard Bible[16] said, "so that she has a miscarriage," but the 1995 version corrected this error so that it reads, "so that she gives birth prematurely."

A very few translations have erroneously rendered this to mean "miscarriage." The Contemporary English Version reads: "Suppose a pregnant woman suffers a miscarriage as the result of an injury caused by someone who is fighting. If she isn't badly hurt…." The Good News Translation says, "so that she loses her child, but she is not injured in any other way."

If Moses had wanted to speak of a miscarriage, there are two Hebrew words he could have used: *shakol*,[17] which he used for miscarriage just two chapters later in Exodus 23:26 and which is also used for miscarriage in Hosea 9:14. Or he could have used *nephel*,[18] which is used for miscarriage in Job 3:16, Psalm 58:8, and Ecclesiastes 6:3. But instead, Moses used the words which denote normal childbirth, and I am convinced that Moses, writing under the inspiration of the Holy Spirit, said exactly what he meant and meant exactly what he said – a premature but live birth.

And the word for "mischief" is *ahsohn*,[19] which can mean anything from death to a sore finger. Some dogmatically assert that this refers only to harm to the mother, but the fact that it appears right after normal childbirth demonstrates that it includes harm to the child as well.

Armed with this knowledge, let's look at the passage again. Two men are fighting. One is the husband of a pregnant wife, and the passage presupposes that he is in the right and the other party is the aggressor. Somehow, the wife gets involved; maybe they roll in her direction, or maybe she comes to the aid of her husband. She is struck, goes into labor, and gives birth prematurely. If there is no harm to the wife/mother or child, the aggressor will pay the husband/father the damages he has caused to him by starting the fight. But if there is injury to either the wife/mother or child, the Hebrew *lex talionis* or law of like punishment applies. This is the principle of "let the punishment fit the crime," and it even includes the death sentence for causing the death of the wife/mother or child.[20]

In the current abortion debate, the Exodus passage might be the most important of all, confirming what we said earlier, that the Biblical passages taken as a whole point inescapably to the conclusion that personhood begins at conception.

In summary, many Bible passages establish the personhood of the preborn child.

## Church Fathers on Personhood

CHURCH TRADITION HAS ALSO BEEN instrumental in the formation of Western law. For this reason, and because Justice Blackmun in *Roe* and Justice Stevens in his Webster dissent cited Catholic Church teaching to justify Roe v. Wade, let us briefly survey church history and its effect on Western law.

The Didache, or Teaching of the Twelve Apostles, a manual dating as early as A.D. "50...or as late as 80 or 90,"[21] commanded, "You shall not kill a child in the womb, or expose infants."[22] The Church Father Tertullian, writing around A.D. 197, cited extensively from Old Testament and New Testament Scriptures.[23] He also noted that Hippocrates, Asciepiades, Erasistratus, Herophius, and Soranos, "all knew well enough that a living being had been conceived, and pitied this most luckless infant state, which had first to be put to death, to escape being tortured alive."[24]

St. Hippolytus, writing around A.D. 228, condemned those who resorted to drugs "so to expel what was being conceived on account of their not wishing to have a child," declaring them guilty of "adultery and murder at the same time."[25] And St. Basil wrote in his letter to *Amphilochius, concerning the Canons*:

> The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed. In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself; because in most cases women who make such attempts die. The destruction of the embryo is an additional crime, a second murder, at all events if we regard it as done with intent.[26]

The Canon Law of the Roman Catholic Church provides, "A person who procures a completed abortion incurs a *latae sententiae* [automatic] excommunication."[27] The Canon Law developed in the early centuries of the Christian Church out of early Church documents such as the Didache and was based on and interacted with the Scriptures, Roman and Greek Law, Byzantine Law, the Justinian Code, the decrees of emperors, and other sacred and secular legal documents.[28] The above citation from the Didache is evidence that the prohibition against abortion was part of the Canon Law from the beginning and consistently thereafter.

Biblical scholar Michael Gorman has noted in his book *Abortion and the Early Church*, that the "three important themes" that "emerged during" the first three

centuries of the Christian era were, "*the fetus is the creation of God; abortion is murder; and the judgment of God falls on those guilty of abortion*."[29]

## The Reformers on Personhood

Nor was this view limited to the Church Fathers or to the Roman Catholic tradition. Martin Luther stated his position forcefully: "For those who pay no attention to pregnant women and do not spare the tender fetus become murderers and parricides."[30] John Calvin was just as clear: "If it seems more horrible to kill a man in his own house than in a field, because a man's house is his place of most secure refuge, it ought surely to be deemed more atrocious to destroy a *fœtus* in the womb before it has come to light."[31]

Pennington notes that when King Henry VIII (1491-1547 A.D.) separated the Church of England from the Roman Catholic Church, he proclaimed that "he, not the pope, was the source of all canon law henceforward."[32] Pennington adds, "Consequently, the Anglican Church preserved the entire body of medieval canon law and converted it into a national legal system."[33]

## Common Law and Personhood

John C.H. Wu, Chief Justice of the Provincial Court of Shanghai, China, and later Professor of Law at Seton Hall, wrote that "…while the Roman law was a deathbed convert to Christianity, the common law was a cradle Christian."[34] Unsurprisingly, the common law of England therefore reflects the Judeo-Christian values of the Bible and the Church.

Why, then, under common law, was "quickening" (the point at which the mother can feel the preborn child move within her) the test for homicide prosecutions involving a preborn baby? Under common law, one could be convicted of homicide for the killing of a preborn child, only if quickening had already taken place. Does this mean the child was not legally a person before quickening?

The authors contend that this common law rule did not mean that the child did not become a person until quickening or that there was a right to abortion before quickening. Rather, it was a procedural matter of proof. One can be guilty of homicide only if the homicide victim was alive at the time of the alleged killing, and at that stage in the development of the common law, medical science had no way of proving the child was alive until the mother had felt the child move within her.[35]

## Medical Developments and Personhood

As we noted earlier, following Luther's two-kingdoms model, the believer should first formulate his position on an issue like abortion based on God's revelation, the Scriptures. But when he enters the secular arena, he must be prepared to defend his position based upon reason and medical science. We will therefore next examine the conclusions of medical science on the personhood of the preborn child.

