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ABORTION, MORAL LAW, AND THE FIRST
AMENDMENT: THE CONFLICT BETWEEN FETAL
RIGHTS & FREEDOM OF RELIGION

BARBARA PFEFFER BILLAUER*

ABSTRACT

The status of abortion as murder, and therefore amenable to governmental intervention and criminalization, has been asserted by those favoring limits on abortion. Opponents claim a superior right of privacy and/or equality exists under the Constitution, vesting in a woman the right to decide activities and actions that affect her physical corpus. The claimed interest of a State to protect the fetus is impliedly based on the concept of “morality” or “natural law,” specifically on the premise that feticide is violative of the basic code of conduct of societal norms. To my knowledge, until now, this is the first investigation undertaken to determine whether in fact indicators of “natural law” or the moral code support this claim from a legal perspective.

To investigate whether there is any “moral” basis to support the State’s claim and the Supreme Court’s recent rulings, I first examined the earliest and most important social codes that have governed the conduct of “man” since the beginnings of civilization, finding that none regard feticide within forty days of gestation as murder. I next investigated international views on abortion to determine if consensus on abortion regulations existed, (and which would be expected if a collective “moral code” existed) and found none, either in timing of allowable abortion on demand or exceptions to any restrictions.

I also demonstrate that the Catholic position on legitimacy of killing a life form (based on the Sixth Commandment of the Decalogue) is vastly different than, say, the Jewish view, and that this appears to be a driving force behind the courts’ positions. As such, invidious, idiosyncratic religious influences are likely driving abortion regulations. I therefore suggest the Freedom of Religion Clause specifically bars legal intervention into practice, whether legislative or by judicial fiat.

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In sum, this Article demonstrates that abortion or feticide is not considered either murder (or even killing another human) by many traditions, religious or moral, and concludes that regulating abortion as sin, rather than crime, should be left to religions' determination rather than governmental intervention. As such, I suggest that the most compelling argument then to support the claim of a woman's right to determine whether or not to abort would be on the basis of the First Amendment's guarantee of *Freedom of Religion*.

SUMMARY

The American position on abortion has advanced and retreated over the last decade. One commentator suggested that the retrogression might be due to a Catholic Supreme Court majority scaling back abortion rights based on their religious beliefs.¹ To evaluate whether religion is influencing abortion law (which suggests that the driving force restricting abortions in the US is masquerading under Constitutional issues, when in reality it is driven by personal credo), I investigated international abortion practices and categorized them by the major religious affiliation of its population. This is only a preliminary study and more work should be done to evaluate whether the level of religiosity (rather than the particular religion) also influences the outcome. To my knowledge, this is the first study evaluating the role of a country's religion in determining its abortion policy as a surrogate for evaluating whether the American position is truly based on "originalism," as Justice Scalia argued, morality,² or personal religious views of the deciders.

I. PROLOGUE

- A. *The First Amendment to the Constitution (Ratified 1791)*
- B. *Preamble to the Constitution of the United States*
- C. *Thomas Jefferson on Religious Freedom*

II. AN OVERVIEW: THE RIGHT TO THE MEDICAL PROCEDURE OF ABORTION

III. PROTECTING THE FREEDOM TO CHOOSE: CONSTITUTIONAL RIGHTS AND CONFLICTS

- A. *The Right of Privacy*
- B. *The Right of Equality and Equal Protection*

1. Lyle Denniston, *Do the Religious Beliefs of Supreme Court Justices Influence Their Decisions?*, MOMENT (Jan.–Feb. 2015) <http://www.momentmag.com/symposium-religion-supreme-court/> [<http://perma.cc/D2RLL9NE>].

2. Robert Cassidy, *Scalia on Abortion: Originalism. . . But, Why?*, 32 TOURO L. REV. 741, 741 (2016).

- C. *Rights Reneged*
 - D. *The Potential Person, the Profound Interest and the Illogic of It All*
 - E. *Rights in Conflict*
 - F. *Retgression and Outmoded Trespass on Autonomy*
 - G. *Equal Protection and The Double Standard*
 - 1. *The Death Penalty in Texas*
 - 2. *The Dunn Case*
 - H. *Revisionist History: The Good Ol' Days of Corsets and Chastity Belts*
- IV. IS IT LEGITIMATE FOR THE STATE TO PROTECT FETAL RIGHTS?
- A. *Examination of Fetal Rights as a Determination of Its Status*
 - B. *The Moral Imperative (Natural Law)*
 - 1. *The Moral Imperative: An Overview*
 - 2. *Morality and Abortion: A Historical Approach*
 - a. *The Sumerian Code of Ur-Nammu*
 - b. *Hammurabi's Code*
 - c. *The Mosaic Code (The Decalogue)*
 - d. *The Justinian Code*
 - C. *Current Views of "The Greater Good" as a Determinant of Morality*
 - D. *Does Religion Influence a State's Decision to Regulate Abortion?*
 - 1. *Abortion in Catholic Countries*
 - a. *The Six Absolutist Countries—And Ireland*
 - b. *The Reverting Catholic States: Now Abortion Is Allowed—Now It Isn't*
 - i. *Poland*
 - ii. *Russia*
 - c. *The Liberal Catholic Jurisdictions*
 - i. *Italy, France and Mexico City*
 - ii. *Canada*
 - 2. *Abortion in Israel*
 - 3. *Abortion and Greek Orthodoxy*
 - 4. *Abortion in Hindu Countries: India and Nepal*
 - 5. *Abortion in Islamic Countries*
 - 6. *Abortion in the Orient: Taoism, Buddhism, Shintoism and Atheism*
 - E. *Reconciling the Results*
- V. THE POINT OF PERSONHOOD
- A. *Is Killing an Embryo Murder?*

B. *Killing v. Murder: Back to the Source—A History of Biblical Mistranslation*

C. *A History of Biblical Mistranslation*

VI. FOR FURTHER RESEARCH: SCIENCE V. EMOTION

CONCLUSION

I. PROLOGUE

A. *The First Amendment to the Constitution (Ratified 1791)*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”³

B. *Preamble to the Constitution of the United States*

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴

C. *Thomas Jefferson on Religious Freedom*

“The rights [to religious freedom] . . . are of the natural rights of mankind, and . . . if any act shall be . . . passed to repeal [an act granting those rights] . . . or to narrow its operation, such as [sic] would be an infringement of natural right.”⁵

“[Religion is] a subject on which I have ever been most scrupulously reserved. I have considered it as a matter between every man and his maker in which no other, [and] far less the public, had a right to intermeddle.”⁶

3. U.S. CONST. amend. I.

4. U.S. CONST. pmb. l.

5. *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. HIST. SOC'Y., <http://www.vahistorical.org/collections-and-resources/virginia-history-explore/thomas-jefferson> [https://perma.cc/QS9WY8SL].

6. *Letter from Thomas Jefferson to Richard Rush* (May 31, 1813), <http://founders.archives.gov/documents/Jefferson/03-06-02-0155> [https://perma.cc/3AHMY9EP] (citing THE PAPERS OF THOMAS JEFFERSON 160–61 (J. Jefferson Looney ed., Princeton Univ. Press 2009)).

II. AN OVERVIEW: THE RIGHT TO THE MEDICAL PROCEDURE OF ABORTION

Few other legal issues spark as emotional a debate as the right of a pregnant woman to choose to abort the fetus or embryo⁷ she is carrying.⁸ Few other legal issues enjoy such disparate outcomes in different jurisdictions.⁹ Few other issues find their way repeatedly before the Supreme Court for re-resolution¹⁰ (this issue being most recently revisited in the case of *Whole Woman's Health v. Hellerstedt*, decided in June).¹¹ Few other issues are crystallized on as weak (or subjective) a platform of evidence as the right of abortion. The issue is an example of outcome-determinedness at its worst.

It would seem that those who believe abortion should be a woman's right know it in their gut, and those who believe the fetus has a right to be born embrace it with their heart. Each tries to find a constitutional basis to support their convictions; neither side will ever convince the other, and neither side will be satisfied to let the matter lie. Even after the last Supreme Court go-around,¹² if recent

7. For the difference between an embryo and a fetus, see James A. O'Brien, *What Is The Difference Between An Embryo And A Fetus?* THE BUMP, <http://www.thebump.com/a/difference-between-embryo-and-fetus> [<http://perma.cc/M9SR93ME>] ("The embryo is defined as the developing pregnancy from the time of fertilization until the end of the eighth week of gestation, when it becomes known as a fetus. . . . During the embryonic period, cells begin to take on different functions. The brain, heart, lungs, internal organs, and arms and legs begin to form. Once a baby is a fetus, it's more about growth and development to prep for life on the outside.") (emphasis added).

8. Arunima Sarkar, *Articulating Various Facets of Female Reproductive Laws: Issues and Challenges*, 2 INDIAN J. OF LEGAL PHIL. 168, 174 (2014) ("Abortion is possibly the most divisive women's health issue that policy makers and planners face, particularly in developing countries where safe abortion facilities are not available to most women.") (citation omitted).

9. See *The World's Abortion Laws 2014*, CTR. FOR REPROD. RIGHTS, <https://www.productiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap2014.PDF> (describing the international variance in abortion regulations).

10. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2230 (2016) (Alito, J., dissenting) ("The constitutionality of laws regulating abortion is one of the most controversial issues in American law . . .").

11. *Id.*

12. The *Whole Woman's Health* decision provoked Rorschach-like responses in scholars and commentators. See Kevin C. Walsh, *Symposium: The Constitutional Law of Abortion after Whole Woman's Health—What Comes Next?*, SCOTUSBLOG (June 28, 2016, 10:56 AM), <http://www.scotusblog.com/2016/06/symposium-the-constitutional-law-of-abortion-after-whole-womans-health-what-comes-next> [<http://perma.cc/VJ68VFA>]. The perspective of bloggers are clearly reflected in their opinions—although some pro-choice proponents view the decision as a huge victory, others are clearly disappointed it doesn't go far enough. And advocates on both sides are clever in their choice of rhetoric: Erika Bachiochi says, "There is no question that the Supreme Court's decision yesterday in *Whole Woman's Health v. Hellerstedt* is a win for abortion clinics and their doctors. Whether the decision is a victory for women and for liberty, we ought not be so sure,"

legal history is any guide, the abortion issue (and matters involving reproductive freedom) will continually raise its phantom face, unless we find a better way to resolve the matter.

Supreme Court watchers eagerly awaited the decision in *Whole Woman's Health*, in the hopes it might at least clarify some of the constitutional controversy. Notwithstanding the litany of academics and advocates sounding in,¹³ the case proved unenlightening on the core constitutional issues. As Kevin Walsh stated: "*Whole Woman's Health v. Hellerstedt* began with the potential to be a big case in a big Term. It has ended as a doctrinally insignificant but ideologically ominous case in a transitional Term."¹⁴ To my mind, the Justices chose to define—and hence decide—the case on narrow factual grounds (whether compliance with specific health regulations constituted an undue burden), and the greater part of the decision turned on strict procedural issues such as the reach of *res judicata*. The definitional issue of exactly what constitutes “undue burden” is never discussed, inviting more cases with different facts to reach the Court, and the ultimate basis for the abortion right is hardly mentioned, with only a passing reference to prior cases, as if genuflecting in mindless obeisance. Past cases have proved far more illuminating, if provocative and controversial.

Previous cases raised the issues of privacy,¹⁵ equality,¹⁶ the right to be safe from unreasonable search and seizure,¹⁷ funding availability,¹⁸ and, of course, the ever-present ghost of Justice Scalia's “originalism.”¹⁹ Enlightened views of freedom from the “servitude” of bearing an unwanted child have been offered by lawyers and

before concluding her post with, “Yet if we are to believe the women who regret their abortions, who outnumber men in their support for restrictions on abortion, and who view abortion as a failure of a nation to come to terms with the distinctive needs of women, we ought not be so sure.” Erica Bachiochi, *Symposium: Is Hellerstedt This Generation's Roe?*, SCOTUSBLOG (June 28, 2016, 11:46 AM), <http://www.scotusblog.com/2016/06/symposium-is-hellerstedt-this-generations-roe/> [https://perma.cc/H7BHJVAE].

13. *SCOTUSblog Case File: Whole Woman's Health v. Hellerstedt*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole> [https://perma.cc/VV8VTU8T].

14. Walsh, *supra* note 12.

15. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 380 (1985).

16. See Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 162 (2013).

17. See Note, *Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures: A New Conceptual Avenue for Challenging Abortion Restrictions*, 128 HARV. L. REV. 951, 953–54 (2015) [hereinafter *Physically Intrusive*].

18. See *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2016), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [https://perma.cc/V6KU3CQD].

19. See Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 62 UCLA L. REV. DISC. 170, 174 (2014).

philosophers of less developed countries.²⁰ Thus far, all these premises have proved unsatisfactory as they never seem to resolve the matter with any finality.²¹ Some legal commentators have proposed that synthetically including both the rights of liberty and equality as the predicates for delegitimizing incursions into a woman's right to abortion "leaves abortion right [sic] on stronger legal and political footing than a liberty analysis alone."²² This may well be true and deserves to be examined, but it is also a tacit admission that either rubric alone is too flimsy a foundation to withstand the repeated attacks leveled at this most personal of choices.²³

Thus, while the predicates of privacy and equality rights appear persuasive, these arguments leave those seeking a response to the "originalism" argument hungry. For those requiring a more "literal" constitutional basis on which to prohibit governmental incursion into regulating or banning abortion, this Article asserts that the First Amendment right of Freedom of Religion provides such protection.²⁴ I also suggest that an appeal to the objective of forming "a more perfect Union"²⁵ also may provide a more satisfying—and

20. Sarkar, *supra* note 8, at 175 ("Human Rights activist [sic] see forced pregnancy as a modified form of servitude, in which the body of women is owned by others for sexual and reproductive purposes. . . . For an emancipated woman, forced pregnancy resembles with [sic] the slavery system as she will have to bear the burden of foetus due to forced pregnancy for many months. Forced pregnancy is not advantageous even from the child's perspectives. Studies reveal that, children born to mothers with forced pregnancy were likely to be picked up for drunkenness, drug abuse, antisocial or criminal behaviour. . . .").

21. The rights of an entity "in utero" in inheritance cases—which American courts have referred to as "*enfant sa ventre sa mere*," is a precedentially potent legal arsenal which might be better developed in the context of abortion. *See, e.g.*, Donald A. Gianella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257, 257 (1968).

22. *See* Siegel & Siegel, *supra* note 16, at 170.

23. *See* Walsh, *supra* note 12.

24. "[O]ne of the amendments to the constitution which expressly declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . . ' thereby guarding in the same sentence [and] under the same words the freedom of religion, of speech [and] of the press. [sic] inasmuch that whatever violates either throws down the sanctuary which covers the others" Thomas Jefferson, *Jefferson's Draft*, in 30 THE PAPERS OF THOMAS JEFFERSON, JAN. 1, 1798–JAN. 31, 1799, 536–43 (Princeton Univ. Press 2003).

25. U.S. CONST. pmbl. In a nutshell, a more "perfect Union" might be predicated on considering the well-being of existing children in the family unit, on the grounds that this would also benefit society as a whole. This consideration is a recognized condition for allowing abortion in several countries, including the United Kingdom. *See Britain's Abortion Law What it Says, and Why*, BRITISH PREGNANCY ADVISORY SERV. 1, 4 (May 2013), http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf. In actuality, however, under the Constitution, "the more perfect union" clause referred to the superiority of the federal government over the states. While this is a political consideration, rather than a social one, in the case of abortion, it could be read to limit states' powers to curb abortion under a federal right of freedom to religion.

lasting—rubric upon which to premise our decisions than ones currently employed.²⁶ Although detailed exploration of the second premise is outside the scope of this Article, it is pointed out that this concern weighs the calculus heavily *against* fetal rights—as the fetus, on one side, is only one *potential* human which affect the rights, freedoms and happiness of existing human beings: its mother, father and siblings. Following these threads to their logical outcomes leads to the conclusion that the prospective mother is best suited to choose whether she wishes to accept the assignment of birthing the fetus—or if this will negatively impact her health or her family’s at any stage of fetal development.²⁷ Thus, we assume the prospective mother would be sensitive to the requirements of her existing children and family as a whole, whose collective rights would be superior to any single potential life-form.²⁸ This construct allows for a mother to make decisions which inure to the societal well-being (a/k/a “a more perfect union”).

To address the issue of “originalism,” it is important to consider when and how curtailing a woman’s right to choose abortion arose in the first place. From this perspective, instead of asking on what basis can/should women be granted a right to choose an abortion, should we not be asking: What is the (legally legitimate) basis for the state to deny this right and on what basis can the state protect alleged interests of a fetus to be born?²⁹

Of course, one initial reaction is that the fetus is a human being, deserving of all rights to which humans are entitled.³⁰ As we shall

26. See U.N., ECON. & SOC. COUNCIL, POPULATION DIVISION, WORLD ABORTION POLICIES (2013).

27. See Appendix B. See also Sarkar, *supra* note 8, at 176–77 (describing the case of “Beatriz, a 22-year-old woman known to the world only by a single name, [who] has been denied abortion in the El Salvador region as abortion is illegal and is punishable with thirty years imprisonment. Beatriz has lupus, an auto-immune disease which causes the body’s immune system to attack its own tissue. Her condition is deteriorating and her doctors say she is at ‘high risk of death’ if the pregnancy continues. Medics have recommended an abortion in order to save her life, but cannot proceed amid fear of prosecution.”) (internal citation omitted). Situations where the mother’s health has deteriorated precipitously during the pregnancy present compelling reasons why allowing abortion throughout the pregnancy is societally wise.

28. The aphorism “when Mama’s happy—everybody’s happy” describes a relevant and commonly held societal belief.

29. See *Planned Parenthood v. Casey*, 505 U.S. 833, 836 (1973) (noting “the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”). See also *Roe v. Wade*, 410 U.S. 113, 150 (1973) (“*In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert its interests beyond the protection of the pregnant woman alone.*”) (emphasis added).

30. See, e.g., *Religious Groups’ Official Positions on Abortion*, PEW RESEARCH CTR. RELIGION AND PUB. LIFE (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/religious-groups-official-positions-on-abortion> [<http://perma.cc/7RJB/PWLZ>].

see, this is entirely a religious view, one possessed in the main by developing countries as opposed to industrialized ones, one which does not enjoy any consensus on the international world scene today³¹ and one, as we shall see, which has little or no basis in fact, law, history, or philosophy.

III. PROTECTING THE FREEDOM TO CHOOSE: CONSTITUTIONAL RIGHTS AND CONFLICTS

A. *The Right of Privacy*

In the field of bioethics, at least from an American perspective, personal autonomy (or freedom) is regarded as one of the four legs upon which the seat of societal conduct is supported.³² It is one rubric for permitting the woman to choose how she will use her body. This notion of the right of privacy, while not specifically enumerated in American bioethical thought and which does not enjoy formal constitutional veneration, is also a central tenet of the UNESCO *Universal Declaration on Bioethics and Human Rights*.³³

It is well-accepted that a “right to privacy” has been carved out by American courts when sexual matters are concerned. Thus, for example, regarding gay rights, the Court in *Lawrence v. Texas* wrote that the petitioners “are entitled to respect for their private lives” and that the “State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”³⁴ In the abortion landmark cases, a right of privacy has been culled from the concept of liberty or personal freedom or autonomy as a predicate for a constitutional right to abortion.³⁵ Hence, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided roughly twenty years after *Roe*, the court explained that a pregnant woman’s “suffering is too intimate and personal for the State to insist, without more,

31. *Id.* See also *Roe*, 410 U.S. at 160 (“There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.”) (citation omitted).

32. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (5th ed. 2001).

33. See UNESCO, *Universal Declaration on Bioethics and Human Rights* (2005) Art. 3 (protecting the right of human dignity and respect for fundamental freedoms, which would include the freedom to choose); Art. 9 (referring to confidentiality and dissemination of personal information).

34. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

35. See Joyce Arthur, *Religion and Abortion*, PRO CHOICE ACTION NETWORK (Oct. 2001), <http://www.prochoiceactionnetwork-canada.org/prochoicepress/01autumn.shtml> [<https://perma.cc/7U9G4NRD>].

upon its own vision of the women's role, however dominant that vision has been in the course of our history and our culture."³⁶

B. The Right of Equality and Equal Protection

While recognizing the privacy argument, *Roe v. Wade*,

locates the abortion right in the Due Process Clauses, [although] the Supreme Court has since come to conceive of it as an equality right as well as a liberty right [and] . . . case law now recognizes equality arguments for the abortion right based on the Due Process Clauses. Additionally, a growing number of justices have asserted equality arguments for the abortion right independently based on the Equal Protection Clause.³⁷

Justice Kennedy linked those rights to equal protection and created a "due process right to demand respect for conduct protected by the substantive guarantee of liberty . . ." ³⁸ This right is derivable, according to the Supreme Court, from the fact that, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."³⁹ Later courts expanded the right of equality to include the sensitivities demanded by their court-crafted right of privacy and autonomy. Equality arguments focus on a "woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."⁴⁰ It appears, however, that the trajectory of recent opinions heralds a major pullback of these rights.

C. Rights Reneged

Expressly rejecting the State's claim that life begins at conception,⁴¹ the Court in *Roe* held that prior to the point of viability (which the court accepted to be twenty-eight weeks),⁴² the State has no interest in protecting a fetus' life, and after that point any interest was subject to the primacy of protecting the mother's right to life and health:

36. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

37. Siegel & Siegel, *supra* note 16, at 164. It is presumed that the due process clause of both the Fifth and Fourteenth Amendments are triggered.

