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METAPHORICAL IMAGINATION: THE MORAL AND LEGAL STATUS OF FETUSES AND EMBRYOS

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While we embrace the many medical advances brought to us by fetal research, we are troubled by simultaneously treating the fetus as a tissue catalog and as a baby, as a non-consenting research subject and as a patient, as property and as a person.

Steven Maynard-Moody[1]

Our various slowly evolved descriptive and explanatory vocabularies are like the beaver's slowly evolved teeth and tail: they are admirable devices for improving the position of our species. But the vocabularies of physics and of politics no more need to be integrated with one another than the beaver's tail needs to be integrated with its teeth.

Richard Rorty[2]

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[1]STEVEN MAYNARD-MOODY, THE DILEMMA OF THE FETUS 185 (New York: St. Martin's Press, 1995).

[2]Richard Rorty, *Against Unity*, WILSON Q., Winter 1998, at 29.

> We live in and by the law .... It is sword, shield and menace .... We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.
>
> *Ronald Dworkin*[3]

Trying to characterize the legal and moral status of fetal and embryonic life has posed significant challenges for judges, legislators, philosophers, and theologians.[4] Moral and legal status often encompasses issues of personhood, interests, and suffering. Is the fetus a person? Is the embryo a piece of property? Does a fetus have interests? Does the fetus suffer? On the one hand, these are not idle questions because they go to the heart of the question asked by the United Kingdom's Warnock Report: "How is it right to treat the embryo?"[5] Many American legal cases have addressed this very topic. This article urges the recognition of the different metaphors used in describing the unborn because it can yield a deeper understanding of the issues presented.

Some commentators believe, for instance, that human embryos and fetuses are separate persons, endowed with certain rights from the time of conception. Others may believe that embryos and fetuses are indeed nothing but appendages to the mother, perhaps even just glorified human tissue. Alternatively, our moral sensibilities toward fetuses and embryos can be analogized to that of higher animals. For instance, humans protect certain higher animals for a variety of deontological and consequentialist reasons. Most higher animals can suffer and feel pleasure; this suggests that humans have a duty not to cause these creatures unnecessary pain. Moreover, torturing or mistreating animals not only harms them but also coarsens our own moral sympathies and sensibilities. Similarly, we treat embryos and fetuses in a certain manner not because they are persons in a strict sense, but because they are along a developmental path toward participation in the human community. The older a fetus is, the more it looks like an infant and has the ability to feel pain. Because of these

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[3]RONALD DWORKIN, LAW'S EMPIRE vii (1986).

[4]The human embryo has been defined as "the developing organism from conception until approximately the end of the second month; developmental stages from this time to birth are commonly designated as fetal." STEDMAN'S MEDICAL DICTIONARY 559 (Baltimore: Williams and Wilkins, 1995).

[5]Bartha Maria Knoppers and Sandrine Pascal-Rossi, The Nature and Status of the Embryo: Common Law (paper presented at the Third Symposium on Bioethics, Medically Assisted Procreation and the Status of the Embryo, Strasbourg, France, Dec. 15-18, 1996).

intrinsic properties, we are careful not to injure fetuses that are on their way to becoming infants and thus members of the human community. This does not mean, however, that embryos and fetuses have a set of absolute rights. It does mean that we have certain *prima facie* duties that may be overridden by other considerations (to protect, for instance, the health or privacy interests of the mother).

The descriptive analysis of the legal cases and statutes surveyed here reflect a plurality of views regarding the status of embryos and fetuses. On one hand, judges have to craft law in a pragmatic manner, responding to the real issues at hand. On the other hand, a normative argument does not have to capitulate to practice. One could argue that despite the plurality of legal views, only one moral view should prevail with regard to embryos and fetuses. A broader approach would argue that our complex and highly varied relations with animals is suggestive. We do not regard animals as being persons in a strict sense, nor do we view them in a purely instrumental fashion. Yet, because of certain biological criteria (their ability to feel pain and pleasure) as well as their relational status to persons, they merit a certain moral status. Similarly, embryos and fetuses are neither persons in a strict sense, nor are they mere things. Because of their potential personhood, as well as their relational status to persons, they merit a certain moral status. Embryos and fetuses have a conferred status, in addition to a certain intrinsic status. Embryos and fetuses have an intrinsic status because of their potential personhood, as well as being a part of the continuum of biological human life. The myriad of metaphors used to describe the unborn reflects our deep ambivalence regarding the moral and legal status of embryos and fetuses. The issues here are too complex to render themselves to a single overarching theory about the status of the unborn. Although some bioethicists, such as Bonnie Steinbock, may find such an approach to be ad hoc and intellectually unsatisfying, she herself argues that a basic moral theory is unnecessary for doing applied ethics.[6] She agrees with Joel Feinberg, who admitted to a lack of a "deep structure" theory in his work *Harm to Others*.[7] This article analyzes the language judges, policymakers, politicians and ethicists use in describing the unborn. Because words such as "person" and "property" are frequently used in describing the unborn,

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[6]BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 8 (New York: Oxford Univ. Press 1992).

[7]*Id.*

these words become broad metaphors in assessing the moral worth of the unborn.

As a response to principle-based bioethics, the claim that we use metaphor and narrative in our moral reasoning has become quite common in the bioethics and medical humanities literature. In their seminal text *Metaphors We Live By*, George Lakoff and Mark Johnson argue that our understanding of the world is inevitably metaphorical.[8] They argue that "[t]he essence of metaphor is understanding and experiencing one kind of thing in terms of another."[9] In a later book, *Moral Imagination*, Johnson takes the metaphorical approach one step further and argues that our moral reasoning is deeply metaphorical.[10] He claims that:

> [m]orality is metaphoric through and through. Our folk models of morality are based on systematic metaphors. Our mundane, mostly automatic and unreflective moral understanding and reasoning are inextricably tied up with metaphors. And even our most abstract, 'pure' rationalistic theories of morality are shot through with metaphor.... [O]ur most fundamental notions of action, purpose, rights, duties, *personhood*, and so forth are irreducibly metaphoric, so that any moral theory in our tradition will necessarily appropriate some set of basic metaphors for such concepts. This follows from the pervasively metaphoric character of human cognition, and not from any idiosyncratic conditions peculiar to morality (emphasis added).[11]

Fetuses and embryos are often understood in terms of person, property or as appendage. These metaphors have dominated the views of common law judges and ethicists regarding human embryos and fetuses. Although no single metaphor captures fully the status of the unborn, the metaphor of stewardship provides us with a better way to view our moral relationship with the unborn.

