A Memorandum

of

Law & Fact

Regarding

Natural Personhood

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Orientation and Framework

This memorandum of law and fact regarding natural personhood is founded on a Bible-based theology. In modern American law, this is generally problematic because of the much-vaunted "separation of church and state". The "separation of church and state" is based on the 1st Amendment. But the 1st Amendment does not call for a separation of church and state. It mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". This is explicitly a limitation on Congress, not on the courts. But because the principles expounded in the Declaration of Independence, Constitution, and Bill of Rights should be universally recognized and accepted in the American system of government, the courts should recognize, and have generally recognized, that this limitation on Congress also necessarily limits secular governments in general. Under such circumstances, it's fitting to interpret these two preeminent clauses of the 1st Amendment as meaning this: ***Secular government shall not impose an established religion, or prohibit anyone's free exercise of their religion***. Because every educated adult at the time of the writing of those documents knew exactly what an ***established religion*** was, it's necessary to acknowledge that the same meaning pertains in the 21st century. The founding documents disallow the establishment of any kind of church or religion. But even conforming to this 18th-century conception of the establishment of religion doesn't exhaust the scope of these establishment and free-exercise clauses, or sufficiently clarify the jurisdictional boundaries between church and state.

The boundary between church and state can be clarified by consideration of the following fact: The avoidance of established religion and the simultaneous avoidance of violation of free exercise of religion, would not necessarily lead to a libertine state of social chaos, in which there are no moral boundaries on human behavior. That's because what remains when religion is swept from the purview of secular government is not a complete vacuum in moral principles. There are principles embedded in the founding documents and common law that are prerequisites to the successful functioning of secular government. Even so, these principles have not been sufficiently defined. In this memorandum, this set of principles will be called the "secular religion". It is not a religion in the traditional sense of the word, but it is a set of principles that apply to all people within the secular government's jurisdiction. This kind of religion is the rationally necessary exception to the rule forbidding the establishment of religion.

It's obvious that the framers were attempting to establish some set of principles that would allow religious freedom, thwart secular government's propensity to diminish

such freedom, and still allow the successful functioning of secular government. Although the founding documents clearly aim at such a state of affairs, they are not clear enough, rigorous enough, or detailed enough, to define this secular religion. This is precisely why secular courts should allow admission of this memorandum of law and fact regarding natural personhood. Even though it's founded on a Bible-based theology, it does not attempt to establish Christianity, Judaism, or any other traditionally recognized churches or religions. Following Porter's **Hermeneutical Prologue for Discovering Basic Jurisdictional Principles**, this memorandum attempts to expound the secular religion at which the founders and framers aimed, as it pertains to natural personhood.

American law presently recognizes two overarching kinds of persons, natural and artificial. This memorandum of law and fact exists to remind the court regarding the legal ramifications of natural personhood.

The contentious supreme Court opinion in *Roe v. Wade*, 410 U.S. 113 (1973),[1] offers an excellent vehicle through which to explore the concept of natural personhood, as this concept arises out of existing jurisprudence. This is not because the opinion is correct, reliable, or true. It is because the case posits a number of legal claims that pertain to personhood. So that all necessary law and facts can be brought into this memorandum, the legal and factual scope of the *Roe* decision must be allowed to expand beyond the normal positivist scope of authority. The claims made in the *Roe* opinion provide a good platform for entering into the examination, but *Roe*'s scope is too narrow to reach the foundational truth that's needed. The traditional authority of supreme Court opinions holds implicitly that the decision's authority must be accepted simply ***because the supreme Court says so***, rather than because the opinion appeals to reason, justice, truth, and equity. Humans err. Supreme Court justices are human. So if this case's central issue is ever to be subdued by reason and justice, all law, fact, and logic pertinent to the case need to be allowed.

The *Roe* decision posited two overarching legal claims. The first held that the case was justiciable. In other words, the first claim was that the Court should grant *certiorari* to the appellant. Without *certiorari*, the Court would not have reviewed the case. Whether the Court granted *certiorari* or not was based primarily upon whether the case was justiciable or not. If Jane Roe lacked standing because her pregnancy had gone to "natural termination" (quoting the opinion), and her case therefore failed to present to the supreme Court an "actual controversy", then her case would normally have been deemed non-justiciable on grounds of mootness and lack of standing. The Constitution's Article III section 2 holds that the "judicial Power"

1 URL: https://supreme.justia.com/cases/federal/us/410/113/case.html.

extends to cases and controversies, which under strict construction eliminates review of presumed cases that have ceased being controversies. Because Roe's pregnancy had indeed gone to natural termination long before the case reached the supreme Court, the Court would normally have found the case non-justiciable on standing and mootness grounds. But the Court found the case to be an exception to the general rule. It found the case to be "an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated". 410 U.S. 113-114. — Although this justiciability issue, including this exception to the normal standing and mootness rules, was crucial to the case, it is not crucial to the subject of natural personhood. So this memorandum will forgo further addressing that particular legal claim.

The second overarching legal claim in the *Roe* opinion was that, "State criminal abortion laws . . . violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy". 410 U.S. 114. This is the crux of the decision. The justiciability issue has attracted relatively little public concern, but this "right to privacy" opinion has been contentious since its promulgation, and has split much of the nation along largely artificial lines. The "pro choice" - "pro life" bifurcation is based on artifice, as though those in the pro-choice camp don't generally value life, and as though those in the pro-life camp don't generally value the ability to choose. The artifice arises immediately out of the Court's opinion, because the Court's opinion is based on legal technicalities that fail to address root issues, and because subsequent opinions have done little or nothing to supplant the artifice. In order to get to the bottom of this controversy, it's necessary to base the opinion on facts and law that arise out of diligent respect for jurisdictional boundaries, rather than upon customs, traditions, presuppositions, *stare decisis*, or the opinions of appellate courts whose invocation of truth is lacking while invocation of governmental *force majeure* is obvious. If appellate courts offer superior opinions, then those opinions should contain rationally convincing arguments, rather than a mere threat of force against anyone who dares to disagree. When authors of judicial opinions camouflage muddled thinking with screeds of verbiage, thereby hiding lack of legal principle behind a facade of authority, their opinions demand higher scrutiny, even if such scrutiny can only be found outside the existing judicial system. Given the overwhelmingly negative reputation that statism has acquired through 20th-century democide, color of law, by itself, should never suffice to establish authority.[1]

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1 Regarding democide: R.J. Rummel, **Death by Government**, 1997, Transaction Publishers. — URL: http://www.hawaii.edu/powerkills/NOTE1.HTM.

Given these prefatory remarks, and given the need to expand the application of law, facts, and logic to this case, it's now possible to start unraveling the issues in *Roe*, based on such law, facts, and logic.

What Is the Fetus?

In Justice Blackmun's majority opinion in *Roe*, Blackmun described the defense presented by the State of Texas of its criminal abortion statute as being based primarily on the State's claim that the fetus had "personhood". According to Blackmun, the State and others "argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment". 410 U.S. 156. According to Blackmun, "If this suggestion of personhood is established, the appellant's [(Jane Roe's)] case . . . collapses". This claim that Roe's case would collapse if the State's claim that the fetus had 14th Amendment personhood begs the question: Why would Roe's case collapse if the fetus had 14th Amendment personhood? Blackmun answered that question by claiming that Roe's case would collapse because, if the fetus had 14th Amendment personhood, then "the fetus' right to life would then be guaranteed specifically by the Amendment." 410 U.S. 157. Section 1 of the 14th Amendment clearly implies that if the State has the duty to protect the life of an adult, adolescent, child, or infant person, and if a fetus is also a person, then the State has the same duty to protect the fetus. Equal Protection clearly demands that if the fetus is as much a person as these non-fetal persons, then the fetus must have its life protected as much as these others. Because Roe's case was based on a denial that the fetus had 14th Amendment personhood, Roe's whole case would have collapsed if the Court had found that fetuses have such personhood. Blackmun confirmed that these are the pivotal circumstances by saying that, "The appellant conceded as much on reargument." In other words, Roe conceded that her case would collapse "if this suggestion of personhood is established". 410 U.S. 156. — It becomes obvious that this whole case revolved around the question of whether a fetus has 14th Amendment personhood or not. If the justiciability issue is ignored, then all other issues are contingent upon this issue of personhood.

Although the State could have easily won the case if it could have proven that fetuses have 14th Amendment personhood, the State could not provide legal arguments or factual evidence sufficient to convince the Court. Regarding caselaw, Blackmun acknowledged this fact by saying, "[T]he appellee [(State of Texas)] conceded . . . that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." 410 U.S. 157. Because caselaw could not be found that would support the contention that "a fetus is a person", Texas resorted to extra-judicial sources of authority to establish the claim as fact. Roe

posited contrary fact claims so that the issue of the fetus' personhood became muddled. Blackmun responded to the evidence by leaving the personhood of the fetus in the first trimester legally non-existent following abundant caselaw that never acknowledged the personhood of the unborn. Then he left the fetus' personhood in subsequent trimesters more ambiguous. In 1973, the facts about the personhood of the fetus were not as clear as they are in 2013.

There are a number of questions that arise even in this brief introduction to the case:

- Was Texas right in its claim that "life begins at conception"? 410 U.S. 159.
- If life begins at conception, then obviously a newly conceived human embryo is a natural person. So under such circumstances, would such a person also be a person within the ambit of the 14th Amendment?
- Why is 14th Amendment personhood important relative to ordinary natural personhood?
- What's the difference between 14th Amendment personhood and natural personhood?
- Does the fetus have a "right to life"? If so, where does that right come from?

By examining these issues, especially in light of the scientific consensus that has developed since 1973, this memorandum will make it clear why the subject matter covered in this case was not covered with sufficient breadth or depth to reach genuine justice in the case. Neither the appellant's case nor the appellee's case was based on law and facts adequate to keep the society from fracturing along artificial lines. If society is going to fracture, then it should at least fracture based upon what's genuinely just versus what's genuinely unjust. Thus, the need for clarity, even if it means deprecating supreme Court authority.

Since 1973, the field of genetics has advanced to the point at which practically all knowledgeable people know that DNA forms the blueprint for the expression of every organism's fundamental uniqueness. Since the mapping of the human genome was declared complete in 2003,[1] the field of epigenetics has arisen to explain

1 (i)Noble, Ivan, "Human Genome Finally Complete", BBC News, Monday, April 14, 2003. — URL: http://news.bbc.co.uk/2/hi/science/nature/2940601.stm. — (ii)Kolata, Gina, "Human Genome, Then and Now", New York Times, April 15, 2013. — URL: http://www.nytimes.com/2013/04/16/science/the-human-genome-project-then-and-now.html?_r=0.

how environmental factors can affect expression of genes within the genome.[1] Even though environmental factors can influence gene expression, the underlying human genome doesn't generally change much, and the genome is a reliable blueprint for what distinguishes humans from other organisms. — It's always possible to find people who will lie if they're given enough money. Even people with advanced degrees in technical fields can be bribed. Looking beyond this fact, there is a consensus among honest people knowledgeable about meiosis, mitosis, chromosomal replication, RNA, DNA, the human genome, epigenetics, and genetics in general, that a newly conceived human embryo is genetically fully human because at conception, the DNA blueprint for that entity is fully formed and fully human. Even a zygote has the unique genetic structure that is the blueprint for this human organism for the rest of the organism's life. Implicit in this consensus is the belief that for all organisms that reproduce through meiosis, a new organism, a new life, begins at conception. So among knowledgeable and honest people in 2013, practically no one claims that life does not begin at conception. So it's common knowledge among honest and knowledgeable people that a human embryo is a human being. So regardless of whatever opinion may have prevailed in any society anywhere in the past, the opinion that necessarily prevails in all technologically advanced societies in 2013, among honest and knowledgeable people, is that human embryos and fetuses have natural personhood. This is now such common knowledge that it shouldn't be necessary to cite authority regarding this claim. In fact, the court should take judicial notice of this common knowledge, and should admit it as fact.

Even though a consensus exists among honest and knowledgeable people in 2013, some of this population of otherwise honest and knowledgeable people also believe in eugenics. Eugenics, by that and other names, has become so popular that among this population of honest and knowledgeable people, many might think human life is cheap and of little value, especially if the life is that of an embryo or fetus. But this philosophical commitment to eugenics that may now be common in many high-tech fields should not be allowed to influence any American court. The commitment to "life, liberty, and property" that is clearly manifest in the 14th Amendment, and in American jurisprudence in general, demands that if a court errs in regard to the protection of life, it should do so on the side of caution, and not on the side of being flippant about whether someone else lives or dies. The 14th Amendment was adopted to correct the serious violations of life, liberty, and property that arose out

1 (i)University of Utah Health Sciences, Genetic Science Learning Center, Epigenetics. — URL: http://learn.genetics.utah.edu/content/epigenetics/. — (ii)"Epigenetics" at Wikipedia. — URL: http://en.wikipedia.org/w/index.php?title=Epigenetics&oldid=585264887.

of the denial that people with black African ancestry are natural persons who are therefore fully human.[1] Erring on the side of caution demands that the court not make a similar mistake in regard to pre-natal natural persons. Erring on the side of caution demands that the court hold that the fetus, from zygote through birth canal, must be recognized not only as genetically fully human, thereby having natural personhood, but also as having 14th Amendment personhood.

Given that Blackmun's opinion makes it clear that he and the Court, at least in 1973, valued human life at least nominally, this memorandum will not enter into a diatribe against eugenics, but will only say this on that subject: If human life, any human life, has no value, then murder ceases to be a crime, and all lesser public delicts and torts cease having a rational basis for prosecution. This is clearly prescription for social collapse. It's therefore absolutely imperative for courts to uphold the commitment to life, liberty, and property.

In *Roe*, the Court was clearly following a line of reasoning, based on the law and facts presented by the litigants, that recognized Roe's natural and 14th Amendment personhood, meaning her right to life, liberty, and property, but that failed to acknowledge her fetus' natural and 14th Amendment personhood. All parties acknowledged that if the fetus' personhood had been recognized, Roe's case would have collapsed. Given what technologically knowledgeable and honest people in the field of genetics accept as undeniable fact in 2013, it appears that Roe's premise was absolutely wrong. Given that Roe's premise that the fetus lack's personhood was absolutely wrong, it appears on its face that the Court should have found in the State's favor, and should have upheld the Texas criminal statutes against abortion. On the other hand, there may be extenuating circumstances, other factors that must necessarily be examined, and that are necessary to grappling with root issues. So before reaching the conclusion that the abortion statutes were correct, it's important to examine some of the more peripheral issues in *Roe*. A good place to start that process is to examine why this natural person who happens to be a fetus is required to have 14th Amendment personhood before being clothed in the kind of personhood that's protected by the general government.

Why 14th Amendment Personhood?

Blackmun indicated that,

> The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three

1 *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). — URL: http://supreme.justia.com/cases/federal/us/60/393/case.html.

> references to "person". The first, in defining "citizens", speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. 410 U.S. 157.

In addition to these citations of § 1 of the 14th Amendment, Blackmun went on to cite other places in the Constitution where the word "person" appears, including §§ 2 and 3 of the 14th Amendment.[1] He concluded that,

> in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application. All this . . . persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

This is surely one of the primary reasons Blackmun denied that the unborn have personhood. But as a consolation to people concerned about pre-natal life, Blackmun also set up the trimester structure, and proscribed abortion beyond "viability".

Roe's complaint alleged that the Texas statutes "abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." 410 U.S. 120. Likewise the District Court found that the

> "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void . . . because they were . . . an overbroad infringement of the plaintiff's Ninth Amendment rights. 410 U.S. 122.

Blackmun confirmed that Roe's alleged right "to terminate her pregnancy" was alleged by her to be a

> personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in . . . privacy said to be protected by the Bill of Rights or its penumbras . . .; or among those rights reserved to the people by the Ninth Amendment. 410 U.S. 129.

Blackmun agreed that supreme Court jurisprudence had found a right to privacy based on the 1st, 4th, 5th, 9th, and 14th Amendments, as well as in the "penumbras of the Bill of Rights". 410 U.S. 152. All this indicates that Roe's alleged right to abort was based on her interpretation of the penumbras of the Bill of Rights, and her interpretation of the 1st, 4th, 5th, 9th, and 14th Amendments. On the other hand, the State of Texas alleged that "the fetus' right to life" was guaranteed by the 14th Amendment. 410 U.S. 156-157. So both parties in this adversarial proceeding

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1 Congressional Research Service Annotated Constitution, Cornell Legal Information Institute. — URL: http://www.law.cornell.edu/anncon/.

were calling on the 14th Amendment as foundational to their causes. So clearly the 14th Amendment was crucial to both the plaintiff's and the defendant's cases. So it's extremely important to examine the salient features of the 14th Amendment, especially as it interfaces with the Bill of Rights. But before that, it's important to discover the relationship between these constitutional references to personhood and natural personhood.

The distinction between natural personhood and 14th Amendment personhood is essentially that 14th Amendment personhood is natural personhood that's cognizable by the Court. The Court in *Roe* clearly indicated that even if the human fetus has natural personhood, such natural personhood is not cognizable by the Court as personhood in any legally meaningful sense. Even if natural personhood exists, if it's not recognized by the Court, then it's not personhood under the 1st, 4th, 5th, and 9th Amendments, under the penumbras of the Bill of Rights, or under the 14th Amendment, at least according to the Court. The legal status of slaves before the War Between the States shows how this works. According to the Court's interpretation of the Constitution before the war, slaves were not persons under the Constitution because they were subject to the "three fifths" compromise.[1] Article I § 2 para 3. By refusing to recognize that natural persons were persons, the Court allocated the given class of natural persons to a status that made them vulnerable to being claimed as property by natural persons in some other class. Refusal to recognize pre-natal humans as natural persons essentially locks pre-natal humans into the same hellish status suffered by antebellum slaves.

Each of the "Civil War Amendments", meaning the 13th, 14th, and 15th, ends with a claim that Congress has the power to enforce the amendment through "appropriate legislation". According to the organic Constitution, it's obvious that Congress has such power, so it tends to make one wonder why Congress thought it necessary to include this kind of claim in these amendments. To know why, it's necessary to examine the judicial history between the ratification of the Bill of Rights and the ratification of these three Amendments. — The 9th Amendment states,

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

This has been commonly interpreted to mean that there is a set of rights that is so vast that it is ultimately unarticulable, and that all these that are not articulated by the Constitution are "retained by the people". Any rational person who read this amendment would naturally conclude that if slaves are human beings, then

1 *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). — URL: http://supreme.justia.com/cases/federal/us/60/393/case.html.

according to the Bill of Rights generally and the 9th Amendment specifically, slaves, as natural persons, must naturally have the rights to "life, liberty, and property", and that as slaves, they had somehow been wrongfully deprived of these rights. The Constitution being a sheaf of compromises, the framers of the Bill of Rights included the 10th Amendment in the Constitution, among other reasons, to keep people from reading the Bill of Rights in a manner that would clearly promote slavery abolition. The 10th Amendment says,

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Because the Constitution did not claim the power to abolish slavery, the power to have slavery, or not to have slavery, was left to the States, meaning to the people within each State. So these rights mentioned in the first nine articles in amendment were legally in effect only within the immediate jurisdiction of the general government, meaning only in the District of Columbia and federal enclaves, except in cases in which States recognized such rights through their own initiative and irrespective of what the Constitution said. But even in D.C. and the federal enclaves, slaves were not recognized as fully human because of the three-fifths compromise. The 13th Amendment officially abolished slavery and "involuntary servitude" within all the States and federal territories. The 15th Amendment attempted to guarantee the "right . . . to vote" for all "citizens of the United States", regardless of "race, color, or previous condition of servitude". Regardless of whether the War Between the States was necessary or not, and regardless of whether §§ 2-4 of the 14th Amendment were good or not, 14th Amendment § 1 was clearly and obviously an attempt to guarantee to ex-slaves the Bill of Rights and the "penumbra of the Bill of Rights". In order for the general government to guarantee the Bill of Rights and its penumbras to ex-slaves, it was necessary for the general government to claim enforcement powers within State jurisdictions, where such federal enforcement powers had previously not existed because of the 10th Amendment's barrier to intrastate enforcement by the general government. This is why the "Civil War Amendments" each have this extraordinary claim that Congress has the power to enforce the amendment through "appropriate legislation". The new capacity for intrusion of federal jurisdiction into State jurisdiction that was established by these amendments was the beginning of the so-called "incorporation doctrine".[1] The incorporation doctrine identifies a

1 **West's Encyclopedia of American Law**, edition 2. Copyright 2008. The Gale Group, Inc. — URL: http://legal-dictionary.thefreedictionary.com/Incorporation+Doctrine.

process by which the Bill of Rights and its penumbras would be incorporated by the States, through federal force if necessary.

The incorporation doctrine was essentially a doctrine founded in the 13th-15th Amendments, by which the Bill of Rights and the penumbras of the Bill of Rights were applied by the general government to intra-State jurisdictions. Through caselaw and federal statutes, the "Civil War Amendments" have gradually broken the barrier between the general government and the States that was identified by the 10th Amendment.[1] With regard to the protection of natural rights, like the right not to be forced into involuntary servitude, this process identified by the incorporation doctrine has been an absolutely good thing. However, the general government has used this mechanism, embodied primarily in the 14th Amendment, to usurp power "reserved to the States" and "to the people" in ways that far exceed the protection of natural rights. Although this usurpation, as a general topic, is far outside the scope of this memorandum, it does demand mention in passing for the sake of keeping perspective.[2] Use of the incorporation doctrine for purposes other than the protection of natural rights is an absolute perversion of the constitutional powers of the general government. This perversion has happened largely because of failure to recognize what constitutes the natural right to life, liberty, and property, and what doesn't, and to recognize what constitutes deprivation of life, liberty, and property, and what doesn't.

The reason the 14th Amendment was important to the arguments of both parties in *Roe*, is because each party was basing its case on natural rights that clearly exist within the Bill of Rights and the "penumbra of the Bill of Rights", and each party was implicitly claiming that through the 14th Amendment, their particular rights were incorporated into State jurisdictions. Roe was claiming that the "right to privacy" had been incorporated to the States via the 14th Amendment "Due Process Clause". That clause says,

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1 If humans are proscribed from violating natural rights, then human governments are as proscribed as any individual(s). Claims that "police powers" are reserved to the States via the 10th Amendment don't quite stand up well against a claim that every human being is duty-bound to render justice whenever damage exists through delicts and contract violations. The supreme Court justices, being human, are thereby obligated by such an appeal for justice, regardless of what the 10th Amendment may say.

2 For the sake of keeping perspective, it's important to understand that even though the general government's jurisdictional incursion into intra-State jurisdictions is justified when intra-State natural rights are violated, that is not the only criterion for such incursion. The State has original jurisdiction. So the general government's incursion is justified only when the State fails to exercise its original jurisdiction over such a subject matter.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

By basing its case on the "right to life", the State of Texas was defending its abortion statutes based on the natural right that it clearly recognized in the Due Process and Equal Protection clauses of section 1. If a State recognizes that it has a duty to protect the life, liberty, and property of one kind of natural person within its jurisdiction, then it must, under Equal Protection, recognize its duty to protect the same for every other kind of natural person within its jurisdiction. Under Due Process, the State is not allowed to "deprive . . . without due process". Given that the Equal Protection and Due Process clauses are crucial and good, and given that the fetus is a natural person, it's reasonable and good that the State was protecting the "right to life" of the fetus, assuming that there was no conflict between the mother's natural rights and the fetus' natural rights.

Each party was basing its case on the 14th Amendment Due Process clause. Each party was doing this for two reasons: (i)to have the Court recognize the existence of the natural right being defended by the party; and (ii)to have the Court recognize that the protection of that natural right had been incorporated by the general government as a power that the general government could legally exercise within the State's jurisdiction if the State failed to do so. So both parties were appealing to the 14th Amendment for the sake of claiming its authority under the incorporation doctrine. — One of the factors that skewed the Court's decision far into artificial territory was its refusal to acknowledge that this pre-natal human being was in fact a natural person. If Blackmun had recognized that a fetus is a natural person, then he would have necessarily also recognized that a fetus is a person within the ambit of the 14th Amendment, which would automatically entail that the fetus has a right to "life, liberty, and property" under the Due Process clause. All this means that under the incorporation doctrine, the general government has the power to enforce both Roe's "right to privacy" against the State, and the fetus' "right to life" against anyone who might usurp that life. Clearly if the fetus were a person under the 14th Amendment, its "right to life" would trump Roe's "right to privacy". No lawful jurisdiction would honor a right to privacy if such right to privacy were used to hide a murder. That's why Roe's case would collapse if the fetus were a natural person.

In summary, the reason the 14th Amendment was crucial to each party's case was because the incorporation doctrine was crucial to each party's case.

Possible Claims Roe Could Have Used to Rebut the Fetus' Right to Life

Now that it's clear that based on scientifically established fact, the fetus is a natural person and therefore a person under the 14th Amendment Due Process clause, and that Blackmun's opinion was therefore absolutely wrong about this aspect of the State's case, it may seem obvious that the State's claim that the fetus has a "right to life" must be correct. On the other hand, this conclusion may be premature. It depends upon how "right to life" is defined. Roe's claim that her 14th-Amendment-based "right to privacy" must prevail could not withstand a well-established claim that the fetus has natural personhood, unless there were extenuating or mitigating circumstances that were never presented in the 1973 case. Perhaps Roe's legal team could have devised a legal theory that would somehow trump the State's "right to life" claim, even though the fetus clearly had natural personhood.

As should be obvious, with it established that the fetus is a natural person, Roe cannot use a mere "right to privacy" to shield her against prosecution for killing her baby. As a natural right, part of the penumbra of the Bill of Rights, and a right under the Due Process clause of the 14th Amendment, she certainly had a right to privacy. But this could never be used to excuse murder. Even so, the question remains, if she aborted her fetus, would that necessarily constitute murder? In order to answer this question holistically, it's necessary to examine the circumstances more holistically. It's necessary to return to examining basic biological facts.

It's a biological fact that no reputable biologist or medical technician would deny, that the fetus lives within the mother's womb, and is sustained by nutrients derived from the mother's blood. In other words, the relationship between the mother and the fetus is analogous to the relationship between a host and a parasite, respectively. Again, no one honest and knowledgeable in the field would deny these facts. So it's important that the court admit these facts by taking judicial notice. — The parasite in this case is not merely some non-human organism. The parasite in this case is a natural person. So the mother could conceivably have a righteous claim that the fetus is trespassing on her property. Her body is her private property, and some other human is clearly ensconced on her property, either with her consent or without it. The mother could conceivably claim that this human is trespassing, and is even stealing from her. This is the crux of the case that Roe could have presented to the court, if she had based her case on more reliable law and fact.

If the mother has a lawful claim that the fetus is trespassing on her property and stealing from her, is that damage to her heinous enough to justify her killing the fetus? If not, then her killing the fetus would obviously be murder. But if the claims

to trespass and theft do rise to the level of justifying her killing the fetus, then if she does kill the fetus, then it's justifiable homicide.

Roe never made any such argument in the 1973 case. But if she had known that the State's argument in favor of the fetus' natural personhood was insurmountable, then it would have been necessary for her to bolster her claim to the "right to privacy" with an argument for justifiable homicide. If she could not justify the homicide, then the claim to privacy would have been overridden by the gravity of the homicide. To get a holistic view of the issues and claims involved in this case, it's necessary to examine whether such a homicide can be justified or not, and if so, how.

In order for Roe to be able to establish that abortion of her fetus would have been justifiable homicide, it would have been necessary for her to establish, (i)that the fetus, though a natural person, was trespassing upon her private property; (ii)that the fetus was stealing her private property; and (iii)that these infractions against her private property were heinous enough to justify her committing feticide against her unborn baby. It's such common knowledge among honest and knowledgeable people that the relationship between a pregnant woman and her unborn child is analogous to the relationship between a host and a parasite, that it should not be necessary to cite authority to prove this fact, and the fact should be admissible through judicial notice. If the Court had acknowledged this fact in 1973, it might have been undeniable that the fetus was committing trespass and theft against the mother. But whether such trespass and theft were undeniable or not would have depended upon a number of rudimentary factors that are core attributes of every human and core features of every fetus' relationship with its mother. To get a holistic view of all the issues, it's necessary to discover these rudimentary factors and core attributes, which is one of the core goals of this memorandum.

