

FILED

MAR 14 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

Case Number 304060

LAWRENCE CRONIN
VIRGINIA CRONIN
RICHARD HANSON
MICHAEL WALTERS
DOUGLAS TURNER,
Appellants

v.

SPOKANE POLICE DEPARTMENT, CITY OF SPOKANE, WA
Respondents

REPLY TO BRIEF OF POLICE/CITY OF SPOKANE

Petitioners: Cronin, Cronin, Hanson, Walters and Turner
Address: 6716 E. Big Meadows Rd., Chattaroy, WA 99003

TABLE OF CONTENTS

	Page
Opening Argument	1
Response to the Police/City Brief:	8-24
A.1. Standing and “Beneficial interest”	8
B.1. “Abortion is not homicide”	14
B.2. “Discretion”	16
A.3. “ <u>O’Connor vs. Matzdorff</u> ”	19
A.2. “...resolution of the legal standing issue <i>does not require</i> the Court to determine “who is a human being; who is a person.”	23
Summary and Prayer for Relief	24
Signature Page	26
Attachments:	
1. <u>Cooper v. Aaron</u> , 358 U.S. 1 (1958)	
2. <u>Hamilton v. Scott</u> , Supreme Court of Alabama, # 1100192 (2012)	
3. <u>Vandervort v. Grant</u> , 156 Wash. 96, 286 Pac. 63, (1930)	
4. Rem. Rev. Stat. § 1015 (to 1931)	
5. Rem. Comp. Stat. § 9921 (1922)	
6. 38 <u>Corpus Juris</u> , pgs.839-842, § [546] and [547], (1925)	
7. 55 <u>Corpus Juris</u> , pgs. 77-80 § [53], (2009)	

TABLE OF AUTHORITIES

Table of Cases	Pages
<u>Brown v. Board of Education of Topeka</u> 347 U. S. 483 (1954)	2, 3, 4, 6, 8, 15, 16, 18, 25
<u>Cooper v. Aaron</u> , 358 U.S. 1 (1958)	3, 4, 7, 8, 12, 13, 15, 16, 18, 23, 25
<u>Dred Scott v. Sandford</u> , 60 U.S.393 (1857)	3, 4, 8, 15, 16, 25
<u>Hamilton v. Scott</u> , # 1100192, Supreme Court of Alabama February 17, 2012.	5
<u>O'Connor v. Matzdorff</u> , 76 Wn. 2d 589, 458 P.2d 154 (1969)	11, 19, 20, 21, 22
<u>Plessy v. Ferguson</u> , 163 U.S. 537 (1896)	15
<u>Roe v. Wade</u> , 410 U.S. 113 (1973)	1, 2, 3, 4, 5, 8
<u>State ex rel. Lay v. Simpson</u> , 173 Wash. 512, 513, 23 P.2d 886 (1933)	9
<u>United States v. The Amistad</u> 40 U.S. 518 (1841)	3, 4, 8, 13, 14-16, 22, 24, 25
<u>Vandervort v. Grant</u> , 156 Wash. 96, 286 Pac. 63, (1930)	9, 10
Constitutional Provisions	
<u>Declaration of Independence</u>	6, 13
<u>United States Constitution</u>	3, 6, 7, 13, 16, 18, 25
<u>United States Constitution. Fourteenth Amendment</u>	9, 11, 13, 23
<u>United States Constitution. Ninth and Tenth Amendments</u>	13, 14

Statutes	Pages
38 <u>Corpus Juris</u> , pgs.839-842, § [546] and [547] (1925)	9
Rem. Rev. Stat. § 1015	10
Rem. Comp. Stat. § 9921	10
55 <u>Corpus Juris</u> , pgs. 77-80 § [53] (2009)	10, 11
RCW 7.16.210 Mandamus, Questions of fact (2010)	1, 2, 14, 24, 25
RCW 7.16.150-280 Mandamus Law (2010)	12, 18, 19
RCW 7.16.160	17, 20
RCW 7.16.170	9, 11, 13
RCW 7.16.250	25
RCW 34.05.530 Standing (2010)	12, 20
RCW 9A.32.010. Homicide Defined. (2010)	17

Other Authorities

<i>Merriam Webster's Collegiate Dictionary</i> , 2003, 11th Edition, See "consistent".	16
<i>Black's Law Dictionary</i> , 2009, By Bryan A. Garner, Textbook – 9th Edition. See "ministerial".	17, 20

Opening Argument

We would like to discuss and offer suggestions to the Court in regards to its role in light of what we and the Police have argued. We observed at the October 28th hearing how the Police/City respectfully outlined, in their opinion, the Superior Court's role in this case. RP 5-8, 17. We understand that we also have this prerogative. We are encouraged by the Mandamus Law itself in doing so and respectfully make our case to you, the Justices of Washington State's Court of Appeals, Division III. We are sincerely and clearly driven, in all of our opinions and arguments, to ask: What is Truth?

We understand that a lower court cannot rule against a Supreme Court decision such as Roe v. Wade, 410 U.S. 113 (1973). However, we respectfully argue, based upon other Supreme Court decisions, that this Court is free to make its own decision.

Our Petition, briefs, hearing and Appeal argue that the Court must "look further into the facts" as defined in Washington State and Federal Law. The Superior Court erred in not doing so. The U.S. Supreme Court has done so in four of the most important decisions in our country's history, as we discuss. We ask this Court to do the same.

In Roe, the court did not look further into the facts. In Mandamus this is referred to as "Questions of fact", **RCW 7.16.210**. As a result of their decision of not looking into and resolving the facts, Roe v. Wade:

1) is not a rational decision as evidenced by subsequent Supreme Court decisions subsequent to Roe and current scientific fact. Brown v. Board of Education of Topeka, 347 U. S. 483 (1954). CP 14, 16-25, 53, and CP 108-109, and

2) is a ruling which did not decide the fact: who human beings and persons are legally. CP 10-11,14-15, 20, 22-25; Appeal: 34,40-41.

“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” Roe v. Wade, 410 U.S. 113, 159-160, 93 S.Ct. 705, 730. (1973), and:

The Supreme Court made the following prophetic statement:

“The appellee and certain amici argue that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.” Roe v. Wade, 410 U.S. at 156, 93 S.Ct. at 728.

With the statement, “If this suggestion of personhood is established...”, the Supreme Court left open the decision of who is, in fact, a person. With these insightful and powerful words, the Court acknowledges that no decision can be made without this question of fact being determined. The Supreme Court stated in writing that they would not, “at this point in the development of man’s knowledge” determine, who is in fact, a person. They noted the unresolved “question of fact” before them, but they decided not to resolve it. The evidence for this is that they had the clearness of mind and cognizance to make these

statements. Roe v. Wade, Id., United States Constitution and Appeal 26-34 and 40-41.

Previous Supreme Courts have decided “questions of fact” that have never been decided before and specifically in cases involving: who are human beings and persons: Amistad, “free men vs. slaves”; Dred Scott, “CITIZEN vs. slave”; Brown, “ ‘separate but equal’ vs. segregation”; and Cooper, upholding Brown. United States v. The Amistad, 40 U.S. 518 (1841), Dred Scott v. Sandford, 60 U.S.393 (1857), Brown v. Board of Education of Topeka, 347 U. S. 483 (1954) and Cooper v. Aaron, 358 U.S. 1 (1958) (attached). RP 9, 11-12, 14-16.

In these cases the Court decided that in order to make a legal ruling they had to “look further into the facts” before a decision could be made. Appeal at 26-39. The Court in Roe v. Wade did not adhere to this established high standard of looking into and resolving the facts. “We need not resolve the difficult question of when human life begins” and “the judiciary.....is not in a position to speculate as to the answer.” Roe.

In these four cases the Supreme Court looked at the facts, i.e., “...looking behind these documents” so that the cases could “...be decided upon the eternal principles of justice...”. Amistad, Appeal at 29-32 and RP 12. Looking into and deciding the facts of a case has been considered the duty of the judiciary for over 200 years, “In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation”,

declared in the notable case of Marbury v. Madison, 1 Cranch 137,177, that, “It is emphatically the province and duty of the judicial department to say what the law is.” Cooper, at 18. CP 61-62, 108-109. The Supreme Court in Roe v. Wade left this fact, of who a human being is, unresolved. In the four cases we discuss, the facts, similar to or the same as this fact, were decided by the Courts in order for a just legal decision to be rendered.

The Roe Court set a dangerous precedent. They did not follow the highest legal standards of the Supreme Courts that had gone before them in Amistad, Brown, Cooper and even Dred Scott(standing). Appeal 14-15. By virtue of this and based on the present discussion, this duty now falls to this Court. In their not deciding, the Court left the question open and allowed for the fact that another court could decide this in the future. They did not specify that they, the Supreme Court, needed to decide this issue. “If this suggestion of personhood is established...”, allows for any court to do so. Roe v. Wade, 410 U.S. at 156, 93 S.Ct. at 728.

This Court needs to do so and has been given the authority to do so, as we argue in our Appeal and this Reply. This Court has the option of acting in agreement with a Supreme Court decision that is not rational or acting in concert with judicial decisions representing the highest standards of the Supreme Court. This “question of fact” needs to be decided. It will not go away. CP 20, 109. It is this fact that is needed in any decision resolving whether abortion is homicide, or not. At 11. We

ask the Court to make a rational legal decision by “looking further into these facts”, as argued in our Appeal. Our Appeal is grounded in the Supreme Court’s and the U.S. court system’s judicial history of searching for the truth and making just legal decisions based on fact.

We cite a recent Alabama State Supreme Court decision, Hamilton v. Scott, # 1100192, February 17, 2012(attached). We do so as, “The general rule is that a case pending on appeal will be subject to any change in the substantive law.” Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327 (1941), in Hamilton at 15.

This decision in Hamilton v. Scott adds to the justifications in our Petition re: “Contradictions within Roe v. Wade” and “Discussion of Viability”. Hamilton at 11-13, 15, 16, 19, 21-45; CP 14-15 and 16-25.

“Viability” is the legal foundation of Roe v. Wade. CP 16-25. At the conclusion of his opinion, Alabama Supreme Court Justice Tom Parker states that the use of viability as a standard in this case “is incoherent”. Hamilton v. Scott at 42. We argue in our Petition that “viability” presently “has no clear, discernable legal meaning as applied to the homicide or abortion laws”. Compare with John Q. Adams, Appeal 22.

Justice Parker, states in his concurrence with a unanimous decision, “And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception.¹⁹ An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

Conclusion

“Roe’s viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since Roe have

conclusively demonstrated that an unborn child is a unique human being at every stage of development. And together, Alabama's homicide statute, the decisions of this Court, and the statutes and judicial decisions from other states make abundantly clear that the law is no longer, in Justice Blackmun's words, "reluctant ...to accord legal rights to the unborn." For these reasons, Roe's viability rule is neither controlling nor persuasive and should be rejected by other states until the day it is overruled by the United States Supreme Court." Malone, C.J., and Woodall, Stuart, Bolin, Murdock, Shaw, Main, and Wise, JJ., concur. Parker, J., concurs specially. Stuart, Bolin, and Wise, JJ., concur. Hamilton v. Scott, at 44-45.

The United States of America prides itself on the justice of its government. Justice is provided through the Court system, which relies upon rational, clear, cognizable and coherent thought in order to make just decisions. We wonder how this can be accomplished if this court, or any court, agrees with decisions based upon "incoherent" reasoning. We are a Republic, founded upon the principles of the Declaration of Independence and the Constitution. Our courts are free and should not act as courts in authoritarian societies. Such courts often support decisions made by state agencies in support of a "rule by fiat".

We have the courage to make this last statement based upon the opinion of the Supreme Court regarding this legal issue. The Court uses the words and legal logic of one of our country's Founders, John Adams, in unanimously affirming Brown v. Board of Education:

"The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout its history.... [John Adams] was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power...."

“So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for.” Cooper v. Aaron, at 23-24. CP 61-62, 108-109.

The Police cannot act and rule by “fiat”. CP 6, 9, 26, esp. 61-62, 109.

The Police as “officers and agents” of the State, cannot “deny to any person within its jurisdiction the equal protection of the laws.” Cooper, at 17. The Police have never been “endowed” with the authority to define who “persons” are. They have no power as judges or jury to decide this question of fact. “Whoever, by virtue of public position under a State government...denies or takes away the equal protection of the laws, violates the constitutional prohibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. *Ex parte Virginia*, 100 U.S. 339, 34.” In Cooper, at 17.

The Police are acting from no known legal authority, violating their own policies and making decisions by “fiat”. CP 1-6, 25-26. This is a violation of the Constitution, with the result that innocent people continue to be put to death in buildings in Spokane, WA. CP 8, 13-16, 31-34. The Police are caught in a dilemma. The Police are to protect innocent human life, all of human life, without prejudice. Yet they are constrained to act, because no answer has been made to the factual question: who--human beings and persons--are we protecting? And the Police cannot “be judges in their own case”. Cooper, Id., 23-24.

With the above words and the decisions in Amistad, Dred Scott, Brown v. Board of Education, Cooper and Supreme Court decisions subsequent to Roe, the Supreme Court gives this Court the authority to request that they “reconsider its decisions”. CP 11-27. We ask the Court to “look further” into the Supreme Court decision of Roe v. Wade in light of historical judicial thinking, knowledge and current science, so the Court’s decision might be a source of justice for the people. We seek a court decision, or a jury decision, on the question of fact: Who is a human being; Who is a person? in the United States of America.

How can our great country be the land of liberty and freedom for all people when it refuses to define who “people” are?

Response to the Police, City of Spokane Brief

We have made answer to the Police’s “**Arguments: A, B**” at 3-4, in Reply to Response to Petition for Writ of Mandamus, CP 55-58, our Addendum to Reply, CP 59-64 and Appeal, 39-43. We argue “clear and cognizable” here and in our Appeal, at 4-5, 18-20, 26-45. We discuss the Police’s five responses: Standing(A1), whether abortion is homicide(B1), discretion(B2), the case of O’Connor v. Matzdorff, 76 Wn. 2d 589, 458 P.2d 154 (1969) as relates to standing(A3), and standing related to “question of fact”: Who is a human being/person?(A2)

A.1. Standing and “Beneficial interest”, at 5-7. Appeal 12-24.

The case law and its interpretation upon which the Police argue that the Petitioners are not “beneficially interested” is not applicable to this Mandamus action for two reasons:

- 1) We question whether “beneficial interest” **RCW 7.16.170** must be “beyond that shared in common with other citizens”, and,
- 2) This and the other case laws that the Police cite for justification to deny us standing, if applied here, would violate our “equal rights” under the Fourteenth Amendment. U.S. Constitution, Fourteenth Amendment

1) The Police argue that “A petitioner is “beneficially interested” within the mandamus statute “if he has an interest in the action beyond that shared in common with other citizens.” Based on the origin of this in case law; and the current status of case law, we question the validity of this legal conclusion.

Origin: This statement appears in Vandervort v. Grant, 156 Wash. 96, 286 Pac. 63, March, 1930(attached), cited in State ex rel. Lay v. Simpson, 173 Wash. 512, 513, 23 P,2d 886(1933) at 5. The court relies for their source on Corpus Juris, 1925, in their decision denying the writ to Vandervort, (pg. 65, 2nd paragraph)

“However, according to the weight of authority, the writ will not issue under these statutes to compel the performance of a strictly public duty at the instance of a private citizen having no interest beyond that shared in common with other citizens; but in some jurisdictions the rule is directly to the contrary.” 38 C. J., p. 841, § [547] (1925) (C.J. attached).

This citation, when taken in its entirety, seems to state the exact opposite at one and the same time. This we believe is due to the preceding Corpus Juris reference, [546],

“In other jurisdictions, on the other hand, it has been held that if the public right or duty affects the people at large....any one of the

people at large...may enforce the right or compel performance of the duty regardless of any special or peculiar interest apart from that common to the general public; but where this rule prevails, the writ will not issue unless applicant is one of the classes of persons mentioned.....”, and, “..if the general public as distinguished from the state in its sovereign capacity is affected, any citizen of the state may sue out the writ.” 38 C. J., p. 841, § [546] (1925) (attached).

This statement throws into question the legal validity of “beyond that shared in common with other citizens.”, and also an earlier citation that the Police argue is a requirement for Mandamus, “peculiarly and specially affected”. At 5, ”... (1914).”

In addition, the court seems to base their ruling in this case, not on Mandamus, but on the Nuisance Statute, as per their final statement in the ruling. Vandervort v. Grant (pg. 65, 3rd paragraph).

The laws on which the Police/City cases are based do not include the words, “beyond that shared in common with other citizens.”, or “peculiarly and specially affected”. **Rem. Rev. Stat. § 1015; Rem. Comp. Stat. § 9921; 38 C. J.**, p. 841, § 547 and 546. (attached).

Current Status: The 2009 Corpus Juris validates the 1925 C. J. reference and goes further, authorizing “standing”:

“In a “citizen’s action” to enforce a public duty, it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced. So long as the public duty is sharp and the public need weighty, a citizen has a sufficient interest to confer standing.”... While it has been held that under statutes providing that mandamus may issue on the application of anyone beneficially interested, the writ will not

issue to compel the performance of a strictly public duty at the instance of a private citizen having no interest in common with other citizens, there is also authority to the contrary.” 55 Corpus Juris, pgs. 77-80 § 53, 2009. (attached)

This current case law also supports our argument in **A.3.**

O’Connor v. Matzdorff, pg. 19 herein. We question the validity of the Police/City legal rationale and their addition of these terms to the requirements of the law under **RCW 7.16.170**. Due to the ongoing homicides of children in our society, the “public need” is “weighty”, so we have “standing” and our beneficial “interest” is “in common with other citizens”. CP 4, 27, 55, 59-61. Appeal 21-24. If our argument is not accurate, then all citizens must have some kind of special interest before the Police are required to enforce the homicide laws.

2) This and the other Police/City case discussions argue that we must go “beyond” being “equal to other citizens” and show benefits more befitting to us, more important to us than to any other citizens, who ask that the homicide laws be enforced in this community. The Police are acknowledging that we are not equal to others who know homicides are occurring and report them. We do not understand how we can be more equal than other citizens in seeking to have the Police enforce the homicide laws. The legal result of this Police argument is that the Fourteenth Amendment to the Constitution and the Declaration of Independence “all men are created equal...”, do not apply to us. U.S. Constitution, Fourteenth Amendment, Declaration of Independence.

The Police, as an “agency of the state” need to treat us, the Petitioners, equal to all others who file a homicide report. Cooper, Id. They are also not allowed to treat us in a way that, “The agency action has prejudiced or is likely to prejudice that person.” **RCW 34.05.530.** Standing. The Police, in denying us our “equal rights” to file a homicide report and enforce the homicide laws, are “prejudicing” us, thus violating both Washington State and Federal Law. CP 55. (See also **A.3**)

“Beneficial interest beyond that of the general public” or other similar language, cannot be used to justify “prejudice” against us, nor to violate our “equal rights” as citizens to request that the Police enforce the homicide laws, compared to other citizens. We are not required to be more “equal” or to derive some special benefit that others do not derive, “Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking action..” Cooper v. Aaron at 17. CP 62 and Appeal at 32.

The Police/City case law arguments cannot be applied to the Mandamus Law: **RCW 7.16.150-2.80**, as they have argued them here.

The Police, by their lack of enforcement of the homicide laws, are violating the equal rights of those persons who have been killed, by not investigating and enforcing the homicide laws against those who killed them. CP 5-6, 9, 13-15.

We, the Petitioners, meet the conditions of the Mandamus Law, as our “party” is “beneficially interested.”, as we argue in our Appeal at 21-26.

RCW 7.16.170.

The only argument that the Police can make is that we are, in fact, not reporting homicides of human beings and persons. However, this “question of fact” has not been determined and the Police have no legal right as an “agency of the state” to determine this. Cooper, at 17. We have the equal right to state and argue that, “Human beings and persons exist from the moment of conception and have all rights granted to them under the Constitution, including the right to life.”, a similar argument which Baldwin made in Amistad. Appeal, at 35-39. The Police have not provided a legal response to this right of the Petitioners nor to the inherent rights of unborn children. CP 15, 28-34. Appeal 6. Declaration of Independence and U.S. Constitution, IX, X and XIV Amendments.

In the cases that the Police cite, there were other people involved who could have brought the cases to court. In our case, there are no other people who are “beneficially interested” and have standing, for those with “beneficial interest” are all dead. We, the Petitioners, are alive and are therefore the people who can represent their “beneficial interest”, standing for ourselves and them. Who else is there, other than alive members of the community, who can go to court and seek to mandate that innocent childrens’ lives be saved from death, by the enforcement of

the homicide laws? The Amistad “slaves” advocated for themselves in the courtroom, once they had standing. Although defined as property, they were alive.

B.1. “Abortion is not homicide”, at 11-12. Abortions cannot be legal if they are the killing of persons. “...the fetus' right to life would then be guaranteed ...”, Roe v. Wade, Id. Pgs. 2-5 herein. CP 13-15, 20, 54. Appeal 27. The Police state, “Abortion is not homicide in Washington; thus, the Spokane Police Department is under no clear duty to enforce the homicide laws against Planned Parenthood.”

We state in our Petition and briefs that abortion is homicide. CP 20, 26-28, 54. As no court or law in the land has defined who a human being or person is, we have the equal right to do so. CP 15. We argue as passionately as Baldwin and Adams did for the “freemen” of the Amistad: our “freemen” are “human beings and persons existing at conception”. It is up to the government to prove otherwise and restrict or take this right away from the people. Appeal at 35-39. Cp 15, Constitution, IX and X Amendments. RCW 7.16.210.

The Police/City argue, as the President of the United States and the U.S. Government did in Amistad, that the Court need look no further into the question: Is a slave a freeman? Our question is: Is abortion homicide? The answer to which is based on: Who is a human being; who is a person?. The Police state that abortion is not homicide. They

can cite no law or legal ruling to justify this statement. “The Executive may send the men to Cuba, to be sold as slaves, to be put to death, to be burnt at the stake, they must not go behind this document, to inquire into any facts of the case.”, states John Q. Adams, arguing that the court must look into the facts as to whether the ship’s individuals were slaves or free men. This Police statement is not based on facts. They do not seem willing for the Court to look into the facts. Amistad: Appeal at 29-34.

The Police/City argue just as the Board of Education of Topeka did in Brown v. Board of Education of Topeka and Cooper and the Little Rock School Board did in Cooper v. Aaron, at 1-2, that the Court look no further into the question of “separate but equal” as made legal by Plessy v. Ferguson, 163 U.S. 537(1896). CP 109 and Appeal at 32, 37 and 39-43.

The Police/City cannot rationally make an argument that “abortion is not homicide” without being willing to look into the facts. These four decisions set the standard to look further, to “go behind the documents”, to seek the truth. In a remarkable twist of history, Roger Taney, Chief Justice in the Dred Scott case, was a member of this Court. Taney agreed with Chief Justice Story’s majority decision, 16 years before Dred Scott was decided, “But it is argued, on behalf of the United States, that the ship, and cargo, and negroes were duly documented as belonging to Spanish subjects, and this Court have no right to look behind these documents....To this argument we can, in no wise assent.....The

conflict of rights between the parties under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and international law...A fortiori, the doctrine must apply where human life and human liberty are in issue; and constitute the very essence of the controversy.” The Court “looked behind these documents”. They looked further into the facts. Appeal at 31-32, RP 12.

We can find no rational argument that the Police/City have made in this brief, or in any of their briefs, which stands higher than these standards, set by these Supreme Courts to render justice. We find no Police rationale that legally refutes our arguments which are based in large part on Amistad, Dred Scott, Brown v. Board of Education or Cooper v. Aaron, in addition to the Constitution itself. Contrary to what the Police argue, “the abortion laws in Washington” do not “provide the Spokane Police Department with a clear duty *not* to act and interfere.” at 11. These Supreme Court decisions constitute the highest level of established, “clear and cognizable”, coherent, rational and legal thinking that the U.S. Supreme Court has ever engaged in. At 1,10. Appeal 12-21.

B.2. “Discretion”, at 12-14. The Police/City argue that “Police officers are consistently exercising discretion and judgment.” We do not understand what this means; nor do they provide any evidence for this statement. **“Consistent”* as defined by *Merriam Webster’s Collegiate Dictionary*, 2003, means, “marked by harmony, regularity, or steady

continuity; free from variation or contradiction.” It can be argued from this, that everything the Police do, may be defined as “discretionary”.

*Note: There is no definition of “consistent” in *Black’s Law Dictionary*, 2009.

