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Case No. 96-1957

**IN THE**

**SUPREME COURT OF THE UNITED**

**STATES**

*OCTOBER TERM, 1996*

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**PAUL JENNINGS HILL**

*Petitioner,*

vs.

**STATE OF FLORIDA,**

**RESPONDENT**

---

**CAPITAL CASE**

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF FLORIDA**

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND  
BRIEF OF AMICI CURIAE THE FRIENDS OF  
PAUL JENNINGS HILL  
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI  
With Appendix**

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JAMES JOSEPH LYNCH, JR.  
Attorney At Law (SBN 85805)  
1562 Response Drive  
P.O. Box 336  
Sacramento, CA 95812-0336  
Office: (916) 448-7871  
Fax: (916) 448-0459

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COUNSEL FOR AMICI CURIAE

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## QUESTIONS PRESENTED BY AMICI

1. Was Hill given faulty Farretta advisements, did not qualify to represent himself, and prejudiced within the meaning of *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), by denial of a meaningful access to the courts to provide the following defenses:

a. Based on exhaustive research on the use of the death penalty, the jury should have been instructed that the death penalty could be applied, if at all, only if the state demonstrated beyond a reasonable doubt that the state could not protect society by mere incarceration.

b. Based on new research, the ruling in *Heath v. Alabama*, 474 U.S. 82 (1985) that dual sovereignty allows multiple punishment is inconsistent with the common law, and therefore Hill was denied an opportunity to show, if there is a basis, the death penalty was barred under the doctrine of double jeopardy.

2. In light of *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), was it reasonable for the court below to refuse the defense of the right to use reasonable force, and deadly force if reasonable, in the defense of others, to wit the unborn, where, arguably, the unborn are members of posterity” as used in the Preamble of the Constitution, and therefore a person entitled to a defense?

(i)

TABLE OF CONTENTS

QUESTIONS PRESENTED BY AMICI ..... (i)

TABLE OF CONTENTS .....(ii)

TABLE OF AUTHORITIES.....(iv)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ..... 1

INTEREST OF *AMICI CURIAE*..... 2

STATEMENT OF THE CASE AND FACTS ..... 3

SUMMARY OF REASONS FOR GRANTING WRIT ..... 3

REASONS FOR GRANTING WRIT ..... 4

I. BECAUSE OF FARETTA ERRORS, HILL WAS DENIED AN OPPORTUNITY TO PRESENT EMERGING THEORIES AS TO THE APPLICATION OF THE DEATH PENALTY, AND A POTENTIAL PLEA OF DOUBLE JEOPARDY ..... 4

A. EMERGING STANDARDS SUGGEST A JURY INSTRUCTION MUST INFORM THE JURY THAT BEFORE A VERDICT OF DEATH CAN BE RETURNED, THE STATE MUST DEMONSTRATE BEYOND A REASONABLE DOUBT IT CANNOT CONTROL DEFENDANT'S CONDUCT BY MERE INCARCERATION..... 4

1. Introduction.....

2. Constitutional Premise & Framework; the People Can Only Delegate Reasonable Force for the Protection of Society.....

3. International Law Proscribes the Use of Unreasonable Force in Defense of State Interests .....

4. Where Persons Are A Danger to

Society, Incarceration is the Norm.....10

5. There has been a Gradual  
Withdrawal of the Death Penalty As  
A Form of Punishment, and  
Withdrawal From Public View When  
Used. ....11

6. Conclusion.....14

B. HILL WAS DENIED AN OPPORTUNITY TO ENTER A  
PLEA OF DOUBLE JEOPARDY..... 14

II. HILL WAS DENIED AN OPPORTUNITY TO SHOW  
THAT HE WAS DEFENDING A PERSON IN THE  
CONSTITUTIONAL SENSE ..... 17

CONCLUSION..... 23

## TABLE OF AUTHORITIES

### CASES

<i>Adams v. Storey</i> , 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) .....	5
<i>Alamo School District v. Jones</i> , 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960) .....	19
<i>Anderson v. United Realty Co.</i> , 79 Ohio St. 23, 86 N.E. 644, afmd 222 U.S. 164 (1911) .....	20
<i>Apodaca v. Oregon</i> , 406 U.S.404 (1972) .....	11
<i>Bank of the United States v. Deveaux</i> , 5 Cranch (9 U.S.) 61, 85 (1809) .....	6
<i>Barber v. Pittsburgh, F.W. &amp; C.R. Co.</i> , 166 U.S. 83 (1897) .....	20
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983) .....	9
<i>Beake v. Tyrrell</i> , 3 Mod. 194, S.C. 1 Show 6, 89 E.R. 411 (1689?) .....	15
<i>Beck v. Alabama</i> , 447 U.S. 627 (1980) .....	22
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954) .....	8
<i>Brown v. Bd. of Education</i> , 347 U.S. 483 (1954) (Brown I) .....	7, 8
<i>Brown v. Bd. of Education</i> , 349 U.S. 289 (1955) (Brown II) .....	8
<i>Brown v. United States</i> , 256 U.S. 335 (1921) .....	7
<i>Coggs v. Berherd</i> , 2 Ed.Raym. 909 (1703) .....	21
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977) .....	11
<i>Davis v. Davis</i> , 305 U.S. 52 (1938) .....	16
<i>Eberhardt v. Georgia</i> , 433 U.S. 917 (1977) .....	11
<i>Elkin v. United States</i> , 364 U.S. 206 (1960) .....	14