As mentioned above, when the incorporation doctrine is used to enforce natural rights within State jurisdictions when the intra-State jurisdiction fails to do so, this is an absolutely good thing. That's the way it was used in the termination of institutionalized slavery. But when the incorporation doctrine is used by the general government for purposes other than the protection of natural rights, this is usurpation of power "reserved to the States" and "to the people". The difference between lawful and unlawful exercise of the incorporation doctrine coincides precisely with the distinction between the general government's lawful protection of natural rights and its unlawful usurpation of power. The unlawful usurpation of power reserved to the State and to the people is unlawful precisely because it constitutes violation of the natural rights of the people within the State. This unlawful usurpation of power arises out of a failure to identify, recognize, describe, and define natural rights. Generally, natural rights are just and righteous claims that every natural person

can make. Natural rights are identified by the Declaration of Independence as "unalienable rights" that include "Life, Liberty, and the pursuit of Happiness".[1] They are identified by the 14th Amendment as things that no State should ever deprive of any person "without due process of law", where such things all fall within the general categories of "life, liberty, or property". — There has been a major failure to clearly define natural rights in all the manifestations mentioned in the organic documents, and this failure is precisely what has allowed the general government to abuse its power. This failure to identify natural rights is precisely the same problem that must be solved in order to parse out whether abortion is justifiable homicide or murder. Whether it's justifiable homicide or murder depends upon the natural rights involved. The failure to clearly define the natural rights which abortion allegedly violates is evident by the fact that the litigants in *Roe* have competing natural rights, the natural right to privacy versus the natural right to life, and this conflict between these natural rights has never been properly reconciled by the supreme Court.

Given that it's beyond dispute that this pre-natal human is a natural person, before the *Roe* controversy can be decided in a way that genuinely does justice to the facts, it's necessary to see that this pre-natal natural person has natural rights, and it's necessary to see how these natural rights are constituted. More exactly, it's necessary to understand what constitutes natural rights for both parties and for all people. This memorandum will show that natural rights consist of three essentials: primary property, secondary property, and private jurisdiction. Although there is not a one-to-one correspondence between life, liberty, and property, on one hand, and primary property, secondary property, and private jurisdiction, on the other, the former three and the latter three conceptually overlap, and all natural rights can be understood to be subsumed within these six categories. This claim is not arbitrary. It is based on a natural-law approach to ethics, and on the understanding that natural rights are a function of natural law.

Natural-Law Basis for Natural Rights

As is confirmed by all honest legal scholars who are knowledgeable about the subject, prior to the War Between the States, the natural rights mentioned through various appellations in the organic documents were universally understood to be aspects of natural-law theory.[2] In other words, wherever "rights" are mentioned

1 Declaration of Independence. — URL: http://www.archives.gov/exhibits/charters/declaration.html.

2 "Some early judicial opinions such as that of Justice Samuel Chase in *Calder v. Bull* (1798) held out the possibility that courts enforce 'principles of natural justice'

in the Declaration of Independence, the Constitution, the Bill of Rights, and even the "Civil War Amendments", such rights were understood to be outgrowths of, functions of, and appendages to natural-law theory. Natural-law theory was never perfect, and the lack of perfection certainly contributed to the legal community's eventual rejection of it. The biggest all-around failure of all the various breeds of natural-law theory was the failure to adequately describe and define natural rights. As a consequence of this honest failure, and probably coincident with dishonest economic interests, after the War Between the States, the legal community gradually migrated away from belief in natural law and towards replacement of it with legal positivism, legal realism, and other competing legal philosophies. But this migration is hugely problematic.[1] It was another instance of throwing the proverbial baby out with the bath water. Without a definition of natural rights within the context of natural-law theory, natural rights become so indefinite that they almost appear negligible or non-existent. For example, if natural-law theory is replaced with the Darwinian theory of evolution, then survival-of-the-fittest becomes the rule, and natural rights become irrelevant because every organism has the right to do whatever it wants to survive. In natural-law theory in general, the concept of natural rights is a function of an encompassing moral system, a moral system in which natural rights exist inherently. If this moral system is replaced by another moral system, meaning one in which natural rights have no inherent existence, then if rights exist within the alternative moral system, they are a contrivance, and the concept of natural rights, at best, is on a slippery slope towards meaninglessness. If the moral system that arises naturally out of natural-law theory is replaced with the morals that arise naturally out of the theory of evolution, legal positivism, legal realism, utilitarianism, *etc.*, then rights tend to become meaningless because they are not understood to exist naturally and inherently.

Even though there are ample natural-law theories that do not adequately articulate how natural rights arise naturally within such natural-law theory, natural

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independent of particular constitutional provisions, but this idea was submerged when concepts of natural justice were channeled into the Fourteenth Amendment's Due Process Clause after the Civil War . . . In the early nineteenth century, both sides of the debate over slavery invoked natural law." — Wolfe, Christopher; "Natural Law"; **The Oxford Companion to the Supreme Court of the United States**, pp. 581-582.

1 Some make rational and reasonable arguments that this migration away from natural-law theory was sponsored by the same money and banking interests who fought against the general recognition of natural rights in both the English Civil War and the American War for Independence. For example, see "Endgame: Blueprint for Global Enslavement", a documentary film by Alex Jones. — URL: https://www.youtube.com/watch?v=x-CrNlilZho. — URL for bibliography: http://endgamethemovie.com/biblio01.html.

rights, rights that every human has inherently, cannot arise naturally outside of natural-law theory, except perhaps in cases where a natural-law theory exists by another name. If natural rights don't exist because there is no rational basis for them, then the rational basis for proscribing murder ceases to exist, and murder tends to cease being a crime. If there is no rational basis for proscribing murder, then there is no rational basis for proscribing lesser delicts and torts. Even when such laws are still on the books, if there is no popularly recognized rational basis for them, then there is an absence of morality in the population to support such laws. When natural-law theory is replaced with legal positivism, *etc.*, which is exactly what has happened in America since the War Between the States, then natural rights cannot be meaningfully defined, and they become concessions that statist insiders make to the rabble, rather than attributes possessed naturally by every human being. Such systems are inherently tyrannical. Under such systems, the state is the *de facto* grantor of the privileges that substitute for natural rights, as though the state were the universe's creator. Under these other legal philosophies, the state gives such privileges begrudgingly, rather than acting as the recognizer and protector of such naturally existing rights. — This is a short description of the cultural depravity into which America is now sunk, thanks to the pervasive failure to base natural rights squarely upon natural-law theory.

To maintain reliable interpretation of the organic documents' references to rights, it's necessary to re-establish some reliable approach to natural-law theory. But it's necessary to approach such re-establishment with some trepidation. Because all natural-law theories yet presented have been so flawed, none deserve blanket adoption. So this memorandum will sketch the rudiments of a natural-law theory, aimed specifically at the reliable interpretation of references to "rights" in the organic documents.

Natural law can be understood to be the set of laws that exist naturally, such that if a person could obey them perfectly throughout his/her life, then this person would have lived a perfect life. But this preliminary description of natural law is inherently biased because it defines natural law in moral terms. Natural-law theory should not be defined in strictly moral terms, but should be defined as the intersection of the field of ethics with the field of the natural sciences. So natural law is more than a mere moral system. To see how it is the intersection of the laws of nature and the field of ethics, consider the following scenario: Suppose Person A is staring out his window at a tree. Science makes it clear that there are laws of nature that govern the morphology and physiology of that tree. Those laws can be understood to exist externally to Person A. Those laws of nature are therefore in operation exogenous to Person A. Even so, for Person A to recognize the tree as a tree, it's

necessary for exogenous physical evidence of the tree's existence to reach Person A's cognitive faculties. For example, light reflecting off the tree into Person A's eyes causes, through a chain of events, neurons to fire within Person A's body. The laws of nature that govern this chain of events are clearly in operation endogenous to Person A. But the neuronal firings by themselves do not complete the picture sufficiently to show how this description integrates with the field of ethics. Not only do neurons fire endogenously, but there must also necessarily be some kind of replication of the tree in the mind of Person A. Once there is a one-to-one correspondence between the exogenous tree and the endogenous image of the tree, the endogenous replica can be the subject of ethical decisions by Person A. For example, if the tree is a lime tree, and it has ripe limes, and Person A wants lime juice, where that desire arises out of the laws of nature that govern human desire creation, then a need to make a choice enters into Person A's conscious mind. Should Person A go pick a ripe lime off the tree, or not? If the tree is unowned and unclaimed by any other human, then Person A could exercise his right to homestead the tree, and go pick the lime. That choice would be an ethical issue that did not involve any other human. But if the tree is owned by someone else, then part of Person A's choice necessarily involves consideration of whether Person A should steal the lime or not.

This vignette shows how the field of ethics integrates with the laws of nature, where the discovery of the laws of nature is the objective of the natural sciences. This vignette shows that by logical necessity, natural-law theory is composed of three intersecting fields, or of what can be called the natural-law tripod: (i)the laws of nature that operate exogenously to the human being; (ii)the laws of nature that operate endogenously to the human being; and (iii)the field of ethics, which consists of the pursuit of knowledge about what humans should do in order to live perfect lives, which should be understood to include the implementation of that knowledge through choices. It's obvious that these three fields overlap to some extent. Nevertheless, they are distinguishable even if they are not separable. It's also obvious that because humans do not now know all the laws of nature, humans are incapable of having a perfect grasp of what constitutes a perfect life. So humans are now incapable of being ethically perfect. Even so, some things are obvious. For example, it's obvious that if a person could live a perfect life, such a perfect person would not die, because death is by definition something that happens to imperfect organisms. Another thing that's obvious is that if humans stopped pursuing ethical perfection because perfection is not now completely definable, human society would eventually regress to the point at which all behaviors are permissible, including murder. Ethics and morality pertain to human choices, decisions, and judgments. If people stop doing their best in their choices, decisions, and judgments, then everyone suffers. Rejection of the natural law and the whole field of ethics leads

to the same lawless state as just described in regard to the theory of evolution. It's imperative to find some way to operate within the natural-law framework, for the sake of protecting natural rights, if for no other reason.

This lime-tree vignette also shows how natural-law theory encompasses both individual interactions with nature and individual interactions with other individuals. The field of ethics encompasses both questions of what a person should do in his/her interactions with natural phenomena, and of what a person should do in his/her interactions with other people. The field of ethics also encompasses both questions of what actions a person should positively do in order to live a perfect life, and what actions a person should negatively avoid doing in order to live a perfect life. To live a perfect life, perfection, whatever that is, might demand that Person A homestead the lime tree and take and use the ripe fruit. Or if Person A is allergic to limes, perfection might demand that Person A avoid the homesteading. To live a perfect life, if someone else already had a lawful claim to the tree, then it would be necessary for Person A to enter into some kind of agreement with the tree's owner before taking the lime. Of course this assumes a belief in private property, and it assumes that in order to live a perfect life, whatever that is, Person A would need to honor other people's private property rights the same way he would want them to honor his private property rights.

This vignette also implies that there is a significant difference between the field of ethics in general and the subset of the field of ethics commonly known as jurisprudence. Jurisprudence is focused exclusively on human law, where human law is law that humans impose on other humans. Ethics is focused on what humans should do to coordinate their lives with natural law, while jurisprudence is the subset of ethics that pertains to what humans should do to implement human law, where human law at its best is aimed at ethical perfection for society. At its best, human law is a subset of natural law. But while natural law is perfect, so much so that humans are presently incapable of knowing it in its perfection, human law, at present, is inherently imperfect because humans, at present, are inherently imperfect.

According to the description of natural-law theory that's been presented thus far, natural law imposes duties upon every human. For example, if lime juice would be good for Person A because Person A is deficient in vitamin C, then natural law is clearly imposing a positive duty on Person A to go get the C through the most optimal source available, which presumably would be the lime tree. On the other hand, if lime juice would be bad for Person A because Person A is allergic to limes, then natural law is clearly imposing a duty on Person A to avoid eating the lime juice. Such natural duties as these are clearly not jurisprudential because they pertain exclusively to Person A, and they don't inherently entail Person A's

interaction with another natural person. So these natural duties don't involve law that humans impose on other humans, and they are inherently non-jurisprudential. They don't involve anyone else's property. But in the case in which Person B has clear title to the lime tree, if Person A takes the lime without Person B's permission, then Person A is clearly damaging Person B by stealing from him, and such damage, and the action which causes it, clearly fall within the sub-field of ethics known as jurisprudence. For Person A to take the lime without Person B's permission is theft, which is historically, and even currently, a jurisprudential issue.

The lime-tree vignette shows the two things that are most important to jurisprudence. The two things are, a negative duty and a positive duty. The negative duty is a duty to avoid damaging other people. The positive duty is a subset of a set of positive duties that constitute about half the ethical arena. The ethical arena encompasses both questions of what actions a person should positively do in order to live a perfect life, and what actions a person should negatively avoid doing in order to live a perfect life. The negative jurisprudential duty to avoid damaging other people is obviously a subset of the set of all negative ethical duties. Likewise, the positive jurisprudential duty is also a subset of the set of all positive ethical duties. Ethical duties in general are subject to the ethical leg of the natural law tripod, and they do not necessarily involve human law because they do not necessarily involve law that humans impose on other humans, and they don't necessarily involve other people's property. — The positive ethical duty is a positive duty to take whatever one needs from nature, or from whatever environment one may be in, to nourish, sustain, and enhance one's life. If this positive duty involves other people's property, then as a corollary to the negative jurisprudential duty, one should take that other person's property only through that other person's consent, meaning either through the other's gifting or through a bargain between the two people. So the conclusion is that the two overriding jurisprudential duties are these: (i)the negative jurisprudential duty to avoid damaging other people; and (ii)the positive jurisprudential duty to take other people's property only through the other's consent, which is usually through some contractual mechanism. — If Person A gets permission from Person B to take the lime, either through Person A's proffering money or something else of value to Person B, or through Person B's generously giving permission to Person A to receive the lime as a gift, then Person A would be taking the lime through Person B's consent. If there was an exchange, rather than a gift, then there would obviously be a contract between Person A and Person B, where the contract allowed for Person A to take the lime under the condition that Person B received whatever consideration the contract stipulated.

Under every rational and holistic natural-law theory, these two duties are the crux of jurisprudence. But the first duty inherently calls for universal application as human law, while the second duty is more in the nature of a suggestion or a good idea that people can follow as they see fit. So the first duty, the duty to avoid damaging other people, is a natural duty that every natural person owes to every other natural person. This negative duty is the core of jurisprudence because it applies to all people everywhere. It is also the core ingredient in the definition of natural rights (in the human-law sense of that term), because all people have a natural right to not be damaged by other people.[1] The positive duty is not really a duty in the human-law sense of the word, because there is no human-law penalty for disobedience to it. It is a duty under natural law but not under human law. It is therefore at the interface between that aspect of the field of ethics that is not jurisprudential and that aspect of ethics that is globally jurisprudential. The negative duty is the only genuine source of what Anglo-American jurisprudence has historically called "public law",[2] because it applies to everyone. The positive inclination towards the creation of contracts is the source of what Anglo-American jurisprudence has historically called "private law",[3] because contracts by definition create terms that are laws the contract imposes

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1 It's crucial to accompany this claim with a disclaimer: The damage referred to here is not "damage" in the vernacular. It is damage that can be proven to exist in a court of law, through reasonable rules of evidence. Also, the damage referred to here is definable as equivalent to what Crusoe economics and current ethical libertarianism call violation of the non-aggression principle, nonaggression axiom, nonaggression obligation, anti-coercion principle, non-initiation of force principle, *etc*.

2 "public law" — "A general classification of law, consisting generally of constitutional, administrative, criminal, and international law, concerned with the organization of the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another." (**Black's 5th**, pp. 1106-1107) — As indicated, constitutional, administrative, and international law have been included historically in the category of public law. For reasons that become obvious as the sketch of natural-law theory unfolds, constitutional, administrative, and international law are really private law. — Because Anglo-American law has historically failed to distinguish private law and public law in a way that's rationally consistent with this natural-law theory, this memorandum will attempt to avoid this nomenclature.

3 "private law" — "As used in contradistinction to public law, the term means all that part of the law . . . which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals." (**Black's 5th**, p. 1076) — Historically, private law has included not only law arising out of private, local contracts, but also "definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private

on the parties. So the duties that arise out of contracts are local instead of global. Such contract-based duties apply only to the parties to the contract, in contrast to the proscription of non-contractual damage, which applies to everyone, *i.e.*, which is global. The negative duty imposed by any given contract on all parties to the contract is, "Don't break the contract."

Under natural law, every human being has a negative duty to avoid damaging every other human being regardless of whether the damage arises out of the violation of a contract or not. Under jurisprudence that has existed for millennia, failure to abide by this negative duty consists of an act that damages someone else, and this act has been called a "delict",[1] unless the damage arises out of the violation of a contract. Delicts consist of violations of the negative duty, like murder, rape, theft, extortion, trespass, kidnapping, mayhem, fraud, *etc.* Historically, legal actions that arise out of delicts are called actions "*ex delicto*". The corollary to actions *ex delicto* is actions "*ex contractu*". The corollary to the negative duty is the positive duty to enter into contracts and agreements to accomplish shared goals, rather than to perpetrate delicts. An action *ex contractu* arises out of a violation of a contract, where the violation damages one of the parties. So the core of jurisprudence consists of essentially two different subject-matter jurisdictions, the jurisdiction pertaining to actions *ex delicto* and the jurisdiction pertaining to actions *ex contractu*.

Recapitulating, under every rational and holistic natural-law theory, the following is true:

(i) Ethics is a sub-function of natural law that consists of one leg of the natural-law tripod,[2] where the other two legs are laws of nature

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individuals." This definition thereby indicates that private law has historically included both actions against private delicts and actions *ex contractu*. For reasons that become clear as this sketch of natural-law theory proceeds, private delicts should not be included in private law. Arranging the categories as American law has historically arranged them muddles the issues and obscures natural rights. — Because Anglo-American law has historically failed to distinguish private law and public law in a way that's rationally consistent with this natural-law theory, this memorandum will attempt to avoid this nomenclature.

1 Anglo-American law has historically divided delicts into "public delicts" and "private delicts", and has called public delicts "crimes", and private delicts "torts". The Anglo-American nomenclature is not used in this memorandum because it tends to muddle the issues. — See **Black's 5th**, "delict"; pp.384-385.

2 In fact, ethics is an academic field within philosophy. But the word is being used in this memorandum to include the individual's more informal acts of making choices. In other words, this memorandum treats ethics and morality as largely synonymous.

in operation exogenous to any given human, and laws of nature in operation endogenously.

(ii) Ethics is concerned entirely with the issue of what decisions, choices, judgments, actions, and behaviors contribute to living a perfect life.

(iii) Jurisprudence is a sub-function of the field of ethics that deals with human law, meaning law that humans impose on other humans.

(iv) Jurisprudence in the hard-core sense of the word pertains exclusively to the issue of what to do in response to violations of the negative duty, meaning in response to violations of the global duty not to harm other people.

(v) Jurisprudence in the hard-core sense of the word consists of two and only two subject-matter jurisdictions, the jurisdiction pertaining to actions *ex delicto* and the jurisdiction pertaining to actions *ex contractu*.

(vi) Jurisprudence in the soft sense includes knowledge about how to structure contracts so that the contracts satisfy the mutual goals of the parties without inflicting harm on any of the parties in the process, and without perpetrating delicts on anyone not party to the given contract.

(vii) Jurisprudence in the soft sense is a sub-function of ethics that pertains to the structuring of human relations through contracts.

Although jurisprudence in this soft sense can be distinguished from jurisprudence in the hard-core sense, it is not really separable from it.[1]

The entire field of hard-core jurisprudence is composed of its two and only two overarching subject-matter jurisdictions. These two jurisdictions arise out of the two and only two sources of damage perpetrated by people against other people. The two overarching subject-matter jurisdictions are the jurisdiction of legal actions *ex delicto* and the jurisdiction of legal actions *ex contractu*. These two overarching subject-matter jurisdictions within natural-law theory's sub-field of hard-core jurisprudence encompass and exhaust the entire field of hard-core jurisprudence. This is obvious because according to any rational and comprehensive natural-law theory, hard-core jurisprudence is exclusively about damage perpetrated by one person or group of persons against another person or group of persons, and such damage can only happen

1 A major problem in American culture is excessive compartmentalization. This excessive compartmentalization results from the tendency to impose either-or logic where both-and logic is more appropriate. This logical fallacy is pervasive and causes separations and schisms where they are not needed or appropriate. Such fallacies result in numerous assumptions and presuppositions that are not conducive to natural rights. This neglect of natural rights is built deeply into the American legal framework.

through breach of a contract, or not. Both damage through breach of contract and without any contract are functions of the negative duty, where the negative duty says, "Don't damage other people." Damage perpetrated by one person against another, outside of any contract, is by definition a delict.[1]

It's necessary to conclude that a rational and holistic approach to ethics requires that ethics be encompassed by a rational and holistic approach to natural-law theory, and it requires a rational and holistic approach to jurisprudence, where hard-core jurisprudence must be distinguished from soft jurisprudence, and where hard-core jurisprudence is focused entirely on responding to damage perpetrated by one human party against another human party, and where hard-core jurisprudence is thereby limited to two and only two overarching subject-matter jurisdictions. The two overarching subject-matter jurisdictions are (i)the jurisdiction that adjudicates actions *ex delicto*, and (ii)the jurisdiction that adjudicates actions *ex contractu*.

Regarding soft jurisprudence, contracts are formed to satisfy the mutual goals of parties, and it's implicit in all contracts that damage by one party or group of parties against another party or group of parties is something that the parties should at least attempt to avoid. It's also implicit in all lawful contracts that the contract should not be a conspiracy to perpetrate delicts against people who are not party. Implicit within this strict approach to jurisprudence is also the conviction that governments are inherently contractual. This means that contracts that form governments should not be conspiracies to perpetrate delicts against non-parties. It's also implicit within this strict approach to jurisprudence that constitutional, administrative, and international law are also inherently contractual. Although natural-law theory has never been perfect, there are elements within its various renditions that hint that these claims are true. Also, although America's organic documents are sheaves of compromises, there are elements within them that imply that these claims are true. The same can be said of the English common law that was adopted by the American States.

Conceptually, these two overarching subject-matter jurisdictions within hard-core jurisprudence appear in the organic documents. But they appear as positive attributes of humanity, rather than as negative duties by which every human is naturally encumbered. For example, in the Declaration of Independence these natural rights appear as positive attributes with which every natural person is "endowed by their Creator". The Declaration calls these natural rights "unalienable Rights", and it indicates that these positive attributes include "Life, Liberty, and the

1 And in Crusoe economics, a delict is by definition a violation of the nonaggression axiom outside of any contract.

pursuit of Happiness". Obviously, if any person or group of persons violated these natural, Creator-given rights, the violator would be damaging the victim through a delict, unless the violator was damaging the victim through breach of a contract. The Declaration goes on to say that "Governments are instituted among Men" to "secure these [natural] rights". It says that governments derive "their just Powers from the consent of the governed". This indication that governments arise out of consent implies that governments are inherently contractual. Given that governments are inherently contractual, they must necessarily fall within these parameters established by the negative duty that encompasses all hard-core jurisprudence: "Don't damage other people." And of course the ethical corollary of this jurisprudential negative duty is a positive duty: "In order to ensure that people don't damage other people, people should enter into agreements and contracts to pursue mutual goals." Governments clearly arise out of this impetus to enter agreements and contracts. This belief in government by consent is obviously a belief from natural-law theory that was commonly held by the document's framers. But there has been a serious failure to follow through on this belief by subsequent generations. From the rational perspective of the natural-law theory that's being sketched in this memorandum, this failure by subsequent generations has happened almost entirely by way of the failure to recognize and honor these subject-matter jurisdictions.

As indicated jurisprudence under this natural-law theory is composed of a hard-core sub-field and a soft sub-field, where hard-core jurisprudence is confined to one and only one concern: responding to damage perpetrated by one party or group of parties against another party or group of parties. Such damage can happen in two and only two ways: (i)where the perpetrator and the victim are both party to a contract, where the damage arises immediately out of the perpetrator's breach of that contract; or (ii)where the perpetrator and the victim are not mutually party to a contract, or if they are, the damage to the victim does not arise immediately out of the perpetrator's breach of that contract. These two possible sources of damage, damage *ex delicto* and damage *ex contractu*, are mutually exclusive, and they exhaust the entire field of hard-core jurisprudence that inherently applies to all human beings.

If it's understood and accepted as true that hard-core jurisprudence is a sub-field of ethics that applies to all human beings, whose purview is confined to damage perpetrated by one party against another, where such other-inflicted damage can arise in either of two ways, through breach of a contract or through a delict, and if *ex contractu* and *ex delicto* define subject-matter jurisdictions, then it's reasonable to ask, more specifically, what these subject-matter jurisdictions consist of.

An obvious corollary to this claim that governments originate in contracts is that if government perpetrates damage against people, where such people are innocent of damaging other people, then government has violated its contract and deserves to be prosecuted *ex contractu*, and perhaps even *ex delicto*. This treatment of government as perpetrator is implied in the Declaration where it says, "whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it". The Declaration goes on to say that when government-perpetrated delicts and contract breaches become egregious, "it is their right, it is their duty, to throw off such Government, and to provide for new Guards for their future Security."

According to a reasonable reconstruction of natural-law theory, one that emphasizes natural rights, within the secular arena, natural rights are equivalent to private property rights. This claim is reinforced by the 14th Amendment's rendition of the phrase that appears in the Declaration as "Life, Liberty, and the pursuit of Happiness". The 14th Amendment reverts to the Lockean "life, liberty, or property". Within the secular arena, where multiple religions compete in an at-least-nominal free market, evidence is necessarily confined to what can generally be apprehended regardless of religious inclinations. For example, although character testimony and testimony aimed at determining *mens rea* are admissible under certain circumstances within a secular court, and although expert testimony is sometimes admissible, fact claims are generally inadmissible unless they come into evidence through judicial notice or as testimony given by a witness with personal knowledge. Hearsay, idle speculation, philosophical postures, and religious beliefs are generally excluded. Claims of damage that are not supported by concrete evidence of damage are thereby excluded. Thus damage alleged by a business owner against the owner's competitor, based on the claim that the competitor is cutting into the owner's business, by itself, does not constitute jurisprudential damage or harm, because it is simply a function of economic scarcity, and not of the competitor's negligence or malice. Likewise, damage alleged by a homeowner against a neighbor, based on a claim that the neighbor's race, religion, occupation, *etc.*, is causing a decline in the homeowner's property value is generally inadmissible, because there's nothing inherently delictual about race, religion, occupation, *etc.* — This limitation on admission of evidence into secular courts, to what is concrete, means that to prove damage either *ex delicto* or *ex contractu* within a lawful secular court, the damage must be concrete and cannot be something as ethereal as violation of personal preferences or religious inclinations. These facts manifest a need to convert the global natural rights of life, liberty, pursuit of happiness, and property, into things that can be recognized as concrete within secular courts. That's why this re-presentation of natural-law theory posits that these natural rights, as far as secular courts are concerned, are equivalent to primary

property, secondary property, and private jurisdiction. Rights to life, liberty, pursuit of happiness, and property may all be attributes of free human beings, but they are too nebulous to contribute to the discernment of what constitutes reliable evidence in a secular court.[1]

The Three-Fold Nature of Natural Rights

Primary Property

There's almost nothing controversial about the claim in ethical libertarianism that every human being owns his/her self. As far as secular law is concerned, this is essentially a claim that every natural person owns his/her body. If this were not true, then the 14th Amendment would make no sense. If one's body is owned by someone else, then that state of affairs is essentially slavery, which the "Civil War Amendments" were designed to repudiate. If one's body belongs to no one because the law doesn't recognize property, then that also contradicts the 14th Amendment's clear endorsement of private property rights.[2] Given the complexity of the human being, the human being is certainly more than his/her physical body. As long as the physical body is alive, it's necessary for the law to acknowledge that the physical body is the primary property of whoever happens to own it. Because secular law is limited by strict rules of evidence that tend to exclude non-physical, non-concrete, ethereal stuff from evidence, and because a living physical body is the most obvious and primitive evidence that a human being exists, it's reasonable to refer to this person's physical body as this person's primary property. — It follows from this line of reasoning that from zygote to birth canal, the pre-natal human owns his/her physical body to the exclusion of anyone else's claim to the contrary.