As medical science advanced, so did protection for preborn children. In the 1800s, when medical science was able to determine that the preborn child was in fact alive from the time of fertilization, laws were enacted in England and in the United States to prohibit abortion prior to quickening, in fact, to prohibit abortion at any time after fertilization. Villanova Law Professor Joseph W. Dellapenna, in his monumental *Dispelling the Myths of Abortion History*,[36] documented the changes in state laws in the United States in response to new medical information. For example, Lord Ellenborough's Act of 1803 prohibited abortion after quickening as a capital offense and punished abortion prior to quickening with fines, imprisonment, pillory, whipping, or banishment for up to fourteen years.[37] In 1837 Lord Ellenborough's Act of 1803 was amended to abolish the distinction between pre-quickening and post-quickening and make abortion a crime regardless of when performed.[38]

In 1857 the American Medical Association issued a report stating, "The independent and actual existence of the child before birth as a living being is a matter of objective science."[39] In the 1860s American medical doctors led a movement to criminalize abortion at all stages of pregnancy, and this movement led to the passage of laws prohibiting abortion in all 50 states.[40] Since that time, medical science has advanced further in its understanding of the preborn child, from the discovery of chromosomes (1879-83),[41] the location of genetic material within chromosomes of a cell (1902),[42] the components of DNA (1929),[43] and much more.

Modern medicine and modern science agree with Scripture's teaching concerning the beginning of human life. Consider the following established medical facts:

- From the point of fertilization, the child's DNA or genetic make-up is fixed and remains constant throughout the child's life. This DNA determines, to a large extent, the child's eventual bone structure, skin, eye, and hair color, and many other characteristics.[44]
- Two weeks after fertilization, the brain and the beginnings of the heart appear.[45]
- Three weeks after fertilization, the child already has his own blood supply and blood type. His/her blood and the mother's blood come into contact through a membrane but do not mingle. Three weeks after

fertilization, the heart is beating and a body rhythm is established that will remain constant throughout the child's life.[46]

- Four to five weeks after fertilization, the eyes, lungs, kidneys, and cerebral hemispheres of the brain begin to take shape. The heartbeat can be detected on an electrocardiogram.[47]
- During the sixth and seventh weeks, brain waves begin, and hands, feet, and legs begin to move. The baby can rotate his/her head and have hiccups, and the heart has four chambers. Girls begin to develop ovaries, and boys begin to develop testes.[48]
- By the end of the ninth week, the baby can suck his/her thumb, move his/her tongue, open his/her mouth, sigh, and stretch.[49]
- By the end of the twelfth week (third month, first trimester), the nose and lips are formed, and the child can make facial expressions.[50]

By the end of the third month, the child is about the size of an adult person's thumb, but all basic organs are in place. From this point on, development consists mainly of growth. Clearly, this is not a potential person; this is a person with potential.

In answer to those who claim the preborn child is nothing more than a part of the mother's body, we simply point out that about 50% of preborn babies are boys with male DNA. Common sense tells us that a male baby cannot be part of a female mother's body.

The Scriptural and medical evidence agree (which is no surprise because God is the Author of both): life begins at fertilization.

## State Laws

As medical science advanced and the scientific facts of fetal development became known in the mid-1800s, states across the nation began adopting statutes that prohibited abortion from the time of fertilization, usually with an exception if abortion was necessary to save the life of the mother. Many of these were adopted as a result of efforts by the medical community. Harvard Law Professor Lawrence Tribe acknowledges,

> In the mid-nineteenth century regular physicians were the members of society most vocally committed to defending the value of human life. In 1857 Dr. Horatio Storer, a specialist in obstetrics and gynecology who was then the leading American advocate for the criminalization of abortion, launched a national drive by the ten-year-old American Medical Association (AMA)

to end legal abortion. At its annual convention in 1859 the AMA called for the "general suppression" of abortions, including those performed before quickening. The physicians organized an effective media and lobbying campaign that focused on the fetus's right to life. Over time their efforts altered the prevailing attitudes about the practice in the United States.

A moral component to the doctors' campaign cannot be denied. The movement to end competition for abortion services by having abortions declared criminal was motivated by a reluctance to perform abortions. On a professional level, adherence to the Hippocratic oath and to the ethical vision it implies underlay an important part of the movement to distinguish the regulars from other providers of medical services during this period. The oath expressly forbids giving a woman "an instrument to produce abortion," and it has been interpreted to forbid inducing abortion by any method.

In personal terms, advances in science had given many doctors moral misgivings about abortion. Specifically, their more science-based view of human development as a continuous process rather than as a sudden event led them to question the relevance of the distinction between quick and non-quick fetuses.[51]

Tribe observes that as a result of this mid-nineteenth-century effort, "Within less than two decades, more than forty antiabortion statutes had been passed in the United States."[52]

Of particular significance is the Iowa statute against abortion in 1858. In 1857 and thereafter, Iowa joined other states in affirming this growing respect for the life of the preborn child.

In 1858, at a time when states across the nation were banning abortion because they recognized the personhood of the preborn child, Iowa prohibited abortion by enacting Chapter 165 Article 2 of the Iowa Code:[53]

Section 4221: *Be It enacted by the General Assembly of the State of Iowa*, that every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and shall be fined in a sum not exceeding one thousand dollars.

Of equal significance – and usually overlooked today — is the title of the Act:

"AN ACT for the Punishment of Foeticide"

The term “foeticide” comes from the Latin words *cedo* (to kill) and *foetus* (preborn child). The first known use of this word was in 1842, the very time in which science began to recognize the personhood of the preborn child.[54]

The framers of this Act recognized that abortion is not just a medical procedure performed on a woman; it is an act of killing a preborn child.[55] If the Framers of the 1857 Iowa Constitution had intended to protect the right to abortion by the Due Process Clause of Article I Section 1 or the Equal Application Clause of Section 6, as has been argued, it is highly unlikely that the Legislature would have enacted, and the Governor would have signed, an Act for the punishment of Foeticide the next year.

No, these provisions of the Iowa Constitution, the amendments of 1868, and the later advances toward women’s suffrage, were intended to protect the right of all adults to do those things that were previously extended to white males. They were most definitely not intended to create a “right” to take the life of a preborn child at a time when the American Medical Association and most state legislatures, including the Iowa Legislature, were coming to a recognition that the preborn child is a living human person.

## The Movement to Legalize Abortion

During the 1960s, a combination of factors, including the feminist movement and the sexual revolution, led to efforts to liberalize abortion laws. Colorado, North Carolina, and California liberalized their abortion laws in the late 1960s. In 1970, Hawaii legalized abortion before the twentieth week of pregnancy, followed by New York, Alaska, and Washington.