38. *Lawrence*, 539 U.S. at 575 (2003).

39. *Casey*, 505 U.S. at 856 (1992).

40. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

41. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

42. *Id.* at 160 (according to the *Roe* court, "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").

For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.⁴³

The Court notes that this holding has ample biological and historical reasons for allowing the incursion after viability, but fails to delineate those on which they base their opinion.⁴⁴ This vagueness provides the breeding ground for subsequent courts “to take liberties” with the rights conferred by *Roe*.

The first major assault came in *Webster v. Reproductive Health Services*,⁴⁵ where the Court upheld a statute that included a preamble which “defined life as beginning at conception,”⁴⁶ thereby dismantling essential philosophical (moral) principles established in *Roe*. The case concerned physicians being directed to perform fetal viability tests on women who were twenty or more weeks pregnant, thereby scaling back the unfettered privacy allowed to the mother in *Roe* by two months.⁴⁷ Rehnquist defended his position which upheld the local statute that contained this clause, pretty much by saying: well, it’s only in the preamble, so it doesn’t count for much.⁴⁸ In a blistering dissent, Justice Blackmun took Justices Rehnquist, White, and Kennedy to task for attempting to overturn *Roe* by what he claimed were stealth tactics; “filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly”⁴⁹

While Blackmun’s opinion rests at least partially on the doctrine of *stare decisis*, it is difficult to find a legal reason for the

43. *Id.* at 164–65.

44. *Id.* at 159–60. In fact, the court recognizes that valid formulations of interest in determining when abortion is appropriate includes the point of live birth: “As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes ‘viable,’ that is, potentially able to live outside the mother’s womb, albeit with artificial aid.” *Id.*

45. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

46. *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RESEARCH CTR. (Jan. 2013), <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court> [<https://perma.cc/TZV3U7MG>].

47. *See id.* at 3.

48. *See Webster*, 492 U.S. at 503, 506 (“The Court of Appeals determined that Missouri’s declaration that life begins at conception was ‘simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations’. . . . Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees’ medical practice.”).

49. *Id.* at 538 (Blackmun, J., dissenting).

majority opinion. Thus, while *Roe v. Wade* at least examined several options for deciding the time for initiating fetal rights (conception, forty days, quickening, viability, and birth),⁵⁰ *Webster* evaluates none, and arbitrarily sets the trigger date as the earliest possible date of viability—plus an additional (scientifically unvalidated) window of four weeks to allow for laboratory error.⁵¹ It must be noted that even today, seventeen years after *Webster*, the earliest viability date on record is twenty-two weeks.⁵² Interestingly, from a reverse perspective, when a baby is born prematurely, physicians are loath to institute life-saving technologies before twenty-four weeks.⁵³

The second assault on *Roe* came in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁴ While upholding *Roe*, the court in *Casey* ruled that states could now regulate abortion during the entire period before fetal viability, and they could do so for reasons other than to protect the health of the mother. The result was that a state's interest in, and regulation of, potential life could now arguably extend throughout a woman's pregnancy.⁵⁵ Perhaps the most alarming aspect of *Casey* was its countenancing tinkering with *Roe*.

In 2003, a conservative Congress enacted the Federal Partial Birth Abortion Ban Act which banned a certain abortion technique⁵⁶ called the D and X procedure.⁵⁷ Four years later, in 2007, the Court in *Gonzales v. Carhart*, upheld the law, finding it constitutional.⁵⁸ The *Gonzales* court held that *Casey* overruled prior cases "because they undervalued the State's interest in potential life."⁵⁹ Like peeling the layers of skin off an onion, *Casey* removes one layer of protection for the woman, and *Gonzales* peels off another.

We start off with the following pronouncement:

50. *Roe v. Wade*, 410 U.S. 113, 130–40 (1973).

51. *Webster v. Reproductive Health Services*, 492 U.S. 490, 515–16 (1989).

52. Amanda Cable, *The Tiniest Survivor: How the 'Miracle' Baby Born Two Weeks Before the Legal Abortion Limit Clung to Life Against All Odds*, DAILY MAIL (May 22, 2008), <http://www.dailymail.co.uk/femail/article-1021034/The-tiniest-survivor-How-miracle-baby-born-weeks-legal-abortion-limit-clung-life-odds.html> [https://perma.cc/9FZG8YZX].

53. JoNel Aleccia, *Evidence Complicates Decisions on When to Save Premies*, THE JERUSALEM POST (Nov. 12, 2015), http://www.heraldextra.com/momclick/health-and-fitness/evidence-complicates-decisions-on-when-to-save-preemies/article_21958c01-f460-5b97-b842-3cfa3430b9f0.html [https://perma.cc/4DK5MCUE].

54. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

55. *Id.* at 846.

56. 8 U.S.C.S. § 1531.

57. *Dilation and Extraction/Evacuation*. See *infra* note 88.

58. See *Gonzales v. Carhart*, 550 U.S. 124, at 167–68 (2007).

59. *Id.* at 146 (citing *Casey*, 505 U.S. at 881–83).

We assume the following principles for the purposes of this opinion. Before viability, a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” 505 U.S., at 879 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation’s “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁶⁰

But while not explicitly overruling *Roe v. Wade*,⁶¹ the *Gonzales* Court imposes an additional constraint, noting that:

“[r]egulations which do no more than create a structural mechanism by which the State . . . [or the parent or guardian of a minor] . . . may express *profound* respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose” *id.*, at 877. *Casey* struck a balance . . .⁶²

It must be noted that *Roe* contemplated no such “out” clause and rejected the State’s claimed balancing requirement.⁶³ Further, the loosey-goosey wording of the *Gonzales* Court, allowing regulations which do no more than create a mechanism for the State to impose its wishes, is the trap that creates that very mechanism, such as the substantial obstacle test, and then furnishes the court with the power to determine if the mechanism applies—and at what point in the gestational timeline. Finally and most critically, it is not clear from where the State derives its right to enforce its “profound interest” in “the potential life,” other than some unsupported fiat which asserts that the fetus becomes a human being at the undefined point of viability.

60. *Id.*

61. While *Roe* established that before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure, it also is a confirmation of the State’s power to restrict abortions after fetal viability, “if the law contains exceptions for pregnancies which endanger the woman’s life or health.” *Gonzalez*, 550 U.S. 124, 125 (2007) (citing *Casey*, 505 U.S. at 846).

62. *Gonzales*, 550 U.S. at 126 (quoting *Casey*, 505 U.S. at 877) (emphasis added).

63. A “balance” implies a search for “equilibrium.” See *Balance*, MERRIAM WEBSTER DICTIONARY (defining balance as “a state in which different things occur in equal or proper amounts or have an equal or proper amount of importance”). *Casey* assumes that each side (woman and fetus) come before the court imbued with equal rights, or rights which at least on some level can be equalized. The court in *Roe* made no such inference. And given the variety of “beliefs” on the issue, no legitimate “balance,” I submit, will ever be acceptable.

D. The Potential Person, the Profound Interest and the Illogic of It All

In defending its incursions into the mother's rights, the *Casey* Court employs troubling language. Firstly, it diminishes the fulsomeness of rights enunciated in *Roe*, creating something of a second-order tier of autonomy and privacy for women considering abortion. As the court noted: "[b]ecause abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy."⁶⁴ The distinguishing factor of abortion is that it involves the "purposeful termination of a potential life."⁶⁵

The legal definition of a "potential life" is never made clear, and indeed this undefined chimera is the shadow that still lurks about, searching for a safe (and permanent) legal haven through repeated assaults on *Roe*, where it was first conceived. It must be recognized that neither legal history nor natural law provides much support for any guaranteed right to a "potential life-form" such that it trumps the rights afforded to a live human.⁶⁶ The best that can be said is that there may be competing rights. However, this is not what the court seems to be saying. What seems to emerge is that the potential life, the fetus, has a full right to be born, while the mother has some diminished right of autonomy and privacy. (Her rights to equality, freedom, and liberty are not well-countenanced by the court). The *Roe* Court notes three times that under certain circumstances—occurring after the fetus attains viability: "recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."⁶⁷ Indicating that "some phrase it [the State's interest

64. *Casey*, 505 U.S. at 833.

65. *Id.* at 952.

66. See *Roe*, 410 U.S. at 158 ("[T]hroughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, [which] persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

67. *Id.* at 154, 158–59 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. . . . All this, together with our observation, *supra*, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. This is in accord with the results reached in those few cases where the issue has been squarely presented. . . . Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62 (1971) . . . inferentially is to the same effect, for we there would not have indulged in statutory

in the ‘potential person’ in terms of [a] duty,”⁶⁸ the Court gives no reason or basis for this assertion.⁶⁹

The concept of a “potential person” having rights, however, is logically untenable. Do we allow a potential mother to take deductions on her income tax for the hoped-to-be-born dependent? Do we allow a potential charitable donor to take a deduction for the amount he plans to donate?

It appears that the only basis on which abortion restrictions can survive a legal challenge is some ephemeral assertion that the fetus is an entity with a close-enough relation to humanhood such that we consider it human—but only at a certain point in time—that point in time being under dispute. From this concept of “potential life,” modern courts created the right to be born.

Claiming that the fetus (or embryo) is entitled to a legal right to future birth (a right to life), or that the State has a profound interest in the embryo or fetus is logically flawed, as seen by the way the fetal entity is otherwise treated. For example, does the fetus have the right to choose *how* it wants to be born? Whether it wants to be born via C-section (harmful to the public health by squandering resources, yet preferred by some women and many doctors) or natural birth, squished through a narrow birth canal, risking shoulder dystocia and other forms of damage? Do we ask the fetus whether it wants to be welcomed into the world in the warm cocoon of a *Leboyer* atmosphere versus the noisy hustle and bustle of the standard delivery room?⁷⁰

Of course, the facile response is: the fetus cannot answer. But why is there no provision for appointment of a legal surrogate or a *guardian ad litem*, as is customary where children’s rights can’t be

interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.”).

68. *Id.* at 150.

69. *Id.* at 159 (“As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of *potential human* life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”) (emphasis added). Subsequent courts elevate this right of the State to a “profound” respect, one that pervades the entire pregnancy—even before viability. *See* *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (citing *Casey*, 505 U.S. 833, 877 (1992)).

70. In Israel, the fetus, once born, is not allowed to sue for injuries predating birth that he or she claims would warrant abortion (wrongful life) although the parents can maintain an action for wrongful birth and costs of raising the child. Tomer Zarchin & Dan Even, *Children With Birth Defects Can No Longer Sue for Malpractice*, HAARETZ (May 29, 2012, 1:41 AM), <http://www.haaretz.com/israel-news/children-with-birth-defects-can-no-longer-sue-for-malpractice-1.433038> [<http://perma.cc/BZD3225X>]; *see also* CA 1326/07 *Hammer v. Amit* (2012) (Isr.) (expanding “wrongful birth” as a cause of action for parents but no longer recognizing it is a “child’s claim”).

otherwise protected, or where their rights are adverse to their parents' beliefs? These issues often arise where, for example, Jehovah's witness' refuse blood transfusions for their children.⁷¹ There, we empower the State to take control over the welfare of the child under the doctrine of *parens patriae*.⁷² In cases of abortion, however, the courts act as a sort of societal *guardian ad litem*, deciding only the limited fetal right to be born, but not how or when. But why is that? Is it because, perhaps, deep down inside we don't really believe the fetus is yet "human"? Is it because we really aren't sure what it is, so we make a moral compromise: let's just not kill it.

To restate the question then: Jurisprudentially, there are four logical outcomes:

- a. The fetus is a non-person and hence abortion is allowed on demand, as the human carrier has the right of autonomy and privacy to determine how she wants to use her body.

71. See *M.N. v. S. Baptist Hosp. of Fla.*, 648 So. 2d 769, 770 (Fla. Dist. Ct. App. 1994) (holding that "as between parent and child, the ultimate welfare of the child is the controlling factor" where parents refused consent for a blood transfusion and chemotherapy for their eight month old infant). *But see* *Burton v. Florida*, 49 So. 3d 263, 265–66 (Fla. Dist. Ct. App. 2010) (holding that the prioritization of the child's welfare does not apply to the case of a fetus which is not yet viable).

72. See *Burton*, 49 So. 3d at 265–66. In *Burton*, a woman was compelled against her will to compulsory bed rest to protect the viability of the fetus. 49 So. 3d at 264. The court noted that the fetus is not entitled to protection under the guise of *parens patriae*, noting that "[t]he state's interest in the potentiality of life of an unborn fetus becomes compelling 'at the point in time when the fetus becomes viable,' defined as 'the time at which the fetus becomes capable of meaningful life outside the womb, albeit with artificial aid.'" *Id.* at 266. The Court of Appeals ruled that the appellant suffered a significant deprivation of her physical liberty and personal freedom and ruled that the trial court had erroneously focused its ruling on the best interests of the child, where it determined that forced treatment of the mother was indicated for that purpose, instead of determining whether the State had a compelling interest in overriding the mother's right to refuse medical treatment. *Id.* at 265–66. While the balancing tests employed by the trial judge may be appropriate in other circumstances (such as the competing rights of a parent and an already born child), the Court of Appeals ruled this application of the State's *parens patriae* authority to override the appellant's right to refuse medical treatment for the unborn child was in error. *Id.* Upholding the woman's right to privacy, the court ruled that there was no competing right-to-life for the fetus as there was no showing that the fetus had reached a sufficient stage of viability required to withstand the State's threshold. *Id.* Notably, the court rejected consideration under the right of privacy: "No privacy rights of a pregnant woman were involved. The test to overcome a woman's right to refuse medical intervention in her pregnancy is whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment. In addition, where the state does establish a compelling state interest and the court has found the state's interest sufficient to override a pregnant patient's right to determine her course of medical treatment, the state must then show that the method for pursuing that compelling state interest is 'narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.'" *Id.* (emphasis added) (citations omitted).

- b. The fetus is an (innocent) human person and hence abortion is never allowed as the fetus is entitled to the right to life which is superior to the mother's.
- c. Whether the fetus is a "person" varies with gestational age (which in turn varies with the state of technology), and in deference to society's values (in some cases governed by religion), we allow the fetus a single right—to be born under some circumstances, a right which is superior to enumerated rights of the decidedly human carrier, or
- d. Whether the fetus is a person is indeterminable, and we make the same allowances as in option c.

In the United States (and most industrialized countries), we have rejected choices (a) and (b), and hence by default have chosen option (c) or (d). So, in a sense, we give the fetal entity partial rights. Not yet human, just not animal. We confer on the fetus a presumptive right to be born, which may not be rebuttable, at some undefined and ever-changing point during the pregnancy, nominally referred to as the point of viability.⁷³

E. Rights in Conflict

[T]he principle [is] that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.⁷⁴

Assuming, *arguendo*, the fetus is a "human being," or a "potential life with a right to be born" the conflict between universal rights to dignity and liberty, (manifested in the right of autonomy, i.e., the mother's right to choose to abort) and the right of an innocent person to life (i.e., a fetal right to be born), results in a head-on collision which is not amenable to balancing. Historically, the impasse has been resolved in an off-quoted maxim: one man's liberty ends where another man's nose begins.⁷⁵ This has been loosely translated as envisioning a society which provides for broad-scale personal freedom

73. The point of viability is, essentially, an inchoate time dependent on the state of medical technology, the resources of the locality, and the insurance of the mother.

74. *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992)).

75. See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARVARD L. REV. 957, 957 (1919) ("Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. 'Your right to swing your arms ends just where the other man's nose begins.'").

amiably coexisting with one that follows legally derived and judicially directed societal standards of justice.⁷⁶ In the case of abortion, this clash of values is smoothed over by the courts proclaiming that their “legitimate” and “profound” interest in protecting the life of the fetus, as well as the health of the pregnant woman, is not a contradiction.⁷⁷ This is a fantasy. Assuming lemming-like behavior and hiding its collective head, the Court is hoping no one will notice that when we make compromises on behalf of fetuses, we sabotage rights of its carrier (the pregnant woman), such as her rights to liberty, autonomy, and to pursue happiness. And her rights, both legal and ethical, bump up against whatever rights we may want to afford the fetus—if, that is, we afford the fetus any rights at all.⁷⁸ In determining whose rights are paramount—especially in the default situation—the Supreme Court has yet to enunciate a clear standard upon which it makes its decision.

Some scholars assert the primacy of the woman’s rights exists under various constitutional guises. Professors Siegel and Siegel contend that the equal protection of sex discrimination cases is reflective of a right of autonomy, which is conferred on pregnant women. They also assert that the notion of equality helps delineate “the kinds of restrictions on abortion that are unconstitutional under *Casey*’s undue burden test,”⁷⁹ the very issues the Court in the *Whole Woman’s Health v. Hellerstedt* tried to resolve.⁸⁰ These scholars claim that “abortion restrictions that deny women’s equality impose an undue burden on women’s fundamental right to decide whether to become a mother . . . [and thus] [a]n equality-informed understanding of *Casey*’s undue burden test prohibits government from coercing, manipulating, misleading, or stereotyping pregnant women.”⁸¹

Constitutional absolutists, of course, decry such tomfoolery with the bible of American society, the Constitution, noting that privacy

76. See CASEBOOK ON BIOETHICS FOR JUDGES (Amnon Carmi & Barbara Pfeffer Billauer, eds., UNESCO Chair of Bioethics Section on Judicial Education) (forthcoming October 2016).

77. *Gonzales*, 550 U.S. at 145 (“[T]he principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”) (citing *Casey*, 505 U.S. at 846). This statement contradicts the holding of *Roe v. Wade*, where the compelling interest of the State in protecting the life of the fetus that may become a child is considered the point of viability. 410 U.S. 113, 160 (1973).

78. *Roe*, 410 U.S. at 161 (“In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before life [sic] birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life [sic] birth.”).

79. Siegel & Siegel, *supra* note 16, at 165.

80. Whether they did this in an effective manner depends on who is asked.

81. Siegel & Siegel, *supra* note 16, at 165.

and autonomy are not delineated or protected rights—although some admit that societal interpretations should play a role in the Constitution’s interpretation.⁸² As Siegel and Siegel note:

Some critics pejoratively refer to certain of the Court’s Due Process decisions as recognizing “unenumerated” constitutional rights. . . . [T]hese interpreters regard decisions like *Roe*, *Casey*, and *Lawrence*, which recognize substantive rather than procedural due process rights, as lacking a basis in the text of the Constitution, hence as recognizing “unenumerated rights.”⁸³

F. Retrogression and Outmoded Trespass on Autonomy

The Siegels’ position is clearly demonstrated by an alternative rendition of the *Casey* holding; that *Casey* replaced the viability framework with the determination that regulation of abortion at any stage of a woman’s pregnancy would be constitutional as long as *it did not constitute an “undue burden.”* It is this conception that laid the groundwork for *Gonzales v. Carhart*,⁸⁴ which many criticized as abortion law-retrogression.⁸⁵ Along with women’s and civil rights groups who attacked the ruling, the medical establishment sounded in a starkly negative fashion, the editor of *The New England Journal of Medicine* writing, “until this opinion, the Court recognized the importance of not interfering with medical judgments made by physicians to protect a patient’s interest. For the first time, the Court permits congressional judgment to replace medical judgment.”⁸⁶

82. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (exemplifying the Constitutional absolutist argument in the context of penalties for possession of cocaine).

83. Siegel & Seigel, *supra* note 16, at 168–69.

84. George J. Annas, *The Supreme Court and Abortion Rights*, 356 N. ENGL. J. MED. 2201, 2206 (2007). *Gonzales v. Carhart*, 550 U.S. 124, 125 (2007).

85. *Gonzales* overturned several District Court decisions that restricted abortions. See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1048 (2004), *aff’d* 413 F.3d 791 (8th Cir. 2005), *rev’d*, 550 U.S. 124 (2007) (granting a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute that the fetus was viable); *Planned Parenthood Fed’n Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1034–35 (N.D. Cal. 2004), *aff’d*, 435 F.3d 1163 (9th Cir. 2006), *rev’d*, 550 U.S. 124 (2007) (concluding that the Partial-Birth Abortion Ban Act was unconstitutional “because it (1) pose[d] an undue burden on a woman’s ability to choose a second trimester abortion; (2) [was] unconstitutionally vague; and (3) require[d] a health exception as set forth by . . . *Stenberg*.”).

86. “The American Congress of Obstetricians and Gynecologists called the decision ‘shameful and incomprehensible’ in a statement.” *Attention Media: There’s No “Unsettled Science” In The Contraception Challenges*, PUB. HEALTH WATCH (Mar. 13, 2014), <https://publichealthwatch.wordpress.com/2014/03/13/attention-media-theres-no-unsettled-science-in-the-contraception-challenges> [<http://perma.cc/N9S4ARH7>] (“This decision discounts and disregards the medical consensus that intact D&E is safest and offers significant

Justice Ginsburg was particularly eloquent and vehement on this point.⁸⁷ Similarly, Professor Stone explained:

The five justices in the majority in *Gonzales* have put at risk the health of women who suffer from heart disease, uterine scarring, bleeding disorders, compromised immune systems, and certain pregnancy-related conditions, such as placenta *previa* and *accreta*, as well as those women carrying fetuses with certain abnormalities, such as severe hydrocephalus. In all of these circumstances, and many others, the use of the intact D & E is necessary to ensure the health of the woman. It is important to note that the prohibition of intact D & E has nothing to do with preserving the life of a fetus. The “partial birth abortion” law does not prohibit any abortions. Rather, it prohibits only a particular means of performing abortions. If the woman is willing to undergo a greater than necessary risk to her health, she may terminate her pregnancy by other, less safe, methods. She may, for example, have the fetus terminated by injection prior to extraction, or removed by cesarean, or extracted by non-intact D & E (which involves dismembering the fetus in utero).⁸⁸

The incursion into abortion rights on (medical) procedural grounds in *Gonzales* and the medical issues raised in *Whole Woman's Health* are difficult to track with constitutional imperatives, and perhaps impossible, I argue, to reconcile: What, constitutionally, is considered an “undue burden”? And who makes that decision? The very court that allows its imposition?

