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## ABORTION: THE CONFLICT OF POSITIVE LAW WITH NATURAL LAW AND AQUINAS

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### INTRODUCTION

*Mamma, please don't hurt me; I'm helpless and so small. If you don't choose to keep me safe, then I've no one at all. I'm not a thing to be destroyed - in private, secretly. I'm growing here beneath your heart, I'm real, I'm yours, I'm me! Perhaps your heart is troubled, filled with fears or filled with shame. But Mamma, try to understand; I'm not the one to blame! I've never, ever hurt you, so you've nothing to forgive. Why should I have to die before I've had my right to live . . . Remember that when you were just as small and frail as I, your mother didn't make the choice to have her baby die. You had your chance to live, so, please let me have my chance, too. I can't escape; I can't cry out . . . My life depends on you!*<sup>2</sup>

The legal right to an abortion<sup>3</sup> has been an ongoing controversial debate not only in the United States (“U.S.”), but also the rest of the

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<sup>2</sup> Fredi D'Alessio, *An Unborn Child's Plea: My Life Depends on You*, TAKING LIFE, LOVE AND FAITH SERIOUSLY (Oct. 8, 2006), available at <http://fjdalessio.wordpress.com/2006/10/08/an-unborn-childs-plea/>.

<sup>3</sup> Abortion is defined as “the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus” through miscarriage or when induced by a doctor. *Merriam-Webster Dictionary*, M-W.COM, available at <http://www.merriam-webster.com/dictionary/abortion> (last visited Sept. 16, 2012) [hereinafter *Merriam-Webster*]. Abortion is generally referred to procured abortion, “the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to

world.<sup>4</sup> Abortion is not only a conflict within the law, but also a conflict deeply intertwined with what people perceive to be moral and how it affects their view on abortion.<sup>5</sup> The idea influencing this view is “what seems on the surface to be a merely legal issue about discrimination [of person’s rights] depends upon making an underlying moral judgment.”<sup>6</sup> Thus, morality heightens the dilemma on abortion.<sup>7</sup> Although the legal argument for a woman and her rights as a human being may be more morally conclusive, the argument that would give a fetus<sup>8</sup> legal rights presents a problem due to the diverse opinions as to when life begins.<sup>9</sup> It is this uncertainty that produces the ultimate legal and moral conflict of whose rights shall prevail.<sup>10</sup>

Through the view of Saint Thomas Aquinas (“Aquinas”)<sup>11</sup> on morality and reason, this paper will use natural law<sup>12</sup> to show how the

birth.” *Abortion, The Natural Law and The Sacred Scriptures*, HOLYCATHOLICAPOSTOLI (Jan. 12, 2012), <http://holycatholicapostoli.blogspot.com/2012/01/abortion-natural-law-and-sacred.html>.

<sup>4</sup> “Abortion remains a politically divisive issue within the United States and the world, with activists on both sides of the debate advocating for legislation that supports their respective arguments.” Janessa L. Bernstein, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463, 1473-74 (2008).

<sup>5</sup> “The existence of a moral problem presupposes some conflict of values or goals or interests.” L. W. SUMNER, *ABORTION AND MORAL THEORY* 5 (Princeton Univ. Press 1981); “It could seriously be argued that this tension between considering abortion a serious moral evil that takes life, and the desire to avoid a categorical or even broad prohibition, captures the ambivalence of perhaps the largest segment of the American public.” David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 123 (1995).

<sup>6</sup> Jeffrey Abramson, *Justice Takes a Stand*, 89 Tex. L. Rev. 653, 655 (2011) (reviewing MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2009)), available at <http://www.texasrev.com/wp-content/uploads/Abramson-89-TLR-653.pdf>.

<sup>7</sup> “Moral standing has thus far been defined in terms of the right to life, and a case has been made for connecting possession of this right with sentience.” SUMNER, *supra* note 5, at 161; see also, Bernard Gert, *The Definition of Morality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012), available at <http://plato.stanford.edu/archives/fall2012/entries/morality-definition> (referring to morality as a code of conduct which applies to individuals and society as a whole). “In the normative sense, morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral considerations. All of those who use “morality” normatively also hold that, under plausible specified conditions, all rational persons would endorse that code.” *Id.*

<sup>8</sup> A fetus is defined as “an unborn or unhatched vertebrate especially after attaining the basic structural plan of its kind; specifically, a developing human from usually two months after conception to birth.” *Merriam-Webster*, M-W.COM, available at <http://www.merriam-webster.com/dictionary/fetus> (last visited Sept. 30, 2012). Fetus is generally referred as the “term given to the developing organism” throughout the last seven months of pregnancy. MARIA COSTA, *CONTEMPORARY WORLD ISSUES, ABORTION: A REFERENCE HANDBOOK* 241 (ABC-CLIO, Inc., 1991) (1991).

<sup>9</sup> DAVID BOONIN, *A DEFENSE OF ABORTION* 1 (Cambridge Univ. Press 2003).

<sup>10</sup> *Id.*

<sup>11</sup> Aquinas was born in approximately 1225 A.D. into a politically noble family in the castle of Roccasecca, Province of Frosinone, Italy. SAINT THOMAS AQUINAS, *THE TREATISE ON LAW* 3-7 (R. J. Henle, S. J. eds., & trans., Univ. of Notre Dame Press 1993). On his fifth birthday he was sent to Monte

positive law<sup>13</sup> that legalizes abortion directly conflicts with our fundamental inclination towards the continuation of life.<sup>14</sup> Through his writings, Aquinas transformed the way philosophy and theology was and has been viewed.<sup>15</sup>

Aquinas has written a number of works “provid[ing] an ideal background for understanding . . . moral philosophy such as the nature of human action, virtue, natural law, and the ultimate end of human

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Casino monastery where he was educated for nine years. *Id.* Around Aquinas’ fourteenth birthday, he decided to continue his studies in Naples where he learned of the Dominican order. *Id.* The Dominican order had a way of life that Aquinas’ parents disagreed with, because Dominicans dedicated their lives to study and preserving the soul, ultimately leaving them in poverty, while Aquinas’ parents were used to prestige and power. *Id.* In an attempt to reel Aquinas away from joining the Dominicans, his parents had him kidnapped and held him captive for two years. *Id.* While in captivity, Aquinas was threatened, prayed for, and was tempted with sexual essence. *Id.* However after he showed that nothing would break his determination, he escaped or was sent to Paris to study, where he remained with the Dominicans for three years. *Id.* Eventually he earned a master’s degree and spent several years teaching in Paris and in Rome. *Id.* During this time he wrote some of the most influential philosophical writings in history. *Id.* In 1274, he suddenly fell seriously ill and died. *Id.* Within a century of his death, the Catholic Church adopted his views as its own, naming him one of their saints. *Id.* Today Aquinas is recognized in many respects through textbooks, philosophy and even in court decisions. *Id.*; See also, *Thomas Aquinas (1225-1274)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (May 6, 2009), <http://www.iep.utm.edu/aquinas/>.

<sup>12</sup> Natural law is “a rule of reason, promulgated by God in man’s nature, whereby man can discern how he should act.” CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS & WHY WE NEED IT 51 (Ignatius Press rev. ed. 1999) (1993). “Just as the maker of an automobile builds into it a certain nature and gives directions for its use so that it will achieve its end—that is, to be dependable transportation—so God has built a certain, knowable nature into man to follow if he is to achieve his final end, which is eternal happiness with God in heaven.” *Id.* “Natural law guides human beings through their fundamental inclinations toward the natural perfection that God, the author of the natural law, intends for them.” Peter Koritansky, *Thomas Aquinas: Political Philosophy*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Dec. 27, 2007), <http://www.iep.utm.edu/aqui-pol/>. “[T]he natural law is not invented or formulated by man but discovered as inherent in the structure of reality, in the “nature of things.” It is as real, constant, and universal as the laws that govern the sunrise and sunset. The natural law is independent of opinion and not relative to culture. It encompasses people of all nations, races, and religions, and it is the basis of international law, what the Founding Fathers call “the laws of nature and nature’s God.” Mitchell Kalpakgian, *The Right to Life and the Natural Law*, LIFE AND LEARNING IX 1-2, <http://www.uflf.org/vol%209/kalpakgian9.pdf> (last visited Nov. 9, 2012).

<sup>13</sup> “Positive law (variously called “human law,” “man-made law,” “civil law,” and “municipal law) is the law produced by human institutions.” SAINT THOMAS AQUINAS, THE TREATISE ON LAW, *supra* note 11, at 38. “Law established or recognized by governmental authority.” *Merriam-Webster*, M-W.COM, available at <http://www.merriam-webster.com/dictionary/positive%20law> (last visited Sept. 18, 2012); “Manufactured, created, or constructed by human beings.” *Merriam-Webster*, M-W.COM, available at <http://www.merriam-webster.com/dictionary/man-made> (last visited Sept. 18, 2012).

<sup>14</sup> SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, q. 94, a. 2, (2nd. ed. 1920), available at <http://www.newadvent.org/summa/> [hereinafter *Summa Theologica*].

<sup>15</sup> David L. Gregory, *St. Thomas Aquinas, Jacques Maritain, and Law*, 40 CATH. LAW. 381, 383 (2001). See *infra* note 51.

beings.”<sup>16</sup> In his well-known *Summa Theologica*,<sup>17</sup> Aquinas explains that law is “nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”<sup>18</sup> According to Aquinas, law is broken down into four parts, eternal law, divine law, natural law, and positive law.<sup>19</sup>

Aquinas holds eternal law “as the highest order of law, which is the governance of divine reason over the universe and everything in it.”<sup>20</sup> Eternal law refers to God for He is eternal, and God’s plan for creation of the universe.<sup>21</sup> Divine law derives from eternal law and refers to law provided by God directing man to his righteous path through divine commands.<sup>22</sup> Divine law is separated into two parts: the old, which commanded man through fear, and the new, which commands man

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<sup>16</sup> *Thomas Aquinas: Moral Philosophy (1225-1274)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (May 23, 2006), <http://www.iep.utm.edu/aq-moral/>. Scholars have called Aquinas “one of the most renowned and brilliant theologians and philosophers in history” and “a thinker of unequaled depth and subtlety.” Louis W. Hensler III, *Modest Reading of St. Thomas Aquinas on the Connection between Natural Law and Human Law*, 43 CREIGHTON L. REV. 153, 153 (2009-2010); *See also*, JEFFERY A. BRAUCH, IS HIGHER LAW COMMON LAW?: READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW 19 (Fred B. Rothman & Company 1999).