Some common, every-day metaphors are explicit ("the law is a jealous mistress"), but others are more subtle. Judges often use analogies in their legal reasoning and employ more subtle metaphors in their opinions. For instance, judges often frame their analyses of the fetus

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[8] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1979).
[9] *Id.*
[10] MARK JOHNSON, MORAL IMAGINATION 76 (1993).
[11] *Id.*

regarding whether it is a person or not; this issue of personhood has dominated the debate among many bioethicists as well. Bioethicists such as H.T. Engelhardt think of persons as the constituents of the moral community.[12] Only persons can be blamed or praised; only persons can have both duties and rights.[13] For him, embryos and fetuses are non-persons.[14] On the other hand, self-consciousness plays an important role for theologians such as James Walters.[15] In his trenchant book *What is a Person?*, Walters argues "that the more nearly an individual human or animal approximates a life of self-consciousness (such as yours or mine), the greater the claim of that individual to maximal moral status."[16] Because an embryo or even late-term fetus has no self-consciousness, its moral status is low.[17] Walters argues for a theory of proximate personhood, which can metaphorically be described as "the closer you are to being a person, the greater status you have."[18] For others, such as Steinbock, having interests is what matters.[19] She has treated this topic extensively in her work *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses*.[20] She develops a cogent theory of her interest view, arguing that this view can be readily applied to a variety of living and non-living things: dead people, the permanently unconscious, anencephalic infants, as well as embryos and fetuses.[21] She argues that she is not offering a "startlingly original conception of the status of the unborn . . . [but wants] to elicit a view that is implicit in our legal traditions and ordinary moral thinking."[22] She argues that her interest view provides some coherence to the status of the unborn, rather than a purely ad hoc approach.[23]

Ethicists who work in this area of bioethics tend to be "lumpers"; that is, they build single theories that "prove" the status of the unborn, one way

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[12]H. TRISTRAM ENGELHARDT, THE FOUNDATIONS OF BIOETHICS 255 (Oxford: Oxford Univ. Press, 1996).

[13]*Id.*

[14]*Id.*

[15]JAMES W. WALTERS, WHAT IS A PERSON? 4 (Urbana: Univ. of Illinois Press, 1997).

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]STEINBOCK, *supra* note 6, at 8.

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]STEINBOCK, *supra* note 6, at 90.

or the other. Judges tend to be "splitters"; they take a more varied approach to the status of the unborn. As Steinbock has noted:

> The legal status of the unborn seems equally unclear. For example, the legalization of abortion in 1973 was based in part on the unborn's never having been recognized in law as a full legal person. At the same time, fetuses have been considered as persons for the purposes of insurance coverage, wrongful-death suits, and vehicular homicide statutes. The legal status of the unborn thus appears to vary from jurisdiction to jurisdiction, from context to context, according to our purposes.[24]

The law rarely treats the unborn in a univocal fashion. Although judges have often unreflectively considered the status of embryos and fetuses, their approach is one that should inform our normative claims. Arguing that embryos and fetuses are persons in a strict sense is about as convincing as saying animals are. Nonetheless, we have the ability to think creatively about their status. We can devise rules and regulations to protect them, without being committed to the notion that they are persons in a full, robust sense. Thus, the law takes a more pragmatic, Rortyesque approach to these issues. Judges, policymakers and legislators view the unborn in a variety of ways. As Rorty himself has stated:

> Human beings, like computers, dogs, and works of art, can be described in lots of different ways, depending on what you want to do with them—take them apart for repairs, re-educate them, play with them, admire them, and so on for a long list of alternative purposes. None of these descriptions is closer to what human beings really are than any of the others.[25]

Rorty could have also included embryos and fetuses in that list. They too can be described in a variety of ways — as potential persons, as subjects for research, or as future tort plaintiffs.

One commentator, Steven Maynard-Moody, acknowledges the different metaphors we use in describing fetuses.[26] The most common

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[24] *Id.* at 4.
[25] Rorty, *supra* note 2, at 28.
[26] MAYNARD-MOODY, *supra* note 1, at 83.

metaphors are fetus as appendage, fetus as property and fetus as person.[27] He explains for example that:

> In a minimalist view, the nonviable fetus is little more than a form of the pregnant woman's bodily tissue: it is part of the woman without separate identity or status. This image of the fetus as tissue de-emphasizes the importance of the fetus's separate genetic identity and is most tenable in the early gestational stages . . . . Fetal remains are most commonly discarded in the same manner as other by-products of surgery . . . . With no moral status, they are simply thrown away.[28]

He goes on to describe the fetus as property metaphor:

> A variation on this image of fetus as tissue is the view that the fetus is property. The nature of tissue property rights varies depending on how the fetus is defined. If the dead fetus is considered a dead person, then legal tradition and precedent gives family members only "quasi-property rights": the right to dispose of the body but not the right to sell or profit from it.[29]

And finally, he describes the fetus as person metaphor:

> . . . [T]he fetus is not a spleen. Though wholly dependent on the pregnant woman and unable to live outside her womb, a not-yet-viable fetus is genetically distinct from the pregnant woman; it is not an organ or tissue, but a body, suggesting to some that it can be defined as a person . . . . The view that the fetus is tissue or tissue property is founded on complex scientific evidence about human development and legal arguments about torts and rights, whereas the image of the fetus as a baby is based on a simple, emotional reaction to the form: it looks like a baby.[30]

This article attempts to examine these different metaphors as they apply to various legal cases. These dominant metaphors of appendage, person and property permeate the judicial opinions examined here. This

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[27] *Id.*
[28] *Id.*
[29] *Id.* at 85.
[30] *Id.* at 86.

article will present the position that these metaphors suggest that embryos and fetuses have an important but derivative status. They occupy a role within our moral web of duties not unlike higher animals. Millions of developed fetuses' lives are extinguished every year for a variety of reasons; similarly, millions of stray dogs and cats are euthanized every year, for a variety of reasons. We raise some animals only to slaughter and consume them. Yet, we also develop very close and intimate relationships with our animal pets. Similarly, we invest a great deal of emotion into the development of a gestating fetus. Yet, if it miscarries, we do not normally conduct funeral services. We create laws that prohibit cruelty to animals, yet we kill animals every day. This seeming inconsistency toward animals does not seem to offend most persons' moral sensibilities (except, perhaps, for a few vegans and radical animal rights activists). And, similarly, allowing women to abort fetuses, yet permitting children to recover for damages suffered as fetuses does not offend most of our ordinary sensibilities either (at least for most Americans who are tolerant of abortion). If, as Ralph Waldo Emerson said, a foolish consistency is the hobgoblin of little minds, then our seeming inconsistency toward animals and fetuses should make us appear as broad minded indeed.[31] The variety of metaphors that we use in describing the unborn attests to our pluralistic views, not unlike our views toward animals. Treating an animal pet as a child yet simultaneously conducting animal research does not offend most persons' sensibilities; why should treating the unborn in a similar manner spark such controversy? The courts themselves have adopted a variety of metaphorical approaches to explain the status of the unborn, suggesting that their status is indeed derivative and not strictly intrinsic. Although courts traditionally have subscribed to the appendage metaphor, more and more cases seem to be sympathetic to the person metaphor.

