IN DEFENSE OF ANOTHER: THE PAUL HILL BRIEF

On July 29, 1994, an assailant shot and killed an abortion doctor and his escort outside an abortion clinic in Pensacola, Florida. Paul Hill was arrested and charged with the murder. Prior to trial, the state filed a motion in limine seeking to exclude the use of a justifiable homicide defense. Hill's pro se response argued that he was entitled to present the defense of others justification under Florida statutory law. The prosecution's motion was granted by Circuit Judge Frank Bell. On November 2, 1994, Hill, who offered no other defense, was found guilty of both murders after twenty minutes of jury deliberation.

Paul Hill's brief is a personalized version of a student Comment written by Michael Hirsh and originally scheduled for publication in the Regent University Law Review, Volume 4, Spring 1994. The Comment was itself an adaptation of a master's thesis written by Hirsh over a period of several years beginning in 1990. After Michael Griffin shot and killed an abortionist at a Pensacola clinic on March 10, 1993, Hirsh adapted his completed thesis to Florida law and offered it for publication in the Law Review. His Comment was titled, "Use of Force in Defense of Another: An Argument for Michael Griffin."

For Hirsh, the article was intended to be a purely theoretical legal exercise.[1] In a footnote to the original unpublished article, Hirsh said:

> Some will argue that letting Michael Griffin offer the defense of another defense will allow open season on anyone who performs abortions; people will come out of the woodwork and shoot abortionists. This simply will not happen. The events of March 10, 1993 in Pensacola are unique.... The state initially sought the death penalty in this case. Self-defense and defense of another are affirmative defenses that are very fact specific. The price of being incorrect on one's facts is a high one, a price that no one is anxious to

1. *"Theoretical" Article Tied to Killing at Clinic*, RICHMOND TIMES-DISPATCH, Dec. 25, 1994, at A14.

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> pay. There will be no flood of participants, willing to risk their own lives.[2]

Ironically, the Law Review which contained Hirsh's article was released from the printer the week after the second tragic murder. By that time Hirsh, who had forgotten all about the article,[3] was no longer a student, but an attorney working for the American Center for Law and Justice in Virginia Beach, Virginia.[4] In a second ironic twist, Hirsh was representing Paul Hill in an unrelated case involving a peaceful abortion protest.[5]

An editorial decision was made to reprint the Spring issue without the Hirsh article.[6] Instead, the Law Review solicited an article from Professor Charles Rice on the same topic, but from a different perspective. The Rice article follows this brief, together with a comprehensive student article analyzing justifiable homicide in defense of others in all fifty states.

After Hill was denied the use of the defense, Hirsh offered to represent him on the murder charge "out of compassion" and was fired by the ACLJ.[7] The Virginian-Pilot had earlier reported on the connection between the unpublished Law Review article and Paul Hill:

> Hirsh said he didn't discuss the article with Hill before or after the July clinic shootings and hasn't been asked to represent him. But Hirsh said he was "quite honored" that his work was being used apparently by Hill himself, although the judge in the case denied Hill's request to argue justifiable homicide.[8]

By publishing Hill's brief, the Regent University Law Review does not endorse the killing of abortionists. The legal community understands the difference between offering a legal defense and condoning a crime. Therefore, the Law Review has

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2. Michael R. Hirsh, *Use of Force in Defense of Another*, Regent U. L. Rev., Spring 1994, (unpublished) at 136-37 n.109.

3. *"Theoretical" Article Tied to Killing at Clinic, supra* note 1.

4. The American Center for Law and Justice (ACLJ) is housed in the Regent University Law School building in Virginia Beach, Virginia.

5. *See* Matthew Bowers, *Abortion: Only a Few Copies of Article Reach the Public*, VIRGINIAN-PILOT AND LEDGER-STAR, Nov. 1, 1994, at B6; Eric Lipton, *Law Review Cancels Abortion Article*, WASH. POST, Aug. 23, 1994, at B2.

6. *See, "Theoretical" Article Tied to Killing at Clinic, supra* note 1.

7. *Id.*

8. Matthew Bowers, *CBN Fires Hirsh Over Conflicting Views, Not Article*, VIRGINIAN-PILOT AND LEDGER-STAR, Nov. 2, 1994, at B3.

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decided to publish this brief balanced by the articles which follow it.

THE EDITOR

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE STATE'S MOTION IN LIMINE

INTRODUCTION

On July 29, 1994, John Britton and James Barrett (decedents) were shot as they entered The Ladies Center abortion facility (Center). Britton was the abortionist and Barrett was his bodyguard. Barrett's wife was also injured. Paul Jennings Hill has been charged in the shootings.

Assuming for argument only that Paul Hill acted as charged in the indictments, this memorandum presents the arguments that could be made that Paul Hill was justified. Nothing contained herein is an admission to any charge, but such statements are made only for argument. This caveat applies throughout this memorandum to all statements.

The state has subsequently filed a motion in limine to prevent the defendant from presenting evidence of defense of another. This brief is filed in opposition to the state's motion. Without admitting any of the allegations in the state's indictment or subsequent pleadings, Paul J. Hill opposes the state's motion, which is an attempt to suppress relevant evidence that legitimately supports a right of self defense on behalf of others. Further, the motion is an attempt by the state to assuage its own guilty conscience for its failure to protect unborn human life. This failure itself makes the state complicit in the brutal destruction of unborn human life. Under a natural law jurisprudence, such complicity makes the state an accessory to murder. As discussed below, the state's motion must be denied.

Abortion takes the life of an innocent human being, the unborn child. In addition to attending seminars where the scientific and medical fetal development was explained, Hill has been informed through video and audio tape lectures of this fact. Many of these seminars and lectures included intrauterine pic-

tures of unborn children graphically portraying fetal gender, development, and motion. As Paul Hill learned, and the Florida Supreme Court recognized:

> A viable fetus is a human being, capable of independent existence outside the womb; a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death; such a situation favors the wrongdoer who causes death over the one who merely causes injuries, and so enables the tortfeasor to foreclose his own liability.[1]

The fact that several unborn human beings were scheduled to be killed at the Center on July 29, 1994 at the hands of the decedents, is not in dispute.

Had the decedents attempted to do to Paul Hill what they were planning to do to unborn children that day, Hill could have responded with deadly force to repel the attack. These unborn children, children who medically, scientifically, and logically were in imminent peril, needed a defender. The children scheduled to die by the decedents' hands survived that day.

At trial, Paul Hill could present evidence proving that he acted in defense of another. Statutes, case law, and history would support such a claim. In addition to denying a Defendant the opportunity to offer a reasonable defense, the state's motion runs counter to the current of statutory law, case law, and historic jurisprudence. Therefore, the state's motion must be denied.

STATEMENT OF FACTS

Florida statutes and case law permit the use of force in the defense of another. The state's motion invades the province of the jury, denies a potential statutory defense, and interferes with a just verdict. Thus, the motion in limine must be denied.

A defense of justification, whether in a spouse abuse case or an abortion case, conforms with historical precedent and the Rule of Law. This fact alone provides a sufficient basis to deny the state's Motion.

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1. Stern v. Miller, 348 So. 2d 303, 306 (Fla. 1977) (seven-month-old unborn child killed in an automobile accident caused by another's negligence).

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In self defense and defense of another, Florida statutes declare that the character of the decedent is relevant.[2]

Abortion, as legalized by *Roe v. Wade*,[3] is the killing of an unborn human being. A ruling that the unborn human being is not a person under the U.S. Constitution, like the slave once was, is not a finding that the human unborn is not a human life. Even the Supreme Court is bound by reality. A slave human being had the right of self defense and self preservation.[4] So does an unborn human being.[5] A self defense right can be exercised by others and, when so done, the Rule of Law applies to the legal defense.

In the February 1994 issue of *GQ* magazine, a portrait of the character of the decedents is drawn and those facts are relevant. Making either abortion or prostitution legal does not change the nature of abortionists or pimps even if they are called providers and given country club memberships.

Behold the abortion providers:

[EDITOR'S NOTE: The brief quoted sixteen paragraphs from the G.Q. article.[6] The article describes John Bayard Britton or "Doc" as a man who "is not pure. He is 68 years old, and his aspect can be wolfish."[7] Junod writes:

> There is an NRA sticker on his briefcase, and a .357 magnum in a box on the seat of his truck. Since the murder of David Gunn, he views all the Christian protesters as potential assailants and believes that if they come on his property with the intention of doing him harm, he should have the right to shoot them. At the clinic in Pensacola, the protesters congregate behind a tall wooden fence, and Doc Britton sometimes speaks, with a smile, of taking target practice through the knotholes.[8]

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2. FLA. STAT. ANN. § 90.404(1)(b)(1) (West 1993).

3. 410 U.S. 113 (1973).

4. *See* Dave v. State, 22 Ala. 23 (cited in SLAVES 80 C.J.S. § 8(a)).

5. Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964) (unanimous New Jersey Supreme Court recognizing the right of a 32-week-old unborn child to a blood transfusion against the mother's wishes). *See also* (post-*Roe v. Wade* rulings) Jefferson v. Griffin-Spalding County Hosp. Auth., 274 S.E.2d 457 (1981) (Caesarian section ordered to preserve life of 39- week-old unborn child); United States v. Denoncourt, 751 F. Supp. 168 (D. Haw. 1990) (pregnant woman given probation rather than prison in deference to her unborn child's rights and interests).

6. Tom Junod, *The Abortionist*, GQ, Feb. 1994, at 152, 154, 155-56 and 190-91.

7. *Id.* at 152.

8. *Id.*

Britton told Junod why he began to do abortions: "I made a living doing abortions . . . . I did them because I thought they should have been done; I wouldn't have done them otherwise. But I will say I had no money to feed my family . . . ."[9]

Junod goes on to describe a day in the life of Doc Britton as he travels to the Ladies Center in Pensacola whistling "Ode to Joy" from Beethoven's Ninth Symphony.[10] Meanwhile, outside the clinic, Junod notes:

> Jim [Barrett, Doc's bodyguard who was also killed by Paul Hill] takes out his gun box and places it on the deck outside the clinic's entrance. He looks at the fence, where the Christians usually come. "I like to keep an eye on those peckerheads," he says. "I didn't go to Korea and serve my country for twenty-five years in the service so that these peckerheads can shoot doctors. It won't happen as long as I'm around. I do not miss. These hands are small but I know where to put them. I have survived this long because I shoot first. I was sent home from Korea because I taught that to the 357 men I brought over there. [My superiors] thought my hyperaggressiveness was not in keeping with the military effort. But of the 357 I brought to Korea, 356 came home.[11]

Junod describes Britton getting ready for his first abortion of the day, putting his hands into his rubber gloves, lubricating them with jelly, and bantering with the young girl on the examining table as he examines her cervix.[12] Junod notes that Britton has been performing abortions for over twenty years:

> As soon as the Supreme Court wrote Roe v. Wade into law, he applied some heat to the shaft of a ballpoint pen, fashioned it into a cannula (the stiff tube that's inserted through the cervix during an abortion), attached the cannula to a hose and the hose to a small vacuum and went into business. In the Ladies Center, although the cannula is a long plastic tube, rather than the body of a ballpoint pen, and the vacuum is a large beige box fitted with hoses and gauges, rather than a small gray cylinder, there is something ramshackle about Doc, something improvisatory and unsettled.[13]

The abortion proceeds and is described in detail by Junod, including the sucking sound of the vacuum console and the purple

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9. *Id.* at 154.
10. *Id.* at 155.
11. *Id.* at 155-56.
12. *Id.* at 190.
13. *Id.*

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clots that fill the hose, as the patient grows pale and turns away, covering her eyes. Britton continues to banter with the young girl as she flinches in pain, while the nurse holds her hand.[14] When the procedure is over and "what was once in the patient's womb is in a glass jar," Britton leaves the room once again "whistling Beethoven's Ninth."[15]

The quoted material in the brief ends:

> The nurse brings the jar to a technician; the technician dumps its contents into what resembles a glass pie plate and, over a sink, combs through it with gloved fingers. The technician describes herself as "a recovering Catholic" and often seems on the verge of tears. "I don't approve, but it doesn't matter if I don't approve," she says. "I'm doing my job. I'm doing what I'm trained to do, and so is Doc—it's better than that back-alley shit! These girls put themselves through hell over this. The punishment is themselves. They don't need people outside to tell them they're going to hell." She runs water and looks at the fetal tissue in the plate. "This one's nine weeks, so it's not that bad. The later ones, though, they're bad—you see little arms and feet ... little, but you know what they are, and you know what's really being done."[16]]

ARGUMENT

I. FLORIDA STATUTES AND CASE LAW PERMIT THE USE OF FORCE IN THE DEFENSE OF ANOTHER. THE STATE'S MOTION INVADES THE PROVINCE OF THE JURY, DENIES PAUL HILL HIS STATUTORY DEFENSE, AND INTERFERES WITH A JUST VERDICT. THUS, THE MOTION IN LIMINE MUST BE DENIED.[17]

Behold the man, Paul Jennings Hill, charged with murder. There was a threatened, imminent harm, the scheduled killing of unborn humans to be committed by the decedents. The relevant statutory section defines the offense: "The unlawful killing of a human being: When perpetrated from a premeditated design to effect the death of the person killed or any human being . . . ."[18]

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14. *Id.*

15. *Id.*

16. *Id.* at 191.