<sup>17</sup> *Summa Theologica* was Aquinas’ most influential writing consisting of three parts, the first discussing God and proof of his existence, the second discussing ethics and the virtue of man, and the third which he died before able to finish, discussing Christ and salvation. INTERNET ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 11.

<sup>18</sup> *Summa Theologica*, *supra* note 14, at I-II, q. 90, a. 4. Promulgation is “the application of the law to those whom it is applied and the communication of this law to them, it is essential to the nature of the law. The natural law is promulgated by God: ‘God has instilled it into human minds so as to be known by them naturally.’” Jan Edward Garrett, *Aquinas on Law*, <http://people.wku.edu/jan.garrett/302/aquinlaw.htm> (last visited October 13, 2012). “Aquinas equates God with the common good, [therefore] the common good [for the sake of the community] supersedes the good of the individual.” EMILY WESTON, *The Resuscitation of St. Thomas Aquinas: Catholic Bioethics and Abortion in the United States*, 69 (May 2009), [http://wakespace.lib.wfu.edu/jspui/bitstream/10339/14683/2/Weston\\_Thesis.pdf](http://wakespace.lib.wfu.edu/jspui/bitstream/10339/14683/2/Weston_Thesis.pdf).

<sup>19</sup> RICE, *supra* note 12, at 50.

<sup>20</sup> WESTON, *supra* note 18, at 66.

<sup>21</sup> “[A] law is nothing else but a dictate of practical reason [emanating from the ruler who governs a perfect community. Now it is evident . . . that the whole community of the universe is governed by Divine Reason. Wherefore the very idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason’s conception of things is not subject to time but is eternal . . . therefore it is that this kind of law must be called eternal.” SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 91, a. 1.

<sup>22</sup> According to Aquinas, divine law is necessary for four reasons: natural and positive laws are not enough in order for man to reach eternal happiness; positive law is not always certain and in order for man to know with certainty what is good and what is evil there is a need for a law from God because such a law cannot be an error; man is not sophisticated enough to make law based on the interior so there exists a need for God to provide such law; and lastly divine law is necessary to make sure that all evil deeds are forbidden. RICE, *supra* note 12, at 54-55; *see also* SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 91, a. 4.

through love.<sup>23</sup> Natural law is a “dictate of reason commanding something.”<sup>24</sup> It is discoverable by the use of reason to discern what is good and what is evil.<sup>25</sup> Natural law is a rational man’s participation in God’s wisdom, and God’s wisdom is the eternal law because it ordains and directs the man to the ultimate end, which are happiness and the common good.<sup>26</sup> When God created man, He provided man with natural instincts that should be used through reason to lead him towards good.<sup>27</sup> Therefore, “[m]an can know, through the use of his reason, what is in accord with his nature and therefore good.”<sup>28</sup> Positive law<sup>29</sup> refers to laws made by man, and according to Aquinas all positive law is derived from natural law.<sup>30</sup> Aquinas explains that positive law is an “integral part of God’s plan . . . designed to promote the common good and help man attain his highest end of happiness.”<sup>31</sup> Since positive law is derived from natural law and natural law is derived from eternal law, it is logical to conclude that all laws are derived from eternal law.<sup>32</sup>

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<sup>23</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 91, a. 5 c.

<sup>24</sup> *Id.* at I-II, q. 92, a. 2 c. See also, FULVIO DI BLASI, GOD AND THE NATURAL LAW: A REREADING OF THOMAS AQUINAS 1 (David Thunder, trans., St. Augustine’s Press 2006) (1999).

<sup>25</sup> DI BLASI, *supra* note 24, at 1.

<sup>26</sup> RICE, *supra* note 12, at 31-32. Common good is that “each and everyone’s well being, in each of its basic aspects, must be considered and treated favorably at all times by those responsible for coordinating the common life.” DI BLASI, *supra* note 24, at 2; see also, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 214 (Oxford Univ. Press 1980). Aquinas refers to the common good as the common benefit for all the community as a whole rather than for each individual separately. SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 90, a. 2.

<sup>27</sup> RICE, *supra* note 12, at 30.

<sup>28</sup> *Id.*

<sup>29</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 91, a. 3, (using reason from the precepts of natural law, man can proceed to make “particular determinations of certain matters” and this is how positive law is formed).

<sup>30</sup> Positive law derives from natural law in two ways. *Id.* at I-II, q. 95, a. 2. There are things that derive from natural law principles through conclusions, for example “that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man’.” *Id.* There are also things that derive from natural law principles through determination, for example that natural law provides that someone who does evil should be punished but the manner in which that someone should be punished is a “determination of the law of nature.” *Id.*

<sup>31</sup> RICE, *supra* note 12, at 61. “Law principally and properly seeks the common good. Planning for the common good is the task of the whole people or of someone ruling in the person of the whole people. Thus lawmaking is the task of the whole charge of the whole people; for in all other matters direction toward an end is the function of him to whom the end belongs”, Paul Halsall, *Aquinas on Law*, FORDHAM UNIV. (David Burr trans., 1996), available at <http://www.fordham.edu/halsall/source/aquinas2.asp>.

<sup>32</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 93, a. 3; see also, RICE, *supra* note 12, at 54. An analogy might help: imagine that for your birthday, you get a new iPad but when you open the package it is missing the manual, so you ask a friend who works at an electronic store to help you figure out how to work your new iPad. Your friend then tries to play with the applications and settings and then

Part I of this paper will delineate the conflict between natural law and the current positive law. Part II will introduce the history of positive law with regards to abortion in the U.S. by focusing on three seminal cases. Through *Roe v. Wade*,<sup>33</sup> *Planned Parenthood v. Casey*,<sup>34</sup> and *Stenberg v. Carhart*,<sup>35</sup> the Supreme Court announced that a woman's right to choose to terminate her pregnancy is a fundamental right under the Ninth and Fourteenth Amendments<sup>36</sup> of the U.S. Constitution.<sup>37</sup> Part III will provide the arguments made by the parties that are for abortion staying legal, as well as the parties that are against abortion staying legal. This section will provide an explanation regarding the manner in which each side uses natural law to justify its' view regarding whether abortion should remain legal, or become criminalized again. Part IV will provide an analysis on the future if the positive laws from *Roe*, *Casey*, and *Carhart* remain precedent.<sup>38</sup> Finally, in Part V, I will provide my recommendations as to how the conflict should be resolved in order for the U.S., as a people, to move towards the fundamental inclination of the continuation of life.

#### I. DELINEATING THE CONFLICT BETWEEN NATURAL LAW AND POSITIVE LAW, AS WELL AS, THE CONFLICT WITHIN NATURAL LAW

"There is too much at stake to leave the lives of so many millions of Innocents - both women and unborn children - up to mere personal whimsy or political bartering."<sup>39</sup> Societal views in the U.S. have been "shattered and stretched to the limit."<sup>40</sup> By continuing to follow the

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shows you how the iPad works. From an observing point, your friend has explained to you what you would have learned had you been provided a manual. In this example the eternal law is the manual for the iPad, and the natural law is what your friend both observed and knew innately so through his reason he was able to work out what the instructions were.

<sup>33</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>34</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>35</sup> *Stenberg v. Carhart*, 530 U.S. 914, (2000).

<sup>36</sup> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. "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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

<sup>37</sup> E.g., *Carhart*, 530 U.S. 914; *Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113.

<sup>38</sup> *Id.*

<sup>39</sup> Dianne N. Irving, *Abortion: Correct Application of Natural Law Theory*, LIFE ISSUES (Feb. 2000), [http://www.lifeissues.net/writers/irv/irv\\_08natlaw.html](http://www.lifeissues.net/writers/irv/irv_08natlaw.html).

<sup>40</sup> *Id.*

positive law on abortion, people as a society are drifting further apart from their natural inclinations, having their reason distorted.<sup>41</sup> Since *Roe v. Wade*, society has begun valuing the right of choice over the right to life, and seemingly protects privacy over protecting life itself.<sup>42</sup> In essence, society's value system has created a chain of events that has led society to split in two.<sup>43</sup>

Pro-life<sup>44</sup> advocates follow the view of Aquinas, arguing that the positive law legalizing abortion contradicts the natural law, which preaches the continuation of life as a fundamental principle.<sup>45</sup> On the other hand, while pro-choice<sup>46</sup> advocates also follow the view of Aquinas, they argue that a woman's right to choose to terminate her pregnancy is a right provided under the Constitution, which upholds the natural law

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<sup>41</sup> Halsall, *supra* note 31 (providing an explanation on how reason works, recognizing that natural law may fail "because the reasons of some are distorted by passion, evil habits, or evil natural disposition."). "[P]assion causes us not to consider in a particular instance what the reason knows in general to be wrong; the passion distracts the reason, opposes it, even fetters it, thus giving the reason contradictory distorted propositions," by analogy, passion has distorted the reason into thinking that abortion is good. *Key Ideas in Summa I-II: Questions 71-77 (Vices) & 90-97 (Law)*, available at <http://www3.dbu.edu/mitchell/summa6.htm> (last visited Nov. 12, 2012).