We have argued that the Police require no discretion in enforcing the homicide laws. Appeal at 43. “Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time.....” **RCW 9A.32.010**. Homicide Defined. CP 4-9. The Police know that there are human bodies at Planned Parenthood. CP 63. They know how to do their “duty with precision and certainty as to leave nothing to the exercise of discretion or judgment” at 3 and 14. They know how to enforce the homicide laws equally, as they do in all reported homicide cases. The Police have a “clear duty to act”, at 4 and 14. **RCW 7.16.160**.

The Police state “mandamus will not lie to compel a general course of official conduct...” at 12. We answer at: CP 56-57, 63 and 108. We are not asking the Police to “perform a discretionary act.” as stated at 3.

The term “ministerial” applies to the Police duties. As defined by *Black’s Law Dictionary*(2009): “Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill.” There is a homicide/manslaughter law and the Police know how to perform their duties in enforcing it. **RCW 7.16.160**, CP 3-9, 25-28. Also, the Police, in exercising their duties, must “act” with “obedience” to these same “laws”. CP 6-9, 25-28. They have been performing these duties for over 130 years, since 1881. The Police “act” ...”involves obedience”....to the homicide “laws”, to their own policies and to the

Constitution of the United States. CP 25-28, 31-34. This duty is their most important one in terms of protecting society. CP 25-26.

The only way this “act” could be discretionary, is if the Police are using “discretion” to define a human being. The Police denied our requests to “enforce the homicide laws and investigate the deaths of children....” because they used their discretion in deciding who human beings and persons are. CP 3-6. As this legal fact is not defined in the law or courts, they do not legally have “discretion” to do this. CP 5, 54, 56, 63, 108; Appeal at 32, 42-43. No one had discretion in Amistad to decide whether the African individuals were “freemen” or slaves: not the Navy, not the President of the United States. No one had discretion to determine if “separate but equal”, i.e., “segregation” was legal: not the schools, not the police, not the legislature nor the Governor. Brown v. Board of Education; Cooper v. Aaron at 1 and 16-17. Appeal at 43.

If the Police/City argument of “consistent exercise of discretion” is accepted by this Court then all Police actions can be so legally described. “Discretion” then becomes a legal term with universal and wide application, not only to Police-government action but to any government action. How can anyone file for a Writ of Mandamus against the Police, or any other government office, agency or officer, if discretion is so widely defined as to become applicable to all or nearly all government actions? Such a decision by this Court would set a legal precedent effectively rendering the Mandamus Law moot. **RCW 7.16.150-280.**

Note: Neither the terms “discretion”, “ministerial”, or “consistent”, appear in the Mandamus Law in relation to the “duty resulting from an office, trust or station.” The only government entity referred to in this law as having “discretion” is the court. **RCW 7.16.150-7.16.280.**

A. 3. “O’Connor vs. Matzdorff” at 8-10. CP 4, 55, 59-60.

Although the Police seem to agree that this woman was granted standing, we feel we need to respond to other points of their argument here, as they come to conclusions which we do not agree with, related to standing, and especially as relates to “beneficial interest”, at 9.

The Police state that “...the issue before the State Supreme Court in *O’Connor* was whether the court had original jurisdiction, not whether the claimant had “beneficial interest”. Id.at 592.”,at 8. We argue that the issue before the Court in this case was the issue of standing. She had “beneficial interest”, but not for the reasons the Police provide.

The Washington State Supreme Court held, “[2]... As the petitioner here maintains, the question of whether she is entitled to pursue her remedy at law for an alleged wrong, in spite of her poverty, raises a fundamental issue and one which must be decided by this court ultimately, whatever the answer of the superior court might be.” O’Connor, 76 Wn.2d 589 at 592, and, “[4,5]...No rule of this court was ever intended to be an instrument of oppression or injustice or to deprive a litigant of his life, his liberty, or his property without due process of law.” O’Connor, 76 Wn.2d 589 at 596. These statements clearly indicate that the Court was not just deciding a jurisdictional issue. This would not have become a case, if she had not been poor---“fundamental issue.”

According to *Black's Law Dictionary*, 2009, "standing" is "A party's right to make a legal claim or seek judicial enforcement of a duty or right." We do not see how the Court's statement of "to pursue her remedy at law for an alleged wrong" is significantly different from *Black's* definition of "standing." Our case discusses this same "duty" of the Police to enforce the homicide laws. **RCW 7.16.160**. CP 3-6.

And in Washington State Law:

"Standing. RCW 34.05.530. A person has standing to obtain judicial review of an agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice that person caused or likely to be caused by the agency action."

The Washington State Supreme Court stated in this case, "The inherent power of the court is thepower to provide process where none exists." O'Connor v. Matzdorff, at 600. The Court thereby ruled that she had the "right to make a legal claim or seek judicial enforcement of a duty or right." The Court authorized "due process". O'Connor, Id. The issue of standing was before the Court in O'Connor v. Matzdorff, as well as the issue of jurisdiction. See also Judge Inglis's ruling on jurisdiction; granting trial and standing to the Amistad Africans, Appeal 17-18.

The Court indicates that she was denied standing because she was poor, “In the matter presently before this court, we need only determine whether the petition is urged in good faith and presents an issue of probable substance, and we are convinced that it does. The motion for leave to proceed in this court in forma pauperis is therefore granted.” O’Connor at 603. The court resolved the issue by granting her standing to proceed as a poor person.

The Police/City are willing to grant the fact that this woman had standing, “arguably she had the standing because she had a “beneficial interest” in obtaining the money owed to her from her complaint for replevin. This interest would have been beyond any interest in common with other citizens.”, at 9. However, as we argue above, she had been denied standing--because she was “poor”--and could not pay the fees. There is no evidence in the case to support the Police contention that she was granted standing “because she had a “beneficial interest beyond...”. Rather, she had been denied standing to proceed equal to all other citizens, not because she had an interest that was “beyond any interest shared in common with other citizens”, but because she was poor and thereby had not the equal rights to proceed with her case as all other citizens who had money.

The Court states, “...an individual’s right is being asserted in this proceeding, the question to be decided involves very deeply the interests of the public...the right of the poor to obtain redress of wrongs.”

O'Connor at 592. A person's "right" is a status in society that is equal to others, who have the same right. "Beneficial interest", as the Police have argued is, "an interest in outcome beyond that shared by the general public." The court resolved the inequality between her and other citizens due to her poverty. She now had equality with citizens who were not poor and she could proceed with her legal action. Significantly, "the interests of the public" were also served by her and her counsel's action. In the same way, unborn children have not the money or ability to seek "redress for wrongs" for themselves. We therefore seek it for them. This is why the "the question presented in this case is of such significant public import and urgency.." for this woman and for us. O'Connor, 593.

Similarly, how can there be a "beneficial interest beyond..." on our part, when we, the Petitioners have been denied our equality with other citizens who discover that homicides have been committed, request and do in fact, have the homicide laws enforced.

The Police are acting as Spain did when they questioned the right of the Amistad "slaves" to "enjoy civil rights" and to those who would represent their rights, as discussed in our Appeal, at 17.

The Police and city's decision, in denying our request to enforce the homicide laws, act as if they know who "human beings" and "persons" are, although they cannot know, as these legal terms have not been defined in either set of laws". CP 10. They are doing what the school boards, governor and legislature did in their attempts to legally delay

desegregation in Little Rock, Arkansas. Cooper at 1. Central High School in Little Rock was an “all white” school. What was the “beneficial interest” of those people fighting for those nine black children to attend an all white school that was “beyond that shared in common with other citizens.”? An argument can be made that there was no “beneficial interest beyond...”. There was a “beneficial interest” in fighting for those black children to become equal to the other citizens who attend Central High School. We are making the same argument.

We have been treated unequally in our request for the homicide laws to be enforced because of Police “discretion” in deciding who human beings and persons are, a “discretion” which they do not legally possess. Given this, how can we attain “beneficial interest beyond other citizens”? The Writ of Mandamus Law becomes unavailable to us because we have been denied our Constitutional rights. Constitution, XIV Amendment.

This woman’s “beneficial interest” and ours is to have equal access to the process that everyone else has in requesting the enforcement of the homicide laws—1) to have “standing”, and, 2) to have our specific case heard and decided before the courts.

A.2. “...resolution of the legal standing issue does not require the Court to determine “who is a human being; who is a person.” At 7-8.

We have made our case in the above arguments that we have “beneficial interest” at 8. “Beneficial interest” and therefore “standing” may be dependent on the Petitioners’ standing for “a person”, as who a

human being or person is, directly affects this argument, at 7. The fact that these two issues may be inseparable is discussed in our Appeal at 1-3, 10-24. CP 4-6.

We have stated our legal position that all alive children are human beings and persons, as this “question of fact” has never been decided. Appeal 35-39. We understand that we may be granted standing for other reasons than the ones we have argued. We argue that this Court is free to decide who a human being or person is, or “can order the question to be tried before a jury...”Appeal at 21-24, **RCW 7.16.210**.

Summary and Prayer for Relief

The Law has as its basis, the need and responsibility to protect and safeguard the rights and privileges of all United States’ human beings and persons.

We understand unborn children to be human beings, alive within the confines of their mothers’ wombs, defined as persons currently by the scientific community. CP 20-25. Once conceived, they lack nothing in nature but to develop and continue to live their lives, which each of us have done and continue to do, from conception until death. By law, these children are not human beings, persons, or even property. The Spokane City Police Department and the City of Spokane refuse to “look further into the facts”. We notice that the Police/City argue many points of the Mandamus Law, but not the most important one, the “question of fact”: who is a human being; who is a person? 1) They have not provided rational arguments to show that unborn children are not human beings or

persons. 2) They do not argue that this has been decided in the law.

RCW 7.16.250. 3) They do not discuss or offer rebuttals to the most powerful, reasoned out cases in our country's history; cases argued and decided on the same legal points as this case.

We have the legal right to answer this question of fact, just as Attorney Roger Baldwin so elegantly answered it in Amistad. Appeal 35.

The Writ of Mandamus appropriately embraces the matter we place before you. This is indeed an extra-ordinary request of the most urgent nature. We, like other citizens of Spokane seek this court's wisdom in having this "question of fact" resolved and answered..

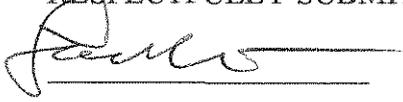
Based on our arguments submitted in our Petition, Replies, Addendum, other Briefs, the Appeal and this present document, we respectfully ask this Court to grant us standing. We ask this Court to decide the legal meaning of the words "person" and "human being" in the laws of our state and the laws of our land; or to "order the question to be tried before a jury", which at your discretion, is authorized in the Mandamus Law. **RCW 7.16.210.** We ask that once this fact has been decided by this Court, or a jury, that our Petition be heard on its merits to its logical, legal and rational conclusion as per the Washington State Mandamus Law.

Who is a human being, who is a person?

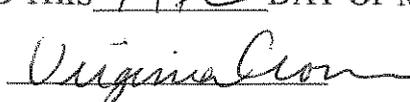
We are equal: born people and unborn people.

Voiceless unborn children are human beings.

RESPECTFULLY SUBMITTED THIS 14th DAY OF MARCH, 2012



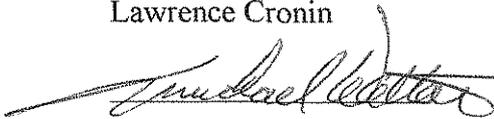
Lawrence Cronin



Virginia Cronin



Richard Hanson



Michael Walters



Douglas Turner

ed Au-
1957,
lan for
th the
. Board
ct. 686,
ct. 753,
follows
Appeals
its own

hall be
be com-
t Court
nsas.

Cite as 78 S.Ct. 1401

358 U.S. 1

William G. COOPER et al, Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Petitioners,

v.

John AARON et al.

No. 1—August Special Term, 1958.

Decided Sept. 29, 1958.

Concurring Opinion Oct. 6, 1958.

Proceedings on application for permission to suspend for specified period a judicially-approved school integration plan. The United States District Court for the Eastern District of Arkansas, 163 F.Supp. 13, granted the permission sought, and an appeal was taken. The Court of Appeals for the Eighth Circuit, 257 F.2d 33, reversed, and certiorari was granted. The Supreme Court held that governor and legislature of state were bound by Federal Supreme Court's prior decision that enforced racial segregation in public schools of state was an unconstitutional denial of equal protection of laws; and held that, from point of view of Fourteenth Amendment, members of school board and superintendent of schools stood as agents of state, and that their good faith would not constitute legal excuse for delay in implementing plan for desegregating schools where actions of other state officials were responsible for conditions alleged by such school officials to make prompt effectuation of desegregation plan impossible and it was conceded that difficulties could be brought under control by state action.

Judgment, affirming Court of Appeals, reported at 78 S.Ct. 1399.

1. Schools and School Districts ⇐13

Judicially-approved plan to do away with racial segregation in public schools would not be suspended pending further challenge in courts of state laws and efforts to upset and nullify federal Supreme Court's holding that enforced

78 S.Ct.—38½

racial segregation in public schools of state was unconstitutional denial of equal protection of laws. U.S.C.A. Const. Amend. 14.

2. Schools and School Districts ⇐13

Under directive to require prompt and reasonable start toward desegregation of public schools and to take such action as might be necessary to end racial segregation "with all deliberate speed", district court, after analysis of relevant factors, could conclude that justification existed for not requiring present nonsegregated admission of all qualified Negro children, but court would have to scrutinize program of school authorities to make sure that they had developed arrangements pointing toward earliest practicable completion of desegregation and that they had taken appropriate steps to put their program into effective operation. U.S. C.A.Const. Amend. 14.

3. Schools and School Districts ⇐13

Under directive to district courts to require prompt and reasonable start toward desegregation of public schools and to take such action as was necessary to bring about end of racial segregation "with all deliberate speed", hostility to racial desegregation would not be justification for not requiring present nonsegregated admission of all qualified Negro students. U.S.C.A.Const. Amend. 14.

4. Schools and School Districts ⇐13

From point of view of Fourteenth Amendment, members of school board and superintendent of schools stood as agents of state, and their good faith would not constitute legal excuse for delay in implementing plan for desegregating public schools where actions of other state officials were responsible for conditions alleged by such school officials to make prompt effectuation of desegregation plan impossible and it was conceded that difficulties could be brought under control by state action. U.S.C.A.Const. Amend. 14.

5. States ⇨4.11

Preservation of public peace is desirable, but laws or ordinances which deny rights created or protected by federal constitution cannot be justified as measures necessary to preservation of public peace.

6. Constitutional Law ⇨220

Law and order were not to be preserved at expense of constitutional right of children not to be discriminated against in public school admission on grounds of race or color. U.S.C.A. Const. Amend. 14; Const.Ark. Amend. 44; Ark.Stats. §§ 6-801 to 6-824, 80-1519 to 80-1525.

7. Constitutional Law ⇨209, 213

Prohibitions of Fourteenth Amendment extend to all actions of state denying equal protection of the laws, whatever state agency takes the action or whatever the guise in which it is taken. U.S.C.A.Const. art. 6; Amend. 14.

8. Constitutional Law ⇨220

Constitutional right of children not to be discriminated against in public school admission on grounds of race or color can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation, whether attempted ingeniously or ingenuously. U. S.C.A.Const. Amend. 14.

9. States ⇨4.8

The federal judiciary is supreme in exposition of law of constitution, which is the supreme law of the land, and Supreme Court's interpretation of Fourteenth Amendment is part of supreme law of land. U.S.C.A.Const. art. 6; Amend. 14.

10. States ⇨4.2

Federal Supreme Court's decision that enforced racial segregation of public schools of state was an unconstitutional denial of equal protection of laws was binding upon governor and legislature of state; and they had duty to obey federal court orders resting on Supreme Court's considered interpretation

of constitution. U.S.C.A.Const. art. 6; Amend. 14.

11. States ⇨4.1

No state legislator or executive or judicial officer can war against federal constitution without violating his undertaking to support constitution. U.S.C. A.Const. art. 6; Amend. 14.

12. States ⇨4.11

Governor of state has no power to nullify federal court order. U.S.C.A. Const. art. 6; Amend. 14.

13. Constitutional Law ⇨220

Responsibility for public education is primarily concern of states, but such responsibility must be exercised consistently with federal constitutional requirements, as they apply to state action. U.S.C.A.Const. art. 6; Amend. 14.

14. Constitutional Law ⇨220

State support of racially-segregated schools through any arrangement, management, funds, or property cannot be squared with Fourteenth Amendment's command that no state shall deny to any person within its jurisdiction equal protection of laws. U.S.C.A.Const. Amend. 14.

15. Constitutional Law ⇨274

Right of students not to be segregated on racial grounds in public schools is so fundamental and pervasive that it is embraced in concept of due process of law. U.S.C.A.Const. Amend. 14.

3

Mr. Richard C. Butler, Little Rock, Ark., for petitioners.

Mr. Thurgood Marshall, New York City, for respondents.

Mr. J. Lee Rankin, Sol. Gen., Washington, D. C., as amicus curiae by invitation of the Court.

4

Opinion of the Court by The CHIEF JUSTICE, Mr. Justice BLACK, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS, Mr. Justice BURTON, Mr. Justice CLARK, Mr. Justice HARLAN, Mr. Justice BRENNAN, and Mr. Justice WHITTAKER.

Cite as 78 S.Ct. 1401

[1] As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.

The case was argued before us on September 11, 1958. On the following day we unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit, 257 F.2d 33, which had reversed a judgment of the District Court for the Eastern District of Arkan-

* The following was the Court's *per curiam* opinion, 78 S.Ct. 1399:

The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as supplemented by the arguments presented on September 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of August 18, 1958, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

It is accordingly ordered that the judgment of the Court of Appeals for the

Eastern District of Arkansas, 163 F.Supp. 13. The District Court had granted the application of the petitioners, the Little Rock School Board and School Superintendent, to suspend for two and one-half years the operation of the School Board's court-approved desegregation program. In order that the School Board

might know, without doubt, its duty in this regard before the opening of school, which had been set for the following Monday, September 15, 1958, we immediately issued the judgment, reserving the expression of our supporting views to a later date.* This opinion of all of the members of the Court embodies those views.

The following are the facts and circumstances so far as necessary to show how the legal questions are presented.

On May 17, 1954, this Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education*,

347 U.S. 483, 74 S.Ct. 686. The Court postponed, pending further argument, formulation of a decree to effectuate this decision. That decree was rendered May 31, 1955. *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 756. In the formulation of that decree the Court recognized that good

Eighth Circuit, dated August 18, 1958, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.

The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas.

Digest

faith compliance with the principles declared in *Brown* might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." The Court went on to state:

"Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at pages 300-301, 75 S.Ct. at page 756.

[2, 3] Under such circumstances, the District Courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end

of racial segregation in the public schools "with all deliberate speed." *Ibid.* Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

On May 20, 1954, three days after the first *Brown* opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision—Segregation in Public Schools." In this statement the Board recognized that

"It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed."

Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It

instruc
to prep
approv
seven
ion.
tion
(grade
Deseg
elemen
conten
high
fall o
that c
syster
Follow
Super
with
in the
sions,
that
of Li
that
princ
those
"was
all p
U
plain
tion
Dist
plan.
The
243
was
W
ing
dese
tem.
wer
sigr
syst
Cou
Am
195
stit
Ger
Cor
tion
195
Sta
An
a

instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second Brown opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the Board reached the conclusion that "a large majority of the residents" of Little Rock were of "the belief * * that the Plan, although objectionable in principle," from the point of view of those supporting segregated schools, "was still the best for the interests of all pupils in the District."

Upon challenge by a group of Negro plaintiffs desiring more rapid completion of the desegregation process, the District Court upheld the School Board's plan, *Aaron v. Cooper*, 143 F.Supp. 855. The Court of Appeals affirmed, 8 Cir., 243 F.2d 361. Review of that judgment was not sought here.

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-constitutional

desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court," Ark.Const. Amend. 44, and, through the initiative, a pupil assignment law, Ark.Stats. §§

80-1519 to 80-1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark. Stats. § 80-1525, and a law establishing a State Sovereignty Commission, Ark. Stats. §§ 6-801 to 6-824, were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds, and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. The findings were these:

"Up to this time [September 2], no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate

steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any in-

Digest

idents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." Aaron v. Cooper, 156 F.Supp. 220, 225.

The Board's petition for postponement in this proceeding states: "The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe that there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained." The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's

11

request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students * * * from entering," as they continued to do every school day during the following three weeks. 156 F.Supp. at page 225.

That same day, September 4, 1957, the United States Attorney for the Eastern District of Arkansas was requested by the District Court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the District Court's direction to carry out the desegregation program. Three days later, September 7, the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program.

Upon completion of the United States Attorney's investigation, he and the Attorney General of the United States, at the District Court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae*, to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September

12

20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. 156 F.Supp. 220, affirmed, *Faubus v. United States*, 8 Cir., 254 F.2d 797. The National Guard was then withdrawn from the school.

The ne
tember 2
tered the
the prote
Departm
sas State
the child
school di
had diff
demonst
at the hi
16. On
Presider
ed feder
and adri
the scho
army tr
until N
then re
Guardsr
balance
Negro s
at the s

We co
ceeding
ary 20,
Superin
in the I
ment of
Their p
cause o
they st
by the c
Govern
tenance
at Cent
student
sible. I
the Ne
the sch

regated
to cari
progra
sugges
one-ha
Afte
grante
Board.
found
School
of "ch

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. 163 F.Supp. at page 16. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn

13

and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam and turmoil"; that

there were "repeated incidents of more or less serious violence directed against the Negro students and their property"; that there was "tension and unrest among the school administrators, the class-room teachers, the pupils, and the latter's parents, which inevitably had an adverse effect upon the educational program"; that a school official was threatened with violence; that a "serious financial burden" had been cast on the School District; that the education of the students had suffered "and under existing conditions will continue to suffer"; that the Board would continue to need "military assistance or its equivalent"; that the local police department would not be able "to detail enough men to afford the necessary protection"; and that the situation was "intolerable." 163 F.Supp., at pages 20-25.

The District Court's judgment was dated June 20, 1958. The Negro respondents appealed to the Court of Appeals for the Eighth Circuit and also sought there a stay of the District Court's judgment. At the same time they filed a petition for certiorari in this Court asking us to review the District Court's judgment without awaiting the disposition of their appeal to the Court of Appeals, or of their petition to that court for a stay. That we declined to do. 357 U.S. 566, 78 S.Ct. 1189, 2 L.Ed.2d 1544. The Court of Appeals did not act on the petition for a stay but on August 18, 1958, after convening in special session on August 4 and hearing the appeal, reversed the District Court, 257 F.2d 33. On August 21, 1958, the Court of Appeals stayed its mandate

14

to permit the School Board to petition this Court for certiorari. Pending the filing of the School Board's petition for certiorari, the Negro respondents, on August 23, 1958, applied to Mr. Justice Whittaker, as Circuit Justice for the Eighth Circuit, to stay the order of the Court of Appeals withholding its own mandate and also to stay the District Court's judgment. In view of the nature of the motions, he referred them to the

entire Court. Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958-1959 school year, see *Aaron v. Cooper*, 357 U.S. 566, 567, 78 S.Ct. 1189, 1190, we convened in Special Term on August 28, 1958, and heard oral argument on the respondent's motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae*, and asserted that the Court of Appeals' judgment was clearly correct on the merits, and urged that we vacate its stay forthwith. Finding that respondents' application necessarily involved consideration of the merits of the litigation, we entered an order which deferred decision upon the motions pending the disposition of the School Board's petition for certiorari, and fixed September 8, 1958, as the day on or before which such petition might be filed, and September 11, 1958, for oral argument upon the petition. The petition for certiorari, duly filed, was granted in open Court on September 11, 1958, 358 U.S. 29, 78 S.Ct. 1398, and further arguments were had, the Solicitor General again urging the correctness of the judgment of the Court of Appeals. On September 12, 1958, as already mentioned, we unanimously affirmed the judgment of the Court of Appeals in the *per curiam* opinion set forth in the margin at the outset of this opinion.

In affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the School Board, the

15

Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the District Court as to the conditions at Central High School during the 1957-1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and

will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

[4] One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested

16

that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

[5, 6] [7] respondent yielded to t have follo Governor Court said imous opin aspect of r that this p mote the p conflicts. portant as public pea plished by rights cre eral Const. 245 U.S. 6 149. Thu to be pres children c The recor that the g to a magn er to con action. T the Board oral argur brought u

[7, 8]

are plain. teenth Ar shall deny diction th "A State ecutive, o can act in

tional pro that no a officers o are exert within its tion of t of public ernment the equal the const acts in th is clothed is that of or the co meaning.'