Secondary Property

Private property cannot be limited to primary property. This is because, as is obvious in the lime-tree vignette, private property is an absolutely crucial concept in any natural-law theory that genuinely safeguards natural rights, and it cannot be limited to body ownership. When a natural person clearly acquires the capacity

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1 For more about why it's crucial to cast natural rights as property rights, see Rothbard, **The Ethics of Liberty**, "'Human Rights' As Property Rights", pp. 113-120. — URL: http://mises.org/rothbard/ethics/ethics.asp.

2 For more about why these two alternatives are absurd, see Rothbard, **Ethics of Liberty**, pp. 45-47.

to claim things other than primary property, things exogenous to the person, like a lime or the lime tree, and where such claims are lawful and coincide with lawful title, it's reasonable to call such exogenous property "secondary property". But this claim identifies a need to discover how lawful title to secondary property arises. Discovering how lawful title to secondary property arises is crucial to the discernment of the property rights that exist between a pregnant woman and her unborn child. — The property rights extant in a pregnancy are so rudimentary that discernment of them requires a rudimentary approach to economics. Such an approach is supplied by "Crusoe Economics" as expounded by Murray Rothbard in his **Ethics of Liberty**. Crusoe economics is "the analysis of an isolated man face-to-face with nature".[1]

> [T]his seemingly "unrealistic" model . . . has highly important and even indispensable uses. It serves to isolate man as against nature, thus gaining clarity by abstracting at the beginning from interpersonal relations. Later on, this man/nature analysis can be extended and applied to the "real world." . . . Thus, the abstraction of analyzing a few persons interacting on an island enables a clear perception of the basic truths of interpersonal relations[2]

Although Rothbard may use different nomenclature, it's nevertheless true that Crusoe economics starts with primary property, self-ownership, with a natural person's ownership of his/her body. With that beginning, it extends out to the given person's ownership of exogenous objects, of secondary property. Through Crusoe economics it becomes evident that there are two different ways that people can procure lawful secondary property, and these two methods appear in the lime-tree vignette. If the tree was given by nature and unclaimed by any other human, then Person A could homestead the tree, claiming it for his own. After claiming the tree and thereby establishing lawful title to it, Person A could trade the produce from it for other goods produced by Person B. Person A would thereby procure lawful title to these other goods procured through trade with Person B. Of course, if Person B had lawful title to the lime tree, then Person A could procure access to the tree through one of three methods: (i)through trading something of equal perceived value to the owner, Person B; (ii)through convincing Person B to give it as a gift to Person A; or (iii)to use "*the political means*" to gain access to the tree, meaning to gain access through "the expropriation of another man's [(Person B's)] property by violence".[3] Clearly, lawful ownership of secondary property, meaning ownership that honors natural rights, is limited to homesteading and procuration through mutual consent,

1 Rothbard, Murray, **The Ethics of Liberty**, p. 29.

2 Rothbard, Murray, **The Ethics of Liberty**, p. 29.

3 Rothbard, Murray, **The Ethics of Liberty**, p. 49.

where mutual consent can either consist of a gift or of a trade with another person (or group of people), where the parties have lawful title to the consideration.

In order to refine Crusoe economics down to a point at which it might be clarifying to the intricacies of property rights during pregnancy, it will probably be helpful to examine some hypothetical situations. Is the fetus confined to owning its primary property and nothing else? Does the mother have exclusive ownership of the placenta, the chorion, the amniotic sac, the amniotic fluid, the umbilical cord, and other such organs that exist exclusively during pregnancy? Are these organs owned mutually by the mother and the unborn child, or are they owned exclusively as secondary property by the fetus? If these organs are owned mutually, then is there some contract between the mother and the child that governs mutual usage of these organs? The existence or non-existence of such a contract would thereby become crucial in determining whether the fetus is a trespasser or a guest. But before examining the possibility that such a contract exists, it's important to examine a few hypothetical situations to establish some legal concepts that might apply to a pregnancy.

Crusoe economics makes it obvious that all secondary property arises out of the combination of land and labor, or more specifically, labor on land. Land in this context should be understood generally, like the word "terra", earth, which includes oceans and atmosphere as well as soil, minerals, and, in the age of space travel, any such extra-terrestrial property to which one can lay legitimate claim. Likewise, in Crusoe economics, labor is simply the expenditure of mental and physical energy in the production of something that has economic value. In agreement with Rothbard's common-sense approach to Crusoe economics, all economic value arises out of this combination of land and labor.

> If every man has the right to own his own person and therefore his own labor, and if by extension he owns whatever property he has "created" or gathered out of the previously unused, unowned state of nature, then who has the right to own or control the earth itself? In short, if the gatherer has the right to own the acorns or berries he picks, or the farmer his crop of wheat, who has the right to own the land on which these activities have taken place? Again, the justification for the ownership of ground land is the same for that of any other property. For no man actually ever "creates" matter: what he does is to take nature-given matter and transform it by means of his ideas and labor energy. But this is precisely what the pioneer—the homesteader—does when he clears and uses previously unused virgin land and brings it into his private ownership. The homesteader . . . has transformed the nature-given soil by his labor and his personality. . . . [I]t is

> difficult to see the morality of some other group expropriating the product and labor of the homesteader. . . . The pioneer, or homesteader, is the man who first brings the value-less unused natural objects into production and use.[1]

Land is the most fundamental of all secondary property, because all the products that are crucial to human survival derive ultimately from land. To understand whether the fetus can have lawful title to secondary property, even though it is not apparently doing labor on land (unless one stretches meanings to some extraordinary extremes), consider a few hypothetical situations.

Suppose Fred invites his friend Jake over to his house. Jake arrives at Fred's house, and Jake is standing in Fred's living room. Who owns the two shoe-sized areas of carpet that Jake is standing on, Jake or Fred? — The obvious answer is that Fred owns the house, so Fred owns those two shoe-shaped areas of carpet. If Fred has absolute ownership of those two areas of carpet, then it's necessary to conclude that Jake has no rights to be standing on those two areas of carpet. — That's obviously an absurd conclusion. Every human being has an interest in the territory that he/she is standing on, sitting on, lying on, *etc*. Even if someone else owns that property, anyone who is on it has an interest in it. The interest may be extremely temporary and extremely minute, but it is nevertheless an interest that deserves to be recognized. The interest entails that Fred will not suddenly pull the carpet out from under Jake under the pretense that he's replacing it, because he will recognize that Jake has a safety-related interest in the stability of the property that he stands on.

Now suppose Jake comes into possession of a key to Fred's house. Fred is unaware that Jake has the key. When Fred goes out of town, Jake goes over to Fred's house and uses the key to get in. Jake stands around Fred's living room proving to himself that he can violate Fred's absolute title with impunity. Then Jake goes home, locking the door without doing any damage. — While Jake was standing around Fred's house this time, Jake still had an interest in every portion of the floor that he stood on. But Jake's interest this time is different, because this time, he was not invited.

Because all human beings have corporeal bodies that are weighed down on the earth, every human being has an interest in the point-of-contact at which the body is grounded. This point-of-contact is part of being alive on planet earth. This interest is deservedly understood by any rational legal system to be a partial ownership of that point-of-contact by whoever is making the point-of-contact. So if Jake is walking through a primordial forest, which is owned by no one, it's valid for him

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 49.

to claim at least temporary title to each point-of-contact where his body meets the earth. This includes the air that he breathes, the water he drinks, the ground that he walks on, and the trees that he touches. When he inhales, the air becomes his. When he exhales, it ceases to be his. When he touches the ground or a tree, the point-of-contact is his. When he lifts his foot, or his hand, the point-of-contact ceases to be his. So he has a temporary interest, which can be understood to be a temporary ownership, temporary possession, and temporary title. Common sense, respect for the fact that every human being has natural rights, and the obligation to avoid damaging other people, combine to demand that this primordial interest be universally recognized and honored.

In both the case in which Jake was invited to Fred's house, and the case in which Jake went without an invitation, Jake had this primordial interest in Fred's carpet as he stood on it. So there are three different cases in which Jake has a primordial interest (a primordial temporary ownership / possession of his point-of contact): (i)in the unclaimed forest; (ii)in Fred's living room at Fred's invitation; and (iii)in Fred's living room without Fred's invitation. Even though primordial possession exists in each case, Jake's overall interest is different in each case because of the differences in pre-existing title.

(i) Because this forest is not claimed by anyone, Jake's interest in his points-of-contact in the forest are defined purely in terms of his unalienable right to live and breathe and have his being at those points-of-contact. Jake's interest is strictly primordial, and his title is absolute, although limited in time.

(ii) When Jake was invited over to Fred's house, as Jake was standing in Fred's living room, Jake still had this primordial interest in his points-of-contact with Fred's living room. But added to this interest was the implicit acknowledgement that Fred owned the house, and that Jake would respect Fred's ownership by behaving in certain ways. Jake wouldn't start a campfire on Fred's living room floor, as though it were the floor of a primordial forest. Jake wouldn't urinate in a corner as though it were a tree in the forest. Jake wouldn't pick up items in Fred's living room and put them into his pockets as though they were doodads Jake picked up off the forest floor. In short, Jake's interest in this case is the combination of his primordial interest with the implicit acknowledgment of Fred's title; implicit acknowledgment of Fred's interest and ownership of his real property; and implicit acknowledgment of the fact that Jake's primordial interest in Fred's

living room exists only because Fred allowed it by inviting Jake to his house, and because Jake consented to the invitation.

(iii) When Jake went over to Fred's house without Fred's invitation, Jake still had his primordial interest in his points-of-contact as he stood in Fred's living room. But Jake's overall interest in Fred's property, this time, was a combination of Jake's primordial interest with an implicit repudiation of Fred's title; an explicit violation of Fred's interest in and ownership of Fred's real property; and an implicit act of theft against Fred. Jake was imposing an interest on Fred's property without Fred's consent. Jake was thereby stealing an interest in Fred's property. Jake's overall interest in this case is a combination of his primordial interest with the interest that he was stealing from Fred.

These hypothetical situations show that a natural person's physical presence on land must necessarily invest a genuine interest of the given person in the land occupied. The interest may be momentary or temporal, but it's certain that the interest is real. With this established, it's obvious that the fetus certainly has at least an interest in the placenta, the chorion, the amniotic sac, the amniotic fluid, the umbilical cord, *etc.* — In each of these three situations, Jake's points-of-contact don't qualify facially as acts of labor on land. One's first impression might be that these don't qualify as having economic value under Crusoe economics. But further consideration demands that every human being's points-of-contact with land are every natural person's most primordial secondary property. Without those points-of-contact, human beings don't have the vantage point necessary for doing labor on land. So such points-of-contact are necessarily primordial secondary property.

This kind of primordial secondary property that arises out of the natural person's interest in his/her points-of-contact elucidates the economic relationship between the fetus and his/her mother. When the embryo implants in the mother's uterus, the embryo is clearly acquiring a point-of-contact on land. But the mother owns the land with absolute title. This is like Jake standing in Fred's living room. The big question is, does the embryo have that point-of-contact with the mother's consent, or not?

Though these facts may bring some clarity to the situation, they're not adequate to reach a valid decision in Roe's case. To complete the picture, it's necessary to examine the third and final node of the three nodes that encompass natural rights, the third node being private jurisdiction.

Private Jurisdiction

The third and final node of what constitutes natural rights under this rendition of natural-law theory is what can be called "private jurisdiction", in absence of better nomenclature.

A preliminary definition of private jurisdiction is that it is a kind of jurisdiction with which every human who has some capacity for cognition must necessarily be endowed. Like every jurisdiction within jurisprudence, this jurisdiction involves making judgments, decisions, choices, *etc.*, and putting these things into action. Because these are things that every adult human must do, every adult human having capacity must necessarily have private jurisdiction. The capacity to make judgments, decisions, choices, *etc.*, is crucial to any given person's voluntary consent to participation in a contract. These cognitive capacities are also prerequisites to the viable functioning of any court of law. So when these capacities are exercised endogenously by any given natural person, that person is essentially operating as judge, jury, litigants, *etc.*, within his/her own private jurisdiction. Of course, when such private decision-making has no immediate impact on anyone else, this private jurisdiction is operating in a strictly ethical sphere, outside the domain of human law, outside the jurisprudential sphere. But when the endogenous decision-making pertains to the individual person's participation in a contract, that private jurisdiction is being exercised within the sphere of soft jurisprudence. Because human governments arise out of human contracts, this private jurisdiction is extremely important to the issue of how to constitute lawful governments. The importance of private jurisdiction is evident furthermore when considered relative to the 14th Amendment.

The first sentence in section 1 of the 14th Amendment states,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

A long-standing problem in regard to this governmental claim, one that the government has never resolved in a way that properly acknowledges natural rights, is this: Should this claim from the 14th Amendment be understood within the context of the Declaration's claim that governments exist through the consent of the governed, or not? This sentence from section 1 clearly indicates that any natural person "born or naturalized in the United States", and subject to its jurisdiction, is a citizen. The supreme Court's interpretation of this sentence clearly indicates that the supreme Court holds that people "born or naturalized in the United States" must be citizens. Under such jurisprudence, people thus "born or naturalized" are

compelled to be citizens, and the natural person's overtly articulated consent to being a citizen is negligible. If someone is voluntarily naturalized, then it's clear that this person consents to being a citizen. But the same is not necessarily true of people who are citizens through birth. For instance, citizenship carries duties that a newborn may later find repugnant. At the time of the newborn's later passage from minority to majority, this person might be absolutely disgusted at the prospects of being saddled with the duties of citizenship for the rest of his/her life. So it appears absolutely imperative that some extremely explicit rite of passage exist where this natural person's express consent to being "subject to the jurisdiction thereof", or dissent from being "subject to the jurisdiction thereof", is registered. This rite of passage has never existed for most people who consider themselves American citizens, and it has never existed for Americans who abhor the existing duties of citizenship. For genuine consent to being party to the governmental contract to exist, mere place of birth cannot suffice, because mere place of birth doesn't give due consideration to private jurisdiction. So under current supreme Court jurisprudence, natural-born citizens are coerced into citizenship.

When this initial sentence of section 1 says, "All persons born or naturalized in the United States", it doesn't explicitly indicate how the geographical jurisdiction of "the United States" is intended to be understood. The geographical jurisdiction of the "United States" could be understood to be limited to the original jurisdiction of the general government (meaning to the District of Columbia, federal enclaves, territories, *etc.* — Article I § 8 clause 17). Or such geographical jurisdiction could be understood to include both the original jurisdiction of the general government and the original jurisdiction of each State. Certainly, supreme Court jurisprudence has given this clause the latter interpretation. This latter interpretation is bolstered by the final clause, "are citizens . . . of the State wherein they reside", which clearly implies that "United States" is meant to include intra-State jurisdictions. But the phrase, "and subject to the jurisdiction thereof", can be easily interpreted to be an opt-out clause for anyone born within the geographical jurisdiction of one of the States who happens to believe that government exists by the consent of the governed. It's clear that the courts have never interpreted this phrase in this way. On the contrary, it's obvious through historical facts that the general government during the post-"Civil War" era was intent on forcing both former Confederates and former slaves into citizenship duties under the general government. Even so, these historical facts don't necessarily mean that this subject-to-the-jurisdiction phrase could not be interpreted in a way that would force federal courts to honor private jurisdictions. If the courts adopted an interpretational policy that paid due respect to that "consent of the governed" phrase in the Declaration, then the courts would necessarily interpret the "subject to the jurisdiction thereof" phrase to allow dissenters to opt

out. — Although this subject-to-the-jurisdiction-thereof issue is absolutely crucial in supreme Court jurisprudence, the Court largely ignores it. This issue is also largely peripheral to this memorandum, but this memorandum is focusing on it here to emphasize how crucial private jurisdiction is to natural rights and human government. This memorandum is committed to finding the natural rights that are inherent in every natural person, regardless of what the supreme Court may decree. The supreme Court has never interpreted the 14th Amendment to honor the consent of all people, and it has thereby violated private jurisdiction for as long as the 14th Amendment has existed. Because the supreme Court was violating the private jurisdiction of slaves prior to the ratification of the 14th Amendment, the supreme Court has never interpreted the Constitution to honor the consent of people generally, neither before the 14th Amendment nor after it.

It's clear that the individual natural person's private jurisdiction is being neglected by the assumption that all one needs to do to be a citizen is to be born within the geographical jurisdiction of any one of the given States. This is clear violation of government by consent. One of the most important things that private jurisdiction inherently conveys to every natural person is the power to consent to, or to dissent from, any contract offered. The ancient principles of *jus sanguinis* and *jus soli* both inherently violate private jurisdiction by neglecting to ask for the prospective citizen's consent to citizenship.[1] The way the 14th Amendment has been implemented, not necessarily the way it is written, but definitely the way it has been interpreted and implemented, the 14th Amendment endorses the same kind of disdain for private jurisdiction.

On its face, it's undeniable that every natural person starts out incapable of manifestly exercising private jurisdiction, simply because every natural person lacks cognitive abilities at embryonic, fetal, and infantile stages of development. For practically as long as it has existed, American law has not acknowledged the natural person's capacity to consent until the person passes from minority to majority. At this transition to majority, the legal system has generally recognized that the natural person has developed the cognitive skills necessary to enter into mutually binding contracts. But citizenship under supreme Court jurisprudence does not operate under the same contractual rules as ordinary contracts. This is evidenced by the fact

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1 *jus soli* — "The law of the place of one's birth as contrasted with jus sanguinis, the law of the place of one's descent or parentage. The principle that a person's citizenship is determined by place of birth rather than by the citizenship of one's parents. It is of feudal origin." (**Black's 5th**, p. 775)

jus sanguinis — "The right of blood. The principle that a person's citizenship is determined by the citizenship of the parents." (**Black's 5th**, p. 775)

that even infants who are inherently incapable of consent in any ordinary sense of the word, are citizens under long-standing supreme Court opinions. An example of this fact is evident in an important case from 1874.

The primary issue in *Minor v. Happersett*, 88 U.S. 162 (1874), was women's suffrage. Minor sued the local registrar of voters, Happersett, for refusing to register Virginia Minor to vote. The supreme Court held that "the Fourteenth Amendment did not confer the right to vote on women any more than it conferred such a right on children, the insane, or criminals".[1] Given that the women's suffrage issue was settled by the 19th Amendment, this case was overruled regarding women's suffrage. But the conjoined issue of citizenship has not been overruled. This opinion "is notable for its narrow definition of citizenship 'as conveying the idea of membership of a nation, nothing more' (p. 166)".[2] In this opinion Chief Justice Waite acknowledged that women are persons under the 14th Amendment, and therefore citizens, but he makes it clear that this amendment was not necessary "to give them that position", and he makes clear that citizenship doesn't convey much more than mere membership.

> The very idea of political community such as a nation is implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are in this connection reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.
>
> For convenience it has been found necessary to give a name to this membership. . . . Citizen is now . . . commonly employed . . . as it has been considered better suited to the description of one living under a republican government . . . When used in this sense, it is understood as conveying the idea of membership of a nation, and nothing more. — *Minor v. Happersett*, 88 U.S. 165-166 (1874)[3]

Waite goes on to indicate that there are two and only two ways that people may be made citizens of the united States: "first, by birth, and second, by naturalization" (88 U.S. 167). This clearly indicates that infants are citizens without the infant's consent. If infants are citizens without their consent, then because fetuses are natural and 14th-Amendment persons, fetuses are also citizens without their consent. Under the existing regimen, infants owe the nation their allegiance, and in return for that

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1 Erickson, Nancy S.; "Nineteenth Amendment"; **Oxford Companion**, p. 589.

2 Elliot, Ward E. Y.; "Minor v. Happersett"; **Oxford Companion**, p. 551.

3 URL: http://supreme.justia.com/cases/federal/us/88/162/case.html.

allegiance, they are given protection by the government. This regimen clearly violates government by consent. This regimen clearly demands allegiance without the proper offer and acceptance that every lawful contract demands. Proper respect for private jurisdiction demands that offer and acceptance / consent are indispensable to the existence of any contract. This is as true for governmental contracts as it is for any other kind of contract. It is also as true when the contract plausibly involves fetuses as when it involves more cognitively developed natural persons.

There's no doubt that infants and fetuses are incapable of consenting to a contract like a governmental contract, a contract that clearly requires cognitive abilities as a prerequisite to consenting or dissenting. Neither government nor anyone else should use this inability to consent or dissent as an occasion to impose a contractual duty without a lawful contract. Under a lawful definition of contract, mutual consent to mutual offer is a necessary prerequisite to the contract's existence. To impose a contractual duty without acquiring the necessary consent is essentially to threaten perpetration of a delict upon the non-consenter, if not to actually perpetrate the delict. Regarding Waite's decision, allegiance and protection, without consent, are clearly ingredients that turn the government into a glorified protection racket. Even though Waite and company may claim otherwise, through this non-consensual imposition, the government becomes inherently criminal. The government has no more right to impose such non-consensual duties than the common criminal does. If this is not so, then what premise, axiom, religion, mythology, or set of circumstances makes it not so? Under any reasonable understanding of natural rights, it must be so, and the government-by-consent clause in the Declaration confirms that this is true. The religion and mythology of statism that left devastation in its wake throughout the 20th century is the default rationalization for such government abuse. The remedy to democide is respect for private jurisdiction, and that respect must include respect for the private jurisdiction of infants and fetuses.[1]

Every natural-law theory that genuinely recognizes natural rights must necessarily demand that natural rights be assiduously honored in regard to every human being. This is as true for every natural person's private jurisdiction as it is for his/her primary and secondary property. To do otherwise is to default into the violation of natural rights. These claims clearly imply that there is a huge problem in ascertaining how the contracts that form governments should interface with people who lack capacity to consent in the ordinary sense of that word. Ordinary people who have normal

1 "Democide is a term revived and redefined by the political scientist R.J. Rummel as 'the murder of any people by a government, including genocide, politicide, and mass murder.'" — URL: http://en.wikipedia.org/w/index.php?title=Democide&oldid=583445600.

cognitive abilities are a huge problem to the normal statist conception of government, because many of these normal people refuse to see the state as the almighty entity that statists claim it is. People who lack cognitive ability to consent in the ordinary sense, which means that they lack the ability to exercise their private jurisdiction as full-fledged members of society, may not be such an obvious impediment to statism. But they are a huge ideological problem, because figuring out how to treat these incapacitated natural persons so that their full spectrum of natural rights is honored is a problem that has remained unresolved in soft jurisprudence for a long time. — In contrast to Waite's opinion in *Minor*, adult women certainly don't generally belong in this category of people who lack cognitive capacity. But "children, the insane, or criminals" may each fall into this incapacitated population.[1] More to the point, the natural person who happens to be a fetus absolutely falls within this vulnerable population. Contracts, in the normal sense of the word, can only be entered by people who have the cognitive capacity that is the prerequisite to choosing to consent or dissent.

To be consistent with the Declaration's claim that governments derive "their just Powers from the consent of the governed", Waite's claim that citizenship "under a republican government" is merely "membership of a nation", can only be true if membership is granted through the grantee's cognitive consent. This implies that republican government is the manifestation of a contract, and exists only through such a contract. Such governmental contracts can only be constructed, maintained, and entered through the cognitive skills of its participants, because such cognitive skills are prerequisites to the act of consenting to such contracts. Because every society on earth contains people who lack cognitive capacity to consent to cognitively demanding contracts, it's crucial to understand how this vulnerable population fits into the society as a whole, and how it should interface with such republican government. This population includes children, infants, fetuses, the insane, the demented, the comatose, and numerous other classes of people who lack cognitive capacity. Any natural-law theory that purports to be a reliable foundation for human law, and which simultaneously purports to properly describe and protect natural rights, must necessarily show how such human law should interface with this vulnerable population. A description of that interface is an important part of

1 Children and the insane are clearly lacking in cognitive capacity. Genuine criminals, on the other hand, meaning people who have violated the natural rights of other people, in the process of violating those rights, have proportionally surrendered their lawful claim to natural rights. This is why Waite rightly recognized criminals as lacking capacity to vote. But criminals are not necessarily lacking in cognitive capacity any more than women are.

this natural-law theory, but before entering into that description, it's necessary to recapitulate to emphasize the importance of private jurisdiction.

Every human is endowed with this natural right to exercise his/her private jurisdiction, as much as to exercise rights to primary property and secondary property. This right is obviously crucial within the ethical arena outside of jurisprudence, but it is also crucial in the sub-function of ethics called jurisprudence. The natural right to private jurisdiction is crucial to both soft jurisprudence and hard-core jurisprudence. Private jurisdiction is crucial outside of jurisprudence because it's necessary to every human's private decisions, regardless of whether such decisions impact human law or not. It's crucial to soft jurisprudence because mutual consent is crucial to the formation of contracts.[1] Private jurisdiction is crucial in hard-core jurisprudence because both actions *ex delicto* and actions *ex contractu* arise out of violations by the alleged perpetrator of the private jurisdiction of the alleged victim. Such damage arises out of violations of what the victim would have chosen for his/her self. As an example of how private jurisdiction interfaces with hard-core jurisprudence, consider this scenario: Tom thought he owned his body, but Jack cut Tom's left hand off, just to prove he could. That's certainly a violation of Tom's primary property, but it's also a violation of Tom's private jurisdiction. This is because Tom in no way consented to having his hand cut off. If Jack had trespassed onto Tom's farm and killed some of Tom's livestock for fun, then that would have been a violation of Tom's secondary property, but it would have also been a violation of Tom's private jurisdiction. This is because Tom certainly did not consent or volunteer to have his livestock wasted. — So violations of primary and secondary property are both inherently violations of private jurisdiction.

Cognition is clearly an important aspect of private jurisdiction. Cognition can be defined in terms of the lime-tree vignette. When Person A is able to replicate the lime tree in Person A's mind, doing so is a fundamentally cognitive act. In fact, cognition can be defined in terms of this replication process. Cognition includes rudimentary percept-formation, concept-formation and –recall, and practically all the other issues addressed in the field of epistemology. This fundamental replication process is clearly a prerequisite to consent / dissent because it's a prerequisite to decision-making in general, under any normal understanding of decision-making. Because cognition and private jurisdiction are conjoined, private jurisdiction is crucial in the entire field of ethics, regardless of whether private jurisdiction is being exercised in the sphere of hard-core jurisprudence, in the sphere of soft jurisprudence, or in the sphere of ethics that's entirely outside the realm of jurisprudence. In

1 Contracts that are not based on mutual consent are not contracts, except in unlawful courts that are dedicated to violating natural rights under color of law.

the arena of jurisprudence, especially regarding the protection of natural rights, cognitively structured choices generally manifest as either consent or dissent. The reason for this claim in regard to contracts is obvious, and the reason in regard to delicts is evident through the above fabricated interactions between Tom and Jack. Obviously, cognition is generally important in legal actions *ex delicto* and *ex contractu*. So private jurisdiction is generally crucial to such actions. So these manifestations of cognition and private jurisdiction are generally crucial to both hard-core and soft jurisprudence. Similar cognitive processes are generally essential to both the formation of contracts and the enforcement of actions *ex delicto* and *ex contractu*. Although all these things are generally true on their face, and non-controversial, the fact that fetuses, infants, children, the insane, *etc.*, have natural rights means that people who form this relatively large population are apparently exceptions to what's generally true.