17. *See* Jack Lowery, Jr., *A Statutory Study of Self-Defense and Defense of Others as an Excuse for Homicide*, 5 U. FLA. L. REV. 58 (1952) (general overview and development of self-defense).

18. FLA. STAT. ANN. § 782.04(1)(a)(1) (West 1993).

Some homicides are lawful: police in the course of their duties; condemned prisoners executed by the State; homeowners in defense of their family and property. But neither the legislature nor the courts can envision every possible circumstance where killing a human being is lawful. Statutes describe in general terms when force, even deadly force, may be used.

The pertinent passage of Florida law provides that "[a] person ... is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself *or another* ...."[19] Legislative intent and judicial practice allow the jury to decide whether the facts of a particular case fall within these general rules. These rules require that any force used be reasonable under the circumstances and that the threatened harm be imminent. As discussed below, the facts of Paul Hill's case satisfy these requirements. For these reasons, the state's motion must be denied and Paul Hill should be allowed to go forward with his defense.

A. *Paul Hill Reasonably Believes that he was Protecting Innocent Life.*

First, the accused must "reasonably believe" that the use of force is necessary. Reasonableness is a fact-sensitive question that must be decided by the jury. Several other sections of Florida law are instructive on what constitutes "reasonable." Section 90.404 provides that "evidence of a pertinent trait of character of the victim of the crime offered by the accused [is relevant]."[20]

Paul Hill can prove that he had an enhanced sense of peril based on personal knowledge that the deceased had committed prior acts of violence.[21] Attached is a copy of an article from *GQ* magazine, "The Abortionist," which is marked as Exhibit A. Florida courts hold that when self defense is asserted, it is error to exclude evidence of the defendant's knowledge of the decedents' reputation for violence and the defendant's knowledge of specific violent acts.[22] The decedents' habitual threats, threats

19. FLA. STAT. ANN. § 776.012 (West 1993) (emphasis added).
20. FLA. STAT. ANN. § 90.404(1)(b)(1) (West 1993).
21. *See* Fersner v. United States, 482 A.2d 387, 391 (D.C. Ct. App. 1984).
22. Hager v. State, 439 So. 2d 996, 997 (Fla. Dist. Ct. App. 1983); State v. Coles, 91 So. 2d 200, 203 (Fla. 1956.); Sanchez v. State, 445 So. 2d 1 (Fla. Dist. Ct. App. 1984); Mozqueda v. State, 541 So. 2d 777 (Fla. Dist. Ct. App.).

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made and carried out repeatedly over the years, are relevant in Hill's assertion of defense of another.[23] Evidence of the decedents' reputation for violence and Paul Hill's knowledge of that reputation are factors indicating that Paul Hill acted reasonably. The reasonableness standard has been repeated throughout the cases dealing with the claims of self defense and defense of another. Generally, the standard is an objective one: What a reasonably prudent and cautious man would have done in the circumstances.[24]

Florida's Supreme Court, while maintaining an objective standard, has tempered the rule with an element of greater subjectivity, requiring only that conditions from the intervenor's standpoint would lead a cautious, prudent man to believe it was necessary to use deadly force to save another from death. The danger does not have to be real or actual, but must appear real and imminent.[25] In addition to having reason to believe that harm was imminent (even if it turned out not to be), the defendant actually had to believe that the harm was imminent.[26]

B. *Paul Hill Used Reasonable Force Under the Circumstances.*

Second, only that force which is necessary to prevent the imminent death to himself or another may be used.[27] Although the claim of self defense or the defense of another, if accepted, results in acquittal, a jury finding that the defendant used excessive force could result in mitigation of the crime charged—for instance, from murder to manslaughter. A plainly unnecessary killing, even in self-defense or defense of another, may be deemed manslaughter under section 782.11 of the Florida statutes[28] when an assertion of justifiable homicide is interposed.

Experience is a great teacher, and Pensacola has had lots of experience. Many people who are as bothered by abortion as Paul Hill is have used lower levels of force (pickets, blockades) to prevent the imminent death of the unborn child. Arguably,

23. Sanchez v. State, 445 So. 2d 1 (Fla. Dist. Ct. App. 1984) (Evidence of prior specific acts of violence by deceased known to defendant at the time of shooting was admissible and failure to admit such testimony was reversible error.).

24. Reimel v. State, 532 So. 2d 16, 18 (Fla. Dist. Ct. App. 1988); Terry v. State, 467 So. 2d 761, 764 (Fla. Dist Ct. App. 1985); Pressley v. State, 395 So. 2d 1175, 1177 (Fla. Dist. Ct. App. 1981).

25. Lightbourn v. State, 175 So. 857, 857 (Fla. 1937).

26. Ammons v. State, 102 So. 642, 646 (Fla. 1924).

27. FLA. STAT. ANN. § 776.012 (West 1993).

28. FLA. STAT. ANN. § 782.11 (West 1993).

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these lower levels delay more deaths than they prevent. Paul Hill used no more force than the attacker (the decedent) was going to use. Even if a lesser amount of force *might* have been sufficient, lethal force was reasonable in light of the magnitude of the threatened harm.

Reasonableness addresses more than what Paul Hill believed at the time of the shooting. Reasonableness relates to requirements of the statute,[29] including the amount of force used under the circumstances. Whether Paul Hill used an appropriate level of force is one of the facts that the jury must consider.

The right to use reasonable force in defense of a third person is predicated upon the defended person's right of self defense.[30] One aspect of that right is the duty to retreat. Unless the defendant uses every reasonable means within his power and consistent with his own safety to avoid the danger, he is not justified in the use of deadly force. Even though the defendant is wrongfully attacked he cannot justify the use of deadly force if by retreating he could have avoided the need to use that force. If the accused was placed in imminent danger of death or great bodily harm, he is not required to retreat before using deadly force if retreating would have increased the risk of danger.[31]

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29. FLA. STAT. ANN. § 776.012 (West 1993).

30. Dawson v. State, 597 So. 2d 924, 924 (Fla. Dist. Ct. App. 1992).
Fersner v. United States, 482 A.2d 387, 390 (D.C. Ct. App. 1984), outlines the rights and duties upon a defendant asserting a justified use of force defense. The trial court observed that the right to use force in defense of a third person is predicated upon that third person's right of self-defense. The intervenor must prove that the victim of the attack was himself entitled to the defense of self-defense. *Id.* at 390 n.2 (citing Taylor v. United States, 380 A.2d 989, 994 (D.C. 1977)).

A person may kill in the defense of another person, when it is reasonably apparent that the person attacked could have justifiably used such means himself. Generally, the slayer can do in another's defense what the defended person could have done and no more. State v. Washington, 175 N.W.2d 620, 621 (Neb. 1970); State v. Barnes, 675 S.W.2d 195, 195 (Tenn. Crim. App. 1984). Some jurisdictions make an exception when a child is being defended, State v. Best, 113 S.E. 919, 925 (W. Va. 1922); others allow the force necessary to protect the third person as determined by a reasonable intervenor, not from the third person's perspective. Graves v. United States, 554 A.2d 1145, 1147-48 (D.C. Ct. App. 1989).

31. Courts have also applied the duty to retreat to cases involving self defense. The jury could conclude that a defendant could have avoided the self-defense by retreating. One who can retreat must do so, if retreating will remove him from danger. State v. Tai Van Le, 553 So. 2d 258 (Fla. Dist. Ct. App. 1989). Two exceptions to this duty to retreat are recognized. The first is the "castle doctrine" which holds that a man does not have to flee from his own home. State v. Bobbitt, 429 So. 2d 7 (Fla. 1983).

The other, explained in Cleveland v. State, 700 S.W.2d 761 (Tex. Ct. App. 1985), is that "a duty to retreat is not imposed when one engages in the defense of third persons. . . . An actor, such as appellant in this case, may be able to safely retreat, however, if the

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Florida applies what is commonly called the "castle doctrine." If a man is attacked in his home or on his premises, it is presumed that there is no place left for him to flee; and that even if he could flee, he is neither expected nor required to do so. A man attacked in his home can stand his ground and meet force with force if it is necessary to prevent death or great bodily harm to himself or another.[32]

When the claim is self defense, the duty to retreat is applied to the accused. For the defense of another, the duty to retreat analysis is applied to the one being protected, not to the intervenor.[33] Unborn children "dwell" in their mother's womb. Though Paul Hill could have fled *for his own safety*, the children he protected could not flee and had their backs to the wall—the uterine wall.

C. Paul Hill is Justified Because he Prevented Imminent Harm.

Third, the threatened harm must be imminent. The best description of what constitutes "imminent" is found in a 1928 Florida Supreme Court ruling.[34] It is the standard Florida has consistently applied ever since. The threatened harm must be "near at hand, mediate rather than immediate, close rather than touching."[35] Imminent harm is self-evident in this case. The decedents and their agents advertised in various media that abortions were committed at the Center.

As discussed above, the amount of force used by Hill must undergo a "reasonableness" analysis. The same must be done with regard to imminence. The facts indicate that the threatened harm was "near at hand, close" to a reasonably prudent and cautious person. Generally, the abortionist is the last one to arrive in the morning and the first one to leave at night. Admin-

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actor is acting in defense of third persons, it is the position of the third person that is relevant." *Id.* at 762.

Although the duty to retreat is recognized in Florida, the doctrine is subject to exceptions. One threatened with harm is not expected to flee his own home. In the case of one defending an innocent third person, the position and the ability to retreat of that third person is determinative. As the *Cleveland* court recognized, the defense of another is not an exception to the duty to retreat doctrine, but an application that gives the intended effect of that doctrine.

32. FLA. STAT. ANN. § 782.02 (West 1993).

33. Cleveland v. State, 700 S.W.2d 761 (Tex. Ct. App. 1985).

34. Scholl v. State, 115 So. 43 (Fla. 1928).

35. *Id.* at 44.

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istrative personnel and patients often arrive much earlier to prepare for the abortion.

The decedents were confronted as they approached the entrance to the Center, just moments and feet away from doing what many recognize as murdering innocent children. As a practical matter, Paul Hill waited as long as he could before using force to prevent the imminent harm. Hill could not have gotten any closer in time or place than he did. The standard is whether the threatened harm was imminent, not whether it was as close as possible. Because this requirement is satisfied by the facts of the present case, Paul Hill should be permitted to go forward with his defense and the State's motion must be denied.

D. *Paul Hill's Actions are Justified Because He Protected "Another" Under Florida Law.*

The statute provides that the threatened harm must be to "himself or another." Another what? The obvious initial answer is another person, but that is not what the statute says. The word "person" begins the statute; it would be strange if the legislature began this section with "One is justified." Further, the legislature did not say "to prevent harm to himself or another person."

The word "person" has legal significance. Its omission from the last clause of this statute means one of three things: An oversight by the legislature; or, "person" is implied but with a broader application than in sections of Florida law providing for prosecutions and penalties; or, "person" is implied and is to be given the same application as its other uses in the Florida Code. For purposes of this statute, unborn children qualify under any of these three potential meanings.

Throughout Florida statutes, the legislative intent to extend protection to unborn children is clear. Though prevented by Supreme Court rulings from completely barring abortions,[36] the legislature has extended a number of permitted restrictions: Advertising and providing chemicals for abortion is prohibited and punished;[37] certain abortions are prohibited altogether;[38] gen-

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36. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) (no "undue burden" on access to abortion).

37. FLA. STAT. ANN. § 797.02 (West 1993).

38. FLA. STAT. ANN. § 797.03 (West 1993).

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eral protection of the unborn child is codified;[39] and the willful killing of the unborn child (except for abortion, of course) constitutes manslaughter.[40] Indeed, a Clearwater, Florida woman currently faces murder charges for killing her unborn child by shooting herself in the abdomen.

The English Common Law provides the basis for Florida statutory law.[41] The right to use deadly force is no recent development, but finds its roots even earlier than the Common Law of England.[42] Two perspectives exist on the foundation of the right of self-defense and the defense of others.

The first holds that the right to use deadly force resides exclusively in the civil government. An individual has the authority to act when the requirements of immediate justice demand it.[43] Because the civil ruler (*e.g.* police) is absent at the moment of confrontation, the individual has the right to act on behalf of the civil magistrate, filling the vacuum when normal legal channels are inadequate. This argument is strengthened when the civil magistrate is intentionally absent; stronger still if the government is the perpetrator of the unlawful harm.

The second perspective is similar. Chief among individual rights is the right to life. Inextricably entwined with this right is the right—some would say duty—to defend life. Without the right to defend life, the right to life itself becomes meaningless. Self defense and the right to defend another reside in the individual and cannot be taken from him by the action of the state without due process of law.