78 S.C

Cite as 78 S.Ct. 1401

[5, 6] The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

[7, 8] The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no

17

other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte Virginia*, 100 U.S.

78 S.Ct.—89

339, 347, 25 L.Ed. 676. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667; *Com. of Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792; *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; or whatever the guise in which it is taken, see *Derrington v. Plummer*, 5 Cir., 240 F.2d 922; *Department of Conservation and Development v. Tate*, 4 Cir., 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith v. Texas*, 311 U.S. 128, 132, 61 S.Ct. 164, 166, 85 L.Ed. 84.

[9, 10] What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

18

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been

Digest

respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. * * *" *Ableman v. Booth*, 21 How. 506, 524, 16 L.Ed. 169.

[11, 12] No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *." *United States v. Peters*, 5 Cranch 115, 136, 3 L.Ed. 53. A Governor who asserts a

¹⁹ power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases * * *." *Sterling v. Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190, 195, 77 L.Ed. 375.

[13-15] It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884. The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution,

²⁰ are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Concurring opinion of Mr. Justice FRANKFURTER.

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

By word and tempo agreement thereby t This proc Rock. Th the Little of local cit by the U Arkansas of this Co of Educat 99 L.Ed. Board ha effort "to plan." Tl ty's accor law upon acceptanc dren to tl guarantee 14, had 1 gun. The this proc those in Arkansas trict Cou have not

"14. had ga School threats with t had oc an abu author:

with tl of Litt priate to prev or acts the att dents : Mayor Rock 1 cope w arise a Mayor school

By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was under way in Little Rock. The detailed plan formulated by the Little Rock School Board, in the light of local circumstances, had been approved by the United States District Court in Arkansas as satisfying the requirements of this Court's decree in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. The Little Rock School Board had embarked on an educational effort "to obtain public acceptance of its plan." Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution, Amend. 14, had peacefully and promisingly begun. The condition in Little Rock before this process was forcibly impeded by those in control of the government of Arkansas was thus described by the District Court, and these findings of fact have not been controverted:

"14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had

²¹ frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request

to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." 156 F.Supp. 220, 225.

All this was disrupted by the introduction of the state militia and by other obstructive measures taken by the State. The illegality of these interferences with the constitutional right of Negro children qualified to enter the Central High School is unaffected by whatever action or non-action the Federal Government had seen fit to take. Nor is it neutralized by the undoubted good faith of the Little Rock School Board in endeavoring to discharge its constitutional duty.

The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one

²² of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the Board of Edu-

cation had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution. For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State "must * * * yield to an authority that is paramount to the State." This language of command to a State is Mr. Justice Holmes's, speaking for the Court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Sutherland,²³ Mr. Justice Butler, Mr. Justice Stone. *State of Wisconsin v. State of Illinois*, 281 U.S. 179, 197, 50 S.Ct. 266, 267, 74 L.Ed. 799.

When defiance of law, judicially pronounced, was last sought to be justified before this Court, views were expressed which are now especially relevant.

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was not indulging in a rhetorical flourish. He was expressing the aim of those

who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

"But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' (Pound, *The Future of Law* (1937) 47 *Yale L.J.* 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this

²⁴
Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit'. So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with ex-

traord
tige.
alted
eous h
in his
courts
United
307-30
884.

The di
"the sup
Const.,
organ of
ing it,
proval o
dissent.
Active o
Our kind
controlli
rived fro
the trib
duty of
is "the s
Presider
Congres
son, Me
dents, 6
where th
preme L
moral is
ment of
the unar
tured de
tution is

ly person
Court, n
to the c
controlli
however
creed in
they eng
moderate
local hab
ually the
tion. An
erted n
They vig
exercise
charged
from th
forming

Cite as 78 S.Ct. 1401

traordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for." *United States v. United Mine Workers*, 330 U.S. 258, 307-309, 67 S.Ct. 677, 703, 91 L.Ed. 884.

The duty to abstain from resistance to "the supreme Law of the Land," U.S. Const., Art. VI, § 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme Law of the Land." See President Andrew Jackson's Message to Congress of January 16, 1833, 2 Richardson, Messages and Papers of the Presidents, 610, 623. Particularly is this so where the declaration of what "the supreme Law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process. The Constitution is not the formulation of the

25

merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system—"common" meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.

For carrying out the decision that color alone cannot bar a child from a public school, this Court has recognized the diversity of circumstances in local school situations. But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two

26

lower courts, would have to be retraced, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to block that progress. Is there not the strongest reason for concluding that to accede to the Board's request, on the basis of the circumstances that gave rise to it, for a suspension of the Board's non-segregation plan, would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the Brown case that the Constitution precludes compulsory segregation based on color in state-supported schools?

That the responsibility of those who exercise power in a democratic govern-

ment is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with a Negro population of large proportion. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political

power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

Lincoln's appeal to "the better angels of our nature" failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.



Rel: 02/17/2011

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1100192

Amy Hamilton, individually and on behalf of her stillborn son

v.

Dr. Warren Scott et al.

Appeal from DeKalb Circuit Court
(CV-06-149)

PARKER, Justice.

Amy Hamilton, individually and on behalf of her stillborn son, sued Dr. John Blakely Isbell, Dr. Steven Coulter, Dr. Warren Scott, and the Isbell Medical Group ("IMG") (Dr. Isbell, Dr. Coulter, Dr. Scott, and IMG are hereinafter sometimes referred to collectively as "the defendants"), as well as several

1100192

fictitiously named defendants, claiming that their negligent and wanton acts had wrongfully caused the death of her son and also caused her to suffer emotional distress. The DeKalb Circuit Court entered a summary judgment in favor of the defendants, holding that a wrongful-death action could not be maintained for the death of an unborn child who died before he was viable. The trial court also held that Hamilton was not in the "zone of danger" and, thus, could not recover damages for emotional distress. We reverse in part, affirm in part, and remand.

Facts and Procedural History

A. Hamilton's pregnancy and medical care

In December 2004, Hamilton, pregnant with her second child, sought prenatal care from IMG, which had provided Hamilton with prenatal care during her first pregnancy. On Monday, January 10, 2005, Hamilton contacted IMG; she explained that she and her seven-year-old son had a rash that she believed might be "fifth disease," an infection caused by human parvovirus B19. The next day, January 11, 2005, Hamilton had blood drawn at IMG and was told that she would be notified of the results. On Friday, January 14, 2005, an IMG employee told Hamilton over the telephone that Hamilton "had been exposed to fifth disease and

1100192

had the parvovirus" and that, consequently, she needed to immediately schedule an ultrasound, to be followed by an ultrasound every 2 weeks for the next 10 weeks. Hamilton understood this every-two-weeks ultrasound schedule to have been ordered by Dr. Isbell; Dr. Isbell confirmed as much in his deposition.

On Monday, January 17, 2005, Hamilton went to IMG for the first scheduled ultrasound as well as a consultation regarding treatment for fifth disease. However, the doctor with whom Hamilton was scheduled to meet was unavailable; Hamilton was also unable to undergo the scheduled ultrasound because the technician was leaving early. Hamilton's request that she be sent to the adjoining hospital for an ultrasound was denied by an IMG employee; instead, she was told to wait for her next appointment two weeks later.

Hamilton returned to IMG two weeks later, on Monday, January 31, 2005; during the appointment, the doctor she met with, Dr. Coulter, listened to the unborn child's heartbeat and told Hamilton that an ultrasound was unnecessary. He also explained to Hamilton the potential complications of fifth disease and the procedure for potential treatment of her unborn child, if necessary.

1100192

On February 18, 2005, Hamilton returned to IMG for her next scheduled appointment; she again requested an ultrasound, but the doctor she met with, Dr. Scott, said that an ultrasound was unnecessary.

On February 25, 2005, Hamilton returned to IMG for her next scheduled appointment, at which an ultrasound was performed. During the ultrasound, IMG's technician noticed that Hamilton's unborn son was not as large as the technician thought he should be at that stage of the pregnancy and that there was "a little fold at the back of his neck which worried [the technician] a little bit because it might be a sign of anemia." The technician told Hamilton "not to be alarmed because [she] would probably be referred to a perinatologist for a second opinion" and that treatment, if any was necessary, would be available at "Kirklin Clinic."

Following the ultrasound, Hamilton met with Dr. Scott, who looked at still photographs from the ultrasound. Dr. Scott told her that a "nuchal fold [was] beginning to form" and that the nuchal fold "was one of the signs of becoming severely anemic and having hydrops," which, he said, "can lead to congestive heart failure." However, Dr. Scott told Hamilton that hydrops "can reverse itself" and that Hamilton should wait two weeks and

1100192

return to IMG for another ultrasound. Hamilton requested that Dr. Scott refer her to "a perinatologist at Kirklin Clinic," but Dr. Scott told her that IMG could "handle it" at its office. Instead, Dr. Scott told Hamilton to come back in two weeks for another ultrasound, and he promised to refer Hamilton to a perinatologist at that point, if necessary.

Eleven days later, on March 8, 2005, Hamilton visited IMG without a scheduled appointment because she was feeling ill. In her deposition, Hamilton described how, after she tested positive for the flu, Dr. Scott "prescribed Extra Strength Tylenol for body aches, pain, and fever, because he said with that particular situation, there's nothing you can do, you just have to wear it out." Hamilton summarized her symptoms as an "acute illness."

On March 10, 2005, Hamilton returned to IMG; as she explained in her deposition, she was "feeling really bad" and "seemed to be getting worse." She had also noticed "decreased movement" of her unborn child. An ultrasound performed by IMG determined that Hamilton's unborn son had died, probably in the previous 24 or 48 hours; labor was induced, and the child was stillborn on March 11, 2005. Dr. Isbell, Dr. Coulter, and Dr. Scott agree that Hamilton's unborn son had not reached

1100192

viability, which is to say that, if her son had been born alive on that date, he was unlikely to have survived outside the womb.

B. Hamilton's litigation

On April 28, 2006, Hamilton filed a complaint in the trial court, alleging that the defendants had caused the death of her unborn son "and that the death of her unborn son was wrongful within the meaning of the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975)."¹ Hamilton later amended her complaint to allege that the defendants' negligence had caused her to suffer "mental anguish and emotional distress."

After completing discovery, the defendants filed a summary-judgment motion on June 7, 2009, arguing that this Court's decisions in Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993), and Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993), did not permit a wrongful-death action where a preivable child died before birth: "The Supreme Court of Alabama has held that

¹In her complaint, Hamilton stated that she was bringing "this action pursuant to [the Wrongful Death Act] as well as the provisions the Medical Liability Act of 1987, as amended, Ala. Code § 6-5-540 et seq. (1975)." The defendants also cited the Alabama Medical Liability Act ("AMLA") in their answer and in their motions for a summary judgment. Hamilton does not dispute the applicability of the AMLA to this case; indeed, in her reply brief, Hamilton acknowledged that "claims against healthcare providers, whether in contract or tort, are now subsumed into one action by the Alabama Medical Liability Act." Hamilton's reply brief, at 6.

1100192

a plaintiff cannot maintain a wrongful death action for a fetus not viable to live outside of the womb As such, summary judgment must be granted on behalf of the Defendants in regard to the wrongful death claim of the fetus." The defendants also argued that Hamilton could not recover damages for her emotional distress because, they said, she had not shown either that she had sustained physical injury or that she was placed at risk of immediate physical harm by the defendants, as required by this Court in AALAR, Ltd. v. Francis, 716 So. 2d 1141 (Ala. 1998). The defendants stated that Hamilton "failed to demonstrate that she was in the 'zone of danger' as required by Alabama law."²

Dr. Isbell and Dr. Coulter separately moved for a summary judgment; Dr. Isbell argued that Hamilton had presented no argument or evidence to show that he had breached the standard of care in his treatment of her.

Hamilton responded to the summary-judgment motions on October 1, 2010. She conceded that Dr. Isbell was entitled to

²The defendants' summary-judgment motion also argued that Hamilton had failed to prove that the death of her son was caused by the defendants. Hamilton responded to that argument, and the defendants raised it again in their reply brief to the trial court. However, the trial court's order made no factual determination regarding causation; therefore, the issue of causation is not before this Court. For that reason, we do not discuss causation issues in this opinion.

1100192

a summary judgment, stating that she "hereby agrees that the 'Motion for Summary Judgment on Behalf of Dr. John Blakely Isbell' is due to be granted and concedes that there is no set of facts that, if proved against Dr. Isbell, would entitle her to recover." However, she argued that the summary-judgment motions filed by the other defendants should be denied. Specifically, she argued that in Gentry this Court had "based [its decision to deny recovery for the death of a previable unborn child] on the fact that 'there is no clear legislative direction.' 613 So. 2d at 1244." Hamilton argued that subsequent legislative actions had provided the courts with that "legislative direction." Specifically, Hamilton argued that several statutes on abortion enacted since Gentry was decided "provided clear direction indicating that the term 'minor child' can include nonviable fetuses." On the issue of damages for emotional distress, Hamilton argued that the loss of her unborn child was a physical injury that entitled her to recover damages for her emotional distress; alternatively, she argued that she was entitled to damages for emotional distress under Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (1981), in which this Court permitted a mother to recover damages for emotional distress following the death of her child during birth.

1100192

On October 5, 2010, the defendants filed a reply brief in support of their summary-judgment motions. In their reply brief, they argued that "the law in Alabama remains that a plaintiff cannot maintain a wrongful death action for a non-viable fetus and the Alabama legislature has not declared otherwise." Specifically, the defendants argued that the legislature's subsequent, abortion-related legislation did not justify overruling Gentry and Lollar. The defendants also argued that, in seeking damages for her emotional distress, Hamilton did "not state a claim upon which relief can be granted" because, they said, she "misinterprets the holding in Taylor" and her "individual claim is insufficient as a matter of law."

On October 15, 2010, the trial court granted the defendants' summary-judgment motions, concluding:

"[Hamilton] has conceded that the defendant, Dr. John Blakely Isbell, is due to be granted summary judgment.

"[Hamilton's] claims are for wrongful death and for emotional distress suffered by [Hamilton] as a result of being caused to deliver a stillborn child.

"The defendants assert, and the court agrees, that [Hamilton] cannot maintain a wrongful death action for a fetus not viable to live outside the womb. Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993); Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993). The court considers the Gentry and Lollar cases controlling on this issue. The court is unconvinced that statutes passed by the legislature subsequent to those decisions have altered their application. Accordingly, it is adjudged that the defendants'

motion for summary judgment is due to be granted as to the wrongful death claim.

"The defendants also assert that [Hamilton] cannot maintain a claim for emotional distress and mental anguish because she has failed to produce substantial evidence that she sustained a physical injury or was placed in immediate risk of physical harm by the conduct of defendants. [Hamilton] insists that the Alabama Supreme Court's decision in Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981), is controlling on this issue. In Taylor, the plaintiff's action against her physician was based on allegations that the physician negligently failed to attend during her labor and her delivery of a child who either was stillborn or died within moments of birth.

"The Supreme Court in Taylor abandoned the 'physical impact' test that had been the law up until that point and extended the right to recover to those who suffered emotional distress without also suffering a corresponding physical injury. In a later case, the Supreme Court discussed three tests for evaluating claims alleging negligent infliction of emotional distress that have developed in the common law: the physical impact test; the zone of danger test; and the relative bystander test. It then declared the current state of Alabama law to be consistent with the 'zone of danger' test, which limits recovery for emotional injury to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141 (Ala. 1998). In the AALAR decision, the Court found the decision in the Taylor case to be consistent with that test because it was reasonably foreseeable that the plaintiff would be placed at risk of physical injury by the physician's failure to attend her delivery.

"Given that the 'zone of danger' test is the current state of the law in Alabama, this court concludes that it is the test applicable to [Hamilton's] claim for

emotional distress and mental anguish. To support that claim, [Hamilton] must establish by substantial evidence that it was reasonably foreseeable that she would be placed at risk of physical injury by the defendants' conduct. The materials submitted to the court in support of and in opposition to defendants' motions for summary judgment are devoid of any such evidence, and the court finds the evidence insufficient to raise an issue of material fact as to whether the defendants' alleged breach of care placed [Hamilton] within the 'zone of danger.'

"[Hamilton] argues that the death of the fetus constituted 'physical injury' to her body, thereby entitling her to claim emotional distress and mental anguish. She suggests that the fetus was as much a part of her body as a lung, a kidney, a spleen, an arm, a leg or any other organ. Our Supreme Court, however, has quoted with approval holdings in cases from other jurisdictions that the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother. Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 768 (1973). The death of a fetus does not, without more, constitute a physical injury to the body of the mother, and the court finds as a matter of law that [Hamilton] cannot recover for emotional distress or mental anguish based on such claim.

"In conclusion, the court finds that [Hamilton] cannot maintain a wrongful death claim for the death of a non-viable fetus; she cannot maintain an individual claim for emotional distress because the evidence is insufficient to show that she was within the 'zone of danger,' and she cannot claim a physical injury to her body as a result of the death of the fetus. Based on these conclusions, the court finds it unnecessary to address the issue of causation.

"Accordingly, it is adjudged that the defendants' motion for summary judgment for all defendants on all claims is granted, and [Hamilton] shall have no recovery against the defendants."

1100192

Hamilton appealed the summary judgment in favor of the defendants other than Dr. Isbell.

After briefing in this case was completed, this Court issued its decision in Mack v. Carmack, [Ms. 1091040, Sept. 9, 2011] ___ So. 3d ___ (Ala. 2011). In Mack, this Court recognized that a wrongful-death action is available for recovery of damages for the accidental death of a preivable unborn child, specifically overruling Gentry and Lollar; in those cases, which the trial court in this case relied upon (see the trial court's order, quoted supra), this Court had held that damages could not be recovered for the wrongful death of a child who died without being born alive or reaching viability. In Mack, we stated:

"In sum, it is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability. Moreover, it is an endeavor that unfairly distracts from the well established fundamental concerns of this State's wrongful-death jurisprudence, i.e., whether there exists a duty of care and the punishment of the wrongdoer who breaches that duty. We cannot conclude that 'logic, fairness, and justice' compel the drawing of such a line; instead, 'logic, fairness, and justice' compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a fetus before the fetus has achieved the ability to live outside the womb.

"In accord then with the numerous considerations discussed throughout this opinion, and on the basis of the legislature's amendment of Alabama's homicide statute to include protection for 'an unborn child in utero at any stage of development, regardless of viability,' § 13A-6-1(a)(3), [Ala. Code 1975,] we overrule Lollar and Gentry, and we hold that the Wrongful Death Act permits an action for the death of a previable fetus. We therefore reverse the summary judgment in favor of Carmack and remand the action for further proceedings consistent with this opinion."

___ So. 3d at ____.³

Hamilton submitted copies of the Mack decision to this Court as supplemental authority in her appeal, accompanied by a letter asking the clerk of this Court to distribute those

³Additionally, we note that this Court's holding in Mack is consistent with the Declaration of Rights in the Alabama Constitution, which states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Ala. Const. 1901, § 1 (emphasis added). These words, borrowed from the Declaration of Independence (which states that "[w]e 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 are Life, Liberty and the pursuit of Happiness"), affirm that each person has a God-given right to life.

1100192

copies to the members of the Court. The defendants filed a motion to strike Hamilton's supplemental authority, or, in the alternative, to grant the defendants permission to respond to that supplemental authority. This Court denied the motion to strike, granted the motion to respond to the supplemental authority, and permitted Hamilton to reply to the defendants' response.

Standard of Review

"[O]n appeal a summary judgment carries no presumption of correctness,' Hornsby v. Sessions, 703 So. 2d 932, 938 (Ala. 1997). "In reviewing the disposition of a motion for summary judgment, we utilize the same standard as that of the trial court in determining whether the evidence before the court made out a genuine issue of material fact" and whether the movant was entitled to a judgment as a matter of law.' Ex parte General Motors Corp., 769 So. 2d 903, 906 (Ala. 1999) (quoting Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988)). 'Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.' Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997)."

Harper v. Coats, 988 So. 2d 501, 503 (Ala. 2008).

Discussion

A. Whether Mack should apply in this case

The defendants present several arguments contending that this Court should not apply our recent holding in Mack in this

1100192

case, which was pending on appeal when Mack was decided. However, these arguments are inconsistent with Alabama law:

"The general rule is that a case pending on appeal will be subject to any change in the substantive law. The United States Supreme Court has stated, in regard to federal courts that are applying state law: '[T]he dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.' Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327 (1941). See also United States v. Schooner Peggy, 1 Cranch 103, 5 U.S. 103, 2 L.Ed. 49 (1801). Thus, courts are required to apply in a particular case the law as it exists at the time it enters its final judgment:

"'[I]t has long been held that if there is a change in either the statutory or decisional law before final judgment is entered, the appellate court must "dispose of [the] case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal." This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings.'

"Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 912 (1962) (quoting Montague v. Maryland, 54 Md. 481, 483 (1880))."

Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 438 (Ala. 2001) (emphasis added). Mack is now controlling

1100192

precedent on the issue whether "the Wrongful Death Act permits an action for the death of a previable fetus," Mack, ___ So. 3d at ____, and the Court in that case held such an action permissible. Therefore, we will apply Mack in deciding this appeal.

B. Whether Hamilton Can Recover Damages for the Alleged Wrongful Death of Her Stillborn Son

The first substantive issue we must consider is whether the trial court erred in holding that Hamilton could not maintain a wrongful-death action "for the death of [her] non-viable fetus." As set forth in Mack and as applicable in this case, Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability. Applying our holding in Mack, quoted supra, we conclude that the summary judgment, insofar as it held that damages for the wrongful death of a previable unborn child were not recoverable, must be reversed and the case remanded for the trial court to reconsider the defendants' summary-judgment motions in light of this Court's holding in Mack.

C. Whether Hamilton Can Recover Damages for Emotional Distress

1100192

The second issue raised in this appeal is whether the trial court erred in holding that Hamilton "[could not] maintain an individual claim for emotional distress because the evidence is insufficient to show that she was within the 'zone of danger,' and she cannot claim a physical injury to her body as a result of the death of the fetus."

In their summary-judgment motions, the defendants argued that Hamilton could not recover damages for emotional distress because, they said, Hamilton "was not physically injured as a result of the defendants' alleged conduct" and Hamilton "was never in the 'zone of danger.'" In support of this argument, the defendants cited AALAR, 716 So. 2d at 1148, in which this Court stated that it "has not recognized emotional distress as a compensable injury or harm in negligence actions outside the context of emotional distress resulting from actual physical injury, or, in the absence of physical injury, fear for one's own physical injury." (Citing Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L.Rev. 477, 487 (1982)).

1100192

The defendants noted that, during her deposition, Hamilton testified that she had not been "concerned for [her] life."⁴

In her response to the defendants' summary-judgment motions, Hamilton stated that she "[did] not dispute that she never feared for her own life and is therefore not entitled to zone of danger damages." However, Hamilton claimed that she is "entitled to mental anguish damages" under this Court's decision in Taylor v. Baptist Medical Center, supra. Hamilton argued that Taylor "carve[d] out a specific exception" to the zone-of-danger test for cases in which a mother has suffered the loss of her unborn child. However, in AALAR, this Court explained that the test this Court had been applying with regard to claims for emotional-distress damages, including the test applied in Taylor, was "consistent with the 'zone of danger' test discussed in [Consolidated Rail Corp. v. Gottshall, [512 U.S. 532 (1994)]]". 716 So. 2d at 1147. In Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994), the United States Supreme Court stated that "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical

⁴Specifically, during her deposition, Hamilton was asked, "I mean, at any time in this process, were you ever concerned for your life?" Hamilton answered, "I was not concerned for my life."

1100192

impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. Hamilton's assertion that Taylor "carve[d] out a specific exception" to the zone-of-danger test is erroneous.

The only physical harm Hamilton alleged in her response to the defendants' summary-judgment motions was the death of her unborn son. She argued that her unborn son was a part of her body; thus, she said, his death was a physical injury to her that allows her to recover damages for emotional distress. We reject that argument, however, because it is incompatible with this Court's holding in Wolfe v. Isbell, 291 Ala. 327, 330-31, 280 So. 2d 758, 768 (1973), in which we said "that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother."⁵

Because Hamilton conceded that she was "not entitled to zone of danger damages" and her argument suggesting that Taylor created an exception to the zone-of-danger test is misplaced, and because she presented no evidence in response to the

⁵In their brief on appeal, the defendants cite Wolfe for this same proposition. See defendants' brief, at 40

1100192

defendants' summary-judgment motions showing that she suffered a physical injury as a result of the defendants' actions, we conclude that the trial court properly entered a summary judgment insofar as it concerns Hamilton's claim for damages for emotional distress.