On one hand, this cognition-deficient subset of every society lacks capacity to exercise private jurisdiction, and this lack of capacity to exercise private jurisdiction disables this population from operating as genuine citizens. On the other hand, this lack of cognitive capacity cannot mean that people in this population lack private jurisdiction. Because this disabled population is composed of natural persons who have natural rights like everyone else, and because natural rights inherently include private jurisdiction, to claim that this population lacks private jurisdiction cannot be just. Rather, their capacity to exercise their private jurisdiction is latent, as their full cognitive abilities are latent. Because of these cognitive disabilities, this population lacks capacity to exercise all three legs of the natural rights tripod in their fullness. Even though there may be nothing particularly controversial about any of these claims, the claim that all people are deficient in capacity to exercise natural rights in their fullness introduces a perspective that may be more controversial, a perspective that must necessarily incorporate the existence of pre-cognitive contracts and pre-cognitive consent.

An Expanded View of Private Jurisdiction: Pre-Cognitive Consent & Pre-Cognitive Contracts

Among other things, this memorandum has thus far established two important facts: (i)that human life begins at conception; (ii)that all humans, including fetuses and the cognitively impaired, have the same set of natural rights, from conception. Although natural duties have been mentioned, they have not been given sufficient emphasis to complete this sketch of a viable, natural-rights-honoring natural-law theory. The fact that every human is conceived with natural rights implies a corollary fact, that every human is conceived with natural duties not to violate the natural

rights of other people. The existence of natural duties hints at a proposition that may be controversial. But it should be no more controversial than the existence of natural rights. The proposition is that there must necessarily exist something that can be called "pre-cognitive contracts" and "pre-cognitive consent".

The fact that humans are social beings is evidence that this propensity to be social is built into the genome. In the same way that perfect conformity to natural law is a concept or idea that must exist as part of any holistic natural-law theory, even if humans are presently incapable of attaining that ideal, there must likewise be a corollary perfection for human societies. Even though no society presently exists that is capable of perfect conformity to natural law as a society, the concept or idea of such societal perfection must exist as part of any holistic natural-law theory. This line of reasoning has huge implications for the rational basis of human law. Where private jurisdiction, in the cognitive sense presented above, is aimed at decision-making that puts the decision-maker in harmony with natural law, jurisprudential jurisdictions, at their best, are aimed at decision-making that puts society in harmony with natural law. This line of reasoning is crucial to proving that pre-cognitive contracts and pre-cognitive consent must necessarily exist. But it's important to view natural law generally in order to keep human law in perspective, and to see why pre-cognitive contracts and consent must exist.

The Natural-Law Framework for Human Law

One of the ideas that continues to undergird the scientific enterprise is that the universe operates according to rational rules, and that science is aimed specifically at discovering those rules. Even if scientists like to use different jargon these days, the fact remains that these rules that scientists are trying to discover are rules or laws of nature, or natural laws. The concepts are the same even if the terminology varies. If one assumes, with science, that the universe operates through natural law and that natural law is rational, then that means that natural law cannot be broken, at least not by humans. Given that this is true, the issue in ethics is not, How do humans avoid violating natural law? The issue is rather, How do humans conform themselves to natural law so that they live perfect lives? The distinction between these two postures is crucial to the concept of moral agency, and moral agency is crucial to humans having a rational basis for holding other humans accountable through human law. People who believe that moral agency is relevant to the entire ethical arena are prone to confuse violations of natural law and violations of human law. Humans are certainly capable of violating human law. But humans are not capable of violating natural law. Natural law cannot be broken. Humans can either

live in harmony with it, or in disharmony with it. The latter is a prescription for self-inflicted pain, suffering, and death. The former is a prescription for eternal life.

It's important to recognize how the so-called "supernatural" fits into this natural-law theory. Some, if not many, if not most, natural-law theories of the past have either relegated the supernatural to non-existence, or allowed their theory to deteriorate into inconsistency for the sake of incorporating the supernatural. Historically, neither of these positions has worked. — By definition, natural-law theory holds that things that happen in the universe happen according to natural laws, and the natural-law theory being sketched in this memorandum certainly conforms to that standard. In keeping with that standard, this natural-law theory does not posit what has generally been called the "supernatural". The history of science shows clearly that what is "supernatural" in one era is often subsequently discovered to be natural. So "supernatural" really refers to phenomena whose rules of operation are mysterious and are outside the range of what is currently known and understood. Today's mystery is often recognized tomorrow as a function of the laws of nature. This truth, evidenced by historical fact, reinforces the claim that humans are not capable of violating natural law. Certain humans at certain times may find ways to supersede the existing natural-law knowledge base, but that supersession is not necessarily a violation. Genuine "miracles" are not violations. They are merely instances in which the current natural-law knowledge base is superseded. They are instances in which power is tapped whose source is inexplicable under the current knowledge base.

The vital distinction between rights and duties, mentioned above, has a corollary distinction, the distinction between rights and powers. These distinctions between rights, duties, and powers are crucial to the natural-law theory being sketched here. Relating to this, Rothbard made the following observation in passing:

> We have seen that Crusoe . . . has freedom of will, freedom to choose the course of his life and his actions. Some critics have charged that this freedom is illusory because man is bound by natural laws. This, however, is a misrepresentation—one of the many examples of the persistent modern confusion between *freedom* and *power*. . . . [W]hen we say that "man is not 'free' to leap the ocean," we are really discussing not his lack of freedom but his lack of *power* to cross the ocean, given the laws of his nature and the nature of the world.[1]

Every person certainly has the natural right, the freedom, to leap the ocean in a single bound, if doing so isn't prohibited by natural law. Whether it is prohibited by

1 Rothbard, Murray, **The Ethics of Liberty**, p. 33.

natural law or not, no one can currently say with certainty. Such a possibility doesn't currently exist within any natural-law knowledge base, but the current absence of that possibility doesn't eliminate the possibility forever. Everyone has the apparent freedom and the natural right to leap the ocean in a single bound, but no one has the power to do so. This leaves the freedom and natural right dubious from a natural-law perspective, although they are extant from a natural-rights perspective. Anyone who has a natural right to something has a just claim to that thing, regardless of whether the thing is an activity or an object, or some combination of the two. This just claim is a freedom that this natural person has, or at least should have under a just state of affairs. This just claim is this person's freedom in regard to the given thing. But having a just claim to something is not the same as having the power to effectuate it. — Within the realm of human law, the duty to avoid violating the other's rights is linked inevitably to the power to at least attempt to violate the other's rights. If there is no prospect that one person might violate another person's natural rights, then there is no reason to recognize a duty to avoid violating those rights. So in the realm of human law, power and duty are opposite sides of the same coin. But in the realm of natural law, outside the realm of human law, the relationship between powers and duties might be quite different. The situation demands more clarity between powers and duties, in regard to natural rights, and powers and duties, in regard to natural law. In speaking of power to leap the ocean, Rothbard is clearly speaking of power in regard to natural law.

It should be obvious to everyone that humans presently lack the power to live in complete harmony with natural law. If people had that power, then perhaps they would be able to leap oceans in a single bound. Even though people have the natural right to be able to live in complete harmony with natural law, they don't have the power to do so. The evidence supporting this claim exists in the fact that all humans die. Humans die because they fail to live in complete harmony with natural law. Even though humans are incapable of violating natural law, they are not incapable of violating the natural duty they have to live in complete harmony with natural law. The fact that all people die is evidence that all people violate this natural duty compulsively. People may be able to live in harmony with natural law in some respects, but in the final analysis, they are presently incapable of complying with the demand for perfect harmony. Why this is so is outside the scope of this brief sketch of a viable natural-law theory. But that it is so should be obvious to everyone.

Rothbard makes it clear that his book is focused on the subset of ethics that revolves around political philosophy. He says, "It is . . . the intention of this book . . . to elaborate that subset of natural law that develops the concept of natural

rights".[1] He makes it clear that his ethics of liberty is intended to exist within a natural-law framework. Using this memorandum's jargon, Rothbard is focused on jurisprudence, and he clearly leaves the development of a compatible natural-law theory a task for others. The "persistent modern confusion between *freedom* and *power*" results largely from a lack of due diligence in distinguishing the purview of ethics in general from the purview of the jurisprudential subset of ethics. Lack of care in this regard is one of the reasons natural-law theories have been rejected by the American legal community. This memorandum will start correcting this confusion by clarifying its own claims. — In claiming that all natural persons have the same set of natural rights, this memorandum is using "natural rights" in the extra-jurisprudential sense. Like Crusoe alone on an island, every natural person has a just claim to live in harmony with natural law to whatever extent he/she is able, and this just claim is a natural right. No matter what the natural law may be, every natural person has a natural right to live in accord with that natural law to whatever extent he/she is willing and able. This natural right in the extra-jurisprudential sense is accompanied by the natural duty to live in absolute harmony with natural law. So the natural duty to live in perfect harmony with natural law is necessarily accompanied by a natural right to do so, where natural right in this context is an extra-jurisprudential term. Every human inherently has both a natural duty to live in perfect harmony with natural law and a natural right to do so. But no human presently has the power to satisfy this natural duty. This is the basic lay of the land in the extra-jurisprudential subset of the field of ethics. In this subset of the field of ethics, there is a stark contrast between freedom / natural rights, on one hand, and power / ability, on the other. The lay of the land in the jurisprudential subset of the field of ethics is different.

While natural duties and natural rights must necessarily exist within the extra-jurisprudential subset of the field of ethics, they must also exist inherently within the jurisprudential subset of the field of ethics. Otherwise there is no natural and rational basis for human law, and human law turns into a mere tool for tyrants to use according to psychopathic whim. But because human law is law that humans impose on other humans, and law that humans contractually bind themselves to, the parameters of natural duties and natural rights within this jurisprudential arena are not the same as the parameters of natural duties and natural rights in the extra-jurisprudential arena. It's certain that an aspect of the extra-jurisprudential natural duty to live in harmony with all natural laws translates readily into a natural duty to avoid violating the other person's natural rights. But the radical distinction between natural laws and human laws demands that the distinction between natural duties

1 Rothbard, Murray, **The Ethics of Liberty**, p. 25.

in the extra-jurisprudential sense and natural duties in the jurisprudential sense be marked emphatically. While the natural duty in the extra-jurisprudential sense is a duty to perfect conformity to natural law, the natural duty in the jurisprudential sense is a duty to avoid violating other people's natural rights. While natural right in the extra-jurisprudential sense is a right, a just claim, to live in perfect harmony with natural law, natural right in the jurisprudential sense is a just claim to pursue one's vision of harmony with natural law without having this just claim trespassed by other people. — The jurisprudential natural duty has no prominent place in Crusoe's concerns before Friday arrives, because there's no one else on the island whose natural rights Crusoe might violate, and no one who might violate his natural rights. Crusoe has a natural duty to conform to natural law, and when Crusoe fails to abide by that natural duty, natural law naturally operates to Crusoe's disadvantage. In fact, the end result of violating this natural duty is death. This natural duty that Crusoe owes to natural law can be characterized as a duty that Crusoe owes to himself alone, because there's no one else on the island to care about whether he obeys this extra-jurisprudential natural duty or not. But because being social is built into the genome, the claim that Crusoe owes this duty to himself alone has only marginal bearing when more than one person is on Crusoe's island. Natural rights and duties in the extra-jurisprudential sense must be clearly distinct from natural rights and duties in the jurisprudential sense.

No population of humans has a flawless understanding of natural law. In proceeding, it's critical to emphasize the huge difference between natural law as it exists in its perfection and natural law as it exists as conceptual constructs and data within a given human population's knowledge base. Natural law as it so finely runs the universe and everything in it, on one hand, and natural law as it's known and recognized by a given population of humans, on the other, are two radically different things. The latter can certainly be broken, or superseded. The former cannot be broken. If natural law in the perfect sense could be broken, then it would not be perfect, and it would not be completely rational. If natural law could be broken, then this would mean that the universe might be run by a trickster, or by a population of tricksters. Science, for the hundreds of years that it has existed, has been dedicated to opposing that kind of superstition. — If humans try to create human laws in ways that accord with their natural-law knowledge base, it's certain that their human laws will be at least as vulnerable to being wrong as the laws in their natural-law knowledge base. So it's important to avoid making a linkage between natural law, in the knowledge-base sense, and human law, where the linkage is stronger than it needs to be. Natural law, in the perfect sense, enforces itself. Natural law, in the knowledge-base sense, might enforce itself, and it might not. Human law never enforces itself.

In speaking of the difference between powers and duties, it's critical to emphasize the distinction between their existence in the extra-jurisprudential arena from their existence in the jurisprudential arena. To make and keep the distinction, it's crucial to keep Crusoe economics as foundational. Because there's no one else on the island, powers and duties in the jurisprudential sense are irrelevant there. Crusoe clearly has duties in regard to natural laws. He has a duty to conform his thoughts, speech, and behavior to them all, evidenced by the fact that failure to meet that conformity is the source above all sources, of pain, suffering, and death. But does Crusoe have power to conform to them all? No, evidenced by the fact that like all people, Crusoe will suffer and die. Even so, Crusoe has a natural right, a just claim inherent in being human, to seek to obey all natural laws. Because he has a natural, extra-jurisprudential duty to abide by all natural laws, he does not have a natural right, in the extra-jurisprudential sense of that term, to disregard that natural, extra-jurisprudential duty. Death is the price he pays for that disregard. Now the pressing question is what the arrangement of natural rights and natural duties will be when Friday arrives on the island. Will Friday have a natural right to act like God, and force Crusoe to obey natural law, or will Crusoe have the same regarding Friday? Before addressing that question, it should help to clarify what "power" means in this context.

When Rothbard speaks of "*power* to cross the ocean", it's clear that he's speaking of the *ability* to cross the ocean, like Superman, in a single bound. Such an ability necessarily consists not only of the capacity to do work, as a function of time, which is a more formal definition of power. It also consists of knowledge about how to do it. In fact, this ability to cross the ocean in a single bound takes not only knowledge and power, but also perhaps numerous other things. So really, what Rothbard is speaking of in distinguishing freedom and power is the distinction between freedom and ability, where the latter can simply be understood to mean wherewithal.

It's clear that as Crusoe exists alone on the island, he has abilities, natural rights, and natural duties in regard to natural laws, in the extra-jurisprudential sense of these terms. It is also clear that his abilities are incapable of completely satisfying the natural duties. His natural rights, in the extra-jurisprudential sense, consist of just claims to pursue conformity to natural law, but they do NOT consist of just claims to violate his natural duty to conform to natural law, evidenced by his eventual death by dysfunction, the penalty he pays for violating that natural duty. — There's a facially plausible claim that this disability, this inability to fully satisfy the natural duty to conform to all natural laws, is natural, in the sense that "natural" indicates something that is inherent. In the extra-jurisprudential arena, natural rights, natural duties, and natural law are all inherent. Natural law is inherent in the universe.

Natural rights and natural duties are inherent in being human. But the claim that the human disability, meaning the inability to satisfy the natural duty to conform to natural law, is natural and inherent in being human, demands higher scrutiny. This combination of extra-jurisprudential natural duties, natural rights, and natural laws will not allow this disability to be natural, in the sense of it being inherent in being human. If the human inability to satisfy the duty to live in complete harmony with natural law is natural and inherent in being human, and the duty to live in complete harmony with natural law is also natural and inherent, then humanity exists under irrational, "catch-22" circumstances. Either the duty is not natural or the inability is not natural. This is a situation in which either-or-logic is necessary and appropriate, because the duty and the inability cannot both be natural and inherent. If humans have a natural and inherent duty to live in complete harmony with all natural law, having an inability to do so, where the inability is also natural and inherent, then this set of conditions is not tenable over the long haul. Such circumstances are not sustainable. Such circumstances are inherently irrational. Anyone who believes, with the scientific enterprise, that the universe operates by natural laws that are inherently rational, should be prone to choosing a rational worldview over an irrational worldview. So the circumstances demand that either the duty is not natural or the inability is not natural. Or perhaps neither is natural. It's certain that both cannot be natural. — To ascertain which of these circumstances must prevail, it should help to recapitulate.

Regarding the natural duty in the extra-jurisprudential arena to conform perfectly to natural law:

(i) The claim that the scientific enterprise by its very nature must assume that the universe operates by natural laws that are inherently rational cannot be rejected without serious damage to the enterprise. At best, this rejection would lead to the conversion of science from an enterprise that has a genuine commitment to rational integration of all its sub-fields–in spite of whatever difficulties may be involved in such rational integration–into an enterprise that is really nothing more than glorified witchcraft. More realistically over the long run, the rejection of this principle will lead to the obliteration of science entirely, returning humanity to dark ages and/or barbarism. In fact, compartmentalization is currently so endemic that science is currently being used more for the destruction of the human race than for its edification. Steering the enterprise back to solid philosophical footing demands that the enterprise return to the ancient assumption that the universe operates by rationally cohesive natural laws.

(ii) The distinction between natural law as it must necessarily exist in its perfection and natural law as it exists in any given human knowledge base is crucial to maintaining the claim that the universe operates by rationally cohesive natural laws. History shows that when people claim that their knowledge base is perfect, it's a sign that their knowledge base is ossified, and that they intend to use it as a platform for tyranny.

(iii) The claim that the natural law in its perfection cannot be violated is a necessary corollary to the claim that the universe operates by natural laws that are inherently rational.

(iv) The claim that humans have a natural duty to be completely conformed to the natural law is crucial if humans are to have purpose and meaning within this natural-law framework. It's better to have a high standard than no standard, because without a standard, humans have no purpose and direction in life, and human societies have no purpose and direction in life.

(v) The claim that humans can violate the duty to be completely conformed to natural law is reinforced by ample evidence in everyone's everyday life.

(vi) The claim that the universe operates by rationally cohesive natural laws is inherently an explanation for why death reigns over the human race: because humans violate the natural duty to conform to all natural laws.

(vii) The natural duty to be utterly conformed to natural law, by logical necessity, must entail the existence of a natural right to pursue such conformity.

(i)Given these seven points, for anyone to claim that the human inability to be utterly obedient to this natural duty to be conformed to natural-law-in-its-perfection, is natural, meaning inherent in being human, is to claim that complete obedience to the natural duty is an impossibility. If the duty to be utterly conformed to natural law is natural, meaning that it is an inherent aspect of being human, then the inability to be utterly conformed to natural law cannot be inherent in being human. Both the duty to be utterly conformed and the inability to be utterly conformed cannot both simultaneously be inherent. If they were, then that would mean that nature is inherently irrational, demanding that humans do something that they are inherently incapable of doing. This is the archetypal trickster with a vengeance.

(ii)If the duty to be utterly conformed to natural-law-in-its-perfection is not natural, then it's reasonable for the inability to be utterly conformed to natural law

to be natural. These are essentially the circumstances that describe the entire animal kingdom, excluding *homo sapiens*. In the animal kingdom, excluding humans, every animal has a duty to partial conformity to natural law, rather than to complete conformity to natural law. A duty to utter non-conformity to natural law is a duty to instant annihilation. So utter non-conformity is not really an alternative for any organism. But a duty to partial conformity to natural law is not only an alternative. It's also a dominant characteristic in the animal kingdom. In the entire animal kingdom excluding humans, each animal's genome specifies partial conformity to natural law. Evidence for this claim exists in the fact that every organism's genome is geared to operate within a specific kind of ecological niche. When set far outside its ecological niche, a species generally gets clear mutate-or-go-extinct messages from its environment. The inability to be utterly conformed to natural law is essentially inherent in the entire animal kingdom. That's why they all die. So for animals, the inability to be utterly conformed to natural law is natural, while the duty to be utterly conformed to natural law is not natural. In fact, each animal's duty to be conformed to natural law is limited to a specific spectrum of the natural law, where such fragment of the natural law is generally known as the organism's ecological niche. So animals have no duty to be utterly conformed to natural law. Their genome specifies that they conform to natural law as such law operates within a specific ecological niche, and to conform as long as they can, which is always a finite amount of time. So the claim that (a)humans do not have a duty to be utterly conformed to natural law, because they only have a duty to be conformed to a fragment of the natural law, while (b)the human inability to be utterly conformed to natural law is inherent and natural, is essentially a claim that humans are nothing more than animals.

(iii)The claim that (a)humans do not have a duty to be utterly conformed to natural law because they only have a duty to be conformed to a fragment of natural law, while (b)the human inability to be utterly conformed to natural law is not inherent and natural, has much in common with some sects, religions, and philosophies. For example, some Hindu sects claim that humans exist on a wheel of life in which people are reincarnated iteratively based on their "karma", and at some point their karma may become good enough for them to transcend the wheel of life and become "enlightened", which presumably means that they somehow learn to live in complete harmony with natural law. So under this configuration of duties and abilities, humans don't have a duty to be utterly conformed to natural law, but somehow, through some fatalistic happenstance, some rare individuals might from time to time become "enlightened". So under these circumstances, people don't have a universal duty to be utterly conformed to natural law, and they don't have a natural / inherent inability to do so either. Given that the three alternatives to this

posture are: (a)both the duty and the inability are natural; (b)the duty is not natural but the inability is natural; and (c)the duty is natural but the inability is not natural; this wheel-of-life claim of neither the duty nor the inability is natural, may appear to be most attractive. But the soul migration that is an inherent aspect of this wheel-of-life alternative has huge mathematical problems. Soul migration is not a good fit for a scientific approach to these natural-law problems because soul migration doesn't integrate well with scientific facts. It's extremely difficult to find scientific evidence to support reincarnation. In fact, the claim that humans do not have a duty to be utterly conformed to natural law while their inability to be utterly conformed is not inherent and natural, is too fanciful to be taken seriously.

(iv)Because this memorandum is not intended to be a theological or philosophical treatise, the treatment of these issues is admittedly skimpy. But there should be enough reasoning and evidence here to establish that the duty to be completely conformed to natural law is natural and inherent, while the inability to be completely conformed to natural law is not natural and inherent. Because the inability to be utterly conformed to natural law is common and normal among humans, it's reasonable to call this a common or normal disability, but not a natural disability. It's necessary to conclude that in the extra-jurisprudential field of the ethical leg of this natural-law theory, human beings generally have a natural duty to be utterly conformed to natural law, while they generally have a common and normal, but not natural, inability to be utterly conformed to natural law.

Although a thorough examination of this subject is outside the scope of this memorandum, this being a mere sketch of a natural-law theory, this sketch should be sufficient to show that the claim that the common, even normal, human inability to live in utter conformity to natural law is not natural and inherent in being human. So the claim that this inability is natural and inherent in being human, is simply nihilism, even if it goes by some other name. This claim that this disability is natural simply rejects the whole natural-law structure, which demands a question: On what grounds is this structure to be rejected? If nihilism is the truth, then law courts have no reason to exist, because what they are dedicated to producing is not justice, but arbitrary and capricious sociopathy. This human disability in regard to the natural duty is common, for sure. But to claim it's natural is to claim that humanity has no future, because perfect conformity to natural law is impossible, and humans are little if anything more than animals, or wraiths that migrate endlessly through time because they can never find a society that conforms to natural law. Courts MUST reject this nihilistic assumption, and return to belief that even though humans are currently disabled from satisfying the natural duty completely, they are not thus disabled forever. Otherwise, courts have no real commitment to protecting natural

rights, because courts don't know what they are. Natural rights can only be defined within a genuine natural-law theory that holds that all humans have both a natural duty to be utterly conformed to natural law and a currently common and normal inability to do so. This is why this memorandum identifies this inability to satisfy the natural duty to conform to all natural law as a common disability, and a normal disability, but not a natural disability.

It's critical to say in passing that if and when, and to whatever extent, courts adopt this natural-law theory, they are NOT simultaneously adopting a particular religion over other religions. In a superficial examination of this natural-law framework for human law, the framework may appear to require that the court adopt such a bias. But this is not a bias in favor of any particular religion. It's a bias in favor of natural-law theory that gives rise to natural rights, including the natural right to have whatever religion one may choose to have. Humans absolutely do not have natural rights to enforce human laws against other humans based on the belief that the enforcer's natural-law knowledge base is so perfect that it's perfection gives him/her the just claim to enforce natural law against other people. Natural law enforces itself, and it doesn't generally need human enforcers. The only kinds of subject-matter jurisdictions humans are justified in enforcing against other humans are *ex delicto* and *ex contractu*. Twentieth century democide is ample evidence that human-law enforcement outside those two narrow subject matters is inherently evil. If this kind of belief is religious, then let courts attach themselves fervently to that religion. However, no historically recognized religion on earth has manifested a meaningful commitment to this definition of human law. So it's really not valid to claim that courts that adopt this natural-law theory are adopting a religion in the traditional sense of that word. Courts that adopt this natural-law theory are merely adopting a commitment to a rational worldview that is capable of rendering justice regardless of whatever religions litigants may espouse.

When Friday shows up on the island, the extra-jurisprudential distinctions between natural law, natural duties, natural rights, and common disabilities become complicated by the need to recognize the jurisprudential arena. For Crusoe, this basic allotment of natural laws, natural duties, natural rights, and common abilities and disabilities stays the same, except that jurisprudential rights, duties, abilities, and disabilities are added to the rights, duties, abilities, and disabilities that existed before Friday's arrival. The natural laws that exist throughout the universe do not change. But now both Crusoe and Friday must necessarily be concerned about the natural laws that govern relationships with other humans. This concern is (i)a soft jurisprudential concern about how to form contracts that have terms that are human laws that will ensure that Friday and Crusoe are able to cohabit the island without

damaging each other, and perhaps even prospering each other through cooperation, and (ii)a hard-core jurisprudential concern about executing justice if either damages the other.

It's still true that both Crusoe and Friday have the natural right, the just claim inherent in being human, to seek conformity to all the laws of nature. Added to the extra-jurisprudential natural rights, natural duties, and common disabilities in regard to natural laws is the jurisprudential natural duty not to violate the other natural person's natural rights. Natural rights in the extra-jurisprudential sense means rights to pursue perfect harmony with natural law. Natural rights in the jurisprudential sense refers to the natural person's just claim to pursue his/her vision of harmony with natural law without having this right trespassed by some other natural person. This natural right, in the jurisprudential sense, to pursue one's vision of harmony with natural law is the essence of private jurisdiction within the jurisprudential arena. Natural rights in the jurisprudential sense means that Crusoe has a natural duty, in the jurisprudential sense, not to damage Friday's primary property, secondary property, or private jurisdiction. Crusoe could violate his natural duty to Friday in myriad ways commonly recognized in human law courts, ways already examined above to some extent. The crucial thing to recognize in passing is this: Because all humans suffer from severe common disabilities in the extra-jurisprudential sense, no human, group of humans, or human government should pretend to exercise God-like authority over any other human being(s) under the pretense that he/she/it is enforcing natural law as human law. The fact that Person X believes emphatically that natural law is M in regards to subject matter T, is not reliable grounds for Person X to prosecute Person Y. History shows emphatically that the only reliable grounds for one party to prosecute another is when there is genuine damage, or genuine threat of damage, by one human party against another, where such damage is *ex delicto* or *ex contractu*, and where such damage clearly results from violation of the ethical libertarian's proscription of the initiation of force and fraud, also known as the "nonaggression axiom".

Friday has the same natural duty to not damage Crusoe. The natural rights of each, in the jurisprudential sense, limit the natural rights of the other, in the sense that one cannot homestead another person's property, and one cannot utterly ignore another person's private jurisdiction. On the other hand, the abilities of each can enhance the abilities of the other, to the extent that they choose to enter into honest trading. Furthermore, each might be able to help the other to better satisfy the other's extra-jurisprudential natural duties, where such duties may involve extra-jurisprudential private jurisdiction, but don't immediately involve primary or secondary property. Both trading in secondary property and agreements relating

to the latter kind of assistance, usually involve contracts. These two kinds of contracts are outside the scope of this memorandum, and are addressed in Porter, **A Memorandum of Law and Fact about Contracts**.

It's important to emphasize that even though people have the natural right to live in complete harmony with natural law, they don't. People can violate the natural duty to conform to all natural laws, which they obviously do, but people cannot violate the natural laws themselves. No matter how hard they try, and no matter how smart, talented, strong, wise, *etc.*, any natural person may be, in spite of their natural right to conform to all natural laws, people generally suffer from this common disability in which each is disabled from conforming to all natural laws. So this disability is common and normal even though it is not natural. Why the human condition is presently marked by this disability is a religious, philosophical, metaphysical, and/or theological issue that's outside the scope of this memorandum. But anyone who doubts that the disability exists has the burden of proof. Human death supplies ample proof to the contrary. Human death is also proof that this disability that exists generally for the human race, and therefore exists for humans practically from conception, is not generally overcome within the human's subsequent lifetime.