<sup>42</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (Holding that a woman's right to choose to terminate her pregnancy is a protection provided under the Fourteenth Amendment, that the state shall not interfere with a woman's choice before the end of the first trimester, and in later stages of the pregnancy, the state shall only have limited power to interfere such as when the life of the woman is in grave danger). Justice Blackmun acknowledging in the majority opinion that "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." *Id.* But then the Justice goes on to say that the Court must make a decision that is "free from emotion." *Id.*

<sup>43</sup> Although there are many points of view on abortion, society has finely been split into two, the pro-choice and the pro-life. *Both Sides of the Abortion Debate*, STUDYWORLD.COM, available at [http://www.studyworld.com/moral\\_issues/abortion/both\\_sides\\_of\\_the\\_abortion\\_debate.htm](http://www.studyworld.com/moral_issues/abortion/both_sides_of_the_abortion_debate.htm) (last visited Oct. 31, 2006). "A pro-choicer would feel that the decision to abort a pregnancy is that of the mother . . . A pro-lifer would hold that from the moment of conception, the embryo or fetus is alive . . . impos[ing] on [society] a moral obligation to preserve it." *Id.* "The simple idea is this: Abortion is regarded by many, probably the overwhelming majority, as an evil. But it is also regarded by many, probably a somewhat different majority, as an unavoidable or even a necessary evil that our society is not yet prepared to abolish and cannot abolish without severe disruptions to the fabric of society. Few regard abortion as a "positive good. Those who do are rightly regarded as extremists." Michael Stokes Paulsen, *Prospective Abolition of Abortion: Abortion and the Constitution in 2047*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 51, 52 (2007).

<sup>44</sup> See *infra* text accompanying note 113.

<sup>45</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 95, a. 2.

<sup>46</sup> See *infra* text accompanying note 114.

principle of self-preservation.<sup>47</sup> With both sides justifying their view on abortion with natural law, the dilemma on which side is right is more important than ever.

According to Aquinas, positive laws must not only fall in accordance with natural law, but that all positive law is actually “derived from the law of nature,” and if positive law contradicts natural law then it should not be considered law at all.<sup>48</sup> However, whether positive law contradicts natural law is not what determines the validity of that law but rather that its contradiction makes it an unjust law from a moral standpoint and therefore, such law “do[es] not bind the conscience. . .”<sup>49</sup> Based on this, Aquinas would argue that the positive law legalizing abortion directly contradicts the natural law, because natural law sees the continuation of life as a fundamental principle.<sup>50</sup> Since abortion is essentially ending life, and is the opposite of a fundamental tenet of natural law, it follows that positive law allowing such an act is an unjust law.<sup>51</sup> Positive law must conform to natural law, and abortion is not a legal act under Aquinas’ view of natural law.<sup>52</sup>

Aquinas provides that the main precept of natural law is “that good is to be done and pursued, and evil is to be avoided.”<sup>53</sup> From this

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<sup>47</sup> See *Stenberg v. Carhart*, 530 U.S. 914, (2000); See also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); See generally *Roe v. Wade*, 410 U.S. 113 (1973) (holding that although not explicit, the Constitution extends the right to privacy to include a woman’s right to terminate her pregnancy).

<sup>48</sup> “Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 95, a. 2. Assuming this is true it would mean that all laws no matter the jurisdiction would be the same, all derived from natural law but we know that this is not true. AQUINAS, *supra* note 11, at 16. To resolve this statement Aquinas provides two ways that laws arise out of natural law. *Id.* “One by way of conclusion. Thus the general precept ‘harm no person’ the prohibition of murder can be deduces. The second way is by way of determination. Thus, reckless driving is against the natural law since it endangers life and limb.” *Id.* From this different jurisdictions decide how to regulate or punish the wrongdoers. *Id.*

<sup>49</sup> Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 96 (1992).

<sup>50</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 94, a. 2.

<sup>51</sup> Gregory, *supra* note 15, at 386 (explaining that according to Aquinas, when positive law conflicts with natural law it becomes “a perversion of law,” in the sense that the law is no longer “an ordinance of reason for the common good”).

<sup>52</sup> Matthew Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 Vill. L. Rev. 247, 274 (2009). “[N]atural law proscribes the direct, intentional killing of innocent human persons. Aquinas declared that “therefore it is in no way lawful to slay the innocent.” See also, SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 64, a. 6.

<sup>53</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 94, a. 2. “The good preceded the right, and hence there is no “right” to choose evil, or to define that which is by nature evil, as good.” Smolin, *supra* note 5, at 129. Precept is defined as “a command or principle intended especially as a general rule of action.” *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/precept> (last visited Oct. 13, 2012).

precept, Aquinas explains that three primary fundamental principles of man are derived.<sup>54</sup> The first fundamental principle is the natural inclination of self-preservation by warding off evil and maintaining our existence.<sup>55</sup> The second fundamental principle is the natural inclination to procreate and to nurture our offspring.<sup>56</sup> The third fundamental principle is the natural inclination towards the good, to live amongst others within society.<sup>57</sup> “For Aquinas, there are also secondary principles, which are derived from the primary principles and ‘contribute to public and private moral good.’”<sup>58</sup>

The first two inclinations have been used to argue for and against abortion.<sup>59</sup> The inclination of self-preservation includes the continuation of life in a general aspect and has been used to argue for abortion, while the inclination to continue life, specifically procreating and nurturing for children has been used to argue against abortion.<sup>60</sup>

These two natural-law precepts relate differentially to the abortion issue. While the law of “respect for life” includes one’s offspring in a general way, the second law, related to having and caring for offspring, if it be acknowledged to prevail, is much more relevant to the case of abortion — since it is diametrically opposed to a woman’s extermination of her own child *in utero*. An intentional extermination would seem to

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“Precepts (interchangeably used with principles) are not something that can be demonstrated, rather they are principles without which human reasoning cannot coherently draw any conclusions whatsoever. Otherwise stated, they are first principles inasmuch as they are not derived from any prior practical or speculative knowledge. Still, they are just as surely known as any other knowledge obtained through demonstrative reasoning. In fact, they are naturally known and self-evident for the very same reason that they are not subject to demonstration. This is important from Aquinas’ perspective because all practical knowledge (including the moral and political sciences) must rest upon certain principles before any valid conclusions are drawn.” Koritansky, *supra* note 12.

<sup>54</sup> “Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.” *SUMMA THEOLOGICA*, *supra* note 14, at I-II, q. 94, a. 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> WESTON, *supra* note 18, at 67; *see also*, CHARLES E. CURRAN, *CATHOLIC MORAL THEOLOGY IN THE UNITED STATES: A HISTORY* 67 (Georgetown Univ. Press 2008).

<sup>59</sup> Howard Kainz, *Natural Law and Abortion*, *CRISIS MAGAZINE* (Jan. 6, 2010), <http://www.crisismagazine.com/2010/natural-law-and-abortion>.

<sup>60</sup> *Id.*

belong preeminently to the category of sins deemed “contrary to nature”.<sup>61</sup>

The issue is that positive law, currently holding abortion legal, contradicts the natural law and its inclination towards the preservation and continuation of life.<sup>62</sup> In addition, there is an issue within natural law itself; views are split between those who see the natural law inclination of self-preservation as a valid reason for woman’s rights versus those who see the natural law inclination of continuation of life as contradicting abortion.<sup>63</sup> However, natural law holds that human life should be preserved regardless of what condition or stage the life is in; thus the right to life is above anything else.<sup>64</sup> So if society as a whole does not fix the contradiction between positive law and natural law in regards to abortion, it will never be able to reach its ultimate end.<sup>65</sup>

## II. A LOOK INTO THE HISTORY OF ABORTION AND ITS’ PAST TRENDS

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<sup>61</sup> *Id.*

<sup>62</sup> See SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 95, a. 2.

<sup>63</sup> See *supra* note 47.

<sup>64</sup> Garrett, *supra* note 18. See also, Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground*, 54 EMORY J.L. 97, 135 (2005). “The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the . . . processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge. The horror we feel in the willful destruction of a human life reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investments”. *Id.*

<sup>65</sup> Germain Grisez, *The True Ultimate End of Human Beings: The Kingdom, Not God Alone* 39 (2008), available at <http://www.twotlj.org/ult-end.pdf> (according to Aquinas the ultimate end is in God, and that all man is directed towards the good but not all reach it in the same way). A man cannot attain towards more than one end at a time, “[s]ince everything tends to its own perfection, what human beings tend toward as their ultimate end must be something that they tend toward as a good that is perfect and utterly fulfills them.” *Id.* at 40; See also, SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 1, a. 5. “Ultimate ends of human action are mutually incommensurable . . . if man, objectively speaking, has several ultimate and incommensurable ends to pursue, his particular moral choices will depend in the end on a subjective and arbitrary element—just as a ship that simultaneously has two possible routes, one toward Naples and the other toward Palermo, cannot sail until it chooses one of the options arbitrarily . . . where the rejection of an ultimate end capable of justifying an objective hierarchy guiding individual ethical choices leads to the positing of a subjective hierarchy among values as the necessary premise of every concrete action”. DI BLASI, *supra* note 24, at 16; see also, FINNIS, *supra* note 26, at 92-93.

In order to understand how society has arrived at the present day's conflict on abortion, one must take a look into abortion's history. Abortion laws in the U.S. have only begun to be widely discussed over the past forty years.<sup>66</sup> It was not until *Roe v. Wade*,<sup>67</sup> a 1973 case, in which the Supreme Court single handedly took the power away from the states and recognized that a woman's right to choose to terminate her pregnancy is protected under the Constitution, that abortion became a highly noted topic.<sup>68</sup> However, the conflict concerning abortion dates back to eras as early as the Roman Empire (around 753 BC) and has been in dispute long before the U.S. was formed and the Supreme Court began addressing it.<sup>69</sup> The following two subsections will provide a look into abortion before and after it became legal through *Roe*.

#### *A. Abortion: Before Roe*

During the Roman Empire, abortion was not considered to be murder because the Romans valued the rights of the father over the rights of the fetus, completely ignoring the rights of the mother.<sup>70</sup> However, for

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<sup>66</sup> COSTA, *supra* note 8, at xi.