<i>Enmund v. Florida</i> , 458 U.S. 752 (1982) .....	11
<i>Ex Parte Lange</i> , 85 U.S. (18 Wall.) 163 (1873) .....	16
<i>Field v. Clark</i> , 143 U.S. 649, 691 (1891) .....	7
<i>Gannon v. Albright</i> , 183 Mo. 238, 81 S.W. 1162 (1904) .....	20
<i>Garland, Ex Parte</i> , 71 U.S. (4 Wall.) 333 (1867) .....	7
<i>Gibbons v. Ogden</i> , 9 Weat. (22 U.S.) 1 (1824) .....	6
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	5
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88 (1976) .....	17
<i>Haward v. Howe</i> , 12 Gray (Mass.) 49 (1858) .....	20
<i>Heath v. Alabama</i> , 474 U.S. 82 (1985) .....	i, 3, 14, 16
<i>Hertz v. Abrahams</i> , 110 Ga. 707, 36 S.E. 409 (1900) .....	20
<i>Hitchcock v. Dugger</i> , 481 U.S. 939 (1987) .....	10
<i>Hockett v. State Liquor Licensing Board</i> , 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7 (1915) .....	18
<i>Hughes v. Cornelius</i> , 2 Show. KB 232, 89 E.R. 907, 89 E.R. 907 (1664) .....	15
<i>INS v. Cardozo-Fonesca</i> , 480 U.S. 421 (1987) .....	8
<i>Kay v. Scates</i> , 37 Pa 31 (1860) .....	20
<i>Land v. Dollar</i> , 330 U.S. 731 (1947) .....	17
<i>Larew v. Larew</i> , 146 Va. 134, 135 S.E. 819 (1926) .....	20
<i>Locke v. New Orleans</i> , 4 Wall (71 U.S.) 172 (1866) .....	6
<i>McCleskey v. Kemp</i> , 107 S.Ct. 1756 (1987) .....	4

<i>McIntosh v. Dill</i> , 86 Okla. 1, 205 P. 917, 925 (1922) .....	19
<i>Moore v. Illinois</i> , 14 How. 13 (1852) .....	14
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982) .....	6
<i>People v. Ghent</i> , 43 Cal.3d 739 (1987) .....	8, 9
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896) .....	7
<i>Rex v. Elrington</i> , 9 Cox, Crim Cases 86, 121 E.R. 870 (1861) .....	15
<i>Rex v. Hutchingson</i> , 2 Keb 785, 84 E.R. 1011 (16__?) .....	15
<i>Rex v. Roche</i> , 1 Lench 134, 168 E.R. 169 (1775) .....	15
<i>Rex v. Sawyer</i> , 2 Car. & Kir. 101, 175 E.R. 41, 44 (1815) .....	15
<i>Rex v. Sheen</i> , 2 Carr. & P. 634, 172 E.R. 287 (1827) .....	15
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) .....	16
<i>Scott v. Sanford</i> , 60 U.S. (19 How.) 393 (1857) 6, 14, 18	
<i>Sinkler v. Kneale</i> , 401 Pa 267, 164 A.2d 93 (1960) .....	19
<i>Solem v. Helm</i> , 463 U.S. 277 (1983) .....	10
<i>Sullivan v. Louisiana</i> , 113 S.Ct. 2078 (1993) .....	<i>passim</i>
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1986) .....	7, 9
<i>The Nereide</i> , 13 U.S. 388 (1815) .....	8
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987) .....	11
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958) .....	4
<i>United States v. Block</i> , 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1867) .....	6

<i>United States v. Boyer</i> , 85 F.425 (D.C., Mo., 1898) .....	17
<i>United States v. Classic</i> , 314 U.S. 707 (1941) .....	6
<i>United States v. Cruikshank</i> , 92 U.S. (2 Otto) 542 (1876) .....	18
<i>United States v. Harris</i> , 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) .....	6
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978) .....	14
<i>Veazie Bank v. Fenno</i> , 8 Wall (75 U.S.) 533 (1869) .....	6
<i>Weems v. United States</i> , 217 U.S. 349 (1910) .....	4
<i>White v. Hart</i> , 80 U.S. (13 Wall.) 646, 650 (1871) .....	19
<i>Willers v. Washington Dept of Social Svcs for the Blind</i> , 474 U.S. 481 (1986) .....	19
<i>Wright v. United States</i> , 302 U.S. 583 (1938) .....	6

## CONSTITUTIONS

### United States

Preamble .....	5, 6, 14, AC App. 1-7
Art. I, § 1 .....	9
Art. I, § 2, cl 3; § 9, cl. 1 .....	18
Art. I, § 8 .....	6
Art. I, § 8, cl. 17 .....	20
Art. I, §§ 8 & 9 .....	15
Art. I, §§ 9 & 10 .....	6, 16
Art. I, § 10 .....	15
Art. III, § 3, cl. 2 .....	20

Art. IV, § 1 .....	15
Art. IV, § 2, cl. 1 .....	20
Art. IV, § 3, cl. 2 .....	20
Art. VI .....	17
1st Amend .....	19
3rd Amend .....	20
4th Amend .....	20
5th Amend .....	17, 20
8th Amend .....	4
9th, 10th & 14th Amend .....	16
10th Amend .....	6
13th & 14th Amend .....	14
13th Amend .....	18
14 <sup>th</sup> Amend .....	17, 18

**TREATIES**

United Nations Charter, Chapter VI [commencing with Article 33] .....	8
--	---

**CODES**

United States

18 U.S.C. § 3566 .....	12
18 U.S.C. §§ 3551 .....	12
Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987 .....	12

California

Govt.C. § 100(a) .....	6
------------------------	---

Penal Code § 3605 .....	12
Probate Code, § 1400, et seq. ....	10
Welfare & Institutions Code § 200, et seq .....	10
Welfare & Institutions Code § 5000, et seq .....	10

**STATUTES**

England

10 Halsburys Statutes of England (4 <sup>th</sup> Ed.) Constitutional Law, 25 Edw. 1 ( <i>Magna Carta</i> ) (1297), Notes, § 3.5 .....	17
<i>Magna Carta</i> (1215), Article 54 .....	19

**MISCELLANEOUS**

1 Kings 1-2 .....	17
1 Sam. 16 .....	17
2 Farrand, THE CONSTITUTIONAL DEBATES, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651 .....	20
2 Sam. 5, 9-20 .....	17
3 Encyclopædia Britannica 404 (1971) .....	12
3 Rotunda, Treatise on Constitutional Law, § 23.33, p. 512 (1986) .....	7
3 Rotunda, TREATISE ON CONSTITUTIONAL LAW, p. 663 (1986) .....	20
4 Blackstone, p. 198 .....	19
4 Bl.Comm. *97 .....	11
4 Encyclopædia Britannica 847 (1971) .....	11, 12
6 Encyclopædia Britannica 802 .....	12
11 Encyclopædia Britannica 64 .....	12