The very act of naming things in the world shapes the way we think about and treat them. For instance, if one labels an entity a person, it suggests that that entity has certain intrinsic rights, independent of one's relationship with it. On the other hand, if one frames something as "property," a wholly different way of thinking arises. Property does not have any intrinsic rights of its own; the notion of property suggests the bundle of rights and duties a person has with regard to the property

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[31]MAYNARD-MOODY, *supra* note 1, at 86.

(whether it is a physical object or something more intangible such as intellectual property). Certain entities are "easy cases." Planes, trains and automobiles typically fall under the category of property. They have no intrinsic value independent of someone's property interests in them (they may, however, have a certain aesthetic value). A healthy, competent, adult human being is another example of an easy case. Such a creature is not property, but rather a person. This suggests that such a human being qua person cannot be treated in merely an instrumental fashion, as Kant would argue, but must be treated as an end in itself. Harder cases involve such beings as animals, the severely mentally disabled, PVS patients and, of course, fetuses and embryos.

In trying to describe the moral status of both living creatures and inanimate objects, we often talk metaphorically. One scholar who has written extensively about medical metaphors is Emily Martin. For instance, she argues that menstruation was traditionally thought of as an in-take and outgo system that maintained the body's balance to remain healthy.[32] By the nineteenth century, however, this older metaphor was being replaced by another metaphor that treated menstruation as pathological.[33] The body came to be seen metaphorically as an industrial system.[34] In Martin's view, menstruation carried "with it the connotation of a productive system that has failed to produce . . . [with] the idea of production gone awry, making products of no use, not to specification, unsalable, wasted, scrap."[35] Moreover, menopause came to be seen as a "breakdown of central control."[36]

As Martin attests, health care is replete with metaphors.[37] We pejoratively label permanently unconscious human beings as vegetables. We say that the elderly suffering from dementia "aren't all there." Women's bodies have been thought of metaphorically as "monstrous because of the female's capacity to create monstrosity through her capacity for generation."[38] And we frequently talk about fetal and

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[32]EMILY MARTIN, THE WOMAN IN THE BODY: CULTURAL ANALYSIS OF REPRODUCTION 30 (Boston: Beacon Press, 1992).

[33]*Id.*

[34]*Id.*

[35]*Id.* at 46.

[36]*Id.* at 51.

[37]MARTIN, *supra* note 32 at 51.

[38]Julia Epstein, *The Sacred Body in Law and Literature: The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 146 (1995).

embryonic life metaphorically. The fetus or embryo is a child, a pawn, a parasite, a symbol, or an appendage, depending upon one's moral, legal and political framework. Barbara Katz Rothman, for instance, has made explicit the parasite metaphor of the fetus, where she describes:

> the reigning medical model of pregnancy, as an essentially parasitic and vaguely pathological relationship, [which] encourages the physician to view the fetus and mother as two separate patients, and to see pregnancy as inherently a conflict of interests between the two. Where the fetus is highly valued, the effect is to reduce the woman to what current obstetrical language calls the 'maternal environment.'[39]

Moreover, depending upon the mother's emotional, financial and social situation, the fetus can be seen as either a blessing or a burden.[40] As Mark Johnson has noted, we tend to view the fetus very differently if we understand it as a person in one frame and as a biological organism with no personality in another frame.[41] Yet that is what we frequently do when we talk about embryonic and fetal life. This kind of framing occurs in the law whenever the status of the embryo/fetus becomes an issue. Even the word "status" connotes a metaphorical hierarchy. An adult human being ranks at or near the top, a three-month-old fetus much lower, and a two-day embryo at or near the bottom. But the concept of "status" is hardly static. Our metaphors shift depending upon how we frame the issue. So, for example, if a legal case arises which puts into issue questions of property, the fetus/embryo will be framed differently than in a criminal case.

With this in mind, it is no surprise that our language in describing the fetus and embryo is rife with metaphor. Most metaphors usually compare abstract concepts, such as time, life, and even ideas, to more concrete examples. Thus time is money, life is a journey and an idea is as good as its foundation, whereby an idea is compared to a building.[42] These kinds of metaphors so thoroughly shape the way we think about these concepts

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[39]Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47, 63 (1997) (*quoting* Barbara Katz Rothman, *When a Pregnant Woman Endangers her Fetus*, HASTINGS CTR. REP. 24-25 (Feb. 1986)).

[40]JOHNSON, *supra* note 10, at 9-10.

[41]*Id.*

[42]LAKOFF & JOHNSON, *supra* note 8, at 46-51.

that we often commodify time and treat life as a linear path from birth to death. Metaphors can expand our imagination or limit the way we think about such things. For instance, Westerners often think of time as a linear path, but Buddhists think of time as being more cyclical.[43]

In addition to metaphors that make the abstract more concrete, there are also those metaphors that compare a physical object to another physical object or even to something more abstract. Take the common expression, "the eyes are the windows to the soul." Not only are eyes compared to windows, but the soul is compared to a building, whereby we can examine its contents by looking through its metaphorical windows, the eyes. One might say that this is merely a literary metaphor and that the language judges and legislators use is more precise. How can such labels as person or property be thought of as metaphors anyway? Writers such as George Lakoff and Mark Johnson use the term metaphor in a broad sense. A metaphor need not be only some sort of mental shorthand. Rather, our language is invariably metaphorical. A "firmly implanted" embryo conjures up a different image than saying it is "suspended" in cryogenic preservation. These kind of subtle metaphors are more prevalent in the legal opinions examined here than a cursory glance would suggest. The embryo or fetus is undeniably some kind of physical thing, but it is often compared to some abstract entity. Thus, saying the embryo is a piece of property or that the fetus is a person compares the physical to the abstract. Both property and personhood are indeterminate, abstract concepts. If we frame the fetus as an appendage to the mother, then it becomes more plausible to think of it as quasi-property, perhaps like an organ.[44] But if we frame the embryo or fetus as a distinct being with certain rights, then it seems more reasonable to think of it as some sort of person. This becomes even more apparent by examining the language courts, policymakers, and ethicists use in describing fetal and embryonic life. As Clifford Geertz has argued, laws are not simply an array of practical rules for persons to resolve disputes or advance personal interests.[45] Rather, for Geertz, the law is "part of a distinctive manner of

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[43]*See generally id.*

[44]Of course, property encompasses abstract entities as well, such as intellectual property. But property is usually concerned with physical objects.