But at that point, the drive toward liberal abortion laws stalled. The Iowa Legislature rejected an abortion bill in 1971, and in 1972, referenda to amend state constitutions to legalize abortion were defeated 2-1 in Michigan and 3-1 in North Dakota. As Tribe says, “…between 1971 and 1973 not one additional state moved to repeal its criminal prohibition on abortion early in pregnancy.”[56]

Failing in the legislatures and at the ballot box, pro-abortion forces turned to the courts.

## Enter the Courts

### *Roe v. Wade*

In an unprecedented and revolutionary decision, Justice Blackmun and six other Justices concluded in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a constitutional right and therefore the anti-abortion laws of Texas and other states were unconstitutional. The majority held that the right to abortion, although not mentioned

in the Constitution, is a "liberty" implied in the "emanations" and "penumbras" of the Bill of Rights and the Fourteenth Amendment.

Justice Blackmun did not exactly rule that preborn children are not persons, only that they are not "persons" within the meaning of the Fourteenth Amendment. He presented very little evidence to support that conclusion. Although he mentioned that the American Medical Association had led efforts to suppress abortion in the late 1800s, he ignored the AMA's medical findings about the beginning of human life, findings that had been developed and that had come to light during the very time in which the Fourteenth Amendment was adopted. He acknowledged that states during the 1860s were adopting anti-abortion statutes but ignores the reason – the evidence of the personhood of the preborn child.

He acknowledged that "if this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[57] Unfortunately, Justice Blackmun ignored the very evidence that the personhood of the preborn child was becoming a consensus at the time the Fourteenth Amendment was adopted.[58]

Because abortion is a fundamental right, Justice Blackmun said, it may be restricted only if the state has a compelling interest that cannot be achieved by less restrictive means. He set forth a "trimester" approach under which (1) during the first trimester of pregnancy there can be almost no regulation of abortion; (2) during the second trimester the state may regulate abortion only to protect the health of the mother; and (3) during the third trimester the state may regulate abortion to protect the life of the preborn child, because at the beginning of the third trimester the child is able to survive outside the womb. He did not say preborn children become "persons" at the beginning of the third trimester; rather, he said the state's interest in the life of that child becomes compelling at that point because the child is now viable.

Justice Blackmun presented very little historical, legal, or medical support for the use of the viability test, because very little support exists. Viability is a very subjective and speculative test. The point of viability may vary with the individual child, with the state of technology at the time, and from one society to another. When *Roe* was decided, viability was usually around six months; now it is at least a month earlier. But, in reality, there is no way of knowing for certain, so sometimes we set an arbitrary point like six months, or sometimes we leave it to a doctor's speculative opinion.

But why should viability be the point at which the State's interest becomes sufficient to justify restricting abortion? Viability would be significant only in those extremely rare instances in which a child is born prematurely or is removed from the womb by a C-section or other medical procedure. Otherwise, it is simply one more step toward childbirth.

Furthermore, the question of viability by its very nature is subjective in that it calls for an opinion. The question is whether, in the opinion of a doctor, the child is viable. One doctor might think the child is viable; another doctor might think otherwise. That opinion might vary depending upon the subjective beliefs of the doctor.

As Yale Law Professor John Hart Ely wrote:

> The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop) the interest in protecting the fetus is compelling. Exactly why that is the magic moment is not made clear: Viability, as the Court defines it, is achieved some six to twelve weeks after quickening. (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial—to the extent any point between conception and birth has been focused on.) But no, it is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism.[59]

## The Retreat from Roe v. Wade

Abortion advocates have stubbornly claimed that *Roe v. Wade* set in stone legalized abortion. But ever since it was announced, *Roe* has come under steady criticism from all parts of the country, from legal scholars, judges, congresspersons, the clergy, the medical profession, state legislatures, the general public, and many Justices of the U.S. Supreme Court.

### A. *Akron*

In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), Justice O'Connor said *Roe v. Wade* was "on a collision course with itself," because the age of viability was already earlier and, due to medical technology, was being pushed closer and closer to conception, while the age at which abortions could be performed safely (for the mother, not for the child) was being pushed closer and closer to actual childbirth.

### B. *Thornburgh*

The move away from Roe continued in *Thornburgh v. American College of Obstetricians and Gynecologists* 476 U.S. 747 (1986). In this case, Chief Justice Burger, who had joined with Justice Blackmun in the *Roe* decision, now dissented, saying, "In my view, the time has come to recognize that *Roe v. Wade* ... 'departs from a proper understanding' of the Constitution and to overrule it."[60] [*Thornburgh* at 788.]

## C. *Webster*

The departure from *Roe* became even more pronounced in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In this case, the Court upheld provisions in a Missouri statute that stated that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being"; that before an abortion may be performed, if a doctor reasonably believes a woman is beyond the twentieth week of pregnancy, he must perform tests to determine whether the child is viable; that no public facilities may be used to perform or assist with abortions; and that no public funds may be used to encourage or counsel women to undergo abortions.

Sometimes the full significance of a legal opinion can be gauged by reading the tenor of the dissenting opinions. Justice Blackmun, the author of the *Roe v Wade* opinion, warned in dissent at 538 that "The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly ... The simple truth is that *Roe* would not survive the plurality's analysis..." He concluded ominously at 560, "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." What Justice Blackmun called a "chill wind," others might call a refreshing breeze.

## D. *Casey*

Planned Parenthood v. Casey, 505 U.S. 833 (1992), involved a Pennsylvania law that required notification of the husband for a married woman's abortion and the consent of one parent for a minor (with a judicial bypass exception), as well as informed consent and a 24-hour waiting period. The Court upheld all provisions of the law except for the husband's consent. The significant part of the case was that the plurality opinion essentially eliminated the strict scrutiny/compelling interest requirement of *Roe v. Wade* and replaced it with a new standard that asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." This represents a sharp departure from *Roe*.

## E. *Carhart*

*Gonzales v. Carhart* 550 U.S. 124 (2007) further eroded *Roe v. Wade* by upholding a federal partial-birth abortion prohibition. The Court said, "Where [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including the life of the unborn." As in *Webster* and *Casey*, the

dissents clearly recognized the direction the Court was taking. Justice Ginsburg denounced the majority for their anti-*Roe* sentiments: "The Court's hostility to the right *Roe* and *Casey* secured is not concealed."