<sup>67</sup> Jane Roe (Roe), a pregnant single woman, brought a class action suit, naming District Attorney Henry Wade (Wade) as the defendant, challenging the constitutionality of a Texas statute that prohibited a woman's right to terminate her pregnancy, punishable by imprisonment except in those cases where a physician's medical opinion shows that the termination of the pregnancy is necessary to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113, 120 (1973). In addition to Roe, there were two other plaintiffs; a married couple with no children, known as John and Mary Doe (Does), and James Hallford (Hallford), a licensed physician who had previously violated the Texas statute being challenged. *Id.* at 120-121. Roe alleged that she was not able to terminate her pregnancy because the pregnancy did not threaten her life. *Id.* at 120. The Does alleged that because the wife was diagnosed with a disorder that would put her life in danger if she were to get pregnant, she wanted to make sure that she would be able at that time to safely and legally terminate her pregnancy within the state of Texas. *Id.* at 120-122. Hallford alleged that the Texas statute was vague and uncertain, violating his patient's and his own right to privacy. *Id.* at 121. The Supreme Court dismissed Hallford's and Doe's claims but in the matter of Roe, the Court held that Roe along with all women in the U.S. had the right to choose whether or not to terminate their pregnancies. *Id.* at 126-129, 152-156. The Supreme Court then provided some boundaries as pertained to the different trimesters of a pregnancy. *Id.* at 164-165. During the first trimester, a pregnant woman's doctor shall make the medical judgment. *Id.* During the second trimester, a state may regulate abortion procedures when those interests are related to the woman's health. *Id.* During the third trimester, a state may regulate or even prohibiting abortion, except when necessary to preserve the life or health of the mother. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> COSTA, *supra* note 8, at xii.

<sup>70</sup> "[L]egal regulation of abortion as exists in the Roman Empire at this time is aimed at protecting the rights of the fathers, not of fetuses." COSTA, *supra* note 8, at 1. During this era, abortion was legal but it did not give women a right to choose because a woman was not able to abort her fetus without the consent of her husband, and failure to obtain consent would result in exile. *Id.*

almost two thousand years after this era, the universal consensus agreed that abortion was “a horrendous evil which would seriously lead to hell.”<sup>71</sup> Further, during the 1200s, the Roman Catholic Church adopted the view of Aquinas, which said that abortion goes against the natural law of man, deeming abortion illegal in the eyes of God.<sup>72</sup> Although not everyone shares the same religion, according to Aquinas, everyone “possess[es] the same human nature and the same desire for justice. All people belong to the human race and are endowed with the gift of reason and born with a conscience, an innate moral law that is God-given and natural,” therefore everyone could agree that abortion was morally wrong.<sup>73</sup>

Moving forward to the early years of the U.S., there were no explicit statutory laws prohibiting abortions.<sup>74</sup> The first anti-abortion regulation or law to pass in the U.S. occurred in 1821, in the state of Connecticut, which held abortions to be illegal if they were done after the quickening.<sup>75</sup> But it was not until the 1840s, two decades later, when other states joined in and began to pass similar laws.<sup>76</sup> The likely reason for the sudden state involvement was due to the sky rocketing numbers of abortions being performed throughout the U.S.<sup>77</sup>

[T]he average American woman bore seven children in 1800, three and a half by 1900. Estimates of abortions ranged between one-fifth and

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<sup>71</sup> Kalpakgian, *supra* note 12, at 3.

<sup>72</sup> COSTA, *supra* note 8, at 3. Roman Catholic Church adopted Aquinas' writings as their own because he wrote about the truths of God and explained the principles of reason that interlocked with the Church's view. John Dempsey, *Thomas Aquinas*, CHRISTIAN HISTORY FOR EVERY MAN, available at <http://www.christian-history.org/thomas-aquinas.html> (last visited Oct. 28, 2012). In the 14th century, Aquinas was crowned a saint by the Church and in the 15th century, as a doctor of the church with a recognized holiday in his honor. *Id.*

<sup>73</sup> Kalpakgian, *supra* note 12, at 3.

<sup>74</sup> COSTA, *supra* note 8, at 3.

<sup>75</sup> DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT* (Twayne Publishers 1994). Quickening is defined as “the point at which a pregnant woman could feel the movements of the fetus (approximately the fourth month of pregnancy).” LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973* 8 (Univ. of Cal. Press 1997). Before advanced medical expertise came to light, it was extremely difficult to tell at which point of a pregnancy a quickening occurred. *Id.* “Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the nineteenth century, there was otherwise little agreement about the precise time of formation or animation.” *Roe v. Wade*, 410 U.S. 113, 132-134, 138 (1973).

<sup>76</sup> TIM STAFFORD, *The Abortion Wars: What Most Christians Don't Know About The History of Pro-life Struggles*, CHRISTIANITY TODAY (Jan. 1, 2003, 12:00 AM), <http://www.christianitytoday.com/ct/2003/januaryweb-only/1-20-31.0.html?start=2>.

<sup>77</sup> *Id.*

one-third of all pregnancies. Before, abortion had been the refuge of desperate, unmarried women; now most abortions were by married women, using it as birth control.<sup>78</sup>

Within the next thirty-five years, every state had passed some form of law that either made abortion illegal or regulated it with exceptions, such as in circumstances when a woman's life was considered by her physician to be in grave danger.<sup>79</sup>

### *B. Abortion: After Roe*

"Until the 1960s, all but four of the fifty states had statutes that prohibited abortion except when necessary to save the life of the mother."<sup>80</sup> However, the cultural disorder provided by the 1960's and 1970's sexual revolution, along with the advancement in birth control and the availability of the birth control pill, created a time where family planning and safe sex needed to be controlled in order to bring society back into order.<sup>81</sup> Due to the multicultural characteristic of the society "with a wide spectrum of opinions", it was held that "no one individual or group should impose its opinion or morality on others."<sup>82</sup> This in effect led to those with power, to take action.

And so American history on abortion changed drastically in 1973 when the Supreme Court took the power into its' own hands and held

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<sup>78</sup> *Id.*

<sup>79</sup> COSTA, *supra* note 8, at 4-9, 15; *see generally*, BLANCHARD, *supra* note 75. At this time, abortion laws were being implemented around the world. *Center for Reproductive Rights*, REPRODUCTIVE RIGHTS ORG., available at <http://worldabortionlaws.com/about.html> (last visited Oct. 28, 2012) (providing that most countries have liberalized their laws on abortion between 1950 and 1985). For example, the Ethiopian Penal Code of 1957 only permitted an abortion when it was necessary to save the pregnant woman from death or a permanent danger to her health, and even then it was only permitted after it was attested by two physicians that there was no other way to avert the danger. ETHIOPIAN PENAL CODE 158 ART. 534 (1957), available at <http://cyber.law.harvard.edu/population/abortion/Ethiopia.abo.html>.

<sup>80</sup> Clarke D. Forsythe, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L & POL. 85, 94 (2005).

<sup>81</sup> Gerard V. Bradley, *The Pro-Life Movement, Forty-One Years After Roe* (Jan. 2014), available at <http://www.thepublicdiscourse.com/2014/01/11929/> (asserting that "[w]omen's care centers will have to discover new ways to step between pregnant women and the temptation to abort by taking a pill. The argument about abortion from this point forward is about ethics, not status. It is about justice, not about "personhood." It is about establishing that, even if an abortion would be advantageous (up to a point) for a woman – and even if abortion rights are a boon to women's general social prospects – abortion is always gravely unjust. For that reason, it is not to be done. A just society must prohibit it.").

<sup>82</sup> Kalpakjian, *supra* note 12, at 1-2.

anti-abortion statutes to be unconstitutional in its *Roe v. Wade* decision.<sup>83</sup> With this ruling the Supreme Court “changed the traditional, time-honored meanings of good and evil, allowing the killing of pre-born children on the basis of a woman's right to privacy, reversing 2,000 years of custom, tradition, law, and religion . . .”<sup>84</sup>

Following *Roe*, there has been an ongoing dispute on whether *Roe* should be overturned, making it illegal to obtain an abortion.<sup>85</sup> Individuals have initiated and supported more than 330 Human Life Amendment proposals that would reverse the ruling in *Roe*.<sup>86</sup> These Human Life Amendments have been introduced to Congress, in order to implement them to the U.S. Constitution.<sup>87</sup> In 1983, the Hatch-Eagleton Human Life Federalism Amendment<sup>88</sup> was proposed, and became the closest Human Life Amendment to becoming adopted, but as of yet, no Human Life Amendment has been successfully adopted thus far.<sup>89</sup> Although the Human Life Amendments previously proposed have not specifically mentioned Aquinas or natural law outright, all have emphasized that human life begins at conception and the fetus should have all the rights afforded to human beings which follows in accordance to Aquinas’ view of conception.<sup>90</sup>

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<sup>83</sup> *Roe*, 410 U.S. 113.

<sup>84</sup> Kalpakjian, *supra* note 12, at 1-2.

<sup>85</sup> REAGAN, *supra* note 75, at 14-15.

<sup>86</sup> “The proposed amendments have aimed at making abortion unconstitutional by legally defining human life or ‘personhood’ to include the fetus, granting it the due process protection of the Fourteenth Amendment.” WESTON, *supra* note 18, at 48; *see also*, *Human Life Amendment*, NAT’L COMM. FOR A HUMAN LIFE AMEND <http://www.nchla.org/issues.asp?ID=46> (last visited Sept. 24, 2012).

<sup>87</sup> NAT’L COMM. FOR A HUMAN LIFE AMEND, *supra* note 86 (providing that approximately 330 Human Life Amendments have been either initiated, proposed, or submitted thus far).

<sup>88</sup> The Hatch-Eagleton Human Life Amendment was a reversal amendment “specifically designed to abolish the constitutionally protected right to abortion found originally in *Roe v. Wade*.” RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT 27 (James Bopp, Jr. ed., Brigham Young Univ. Press 1984). The Amendment would work to take the power away from Congress, and place it back into State hands. *Id.* at 28.

<sup>89</sup> WESTON, *supra* note 18, at 49 (the Hatch-Eagleton Human Life Federalism Amendment was the only Human Life Amendment to receive a formal vote in Congress, and failed by eighteen votes from the Senate). *Id.*; *See also*, Reid, *supra* note 81, at 2 (failing because it did not meet the criteria provided for an amendment to be successful which is at least a two-thirds vote by Congress followed by the ratification of the amendment by at least three-fourths, approximately thirty-eight out of the fifty states).

<sup>90</sup> Stephen Mumford, *the “Human Life Amendment”, Catholic Bishops and the GOP*, available at <http://churchandstate.org.uk/2012/04/the-life-and-death-of-nssm-200/> (last visited Oct. 13, 2012).