17 Halbury's Laws of England (1st ed, 1911) Infants §§ 132, 135 .....	19
21 Exodus 22 .....	19
28 American Jurisprudence (2nd), Estates, § 53 .....	20
Acquinas, <i>Summa Theologiae</i> , 1, q. 76, a. 5 and q. 118, a. 2 .....	19
ALI, MPC, part II, vol. I, pp. 112-114 .....	13
AMERICAN DECLARATION OF INDEPENDENCE .....	19
American Declaration of Independence, ¶ 2 .....	20
Aristotle, <i>Politics</i> , VII, 1335b, 24-26 .....	18
Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2 .....	7
Cheshire, THE MODERN LAW OF REAL PROPERTY .....	7
Chitty, CONTRACTS, 134 (23rd ed, 1968) .....	21
Farrands 28-33 .....	6
Foster, CROWN LAW 273-277 (1762) .....	7
Gray, THE RULE AGAINST PERPETUITIES (4th Ed.) .....	19
Hobb, LEVIATHAN (1651) .....	20
Laqueur, THE HUMAN RIGHTS READER .....	20
Locke, SECOND TREATISE OF GOVERNMENT (1690) .....	20
McKechnie, MAGNA CARTA; THE GREAT CHARTER OF KING JOHN, ART. 41 .....	17
Milton, " <i>Aeropagitica</i> " (1644) .....	18
Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 6.1 n.2, 15.11 n.4, & 23.8 .....	7

Noonan, Contraception, 86-88 (Harv. U. Press, 1965). .....	19
Note, PROBATE CODE CONSERVATORSHIPS	
A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS (1977) 8 Pacific L.J. 73 .....	10
Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, .....	6
Perkins, CRIMINAL LAW AND PROCEDURE (Foundation press, 4th Ed., 1972), .....	7, 10, 11
Restatement (1st) Contracts, § 77 .....	21
Rotunda (Vol. 3) § 23.20,fn. 2 .....	16
Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) § 3.12 n.2 .....	6
Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 3.1, 3.2 .....	6
Schwartz, The Bill of Rights, A documentary history .....	19
Statute of Westminster (1275) 1, c. 15 .....	11
The International Covenant on Civil and Political Rights, Part III, art. 6(2) .....	9
United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43, 53 .....	9
Verdross, <i>Forbidden Treaties in International Law</i> , 31 AJIL 571 .....	6
Verdross, <i>Forbidden Treaties in International Law</i> , 31 AJIL 571 (1937) .....	8, 20
Verdross, <i>Jus Dispositivum and Jus Cogens in International Law</i> , 60 AJIL 55 (1961) .....	6, 8, 21



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IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI  
WITH APPENDIX**

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**MOTION FOR LEAVE TO FILE AMICI CURIAE  
BRIEF**

The Friends of Paul Hill move for leave to file a brief in support of the petition on the grounds there are issues, and refinement of issues, not adequately dealt with in the Petition, the Friends were permitted to file such a brief covering the additional issues in the Florida Supreme Court, the brief will aid this court in reaching a just result in this case, and a capital Petitioner should have as much help as possible. Counsel

fax'd a copy of this document and called Counsel of Record, but neither takes a position at this time.

The interest of Amici follows.

Dated September 15, 2006

JAMES JOSEPH LYNCH, JR.  
Attorney At Law (SBN 85805)  
1562 Response Drive  
P.O. Box 336  
Sacramento, CA 95812-0336  
Office: (916) 448-7871  
Fax: (916) 448-0549

Counsel for Amicus Curiae

### **INTEREST OF *AMICI CURIAE***

The Friends of Paul Hill are an unorganized group of individuals scattered throughout the United States who have contributed to the provision of this brief in his behalf. Counsel for the Friends has a similarity of purpose, to wit, an attorney admitted to practice law in the highest court of the State of California, who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He has presented a similar *Amicus Curiae* Brief in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989); *Ohio v. Akron Reproductive Ctr*, 497 U.S. 502 (1990); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) *Turnock v. Ragsdale*, 503 U.S. 916 (1992); *Bray v. Alexandria*, 113 S.Ct. 753 (1993); *Planned Parenthood v. Williams*, 10 Cal.4<sup>th</sup> 1009 (1994). He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He is the author of ABORTION AND INAL-

INENABLE RIGHTS IN AMERICAN JURISPRUDENCE: A PROSPECTIVE POLICY (© 1986), AND POSTERITY: A CONSTITUTIONAL PEG FOR THE UNBORN, 40 AJJ 410 (1995). He lived four years in England where he engaged in a self-directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

Friends believe that pro-life individuals should not take human life without substantial justification. On the other hand, they are firmly committed to the proposition that the unborn are persons in the constitutional sense whose life ought not to be taken without substantial justification either. In that regard they do not believe that Paul Hill received a fair trial as to whether his acts on that particular occasion, in the defense of the unborn, were justified. They are also concerned that the rights of that the unborn, in this, and other litigation, have been unrepresented or under-represented as to their interest in the outcome.

### **STATEMENT OF THE CASE AND FACTS**

*Amici Curiae* adopt by reference Petitioner's statement of the case and facts. Pet., p. 7.

### **SUMMARY OF REASONS FOR GRANTING WRIT**

1. Review is required because it appears that Hill was given faulty Farretta advisements, did not qualify to represent himself, and prejudiced by a denial of a meaningful access to the courts to provide the following defenses:

a. Based on exhaustive research on the use of the death penalty, the jury should have been instructed that the death penalty could be applied, if at all, only if the state demonstrated beyond a reasonable doubt that the state could not protect society by mere incarceration.

b. Based on new research, the ruling in *Heath v.*

*Alabama*, 474 U.S. 82 (1985) that dual sovereignty allows multiple punishment is inconsistent with the common law, and therefore Hill was denied an opportunity to show, if there is a basis, the death penalty was barred under the doctrine of double jeopardy.

2. In view of *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), review is required because it appears to have been unreasonable for the court below to refuse the defense of the right to use reasonable force, and deadly force if reasonable, in the defense of others, to wit the unborn because they are members of posterity” as used in the Preamble of the Constitution, and therefore a person entitled to a defense.

## REASONS FOR GRANTING WRIT

### I.

#### BECAUSE OF FARETTA ERRORS, HILL WAS DENIED AN OPPORTUNITY TO PRESENT EMERGING THEORIES AS TO THE APPLICATION OF THE DEATH PENALTY, AND A POTENTIAL PLEA OF DOUBLE JEOPARDY

A. EMERGING STANDARDS SUGGEST A JURY INSTRUCTION MUST INFORM THE JURY THAT BEFORE A VERDICT OF DEATH CAN BE RETURNED, THE STATE MUST DEMONSTRATE BEYOND A REASONABLE DOUBT IT CANNOT CONTROL DEFENDANT'S CONDUCT BY MERE INCARCERATION.