G. Equal Protection and The Double Standard

Even assuming, *arguendo*, a right to protect a viable fetus does exist, this right must be balanced against the rights and needs of others. When a viable fetus is given superior rights to that of its female nurturer (or other living offspring of the pregnant woman) we must entertain the notion that some subtle form of chauvinism is at work. One way of examining this is to investigate other instances where killing is permitted. Since the case of *Whole Woman's*

benefits for women suffering from certain conditions that make the potential complications of non-intact D&E especially dangerous.’ . . . ‘Moreover, it diminishes the doctor-patient relationship by preventing physicians from using their clinical experience and judgment.’”).

87. *Gonzales*, 550 U.S. at 169–91.

88. Geoffrey R. Stone, *Our Faith-Based Justices*, THE HUFFINGTON POST (Apr. 20, 2007), http://www.huffingtonpost.com/geoffrey-r-stone/our-faithbased-justices_b_46398.html [<http://perma.cc/7QZV6TXC>].

*Health v. Hellerstedt*⁸⁹ and the law on which it is based⁹⁰ derive from the State of Texas, this state makes a good test venue. Should we determine that women, as a group, are singled out and forced or coerced to bear, support, and carry an unwanted life-form, the traditional notions of violation of Equal Protection would apply and restrictions on abortion would be unconstitutional under the Fourteenth Amendment.

1. *The Death Penalty in Texas*

Texas is one of thirty-one states in which the death penalty is legal.⁹¹ Not only is capital punishment legal on the books, its practice is well-countenanced in Texas. Since the death penalty was reinstated with *Gregg v. Georgia*, 428 U.S. 153 (1976),⁹² Texas has executed more inmates than any other state; in the last thirty years, over 500 people have been executed in Texas alone.⁹³ It would therefore appear that the State of Texas, its voters, legislators, judges, and executives countenance the need for killing—at least under certain circumstances such as punishment for murdering others.

2. *The Dunn Case*

The legitimacy of taking a human life in Texas has also been recognized where that life poses a drain on societal resources—even when the human in question is desirous of continuing his or her existence.⁹⁴ In the recent case of *Kelly v. Houston Methodist Hospital*,⁹⁵ a forty-five-year-old hospital patient, lucid and conscious, was condemned to death by lethal injection (after removal of his feeding and breathing tubes) by his physicians, a decision seconded by the Hospital's Ethics committee on the grounds that future care was

89. *Whole Women's Health v. Hellerstedt*, No. 15-274, 84 U.S.L.W. 4534 (U.S. 2016).

90. Texas H.B. 2 (2013).

91. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 30, 2016), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/W7AKNA67>].

92. The death penalty was reinstated in the instant cases; as *Furman* had not outlawed the application of the death penalty outright, executions continued during the interim period.

93. *Executions in the U.S. 1608–2002: The ESPY File Executions by State*, DEATH PENALTY INFO. CTR. (Dec. 31, 2015), <http://www.deathpenaltyinfo.org> [<https://perma.cc/8GNQFZ26>]. See *Death Row Information*, TEX. DEP'T OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html [<https://perma.cc/BAU9LHQT>].

94. Whether it is called killing, murder, or euthanasia.

95. Plaintiffs' First Amended Petition at 1–2, *Kelly v. Houston Methodist Hosp.*, No. 2015-69681 (Tex. Dist. Ct. filed Feb. 2, 2016), http://www.thaddeuspope.com/images/Dunn_v_Methodist_amended_petition.PDF.

futile.⁹⁶ All this is apparently legal in Texas under Texas' Advance Directives Act (which allows doctors to decide when to terminate treatment—irrespective of a patient's advanced directives).⁹⁷ When Mr. Dunn and his mother sought judicial stay of the execution, a representative of the hospital filed papers seeking guardianship (which included the patient's records in an unsealed document, possibly also violating the patient's right to privacy and HIPAA).⁹⁸ According to papers filed by Mr. Dunn in the District Court of Harris County on November, 20, 2015 seeking to stay the decision: The plaintiff,

David Christopher Dunn ("Dunn"), a Texas resident, is currently receiving life sustaining treatment at The Methodist Hospital . . . Dunn faces immediate irreparable harm of death if the life sustaining treatment is discontinued. The Methodist Hospital seeks to discontinue his treatment, and via a committee meeting for which Dunn had neither legal counsel nor the ability to provide rebuttal evidence, The Methodist Hospital found that it will discontinue life sustaining treatment [on] Tuesday, November 24, 2015 [two days before Thanksgiving]. Dunn believes the Texas Constitution and the U.S. Constitution guarantees him a representative to advocate for his life and opportunity to be heard when life sustaining treatment is being removed. Dunn seeks a temporary restraining order preserving the status quo of his treatment. Dunn further seeks a declaration that Texas Health and Safety Code Section 166.046 violates his due process rights under the Texas Constitution and the U.S. Constitution. . . . [which] allows doctors and hospital the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient, despite the existence of an advanced directive . . . or expressed patient decision to the contrary.⁹⁹

96. *Id.* at 2, 11.

97. This is not apparently an isolated case. See *Chris Dunn's Was Not a Singular Case of Injustice in Texas*, TEX. RIGHT TO LIFE (Jan. 7, 2016), <https://www.texasrighttolife.com/chris-dunn-s-was-not-a-singular-case-of-injustice-in-texas/> [<https://perma.cc/N754BBV2>].

98. See Wesley J. Smith, *Hospital Files Guardianship Petition for David Dunn*, NAT'L REVIEW (Dec. 10, 2015), <http://www.nrostatic.com/human-exceptionalism/428363/hospital-files-guardianship-petition-david-dunn-wesley-j-smith> [<https://perma.cc/7Q2BP56U>].

99. Plaintiff's Original Verified Petition and Application for Temp. Restraining Order and Injunctive Relief at 1–2, *Dunn v. Methodist Hosp.* (Tex. Dist. Ct. filed Nov. 20, 2015), http://www.thaddeuspope.com/images/Dunn_v_Methodist_001.pdf. Further, the district court found that the patient's due process rights were violated and granted him a two week reprieve to find another hospital to administer to his needs. The extensions were granted twice. See Steven Ertelt, *Hospital Trying to Seize Guardianship of Disabled Patient from His Family in Order to Kill Him*, LIFENEWS.COM (Dec. 10, 2015), <http://www.lifenews.com/2015/12/10/HOSPITAL-TRYING-TO-SEIZE-GUARDIANSHIP-OF-DISABLED>

The “sanctity of life” proclaimed by opponents to abortion—at least in Texas—clearly is being employed selectively.

H. Revisionist History: The Good Ol’ Days of Corsets and Chastity Belts

The second rubric the *Casey* court uses to support its ruling is a manipulated and misleading rendition of American history. Rather than the detailed historical review undertaken by the *Roe* court, the *Casey* court merely states, in hearsay fashion, that “the historical traditions of the American people—as evidenced by the English common law and by the American abortion statutes in existence both at the time of the Fourteenth Amendment’s adoption and *Roe*’s issuance—do not support the view that the right to terminate one’s pregnancy is ‘fundamental.’ Thus, enactments abridging that right need not be subjected to strict scrutiny.”¹⁰⁰

It is interesting that the court selected the date of the Fourteenth Amendment to tether its ruling. Indeed, the Fourteenth Amendment was enacted in 1868 when abortion was generally illegal; but the Bill of Rights (which contains the Fifth Amendment Due Process Clause and the First Amendment Freedom of Religion Clause) was ratified in 1791. And in 1791, abortion was perfectly legal in the United States (as it was when the Constitution was ratified three years earlier), and it was largely ignored in England.¹⁰¹ Hence,

-PATIENT-FROM-HIS-FAMILY-IN-ORDER-TO-KILL-HIM [https://perma.cc/E4CHVY 2H]. On December 9, the Hospital sought an application for custodial guardianship of Mr. Dunn so as to enable them to terminate his life, thereby bypassing Mr. Dunn’s extension. *Id.* Methodist hospital invoked the Texas Advanced Directives Act, (signed into law by Governor George Bush) “which allows the hospital to override medical directives of a patient and provide only ten days’ notice before involuntarily withdrawing life-sustaining treatment.” *Id.* The patient’s only recourse is to find another facility which would offer him an ICU bed, a daunting proposition, given his lack of insurance. *Id.* See also *Attorneys Representing Chris Dunn Contest Methodist Hospital’s Attempt to Seize Guardianship*, TEX. RIGHT TO LIFE (Dec. 10, 2015), <https://www.texasrighttolife.com/attorneys-representing-chris-dunn-contest-methodist-hospital-s-attempt-to-seize-guardianship> [https://perma.cc/L8HNUYH7].

100. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 839–40. Here, the *Casey* Court directly contradicts the Court in *Roe*, which stated, “It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.” *Roe v. Wade*, 410 U.S. 113, 129 (1973).

101. GREGORY J. DURSTON, *WICKED LADIES: PROVINCIAL WOMEN, CRIME AND THE EIGHTEENTH-CENTURY ENGLISH JUSTICE SYSTEM* 168 (Cambridge Scholars Publishing 2014). See *History of Abortion Law in the UK*, ABORTION RIGHTS, <http://www.abortionrights.org.uk/history-of-abortion-law-in-the-uk> [https://perma.cc/3V2LY4KS]; *Abortion*

selecting a point source date of the Fourteenth Amendment to “measure” historical traditions is misleading—as well as arbitrary and capricious—at best.¹⁰²

Indeed, our founding fathers crafted a constitution that *forever* would protect certain individual rights from the caprices and credos of politicians, do-gooders and meddlers, whether on a state or national level. They did not *specifically* protect abortion—although they did recognize the importance of guaranteeing security in one’s home and person,¹⁰³ which intuitively could be read to encompass abortion.¹⁰⁴ The answer to why the drafters did not specifically include abortion in its ambit of protective rights is simple—there was no reason to do so, since it was legal in both America and Great Britain at the time.¹⁰⁵ No wonder it is challenging to find a constitutional basis to permit abortion—since it was not illegal when the constitution was ratified in the first place.

Only later would vigilante efforts to safeguard the morality of the country under the guise of regulating personal conduct (e.g., contraception, sodomy—and abortion), be implemented. This Victorian prissiness¹⁰⁶ emerges in the 1800s, as a wave of imposed morality

in *Ancient History*, BBC, http://www.bbc.co.uk/ethics/abortion/legal/history_1.shtml [<https://perma.cc/E74K4FNM>].

102. Those Justices eager to strike down or diminish *Roe* seem woefully ignorant of abortion history. Thus, Rehnquist’s rejoinder to Blackmun’s dissent in *Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1988), is illustrative: “Justice Blackmun’s suggestion . . . that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the Dark Ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.” To be sure, abortion in the “dark ages” was legal. Presumably, Rehnquist means to equate scaling back of abortion to the dark ages of male chauvinism.

103. Nevertheless, that right could also be “aborted” under the Fourth Amendment, if there is a reasonable basis to suspect a crime has been committed. And here’s the rub: by crafting abortion as a criminal matter—although it infringes on a woman’s right to the security of her own person—a state can circumvent the Fourth Amendment.

104. See *Physically Intrusive*, *supra* note 17, at 953.

105. HISTORY OF ABORTION, FEMINIST.COM, http://www.feminist.com/resources/our_bodies/abortion.html [<https://perma.cc/EFN4RKYW>] (citing ABORTION in OUR BODIES, OURSELVES FOR THE NEW CENTURY 408 (1998)) (“In 1803, Britain first passed anti-abortion laws, which then became [more strict] throughout the century. The U.S. followed as individual states began to outlaw abortion. By 1880, most abortions were illegal in the U.S., except those ‘necessary to save the life of the woman.’ But the tradition of women’s right to early abortion was rooted in U.S. society by then; abortionists continued to practice openly with public support, and juries refused to convict them.”).

106. Laura Cenicola & Mareike Aumann, *British History 2: From the French Revolution to World War II, Topic: “Majesties and Royal Highnesses,”* (2008), <http://www.laura-cenicola.de/brithist2/brithist/8-1-introduction-into-victorian-morality-what-exactly-was-the-victorian-era.html> [<https://perma.cc/674YJJT2>] (“The term ‘Victorian’ owns a wide range of connotations, most specifically the high and strict moral standards. Nowadays the Victorian time is usually associated with ‘prudishness’ and ‘repression.’”). Queen

took on a religious tone in the revivalism that swept the United States in the 1820s and '30s. The national mood expanded to include calls for temperance. "In 1838, the state of Massachusetts passed a temperance law banning the sale of spirits . . . set[ting] a precedent for such legislation. Maine passed the first prohibition law in 1846, and a number of other states had followed suit by the time the Civil War began in 1861."¹⁰⁷ In 1873 The New York Society for the Suppression of Vice was founded for the purpose of supervising the morality of the public.¹⁰⁸ It was granted powers to enforce laws that prohibited transmissions of "obscene" or "immoral" mail, and society agents were appointed by sheriffs as "peace officers."¹⁰⁹ By 1920, the religious fervor led to a Constitutional Amendment banning the manufacture and sale of alcoholic beverages.¹¹⁰ Only when prohibition impacted the economy was the Eighteenth Amendment repealed.¹¹¹ Over time, all such governmental incursions into private life were regarded as antithetical to "The American Way" and rescinded (to wit, *Griswold v. Connecticut*).¹¹² Except, that is, for abortion.

IV. IS IT LEGITIMATE FOR THE STATE TO PROTECT FETAL RIGHTS?

Perhaps, then, the basic problem in resolving the abortion controversy is that there is a constitutional void regarding how to handle it. To fill this legal void, one possibility is that judges employ personal preferences, creating legal fictions like "potential people" or "profound" interests to bolster a flawed approach. In fact, since the court in *Roe* made a demonstrable, well-articulated and concerted effort to avoid basing their decision on personal beliefs, they impliedly expressed concern that their personal beliefs (which includes religious background) might influence their decision had they not taken caution to avoid it—including performing an extensive (albeit not exhaustive) investigation of historical *practices*.¹¹³

Victoria reigned from 1837 to 1901, which pretty much coincided with the sudden emergence of anti-abortion laws in the United States. *See infra* note 107.

107. *Prohibition*, HISTORY (2009), <http://www.history.com/topics/prohibition> [<https://perma.cc/KEQ25YB4>].

108. Anthony Comstock, et. al, *The Suppression of Vice*, 135 THE N. AM. REV. 484, 484–85 (1882).

109. *Id.* at 485.

110. *Prohibition*, *supra* note 107.

111. *American Spirits: The Rise and Fall of Prohibition*, NAT'L CONSTITUTION CTR., <http://prohibition.constitutioncenter.org/exhibition.html> [<https://perma.cc/LM8T6PSN>].

112. *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (finding a state ban on contraceptive use violates the Constitutional right to privacy in marital relations).

113. In their diligent efforts to avoid making the decision on personal views, the court reviewed the practices throughout history, e.g. in *Roe v. Wade*, 410 U.S. 113, 117, 130–47. It is not clear, though, exactly why they made this detailed inquiry other than looking for a way to assure themselves the decision was not based on personal opinion. Their

In the absence of any demonstrable legal basis to regulate abortion by the drafters of the Constitution, and in the absence of direct guidance from that document, a second option to fill the void is for natural law (the “moral code”) to dictate the standard—assuming we can find some basis to craft such a moral law. However, should we find that no natural or moral laws exists, i.e., that there is no consensus of societal opinion, we must respect the woman’s right to liberty and autonomy—allowing her to choose for herself how she wants her body to be used.

That the judges in post-*Roe* cases were influenced by their religious notions masquerading as moral views is suggested by Professor Geoffrey Stone¹¹⁴:

All five justices in the majority in *Gonzales* were Catholic. The four justices who are either Protestant or Jewish¹¹⁵ all voted in accord with settled precedent. It is mortifying to have to point this out. But it is too obvious, and too telling, to ignore. Ultimately, the five justices in the majority all fell back on a common argument to justify their position. There is, they say, a compelling moral reason for the result in *Gonzales*. Because the intact D & E seems to resemble infanticide it is “immoral” and may be prohibited even without a clear statutory exception to protect the health of the woman.”¹¹⁶

As the Court observed twenty-five years ago, “Some of us as individuals find abortion offensive to our most basic principles of

inquiry focused on the practices in ancient Persia, under Greek and Roman law, the Hippocratic Oath, the Pythagorean notions, early common law, early British law, early Christian theology including the views of Thomas Aquinas, St. Augustine Aristotle, Galen, *id.* at n. 22, and the American Medical Association, *id.* at nn. 38, 39, concluding that until relatively recently “a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.” *Id.* at 140–41.

114. Geoffrey R. Stone, *Justice Sotomayor, Justice Scalia and Our Six Catholic Justices*, THE HUFFINGTON POST (Sept. 28, 2009), http://www.huffingtonpost.com/geoffrey-r-stone/justice-sotomayor-justice_b_271229.html [<https://perma.cc/PJD8NDWJ>].

115. The current constituency of the Supreme Court includes five Catholic Judges and three Jewish judges. See JNI MEDIA, *Sotomayor: Too Many Catholics, Jews, on the Supreme Court*, BREAKINGISRAELNEWS (Apr. 10, 2016), <http://www.breakingisraelnews.com/65314/sotomayor-too-many-catholics-jews-supreme-court-jewish-world> [<https://perma.cc/F3VB4YVK>]. The death of the Catholic Justice Scalia leaves the scales more equally balanced, added to the effect of Justice Sotomayor’s more feminist leanings trumping any Catholic notions she might have.

116. Stone, *supra* note 88.

morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”¹¹⁷

A. Examination of Fetal Rights as a Determination of Its Status

While rejected as a determinant of the *Roe* decision, many proponents of the State’s interest over the future life of a fetus focus on answering: when does life begin?¹¹⁸ While conservatives and Catholics assert with perfect faith that the answer to this unscientific question is it occurs at conception, others differ—seemingly based on their religion or religiosity.¹¹⁹ I suggest it never gets fully resolved because the answer turns on a theosophical question. When it does get (temporarily) answered—the outcome differs—seemingly based on the prevailing religion of that state, or province, or country, or voter bloc,¹²⁰ or on State policy.¹²¹ But because personal religious opinions cannot justify legal incursion into a woman’s freedom to maintain her own body, another basis must be found. Thus, I investigate the possibility that the moral imperative may offer such basis.

117. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1991). It must be noted, however, that Justice Rehnquist, the sole dissenter in *Roe*, was Lutheran. See BIOGRAPHY.COM, *William Rehnquist Bio.*, BIO. (Nov. 19, 2014), <http://www.biography.com/people/william-rehnquist-9454479#supreme-court-justice> [<https://perma.cc/4AXK4EV5>].

118. See *Roe v. Wade*, 410 U.S. 113, 150 (1972) (“Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception [a justification rejected by the court]. . . . Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth.”).

119. Following its criminalization of abortion, in 1999, El Salvador amended the law to include a declaration that life began at conception, with strong support from the Catholic Church. See Nathalie Baptiste, *In El Salvador, Abortion Laws Turn Pregnant Women into Criminals*, LATIN CORRESPONDENT (Oct. 15, 2014), <http://latinrespondent.com/2014/10/el-salvador-abortion-laws-turn-pregnant-women-criminals> [<https://perma.cc/96TP2PDR>].

120. Compare *Eur. Ct. H.R., R.R. v. Poland Summary in 2011-III, Reports of Judgments and Decisions (2014) 209, 211* (holding that the doctors had breached the applicant’s rights where a twenty-three-week pregnant woman, carrying a fetus with a genetic defect, was denied an abortion because she had been denied an opportunity for genetic counseling prior to the 22 week cut off allowing abortions in her home country of Poland and the tests should have been carried out immediately after the suspicions arose) with *A., B. and C. v. Ireland*, 2010 *Eur. Ct. H.R.* 2032, 46 (denying three women an unlimited right to abortions on the grounds that Ireland, their home country had a recognized vested right in criminalizing abortion). But see UNESCO Res. 33/36, annex, *Universal Declaration on Bioethics and Human Rights* (Oct. 19, 2005) (outlining “*Principles: 1. Human dignity, human rights and fundamental freedoms are to be fully respected.; 2. The interests and welfare of the individual should have priority over the sole interest of science or society*”) (emphasis added); G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination against Women*, art. 16, 1249 U.N.T.S. 13 (Dec. 18, 1979).

121. Thus, compare Russia, Japan, China and Korea, *infra* Sec. IV.D.

B. The Moral Imperative (Natural Law)

The first enumerated recognition of rights of a “potential” person as a moral concern is found in *Stenberg v. Carhart*, which struck down a Nebraska law prohibiting partial-birth abortion.¹²² Justice Kennedy dissented, emphasizing what he described as the “consequential moral difference” between the dilation and extraction method, and other abortion procedures.¹²³

Perhaps it can be said that a moral imperative governs “infractions” against humanity, that which we call “crimes” or “civil infractions.” By comparison, religious laws, even those governing conduct between humans, are predicated on edicts of a divine entity. Under a religious framework, these same acts are not *crimes* against humanity; they are *sins* against God.¹²⁴ However, only if the predicate is based on the moral code of humanity (described as a natural law) can judicial action withstand legal scrutiny and be allowed to stand.