Conclusion

Based on our recent holding in Mack, we conclude that Hamilton was entitled to pursue a claim against the defendants for the wrongful death of her unborn son. Thus, as to Hamilton's wrongful-death claim, we reverse the trial court's summary judgment in favor of all the defendants except Dr. Isbell, as to whom Hamilton has not appealed, and we remand the case for further proceedings consistent with this opinion. However, because Hamilton failed to demonstrate that she was entitled to damages for emotional distress, we affirm the summary judgment for the defendants -- other than Dr. Isbell -- insofar as it denied Hamilton's claim for such damages.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Malone, C.J., and Woodall, Stuart, Bolin, Murdock, Shaw, Main, and Wise, JJ., concur.

Parker, J., concurs specially.

PARKER, Justice (concurring specially).

Today, this Court reaffirms that the lives of unborn children are protected by Alabama's wrongful-death statute, regardless of viability. I write separately to explain why the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), does not bar the result we reach today and to emphasize the diminishing influence of Roe's viability standard. Because Roe is not controlling authority beyond abortion law, and because

1100192

its viability standard is not persuasive, I conclude that, at least with regard to the law of wrongful death, Roe's viability standard should be universally abandoned.

I. The uncertain status of the viability standard in tort and criminal law since Roe.

Since 1973, when Roe was decided, laws regarding prenatal injury, wrongful death, and fetal homicide have increasingly abandoned the viability standard expressed in Roe. In prenatal-injury law, "every jurisdiction permits recovery for prenatal injuries if a child is born alive. ... This generally holds true regardless whether the injury occurred either before or after the point of viability. ... The majority of jurisdictions also recognize a cause of action for the wrongful death of a stillborn, viable fetus." Crosby v. Glasscock Trucking Co., 340 S.C. 626, 634, 532 S.E.2d 856, 860 (2000) (Toal, J., dissenting) (footnotes omitted) (citing Farley v. Sartin, 195 W.Va. 671, 466 S.E.2d 522 (1995)).

States have been slower to abandon the viability standard in the area of wrongful death. If the child is stillborn, a majority of states and the District of Columbia allow recovery if the injury occurred after viability. See Aka v. Jefferson Hosp., 344 Ark. 627, 637 n. 2, 42 S.W. 3d 508, 515 n. 2 (2001)

1100192

(noting that 32 jurisdictions permitted the recovery of damages for the wrongful death of a viable unborn child). Although some states never permit recovery for the wrongful death of a pre-viable child,⁶ other states permit recovery if the pre-viable child is born alive and later dies.⁷

⁶See Aka, 344 Ark. at 640, 42 S.W. 3d at 516-17; Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002); Humes v. Clinton, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990); Kandel v. White, 339 Md. 432, 433, 663 A.2d 1264, 1265 (1995); Thibert v. Milka, 419 Mass. 693, 695, 646 N.E.2d 1025, 1026 (1995); Fryover v. Forbes, 433 Mich. 878, 446 N.W.2d 292 (1989); Blackburn v. Blue Mountain Women's Clinic, 286 Mont. 60, 86, 951 P.2d 1, 16 (1997) (reaffirming Kuhnke v. Fisher, 210 Mont. 114, 119-20, 683 P.2d 916, 919 (1984) (holding that an unborn child is not a "minor child," as that term is defined by statute)); Wallace v. Wallace, 120 N.H. 675, 677, 421 A.2d 134, 136 (1980); Miller v. Kirk, 120 N.M. 654, 657, 905 P.2d 194, 197 (1995); LaDu v. Oregon Clinic, P.C., 165 Or. App. 687, 693, 998 P.2d 733, 736 (2000) ("[N]othing in the statutory context indicates that a nonviable fetus is to be considered a 'person' for purposes of the wrongful death statutes."), cert. denied, 331 Or. 244, 18 P.3d 1099 (2000); Coveleski v. Bubnis, 535 Pa. 166, 170, 634 A.2d 608, 611 (1993); Miccolis v. AMICA Mut. Ins Co.n, 587 A.2d 67, 71 (R.I. 1991); Crosby, 340 S.C. at 629, 532 S.E.2d at 857; and Baum v. Burrington, 119 Wash. App. 36, 43, 79 P.3d 456, 459-60 (2003), cert. denied, 151 Wash. 2d 1035, 95 P.3d 758 (2004).

⁷See, e.g., Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 505, 93 S.E.2d 727, 728 (1954) ("Where a child is born after a tortious injury sustained at any period after conception, he has a cause of action."); Kelly v. Gregory, 125 N.Y.S.2d 696, 697, 282 A.D. 542, 543-44 (1953) ("[L]egal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception."); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977) ("The development of

The most significant shift away from the viability standard, however, has been in the law of fetal homicide. At least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception. See State v. Courchesne, 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n.46 (2010)

the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law."); Bennett v. Hymers, 101 N.H. 483, 485, 486, 147 A.2d 108, 110 (1958) ("We adopt the opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life. ... We hold therefore that an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury."); Smith v. Brennan, 31 N.J. 353, 367, 157 A. 2d 497, ine504 (1960) ("We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. ... Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) ("As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several of the states, we regard it as having little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception."); Torigian v. Watertown New Co., 352 Mass. 446, 449, 225 N.E. 2d 926, 927 (1967) ("We are not impressed with the soundness of the arguments against recovery. They should not prevail against logic and justice. We hold that the plaintiff's intestate was a 'person'" for the purposes of the wrongful-death statute.); and Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976) ("We hold that a child born alive, having suffered prenatal injuries at any time after conception, has a cause of action against the alleged tortfeasor.").

1100192

("' [As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, Fetal Homicide Laws (March 2010) (alterations in Courchesne))).

Alabama's homicide statute, for example, defines "person" specifically to include "an unborn child in utero at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975. As Justice See wrote in a special concurrence joined by then Chief Justice Nabers and Justices Stuart, Smith, and Parker in Ziade v. Koch, 952 So. 2d 1072, 1082 (Ala. 2006), the homicide statute "defines 'person' to include an 'unborn child.' The legislature has thus recognized under that statute that, when an 'unborn child' is killed, a 'person' is killed." See also Ankrom v. State, [Ms. CR-09-1148, Aug. 26, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011) ("Alabama's homicide statute ... does apply to unborn children.").

Noting that Alabama's homicide statute protects an unborn child before viability, this Court recently held that, similarly, Alabama's "Wrongful Death Act permits an action for the death of a preivable fetus." Mack v. Carmack, [Ms. 1091040, Sept. 9, 2011] ___ So. 3d ___, ___ (Ala. 2011). In deciding that, for purposes of the Wrongful Death Act, a "person" includes

1100192

an unborn child at any stage of gestation, this Court recognized the arbitrariness of "draw[ing] a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability." Mack, ___ So. 3d at _____. These developments in Alabama match a larger pattern; currently, at least nine other states permit recovery for the wrongful death of pre-viable unborn children, five by judicial construction -- Missouri, Oklahoma, Utah, South Dakota, and West Virginia⁸ --

⁸Missouri: Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) ("[W]e cannot avoid the conclusion that the legislature intended the courts to interpret 'person' within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability."); Oklahoma: Pino v. United States, 183 P.3d 1001, 1005 (Okla. 2008) ("Our construction of [Oklahoma's wrongful-death statute] and the Oklahoma Constitution requires that a remedy be afforded for the death of a fetus, whether or not viable and whether or not born alive, and prohibits abrogating such an action."); Utah: Carranza v. United States, [No. 20090409, Dec. 20, 2011] ___ P.3d ___, ___ (Utah 2011) (holding "that the statute allows an action for the wrongful death of an unborn child; the term 'minor child,' as used in the statute, includes an unborn child" and noting that the language of the statute being interpreted by that court had since been amended); South Dakota: Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791 (S.D. 1996) ("Based on our reading of [South Dakota Codified Law] 21-5-1, we conclude the Legislature clearly intended to encompass nonviable children in the term 'unborn child.'"); West Virginia: Farley v. Sartin, 195 W.Va. 671, 683, 466 S.E.2d 522, 534 (1995) ("[W]e, therefore, hold that the term 'person' ... encompasses a nonviable unborn child and, thus,

1100192

and four by statute -- Illinois, Louisiana, Nebraska, and Texas.⁹ Georgia and Mississippi permit recovery of damages for the wrongful death of a "quick" unborn child previability.¹⁰

permits a cause of action for the tortious death of such child.").

⁹Illinois: 740 Ill. Comp. Stat. 180/2.2 (2011) ("The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default."); Louisiana: La. Civ. Code Ann. art. 26 (1999) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death."); Nebraska: Neb. Rev. Stat. § 30-809(1) (2010) ("Whenever the death of a person, including an unborn child in utero at any stage of gestation, is caused by the wrongful act, neglect, or default ... the person who ... would have been liable if death had not ensued, is liable in an action for damages, notwithstanding the death of the person injured"); Texas: Texas Civil Practice & Remedies Code Ann. § 71.001(2) and (4) (2011) ("'Person' means an individual. ... 'Individual' includes an unborn child at every stage of gestation from fertilization until birth.").

¹⁰See Porter v. Lassiter, 91 Ga. App. 712, 716, 87 S.E.2d 100, 103 (1955) ("'[A] suit may be maintained by the mother for the loss of a child that was "quick" in her womb at the time of the homicide. ... The court does not believe it necessary for the child to be "viable" provided it was "quick", that is "able to move in its mother's womb."'") (quoting the trial court); 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 112 (Miss. 2003) ("[W]e hold that our wrongful death statute includes a fetus who is 'quick' in the womb as a 'person' within the language of that statute."). See also Shirley v. Bacon, 154 Ga. App. 203, 204, 267 S.E.2d 809, 811 (1980) (explaining that "[t]he mere fact that [the mother] had not felt the movement of the fetus does not

1100192

Thus, the law of prenatal injury and fetal homicide has moved decidedly away from the viability standard, while the law of wrongful death has slowly followed.

II. Roe's viability standard is not controlling authority in wrongful-death law.

Some state courts have applied Roe's viability standard to wrongful-death law, citing Roe as prohibiting the recovery of damages for the wrongful death of a child who dies without reaching viability.¹¹ The California Supreme Court held that Roe limited California's criminal statutes protecting unborn children.¹² Misreading Roe, these courts concluded that the

necessarily mean that the fetus did not move or was not capable of movement at the time of the unborn child's death").

¹¹See, e.g., Toth v. Goree, 65 Mich. App. 296, 304, 237 N.W.2d 297, 301 (1975) ("There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act."); Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) ("[I]t would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus ... and at the same time for a third party to be subject to liability to the fetus for his unintended but merely negligent acts."). See also Aka, 344 Ark. at 641, 42 S.W.3d at 517-18; Justus v. Atchison, 19 Cal. 3d 564, 577-78, 565 P.2d 122, 130-31 (1977), disapproved on other grounds, Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1 (1985); Hamby v. McDaniel, 559 S.W.2d 774, 778 (Tenn. 1977); and State ex. rel. Hardin v. Sanders, 538 S.W.2d 336, 339 (Mo. 1976).

¹²People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 501 (1976).

1100192

United States Supreme Court held in Roe that states have no interest in protecting the life of an unborn child before viability.

Although broadly written, Roe does not support that conclusion; the states are forbidden to protect unborn children only in ways that conflict with a woman's "right." Roe held that a pregnant woman's "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. See also Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (describing Roe as "holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages"). No one, however, other than a woman seeking to "terminate her pregnancy," possesses the "right" created in Roe. Nothing in Roe indicated that anyone other than the pregnant woman has any right to terminate her pregnancy and thereby to cause the death of her unborn child.

Roe does not prohibit states from protecting unborn human lives. To the contrary, in Casey, the Supreme Court acknowledged that "the State has legitimate interests from the outset of the pregnancy" in protecting the unborn child, 505 U.S. at 846, and a "substantial state interest in potential life

1100192

throughout pregnancy." 505 U.S. at 876. Thus, unless a state's law conflicts with a woman's "right" to an abortion, the state law does not conflict with Roe. See also Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (noting that "the State, from the inception of the pregnancy," has an interest "in protecting the life" of the unborn child). Webster v. Reproductive Health Servs., 492 U.S. 490, 516 (1989); and Harris v. McRae, 448 U.S. 297, 313 (1980).

Roe's statement that unborn children are not "persons" within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are "persons" under state law. Because the Fourteenth Amendment "right" recognized in Roe is not implicated unless state action violates a woman's "right" to end a pregnancy, the other parts of the superstructure of Roe, including the viability standard, are not controlling outside abortion law.

Many state appellate courts have recognized that, except in the case of abortion, Roe does not limit state criminal or civil protection of the unborn child.¹³ Justice Maddox

¹³See, e.g., Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) (Roe's viability standard not applicable to wrongful-death action); Commonwealth v. Bullock, 590 Pa. 480, 491-92, 913 A.2d 207, 214 (2006) (Roe does not prohibit charging killer of unborn child with murder); State v. MacGuire, 84 P.3d

1100192

explained this distinction in his dissent in Gentry v. Gilmore, 613 So. 2d 1241, 1247 (Ala. 1993):

"Roe and its progeny address the potential conflicts between a woman's right to an abortion and the State's interest in the woman's health and the fetus's life. Roe is not implicated when, as in this case, both the State and the mother have congruent interests in preserving life and punishing its wrongful

1171, 1179-80 (Utah 2004) (Parrish, J., concurring) (Roe does not prohibit charging killer of unborn child with murder); 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 113-14 (Miss. 2003) (Roe does not apply to action brought under wrongful-death statute); Farley v. Sartin, 195 W.Va. 671, 683-84 & n. 28, 466 S.E.2d 522, 534-35 & n.28 (Roe does not apply to wrongful-death action); People v. Davis, 7 Cal. 4th 797, 809, 872 P.2d 591, 598 (1994) (Roe's viability standard does not apply in the context of fetal murder); State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) ("Roe v. Wade protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."), cert. denied, 496 U.S. 931 (1990); Summerfield v. Superior Court, 144 Ariz. 467, 478, 698 P.2d 712, 723 (1985) (Roe does not apply to wrongful-death action); and O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (noting that Roe, "while holding that the fetus is not a person for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a nonentity."). See also Crosby, 340 S.C. at 642, 532 S.E.2d at 864 (Toal, J., dissenting) ("Unlike abortion cases, wrongful death actions do not automatically implicate any countervailing constitutional liberties. No one can argue in this case that the state or federal constitution shields the defendants' allegedly wrongful conduct."); Lawrence v. State, 240 S.W.3d 912, 917-18 & n.24 (Tex. Crim. App. 2007) (Roe does not prohibit state from charging killer of unborn child with capital murder), cert. denied, 553 U.S. 1007 (2008); State v. Alfieri, 132 Ohio App. 3d 69, 78-79, 724 N.E.2d 477, 483 (1998) (Roe does not prohibit state from criminalizing fetal homicide); and People v. Ford, 221 Ill. App. 3d 354, 368-69, 581 N.E.2d 1189, 1199 (1991) (Roe does not apply to third-party assault of pregnant woman, which kills the unborn child).

destruction. I conclude that the legislature has a right to protect nonviable fetal life when its interest is congruent with that of the mother."

Scholars have also recognized the limitations of Roe.¹⁴ For these reasons, Roe is not controlling authority in this case.

III. Roe's viability standard is not persuasive.

Numerous scholars have criticized the viability rule of Roe.¹⁵ Today, "there is broad academic agreement that Roe

¹⁴See, e.g., Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 614 (1987) ("[Roe] does not apply to the context of nonconsensual third party acts against the unborn child."); Jeffrey A. Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. on Legis. 97, 112 (1985) ("The decision in Roe does not preclude the state from protecting previable fetal life when such protection is reasonable and infringes upon no fundamental or other federal or state right"); and David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 657 (1980) ("Roe v. Wade neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes.").

¹⁵Randy Beck, Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework, 51 Am. J. Legal Hist. 505, 516-26 (2011); Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. Rev. 249, 268-70 (2009); Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 38-40 (1993); Mark Tushnet, Two Notes on the Jurisprudence of Privacy, 8 Const. Com. 75, 83 (1991) ("[U]sing the line of viability to distinguish the time when abortion is permitted from the time after viability when it is prohibited (as Roe v. Wade does), is entirely perverse."); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924-25 (1973); and Mark J. Beutler, Abortion and the Viability Standard -- Toward a More Reasoned Determination of the State's Countervailing Interest in

1100192

failed to provide an adequate explanation for the viability rule." Randy Beck, Gonzales, Casey, and the Viability Rule, 103 Nw. U. L. Rev. 249, 268-69 (2009).

A. Roe misstated the protection of the unborn child under the common law.

Roe's viability rule was based, in significant part, on an incorrect statement of legal history. The Supreme Court in Roe erroneously concluded that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. Roe also referred to "the lenity of the common law." 410 U.S. at 165. However, scholars have repeatedly pointed to inaccuracies in Roe's historical account since Roe was decided in 1973.¹⁶ "[T]he history embraced in Roe would not withstand

Protecting Prenatal Life, 21 Seton Hall L. Rev. 347, 359 (1991) ("It is difficult to understand why viability should be relevant to, much less control, the measure of a state's interest in protecting prenatal life."). See generally Douglas E. Ruston, The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice, 61 S.C. L. Rev. 915 (2010); Justin Curtis, Including Victims Without a Voice: Amending Indiana's Child Wrongful Death Statute, 43 Val. U. L. Rev. 1211 (2009); and Sarah J. Loquist, The Wrongful Death of a Fetus: Erasing the Barrier Between Viability and Nonviability, 36 Washburn L.J. 259 (1997); see also the sources cited by Justice Maddox in his dissent in Gentry v. Gilmore, 613 So. 2d at 1248-49.

¹⁶See generally Joseph Dellapenna, Dispelling the Myths of Abortion History (Carolina Academic Press 2006); John Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge

1100192

careful examination even when Roe was written." Joseph Dellapenna, Dispelling the Myths of Abortion History 126 (Carolina Academic Press 2006).

Sir William Blackstone, for example, recognized that unborn children were persons. Although the Court cited Blackstone in Roe, it failed to note that Blackstone addressed the legal protection of the unborn child within a section entitled "The Law of Persons." It also ignored the opening line of his paragraph describing the law's treatment of the unborn child: "Life is an immediate gift of God, a right inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England *129.¹⁷ As Professor David

University Press 1988). See also Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15 (1993); Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade, 6 St. Louis U. Pub. L. Rev. 229, 230 n.8, 241 n.90 (1987); James S. Witherspoon, Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 70 (1985) ("In short, the Supreme Court's analysis in Roe v. Wade of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous."); and Robert Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807 (1973).

¹⁷See Dellapenna, at 200:

"[M]odern research has established that by the close of the seventeenth century, the criminality of

1100192

Kadar noted in 1980, "Rights and protections legally afforded the unborn child are of ancient vintage. In equity, property, crime, and tort, the unborn has received and continues to receive a legal personality." David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 639 (1980) (footnotes omitted).

B. Roe misstated the protection of the unborn child under tort law and criminal law.

Professor Kadar and others have pointed out "the mistaken discussion within Roe on the legal status of the unborn in tort law." Kadar, 45 Mo. L. Rev. at 652. The Court's discussion in Roe of prenatal-death recovery "was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v. Wade." 45 Mo. L. Rev. at 652-53. See also William R. Hopkin, Jr., Roe v.

abortion under the common law was well established. Courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion. The only difference among these authorities had been the severity of the crime (misdemeanor or felony), an uncertainty that, under Coke's influence, began to settle into the pattern of holding abortion to be a misdemeanor unless the child was born alive and then died from the injuries or potions that led to its premature birth."

1100192

Wade and the Traditional Legal Standards Concerning Pregnancy, 47 Temp. L.Q. 715, 723 (1974) ("[I]t must respectfully be pointed out that Justice Blackmun has understated the extent to which the law protects the unborn child.").

Roe's adoption of the viability standard in 1973 did not reflect American law. Viability played no role in the common law of property, homicide, or abortion. Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563, 569 n.33 (1987). And there was no viability standard in wrongful-death law because the common law did not recognize a cause of action for the wrongful death of any person. Farley v. Sartin, 195 W.Va. at 674, 466 S.E.2d at 525 ("At common law, there was no cause of action for the wrongful death of a person."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) ("The common law not only denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependants or heirs for their own loss at his death.").

The viability standard was introduced into American law by Bonbrest v. Katz, 65 F. Supp. 138 (D.D.C. 1946), the first case to recognize a cause of action for prenatal injuries. Bonbrest

1100192

implied that such a cause of action would be recognized only if the unborn child had reached viability. 65 F. Supp. at 140.

Viability was initially adopted by courts in prenatal-injury law, but its influence was waning by 1961. See Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (holding that an infant born alive could recover damages for injuries suffered before viability); see also Note, Torts -- Extension of Prenatal Injury Doctrine to Nonviable Infants, 11 DePaul L. Rev. 361 (1961-62). One thorough legal survey of prenatal-injury law a decade before Roe was decided concluded that "[t]he viability limitation in prenatal injury cases is headed for oblivion. Courts are coming to realize that it is illogical and unjust to the children affected and not readily amenable to scientific proof." Charles A. Lintgen, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. Pa. L. Rev. 554, 600 (1962).

C. Roe's viability standard was dictum.

The viability standard adopted in Roe was dictum. Randy Beck, Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework, 51 Am. J. Legal Hist. 505, 516-26 (2011). It was not a part of either the Texas statute addressed in Roe or the Georgia statute addressed in Doe v. Bolton, 410 U.S. 179

1100192

(1973); neither case was conditioned on viability. In fact, the viability standard was adopted in Roe without any evidentiary record and was not discussed in the briefs or arguments. Beck, 51 Am. J. Legal Hist. at 511-12. The viability rule was also dictum in Casey because the Pennsylvania statute at issue in that case was not conditioned on viability but applied throughout a woman's pregnancy. Beck, 103 Nw. U. L. Rev. at 271-76.

Additionally, "the Roe Court's internal correspondence" demonstrates that the Justices themselves recognized that the viability standard was not only "'arbitrary,'" but also "'unnecessary.'" Beck, 51 Am. J. Legal Hist. 505, 520, 521, 526; see also Randy Beck, The Essential Holding of Casey: Rethinking Viability, 75 UMKC L. Rev. 713, 713 (2007) (quoting Justice Blackmun's "Internal Supreme Court Memo," as quoted in David J. Garrow, Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade 580 (1994)) ("'You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.'").

D. Roe's viability standard was incoherent.

The United States Supreme Court has "never justified" the viability rule of Roe and Casey "in either legal or moral terms."

1100192

Randy Beck, 103 Nw. U. L. Rev. at 249; see also Beck, 103 Nw. U. L. Rev. at 253, 268-69 & n. 116 (and authorities cited therein). Justice White explained the lack of foundation for the viability standard in his dissent in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 794-95 (1986) (White, J., dissenting):

"A second, equally basic error infects the Court's decision in Roe v. Wade. The detailed set of rules governing state restrictions on abortion that the Court first articulated in Roe and has since refined and elaborated presupposes not only that the woman's liberty to choose an abortion is fundamental, but also that the State's countervailing interest in protecting fetal life (or, as the Court would have it, 'potential human life,' 410 U.S., at 159) becomes 'compelling' only at the point at which the fetus is viable. As Justice O'Connor pointed out three years ago in her dissent in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. [416], at 461 [(1983)], the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary. The Court's 'explanation' for the line it has drawn is that the State's interest becomes compelling at viability 'because the fetus then presumably has the capacity of meaningful life outside the mother's womb.' 410 U.S., at 163. As one critic of Roe has observed, this argument 'mistakes a definition for a syllogism.' Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924 (1973).

"The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is

1100192

in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability."

Similarly, in the article cited by Justice White, Professor John Hart Ely noted that Roe justified the viability standard with a definition:

"The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop) the interest in protecting the fetus is compelling. Exactly why that is the magic moment is not made clear: Viability, as the Court defines it, is achieved some six to twelve weeks after quickening. (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial -- to the extent any point between conception and birth has been focused on.) But no, it is viability that is constitutionally critical: the

1100192

Court's defense seems to mistake a definition for a syllogism.

"'With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.'

"With regard to why the state cannot consider this 'important and legitimate interest' prior to viability, the opinion is even less satisfactory."

John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 924-25 (1973) (quoting Roe, 410 U.S. at 163) (footnotes omitted).