Among the reasons it has been important to examine this distinction between "*freedom* and *power*", *i.e.*, between natural rights, natural duties, and normal / common abilities and disabilities, in both the extra-jurisprudential and jurisprudential senses, is because the normal growth pattern for every human is to grow from having virtually no abilities at conception to having more and more abilities as one grows up, then to lose some abilities with old age. If a natural-law theory cannot trace an ongoing relationship between natural rights, natural duties, and normal abilities and disabilities in this normal life pattern, at least in a general way, then it's reasonable to doubt the viability of such a theory. So this memorandum will track these concepts of natural rights, natural duties, abilities and disabilities, in both extra-jurisprudential and jurisprudential senses of these terms, through a normal life span, starting at conception.

Pre-Cognitive Consent, Pre-Cognitive Contracts

Before tracking these concepts in a normal life span and in a general way, it's critical to establish them in the zygote. — The fact that every natural person has the jurisprudential natural right to pursue his/her vision of what it means to live in harmony with natural law, and that every natural person also has a jurisprudential natural duty not to trespass against the other person's natural rights, is evidence that inherent within every human being, at the genetic level, is an agreement with every

other human being to avoid damaging the other. Empirical evidence of such an agreement may not be abundant, but it's practically undeniable that logic demands that such an agreement exist. Political philosophy has certainly had a pressing need to find a rational foundation for this jurisprudential natural duty for a long time. As indicated above, denying that this jurisprudential duty exists naturally and inherently in being human is a slippery slope into social decay and tyranny. The historically accepted alternative to denial that such a jurisprudential duty exists naturally has been for natural-law theories to make a bald claim that this duty exists almost *ex nihilo*, claiming that the duty exists without first finding the duty in an inherent agreement. In contrast to this *ex nihilo* or fiat foundation for this duty, the natural-law theory being sketched in this memorandum posits that this jurisprudential duty arises out of a universally existing agreement. The agreement is necessarily universal because the duty is necessarily universal. This theory claims that the basis for this jurisprudential duty is in an agreement, rather than being fiat. This claim exists as part of a strategy to avoid the statist claim that all people are duty-bound to serve the state. History shows that the claim that the natural duty to avoid damaging other people is not based on agreement tends to default into statism. Further, 20th-century history shows emphatically that statism tends to democide and mass violation of natural rights.

In accordance with this country's founding principles, the state, if it is lawful, exists through consent, not through some mythological duty. Lawful governments arise out of lawful contracts, where all lawful contracts are first agreements. Contracts are agreements in which real consideration is exchanged through mutual consent, and in which there are generally penalties specified implicitly or explicitly for violation. This universal natural jurisprudential duty certainly provides impetus and motivation for the formation of lawful governments, but that doesn't necessarily mean that penalties must necessarily exist in human law to force people into these governmental contracts. Forced participation is an inherently statist posture. Regarding the source and foundation of the jurisprudential natural duty to avoid trespassing against other people's jurisprudential natural rights, the choices can be summarized as being three:

(i) that there is no natural duty to avoid damaging the other person's natural rights;

(ii) that such a natural duty exists, but it is not based on any universal agreement, but is rather a stand-alone duty; and

(iii) that such a natural duty exists and arises out of a universal agreement, a naturally existing contract.

Out of these three, the only option that conforms well to all the demands and requirements is the third. The first option is inherently dysfunctional for reasons already given above. The second option isn't the best because it doesn't give due regard to the human capacity to choose, and it therefore is prone to statism. So by this process of elimination, it's necessary to conclude that this natural duty to avoid trespassing the other's natural rights is grounded in a contract that exists universally between all natural persons. This natural contract must necessarily be entered through the mutual consent of the entire human race. Because the contract and consent to participation in it are inherent in being human, each human must have necessarily consented at the moment he/she became human, at the moment of conception.

Because people enter this contract at conception, they have no memory of entering into it. All people entered it before having cognitive abilities. Like all contracts, this contract has terms, and the terms include most emphatically what Rothbard called the "nonaggression axiom". Because this contract has been entered through the consent of people who don't remember consenting, and who don't acknowledge the contract because the consent and the contract pre-existed cognition, it's important to identify this as a pre-cognitive contract that has been entered through pre-cognitive consent. The concept of pre-cognitive consent and contracts may initially appear preposterous, but by allowing this argument to unfold, the reader will see that it's a necessary feature of human nature.

In claiming that pre-cognitive consent and contracts exist, it's important to simultaneously make a disclaimer: It's important to emphasize that such pre-cognitive contracts and pre-cognitive consent exist in the realm of soft jurisprudence, and not necessarily in the realm of hard-core jurisprudence. Because this pre-cognitive contract that exists universally between all human beings is not the only possible pre-cognitive contract, it's important to recognize in passing that there is necessarily a difference between a pre-cognitive contract that can be translated readily into hard-core jurisprudence and a pre-cognitive contract that does not translate readily into hard-core jurisprudence. A pre-cognitive contract that translates readily into hard-core jurisprudence is a pre-cognitive contract whose jurisdiction is self-evident. To understand this claim, it's critical to understand, (i)that all contracts specify jurisdictions, and (ii)that jurisdiction only exists when subject-matter jurisdiction, *in personam* jurisdiction, and territorial jurisdiction all exist simultaneously. Any legal theory that doesn't exhibit this due regard for jurisdictional boundaries is a legal theory that's inherently prone to abuse private jurisdiction and natural rights, and is therefore inherently abusive if not statist. — This pre-cognitive contract that exists inherently and universally between all humans, and that imposes a duty

upon every human not to violate the natural rights of any other human, translates readily into hard-core jurisprudence because its jurisdiction is self-evident. The *in personam* jurisdiction of this pre-cognitive contract includes all humans. The territorial jurisdiction includes any territory where humans may be. So the only issue capable of being controversial pertains to subject-matter jurisdiction. The only issue capable of being controversial is whether the accused violated the proscription of damage perpetrated by one person against another. So if anyone has both an accusation of damage against someone else and *prima facie* evidence to support the accusation, then this pre-cognitive contract that exists inherently in soft jurisprudence translates readily into hard-core jurisprudence. The same is not true for any other kind of contract, regardless of whether it's a pre-cognitive contract or not, because proof of these three jurisdictional sub-types is not this easy. If jurisdiction is not clearly articulated by the contract, and all three jurisdictional sub-types clearly established by *prima facie* evidence, then the contract cannot be readily translated from soft jurisprudence into hard-core jurisprudence. If *prima facie* evidence to establish jurisdiction cannot be presented at the initiation of a case, then the case and the legal action cannot go forward because jurisdiction cannot be properly established. Because this pre-cognitive contract whose terms proscribe humans damaging other humans has a global *in personam* jurisdiction, and because its territorial jurisdiction is also global, this pre-cognitive contract translates readily into hard-core jurisprudence whenever an action *ex delicto* arises. Without a clearly articulated contract specifying amenable jurisdiction, an action *ex contractu* doesn't translate so easily. This difficulty in translation into hard-core jurisprudence exists in regard to all other pre-cognitive contracts. Although there may be other pre-cognitive contracts between human beings, proving that these contracts exist becomes extremely problematical when people allegedly party to such pre-cognitive contracts refuse to admit that they consented to being party. In contrast to these other pre-cognitive contracts, such a refusal to admit participation in regard to this global proscription of damage perpetrated by one against another is inherently psychopathic and sociopathic, and everybody knows it. Everybody knows it because everybody knows that anyone who claims he/she has a right to harm other people with impunity is inherently sociopathic and/or psychopathic. On the other hand, the same claim cannot be made for any other kind of pre-cognitive contract. That's why hard-core jurisprudence is limited to the subject matter of damage by one human or group of humans against another, where such damage can only happen *ex delicto* or *ex contractu*.

Assuming that the laws of nature, through the DNA blueprint, epigenetic factors, *etc.*, are orchestrating the formation of this natural person from the moment the sperm enters the egg, it's clear that this person's natural rights are largely latent. This

newly conceived person has primary property that consists of zygote, embryo, fetus, *i.e.*, the pre-natal person's body. This person's secondary property consists of his/her interest in his/her point-of-contact with land, meaning placenta, chorion, amniotic sac, amniotic fluid, umbilical cord, *etc.*, in short, the array of organs in which both mother and fetus have overlapping interests. The fetus' private jurisdiction, when understood to be completely dependent upon cognition, is totally latent because his/her cognition is totally latent. But the existence of this natural contract to which all human beings are party, and to which this person consented to participate at conception, demands that this person's private jurisdiction existed in more than merely a latent state from the moment of conception. As the fetus is growing in the mother's womb, he/she doesn't choose, through the cognition-dependent conception of private jurisdiction, to have two eyes, two ears, two legs, two arms, one head, *etc*. He/she doesn't choose, through a normal, cognitive choosing process, to enter into this natural contract. Nevertheless, as surely as this natural person's primary property is formed thus, and as surely as he/she has secondary-property-interests in these pregnancy-related organs, he/she has entered this natural contract with the rest of the human race. So even though this person's cognition is completely latent and dormant, this person's private jurisdiction must be active in a way that allows pre-cognitive choice-making.

To reiterate: As natural and inherent as the genome itself, every human being, as a feature of the genome, necessarily enters a contract with every other human being. Because this contract is not cognitive, because it exists before cognition exists, it's reasonable to call this a "pre-cognitive contract". Because contracts by definition are entered through mutual consent, where consent is an inherently cognitive phenomenon, and because cognition is latent at conception, it's reasonable to call this "pre-cognitive consent", which is obviously subsumed by "pre-cognitive choice-making". In the terms of this pre-cognitive contract, this new party to the contract agrees to abide by the universal duty to not violate the jurisprudential natural rights of any other human being, which is essentially the same as a duty to avoid damaging any other natural person, except in defense of natural rights. The terms of this pre-cognitive contract also stipulate that by becoming party to the contract, each party obligates his/her self not only to a negative duty to avoid harming other people, but also to being subject to the penalty of proportional damage whenever one harms another. This penalty is what converts this from a mere agreement into a contract, though the contract is pre-cognitive. Another term of the pre-cognitive contract is that one will do one's best to execute justice against anyone who harms someone else. But this latter term, this positive duty, is not accompanied by an inherent penalty, and is therefore no basis for statism.

Although it's obvious, it's nevertheless important to emphasize that there is necessarily a radical distinction between pre-cognitive contracts and cognitive contracts, between pre-cognitive consent and cognitive consent, and between pre-cognitive choice-making and cognitive choice-making. The difference can be seen by considering the following question: As the pre-natal human develops, does he/she consent, in the normal sense of that word, to having two eyes, two ears, one head, two hands, two feet, *etc.*? Of course not. This entity is incapable of cognition in the normal sense of the word. This entity is therefore incapable of choosing in the normal sense of the word, and incapable of consenting or dissenting, in the normal sense of those words. The pre-natal human's cognition is probably almost entirely latent, and so is his/her capacity to exercise private jurisdiction, in the cognitive sense of that term. If the entity develops normally, this human will eventually develop cognitive abilities, the ability to make choices based on cognition, the ability to consent and dissent, and the ability to enter contracts in the normal sense of that term; and this latency will end when those capacities begin. The person will even develop the cognitive capacity to object to the way it has developed. For example, this natural person could decide that he/she would rather have been the opposite sex. When he/she comes of age, and is legally qualified to consent / dissent, maybe he/she wants a sex-change operation. Or this human might decide that he/she would rather have been some kind of animal, say, an eagle or a chimpanzee or a gopher, instead of a human. When this person reaches majority, perhaps he/she wants artificial modifications to satisfy these desires. If he/she had entered into a contract with whatever entity was responsible for his/her design and creation, where the contract stipulated his/her morphology and physiology, then under such circumstances, he/she would be cognitively dissenting from the way his/her maker made him/her, meaning that he/she would be dissenting from the pre-cognitive contract that he/she had entered with his/her maker. This means that there would be cognitive dissonance between the way that he/she was actually made and the way that he/she wished that he/she would have been made. In effect, he/she either consents to the maker's design, or he/she dissents from the maker's design. — In speaking of the maker, this memorandum is making no claim for this maker / designer other than that such power / entity must exist. The fact that the human exists with a specific form is sufficient evidence to prove that there is some kind of maker / designer, even if the maker / designer is conceived to be an inanimate, mechanistic, deterministic entity. This memorandum's reason for introducing this maker / designer is not to enter into a theological argument, or to posit a theological posture by stealth. Rather, this memorandum is introducing this maker / designer to introduce the idea that there may be cognitive dissonance between a natural person's cognition and his/her pre-cognition. If this is true in regard to the way people are made, then this

is also true in regard to pre-cognitive consent to the natural jurisprudential duties. When the natural person reaches the age of cognitive capacity, he/she might dissent with respect to that pre-cognitive contract.

So far, in this examination of pre-cognitive consent and pre-cognitive contracts, this memorandum has at least hinted at the possible existence of three pre-cognitive contracts:

(i) the pre-cognitive contract between the fetus and all other human beings, where this pre-cognitive contract is the basis for global jurisprudential natural duties;

(ii) the pre-cognitive contract between the pre-natal human and his/her maker / designer that determines the attributes that this pre-natal person has; and

(iii) the pre-cognitive contract between the pre-natal person and his/her mother that determines the disposition of their respective interests in their shared property.

Because this is not a theological treatise, this memorandum will skip further discussion of a possible pre-cognitive contract between the pre-natal human and his/her maker / designer. But these other two pre-cognitive contracts are between human beings, and they demand more thorough examination in a memorandum dedicated to human law. They especially demand examination of the process of choosing, because choice-making is at the core of both cognitive and pre-cognitive processes of choosing, consenting / dissenting, and contract-making.

Pre-Cognitive Choice Making

Some people may claim that the pre-natal person chooses nothing, because the whole process is deterministic from conception to birth. If this process is utterly deterministic, then the pre-natal person makes no choices because whatever may appear to be a choice is really determined by laws of nature operating external to the pre-natal human's ethical arena. However, this radical commitment to determinism fails to account for the way the natural-law tripod is naturally set up. The laws of nature are certainly in operation deterministically in the two legs of the natural-law tripod in which the laws of nature operate exogenously and endogenously relative to the human being. But this radical determinism is obviously so radical that it refuses to acknowledge any need for the ethical arena. It refuses to acknowledge that those deterministic legs might be compatible with the leg in which humans must be accountable for their choices, and cannot rely on excuses like, "The devil made me do it", or, "Determinism made me do it". Saying that this kind of radical

determinism is lame is probably understating it kindly. So even from conception, and even if it's almost entirely latent, every natural person should be recognized as having the ethical leg of the natural-law tripod, as well as the exogenous and endogenous laws-of-nature legs.

To keep human choice-making in proper perspective, regardless of whether the choices are made by a healthy adult or by a fetus, it's important to recognize this fuzzy boundary between the endogenous laws-of-nature leg and the ethical leg. The former operates deterministically. The latter does not. The dominant purpose of studying the former is inherently descriptive. The dominant purpose in studying the latter is inherently prescriptive. Through the endogenous laws-of-nature leg, all unconscious, subconscious, and pre-conscious physiological processes within all adults, infants, children, adolescents, fetuses, *etc.*, make undeniable contributions to the entity's choice-making process. The obvious difference between fetal persons and non-fetal persons is that non-fetal persons have better-developed cognitive abilities. However, these cognitive processes don't operate in a vacuum. They are subject to these unconscious, subconscious, and pre-conscious processes that are functions of the endogenous laws-of-nature leg. Cognitive processes are influenced by subliminal processes, but by definition, because they are subliminal, subliminal processes are not included in conscious, cognitive decision-making, except to the extent that they cross the threshold of consciousness and thereby become non-subliminal. The point here is that these unconscious processes influence choice-making in all natural persons, both fetal and non-fetal. Because it's almost certainly safe to assume that fetuses have little or no cognitive powers, it's safe to assume that their choices are driven almost entirely by these subliminal physiological phenomena. But subliminal physiological phenomena are also inevitably and actively influencing the choices of more cognitively developed people. Even though cognition is latent in fetuses, the primordial physiological driver of all choice-making for all humans is in effect throughout the full range of the human's life span. Cognition certainly acts as a filter through which to hone and refine the choice-making process. Nevertheless, the inclinations arising out of the unconscious, subconscious, and pre-conscious arena are powerful influences on what people choose, regardless of whether they are fetal or non-fetal. In fact, in a system that posits compatibility between deterministic and ethical arenas, choice is always driven by one's strongest inclination.

Choice is always driven by one's strongest inclination. This is as true for the adult who has fully developed cognitive abilities as it is for the fetus who has no apparent cognitive abilities. — The choices of organisms that lack cognitive abilities are responses to sensory stimuli that do not contribute to the mental replication of exogenous entities endogenously. Because even unicellular organisms make

choices, based upon laws of nature in operation endogenously to them, it's clear that most choice-making among the entire range of biological organisms are made through responses to sensory stimuli, and not through cognitive processes. The sensory stimuli come from the exogenous laws-of-nature leg. The response comes from the endogenous laws-of-nature leg. But among non-cognitive species, the choice-making process is so rudimentary that it's not valid to claim that they have an ethical leg. Their choice-making is practically entirely deterministic. Even so, species with cognitive abilities advanced enough to necessitate the ethical leg still have these sensory stimuli contributing to their choice-making processes. The claim that choice is driven by strongest inclination is true throughout the whole range, from unicellular organisms to the most cognitively advanced entity.

When a fetus is growing in his/her mother's womb, he/she certainly doesn't make any cognitive choices to have two eyes, two ears, two legs, two arms, one head, *etc*. Such choices are certainly driven by primordial physiological phenomena. And because cognition is latent within the fetus, it's reasonable to call such non-cognitive choices "pre-cognitive". But because similar physiological phenomena are always happening in the background in all humans, it's reasonable to also label such non-cognitive processes in non-fetal persons as "pre-cognitive".

Regardless of how much people may pride themselves on acting rationally, and on basing their decisions on well-reasoned cognitive processes, in the final analysis, humans act based upon their strongest inclinations, where inclinations can be some combination of primordial drives and cognitive factors. Choices are NEVER driven by cognitive factors alone. As long as people are alive and have bodies, this is necessarily true. Cognitive factors are means through which to refine impulses arising out of the endogenous leg. But in the final analysis, cognitive factors and endogenous laws of nature combine and collaborate to form the strongest inclination that drives every choice. Logic and cognitive processes are generally useful in channeling and refining impulses from the endogenous leg into what appear to be optimized decisions, choices, *etc*. Organisms that have absolutely no cognitive abilities nevertheless have basic inclinations that are functions of their genetic makeup. These basic inclinations are the drivers of choices that organisms make, because desire-creation is a function of the natural laws in operation endogenously within every organism, and desires inherently entail choices in their pursuit.

Basic inclinations are driven by factors that have roots in genetics and epigenetics, as well as in electro-magnetism and wave mechanics. These factors exist where cognitive capacity doesn't. So attributing pre-cognitive choice-making to the fetus isn't some whimsical idea. On the contrary, the facts demand it. The facts demand that pre-cognitive influences on choice-making be recognized as a basic aspect of

the human condition. Animals may lack the natural-law tripod, because they are driven overwhelmingly by laws of nature that are endogenous to them, and therefore deterministic, even while they make choices based on those endogenous impulses. The range of choices may be far greater for humans than for less cognitively developed organisms, and the boundaries to the human's basic inclinations may be much broader. Nevertheless, boundaries exist for all organisms. But if natural rights are inherent in being human, as this natural-law theory maintains, then private jurisdiction and the ethical leg must be acknowledged as existing, even though perhaps latently, from conception. So while animals may have only two legs under this natural-law umbrella, the breadth available for human choice-making demands that three legs be inherent to natural persons. The strongest inclination is thereby the basic factor in human choice-making from conception to death.

Humans are finite. Even if they could live indefinitely into the future, the evidence indicates that they would still be localized in space and time, and therefore finite. Humans are therefore both individually and collectively incapable of omniscience, and therefore ultimately incapable of comprehending their existence deterministically. Nevertheless, as surely as the two laws-of-nature legs of the natural-law tripod must necessarily exist, determinism has an important, though limited existence within this natural-law theory. Natural-law theory shows the limits on determinism by showing that escape from the ethics leg of the natural-law tripod is ultimately impossible (or at least too fanciful to be taken seriously). If the human develops normally from zygote, it's obvious that latent within the zygote is two eyes, two ears, two legs, two arms, one head, cognitive capacity to make choices, private jurisdiction, natural rights in both extra-jurisprudential and jurisprudential senses, and natural duties in both extra-jurisprudential and jurisprudential senses.

Pre-Cognitive Contract Between Mother and Pre-Natal Person

According to the line of reasoning being followed herein, there is definitely a pre-cognitive contract between the pre-natal human and his/her mother, starting at conception. Especially after the decades of confusion caused by *Roe v. Wade*'s promulgation, there have certainly been ample opinions in popular culture that contradict this claim. No doubt many of these opinions are borne so inflexibly that the bearer would rather turn violent than probe alternative views. In spite of all this strident confusion, the combination of law, facts, and logic demand the existence of this pre-cognitive contract to explain the disposition of the respective interests of mother and fetus in their shared property, if for no other reason. Even though the existence of this pre-cognitive contract is certain, the contract does

not translate well from the arena of soft jurisprudence into the arena of hard-core jurisprudence. This translation is difficult largely because the mother can choose cognitively to refuse to acknowledge her participation in any such contract. When the mother makes an obstinate claim that the fetus is trespassing and stealing from her, her stubborn commitment to this claim necessarily disables opposing jurisdictional claims in secular courts. It might not disable opposing jurisdictional claims in religious courts, but it definitely does so in secular courts. The focus in this memorandum is strictly on what prevails, or should prevail, in the secular arena. The reason these jurisdictional claims cannot be sustained in a secular court will be covered in a coming section of this memorandum, "*Nullification of Pregnancy Pre-Cognitive Contract Versus Transformation of It into Cognitive Bailment Contract*". In the remainder of this section, this memorandum bolsters its claim that the pre-cognitive contract between mother and fetus must necessarily exist.

When the mother becomes conscious of the fetus' existence and implantation, she becomes capable of cognitive consent to, or dissent from, the fetus' parasitic existence within her body. Even though this is true, natural law that's compatible with natural rights demands that she must have entered into a pre-cognitive contract even before she became conscious of the implantation. So pre-cognitive consent and pre-cognitive contract necessarily existed even before the mother was able to dissent cognitively. The mother's cognitive consent to being pregnant does not have any apparent effect upon whether she is pregnant or not. The same way the autonomic nervous system generally operates outside the consciousness of humans, and is therefore unconscious or subliminal, women generally become pregnant largely without regard to what the woman may think or cognize. If a woman becomes pregnant through consensual sex, then her mental processes were certainly involved in that act. But as surely as there is no one-to-one correspondence between copulation and impregnation, there is no one-to-one correspondence between a woman's choice to be pregnant, or not to be pregnant, and her impregnation. There is pre-cognitive consent on her part to having the embryo implanted in the endometrium, but cognition has little or nothing to do with that process. Pre-cognitive consent to the pregnancy exists, evidenced by the existence of the pregnancy, and regardless of whether she cognitively consents or not. The resulting pre-cognitive contract is obviously with the pre-natal human.

Although Rothbard's views are largely impeccable in regard to Austrian and Crusoe economics, his views are not so impeccable when it comes to pregnancy and abortion. The discrepancy between the posture of this memorandum and his posture is obvious in the following passage from his **Ethics of Liberty**:

> [I]t is clear that a newborn babe is in no natural sense an existing self-owner, but rather a *potential* self-owner. But this poses a difficult problem: for *when*, or in what way, does a growing child acquire his natural right to liberty and self-ownership? Gradually, or all at once? At what age? And what criteria do we set forth for this shift or transition?
>
> . . . [L]et us begin with the prenatal child. What is the . . . mother's . . . property rights in the fetus? . . . [W]e must note that the conservative Catholic position . . . holds that the fetus is a living person, and hence that abortion is an act of murder . . . The usual reply is simply to demarcate *birth* as the beginning of a live human being possessing natural rights, including the right not to be murdered; before birth, the counter-argument runs, the child cannot be considered a living person. But the Catholic reply that the fetus is alive and is an imminently potential person then comes disquietingly close to the general view that a newborn baby cannot be aggressed against because *it* is a potential adult. While birth is indeed the proper line of demarcation, the usual formulation makes birth an arbitrary dividing line, and lacks sufficient rational groundwork in the theory of self-ownership.[1]

For Rothbard to claim that "a newborn babe is in no natural sense an existing self-owner", is to undermine his trenchant claims elsewhere that people are naturally self-owners. If a newborn is not a self-owner, then like he says, that "poses a difficult problem". It poses the problem of ascertaining when and how the newborn transitions into self-ownership. The primary problem with Rothbard's position is that he has not applied his distinction "between *freedom* and *power*" to this pregnancy and abortion issue as consistently as he could. From that perspective, all humans are "natural self-owners" from conception. All humans have that just claim, that natural right in the jurisprudential sense, that "*freedom*", from conception. But of course, pre-natal humans lack the "*power*", the ability, to exercise that natural right of self-ownership.

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 97. — Regarding "a newborn babe" being "a *potential* self-owner", Rothbard inserted this footnote: "John Locke, in his *Two Treatises on Government*, p. 327, put it this way: 'Children . . . are not born in this full state of equality . . . though they are born to it. Their parents have a sort of rule and jurisdiction over them'". — Locke, John. *An Essay Concerning the True Origin, Extent, and End of Civil Government in Two Treatises of Government*, edited by P. Laslett. Cambridge: Cambridge University Press, 1960.

Simply by asking the question, "What is [(*sic*)] . . . the mother's . . . property rights in the fetus?", Rothbard is being inherently misleading. The status of the pre-natal person is better characterized as one in which he/she has the full set of extra-jurisprudential and jurisprudential natural rights while also having the normal inability to exercise those rights. The mother has no property rights in the fetus. The mother gave pre-cognitive consent to allow the embryo parasitical existence. At some point, the mother became aware of the fetus' existence, and either chose to cognitively dissent from the pre-cognitive contract, or to cognitively affirm the pre-cognitive contract. If she chose cognitive dissonance, then rather than agreeing to participate in any such contract, she cognitively refused, which leaves her seeking a way to terminate the pre-cognitive contract before the child is born. If she cognitively chose to allow the pre-cognitive contract to stand, then she chose to recognize and allow the fetus' interests in the array of organs necessary to the pregnancy. — In passing, it's important to note that "the conservative Catholic position" is absolutely correct in holding "that the fetus is a living person". But that position's claim that, "hence the abortion is an act of murder", is a *non sequitur*. It's a *non sequitur* because the fetus is inherently parasitic, and is therefore committing trespass and theft, where these delicts may be grounds for justifiable homicide. — When Rothbard claims that "birth is indeed the proper line of demarcation", it's not because he believes that's when that natural person becomes a self-owner. Birth is the point at which this natural person ceases being a parasitic trespasser and thief. Rothbard is right to say that in the "usual formulation", birth is "an arbitrary dividing line", because in the usual formulation, there is inadequate respect for property rights, inadequate recognition of the mother's self-ownership, and inadequate recognition of the parasitic trespass and theft.