1. The Moral Imperative: An Overview

Because the Constitution is silent on the issue of abortion¹²⁵ any basis to regulate this private conduct must derive from one of these two extra-legal contexts: religious views (based on teachings believed

122. *Stenberg v. Carhart*, 530 U.S. 914, 914 (2000) (Kennedy, J., dissenting).

123. *Id.* at 962.

124. See *Leviticus* 19:16–18. Even loving one’s neighbor is seen, at least in Judaism, as deriving from a Divine, rather than moral imperative. See Avi Weinstein, *Be Loving to Your Neighbor as You Would Yourself*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/jsource/Judaism/loving1.html> [https://perma.cc/S6RTKHGA] (“Rabbi Horowitz . . . a renowned Kabbalist . . . comments on ‘being loving to one’s neighbor. . .’ and equates it with loving God.”); see also REUVEN HAMMER, *THE TORAH REVOLUTION: FOURTEEN TRUTHS THAT CHANGED THE WORLD* 38 (2011).

125. Biblically speaking, when an authoritative document is silent on the legitimacy or acceptability of a particular conduct, the default position is not necessarily “no.” This is evident from the incident in Numbers where the daughters of Zelafchad (of the tribe of Menashe) ask Moses to inherit their father’s property. See *Numbers* 27:2–7. While biblical laws of inheritance provide for inheritance through the male line, it is silent on whether, in the absence of male progeny, females can inherit. Rather than reverting to the more conservative negative position, Moses, with the consent and advice from the Almighty, rules that female inheritance is sanctioned where the descendent left no male offspring and rules in favor of the Zelafchad plaintiffs. “G-d spoke to Moses as follows: ‘The daughters of Tzelafchad have spoken correctly. You shall certainly give them a landholding among their father’s brothers, and transfer their father’s inheritance to them.’” *Numbers* 27:2–7. The stakes here were not simply the principle of inheritance, as many assume. Rather, it is not unlikely that the portion in question included the magnificent property of Dor Beach, see *Joshua* 12:23, and the Tribal Elders were drooling over getting their hands on this prime piece of real estate.

to be God-given), or some inherent conviction founded on the moral fabric of the vast majority of human beings. Such “moral” views can be considered legally legitimate if they are representative of the societal collective and reflect a consensus of the absolute “wrongness” of a particular act, such as murder, theft or adultery. Such convictions, often termed the “moral code” or “natural law,” served as the basis for the earliest legal codes, systematized in such works such as Hammurabi’s Code, the Code of Justinian, or the Mosaic Code (the Decalogue). While a religiously driven approach would be barred under the First Amendment’s freedom of religion clause—especially if the holding violates the tenets of another faith¹²⁶—a moral imperative that transcended individual religions or personal views could be legally acceptable.

Morality, as defined by Aristotle, is premised on the greater good,¹²⁷ or as described in philosophy, ethics and political science as

126. The notion that partial birth abortions may be medically required and demanded by non-Catholic women in certain circumstances seems to have been overlooked. It is interesting to compare the attention given to the rights of Native Americans when they conflict with the general “moral” views under The Religious Freedom Restoration Act (RFRA). Thus, in the 1960s, the Supreme Court interpreted the Free Exercise Clause of the First Amendment as banning laws that burdened a person’s exercise of religion, which technically puts *Gonzales* in direct conflict with RFRA. Compare *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (reversing a finding that a woman fired for declining to work on Saturdays for religious reasons was not entitled to unemployment benefits) and *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972) (finding Amish and Mennonite parents were not required to send their children to formal high school which went counter to their religious beliefs), with *Lyng v. Nw. Indian Cemetery Protective Ass’n.*, 485 U.S. 439, 452 (1988) (Native Americans’ religious rights could not defeat a federal road building and timber harvesting program); *Emp’t Div. v. Smith*, 494 U.S. 872, 872 (1990) (an employee terminated for religious peyote use did not qualify for unemployment benefits) (invalidated by State; the RFRA now applies only to federal law). The case of *Zubik v. Burwell*, 135 S. Ct. 1544, 1560 (2015), which involves furnishing contraception against a vendor’s will, is especially relevant here in that it seeks to determine the reach of the RFRA, which states that the government may not impose a burden on a person’s free exercise of religion, unless doing so furthers a “compelling governmental interest.” 42 U.S.C. § 2000(bb)(1). Justice Scalia’s views are particularly reprehensible here. In a CBS interview, writing Jesuit moral manuals, he slipped in a religious view under the guise of a moral stance. See CBS Interview by Lesley Stahl with Justice Antonin Scalia (Apr. 27, 2008). The Court, by framing the issue (in an opinion with which Justice Scalia joined) as “an important question of religion and moral philosophy . . . that has the effect of enabling . . . an immoral act by another,” the Court remade the question into a mixed moral-religious one before the court concluded that federal courts should not answer religious questions because they would in effect be deciding whether certain beliefs are flawed. See *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2778 (2014).

127. See ARISTOTLE, *NICOMACHEAN ETHICS* 1–2 (Terrence Irwin, 2d. ed. 1999). See also *Philosophy 302: Ethics, Aristotle’s Ethics*, PHILOSOPHY LANDER.EDU (Apr. 17, 2006), <http://philosophy.lander.edu/ethics/aristotle1.html> [<https://perma.cc/3ZGD3EDS>] (“The good of human beings cannot be answered with the exactitude of a mathematical problem. . . .

1. Ethics starts with actual moral judgments before the formulation of general principles.

2. Aristotle presupposes natural tendencies in people.”).

a common “good” shared and beneficial for all¹²⁸ or most members of a given community.¹²⁹ This common good has sometimes been seen as a utilitarian ideal, representing the greatest possible good for the greatest possible number of individuals.¹³⁰ “The practice of abiding by societal laws is one of the most prevalent aspects of Aristotelian justice. Aristotle assumed that in an ideal democracy, legislation would embody the values that the society held as reflective of virtuous action.”¹³¹

One way of examining whether the moral code—as a manifestation of the common good—is the driving force behind current abortion regulation is by examining the confluence of ancient and archetypical codes of law, those transcending individual religions, which were adopted by vast swaths of society and which left their mark on later legal works—and current views. Another approach is to evaluate current perspectives in advanced or industrialized countries and compare intercountry variations. If the general standards governing abortion throughout the world are basically similar, one can entertain the proposition that societal morals (i.e., natural law) are governing the decision-making. If they vary greatly, we must conclude that the driving force regulating abortion is idiosyncratic cultural values or nationalist religious views. As such, in the absence of any universal moral view on abortion, its regulation should be *dehors* legal review.

2. *Morality and Abortion: A Historical Approach*

Some claim the prerogative for protecting fetal life centers on rights of a “potential person,” yet unborn and only theoretically viable, now residing within the personal domain of its mother.¹³² This group asserts that the fetal-entity is so related to our concept of a live human being that societal mores apply to determining its welfare.¹³³ In this vein, they claim that prohibiting taking a human life

128. See JOHN RAWLS, *A THEORY OF JUSTICE* 246 (1971).

129. See Robert Cavalier, *Meta-ethics, Normative Ethics, and Applied Ethics. Online Guide to Ethics and Moral Philosophy*, <http://caae.phil.cmu.edu/cavalier/80130/part1/sect4/KantReading.html> [<https://perma.cc/DXS3LU2A>] (describing those reasons as selfishly motivated).

130. See JOHN STUART MILL, *UTILITARIANISM* 41 in *MILL'S UTILITARIANISM: TEXT AND CRITICISM* (James M. Smith & Ernest Sosa, eds., 1969).

131. Sarah Tischler Aikin, *Just Violence: An Aristotelian Justification of Capital Punishment*, CAL. STATE UNIV. AT CHICO, <http://www.csuchico.edu/pst/JustViolence.htm> [<https://perma.cc/T6TK2GLU>]; see also ARISTOTLE, *supra* note 127, at 68.

132. See Jed Rubenfeld, *On the Legal Status of the Proposition that “Life Begins at Conception,”* 43 *STAN. L. REV.* 599, 599–600 (1991).

133. See *The Grounds of Moral Status*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Mar. 14, 2013), <http://seop.illc.uva.nl/entries/grounds-moral-status> [<https://perma.cc/Q4Y3FRU7>].

applies equally to this potential-person, and hence the act of abortion is considered murder.¹³⁴ Because the prohibition against murder is a generally accepted natural law, the pro-lifers argue that killing a fetus (an innocent pre-person)¹³⁵ falls into the category of (non-defensible) murder, and hence is subject to criminal regulation. Because it is asserted (without scientific proof) that this entity, which has yet to take one breath of air into its lungs has been invested with a human soul, it is now not one whit different from you or me, and hence entitled to the same degree of protections and justice afforded all humans. While these arguments are tainted with religious innuendo, it remains to be seen whether there is a moral component, independent of religion, which might justify these arguments.

a. The Sumerian Code of Ur-Nammu

From earliest times, civilized society enumerated acts it considered abhorrent and reprehensible, and hence punishable. Even when differences existed amongst primitive societies (largely reflective of the national or prevalent religion), certain commonalities existed, amongst them prohibitions against unwarranted killing of another human being. Among the oldest codes (predating Hammurabi's) is the Sumerian Code of Ur-Nammu, written sometime between 2100 and 2050 BCE¹³⁶ That code states, "[i]f a man commits a murder, that man must be killed."¹³⁷ This precept did not apply to fetal protection.

b. Hammurabi's Code

Often cited as the basis of all codes of societal conduct, Hammurabi's Code,¹³⁸ written shortly before 1800 BCE and about three hundred years after Ur-Nammu, is the earliest preserved codification of human behavior. It is commonly cited for its almost visceral condemnation of murder with multiple provisions prohibiting the act, reiterating a seeming primordial programming.¹³⁹ Significantly,

134. See *Introduction to the Abortion Debate*, BBC (2014), <http://www.bbc.co.uk/ethics/abortion/philosophical/introduction.shtml> [<https://perma.cc/F7TGH6CP>].

135. A purely Catholic notion.

136. See Joshua J. Mark, *Ur-Nammu*, ANCIENT HISTORY ENCYCLOPEDIA (June 16, 2014), <http://www.ancient.eu/Ur-Nammu> [<https://perma.cc/GXU8G36B>].

137. Code of Ur-Nammu.

138. Jane McGrath, *What's So Important About the Code of Hammurabi?*, HOWSTUFFWORKS (Feb. 17, 2009), <http://history.howstuffworks.com/historical-events/code-of-hammurabi.htm> [<https://perma.cc/6DLBHUG6>].

139. See, e.g., *The Code of Hammurabi* §§ 209–211, THE CONSTITUTION SOC'Y, <http://www.constitution.org/ime/hammurabi.htm> [<https://perma.cc/5FTKFUQQ>]. *Contra* Michael H. Reggio, *History of the Death Penalty*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html> [<https://perma.cc/2CSLMYN6>].

Hammurabi's code does not consider abortion as murder; feticide is regarded as a property right, compensable according to the stature of the "owner"—the woman bearing the fetus:

If a man strike a free-born woman so that she lose her unborn child, he shall pay ten shekels for her loss. . . . If a woman of the free class lose her child by a blow, he shall pay five shekels in money. . . . If he strike the maid-servant of a man, and she lose her child, he shall pay two shekels in money.¹⁴⁰

While many of the tenets of the Code are recognized by today's society (to wit, the provisions regarding judicial misconduct or medical malpractice, albeit perhaps not punished as harshly),¹⁴¹ the provisions regarding feticide are in stark contrast to those advocated by the Catholic Church, pro-life groups or recent Supreme Court rulings on abortion. Thus, we see that feticide, at least according to Hammurabi, was not considered murder; the fetus was considered neither a human, nor even alive.¹⁴² For all intents and purposes, it was regarded as property—throughout its gestation.¹⁴³ To be sure, recklessly damaging property of another was contemptible, and in fact the Code of Hammurabi provides ample punishment—but it was not considered murder.¹⁴⁴

c. The Mosaic Code (The Decalogue)

The Mosaic Code (alternatively called the Decalogue or the Ten Commandments) was revealed circa 1450 BCE, and certainly no later than 600 BCE for those who eschew Divine Revelation.¹⁴⁵ It provided for both sins against the Deity and crimes against humanity. Regulation of the two were different, and civil crimes were dealt with in separate sections of the Bible¹⁴⁶ and resolved by a civil

140. *The Code of Hammurabi*, *supra* 139, at §§ 209, 211, 213.

141. See CHARLES F. HORNE, *Introduction* (1915), in ACADEMY FOR ANCIENT TEXTS, <http://www.ancienttexts.org/library/mesopotamian/hammurabi.html> [<https://perma.cc/W3AT73H2>] ("The judge who blunders in a law case is to be expelled from his judgeship forever, and heavily fined. The witness who testifies falsely is to be slain. Indeed, all the heavier crimes are made punishable with death . . .").

142. See *The Code of Hammurabi*, *supra* note 140, at § 211.

143. *Id.* §§ 209, 211, 213.

144. See, e.g., *id.* § 120.

145. See *The Ten Commandments*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Ten-Commandments> [<https://perma.cc/QCY3TZ6P>].

146. *Exodus* 21:35–36 (ox cause of damages); *Exodus* 21:33 (pit cause of damages); *Exodus* 22:4 (crop destroying beast cause of damages); *Exodus* 22:5 (conflagration cause of damages) (codified in THE MISHNAH 503 (Jacob Neusner trans., Yale University Press 1988); in the section dealing with civil damages for tort liability, called תיקון, the Hebrew word used today for "torts.").

judiciary, while religious infractions were tended to by the priestly class.¹⁴⁷

Mosaic Law has been adopted by the Catholic, Greek Orthodox, and Protestant Churches (and many non-believers). Yet, it, too, does not equate feticide¹⁴⁸ with killing a human¹⁴⁹: The law of homicide in the Torah, found in *Exodus* 21:12, reads, “He who smites a man . . .” According to the Talmud, which refers to *Lev.* 24:17, the passage from *Exodus* includes any human person, defined as a one-day-old child (with the presumption of a full-term pregnancy), but excludes the fetus because the fetus is not a person until it is born.¹⁵⁰ Mosaic Law treats injury or death to the fetus as does the Code of Hammurabi. Thus, *Exodus* 21:23 denies capital crime status to feticide in Jewish law:

[I]f men strive [fight], and hurt a woman with child, so that her fruit depart, and yet no harm follow; he shall be surely fined, according as the woman’s husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow [i.e., she is killed], then thou shalt give life for life . . .¹⁵¹

And while, from a religious point of view, most rabbis treat abortion in a most serious manner (unless the mother’s life or health is imperiled—in which case abortion is *required*), *halakhah* (Jewish Law) tells us that even if not performed to save the life or protect the health of the mother, abortion remains a noncapital sin and not tantamount to murder.¹⁵²

d. *The Justinian Code*

The Justinian Code was written in about 530 CE, a millennium or so after the Mosaic Code was enacted.¹⁵³ It was a compilation of

147. The Chapter of *Jethro* in the Book of *Exodus*. See *Exodus* 18:21–23.

148. Aryeh Spero, *A Talmudic Overview of Abortion*, MIDSTREAM 20, 22 (1990) (noting some would allow abortion on the grounds of mental anguish as late as the end of the second trimester. Thereafter, only danger to the life and physical health of the mother would suffice). Nevertheless, there is no question that before forty days the fetus is not considered a person; at best it enjoys quasi-person status.

149. For an excellent treatise of the comparison of the Jewish Law on abortion and the teachings of the Catholic Church, see Leila Bronner, *Is Abortion Murder? Jews and Christians Will Answer Differently*, LILITH (1997–98), <http://lilith.org/articles/is-abortion-murder> [<https://perma.cc/F3TZ2K44>].

150. *Accord id.*

151. *Exodus* 21:22 (ASV).

152. See Bronner, *supra* note 149.

153. See Code of Justinian, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Code-of-Justinian> [<https://perma.cc/SM2A6UYN>].

a complex of earlier works, especially those created in 438 CE by the Roman Emperor, Theodosius II, adopted by Valentinian and introduced before the Roman senate.¹⁵⁴ Under Justinian's aegis, the works of Theodosius II and Constantine I combining both Greek and Roman legal tradition were systematized.¹⁵⁵ Influenced by his wife, Theodora, Justinian also provided for a more exalted status of women than seen previously, including the establishment of property rights.¹⁵⁶

Justinian was prescient enough to elucidate the differences between what is now referred to as civil laws, i.e., those inherent to a particular nation which integrate legal, cultural and historical influences, and those pertaining to natural law, i.e.,

[T]hat which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished.¹⁵⁷

While the impact of the Ecclesiastical Courts of the Catholic Church during the period between 700 and 1000 cannot be underestimated,¹⁵⁸ the Justinian Code served as the model for most of Europe's laws until the twelfth century.¹⁵⁹

154. *See id.*

155. *See id.*

156. Matthew Barrett, *Women's Rights in the Byzantine Empire*, CHAMPLAIN COLLEGE (Apr. 16, 2015), <http://globalconnections.champlain.edu/2015/04/16/womens-rights-in-the-byzantine-empire> [<https://perma.cc/F49GT4X8>].

157. *Medieval Sourcebook: Corpus Iuris Civilis, 6th Century*, FORDHAM UNIV. (1996), <http://legacy.fordham.edu/halsall/source/corpus1.asp> [<http://perma.cc/N74CG4NA>] (citing THE INSTITUTES OF JUSTINIAN 3–5 (B. Moyle trans., Oxford Univ. Press 1986)).

158. THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CONTROL* 15 (2010).

159. *See* Paul Halsall, *Medieval Sourcebook, The Institutes 535 C.E.*, FORDHAM UNIV., <http://sourcebooks.fordham.edu/halsall/basis/535institutes.asp> [<https://perma.cc/MGM6Q23P>] (“Under the direction of Tribonian, the Corpus Iurus Civilis [Body of Civil Law] was issued in three parts, in Latin, at the order of the Emperor Justinian. The Codex Justinianus (529) compiled all of the extant (in Justinian's time) imperial constitutiones [sic] from the time of Hadrian. It used both the Codex Theodosianus and private collections such as the Codex Gregorianus and Codex Hermogenianus. The Digest, or Pandects, was issued in 533, and was a greater achievement: it compiled the writings of the great Roman jurists such as Ulpian along with current edicts. It constituted both the current law of the time, and a turning point in Roman Law: from then on the sometimes contradictory case law of the past was subsumed into an ordered legal system. The Institutes was intended as [a] sort of legal textbook for law schools and included extracts from the two major works. Later, Justinian issued a number of other laws, mostly in Greek, which were called Novels.”) (brackets in original); *see also* THEODOSIAN CODE, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001) (“Latin Codex Theodosianus, Roman legal code, issued in 438 by Theodosius II, emperor of the East. It was at once adopted by Valentinian III, emperor

The Code explicitly recognizes that killing is permissible under certain enumerated circumstances, and not all killing was equated with murder: “To kill wrongfully is to kill without any right: consequently, a person who kills a thief is not liable to this *actio*, that is, if he could not otherwise avoid the danger with which he was threatened.”¹⁶⁰ Nor is a person made liable by this law who has killed by accident, provided there is no fault on his part, for this law punishes fault as well as willful wrong-doing.”¹⁶¹ More specifically, the Justinian code rejects the notion that feticide is *per se* outlawed—at least prior to forty days of gestation—because fetuses under forty days did not have souls.¹⁶² This finding is consistent with the concept that feticide would not constitute human killing prior to that point in time.¹⁶³ One might argue, then, that under Justinian the rights of the unborn fall into a category that interfaces the domains of human and property—referred to as “*usufructus*”¹⁶⁴—or the right of using and taking the fruits of things belonging to others, so long as the substance of the things used remains. It is a right over a corporeal thing, and if this thing perish, the *usufructus* itself necessarily perishes also.¹⁶⁵ This concept suggests that saving the endangered life of the mother terminates any status the fetus might have enjoyed.

It took a thousand years for Justinian’s views of feticide to be rejected by the Church—and then only for a three-year period.¹⁶⁶ This occurred in the sixteenth century when Pope Sixtus handed

of the West. The code was intended to reduce and systematize the complex mass of law that had been issued since the reign of Constantine I. To a large extent it was based upon two private compilations, the Gregorian (Codex Gregorianus) and the Hermogenian (Codex Hermogenianus). The Theodosian Code was used in shaping the Corpus Juris Civilis.”)

160. ANCIENT HISTORY SOURCEBOOK, *Doc. 10—Justinian, The Institutes (c. 535 CE)* <http://courses.wccnet.edu/~jrush/121source10.html> [<http://perma.cc/K8T82KY9>].

161. Halsall, *supra* note 159.

162. Julia Neuberger, *Embryos and Ensoulment: When Does Life Begin?*, 365 THE LANCET 837 (Mar. 5, 2005), [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(05\)71025-4.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(05)71025-4.pdf).

163. *But see id.* at 838.

164. Some recognition of rights accruing to the unborn exists under the Code under the laws of inheritance. JUSTINIAN, THE DIGEST OF JUSTINIAN 28 (Charles H. Wade trans., Cambridge Univ. Press 1904).

165. THE INSTITUTES OF JUSTINIAN 16 (Thomas Collett Sandars trans., 1917) (“A person is *ingenuus* who is free from the moment of his birth, by being born in matrimony, of parents who have been either both born free, . . .”). Given the testament given to the Natural Law as the final arbiter of human social intercourse by Justinian, a foray into the customs and practices of the animal world might be more authoritative than religious proclamations of a latter-day Catholic cleric on matters pertaining to damage or injury done to the unborn, an issue shared with the natural world, as opposed to the laws of inheritance, a wholly human devised mechanism to distribute accumulated wealth.