Blackstone considered the right to defend another to extend to one's self, spouse, child, parent, master and servant.[44] Force could be used when the requirements of immediate justice demanded it and the future process of law would "by no means

39. FLA. STAT. ANN. § 390.001(3),(5),(10)(a)&(b) (West 1993) (law restricting abortion in Florida). For an abortion performed during viability, the abortionist shall "use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

40. FLA. STAT. ANN. § 782.09 (West 1993).

41. FLA. STAT. ANN. §§ 2.01, 775.01 (West 1993) (sections specifically incorporating the common law of England into Florida law).

42. *See Exodus* 2:11-12 (King James). "And it came to pass in those days, when Moses was grown, that he went out unto his brethren, and looked on their burdens: and he spied an Egyptian smiting an Hebrew, one of his brethren. And he looked this way and that way, and when he saw that there was no man, he slew the Egyptian, and hid him in the sand."

43. 3 WILLIAM BLACKSTONE, COMMENTARIES *4.

44. *Id.* at *3.

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provide an adequate remedy."[45] According to Blackstone, deadly force could be used to recover kidnapped family members[46] or by the husband or father of someone being raped.[47] The right of self defense did not attach, according to Blackstone, for a past or threatened injury.[48] Because of Blackstone's high view of human life,[49] he considered the right of self defense as a "primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."[50]

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45. *Id.* at *4.
46. *Id.*
47. 4 *Id.* at *181.
48. *Id.* at *184.
49. 1 *Id.* at *129.
50. 3 *Id.* at *4. The same circumstances that justify homicide in self defense will justify the slayer if the killing is done in defense of his spouse, parent, child, master, mistress, or servant. Hathaway v. State, 13 So. 592 (Fla. 1893). West Virginia's Supreme Court held that one may exercise the right of self defense on behalf of a brother or stranger. State v. Saunders, 330 S.E.2d 674, 675 (W. Va. 1985). The court went on to warn that although case law on defense of another is sparse, cases do surface occasionally, and it is no antiquated relic of case law that may be set aside quietly and forgotten. *Id.* n.2.

The notion that one could intervene only on behalf of another who shared some relationship with the intervenor grew out of the Common Law. Like the born alive rule, this doctrine has outlived its usefulness. Although the Restatement of Torts is not dispositive in the area of criminal law, it is instructive. RESTATEMENT (SECOND) OF TORTS § 76 (1989), discusses who may be defended:

> The privilege to intervene to protect third persons ... was originally held to exist only where the actor and the third person were members of the same family or household, including master and domestic servants.... The restriction of the privilege to intervene on behalf of third persons to those who are members of the actor's family or household was founded upon conditions long since past. Such a restriction is inconsistent with the duties which the law imposes upon persons standing in many relations to others, which require them to protect such others from the invasion of their interests of personality. Obviously it is impossible that liability should be imposed as a penalty for doing that which there is a legal duty to do. But even though there is no relation which imposes a legal duty to act for the protection of another, the restriction of the privilege to intervene for the protection of third persons, even from harm less than death or serious injury, to members of the same family or household is opposed to the settled usages of modern society. The same policy which permits intervention to prevent a breach of the peace ... justifies one human being in the use of reasonable force to protect the safety of another, without regard to any relation between them; and in the ordinary case the two privileges are so merged that it is impossible to distinguish them.

Id. at cmts. e-f.

Current law allows intervention on behalf of one not in some special relationship when the possible consequences are only monetary. The argument to extend them when the intervenor is facing loss of life or liberty is even more compelling.

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At Common Law one who had killed an unborn child prior to "quickening" was not guilty of murder. This rule is known as the "born alive rule."[51] Florida has adopted this rule and applies it to deny recovery under the state's Wrongful Death Act,[52] in a prosecution under the state's manslaughter statute,[53] and for purposes of vehicular homicide.[54]

Although the state has adopted the born alive rule, there has been little analysis of its purpose and meaning. The born alive rule existed because scientific understanding, or the lack thereof, created a causation problem. Courts and juries could not determine with certainty that the unborn child was already dead prior to the act; or, that some intervening act had occurred causing unborn death. This evidentiary standard is based on scientific knowledge and medical technology that is now several centuries old. Significant technological advantages exist now that did not exist as the Common Law developed.[55]

Through ultrasound and other technologies, we now have a window into the womb. Fetal heartbeat and brain waves are detectable, often before the mother knows she is pregnant.[56] Today, surgery is done on the unborn child, correcting birth defects before birth. Maintaining the born alive rule flies in the face of reality.

Despite medical advances which have eliminated the need for the evidentiary requirements of the rule at Common Law, many American courts have adopted the Common Law view and strictly construe their homicide statutes, thus refusing to acknowledge that the unborn child is a person entitled to the protection of the criminal law.[57] Other courts have expanded protection to the unborn without deferring to the state legislature, citing a "duty to develop the common law ... to better serve an ever-changing society as a whole."[58]

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51. For a discussion of the born alive rule see Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987).

52. FLA. STAT. ANN. § 768.19 (West 1993); Stern v. Miller, 348 So. 2d 303 (Fla. 1977).

53. FLA. STAT. ANN. § 782.09 (West 1993); State v. Shaw, 219 So. 2d 49 (Fla. Dist. Ct. App. 1969).

54. FLA. STAT. ANN. § 782.071 (West 1993); State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984).

55. Forsythe, *Homicide of the Unborn Child*, *supra* note 51, at 563, 565.

56. JOHN THOMAS NOONAN, A PRIVATE CHOICE 158-60 (1979).

57. Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970); Ranger v. State, 290 S.E.2d 63 (Ga. 1982); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).

58. State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

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Several jurisdictions have explicitly rejected the born alive rule. Massachusetts concluded that the Common Law rule denying the unborn child legal protection was suspect. The meaning of the term "person" in the Massachusetts vehicular homicide statute included the fetus.[59] The South Carolina Supreme Court recognizes the unborn child as a "person" within the meaning of state law[60] and extends protection in cases of wrongful death[61] and in cases of homicide[62] without the requirement that the child be born alive. In California a man criminally prosecuted under the feticide statute claimed that the term "fetus" in the statute did not sufficiently warn him of potential prosecution. In response, the California Court of Appeal held that the murder statute gave all persons (born and unborn?) of common intelligence adequate warning that intentionally killing an unborn child can constitute murder.[63] While it is still recognized in many jurisdictions, the trend is away from the born alive rule.

The born alive rule is an anachronistic evidentiary rule not deserving its former significance. Even without this conclusion, Paul Hill's assertion of defense of another prevails. If any of the unborn children who were scheduled to be aborted on July 29, 1994 were not subsequently aborted (or did not meet with some other untimely death), they would be born alive. If the born alive rule is applied and Hill produces evidence of the subsequent live birth of at least one of the children, the evidentiary standard is satisfied.

Additionally, the born alive rule has always been used to protect the defendant in civil and criminal litigation from undeserved liability, *never* to facilitate a prosecution. In *every* case, the defendant has invoked the born alive rule as a defense to a prosecution against him. To use the rule to prevent Hill from offering an affirmative defense is highly irregular and inconsistent with the purpose and history of the rule.

Many courts and legislatures recognize the technological advances that make the born alive rule obsolete. While such recognition might be required to prosecute an abortionist for murder, it is not required for one claiming to have defended a

59. Cass v. Commonwealth, 467 N.E.2d 1324 (Mass. 1984); MASS. GEN. LAWS ANN. ch. 90, § 24G(b) (West Supp. 1984-85).

60. State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984). (South Carolina Supreme Court applying S.C. CODE ANN. § 16-3-10 (1976)).

61. Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).

62. State v. Horne, 319 S.E.2d 703 (S.C. 1984).

63. People v. Apodaca, 142 Cal. Rptr. 830, 835 (Ct. App. 1978).

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third person. The statute against homicide, as currently applied, may not protect unborn children; however, an individual acting on behalf of an unborn child may still use this affirmative defense. Tension between adherence to the born alive rule and the reality of modern science has led to the conflict over the definition of "person."

Clearly the meaning of "person" is susceptible of multiple constructions, depending on the jurisdiction and on the particular application. Courts and legislatures around the nation wrestle with what meaning to attach to "person." The challenge is to provide the protection of the law to everyone and to avoid conflicts with Supreme Court opinions. Florida law provides that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."[64] Paul Hill is "the accused." The term "another" should be construed in a manner most favorable to him; that is, the word "another" in this case should be construed to include an unborn child. The "another" in Florida law[65] provides protection of the law to unborn children. If the legislature had some other intent, then it is for the legislature to express it.[66]

Courts treat the child in his mother's womb as a person in many contexts, although the question is not settled among the jurisdictions. In some situations, the question is not settled within a jurisdiction.

In 1980 the Vermont Supreme Court held that a viable fetus, though later stillborn, is within the meaning of the term "person" as used in the state's wrongful death statute, which provided a remedy for the death of a person. Consequently, tort liability attaches when one negligently causes the death of the unborn child.[67] Nine years later, the same court rejected the use of the word "person" to mean unborn child for purposes of the state's vehicular homicide statute.[68]

More consistent in its treatment of the child in his mother's womb is the South Carolina Supreme Court. In 1964 the court recognized that the unborn child had a cause of action in tort for

64. FLA. STAT. ANN. § 775.021(1) (West 1993).

65. FLA. STAT. ANN. § 776.012 (West 1993) ("A person is justified in the use of force . . . against another . . . .").

66. *See, e.g.*, TEX. PENAL CODE ANN. § 1.07(a)(17) (West 1988) (Texas statute defining "individual" as a human being who has been born and is alive).

67. Vaillancourt v. Medical Ctr. Hosp. of Vt. Inc., 425 A.2d 92, 94 (Vt. 1980).

68. State v. Oliver, 563 A.2d 1002, 1003 (Vt. 1989).

wrongful death.[69] Twenty years later the court extended that same protection to a child who died through a criminal act, reasoning that, "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."[70]

Many other jurisdictions recognize the child in his mother's womb as a person for purposes of computing welfare aid[71] and for other family court services.[72] Unborn children are persons in traffic court, allowing at least one woman to beat a ticket for riding in the carpool lane. She and her unborn child were counted separately.[73] In addition, the unborn child is a person within the scope of insurance policies,[74] and can bring an action for wrongful death even though he is not born alive.[75] For these reasons it is clear that Paul Hill acted in defense of a third person. Thus, the state's motion must be denied and Paul Hill should be allowed to present evidence to the jury.

E. *Evidence that Paul Hill Acted in Defense of Another Must be Presented to the Jury.*

The Criminal Jury Instructions for the District of Columbia sum up the defense:

> A person has the right to use a reasonable amount of force in defense of another person under certain circumstances. First, the defendant must actually believe that the other person is in imminent danger of bodily harm. Second, under the circumstances as the defendant believes them to be, the person whom he seeks to protect would have to be justified in using a reasonable amount of force in his own self-defense. Third, the defendant must have reasonable grounds for his belief that the other person is in imminent danger of bodily harm. Finally, the defendant must believe that his interven-

69. Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).

70. State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

71. California Welfare Rights Org. v. Brian, 520 P.2d 970 (Cal. 1974).

72. Matter of Smith, 492 N.Y.S.2d 331, 334 (Fam. Ct. 1985).

73. Adam Z. Horvath, *Carpool - That's an Order*, NEWSDAY, Aug. 23, 1992, at 7.

74. Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935, 936 (E.D. Pa. 1980); Craig v. IMT Ins. Co., 407 N.W.2d 584, 587 (Iowa 1987).

75. O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983); Fryover v. Forbes, 439 N.W.2d 284, 285 (Mich. Ct. App. 1989); Presley v. Newport Hosp., 365 A.2d 748, 759 (R.I. 1976); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 917 (Mass. 1975); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. Ct. App. 1984).

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> tion is necessary for the protection of the other person. The question is not whether you believe, in retrospect, that the use of force by the defendant was necessary. The question is whether the defendant, under the circumstances as they appeared to him at the time of the incident, actually and reasonably believed that the person he was seeking to defend was in imminent danger of bodily harm and was in need of his protection, and whether the person the defendant sought to protect would himself have been justified in resorting to self-defense under the circumstances as perceived by the defendant. The defendant is not required to prove that he acted in the defense of another person. If evidence of defense of another is present, the government must prove beyond a reasonable doubt that the defendant did not act in the defense of another person. If you find that the government has failed to prove beyond a reasonable doubt that the defendant did not act in defense of another person, then you must find him not guilty.[76]

In *People v. Gaines*,[77] the defendant was convicted of voluntary manslaughter for killing her husband. The shooting ended a half decade of fights between the defendant and the decedent. Taking the stand on her own behalf, the defendant, Mary Gaines, testified that her husband had beaten, choked, cursed, and threatened her. Apart from other inconsistencies in the defendant's statements, other evidence indicated that the decedent was sitting down, watching television, and eating at the time he was shot.[78]

It was the defendant's contention that she was acting in the defense of her unborn child. The court rejected her claim stating, "[I]n order to protect her unborn child the defendant would have to establish that [the unborn child] had the right to kill in her own defense. This she failed to do."[79] By implication, the defendant's use of deadly force would have been justified had she first shown that the circumstances permitted her to kill in self-defense. The decedent in *Gaines* was, at the time of his death, not posing a threat to anyone. Harm threatened against either the mother or the child would, by definition, mean harm to the other. The defendant did not prove that any harm to herself or her unborn child was imminent.