Because copulation and conception are two distinctly different phenomena, it doesn't make sense to claim that the mother's element of control over the one means a simultaneous control over the other. On many occasions, copulation doesn't lead to conception. So there is no one-to-one correspondence between the two, and therefore no deterministic causal connection. Copulation may be necessary for conception, but it is not sufficient for conception. So neither the mother nor the child has cognitive control over the conception process. So the conception process is essentially pre-cognitive for both of them. So regardless of the mother's prior sexual activities, when the woman becomes pregnant, the pregnancy is not deterministic, in the sense that there might be a one-to-one correspondence between sexual activity and pregnancy. Pregnancy is certainly more probable when she is sexually active than when she is not. But even when she becomes pregnant, she may be pregnant for weeks or months before she becomes conscious of being pregnant. Given these facts, it's clear that when the woman becomes conscious of the pregnancy, and

when she cognitively consents to having this alien human exist parasitically on her property, her cognitive consent is well after the initial implantation of this alien on her property. So even if there is a contract implied in fact between the mother and the fetus at the time of her clear and conscious cognitive consent, that doesn't mean that there was clear and conscious consent at the moment of conception and moment of implantation of the embryo. Therefore, even if there's a contract implied in fact at the moment the mother cognitively consents to having the fetus in her body, that doesn't mean that the contract implied in fact existed from the moment of conception. In fact, like all genuine minors, the fetus is incapable of cognitively consenting in the normal understanding of what that means. On the other hand, any assumption that the fetus dissents from its existence in the mother's womb is essentially an assumption that the fetus wishes it didn't exist, which is inherently absurd. This absurdity is proof of the existence of the fetus' implied consent to a contract implied in fact. Given the mother's cognitive consent, this argument *ad absurdum* in favor of the fetus' implied consent is argument in favor of mutual cognitive consent. Mutual consent is a necessary ingredient in the construction of all contracts. To bolster this claim to mutual consent to a contract implied in fact under such circumstances, it's important to notice that the common law has held for a long time that contracts between minors and majors cannot be enforced to the detriment of the minor, although they can be enforced against the major. Contracts between minors and adults are voidable by the minor. They are not voidable by the adult. So as long as the contract genuinely benefits the minor, evidence that the minor's consent exists should stand, and the contract should not be nullified based on the fact that the fetus is a minor.

If the mother has consented to the cognitive contract, regardless of whether her consent is express or implied in fact, then the preponderance of evidence is on the side of the contract's existence, even though the fetus never expresses anything. But if the mother refuses to acknowledge that the pre-cognitive contract carries weight, then in the secular arena, the contract is negated even if the contract would benefit the fetus, because her cognitive negation of the contract negates the fetus' interests in the array of pregnancy-related organs and resources, negates any claim on the fetus' behalf to having subject-matter jurisdiction, and thereby eliminates every legal action *ex delicto* or *ex contractu* that might otherwise be possible within a secular court. In secular courts, the woman's self-ownership trumps all the fetus's virtual claims, because of the fetus' inherent trespass and theft.

In contrast to these claims that a pre-cognitive contract necessarily exists, and that a cognitive contract might exist based on the mother's cognitive consent to the

pre-cognitive contract, Rothbard makes plausible arguments against such a cognitive contract between the mother and the fetus:

> It has been objected that since the mother originally consented to the conception, the mother has therefore "contracted" its status with the fetus, and may not "violate" that "contract" by having an abortion. There are many problems with this doctrine . . . In the first place, . . . a mere promise is not an enforceable contract: contracts are only properly enforceable if their violation involves *implicit theft*, and clearly no such consideration can apply here. Secondly, there is obviously no "contract" here, since the fetus . . . can hardly be considered a voluntarily and consciously contracting entity. And thirdly, . . . a crucial point in libertarian theory is the *inalienability of the will*, and therefore the impermissibility of enforcing voluntary slave contracts. Even if this *had been* a "contract," then, it could not be enforced because a mother's will is inalienable, and she cannot legitimately be enslaved into carrying and having a baby against her will.[1]

By claiming that "contracts are only properly enforceable if their violation involves *implicit theft*", Rothbard is certainly claiming something that's true, but it's only partially true. What he's claiming is true in secular courts, but not necessarily in religious courts. As proven trenchantly in Porter's **A Memorandum of Law and Fact about Contracts**, there is necessarily a distinction between secular courts and religious courts. Secular courts have strict rules of evidence that eliminate, or at least should eliminate, alleged evidence that does not revolve around concrete, physical facts. In contrast, religious courts can allow evidence that is not so physical. This means that religious courts can recognize consideration that would never be, or should never be, recognized in a secular court. In a religious court, the court may recognize "a mere promise" as valid consideration, while a lawful secular court would never recognize the same promise as consideration. Rothbard does not recognize this distinction between secular courts and religious courts, at least his **Ethics of Liberty** doesn't. But it's a distinction that's absolutely crucial if people are allowed to keep whatever religion they please. To refuse to recognize and allow religious courts is to presume that secular courts are the only kind of courts allowable in a free society. That presumption is its own breed of tyranny.

The biggest problem in allowing the existence of religious courts appears at the interface between religious courts and secular courts. It's probably safe to assume that a decision in a secular court would never, or at least should never, be appealed

1 Rothbard, Murray, **The Ethics of Liberty**, p. 98.

into a religious court. This is because such an appeal would signal the establishment of the given religion, where such establishment violates the Establishment Clause of the 1st Amendment, and therefore the whole idea of religious pluralism; and it also violates the "nonaggression axiom". However, if there were any interface at all between secular courts and religious courts, it would be through appeal of a decision of a religious court into a secular court. Such an appeal would necessarily entail a transition in rules of evidence from those of the religious court to those of the secular court. This transition would necessarily entail the elimination of any evidence involving consideration based purely on promise. So while a religious court could lawfully recognize and enforce the contract between mother and fetus, a secular court could not. The bottom line here is that any contractual dispute in a religious court should only be between co-participants in that court's overarching religious social compact, and any litigant in a religious court should simply resign from the compact, rather than try to appeal the case into a secular court. For this kind of case to be appealed into a secular court would signal the possible violation of the 1st Amendment's Free Exercise Clause.

The conclusion in regard to Rothbard's first claim against the objection that "the mother has . . . 'contracted' its status with the fetus", is this: In regard to secular courts, what Rothbard claims here is absolutely correct: "[A] mere promise is not an enforceable contract: contracts are only properly enforceable if their violation involves *implicit theft*, and clearly no such consideration can apply here." This means that this pre-cognitive contract between mother and fetus cannot be recognized in a secular court, although a religious court could recognize such a pre-cognitive contract. Because secular courts are focused entirely on executing justice against damage whose existence can be proven with concrete evidence, such a secular court can readily recognize that trespass and theft are being perpetrated by the fetus against the mother. But any presumed arguments in favor of the fetus and against the mother's claim to justifiable homicide cannot be admitted as evidence by a secular court, not because the fetus is not human, but because the only arguments the fetus could make, were it able to speak, would be based upon this pre-cognitive contract, whose existence the court cannot recognize. The fetus' interests are in somebody else's property, somebody upon whose property the fetus is inherently trespassing. So a secular court cannot recognize this pre-cognitive contract, not because it's pre-cognitive, but because even *prima facie* jurisdiction cannot be established.

By comparing the jurisdictions of these two kinds of pre-cognitive contracts, it becomes obvious why a secular court cannot recognize the pre-cognitive contract between mother and fetus, while it MUST recognize the pre-cognitive contract that imposes a global duty on all humans to avoid harming other people.

(i) The *in personam* jurisdiction of the pregnancy pre-cognitive contract includes the mother and the fetus, and no one else. It could be argued that God is a party or that the woman's husband is party. But a secular court, because it's interreligious, cannot recognize the existence of God, except perhaps in ways that never bias litigation, if such ways can possibly exist. Also, because this is a pre-cognitive contract, and because the husband can only be made party through some cognitive process, a secular court cannot recognize the husband as a party. The husband contributing sperm does not make the husband party any more than the mother contributing an unfertilized egg makes her party. What makes the mother party is the fact that the fetus is implanted in her uterus, and she necessarily gave pre-cognitive consent to that implantation. So the only parties to a pregnancy contract that could ever be recognized by a secular court are the mother and the pre-natal person. In contrast to these two parties in a pregnancy pre-cognitive contract, the parties in the global-prohibition-of-aggression pre-cognitive contract include the entire human race. In the latter pre-cognitive contract, there is no doubt about whether so-and-so is party or not. There can only be doubt about whether so-and-so has violated the subject matter or not, where the allegation of such violation, along with *prima facie* evidence of the violation's existence, translates the underlying agreement out of the soft-jurisprudential arena into the hard-core jurisprudential arena. Because the *in personam* jurisdiction is global, and the territorial jurisdiction is global, there is no controversy over whether this pre-cognitive contract exists, so actions *ex delicto* cannot be confused with actions *ex contractu*. The latter have their own distinct *in personam* and territorial jurisdictions. — In contrast to this global pre-cognitive contract, the only parties to the pregnancy pre-cognitive contract are the mother and the fetus. Their clear participation in this pre-cognitive contract does not necessarily translate into their clear participation in a cognitive contract. As indicated, it can only translate into a cognitive contract through the mother's consent, express or implied in fact. But as will be shown, even the mother's express consent or consent implied in fact doesn't necessarily translate into an action admissible to a secular court, because her participation is based on a naked promise.

(ii) The territorial jurisdiction of the pregnancy pre-cognitive contract includes exclusively the mother's primary property. More specifically, it includes all aspects of her primary property in which the fetus necessarily has interest, because part of the subject matter of the pregnancy pre-

cognitive contract necessarily includes the disposition of the shared organs. Because the territorial jurisdiction of this pre-cognitive contract includes the woman's body and only the woman's body, and because no secular court can lawfully have jurisdiction over any human's primary property except when the given person has forfeited his/her primordial rights by damaging someone else *ex delicto* or *ex contractu*, a secular court cannot have *a priori* jurisdiction over the woman's body. The woman has absolute title to her body, like every other human. The fetus also has absolute title to his/her primary property. But all of the fetus' claims to secondary property are claims to the mother's primary property. So all the fetus' interests in secondary property are inherently spurious. Until the fetus becomes viable, he/she can only stay alive through the mother's sufferance. The fetus certainly has a "right to life", like everyone else, as long as it doesn't steal, kill, trespass, *etc.*, against someone else. Because it is stealing and trespassing by its very existence within the mother, the fetus is the trespasser, not the mother. So the fetus absolutely does not have any claims recognizable in a secular court based on said contract's territorial jurisdiction. So it's impossible for anyone, on behalf of the fetus, to translate this pregnancy pre-cognitive contract from soft jurisprudence into hard-core jurisprudence. — As already indicated, the territorial jurisdiction of the global-prohibition-of-damage pre-cognitive contract is global. It exists wherever humans exist. So its territorial jurisdiction offers absolutely no resistance to translation from soft jurisprudence into hard-core jurisprudence.

(iii) The subject-matter jurisdiction of the pregnancy pre-cognitive contract certainly involves agreement about the disposition of the shared organs. Regarding mutual interests in shared organs, what's been said about territorial jurisdiction also applies to subject-matter jurisdiction. Given that the pregnancy pre-cognitive contract is a genuine contract, at least part of the subject-matter jurisdiction should include some indication of what the mutual consideration is. If it's a contract, and not merely a gift, then there should be consideration given by each party to the other. If it's consideration cognizable in a secular court, then it must be concrete consideration. The mother is certainly giving the fetus an interest in her primary property. But what the fetus is giving the mother is too ethereal for a secular court to recognize. The fetus is giving the mother the privilege of safeguarding and nurturing his/her natural rights, and encouraging the growth and development of the fetus' abilities. Regarding the fetus' interaction with exogenous phenomena, the fetus

> starts out with practically no abilities whatever. The mother has the privilege of being able to encourage the development of such abilities. This, by itself, does not constitute consideration recognizable in a secular court, although it could certainly be recognized in a religious court. — In contrast to the pregnancy pre-cognitive contract, the subject-matter jurisdiction of the global-prohibition-of-damage precognitive contract is obvious, and fosters translation of this pre-cognitive contract into hard-core jurisprudence as already indicated.

The necessary conclusion is that secular courts inherently lack jurisdiction over abortion.

Regarding Rothbard's second claim, that "there is obviously no 'contract' here, since the fetus . . . can hardly be considered a voluntarily and consciously contracting entity": It's true that there is no contract based on cognitive consent, at least until the mother cognitively consents. However, it's silly to claim that pre-cognition doesn't exist, and that pre-cognitive consent cannot exist. There is a pre-cognitive contract between the fetus and the mother. If the mother chooses to break the contract, she is choosing cognitive dissonance between her pre-cognitive consent and her cognitive ability to consent. Such cognitive dissonance may be morally wrong, but it is not necessarily legally wrong. It is probably a violation of natural law, but it is not necessarily violation of human law. — As already indicated, without the mother's cognitive consent, the fetus' life is threatened if not forfeit. To say the fetus' cognitive consent is not implied in fact is to say the fetus doesn't care about whether he/she lives or dies. That's absurd. A contract with a person who "can hardly be considered a voluntarily and consciously contracting entity" is certainly not entered wisely by someone who is NOT cognitively disabled. That's because secular courts would, or should, never enforce such a contract against the cognitively disabled, but nevertheless might enforce it against the party who is not cognitively disabled. These two facts, (i)that the fetus' consent is implied in fact, and (ii)that the contract could be enforced against the mother if jurisdiction could be established, combine to negate Rothbard's claim that "there is . . . no 'contract' here". If the woman were party to a religious social compact that prohibits abortion, an action *ex contractu* could be brought against her by the religious court, and tried under its jurisdiction. But the action would be based immediately on the religious social compact, and not on the pre-cognitive contract.

Regarding Rothbard's third claim, regarding the *inalienability of the will*: The inalienability of the will essentially refers to the inability of any living human being to abandon his/her ability to make choices. Rothbard is correct in claiming that living humans are incapable of abandoning their ability to choose, and to at least have

mental preferences. Short of brain death, insanity, coma, *etc.*, that capacity doesn't go away. Because this concept of the inalienability of the will is correct, and is crucial to the title-transfer theory of contracts, the title-transfer theory of contracts is also largely correct. But because religious courts are capable of recognizing consideration that secular courts cannot recognize, the inalienability of the will, and the title-transfer theory of contracts, shouldn't necessarily carry the same weight in religious courts as in secular courts. Rothbard clearly believes that his "title-transfer theory of contracts" is universal. If it's granted to him that it's universal, *i.e.*, that it's an aspect of global pre-cognitive human law, then the big question becomes, how does one enforce a title, whether it's transferred or not? In a secular court, only concrete, physical evidence is admissible. In other words, the only evidence admissible is based on things that exist, have existed, or are purported to exist or to have existed in the physical field of perception and action. Hearsay, frivolous speculation, and claims about things that have happened in the psychic or purely mental field of perception and action are inadmissible, or at most tangential. So when physical evidence is produced indicating that title has transferred, and no physical evidence can be produced to indicate otherwise, the court must naturally find that title has transferred. All this is based in Crusoe economics. These ideas are fundamental to the operation of a secular court. All this is perfectly consistent with Rothbard's title-transfer theory of contracts. But when one considers the operation of a religious court, in particular, one must necessarily recognize that the title-transfer theory of contracts functions in a different way, a way that makes the universality of the title-transfer theory of contracts dubious.

In a religious court, admissible evidence is not limited to the physical field of perception and action. In a religious court, fundamentals like self ownership cannot be presumed to exist. They might exist, and they might not, depending on the religion. In a religious court, if one has voluntarily given one's body to someone or something else, then the religious court might allow testimony about such a gift into evidence. Given that a religious court exists to enforce the religious terms of a community's religious social compact, admissibility of such evidence is absolutely crucial to the existence of such a community. Denial that such evidence is admissible would necessarily mean that the religious community might not be able to function based on its religious precepts. The terms of a religious social compact could consist hugely of "naked promises". So such promissory evidence would be necessarily admissible in the religious court. So, it's absolutely crucial that this kind of promissory evidence be admissible in any religious court that insists on allowing it. What does this do to Rothbard's claim that the human will is inherently "inalienable", and to the implication that the title-transfer theory is universal? And

what does this situation portend for Rothbard's claim that the enforcement of voluntary slave contracts is inherently impermissible?

Allowing promissory evidence in religious courts shows that there are limits to Rothbard's claim that the human will is inherently "inalienable". The human will should be understood within secular courts to be inalienable within the human's private jurisdiction. But as surely as private jurisdiction has limits, so does this inalienability of the will. It has limits both in the extra-jurisprudential arena and in the jurisprudential arena. In the extra-jurisprudential arena, the human will is subject to natural law, in the perfect sense of that term. Humans die. By itself, that's ample evidence to prove that there are definite limits to this inalienability claim. If someone dies, then for all intents and purposes for human life on earth, that person's will, power to choose, doesn't exist any more because, at best, it has been alienated from that person's body. So death is ample evidence that within the extra-jurisprudential arena, there are limits to the will's inalienability. Within the jurisprudential arena, there are also limits, but for different reasons.

To get a clear view of the limitations of the "inalienability of the will" and the title-transfer theory of contracts within the jurisprudential arena, consider the following scenario: One of the purposes of religious social compacts is that they allow people to live together in community in ways that allow them to pursue a shared view of conformity to natural law. Inherent in such religious social compacts are terms that cannot be recognized in secular courts as having genuine authority. For example, a religious community might have a commitment to monogamy, such that if anyone party to the religious social compact were to commit adultery, the community's penalty for that infraction might be stoning, as found in the Tanakh, also known to Christians as the Old Testament. According to Rothbard, such a contractual term is not allowed because there is no real consideration in such contractual terms. According to him, this contractual term, this commitment to monogamy, is nothing but a "naked promise", and by entering into a marriage contract, this alleged adulterer was inherently attempting to alienate his/her power to choose, his/her will. But according to Rothbard, a person cannot alienate his/her will because people can always change their minds, and they must be allowed to do so. Because a secular court should never recognize anything but concrete evidence, presumed consideration that consists of nothing more than a naked promise cannot be admitted into a secular court. On the other hand, based on this naked promise, this religious court has just condemned this alleged adulterer to stoning. Naturally, the alleged adulterer appeals the religious court's decision into a secular court. Because the secular court refuses to admit naked promises as evidence, this appellate court finds in the alleged adulterer's favor. But the people

in the religious social compact refuse to allow the alleged adulterer to live among them, and the community ostracizes him/her. Because the secular courts have very strict and concrete standards for allowable evidence, secular courts that are genuinely committed to the title-transfer theory of contracts can never recognize naked promises as contractual consideration. So religious social compacts should be structured in ways that allow them to pursue their community standards without making themselves vulnerable to being accused by outsiders of perpetrating delicts. In the case of this religious social compact, rather than call for stoning, the compact should specify that the convicted adulterer will be exiled and all his real property in the community, through the terms of the community's land covenant, forfeited. — In this way, Rothbard's claim that the human will is inherently inalienable can be understood to be true within specific boundaries. Outside those boundaries, it's not so true. Also, because the voluntary slave contract is based upon the slave's naked promise, voluntary slave contracts are not allowed and cannot exist or be enforced in the secular arena, but they ARE allowable and enforceable, within limits, within religious social compacts.

It's essential to understand that, at the interface between religious courts and secular courts, and as indicated above, the appellate process should only be allowed to work in one direction, from religious court to secular court, and not the other way around. This is because having it go the other way around would be an act of establishing the given religion. Also, when a case is appealed from religious court to secular court, it's imperative that in reviewing the religious court's decision, the secular court avoid violating free exercise, and do so by focusing entirely upon prosecuting actions *ex delicto*, and restraining itself from meddling in terms within religious social compacts.

Nullification of Pregnancy Pre-Cognitive Contract versus Transformation of It into Cognitive Bailment Contract

While the opinion in *Roe v. Wade* classified the first trimester fetus as not having 14th Amendment personhood and classified the second and third trimester entity more ambiguously, and while Rothbard classified the fetus as being a parasitic, non-self-owning quasi person, and the newborn as being owned by the parent in a kind of trustee or guardian relationship,[1] this natural-law theory holds different views. This natural-law theory holds that the fetus is unequivocally human, and that if the mother does not reject the fetus, and does not alienate her contract with the child

1 Rothbard, Murray, **The Ethics of Liberty**, pp. 100, 104.

after the child's birth, then the mother's natural relationship with her offspring, from conception forward, is a bailment contract. Because secular courts generally lack jurisdiction over abortion, secular courts generally can do practically nothing lawful to stop women from aborting their babies. Even if a woman has entered into a cognitive contract implied in fact with her unborn baby, prior to the baby's birth, the woman could change her mind, renege on the contract, and abort her baby without any lawful interference from any secular court. This is because of the jurisdictional reasons given above. If the fetus were viable, then perhaps that would be different. Perhaps such viability demands further examination. But for most intents and purposes, secular courts lack jurisdiction, and their lack of jurisdiction essentially leads to the conclusion that abortion is justifiable homicide, at least within secular jurisdictions. Whether it's justifiable homicide when the fetus is viable is still an issue that needs examination.

Before arguing that the nature of the contract between mother and fetus is inherently a bailment, it's important to further mark distinctions between this memorandum's view of natural rights and Rothbard's, for the sake of refining some of his misstatements on this cognitive-incapacitation front. The following quote shows Rothbard's views of some of these issues that need to be circumscribed:

> [T]he very concept of "rights" is a "negative" one, demarcating the areas of a person's action that no man may properly interfere with. No man can therefore have a "right" to compel someone to do a positive act, for in that case the compulsion violates the right of the person or property of the individual being coerced. Thus, we may say that a man has a *right* to his property (i.e., a right not to have his property invaded), but we *cannot* say that anyone has a "right" to a "living wage," for that would mean that someone would be coerced into providing him with such a wage, and that would violate the property rights of the people being coerced.[1]

As should be evident from what's been stated above, the claim that the "concept of 'rights' is a 'negative' one" is largely true, but not entirely true. It should be clear that within the jurisprudential arena, whether rights are positive or negative depends upon one's perspective. Largely, they are two sides of the same coin. By saying that "a man has a *right* to his property", Rothbard is indicating the positive side of the coin. It's positive for the man, but negative for outsiders. The negative view is far more important in human law because it's far more conducive to discerning distinctions necessary in adjudicating controversies. Also, it's critical to notice that the global proscription of damage perpetrated by one person against another, where

1 Rothbard, Murray, **The Ethics of Liberty**, p. 100.

proscription is inherently negative, is the only duty humans inherently owe to one another that's inherently accompanied by a penalty executable by humans. In other words, this negative proscription of damage arises out of nature and applies to all people, and is even naturally accompanied by proportional penalization. But there is no global positive duty that is inherently accompanied by a human-law penalty.

A related distinction needs to be made regarding this statement: "No man can . . . have a 'right' to compel someone to do a positive act, for in that case the compulsion violates the right of the person or property of the individual being coerced." It's certain that within the jurisprudential arena, every human has a natural right to pursue his/her own unique vision of what it means to live in harmony with natural law, without having that right violated by anyone else. This necessarily means that people get to do what they want with their property, both primary and secondary, so long as their doing doesn't violate someone else's natural rights. It's also critical to recognize a global positive duty to execute justice against people who damage other people, in other words, against people who violate the "nonaggression axiom". But the penalty for people who refuse to participate in such execution of justice is supplied through natural law, and there is no global duty to implement such a penalty as human law. The absence of such a global human-law penalty for people who refuse to execute justice against perpetrators is precisely why statism has no foundation in natural law. On the other hand, a natural-rights polity certainly has foundations in natural law. Under the natural-rights polity, there's no natural, global, human-law penalty for people who refuse to execute justice against perpetrators. If there's no natural, global, human-law penalty for people who refuse to help in something as basic as the execution of justice against people who violate the "nonaggression axiom", why should there be a penalty for something as dubious as refusing to supply someone else with a "living wage"? In fact, under the natural-rights polity, there's certainly not a global human-law penalty for people who refuse to supply other people with a "living wage".[1]

People get to do what they want with their own property. On the other hand, people who are cognitively incapacitated are inherently unable to discern boundaries, like the boundary between someone else's property and their own. Because such incapacitated people have this disability, sometimes it's necessary to use compulsion to keep them from violating other people's natural rights. It's also sometimes

1 If anyone has a lawful "right" to coerce someone else to supply a "living wage" to someone else, it can only happen because the coerced person contractually volunteered for such compulsion on some prior occasion. Of course, the validity of such a contract is subject to claims about the "inalienability of the will", and the validity of "naked promises".

necessary to use compulsion on such incapacitated people when no third party's natural rights are threatened. For example, a parent might compel a child to make his/her bed, or to pee in the toilet instead of on the carpet, or to wash the dishes, do his/her homework, *etc.*, *etc.*, *etc.* As long as such compulsion doesn't harm the incapacitated person, but, on the contrary, aids that person, common sense demands that it be allowed, but only within the context of a pre-existing contract to which the incapacitated person is party. Such circumstances demand an allowance for some kind of guardian-dependent contract that permits a guardian to use such compulsion on the dependent without interference from outsiders. In fact, the pre-cognitive contract between mother and fetus should be understood to be just such a guardian-dependent contract. In fact, it's probably safe to assume that a similar contract should be recognized between a parent / guardian and a child / dependent for as long as the parties deem the contract fitting. In the same way that a religious social compact might compel a party thereto to do a negative act, like avoid adultery, or to do a positive act, like keep sabbath,[1] one of these guardian-dependent contracts allows the guardian to compel the dependent to do a positive act, or a negative act.

Although it's critical that such guardian-dependent contracts be allowed to exist, it's also necessary to acknowledge the hazards involved in allowing them. The hazards can be exemplified by this fact: Statism can be understood to be a belief that the state is a population's guardian. People who espouse this belief system inherently believe the general population is cognitively incapacitated, and they believe the state exists to compel the population to do whatever it thinks best. This is obviously perverse. This is essentially the *parens patriae* legal doctrine in operation on a grand scale. Humanity needs to offscour both statism and *parens patriae*. In the process, humanity also needs to acknowledge that guardian-dependent relationships are necessary, even inevitable, and humanity needs to acknowledge that such relationships should only exist within some contractual framework. Despite the hazards, when such a contract exists between a cognitively disabled person and the person's guardian, it's critical that secular courts respect the jurisdictional boundaries of such a contract, and not interfere where no real harm exists, or where the genuine terms of a lawful contract are being followed. A parent may positively compel his/her child to do an act, or negatively compel him/her to avoid an act, as long as the parent's act of compelling is within the ambit of his/her contractual duties under the parent-child contract. That ambit should deflect any jurisdictional claim by any secular court.

1 It's critical to understand that religious social compacts, like all contracts, can only be formed, entered, and maintained voluntarily and consensually.

Other than this kind of mitigation of Rothbard's claim regarding compulsion, he is on target. He's especially on target when he says, "we *cannot* say that anyone has a 'right' to a 'living wage'". Recognition of guardian-dependent contracts tempers Rothbard's position, but it shouldn't deprecate it. Because guardian-dependent contracts are an inevitable aspect of human life on planet earth, it's necessary to look more closely at the nature of such guardian-dependent contracts. To emphasize the role of private property in such contracts, they should always be understood to be bailment contracts.

What's a Bailment?

To whatever extent the mother doesn't reject her fetus, she agrees with the terms of the pre-cognitive contract that exists between her and the fetus. Given that it's a contract, this pre-cognitive contract must have terms. To whatever extent the mother expressly or impliedly affirms those terms, this contract is affirmed as a cognitive contract. By examining the implicit terms, it becomes obvious that the contract is most like a bailment, while guardian-trustee ownership, as mentioned in passing by Rothbard,[1] doesn't really do justice to natural rights or natural law. A bailment is defined like this:

> A delivery of goods or personal property, by one person to another in trust for the execution of a special object upon or in relation to such goods, beneficial to either the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.[2]

A typical and common instance of bailment exists when someone leaves his/her car at a commercial parking lot. The driver, being bailor, delivers "personal property", the car, into the "trust" of the parking lot owner / operator, who thereby becomes bailee. The "special object" is for the bailor to have a place to park. There is delivery of the possession of the car by the bailor to the bailee, but there is no transfer of title. After the bailor's need is satisfied, the bailee returns possession of the car, for a fee. — Other common instances of bailment exist when a person (i)pawns an object to a pawnbroker, (ii)delivers an object for repair, or (iii)checks a coat at a restaurant or theater.

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1 Rothbard, Murray, **The Ethics of Liberty**, pp. 100, 104.

2 **Smith and Roberson**, Appendix E, p. [193].