166. See Lindsey Disney & Larry Poston, *The Breath of Life: Christian Perspectives on Conception and Ensoulment*, ANGLICAN THEOLOGICAL REV. 271, 278 (2010), <http://www.anglicantheologicalreview.org/static/pdf/articles/disney-poston.pdf>.

down the edict that ensoulment began at conception.¹⁶⁷ Sixtus' decree was rescinded less than three years later by Pope Gregory XIV.¹⁶⁸ St. Thomas Aquinas' (1224–1275) view, however, was consistent with Justinian's.¹⁶⁹

Neither historical legal or moral codes, then, reflect the view that the fetus has any rights *superior* to its mother. Nor does history document a legally protected fetal right to be born—and surely never before forty days of gestation. In sum, even if the mother's life or health is not endangered, Jewish law regards abortion as a sin and not a crime (as would murder have been),¹⁷⁰ under Hammurabi's Code it is regarded as neither, and in Justinian's code only after forty days would any actionable rights lie.¹⁷¹

C. Current Views of "The Greater Good" as a Determinant of Morality

An overview of current international laws informs us that the fetus' "right to be born" varies too widely from year to year, from country to country, and from judge to judge to generate a consensus representing the values of the greatest number of human beings. Thus, no universally accepted moral view can be said to exist on the international platform today. Further, if some (any) moral or natural law consensus did exist, we should expect similarities—presumably based on some objective standard such as viability,¹⁷² (generally given in legal literature as around the twenty-second or twenty-third week of pregnancy).¹⁷³ In other words, if "morality" were informing the laws, we should see some overarching similarity in abortion rulings throughout the world.

We don't.

The parameters for allowable abortion vary drastically from country to country. In six countries, the fetus enjoys an *absolute* right to be born, and any right to life a woman may have—whether to life, health or the pursuit of happiness—is subordinated to the fetus' right to be born.¹⁷⁴ In some sixty countries, for at least a period

167. *Id.*

168. *See id.*

169. *See* DAVID ALBERT JONES, THE SOUL OF THE EMBRYO: AN ENQUIRY INTO THE STATUS OF THE HUMAN EMBRYO IN THE CHRISTIAN TRADITION 73 (2004). Even Pat Buchanan, an avid proselyte of pro-life thinking admitted this to the author in a personal conversation at the University Club of Washington, D.C. (Nov. 29, 2007).

170. *See* Bronner, *supra* note 149.

171. WILLIAM EDWARD HARTPOLE LECKY, HISTORY OF EUROPEAN MORALS: FROM AUGUSTUS TO CHARLEMAGNE 99 (1890).

172. *See, e.g.*, Burton v. Florida, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010).

173. *See, e.g.*, R.R. v. Poland, [2011]-III Eur. Ct. H.R. 209 ¶ 203.

174. The Holy See, Dominican Republic, Malta, El Salvador, Nicaragua, and Chile do not allow abortion under any circumstances. *See* Devon Haynie, *Countries Where Abortion*

of time during the pregnancy, abortion is allowed on demand (i.e., because the mother wishes it and proof of medical or health or family welfare reasons is not necessary).¹⁷⁵ Interestingly, these time limits vary drastically ranging from ten weeks in Portugal¹⁷⁶ to twenty-four weeks in parts of the United Kingdom (the Isle of Man)¹⁷⁷ and Singapore.¹⁷⁸ Yet it is difficult to believe a Portuguese fetus can reach personhood at ten weeks, but that the fetus must wait another three months before it achieves the same status if its mother lives in Singapore.¹⁷⁹ It is hard to accept that a Chilean woman has such a poverty of rights that she can *never* obtain an abortion under any circumstances (even with consequently high suicide rates in pregnant women, which some attribute to the absolute criminalization on abortion),¹⁸⁰ while in Spain her wishes govern entirely—at least until the fetus reaches a gestational age of fourteen weeks. These facts suggest that fetal attainment of “personhood” varies by nationality—a

is Illegal Under Most Circumstances, U.S. NEWS & WORLD (Feb. 8, 2016), <http://www.usnews.com/news/best-countries/articles/2016-02-08/10-countries-where-abortion-is-illegal-under-most-circumstances> [<https://perma.cc/NQ73QW4X>].

175. Angela Baglini, *Gestational Limits on Abortion in the United States Compared to International Norms*, CHARLOTTE LOZIER INST. 1, 5 (2014), <https://lozierinstitute.org/wp-content/uploads/2014/02/American-Report-Series-INTERNATIONAL-ABORTION-NORMS1.pdf>.

176. Europe’s Abortion Rules, BBC News (Feb. 12, 2007), <http://news.bbc.co.uk/2/hi/europe/6235557.stm> [<http://perma.cc/8X8WGLXE>]. See also *The Rights of the Unborn Child and Artificial Procreation, Teachings of the Catholic Church on Abortion*, PRIESTS FOR LIFE (Ian Gavin trans.), <http://www.priestsforlife.org/magisterium/rightsofunbornchild.htm> [<https://perma.cc/E5S8P7SU>].

177. See Grégor Puppinck, *Abortion in European Law: Human Rights, Social Rights, and the New Cultural Trends*, 4 AVE MARIA INT’L L. J. 29, 30–31 (2015) (“The central question was, and still is, whether or not the unborn child is a person within the meaning of Article 2, protecting ‘[e]veryone’s right to life.’ The [European] Court [of Human Rights] has kept this question open in order to allow the States to determine when life begins, and therefore, when legal protection should start. On the one hand, the Court permits each State, within a ‘margin of appreciation’ to determine ‘when the right to life begins.’ On the other hand, the Court since Brüggenmann and Scheuten v. FRG and R. H. v. Norway has always refused to exclude the unborn from the scope of the Convention’s provisions by declaring the unborn is not a person within the meaning of the Convention”) (internal citations omitted).

178. AWARE (ASSOCIATION OF WOMEN FOR ACTION AND RESEARCH), <http://www.aware.org.sg/abortion> [<http://perma.cc/NQA44DYP>]. Singapore imposes a requirement for pre-abortion counseling, but “[b]efore 17 April 2015, non-Singaporean women, or women with three or more children, or women who have not passed the PSLE and have no secondary education were not obliged to undergo pre-abortion counselling, but new guidelines make counselling mandatory for all patients.” *Id.* See also *Guidelines on Termination of Pregnancy*, SINGAPORE MINISTRY OF HEALTH 1, 4 (Apr. 17, 2015), https://www.moh.gov.sg/content/dam/moh_web/Legislations/Legislation%20And%20Guidelines/TOP_Guidelines%202015.pdf.

179. Europe’s Abortion Rules, *supra* note 176.

180. Mexico, Italy, Canada, UK, Singapore, the Netherlands, India, Sweden. *Id.* See Reva B. Siegel, *The Constitutionalization of Abortion*, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1074 (May 2012), https://www.law.yale.edu/system/files/documents/pdf/Faculty/Siegel_ConstitutionalizationAbortion.pdf.

logically untenable position which undermines *obiter dicta* about fetal personhood in American cases.

Where extenuating circumstances impact the regulations (taking into consideration comparative rights of the mother, such as situations in which she is allowed to abort the fetus beyond the point of viability)—we find even greater variation. Sixty-eight countries allow for late-term abortion when the mother's *life* is at stake. Another fifty-seven deign to protect the mother's *health* at the expense of fetal viability. Yet an additional fourteen countries allow for the fetus's existence to be terminated for socioeconomic motives.¹⁸¹ Additional exceptions are recognized in other countries (e.g., rape, incest, fetal birth defects and the well-being of the family) but these also vary by country, although industrially advanced countries are more lenient in allowing abortions than African and less developed countries.¹⁸² Again, a unified moral basis for these gross differentials is wanting and there is no consistent common good for all, to justify the across-the-board variation.

If the predicate for abortion restrictions arises from a moral perspective, it is difficult to accept a gross variation exists in when a fetus attains "personhood," the predicate for many of these regulations. Thus to argue that "morality" is the governing rubric for sanctioning a State's right to supervise the right of the fetus to be born is untenable.

D. Does Religion Influence a State's Decision to Regulate Abortion?

I have shown that the rubric of the common good or morality, evaluated historically, chronologically and geographically, has insufficient concordance and is insufficiently uniform to sustain a morally based "legitimate interest" by the State over a fetal right to be born. We need to find a different driver. As noted earlier, Professor Stone postulates that decisions regarding abortion are religiously driven.¹⁸³ Consequently, I now examine whether the geographic differential has a basis in religion, and whether this accounts for the differential in regulations.

Religious tenets pertaining to abortion generally are predicated on the timing of ensoulment. The Catholic and conservative belief is that human life (i.e., investiture of the soul) occurs at conception, driving the notion that abortion is prohibited from that moment on. Other

181. Louise Finer & Johanna B. Fine, *Abortion Law Around the World: Progress and Pushback*, 103 AM. J. PUB. HEALTH 585, 585 (2013).

182. *The World's Abortion Laws*, *supra* note 9.

183. *See* Stone, *supra* note 114.

religions believe the soul invests at forty days after conception,¹⁸⁴ a concept reflected in some country's laws.¹⁸⁵ Still, other views claim that soul investiture occurs at the moment of quickening, generally between fourteen weeks and eighteen weeks,¹⁸⁶ this can also be seen in a few countries' regulations.¹⁸⁷ It remains to be seen whether there is any correlation between prevalent religious views and a country's abortion regulations.

1. *Abortion in Catholic Countries*

a. *The Six Absolutist Countries—And Ireland*

A surprising discrepancy in abortion policy is found among Catholic countries. In six overwhelmingly Catholic countries—and only in Catholic countries—is abortion forbidden (and criminalized) under *all* circumstances (even to save the mother's life).¹⁸⁸ Along with The Holy See and Malta,¹⁸⁹ where religious law is the official law of the land, and the Dominican Republic where the population is overwhelmingly Catholic (90%), Chile, Nicaragua and El Salvador subscribe to these draconian abortion laws.¹⁹⁰ In the latter three countries, the population identifying themselves as Catholic hovers around 55 and

184. Julia Neuberger, *Embryos and ensoulment: when does life begin?*, THE LANCET (Mar. 5, 2015), <http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736%2805%2971025-4.pdf>. Justinian's view that ensoulment occurs at forty days has parallels in Kaballistic lore, which holds that on that date a divine voice goes forth and proclaims the intended mate for the prospective soul. *See id.*

185. Saudi Arabia, which follows Sharia law, allows abortion until the fourth month if the life of the mother is in danger—but it also provides certain broader allowances for abortion until the fortieth day. *See infra* note 239.

186. MALCOLM I. LEVENE, ET AL. *ESSENTIALS OF NEONATAL MEDICINE* 8 (3rd ed. 2000).

187. Hungary, Romania, Spain, Germany, Switzerland and Austria allow abortion until at least the twelfth week; Sweden allows abortion until the eighteenth week. Europe's Abortion Rules, *supra* note 176. Islamic countries such as Iran and Saudi Arabia allow abortion if the mother's life is at stake until the sixteenth or eighteenth week (the timing of investiture of the soul according to Islam). *See infra* note 239.

188. Julia Calderone, *Here are the 6 Countries where a woman cannot have an abortion even if it will save her life*, TECH INSIDER (Oct. 8, 2015), <http://www.businessinsider.10/pew-research-countries-abortion-save-life-2015-10> [<https://perma.cc/H4CSFRQY>].

189. Constitution of Malta, art. 2, ¶ (1)–(3) (stating that the religion of Malta is the “Roman Catholic Apostolic Religion” (¶ 1), that the authorities of the Roman Catholic Church “have the duty and the right to teach which principles are right and wrong” (¶ 2) and that religious teaching of the Roman Catholic apostolic faith “shall be provided in all [s]tate schools as part of compulsory education” (¶ 3)).

190. *Chile: Extreme Anti-Abortion Law Creates Climate of Fear and Substandard Health Care for Women*, AMNESTY INT'L (Sept. 28, 2015), <https://www.amnesty.org/en/press-releases/2015/09/chile-extreme-anti-abortion-law-creates-climate-of-fear-and-substandard-health-care-for-women> [<https://perma.cc/4LA3M8LP>].

58%¹⁹¹ and hence it is difficult to understand the driving force of religion on abortion practice in these countries, a feature warranting further investigation. In Ireland, Catholic constituents comprise 84% of the population.¹⁹² Ireland is also overwhelmingly religious (indicated by church attendance).¹⁹³ Here abortion is available—but only if the mother's life is at stake.¹⁹⁴ Although Ireland does not prevent pregnant women from traveling to neighboring England for an abortion,¹⁹⁵ counseling facilities which would facilitate this option are unavailable, effectually foreclosing or at least strongly curtailing this abortion alternative.¹⁹⁶ The Irish approach should be contrasted with the British, where the official religion is Anglican (Protestant) and abortions laws are among the most liberal in the world,¹⁹⁷ allowable where the life or health of the pregnant woman *or other existing children of the family are at risk*—until the twenty-fourth week of pregnancy.¹⁹⁸ Theoretically the approval of two physicians is needed, a requirement often dispensed with in practice.¹⁹⁹

191. See *Religion in Latin America*, PEW RESEARCH CTR. (Nov. 13, 2014), <http://www.pewforum.org/2014/11/13/religion-in-latin-america> [<https://perma.cc/F23QUYSV>].

192. Paul Hyland, *Number of Catholics at Record High, Despite Lowest Percentage Ever-CSO*, *thejournal.ie* (Oct. 18, 2012), <http://www.thejournal.ie/religious-statistics-census-2011-640180-Oct2012> [<https://perma.cc/KRZ2WQFD>].

193. 'One in 10' Attends Church Weekly, *BBC NEWS* (Apr. 3, 2007), http://news.bbc.co.uk/2/hi/uk_news/6520463.stm [<https://perma.cc/872KW45E>].

194. See *A, B and C v. Ireland*, 2010-IV Eur. Ct. H.R. 185, 187.

195. See Henry McDonald, *No Extending Abortion Act to Northern Ireland, First Female Leader Says: DUP's Arlene Foster Vows to Retain Almost Total Ban on Terminations—but Agrees to 'Carefully Consider' Court Ruling on Rape*, *THE GUARDIAN* (Jan. 6, 2016), <https://www.theguardian.com/world/2016/jan/06/no-extending-abortion-act-to-northern-ireland-first-female-premier-arlene-foster-court-ruling-rape> [<https://perma.cc/M34Q26XP>].

196. See *A, B and C v. Ireland*, 2010-IV Eur. Ct. H.R. 185, 196–97, 216 (describing the necessity to travel elsewhere for abortion procedures).

197. See *Abortion Act 1967*, c. 87, sec. 1 (Eng.), http://www.legislation.gov.uk/ukpga/1967/87/pdfs/ukpga_19670087_en.pdf (“[A] person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith— (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or (b) that the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”).

198. *Id.* (emphasis added).

199. *Prolife Alliance v. British Broadcasting Corporation* [2002] EWCA (Civ) 297 [6] (Eng.). Lord Justice noted, “There is some evidence that many doctors maintain that the continuance of a pregnancy is always more dangerous to the physical welfare of a woman than having an abortion, a state of affairs which is said to allow a situation of *de facto* abortion on demand to prevail.” *Id.* ¶ 6.

b. The Reverting Catholic States: Now Abortion Is Allowed—Now It Isn't

i. Poland

Poland's population is overwhelmingly Catholic,²⁰⁰ and abortion is generally banned.²⁰¹ Exceptions, however, do exist, such as where the woman's life or health is endangered, when the fetus is seriously malformed (both requiring physician certification), and when the pregnancy is a result of a criminal act (requiring certification by the prosecutor).²⁰² By contrast, before the fall of the Soviet Union when the country was under Communist rule, abortion was both legal in a wide variant of circumstances, such as where birth would create "difficult living conditions,"²⁰³ and well-utilized. Some estimates of pregnancies terminated by abortion during the Communist era prior to 1989 run as high as 50%.²⁰⁴

Nevertheless, the current milieu respects some maternal rights. In two cases where abortion was legal but denied (one being a rape

200. "Catholic 87.2% (includes Roman Catholic 86.9% and Greek Catholic, Armenian Catholic, and Byzantine-Slavic Catholic .3%), Orthodox 1.3%." See INDEXMUNDI, *Poland Religions* (June 30, 2015), <http://www.indexmundi.com/poland/religions.html> [<http://perma.cc/9DJWTZPS>] (citing the CIA WORLD FACTBOOK); Susan A. Cohen, *Nepal Reforms Abortion Law to Reduce Maternal Deaths Promote Women's Status*, THE GUTTMACHER REPORT ON PUB. POLICY REV. (May 2002), http://www.guttmacher.org/sites/default/files/article_files/gr050213.pdf ("Other than Poland, which reversed its long-standing policy in 1997 and outlawed abortion in most circumstances, no country has restricted its abortion law in any significant way in many years.").

201. See Donald Snyder, *Poland Debates Proposal to Ban all Abortion*, NAT'L CATHOLIC REPORTER (July 13, 2016), <https://www.ncronline.org/news/world/poland-debates-proposal-ban-all-abortion> [<http://perma.cc/N58NBF7X>].

202. *Id.*

203. See *Population Policy Data Bank*, POPULATION DIV. OF ECON. AND SOC. AFFAIRS OF THE UNITED NATIONS SECRETARIAT 38 ("A law adopted by the Polish Parliament (Sejm) on 27 April 1956 (Law No. 61) further liberalized the abortion laws by permitting abortion on medical grounds, if the pregnancy resulted from a criminal act or because of 'difficult living conditions'. . . . [S]erious defects of the unborn child often constituted 'difficult living conditions'. . . . [A]ccess to abortion after the passage of the 1956 legislation remained largely constant until 1990 with the election of the . . . non-Communist Government . . . Under regulations issued by the [new, non-Communist] Ministry of Health and Social Welfare (Ordinance of 30 April 1990), a request for an abortion on the grounds of difficult living conditions had to be approved by two gynecologists and a general practitioner. The pregnant woman was also required to obtain the counselling of a State-approved psychologist. . . . In 1993, Parliament . . . eliminate[d] entirely 'difficult living conditions' as a ground for . . . legal abortions. Henceforth, abortions could be performed legally only in cases of serious threat to the life or health of the pregnant woman, as attested by two physicians, cases of rape or incest confirmed by a prosecutor, and cases in which prenatal tests, confirmed by two physicians, demonstrated that the foetus [sic] was seriously and irreversibly damaged [and only up to a twelve week limit].").

204. Drusilla Menaker, *33 Years After Legalizing Abortion, Poland Is Pressured to Reconsider*, LOS ANGELES TIMES (June 4, 1989), http://articles.latimes.com/1989-06-04/news/mn-2570_1_anti-abortion-leader-roman-catholic-poland-dr-zofia-kuratowska [<https://perma.cc/5JXKU5MM>].

case,²⁰⁵ and one where the child was born with a genetic defect),²⁰⁶ the European Court of Human Rights ruled that the women's rights of Respect for Private and Family life and the right to Liberty and Security were breached, and the women were awarded compensation.²⁰⁷

ii. Russia

Until recently, Russian law guaranteed women freedom in relation to reproduction and reproductive health. However, this right has been slowly but steadily undermined. The forces behind this trend are actively seeking to dramatically change current legislation. . . .

For decades, Russian women could have abortion up [until] week 12 of pregnancy; between 12 and 22 weeks, medical or social grounds were required . . . [but] [i]n mid 2011,²⁰⁸ a group of Parliamentarians teamed up with Russian Orthodox Church activists [41% of the population are Russian Orthodox, while 13% are Atheist] and announced their desire to ban abortions, and the new version of the health law with restricting amendments was introduced. . . .²⁰⁹

While the resurfacing respect for religion seems to play a role in the clamping down on abortion rights in Russia, the decline in population (often attributed to devastating socioeconomic conditions)

205. Press Release, European Court of Human Rights Registrar, Teenage Girl Who Was Raped Should Have Been Given Unhindered Access to Abortion ECHR 398 (Oct. 30, 2012) (stating the courts ruling that a teenage girl who was raped should have been given unhindered access to an abortion) (“[I]n the case of P. and S. v. Poland (application no. 57375/08), which is not final, the European Court of Human Rights held that there had been . . . violations of . . . [the] (right to respect for private and family life) of the European Convention on Human Rights, as regards the determination of access to lawful abortion in respect of both applicants. . . . It further held . . . that there had been: A violation of Article 5 § 1 (right to liberty and security) in respect of P., and a violation of Article 3 (prohibition of *inhuman* or degrading treatment) in respect of P.”) (emphasis added).

206. R.R. v. Poland, 2011 Eur. Ct. H.R. 828, ¶ 9.

207. See *id.* ¶ 224–25.

208. Lyubov Vladimirovna Erofeeva, *Traditional Christian Values and Women's Reproductive Rights in Modern Russia—Is a Consensus Ever Possible?* 103 AM. J. PUB. HEALTH 1931, 1931 (2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3828703> [<https://perma.cc/ED7XND4U>]. In mid-2003, the government dramatically limited the number of permissible grounds for the first time. *Id.* (“[I]n 2009, the *Guidelines on Psychological Pre-Abortion Counseling* . . . published by the Ministry of Sports, Tourism, and Youth Policy of the Russian Federation, Federal Agency for Youth Affairs . . . abortion is treated as ‘a murder of a living child.’ A woman willing to undergo abortion is assessed here as being ‘mistaken and deluding herself,’ whereas pregnancy and childbearing are treated as a woman’s destiny. The authors . . . recommends [sic] that psychologists show patients graphic movies on abortion.”). See *infra* note 211.