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76. *Williams*, 482 A.2d at 399 n.1.
77. 292 N.E.2d 500 (Ill. App. Ct. 1973)
78. *Id.* at 502.
79. *Id.* at 503.

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In the present case, however, the threatened harm was imminent. Further, Paul Hill used no more force than the decedents' intended victims could have used.[80] Thus, Paul Hill acted in the legitimate defense of another.

Whether the facts of Paul Hill's case are sufficient to sustain a defense of others defense is a jury question. What facts justify a homicide is a question of law. The court in *Gladden v. State*[81] held that it is the province of the court to state what the rule of law is as to the facts, and the province of the jury to determine whether such facts exist in the particular case.[82] One hundred twenty-three years later in *Dawson v. State*,[83] the Florida Court of Appeal held that a trial court fundamentally erred in omitting elements of defense of others in a self defense instruction.[84] The appellate court reached this conclusion even though the defense offered no objection to the charge as given, further stating that the error went to the "essence and entirety of the defense."[85]

The thread between *Gladden* and *Dawson* is clear, continuous and often repeated. In a prosecution for murder, the jury must determine if the accused is free from fault in bringing on the difficulty;[86] if reasonable grounds for the killing exist;[87] if the harm is imminent;[88] and whether the homicide is justified.[89] Although what constitutes justifiable homicide is a matter of law, the jury determines the existence of the facts in a particular case.[90] The trier of fact is to decide the question of defense of another in a murder prosecution.[91] The jury is the last line of defense against tyranny. Because the facts of Paul Hill's case satisfy this threshhold, he must be allowed to present his defense to the jury.

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80. If it were possible to put a gun in the hand of the unborn child, that child would be justified in using deadly force against an attacker.

81. 12 Fla. 562 (1869).

82. *Id.* at 576.

83. 597 So. 2d 924 (Fla. Dist. Ct. App. 1992).

84. *Id.* at 925.

85. *Id.*

86. Zow v. State, 70 So. 18, 19 (Fla. 1925).

87. Crockett v. State, 188 So. 214, 215 (Fla. 1939).

88. Ward v. State, 79 So. 699, 705 (Fla. 1918); O'Steen v. State, 111 So. 725, 727 (Fla. 1927).

89. Smith v. State, 176 So. 781, 782 (Fla. 1937).

90. State v. Coles, 91 So. 2d 200, 203 (Fla. 1957).

91. Payton v. State, 200 So. 2d 255, 256 (Fla. Dist. Ct. App. 1967).

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F. Paul Hill's Defense does not Conflict with Roe *or* Casey.

Recognition of the unborn child as "another" for purposes of an affirmative defense conforms to the requirements of *Roe v. Wade*[92] and *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[93] Even in the abortion context, the Court in *Roe* affirmed that the state has an interest in protecting fetal life.[94] Furthermore, the Supreme Court expressly left unanswered the question of when human life begins.[95] States are not bound by a Supreme Court definition of when life begins. The Supreme Court has not offered one.

"Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."[96] In an emotional opinion, the Court removed constitutional protection from unborn children, indicating that if the unborn were afforded personhood, abortions—even those to save the mother's life—would not be permitted.[97] Justice Blackmun, writing for the majority, candidly acknowledged that the foundation of legalized abortion crumbled if the unborn child is a person. Such classification would afford them protection specifically guaranteed by the Fourteenth Amendment.[98]

Planned Parenthood of Southeastern Pennsylvania v. Casey[99] reaffirmed the Court's commitment to its conclusion in *Roe*, and eviscerated the basis for *Roe* in one stroke. In the words of Chief Justice Rehnquist, the majority in *Casey* plucked its new "undue burden" test out of thin air[100] and beat "a wholesale retreat from the substance of [*Roe*]."[101] Justice Scalia accused the majority of substituting *Casey* for *Roe* on a "keep-what-you-want-and-throw-away-the-rest version" of stare decisis.[102] Indeed, the *Casey* Court ignored the foundation established in *Roe*, in part because these evidentiary factors were not part of that case, and in part because of their suspicious retreat to stare decisis.

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92. 410 U.S. 113 (1973).
93. 112 S. Ct. 2791 (1992).
94. 410 U.S. at 163-64.
95. *Id.* at 159.
96. *Id.* at 116.
97. *Id.* at 157 n.54.
98. *Id.* at 156-57.
99. 112 S. Ct. 2791 (1992).
100. *Id.* at 2866.
101. *Id.* at 2855.
102. *Id.* at 2881.

The *Roe* Court spoke only loosely about the beginnings of life, anchoring itself to the point of viability. This mooring did not hold for long. With technological development, the point when the unborn child becomes viable outside his mother's womb moves increasingly conception-ward.

Technology and medicine have dramatically changed since *Roe*, causing Justice O'Connor to assert in *City of Akron v. Akron Center for Reproductive Health, Inc.*[103] that "[t]he *Roe* framework, then, is clearly on a collision course with itself.... The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues."[104] *Casey* did not deal with these factors; factors that, arguably, were unknown at the time of *Roe v. Wade*. But they *are* known now.

As author of *Roe* and a concurring opinion in *Casey*, Blackmun implicitly acknowledged the Court's departure from the Rule of Law to adoption of rule of the Court[105] and the problems inherent in such a shift when he wrote, "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."[106]

Justice Blackmun correctly understands that indeed there are two worldviews, and they are on a collision course. One is a worldview full of statutes, decrees, and orders—illegal in their inception and execution[107]—which destroy law and justice and perpetrate judicial murder through legal artifice[108] and the emptied forms of legal process;[109] the other is of the Rule of Law.

Part of the problem is the attempted distinction made between the humanity of the unborn and the personhood of the unborn. *Webster's* defines humanity as, "The peculiar nature of man, by which he is distinguished from other beings."[110] "Person" is, "A man, woman or child, considered as opposed to things, or

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103. 462 U.S. 416 (1983).

104. *Id.* at 458.

105. The Court repeatedly refers to its rulings as "Our law." 112 S. Ct. at 2805, 2807, 2838, 2839, 2840 n.3.

106. *Casey*, 112 S. Ct. at 2854-55.

107. *See infra* note 141 and accompanying text.

108. *See infra* note 149 and accompanying text.

109. *See infra* note 146 and accompanying text.

110. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 103 (New York, S. Converse 1828).

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distinct from them."[111] *Webster's* does not indicate the difference; neither does the Supreme Court.

Protection of the law is afforded to unborn children in cases of inheritance,[112] negligence,[113] and vehicular homicide.[114] But for purposes of abortion and preservation of penumbral liberty rights, "the unborn have never been recognized in the law as persons in the whole sense."[115] Unborn children are persons for some purposes, non-persons for others.

The decision in *Casey* restricted the state from creating an "undue burden" on a woman in her search for an abortion. The Court explained that "undue burden" was "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[116] The Court correctly pointed out that the "undue burden" test is not a test at all, but a "conclusion." If the Court wants to uphold a state's law, then it is not an undue burden; if the Court wants to strike down the statute, then it does create an undue burden.

Allowing Paul Hill to argue to the jury that he was acting in the defense of the unborn children does not create an undue burden on a woman's right to abortion. The Supreme Court in *Casey* also acknowledged that the state has "a substantial interest in potential life [and] not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue."[117] Again, the Court asserted that any piece of legislation "must be calculated to inform the *woman's* free choice, not hinder it."[118] Notice that it is the woman's choice to have an abortion that may not be "unduly burdened." Some might argue that abortions will be more difficult to obtain because fewer abortionists will perform them. Even if this assumption is accurate,[119] availability is not what *Casey* intended to guarantee. Indeed, the Court recognized that:

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111. 2 *Id.* at 33.

112. De Santo v. Haug, 167 A.2d 428 (Super. Ct. N.J. Ch. 1961).

113. Kalafut v. Gruver, 389 S.E.2d 681 (Va. 1990).

114. Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984).

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

116. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2819 (1992).

117. *Id.*

118. *Id.* (emphasis added).

119. The state is seeking the death penalty in this case. Self defense and defense of another are affirmative defenses that are very fact sensitive. The price of being incorrect on one's facts is a high one, a price that no one is anxious to pay. Denial of

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[120]

As the Court wrote, *Casey only* protects a woman's right to choose abortion, not an abortionist's right to perform them. The application of the statutory defense to Paul Hill's case does not create an undue burden on a woman's choice. The defense of another statute serves a valid purpose; it is not one designed to strike at the right to abortion itself, and any incidental effect that it *may* have on the abortion industry is insufficient to deny Hill the defense in this case.

Furthermore, *Casey* addresses a state regulation. The Florida statutory provision for an affirmative defense is not a regulation at all. Regulations have the purpose and effect of restraining individual conduct. An affirmative defense is not a restraint by the state, it is a restraint on the state, giving the state one more hurdle to overcome in proving its case. The purpose of the self defense statute is to protect individuals from unjust prosecution.

The Fourteenth Amendment is also designed to restrain the state. "The Fourteenth Amendment does not guarantee a right to life — it guarantees only that life cannot be taken *by the state* without due process of law."[121] The Florida statute that provides for the affirmative defense of another also places a restraint on the state. To argue that *Casey* prevents the use of the statute in this case is to say that the state may not restrain itself.

The Supreme Court, recognizing that the Due Process Clause protects individuals from actions by the state, not actions by private individuals, established a three-part test for determining state action:

Paul Hill's right to offer the defense of another defense is equivalent to saying, "We don't like this direction, even though we're not quite sure what it is or even what it might be. To keep things simple, we are going to have you killed." Any conjecture that others will act in this way is just that—conjecture. Speculation is no basis for denying Paul Hill his constitutional rights.

120. *Casey*, 112 S. Ct. at 2819.

121. STEPHEN CARTER, THE CULTURE OF DISBELIEF 252 (1993) (emphasis in original).

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> First, State action exists when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. Second, the State is responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Third, State action exists if the private entity has exercised powers that are traditionally the exclusive prerogative of the State.[122]

First, in a criminal prosecution, the state can not be "responsible for the specific conduct of which the plaintiff complains" because the state is the plaintiff. By definition, it seems impossible for the state to preclude the use of an affirmative defense by a private individual. The first prong of the "state action test" is not satisfied.

Second, the state is seeking the death penalty in its prosecution of Paul Hill. Only the most profound contortion of the English language could allow interpreting this action by the State of Florida as "significant encouragement." Clearly, the second prong of the "state action test" is not met, and Paul Hill should be allowed to go forward with his defense.

Third, Paul Hill did not exercise power that is traditionally the prerogative of the state, as demonstrated by the fact that Florida has enacted a law which recognizes an individual right to use deadly force in defense of himself or another. Even if the state abolished this statute altogether, self defense and the defense of another are still not a power "traditionally" left to the state. Paul Hill's affirmative defense is not state action because the requirements established in *Blum* are not satisfied.

In *Shelley v. Kraemer*,[123] the Supreme Court held that judicial enforcement of racially restrictive covenants constitutes state action, and is therefore unconstitutional. The Court did note, however, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."[124] Relying on *Shelley v. Kraemer*, a federal court held in *Jones v. Alfred H. Mayer Co.*[125] that state action was not involved where a corporation, which receives its creation and license from the state, refused to sell land to an individual solely on the basis of race.

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122. Blum v. Yaretsky, 457 U.S. 991, 1002-05 (1982).
123. 334 U.S. 1 (1948).
124. *Id.* at 13.
125. 255 F. Supp. 115 (E.D. Mo. 1966), *rev'd on other grounds*, 392 U.S. 409 (1968).

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In *Jackson v. Metropolitan Edison Co.*,[126] a heavily state-regulated utility turned off a customer's electricity. The customer sued, alleging state action and a violation of her rights under the Fourteenth Amendment. The United States Supreme Court held: "The mere fact that a business is subject to state regulation does not itself convert its action into that of the state for purposes of the Fourteenth Amendment."[127] Although the utility was heavily regulated and many company policies were dictated by the state, the Court held that the utility merely conducted itself in a way that was permitted by state law. Paul Hill's use of an affirmative defense involves far less entanglement than an act of the state which creates and, to a certain extent runs, an industry. The defense of another statute merely allows a defendant to assert his claim in court. Private use of a permissive statute does not constitute state action.

The only way that either *Roe* or *Casey* would prohibit application of the defense of another is if allowing the defense to go forward constitutes state action, making Paul Hill a state agent. If the Florida statute providing for this affirmative defense qualifies Hill as a state agent, then *Roe* and *Casey* qualify every abortionist as a state agent as well. Either application strains credulity.