When speaking of a bailment as being pertinent to the relationship between a guardian and the guardian's dependent, it's necessary to emphasize that the personal property bailed into a bailment contract is not necessarily tangible. When an embryo implants his/her self in the mother's womb, this natural person has a full set of natural rights. These natural rights consist of primary property, secondary property, and private jurisdiction, although this natural person has extremely limited ability to exercise these rights, as indicated above. Given the fact that the personal property being bailed is not necessarily tangible, the relationship between the mother and the fetus has all the necessary requirements to make it a bailment.

> The essential elements of a bailment include the following: (I) there must be lawful possession without title in the bailee (II) for a determinable time (III) of personal property (IV) which the bailee must restore when his lawful possession comes to an end (V) to the bailor who is either the owner or a person who has a superior right to possession.[1]

This identification of the "essential elements of bailment" applies perfectly to the relationship between mother and fetus.

(I) lawful possession without title in the bailee: The obvious bailee in a pregnancy is the mother. Because the fetus is implanted in the mother's primary property, the mother has possession of the fetus, but does not have title. The mother has *de facto* possession of the fetus' primary property because the fetus is implanted in the mother's primary property. But because the fetus is fully human, the fetus has absolute title to his/her natural rights, meaning to his/her primary property, secondary property, and private jurisdiction. But because the fetus has extremely limited abilities to exercise his/her natural rights, the fetus' abilities are in the mother's possession. The fetus' rights and abilities are both bailed into the mother's possession. If the mother refused to act as bailee, and took actions to terminate the bailment, then the fetus' life would be extinguished unless his/her life were viable outside the womb.

In the secular arena, it's a violation of natural rights for a human being to own another human being. But as already indicated, some things are allowable under a religious social compact that are not allowable under a secular social compact (and vice versa). By its very nature, the bailment contract between a mother and her fetus is religious. The fetus has the full set of natural rights, including self-ownership. The fetus has the natural duty in the extra-jurisprudential sense to conform to all natural laws. But the fetus has the common disability of not being able to obey that natural duty completely. In fact, the fetus is so disabled in this extra-jurisprudential arena

1 **Smith and Roberson**, p. 352.

that he/she can't even manifest self-ownership in a way that's easily recognizable by other people. This translates into a general lack of recognition in the secular aspect of the jurisprudential arena. The fetus can't even survive without the bailee's concession. Within the jurisprudential arena, the fetus certainly has the natural right to pursue his/her vision of what it means to conform to natural law without having that pursuit violated by other people. But because the fetus' survival is at stake, it's reasonable to presume that the fetus is willing to exchange some of that unfettered freedom to which he/she has absolute title, for some concessions offered in this pre-cognitive contract by the mother.

What's being bailed is the fetus' natural rights and normal / common abilities and disabilities. Obviously these are not recognizable in a secular court as genuine contractual consideration, because secular jurisprudence exists exclusively to protect natural rights, and must therefore treat them as "unalienable". Although the fetus has absolute title to these things, to a huge extent, they are bailed into the mother's possession and care. So through this lawful pre-cognitive bailment contract, the mother, being bailee, has lawful possession without title.

(II) determinable time: The "determinable time" of a pregnancy bailment depends upon the perceived object of the bailment. If someone pawns some valuable personal property, the "determinable time" of the bailment is however long it takes the bailor to return the borrowed money to the bailee. If someone bails an appliance to a repairman, the "determinable time" of the bailment is however long it takes to make the repairs and pay the repairman. If someone bails hat and coat at a theater, the "determinable time" is however long it takes for the theatrical event to end. If someone is pregnant, the "determinable time" depends upon whether the pregnant woman sees herself as trespass victim or bailee. If she believes herself to be trespass victim, then the "determinable time" for this pre-cognitive bailment contract is however long it takes for her to terminate the pregnancy.[1] She has no bailment obligations, in the cognitive sense, unless she has cognitively consented to them. If she believes herself to be bailee, then she has possession of, but not title to, the fetus's natural rights and common abilities and disabilities. Under such circumstances, she has an obligation to do whatever is necessary to help the unborn to gain possession of those rights and abilities. For the infant to gain possession of these rights and abilities, the bailee must give live birth when the infant is at a viable

1 If the woman waits to terminate the pregnancy until the fetus is viable outside the womb, then it's reasonable to assume that there is a bailment contract implied in fact between the mother and the bailor.

age. So the "determinable time" for a cognitive pregnancy bailment is the period from conception to such a live birth.

(III) personal property: Within the secular arena, a human being can never lawfully be somebody else's personal property. The property involved in a pregnancy bailment, as already indicated, is the fetus' natural rights and common / normal abilities and disabilities. According to long-standing jurisprudence, "It's not necessary that the bailed property be tangible."[1] Natural rights and common / normal abilities and disabilities are not generally understood to be tangible. The bailed property is the fetus' primary property, secondary property, and private jurisdiction. Because natural rights are unalienable within secular jurisdictions, secular courts cannot recognize this kind of bailment contract, except as a religious contract over which they lack subject-matter jurisdiction. The mother, as the bailee, possesses the fetus' natural rights and common / normal abilities / disabilities, although the fetus, as the bailor, retains the title to these things.

(IV-V) the bailee must restore . . . to the bailor: As bailee, the mother has a contractual obligation to turn possession of the infant's natural rights and common / normal abilities and disabilities, back to the bailor, the infant, at the end of the "determinable time". The infant, at live birth, is the person "who is either the owner or a person who has a superior right to possession". In normal bailment contracts, the bailor is the person who initiates the bailment contract with the bailee. Because it's absurd to believe that the embryo did not pre-cognitively consent to being implanted in the endometrium, it's reasonable to recognize the fetus as having initiated the bailment contract. So the fetus is the bailor in this pregnancy bailment.

In summary, a pregnancy bailment is a contract between the mother and her fetus, regardless of whether the bailment contract is pre-cognitive or cognitively consensual. The property bailed is the fetus' natural rights and normal abilities / disabilities. This property is bailed into the mother's possession and care while the fetus is growing up, *i.e.*, while he/she is going through a process of converting disabilities into abilities. Within the secular arena, it's reasonable to understand the fetus to be the bailor, based on the following idea: If the fetus did not pre-cognitively consent to the bailment contract, then the fetus would essentially be refusing to consent to be alive. That's absurd. To avoid the absurdity, and to comply with all the existing facts, it's necessary to recognize the fetus as bailor. In the pre-cognitive contract, the fetus bails his/her natural rights and normal abilities / disabilities into the mother's possession, while the fetus retains title. This distribution of title and

1 **Smith and Roberson**, p. 355.

possession is not static, in the *de facto* sense, evidenced by the fact that the fetus is growing and replacing disabilities with abilities. This process of replacing disabilities with abilities is close to the core purpose of the bailment contract. The bailee guards and nurtures that development until the bailment reaches the "determinable time". The obvious determinable time in a pregnancy bailment is the point at which the pregnancy is naturally terminated through live birth.

Because newborns are so incapacitated, it's reasonable to consider the bailment contract as having a "determinable time" that goes well beyond live birth. It's reasonable to envision the determinable time as extending to the point at which this natural person can live and exist on his/her own without being dependent upon anyone. One problem with conceiving of the bailment as having a determinable time that goes from conception to adult independence, is that such a transition into complete independence can be fuzzy, and hard to distinguish. In contrast to this fuzziness, the transition out of this host-parasite relationship into circumstances in which the infant can survive outside the mother's womb without dependence upon those internal organs, is NOT fuzzy. It's distinct. For this and other reasons, it's important to recognize major transitions in the bailment contract, transitions that mark the bailor's migration out of one major degree of dependence into a lesser degree of dependence. It's reasonable to understand such major transitions as points at which the bailment contract must be renegotiated. These major transitions include (i)the end of the pregnancy bailment, at which time a guardian-dependent bailment must begin, and (ii)the end of the guardian-dependent bailment. At these major transitions, it's reasonable to consider the bailment property as being restored to the bailor while the bailment contract is terminated and/or renegotiated.

End of Pregnancy Bailment & Start of Guardian-Dependent Bailment

It should be amply clear by now that the pre-cognitive bailment contract always exists wherever human pregnancy exists. It should also be clear that whenever and wherever the mother's cognitive consent to the pregnancy exists, evidenced expressly or implied in fact, there is a cognitive bailment contract. Now that it's obvious that the pregnancy bailment exists wherever human pregnancy exists, it's necessary to tie up loose ends in regard to the transition from the pregnancy bailment contract into the guardian-dependent bailment contract. This especially includes examination of abortion during viability. Regarding abortion, Rothbard says the following:

> The proper groundwork for analysis of abortion is in every man's absolute right of self-ownership. This implies immediately that every woman has the absolute right to her own body, that she has absolute dominion over her body and everything within it.

> This includes the fetus. Most fetuses are in the mother's womb because the mother consents to this situation, but the fetus is there by the mother's freely-granted consent. But should the mother decide that she does not *want* the fetus there any longer, then the fetus becomes a parasitic "invader" of her person, and the mother has the perfect right to expel this invader from her domain. Abortion should be looked upon, not as 'murder' of a living person, but as the expulsion of an unwanted invader from the mother's body. Any laws restricting or prohibiting abortion are therefore invasions of the rights of mothers.[1]

This natural-law theory agrees that the "proper groundwork for analysis of abortion is in every man's absolute right of self-ownership". This natural-law theory adds that recognition of this absolute right is the specific objective of every lawful secular jurisdiction. So within secular jurisdictions, the pregnant woman "has the absolute right to own her body". But when the fetus grows to the point at which he/she might be viable outside the womb, this agreement between this natural-law theory and Rothbard might break down, even in regard to secular jurisdictions, because this natural-law theory recognizes the existence of voluntarily-entered contracts that Rothbard might not recognize.

At viability, there might be plausible *prima facie* grounds for a secular court to stop the mother from aborting, based on the idea that aborting the viable fetus might be perpetration of a delict. Because trespass and theft often do not rise to the level of justifying homicide, if the fetus is viable, and the mother is committed to aborting, and to not going to natural termination, then a secular court might consider the possibility that she is obligated to terminate in a way that allows the baby to live after the abortion. Because the woman "has the absolute right to own her body", if the fetus is not viable, then she has an absolute right to abort the pregnancy. Under such circumstances, the decision is entirely within her private jurisdiction, and no secular court has grounds for overriding her decision. If the fetus is not viable, then even though trespass and theft might not normally rise to the level of justifying homicide, the death of the baby at the time of abortion is a lamentable side effect of her exercising her "absolute right of self-ownership". The death of the baby is therefore in effect justifiable homicide within secular jurisdictions when the fetus is not viable. But after the fetus reaches viability, the mother's right to abort may be in doubt. The circumstances demand a more nuanced treatment.

Although Rothbard is absolutely correct, from a jurisprudential natural rights perspective, to claim that every man, including every woman, has the "absolute right

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 98.

of self-ownership", he overstates his case by claiming that "she has absolute dominion over her body and everything in it", including the fetus. Because the fetus is as much a natural person as the mother, the fetus is as much a self-owner as the mother. The fetus has all the natural rights the mother has, although the fetus certainly does not have all the abilities that the mother has. Because the woman is incapable of controlling many of her body's endogenous functions, it's a bit of an overstatement to claim that "she has absolute dominion over her body and everything within it". Dominion is a word that denotes not only rights but also powers. The woman certainly has absolute rights to her body, but she lacks absolute powers over her body. The self-owning fetus has not only primary property, but also interests in secondary property, specifically, in all those internal organs the fetus shares with the mother. So the fetus has just claims to his/her primary property, and interests in secondary property to which the mother has absolute title, that property being primary to her. In addition to these just claims and interests, the fetus also deserves all due regard for his/her private jurisdiction. — It may be absolutely true that "should the mother decide that she does not *want* the fetus there any longer, then . . . the mother has the perfect right to expel this invader from her domain." But even though this may be true, and even though she may have the jurisprudential natural right to abort, and even though it may be true that abortion should not be looked upon as murder, it's also true that abortion should be looked upon as a lamentable side-effect of the mother's exercise of her jurisprudential natural rights.

Regarding Rothbard's claim that, "Any laws restricting or prohibiting abortion are . . . invasions of the rights of mothers", Rothbard is again overstating his case, but not by much. As indicated, no secular court has jurisdiction over this pre-cognitive contract between the mother and the fetus. Because the fetus is ensconced on the mother's primary property, she alone has jurisdiction, where her jurisdiction is inherently private. — If the pre-natal person is viable outside the womb, then he/she is capable of living without being attached to the mother through that array of shared organs. Under such circumstances, if the mother aborts in a way that allows the infant to live, then the trespassing and stealing end without her damaging the infant. But if she aborts in a way that kills or damages the infant, this might appear to subject her to the possible allegation that she perpetrated a delict against her baby. For example, if the fetus were viable, and she aborted through "partial birth abortion", then this would appear to be grounds for murder charges against her and her abortionist. If the trespassing and theft are at an end, or if it's clear that this parasitism could end immediately without inherent harm to the infant, then reason and justice demand that the pregnancy end without harm to the fetus.

It's important to understand these circumstances within the context of the definition of "bailment". It's important to understand that the pregnancy bailment is a "delivery of . . . personal property" by the bailor to the bailee, "in trust for the execution of a special object". The special object is the bailor's growth, meaning his/her transformation of disabilities into abilities. At viability, the fetus has grown from being utterly incapable of surviving outside the mother's womb to being capable. As surely as the special object in a parking bailment is for the bailor to have a place to park, and the special object in a repair bailment is to get the bailed object repaired, the special object in a pregnancy bailment is to nurture the bailor's growth into viability. Given that this is an obvious fact, it's reasonable to consider what influence this might have on the circumstances surrounding the pregnancy bailment's termination. In a parking bailment, the bailment is satisfactorily terminated when the bailee returns the car to the bailor, timely, without any new dents, without any stuff stolen from the car's interior, and with the bailor delivering the agreed-upon fee. Likewise, it's reasonable to surmise that in a pregnancy bailment, the bailment is satisfactorily terminated when the bailee returns the bailor's natural rights and common / normal abilities and disabilities to the bailor, without damaging the bailor in the process. The bailee might damage the bailor's property by hiring someone to deliver the baby who would use forceps or tongs to drag the baby out by its head, thereby doing irreparable brain damage to the bailor. Or the bailee might damage the bailor's property by hiring an abortionist to administer "partial birth abortion" during otherwise natural delivery. Clearly, if the pregnancy bailment ends with the bailee deliberately perpetrating a delict against the bailor, when the bailor could otherwise survive outside the womb, the bailee has failed to perform the "special object" of the bailment. Under such circumstances, the bailee has made herself vulnerable to lawful prosecution not only by a religious court, but also by a secular court.

Viability clearly marks the outer limit of the mother's right to abort. However, viability should never be used to impose religious burdens on the mother that are inappropriate in secular jurisdictions. Viability can exist based upon medical technology, where viability would not exist without such technology. For example, if the infant's delivery is premature, then the infant might be dependent upon an oxygen tent and intravenous feeding for its survival. Under such circumstances, it would not be viable in the natural sense of that word. To avoid imposing religious burdens on the mother, secular jurisdictions should use a definition of viability that excludes recourse to such medical technology. If the infant can survive only with such technology, then the infant is not really viable. Under such circumstances, even in the third trimester, "the mother has the perfect right to expel this invader from her domain", at least within secular jurisdictions. If the cost of an abortion that kills the viable fetus is greater than or equal to the cost of an abortion that does

not kill the viable fetus, and the mother chooses the former, then the mother is clearly choosing to kill the fetus without justification. Within the arena of secular courts, this might be an exception to Rothbard's rule that, "Any laws restricting or prohibiting abortion are . . . invasions of the rights of mothers."

Given all that's been said thus far, this genuine viability exception is the only plausible exception to this Rothbardian rule within secular courts. On the other hand, there can be massive exceptions to these rules within "religious courts". These religious courts have jurisdictions—subject-matter, *in personam*, and territorial—that are radically different from secular courts. According to Rothbard:

> [I]t is impermissible to interpret the term "right to life," to give one an enforceable claim to the action of someone else to sustain that life. . . . Or, as Professor Thomson cogently puts it, "having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself."[1]

So every human has the natural right to life. But this natural right to life should never be interpreted to include a right to trespass and steal someone else's property. This "never" is absolute within secular jurisdictions. But of course it's not necessarily absolute within religious jurisdictions.

With the exception of abortion during genuine viability, mother-initiated abortion cannot be treated as a delict in secular courts, because the mother has a lawful claim in every secular court that the fetus is trespassing and stealing her private property, and she therefore has a right to defend herself by eliminating this human parasite. Abortion is therefore active euthanasia of someone who is violating her natural rights. On the other hand, if the mother allows the pregnancy to go to natural termination, or to some other kind of delivery that yields a viable baby, the delivery is concrete evidence that a cognitive bailment contract has existed between the mother and the baby. The delivery is evidence that the host-parasite relationship is terminated. The delivery is also evidence that the newborn is helpless and still needs to be party to a guardian-dependent bailment contract. Regarding this transition, Rothbard says the following:

> [E]ven from birth, the parental ownership is not absolute but of a "trustee" or guardianship kind. In short, every baby, as soon as it is born and is therefore no longer contained within his mother's body, possesses the right of self-ownership by virtue of being a separate entity and a potential adult.[2]

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 99.

2 Rothbard, Murray, **The Ethics of Liberty**, p. 100.

In contrast to Rothbard's position, the natural-law theory this memorandum is sketching claims that even from conception, the fetus "possesses the right of self-ownership". By possessing the right, the fetus has absolute title. But the fetus doesn't actually possess self-ownership. Even though the fetus owns self, he/she has limited capacity to exercise that ownership in practice. The same is true for the newborn. In both cases, growth is a process of acquiring such capacity, and thereby eliminating lack of capacity. Even though the fetus has title to self-ownership but lacks capacity to exercise it, the fetus, unlike the newborn, is perpetrating trespass against the mother if the mother refuses to enter cognitively into the bailment. By entering cognitively into the bailment, the mother becomes the fetus's protector, guardian, and bailee. The newborn's self-ownership conflicts with Rothbard's claim that "A newborn baby cannot be an existent self-owner in any sense."[1]

To cross the threshold from examination of natural rights during pregnancy to examination of natural rights after pregnancy, consider the following:

> Let us examine the implications of the doctrine that parents *should have* a legally enforceable obligation to keep their children alive. The argument for this obligation contains two components: that the parents created the child by a freely-chosen, purposive act; and that the child is temporarily helpless and not a self-owner. If we consider first the argument from helplessness, then first, we may make the general point that it is a philosophical fallacy to maintain that A's needs properly impose coercive obligations on B to satisfy these needs. For one thing, B's rights are then violated. Secondly, if a helpless child may be said to impose legal obligations on someone else, why specifically on its *parents*, and not on other people? What do the parents have to do with it? The answer, of course, is that they are the creators of the child, but this brings us to the second argument, the argument from creation.
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> . . .
>
> A common argument holds that the voluntary act of the parents has created a "contract" by which the parents are obligated to maintain the child. But (a) this would also entail the alleged "contract" with the fetus that would prohibit abortion, and (b) this falls into all the difficulties with the contract theory as analyzed above.[2]

1 Rothbard, Murray, **The Ethics of Liberty**, p. 99.

2 Rothbard, Murray, **The Ethics of Liberty**, pp. 101-103.

Rothbard raises several issues here: (i)Should parents have "a legally enforceable obligation to keep their children alive"? (ii)Does the argument in favor of this obligation really rest upon the "two components", (a)"that the parents created the child" purposively, and (b)"that the child is temporarily helpless and not a self-owner"? — To deal with these issues, it's important to recognize that the biological parents are not necessarily involved in the guardian-dependent bailment at all. If they are not party to this contract, then they clearly have no obligation arising out of the contract. But this begs the question: Who does? Does anyone have an obligation to keep a post-natal child alive? To get clarity on this issue, it should help to return to the transition out of the pregnancy bailment into the guardian-dependent bailment.

As indicated, the "special object" of the pregnancy bailment is the development of the bailor's abilities to the point at which the bailor is viable outside the womb, the termination of that bailment being the successful delivery of the viable person. Such a delivery marks the end of the pregnancy bailment, which marks the need for the initiation of a guardian-dependent bailment. While the pregnancy bailment started as a pre-cognitive contract that evolved into a cognitive contract through the mother's express or implied cognitive consent, along with the fetus' clearly implied consent, the guardian-dependent bailment must start with the guardian's cognitive consent and the infant's clearly implied consent. — Because the infant is so utterly incapacitated, he/she cannot survive without someone taking care of him/her. Obviously, the infant is still incapable of cognitive consent to anything. But to assume that the infant doesn't consent to entering into a guardian-dependent bailment contract with someone, is to assume that the infant would rather be dead than be involved in such a contract. That's absurd. So it's important to recognize that at birth, there is a bailment contract begging some adult's participation. Because cognitive contracts inherently demand the cognitive consent of all parties, because all newborns are cognitively incapable of cognitive consent, and because it's absurd to assume that the child would rather be dead than participate; to avoid absurdity, it's necessary to assume that the infant cognitively consents. Like all contracts between minors and majors, the contract cannot be lawfully executed or nullified to the infant's detriment. On the contrary, if the guardian cannot enter the guardian-dependent bailment by way of his/her express recognition that the "special object" of the bailment is the minor's development of capacities and abilities, then the guardian is not qualified to be guardian, and the bailment cannot be a genuine bailment. As surely as it's absurd to assume that the child prefers to be dead, it's also absurd to assume that the child would want to enter the bailment for any "special object" other than his/her development of his/her capacities and abilities to conform to natural law.

Obviously, at this transition from the pregnancy bailment into the guardian-dependent bailment, the mother has precedence over all other possible claimants to the role of bailee. When she cognitively volunteers and consents to be the child's guardian, no lawful court should deny her claim. At this transition, it's also obvious that the mother has the just claim to share this bailment with her husband, or with whomever else she may choose to include. So that's the way the guardian-dependent bailment is entered: voluntarily, cognitively, and consensually. It should also be obvious that if anyone else qualified to be bailee volunteers to do so, under the condition that the mother rejects her opportunity to be bailee, such a third party should be allowed to take on that contractual responsibility. This is certainly preferable to allowing the infant to starve.

Based on this fact that this guardian-dependent bailment contract is created by way of the guardian's cognitive consent, it's undeniable that the guardians, regardless of whether he/she/it/they are the biological parents or not, are contractually obligated to pursue the "special object" of the bailment. Based on this bailment contract, they may have "a legally enforceable obligation to keep their" child alive, depending upon the jurisdiction. This legal obligation does not arise out of either of the "two components" cited by Rothbard. It arises out of the guardian's voluntarily entering into the bailment contract and thereby assuming the obligation to pursue the bailment's "special object", the growth, development, and health, in short, the welfare, of the dependent.

Obviously, this guardian-dependent bailment contract is based on "naked promises". This is evident by looking at the consideration. It's certain that the bailment property isn't necessarily tangible. This by itself might make it difficult for a secular court to adjudicate an alleged breach of such a bailment contract. That's because rules of evidence in a secular court must demand that the bailed property must be tangible, or at least linked through proximate linkage, through direct and identifiable linkage, to something tangible. Rules of evidence in secular courts must also demand that the consideration to all parties must be tangible. The consideration in a parking bailment is the trade of money for a place to park, each being tangible consideration. The consideration in a repair bailment is the trade of money for the repaired object, each also being tangible consideration. In this guardian-dependent bailment, the consideration to the dependent is obviously tangible: food, clothing, shelter, education, *etc*., whatever contributes to the child's welfare. But what the guardian gets as consideration is difficult to define. In fact, in the secular arena, the guardian-dependent bailment contract is based on the guardian's naked promise, because the guardian gets no tangible consideration. So there is really no way for a secular court to adjudicate the *ex contractu* breach of the guardian-dependent bailment.

Even so, a secular court might have lawful jurisdiction *ex delicto* if guardians starved their dependents. — In order to have a contract recognizable in a secular court, all parties must have entered the contract through cognitive consent; the object of the contract must be tangible; and each party's consideration must be tangible. By actions after birth that indicate the existence of a contract implied in fact, if not an express contract, the guardians certainly become cognitively consenting parties to a guardian-dependent bailment contract. The infant's cognitive consent is implied in fact, as already indicated. So all parties have given consent to the contract. But a secular jurisdiction cannot take jurisdiction over the contract because naked promises don't suffice as tangible consideration, and the bailed property might not be recognized as tangible. The best a secular jurisdiction can do is recognize the guardian-dependent bailment as a kind of religious contract / compact over which it cannot lawfully exercise jurisdiction. It cannot exercise jurisdiction *ex contractu*, but it might be able to exercise jurisdiction *ex delicto*.

To expose the root issues involved in determining whether a secular court might have jurisdiction *ex delicto* when guardians in such a bailment contract refused or neglected to "keep their children alive", it might help to return to Rothbard's arguments:

> The law . . . may not properly compel the parent to feed a child or to keep it alive. . . . This rule allows us to solve such vexing questions as: should a parent have the right to allow a deformed baby to die (e.g. by not feeding it).[1]

When Rothbard says, "The law", it's obvious that he means the universal, global human law that he sees as fitting for all people. As already indicated, he doesn't recognize a lawful distinction between secular law, meaning global human law that's rightly applicable to all people, and religious law, meaning law that arises locally as terms of a religious social compact. Given that a religious social compact is a lawful contract, it is necessarily entered and formed through the cognitive consent of the parties. This being the case, the religious law that arises out of the terms of a religious social compact is applicable only to people voluntarily party to the given compact. As implied above, secular courts can lawfully take jurisdiction over cases and controversies that arise *ex delicto* within religious jurisdictions, when such religious jurisdictions neglect or refuse to take such jurisdiction. The same idea applies to the essentially religious bailment contract between guardian and dependent. To keep context, it should be helpful to recapitulate, (i)the overall goal of human action within the extra-jurisprudential arena; (ii)the overall goal of human action in the soft jurisprudential arena; (iii)the overall goal of human action in the

1 Rothbard, Murray, **The Ethics of Liberty**, pp. 100-101.

hard-core jurisprudential arena; and (iv)the relative jurisdictions of secular and religious compacts.

(i)This natural-law theory claims that in natural law in the perfect sense of that term, the goal of all human action is life in harmony with natural law. This is true even of actions of people who refuse to acknowledge that natural law exists. In the perfect sense of the term, "natural law", all humans have a natural duty to live in complete harmony with natural law, a natural right to live in complete harmony with natural law, and a normal / common inability to live in complete harmony with natural law. Life in harmony with natural law is the overarching motive for every human action, so it's the overarching motive for every action in the extra-jurisprudential arena.

(ii)Within the jurisprudential arena, every human has a jurisprudential natural right to pursue his/her vision of harmony with natural law without having that right trespassed by other people. Within the soft jurisprudential arena, this means that people have natural rights to enter into agreements and contracts with one another, where such agreements and contracts have the overarching goal of promoting life in harmony with natural law for every party within the given agreement / contract. Such agreements and contracts include agreements / contracts aimed at enforcing human laws *ex delicto* and *ex contractu*.

(iii)The overall goal of human action within the hard-core jurisprudential arena is the prosecution of people who damage other people, where the damage is caused by trespassing against the other's natural right to pursue his/her vision of harmony with natural law. Such damage can happen by two means, and only two means: through breach of a cognitive contract and NOT through breach of a cognitive contract. So while soft jurisprudence includes formation and maintenance of contracts aimed at enforcing human laws *ex delicto* and *ex contractu*, hard-core jurisprudence pertains to the actual enforcement, adjudication, *etc*., of such human laws.

(iv)A secular social compact is a contract whose sole purpose is the execution of justice against people who damage other people *ex delicto* or *ex contractu*. It is a contract in which the parties agree to execute justice against perpetrators. Because the motivation for the formation, maintenance, and execution of such a compact arises immediately out of the global natural duty to avoid damaging other people, the rules of evidence in secular cases and controversies includes exclusively evidence that can be recognized by practically any person from any culture. Delicts include murder, rape, kidnapping, theft, embezzlement, fraud, *etc*. Because secular social compacts have this narrow, exclusive, and global focus, they are capable of encompassing religious social compacts, as long as they abide by a strict forbearance that prohibits them from meddling in the terms of religious social compacts. This

narrow focus necessarily includes honoring what Rothbard calls the "inalienability of the will" and the "title-transfer theory of contracts". It also disallows introduction of "naked promises" into secular courts, as though such promises were concrete evidence.