[45]MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (Cambridge, Ma.: Harvard Univ. Press 1987).

imagining the real."[46] Similarly, Mark Johnson claims that our moral reasoning is not one where we mechanically apply moral rules to differing situations, but is rather a richly imaginative process, whereby thinking morally demands the use of metaphor and narrative.[47] Mary Ann Glendon, in her astute analysis of abortion and divorce laws among Western countries, sees the story that America is telling through its laws (autonomy, individualism, anti-communitarianism) as a distinctly different one from other Western countries.[48] Each country has framed the issue of fetal and embryonic life in a variety of ways.[49] By framing a case concerning a fetus or embryo as a property issue, a criminal issue, a civil issue or as an abortion issue, the metaphorical understanding of the fetus changes.[50] Moreover, when policymaking panels composed of experts from various fields talk about the fetus or embryo, the metaphors change as well.[51] The fetus is not just a victim of negligence or a symbol of abortion politics, but becomes the focus of scientific scrutiny and federal regulation.[52] Embryos are experimented upon, frozen, stored and discarded. Although the commercial trading of embryos is normally prohibited, one would be hard pressed to deny the commodification of the early embryo.

George Annas has commented that every national commission that has examined the embryo calls it a "unique symbolic value that deserve[s] society's respect and protection."[53] Calling the fetus a "symbol" is a popular metaphor. Other commentators speak in similar metaphorical fashion of the embryo/fetus. John Robertson has often referred to the embryo as a symbol ("respecting the early embryo as a symbol . . . is a matter of choice, not moral duty").[54] Engelhardt claims that persons assign value to the embryo/fetus. In his view, the zygote may be thought of as a form of property, albeit a "a special form of very dear property."[55]

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[46] *Id.*

[47] JOHNSON, *supra* note 10, at 9-10.

[48] GLENDON, *supra* note 45, at 8.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] STEINBOCK, *supra* note 6, at 216.

[54] John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 448 (1990).

[55] H. TRISTRAM ENGELHARDT, FOUNDATIONS OF BIOETHICS 255 (Oxford: Oxford Univ. Press, 1996).

Thinking of the zygote as property paves the way for couples who embark upon *in vitro* fertilization (IVF) treatment to execute cryopreservation disposition agreements in the case of divorce.[56]

The aim of this article is to explore the various metaphorical understandings of the fetus/embryo as reflected in legal opinions and statutory law. These various metaphors buttress the claim that the status of embryos and early fetuses is conferred. Metaphor is invoked for a variety of reasons: to provide richer moral understanding, to propagandize, to persuade, to enlighten (yet another very common metaphor). The advantage that metaphor provides is to enrich our moral understanding of both abstractions and concrete events. As fetal life is examined within the frames of criminal law, civil law, abortion or research, our views of the embryo and fetus shift ever constantly.

Similar to animals, the variety of metaphors used to describe embryos and fetuses strongly suggest that although they are neither persons nor mere things, we can imaginatively create rules to guide our conduct towards them. That is the basic ethical quandary over embryos and fetuses, how should we think of these creatures? And, how do we treat them in a manner that best reflects our moral imagination? Rather than creating a new metaphor for embryos and fetuses, we should pay more attention to the metaphor of stewardship with regard to the unborn.

AMERICAN CASE LAW

According to Glendon, "[m]ore than any other country, the United States has given priority in its constitutional law to individual liberty and has adopted a posture of rigorous official indifference toward moral issues."[57] Web-like in its organization, the legal system of the United States is highly complex, consisting of many different jurisdictions. Reproductive health law reflects the diverse and multi-layered nature of the American legal system.[58] Federal regulations, state statutes, and judicial cases have all addressed the issue of embryonic and fetal life.[59] Judges have assessed the legal status of fetal/embryonic life in numerous cases, often without

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[56]*Id.*

[57]Mary Ann Glendon, *Legal Institution: A Beau Mentir Qui Vient De Loin. The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569, 585 (1989).

[58]*Id.*

[59]*Id.*

the assistance of statutory law; more recently, states have passed laws regarding fetal experimentation.[60] A distinction should be made, however, between substantive legal interpretations of the status of fetal and embryonic life (as exemplified, for instance, in the case *Davis v. Davis*[61]) and the procedural rules that govern a variety of reproductive technologies involving embryonic and fetal life.[62] Oftentimes, the substantive legal interpretations are judicial opinions; procedural requirements and prohibitions are usually found in statutory law (whether state or federal).[63] Depending upon the issue, there may be scant legislation or a good deal of it.

During the era when abortions were criminalized, the fetus was treated as a potential homicide victim. Yet, early negligence cases treated the fetus as an appendage to the mother; it had no distinct identity and had no standing to sue for prenatal injuries. This kind of confusion surrounding the status of the unborn eventually created the "cipher metaphor." This means that the unborn has no intrinsic status, but only what persons confer upon it. This can be interpreted on two levels: metaphysically and epistemologically. Metaphysically, we can say that as a matter of reality, the fetus has no intrinsic worth. Its worth, then, is merely a matter of social construction or convention. On the other hand, an epistemological approach would argue that we do not really know what the value of a fetus is and people have had different responses to the issue. For a variety of reasons (its potential personhood, its relational status to other persons) we do have some idea what the value of a fetus is. However, the fetus's status is not purely a social convention. Animals have some inherent status, simply because of their ability to suffer. As a result, we create rules that demand humane treatment of animals.

Within the abortion debate, yet another metaphor emerged—the fetus as symbol. Many of the abortion cases most vividly illustrate this metaphor. In the 1980s, the metaphor of the embryo as property emerged most significantly with the case of *Davis v. Davis*.[64] Alternatively, a number of states have passed homicide statutes that criminalize the

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[60] *Id.*
[61] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
[62] GLENDON, *supra* note 57, at 585.
[63] *Id.*
[64] *Davis*, 842 S.W.2d at 588.

intentional harming of a fetus.[65] Again, the metaphor of homicide victim emerges once again.