Allowing Paul Hill to use an affirmative statutory defense is not state action. The holdings in *Roe* and *Casey* merely created a permissive environment that allowed the decedent to perform abortions. Nothing in federal or state law compels anyone to get an abortion, or abortionists to perform them, at least not yet. Additionally, Paul Hill's affirmative defense does not violate *Casey* because this defense does not place an undue burden on a woman's choice, which is what *Casey* alleges to protect.

Similarly, application of the Florida statute providing this affirmative defense is not state action. The statutory provision does not compel anyone to do anything. Application of the defense here merely recognizes that the Florida legislature foresaw that, under some circumstances, killing is justified. Judicial recognition of this is appropriate; and, as this section demonstrates, it is the norm.

The state, in its motion, seeks to hide behind *Roe* and *Casey*, both of which are inapplicable here. Assuming, arguendo, that *Roe* or *Casey* are somehow implicated, Paul Hill must still be

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126. 419 U.S. 345 (1974).
127. *Id.* at 350.

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allowed to present the defense of another. History clearly shows that the mere presence of some positive law, statute, or decree provides no safe haven for institutional lawlessness. If some attenuated reading of *Roe* or *Casey* conflicts with this defense, it is because those holdings themselves are unlawful. A decree enacted into code (legal), does not necessarily become right (lawful). Conversely, negative sanctions making a particular act illegal do not necessarily make that conduct wrong (unlawful). Pursuant to Florida statutes, this Court should take judicial notice of the laws of foreign nations and organizations of nations as those nations and organizations have applied the Rule of Law.[128]

II. Paul Hill's Defense of Justification Conforms with Historical Precedent and the Rule of Law. This Fact Alone Provides a Sufficient Basis to Deny the State's Motion.

Throughout history, individuals, like Paul Hill, who have intervened in defense of others have been exonerated. This is true even when these individuals acted in violation of positive law. Further, positive law is not a shield to prosecution for government agents who enforce unlawful laws. The Rule of Law sometimes condemns those who act in conformity with positive law and exonerates those who intervene in violation of positive law. As discussed below, Paul Hill has a valid justification defense and the State's motion in limine must be denied.

Abortion is considered by many to be the law of the land. Every year since *Roe v. Wade* over one and a half million (1,500,000) unborn children have been killed in the womb. In addition, tens of thousands of people who believe that abortion is murder have been arrested for their participation in abortion clinic blockades. Modern western wisdom teaches us that when the Supreme Court rules in a case, the final word has been spoken. Similarly, when someone "breaks the law," they should go to jail. This perspective is correct when the legal code is lawful—punishing evildoers and praising those that do good. But when that code itself falls into lawlessness by allowing, for example, abortion on demand, those that implement its provisions have no basis for their actions, only raw power. Tyranny prevails unrestrained by law.

128. FLA. STAT. ANN. § 90.202(4) (West 1993) (allowing courts to take judicial notice of laws of organizations of nations).

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Nations often fall into lawlessness. When they do, government agents—the ones implementing the lawlessness—are ultimately taken to task for their misdeeds. Only the Rule of Law provides a template for doing that. Holding government agents' feet to the fire, and, literally, neck to the noose, presupposes a higher standard that supersedes anything that man can put into code. Similarly, those that intervene in violation of positive law receive commendation for the same reason: there is a Higher Law.

Modern Americans seem to have forgotten the legal and historical precedents that recognize this standard, sailing instead in a rudderless ship on the sea of social change. But Machiavellian political systems cannot last for long. People will not tolerate tyranny forever. The strongman's lawlessness is eventually judged; sometimes by history, sometimes by the firing squad.

The same thing is true of abortion. With all the economic, social, and philosophical pressure of our day, the practice cannot continue, at least not in such epidemic proportions. As Justice Blackmun noted in *Casey*, he was not going to sit on the Court forever, thus acknowledging his own mortality. Someday he is going to die. Tyranny dies too, usually after a lot of bloodshed. Although the pervasiveness of abortion in America is without precedent in history, similar injustices have occurred in the past, and the perpetrators have all been condemned.

Although government agents generally enjoy immunity from prosecution for their actions done in their official capacity, executives, Justices and judges should note that this immunity is not absolute. In Nazi Germany, for example, the government at every level became a vehicle for oppression and tyranny. Yet these officials were made to account for their departure from the Rule of Law.

Individuals who intervened to stop governmentally sanctioned lawlessness were justified in their actions. Paul Hill is justified in his.

A. *Officials in Every Branch of Government Have Been Prosecuted for Enforcing Unlawful Laws.*

History has repeatedly demonstrated man's inhumanity toward man. No period in history has recorded this fact more graphically than Nazi rule in Germany and Eastern Europe during World War II. Twisting the legal process to suit their goals, the Nazis used existing German law and instituted their own direc-

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tives. Excuses were offered; nonetheless, Nazi leaders were held responsible for their actions, most notably at the Trial of the Major War Criminals at Nuremberg.

1. The Trial of the Major War Criminals

On August 8, 1945 the United States together with France, Great Britain, and the Soviet Union signed documents collectively known as the *London Agreement and Charter*. The accord announced their intention to establish the International Military Tribunal for the trial of the major war criminals.[129]

The United States led the four nations in the development of the London Agreement and Charter. In his opening statement to the International Military Tribunal at Nuremberg, United States Supreme Court Justice Robert H. Jackson emphasized the binding intent of the Charter on all the signatories when he stated that:

> [T]he ultimate step ... is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes ... other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors.[130]

Three categories of charges were brought: crimes against the peace included "planning, preparation, initiation, or waging a war of aggression;" war crimes, which were violations of the laws and customs of war, including ill-treatment of prisoners; and crimes against humanity, specifically "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war."[131]

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129. 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, at xi-xviii (U.S. Gov't Printing Office 1951) [hereinafter TRIALS, VOL. III].

130. ROBERT H. JACKSON, THE NURNBERG CASE 93 (1947) (Justice Jackson was the chief counsel for the United States in the prosecution of war crimes. Justice Jackson was the last Supreme Court Justice who had not attended law school.).

131. TRIALS, VOL. III, *supra* note 129, at xii-xiv.

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Responding to these charges, many of the defendants claimed that they were either following orders or complying with enacted laws. The Charter recognized that individual responsibility is essential and authorized prosecution for crimes against humanity "in connection with any other crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country."[132] The accused could not absolve themselves by cloaking themselves or their actions with German positive law.[133]

Justice Jackson argued that the power to enact statutes did not legitimate the statute or the power. He articulated that the Rule of Law must prevail over lawlessness when he stated: "[T]hese men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law."[134]

"Power tends to corrupt and absolute power corrupts absolutely."[135] As Chief Prosecutor, Justice Jackson asserted that those charged were absolutely corrupt and had been "entrusted with broad discretion and exercised great power. Their responsibility is correspondingly great and may not be shifted to that fictional being, 'the State,' which cannot be produced for trial, cannot testify, and cannot be sentenced."[136] Individuals were held responsible for routine beatings, starvings, tortures, and murders carried out in the name of the law;[137] and for exterminating by lethal injection, asphyxiating in gas chambers, and shooting victims with poison bullets to study the effects—all performed in the name of science.[138]

Following the celebrated Trial of the Major War Criminals, twelve additional trials were held at the Palace of Justice in Nuremberg and were presided over by the United States. Control Council Law No. 10, enacted on December 20, 1945, declared Allied authority for these trials.[139] The third such trial was known as The Justice Case.

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132. *Id.* at xiv.
133. JACKSON, *supra* note 130, at 22-23.
134. *Id.* at 81.
135. JOHN EMERICH EDWARD DALBERG-ACTON, ESSAYS IN RELIGION, POLITICS, AND MORALITY 519 (J. Rufus Fears ed., 1988).
136. JACKSON, *supra* note 130, at 89.
137. *Id.* at 64.
138. *Id.* at 67.
139. TRIALS, VOL. III, *supra* note 129, at xviii-xxii.

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2. The Justice Case

With the opening statements on March 5, 1947, the eleven-month-long trial began at Nuremberg. The People's Court was an established part of the administration of justice during the Nazi regime. Prosecutors and judges of the People's Court were charged with murder, torture, and persecution.[140]

Count One of the indictment charged the defendants with systematically engaging in atrocities against persons and property: Plunder of private property, murder, extermination, enslavement, unlawful imprisonment, and torture. To achieve these goals, the accused enacted, issued, enforced, and gave effect to certain statutes, decrees, and orders, "which were criminal in inception and execution."[141]

The People's Court became a terror court,[142] using judicial process as a powerful weapon for persecution and extermination.[143] German criminal laws were used by the courts to subjugate the German people.[144] Crimes committed by the defendants were as old as mankind, but had special significance because they were "committed in the guise of legal process."[145] The accused, the tribunal was told, were guilty of "judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale."[146]

With ecclesiastical fervor Brigadier General Telford Taylor emphasized a judge's special duty:

> [C]ourt is far more than a courtroom; it is a process and a spirit. It is the house of law.... [L]eaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter.... They defiled the German temple of justice, and delivered Germany into the dictatorship of the Third Reich,

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140. *Id.* at 3.
141. *Id.* at 17.
142. *Id.* at 19, 23.
143. *Id.* at 18.
144. *Id.* at 23.
145. *Id.* at 31.
146. *Id.* at 32-33.

> "with all its methods of terror, and its cynical and open denial of the rule of law."[147]

Through Hitler's *Nacht und Nebel* (Night and Fog) Decree on December 7, 1941, over 5200 prisoners were delivered for execution by the Nazi judiciary.[148] Through "legalistic artifices,"[149] the accused perpetrated judicial murder and manifested a "zealous desire to exterminate even trifling activity not even deemed misdemeanors by the community of civilized nations."[150]

The defense argued that positive (written) law should control; and, that one cannot superimpose Western common law development upon the German system of codified law.[151] "Only the written law," the positivist defense counsel continued, "and not general ideas on morals and rights constituted the directive for administration of law and justice."[152] Counsel supplanted one absolute for another. Denying the absolutes of morals and rights, he maintained that the rule in Germany was one of "absolute codification."[153] Speaking for the prosecution, General Telford Taylor rebutted this defense on two grounds.

First, the proceedings raised the "moral standard of the civilized world."[154] To do otherwise would result in an aimless, amoral world and a cynical Germany.[155] It was the duty of the tribunal to "impose an obligation on the nations of the world to measure up to the standards applied here."[156] Although internationally constituted, the tribunal was an American court and "particularly binding on the United States."[157]

Secondly, with no absolute moral code by which nations were to operate, the enactment of any statute or other written law would become pure pretense. Particularly damning was the blunt assertion made in 1934 by Propaganda Minister Joseph Goebbels[158] that "[w]e were not legal in order to be legal, but in

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147. *Id.* at 31, 33 (quoting the prosecution arguments given in the Trial of the Major War Criminals, Nuremberg, 1947, vol. I, 181).

148. *Id.* at 76.

149. *Id.* at 82.

150. *Id.*

151. *Id.* at 108.

152. *Id.* at 108-09.

153. *Id.* at 109.

154. *Id.* at 107.

155. *Id.*

156. *Id.*

157. *Id.*

158. Goebbels followed Hitler in death as well as in life. Both committed suicide on April 30, 1945.

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order to rise to power. We rose to power legally in order to gain the possibility of acting illegally."[159]

Judges became the judged. They were judged by an objective standard by which men and nations can be judged. Mere codification does not a law make; judicial robes do not a lawful judge make. Four of fourteen defendants were acquitted; the ten convicted received sentences ranging from five years to life imprisonment.[160]

In the Nazi mind, Jews were to be exploited and exterminated. Man's inhumanity to man in Nazi Germany was made possible because the state itself acted lawlessly. Jews and others were subhuman: Non-persons for some purposes; persons for others.

Abortion is a divisive issue. Advocates on both sides of the issue claim the high moral ground. *Roe v. Wade* lit the fire. Subsequent judicial decisions have fanned those flames, each side claiming victory in the latest decision. Each generation has a tendency to be parochial in their struggles and debates—believing that their generation is the first to deal with the really hard issues, achieving some sort of higher philosophical plane.

The abortion debate is nothing new. It has taken many forms and has varied in intensity. Neither is *Roe* the first time that a judicial tribunal has issued an opinion concerning abortion. The eighth of the twelve trials at Nuremburg is known as the RuSHA Case. On July 1, 1947 fourteen individuals were indicted by the Nuremberg Military Tribunal in Case Eight for their role in the Nazi program of forced abortion. In that trial, members of the agency responsible for implementing "laws" were tried for their role in the extermination of unborn children. Each defendant pled not guilty.[161]

3. *The RuSHA Case*

The acronym "RuSHA" is taken from the term which translates into English the "Main Race and Resettlement Office."[162] Despite the innocuous sounding title, this organization formed the backbone of the Nazi racial program and, together with The

159. TRIALS, VOL. III, *supra* note 129, at 41 (citing Deutsche Allgemaine Zeitung, Nov. 28, 1934).

160. JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 157-58 (1954).

161. *Id.* at 196.