Almost twenty years after the Supreme Court ruled on *Roe*, the Court reaffirmed its decision in a 1992 case, *Planned Parenthood v. Casey*.<sup>91</sup> Although the Supreme Court upheld the ruling in *Roe*, preserving the constitutional protection for a woman's right to choose to abort, the Court adopted a new and some would say weaker test for evaluating restrictive abortion laws, giving the power to regulate abortion back to the States, allowing States to restrict access to abortions, as long as, women who sought abortions, were not unduly burdened.<sup>92</sup>

Individuals, disappointed by the Court's unwillingness to overrule *Roe* in their decision in *Casey*, have since changed their strategy of trying to get the Court to make abortion illegal again, and instead "they are trying to make it impossible" to have an abortion.<sup>93</sup> Many restrictions have been placed between a woman and an abortion, such as

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<sup>91</sup> Five abortion clinics and a physician brought a class action suit, challenging five provisions of a Pennsylvania Abortion Control Act. *See generally Casey*, 505 U.S. 833. The Act required a woman seeking an abortion to provide informed consent prior to an abortion; specified certain information that a woman must be provided with 24 hours prior to an abortion; required that if the woman was a minor, parental consent had to be provided before an abortion were to be carried out; and required a married woman to have signed consent from her husband. *Id.* In addition, the Act required facilities that carried out abortions to provide reports of the abortions provided. *Id.* If a facility failed to report the required consents, a physician that performed the abortion could have his or her license revoked and could be liable in damages in cases where consent from a husband was not provided. *Id.* The Supreme Court in this case found it "imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures." *Id.* The Supreme Court in this opinion reaffirmed the holding in *Roe* with three specific principles: (1) a woman has the right to choose and obtain the termination of her pregnancy without undue interference from the State as long as it is before the viability stage; (2) States are restricted from placing restrictions on abortions prior to the viability stage; and (3) States have an interest in protecting the health of a woman and fetus from the outset of a pregnancy. *Id.* The Supreme Court provides an undue burden test, a weaker test for evaluating restrictive abortion laws, stating that so long as a State does not place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus", State regulations will survive a constitutional review. *Id.*

<sup>92</sup> Linda J. Wharton, *Preserving The Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317 (2006) ("Supreme Court backed away from affording women the highest level of constitutional protection for the abortion choice"); *see also Casey*, 505 U.S. at 877 (Supreme Court defining that an undue burden is placed on a woman seeking to terminate her pregnancy when "a state regulation has the purpose or effect of placing a substantial obstacle" on the woman and that such a regulation would not be valid because states may not hinder a woman's right). *Id.* *But see Facts on Induced Abortions In The United States*, GUTTMACHER INSTITUTE (Aug. 2011), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf) (Casey's ruling "significantly weakened the legal protections previously afforded women and physicians by giving states the right to enact restrictions that do not create an "undue burden" for women seeking abortion."); The test was weaker because, the restrictions granted to the states "severely limited access to abortion." BLANCHARD, *supra* note 75, at 111.

<sup>93</sup> Bernstein, *supra* note 4, at 1473.

“mandatory waiting periods before an abortion may be performed, parental-consent and parental notification laws, and refusal laws that allow doctors and hospitals to decline to perform abortions.”<sup>94</sup>

Eight years later, in 2000, the Supreme Court in *Stenberg v. Carhart*, debated what would constitute the most humane way to dismember a fetus so that the law would consider this act an abortion rather than a murder.<sup>95</sup> The Supreme Court used the undue burden test, established in *Planned Parenthood* to hold a Nebraska partial-birth abortion<sup>96</sup> ban unconstitutional for two reasons.<sup>97</sup> First, the Court held that because the ban did not include a health exception it inevitably threatened women's health if a woman needed an abortion due to a health reason.<sup>98</sup> Second, the Court held the ban used language allowing abortion to be the most common method for the second trimester and creating an undue burden because it created a substantial obstacle for women seeking abortions.<sup>99</sup> With this ruling, *Stenberg* effectively invalidated a majority of similar bans nationwide.<sup>100</sup>

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<sup>94</sup> *Id.* (listing a number of restrictions placed between a woman and an abortion, to name a few others: “abortions be performed in a hospital after a certain point in the pregnancy or that a second doctor be present for the procedure” as well as “restrictions on public funding of abortions and on private insurance availability.”).

<sup>95</sup> *Carhart*, 530 U.S. at 922.

<sup>96</sup> Nebraska Statute § 28-328(9) defined partial-birth abortion as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Id.* Further the statute defines “partially delivers vaginally a living unborn child before killing the unborn child” as the “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” *Id.*

<sup>97</sup> Dr. Leroy Carhart, a Nebraska physician brought a lawsuit alleging that a Nebraska Statute on partial-birth abortion violated the Constitution and sought an injunction against its enforcement. *Id.* The Statute banned all partial-birth abortions unless the woman seeking one fell within the exception. *Id.* The exception provided that a partial-birth abortion may be carried out if it was necessary to save a woman's life, whether from the pregnancy itself or from some physical disorder, illness of injury. *Id.* The Supreme Court did not revisit the issue of whether a woman has a constitutional right to terminate her pregnancy if she so chooses, instead the Court used its precedent from *Roe* and *Planned Parenthood* to apply to the case in *Stenberg*. *Id.* In applying *Roe* and *Planned Parenthood*, the Supreme Court affirmed the Court of Appeals, stating that the Nebraska Statute was unconstitutional on two reasons: (1) the ban failed to include a health exception; and (2) the ban created an undue burden by forming a substantial obstacle for women seeking abortions during the second trimester. *Id.*

<sup>98</sup> *Carhart*, 530 U.S. at 930.

<sup>99</sup> *Id.*; Dawn Stacey, *D&E (Dilation and Evacuation)*, ABOUT.COM (Apr. 5, 2011), available at <http://contraception.about.com/od/abortion/g/Dande-Dilation-And-Evacuation.htm> (providing that the most common method for abortion in the second trimester is the dilation and evacuation procedure).

<sup>100</sup> Cynthia Dailard, *Courts Strike 'Partial-Birth' Abortion Ban: Decisions Presage Future Debates*, GUTTMACHER INSTITUTE (Oct 2004), <http://www.guttmacher.org/pubs/tgr/07/4/gr070401.html>. Even

In 2004, President George W. Bush signed into law a federal Unborn Victims of Violence Act.<sup>101</sup> The Act protects the unborn child<sup>102</sup> by criminalizing and punishing “as a separate offense, conduct that violates specified federal statutes or military laws, and thereby causes death or bodily injury to an embryo or fetus,” punishing the offender in the same way that the offender would be punished “had the offense been committed against the woman carrying the embryo or fetus.”<sup>103</sup> However, the Act provides a section that excludes abortions from being a punishable offense.<sup>104</sup>

A number of states had their own Unborn Victims of Violence Acts prior to the Act of 2004, but many came on board after.<sup>105</sup> As of November 2011, thirty-seven states across the U.S. currently hold a type of Unborn Victims of Violence Act.<sup>106</sup> These Acts are all similar in nature

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after the Supreme Court struck down the Nebraska Ban, and in effect similar bans throughout the states, President Bush in 2003 had signed a federal Partial-Abortion Ban Act into law but it has yet to have seen any enforcement. *Id.* “The Court, in *Gonzales v. Carhart*, upheld the Act, distinguished it from the Nebraska statute struck down in *Stenberg*, and determined that it neither imposed an undue burden on a woman’s right to choose to have an abortion nor required a health exception. It found that the Act clearly only prohibited one type of abortion, intact D&E, and did not prohibit the D&E procedure where the fetus is removed in parts.” *Id.*; see also, Stacey, *supra* note 99 (explaining the dilation and evacuation abortion procedure). Usually performed after the 12th week of the pregnancy, a dilator is inserted into the cervix in order to help the cervix open up, after which forceps are used to clamp and pull out the fetus, then the lining of the uterus are checked to make sure than no parts of the fetus were left behind. *Id.*

<sup>101</sup> *President Bush Signs Unborn Victims of Violence Act into Law, After Dramatic One-vote Win in Senate*, NATIONAL RIGHT TO LIFE COMMITTEE, (Apr. 6 2004), [http://www.nrlc.org/Unborn\\_Victims/BushsignsUVVA.html](http://www.nrlc.org/Unborn_Victims/BushsignsUVVA.html) (President Bush signing in the federal Unborn Victim of Violence Act also known as Laci and Conner’s Law.); Wendell Goller, *Bush Signs Laci and Conner’s Law*, FOXNEWS.COM, (Apr. 22 2004), <http://www.foxnews.com/story/0,2933,115825,00.html> (naming the Act after Laci and her unborn child Conner Peterson who were brutally murdered by Laci’s husband Scott Peterson).

<sup>102</sup> Amy J. Sepinwal, *Defense of Others and Defenseless “Others”*, 17 YALE J.L. & FEMINISM 327, 339 (2005) (defining unborn child as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”).

<sup>103</sup> *Id.* (protecting violent acts against pregnant women, with the effect of providing a protecting for the unborn child).

<sup>104</sup> Unborn Victims of Violence Act of 2004, Public L. No. 108-212, 90 U.S.C § 1841(c)(1)-(3) (2004), available at <https://www.congress.gov/108/plaws/publ212/PLAW-108publ212.pdf> (excluding abortions from being punishable under the Act).

<sup>105</sup> Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 721 (2006); See also, Ben Johnson, *Law Protecting Unborn Victims of Violence Goes Into Effect Dec. 1 in North Carolina*, (Nov. 30 2011), <http://www.lifesitenews.com/news/law-protecting-unborn-victims-of-violence-goes-into-effect-dec-1-in-north/>.