— In contrast to a secular social compact, a religious social compact is not aimed exclusively at addressing the global natural duty to avoid damaging other people. Instead, it is aimed more generally at a society that operates in harmony with natural law. This is a comprehensive contract entered and formed voluntarily through the consent of people who commit themselves to live in community through the terms of the compact. The overall goal of people in a given religious social compact is pursuit of community in harmony with natural law, above and beyond the harmony pursued collectively under the immediate jurisdiction of a secular social compact. Because of this aim at conformity to natural law in general, religious social compacts can enforce laws that are unique to the given community. For example, religious social compacts can enforce "naked promises" like laws enforcing monogamous marriage, laws pertinent to keeping sabbath, laws pertaining to religious holidays, laws pertaining to the diet that may be peculiar to the community, laws pertaining to the education of children, *etc*. Unlike secular social compacts, the *in personam* jurisdiction of religious social compacts is limited to people who voluntarily enter into the compact.[1]

The reason this recapitulation has been necessary is because the guardian-dependent bailment is an essentially religious contract, and it therefore needs to be understood within this overall context. This kind of bailment is not a religious social compact because it does not include an entire community. It only includes the guardian(s) and the dependent. It nevertheless includes numerous kinds of naked promises. While the overall goal of a religious social compact is pursuit of societal harmony with natural law, the overall goal of a guardian-dependent bailment contract is the development of the bailor's abilities and capacities to live in harmony with natural law, to the point at which the bailor no longer needs to participate in the bailment. It's helpful to understand these two kinds of religious contracts in parallel because they have similar interfaces with secular social compacts. That interface is crucial to any determination by a secular court of whether it has subject-matter jurisdiction over parents allowing their child to starve to death.

A secular court has absolutely no business adjudicating the terms of a religious social compact, and it has absolutely no business adjudicating the terms of a guardian-dependent bailment contract. However, a secular court is certainly capable of knowing

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1 An exception to this claim exists under the jurisdiction of a religious social compact's "jural society". For more about this exception, see Porter, **A Memorandum of Law and Facts about Contracts**.

that every religious social compact exists for the sake of pursuing the religion's vision of life in harmony with natural law. And a secular court is certainly capable of knowing that every guardian-dependent bailment contract exists for the sake of helping the dependent to develop his/her abilities and capacities to live in harmony with natural law. In each case, both the case of the religious social compact and the case of the guardian-dependent bailment, a secular court MUST allow a huge swath of discretion to the given religious contract, and not interfere where interference is not called for. This is because the call of hard-core jurisprudence is not the enforcement of natural law. The call of hard-core jurisprudence is strictly the enforcement of human laws against an extremely crude and obvious variety of damage perpetrated by people against other people. To know whether a secular court has subject-matter jurisdiction over circumstances involving a religious contract, or not, the secular court must know that there is damage to a party to the religious contract, where such damage is caused by some other party or parties to the contract, where such damage is outside the ambit of the natural-law purpose of the religious contract, and where the parties to the religious contract are not taking the necessary actions to correct the damage. While the natural-law purpose of a religious social compact is the given religious community's pursuit of the religion's vision of life in harmony with natural law, the natural-law purpose of a guardian-dependent bailment is necessarily the guardian-and-dependent's pursuit of the guardian's vision of the dependent's life in harmony with natural law. The secular court must limit its view of any such case and controversy to this overarching perspective, and ask: Does the damage at issue both look tangibly delictual, and look like clear and obvious violation of the general and overarching purpose of this kind of religious contract? If the damage is clearly delictual, and it's obvious that the damage arises in violation of the general overarching purpose of the religious contract, then the secular court has subject-matter jurisdiction. Otherwise, it doesn't. Rothbard provides a good test case to see how this works out by claiming that, "The law . . . may not properly compel the parent to feed a child or to keep it alive".

If a religious social compact is dedicated to child sacrifice, then such a sacrifice would be an act of murder because children are incapable of giving genuine cognitive consent to their own demise. Such a contractual term would be inherently fraudulent, because murder cannot put a society in greater harmony with natural law. Execution of a murderer certainly can. But murder itself cannot promote societal harmony. As long as the terms of the religious social compact don't promote tangible damage to people, where such damage clearly exceeds reasonable payment parties make for participation in the compact, secular courts have no subject-matter jurisdiction. But if a religious social compact does promote tangible damage that exceeds reasonable damage, and insists on something like child murder, then such

murder is clearly violation of the child's natural rights, and clearly demands the execution of justice against whoever is perpetrating the murder.

Something similar exists in regard to the guardian-dependent bailment contract. This kind of bailment contract is essentially religious, because it is based on naked promises. The naked promise is that the guardian will do his/her best to do whatever is necessary to provide the dependent's welfare. A secular court has no business getting involved in this kind of religious contract unless there is tangible damage that clearly exceeds the general parameters for every guardian-dependent contract. In the same way that secular courts need to recognize the general and lawful subject matter of religious social compacts, meaning pursuit of societal harmony with natural law, secular courts also need to recognize the general and lawful subject matter of guardian-dependent bailment contracts. The "special object" of religious social compacts pertains to societal conformity to natural law. The "special object" of the guardian-dependent bailment contract pertains to the welfare of the dependent. Where does this leave Rothbard's defense of parents allowing their child to starve to death?

If parents starve their child to death, then this is clearly violation of the general parameters of the guardian-dependent bailment contract. But this assumes several things. It assumes that the parents are in fact the child's bailees. It also assumes that the parents did not starve their child because they were destitute, but because they simply wanted the child dead, or simply wanted to be free from their obligation to care for the child. To actively cause the child's death, by slitting the child's throat, puncturing the child's heart, *etc*., would be clearly delictual, and would obviously give a secular court subject-matter jurisdiction. To refuse to provide nutritional sustenance to the child may appear to be acceptable because it doesn't appear to be aggressive, in the Rothbardian sense of that word. But if the parents are, in fact, bailees, and are not destitute, then it appears that they are violating their contractual obligation.

In the same way that a pregnant woman has an obligation to be very careful about how she terminates the pregnancy bailment when her dependent is viable, guardians have an obligation to be very careful about how they terminate their participation in a guardian-dependent bailment. Neither the viable fetus nor the unwanted infant is necessarily a trespassing, stealing parasite. In both cases, the dependent is capable of living outside the womb. In both cases, if the guardian wants to terminate his/her guardianship, he/she needs to approach such termination within the overall context of this particular kind of religious contract. Even though allowing the dependent's death through passive abandonment of caretaking duties may appear to be less aggressive than actual perpetration of a deadly delict, the fact

that the guardian has been involved in this bailment says that if the guardian wants out of the bailment, he/she needs to get out by some means less aggressive than refusing to feed and hydrate. In short, if the guardian wants out of the bailment, then he/she should get out by some means that minimizes the harm done to the dependent. In the case of a viable fetus in the womb of a mother who refuses, for whatever reason, to take on guardian duties after birth, the mother needs to use all means readily at her disposal to see that there is someone else to take responsibility for the child. If she exercises all due diligence in this regard, and no volunteer comes forward to take over the guardianship, then when the baby dies from starvation or dehydration, no secular court will have grounds for prosecuting her. A similar situation exists when parents decide to abandon their baby. If both parents are guardians, then both mother and father have at least exhibited implied consent to being guardians. If, after several hours, days, weeks, *etc.*, they decide to abandon the bailment, then they must do so with some reasonable effort at NOT damaging the bailor's bailed property. They must exercise due diligence to find a replacement guardian. If they refuse to take such due diligence, then their starvation of the child is obviously delictual, even if it's a kind of passive aggression. Under such circumstances, a secular court clearly has subject-matter jurisdiction. The damage is tangible; the overarching purpose of the religious contract is repudiated; and the guardians are clearly refusing to take action to correct the damage. On the other hand, if they take due diligence, and make the necessary good-faith efforts to secure some alternative guardian, and no such guardian surfaces, then, and only then, is it reasonable, within secular jurisdictions, to abandon the feeding and hydrating.

In conclusion, if guardians refuse to feed their dependents, because they decide to terminate their participation in the bailment contract, then they should do so within the ambit of the "special object". They have a duty to the dependent's welfare that they have assumed voluntarily. If, for whatever reason, they choose to terminate their participation, then they should make reasonable efforts to do so in such a way as to not violate their bailment contract. By neglecting to take this kind of due diligence, these ex-guardians make themselves vulnerable to fraud allegations, allegations that they entered the bailment with fraudulent intent. Fraud is a delict, given that it results in tangible damage. Under such circumstances, a secular court certainly has *prima facie* subject-matter jurisdiction, especially if the alleged fraud involves a dead child. After the guardians exercise due diligence, and cannot find someone else to take charge, then their refusal to feed their dependent might not be delictual. Again, it might be heinous violation of natural law. But when they've done due diligence to avoid violating the special object of the bailment, they shouldn't be vulnerable to enforcement by secular courts. So under the immediate jurisdiction of a secular social compact, and given such due diligence, a guardian certainly has the

"right to allow a deformed baby to die". Given that the parent has the capacity to keep the baby alive, even if deformed, refusing to do so is probably *malum in se*, evil in itself, a violation of natural law. But under this kind of jurisdiction, it is NOT a violation of human law. — It's said these days that it's common practice for hospitals to impose passive euthanasia on unwanted infants. Under such circumstances, the parents, guardians, hospitals, doctors, nurses, *etc.*, have all given up all lawful claims to privileges that might derive from such a bailment contract with the child. So anyone, from anywhere, who goes into such a situation to rescue the child, has a lawful right to do so. Such a rescuer would essentially be "homesteading" a new bailment contract with the dependent. To mitigate the *malum in se*, any unwanted baby should be put up for adoption, and if no one wants to take care of him/her, then he/she will naturally starve to death.

Guardian-Dependent Bailment

In the same way that the bailee's duty in pregnancy bailment (the "special object" of the bailment) is to provide nurture and sustenance so that the fetus can develop capacity to take possession of the bailed property, the bailee's duty in guardian-dependent bailment (the "special object" of the bailment) is to provide nurture and sustenance to help the child to gain capacity to take possession of his/her bailed property. The object is largely the same in these two bailments, while the big difference between the two is that in the guardian-dependent bailment, the child is no longer a parasite. In the guardian-dependent bailment, the child retains title to all of his/her natural rights and common / normal abilities and disabilities, while the child does not possess these properties in the formal sense. As the child gains capacity, the child acquires *de facto* capacity to exercise possession of the bailed property. But as long as the guardian-dependent bailment exists, the bailed property is lawfully in the possession of the guardian.

At live birth, although the pregnancy bailment is ended, the infant still lacks capacity. So a new bailment contract needs to be negotiated. The same logic applicable in explaining why it's necessary to see the fetus as bailor in the pregnancy bailment, applies as well to he/she being bailor in the guardian-dependent bailment. It's absurd to think the baby would not want this, because without such a contract, this natural person cannot survive.

In claiming that the mother has trustee-ownership of the child, Rothbard appears to violate his own claim that people have absolute self-ownership. In contrast, this natural-law theory holds that there are no exceptions to the claim that within

secular jurisdictions, humans do not and cannot own other humans. According to Rothbard,

> In the libertarian society, then, the mother would have the absolute right to her own body and therefore to perform an abortion; and would have the trustee-ownership of her children, an ownership limited only by the illegality of aggressing against their persons and by their absolute right to run away or to leave home at any time.[1]

The circumstances indicate that the contract between the mother and her child has all the necessary attributes of a bailment, not "trustee-ownership". Under a bailment contract, the bailees have duties to care for the welfare of the child. In contrast, and by default, agents of secular social compacts should operate on the assumption that such duties exist outside their secular jurisdiction. It's especially important for this jurisdictional limitation to be recognized by agents of the jurisdictionally dysfunctional, statist perversion of such compacts that now dominate the jurisprudential landscape. This means that when the bailor communicates to the bailee that the bailment is coming to an end, these agents should refrain from interfering, and so should all other outsiders. The termination of this guardian-dependent bailment contract is a crucial rite of passage. As long as no real damage is being done, especially to outsiders, whatever tumult may arise out of this rite of passage should go unhindered by agents of secular courts. This includes "the absolute right to run away". But as already indicated, the Rothbardian definition of aggression doesn't really work well within such bailment contracts. This means that the claim that a mother's trustee-ownership of her children is "ownership limited only by the illegality of aggressing against their persons", needs amelioration. Sure, they can run away. But to make corporal punishment illegal within such a bailment contract is itself a governmental act of aggression.

Continuing to follow Rothbard's reasoning on this subject, he claims that,

> [A] parent does not have the right to aggress against his children, *but also* the parent should not have a *legal obligation* to feed, clothe, or educate his children, since such obligations would entail positive acts coerced upon the parent and depriving the parent of his rights. The parent therefore may not murder or mutilate his child . . . but the parent should have the legal right not to feed his child, i.e., to allow it to die.[2]

Largely, these issues have already been addressed, but they might deserve repeating within this slightly different context. In a bailment, the bailee has an obligation

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 104.

2 Rothbard, Murray, **The Ethics of Liberty**, p. 100.

to the bailor, namely, to see that the property is properly cared for, and to see that the "special object" of the bailment is pursued, until the bailment is terminated. This precludes the bailee from being able to abuse the bailor. But because this bailment contract exists, it is a shield against any interference from any non-party unless the abuse becomes so obvious that it rises to the level of a public delict. As already indicated, both passive and active euthanasia can be treated as such public delicts. Given the existence of such a contract, passive euthanasia would rightly be classified as "aggression", under the circumstances described above, and therefore as a violation of the "nonaggression axiom". It's true that a guardian "does not have the right to aggress against his" dependent.[1] But it's not true that passive euthanasia does not constitute such aggression when the bailee has not taken due diligence to avoid the dependent's death. — Under the bailment, the guardians DO have "*legal obligation*" to feed, clothe, [and] educate" their dependent. As indicated, if the dependent starves to death, or freezes to death, then a secular jurisdiction might have sufficient *prima facie* evidence to investigate for possible prosecution. But other than such public delicts, this obligation is not enforceable by a secular court, because secular courts lack jurisdiction to look deeply into the terms of religious contracts. Secular courts lack subject-matter jurisdiction to investigate ordinary corporal punishment. Within religious contracts, a legal obligation to feed, *etc.*, can coexist with a legal obligation to provide corporal punishment as needed. Neither of these religious legal obligations is within the subject-matter jurisdiction of a secular court. Public delicts that clearly and obviously violate the general natural-law purpose of the religious contract are within the subject-matter jurisdiction of secular courts through constructive fraud. Such public delicts must be distinguished from legal obligations that can only be adjudicated within religious courts.

In order for guardians to avoid being accused of perpetrating a delict against the dependent, when in fact the guardians are exercising corporal punishment that is allowable under the bailment, secular jurisdictions need to make allowances for a large variety of terms within various bailments. Corporal punishment should be allowed within a secular jurisdiction under certain circumstances. The complete prohibition of corporal punishment is clearly an intrusion by a secular jurisdiction into a religious contract. When parties to such a bailment contract appear within secular jurisdictions, cognitive consent by the bailor to such a bailment contract

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1 Given the current intrusiveness of the state, it's imperative to follow this statement with a disclaimer: The state has no business defining these things, especially "education", within this context. These things are defined within the confines of the religious contract, not by the state for the sake of imposing such definitions willy-nilly. The "*legal obligation*" derives from the contract, not from the state.

should be assumed as long as the bailor is incapable of living on his/her own and as long as the bailees are not clearly perpetrating tangibly delictual damage against the bailor. Beyond obvious delicts, the type of punishment that parents use on their children is a religious issue, and should be well outside the jurisdiction of a secular social compact, regardless of whether the guardians have their dependent at home, at the mall, or on a sidewalk. Assuming the mall and the sidewalk are privately owned, the owner can surely set whatever rules he/she wants regarding people who enter onto his/her property. But surely such an owner, given that he/she wants his/her business to prosper, would choose to allow people to behave as they see fit, as long as such behavior is not obviously delictual.

One of the biggest problems impacting children under the current *de facto* regime is the manner in which the bailees turn the bailment duties over to the megastate. Two things parents normally do when their baby is born are get a birth certificate and get a "social security" number. Why? — Under the existing *de facto* governments, these are initial acts of inducting the child into the statist regimen. This induction process commonly continues with induction of children into statist indoctrination centers usually called "public schools", ruining the child's health with the vaccination regime, and incorporation of children into numerous other programs that are inherently bad, because they're inherently statist, delictual, and abusive. Such things encumber the child with secular obligations, indoctrinate the child into a worldview that has little genuine esteem for natural law, and run a high risk of permanently ruining the child's life. These abdications of duty by the bailee are essentially violations of the bailment contract. This is because the "special object" in the guardian-dependent bailment is to provide nurture and sustenance so the child can gain capacity to take possession of the bailed property. When the bailment contract terminates and the child is able to claim title in earnest, the natural person / bailor / former child who receives the bailed property is able to affirm or deny the obligations created for the child by the bailee. At this transition out of the guardian-dependent bailment, the former bailor has an opportunity to reject all the encumbrances that have been placed on the bailed property by the discretion, or lack of discretion, of the bailee. The ex-bailor can do so by affirming or denying the contractual benefits and obligations that the bailee has appended to the bailed property. However, by the time the bailment is terminated, this ex-bailor may be too brain damaged to be able to rationally assess these foisted obligations.

> [W]hen are we to say that this parental trustee jurisdiction over children shall come to an end? Surely any particular age . . . can only be completely arbitrary. The clue to the solution of this thorny question lies in the parental property rights in their home. For the child has his *full* rights of self-ownership *when he*

> *demonstrates that he has them in nature*—in short, when he leaves or 'runs away' from home. . . . The absolute right to run away is the child's ultimate expression of his right of self-ownership, regardless of age.[1]

The guardian-dependent bailment comes to an end when the bailor no longer has need of it. Said another way, it's over when whatever demand the bailor has for it can, or will, no longer be supplied by the bailee. This may appear to make the "determinable time" for this particular kind of bailment fuzzy, meaning difficult to determine, but it doesn't make it indeterminate. Rothbard is right to say that setting an age is "completely arbitrary". The appropriate age for bailment termination is determined through a constellation of circumstances that varies from bailment to bailment. It's almost a self-evident truth to say that "the child has his *full* rights of self-ownership *when he demonstrates that he has them in nature*". Actually, the bailor has had absolute title to self-ownership since conception. In this natural person's growth and development, he/she reaches a point in this procuration of powers and abilities at which he/she is able to pay his/her own way in the world. This is a long way from having all the abilities necessary to live in complete harmony with natural law, but it is as far down this road as the bailees are able to take the bailor via the bailment. The question of whether the bailment is terminated by the bailor's running away, by a more harmonious approach to finding mutual agreement of the parties to end the bailment, or by the bailee kicking the bailor out of the nest, is more about means than ends. Regardless of whether the bailment ends by mutual agreement or by running away, what Rothbard says about the child's self-ownership is true. But the parent's home ownership is not so much a criterion as he posits here. If home ownership is as big a deal as he says, then the mortgage company has some say about how the parents raise the child. They do not and should never. — Regarding methods of terminating the bailment:

> [I]f a parent may own his child (within the framework of non-aggression and runaway-freedom), then he may also transfer that ownership to someone else.[2]

Of course, the claim that a parent "owns his child" conflicts with the idea that all natural persons are self-owners. It's more correct to say that as bailee, the parent has an ownership interest in the bailment contract. Despite this distinction, it should nevertheless be possible for the bailee to transfer his/her participation in the contract to someone else.

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 103.

2 Rothbard, Murray, **The Ethics of Liberty**, p. 103.

If actual damage happens to a child at the hands of a parent, then it's reasonable that the child should be able to file an action *ex delicto*, in a secular court, based on an alleged private delict, against the parent. So it's not reasonable that the parents should have complete immunity. So if parents are sued by children, as long as the suit is not being funded by some crime syndicate like "Child Protective Services", there's no good reason for such a suit not to go forward. On the other hand, if a secular court brings a legal action against a parent, where the action arises out of a public delict, then the damage must be very real and very public.

> [T]wo . . . grounds for seizing children from their parents, both coming under the broad rubric of "child neglect," clearly violate parental rights. These are: failure to provide children with "proper" food, shelter, medical care, or education; and failure to provide children with a "fit environment." It should be clear that both categories . . . are vague enough to provide an excuse for the State to seize almost any children, since it is up to the State to define what is "proper" and "fit." Equally vague are other, corollary, standards allowing the State to seize children whose "optimal development" is not being promoted by the parents, or where the "best interest" of the child (again, all defined by the State) are promoted thereby.[1]

All these indictments of the state are absolutely true and mark an entrenched tyranny. Furthermore, there's no way public schools, meaning schools funded through taxation by a jurisdictionally dysfunctional secular social compact, can lawfully exist. They cannot exist within a genuinely secular jurisdiction because a secular social compact is by definition disallowed from stealing money from people for the sake of funding any kind of education of anyone.

Even though the child's abilities to exercise his/her natural rights grow as the child grows, the parents / guardians retain their status as bailee, having "lawful possession without title", until the bailment is terminated. The natural "determinable time" of the bailment is the period from birth until the bailor's "right to possession" has matured. When the minor has developed capacity to take normal adult responsibility for the bailed property to which he/she has title, then the bailor's "right to possession" has matured. Since defining such maturity is haphazard and fuzzy, societies generally allot an arbitrary age to mark the transition from minor to major. As already indicated, setting an arbitrary age may satisfy the state, but it doesn't really do justice to the facts.

> [J]uveniles are habitually deprived of such elemental procedural rights accorded to adult defendants as the right to bail, the right

1 Rothbard, Murray, **The Ethics of Liberty**, p. 105.

> to a transcript, the right to appeal, the right to a jury trial, the burden of proof to be on the prosecution, and the inadmissibility of hearsay evidence. As Roscoe Pound has written, "the powers of the Star Chamber were a trifle in comparison with those of our juvenile courts."[1]

None of these deprivations should exist in regard to anyone within the immediate jurisdiction of a secular social compact. This is especially true given that a secular social compact has no authority to arbitrarily set any age of consent, age of adulthood, *etc*. Children who are on their own in secular jurisdictions should be assumed to have full natural rights.

At this transition from minor to major, the new major / ex-bailor has a "superior right to possession" over the parent / guardian / bailee's claim. Since "the bailee must restore [the property] when his lawful possession comes to an end", the bailee must relinquish all claims to the new major's bailed property. This inevitably means that whoever the bailee has enlisted to assist in raising the child is also obligated to relinquish all claims to the new major's bailed property. This includes secular government's claim to the bailed property. This also includes the claims of those who collaborate with secular government's *ultra vires* activities. This even means that the secular governments the bailee has enlisted to help are lawfully obligated to relinquish their claims that the new major is a citizen. As indicated above, citizenship can be lawfully available only to those who have capacity, and who consent to being citizens.

According to Rothbard,

> The current judicial view, which regards the child as having virtually no rights, was trenchantly analyzed by Supreme Court Justice Abe Fortas in his decision in the *Gault* case:
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> ". . . The child was to be 'treated' and 'rehabilitated' and the procedures . . . were to be 'clinical' rather than punitive.
>
> "These results were to be achieved . . . by insisting that the proceedings were not adversary, but that the State was proceeding as *parens patriae* (the State as parent). . . . [I]ts meaning is murky and its historical credentials are of dubious relevance."[2]

Fortas is clear that the doctrine of *parens patriae* has a dubious pedigree. In fact, *parens patriae* is inherently statist, and is inherently violation of the natural rights of all those subjected to the state's claim.

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1 Rothbard, Murray, **The Ethics of Liberty**, p. 108.

2 Rothbard, Murray, **The Ethics of Liberty**, p. 110. — Rothbard here quotes *In re Gault*, 387 U.S. 1, 16 (1967).

Under the existing regimes, many of the benefits created for the child in the guardian-dependent bailment are accompanied by obligations that fall on the bailor when the bailment contract ends. So the bailee in essence puts the child in debt. When the child reaches majority (through termination of the bailment), the bailor in this contract will usually have debts that he/she might not recognize as debts. The late custom of loading young people with debts is accompanied by a similar custom of keeping the youth ignorant about how to annul these foisted obligations. The young should never treat these foisted statist obligations with silent acquiescence.[1] They demand radical repudiation from anyone who intends to preserve his/her natural rights. The incentive to object timely should be magnified by the following fact about bailments:

> Possession by bailee in a bailment relationship may be said to involve: (1) power to control and (2) either an intention to control or an awareness on the part of the bailee that the rightful possessor has lost physical control of the personal property. Thus, where a customer in a restaurant hangs his hat or coat on a hook furnished for that purpose, the hat or coat is within an area which is under the physical control of the restaurant owner; however, the restaurant owner is not a bailee of the hat or coat unless he clearly signifies that he intends to exercise the power to control the hat or coat.[2]

When the new major fails to claim his rights as a new major – including the right to condone or deny citizenship – this is like leaving the hat on the hook at the restaurant. If the parents / guardians and their collaborators, including the secular state, "clearly [signify] that [they intend] to exercise power to control the" formerly bailed property to which the new major has title, the parents / guardians / collaborators are themselves essentially claiming to be bailee in a new bailment. Because the new major is not taking possession, he/she is leaving a vacuum for anyone to step in and claim the property, including organized criminals. In fact, parents and guardians are usually happy to see their charges go into the world and do well. Other collaborators, including teachers, church leaders, scout leaders, etc., are also likely to encourage the new major to take full responsibility for his/her bailed property. But the collaborator that the parent / guardian / bailee has enlisted in the form of secular government, corporations, tax-free foundations, and

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1 The ruinous nature of the failure to object timely in court, combined with the common-law maxim, *Qui tacet, consentire videtur* ("He who is silent is supposed to consent." — **Black's 5th**, p. 1126), make it obvious that silence can be as destructive as admissions and confessions in a Star Chamber.

2 **Smith and Roberson**, p. 352.

a variety of other dubious entities, are likely to be different. The fact that secular governments claim that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens" (14th Am. § 1), means that secular government "intends to exercise the power to control" over the new major's formerly bailed property. Since it unlawfully assumes that it has subject-matter jurisdiction over the new major, this government is exercising "the power to control" the new major's formerly bailed property. By imposing citizenship, the state is denying the new major's natural right to consent or dissent to citizenship, including his/her right to condone or deny all the benefits and obligations appending thereto. The secular governments are establishing themselves as bailee over abandoned property. Or perhaps it's more accurate to claim they're attempting to homestead property to which someone else has lawful title. If the new major neglects to claim his/her rights, the new major's bailed property will remain in a largely alienated condition indefinitely. If the new major claims his/her rights to his/her bailed property, and the state and its collaborators refuse to deliver the property, then the state is guilty of conversion, *i.e.*, theft.

Conclusion

By sketching this natural-law theory, this memorandum has traced the ongoing relationship between natural law, natural rights, natural duties, and normal abilities and disabilities, in a normal life span and in a general way. It has done this in both extra-jurisprudential and jurisprudential senses of these terms, starting at conception. If it's understood that what this memorandum has claimed about the cognitively incapacitated population of children is generally true of any other population of cognitively incapacitated people, then it's reasonable to understand that these claims can be easily extrapolated to include practically all other populations of cognitively disabled people. Children are bailors in guardian-dependent bailment contracts, and all other cognitively incapacitated people are in similar need to be party to guardian-dependent bailment contracts. In the process of making these claims, this memorandum has shown that this natural-law theory is a reliable foundation for human law because it sketches the proper relationships between natural rights, human law, and natural law. By sketching this natural-law theory, this memorandum has shown how these incapacitated natural persons must be treated so that their full spectrum of natural rights is honored, as much as people who have normal adult capacities.

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