162. *Id.*

Well of Life Society and the Main Office for Repatriation of Racial Germans, implemented a program of extermination, kidnapping, and forced abortion.[163]

The indictment charged the defendants with carrying out a "systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups . . . by murderous extermination . . . ."[164] RuSHA's design was to "proclaim and safeguard"[165] the superiority of Nordic blood, and to "exterminate and suppress all sources which might 'dilute' or 'taint' it."[166]

What was proclaimed was a plan designed to weaken and destroy other European nations. What was safeguarded was a strengthened Germany.[167] Every known pregnancy among Eastern slave workers was submitted to RuSHA for examination of the racial characteristics of the expectant parents.[168] Often, however, pregnancies were not discovered until it was too late for an abortion or until after the child was born. To weaken enemy nations and increase the population of Germany, RuSHA dealt with this "contingency" through an extensive plan of kidnapping "racially valuable" children, including illegitimate children whose mothers were non-German and whose fathers were members of the German Armed Forces in the occupied countries.[169] Children considered "racially valuable" were taken immediately after birth for Germanization in specially designated children's homes.[170] Those children not selected for Germanization were "taken from their mother and placed in designated collection centers for the purpose of extermination."[171]

When pregnancy was discovered early enough, prospective parents were examined to determine their racial characteristics. If the examination indicated that the child would be of "racial value," the child would be taken from the parents shortly after birth.[172] When racial examination yielded negative results, the

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163. *Id.*

164. 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 609 (U.S. Gov't Printing Office 1949) [hereinafter TRIALS, VOL. IV] (Count I of the indictment of the defendants in the RuSHA case was limited to charges against the group of "Crimes Against Humanity.").

165. *Id.* at 613.

166. *Id.*

167. *Id.* at 599.

168. *Id.* at 613.

169. *Id.*

170. *Id.* at 613-14.

171. *Id.* at 614.

172. *Id.* at 613.

women were induced or forced to undergo abortions.[173] Keeping women available as labor for the Reich and reducing the populations of Eastern nations was the goal of the kidnapping and abortion program.[174]

The indictment alleged that the defendants forced Polish women to undergo abortions.[175] In support of this charge, the prosecution introduced a letter from Heinrich Himmler's office addressed to RuSHA which directed that Polish women with unfavorable racial examinations "be made to consent."[176] Another memo from Himmler's office, dated March 11, 1943, ordered that "an interruption of pregnancy is to be carried out *positively* ... unless the woman is of good stock which is to be ascertained in advance in every case."[177] On February 18, 1944, a letter went to the branch offices stating:

> As you know, racially substandard offspring of Eastern workers and Poles is to be avoided, if at all possible. Although pregnancy interruptions ought to be carried out on a voluntary basis only, pressure is to be applied in each of these cases....[178]

In their defense, the Nazis maintained that all abortions were voluntary.[179] Even if this claim were believed, the prosecutor responded that

> [t]hese unfortunate women working as slaves under terrible conditions in a hostile country found themselves subjected to all manner of pressure, both direct and indirect. They lived and labored under conditions which would not permit them to take care of their children. Moreover, every pregnancy had to be reported to the dreaded Gestapo. The suggestion of an abortion by that organization did not invite argument from Polish and Russian women.... [E]ven if it be assumed that all abortions were voluntary, they still constitute a crime. This was nothing more than another technique in furtherance of the basic crime of genocide and Germanization. It was even a crime under German law.[180]

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173. *Id.*
174. *Id.*
175. *Id.* at 1076.
176. *Id.* at 110.
177. *Id.* at 686 (emphasis added).
178. *Id.* at 687.
179. *Id.* at 112.
180. *Id.* at 687.

Abortions were prohibited under Article 218 of the German Penal Code[181] and under Polish law.[182] When the Nazis assumed power, they suspended these abortion laws with Order No. 4/43 dated March 11, 1943.[183] Women expecting "racially valuable" children were forbidden from aborting their children. Those not meeting the purity of stock test were directly or indirectly forced to abort their child.[184] To insure the plan's success, abortions on Polish women were removed from the jurisdiction of the Polish courts.[185]

Although crimes against the workers themselves were part of the indictment, an extract from the prosecution's closing brief reveals another reason these defendants were charged:

> Abortions were prohibited in Germany .... After the Nazis came to power this law was enforced with great severity. Abortions were also prohibited under the Polish Penal Code .... But protection of the law was denied to the *unborn children* of the Russian and Polish women in Nazi Germany. Abortions were encouraged and even forced on these women.[186]

Even if all abortions were voluntary, as the defendants asserted, their actions were considered criminal, a "murderous extermination,"[187] against the rights of the unborn child.

As Reich Commissioner for the Strengthening of Germanism, defendant Kaltenbrunner[188] issued a secret memorandum dated June 9, 1943 which stated that any "[c]riminal prosecution of abortion undertaken according to this [RuSHA] procedure in the case of Eastern female workers is of course, suspended."[189] Of course! Kaltenbrunner's memorandum was issued after many months of planning for the implementation of the program. A letter dated March 21, 1942 to Health Minister Leonardo Conti[190] stated, "I absolutely agree with your thinking that abortion for

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181. *Id.* at 1077.
182. *Id.*
183. *Id.* at 109.
184. *Id.* at 1077.
185. *Id.* at 613.
186. *Id.* at 1077 (emphasis added).
187. *Id.* at 609.
188. Kaltenbrunner was a defendant in the Trial of the Major War Criminals and was prosecuted for his role in the RuSHA program. He was executed.
189. TRIALS, VOL. IV, *supra* note 164, at 1077-78.
190. Conti was the so-called "Head of National Hygiene" who set about his task of cleansing the nation through medical experiments and "mercy killings." Conti hanged himself on October 5, 1945 with a towel tied to the bars of his cell window.

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Poles [in Poland] should in no way be criminal."[191] The letter closed with the obligatory salutation, "Heil Hitler!"[192] and was signed "H[einrich] Himmler."[193]

On March 10, 1948, all but one of the defendants were convicted and sentenced by the tribunal to prison for terms ranging from credit for time served to life imprisonment.[194] Although the record reflects the injustice that was done to the women involved, the charges against the defendants arose in part because of their denial of the protection of the law to unborn children.[195] Despite claims of legitimate authority, compliance with positive civil decrees did not benefit the defendants.

4. The On Again, Off Again Trial of Erich Honecker

Although the events surrounding Hitler, Nazi Germany, and the subsequent tribunals are among the most famous in history, trials of fallen regimes have taken place in Germany, the Soviet Union, and the United States. More recently, Erich Honecker's trial for treason and manslaughter stirs memories of the Nazi regime which once imprisoned the deposed East German leader.

Erich Honecker ruled East Germany for eighteen years until his removal from power in October of 1989. Honecker was arrested on January 29, 1990 as he left an East Berlin hospital following surgery to remove a malignant tumor from his kidney. A national prosecutor announced that the former Stalinist ruler was charged with treason. The former dictator "is accused of leading the nation to the brink of economic collapse through mismanagement and the misuse of power for personal enrichment. . . . Treason previously carried a maximum penalty of death, but East Germany abolished capital punishment [in 1989]."[196]

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191. MILITARY TRIBUNAL NO. I, PROSECUTION EXHIBIT NO. 466, CASE I, NO. 110-5130.

192. *Id.*

193. *Id.*

194. APPLEMAN, *supra* note 160, at 195-96.

195. TRIALS, VOL. IV, *supra* note 164, at 1077.

196. *East German Ex-Leader to be Tried for Alleged Treason*, ARIZ. REPUBLIC, Jan. 30, 1990, at A10. (In 1935 Honecker was a 23-year-old foot soldier in the Communist underground. He spent all of World War II in the Nazi concentration camp of Brandenburg-Goerden for "preparations to high treason." Released in 1945, he helped lead the Communist Party to grab power in the Soviet sector of a defeated and divided Germany. Among his other accomplishments, Honecker directed the construction of the Berlin wall in 1961.)

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Specifically, Honecker kept a private account that contained about $60 million. Most of the money was supplied by illegal weapons exports.[197] He also personally gave safe haven to terrorists. Prosecutor Diestel described Honecker's harboring of terrorists as a "personal hobby."[198]

In early 1991 Honecker was quietly moved to the Soviet Union, allegedly for health reasons. Soviet officials called it "humanitarian."[199] Former Soviet Premier Gorbachev's promise of political asylum was valid only until Gorbachev developed internal problems of his own. Honecker was ousted once the Soviet Union collapsed.[200]

Returned to Germany for trial July 29, 1992, Honecker faced a variety of additional charges, including forty-nine counts of manslaughter and twenty-five counts of attempted manslaughter—deaths resulting from Honecker's "shoot-to-kill" order. Obedient East German border guards were handsomely rewarded for shooting their fellow East Germans, receiving bonuses, extra vacation days, and a celebratory meal. Apparently the former East German leader's exuberance had faded; he showed no emotion as prosecutors read the list of charges against him.[201]

Displaying more compassion than Honecker ever did, a Berlin court suspended Honecker's trial on January 12, 1993. The 80-year-old Honecker suffered from liver cancer and was believed to have less than six months to live. The day after the trial was suspended, Honecker joined his wife and daughter in Chile. Upon arrival the unrepentant Honecker gushed that he had fulfilled his "last personal wish."[202]

Although Chilean Senate President Gabriel Valdes welcomed the former dictator to Chile,[203] an infuriated German public wanted Honecker to stand trial.[204] On January 28, only two weeks after

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197. *Ousted E. German Chief, Aides Stole Millions, Prosecutor Says*, ARIZ. REPUBLIC, Feb. 8, 1990, at B8.

198. *A Very Special Hobby*, TIME, July 2, 1990, at 41.

199. *People: Erich Honecker*, U.S. NEWS & WORLD REP., Mar. 25, 1991, at 21.

200. Marc Fisher, *Chile Rebuffs Honecker, Denies Political Assylum*, WASH. POST, Dec. 13, 1991, at D14.

201. Terence Roth, *Honecker Returns to Berlin for Trial on Manslaughter, Corruption Charges*, WALL ST. J., Jul. 30, 1992, at A10; *From Heroes to Infamy*, TIME, Sept. 16, 1991, at 43. The guards also are charged with manslaughter. According to their attorneys, the accused will offer as their defense that they were just following orders. Honecker had fortified the zone with mines and trip-wired "scatter-guns" in the 1970's.

202. *Honecker is Reunited with his Family in Chile*, RICHMOND TIMES-DISPATCH, Jan. 15, 1993, at A4.

203. *Id.* ("He's in a free country. There are no walls here.")

204. WORLD, Jan. 23, 1993, at 5.

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releasing Honecker, prosecutors announced that the trial would resume.[205] Whether the trial would commence without Honecker present, or if extradition proceedings would be initiated, was unclear.[206] Germans became angry when medical reports from Chile indicated that Honecker might not be so sick after all.[207]

According to the German Justice Minister, the criminal trial against Honecker "[was] not a matter of revenge but rather [an] attempt to satisfy justice and the rule of law."[208] For many Germans the trial of Erich Honecker has a deeper meaning—an historical obligation for Germany. According to lawyer Rudiger Boergen: "Unlike the Nuremberg trials, we should prove we are able to undertake this important task on our own. This is a second chance for Germany. We cannot miss this opportunity. What Mr. Honecker did was a crime against humanity, too."[209]

Although Honecker operated with complete power and in conformity with his laws, he is still accountable. Blind conformity with positive law that disregards the Rule of Law is indefensible. Honecker's actions defied the Rule of Law; so did the Supreme Court in *Roe v. Wade.*

B. The motion in limine must be denied because the State has not met the required burden of proof. Paul Hill has shown that he acted in defense of another.

It is a well-accepted legal principle that a special relationship exists between principal and agent, with rights and responsibilities on each side. In each of the above examples, government agents actually issued the decrees, carried out the tasks, and practiced lawlessness. Subsequent trials led to the execution and imprisonment of many of these officials. Knowing what we now know, how would we deal with those who tried to stop the Nazis, hide Jews, or attempted to kill a chief of state, like Hitler?

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205. *Honecker Trial Back in Session*, RICHMOND TIMES-DISPATCH, Jan. 28, 1993, at A5.

206. *Id.*

207. *Id.*

208. Terence Roth, *Honecker Returns to Berlin for Trial on Manslaughter, Corruption Charges*, WALL ST. J., Jul. 30, 1992, at A10.

209. Bill Schiller, *Honecker Trial Stirring Debate, Sad Memories*, TORONTO STAR, Nov. 24, 1992, at A2. Honecker is expected to argue that his orders to shoot fleeing countrymen were directives from Moscow and that everything he did was legal under the laws of his own country. Marc Fisher, *Fallen Strongman in the Dock; Germany's Trial of Aged, Still Defiant Honecker Raises Questions*, WASH POST, Nov. 30, 1992, at A28.