209. *Id.*

and shrinking fertility rates may be a more potent driving force for government initiatives.²¹⁰

c. The Liberal Catholic Jurisdictions

i. Italy, France and Mexico City

Other jurisdictions with a high percentage of Catholics have far more relaxed views. Mexico City²¹¹ and Italy, both with an 88% Catholic population, allow abortion until the twelfth week of pregnancy (although other states in Mexico still retain draconian laws criminalizing the practice except in cases of rape).²¹² While technically Catholicism is the primary religion in France²¹³ (polls claim between 50% and 80% of the French identify themselves as Catholic), the religious practice of the country belies this fact: 32% of the French population described themselves as agnostic, a further 32% were self-described atheists, and only 27% believed in any type of God or Supreme Being.²¹⁴ It is perhaps this lack of religiosity²¹⁵ that explains the liberal French views—where abortion is legal on demand up to twelve weeks after conception.²¹⁶ Abortions at later stages of pregnancy are

210. *Id.*

211. Allyn Gaestel & Allison Shelley, *Mexican Women Pay High Price for Country's Abortion Laws*, THE GUARDIAN (Oct. 1, 2014), <https://www.theguardian.com/global-development/2014/oct/01/mexican-women-high-price-abortion-laws> [https://perma.cc/MZF4LM7Y] (“Mexico City was the first area in the country to decriminalize abortion.”). “In 2007 the Mexico City federal district passed a law making abortion legal and free in public health centres in the first 12 weeks of pregnancy. Since then, more than 100,000 abortions have been carried out . . .” *Id.* See also *Abortion Rights Around the World—interactive*, THE GUARDIAN (Oct. 1, 2014), <http://www.theguardian.com/global-development/ng-interactive/2014/oct/01/sp-abortion-rights-around-world-interactive> [https://perma.cc/ESD8VK8Z]; Davida Becker & Claudia Díaz Olavarrieta, *Decriminalization of Abortion in Mexico City: The Effects on Women's Reproductive Rights*, 103 AM. J. PUB. HEALTH 590, 590 (2013) (“Shortly after being passed, the law was challenged in the Mexican Supreme Court. . . . but in August 2008, the Supreme Court voted to uphold the law.”).

212. Gaestel & Shelley, *supra* note 211 (“Mexico has some of the strictest abortion laws in the world. In many states abortion is a punishable offence. At least 679 women were reported or sentenced for the crime of abortion between 2009 and 2011, . . . Some women, . . . have been accused of murder after suffering a miscarriage.”).

213. *But cf.* Loi du 9 décembre 1905 concernant la séparation de Églises et de l'État [Law of December 9, 1905 concerning the separation of Church and State], Journal Officiel de la République Française [J.O.] [Official Gazette of France] (Dec. 9, 1905).

214. Harris Interactive, *Religious Views and Beliefs Vary Greatly by Country, According to the Latest Financial Times/Harris Poll*, PR NEWswire (Dec. 20, 2006), <http://www.prnewswire.com/news-releases/religious-views-and-beliefs-vary-greatly-by-country-according-to-the-latest-financial-times-harris-poll-57217417.html> [https://perma.cc/2YMNQRL8].

215. See *Religion Important for Americans, Italians Says Angus Poll*, ANGUS REID GLOBAL MONITOR (Dec. 30, 2006), <http://www.italystl.com/ra/2996.htm> [https://perma.cc/A46KCTPQ] (comparing religiosity of France to other European countries and the United States).

216. *Termination of Pregnancy and Abortion in France*, ANGLINFO, <https://www.anglo>

allowed if two physicians certify that the abortion will prevent grave permanent injury to the physical or mental health of the pregnant woman, a risk to the life of the pregnant woman, or that the child will suffer from a particularly severe illness recognized as incurable.²¹⁷

ii. Canada

Notwithstanding a 40% Catholic population, Canada has one of the most liberal abortion laws in the world: the decision remains one made by a woman and her doctor.²¹⁸ The history of abortion in Canada is virtually the opposite of the United States. America began with no restrictions, while early in Canadian history all abortions were illegal.²¹⁹ In 1969, abortion was legalized in Canada, but only when a committee of doctors agreed it was necessary for the physical or mental well-being of the mother. But in 1993, the (mostly Protestant) Supreme Court of Canada ruled in *R. v. Morgentaler* that the existing laws were unconstitutional and struck down the 1969 law.²²⁰ Conservatives continue to try (unsuccessfully) to pass new restrictive laws.²²¹

2. Abortion in Israel

Perhaps not surprisingly, Israel, where Jewish law predominates, is relatively lenient.²²² Abortion is obtainable upon request with the permission of a three-person medical committee (which is freely given

info.com/riviera/how-to/page/france-healthcare-pregnancy-birth-termination-abortion [https://perma.cc/SVQ43LPD].

217. See *Abortion Legislation in Europe*, THE LAW LIBRARY OF CONGRESS 1, 13, 32, 37 (Jan. 2015), <https://www.loc.gov/law/help/abortion-legislation/abortion-legislation.pdf> (also describing later authorizations in Russia and Ukraine).

218. See CHRISTINE AMMER & JOANN E. MANSON, THE ENCYCLOPEDIA OF WOMEN'S HEALTH 7 (6th ed. 2009).

219. *Abortion in Canada*, THE WILBERFORCE PROJECT (2016), <http://thewilberforceproject.ca/resource-centre?task=view&id=6> [https://perma.cc/M3B8B9K8].

220. *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 464–65 (Can.).

221. *Abortion in Canada*, *supra* note 219.

222. Debra Kamin, *Israel's Abortion Law is Among World's Most Liberal*, THE TIMES OF ISRAEL (Jan. 6, 2014), <http://www.timesofisrael.com/israels-abortion-law-now-among-worlds-most-liberal> [https://perma.cc/E3MQG5RA]. Most Jewish commentators do not recognize the fetus as a “person” until after birth. See Spero, *supra* note 148, at 22 (“Judaism’s position is as far removed from the pro-abortion slogan claiming a woman has a right to control her body even to the extent of destroying a fetus as it is from the Catholic position which would compell [sic] a woman to forfeit her life for the sake of the fetus. All in all, Judaism displays a middle approach, balancing the aforementioned compelling needs of the mother with a respect for the right of the fetus, as life, to travel uninterrupted to its ultimate destination: birth.”). Spero asserts that one thing is unequivocally certain, the father’s [along with the mother’s] rights over the fetus are considered property rights. *Id.* Spero also acknowledges that mental anguish of the pregnant woman can suffice to allow the procedure, preferably earlier on in the pregnancy. *Id.*

in practice; only two per cent of requests are denied), rigid time constraints are not imposed, and criminalization has been non-existent, at least in practice. Israeli law, however, does not apply to its Muslim population, where family matters are governed by Sharia law.²²³

3. *Abortion and Greek Orthodoxy*

Greece is relatively lenient.²²⁴ This is surprising considering the comparative stringency of Greek Orthodox religious law which holds that, “[t]he only time the Orthodox Church will reluctantly acquiesce to abortion is when the preponderance of medical opinion determines that unless the embryo or fetus is aborted, the mother will die.”²²⁵ Yet, Greece allows abortion on demand where the pregnancy has not exceeded twelve weeks.²²⁶ In the case of rape or incest, an abortion can occur as late as nineteen weeks, and as late as twenty-four weeks in the case of fetal abnormalities.²²⁷

4. *Abortion in Hindu Countries: India and Nepal*

In India, Hindu law²²⁸ applies to the majority of the population.²²⁹ However, the religious view is relatively tolerant, which is reflected in civil practice. “The Vedas teach that all life is sacred. However, human life is the highest level of consciousness. The

223. Yuksel Sezkin, *Conference on Religious Law and Democracy*, BAR ILAN UNIV. (Dec. 2016).

224. See GREECE, U.S. DEP’T OF STATE 1, 2, <http://www.state.gov/documents/organization/171697.pdf> (“[T]he [Greek] government recognizes the canon law of the Orthodox Church, both within the church and in areas of civil law such as marriage” and financially supports the Orthodox Church. “Privileges . . . granted to the Orthodox Church [are] not routinely extended to other religious groups.”).

225. Stanley S. Harakas, *The Stand of the Orthodox Church on Controversial Issues*, GREEK ORTHODOX ARCHDIOCESE OF AMERICA, <http://www.goarch.org/ourfaith/controversialissues> [<https://perma.cc/TSN629P3>]. War is only justified when a nation defends itself to protect the lives of its citizens against the offenders in an unjust war. Killing anything is forbidden. See also George Mastrantonis, *The Ten Commandments*, GREEK ORTHODOX ARCHDIOCESE OF AMERICA, <http://www.goarch.org/ourfaith/ourfaith7115> [<https://perma.cc/2URE2XUV>].

226. *Abortion Legislation in Europe*, *supra* note 217, at 34. Girls under the age of 18 must get written permission from a parent or guardian before being allowed an abortion. *Id.*

227. *Id.*

228. *The Hindu Ethic of Non-Violence*, KAUAI’S HINDU MONASTERY, <https://www.himalayanacademy.com/readlearn/basics/ahimsa-nonviolence> [<https://perma.cc/3Q5P4CF2>] (“Yoga Sutras, sage Vyasa defines ahimsa as ‘the absence of injuriousness (anabhidroha) toward all living beings (sarvabhuta) in all respects (sarvatha) and for all times (sarvada).’”).

229. *Indian law*, THE ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/print/article/285760> [<https://perma.cc/NNT8PR4C>].

divine spark, or soul enters at 120 days (Artma). Hindus also perform a pre-birth ceremony at 7 months when personhood is fully achieved.²³⁰ Hence, it is not surprising that abortion in India is legal up to twenty weeks²³¹ on a showing that the continuance of the pregnancy involves a risk to the life of the pregnant woman, or of grave injury of physical or mental health, or “there is a substantial risk that, if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.”²³²

Nepal, also a Hindu state (81% of the population identify themselves as Hindu), is even more lenient in its practice: abortion is available on demand up until twelve weeks and until eighteen weeks in cases of rape or incest.²³³

5. Abortion in Islamic Countries

We find similar disparities among countries identifying themselves as Islamic. Jordan,²³⁴ Iran,²³⁵ Egypt and Syria generally allow abortion only if the mother’s life is endangered.²³⁶ Iran allows abortion in cases of birth defects,²³⁷ and Iraq sometimes in cases of rape

230. *The Status of the Human Embryo: Key Facts—Personhood*, UNIV. OF MARYLAND, <http://embryo-ethics.smd.qmul.ac.uk/key-facts/personhood>, [<https://perma.cc/J6UFXCTY>]; S. CROMWELL CRAWFORD CHAPTER 1: DILEMMAS OF LIFE AND DEATH: HINDU ETHICS IN A NORTH AMERICAN CONTEXT (1995).

231. Termination of Pregnancy and Abortion in India, ANGLINFO, <https://www.angloinfo.com/india/how-to-page/india-healthcare-pregnancy-birth-termination-abortion> [<https://perma.cc/VUE6J3DT>].

232. CRAWFORD, *supra* note 230, at 32.

233. *Nepal 2012 International Religious Freedom Report*, U.S. DEP’T OF STATE 1, 1 (2012), https://photos.state.gov/libraries/nepal/391216/misc_pdf/Final.pdf; Susan A. Cohen, *Nepal Reforms Abortion Law to Reduce Maternal Deaths, Promote Women’s Status*, 5 GUTTMACHER POL’Y R. 1 (“The parliament of Nepal voted overwhelmingly in March [of 2002] to legalize abortion in that country up to 12 weeks of pregnancy and as late as 18 weeks in cases of rape or incest. The Nepali action continues the worldwide trend toward liberalization of countries’ abortion laws.”).

234. *Jordan*, UNITED NATIONS (2002), <http://www.un.org/esa/population/publications/abortion/doc/jordan.doc>.

235. *The World’s Abortion Laws*, *supra* note 9.

236. *Id.*

237. See K. M. Hedayat et al., *Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation*, 32 J. MED. ETHICS 652, 654–55 (2006). Iran, like Poland, is another country where abortion laws track the change from a secular government to a religious one. After the Khomeini revolution, abortion rights were changed to follow Islamic Sharia law “where . . . formation of the fetus’s life is divided into two stages: before the fetus is infused with life and after . . . Before the fetus has a soul, abortion is legal if pregnancy endangers the mother’s life. . . . Imam Khomeini [was asked] . . . if abortion was legal (before the fetus has a soul) . . . where doctors are certain or when they fear that the continuation of pregnancy would kill the mother. . . . Imam Khomeini said not only it is legal but it is also necessary. Even though in penal code, abortion is considered a crime, when it is done to save the mother’s life

or incest.²³⁸ Saudi Arabia allows limited abortion availability until four months after conception.²³⁹ By comparison, the Islamic countries of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan (whose Islamic populations range from 56% in Kazakhstan, 93% in Turkmenistan, to 84% in Tajikistan and 96.3% Uzbekistan) allow abortion *on demand* until the twelfth week of pregnancy.²⁴⁰ Yet, in Malaysia, abortion is both restricted and heavily criminalized.²⁴¹ Abortion in Turkey is legal until the tenth week after the

(before the fetus is infused with life), it is regarded as legal. . . . After the Islamic Revolution and the ruling of Islamic (particularly Shia) laws, the life stages of the fetus were taken into consideration. . . . As was mentioned earlier, fetus develops in two stages: before it has a soul and after it. 'After the fetus has a soul' means the time when signs of life can be seen in the fetus. Based on science and the sayings of Imams, the fetus is infused with life after the 4th or 4.5 month (16 to 18 weeks) of pregnancy and because killing any live human being is a crime, abortion after this time is a great sin and crime." Farokhzad Jahani, *Abortion in Iranian Law*, IRAN CHAMBER SOC'Y (Jan. 2004). In April 2005, the Iranian Parliament approved by the Council of Guardians eased the conditions by allowing abortion on medical proof of fetal abnormalities such as anencephaly (i.e., where the child cannot survive) exist, or where they produce difficulties for the mother to take care of, such as major thalassemia or bilateral polycystic kidney disease) before the nineteenth week of pregnancy. See Hedayat et al., *supra* note 237.

238. *Iraq*, POPULATION DIV. OF THE DEP'T FOR ECON. AND SOC. AFFAIRS OF THE UNITED NATIONS SECRETARIAT, https://esa.un.org/unpd/wpp/Publications/Files/Key_Findings_WPP_2015.pdf.

239. Ministerial Resolution No. 218/17/L, MINISTRY OF HEALTH (June 26, 1989) §2, art. 24 ("A physician is prohibited to perform an abortion of a pregnant woman unless an abortion is deemed the only course of action that is apt to save her life. Nevertheless, a physician may perform an abortion if the pregnancy is less than four months old and it is proven beyond doubt that continued pregnancy gravely endangers the mother's health provided such facts are supported by a resolution of a medical committee [T]he Committee of Senior Ulema stipulated as follows: (1) Pregnancy in any of its stages may not be aborted except when legally (according to Islamic laws) justified and within very narrow limitations. (2) In the first forty days of pregnancy, and if abortion is deemed necessary to accomplish a legal benefit or to prevent an expected harm, abortion may be allowed. However, abortion is not allowed during this state for fear of hardship in child upbringing or inability to secure cost of living, education or future or if the parents decide that they have enough children. (3) Abortion in the embryo stage is not allowed unless an approved medical committee decides that continuation of pregnancy endangers the mother's safety and could possibly lead to her death. In such cases, abortion shall be allowed if all means to eliminate the danger are exhausted to no avail. (4) After the third stage where pregnancy is over four months, abortion is not allowed unless and until a panel of approved specialists diagnose that continuation of pregnancy will cause the mother's death and all means to eliminate the danger are exhausted to no avail.").

240. *Mapping the Global Muslim Population*, PEW RESEARCH CTR. (Oct. 7, 2009), <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population23> [<https://perma.cc/7N3XCUMJ>]; *Abortion Policies: A Global Review*, UNITED NATIONS DEP'T OF ECON. AND SOC. AFFAIRS, <http://www.un.org/esa/population/publications/abortion/profiles.htm> [<https://perma.cc/6Q7FP2T4>].

241. See Anees Syafwah, *Legal Issues of Abortion in Malaysia*, ACADEMIA.EDU, https://www.academia.edu/7691081/Legal_Issues_of_Abortion_in_Malaysia [<http://perma.cc/G9S87X49>] ("Section 312 of the Penal Code states that a termination of pregnancy is permitted in circumstances where there is risk to the life of the pregnant woman or threat of injury to her physical or mental health . . . [I]t is the doctor alone who makes the

conception, although that can be extended to the twentieth week if the pregnancy threatens the woman's mental and/or physical health or if the conception occurred through rape.²⁴²

6. Abortion in the Orient: Taoism, Buddhism, Shintoism and Atheism

The variation does not escape the Eastern religions²⁴³: China,²⁴⁴ North Korea and Vietnam,²⁴⁵ whose population is divided between Taoists, Buddhists and atheists (communists) have relaxed views on abortion. In fact, the Chinese are so proactive in promoting abortion, that they force it on Tibetans.²⁴⁶ A liberal but somewhat less relaxed view is found in Hong Kong²⁴⁷ and Taiwan,²⁴⁸ which have more diverse

decision as to whether a termination should be carried out.”). *See also Misconceptions, REPROD. RIGHTS ADVOCACY ALL. OF MALAY. (RRAAM)*, <http://www.rraam.org/issues/misconceptions/> [<https://perma.cc/J6YQGYQA>] (citing a 2007 survey finding that only 57% of 120 doctors and nurses surveyed knew that abortion is legal in certain circumstances).

242. However, a married woman must obtain her husband's consent. *See Contraception and Termination of Pregnancy/Abortion in Turkey*, ANGLOINFO, <https://www.angloinfo.com/turkey/how-to/page/turkey-healthcare-pregnancy-birth-termination-abortion> [<http://perma.cc/QP4S7NRE>].

243. Taiwan and Hong Kong (whose populations adhere to a mixture of the traditional Eastern religions) have a restrictive view, and Tibet is incensed by the Chinese imposition of abortion. *See Termination of Pregnancy and Abortion in Taiwan*, ANGLOINFO, <https://www.angloinfo.com/taiwan/how-to/page/taiwan-healthcare-pregnancy-birth-termination-abortion> [<http://perma.cc/CC62QXGA>]; *Termination of Pregnancy and Abortion in Hong Kong*, ANGLOINFO, <https://www.angloinfo.com/luxembourg/index.php/hong-kong/how-to/page/hong-kong-healthcare-pregnancy-birth-termination-abortion> [<https://perma.cc/G5NLFMS6>]; *China Forces Abortion, Sterilization on Tibetans*, LIFESITE (Aug. 2, 2000), <https://www.lifesitenews.com/news/china-forces-abortion-sterilization-on-tibetans> [<http://perma.cc/3R8H4EXD>].

244. *China*, POPULATION DIV. OF THE DEP'T OF ECON. AND SOC. AFFAIRS OF THE UNITED NATIONS SECRETARIAT, <http://www.un.org/esa/population/publications/abortion/doc/chinas1.doc> (“The Criminal Code of China (enacted by the National People's Congress on 1 July 1979) does not contain any provisions under which abortion, performed with the consent of the pregnant woman, constitutes an offence.”).

245. A 1989 law affirming the people's right to choose contraceptive methods states that: “Women have the rights to have abortion; to receive gynecological diagnosis and treatment; and health check-up[s] during pregnancy; and medical service when giving birth at health facilities.” *Abortion in Vietnam*, WOMEN ON WAVES, <https://www.womenonwaves.org/en/page/4898/abortion-law-vietnam> [<http://perma.cc/N45WGEZJ>].

246. *China Forces Abortion*, *supra* note 243 (relying on an August report in *Jane Magazine*).

247. The religious climate in Hong Kong includes Buddhism, Taoism and Confucianism, accentuated by local practices and beliefs. Forty-three percent of the population is religious, and the majority of these follow Chinese traditional religions. *Religion in Hong Kong*, INTERNATIONS.ORG, <https://www.internations.org/hong-kong/religion-in-hong-kong-15922> [<http://perma.cc/28N4YELM>].

248. In Taiwan, religious sects also include the Unification Church, Mormonism, and Hinduism. *Religion*, DISCOVER TAIWAN (Aug. 2, 2016), <http://eng.taiwan.net.tw/m1.aspx?sNo=0002009> [<http://perma.cc/X5P3CQ4V>].

populations.²⁴⁹ In these countries, abortion is available until twenty-four weeks of pregnancy where the woman is under sixteen, in cases of rape or incest, where the fetus has serious abnormalities, and where the pregnancy will cause mental, psychological or physical impact to the mother.²⁵⁰ In Taiwan, a married woman must obtain her husband's consent, and criminal penalties apply to both the woman undergoing the abortion and the practitioner who performs it.²⁵¹ Yet, in South Korea, where religious practice is divided between non-religious and Buddhism (along with a smaller assortment of Christian religions), abortions are mainly illegal²⁵²—at least in theory²⁵³—except for health hazards to the mother, rape, incest and cases where a parent has an inheritable disease.²⁵⁴

Japan, where a dominant religion is Shintoism, faces a totally different and anomalous situation. Here, at least “on the books” abortion is illegal.²⁵⁵ However, for all practical purposes they are performed

249. *Id.* See *Religion in Hong Kong*, *supra* note 247. Hong Kong, however, has limited requirements. See *Termination of Pregnancy and Abortion in Hong Kong*, *supra* note 243 (outlining the requirements of an abortion in Hong Kong under the Offences Against the Person Ordinance).