Neither Roe nor any of the subsequent cases relying on the viability standard have provided any alternative rationale to support that standard: "In the decades since Roe, the Court has offered no adequate rationale for the viability standard, notwithstanding persistent judicial and academic critiques." Beck, 75 UMKC L. Rev. at 740.

Because of Roe, viability, in abortion law, is a limitation on the exercise of the state's interest in protecting the unborn child. Outside abortion law, viability has little significance. Viability is largely based on outcome statistics at a specific gestational age, coupled with an estimation of the

1100192

technological capabilities of a particular facility in medically assisting premature children. As the South Dakota Supreme Court said in Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996), "'[v]iability' as a developmental turning point was embraced in abortion cases to balance the privacy rights of a mother against her unborn child. For any other purpose, viability is purely an arbitrary milestone from which to reckon a child's legal existence." (Footnote omitted.)

Viability is irrelevant to determining the existence of prenatal injuries, the extent of prenatal injuries, or the cause of prenatal death. Viability is irrelevant to proving causation because the unborn child's anatomic condition can be observed regardless of viability and, if the unborn child dies, the cause of its death can be determined by autopsy regardless of the child's gestational age. Viability does not affect the child's loss of life or the damages suffered by the surviving family. There is no evidence that permitting recovery of damages for the wrongful death of a child before viability will increase fraudulent litigation. See 66 Federal Credit Union v. Tucker, 853 So. 2d 104, 113 (Miss. 2003).

Quite simply, the use of viability as a standard in prenatal-injury or wrongful-death law is incoherent. As the

1100192

West Virginia Supreme Court concluded in Farley: "[J]ustice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death." 466 S.E.2d at 533. Though a number of rationales were originally cited for the viability rule in prenatal-injury or wrongful-death law, the sole remaining justification of not abandoning viability in wrongful-death law seems to be deference to legislative bodies, a rather strange rationale for caution in abandoning a judicially created rule.

Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined. Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity.¹⁸ Of course, that new life is not yet

¹⁸See, e.g., Bruce M. Carlson, Human Embryology and Developmental Biology 3 (1994) ("Human pregnancy begins with the fusion of an egg and a sperm"); Ronan O'Rahilly & Fabiola

1100192

mature -- growth and development are necessary before that life can survive independently -- but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception.¹⁹ An unborn child is a unique and individual human being from

Muller, Human Embryology and Teratology 8 (2d ed. 1996) ("Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. This remains true even though the embryonic genome is not actually activated until 4-8 cells are present, at about 2-3 days."); Keith Moore, The Developing Human: Clinically Oriented Embryology 2 (8th ed. 2008) (The zygote "results from the union of an oocyte and a sperm during fertilization. A zygote or embryo is the beginning of a new human being."); Ernest Blechschmidt, The Beginning of Human Life 16-17 (1977) ("A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."); C.E. Corliss, Patten's Human Embryology: Elements of Clinical Development 30 (1976) ("It is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."); and Clinical Obstetrics 11 (Carl J. Pauerstein ed. 1987) ("Each member of a species begins with fertilization -- the successful merging of two different pools of genetic information to form a new individual.").

¹⁹See Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 120-137 (1993) ("Appendix B: The Legal Consensus on the Beginning of Life," citing caselaw and statutes from 38 states and the District of Columbia stating that the life of a human being should be protected beginning with conception).

1100192

conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

Conclusion

Roe's viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since Roe have conclusively demonstrated that an unborn child is a unique human being at every stage of development. And together, Alabama's homicide statute, the decisions of this Court, and the statutes and judicial decisions from other states make abundantly clear that the law is no longer, in Justice Blackmun's words, "reluctant ... to accord legal rights to the unborn." For these reasons, Roe's viability rule is neither controlling nor persuasive here and should be

rejected by other states until the day it is overruled by the United States Supreme Court.

Stuart, Bolin, and Wise, JJ., concur.

NATIONAL REPORTER SYSTEM — STATE SERIES

THE
PACIFIC REPORTER

VOLUME 286

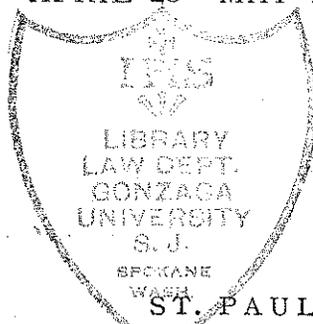
PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
DISTRICT COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

3986

APRIL 25—MAY 16, 1930



WEST PUBLISHING CO.

1930

ne
ked
der
can

act
ive
the

STATE ex rel. VANDERVORT v. GRANT
et al.

No. 22003.

Supreme Court of Washington.

March 26, 1930.

Nuisance ¶72—Taxpayer suffering no injury not common to general public could not maintain action for removal of market stalls from streets (Rem. Comp. Stat. §§ 9912-9914, 9921).

In mandamus action instituted by taxpayer to require removal of market stalls as public nuisance, under Rem. Comp. Stat. §§ 9912-9914, from city street, where it appeared that taxpayer resided about seven miles from place of alleged nuisance and that he was not an abutting owner and was not especially affected by obstruction of sidewalk otherwise than as general taxpayer, taxpayer could not maintain action, since generally, and under Rem. Comp. Stat. § 9921, public nuisance does not furnish ground for action by individual who merely suffers injury which is common to general public.

Department 1.

Appeal from Superior Court, King County; Robert M. Jones, Judge.

Mandamus by the State, on the relation of J. W. Vandervort, against L. Murray Grant and others, as the board of public works of the city of Seattle, in which the Pike Place Public Markets, incorporated, and others intervened. From the judgment for relator, the defendants and interveners appeal.

Reversed, with directions.

Thos. J. L. Kennedy, J. Ambler Newton, Tucker & Tucker, Hyland, Elvidge & Alvord, Lane & Thompson, McClure & McClure, Palmer, Askren & Brethorst and H. W. Haugland, all of Seattle, for appellants.
Vanderveer, Bassett & Levinson, of Seattle, for respondent.

MILLARD, J.

This is a mandamus action instituted by a taxpayer to require the removal of market stalls, as a public nuisance, from the west sidewalk of Pike place, a public street of the city of Seattle. From judgment ordering removal of the stalls, the defendant members of the board of public works and the intervening defendants have appealed.

Pike place is a public street and runs in a northerly and southerly direction. Pike street runs in an easterly and westerly direction. Pike place extends from Pike street to a point two hundred feet north of Stewart street. Along the westerly side of Pike place, and abutting upon the curb, is a sidewalk ten feet wide extending from the curb to the property line. Western avenue is a public street parallel with, and on a grade below, the level of Pike place. Pursuant to an

ordinance passed by the Seattle city council in 1921, the Seattle board of public works entered into a written contract with the Public Market & Department Store Company. Under the terms of that contract, the Market Company was authorized to build an arcade over the sidewalk on the west side of Pike place and to place booths and market stalls on the sidewalk for a distance of two hundred feet. Part of the booths became the property of the market company who operated the same as stalls for the sale of merchandise and farm products. The remaining booths were turned over to the city, and by it leased to various parties for the same purposes. The Pike Place Market building, which has been located at this point for many years, was remodeled. The market company also placed booths along the viaduct leading over Western avenue. In lieu of the sidewalk on the west side of Pike place occupied by booths and stalls, the market company and its successors, the intervening appellants, provided a more commodious sidewalk on their own property immediately adjoining the vacated sidewalk. The lease by the city to the market company and its successors is for a term of fifteen years. The owners of the fee in the property directly abutting on Pike place are the intervening appellants. The validity of the 1921 ordinance having been questioned, the city council in September, 1927, passed an ordinance reaffirming and ratifying the 1921 ordinance and the contract executed thereunder by the city with the market company.

Relator Vandervort, who seeks writ of mandamus requiring the removal of the stalls from the sidewalk, is a taxpayer and resides in Seattle about seven miles from Pike place. He is not an abutting owner and is not especially affected by the obstruction of the sidewalk otherwise than as a general taxpayer.

The respondent contends that the 1921 ordinance, and the contract executed pursuant thereto, and the 1927 validating ordinance are void; therefore the obstruction of the sidewalk by the booths and stalls is unlawful and constitutes a public nuisance, for the abatement of which the respondent as a resident and taxpayer of Seattle may maintain this action.

Holding that the city without color or right or authority by ordinance and contract provided for the erection and maintenance of a public nuisance, and that the 1927 ordinance was not effectual to validate the 1921 ordinance and contract, the trial court said: "Reluctantly I am forced to the conclusion that where a public nuisance exists, which the proper authorities neglect or refuse to abate, where the ordinary course of law does not afford a plain speedy and adequate remedy, then the writ will issue on the relation of a citizen and taxpayer, though no special,

↪ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

l upon the merits
ig to the mortgage
d for, from which
appealed to this
ights of other par-
dicated by the de-
e lumber company
in so far as it ad-
en to be superior

on was duly filed
office of the auditor
1928, at 9:51 a. m.
tends that it com-
on the lot, to be
of the house there-
k during the morn-
uced evidence tend-

The mortgage cor-
o lumber was deliv-
umber company, or
n of May 12, and in-
ling to so show;
aded to show that
ered until May 14.
alling for considera-
ation of fact as to
ay commenced to de-
lot. It is conceded
of delivery of lumber
y 12, the time of the
ge, is necessary to be
blish the superiority
r the mortgage lien.
in behalf of the lum-
clear or satisfactory,

undisputed, we may
be sufficient to estab-
the lumber lien over
re was, however, posi-
which seems to us to
festly did to the trial
was delivered upon the
pany, or by any one,
2. Indeed, the evidence
substantial ground for
er was delivered upon

We are clearly of the
ace does not preponder-
ision of the trial court
s duly recorded before
the delivery of any lum-
pany to be used in the
ouse. This, manifestly,
hich the trial judge de-
hé made no formal find-
quired to do; this being

firmed.

and TOLMAN, BEALS,
concur.

and Digests and Indexes

beneficial interest on his part in the relief sought be shown. The case of *State ex rel. Reynolds v. Hill*, 135 Wash. 442, 237 P. 1004, I think to be conclusive on this point."

Assuming that the two ordinances and the contract are void, the occupancy of the sidewalk by the stalls is unlawful, therefore such obstruction constitutes a public nuisance.

"Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission * * * unlawfully interferes with, obstructs or tends to obstruct, * * * any * * * street or highway. * * *" Section 9914, Rem. Comp. Stat.

"A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." Section 9912, Rem. Comp. Stat.

"It is a public nuisance— * * * 4. To obstruct or encroach upon public highways, private ways, streets, alleys. * * *" Section 9913, Rem. Comp. Stat.

The respondent does not own the property abutting the sidewalk nor does he own any property in the vicinity of Pike place; in fact he resides seven miles distant from the obstruction of which he complains. He is a taxpayer and a resident of the city of Seattle but he has no special interest, apart from his interest as one of the general public, entitling him to maintain mandamus proceedings to compel the removal of the booths from the sidewalk. The rule is uniformly recognized that, "In the absence of statute providing otherwise, a public nuisance does not furnish ground for an action either at law or in equity by an individual who merely suffers an injury which is common to the general public; * * *" Section 311, p. 723, Vol. 46, C. J.

Our statute is declaratory of the rule that it is essential to the right of an individual to relief against a public nuisance, that the individual show he has suffered or will suffer special injury other than that in which all the general public share alike.

"A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise." Section 9921, Rem. Comp. Stat.

The rule is discussed as follows in the well considered case of *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 90 Am. Dec. 181:

"Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not

be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offence would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance. * * * When the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community."

Reed v. Seattle, 124 Wash. 185, 213 P. 923, 29 A. L. R. 446; *Motorcamp Garage Co. v. Tacoma*, 136 Wash. 589, 241 P. 16, 42 A. L. R. 886; and *Anderson v. Nichols*, 152 Wash. 315, 278 P. 161, are not in point. The complainants in those actions were abutting property owners or owned property in the vicinity of the obstruction or encroachment, and the injury they suffered differed in kind from that suffered by the general public.

State v. Camp Lewis Service & Garage Co., 129 Wash. 166, 224 P. 584, is clearly distinguishable, as that action was by the state to abate a nuisance.

State ex rel. Reynolds v. Hill, 135 Wash. 442, 237 P. 1004, 1005, relied upon by respondent, and deemed by the trial court as conclusive of the question involved in the case at bar, was an action brought by a taxpayer to require the city commission of Walla Walla to remove gasoline pumps from the sidewalks of that city, on the ground that such encroachment was a public nuisance. A demurrer to the complaint was sustained, the parties stood upon the pleadings, and upon appeal to this court we held that the demurrer was improperly sustained. In that opinion it is stated that, " * * * The existence of the nuisance, and the right of the court to compel the officers to abate it, were not the determining factors in the consideration of the demurrer to the petition. Apparently, what resulted in the sustaining of the demurrer was the contention that all the necessary parties had not been joined as defendants, and that the court would not attempt to compel the doing of acts when it could not be determined when the court's mandate had been complied with."

It was urged by the demurring respondents that the owners of the gasoline pumps should have been made parties to the action. We held that the demurrer on the ground of the absence of proper parties when they are not necessary parties is not sustainable. How-

ever, there is language in which it may be concluded that it is not an abutting or mandamus proceedings for a public nuisance though an injury which is common to the public. Such rule is not a generally recognized rule. Section 9921, Rem. Comp. Stat., provides that a person cannot maintain an action for abatement of a public nuisance if an individual does not suffer special damage distinct from that suffered by the general public. Therefore, *State v. Hill*, supra, is modified in variance with the rule that a demurrer does not furnish ground for an action by an individual who merely suffers a common injury to the general public.

"By the express provision in some jurisdictions permitting a person interested in compelling the performance of the acts sought to be enforced, or necessary parties to mandamus for enforcement of the weight of the performance of a public duty will not issue under the instance of a private interest beyond that shared by other citizens; but in such a case the rule is directly to the contrary." Vol. 38, C. J.

The right of a private person to maintain a civil action for a public nuisance, and clearly limited, by Section 9921, Rem. Comp. Stat., to individuals who suffer special damage distinct from that suffered by the whole community. If a private person cannot maintain an action for a public nuisance much as his injury from the obstruction of the sidewalk differs not in kind from that suffered by the public generally.

The judgment appealed from is affirmed with directions to dismiss the writ.

MITCHELL, C. J.,
and TOLMAN, JJ., cc

STATE v. W
No.

Supreme Court
March

Criminal law § 824—
jury that no inference
defendants' failure
without request there
9, § 1; Laws 1925,
Comp. Stat. § 2148)

Under Supreme Court
pursuant to Laws 19

For other cases
286 P.—5

prosecution for such a
any one had been de-

The offence would be
ing the continuance of
had had occasion to
The wrong consists in
with and in deroga-
ommon right. It is in
that the law does not
to be maintained on
urbance in the enjoy-
ht, unless special dam-
ct not only in degree
which is done to the
ance. * * * When
itself a disturbance or
exercise of a common
ole remedy is by pub-
s special damage is

In such case the act
to individuals distinct
whole community."

Wash. 185, 213 P. 923,
Camp Garage Co. v.
241 P. 16, 42 A. L. R.
Nichols, 152 Wash. 315,
point. The complain-
ere abutting property
rty in the vicinity of
achment, and the in-
ed in kind from that
public.

Service & Garage Co.,
584, is clearly distin-
a was by the state to

s v. Hill, 135 Wash.
lied upon by respon-
trial court as conclu-
olved in the case at
ght by a taxpayer to
sion of Walla Walla
s from the sidewalks
d that such encroach-
nce. A demurrer to
ned, the parties stood
upon appeal to this
murrer was improv-
opinion it is stated
istence of the nul-
e court to compel the
not the determining
ion of the demurrer
tly, what resulted in
murrer was the con-
sary parties had not
s, and that the court
pel the doing of acts
etermined when the
i complied with."

nurring respondents
soline pumps should
to the action. We
n the ground of the
when they are not
sustainable. How-

ever, there is language in that opinion from
which it may be concluded that a taxpayer
who is not an abutting owner may maintain
mandamus proceedings for the abatement of a
public nuisance though he merely suffers an
injury which is common to the general pub-
lic. Such rule is not consonant with the
generally recognized rule and is contrary to
section 9921, Rem. Comp. Stat., that a private
person cannot maintain a civil action for the
abatement of a public nuisance when such in-
dividual does not suffer injury differing in
kind from that suffered by the public gen-
erally. Therefore, State ex rel. Reynolds v.
Hill, supra, is modified in so far as it is at
variance with the rule that a public nuisance
does not furnish ground for an action by an
individual who merely suffers an injury that
is common to the general public.

"By the express provisions of the statutes
in some jurisdictions persons beneficially in-
terested in compelling the performance of
the acts sought to be enforced are the proper
or necessary parties to bring proceedings in
mandamus for enforcement. However, ac-
cording to the weight of authority, the writ
will not issue under these statutes to compel
the performance of a strictly public duty at
the instance of a private citizen having no
interest beyond that shared in common with
other citizens; but in some jurisdictions the
rule is directly to the contrary." § 547, p. 841,
Vol. 38, C. J.

The right of a private person to maintain a
civil action for a public nuisance is definitely
and clearly limited, by section 9921, Rem.
Comp. Stat., to individuals who have suffered
special damage distinct from that done to the
whole community. It follows that the re-
spondent cannot maintain this action, inas-
much as his injury from the obstruction of the
sidewalk differs not in kind from that suffered
by the public generally.

The judgment appealed from is reversed
with directions to dismiss the action.

MITCHELL, C. J., and MAIN, PARKER,
and TOLMAN, JJ., concur.

STATE v. WILLIAMS et al.
No. 22285.

Supreme Court of Washington.
March 17, 1930.

Criminal law § 824(13)—Failure to instruct
jury that no inference of guilt resulted from
defendants' failure to testify was not error
without request therefor (Supreme Court Rule
9, § 1; Laws 1925, Ex. Sess., p. 187; Rem.
Comp. Stat. § 2148).

Under Supreme Court Rule 9, § 1, adopted
pursuant to Laws 1925, Ex. Sess., p. 187, and

abrogating Rem. Comp. Stat. § 2148, providing
that it should be the duty of the trial court to
instruct jury that no inference of guilt should
arise against accused should he fail or refuse
to testify as a witness on his own behalf, fail-
ure of court to instruct jury that no inference
of guilt should be drawn because of defendants'
failure to testify was not erroneous in absence of
request for any such instruction.

Department 1.

Appeal from Superior Court, Cowlitz Coun-
ty; Homer Kirby, Judge.

Dolores Rhea Williams and another were
convicted of the crime of being jointists, and
they appeal.

Affirmed.

Gus L. Thacker, of Chehalis, for appellant.
Joseph A. Mallery, of Tacoma, and Cecil C.
Hallin and J. E. Stone, both of Kelso, for the
State.

BEALS, J.

Defendants were charged by information
with the crime of being jointists, to which in-
formation they pleaded not guilty. Their
trial resulted in a verdict of guilty as charged
as to each defendant, and from judgment and
sentence entered upon this verdict defendants
appeal.

Appellants did not take the stand as wit-
nesses on their own behalf, and they assign
error upon the failure of the trial court to in-
struct the jury that no inference of guilt
should be drawn by the jury because of their
failure to so testify. It is admitted by appel-
lants in their brief that no request for any
such instruction was made by appellants, or
either of them.

Appellants contend that under the constitu-
tion and laws of this state it was the duty of
the trial court to instruct the jury as above
indicated, even though no such instruction
was requested by them, and notwithstanding
section 1, rule 9 (Criminal Procedure), of the
Rules of Pleading, Procedure and Practice
adopted by this court January 14, 1927, pur-
suant to chapter 118, Laws of 1925, Extra-
ordinary Session, which section of the rule
referred to abrogates that portion of section
2148, Rem. Comp. Stat., which provides that
it shall be the duty of the trial court to in-
struct the jury that no inference of guilt shall
arise against an accused should he fail or re-
fuse to testify as a witness on his own behalf.

Only one of the instructions given by the
court is included in the record before us, and
this record contains no certificate by the
court to the effect that the instruction which
appellants contend should have been given
either was or was not read to the jury, and
we are consequently unable to determine from
the record whether or not any such instruc-
tion was included among those which the
court gave.

CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT
OF
THE WHOLE BODY OF THE LAW

AS EMBODIED IN AND
DEVELOPED BY

ALL REPORTED DECISIONS

EDITED BY

WILLIAM MACK, LL.D.

Editor-in-Chief of the Cyclopedia of Law and Procedure

AND

DONALD J. KISER, LL.D.

Contributing Editor of the Cyclopedia of Law and Procedure

The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.

GREENE, C. J., in *I R. I.* 356.

VOLUME XXXVIII

New York
THE AMERICAN LAW BOOK CO.
London: Butterworth & Co., Bell Yard
1925

00548

duty of the
 rance of
 ce purely p
 y. As a gen
 is the prop
 the perform
 the county
 in.²⁴ He cann
 oceedings
 d to have in
 lings of the
 al jurisdiction
 must be made
 in the name
 per party to
 NW 309; Wol
 r. Judge, 162
 Peo. v. Swift
 94.
 v. State Bd.
 N. Y. 360, 29
 Peo. v. Tracy
 186.
 v. Forsyth Co
 SE 330.
 v. Marshall,
 te v. Yakima
 Wash. 30, 29
 he may instit
 edings: (1)
 on council of
 on reject the
 liquor dealer.
 178 Mich. 151
 o compel coun
 o draw a gran
 syth County,
 30), (3) or to
 public duty
 an. 726, 220 P
 n inferior cour
 ase. Peo. v. S
 NW 694. (6)
 to issue a war
 ers v. State, 12
 (6) To compel
 a temporary
 e acceptance of
 he issuance of
 on the ground
 id be illegal.
 n Cir. Judge,
 V 744. (7) To
 of a courthou
 3 WkyNC
 pel a railroad
 id main. v. W
 e. R. Co. v. W
 2, 12 SCT 283,
 Wash T. 303,
 ng petition fo
 al capacity.—W
 mandamus agai
 to compel them
 est against the
 es was signe
 attorney in h
 d he represente
 that capacity
 t and in the
 riorari, it
 he acquiesced
 he petitioners
 apacity, altho
 as a petitioner
 Tp., 183 Mich

ther a deputy
 as authority
 proceedings
 e in a criminal
 ave doubt
 la. 584, 6 S 27
 v. Burke, 169
 Ex p. State, 11
 s circuit sol
 tants have no
 laws of Alaba
 for mandamu
 tement of crim
 it such suits
 e, page and not

proceedings where a private right only
 (4) Other Municipal Officers. The gen
 rules applicable to the institution and main
 of mandamus proceedings by public officers
 boards²⁷ have been applied in the case of city
 and boards,²⁸ township officers and boards,²⁹
 school officers and boards.³⁰
 e. Agents of Organization Invested with
 A board which serves only as an agent
 of the political corporation, although invested with
 governmental authority, is without power to bring
 mandamus proceedings.³¹
 f. Right of Private Individual or Corpo-

only on the relation of the
 general. State v. Burke, 160
 48 S 1035.
 Com. v. West Grove Borough,
 Dist. 285.
 See supra § 539.
 See cases infra this note.
 Mayor.—(1) A duly elected
 may maintain mandamus pro
 to compel an exmayor to
 to him possession of the
 papers, and seal of office. Peo.
 15 Ill. 492, 60 AmD 769.
 However, a mayor authorized to
 a vacancy in the office of
 cannot bring mandamus to
 the probate judge to call a
 of the county commission
 to furnish names for a successor
 in the office where he has no right
 to enforce the performance of that
 Rose v. Lampley, 146 Ala. 445,
 171.
 A municipal council may
 draw a mandamus proceedings to com
 mayor to sign an ordinance.
 Bullock, 2 Mont. Co. (Pa.) 5.
 A city collector may bring
 mandamus to compel a county treas
 to refund to him moneys wrong
 received by the treasurer and
 paid by him in his official ca
 r. Webster v. Wheeler, 119
 401, 78 NW 657.
 A police justice of a city may
 maintain mandamus to compel
 a board of supervisors of the
 in which the city is situ
 to audit and allow to the city
 which the city is entitled, as
 power is not germane to the of
 police justice, but is purely
 of its nature. Peo. v. Kent
 183 Mich. 421.
 Bridge commissioners. — A
 mandamus is the proper remedy for
 commissioners of the South
 Bridge, to enforce payment
 of expenses of the commission
 to enforce payment of in
 on the bond, suit must be
 by the bondholders. South
 Comrs. v. Philadelphia, 3
 (Pa.) 596, 7 Phila. 298.
 A burgess may maintain man
 to compel the council to per
 duties. Com. v. Oliphant, 2
 (Pa.) 181.
 Metropolitan district board
 as the local sanitary au
 has no specific legal interest
 in a mandamus directing
 board of guardians to en
 provisions of the vaccina
 Reg. v. Lewisham Union,
 Q. B. 498.
 City solicitor.—An action in
 mandamus may be properly brought
 by a solicitor, under Gen. Code
 § 4312, to compel a city audi
 to issue his warrant for pay
 ment of the public serv
 employees of the public serv
 and it will not be
 on demurrer to such a peti
 tion the action is being prose
 cuted for the benefit of private in
 dividuals. Smith v. Lothschuetz, 10
 Mich. 267.
 See cases infra this note.
 Supervisors of a township (1)
 may for a writ of mandamus
 against a railroad company to
 issue a writ of mandamus
 for public accommoda-