#### 1. Introduction.

The constitutional prohibition against cruel and unusual punishment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice.” *McCleskey v. Kemp*, 481 U.S. 279 *citing Weems v. United States*, 217 U.S. 349 (1910), 378. “[T]he ‘basic con-

cept underlying the 8th Amendment' in this area is that the penalty must accord with the 'dignity of man.'" *Id*, citing *Trop v. Dulles*, 356 U.S. 86 (1958), 99, 100. Decisions in this area have been informed by "contemporary values concerning the infliction of a challenged sanction." *McCleskey*, citing *Gregg v. Georgia*, 428 U.S. 153 (1976), 173.

A survey of "contemporary values concerning the infliction" of the death penalty suggests there are three objective evolving standards of decency which restrict when the death penalty may be inflicted: (i) a re-examination of the 8th Amendment in the context of the amount of force which a state may use to defend its citizens; (ii) a historical retreat from infliction of the death penalty in all felonies to those limited circumstances when a victim is killed, and there is the requisite culpability; (iii) a historical retreat from public executions.

However, because of Farretta errors, Hill was denied an opportunity to marshal legal arguments and present them, with supporting facts, to the court. He was prejudiced because the emerging standards demonstrate a potentially meritorious claim the state may impose the death penalty, if at all, only on a showing that the state can not control Hill's conduct by mere incarceration. As an important instruction was not given, review is required to determine whether reversal is automatic and mandatory. *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

## **2. Constitutional Premise & Framework; the People Can Only Delegate Reasonable Force for the Protection of Society.**

Sovereignty resides in the People. U.S. Constitution,<sup>1</sup>

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<sup>1</sup> In the solution of constitutional questions the same rule of inter-

Preamble [“We, the People”].<sup>2</sup> The federal powers are expressly recognized as being delegated powers. U.S.Const., 10th Amendment. 1 Rotunda, *Treatise on Constitutional Law* §§ 3.1, 3.2. By its terms, the 10th Amendment implies that powers are delegated by the People to the State, and the concept is written into the California Constitution's Pream-

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pretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) . The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809) . No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938) . Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869) ; *Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866) ; *Gibbons v. Ogden*, 9 Weat. (22 U.S.) 1, 188-189 (1824) ; *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) ; *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) ; *Pardoning Power of the President*, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) . Where there are several possible meanings of the words of the constitution, that meaning that will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 314 U.S. 707 (1941).

<sup>2</sup> While the result in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), may be correct, its *ratio decidendi* does not square with the Preamble and Article I §§ 9 & 10. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. Farrands 28-33; *Federalist Papers*, ## 32, 39;. The framers placed sovereignty in the People. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) .

ble.<sup>3</sup>

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;<sup>4</sup> Cheshire, THE MODERN LAW OF REAL PROPERTY, p. 660 (Citing common law principles). At the time the constitution was drafted, an individual could use only reasonable force for self-defense, and deadly force only when met with deadly force and its use is reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, CROWN LAW 273-277 (1762); *Brown v. United States*, 256 U.S. 335 (1921); Perkins, CRIMINAL LAW AND PROCEDURE (1972) 660-667; *Tennessee v. Garner*, 471 U.S. 1 (1986).

Because an individual at common law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the individual collectively could delegate to the States, hence the State may only use reasonable force, and deadly force if reasonable.<sup>5</sup> *Garner*.

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<sup>3</sup> The United States was established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations. Verdross, *Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937) ;. and recognized in the Preamble; and Art. I, § 8; of the U.S. Constitution. See also, California Constitution, Preamble ["We, the People"]; Cal. Govt. C. § 100(a).

<sup>4</sup> Blackstone; is a recognized source of the common law in aid of interpreting the U.S. Constitution. 1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

<sup>5</sup> Statutes or practices inconsistent with the Constitution, however

Because of the Farretta error, Hill was denied an opportunity to bring this to the Court's attention, therefore reversal is required. *Sullivan, supra*.

### **3. International Law Proscribes the Use of Unreasonable Force in Defense of State Interests**

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numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, *Treatise on Constitutional Law* § 23.33, p. 512 (1986). The Court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by the Court, the Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown I*, 347 U.S., at 488-89, 496 (1954); *Brown v. Bd. of Education*, 349 U.S. 289, 294, 298 (1955) (*Brown II*) (Nature of remedy to be utilized). Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country, abortion controversy has led to disorder in the streets. It is not suggested that the disorder is the reason for overruling *Roe*. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

The rules of self-defense apply to states in International Law.<sup>6</sup> United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961), 60, #3; Id, *Forbidden Treaties in International Law*, 31 AJIL 571-77.<sup>7</sup> The concept is preserved in the United States Constitution, Art. I, § 1 (No State shall, ... engage in War, unless actually invaded ... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner*, 471 U.S. 1 (1986) [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm and the death penalty<sup>8</sup> therefore would be cruel and unusual punishment,

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<sup>6</sup> Courts are bound by the law of Nations which is part of the law of the land. *The Nereide*, 13 U.S. 388 (1815); *INS v. Cardozo-Fonesca*, 480 U.S. 421 (1987) ; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

<sup>7</sup> In *People v. Ghent*, 43 Cal.3d 739 (1987), the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, and in any event before those documents may be utilized, they must be either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out that these laws, by their very nature, are self-executing. Finally, no argument is made here that the death penalty is barred; rather the argument centers on what process is due before it may be imposed.

<sup>8</sup> The International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious

unless the State shows, in a given case, beyond a reasonable doubt that society cannot protect itself by mere incarceration.

Because of the Farretta error, Hill was denied an opportunity to bring this to the Court's attention, therefore reversal is required. *Sullivan, supra*.

#### **4. Where Persons Are A Danger to Society, Incarceration is the Norm.**

In *Barefoot v. Estelle*, 463 U.S. 880 (1983) it was held that it was proper for the jury to consider whether or not defendant would commit criminal acts in the future and thus pose a threat to society. However, the court went on to say in *Solem v. Helm*, 463 U.S. 277 (1983), that we will not assume that there is no rehabilitative opportunity. *Accord, Hitchcock v. Dugger*, 481 U.S. 393 (1987) [reversing death penalty for refusal to consider mitigating circumstances].