### F. *Stenehjem*

The case of *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015) involved a constitutional challenge to North Dakota's law prohibiting abortions after a fetal heartbeat can be detected. Author Eidsmoe wrote an amicus brief supporting North Dakota on behalf of the Foundation for Moral Law and Lutherans for Life, in which he urged the Court to disregard Roe's viability test and adopt North Dakota's heartbeat test instead, because, in contrast to the vagaries of viability, the heartbeat test is rock-hard science: either there's a heartbeat or there isn't. The Eight Circuit considered itself bound by the Supreme Court's viability test, but in an unusual action, the Eighth Circuit urged the Supreme Court to reevaluate the test, stating: "Although controlling Supreme Court precedent dictates the outcome, in this case, good reasons exist for the Court to reevaluate its jurisprudence." The Eighth Circuit noted that "the Court's viability standard has proven unsatisfactory," noting that in the 1970s the state could not protect a 24-week-old fetus because it did not satisfy the viability standard of the time, but because of advanced technology, it would satisfy the viability standard of today.

*Akron ... Thornburgh ... Webster ... Casey ... Carhart ... Stenehjem*. The move away from Roe v. Wade has been steady over the last forty-eight years.

## Dobbs v. Jackson

Finally, in *Dobbs v. Jackson Women's Health*, 597 U.S. ___ (2022) the Court has at last taken the final step of overruling *Roe v. Wade*. Justice Alito's majority opinion could have gone in any of three directions:

(1) He could have held that the right to abortion is guaranteed by the Constitution and therefore abortion must be legal in all states, thus upholding *Roe v. Wade*.

(2) He could have held that the Fifth and the Fourteenth Amendments' protection of "life" encompasses the life of the unborn child, and therefore, abortion should be prohibited in all states.

(3) Instead, he took a middle course, holding that the right to abortion is not found in the Constitution and is not deeply rooted in our history and tradition, and therefore each state may prohibit, regulate, or legalize abortion as it sees fit.

*Dobbs*, therefore, does not address the question whether the preborn child is a person. The battle over personhood must therefore be waged in Congress, in state legislatures, in hospitals and medical schools, in the courts, in the classrooms, in the media, in the pulpits, and in every element of society. And it has been waged, and is still being waged, in the State of Alabama in a unique way.

## The Alabama In Vitro Case

On February 16, 2024, the Alabama Supreme Court, in *LePage v. Center for Reproductive Medicine*, SC-2022-0515, SC-2022-0579, addressed another ramification of the personhood issue.

The case arose out of a lawsuit alleging that an Alabama clinic negligently allowed the destruction of frozen embryos. The parents sued the clinic, alleging the wrongful death of the frozen embryos. So the question arose: are these frozen embryos "persons" under Alabama law?

In 2018, the people of Alabama ratified the Sanctity of Life Amendment to the Alabama Constitution, which reads:

> (a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
>
> (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.
>
> (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of abortion."

In keeping with this amendment, the following year (2019), Alabama adopted one of the strongest pro-life laws in the nation.

Protecting preborn human persons, the Sanctity of Life Amendment makes no exceptions for children conceived in vitro. Children conceived in vitro are therefore "unborn children," entitled to "the rights of unborn children, including the right to life." Further, the Amendment establishes that Alabama's public policy seeks to "ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate."

Ruling that these frozen embryos were unborn children under the Alabama Constitution, the Alabama Supreme Court sent the case back to the trial court for further adjudication. Fearing that they could be held liable for discarded frozen embryos, the University of Alabama at Birmingham Hospital suspended its in vitro program, and several other hospitals followed suit.

This prompted Alabama to adopt SB159. This new law does not dispute the court's finding that frozen embryos are human persons, but it exempts IVF providers from liability for the destruction of frozen embryos. Now that SB159 is law, many IVF providers are back in business.

Alabama House Speaker Nathaniel Ledbetter says "IVF is as pro-life as it gets." The authors might be inclined to agree – unless they were discarded frozen embryos.

The authors sympathize with would-be parents who cannot conceive a child and understand the parents' hope that IVF can enable them to have the family they so desperately want. And the bill would be less troubling if it provided immunity only for the unintentional destruction of frozen embryos, but it appears to protect their intentional destruction as well.

IVF clinics commonly produce multiple frozen embryos so the would-be parents can select one to be their child, while the others are either consigned to labs or discarded. But if the Alabama Constitution is correct – and I believe it is – these frozen embryos are human persons, and they have a right to live. Can we justify a practice that allows the killing of multiple preborn children so that parents can fulfill their dreams of raising families?

As medical science advances, the moral dilemma will become more difficult. At present, a frozen embryo can develop into a full-term baby only if it is implanted in a woman's womb. But that will likely change.

Medical science is working on the development of artificial wombs, or possibly the wombs of animals such as sheep. Once medical science achieves ectogenesis[61] (production of a baby outside the mother's body), this frozen embryo may develop into a full-term baby, and then into a child and an adult, without ever being implanted in a mother's womb. Can we doubt that such a person is a human being?

If we grant that this adult person who was conceived in vitro and was never implanted in a womb and never born is nonetheless a human being, when did that person become human? The answer must be at fertilization, for at that point the child has all the DNA largely determining his sex, skin tone, hair color, and so much about the adult person that child will become. And if so, that child at fertilization has the God-given right to life that the Alabama Constitution recognizes and that the Alabama Supreme Court has affirmed.

Maybe medical science will provide a solution to this dilemma. As Chief Justice Parker pointed out in his concurring opinion in *LePage*, some countries already limit the number of frozen embryos that can be produced. But while we recognize the joy of parents that their hopes for a child can finally be fulfilled, we must also remember that each frozen embryo produced in vitro is a human person whose life must be protected.

Are we really certain that God wants us to venture along these uncharted, trackless paths? Let us proceed with caution.

## How Should We Then Respond?

First, we should thank God that courageous Christian jurists like Justice Alito at the U.S. Supreme Court and Chief Justice Parker at the Alabama Supreme Court had the insight and courage to follow the Constitution and to protect the preborn's right to life.

Second, we should consider the practical consequences of their decisions. *Dobbs* led to a backlash, partly among those misled to think the Supreme Court outlawed abortion. (It didn't; it left the issue to the states where it belongs.) Pro-abortion measures were passed and pro-life measures were defeated in legislatures and in popular referenda, even in conservative states. The Alabama *LePage* decision threatens even greater backlashes. If we overrule *Roe v. Wade* (the worst constitutional atrocity since *Dred Scot*), but the result is the defeat of pro-life legislators and other candidates across the board, along with the enactment of abortion-demand laws in every state, have we really scored a victory for the pro-life cause and the lives of the preborn?[62]

I'm still thinking about this. But I'm starting to conclude that, when enacting righteous laws and policies, legislatures and courts cannot get too far in front of public opinion. Otherwise, the people will dig in their heels and rebel.