This section presents a survey of American case law and legislation as they pertain to these metaphorical descriptions of the status of the fetus/embryo. First, a long line of cases that have dealt with the status of the late-term fetus, often in situations where the living child is suing for prenatal injuries is examined. Then, attention is shifted to the current state of legislation regarding embryo and fetal research in the different states. Finally, an analysis of any federal regulations that address the status of fetal and embryonic life will be presented.

After reviewing the case law, it will be argued for a "special status" for the embryo and early fetus, based on its potential personhood and its relational status to other persons. The variety of metaphors used to describe the unborn suggests our ambivalent views toward embryos and fetuses. Similar to pet animals, human embryos and fetuses hold a special place in our web of rights and duties. We grow strong emotional bonds with pet animals, yet we euthanize them by the millions; similarly, many women develop intense bonds with their fetuses, yet millions of fetuses are aborted every year. Moreover, we use animals for food and research, but we spend billions on taking care of our pet animals. Why then do we seem to be troubled with embryo research? Just as people do not find the seemingly contradictory relationship with animals to be seriously troubling, they should not be deeply troubled with using early embryos for research and aborting fetuses, yet at the same time spending billions on prenatal care.

Strachan Donnelley has argued that in the animals rights context, there are three groups of people: the anthropocentric advocates of human welfare and scientific progress, the staunch animal rights activists who view animals as our moral equals, and then the "troubled middle... [who] wish to balance the undeniable benefits that result from scientific research with a genuine concern for the well-being of animals."[66] This troubled middle view could easily be applied to the issue of the status of embryos and fetuses. The troubled middle position suggests the strong ambivalence ordinary people have toward our treatment of the unborn.

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[65] *See id.* at 591.

[66] Strachan Donnelley, *Speculative Philosophy, the Troubled Middle, and the Ethics of Animal Experimentation*, HASTINGS CTR. REP. 19, No. 2, 15 (Mar. 1989).

Nearly all of the cases in this area deal with late-term fetal life; only more recent cases (such as *Davis*) address the legal status of embryos.[67] In trying to determine the status of fetal and embryonic life, judges historically only had a few authorities at their disposal. They would frequently cite venerable British authorities such as Blackstone or Coke or they would rely on the accretion of Anglo-American common law on the topic (although occasionally American judges would look to Irish or Canadian cases for some guidance). Blackstone's and Coke's pronouncements on the fetus had strong theological overtones; Blackstone called life a gift of God.[68] Yet, what swayed early jurists most was the common law which generally held that fetuses (and, of course, embryos) were neither legal persons nor even human beings.[69] As new scientific and medical evidence began to appear, however, judges became more deferential to the new evidence, although some would still defer to older common law rulings.[70]

Birth as the Defining Event: Civil Cases

American case law has been wrestling with the question of fetal and embryonic life for over a hundred years. A late nineteenth century case, *Dietrich v. Inhabitants of Northampton*, was perhaps one of the earliest cases.[71] In this case, the Supreme Court of Massachusetts reviewed a lower court decision regarding a fatal injury to a fetus.[72] A woman who was four to five months pregnant fell on a defective road in the town of Northampton.[73] The fall precipitated a miscarriage of the fetus and the fetus lived for about ten to fifteen minutes.[74] The plaintiff based his claim on a statement by Lord Coke of England.[75] Coke surmised that if a woman is "quick with child", takes a poison or is beaten, thereby causing the death of the child, then this constitutes a murder.[76] Holmes, however,

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[67]*Davis*, 842 S.W.2d at 588.
[68]Donnelley, *supra* note 66, at 15.
[69]*Id.*
[70]*Id.*
[71]Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
[72]*Id.*
[73]*Id.*
[74]*Id.*
[75]*Id.*
[76]*Dietrich*, 138 Mass. at 15.

resisted analogizing this criminal case to the civil law arena.[77] Holmes noted that no court had ever permitted an action to be maintained by an infant who experienced injuries in his mother's uterus.[78]

Holmes further distinguished the *Dietrich* case with the criminal case that Coke addressed.[79] Holmes argued that in the criminal case, the fetus had to have quickened (*i.e.* moved) within the womb before criminal charges could be filed against someone who killed the fetus.[80] But with a civil action, the time of the injury made little difference; regardless as to whether the fetus was a young embryo or a mature fetus, the prenatal injury would create a live injured child.[81] Holmes also looked to another Massachusetts statute for some guidance in this case.[82] This statute punished illegal attempts to procure a miscarriage.[83] Although the punishment was more severe if the woman died, there was no increase in the severity of the punishment if the fetus died, even once it had left the womb.[84] Holmes ultimately held that at the time of the injury, the fetus was part of the mother, and therefore the mother could recover damages for injuries to the fetus.[85] The fetus itself, however, had no standing to sue separately.[86]

The appendage metaphor held great appeal for a number of courts early in this century.[87] Interestingly, the metaphor held greater currency for cases where the live child was suing for prenatal damages.[88] The fetus-as-appendage metaphor incorporated into negligence theory treated the mother and fetus as one entity.[89] This metaphor made it much easier for judges to view the fetus not as a being, which can be harmed, but rather a part of the mother, which may be injured.[90] Perhaps a good comparison would be to an injury to an internal organ. First of all, an organ is

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Dietrich*, 138 Mass. at 15.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 17.
[85] *Id.*
[86] *Dietrich*, 138 Mass. at 17.
[87] *See generally* Allaire v. St. Luke's Hosp., 56 N.E. 638 (1900).
[88] *Id.*
[89] *Id.*
[90] *Id.*

necessary for the health of a person; a fetus is not. Moreover, an organ has no intrinsic identity of its own, any "status" it may possess is due to the fact that it is attached to a person. A spleen, for instance, may be injured, but it is the person, not the spleen, that can later sue for compensation. The problem with the appendage metaphor is that unlike a spleen, the fetus will eventually develop into a live child who may have been harmed because of the injury suffered by its earlier fetal state.