Every day we incarcerate People who pose a threat to society. LPS Act, Welfare & Institutions Code § 5000, *et seq.*; Probate Code, § 1400, *et seq.*; Conservatorship and Wardship, Welfare & Institutions Code § 200, *et seq.*; Generally, NOTE, PROBATE CODE CONSERVATORSHIPS: A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS (1977) 8 Pacific L.J. 73. Thus, the relevant inquiry is not whether the defendant poses a future threat to society, an entirely speculative and subjective opinion of what may happen, but whether or not society can effectively control the behavior by incarceration, with a possibility of rehabilitation. That is to say, the emerging standards of decency is such that the State may not

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crimes in accordance with the law in force at the time of the commission of the crime ...." Ratified by the United States and 71 other countries, effective March 23, 1966. *E.g., People v. Ghent*, 43 C.3d 739 (1987) (Dissenting Opinion by Broussard and Mosk, JJ).

exact the death penalty unless it demonstrates beyond a reasonable doubt that it cannot protect society by mere incarceration.

Because of the Farretta error, Hill was denied an opportunity to bring this to the Court's attention, therefore reversal is required. *Sullivan, supra*.

### **5. There has been a Gradual Withdrawal of the Death Penalty As A Form of Punishment, and Withdrawal From Public View When Used.**

At common law, all felonies, regardless of whether death resulted, and in theft cases, regardless of the amount taken, warranted the death penalty, except mayhem for which mutilation was substituted. Perkins, *Criminal Law and Procedure* (Foundation press, 4th Ed., 1972), p. 4-5. Whipping was substituted for death as the penalty for petite larceny, but that was a change from the common law resulting from an early statute. *Id.* Statute of Westminster, 1, c. 15 (1275). In the words of Blackstone, "the true criterion of felony is forfeiture." 4 Bl.Comm. \*97. Modernly, few felonies are recognized as capital crimes. Perkins, at p. 5; *generally*, 4 Encyclopædia Britannica 847 (1971). Moreover, and notwithstanding *Apodaca v. Oregon*, 406 U.S.404 (1972), there is not a single jurisdiction left which allows the infliction of the death penalty with less than a unanimous jury verdict.<sup>9</sup>

The United States Supreme Court has recognized further restrictions upon the utilization of the death penalty. Thus in

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<sup>9</sup> When *Apodaca* was decided, only two jurisdictions allowed the death penalty on less than a unanimous decision. Oregon required a 10-2 decision. Oregon has since repealed its death penalty, and Louisiana now requires a unanimous decision. ALI, MPC, p. 154.

non-fatal felonies, the court held that the imposition of the death penalty was unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977); *Eberhardt v. Georgia*, 433 U.S. 917 (1977). Similarly, in *Enmund v. Florida*, 458 U.S. 752 (1982), the court held that in felony-murder cases, the death Penalty was unconstitutional where the accomplice did not commit murder, nor intend that death result. Then in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court distinguished *Enmund* on the basis that in *Enmund* “the degree of participation **was so tangential** that it could not be said to justify a sentence of death”,<sup>10</sup> and held that “the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.”<sup>11</sup>

Congress at one point abolished the death penalty altogether. Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987, adopting Chapter 227 - Sentences, 18 U.S.C. §§ 3551, et seq.<sup>12</sup> 10 States of the United States have abolished it. 4 Encyclopædia Britannica 847 (1971). Of 20 Latin American

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<sup>10</sup> The court noted in *Tison* that in *Enmund* it conducted its own proportionality analysis. How about world wide proportionality analysis. Vis, England, Ireland, Canada, and France have all abolished death penalties. How many other countries? How many still have it? See Brennan's dissent.

<sup>11</sup> *Enmund* was outside in the getaway car, hence he was not in a position to stop the homicides by co-defendants even had he wanted to stop the homicides. In *Tison*, on the other hand, the defendants were at the scene of the homicides, and made no effort to curb their father.

<sup>12</sup> Congress did not reinstate the mode of execution until September 1, 1994. 18 USC Sec. 3596.

Countries, 10 have abolished it. *Id.* All but 4 Mexican States have abolished it. *Id.*<sup>13</sup>

At common law, and the early days of this Country, executions were a public affair designed as a deterrent. 3 *Encyclopædia Britannica* 404 (1971) [except heads of state]; 4 *Id.* 847; 6 *Id.* 825; 11 *Id.* 64; 18 *Id.* 556. At the restoration, Cromwell's body was exhumed, and his head displayed on a spike at the gates as a warning to all. 6 *Encyclopædia Britannica* 802. Common Law displays of execution have become a relic of the past. The last public execution occurred in Kentucky in 1936. 11 *Encyclopædia Britannica* 64. Under modern statutes, the public is excluded, witnesses limited to those found by law necessary to be present to assure the State that the law had been obeyed. Infliction of the death penalty has steadily been withdrawn from public view.<sup>14</sup> Former 18 U.S.C. § 3566 [Chap. 227]; California Penal Code § 3605. Thus, much of the deterrent effect is now gone, if there ever was any deterrent effect.<sup>15</sup> AC App., p. 8.

Thus, the emerging standards of decency has been withdrawal of the death penalty from all felonies to those felonies in which the victim dies as a proximate result of culpable personal conduct on the part of the defendant. Where the

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<sup>13</sup> See footnote 6.

<sup>14</sup> We can literally say "We have swept the death penalty under the carpet and out of view."

<sup>15</sup> The ALI Committee set out some rather stale statistical studies which failed to conclusively prove that capital punishment was or was not a deterrent. ALI, MPC, part II, vol. I, pp. 112-114. In the table hereinafter, using more current statistics, based upon the number of murders per hundred thousand, the rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity for capital punishment. A statistician would be better qualified to render an expert opinion.

death penalty is imposed, it is hidden from the public eye, therefore lacks any significant impact on deterrence.

Because of the Farretta error, Hill was denied an opportunity to bring this to the Court's attention, therefore reversal is required. *Sullivan, supra*.