250. *Termination of Pregnancy and Abortion in Hong Kong*, *supra* note 243.

251. *Termination of Pregnancy and Abortion in Taiwan*, *supra* note 243.

252. Jane Kang, *To Abort or Not to Abort: That is the Question in South Korea*, VOICES IN BIOETHICS, <https://voicesinbioethics.org/2013/10/14/abortion-south-korea> [http://perma.cc/QT6LHT4X] (“In 1953, the Korean Criminal Code made abortions illegal. In 1973, the Maternal and Child Health Act allowed doctors to perform abortions within the first 28 weeks of pregnancy in cases of rape or incest, when a woman’s health is in danger, or when a pregnant woman or her spouse has certain communicable or hereditary diseases. In 2009, the abortion law in South Korea was revised so that the deadline for a legal abortion was moved from 28 weeks to 24 weeks, and certain diseases (such as viral hepatitis) were removed from the list of accepted reasons for abortion.”).

253. Woong Kyu Sung, *Abortion in South Korea: The Law and the Reality*, 26 INT’L J. OF L., POL’Y. & FAM. 278, 278 (2012) (theorizing that “a deep-seated disregard for women’s rights is behind recent abortion controversies in South Korean society” and places the regulation of abortion in the context of political agendas, ideological positions, and cultural values related to abortion).

254. See Kang, *supra* note 252. If a woman has an illegal abortion, she can be sentenced to prison for up to a year and fined about \$2,000, although these punishments are rarely enforced. Nevertheless, “Korean women have expressed their desire to legalize abortion, yet the government, the social expectations of women, and some groups in the medical community hinder them from having this right to choose and being in charge of their own reproductive capability. . . . In late 2009, a report on declining birth rates was released by the Presidential Council for Future & Vision. In the Council’s report, various suggestions for increasing the birth rate were proposed, one of them being an anti-abortion campaign. At this point, the debate on abortion became much more heated, and legislators were motivated to stringently enforce punishments for illegal abortions. . . . Due to a significant decrease in fertility rates, the government now charges fees for family planning services, hoping this will discourage couples from practicing any form of birth control. . . . From the early 1960s to late 1990s, the Korean government actually encouraged women to get abortions to prevent overpopulation. The Korean government no longer encourages abortions, but the abortion rate seems to have increased substantially.” *Id.*

255. Philip Brasor & Masako Tsubuku, *Japanese Laws Make Abortion an Economic*

freely and no woman has been prosecuted for having an abortion since World War II. Hence, they are effectively legal, albeit quite expensive and generally not covered by national health insurance.²⁵⁶

E. Reconciling the Results

Looking at the international scene, there is no consistency in abortion regulation associated either with official religion or the preponderance of religious practice. This is the case whether the determination is based on fetal viability or extenuating circumstances of the mother: as far as predominantly Catholic jurisdictions, we find six absolutely banning abortion,²⁵⁷ three which are quite lenient, and many that span the middle range. We have Muslim countries strictly limiting its performance and those which are liberal, both in the conditions allowing abortions and duration of pregnancy when it is allowed.²⁵⁸ Similar discrepancies are found in the Eastern religions. Perhaps the only consistency is that where atheism is (or was) the state-endorsed religion, such as under Communism, abortion regulations are (or were) quite relaxed.²⁵⁹ But, it is not only in those countries where we find relaxed rules. We find them also in Canada and in the United Kingdom and other industrialized countries.²⁶⁰

Otherwise, only two or three vaguely uniform factors are correlative: abortion is overwhelmingly more available in developed countries where more than 90% of women can obtain abortion in most circumstances, while in less developed countries only 50% have similar access to abortion.²⁶¹ In countries where the population considers themselves religious, more restrictive abortion regulations apply. And religiously—all religions viewed ensoulment, the *sine qua non* of personhood, to occur at or after the fortieth day of gestation (or at least they did at the inception of the religion's development). Perhaps we can also conclude that the most repressive abortion laws are found in Catholic countries (or those where the majority of the population is Catholic), even if this trend is not followed in Catholic countries the world over.

Issue (May 13, 2012), <http://blog.japantimes.co.jp/yen-for-living/japanese-laws-make-abortion-an-economic-issue> [<http://perma.cc/L4PFCY6T>].

256. *Id.*

257. *See supra* Part IV.D.

258. *See supra* Part IV.D.5.

259. *See supra* Part IV.D.6.

260. *See supra* Part IV.D.1.c.

261. *See supra* Part IV.D.1.a.

V. THE POINT OF PERSONHOOD

A. Is Killing an Embryo Murder?

We have already seen that the decisions around the world are not uniform enough to be governed by “natural law.” However, the lack of correlation between religious preferences of a country and its regulations would negate the claim that religion, *per se*, is the driving force. Nevertheless, given Professor Stone’s “painfully awkward observation” that all the American Justices who voted to restrict abortion in *Gonzales* were Catholic,²⁶² we must examine whether different religious teachings of the same denomination foster local, idiosyncratic beliefs. Alternatively, it may not be a specific religious denomination that is driving the decisions, but rather the degree of religiosity of the adherents. The factors cry out to be examined in systematic detail, revisiting this worldwide disparity with two questions in mind: (1) why is the worldwide differential in approach to abortion so varied? and (2) is there any uniform and logical (moral) basis for determining whether a fetus has any guaranteed right to life? These issues, however, are outside the scope of this Article.

This Article does, however, raise a contextual basis for the disparate views. The challenge is to explain the arbitrary and capricious nature of the far-flung results, noting that decisions driven by religious fervor or teachings would be banned under the First Amendment. In other words, I question whether local cultural determinants and/or personal religiosity of the judge or legislators have an impact on decision-making.²⁶³

To reiterate, one basis for any moral argument derives from an Aristotelian assessment of the enlightened society and its view of “the common good.” “Claiming that virtually every code of civilized human behavior includes a prohibition against murder,²⁶⁴ [pro-lifers] argue that this precept should apply, as stated in the American Pledge of Allegiance ‘for all,’”²⁶⁵ which they claim includes the fetus

262. Stone, *supra* note 88.

263. This view might perhaps explain the law in Greece, where the official religion is the abortion-intolerant Greek Orthodox, but the law of the land is more forgiving. One might hypothesize that perhaps the ancient Aristotelian concepts of abortion and personhood have had some type of “Jungian” impact.

264. Murder is defined as, “The unlawful killing of another human being without justification or excuse.” *Murder*, <http://legal-dictionary.thefreedictionary.com/murder> [<https://perma.cc/L7H3ALQC>].

265. Barbara P. Billauer, *With Liberty and Justice for All: Abortion and the Constitution* (Oct. 31, 2008) n. 10 (available in PDF by author search on <https://papers.ssrn.com>) (“The Pledge of Allegiance was written in 1892 by Francis Bellamy. . . . In 1940 the Supreme Court, in . . . *Minersville School District v. Gobitis*, ruled that students in public

from the moment of conception—which more properly would be the embryo at that point. Surely, constitutions world-over routinely stipulate that every human person has a right to life, that human life is not only sacred, but inviolable. No one, therefore, has the right to take away human life; instead we have the duty to care for it, to protect it and to defend it, as “[o]nly God is the owner and Master of human life,”²⁶⁶ although this concept has caveats as, for example, in the case of self-defense. The question we face is whether killing an embryo or a fetus—via abortion—can be considered murder from a religious point of view; the notion of moral involvement having been dispelled by the universal variance in abortion regulations. Thus, notwithstanding intense proselytizing that human life begins at conception,²⁶⁷ (by Supreme Court originalists or others) this simply cannot be a “natural law” when modern “civilized” countries have such varying viewpoints. However, if some religions so identify the act as murder, this might be the identifier of the source of legal decisions restricting abortion, as Professor Stone claims, a view that must be rooted out.

Since investiture of soul (the rubric upon which religion declares “personhood” and establishes when life begins) is not a natural phenomenon capable of being addressed by science,²⁶⁸ and since it varies by religion, any legal determination of personhood based on “ensoulment” must fail. Further, recognition of the consequences of failure to provide for legal abortion requires Justices who would impose obstacles to its use to be mindful of the dangers of such a course of action (including danger and even death to the woman), especially to women not of their religious persuasion.²⁶⁹ And it further remains to be determined how the Judeo Christian religions—which have a common legal source, i.e., the Decalogue—could have such different views on the inception of “personhood” and the applicability of the prohibition on murder.

schools should be compelled to recite the Pledge, even Jehovah’s Witnesses . . . who considered the flag salute to be idolatry. . . . In 1943 the Supreme Court reversed its decision, ruling in *West Virginia State Board of Education v. Barnette* that ‘compulsory unification of opinion’ violated the First Amendment”) (citations omitted).

266. Jude I. Ibegbu, *Rights of the Unborn Child in International Law: Towards a Current Convention Issues of International Law of Human Rights*, <http://groups.csail.mit.edu/mac/users/rauch/nvp/misc/ibegbu.html> [<https://perma.cc/372MRW7Q>].

267. JOHN L. MERRITT & J. LAWRENCE MERRITT II, WHEN DOES HUMAN LIFE BEGIN? 4–5 (2012).

268. See, e.g., *Daubert v. Merrell Dow* 509 U.S. 579 (1993) (pertaining to what is science, junk science, and metaphysics).

269. See LAURA KAPLAN, THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE 88 (1995).

B. Killing v. Murder: Back to the Source—A History of Biblical Mistranslation

Historically, common law defined murder as “the unlawful killing of a human being with malice aforethought.”²⁷⁰ The instances of when killing is permitted and when it is considered murder have been a subject of much religious as well as legal debate.²⁷¹ Let us assume that human life does begin sometime before actual birth. And now let us re-ask: are we legally permitted to *kill* this entity, and if so, until what point and under what conditions such that it does not constitute murder?

If the embryo/fetus constitutes a human being, complete with a divine soul from the moment of conception, killing it would be prohibited,²⁷² although if abortion is merely “killing,” certain exceptions would be allowed, such as, for example, self-defense, or preservation of the life and health of the mother. On the other hand, if abortion is “murder,” this definition forecloses the concept of comparative rights of the mother, since one cannot chose one life over another.²⁷³ The Catholic position further holds that even “killing” is prohibited, without allowances for exceptions,²⁷⁴ a prohibition which applies even to an embryo/fetus. This exposition illustrates the problem with commingling the concepts of killing and murder when it comes to abortion, and this puts us in a troublesome legal bind.

The basis for the disconnect can be traced to the Sixth Commandment of the Decalogue, (Catholic translation “Thou shall not kill”).²⁷⁵ Thus, even if the act is not murder, it is still prohibited

270. 18 U.S.C.A. § 1111 (West 2016).

271. See GERALD J. BLIDSTEIN, CAPITAL PUNISHMENT: THE CLASSIC JEWISH DISCUSSION, Q.J. JEWISH LIFE & THOUGHT 2 (1965), reprinted in CAPITAL PUNISHMENT—A READER 107 (Glen H. Stassen ed., 1998); RASHBAM’S COMMENTARY ON EXODUS: AN ANNOTATED TRANSLATION, 217–18 (Martin I. Lockshin ed., Scholars Press 1997); Ben-Tsiyon Segal, *The Ten Commandments in History and Tradition*, HEBREW UNIVERSITY OF JERUSALEM (Gershom Levi trans. 1990).

272. Under these circumstances, Maimonides equates the fetus with a “pursuer” and hence allows abortion as an act of the mother in self-defense. *The Abortion Controversy: Jewish Religious Rights and Responsibilities*, THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM, http://www.uscj.org/JewishLivingandLearning/SocialAction/SocialJustice/CurrentIssues/Political_SocialIssues/TheAbortionControversy.aspx [https://perma.cc/8NP6QLYL].

273. For a situation which occurred in El Salvador, see Nathalie Baptiste, *In El Salvador, Abortion Laws Turn Pregnant Women into Criminals*, LATIN CORRESPONDENT (Oct. 15, 2014), <http://latinrespondent.com/2014/10/el-salvador-abortion-laws-turn-pregnant-women-criminals> [https://perma.cc/96TP2PDR] (“Between 2000 and 2011, 129 Salvadoran women were charged with abortion-related crimes. Of those, 49 were convicted: 23 were convicted of abortion and the rest received different degrees of *homicide*. According to an extensive report by the Center for Reproductive Rights, the women on trial for abortion routinely have other rights denied, including the right to due process—through practices like preventive detention and inadequate access to legal representation—and the right to privacy.”) (emphasis added).

274. Perhaps something akin to manslaughter.

275. *The Fifth Commandment, Catechism of the Catholic Church*, U.S. CONFERENCE OF

according to the Catholic Church's reading of it. This interpretation, if valid, might even support the global restricting or banning of abortion, even for non-Catholics, since the Ten Commandments are often considered the heart of "natural" or "moral law."²⁷⁶

The Catholic understanding of the Decalogue, rendered as "Thou Shalt Not Kill," however, was born at least a thousand years after its original Hebrew revelation was translated into English in 1611 as the King James Version.²⁷⁷ It was, according to Catholic tradition, rearticulated by Jesus hundreds of years after its initial declaration in the same fashion.²⁷⁸ A more authoritative rendition would be a direct translation from the Hebrew²⁷⁹ and the Hebrew Torah²⁸⁰ (and some Protestant Bibles)²⁸¹ do not interpret the Hebrew commandment as does the Catholic Church. Rather the Hebrew words utilized in the Decalogue "*Al Tirzach*"²⁸² actually

CATHOLIC BISHOPS—LIBRERIA EDITRICE VATICANA 544 (2016) <http://ccc.usccb.org/flipbooks/catechism/index.html#562> [<http://perma.cc/Z6HXKJ7S>] (citing *Exodus* 20:13 (King James)).

276. Moral laws derived from the Decalogue may not be embraced by Muslims, as the Quran has its own version which supersedes any contrary views of the Old and New Testaments. Thus the Third Commandment of the Quran states: "Kill not your children because of poverty" and the Fifth Commandment states: Kill not anyone whom God has forbidden." Imam K. Mufti, *Ten Commandments in the Quran (part 1 of 3): A Quick Introduction*, ISLAMRELIGION.COM (Mar. 19, 2012), <http://www.islamreligion.com/articles/5114/viewall/ten-commandments-in-quran> [<https://perma.cc/W8LUUUU8>].

277. Wayne Blank, *The Decalogue*, THE CHURCH OF GOD DAILY BIBLE STUDY, <http://www.keyway.ca/htm2004/20040316.htm> [<https://perma.cc/VE9FWE5Z>].

278. *Mark* 10:17–19 (King James Version) ("And when He was gone forth into the way, there came one running, and kneeled to him, and asked him, Good Master, what shall I do that I may inherit eternal life? And Jesus said unto him . . . Thou knowest the commandments, Do not commit adultery, *Do not kill*, Do not steal, Do not bear false witness, Defraud not, Honour thy father and mother . . .") (emphasis added).

279. For comparative translations, see *The Ten Commandments of God*, BIBLESCRIPTURE.NET, <http://biblescripture.net/Commandments.html> [<https://perma.cc/UK2CAGR1>].

280. *Exodus Chapter 20*, MECHONMAMRE (2016), <https://www.mechon-mamre.org/p/pt/pt0.htm> [<https://perma.cc/Z9KKM3BF>].

281. *Ten Commandments from God Bible Study*, CHRISTIAN BIBLE STUDY AND GAMES (Mar. 24, 1998), <http://www.biblestudygames.com/biblestudies/ten.htm> [<http://perma.cc/8LQMXQXQ>] ("Thou shalt not kill. [] Kill 7523 ratsach (raw-tsakh); a primitive root; properly, to dash in pieces, i.e. kill (a human being), especially to murder. [] This was a bad translation, the word should be murder and not kill. There is a huge difference between killing a person and murdering them . . . [See] Numbers 35:16–21.").

282. Eliezer Segal, *Thou Shalt Not Murder*, FROMTHE SOURCES, http://people.ucalgary.ca/~elsegal/Shokel/001102_ThouShaltNotMurder.html [<https://perma.cc/KFL7KBL2>] ("Don Isaac Abravanel . . . noted that *ratsah* [rezach] is employed in Numbers 35:27–30 both when dealing with an authorized case of blood vengeance, and with capital punishment . . . Rabbi Samuel ben Meir (Rashbam) and Rabbi Joseph Bekhor-Shor . . . explain[ed] that the Hebrew text refers only to unlawful killing. Both . . . pointed out plainly the differences between the Hebrew roots for killing and murdering. (. . . Bekhor Shor even provides a French translation of the latter term: *meurtre*), and brought ample evidence of the Torah's condoning other types of killing . . . [Rashbam also notes] [a]nd this is a refutation of the heretics, and they have conceded the point to me. Even though their own books state 'I kill, and I make alive' (in Deuteronomy 32:39)—using the same Latin root as for 'thou shalt not murder'—they are not being precise.").

mean²⁸³ “*Do not murder!*”—an injunction that applies to only live, fully birthed humans—and only in certain circumstances, and allows for various defenses. Thus this dichotomy in translating the Sixth Commandment as prohibiting murder or killing becomes most significant.²⁸⁴

The root of the word *Tirzach* derives from the word *Rezach*—a pursuer,²⁸⁵ and is distinguishable from the Hebrew expression that might signify a prohibition against killing—*Lo Taharog*²⁸⁶—precisely because, not only is killing permitted in the proper context, but under certain, albeit strictly circumscribed, circumstances²⁸⁷ it is required.²⁸⁸ Such a situation might arise if killing the fetus must be done to protect or preserve the mother’s health—and the only available manner would be akin to *Gonzales’* outlawed D and X procedure.²⁸⁹ Hence, where mandatory actions are involved, such as an

283. See *Chart: Comparing the Ten Commandments*, BELIEFNET, <http://www.beliefnet.com/faiths/2007/03/chart-comparing-the-ten-commandments.aspx> [<https://perma.cc/79A37J57>] (listing the translation of the Hebrew in Jewish tradition as “thou shall not kill.”).

284. Berel Lang, *You shall not murder*, THE FORWARD (Jan. 9, 2004), <http://forward.com/articles/6091/on-language> [<http://perma.cc/9U2KVXLM>].

285. RONALD H. ISAACS, EVERY PERSON’S GUIDE TO JEWISH LAW 145 (2000) (citing *Murder and the Preservation of Life*, CODE OF MAIMONIDES, 1:9). This translation serves as the basis for the views of Moses Maimonides, the Rambam, court physician to the Caliph of Alexandria on abortion. The Rambam, an ardent follower of Aristotle, opined that “the reason the life of the unborn child may be taken when it endangers the life of the mother is based on the law of the ‘pursuer’ . . . In his code, Maimonides says: “This is, moreover, a negative commandment, that we have no pity on the life of a pursuer. Consequently, the sages have ruled that if a woman with child is having difficulty in giving birth, the child inside her may be taken out, either by drugs or by surgery, because it is regarded as one pursuing her and trying to kill her.” *Id.* The Rambam, however, takes heed to note that, “[O]nce its head has appeared, it must not be touched, for we may not set aside one human life to save another human life, and what is happening is the course of nature.” *Id.* Clearly by comparing the fetus to a pursuer whose interests are not considered, we are in fact favoring the needs of one person (the pursuer) over another (the pursued).

286. ELIEZER SEGAL, ASK NOW OF THE DAYS THAT ARE PAST 60 (2005) (ebook) (“[K]ill’ in English is an all-encompassing verb that covers the taking of life in all forms and for all classes of victims. That kind of generalization is expressed in Hebrew through the verb *harag*. However, the verb that appears in the Torah’s prohibition is a completely different one, *rasah* which, it would seem, should be rendered ‘murder.’ This root refers specifically to criminal acts of killing.”).

287. John A. Battle, *What Does the Sixth Commandment Mean*, 9 WRS J. 1, 8–10 (2002).

288. Another divergence in translation contributing to the differing viewpoints derives from the word *ason*, or harm, as used in that statement, and mistranslated into form by the Catholic clergy, meaning soulless fetus. See Bronner, *supra* note 149, at 2–3. A similar paradox arises with regard to animals. Killing animals is not only permissible, but is also required to perform the sacrificial rites. However, causing suffering to animals is strictly prohibited, and is a prohibition contained in perhaps the earliest known codification of human conduct, the Seven Laws of Noah. *The Seven Noahide Laws*, TRUE GRACE MINISTRIES, <http://www.auburn.edu/~allenkc/noahide.html> [<http://perma.cc/D47R82RN>].

289. ISAACS, *supra* note 285, at 143 (“If a woman is having difficulty giving birth, it is permitted to cut up the child inside her womb and take it out limb by limb because her life takes precedence. If the greater part of the child has come out it must not be touched,

abortion to alleviate serious suffering or protect the life of a mother, Judaic law would be in stark conflict with prevailing state laws that prohibit, for example, partial birth abortion.²⁹⁰ The Catholic interpretation of the commandment forbids killing of any innocent life, interpreted to include the unblemished fetal entity, theologically giving that entity superior rights to its mother, who at the very least is guilty of what Catholics call “original sin.”²⁹¹ The Catholic view then dovetails very well with the *obiter dicta* found in the *Roe* progeny of cases—and resolves the conflicting rights issue posed at the outset of this Article. Identifying this discrepancy brings into stark relief the religious root of the anti-abortion (pro-life) vs. pro-freedom (pro-choice) camps—and highlights the problems courts will face if their unconscious religious programming directs judicial opinions.