The metaphor of fetus-as-appendage was even more greatly illustrated in the 1900 Illinois case of *Allaire v. St. Luke's Hospital.*[91] An expectant mother was seated in a chair positioned inside of a hospital elevator.[92] The top of the chair suddenly struck a projection on the side of the shaft.[93] The woman's left limb was caught between the floor and the projection, whereby it became "greatly cut, mangled, bruised and the bones thereof broken, and said mother greatly and grievously bruised, hurt, jammed and wounded in her left hip, thigh, side and body."[94] The mother's baby was born four days after the accident with the left side of his body damaged and paralyzed, among other injuries.[95] The mother sued as next friend on behalf of her son, the plaintiff.[96]

The plaintiff cited Blackstone as authority in this case, stating that "[l]ife is the immediate gift of God—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as the infant is able to stir in its mother's womb."[97] The metaphor employed here, that life is a gift from God, does not offer any clear guidance as to the status of the fetus.[98] Gifts are often inanimate objects, although sometimes they may be living creatures. When one gives something to another, there is the notion that the recipient will have some control over the gift. Hopefully, the recipient will cherish the gift and show the giver some kind of gratitude. Also, giving a gift transfers ownership of the gift from one party to another. Describing most objects in this fashion is uncontroversial. But, once we describe living things (organs, fetuses) as gifts, some problems arise. When an organ donor gives away his liver, he

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[91] *Id.*
[92] *Allaire,* 56 N.E. at 638.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Allaire,* 56 N.E. at 638.
[98] *Id.*

has given away an organ that belonged to him. People will often refer to organ donors as giving the gift of life. Blackstone's comment frames this act in a theological perspective. The metaphor's imagery suggests that God has extended this "gift" of life to an inanimate being (the fetus) which is then the recipient of this gift. The parents are considered the steward, rather than the owners, of this gift. This language suggests that before quickening, the fetus may be viewed as only an appendage, but afterwards, it is imbued with a greater degree of moral status.

The plaintiff also cited the earlier *Dietrich* case.[99] But the *Dietrich* court, as acknowledged by the *Allaire* court, stated that there had never been a case where an injured infant had maintained an action for injuries received in utero.[100] The *Allaire* court echoed this view, stating "[t]hat a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed."[101] Moreover, the court was not persuaded by the argument that the infant in utero is sometimes regarded as *in esse* (in existence) for some purposes, such as within the doctrine of civil law and the ecclesiastical and admiralty courts.[102] In this court's eyes, the common law had never recognized an infant's standing for injuries received before birth.[103]

The absence of any precedent did not trouble the dissent in this case as much as the majority.[104] The dissent of Justice Boggs acknowledged that under common law, the fetus was considered to be part of the mother, and that an injury to it was an injury to the mother and no more.[105] The dissent argued that once the fetus had reached a certain point of viability, there were, in fact, two lives and not just one.[106] And if that fetus was injured and then born live with that injury, "is it not sacrificing the truth to a mere theoretical abstraction to say the injury was not to the child but wholly to the mother."[107]

The dissent also cited Blackstone, who offered the following pronouncement regarding life:

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Allaire*, 56 N.E. at 640.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 640-41.
[106] *Id.* at 641-42.
[107] *Allaire*, 56 N.E. at 641.

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation .... For if a woman is quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her, whereby the child dieth in her body and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter.[108]

In his dissent, Boggs addressed the differences in how the common law treated the intentional killing of a fetus.[109] For instance, the intentional killing of a fetus that is stillborn was considered manslaughter.[110] On the other hand, if the fetus was born live, even fleetingly, and then died, the common law treated the act as murder.[111] Boggs argued that if the quickened child can be murdered, then why deny it the opportunity to later sue for prenatal injuries?[112] Essentially, Boggs argued that if a fetus in utero is viable, it should have the ability to later sue for prenatal injuries.[113]

The dissent offered one of the earliest challenges to the traditional common law view of the in utero fetus as a nonentity, legally speaking.[114] By viewing the fetus as a separate entity, Boggs framed the status of the fetus differently.[115] The murder statute's metaphor of the fetus as a potential victim persuaded Boggs to challenge the common law's traditional refusal to grant standing to the child who suffered injuries as a fetus.[116] Framing the fetus as part of the mother made it much easier for judges to dismiss any tort rights the child qua fetus might possess.[117] But Boggs found the inconsistency between the criminal and civil law to be too glaring to ignore.[118]

In the 1913 New York case of *Nugent v. Brooklyn Heights Railroad Co.*,[119] Judge Thomas wrote a rather cumbersome opinion regarding

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 641.
[112] *Allaire,* 56 N.E. at 641.
[113] *Id.*
[114] *Id.* at 641-42.
[115] *Id.*
[116] *Id..*
[117] *Allaire,* 56 N.E. at 641-42.
[118] *Id.*
[119] Nugent v. Brooklyn Heights R.R. Co, 139 N.Y.S. 367 (1913).

injuries sustained by a fetus in utero.[120] Here, the late-term fetus was injured about a month before delivery.[121] In trying to determine whether the fetus had standing to sue for its injuries, the court assessed the status of the fetus.[122] The court acknowledged that one argument contends that only upon birth does the infant become a rights-bearing entity, a being that can possess property, for instance.[123] In his opinion, however, Judge Thomas argued that even before birth, fetuses have the ability to receive property; only after birth are they able to enjoy it.[124] Thomas cited the language of an earlier case, which in turn cited the language of yet another even earlier case:

> Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.[125]

Moreover, Thomas acknowledged that the intentional killing of an unborn child is considered murder and that an unborn child has the same remedies regarding property interests as a human owner.[126] Nonetheless, Thomas examined the nature of the duty owed by the defendant in this case to the unborn infant.[127] Although the carrier had a duty to act reasonably toward the mother (as well as to a born, yet concealed infant), the carrier had no duty to the concealed, unborn infant.[128]

In its opinion, the court seemed sympathetic to some of the views espoused by Justice Boggs in his dissent in *Allaire*.[129] The fetus occupied this strange role where it could possess property rights, be victimized by a murderer, and yet could not later sue for negligently inflicted prenatal

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[120] *Id.*
[121] *Id.* at 368.
[122] *Id.* at 369.
[123] *Id.*
[124] *Nugent*, 139 N.Y.S. at 369.
[125] *Id.* (*citing* Thellusson v. Woodford, 4 Ves., Jr. 227, 321, 322, *cited in* Walker v. Great Northern R. Co., 28 L.R. Ir. 69, 175 (1891)).
[126] *Id.* at 370.
[127] *Id.* at 371.
[128] *Id.*
[129] *Id.* at 372.

injuries.[130] For Thomas, however, the crucial question was the relationship between the defendant in this case and the plaintiff infant.[131] The simple question was, did the defendant owe a duty of care to the fetus in utero?[132] After acknowledging the "fictional" property rights a fetus has, the court reasoned that since the fetus was not a passenger in its own right (as would be a born infant), the defendant had no duty of care to it.[133] Thus, the defendant had a duty of care toward the mother, but not the dependent fetus residing within the mother's uterus.[134]