## **6. Conclusion**

Capital punishment is no longer a universally recognized means of controlling human behavior. It has been withdrawn as a public spectacle, and restricted to a narrow class of cases in which a victim dies as a proximate result of the defendant's own culpable conduct. Most jurisdictions that do allow capital punishment require a unanimous verdict. Just as *Tison* teaches that some homicides are justifiable, anthropologists can show in recent modern time cultures that recognize cannibalism as socially acceptable. Youths who are left unguided, misguided by parents, or abused by others may well have grown up with maladaptive behavior through no fault of their own.

The sum total of the foregoing, implicit in *Garner*, is that the State may not use its sovereignty with any more force than is reasonably under the circumstances, and the death penalty only if it has demonstrated beyond a reasonable doubt that it cannot protect society by mere incarceration.

### **B. HILL WAS DENIED AN OPPORTUNITY TO ENTER A PLEA OF DOUBLE JEOPARDY**

It is not clear whether there is a factual basis for a plea, but that can be explained by the fact Hill was denied appropriate *Farretta* considerations, and thus denied meaningful access to the Courts. Assuming *arguendo* a potentially meritorious defense, in view of Hill's conviction and sentence of life in federal court, if the case involves the same set of facts

necessary for guilt or death litigated in the federal case, then double jeopardy would apply, absent *Heath v. Alabama*, 474 U.S. 82, 96 (1985). However, current scholarly research suggests that the court erred in *Heath*.

D was tried, convicted, and given life in Georgia, then tried and given the death penalty for the same homicides in Alabama. Held: Dual Sovereignty does not bar second trial. *Heath v. Alabama*, 474 U.S. 82 (1985), 96. The court readily conceded had Georgia attempted a second shot to get the death penalty, it could not. The Court relied on *Moore v. Illinois*, 14 How. 13 (1852), 20; *United States v. Wheeler*, 435 U.S. 313 (1978), 317. The court over-looks the fact that Dual sovereignty is a concept rejected by itself in *Elkin v. United States*, 364 U.S. 206 (1960). The very concept is flawed in the United States where sovereignty is vested in the People. U.S. Constitution, Preamble; *Scott v. Sanford*, 60 U.S. (19 How.) 393 [The 13th & 14th Amendments enlarge the class of persons belonging to sovereignty]. As each State is a part of the whole, it is the Peace and Dignity of the People violated, wherever situated, and it can be punished but once. The concept was understood at Common Law to bar punishment for the same offenses committed abroad. *Rex v. Hutchinson*, 2 Keb 785, 84 E.R. 1011 (16\_\_?); *Hughes v. Cornelius*, 2 Show. KB 232, 89 E.R. 907, 89 E.R. 907 (1664) [Admiralty; Captain charged with piracy on the high seas pleaded in abatement he was found by an admiralty court in another country to have taken a prize according to articles of war; plea held to be good]; *Beake v. Tyrrell*, 3 Mod. 194, S.C. 1 Show 6, 89 E.R. 411 (1689?); *Rex v. Roche*, 1 Lench 134, 168 E.R. 169 (1775) [Plea withdrawn]; *Rex v. Sawyer*, 2 Car. & Kir. 101, 175 E.R. 41, 44 (1815); *Rex v. Elrington*, 9 Cox, Crim Cases 86, 121 E.R. 870 (1861); *Rex v. Sheen*, 2 Carr. & P. 634, 172 E.R. 287 (1827); *Rex v. Walker*, 2 Moo & Rob 446, 174 E.R. 345, 347 (1843). In *Roche*, quoting *Beake* on *Hutchinson' Case*, Hutchinson was tried and acquitted in

Portugal, arrested in Newgate to be tried for the same murder, and it was agreed having been acquitted in Portugal, he could not be tried again in England.<sup>16</sup> Support for this common law tradition is found in the Constitution: Sovereignty vested in People (Preamble); Rights and limits of federal power (Art. I, §§ 8 & 9); rights and limits of State Power (Art. I, § 10; Art. IV, § 1 [supremacy; full faith and credit], 9th, 10th & 14th Amendments); limits on both federal and state power (1st [speech, petition, religion], 2nd [quartering of soldiers], 4th through 7th [rights of “people”, “person”, and “accused”]). By 28 U.S.C. §§ 1738 and 1739, Congress has made the full faith and credit clause applicable to federal courts. *Davis v. Davis*, 305 U.S. 52 (1938), 118 ALR 1518. *Heath v. Alabama*, 474 U.S. 82 (1985) should be *overruled* as being inconsistent with the warp and wolf of common law and American notions of double jeopardy *jurisprudence*. Other cases of note: *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 172 (1875); 3 Rotunda § 23.20,fn. 2. The constitution protects People, not places. The *Katz Doctrine*. It is absurd to be-

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<sup>16</sup> A reading of *Hutchingson's Case* itself shows it to be on a writ of *habeas corpus* on the grounds that the court lacked jurisdiction because the crime occurred in another country. Nonetheless all courts of record who quote the case cite it for double jeopardy. Research tends to indicate the case appears in the Bulletin of Nisi Prius, a local legal newspaper such as the Los Angeles Daily Journal or the Sacramento Daily Recorder. It appears to have been a celebrated case with a number of hearings in which ultimately the bar was held to be good. In *Roche's Case*, *Beake v. Tyrrell*; is cited as *Beak v. Thyrrwhit*;. Furthermore, the official proceedings were often held in Latin or French in the Seventeenth Century, with only a brief public announcement in English, and many of the official reports were never translated. See volume 81 of the English Reports (N.S.). In *Sawyer's Case*, 175 E.R., at 44, at least one of the justices questioned *Hutchingson's Case*, but the bar was held good in any event. I have never found *Cottingham's Case*, but I am still looking for it.

lieve that the Federal Government cannot deny rights; a state acting alone cannot deny rights; but the federal government acting in concert with a State, or two States acting in concert can. The Constitution protects People, not abstract notions of sovereignty the common law tradition of which has been abolished by Article I §§ 9 & 10.

Because of the *Farretta* error, Hill was denied an opportunity to bring this to the Court's attention, therefore reversal is required. *Sullivan, supra*.

## II.

### HILL WAS DENIED AN OPPORTUNITY TO SHOW THAT HE WAS DEFENDING A PERSON IN THE CONSTITUTIONAL SENSE

The Court below denied Hill an opportunity to justify his conduct as defense of third persons. IBA, pp. 53. If in fact the unborn are persons in the Constitutional sense, then Hill was privileged to use reasonable force in their defense. *Roe v. Wade*, 410 U.S. 113 (1973), is an aberration and should be discarded as unsound in principal and unworkable in practice because, in light of scholarly research, it appears that the court overlooked where in the Constitution the unborn are persons in the constitutional sense, and thus entitled to the same protections as others.