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Certainly they would not be prosecuted; perhaps they would receive a medal for valor.

Of course it is easy to say, on this side of Nuremberg, what "we" would have done, or what another would, could, or should have done in the face of tyranny. Looking at these examples of injustice, we can see their lawlessness; we just cannot see our own. A private individual is justified in the use of force against one of these government agents who was attempting to perpetrate some "authorized" harm. How much more compelling that intervenor's actions are if he prevented harm at the hands of another individual (one not in that special relationship). This is the case of Paul Hill.

These egregious accounts really overstate what Paul Hill must prove, not only in his offer of proof for the defense of others, but also for a verdict in his favor. Justifying the use of force against a government agent in the course of his duties is a tougher standard to meet, a higher hurdle to overcome, than the same action against another private citizen. Paul Hill meets even this higher standard, a level the law does not require him to achieve. He prevented harm to judicially innocent third parties—unborn children. The decedents were not government agents. Neither was Paul Hill. Both were private actors. The decedents practiced an unlawful harm.

Conversely, what of an individual who places himself between a potential victim and threatened harm, a harm permitted by positive law? Paul Hill's actions are not without historical precedent. Others have intervened, at great personal risk, to prevent harm to an innocent party. The harm that these individuals sought to prevent was permitted by positive law, laws we now recognize as lawless.

C. Individuals, like Paul Hill, who have protected others in violation of positive law, are exonerated by history as having acted lawfully.

Despite Hitler's reign of terror, some Germans did challenge Nazi tyranny. The White Rose, led by brother and sister Hans and Sophie Scholl, was a group of young Germans who sought to expose the lawlessness of Nazi power.

1. The German Resistance

With their colleagues, the Scholls distributed leaflets in Germany decrying both the brutality of the Nazi regime and the

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apathy of their fellow Germans.[210] In their second leaflet, the Scholls confronted their countrymen with the enormity of the carnage and assessed blame for the indifference of the German people.[211]

While distributing leaflets on February 18, 1943, Hans and Sophie were spotted by a university janitor who immediately summoned the Gestapo. Hans and Sophie were arrested and charged with "preparing for treason." Four days later they were brought before the notorious Roland Freisler, Nazi judge and President of the People's Court, where they were convicted of their crimes. In the tradition of the Enlightenment, Hans and Sophie Scholl were guillotined that day.[212]

The trial of Hans and Sophie Scholl is not the only mark left on jurisprudential history by Roland Freisler. As President of the People's Court,[213] he presided over the trial of the German

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210. INGE SCHOLL, DIE WEISSE ROSE (THE WHITE ROSE) 73-74 (Arthur R. Schultz trans., STUDENTS AGAINST TYRANNY 1st ed. 1970). Their first flyer declared:

> Nothing is so unworthy of a civilized nation as allowing itself to be "governed" without opposition by an irresponsible clique that has yielded to base instinct. It is certain that today every honest German is ashamed of his government. Who among us has any conception of the dimensions of shame that will befall us and our children when one day the veil has fallen from our eyes and the most horrible of crimes—crimes that infinitely outdistance every human measure—reach the light of day? If the German people are already so corrupted and spiritually crushed that they do not raise a hand ... [and] have gone so far ... toward turning into a spiritless and cowardly mass—then, yes, they deserve their downfall.... Do not forget that every people deserves the regime it is willing to endure.

211. *Id.* at 78-79.

> [W]e want to cite the fact that since the conquest of Poland *three hundred thousand* Jews have been murdered in this country in the most bestial way. Here we see the most frightful crime against human dignity, a crime that is unparalleled in the whole of history. For Jews, too, are human beings ... and a crime of this dimension has been perpetrated against human beings.... Why tell you these things since you are fully aware of them ... ? Why do the German people behave so apathetically in the face of all these abominable crimes, crimes so unworthy of the human race ... ? Is this a sign that the Germans are brutalized in their simplest human feelings ... ? [Each German] must evidence not only sympathy; no, much more: a sense of *complicity* in guilt.... [H]e himself is to blame for the fact that it came about at all! Each man wants to be exonerated of a guilt of this kind .... But he cannot be exonerated; he is *guilty, guilty, guilty*! (Emphasis in original).

212. HANS SCHOLL & SOPHIE SCHOLL, AT THE HEART OF THE WHITE ROSE 280 (1987) (Freisler was "all fuming and sputtering with rage" as he faced the accused. Robert Scholl, Hans and Sophie's father, didn't arrive at the trial until it was nearly over - just in time to hear the sentences pronounced. The elder Scholl cried out, "There is a higher court before which we all must stand!").

213. MARIE VASSILTCHIKOV, BERLIN DIARIES 1940-1945 at 220 (1985).

Generals who attempted to assassinate Hitler and assume control of the military and their country.[214]

The plot arose as officers in Hitler's inner circle grew disillusioned[215] over Hitler's consolidation and abuse of power, believing that the Fuhrer had come to power by fraud and compulsion.[216] Several times the generals sought to remove Hitler; however, the combination of aborted assassination attempts,[217] Hitler's numerous military successes,[218] and a lack of cooperation from the Allies for a subsequent armistice[219] prevented the conspiracy from moving forward.[220]

On July 20, 1944, Hitler called his closest advisors for a meeting at his heavily fortified headquarters at Rastenberg. Colonel Count Claus von Stauffenberg, Chief of Staff of the Replacement Army, carried the briefcase containing a bomb to that meeting. After the massive explosion demolished the building that Hitler was in, von Stauffenberg notified his co-conspirators that Hitler was dead, initiating a disastrous course of action for himself and the others who desired to restore Germany to lawfulness.[221]

Von Stauffenberg was court-martialed and shot that evening.[222] Other conspirators were tried before Roland Freisler, who removed belts and suspenders from the accused and ridiculed them as they clung to their clothes. Freisler had the proceedings filmed as he taunted and demoralized the defendants with sarcasm and vulgar abuse.[223] Most of the accused were beaten, tortured, and found guilty of treason and sentenced to death by hanging.[224] Because there were no gallows in Germany and the usual method of execution was beheading, a makeshift gallows was set up in an execution cell in the prison.[225]

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214. *Id.* at 192-94.

215. *Id.* at 45.

216. *Id.* at 222 (With all his fraud and compulsion, characteristic of many chief executives, Hitler's rise to power was, nonetheless, constitutional).

217. *Id.* at 192.

218. *Id.* at 43-44.

219. *Id.* at 190 (In January of 1941 Churchill instructed that any peace feelers from inside Germany should be responded to by 'absolute silence').

220. *Id.* at 43-45.

221. *Id.* at 196.

222. *Id.* at 197.

223. *Id.* at 220 (The developed films were rushed to Hitler).

224. *Id.* at 218.

225. *Id.* at 223.

[O]rdinary meat-hooks had been fixed to an iron rail set in the ceiling of the

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On February 3, 1945, Hitler's "hanging judge," Roland Freisler, was questioning a prominent resister. During the interrogation, the United States carried out its heaviest ever air raid, on Berlin and in broad daylight. Judges, guards, prisoners and spectators evacuated to the building's bomb shelter. After the bombing, Freisler was found crushed by a fallen beam, still clutching the resister's file.[226] Had he not been precipitously dispatched by the Allies, Freisler would have found himself a defendant at the third of twelve terrestrial tribunals, the Justice Case.[227]

Hitler's regime was one of the bloodiest in history. He ruled, not by law, but by raw power and oppression. Today we rightfully praise those, like the Scholls and the conspirators, who desired the Rule of Law. The use of force, even deadly force, in the face of such widespread lawlessness is commendable. Nazi resisters, however, were preceded by resisters of an earlier era: the "conductors" of the Underground Railroad.

2. The Underground Railroad

At no time in United States history was the nation more divided than it was during the Civil War. Arguably, nothing is as much a blight in our nation's history as institutionalized slavery. Blacks were counted as property to their owners and were counted as three-fifths persons for purposes of representation: persons for some purposes; non-persons for others.

Slavery is remembered as a period of national shame; those who worked for its eradication are admired. Among those who labored, no one did more than the individuals of the "Underground Railroad," a network that brought thousands of fugitive slaves from bondage to freedom. Guides were "conductors"; fugitives were their "freight"; sympathizers provided shelter and

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> execution cell .... The hangings were filmed, with spot-lights illuminating the scene .... The condemned were brought in one by one; the executioners fixed the nooses round their necks (Hitler had prescribed piano wire instead of rope so that death would come by slow strangulations rather than from a broken neck); and while they writhed and twisted, sometimes for as long as twenty minutes, and the cameras whirred, the executioner—who was famous for his macabre humor—cracked obscene jokes. The film was then rushed to Hitler's H.Q. where the Fuhrer would gloat over it.

226. *Id.* at 307 (Presumably Freisler found himself before another Judge, as warned by Robert Scholl. It is believed that Freisler offered neither taunts, sarcasm, nor vulgar abuse. *See supra* note 212).

227. APPLEMAN, *supra* note 160, at 157; *see supra* part II. A. 2.

provisions at "stations."[228] Slaves were taken to Canada after Congress passed the Fugitive Slave Act in 1793 and revived its more egregious provisions in the Compromise of 1850.[229]

The fugitive slave laws allowed owners to recover slaves who had escaped to the North. Proof of ownership given to a magistrate was the only requirement. Arrest and return of the slave was executed without a jury trial or other due process. Under these laws many free Blacks living in the North were kidnapped and brought to the South as slaves.[230] Interfering with recapture or aiding in the escape of a runaway was an expensive proposition.[231]

Twice prosecuted, twice convicted for assisting fugitive slaves, a Quaker named Thomas Garrett had all he owned seized and sold to pay the exorbitant fines levied against him. At sixty, Garrett was penniless. He worked and regained some of his former wealth, during which time he always helped any fugitive slave who asked. When Garrett was again arrested, tried, and heavily fined, the judge pronounced the sentence and warned: "Garrett, let this be a lesson to you, not to interfere hereafter with the cause of justice, by helping off runaway Negroes."[232]

Others, like Thomas Garrett, assisted fugitive slaves though slavery itself was legal—a property right—and harboring slaves was a crime. Though many sacrificed to bring slaves to freedom, Harriet Tubman brought more slaves to freedom than any other individual.[233]

Born into slavery around 1820, Harriet Tubman had ten brothers and sisters, all of whom she rescued from slavery. At the age of thirteen, Tubman was hired out as a field hand to a local farmer. When another of the farmer's slaves left his work, the master pursued him; Harriet followed.[234]

Once the slave was found, the overseer instructed the other slaves, including Harriet, to bind the slave so he could be whipped. Harriet refused the order. As the slave fled, Tubman placed

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228. WILLIAM STILL, THE UNDERGROUND RAILROAD v-vii (1970).

229. *Id.* at 355-60.

230. BUTLER A. JONES, INTRODUCTION TO SARAH BRADFORD, HARRIET TUBMAN, THE MOSES OF HER PEOPLE vii (1981) [hereinafter TUBMAN].

231. STILL, *supra* note 228, at 357-58.

232. TUBMAN, *supra* note 230, at 53-54 (Garrett stood to receive his sentence, looked at the judge and said, "Judge—thee hasn't left me a dollar, but I wish to say to thee, and to all in this court room, that if anyone knows of a fugitive who wants a shelter and a friend, send him to Thomas Garrett, and he will befriend him!").