E. C. Wines, a great Bible scholar whose *Commentaries on the Laws of the Ancient Hebrews* (1853) is a classic, observed that a literal application of the Mosaic Law "overlooks a material distinction – the distinction between laws intrinsically the wisest, and laws which are the wisest only when viewed as relating to times and circumstances." He continued:

> Civil laws, whatever be their source, to be adapted to the wants of any given community, must arise out of circumstances, and be relative to certain specific ends; which ends, under other circumstances, it might be the height of folly to pursue. When Solon was asked whether he had given the best laws to the Athenians, he replied: "I have given them the best that they were able to bear." Sage response! Is it not of much the same nature with that declaration of divine wisdom to the Jews, which has so perplexed biblical inquirers, "I gave them also statutes that were not good," [Ezekiel 20:25] that is, laws not absolutely the best, though they were relatively so. Montesquieu, with that penetration which belongs to all his philosophical reflections, has observed, that the passage cited above, is the sponge that wipes out all the difficulties, which are to be found in the law of Moses. …

> A wise legislator, whether divine or human, in framing a new code of laws for a people, will give attention to considerations of climate, of religion, of existing institutions, of settled maxims of government, of precedent, of morals, of customs, and of manners. Out of all these there arises a general tone, or habit, of feeling, thinking, and acting, which constitutes what may be called the spirit of the nation. Now, a lawgiver shows himself deficient in legislative wisdom, who makes laws which shock the general sentiment of the people, laws which are at war with prevalent notions and rooted customs, which strip men of long-established and favorite rights. …
>
> The principle that laws must be relative to circumstances, that they must grow out of the state of society, and be adopted to its wants, is founded in reason, and confirmed by experience.[63]

Does this mean we give up our legal and political struggle for the civil rights of the preborn? Absolutely not!

But while we litigate and legislate, we must also educate. We must impress people with the personhood of the preborn – and we have the high ground, because Biblical testimony and scientific evidence are both clear.

The battle for preborn life did not culminate with the *Dobbs v. Jackson* decision. It now enters an intensified stage – the battle for the hearts and minds and souls of men. But it is a winnable war, so let us press on to victory!

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## Notes

1. This statement is attributed to an anonymous preborn child but has not been documented.
2. Commissioners of the Public Records of the Kingdom, *Ancient Laws and Institutes of England* (1840), 44-101. The Ten Commandments are on page 45. https://books.googleus-ercontent.com/books/content?req=AKW5QaeMxrHlRwL6ifCB13e9zQ_Su6QPtCk93Gv-JhNIsOPXi5l9vq2HUBW5WcBg5Dzxh1jlX0D79BNtQTf53vK_zc-ssELmIbfUY1_3h-vNhDiVaPZ_x4YeP06EHVleduCAQ_rCA8iCMWFxn0II-rfCXY__GvPuO-Rn2Cp7M-vB8xjsElNsnwbyLQNwV50gUWcF75EWWXUasCX2FDQpDvuBr8NMM0TbORH-DxvjssjocoimHuFGItLuIKhZBK5BFzy0S8GuRE8oln-_MrbFKQKgCACfijeIxSzmsi-39YFVdQUX7HHmBMaj7rFQ. Accessed August 27, 2024.
3. Public Law 97-280, October 4, 1982. https://www.congress.gov/97/statute/STATUTE-96/STATUTE-96-Pg1211.pdf. Accessed August 27, 2024.
4. Joshua Berman, Created Equal: *How the Bible Broke with Ancient Political Thought* (Oxford, UK; New York, NY: Oxford University Press, 2008),175, See also John Marshall Gest, The Influence of Biblical Texts Upon English Law, an address delivered before the Phi Beta Kappa and Sigma xi Societies of the University of Pennsylvania June 14, 1910, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7211&context=penn_law_review. Accessed August 27, 2024. Here Gest quotes Sir Francis Bacon: "The law of England is not taken out of Amadis de Gaul, nor the Book of Palmerin, but out of the Scripture, of the laws of the Romans and the Grecians" (16).
5. Martin Luther, *Luther's Works, Vol. 44: The Christian in Society I*, eds. Jaroslav Jan Pelikan, Hilton C. Oswald, and Helmut T. Lehmann (Philadelphia: Fortress Press, 1999), 203. WA 6, 459: "Furwar, vornunfftige regenten neben der heyligen schrifft werenn ubrig rechtgnug." Martin Luther, *An Den Christlichen Adel Deutscher Nation Von Des Christlichen Standes Besserung: D. Martinus Luther*, edited by Knaake, D. Weimar: Hermann Bohlaus Nachfolger, 1888. http://ilt.idm.oclc.org/login?url=https://www.proquest.com/books/den-christlichen-adel-deutscher-nation-von-des/docview/2897423640/se-2. Accessed August 27, 2024.
6. Martin Luther, quoted in Ewald M. Plass, *What Luther Says: A Practical In-Home Anthology for the Active Christian* (St. Louis: Concordia, 1959, 1994), 772-73. Luther says this in a January 1, 1540 sermon on the day of the Circumcision of Jesus. In this sermon, the text changes between German and Latin. The Weimar text has, "**Naturlich recht ist die 10 gebot. Dasselb** est scriptum in corde omnium hominum per Creationem. Et **ist klar und fein gefasst** in monte Sinai **und feiner** quam a philosophis." See Martin Luther, *Predigt am Tage der Beschneidung, nachmittags/CIRCUMCISIONIS Vesperi in D. Martin Luthers Werke, Schriften*, 49. Band (Weimar: Hermann Bohlaus Nachfolger, 1913), 1-2. Hereafter, WA. The bold indicates the German words. The Latin words are in regular type. http://ilt.idm.oclc.org/login?url=https://www.proquest.com/books/circumcisionis-vesperi/docview/2897426476/se-2. Accessed July 27, 2024.
7. Until recently, the terms "fertilization" and "conception" were virtually synonymous, but in recent years some have altered the meaning of "conception" to include the period from fertilization to implantation, possibly so they can claim abortion pills do not kill a child. Except when quoting others or when the context requires the term "conception," the authors have chosen to use the term "fertilization."

8. Except when quoting others or when the context requires otherwise, the authors have chosen to use the term "preborn" rather than "unborn." Unborn implies the opposite of born, whereas preborn simply means "before being born."

9. See "Brephos" in Bauer, Arndt & Gingrich, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature* (Chicago: University of Chicago Press, 1952, 1967), 146-47.; "Babe" in W.E. Vine, *An Expository Dictionary of New Testament Words* (Old Tappen, NJ, Fleming H. Revell Company, 1940, 1967), 93-94.