Neither the 5<sup>th</sup> nor the 14<sup>th</sup> Amendment defines person. The 14<sup>th</sup> Amendment defines citizenship.<sup>17</sup> In other contexts, the court has held that aliens (*E.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); U.S. Const., Art. VI (Treaty Clause); McKechnie,<sup>18</sup> MAGNA CARTA; THE GREAT CHAR-

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<sup>17</sup> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, ..."

<sup>18</sup> McKechnie is **the** recognized scholar on the *Magna Carta*. 10

TER OF KING JOHN, ART. 41 (ALIENS)) and non-natural person are person entitled to Constitutional protection. *E.g.*, *Land v. Dollar*, 330 U.S. 731 (1947) (Replevin; Stock taken under color of law). Not to recognize the unborn is therefore an anomaly. As "Person" is used without qualification, the most logical place to look for meaning is the Preamble,<sup>19</sup> because, while its purpose is not to create rights,<sup>20</sup> it does define for whom the rights were created.<sup>21</sup> The words "people of the United States" and "citizens" are synonymous terms, and

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Halsburys Statutes of England (4<sup>th</sup> Ed.) Constitutional Law, 25 Edw. 1 (*Magna Carta*) (1297), Notes, § 3.5.

<sup>19</sup> Recorded history first notes that a sovereign rules with the consent of the governed in 1 Sam. 16, 2 Sam. 5, 9-20, 1 Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when Israel was doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

<sup>20</sup> *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf.*, *Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7 (1915).

<sup>21</sup> *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404 (1857). The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

mean the same thing.<sup>22</sup> The Preamble creates two classes of sovereignty: "Ourselves" and "our Posterity."<sup>23</sup> Its purpose appears to be to include "Posterity"<sup>24</sup> on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity," as to those who are lives in being, is synonymous, if not with "citizen,"<sup>25</sup> surly with "person."<sup>26</sup> This understanding is consistent with the meaning of 'posterity' in 1787 when the Constitution was signed.<sup>27</sup> In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can the issue of the womb."<sup>28</sup> At common law, it was understood that certain members of future generations, fetuses,<sup>29</sup> were a life in being for the purposes of the

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<sup>22</sup> See footnote at 21. See A.C. App., pp. 1-7.

<sup>23</sup> ABORTION AND INALIENABLE RIGHTS, etc., *supra*, at footnote 1, pp. 11-12.

<sup>24</sup> "Posterity" is capitalized in the original. As a noun is capitalized only if it identifies a particular person, place, or thing, it implies the framers considered the word important.

<sup>25</sup> See footnote 9, *supra*. It is probably more accurate to say the unborn is a person, who, upon birth, becomes a citizen (§ 1, 14<sup>th</sup> Amendment), except (26<sup>th</sup> Amendment) for the right to vote.

<sup>26</sup> See footnotes 17 and 24.

<sup>27</sup> ABORTION AND INALIENABLE RIGHTS, etc., *supra*, at footnote 1.

<sup>28</sup> Milton, John, "Aeropagitica" (1644).

<sup>29</sup> That a fetus has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Aquinas, *Summa Theologiae*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, *Contraception*, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v.*

Rule Against Perpetuities.<sup>30</sup> Moreover, prenatal injuries, were to a limited extent, recognized at Common Law,<sup>31</sup> and it does not appear that tort actions for prenatal injuries were barred.<sup>32</sup> Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation,<sup>33</sup> a concept clearly inconsistent with the concept of "unalienable rights" found in the Declaration of Independence<sup>34</sup> and the concept of an "indestructible and

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*Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

<sup>30</sup> Gray, *The Rule Against Perpetuities* (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

<sup>31</sup> "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198. Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

<sup>32</sup> *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925 (1922); 17 Halbury's Laws of England (1st ed., 1911) Infants §§ 132, 135.

<sup>33</sup> *White v. Hart*, 80 U.S. (13 Wall.) 646, 650 (1871).

<sup>34</sup> AMERICAN DECLARATION OF INDEPENDENCE; Schwartz, *The Bill of Rights*, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable** Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ...." Declara-

perpetual union" in the Preamble, whereas if construed as a fee tail,<sup>35</sup> it would be consistent with an intent to create "unalienable rights" and "a perpetual union,"<sup>36</sup> for the protection of future generations, including the unborn. It was submitted to the People for ratification.<sup>37</sup> Implicit in the Preamble is the concept of social contract<sup>38</sup> wherein society promises the individual inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate<sup>39</sup> from inalienable rights. Mutual promises have

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tion of Independence, ¶ 2.

<sup>35</sup> *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward v. Howe*, 12 Gray (Mass.) 49 (1858); *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31 (1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926). The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amendment IV (Secure in their persons, houses); Amendment V ("... nor be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation ....").

<sup>36</sup> 28 *American Jurisprudence* (2nd), Estates, § 53. Cf., *Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (1911) (recognizing by *dictum* that this rule was followed at common law).

<sup>37</sup> 2 Farrand, Max, *The Constitutional Debates*, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, *op cit.*, p. 663, note 1.

<sup>38</sup> E.g., Hobb, *Leviathan* (1651); Locke, *Second Treatise of Government* (1690); Laqueur, *The Human Rights Reader*.

<sup>39</sup> Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937) ; Verdross, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966) ; Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577

always been considered sufficient consideration for enforceability.<sup>40</sup> As persons who have not reached the age of capacity<sup>41</sup> could not consent,<sup>42</sup> it appears that adults are of the class "our selves," and all others of the class "Posterity,"<sup>43</sup> to include lives in being, i.e., the unborn.

Taking the approach that the unborn are members of 'Posterity' answers a number of theoretical problems. First, it is a further development of constitutional theory which recognizes there is not just one right, or more precisely—life, at stake, but two, the mother's, a member of 'Ourselves,' and the Unborn, a member of 'Posterity.' Second, it answers why the State cannot force a woman to terminate pregnancy or engage in eugenics, because the life of the unborn cannot be taken, absent legal justification or excuse. Third, it assures that a women's right to terminate pregnancy is not abridged where to carry to term would be an undue burden, i.e. mother has a right to self-defense where fetal life endangers her life. Fourth, it sets a standard for preserving both lives, if possible, guarding against undue state influence. Finally, it does justice by respecting the Constitutional guarantee to protect human life, removing from the discussion a word, abortion, which is inflammatory, ending, hopefully, the carnage done to women, Posterity, and others.