233. STILL, *supra* note 228, at 305.

234. TUBMAN, *supra* note 230, at 15, 109.

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herself in a doorway between the fleeing fugitive and the outraged overseer. Hurling a two pound weight at his escaping chattel, the master struck Harriet in the head almost killing her. Damage from the blow afflicted her for the rest of her life.[235]

In 1849 Tubman escaped to the North, returning to the South nineteen times to lead groups of fugitive slaves to freedom in Canada.[236] As elusive as she was successful, Harriet Tubman's pursuers offered $40,000 for her capture. Not bad for an illiterate woman who earned $40 for a year's labors.[237]

While visiting a cousin in Troy, New York, in 1860, Harriet heard of a fugitive slave, Charles Nalle, who had been followed by his master. Nalle was arrested and awaited his return to the South. After hearing this news Tubman immediately went to the Commissioner's office where Nalle was held, gathering a crowd as she went.[238]

After a long delay because of the large and growing crowd, Nalle was brought through the door with his hands chained together and a United States Marshall on each side. Tubman pulled both officers away, wrapped her arms around Nalle, and yelled to her friends, "Drag us out! Drag him to the river! Drown him! But don't let them have him!"[239]

Nalle and his rescuer were knocked down and dragged to the river. During the half-hour struggle from the office to the dock, Tubman was repeatedly beaten over the head but never let go of Nalle. By the time that the two criminals reached the boat, Tubman's clothes were severely torn and Nalle's wrists were bleeding profusely.[240] Nalle was put in the boat and "started for the land of freedom, guided by the steady light of the North Star."[241] As one of over three hundred slaves led to freedom by Tubman, Nalle at last found refuge "under the paw of the British Lion."[242]

In addition to serving as a guide to fugitive slaves, Tubman worked as a nurse and spy for the Federal army.[243] Forced to earn her own support, Tubman received neither pay nor other

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235. *Id.*
236. *Id.* at 6.
237. *Id.* at 110.
238. *Id.* at 119-20.
239. *Id.* at 122.
240. *Id.* at 122-23.
241. *Id.* at 125.
242. *Id.* at 112.
243. *Id.* at 6.

compensation[244] until 1905, forty years after the war, when she received a pension in recognition of her years of service.[245] Harriet Tubman died in 1913 at the age of ninety-three.[246]

The institution of slavery was a part of this country from its founding until after the Civil War. Foundational to the institution of slavery was the proposition that Blacks were not persons but property. We can see now that slaves were neither property nor potential life, but "persons" in every sense of the word. Viewed as criminals in their day, "conductors" of the Underground Railroad are remembered as brave and heroic. They came to the defense of others, even to the point of using deadly force to protect escaping slaves.[247]

D. *Paul Hill's Defense is Consistent With Historical Precedent.*

No one in our enlightened day defends the actions of the Nazis. Jurisdictional questions aside, the Nazis should have been brought to justice and not allowed to hide behind their legal code. Many share the sentiments expressed on the state seal of Virginia: the freedom loving woman warrior, *Virtue*, with her foot on the chest of the slain king declaring *Sic Semper Tyrannis*.[248] Individual intervention is the right thing, even though the act may be contrary to positive law. The operative question is, "Why?"

If actions may be judged only a half-century or more after the fact, what right do we have to sanction any behavior? If "what feels right to us in our psyche" determines what we sanction, reward, and tolerate, we are no different in substance or structure than Hitler and Stalin. The Rule of Law, clearly understood, restrains and protects executive, legislature, judge, and citizen. It is the foundation of liberty and the heart of America's beginning. It is also the basis for justification as a defense to murder in the case of Paul Hill.

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244. *Id.* at 95.

245. 12 THE NEW ENCYCLOPEDIA BRITANNICA, TUBMAN, HARRIET 25 (1994).

246. TUBMAN, *supra* note 230, at x.

247. TUBMAN, *supra* note 230, at 33. (Often a member of the escaping party would grow weary along the way—longing, as it were, for Egypt. Tubman subtly encouraged the tired fugitive. As they sat, exhausted, Tubman would remove a revolver from her waistband, hold the cocked weapon to the slave's head, and warn: "Dead niggers tell no tales; move on or die." More can be accomplished with a kind word and a loaded gun than with a kind word alone. *Id.*)

248. "Thus ever to tyrants."

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Prohibiting Paul Hill from presenting his defense to the jury parallels defending the lawlessness of the Third Reich and others merely because they had the power or the position to do what they did. Although these government agents wrapped themselves in authority, their actions were in fact lawless and without authority. Denying Paul Hill his constitutional rights is analogous to condemning Hans and Sophie Scholl, the German Generals, and the "conductors" of the Underground Railroad. Resistance to tyranny and to the tyrant is legitimate. The only reason the actions of those that fought the Nazis or slavery can be endorsed is if that intervention was itself lawful, even though it was contrary to the legal code. If Paul Hill deserves punishment, then so did each of them. The same rule that condemns tyrants and exonerates the intervenor vindicates Paul Hill.

E. Only the Rule of Law Guarantees Orderly Society and Freedom. Properly Applied, it also Exonerates Paul Hill.

The Rule of Law is essential to liberty. Samuel Rutherford's book, *Lex Rex*,[249] was critical of the monarchy.[250] *Lex Rex*, written in 1644, outlined many of the principles that were embodied in the American Revolution 130 years later. As Rutherford wrote in response to the lawlessness of the king in Britain, the Declaration of Independence and the Constitution were a response in America to the abuses of the Crown; they established how the nation was to be governed. Chief Justice John Marshall articulated this truth in *Marbury v. Madison* when he declared that "[t]he government of the United States has been emphatically termed a government of laws and not of men."[251] America's origins are based on the Rule of Law.

By contrast, it is not surprising that the Rule of Law was expressly rejected in the former Soviet Union. As Marshall expounded foundational principles of young America, in 1929 Secretary Kagonovich of the Central Committee Communist Party expounded the basis for rule in the fledgling, and now defunct, Soviet Union:

> We reject the concept of a state based on the rule of law. If a person claiming the title of Marxist speaks seriously about a state based on the rule of law, and, what's more, applies

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249. The Law is King.
250. SAMUEL RUTHERFORD, LEX, REX, OR THE LAW AND THE PRINCE xxi (1982).
251. 5 U.S. (1 Cranch) 137, 163 (1803).

> the concept of 'a state based on the rule of law' to the Soviet State, this means that he is deviating from the Marxist-Leninist teaching about the state.[252]

Reflecting on some of the abuses in the former Soviet state, Alexander Solzhenitsyn observed that the denials of life and liberty were possible because the Russian state had "no objective legal scale."[253]

Marshall and Kagonovich expressed the framework for two diametrically opposed civil orders. One, to paraphrase Solzhenitsyn, is based on an objective legal scale that governs even the governor; the other governs by sheer power. Implicit in Marshall's statement is the premise that right makes might; for Kagonovich and his adherents, might makes right. Roland Freisler and Erich Honecker each acted absolutely for a time. From their decisions there were no appeals; over their realms they exercised complete dominion. Each issued edicts and enforced them ruthlessly. Yet each is condemned as lawless. How then is this condemnation justified?

If legislative or judicial positivism is adopted, no legitimate basis exists for this condemnation. The Nazis and Honecker, for example, followed the dictates of their law, and acted in accordance with it. Hitler's rise to power, though rapid, self-serving, and absolute, was accomplished through legal means. Both Hitler and Honecker had the power to make their decrees and to see that they were carried out. The positivist finds himself arguing alongside the defense at Nuremberg: There are no absolutes, absolutely.[254] One's only remedy in this scheme is to enact a new code enforced prospectively, never retroactively; unless, of course that new code provides for ex post facto sanctions.

Neither is there any refuge for Nazi condemners in the construct built on the shifting sands of Critical Legal Studies. Like George Eliot's character in *Middlemarch*: "Brooke is a very

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252. Yury Feofanov, *Citizen Gorbachev vs. General Secretary Gorbachev*, IZVESTIA, Sept. 30, 1992, at 2, *translated in* THE CURRENT DIGEST OF THE POST-SOVIET PRESS, Vol. XLIV, No. 39, 1992, at 18. It was at Katyn that 21,857 Polish officers and others were executed. The orders for the slaughter came directly from Stalin, Molotov, Voroshilov, and that renowned critic of the rule of law, Kaganovich. Charges for the Katyn Massacre were originally part of the charges brought against the Major War Criminals at Nuremberg. When the defendants there offered proof that the blame belonged with the Soviets, the matter was quietly dropped. Stalin, who was in power at the time of the Massacre, once noted that, "One death is a tragedy; a million deaths is a statistic."

253. Aleksandr I. Solzhenitsyn, *A World Split Apart*, reported in SOLZHENITSYN AT HARVARD 8, 12 (Ronald Berman ed. 1980).

254. *See supra* text accompanying notes 153 and 154.

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good fellow, but pulpy; he will run into any mold but he won't keep shape,"[255] there are no enduring principles. What is right and lawful and legitimate might, and probably will, change from one generation—and, presumably, from one regime—to the next. What was once acceptable, is now barbaric, inhuman, lawless; but, who knows: the old norm might once again be in vogue as the current norm is rejected as archaic and narrow.

Only a Rule of Law offers a basis for dealing with lawlessness. Without the absolute rule of law, there is the absolute rule of tyrants. With no standard by which men and nations are judged, no basis exists to condemn atrocities in history. Without the rule of law, the massacre of 21,000 Polish soldiers at Katyn is nothing more than "a statistic."[256]

The notions of individual responsibility and the Rule of Law did not grow out of the experiment at Nuremberg; nor have they emerged from the evolutionary ooze of post-Civil War jurisprudence. Rather, from the beginning of America it was already so. In 1804, Chief Justice John Marshall recognized that a subordinate has a duty to obey only lawful orders. In *Little v. Barreme*,[257] the Supreme Court held that a commander of a United States warship acted at his own peril even when obeying the orders of the President, if those orders were not justified.[258] Justice Storey noted in *United States v. Bevans*[259] that a soldier charged with murder was without excuse even though he acted in obedience to his superior officer. The Court held that the order was "illegal and void."[260]

In response to the war crimes and crimes against humanity, the United Nations proposed the *Convention on the Prevention and the Punishment of the Crime of Genocide* in 1948.[261] The United States reaffirmed this commitment when it adopted the terms of the Genocide Convention in 1988.[262] Article I of the Genocide Convention emphasizes that its terms extend to both peace and

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255. GEORGE ELIOT, MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE 69 (1986).
256. *See supra* note 252.
257. 2 Cranch 170 (1804).
258. *Id.*
259. 16 Wheaton 386 (1818).
260. *Id.*
261. G.A. Res. 260A (III), U.N. GAOR at 174, U.N. Doc. A/810 (1948) (In force 12 January 1951 in accordance with Article XIII).
262. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 255-56 (1991).

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war.[263] Article II defines genocide in accordance with the Nuremberg Charter:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
>
> a. Killing members of the group;
> b. Causing serious bodily or mental harm to members of the group;
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d. *Imposing measures intended to prevent births within the group;*
> e. Forcibly transferring children of the group to another group.[264]

Subsequently, the General Assembly of the United Nations unanimously adopted the *Declaration of the Rights of the Child* on November 20, 1959.[265] The preamble to the Declaration states, "[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[266]

Barbarisms cannot occur under the Rule of Law. This continuous thread—the Rule of Law—runs from Rutherford in *Lex Rex*, to Marshall in *Marbury*, to Kaganovich on the Central Committee, to Justice Jackson at Nuremberg, to the Genocide Convention adopted by the United States in 1988. Each recognizes that when any executive, legislator, or judge acts out of accord with the Rule of Law, he is not making new law but is acting lawlessly. As Justice Jackson urged at Nuremberg, "Their program denied and ignored all law,"[267] and the "ultimate step ... is to make statesmen responsible to law."[268] Making statesmen responsible to law has been the goal, the ultimate step, since America's beginning.[269] This objective has been emphasized and reemphasized; affirmed and reaffirmed throughout history.

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263. G.A. Res. 260A (III), U.N. GAOR at 174, U.N. Doc. A/810 (1948).
264. *Id.* (emphasis added).
265. SOCIAL ISSUES RESOURCES SERIES, VOL. 1, ARTICLE 5 (1973).
266. DECLARATION OF THE RIGHTS OF THE CHILD (1959).
267. JACKSON, *supra* note 130, at 81.
268. *Id.* at 93.
269. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

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CONCLUSION

The Florida legislature understands that some killings are justified and should not be punished. Florida law provides that one may kill to protect himself or another from an imminent deadly harm. This statutory defense is available to Paul Hill and he should be allowed to present the evidence to the jury.

Application of Florida law, which has its roots in the Common Law of England, supports Paul Hill's assertion of a defense of another defense. The case law requirements for justification of his actions are satisfied.

Abortion is presently viewed to be the law of the land. In the present case, an affirmative defense presented by a private actor presents no conflict with the holdings of either *Roe* or *Casey*. Those decisions prevent the state from erecting barriers that place an "undue burden" on a woman's access to abortion, but do not address an individual's conduct that might have the effect of making an abortion slightly more inaccessible.

Neither decision is relevant to the conduct of abortion protesters acting as private individuals. Even if a conflict does exist, precedents in history demonstrate that civil rulers are held accountable when they act lawlessly. So are individuals. It was this lawlessness that Paul Hill stopped.

Presently, access to abortion is held to be a right, protected by the law. If there is such a law, that law is wrong. One hundred fifty years ago, slavery enjoyed the same position. Tubman, the Scholls, the German Generals: All are heroes. That is how they are remembered; it is not how they were treated in their day. Kaltenbruner, Freisler and Taney held prestigious positions in their governments; each is remembered with disdain.

Ultimately, the jury is the last line of defense for any defendant. The judge should permit a defendant to use a defense of another defense and allow the jury to rule on its applicability to the facts. This has been true since the beginning of our jurisprudence system. As the first Chief Justice of the Supreme Court, John Jay, said, "[I]t must be observed that ... you [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.... [B]oth objects are lawfully, within your power of decision."[270] This decision stands.

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270. Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

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The state's motion invades the province of the jury and attempts to remove a statutory defense from this defendant. For these reasons, the State's motion must be denied.

Dated: Oct. 20, 1994

Respectfully submitted,

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Paul J. Hill
As Attorney Pro Se

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