tion required by their charter.
 Whitmarsh Tp. v. Philadelphia, etc.,
 R. Co., 8 Watts & S. (Pa.) 365. (2)
 But it cannot maintain mandamus
 proceedings to compel the town
 treasurer to pay orders issued by
 it in favor of one who has furnished
 material to the town. Portland Stone
 Ware Co. v. Taylor, 17 R. I. 33, 19 A
 1086.
 [b] A town clerk (1) may main
 tain mandamus to compel delivery to
 him of the books of record of the
 town wrongfully held by a person
 claiming to be the town clerk. Wal
 ter v. Belding, 24 Vt. 558. (2) But
 it has been held that the fact that
 a proceeding in the name of a town
 is brought by the town agent in
 stead of the town clerk is not a
 fatal irregularity. Walter v. Belding,
 supra.
 [c] The board of water commis
 sioners of a town may maintain man
 damus to compel the town treasurer
 to deliver water bonds to the board.
 Pearsons v. Ranlett, 110 Mass. 118.
 [d] Township road commission
 ers may maintain mandamus to com
 pel a railroad company to reconstruct
 a public highway injuriously oc
 cupied by it. Com. v. New York,
 etc., R. Co., 138 Pa. 58, 20 A 951
 [aff 7 Pa. Co. 407].
 [e] Selectmen cannot bring man
 damus against the town treasurer to
 compel him to pay an order drawn
 by them on him for a town debt.
 "In the absence of any express vote
 or direction by the inhabitants, it
 does not come within the scope of
 the general powers and duties by law
 conferred on selectmen, to ask, in the
 name of the town or its inhabitants,
 for the interference of this court
 by a summary and extraordinary
 process to compel a town officer to
 perform a particular act." Lexing
 ton v. Mulliken, 7 Gray (Mass.) 280,
 281.
 [f] Auditing committee appointed
 by town.—A committee appointed by
 a town to audit the accounts of the
 overseers of the poor, and to de
 mand and receive from them their
 books of account held by the over
 seers in their official capacity, has
 no such property in the books as
 will authorize it to apply in its
 own names for a mandamus to com
 pel the surrender of the books. "In
 no form of process can a mere serv
 ant or agent be permitted to enforce,
 in his own name, the rights of his
 principal or master." Bates v.
 Plymouth, 14 Gray (Mass.) 163, 165.
 30. See cases infra this note.
 [a] A school board may bring
 mandamus: (1) To compel an of
 ficer holding funds belonging to it
 to pay over the same. Hon. v. State,
 89 Ind. 249. (2) To compel another
 possession of the rooms and docu
 ments of the board. Hooper v.
 Farnem, 85 Md. 587, 37 A 430. (3)
 And where under statute "a joint
 authority given to any number of
 persons, or officers, may be executed
 by a majority of them, unless it is
 otherwise declared" a majority of
 the members of the board of educa
 tion of a city have authority to in

ration to Enforce Public Right or Duty—(1) In
 General. The authorities are not in harmony as
 to the right of an individual to enforce a public
 right or to compel the performance of a public duty
 by mandamus, and decisions even in the same states
 are sometimes conflicting. In some jurisdictions, it
 has been held that the proceedings must be insti
 tuted by the proper public officer, and that a pri
 vate individual is not entitled to the writ unless he
 has a special and peculiar interest in the enforce
 ment of the right or the performance of the duty,
 apart from his interest as one of the general pub
 lic.³² In other jurisdictions, on the other hand, it
 has been held that if the public right or duty affects

stitute mandamus against the mayor
 and council to compel them to pass
 a resolution directing a designated
 bank to pay to the board a fund
 raised by the sale of bonds to erect
 a school building. Blakely v. Single
 tary, 138 Ga. 632, 75 SE 1054. (4)
 But mandamus will not lie by two
 members of a board of school di
 rectors against a third to compel
 him to sign warrants in payment of
 teachers' salaries, since they have no
 beneficial interest in the subject of
 litigation. State v. James, 14 Wash.
 82, 44 P 116.
 [b] The trustee of a school town
 ship may maintain mandamus to
 compel the auditor to assess the
 school tax. Cole v. State, 131 Ind.
 591, 31 NE 458.
 [c] The treasurer of a school
 board may maintain mandamus to
 compel the payment of money ap
 propriated for school purposes. State
 v. White, 116 Ala. 262, 23 S 31.
 [d] A school book commission
 may maintain mandamus to compel
 the directors of the school district
 to introduce and put in use in their
 district textbooks selected and con
 tracted for by the commission.
 State v. Bronson, 115 Mo. 271, 21 SW
 1125.
 31. Macon Ridge Highway Dist. v.
 West Carroll Parish Police Jury, 152
 La. 205, 92 S 860 (under Act [1917]
 No. 30, conferring the governing au
 thority over road districts on police
 juries, § 4, providing for the appoint
 ment of a supervising board, such
 a supervising board has no authority
 in its corporate or representative ca
 pacity to maintain mandamus pro
 ceedings against the police jury to
 compel the repeal of a resolution dis
 pensing with the services of a drafts
 man and inspector).
 32. Conn.—Atwood v. Partree, 56
 Conn. 89, 14 A 85; Peck v. Booth, 42
 Conn. 271; Lyon v. Rice, 41 Conn.
 245. But see State v. Fyler, 48 Conn.
 145 (dictum).
 Iowa.—Moore v. Cort, 43 Iowa 503;
 Weich v. Mahaska County, 23 Iowa
 199; State v. Davis County Judge, 2
 Iowa 280. Contra State v. Marshall
 County Judge, 7 Iowa 186.
 Kan.—Weigand v. Lester, 111 Kan.
 455, 207 P 651; Gormley v. Doniphan
 County Rural High School Dist. No.
 5, 110 Kan. 609, 204 P 741; Titus v.
 Sherwood, 81 Kan. 870, 106 P 1070;
 Adkins v. Doolen, 23 Kan. 659; Reedy
 v. Eagle, 23 Kan. 254; Turner v. Jef
 ferson County, 10 Kan. 16; Bobbett
 v. State, 10 Kan. 9.
 La.—State v. Dubuclet, 28 La. Ann.
 85.
 Me.—Robbins v. Bangor R., etc.,
 Co., 100 Me. 496, 62 A 186, 1 LRANS
 963; Weeks v. Smith, 81 Me. 538, 18
 A 325; Mitchell v. Boardman, 79 Me.
 469, 10 A 452; Sanger v. Kennebec
 County, 25 Me. 291.
 Mich.—Wilson v. Cleveland, 157
 Mich. 510, 122 NW 284, 133 AmSR
 352; Sweet v. Smith, 153 Mich. 474;
 117 NW 59; Peo. v. Ihnken, 129 Mich.
 466, 89 NW 72; Thomas v. Hamilton,
 101 Mich. 387, 59 NW 658; Smith v.
 Saginaw, 81 Mich. 123, 45 NW 964;
 Peo. v. Whipple, 41 Mich. 548, 49 NW
 922; Peo. v. Green, 29 Mich. 121; Peo.

the people at large or the people of a particular governmental district, or a particular class of the people, such as voters or taxpayers, any one of the people at large or of the district affected, or any

member of the class in question, may enforce right or compel performance of the duty regarding any special or peculiar interest apart from that common to the general public;³³ but where this

546-547]

the writ will not of the classes of persons. Some jurisdictions it holds where the right of state in its sovereignty in the people at large is not affected by the proper general public as this sovereign capacity state may sue out that, where an office sets at naught the rights of the public, especially interested in the writ, expressly in his favor proceedings for that purpose to such proceed

v. State Prison Inspectors, 4 Mich. 187; Peo. v. State Univ., 4 Mich. 98. But see Baldwin v. Alger County, 189 Mich. 372, 155 NW 367 [quot Peo. v. Board of State Auditors, 42 Mich. 422, 4 NW 274] (where it was held that the recognized rule forbidding the intervention of private parties to redress grievances is not absolute but discretionary). Material limitations of this doctrine see cases infra note 36.

Pa.—Stegmaier v. Jones, 203 Pa. 47, 52 A 56 [aff 10 Kulp 496]; Com. v. Mitchell, 82 Pa. 343; Heffner v. Com., 28 Pa. 108; Com. v. Board of Revision of Taxes, 23 Pa. Dist. 424; Com. v. Raesly, 18 Pa. Dist. 704; Com. v. State Treasurer, 13 Pa. Dist. 231; Thatcher v. County, 13 Pa. Dist. 70; Loraine v. Pittsburg, etc., R. Co., 27 Pa. Co. 359; Baugh v. Elkin, 24 Pa. Co. 203; Owens v. Woolridge, 22 Pa. Co. 237; Com. v. Westfield Borough, 11 Pa. Co. 369; In re Forty Fort, 9 Kulp 65; Com. v. Park, 9 Phila. 481; Com. v. McCallin, 16 PittsbLegJNS 152.

R. I.—Williams v. Champlin, 26 R. I. 416, 59 A 75 (dictum); O'Brien v. Pawtucket, 18 R. I. 113, 25 A 914.

S. C.—State v. Charleston Light, etc., Co., 68 S. C. 540, 47 SE 979. But see Garrison v. Laurens, 55 S. C. 551, 33 SE 577.

Eng.—Reg. v. Frost, 8 A. & E. 822, 35 ECL 861, 112 Reprint 1049.

Can.—Hislop v. McGillivray Tp. Corp., 17 Can. S. C. 479 [aff 15 Ont. A. 687 (aff 12 Ont. 749)].

Ont.—Kingston v. Kingston, etc., Electric R. Co., 25 Ont. A. 462; Reg. v. Gore, 5 U. C. Q. B. 357.

[a] Reasons for rule.—(1) "The burdens of public office are sufficiently serious in themselves to make the best men of almost every community reluctant to assume them; but if in addition, public officers are liable to be brought into court at the call of every citizen, who may think he has a grievance in the non-enforcement of a purely public duty, such burdens will be greatly enhanced. Public officers are appointed to enforce the laws. It is to be presumed that they will do their duty. If they omit to do it application can be made to the proper official to compel them to do it. But in the first instance the duty to move in the enforcement of a public right should be upon a public officer. This is not only more consistent with our form of government and more orderly in its method, but it prevents the annoyance and expense which would be incident to a rule allowing any citizen to be a prosecutor." O'Brien v. Pawtucket, 18 R. I. 113, 116, 25 A 914. (2) "The right of the private party to obtain redress in his own name is denied, because, if he interposes, any other might, and as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife." Com. v. State Treasurer, 13 Pa. Dist. 231, 232.

[b] Rule applied.—Mandamus on the relation of private relators is not available to compel the police officers of Detroit to prohibit Sunday baseball playing in the city, where it does not appear that the grievance of relators is any other than that sustained by other citizens of the city, or that the attorney-general has refused to act, since, the grievance being purely a public one, redress should be sought by the people's public agents, and not by private intervention. Sweet v. Smith, 153 Mich. 674, 117 NW 59.

[c] Limitation of rule by statute.—By special statutory provision

two reputable citizens resident on the line of a street railway company may bring mandamus to compel the attorney-general to institute proceedings against the company, to have certain shares of stock and bonds issued by it in violation of law declared void. Cheatham v. McCormick, 178 Pa. 186, 35 A 631.

33. Alaska.—Brand v. Nome, 3 Alaska 29.

Ark.—Moses v. Kearney, 31 Ark. 261.

Cal.—Platnauer v. Sacramento County, (A.) 225 P. 12.

Colo.—Rizer v. Peo., 18 Colo. A. 40, 69 P 315; Chapman v. Peo., 9 Colo. A. 268, 48 P 153.

Del.—Hawkins v. Dougherty, 14 Del. 156, 172, 18 A 951 ("any interest of a legal and direct character will warrant the issuance of an alternative mandamus, and ultimately the peremptory writ, unless sufficient cause upon the hearing of the rule be shown against it").

D. C.—U. S. v. Cortelyou, 26 App. 298.

Fla.—Florida Cent., etc., R. Co. v. State, 31 Fla. 482, 13 S 103, 34 AmSR 30, 20 LRA 419; State v. Jefferson County, 17 Fla. 707; McConihe v. State, 17 Fla. 238. But see cases infra note 36 which materially limit this rule.

Ga.—McClatchey v. Atlanta, 149 Ga. 648, 101 SE 682. See Ford v. Cartersville, 84 Ga. 213, 10 SE 732 (dictum).

Ill.—Peo. v. Gallatin County, 294 Ill. 579, 128 NE 645; Peo. v. Harrison, 253 Ill. 625, 97 NE 1092, Ann Cas1913A 539; Peo. v. Harris, 203 Ill. 272, 67 NE 785, 96 AmSR 304; Peo. v. Suburban R. Co., 178 Ill. 594, 53 NE 349, 49 LRA 650; Glencoe v. Peo., 78 Ill. 382; Hall v. Peo., 57 Ill. 307; Ottawa v. Peo., 48 Ill. 233; Higgins v. Chicago, 18 Ill. 276; Pike County v. Peo., 11 Ill. 202; Greene County School Directors Dist. 25 v. Peo., 123 Ill. A. 73. Contra Peo. v. Vermilion County, 47 Ill. 256. Limitations of rule see dicta infra note 35.

Ind.—Wampler v. State, 148 Ind. 557, 47 NE 1068, 38 LRA 829; Clarke County v. State, 61 Ind. 75; State v. Hamilton, 5 Ind. 310; Hamilton v. State, 3 Ind. 452.

Mo.—State v. Roach, 230 Mo. 408, 130 SW 689, 139 AmSR 639; State v. Wabash R. Co., 206 Mo. 251, 103 SW 1137; State v. St. Louis Public Schools, 134 Mo. 296, 35 SW 617, 56 AmSR 503; State v. St. Louis School, 131 Mo. 505, 33 SW 3; State v. Francis, 95 Mo. 44, 8 SW 1; State v. Hannibal, etc., R. Co., 86 Mo. 13; State v. Dreyer, 183 Mo. A. 463, 466, 167 SW 1123; State v. Noonan, 59 Mo. A. 524.

Nebr.—State v. Moorhead, 99 Nebr. 527, 156 NW 1067; State v. Lincoln, 98 Nebr. 634, 154 NW 217; State v. Osborn, 60 Nebr. 415, 33 NW 357 (dictum); Coeperrider v. State, 46 Nebr. 84, 64 NW 372; State v. Kearney, 25 Nebr. 262, 41 NW 175, 13 AmSR 493; State v. Willard, 11 Nebr. 104, 7 NW 743; State v. Shropshire, 4 Nebr. 411; Peo. v. Buffalo County, 4 Nebr. 150. Compare Morse v. Hitchcock County, 19 Nebr. 556, 27 NW 637; State v. Sovereign, 17 Nebr. 173, 22 NW 353 (both holding that, where a special tribunal is provided by law to whom officers must account, a mere taxpayer in the first instance cannot proceed by mandamus against the officers to compel an accounting where such tribunal has not refused to act).

Nev.—State v. Gracey, 11 Nev. 223. N. J.—Doremus v. Passaic Bd. of Chosen Freeholders, 89 N. J. L. 197,

98 A 390; Lay v. Hoboken, 75 N. J. L. 315, 67 A 1024; Perry v. Williams, 41 N. J. L. 332, 32 AmR 219; State v. Camden City Council, 39 N. J. L. 332. See Bamford v. Hollinshead, 47 N. J. L. 439, 2 A 244 (apparently contra N. Y.—Peo. v. Ludwig, 213 N. Y. 540, 113 NE 532 [aff 172 App. Div. 71, 158 NYS 208 (rearg den 222 N. Y. 553 mem, 114 NE 1079 mem) and remittitur amended 219 N. Y. 586 mem, 114 NE 1079 mem); Southern Leasing Co. v. Ludwig, 217 N. Y. 100, 111 NE 470; Peo. v. Keating, 152 N. Y. 390, 61 NE 637 [rev 62 App. Div. 348, 71 NYS 97]; Peo. v. Northern Cent. R. Co., 164 N. Y. 289, 114 NE 138; Chittenden v. Wurster, 152 N. Y. 345, 46 NE 857, 37 LRA 183; Baird v. Kings County, 138 N. Y. 95, 33 NE 827, 20 LRA 81; Peo. v. Sullivan County, 66 N. Y. 249; Peo. v. Halsey, 37 N. Y. 344; Peo. v. Bridge, 152 App. Div. 913, 137 NYS 993 [mem on other grounds 206 N. Y. 246, 114 NE 573]; Peo. v. Smith, 152 App. Div. 514, 137 NYS 387 [mem on other grounds 206 N. Y. 231, 99 NE 580]; Peo. v. Frendergast, 140 App. Div. 235, 125 NYS 99; Peo. v. Dorse, 137 App. Div. 400, 120 NYS 982 [198 N. Y. 605 mem, 92 NE 100 mem]; Peo. v. Ahearn, 124 App. Div. 840, 109 NYS 249; Peo. v. Swanstrom, 79 App. Div. 94, 79 NYS 934; Peo. v. Manning, 37 App. Div. 141, 55 NYS 781; Peo. v. Meakin, 56 Hun 626, 1 NYS 161 [aff 123 N. Y. 660 mem, 114 NE 749 mem]; Peo. v. Daly, 37 App. Div. 461; Peo. v. Rochester, etc., R. Co., 14 Hun 371 [aff 76 N. Y. 294]; Peo. v. Watt, 115 Misc. 120, 188 NYS 559 [aff 197 App. Div. 929, 188 NYS 579]; Peo. v. Williams, 100 Misc. 569, 166 NYS 569 [rev on other grounds 191 App. Div. 279, 181 NYS 2201]; Pounds v. Lee Ave. Theatre Co., 84 Misc. 623, 147 NYS 315; Peo. v. Wheeler, 62 Misc. 37, 115 NYS 81 [aff 137 App. Div. 894, 121 NYS 1143]; Peo. v. Guggenheimer, etc., Misc. 735, 59 NYS 913 [aff 47 App. Div. 9, 62 NYS 111]; Matter of London, 14 Misc. 208, 35 NYS 996, 999; Peo. v. Whitney, 3 NYS 838; Peo. v. Collins, 19 Wend. 56. Compare dicta infra note 36 as to material limitation of the rule.

N. D.—State v. Drakeley, 26 N. D. 87, 143 NW 768; State v. Harmon, N. D. 513, 137 NW 427.

Okl.—Becknell v. State, 65 Okl. 264, 172 P 1094.

Or.—State v. Grace, 20 Or. 150, 1 P 382; State v. Ware, 13 Or. 880, 1 P 885.

Philippine.—Severino v. Governor Gen., 16 Philippine 366.

S. D.—State v. Menzie, 17 S. D. 535, 97 NW 745; State v. Lien, S. D. 297, 68 NW 748.

Tex.—Felton v. Kansas City, etc., R. Co., (Civ. A.) 143 SW 650; Laughlin v. Smith, (Civ. A.) 11 SW 248.

Utah.—Crockett v. Carbon County School Bd. of Education, 53 Utah 199 P 153.

Va.—Zigler v. Sprinkel, 111 Va. 408, 108 SE 656; Harrison v. Board of Dale, 127 Va. 180, 102 SE 759; Board v. Ballard, 87 Va. 101, 102 SE 575.

Wash.—State v. Everett, 101 Wash. 561, 172 P 752, LRA1918E 418, 154 P 561, 172 P 752, 234, 88 P 154; Peo. v. Mason, 45 Wash. 234, 88 P 154; LRANS 1221; State v. Annas, 17 Wash. 15, 85 P 996, 9 AnnCas 11. Apparently contra State v. Ross, Wash. 399, 81 P 865.

W. Va.—State v. Davis, 76 W. Va. 587, 85 SE 779; Frantz v. Wyoming County Ct., 69 W. Va. 734, 756, 133 328 [cit Cycl]; Payne v. Staunton, W. Va. 202, 46 SE 927 (dictum).

State v. Wyoming County Ct., Va. 672, 35 SE 959.

State v. Cornwall, 73 NW 63.

"The reason is, the exercise of such power assurance that the la secured." State v. Sov Div. 173, 176, 22 NW 353

Statutory limitation grounds 206 N. Y. 231, 99 NE 580; Peo. v. Frendergast, 140 App. Div. 235, 125 NYS 99; Peo. v. Dorse, 137 App. Div. 400, 120 NYS 982 [198 N. Y. 605 mem, 92 NE 100 mem]; Peo. v. Ahearn, 124 App. Div. 840, 109 NYS 249; Peo. v. Swanstrom, 79 App. Div. 94, 79 NYS 934; Peo. v. Manning, 37 App. Div. 141, 55 NYS 781; Peo. v. Meakin, 56 Hun 626, 1 NYS 161 [aff 123 N. Y. 660 mem, 114 NE 749 mem]; Peo. v. Daly, 37 App. Div. 461; Peo. v. Rochester, etc., R. Co., 14 Hun 371 [aff 76 N. Y. 294]; Peo. v. Watt, 115 Misc. 120, 188 NYS 559 [aff 197 App. Div. 929, 188 NYS 579]; Peo. v. Williams, 100 Misc. 569, 166 NYS 569 [rev on other grounds 191 App. Div. 279, 181 NYS 2201]; Pounds v. Lee Ave. Theatre Co., 84 Misc. 623, 147 NYS 315; Peo. v. Wheeler, 62 Misc. 37, 115 NYS 81 [aff 137 App. Div. 894, 121 NYS 1143]; Peo. v. Guggenheimer, etc., Misc. 735, 59 NYS 913 [aff 47 App. Div. 9, 62 NYS 111]; Matter of London, 14 Misc. 208, 35 NYS 996, 999; Peo. v. Whitney, 3 NYS 838; Peo. v. Collins, 19 Wend. 56. Compare dicta infra note 36 as to material limitation of the rule.

N. D.—State v. Drakeley, 26 N. D. 87, 143 NW 768; State v. Harmon, N. D. 513, 137 NW 427.

Okl.—Becknell v. State, 65 Okl. 264, 172 P 1094.

Or.—State v. Grace, 20 Or. 150, 1 P 382; State v. Ware, 13 Or. 880, 1 P 885.

Philippine.—Severino v. Governor Gen., 16 Philippine 366.

S. D.—State v. Menzie, 17 S. D. 535, 97 NW 745; State v. Lien, S. D. 297, 68 NW 748.

Tex.—Felton v. Kansas City, etc., R. Co., (Civ. A.) 143 SW 650; Laughlin v. Smith, (Civ. A.) 11 SW 248.

Utah.—Crockett v. Carbon County School Bd. of Education, 53 Utah 199 P 153.

Va.—Zigler v. Sprinkel, 111 Va. 408, 108 SE 656; Harrison v. Board of Dale, 127 Va. 180, 102 SE 759; Board v. Ballard, 87 Va. 101, 102 SE 575.

Wash.—State v. Everett, 101 Wash. 561, 172 P 752, LRA1918E 418, 154 P 561, 172 P 752, 234, 88 P 154; Peo. v. Mason, 45 Wash. 234, 88 P 154; LRANS 1221; State v. Annas, 17 Wash. 15, 85 P 996, 9 AnnCas 11. Apparently contra State v. Ross, Wash. 399, 81 P 865.

W. Va.—State v. Davis, 76 W. Va. 587, 85 SE 779; Frantz v. Wyoming County Ct., 69 W. Va. 734, 756, 133 328 [cit Cycl]; Payne v. Staunton, W. Va. 202, 46 SE 927 (dictum).

State v. Wyoming County Ct., Va. 672, 35 SE 959.

State v. Cornwall, 73 NW 63.