The point is that an important defense was withdrawn

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(1937).

<sup>40</sup> Chitty on Contracts, 134 (23rd ed., 1968); Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909 (1703) .

<sup>41</sup> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." § 1, 26th Amendment.

<sup>42</sup> Chitty, *op. cit.*

<sup>43</sup> 2 Stephens Commentaries 342 (1841).

from **consideration**. Properly charged, a jury could have found that Hill acted with a bona fide good faith belief his acts were necessary for the protection of a life protected by the constitution, and reasonable, therefore not guilty, or unreasonable, and therefore guilty only of voluntary manslaughter. The failure to give the jury a third option is constitutional error. *Beck v. Alabama*, 447 U.S. 627 (1980). Moreover, the Court should not speculate what the jury might have done in a hypothetical case never presented to it, therefore the reversal is automatic and mandatory. *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

### CONCLUSION

WHEREFORE, *Amicus Curiae* pray, for all of the reasons and arguments set forth herein, this court grant review, reverse the judgment, and remand for further proceedings not inconsistent with this court's opinion, and such other and further relief as the court deems just and proper under the circumstances.

Dated: September 15, 2006

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.  
California Attorney (SBN 85805)  
P.O. Box 336  
Sacramento, CA 95812-0336  
(916) 448-7871

*AMICUS CURIAE* THE FRIENDS OF PAUL  
JENNINGS HILL IN SUPPORT OF APPELLANT



EXCERPTS FROM  
2 Farrand, Max, The Constitutional Debates\*  
[129]

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COMMITTEE OF DETAIL, I

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[Proceedings of the Convention, June 19 -- July 23.]  
[152]

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COMMITTEE OF DETAIL, IV

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VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

\*\*\*\*\*

[163]

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\* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

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COMMITTEE OF DETAIL, IX

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IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

\*\*\*\*\*

[177]

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Monday

MADISON

August 6

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MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutledge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

\*\*\*\*

[193]  
TUESDAY, AUGUST 7, 1787.  
JOURNAL  
Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5;  
noes -- 4.

Delaware being represented during the Debate a question was  
again taken on ye Committee of ye whole Ayes --- 3; noes --  
- 6.]

On the question to agree to the Preamble to the con-  
stitution as reported from the committee to whom were re-  
ferred the Proceedings of the Convention -- it was passed  
unan: in the affirmative [Ayes -- 10; noes --- 0.]

\*\*\*\*\*

[196]

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Tuesday	MADISON	August 7
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---

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken  
up,

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The <preamble> of the Report was agreed to nem.  
con. So were Art: I & II.

\*\*\*\*\*

[209]

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Tuesday	MADISON	August 7
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---

MCHENRY

Augt. 7.

\*\*\*\*\*

The preamble or caption and the 1. and 2. article passed without debate, ....

\*\*\*\*\*

[565]

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COMMITTEE OF STYLE

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Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

\*\*\*\*\*

[590]

---

COMMITTEE OF STYLE

---

Report of Committee of Style

**WE, the People of the United States, in order to form**

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Consti-

tution for the United States of America.

ARTICLE I.

\*\*\*\*\*

[604]  
THURSDAY, SEPTEMBER 13, 1787.  
JOURNAL  
Thursday September 13, 1787.

\*\*\*\*

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. \*\*\*

\*\*\*\*\*

[604]

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[To postpoin the report respecting the 22nd and 23rd Ayes --- 9; noes --- 1.]

\*\*\*\*\*

To strike out the word "to" before establish justice  
Ayes --- 8; bites --- 2,]

[641]  
MONDAY, SEPTEMBER 17, 1787.  
JOURNAL  
Monday September 17, 1787.  
Detail of Ayes and Noes

	The Constitu- tion Unani- mously agreed to.	To deliver over the Jour- nal and papers to the Presi- dent	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Doctr. Franklin rose with a speech in hand ....

\*\*\*\*\*

[643]

... --- He then moved that the Constitution be signed ...

[644]

\*\*\*\*\*

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

\*\*\*\*\*

[649]  
MCHENRY  
Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation  
in the house of representatives.

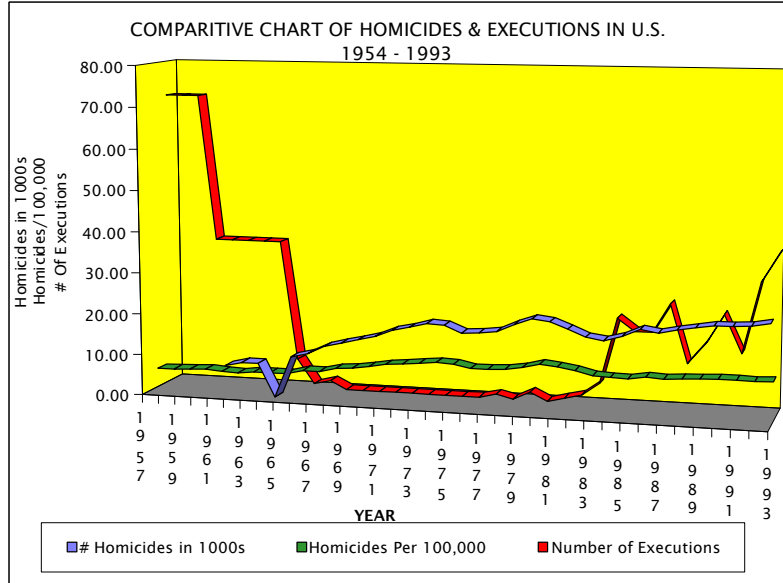
\*\*\*\*\*

[651]  
  
THE CONSTITUTION  
OF THE UNITED STATES

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

ARTICLE I.

\*\*\*\*\*



Source: STATISTICAL ABSTRACT OF THE UNITED STATES, 1963 (Table 197), 1969 (Table 199), 1976 (Tables 252 & 299), 1986 (Tables 279 & 329), 1996. Total Murders represent number of murders committed in United States. Number per 100,000 represents the number of murders per 100,000 persons in the United States.