10. See "Huios" in Bauer, Arndt & Gingrich, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature*, 841-43; "Son" in Vine, *An Expository Dictionary of New Testament Words*, 47-50; "Child" in Colin Brown; *The New International Dictionary of New Testament Theology* (Grand Rapids: Zondervan 1967, 1975), 287-91.

11. See "Ben" in L. Laird Harris, Gleason L. Archer, Jr. & Bruce K. Waltke, *Theological Wordbook of the Old Testament*, Vol. 1 (Chicago: Moody Press, 1980, 1981), 113-15, § 254.

12. Ibid., 148-149, § 310.

13. See "Nepesh" and "neshemah" in Harris, Archer, & Walke, *Theological Workbook of the Old Testament*, vol. 2, 587-91, § 1395a and 605, §1433a.

14. Ibid., vol. 1, 378-80, § 867.

15. Ibid., vol. 1, 393-94, § 893.

16. The New Testament was published in 1963 and the entire Bible in 1971. See Gordon D. Fee and Mark L. Strauss, *How to Choose a Translation for All Its Worth: A Guide to Understanding and Using Bible Versions* (Grand Rapids, MI: Zondervan, 2007), 147.

17. Ibid., vol. 1, 923-24, § 2385.

18. Ibid., vol. 1, 586-87, § 1392.

19. Ibid., vol. 1, 60, § 138.

20. A survey of Biblical scholarship on Exodus 21:22-25 supports this interpretation. See Russel Fuller, "Exodus 21:22-23: The Miscarriage Interpretation and the Personhood of the Fetus," *Journal of the Evangelical Theological Society* 37, no. 2 (June 1994): 169-94 https://etsjets.org/wp-content/uploads/2010/07/files_JETS-PDFs_37_37-2_JETS_37-2_169-184_Fuller.pdf. Fuller compares Hebrew law to the laws of other nations of the ancient Middle East, all of which punished the destruction of a preborn child as a criminal offense, among them the Sumerians, the Babylonians, the Assyrians, and the Hittites. Fuller demonstrates that the prevailing view throughout the Middle East was that the preborn child was a person, although the value of that personhood might depend upon his/her social class. See also, Dr. Thomas Constable, *Constable's Expository Notes, Exodus 21*, https://www.studylight.org/commentaries/eng/dcc/exodus-21.html; John Piper, "The Misuse of Exodus 21:22-25 by Pro-Choice Advocates," Desiring God, February 8, 1989, https://www.desiringgod.org/articles/the-misuse-of-exodus-21-22-25-by-pro-choice-advocates.

21. Thomas O'Loughlin, *The Didache: A Window on the Earliest Christians* (SPCK: London, UK; Grand Rapids: MI: Baker Academic, 2010), 26.

22. Ibid., 162. O'Loughlin has translated the entire *Didache* and placed it at the back of his book, 161-171. The Greek text says, "οὐ φονεύσεις τέκνον ἐν φθορᾷ ·, οὐδὲ γεννηθὲν ἀποκτενεῖς..." Διδαχὴ τῶν δώδεκα ἀποστόλων II.3 in *The Apostolic Fathers*, ed. Kirsopp Lake (Cambridge MA; London, UK: Harvard University Press, 1912–1913), 310–312.

23. Scriptures cited by Tertullian include Jeremiah 1:5; Psalm 139:15; Luke 1:41-42.

24. Tertullian, “ Treatise on the Soul,” in *Latin Christianity: Its Founder, Tertullian*, ed. Alexander Roberts, James Donaldson, and A. Cleveland Coxe, trans. Peter Holmes, vol. 3, The Ante-Nicene Fathers (Buffalo, NY: Christian Literature Company, 1885), 206. “Hoc et Hippocrates habuit, et Asclepiades, et Erasistratus, et majorum quoque prosector Herophilus, et mitior ipse Soranus, certi animal esse conceptum, atque ita miserti infelicissimae hujusmodi infantiae, ut prius occidatur, ne viva lanietur.” Quinti Septimii Forentis Tertulluliani, *Liber de Anima* (PL2:692A). He declared firmly, “For us murder is once for all forbidden; so even the child in the womb, while yet the mother’s blood is still being drawn on to form the human being, it is not lawful for us to destroy. To forbid birth is only quicker murder. It makes no difference whether one take away the life once born or destroy it as it comes to birth. He is a man, who is to be a man; the fruit is always present in the seed.” Tertullian and Minucius Felix, *Tertullian's Apology and de Spectaculis*, ed. G. P. Goold and W. C. A. Kerr, trans. T. R. Glover and Gerald H. Rendall, The Loeb Classical Library (Cambridge, MA; London: Harvard University Press; William Heinemann, 1931), chapter IX.8 (page 49). “Nobis vero semel homicidio interdicto etiam conceptum utero, dum adhuc sanguis in hominem delibatur, dissolvere non licet. Homicidii festinatio est prohibere nasci, nec refert natam quis eripiat animam an nascentem disturbet. Homo est et qui est futurus; etiam fructus omnis iam in semine est.” Ibid., IX.8 (page 48).

25. Hippolytus, circa 228 A.D., quoted in *The Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325*, ed. Alexander Roberts, Sir James Donaldson, vol. 5, *Hippolytus, Cyprian, Caius, Novatian, Appendix* (New York: Charles Scribner’s Sons, 1903), 131.

26. Basil (c. A.D. 330-379), reprinted in *A Select Library of Post-Nicene Fathers of the Christian Church*, Second Series, eds. Philip Schaff and Henry Wace; trans. Blomfield Jackson, vol. 8, *Basil: Letters and Select Works* (New York: The Christian Literature Company, 1895), 225. “Φθείρασα κατ’ ἐπιτήδευσιν, φόνου δίκην ὑπέχει. ἀκριβολογία δὲ ἐκμεμορφωμένου καὶ ἀνεξεικονίστου παρ’ ἡμῖν οὐκ ἔστιν. ἐνταῦθα γὰρ ἐκδικεῖται οὐ μόνον τὸ γεννηθησόμενον, ἀλλὰ καὶ αὐτὴ ἡ ἑαυτῇ ἐπιβουλεύσασα· διότι ὡς ἐπὶ τὸ πολὺ ἐναποθνήσκουσι ταῖς τοιαύταις ἐπιχειρήσεσιν αἱ γυναῖκες. πρόσεστι δὲ τούτῳ καὶ ἡ φθορὰ τοῦ ἐμβρύου, ἕτερος φόνος, κατά γε τὴν ἐπίνοιαν τῶν ταῦτα τολμῶντων.” S. Basilii Magni, “Epistolarum Classis II. Epist. CLXXXVIII. (PG 32:672a).