<sup>106</sup> Johnson, *supra* note 105 (providing that North Carolina was the 37th state to adopt an Unborn Victim of Violence Act).

and provide that the fetus is an unborn child in the womb.<sup>107</sup> Most of the Acts apply to the unborn child at any stage of its development. Some states even go as far as stating that “[f]or purposes of establishing the level of punishment, a victim who is “an unborn child shall be treated like a minor who is under twelve years of age.”<sup>108</sup> In some ways, although the Unborn Victims of Violence Acts came about in order to deter violence against pregnant women, they in effect brought about the classification that killing a fetus is murder, and “and necessarily imply[ing], if . . . not directly stat[ing], that the fetus is a ‘person’ under the law.”<sup>109</sup>

Since the Roman Era, society has gone from viewing abortion as “sinful, immoral, and evil to the idea that abortion is a right and a way of life around which people organize their futures and careers.”<sup>110</sup> For over forty years now, the Supreme Court has consistently held that “[w]omen should have the right to terminate inconvenient pregnancies so that they can emphasize portions of their lives other than childbearing and child raising.”<sup>111</sup>

### III. IDENTIFYING THE PARTIES INVOLVED

Whether an individual has been personally affected by abortion does not change the fact that almost everyone has some sort of observation on how they view its existence.<sup>112</sup> In general and for purposes of this paper, people with opposing views on abortion are divided into two main parties: those who are pro-life<sup>113</sup> and those who are pro-

<sup>107</sup> *State Homicide Laws that Recognize Unborn Victims*, NATIONAL RIGHT TO LIFE COMMITTEE, (July 5 2011), <https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/> (providing a breakdown of twenty-seven out of the thirty-seven states who have adopted an Unborn Victims of Violence Act, and summarizing the states’ individual Acts).

<sup>108</sup> *Id.* (explaining for example that Arizona is one of the states to hold that an unborn child victim is viewed as a minor under the age of 12 under the law in that state).

<sup>109</sup> Juliana Vines Crist, *The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws*, 60 CASE W. RES. L. REV. 851, 853 (2010).

<sup>110</sup> Kalpakgian, *supra* note 12, at 12-13; *See also, Casey*, 505 U.S. at 856. “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Id.*

<sup>111</sup> Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators be Accountable to the Voters?* 39 CREIGHTON L. REV. 695, 710 (2006).

<sup>112</sup> “It is a fact that at least 40 million abortions have occurred since 1973 . . . everyone is touched by abortion, whether they know it or not.” *Who is Affected by Abortion*, RAMAH INTERNATIONAL, <http://www.ramahinternational.org/who-affected-by-abortion.html> (last visited Oct. 13, 2012).

<sup>113</sup> Pro-life refers to persons who oppose abortion. BOONIN, *supra* note 9, at xiii. Pro-life supporters are usually viewed to be on the conservative side, and believe that conception deems the beginning of a human life; therefore, abortion is murder of a human being who has individual rights, separate of

choice.<sup>114</sup> Both sides have lengthy arguments, reasoning why abortion should be made illegal or why it should stay legal.<sup>115</sup> The following subsections will illustrate how pro-life and pro-choice advocates use natural law and positive law in order to justify the argument of abortion in their favor.

### A. Pro-life Stance on Abortion

Individuals most commonly argue against the legal right to an abortion on the claim that a human fetus has an individual right to life.<sup>116</sup> Individuals believe that a fetus is in itself a human being and since human beings have a right to life, a fetus shall have a right to life as well.<sup>117</sup> In accordance with this view, aborting a fetus is killing a human being, and this goes against what people who are pro-life perceive as morally right.<sup>118</sup> Individuals argue that the uncertainty as to when human life begins should be presumed at the time of conception, meaning that a fetus is an individual apart from the woman.<sup>119</sup> Further, they argue while

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those of the mother. *Abortion—Conservative vs. Liberal View*, DIVIDED STATES, <http://www.dividedstates.com/abortion/> (last visited Oct. 13, 2012).

<sup>114</sup> Pro-choice refers to those who support abortion. BOONIN, *supra* note 9, at xiii. Pro-choice supporters are usually viewed to be on the liberal side and usually have the belief that a woman has the right to choose whether to terminate her pregnancy and that a fetus does not have individual rights because it is not a human being on its own. DIVIDED STATES, *supra* note 113.

<sup>115</sup> C. Fletcher Armstrong, *Pro Life vs. Pro Choice: An Introduction to the Debate* (2009), available at [http://www.prolifeoncampus.com/dynamic\\_pages?page=Pro%20Life%20Vs%20Pro%20Choice%3A%20An%20Introduction%20to%20the%20Debate&id=11](http://www.prolifeoncampus.com/dynamic_pages?page=Pro%20Life%20Vs%20Pro%20Choice%3A%20An%20Introduction%20to%20the%20Debate&id=11) (providing a list of arguments on each side of pro-choice and pro-life)

<sup>116</sup> BOONIN, *supra* note 9, at 14.

<sup>117</sup> *Id.* at 15.

<sup>118</sup> SUMNER, *supra* note 5, at 17-18.

<sup>119</sup> *When does human life begin?* PROLIFEPHYSICIANS.ORG, <http://prolifephysicians.org/app/?p=62> (last visited Oct. 8, 2015). "According to [an] elementary definition of life, life begins at fertilization, when a sperm unites with an oocyte. From this moment, the being is highly organized, has the ability to acquire materials and energy, has the ability to respond to his or her environment, has the ability to adapt, and has the ability to reproduce (the cells divide, then divide again, etc., and barring pathology and pending reproductive maturity has the potential to reproduce other members of the species). Non-living things do not do these things . . . . Genetically, a new human being comes into existence from the earliest moment of conception." *Id.*

the stage when human life begins may be uncertain, it is a sin to kill and this includes the killing of a fetus.<sup>120</sup>

In order to argue that a fetus' rights should be protected, individuals rely on one of natural law's fundamental inclinations: the continuation of life, to care and provide for one's offspring.<sup>121</sup> First, the life growing inside the mother must be considered a human being. Examining Aquinas's theory on the conception of the soul and how the soul correlates with human creation provides an assessment as to when such human life begins.<sup>122</sup> Due to the era in which Aquinas lived, he lacked the knowledge that modern science and technology provides today.<sup>123</sup> Therefore, according to Aquinas "human life began and ensoulment took place, not at conception, but some time later, probably 40 days later for males and 80 for females," which has been referred to as the moment of quickening.<sup>124</sup> However, if Aquinas were living in today's modern world, he would have accepted the "scientific reality that human life begins at fertilization" and therefore would have held abortion as a homicide from the moment the soul enters the fetus which today happens simultaneously with fertilization at conception.<sup>125</sup>

More recently, individuals have argued that abortion is in contradiction with the Unborn Victims of Violence Acts<sup>126</sup> across the country. These Acts provide that the murder of an unborn child during a crime on the expecting mother is a punishable crime.<sup>127</sup> At the same time, positive law today allows women the right to choose to terminate their pregnancy, in other words murder their unborn child without

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<sup>120</sup> "Abortion always involves "the deliberate and direct killing . . . of a human being in the initial phase of his or her existence." Thus, society must resist the temptation to engage in obfuscation and denial. Instead, we must "have the courage to look the truth in the eye and to call things by their proper name. "The hard truth that abortion calls us to "recognize [is] that we are dealing with murder" because "[t]he one eliminated is a human being at the very beginning of life." John H. Breen, *Modesty and Moralism: Justice, Prudence, Abortion – A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL'Y 219, 248 (2008).

<sup>121</sup> See *supra* text accompanying note 56.

<sup>122</sup> WESTON, *supra* note 18, at 62.

<sup>123</sup> CHARLES E. RICE, *THE WINNING SIDE: QUESTIONS ON LIVING THE CULTURE OF LIFE* 75-76 (St. Brendan's Institute 2000) (1999).

<sup>124</sup> RICE, *supra* note 123, at 76; see *supra* note 75 (defining quickening).

<sup>125</sup> *Id.*

<sup>126</sup> Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 90 U.S.C § 1841 (2004), available at <https://www.congress.gov/108/plaws/publ212/PLAW-108publ212.pdf>; See *supra* text accompanying note 101.

<sup>127</sup> Crist, *supra* note 109, at 853.

punishment.<sup>128</sup> Pro-life scholars suggest that "it makes no sense for courts to say an 'abortion' of an unborn child is legal, but the 'wrongful death' of the same child by someone other than the mother is not legal."<sup>129</sup> There are still individuals that strictly follow the view from a natural law prospective, arguing that the fetus should be saved no matter what because it is a sin to kill.<sup>130</sup>

### *B. Pro-choice Stance on Abortion*

Pro-choice advocates most commonly argue in favor of the right to an abortion on the claim that a woman's right to choose whether or not to terminate her pregnancy is a fundamental right provided by the U.S. Constitution.<sup>131</sup> They also use the uncertainty as to when human life begins, arguing that the fetus is just another part of a woman's body, and not a human being; therefore abortion is not the killing of a child.<sup>132</sup> These advocates suggest that although a fetus has potential to become a human being, like a blue print to a house, the fetus does not have a mind of its own and cannot yet think.<sup>133</sup>

Pro-choice advocates argue that everyone has a right to make choices to their body, so a woman should not be denied her sole rights to the freedom of reproduction.<sup>134</sup> In this regard, pro-choice advocates use

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<sup>128</sup> *Id.* The argument made by individuals basically asks, if three-fourths of the States recognize a fetus as a person in order to charge someone of murder of the fetus during a crime, why is it okay for a woman to commit that murder, and better yet, why is the fetus then not recognized as a person having a right to live.

<sup>129</sup> Crist, *supra* note 109, at 853.

<sup>130</sup> It is always wrong to intentionally kill another because "the basic good of human life gives rise to a moral norm which singles out and forbids all actions contrary to it . . . human reason has a natural inclination to understand that life is "a good to be pursued" and that which is contrary to it "a bad to be avoided." Christian Brugger, *Aquinas and Capital Punishment: The Plausibility of the Traditional Argument*, 18 NOTRE DAME J. L. ETHICS & PUB POL'Y 357, 362 (2004). Therefore "intentional destruction of human life is a bad to be avoided." *Id.*

<sup>131</sup> "[R]ight of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

<sup>132</sup> RANDY ALCORN, PRO-LIFE ANSWERS TO PRO-CHOICE ARGUMENTS (Multnomah Publishers, 2000) (1999).

<sup>133</sup> ALCORN, *supra* note 133 (analogizing that a fetus must develop into a human being like a blue print must be developed into a house before it can stand on its own).

<sup>134</sup> See generally *Roe*, 410 U.S. at 152-153 (1973) (although the Constitution does not outwardly provide for an explicit right to privacy, the Supreme Court in an array of decisions dating back as far as 1891, has acknowledged that "a right of personal privacy, or a guarantee of certain areas or zones of

one of natural law's fundamental inclinations, self-preservation, to argue that a woman has a right to privacy about her decision to have an abortion.<sup>135</sup> "The existence of rights rests on natural law. Not only is it true that human beings have rights, but these rights are entailed by man's nature."<sup>136</sup> Pro-choice advocates hold that a woman's right to privacy is part of her right to self-preserve herself and her quality of life; including the woman's choice to terminate her pregnancy.