"The reason is, the exercise of such power assurance that the la secured." State v. Sov Div. 173, 176, 22 NW 353

Statutory limitation grounds 206 N. Y. 231, 99 NE 580; Peo. v. Frendergast, 140 App. Div. 235, 125 NYS 99; Peo. v. Dorse, 137 App. Div. 400, 120 NYS 982 [198 N. Y. 605 mem, 92 NE 100 mem]; Peo. v. Ahearn, 124 App. Div. 840, 109 NYS 249; Peo. v. Swanstrom, 79 App. Div. 94, 79 NYS 934; Peo. v. Manning, 37 App. Div. 141, 55 NYS 781; Peo. v. Meakin, 56 Hun 626, 1 NYS 161 [aff 123 N. Y. 660 mem, 114 NE 749 mem]; Peo. v. Daly, 37 App. Div. 461; Peo. v. Rochester, etc., R. Co., 14 Hun 371 [aff 76 N. Y. 294]; Peo. v. Watt, 115 Misc. 120, 188 NYS 559 [aff 197 App. Div. 929, 188 NYS 579]; Peo. v. Williams, 100 Misc. 569, 166 NYS 569 [rev on other grounds 191 App. Div. 279, 181 NYS 2201]; Pounds v. Lee Ave. Theatre Co., 84 Misc. 623, 147 NYS 315; Peo. v. Wheeler, 62 Misc. 37, 115 NYS 81 [aff 137 App. Div. 894, 121 NYS 1143]; Peo. v. Guggenheimer, etc., Misc. 735, 59 NYS 913 [aff 47 App. Div. 9, 62 NYS 111]; Matter of London, 14 Misc. 208, 35 NYS 996, 999; Peo. v. Whitney, 3 NYS 838; Peo. v. Collins, 19 Wend. 56. Compare dicta infra note 36 as to material limitation of the rule.

N. D.—State v. Drakeley, 26 N. D. 87, 143 NW 768; State v. Harmon, N. D. 513, 137 NW 427.

Okl.—Becknell v. State, 65 Okl. 264, 172 P 1094.

Or.—State v. Grace, 20 Or. 150, 1 P 382; State v. Ware, 13 Or. 880, 1 P 885.

Philippine.—Severino v. Governor Gen., 16 Philippine 366.

S. D.—State v. Menzie, 17 S. D. 535, 97 NW 745; State v. Lien, S. D. 297, 68 NW 748.

Tex.—Felton v. Kansas City, etc., R. Co., (Civ. A.) 143 SW 650; Laughlin v. Smith, (Civ. A.) 11 SW 248.

Utah.—Crockett v. Carbon County School Bd. of Education, 53 Utah 199 P 153.

Va.—Zigler v. Sprinkel, 111 Va. 408, 108 SE 656; Harrison v. Board of Dale, 127 Va. 180, 102 SE 759; Board v. Ballard, 87 Va. 101, 102 SE 575.

Wash.—State v. Everett, 101 Wash. 561, 172 P 752, LRA1918E 418, 154 P 561, 172 P 752, 234, 88 P 154; Peo. v. Mason, 45 Wash. 234, 88 P 154; LRANS 1221; State v. Annas, 17 Wash. 15, 85 P 996, 9 AnnCas 11. Apparently contra State v. Ross, Wash. 399, 81 P 865.

W. Va.—State v. Davis, 76 W. Va. 587, 85 SE 779; Frantz v. Wyoming County Ct., 69 W. Va. 734, 756, 133 328 [cit Cycl]; Payne v. Staunton, W. Va. 202, 46 SE 927 (dictum).

State v. Wyoming County Ct., Va. 672, 35 SE 959.

For later cases, developments and changes in the law see cumulative Annotations, same title, page and note number.

the
dless
that
rule
N. J.
ams,
ate v.
4, 620.
N. J.
ntra).
N. Y.
Div.
219
mem.
N. Y.
outh-
N. Y.
K, 168
App.
North-
89, 58
r, 152
A 209;
N. Y.
eo. v.
eo. v.
Britt,
[mod
46, 39
App.
other
568];
e, Div.
ee, 136
2 [aff
1 1093
p. Div.
strom,
5 Peo.
5 NYS
626, 10
em, 26
7 Hun
R. Co.
1; Peo.
3 NYS
8 NYS
Misc.
other
1 NYS
Theatre
115; In
YS 605
1 NYS
er, 23
7 App.
999; In
v. Cole
e dicta
limita-
6 N. D.
non, 23
3 Okl.
154, 25
380; 18
vernor.
7 S. D.
Lien. 5
ty, etc.
50; Mc
A.) 140
County
tah 307
131 Va.
Barks
9; Clay
3 253
1 Va.
L. Va.
1 State
P 125
key
as 107
Ross, 1
W. Va.
67; 81
inter v.
Hottel

prevails, the writ will not issue unless applicant is one of the classes of persons mentioned.³⁴ Further, in some jurisdictions it has been either held or said that, where the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, the proceeding must be instituted by the proper public officer;³⁵ but that if the general public as distinguished from the state in its sovereign capacity is affected, any citizen of the state may sue out the writ.³⁶ So it has been held that, where an officer of a municipal corporation sets at naught the corporate will, one who is beneficially interested in enforcing the corporate will expressly in his favor may institute mandamus proceedings for that purpose where the corporation assents to such proceedings.³⁷ Although the right

or duty sought to be enforced is a public one, yet if the public interest is not injuriously affected by a breach thereof, a private individual cannot enforce it solely in behalf of the public.³⁸

§ 547] (2) Persons Having "Beneficial Interest." By the express provisions³⁹ of the statutes in some jurisdictions persons beneficially interested in compelling the performance of the acts sought to be enforced are the proper or necessary parties to bring proceedings in mandamus for enforcement.⁴⁰ However, according to the weight of authority, the writ will not issue under these statutes to compel the performance of a strictly public duty at the instance of a private citizen having no interest beyond that shared in common with other citizens;⁴¹ but in some jurisdictions the rule is

Wis.—State v. Cornwall, 97 Wis. 105, 73 NW 63.

[a] "The reason is, that without the exercise of such power there is no assurance that the law will be enforced." State v. Sovereign, 17 Nebr. 173, 176, 22 NW 353.

[b] Statutory limitation of rule.—Election L. § 381, authorizing mandamus on the application of a candidate to require a recount of ballots protested or rejected, limits the right to mandamus to a candidate, and the court has no jurisdiction on the application of a hotel keeper in a town for a recount of ballots cast at an election with reference to the sale of liquor by hotel keepers. Tamney v. Atkins, 209 N. Y. 162, 162 NE 567 [rev 151 App. Div. 136 NYS 865].

[c] Right as dependent on status as citizen, resident, or taxpayer.—

One who is not a citizen cannot enforce a public right or compel the performance of a public duty, where he has no special and peculiar interest in the matter. Peo. v. Colorado Nat. R. Co., 42 Fed. 638; State v. Osborn, 60 Nebr. 415, 83 NW 357. So a person who is not a resident in the territory to be embraced in a proposed new school district cannot petition for mandamus to compel the formation of the district (Township 14 School Trustees v. Peo., 71 Ill. 559); (3) and a taxpayer of a county is not beneficially interested in having a vote on county division canvassed where he does not reside therein (Terr. v. Cole, 35 Okl. 301, 19 NW 418. But see Peo. v. Singer, 162 Ind. 568, 70 NE 101, holding that a legal voter of the state at the time the last preceding enumeration of the male inhabitants for legislative purposes was taken may maintain suit to test the constitutionality of an act of the general assembly based thereon purporting the number of senators representing the state, although the wrong complained of does not exist in his own senatorial or representative district. One who is not a taxpayer cannot compel the execution of a tax).

The payment of awards for damages for laying out a highway is not a matter of public interest entitling a freeholder and taxpayer to maintain a proceeding to compel payment. Peo. v. Morgan, 97 App. Div. 207, 89 NYS 332. Doremus v. Passaic Bd. of Freeholders, 89 N. J. L. 197, 199; Oliver v. Jersey City, 63 N. J. L. 96, 42 A 782 [rev on other side 63 N. J. L. 634, 44 A 709]. NYSR 223, 48 LRA 412]. And see supra note 33.

U. S.—Union Pac. R. Co. v. Peo., 31 U. S. 343, 23 L. ed. 423 [aff 31 U. S. 343, 23 L. ed. 423].

Nickelson v. State, 62 Fla. 448, 57 S 194 [cit Cycl]. But see supra note 33. Chicago, etc., R. Co. v. Suffern, 129 Ill. 274, 21 NE 324 (dic-

tum); Hall v. Mann, 96 Ill. A. 659 (dictum). But see cases infra note 36.

Ky.—State Text-Book Commn. v. Weathers, 184 Ky. 748, 213 SW 207, 209 [quot Cycl]; Gay v. Haggard, 133 Ky. 425, 118 SW 299, 301 [quot Cycl].

Md.—Pumphrey v. Baltimore, 47 Md. 145, 28 AmR 446 (dictum).

Mich.—Gowan v. Smith, 157 Mich. 443, 448, 122 NW 286 [quot Cycl]; Berube v. Wheeler, 128 Mich. 32, 37 NW 50 (dictum). But see cases supra note 32.

Minn.—State v. Archibald, 43 Minn. 328, 45 NW 606 (dictum); State v. Weld, 39 Minn. 426, 40 NW 561 (dictum).

N. Y.—Peo. v. State Bd. of Canvassers, 129 N. Y. 360, 29 NE 345, 14 LRA 646. But see cases infra note 36.

N. D.—State v. Carey, 2 N. D. 36, 49 NW 164 (dictum).

Tex.—Lewright v. Love, 95 Tex. 157, 65 SW 1039.

U. S.—Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 423 [aff 11 F. Cas. No. 5,950, 3 Dill. 515].

Fla.—Nickelson v. State, 62 Fla. 243, 248, 57 S 194 [cit Cycl]. Compare cases supra note 32.

Ill.—Chicago, etc., R. Co. v. Suffern, 129 Ill. 274, 21 NE 324 (dictum); Hall v. Mann, 96 Ill. A. 659 (dictum). But see cases supra note 33.

Ky.—State Text-Book Commn. v. Weathers, 184 Ky. 748, 213 SW 207, 209 [quot Cycl]; Elam v. Salisbury, 150 Ky. 142, 202 SW 56; Gay v. Haggard, 133 Ky. 425, 118 SW 299, 301 [quot Cycl]; Louisville Home Tel. Co. v. Louisville, 130 Ky. 611, 113 SW 855; Leslie County v. Wooten, 115 Ky. 850, 75 SW 208, 25 KyL 217. Md.—Thomas v. Field, 143 Md. 128, 122 A 25; Levering v. Williams, 134 Md. 43, 106 A 176, 4 ALR 374; Hummelshime v. Hirsch, 114 Md. 39, 79 A 38; Pumphrey v. Baltimore, 47 Md. 145, 28 AmR 446.

Mass.—Donovan v. Suffolk County Apportionment Comrs., 225 Mass. 55, 113 NE 740, 2 ALR 1334; Cox v. Segee, 206 Mass. 330, 92 NE 620; Sinclair v. Brightman, 198 Mass. 248, 84 NE 453; Weld v. Bd. of Gas, etc., Comrs., 197 Mass. 556, 84 NE 101; Brewster v. Sherman, 195 Mass. 205, 80 NE 821, 11 AnnCas 417; Welch v. Swasey, 193 Mass. 364, 79 NE 745, 118 AmSR 523, 23 LRANS 1160; Atty.-Gen. v. Boston, 123 Mass. 460. But see in re Wellington, 16 Pick. 87, 26 AmD 631 (not in harmony with this doctrine).

Mich.—Scott v. Secretary of State, 202 Mich. 629, 168 NW 709; Thompson v. Secretary of State, 192 Mich. 512, 159 NW 65; Gowan v. Smith, 157 Mich. 443, 448, 122 NW 286 [quot Cycl]; Berube v. Wheeler, 128 Mich. 32, 37 NW 50; Elliott v. Detroit, 121 Mich. 611, 84 NW 820. But see cases supra note 32.

Minn.—State v. Archibald, 43 Minn. 328, 45 NW 606; State v. Weld, 39 Minn. 426, 40 NW 561.

N. Y.—Peo. v. State Bd. of Canvassers, 129 N. Y. 360, 29 NE 345, 14 LRA 646 (dictum). But see cases supra note 35.

N. D.—State v. Carey, 2 N. D. 36, 49 NW 164.

Tex.—Kimberly v. Morris, 87 Tex. 637, 31 SW 808; State v. San Antonio St. R. Co., 10 Tex. Civ. A. 12, 30 SW 266.

Va.—Richmond, etc., Co. v. Brown, 97 Va. 26, 32 SE 775.

37. Peo. v. Brennan, 39 Barb. (N. Y.) 522.

38. Crane v. Chicago, etc., R. Co., 74 Iowa 330, 37 NW 397, 7 AmSR 479. See statutory provisions.

40. U. S.—Clough v. Curtis, 134 U. S. 361, 10 SCT 573, 33 L. ed. 945 (Idaho).

Ariz.—Campbell v. Caldwell, 20 Ariz. 377, 181 P 181.

Cal.—Ellis v. Workman, 144 Cal. 113, 77 P 822; Colnon v. Orr, 71 Cal. 43, 11 P 314; Taft v. Haas, 34 Cal. A. 309, 167 P 306; Webster v. San Diego Common Council, 8 Cal. A. 480, 97 P 92.

Dak.—Terr. v. Cole, 3 Dak. 301, 19 NW 418.

Mont.—State v. Lyons, 37 Mont. 354, 96 P 922.

N. D.—State v. Carey, 2 N. D. 36, 49 NW 164.

Oh.—State v. Tanzey, 49 Oh. St. 656, 32 NE 750; State v. Brown, 38 Oh. St. 344.

Porto Rico.—Peo. v. Executive Council, 7 Porto Rico 437; Monserrate v. Valls, 7 Porto Rico 427; Casaldud v. Soba, 7 Porto Rico 425.

S. D.—Heintz v. Moulton, 7 S. D. 272, 64 NW 135.

Utah.—Startup v. Harmon, 59 Utah 329, 203 P 637.

Wash.—State v. Ross, 39 Wash. 399, 81 P 865.

41. Ariz.—Campbell v. Caldwell, 20 Ariz. 377, 181 P 181.

Cal.—Fritts v. Charles, 145 Cal. 512, 78 P 1057; Ellis v. Workman, 144 Cal. 113, 77 P 822; Ashe v. Colusa County, 71 Cal. 236, 16 P 783; Linden v. Alameda County, 45 Cal. 6; Drumhiller v. Wright, 64 Cal. A. 498, 222 P 166; Conn v. Richmond City Council, 17 Cal. A. 705, 121 P 714, 719. Contra Eby v. Red Bank School Dist., 87 Cal. 166, 25 P 240. Oh.—State v. Murphy, 3 Oh. Cir. Ct. 332, 2 Oh. Cir. Dec. 190; State v. Preble County, 6 OhS&CE 238, 4 OhNP 180; State v. Felton, 10 OhNP NS 344.

Porto Rico.—Lutz v. Peo., 14 Porto Rico 830.

Utah.—Startup v. Harmon, 59 Utah 329, 336, 203 P 637.

Wash.—State v. Ross, 39 Wash. 399, 81 P 865. But see Washington cases supra § 546.

"The party must have some peculiar interest separate and distinct from that of the community in general." Startup v. Harmon, supra.

"His interest must be of a nature which is distinguishable from that of the mass of the community." Linden v. Alameda County, 45 Cal. 6, 7. And see cases supra note 40.

GONZAGA LAW LIBRARY

REMINGTON'S
REVISED STATUTES
OF WASHINGTON

ANNOTATED

SHOWING ALL

STATUTES IN FORCE TO AND INCLUDING
THE SESSION LAWS OF 1931

BY

HON. ARTHUR REMINGTON

Reporter of the Supreme Court of the State of Washington, Author of
"Notes on Washington Reports," "Remington's Washington Digest,"
"Remington's Compiled Statutes of Washington," etc.

VOLUME III

83473

CODES OF PROCEDURE

TITLE VI.—ACTIONS IN PARTICULAR CASES
TITLE VII.—SPECIAL PROCEEDINGS
TITLE VIII.—LIENS AND THEIR ENFORCEMENT
TITLE IX.—EVIDENCE
TITLE X.—PROBATE LAW AND PROCEDURE

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY

1932

Jury list, mandamus as a remedy for exclusion of eligible class or classes of persons from. 52 A.L.R. 928.

Partner's right to maintain mandamus against copartner. 58 A.L.R. 634.

Penalty, fine, or imprisonment, officer's liability to, as affecting right to mandamus to enforce performance of public duty by him. 19 A.L.R. 1382.

Reinstatement—

—remedy by mandamus to restore party to office. 19 L.R.A. (N.S.) 49.

—unfitness as affecting right to restoration to office from which officer has been illegally removed. 36 A.L.R. 508.

Removal of public officer, mandamus to compel institution of proceedings for purpose of. 51 A.L.R. 561.

Resignation of officer, mandamus to compel performance of duties after. 19 A.L.R. 48.

Right of way, mandamus as remedy for interference with. 47 A.L.R. 557.

Salary of public officer or employee, mandamus to compel payment of. 5 A.L.R. 572.

§ 1015. Writ in absence of remedy at law—Affidavit. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested. [L. '95, p. 117, § 17.]

Cited in 20 Wash. 44, 54 Pac. 768; 20 Wash. 397, 55 Pac. 570, 72 Am. St. Rep. 110; 32 Wash. 552, 73 Pac. 690, 98 Am. St. Rep. 858; 36 Wash. 168, 78 Pac. 796; 39 Wash. 409, 81 Pac. 865; 74 Wash. 592, 134 Pac. 484; 97 Wash. 174, 166 Pac. 69; 101 Wash. 96, 172 Pac. 257, 4 A.L.R. 572; 111 Wash. 103, 189 Pac. 256; 125 Wash. 322, 216 Pac. 9; 133 Wash. 34, 233 Pac. 301; 162 Wash. 378, 298 Pac. 716.

Existence and adequacy of other remedy in general: See Remington's Digest, Mand., § 2; Paul v. McGraw, 3 Wash. 296, 28 Pac. 532; Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794; State ex rel. Gannon v. Hitt, 13 Wash. 547, 43 Pac. 638; Quaker City Nat. Bank of Tacoma, 27 Wash. 259, 67

Schools—

—building, mandamus to compel construction or repair of. 1 A.L.R. 1559.

—enrollment or reinstatement of pupil in state school or university, mandamus to compel. 39 A.L.R. 1019.

—grant of diploma or other evidence of pupil's completion of course, mandamus to compel. 6 A.L.R. 1533.

—teacher, reinstatement by writ of mandate. 49 L.R.A. (N.S.) 62.

Soldier's bounty, mandamus as proper remedy to compel payment of. 13 A.L.R. 604.

Street or highway, mandamus against municipality to compel improvement or repair of. 46 A.L.R. 257.

Taxes, mandamus to compel collection of. 58 A.L.R. 117.

Unconstitutionality of statute as defense to mandamus proceeding. 30 A.L.R. 378.

Witnesses, mandamus to compel court or judge to require witness to testify or to produce documents. 41 A.L.R. 436.

Pac. 710; State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. 308, 111 Am. St. Rep. 1019; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 135 Pac. 1064; State ex rel. Whitten v. Spokane, 92 Wash. 667, 159 Pac. 805; State ex rel. Godfrey v. Turner, 113 Wash. 214, 193 Pac. 715.

There being no appeal, and no right to a trial de novo on writ of certiorari, and mandamus in this state being but a civil proceeding for the redress of wrongs, the latter is the proper remedy to rescind an arbitrary and capricious redistricting of the county commissioner districts: State ex rel.

Mason v. Board of King County, 146 W 735.

There being adequate attachment against the petitioner against the enforcement of an order for suit money to enable the petitioner to appeal, the order to "reduce" the order to and order execution ex rel. Taylor v. S. Wash. 568, 276 Pac. Mandamus lies to of the peace to take civil case filed with that there are other does not constitute at law: State ex Adjustment Co. v. 201, 292 Pac. 741.

§ 3. Remedy by error: State ex rel. perior Court, 15 V 395 (overruled); S end Gas etc. Co. v. Wash. 502, 55 Pac. Washington Dredg. 21 Wash. 629, 59 rel. Miller v. Super 555, 82 Pac. 877, 925, 2 L.R.A. (N.S.) Barbo v. Hadley, Pac. 29; State ex perior Court, 20 W 45 L.R.A. 177; St v. Superior Court, Pac. 256; State e Superior Court, 1 Pac. 865; Russell 51, 231 Pac. 18.

§ 4. — Acts courts, judges and general: Scott v 471, 43 Pac. 372; hard & Co. v. Supe 631, 59 Pac. 505; S v. Tallman, 25 Wa State ex rel. Stra Wash. 317, 69 Pac Townsend Gas. e Court, 20 Wash. State ex rel. Barbo 520, 56 Pac. 29; S Superior Court, 21 35, 45 L.R.A. 177 bard v. Superior 64 Pac. 727; Stat Superior Court, 2 352; State ex rel & Imp. Co. v. Mo

Mason v. Board of County Com'rs of King County, 146 Wash. 449, 263 Pac. 735.

There being adequate remedies by attachment against the person or execution against the property for the enforcement of an order in divorce for suit money to enable a wife to prosecute an appeal, mandamus does not lie to compel the superior court "to reduce" the order to "final judgment" and order execution thereon: State ex rel. Taylor v. Superior Court, 151 Wash. 568, 276 Pac. 866.

Mandamus lies to compel a justice of the peace to take jurisdiction of a civil case filed with him, and the fact that there are other qualified justices does not constitute an adequate remedy at law: State ex rel. Pacific Coast Adjustment Co. v. Taggart, 159 Wash. 201, 292 Pac. 741.

§ 3. Remedy by appeal or writ of error: State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395 (overruled); State ex rel. Townsend Gas etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Washington Dredg. etc. Co. v. Moore, 21 Wash. 629, 59 Pac. 505; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L.R.A.(N.S.) 395; State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L.R.A. 177; State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac. 256; State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865; Russell v. Dibble, 132 Wash. 51, 231 Pac. 18.

§ 4. — Acts and proceedings of courts, judges and judicial officers in general: Scott v. Bourn, 13 Wash. 471, 43 Pac. 372; State ex rel. Hubbard & Co. v. Superior Court, 21 Wash. 631, 59 Pac. 505; State ex rel. Stratton v. Tallman, 25 Wash. 295, 65 Pac. 545; State ex rel. Stratton v. Tallman, 29 Wash. 317, 69 Pac. 1101; State ex rel. Townsend Gas. etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L.R.A. 177; State ex rel. Hubbard v. Superior Court, 24 Wash. 438, 64 Pac. 727; State ex rel. McIntyre v. Superior Court, 21 Wash. 108, 57 Pac. 352; State ex rel. Washington Dredg. & Imp. Co. v. Moore, 21 Wash. 629, 59

Pac. 505; State ex rel. Piper v. Superior Court, 45 Wash. 196, 87 Pac. 1120; State ex rel. Brunn v. State Board of Medical Examiners, 61 Wash. 623, 112 Pac. 746; State ex rel. Langley v. Superior Court, 74 Wash. 558, 134 Pac. 173; State ex rel. Stone v. Superior Court, 97 Wash. 172, 166 Pac. 69; State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac. 256; State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865; State ex rel. Fleischman v. Superior Court, 117 Wash. 500, 201 Pac. 739; State ex rel. Farmers State Bank v. Superior Court, 118 Wash. 297, 203 Pac. 13.

The remedy by appeal is inadequate, and mandamus lies to compel a superior court to enter a judgment of dismissal, with prejudice, after sustaining a challenge to the sufficiency of plaintiff's evidence: State ex rel. Western Stevedore Co. v. Jones, 145 Wash. 258, 259 Pac. 718.

Mandamus does not lie to compel the trial court to hear a petition for the modification of a decree for separate maintenance, after sustaining a demurrer to the petition, where no final judgment had been entered; since there is a remedy by appeal from final judgment of dismissal: State ex rel. Dailey v. Superior Court, 150 Wash. 299, 272 Pac. 733.

§ 5. — Acts and proceedings of public officers and boards of municipalities: Elder v. Territory, 3 W. T. 438, 19 Pac. 29; State ex rel. De Rackin v. Allen, 8 Wash. 168, 35 Pac. 609; State ex rel. Banks v. Snohomish County, 18 Wash. 160, 51 Pac. 368; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948; Ilwaco v. Ilwaco Riv. & Nav. Co., 17 Wash. 652, 50 Pac. 572; State ex rel. Smith v. Ross, 42 Wash. 439, 85 Pac. 29; State ex rel. Brunn v. State Board of Medical Examiners, 61 Wash. 623, 112 Pac. 746; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 Pac. 1064; State ex rel. Godfrey v. Turner, 113 Wash. 214, 193 Pac. 715; State ex rel. Hawksworth v. Clifford, 130 Wash. 103, 226 Pac. 272.