C. A History of Biblical Mistranslation

In discerning the history of the mistranslation of “Thou Shalt Not Murder”²⁹² into “That Shalt not Kill,” the position of St. Jerome—who allows abortion under certain circumstances—also becomes significant.

The Hebrew Bible was first translated into Greek via the Septuagint (drafted in the third century CE).²⁹³ The Greek version also used the equivalent for “murder.”²⁹⁴ But before it was rendered into English, the Septuagint was translated into Latin (the Vulgate) by St. Jerome (who, it must be recalled allowed abortion until forty days).²⁹⁵

because one life must not be taken to save another’ (Ahalot 7:6).”). Rashi, a renowned Hebrew sage of the Middle Ages, comments on the above passage: “For as long as it did not come out into the world, it is not called a living thing, and it is permissible to take its life in order to save its mother.” *Id.* at 144. Thus, according to Rashi, the reason that it is permitted to take the life of the unborn child is that the fetus is not considered a living thing and, hence, taking its life cannot be called murder.

290. ISAACS, *supra* note 285, at 145.

291. SEGAL, *supra* note 286, at 60 (“It is, of course, not just a question of etymology. Those ideologies that adduce the commandment in support of their gentle-hearted causes are compelled to feign ignorance of all those other places in the Bible that condone or command warfare, the slaughter of sacrificial animals, and an assortment of methods for inflicting capital punishment.”).

292. *Id.*

293. Crawford H. Toy & Richard Gottheil, Bible Translations—The Septuagint, JEWISH ENCYCLOPEDIA, <http://jewishencyclopedia.com/articles/3269-bible-translations> [<https://perma.cc/HV4RGFPX>] (“The Pentateuch was translated at the time of Philadelphus, the second Ptolemy (285–247 B.C.[E.]”).

294. The *Greek Septuagint* translation correctly translated the Hebrew word *ratsah* into *Greek* with the *Greek* word for “murder.” Segal, *supra* note 282, at 60–63.

295. SEGAL, *supra* note 286, at 61–62 (“[T]he Vulgate . . . employ[s] the Latin verb *occidere*, which has the sense of ‘kill’ rather than ‘murder.’ By demonstrating that the Vulgate itself employed the root *occidere* in Deuteronomy, when the Almighty himself is speaking of his own power over the lives of his creatures—in a context where it cannot conceivably be rendered as ‘murder’—Rashbam aggressively proved the error of the

The Latin Vulgate and subsequent early English translations of the Bible used the term for killing.²⁹⁶ The King James' version continued rendering the prohibition as against "killing" as included in St. Jerome's Vulgate, the official version of the Roman Catholic Church.²⁹⁷ But, as Professor Segal writes: "This still raises some difficult questions about the Latin Vulgate translation. The author . . . Saint Jerome²⁹⁸ . . . spent much of his career in the Land of Israel, where he consulted frequently with Jewish scholars whose interpretations he often cites with great respect."²⁹⁹ St. Jerome knew both Hebrew and Greek—and one wonders why he used the word akin to "killing" for his Latin version. Professor Segal postulates that St. Jerome substituted the word he felt most closely approximated the "turn the other cheek" pacifism attributed to the early followers of Jesus.³⁰⁰

Interestingly, "St. Augustine, basing himself on the standard translations, made it clear that the commandment does not extend to wars or capital punishments that are explicitly ordained by God."³⁰¹ St. Jerome who lived contemporaneously with St. Augustine, agreed. And he extended the largesse to abortion, allowing the practice in fetuses less than forty days old.³⁰²

traditional Christian understanding of the sixth commandment."). See also Segal, *supra* note 282.

296. Noting that it talks about "secretly killeth his neighbor or smiteth his neighbour secretly rather than murder for the Latin *clam percusserit proximum*." *Murder*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Murder> [<https://perma.cc/R35VDQ27>] (emphasis added).

297. Monk Preston, *The Ten Commandments: Different Versions*, THE PRAYER FOUNDATION, http://www.prayerfoundation.org/ten_commandments_different_versions.htm [<https://perma.cc/5574ZRFG>]. Some scholars have a slightly alternative history. See *The Catholic Church Changed the Ten Commandments?*, FISH EATERS n.1, <https://www.fisheaters.com/10commandments.html#1a> [<https://perma.cc/4KYGSP6N>] ("The Septuagint, the Latin Vulgate (the official Scripture of the Church), and the original Douay-Reims phrase the Fifth Word as 'Thou shalt not murder;' later Douay-Reims versions, such as the Challoner, and the King James Bible, etc., phrase it as 'Thou shalt not kill.' 'Thou shalt not murder,' however, is the original intent and the meaning of the earliest texts. Catholics, of course, have 2,000 years of Church teaching and the Magisterium to interpret Scripture, and the meaning of the Fifth Commandment is that one is not to take innocent life. It doesn't entail pacifism, ignoring the needs of self-defense and justice, worrying about squashing bugs, etc.").

298. Jerome was born in 342 AD, Stridon (possibly present day Štrigova, Croatia) and died September 30, 420 AD, Bethlehem. *St. Jerome*, CATHOLIC ONLINE, http://www.catholic.org/saints/saint.php?saint_id=10 [<https://perma.cc/BV48J6MK>]. Augustine, born in 354 in Algeria, where he died in 430, likely embraced some of his views, including the views on the permissibility of abortion prior to its becoming ensouled; Saint Augustine, Encyclopedia Britannica, <https://www.britannica.com/biography/Saint-Augustine> [<https://perma.cc/CDS4VSLH>]. See SAINT AUGUSTINE, ENCHIRIDIAN: ON FAITH, HOPE, AND LOVE ¶ 85–86 (Albert C. Outler trans., 1955).

299. Segal, *supra* note 282.

300. *Matthew* 5:39.

301. SEGAL, *supra* note 286, at 62.

302. *Roman Catholicism and Abortion Access*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/abo_hist.htm [<https://perma.cc/WR9JD7NV>].

Augustine goes further. Believing, according to the science of his day, that the body of a pre-born child “lacked sensation,” he concluded that the child likewise lacked a human soul.³⁰³ He then distinguished between a vivified and unvivified fetus (a fetus before or after ensoulment), and since Augustine could not conceive of an ensouled person without sensation, he concluded that abortion of a “pre-vivified” fetus, while a grave evil, could not be considered, in the strict moral sense, a murder.³⁰⁴ As St. Augustine said, “the law does not provide that the act (abortion) pertains to homicide, for there cannot yet be said to be a live soul in a body that lacks sensation.”³⁰⁵ The views of St. Augustine and St. Jerome, then, turn both on differentiating murder versus killing, as well as the timing of ensoulment and attainment of personhood.

VI. FOR FURTHER RESEARCH: SCIENCE V. EMOTION

Although feticide does not achieve universal recognition as constituting the crime of murder, pro-lifers have sought to create this impression. This is reflected unfortunately in *obiter dictum*, where one Justice, on the basis of unscientifically gathered petitions, opined that those who have had abortions experience feelings of remorse or regret.³⁰⁶ Before engaging in unsupported and emotional or anecdotal suppositions regarding any claimed adverse effects incidental to abortion, it might be more productive to engage in scientific and balanced inquiry, which includes assessing the comparative benefits of the procedure. Thus, legal abortion has resulted in a decline in maternal mortality.

According to South Africa’s National Committee of Confidential Inquires into Maternal Deaths, liberalization in the country in 1996 led to a 91% decline in abortion-related maternal mortality between 1994 and 1998–2001. One study showed an ‘immediate positive impact on morbidity,’ in particular arising from infection, and another concluded that a ‘cautious assessment of the magnitude of the reduction [in maternal mortality] confirms that it is

303. Robert Vasa, *Modern Look at Abortion Not Same as St. Augustines*, ETERNAL WORDTELEVISION NETWORK, <https://www.ewtn.com/library/bishops/vasapelosi.htm> [https://perma.cc/QK6WG5P5] (it could not be said whether the soul was yet present).

304. JOHN C. BAUERSCHMIDT, *AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 1* (2009). See also SAINT AUGUSTINE, *supra* note 298.

305. Vasa, *supra* note 303.

306. Stephanie Pappas, *Most Women Who Have Abortions Don't Regret Them*, LIVE SCIENCE CONTRIBUTOR (July 15, 2015, 11:09 A.M.), <http://www.livescience.com/51559-women-abortions-don't-regret.html> [https://perma.cc/LYC8G67T].

large.’ Evidence from Nepal, where revisions to the country’s legal code in 2002 granted women the right to terminate a pregnancy up to 12 weeks without restriction as to reason and later on specific grounds, suggests that liberalization has contributed to a decline in complications from unsafe abortion. Following the liberalization of Romania’s abortion law in 1989, maternal mortality dramatically decreased.³⁰⁷

Chile, a country which criminalizes all abortions, is said to have the highest suicide rate of pregnant women—precisely because they are frightened and feel trapped,³⁰⁸ although research has obfuscated causes of death from suicide as opposed to other causes.³⁰⁹ Nevertheless, some research states that all over maternal mortality has decreased.³¹⁰ A more reliable study, however, comes from El Salvador, another country that totally bans abortion. Here the statistics indicate the huge suicide impact abortion has on the population.³¹¹

Further research into countries like Argentina and Brazil, both with women leaders, might shed some additional light on the issue. Indeed since Cristina Kirchner and her husband, Nestor, took power,

307. *Finer & Fine, supra* note 181, at 587 (citations omitted).

308. MELISA Inst., *The Chilean Abortion Paradox: Even When Prohibited by Law, Abortion Rates Decrease*, SCIENCE NEWSLINE MEDICINE (Nov. 7, 2014), <http://www.sciencenewsline.com/news/2014110715400022.html> [<https://perma.cc/C9QTDG63>] (“[R]esearch suggests that women at high risk of abortion display a vulnerability profile marked by coercion and fear, which together account for nearly 70% of the reasons for declaring the intention to terminate the pregnancy.”). Notwithstanding the reduction in abortion found in Dr. Koch’s research, from 2000–2004, abortion was the third highest cause of maternal death! Enrique Donoso, *Mortalidad Materna en Chile, 2000–2004*, 71 REVISTA CHILENA DE OBSTETRICIA Y GINECOLOGÍA 246, 246 (2006). As to why Chile might have a higher suicide rate than the other countries banning abortion could be answered by the difference in enforcement. Thus while Malta bans abortion, it is seldom prosecuted when the mother’s life is in danger. See Elard Koch, *A Ground-breaking Abortion Study from Chile*, LIFESITE (May 9, 2012, 11:59 AM), [https://www.lifesitenews.com/news/a-ground-breaking-abortion-study-from-chile%20\(Plos%20One\)](https://www.lifesitenews.com/news/a-ground-breaking-abortion-study-from-chile%20(Plos%20One)) [<https://perma.cc/7E7Z5K9T>]. See also Baptiste, *supra* note 119 (reporting that suicide is the third highest cause of maternal death during pregnancy).

309. See Elard Koch et al., *Women’s Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007*, PLOS ONE (May 4, 2012), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0036613> [<https://perma.cc/8U25NM9G>].

310. *Id.*

311. *Marginalized, Persecuted and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion*, CTR. FOR REPROD. RIGHTS 1, 21 (Feb. 2014). The Report also cites “[a] 2012 report by the director of Radio Yusca [that] found that, according to the Ministry of Health’s Maternal Death Tracking System, suicide of pregnant women in El Salvador represents the third most common cause of maternal death. Furthermore, suicide has been similarly reported to account for 57% of the deaths of pregnant females aged 10–19.” *Id.* (citations omitted).

abortion laws loosened. However, the implications of Brazil would be harder to deconstruct, as the country is known for its reverence of a woman's physical beauty, Brazilian women have the highest rates of Caesarian sections, and Brazilian plastic surgeons are world renowned.³¹² Any conclusions about its relatively loose abortion laws may be due to the aesthetic climate that promotes surgical interventions, rather than the status of women.

CONCLUSION

The most compelling argument, then, to support a woman's claim to abortion would be on the basis of the right to religion (and to her religious practice). In that the Catholic Church's position on the legitimacy of killing a life form is vastly different than, say, the Jewish view, and that this is the driving force between the morality ascribed to the court's positions, the litigant's own view of the Sixth Commandment and when killing might be justified should be recognized.

The conflict between the universal right to liberty and freedom of religion meet a head-on collision in the debate over abortion. The predicate, if any exists, to limit abortion, would have to lie under "the natural law" or "moral law." As enumerated by Justinian this would be best determined by studying natural (feral) behavior, rather than reinterpreting societal norms as enunciated by governmental leaders on behalf of their populace. To couch reliance on the morality espoused in the Decalogue requires either use of the original document (which prohibits *murder*, meaning of a living human) or at least acknowledgment that its interpretation is religiously driven.

Given the lack of a finding that abortion violates the natural law of Justinian (as might be ascertained by the study of zoological behavior) or the common good of Aristotle (as might be gleaned from a careful review of the Code of Hammurabi, Justinian or the Torah), or a survey of how industrialized civilizations the world over have addressed the issue casts light on the issue. And while emotional responses to this report are expected—in lieu of careful scholarship—they should be carefully guarded against.

We must conclude that gross inconsistencies abound in the world view. However, several trends can be elicited: developed countries

312. Ian Garcia-Kennedy, *Plastic Paradise: Brazil's Cosmetic Surgery Boom*, THE POLITICAL (Mar. 28, 2015), <http://thepolitic.org/plastic-paradise-brazils-cosmetic-surgery-boom> [<http://perma.cc/H8YYV3HS>]; *Brazil Caesareans: Battle for natural childbirth*, N.Y. TIMES (Oct. 11, 2015), <http://www.bbc.com/news/world-latin-america-34464268> [<https://perma.cc/P6HXY9PA>].

allow women more freedom of abortion than impoverished or developing ones; countries which are (or were) either not religious or are areligious (atheist/Communist) have the most lenient laws; by and large, the countries which were most religious—in terms of population practice—had the most repressive laws, but this is not religion-specific. Thus, secular Catholic and Islamic countries had less restrictive laws, while religious Catholic and Islamic countries had the strictest. In the Orient, population policy seems to play a major role; and Catholic, Hindu and Islamic countries are split—some imposing draconian laws, some being quite liberal. Overall, the most repressive countries were in South America, Africa, the Middle East, and those below the Equator. The liberal countries tended to be in Europe, where women have greater freedoms and equality generally. Nevertheless, one cannot tell whether the freedom to pursue abortions allowed women the opportunity to advance politically and professionally and gain more positions of power, or because women had greater equality and more power generally, they were able to influence the laws in a way that favors women.

In effect, the U.S. Supreme Court has claimed the power to legislate into existence, by a bootstrapping argument. The legality of abortion—i.e., whether (and when) it is considered unlawful killing (murder) simply by defining the act as unlawful under whatever conditions they determine, approving or rejecting state court decisions or legislative enactments as they see fit.

This Article is not meant to condone (or criticize) the practice of abortion. It is, however, hoped that the historical perversion surrounding the early writings used to create the misapprehension that abortion is murder according to both the common good and natural law, be both exposed, and curtailed. To be sure, there have been times in our history when religions' infractions were considered violative of the civil structure, to wit laws against witchcraft, The Blue Laws, etc. Nevertheless, while the founding fathers were all God-fearing men, the country was established on the principle that each man—and woman—should be able to practice their own religion in peace and tolerance by all.

Finally, it may be that the Pro-Choice Movement is doing itself a disservice in using this appellation. Rather, to counter the power of the phrase “pro-life” it is suggested that the pro-choice commitment to preserving liberty and religious freedom should be emblematic of the movement and its torch-bearer's called “Champions of Freedom,” standing proudly to defend religious freedom, which Thomas

Jefferson, a proud deist,³¹³ once called: “the most inalienable and sacred of all human rights.”³¹⁴

313. John Ragosta, *Something to Celebrate on Religious Freedom Day*, THE WASHINGTON POST (Jan. 13, 2013), https://www.washingtonpost.com/national/on-faith/something-to-celebrate-on-religious-freedom-day/2013/01/15/93669700-5f5d-11e2-9dc9-bca76dd777b8_story.html [<https://perma.cc/77V86DV3>] (“ ‘We have solved, by fair experiment, the great & interesting question whether freedom of religion is compatible with order in government, and obedience to the laws’ . . . [A]nd we have experienced the quiet as well as the comfort which results from leaving every one to profess freely and openly those principles of religion which are the inductions of his own reason & the serious convictions of his own enquiries.”) (citations omitted).

314. *Thomas Jefferson on Politics & Government: Freedom of Religion*, FAM. GUARDIAN, <http://famguardian.org/Subjects/Politics/thomasjefferson/jeff1650.htm> [<http://perma.cc/75JHBZXD>] (citing THE THOMAS JEFFERSON MEMORIAL ASSOCIATION, THE WRITINGS OF THOMAS JEFFERSON ME 19:416 (Lipscomb and Bergh, eds. 1903–1907)).

APPENDIX A:

An Introductory Case-Study

You could see it in her eyes.

Every year during the spring our youth group visited the local Foundling Home (the place where orphans or very young homeless children were sent in those days), and handed out gifts of candies and cake. The Foundling Home is no longer there, but my memory of it—and one poignant event that happened there—still exist.

I was seventeen. That year, there was a particularly winsome little girl whose heart beckoned me. I will call her Alissa Goldfine. She had pixie brown hair and the cutest face with a button nose. She couldn't speak. Or maybe she just wouldn't speak—I never learned. Over the hours I played with her she never uttered a word.

But you could tell she was intelligent. You could see it in her eyes.

So, I spent our four hour visit eagerly trying to engage this lonely little girl with bright almond eyes. Alissa was five years old—significantly older than the other children, who were at most two or three. When they reached that age, they were sent to a larger facility better equipped to handle toddlers. But Alissa was not an orphan. And she did have someplace to go, at least technically—home. But she remained at the Foundling Home because her parents wanted her close by, so they could visit. You see, Alissa was at the Home because the Goldfines had eleven other children—and they just couldn't handle another.

There were about thirty children in the facility, mostly babies—and two caretakers. They were (at least to my seventeen-year-old eyes) capable and caring—but overburdened. Certainly they had no time to talk to or play with a five-year-old, with all the diaper-changing and feeding demanded by their other charges. And so, Alissa remained without company or stimulation, waiting for her family to come and visit, which I gather wasn't too often.

But that day Mrs. Goldfine did make an appearance. As we were leaving for the day, a forty-ish, heavy-set woman made her way up the stairs. She had black “granny” shoes, a beige loose-fitting dress and on her disheveled hair sat a squashed navy pillbox hat—something Jackie Kennedy might have worn in its prior life.

And she was six months pregnant.

Perhaps the pregnancy was simply an accident. Perhaps when the new baby was conceived Mr. Goldfine had a better job and the prospective child's prospects were better than Alissa's. Perhaps the Goldfine's just accepted their lot and never considered whether

Alissa's prospective brother or sister would enjoy a better life than she, now sentenced to a world of isolation. In any event, what choice did Mrs. Goldfine have but to continue the pregnancy?

For, you see, this happened in 1969.

Four years later Mrs. Goldfine would have had the right, if she so chose, to have a legal abortion. She may not have accepted that right. But at least she would have had the choice. Had she lived in England, she would have had the choice even then.

*Ye may kill for yourselves, and
your mates, and your cubs as
they need, and ye can;
But kill not for pleasure of kill-
ing, and seven times never kill
Man.*

—From the *Law of the Jungle*, by Rudyard Kipling³¹⁵

315. RUDYARD KIPLING, THE SECOND JUNGLE BOOK 30 (The Echo Library 2007).

APPENDIX B:

A Second Case-Study

Allowing a woman to choose what is best for her and her family also betters society. This can be best illustrated by example. Suppose we have a family, let's call them the Deveraux. Mr. and Mrs. Deveraux have five boys—and have always longed for a daughter. The Deveraux are not well-off, but are not poor (Mr. Deveraux is a fireman and Mrs. Deveraux is a department store window dresser.) They made a decision to try one more time to produce a girl. After three months, Mrs. Deveraux's amniocentesis reveals she indeed is carrying a girl, although one with a genetic defect called Turner's syndrome and they are offered the chance to abort the fetus. Turner's syndrome is not a fatal condition, but will require more parenting efforts than those required for a normal child. The Deveraux decide not to have the abortion and to accept the extra struggle the child will present, believing that the two of them—working together—can provide for all the family's needs. One day during Mrs. Deveraux's seventh month, her second son is run over by a car. He is not killed, but will require substantial physical therapy—at a cost, both of parental effort and financial. At the beginning of her eighth month, Mrs. Deveraux learns she has chronic Lyme disease. Again, not fatal, but one that will require her to significantly decrease her working hours. Two weeks later Mr. Deveraux dies of a heart attack.

Current abortion laws would not allow abortion unless Mrs. Deveraux can establish that the pregnancy will harm her life or health.³¹⁶ It clearly will not. Only an exception allowing the mother to decide what is best for her family might allow her that out. Otherwise, she will be compelled to accept public assistance and be forced to raise her six children as a single mother, something she never contemplated. Clearly, this is *not* the “more perfect union” dreamed of by our Constitutional forefathers.³¹⁷ The situation presents an agonizing choice. But the operative word should be “choice.”

316. *Roe v. Wade*, 410 U.S. 113, 115 (1973) (“For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”).

317. *See* U.S. CONST. pmbl. *See also* *Roe* 410 U.S. at 158–59 (“[T]hroughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn. This is in accord with the results reached in those few cases where the issue has been squarely presented.”) (citations omitted).