This case slightly eroded the appendage metaphor. Judge Thomas recognized that the fetus had some distinct identity, separate from the mother.[135] It seemed inconsistent that a fetus could be the victim of murder or manslaughter (suggesting a separate identity) and yet could not later sue for prenatal damages.[136] Yet, in the end, the appendage metaphor won the day.[137] The court ruled that the defendant did not owe any duty to the late-term fetus.[138] This is a rather strange conclusion, especially when we consider that the defendant in this case would have owed a duty to a concealed infant. It seems odd that the defendant would have a duty to a week-old newborn, but would not have any duty of care to a late-term fetus a week before delivery. For Thomas, the literal expulsion of the fetus from the uterus and out into the world is understood both metaphorically and existentially as a significant event.[139] Not only does the fetus perform new physical activities (such as breathing) but now the law attaches a great deal of importance to the event.[140] Legally, the infant's age starts at birth.[141] Although it could be the victim of an intentional crime, such as murder, before birth, it could now finally be a plaintiff in a tort action.[142] So, the fetus slips between being a potential

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[130] *Nugent*, 139 N.Y.S. at 372.
[131] *Id.* at 371.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Nugent*, 139 N.Y.S. at 372.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 371.
[139] *Id.*
[140] *Nugent*, 139 N.Y.S. at 372.
[141] *Id.*
[142] *Id.*

victim of murder if framed within the lens of criminal law to the status of an appendage if it is framed within tort law.[143]

In the 1921 New York case of *Drobner v. Peters*,[144] Judge Pound gave the majority opinion.[145] Here, a pregnant woman fell into a coalhole that was in front of the defendant's property.[146] The mother sued on behalf of the infant, who was born eleven days after the accident.[147] The court noted that the vast majority of judicial cases did not believe that the child could maintain a negligence action for injuries sustained while in utero.[148] The court also noted that the law imputes a legal fiction upon the fetus in utero, giving it certain property rights.[149] Moreover, the law severely penalizes the intentional killing of a quickened fetus.[150] But, as the majority stated:

> Rights of ownership of property do not connote a duty of personal care to the inchoate owner, nor does the crime of causing the death of an unborn child connote liability to the child for personal injuries. When justice or convenience requires, the child in the womb is dealt with as a human being, although psychologically it is a part of the mother, but the law has been fairly well settled during its centuries of growth against the beneficence of an artificial rule of liability for personal injuries sustained by it.[151]

Ultimately, the court decided that the defendant owed no duty of care to the fetus, stating that the fetus was part of the mother.[152] This cautious decision reflects a concern for judicial legislation, even though "sympathy and natural justice" may suggest a cause of action in this case.[153]

In addition to the traditional appendage metaphor, Judge Pound offered a new cipher metaphor.[154] As a cipher, the fetus has no inherent status, but only what is conferred upon it.[155] The conception of the fetus's

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[143] *Id.*

[144] Drobner v. Peters, 133 N.E 567 (N.Y. 1921).

[145] *Id.* at 567.

[146] *Id.*

[147] *Id.*

[148] *See* Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1990); Walker v. Great Northern Ry. Co., 28 L. R. Ir. 69 (Q.B. 1891); Gorman v. Budlong, 23 R.I. 169 (1901); Buel v. United Rys. Co., 154 S.W. 71 (Mo. 1913); Lipps v. Milwaukee El. Ry. & L. Co. 164 Wis. 272 (1916).

[149] Drobner v. Peters, 133 N.E. 567, 568 (N.Y. 1921).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Drobner*, 133 N.E. at 568.

[155] *Id.* at 224.

status has a malleable, chameleon-like quality to it.[156] As the court stated, if something benefits the fetus, it is treated as if it has some rights.[157] Yet, the court failed to challenge the traditional inconsistency of criminalizing feticide but not permitting children to recover damages suffered prenatally.[158]

George Lakoff and Mark Johnson have discussed the fluidity of categorization in their work *Metaphors We Live By*.[159] They have argued that categories are not fixed concepts, "but may be narrowed, expanded, or adjusted relative to our purposes and other contextual factors."[160] Similarly, the category of fetus may be shaped according to our own purposes. As Judge Pound asserted in *Drobner*, the fetus may be vested with certain future property rights, if such a vesting benefits the fetus.[161] Yet, a fetus may not have the right to sue for injuries suffered while in utero, for other policy considerations.[162]

Drobner v. Peters was decided in 1921.[163] Fourteen years later, the Supreme Court of Texas addressed a similar case in *Magnolia Coca Cola Bottling Co. v. Jordan*.[164] Here, the defendant ran his truck into Mrs. Jordan, who was pregnant at the time.[165] She later prematurely delivered twin babies, one of whom died.[166] The plaintiff lost at the trial level because the law did not recognize a cause of action to recover damages for prenatal injuries.[167] The court found no guiding authority to permit a child to recover for prenatal injuries.[168] The court cited Holmes's famous ruling in *Dietrich*, as well as the holding in the well-known Irish case, *Walker v. Great Northern Ry. Co. of Ireland*.[169] Two of the justices in *Walker* held that "a fetus in utero is not a person *in esse* . . . not a person, or a

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[156]*Id.*
[157]*Id.*
[158]*Id.*
[159]LAKOFF & JOHNSON, *supra* note 8, at 164.
[160]*Id.*
[161]Drobner v. Peters, 133 N.E. 567, 568 (N.Y. 1921).
[162]*Id.* at 571.
[163]*Id.* at 568.
[164]Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. 1935).
[165]*Id.* at 944.
[166]*Id.*
[167]*Id.*
[168]*Id.*
[169]Walker v. Great Northern Ry. Co. of Ireland, 28 L. R. Ir. 69 (Q.B. 1891).

passenger, or a human being. Her age and existence are reckoned from birth."[170]

The court was highly persuaded by the prevailing legal authority that stated that life begins at birth and not at an earlier time.[171] Justice Smedley, writing for the majority, acknowledged the dissents in such cases as *Allaire*, which argued for recognizing a cause of action for the negligent infliction of prenatal injuries.[172] Although Smedley acknowledged greater medical knowledge that suggests that the fetus has a certain status, he succumbed to practicality.[173] For the court, the birth event provided an easy and clear demarcation between living and non-living.[174] The court believed that trying to determine when exactly a person owed a certain duty of care to an unborn child would be fraught with difficulties.[175] Neither medical nor scientific evidence of the separate existence of the unborn child supposedly aided the law in trying to determine a bright line between when a person owed a duty to the fetus and when he did not.[176] Only birth, in the court's opinion, provided this line.[177] Moreover, the court was concerned with not only the speculation of scientific and medical testimony with regards to viability, but also with the perceived onslaught of false claims.[178]