27. Code of Canon Law, Title VI, “Offences Against Human Life, Dignity and Freedom,” Canon 1398, https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib6-cann1364-1399_en.html#OFFENCES_AGAINST_HUMAN_LIFE,_DIGNITY_AND_FREEDOM.

28. Kenneth Pennington, *A Short History of the Canon Law from Apostolic Times to 1917*, http://legalhistorysources.com/Canon%20Law/PenningtonShortHistoryCanonLaw.pdf Although, as Pennington notes that Martin Luther initially rejected the Canon Law, as his thinking developed, he came to appreciate the value of Roman Catholic Canon Law legal scholarship and concluded that that scholarship should be applied to the civil law and the common law; see John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, UK; New York, NY: Cambridge University Press, 2002), 55-85; John Eidsmoe, *Historical & Theological Foundations of Law*, vol. 3, *Reformation and Colonial* (Powder Springs, GA: American Vision Press/Tolle Lege Press, 2012), 983-84.

29. Michael J. Gorman, *Abortion & the Early Church: Christian, Jewish & Pagan Attitudes in the Greco-Roman World* (Eugene, OR: Wipf and Stock Publishers, 1998), 47. In their

book *Not My Own: Abortion and the Marks of the Church* (Grand Rapids: William B. Eerdmans Publishing Company, 1995), 4, Terry Schlossberg and Elizabeth Achtemeier note, “Ironically, as controversial as the subject is today in the church, abortion historically was one matter over which the church never disagreed. Orthodox scholar Alexander Webster wrote that while it is often difficult to discern the patristic conscience on modern moral questions, there is no such hermeneutical difficulty when it comes to abortion. ‘It is one of only several moral issues on which not one dissenting opinion has ever been expressed by the Church Fathers.’” Schlossberg and Achtemeier are quoting from “An Orthodox Word on Abortion” (Paper delivered at the Consultation on The Church and Abortion, Princeton, 1992), pp. 8-9. Schlossberg & Achtemeier, *Not My Own*, 4, n. 5. While we were unable to find an English copy of the paper given at the 1995 Consultation, an article by the same title [but in Romanian] can be accessed in *Pe Drumul Credentei Arhimandrit Roman Braga* (Rives Junction, MI: HDM Press, inc., 1995), 45-63. Webster makes a comment similar to the one quoted above by Schlossberg and Achtemeier. On page 51 of his article “Un Cuvant Ortodoz Despre Avort,” Webster writes, “Ea este una dintre chestiunile morale asupra cărora Parintii Bisericii nu au formulat nici un fel de parere nonconformista.” See Alexander F. C. Webster, “Un Cuvant Ortodoz Despre Avort,” in *Pe Drumul Credintei Arhimandrit Roman Brage: Texte omagiale oferite de prelati, prieteni si savanti români si Colectie de texte antologice*, Editie ingrijita de colegiul de redactie al editurii ([Rives Junction, MI]: HDM Press, Inc., 2016), 51.

30. Martin Luther, *Luther’s Works*, vol. 5: *Lectures on Genesis Chapters 26-30* (St. Louis: Concordia Publishing House, 1968), 382. WA 43, 692: “Qui enim gravidarum non habent rationem, nec parcunt tenero foetui, fiunt homicidae et parricidae.” https://www.proquest.com/luther/docview/2897405399/Z300013133/9D45F3A5E9C64307PQ/2/luther?accountid=161176&sourcetype=Books. Accessed August 29, 2024.

31. John Calvin, *Commentaries on the Four Last Books of Moses Arranged in the Form of a Harmony*, vol. 3, trans. Charles William Bingham (Edinburgh: Calvin Tract Society, 1854), 42. Calvin’s original words in Latin are, “Quòd si hominem domi suę occidi quàm in agrovidetur indignius, quoniam sua cuique domus tutissimum est receptaculu: multo atrocius censeri debet, foetum qui nondum in lucem editus est in utero necari.” Ioannis Calvini, *Commentarii Ioannis Calvini in Quinue Libros Mosis. Genesis Seorsum: Reliqui Quatuor in Formam Harmoniae Digesti*. Editio Secunda (Genevae: Excudebat Gaspar. De Hus., 1573), 383 (780). https://books.googleusercontent.com/books/content?req=AKW5Qa-fcCh3xNvJ-vHamkNUDi6RbgXO23g6a9xHLtJfcssNzobffwF07r98nlEoMzcIoMtKn4Bd-8DTf3Gk54jAeJSa1GKUaUFTkrjCKCS8w_i7d7XXYwuHN56FMJ9L9TDgBC3eyiK-wLHMYbqbgB-EUcGP2qZGw926uQ2GSxpBck1nwk1DtV-xsFiP7UGGtTLM9cfxIwfpm-wyjLSI3fAm3pJPKbj7Pl1Het4CeaT0_CcOvkkc-pl9JFLOeSZI0mctQNNM7X5gte0GYu_70jC8mCAyNMtOuQtGWB-cD_cCTDuf8MB0KFAsA1Q. Accessed August 30, 2024.

32. Pennington, *A Short History of the Canon Law from Apostolic Times to 1917*.

33. Ibid.

34. John C.H. Wu, *Fountain of Justice: A Study in the Natural Law* (New York: Sheed & Ward, 1955), 65. Legal scholars sometimes use different definitions of the common law. Professor Wu understood the common law to begin with the Norman rule of England, which began with the reign of William the Conqueror in AD 1066, and he regarded Henricus Bracton, the author of *De Legibus et Consuetudinibus Angliae (The Laws and Customs of England)*, as the “Father of the Common Law.” Others, such as Sir William Blackstone, believed the common law predated the Norman Conquest and goes back to

the Anglo-Saxon England of Alfred the Great, and to the Anglo-Saxons in Germany before they came to England in the fifth century A.D. Author Eidsmoe develops the latter view in his *Historical and Theological Foundations of Law*, vol. 2: *The Cornerstone* (Ventura, CA: Nordskog Publishing, 2016), 687-960. Using Professor Wu's understanding of the common law, it was clearly Christian from its inception.