Pro-choice advocates are not of the opinion that the Unborn Victims of Violence Acts provides that the fetus is viewed as a human being.<sup>137</sup> In their view, these Acts reflect "ambivalence about the status of the unborn insofar as it exempts harm to the fetus caused by its mother's conduct . . . demoti[ng] embryos and fetuses to the status of less-than-persons . . ."<sup>138</sup> In fact, pro-choice advocates are not against the Acts, and on the contrary hold that the Acts provide a balance allowing a woman a right to chose and at the same time protecting the woman from harm's way of a third-party.<sup>139</sup>

These advocates are especially adamant about having the right to an abortion when the woman's health or extreme circumstances are involved.<sup>140</sup> Pro-choice advocates argue that women facing health risks should freely be able to get abortions, and women who have been raped or subject to incest should not have to live with the trauma incurred after such a psychological and physical invasion of the body.<sup>141</sup> In addition, pro-choice advocates make a point to emphasize that abortions today are

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privacy, does exist under the first, fourth, fifth, fourteenth and fifteenth amendments of the Constitution).

<sup>135</sup> ALCORN, *supra* note 133.

<sup>136</sup> Hadley Arkes, *Natural Rights and the Right to Choose*, MISES REVIEW VOL.8 NUM.4 (2002), available at [http://mises.org/misesreview\\_detail.aspx?control=221](http://mises.org/misesreview_detail.aspx?control=221).

<sup>137</sup> Amy J. Sepinwal, *Defense of Others and Defenseless "Others"*, 17 YALE J.L. & FEMINISM 327, 344 (2005)

<sup>138</sup> *Id.* at 339.

<sup>139</sup> "[T]he position embodied in many criminal codes that feticide is murder in some circumstances and legal abortion in others balances a pregnant woman's right to make a choice that affects her body and life in profound ways with the need to punish a third-party killer who has no legitimate interest in causing the death of the fetus." Ramsey, *supra* note 105 at 724.

<sup>140</sup> *Abortion Bans without Exceptions Endanger Women's Health*, NARAL PRO-CHOICE AMERICA, available at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-no-exceptions-endanger-women.pdf> (last visited Nov. 12, 2012) (describing in depth and arguing for abortion when there are certain health risks to the expecting mother).

<sup>141</sup> ALCORN, *supra* note 133. Austin Ruse, *Reflections on Rape and Abortion* (Aug. 24, 2012), available at <http://www.thecatholicthing.org/2012/08/24/reflections-on-rape-and-abortion/> (explaining that some have argued and research has shown that forcing a woman to carry the child of a rapist or as result of incest, will cause an emotional and psychological trauma which may even cause the mother to see the baby as a threat to her life).

easily performed and the health risks that were associated with abortions have substantially decreased over the years; therefore, striking down individuals who preach that abortions pose serious health risks for the women during and in the aftermath of the procedure.<sup>142</sup>

#### IV. PROJECTING FUTURE TRENDS

When the Supreme Court made abortion legal in 1973, the opinion provided a seven to two majority decision, with three justices concurring on different issues.<sup>143</sup> The decision in *Roe* was held by five republican appointed justices and two democratic appointed justices.<sup>144</sup> However, as the justices of the *Roe* decision retired and new ones were appointed by different Presidents, the Supreme Court cut down its aggressive approach on limiting state regulation on abortion.<sup>145</sup> Today, the justices who made up the *Roe* decision are no longer on the bench.<sup>146</sup>

As of early 2006, “[f]ifteen of the nineteen justices who have served on the Supreme Court since the *Roe* decision, have voted to uphold it.”<sup>147</sup> Since 2006, two new justices were appointed by President Barack Obama: Sonia Sotomayor (“Sotomayor”) in 2009 and Elena Kagan (“Kagan”) in 2010.<sup>148</sup> In their recent capacity as Supreme Court Justices, neither Sotomayor nor Kagan have yet to decide on a case dealing with

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<sup>142</sup> *Facts on Induced Abortion in the United States*, GUTTMACHER INSTITUTE (Aug. 2001), available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html#11](http://www.guttmacher.org/pubs/fb_induced_abortion.html#11) (providing from a source in 1999, that the risks associated with abortions were reported to be fewer than 0.3%).

<sup>143</sup> *Roe*, 410 U.S. 113 (1973).

<sup>144</sup> Policraticus, *Were Republican-appointed Justices who favored Roe in 1973 “liberal”?* (May 22, 2008), available at <http://vox-nova.com/2008/05/22/were-republican-appointed-justices-who-favored-roe-in-1973-liberal/> (providing that at the time of the *Roe* decision, the justices on the Supreme Court were made up of six republican appointed justices and three democratic appointed justices); see, *Roe*, 410 U.S. 113. Harry A. Blackmun wrote the majority opinion, joined in by Warren E. Burger, William O. Douglass, William J. Brennan Jr., Potter Stewart, Thurgood Marshall, and Lewis F. Powell, Jr. *Id.* However, Burger, Douglas and Stewart wrote concurring opinions on some issues. William H. Rehnquist and Byron R. White dissented. *Id.*

<sup>145</sup> *What the Supreme Court Has Said about Abortion*, NATIONAL RIGHT TO LIFE NEWS VOL. 33, I 1 (Jan. 2006), available at <http://www.nrlc.org/news/2006/NRL01/HTML/SCAboutAbortionPage11.html> (providing that the Supreme Court was aggressive in limiting state abortion regulation from 1973 after the decision of *Roe*, up until the mid 1980s.).

<sup>146</sup> *Id.*

<sup>147</sup> Wilson, *supra* note 111, at 714.

<sup>148</sup> *Supreme Court Justices*, ON THE ISSUES: EVERY POLITICAL LEADER ON EVERY POLITICAL ISSUE, available at <http://court.ontheissues.org/Court/Court.htm> (last visited Nov. 12, 2012).

abortion.<sup>149</sup> However, Justice Sotomayor, in her previous capacity as a Judge for eleven years, had “never ruled directly on whether the Constitution protects a woman's right to an abortion” and Justice Kagan is thought to follow the view on abortion after her mentor, former Justice Thurgood Marshall, who was part of the majority in the original *Roe* decision and “strongly supported the right to an elective abortion and even believed that states should be compelled to fund elective abortions for indigent women.”<sup>150</sup> Today, conservatives and liberals, democrats and republicans alike appear to presume that both Sotomayor and Kagan, if presented with the chance, will uphold the decision in *Roe*.<sup>151</sup>

Therefore, today the Supreme Court is made up of justices who primarily have already upheld *Roe*, or will likely uphold it in the future.<sup>152</sup> Based on this, abortion will continue to stay legal. Justice Blackmun, who wrote the majority opinion in *Roe*, sixteen years later in a dissent of a 1989 case, asserted that abortion, may not be legal for long.<sup>153</sup> “For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”<sup>154</sup> However, as the Supreme Court stands today, abortion may continue to be legal much longer than Justice Blackmun predicted.

Inevitably, abortion laws will continue to contradict natural law's fundamental principles of the continuation of life. According to Aquinas, when positive law contradicts natural law, it should not be considered

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<sup>149</sup> Avalon Johnston, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 37 AM. J. L. AND MED. 652, 665 (2011).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, available at <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 1, 2013) (providing a background on the current justices of the Supreme Court, John G. Roberts, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel Anthony Alito Jr., Sonia Sotomayor and Elena Kagan).

<sup>153</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 560 (1989) (holding that none of the challenged provisions of a Missouri legislation that placed a number of restriction on abortions were unconstitutional). The legislation provided a preamble which stated that “[t]he life of each human being begins at conception, and the law codified . . . public employees and public facilities were not to be used in performing or assisting abortions unnecessary to save the mother's life; encouragement and counseling to have abortions was prohibited; and physicians were to perform viability tests upon women in their twentieth (or more) week of pregnancy.” *Id.* at 501.

<sup>154</sup> Robert J. Araujo, *Abortion, Ethics, and the Common Good: Who are We? What Do We Want? How Do We Get There?*, 76 MARQ. L. REV. 701 (2003) (asserting in a 1989 case that abortion may not be legal in the long run, but as of today, the long run still seems far away); see also *Webster*, 492 U.S. at 560.

law at all.<sup>155</sup> Meaning that its contradiction makes it an unjust law from a moral standpoint and therefore such law “do[es] not bind the conscience . . .”<sup>156</sup> However, “[p]ositive laws have their peculiar force, vigor, from the fact that they have been instituted by human authority . . . they are arbitrary in the sense that they could have been different, but the fact that they have been enacted is the immediate reason why they are obeyed.”<sup>157</sup> Therefore, society will continue to follow that abortion is legal until the balance of the Supreme Court is such that *Roe* can be overturned.

## V. EVALUATION AND RECOMMENDATION

According to the theories set out by Aquinas and his view of the reason leading man on the path to the ultimate end, both sides of abortion have attempted to justify their view as the correct one. Aquinas explained that man’s reason and law would lead the individual and the community to the “ultimate happiness.”<sup>158</sup> Each individual has a goal to reach the good and each individual is part of the community, which seeks the common good. Therefore, it follows, in order for individuals to achieve reaching their good they must be following a law that is in essence concerned with the common good of the community. The law currently followed goes against the common good. Therefore, the ultimate end will never be achieved for society.

Taking into account Aquinas’ theory which sets out the most basic fundamental principle from all other principles derived, that good is to be done and evil is to be avoided, the reasoning used by individuals justifying that abortion should not be legal is clear.<sup>159</sup> The killing of

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<sup>155</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 95, a. 2.

<sup>156</sup> Soper, *supra* note 49, at 2396.

<sup>157</sup> Daniel Westberg, *The Relation Between Positive and Natural Law in Aquinas*, 11 J.L. & RELIGION 1, 6 (1995).

<sup>158</sup> SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 90, a. 2.