There is no speedy or adequate remedy by appeal where the state board of equalization refuses to make a levy required by law; and mandamus lies to compel performance of the duty: State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 996.

Section 4076, providing that any per-

son may appeal from any decision of the board of county commissioners within twenty days, does not give any adequate remedy to one not a party to the proceeding before the board; hence mandamus lies to rescind an arbitrary and capricious redistricting of the commissioner districts: State ex rel. Mason v. Board of County Comrs. of King County, 146 Wash. 449, 263 Pac. 735.

§ 6. Adequacy of remedy—Recourse to other proceeding: State ex rel. Miller v. Lichtenberg, 4 Wash. 653, 30 Pac. 1056; Achey v. Creech, 21 Wash. 319, 58 Pac. 208; State ex rel. Kinneary v. Bridges, 21 Wash. 591, 59 Pac. 487.

§ 7. Conflict with other proceeding: State ex rel. Anderson v. Bell, 36 Wash. 196, 78 Pac. 908; State ex rel. Drasdo v. Frater, 39 Wash. 594, 81 Pac. 1135.

§ 8. Adequacy of remedy: German-American Sav. Bank v. Spokane, 17 Wash. 315, 49 Pac. 542, 38 L.R.A. 259.

§ 78. Petition or complaint, or other application: Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; State ex rel. Dusinger v. Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294; State ex rel. Smith v. Forrest, 11 Wash. 158, 39 Pac. 450; State ex rel. Megler v. Forrest, 13 Wash. 268, 43 Pac. 51;

§ 1016. Writ, alternative or peremptory. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in some similar form, except the words requiring the party to show cause why he has not done as commanded must be omitted and a return inserted. [L. '95, p. 117, § 18.]

Cited in 31 Wash. 539, 72 Pac. 117; 66 Wash. 80, 118 Pac. 923; 101 Wash. 353, 172 Pac. 349; 125 Wash. 322, 323, 216 Pac. 9.

Alternative writ — Nature and grounds: See Remington's Digest, Mand., § 80; Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372.

§ 81. — Issuance, form and requisites: Parrish v. Reed, 2 Wash. 491,

Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; State ex rel. Cicoria v. Corgiat, 50 Wash. 95, 96 Pac. 689; State ex rel. Cowles v. Schively, 63 Wash. 103, 114 Pac. 901; State ex rel. Adams v. Irwin, 74 Wash. 589, 134 Pac. 484, 135 Pac. 472; State ex rel. Mills v. Howell, 93 Wash. 257, 160 Pac. 760; State ex rel. McGhee v. Superior Court, 99 Wash. 619, 170 Pac. 130, L.R.A.1918C, 621.

§ 79. — Form, requisites and sufficiency in general: See V Remington's Sup. Digest, Mand., § 79; State ex rel. Reynolds v. Hill, 135 Wash. 442, 237 Pac. 1004; State ex rel. Heitman v. First Bank of Wilkeson, 125 Wash. 321, 216 Pac. 9.

Appeal or writ of error, inadequacy of remedy by, as affecting right to mandamus to inferior court. 4 A.L.R. 632.

Indictment, adequacy of remedy by, so as to bar mandamus to compel improvement or repair of highway or bridge. 46 A.L.R. 267, 281.

Salary of public officer or employee, existence of other adequate remedy as affecting right to mandamus to compel payment of. 5 A.L.R. 574.

27 Pac. 230, 28 Pac. 372; State ex rel. King v. Trimbell, 12 Wash. 440, 41 Pac. 183; State ex rel. Wolf v. Moore, 15 Wash. 432, 46 Pac. 647; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Hackett v. Arnest, 100 Wash. 286, 170 Pac. 563; State ex rel. Prudential Sav. & Loan Assoc. v. Martin, 101 Wash. 350, 172 Pac. 349.

§ 82. — Waiver of objections to

writ: Clarke T. 200; State Moss, 13 Wash. Pac. 373.

The supren diction of ma there is no and no proof

§ 1017.

out notice must be fir the writ be instance. T ten days. be heard b [L. '95, p.

Cited in 8 1142.

Under this

§ 1018.

tive, or the party on w by answer, a complain

Cited in 14 15 Wash. 87 Rep. 907, 37 54 Pac. 609; 30 L.R.A.(N 132 Pac. 241 9; 139 Wash

Demurrer

§ 1019.

which rais termination the parties the applica tion, order argument the court. order for same shall

REMINGTON'S
COMPILED STATUTES
OF WASHINGTON
1922

VOL. 3
GENERAL STATUTES
JUSTICE OF THE PEACE
GENERAL INDEX

KFW
30
1922
.A41
v.3

statute providing for the abatement of nuisances. 12 A. L. R. 431.

Proximate cause as determining landlord's liability where injury results to a third person from a nuisance that becomes such only upon ten-

ant's using the premises. 4 A. L. R. 740.

Liability of former owner of real estate because of violation of statute or ordinance relating to condition of premises. 8 A. L. R. 356.

§ 9921. [8316.] Civil Action.

A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise. [L. '75, p. 80, § 9; Cd. '81, § 1243; 1 H. C., § 2890.]

Cited in 21 Wash. 538, 546; 35 Wash. 595; 56 Wash. 309; 58 Wash. 569; 61 Wash. 290.

Rights of Private Persons: See Remington's Digest, Nuis., §§ 15-24.

Special Annoyance, Injury or Danger to Individuals: *Morris v. Graham*, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33; *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Carl v. West Aberdeen etc. Co.*, 13 Wash. 616, 43 Pac. 890; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858, *Sultan Water & P. Co. v. Weyerhaeuser Tim. Co.*, 31 Wash. 558, 72 Pac. 114; *Grantham v. Gibson*, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447. See, also:

Rights of Private Parties—Special Damages: *Olsen v. Bremerton*, 110 Wash. 572, 188 Pac. 772.

§ 16. Prescription as Against Individuals: *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35.

§ 18. Actions for Abatement or Injunction—In General: *Carl v. West Aberdeen, Land etc. Co.*, 13 Wash. 616, 43 Pac. 890; *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25, 47 Pac. 226.

§ 19. — Grounds for Abatement or Injunction: *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055; *Dempsey v. Darling*, 39 Wash. 125, 81 Pac. 152. See, also, *Grant v. Rosenburg*, 112 Wash. 361, 192 Pac. 889.

§ 20. — Defenses: *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055; *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710; *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 Pac. 753.

§ 9922. [8317.] Abatement by Whom.

A public nuisance may be abated by any public body or officer authorized thereto by law. [L. '75, p. 80, § 10; Cd. '81, § 1244; 1 H. C., § 2891.]

What constitutes public nuisance, see section 9912, supra.

Abatement by Public Officers: See Remington's Digest, Nuis., §§ 25, 25-1; *Moore v. Walla Walla*, 2 W. T. 184, 2 Pac. 187; *Spokane St. R. Co. v. Spokane Falls*, 6

Wash. 521, 33 Pac. 1072; *Griffith v. Man*, 23 Wash. 347, 63 Pac. 239, 8

§ 9923. [8318.] How Abated

Any person may abate a nuisance to him, by removing, or if not possible, by causing to be removed, the same, without compensation for any necessary injury. [L. '75, p. 80, § 11.]

See supra, § 2503, abatement of nuisance. The obstructing of a public highway by building a fence therein is a nuisance which may be abated by any person who is specially affected thereby, provided

§ 9924. [8319.] Certain Places

Houses of ill fame, kept for the purpose of squaw dance-houses, or squaw houses, rooms, saloons, booths, or places of resort, where women are kept for purposes of prostitution; all places where gambling is carried on or permitted in town, or village, or upon any premises used for gambling, fighting, or breach of the peace, all opium dens or houses, or places where prohibited, are nuisances, and persons in charge thereof who permit the same, shall be punished as provided in Cd. '81, § 1247; 1 H. C., § 2892.

Prosecution, see Remington's Digest, Nuis., § 15. Cited in 1 Wash. 167; 7 Wash. 36; 74 Wash. 296; 99 Wash. 521.

The keeping and having in any place a public house or resort and a place where betting, winning, and losing are carried on, or selling pools on horse races to the public, or congregating and resorting in such places for that purpose, may be inferred under this section: *State v. ...* Wash. 35, 97 Pac. 35.

§ 9925. [8320.] Punishment

Whoever is convicted of a public nuisance, as defined in this section, and the same has not been modified or abated, or punishment therefor is specified in this section, exceeding one thousand dollars, may order such nuisance abated, in manner provided. [L. '75, p. 80, § 12.]

"Title" substituted for "Code of 1881, except as modified." Cited in 8 Wash. 582, 583, 296.

Indictment or Information: *Remington's Digest, Nuis.*, § 31; *State v. ...* Wash. 10, 34 Pac. 132; *St.*

CHASTEK LIBRARY
GONZAGA UNIVERSITY SCHOOL OF LAW

24855
KF
154
.C692
V.55
2009

JUL 28 2009

7/28/09
828

CORPUS JURIS SECUNDUM®

A CONTEMPORARY STATEMENT OF
AMERICAN LAW
AS DERIVED FROM
REPORTED CASES AND LEGISLATION

Volume 55

WEST®

A Thomson Reuters business

For Customer Assistance Call 1-800-328-4880

Mat #40702753

duties by other officers over which they have no supervision and where a failure to perform such duties will not prevent the relators from performing any duty of their office² or to enforce acts in the performance of which they have no interest.³

County attorney.

As a general rule, the district or county attorney may bring mandamus to compel the performance of duties affecting the people of the county and the administration of justice therein.⁴

County legislature.

The legitimate interest of a county legislature in carrying out its mandate and legislative function may be sufficient to bring it within the zone of interest necessary to establish standing.⁵

§ 53 Right of private individual or corporation to enforce public right or duty

Research References

West's Key Number Digest, Mandamus ⇨23, 23(1), 23(2)

County department of health services

A county department of health services had standing to bring a petition for administrative mandate directed at the county civil service commission, since the commission was a charter agency exercising quasi-judicial powers delegated by county charter and, thus, had autonomous stature distinct from the county's corporate identity.

Cal.—Department of Health Services v. Kennedy, 163 Cal. App. 3d 799, 209 Cal. Rptr. 595 (2d Dist. 1984).

²N.Y.—People ex rel. Schneider v. Prendergast, 172 A.D. 215, 158 N.Y.S. 615 (1st Dep't 1916).

Sheriff

A sheriff lacked standing to challenge an alleged failure on the part of the Division of Parole to schedule timely parole revocation procedures.

N.Y.—Ayers v. Coughlin, 72 N.Y.2d 346, 533 N.Y.S.2d 849, 530 N.E.2d 373 (1988).

³S.C.—Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940).

⁴Kan.—State ex rel. v. Peterson, 147 Kan. 626, 78 P.2d 60 (1938).

While the authorities are not in harmony as to the right of an individual to enforce a public right or to compel the performance of a public duty by mandamus in the absence of a special or peculiar interest, it is a rule of general application that, where an individual has a special or peculiar interest of his or her own independent of that which he or she holds in common with the people generally, he or she is entitled to protect or enforce such right by mandamus.

The authorities are not in harmony as to the right of an individual to enforce a public right or to compel the performance of a public duty by mandamus.¹ It has been stated that taxpayer status does not automatically confer standing on a mandamus applicant.² Under some authority, the proceedings must be instituted by the proper public officer, and a private individual is not entitled to the writ unless he or she has a special and peculiar interest in the enforcement of the right or the performance of the duty apart from his or her interest as one of the general public,³ although this rule may be subject to excep-

⁵N.Y.—Putnam County Legislature v. Duffy, 128 Misc. 2d 519, 489 N.Y.S.2d 983 (Sup 1985).

[Section 53]

¹La.—State ex rel. Schoeffner v. Dowling, 158 La. 706, 104 So. 624 (1925).

²Conn.—Civil Service Com'n v. Pekrul, 41 Conn. Supp. 302, 571 A.2d 715 (Super. Ct. 1989), judgment aff'd, 221 Conn. 12, 601 A.2d 538 (1992).

"Person aggrieved"

A town resident was not a "person aggrieved" by a town zoning administrator's decision not to pursue a landowner's alleged violation of a zoning ordinance governing the merger of two nonconforming lots, and thus lacked standing to appeal the decision of the administrative officer to the Zoning Board of Appeals and lacked standing to bring a mandamus action, since the resident alleged standing based solely on his status as a town resident and taxpayer.

N.H.—Goldstein v. Town of Bedford, 154 N.H. 393, 910 A.2d 1158 (2006).

³Conn.—Civil Service Com'n v. Pekrul, 41 Conn. Supp. 302, 571 A.2d 715 (Super. Ct. 1989),

tions⁴ and may be limited by a specific statute.⁵

Under other authority, if the public right or duty affects the people at large or the people of a particular governmental district, or a particular class of the people, such as voters or taxpayers, any one of

the people at large or of the district affected, or any member of the class in question, may enforce the right or compel performance of the duty regardless of any special or peculiar interest apart from that common to the general public;⁶ however, where this rule prevails, the writ

judgment aff'd, 221 Conn. 12, 601 A.2d 538 (1992).

Kan.—Manhattan Bldgs., Inc. v. Hurley, 231 Kan. 20, 643 P.2d 87 (1982).

Mich.—Detroit Fire Fighters Ass'n v. City of Detroit, 449 Mich. 629, 537 N.W.2d 436 (1995).

Interest separate from or in excess of that of public

A private person may only be authorized to petition for a writ of mandamus if he or she can show an interest separate from or in excess of that of the general public.

Miss.—Dupree v. Carroll, 967 So. 2d 27 (Miss. 2007).

Distinction between restraining and compelling performance

There is a distinction between taxpayer suits to restrain unlawful action by public officials, where a special interest on the part of taxpayer may not be required for standing, and a suit to compel performance of a public duty, where a special interest is required.

La.—Mouton v. Department of Wildlife & Fisheries for State of La., 657 So. 2d 622 (La. Ct. App. 1st Cir. 1995), writ denied, 663 So. 2d 710 (La. 1995) and writ denied, 663 So. 2d 711 (La. 1995).

No distinct interest shown

Members of the Fraternal Order of Police (FOP) lacked standing to maintain a declaratory or mandamus action, seeking an order directing the Department of Conservation and Natural Resources to provide police training to park rangers and seeking a declaration that the department's use of untrained park rangers violated the Conservation and Natural Resources Act and Municipal Police Jurisdiction Act, where FOP's general allegation that they feared for their safety and the safety of the citizenry since the rangers had not been trained pursuant to the police officers' education and training program failed to demonstrate that the FOP possessed a substantial and immediate interest that was distinct from the interest of the general public.

Pa.—Pennsylvania State Lodge, Fraternal Order of Police v. Com., Dept. of Conservation and Natural Resources, 909 A.2d 413 (Pa. Commw. Ct. 2006), order aff'd, 592 Pa. 304, 924 A.2d 1203

(2007).

⁴Discrimination against taxpayer

An exception to the general requirement of a particular or special interest in order for plaintiff to have standing to bring suit requesting issuance of a writ of mandamus to a public official is available when a public official charged with unlawful performance or refusal to perform a legal duty discriminates against the taxpayer by increasing his or her tax burden or otherwise injuriously affecting the taxpayer's personal property, in which case the taxpayer need not show a special interest in order to sustain the right of action.

La.—Mouton v. Department of Wildlife & Fisheries for State of La., 657 So. 2d 622 (La. Ct. App. 1st Cir. 1995), writ denied, 663 So. 2d 710 (La. 1995) and writ denied, 663 So. 2d 711 (La. 1995).

⁵R.I.—Hall v. Town Council of North Providence, 48 R.I. 8, 135 A. 33 (1926).

⁶Ill.—Mamolella v. First Bank of Oak Park, 97 Ill. App. 3d 579, 53 Ill. Dec. 12, 423 N.E.2d 204 (1st Dist. 1981).

S.D.—Cummings v. Mickelson, 495 N.W.2d 493 (S.D. 1993).

W.Va.—Smith v. West Virginia State Bd. of Educ., 170 W. Va. 593, 295 S.E.2d 680, 6 Ed. Law Rep. 1138 (1982).

Citizen as beneficially interested party

Where a public right is involved and the object of the writ of mandate is to procure enforcement of a public duty, a citizen is a "beneficially interested party" able to obtain relief in mandamus if he or she is interested in having the public duty enforced.

Cal.—Mission Hosp. Regional Medical Center v. Shewry, 168 Cal. App. 4th 460, 85 Cal. Rptr. 3d 639 (3d Dist. 2008), review denied, (Feb. 11, 2009).

People regarded as real party

Where the question is one of public right and the object of the mandamus action is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator need not show that he or she has any special interest in the result, in order to have standing to bring the mandamus action, since it is sufficient that he or she is interested as a citizen or taxpayer in having the laws executed and the duty in question

will not issue unless the applicant is a member of one of the classes of persons mentioned.⁷ In a "citizen's action" to enforce a public duty, it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced.⁸ So long as the public duty is sharp and the public need weighty, a citizen has a sufficient interest to confer standing.⁹

Furthermore, it has been held that where the right or duty in question affects the state in its sovereign capacity, as distinguished from the people at large, the proceeding must be instituted by the proper public officer,¹⁰ but that if the general public, as distinguished from the state in its sovereign capacity, is affected,

enforced.

Ohio—OAPSE/AFSCME Local 4 v. Berdine, 174 Ohio App. 3d 46, 2007-Ohio-6061, 880 N.E.2d 939, 229 Ed. Law Rep. 239 (8th Dist. Cuyahoga County 2007).

Citizen involvement in government

Members of a committee formed pursuant to a municipality's home-rule charter had sufficient interest in the municipality's performance of its duties under that charter to maintain a mandamus action to compel the secretary of the municipality to provide members with blank initiative petitions in order to place a proposed ordinance before the municipal commission and the voters, where any other result would have effectively precluded judicial review of the secretary's initial decision rejecting the request for petition blanks and would have frustrated the clear intent of the charter to foster citizen involvement in government.

Pa.—Municipality of Mt. Lebanon v. Erskine, 85 Pa. Commw. 490, 482 A.2d 1195 (1984).

⁷N.J.—Doremus v. Board of Chosen Freeholders of Passaic County, 89 N.J.L. 197, 98 A. 390 (N.J. Ct. Err. & App. 1916).

⁸Cal.—Urban Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561, 80 Cal. Rptr. 3d 300 (1st Dist. 2008), review denied, (Oct. 22, 2008).

⁹Cal.—Urban Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561, 80 Cal. Rptr. 3d 300 (1st Dist. 2008), review denied, (Oct. 22, 2008).

¹⁰Ala.—State ex rel. Tallapoosa County v.

any citizen of the state may sue out the writ.¹¹

While it has been held that under statutes providing that mandamus may issue on the application of anyone beneficially interested, the writ will not issue to compel the performance of a strictly public duty at the instance of a private citizen having no interest beyond that shared in common with other citizens,¹² there is also authority to the contrary.¹³

Zone of interest.

A petitioner has standing to institute a mandamus proceeding where the interest he or she seeks to vindicate under a statute falls within the zone of interests protected by that statute.¹⁴ A beneficial interest, required for a claimant to assert

Butler, 227 Ala. 212, 149 So. 101 (1933).

Mass.—Tuckerman v. Moynihan, 282 Mass. 562, 185 N.E. 2 (1933).

¹¹Md.—Pressman v. Elgin, 187 Md. 446, 50 A.2d 560, 169 A.L.R. 646 (1947).

N.M.—Shelton, State ex rel., v. Board of Com'rs of Bernalillo County, 49 N.M. 218, 161 P.2d 212 (1945).

¹²Okla.—State ex rel. Hoard v. Ashley, 1935 OK 286, 171 Okla. 169, 42 P.2d 225 (1935).

Wash.—State ex rel. Lay v. Simpson, 173 Wash. 512, 23 P.2d 886 (1933).

¹³Cal.—Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist., 11 Cal. App. 4th 1513, 14 Cal. Rptr. 2d 908, 79 Ed. Law Rep. 545 (1st Dist. 1992).

Mont.—State ex rel. Halloran v. McGrath, 104 Mont. 490, 67 P.2d 838 (1937).

¹⁴Essential inquiry under test

The essential inquiry for the "zone of interest" test for mandamus relief is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge an agency disregard of law, and there need be no indication of congressional purpose to benefit a would-be plaintiff for the plaintiff to satisfy the zone-of-interest test.

U.S.—Hernandez-Avalos v. I.N.S., 50 F.3d 842 (10th Cir. 1995).

Parole officers

Individual parole officers did not establish that their interest in maintaining a less hazardous work situation was within the "zone of interest" so as to support standing to challenge new parole status for

a petition in mandamus, is a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted,¹⁵ and the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.¹⁶

Officer's absence or refusal to institute proceedings.

It has been held that, although no special interest exists, if the officer whose duty it is to institute the proceedings takes an adverse position,¹⁷ or declines to move,¹⁸ a citizen or taxpayer may do so. There is also authority, however, that a citizen may not institute the proceeding, notwithstanding such officer's refusal.¹⁹

Persons having interest independent of that held in common with public.

It is a rule of very general application that, where an individual has a special or peculiar interest of his or her own independent of that which he or she holds in common with the people generally, he or

she is entitled to protect or enforce such right by mandamus;²⁰ and the fact that it may be the duty of the state²¹ or of the public,²² acting through its officers, to take action in the matter does not defeat the right of an individual having a special interest to maintain the proceeding. Nevertheless, if an individual sues, not in behalf of the public but solely in his or her own behalf, he or she must have a special pecuniary interest in the matter and a clear legal right to the relief asked, or the writ will not issue.²³ The rule is not to be extended so as to permit interference with the operations of government by those whose rights are only remotely and indirectly affected.²⁴

Public officer's standing as citizen-taxpayer.

A member of a governmental body does not have standing as a citizen-taxpayer to seek mandamus against the body of which

certain parolees where they failed to show their interest in maintaining the working situation was within the zone of interests which laws concerning parole supervision were designed to protect.

N.Y.—*Gilkes v. New York State Div. of Parole*, 192 A.D.2d 1041, 597 N.Y.S.2d 224 (3d Dep't 1993).

¹⁵Nev.—*Anse, Inc. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 192 P.3d 738 (Nev. 2008).

¹⁶Nev.—*Anse, Inc. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 192 P.3d 738 (Nev. 2008).

¹⁷Or.—*Vinton v. Hoskins*, 174 Or. 106, 147 P.2d 892 (1944).

¹⁸Or.—*Vinton v. Hoskins*, 174 Or. 106, 147 P.2d 892 (1944).

¹⁹Miss.—*State ex rel. Trahan v. Price*, 168 Miss. 818, 151 So. 566 (1934).

R.I.—*Dupre v. Doris*, 68 R.I. 67, 26 A.2d 623 (1942).

²⁰Miss.—*Jackson County School Bd. v. Osborn*, 605 So. 2d 731 (Miss. 1992).

Ohio—*State ex rel. Carver v. Hull*, 70 Ohio St. 3d 570, 1994-Ohio-449, 639 N.E.2d 1175 (1994).

Pa.—*Municipality of Mt. Lebanon v. Erskine*,

85 Pa. Commw. 490, 482 A.2d 1195 (1984).

Rationale for rule

The requirement that a plaintiff in a mandamus proceeding demonstrate some special interest in the action is imposed to ensure the fair presentation and development of issues by truly adverse parties, and without such showing, interest by the judiciary may surpass its authority allocated by the tripartite system.

La.—*Mouton v. Department of Wildlife & Fisheries for State of La.*, 657 So. 2d 622 (La. Ct. App. 1st Cir. 1995), writ denied, 663 So. 2d 710 (La. 1995) and writ denied, 663 So. 2d 711 (La. 1995).

²¹Mo.—*State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677 (1936).

²²Mo.—*State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677 (1936).

²³Fla.—*Baker v. State ex rel. Hi-Hat Liquors*, 159 Fla. 286, 31 So. 2d 275 (1947) (overruled in part on other grounds by, *Keating v. State ex rel. Ausebel*, 173 So. 2d 673 (Fla. 1965)).

Mo.—*State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677 (1936).

²⁴U.S.—*U.S. ex rel. American Silver Producers' Ass'n v. Mellon*, 32 F.2d 415 (App. D.C. 1929).