35. William Blackstone, *Commentaries on the Laws of England. Book the First* (Oxford: The Clarendon Press, 1768), 129-30, https://www.google.com/books/edition/Commentaries_on_the_Laws_of_England/eK4WAAAAQAAJ?hl=en&gbpv=1&dq=Commentaries+on+the+Laws+of+England,+Blackstone&printsec=frontcover. Accessed August 28, 2024.; see also Hicks v. State, No. 1110620, 2014 WL 1508698 (Ala. April 18, 2014) (C.J. Moore, concurring specially); see also John Eidsmoe, *Historical & Theological Foundations of Law*, vol. 3, *Reformation and Colonial* (American Vision Press/Tolle Lege Press, 2012), 1197 fn. 110.

36. Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham, NC: Carolina Academic Press 2006), see especially pp. 125-370 for the development of the law on abortion in England, in the American colonies, and in the United States. Justice Alito, in his majority opinion in Dobbs v. Jackson, ___ U.S. ___ (2022), cited Dellapenna extensively.

37. Lord Ellenborough's Act 1803, Act 43 Geo.3 c. 58, *Pickering's Statutes at Large* (Cambridge University Press 1804 Ed.).

38. Charles L. Lugosi, *When Abortion Was a Crime: A Historical Perspective, University of Detroit Mercy Law Review* 83 n. 2 (2006 Winter; 8): 51, 60.

39. See *Roe v. Wade*, 410 U.S. at 141 (1973).

40. Amy Lind and Stephanie Brzuzy, eds., *Battleground: Women, Gender, and Sexuality*, vol. 1: A-L (Westport, CT: Greenwood Publishing Group, 2008), 2.

41. See, e.g., Genetic Timeline, https://www.genome.gov/about-genomics/educational-resources/timelines. Accessed August 30. 2024.

42. Robert Snedden, *DNA and Genetic Engineering* (Chicago: Heinemann Library, 2002, 2008), 44.

43. See, e.g., Charles H. Calisher, "Sequences vs. viruses: Producer vs. Product, Cause and Effect," *Croatian Medical Journal* 48, no. 1 (2007) 103-106. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080495/. Accessed August 28, 2024.

44. "Basic Genetics," https://www.hog.org/handbook/section/2/basic-genetics.

45. "First Trimester Babies Aren't Blobs of Tissue – They're Amazingly Complex," LiveAction, November 29, 2017. https://www.liveaction.org/news/first-trimester-babies-complex/?gad_source=1&gclid=CjwKCAjw-O6zBhASEiwAOHeGxRUPrV7EGM73Fo8LdgF8IaQ-4jp_9ZSD_aX97Ox-ZEhgWZwYOHG8yhoCMf8QAvD_BwE. Accessed August 28, 2024.

46. Ibid.

47. Ibid.

48. Ibid.

49. Ibid.

50. Ibid. A survey of the scientific literature reveals broad agreement on the stages of fetal development. However, there are slight differences among authorities as to the precise day or week these developments occur.

51. Lawrence H. Tribe, *Abortion: The Clash of Absolutes* (New York: W. W. Norton & Company, 1990), 30-31.

52. Ibid., 34.

53. Chapter 165 Article 2. *An Act for the punishment of Foeticide. [Passed March 15, 1858, took effect July 4, 1858; Laws of the Seventh General Assembly, Chapter 58, page 93.]. Revision of 1860, Containing all the Statutes of a General Nature of the State of Iowa, Which Are Now in Force or to be in Force, as the Result of the Legislation of the Eighth General Assembly* (Des Moines, IA: John Teesdale, State Printer, 1860), 723-24. https://www.legis.iowa.gov/docs/shelves/code/ocr/1860%20Iowa%20Code.pdf. Accessed November 4, 2023.

54. "Feticide," https://www.merriam-webster.com/dictionary/feticide. Accessed August 28, 2024.

55. The use of the term "foeticide" also refutes the myth that abortion was prohibited because it was dangerous to the mother. All surgery was dangerous in those days. But we do not see laws prohibiting appendectomies or hysterectomies, only laws prohibiting abortion.

56. Tribe, *Abortion*, 51.

57. Strangely, this statement of Justice Blackmun is virtually forgotten, while his statement at 159 that "We need not resolve the difficult question of when life begins" is common knowledge. The possibility of personhood under the law at least partly answers why the majority did not broach the "difficult question," for life would implicate personhood, and personhood and the correlative right to life, by Justice Blackmun's own words, would foreclose any right to abortion.

58. James S. Witherspoon, "Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17, no. 1 (1985-86):29-77. This article thoroughly presents this evidence that Justice Blackmun ignored. https://commons.stmarytx.edu/thestmaryslawjournal/vol17/iss1/3/. Accessed August 28, 2024.

59. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82," *Yale Law Journal* 25 (1973): 920, 924-25; quoted in Hamilton v. Scott, 97 So.3d 728 (Ala. 2012). See https://openyls.law.yale.edu/handle/20.500.13051/3571. Accessed August 30, 2024.

60. Chief Justice Burger also stated in his Thornburgh dissent at 786-87, "The rule of stare decisis is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results. But stare decisis is not the only constraint upon judicial decision-making. Cases—like this one—that involve our assumed power to set aside on grounds of unconstitutionality a state or federal statute representing the democratically expressed will of the people call other considerations into play. Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." Burger continued at 787-88: "The Court has therefore adhered to the rule that stare decisis is not rigidly applied in cases involving constitutional issues, see Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (opinion of

Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. Stare decisis did not stand in the way of the Justices who, in the late 1930's, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see United States v. Darby, 312 U.S. 100 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Nor did stare decisis deter a different set of Justices, some 15 years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. Brown v. Board of Education, 347 U.S. 483 (1954). In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of stare decisis. And only last Term, the author of today's majority opinion reminded us once again that 'when it has become apparent that a prior decision has departed from a proper understanding' of the Constitution, that decision must be overruled." Quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 557 (1985).

61. See https://www.thepublicdiscourse.com/2017/06/19532/. Accessed August 31, 2024.

62. Despite increasing restrictions on abortion, the number of abortions has increased. After a marked decline in abortions from 1.6 million in 1990 to 865,000 in 2017, the number rose to 930,160 in 2020 and 1,026,690 in 2023. (Selena Simmons-Duffin, "Despite Bans in Some States, More Than a Million Abortions Were Provided in 2023," NPR, March 19, 2024; https://www.npr.org/sections/health-shots/2024/03/19/1238293143/abortion-data-how-many-us-2023). Accessed August 28, 2024.

63. E. C. Wines, *Commentaries on the Laws of the Ancient Hebrews* (Philadelphia: Presbyterian Board of Publication, 1853; Reprint edition: Powder Springs, GA: American Vision Press, 2009), 118-21.