<sup>159</sup> An example of how principles are derived from the fundamental principle:

Many proponents and critics of Thomas Aquinas’s theory of natural law have understood it roughly as follows. The first principle of practical reason is a command: Do good and avoid evil. Man discovers this imperative in his conscience; it is like an inscription written there by the hand of God. Having become aware of this basic commandment, man consults his nature to see what is good and what is evil. He examines an

another is an evil; therefore it should be avoided. According to current scientists and theologians, a fetus is considered life at the time of conception; killing a fetus is killing another life and goes against the most fundamental principal. In addition, one of the main principles that derive from doing good and avoiding evil is that as individuals and as a society, there is an innate inclination to continue life, to care and nurture offspring.<sup>160</sup> Justifying that abortion is plain wrong, individuals follow that abortion, by ending the life of a fetus is in contradiction of the inclination to continue life.

On the other hand, implementing Aquinas' explanation of the common good, the reasoning used by pro-choice advocates reveals that they see a woman's right to privacy as the good that will lead to the ultimate end because the right to privacy ties in with the ability to self-preserve. The right to privacy extends to the right to choose to terminate a pregnancy, in effect providing women with the power to do what they will with their bodies. Therefore, a woman may chose to preserve herself over the fetus she is carrying, or to preserve her own quality of life. Pro-choice is justified in the sense that by promoting self-preservation, it is also promoting the common good of society because women will be able to have the quality of life they seek.

However, after looking at the justifications of both pro-life and pro-choice, it is in this author's opinion that pro-choice advocates' reason has been perverted and they are pursuing a false good.<sup>161</sup> "[N]o one should act for the purpose of harming (one or another aspect of) the well being of another, because to do so would be to act contrary to the

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action in comparison with his essence to see whether the action fits human nature or does not fit it. If the action fits, it is seen to be good; if it does not fit, it is seen to be bad. Once we know that a certain kind of action—for instance, stealing—is bad, we have two premises, "Avoid evil" and "Stealing is evil," from whose conjunction is deduced: "Avoid stealing." All specific commandments of natural law are derived in this way.

Germain Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae*, 1-2, Question 94, Article 2, NLRAC.ORG (1965), available at <http://www.nlnrac.org/contemporary/new-natural-law-theory/primary-source-documents/first-principle-of-practical-reason>.

<sup>160</sup> *Supra* text accompanying note 56.

<sup>161</sup> "[I]n some the reason is perverted by passion, or evil habit, or an evil disposition of nature." SUMMA THEOLOGICA, *supra* note 14, at I-II, q. 94, a. 4. Society that sides with pro-choice has become perverted because they have chosen social convenience over life.

requirement “of fundamental impartiality among the human subjects who are or may be partakers of [the basic human goods].”<sup>162</sup>

The author of this paper holds that individuals’ reason is in fact a true good because it is in sync with the view of natural law followed and provided by Aquinas. The abortion law is unjust because it violates God’s eternal law of protection of innocent life, as well as, contradicting with the fundamental inclination under natural law to continue life, therefore, any attempt to end life after conception is a violation of natural law.

Furthermore, although abortion should be illegal because it contradicts natural law, there are three circumstances in which abortion should be permitted. These three circumstances are in cases of rape, incest or when the expecting mother is in danger of a viable health risk. This author holds that a greater common good exists in preserving the physical and psychological well being of a woman faced with one of these circumstances, than the good that exists in the continuation of life.

This author provides that women who have been subjected to rape or incest should be free to terminate their pregnancy if they so choose. The reason for this is because these women involuntarily are forced to endeavor a mentally exhaustive and psychologically traumatic experience; it would be detrimental if they were forced to keep the outcome of this ordeal. There is a good preserved reason allowing women in these situations to have an abortion. The author agrees with pro-choice advocates in this matter because the fundamental inclination to self-preserve the woman’s quality of life by aborting a fetus of rape or incest in the long run will benefit the common good of society. The author elaborates that if women are to be forced to carry to term, the scaring from the initial ordeal may worsen, the pregnancy would be a constant reminder, and the mental health of the woman could worsen, as well as play an effect on the surrounding community. Individuals are compared to the community as a whole. A child from the product of a rape or incest does not affect only the mother, but the society around her as well. Therefore, a rape or incest victim should be able to terminate her pregnancy because by preserving the psychological well being of the individual, by not making the woman go through with the pregnancy, the common good of society as a whole is being preserved.

However, abortion due to rape or incest should not be absolute. At a certain point, the mother must take the scaring and deal with it,

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<sup>162</sup> Perry, *supra* note 64, at 131. See also FINNIS *supra* note 26, at 107.

putting the child ahead of the incident of rape itself. It is in this author's opinion that once the child is able to sustain life on its own if taken out of the womb early, even if with help of machines, then it is too late for an abortion. This provides the victim of rape or incest a viable time frame in which she can make a decision that will best suit her.

In addition, it is in this author's opinion that although abortion should be illegal, it should be available to a woman who is in a circumstance of viable health risks due to her pregnancy. In this situation, the author follows the theory of self-defense provided by Aquinas. According to Aquinas, it is lawful to cut off a decaying limb in order to preserve the whole body.<sup>163</sup> Therefore, a woman should lawfully be able to terminate her pregnancy when the fetus presents health risks that jeopardize the woman's body and her life. When there exists a health risk, the fetus is considered an innocent aggressor. For instance, if a person of mental incapacity is running at you with a knife and to protect yourself you must shoot him, that would be an example of killing an innocent aggressor. Therefore, following Aquinas, it is morally justifiable to kill an innocent aggressor if that is the only way to defend a person's life.<sup>164</sup>

Some individuals will argue that allowing abortions for any reason goes against natural law and therefore should not be upheld.<sup>165</sup>

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<sup>163</sup> SUMMA THEOLOGICA, *supra* note 14, at II-II, q. 64, a. 2, 5. "For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away." *Id.* at II-II, q. 64, a. 5.

<sup>164</sup> "Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible." SUMMA THEOLOGICA, *supra* note 14, at II-II, q. 64, a. 6-7 (asserting that it is unlawful to kill an innocent person unless it is done in self-defense).

<sup>165</sup> See *infra* Section ii. Pro-choice Stance on Abortion. "An unborn child is a unique human being who, by nature, is the bearer of certain rights. . . among them the right to life, may never be abrogated, not even in furtherance of another good, attempting to ease the terrible pain of a rape victim." Ruse, *supra* note 142. Norma McCorvey, who was "Jane Roe" in *Roe v. Wade*, and once hailed her legal victory as "the beginning of a glorious era of women's reproductive freedom and happiness," had in the intervening years become a noted antiabortion activist. Thirty years after *Roe*, she requested . . . [to] vacate *Roe* based on the argument that women are psychologically traumatized by abortion. Affidavits featured women's claims of trauma and of coercion to have abortions. She argued that "because most women injured in abortion are not able to deal with the psychological issues until decades after the abortion, it has taken long periods of time for women to . . . be able to testify as to the physical and psychological effects of abortion." The implication was that the period of delay corresponded to a period of traumatic repression. Though unsuccessful . . . the case produced a concurring opinion that acknowledged that "studies by scientists . . . suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions." Jeanie Suk, *The Trajectory of Trauma*:

Meanwhile, pro-choice advocates will argue that this resolution as a whole will infringe on women's rights to choose what to do with their bodies, but they will agree that abortion should be allowed in the three circumstances mentioned.<sup>166</sup>

Finally, this author holds that natural law must be followed in order for individuals and the community to reach the ultimate end. Society as a whole must strive to continue life, to nurture and care for their offspring and that includes the offspring in the making. However, society must allow the choice to terminate a pregnancy to those women who fall under the three categories of rape, incest or viable health risks.

"The Supreme Court's legalization of abortion has undermined the philosophy of God-given rights that made our progress as a nation possible."<sup>167</sup> The founding fathers of the U.S. have once "embraced natural law", but "few legal thinkers do so today".<sup>168</sup> Luckily, natural law once held a high place in the American legal system and may again return to that high place if society is put back on its track towards the ultimate end.<sup>169</sup> "The purpose of law is to lead man to virtue, and, ultimately, to a better understanding of God and nature."<sup>170</sup> Therefore, lawmakers hold the burden to make sure that the laws individuals follow are in accordance with the common good for the community as a whole.<sup>171</sup>

Ronald Reagan once said, "Evil is powerless if the good are unafraid."<sup>172</sup> Let society not be afraid to strive towards the ultimate end any longer and then "perhaps within some our lifetimes, we will see

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*Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1231-32 (2010) (noting that abortion in itself is a traumatizing act).

<sup>166</sup> GALLUP.COM, *see supra* note 130.

<sup>167</sup> Cliff Kincaid, *Abortion and America's Future* (Jan. 2008), available at <http://www.aim.org/special-report/abortion-and-americas-future/>.

<sup>168</sup> Arkes, *supra* note 137.

<sup>169</sup> Wayne House, *Influence of the Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the United States Constitution*, 2 LIBERTY U. L. REV. 725, 728 (2008) [hereinafter *Natural Law Influence on Constitution*]. As early as 1798, the Supreme Court has recognized natural rights from natural law during its decision making, "claim[ing] that even laws not expressly restrained by the Constitution" should be struck down if they violate natural rights. *Id.*

<sup>170</sup> Gregory, *supra* note 15. "[N]ature inclines us toward good habits, but it is not without our own efforts, the prompting of our parents, and the precepts of the law that we are able to acquire the proper habitual disposition. Success in doing so puts us in the possession of moral virtue." *Id.* at 396; See also, ST. THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS XIX (William P. Baumgarth & Richard J. Regan, S.J. eds., 1988).

<sup>171</sup> Gregory, *supra* note 15; See also Westberg, *supra* note 158, at 6.

<sup>172</sup> Ronald Reagan on Foreign Policy, ON THE ISSUES, [http://www.issues2000.org/celeb/ronald\\_reagan\\_foreign\\_policy.htm](http://www.issues2000.org/celeb/ronald_reagan_foreign_policy.htm) (last visited Nov. 5, 2012).

(even if we do not enter) the promised land in which every human being is welcomed in his or her most fundamental right - the right to live."<sup>173</sup>

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<sup>173</sup> Paulsen, *supra* note 43, at 55.