The court's metaphor of birth event suggests that the fetus is following a purposeful path. As Mark Johnson has noted, the location version of the event structure metaphor suggests a motion along a path toward some destination.[179] Although what the fetus has done literally is merely move from an enclosed womb to breathing air, metaphorically this transition has greater significance. The fetus has emerged from a world where some rights attach, but others do not, to a world where it has many (but not all) of the rights of an adult.[180]

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[170]*Id.*
[171]Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (1935).
[172]*Id.* at 945.
[173]*Id.*
[174]*Id.*
[175]*Id.* at 949.
[176]*Magnolia*, 78 S.W.2d at 949.
[177]*Id.* at 948.
[178]*Id.* at 949.
[179]JOHNSON, *supra* note 10, at 37.
[180]*Id.*

Birth as the Defining Event: Criminal Cases

A number of cases have held that the killing of an unborn fetus is not homicide.[181] The 1872 New York case of *Evans v. People*[182] captured nineteenth century views toward fetal death:

> Causing the death of an infant in the mother's womb was at a very early day deemed murder; but it is not so regarded at the common law at the present time, and is not made so by statute. Such an infant is not considered a person or human being upon whom the crime of murder can be committed.... There must be a living child before its death can be produced. It is not the destruction of the foetus, the interruption of the process by which the human race is propagated and continued, that is punishable by the statute as manslaughter, but it is causing the death of a living child.[183]

In *Keeler v. Superior Court of Amador County*,[184] the California Supreme Court examined the question as to whether an unborn but viable fetus is a human being.[185] In this case, a divorced husband severely beat his pregnant ex-wife with such force that her fetus' skull was fractured.[186] The fetus was delivered stillborn.[187] The fetus at the time of its death was thirty-five weeks.[188] The California statute in question stated that "murder is the unlawful killing of a human being, with malice aforethought."[189] In trying to determine whether an infant could be the subject of a homicide action, Justice Mosk looked to the pronouncements of Lord Coke:

> If a woman be quick with childe, and by potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great

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[181] *See, e.g.*, Abrams v. Foshee, 3 Iowa 274 (1856); Clarke v. State, 23 So. 671 (Ala. 1898); Morgan v. State, 256 S.W. 433 (Tenn. 1923); Passley v. State, 21 S.E.2d 230 (Ga. 1942); Keeler v. Superior Ct. of Amador County, 470 P.2d 617 (Cal. 1970); Meadows v. State, 722 S.W.2d 584 (Ark. 1987); State v. Beale, 376 S.E.2d 1 (N.C. 1989); People v. Ehlert, 654 N.E.2d 705 (Ill. App. Ct. 1995).

[182] Evans v. People, 49 N.Y. 86, 88-90 (1872).

[183] *Id.*

[184] Keeler v. Superior Ct. of Amador County, 470 P.2d 617 (Cal. 1970).

[185] *Id.* at 619.

[186] *Id.*

[187] *Id.* at 624.

[188] *Id.*

[189] *Keeler*, 470 P.2d at 617.

> misprision, and no murder; but if the childe be born alive dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.[190]

Coke spoke metaphorically about the newborn child when he called it a "reasonable creature."[191] In fact, it was probably no more a reasonable creature when newly born than a few hours before delivery.[192] To say that the fetus has the potential to become a reasonable creature suggests the location version of the event structure metaphor.[193] The fetus is moving along (metaphorically) from a place where it is devoid of reason to a place where it eventually will be equipped with reason.[194] Again, birth is treated as an almost mystical event that confers upon the infant a whole host of newly acquired rights.[195]

Judge Mosk, in his majority opinion, briefly reviewed the judgments of a series of English court decisions in the 19th century.[196] In general, these decisions stated that an infant had to first be born alive before the crime of murder could be charged.[197] Although issues such as breathing and the cutting of the umbilical cord were considered to be significant events, there seemed to be a consensus of opinion regarding live birth as somehow conferring "human being" status to a fetus/newborn.[198] This kind of view prevailed until the mid-nineteenth century when some state legislatures, such as New York, modified the common law of abortion.[199] The new law criminalized the killing of "an unborn quick child" as manslaughter.[200] The court also cited an 1856 case from Iowa that declared that "an infant *en ventre sa mere* is not a human being" (again citing Coke along with Blackstone) within the meaning of the then-existing homicide statute.[201]

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[190] *Id.* at 624.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Keeler*, 470 P.2d at 624.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Keeler*, 470 P.2d at 624.
[200] *Id.*
[201] *Id.* at 629. *En ventre sa mere*—"in the womb of one's mother." STEVEN H. GIFIS, LAW DICTIONARY (New York: Barron's, 1984).

The court further noted the language of the California Code Commission, which concluded that "[a] child within its mother's womb is not a 'human being' within the meaning of that term as used in defining murder. The rule is that it must be born."[202] The court also believed that *Chavez* proposed that a viable fetus in the process of being born was a human being.[203] In its view, however, a viable fetus not completely born is not a human being.[204] Again, live birth is invested with a great deal of legal importance.

The court also asserted that the common law never recognized the fetus as a human being within the traditional meaning of murder.[205] Statutory law, however, as reflected through feticide statutes, *has* equated the fetus with a human being.[206] On the other hand, the dissent noted that under common law, the quickened child was considered to be a separate human being.[207] The dissent quoted Blackstone's metaphor of life as gift: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[208] Thus, the dissent argued that killing a quickened child was a severely punishable offense, and not something that was treated leniently.[209] Moreover, the dissent noted that the common law presumed that injured fetuses would be born dead; this presumption discouraged viewing the killing of a viable fetus as a homicide.[210]

The 1974 case *The People v. Carlson*[211] made explicit the metaphor of fetus as murder victim.[212] Here, a California appeals court addressed the issue of manslaughter and the status of the fetus.[213] The defendant was convicted of manslaughter in killing his pregnant wife and the question was whether the defendant was guilty of the second degree murder of the fetus under the felony-murder rule.[214] The court cited the *Keeler* case as

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[202] *Keeler*, 470 P.2d at 630.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.* at 640.
[207] *Keeler*, 470 P.2d at 640.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 643.
[211] People v. Carlson, 37 Cal. App. 3d 349, 355 (1974).
[212] *Id.*
[213] *Id.*
[214] *Id.*

authority and noted that the statute relied upon in that case stated that murder was the unlawful killing of a human being.[215] The legislature, however, quickly amended the law to state that murder was the unlawful killing of a human being, *or a fetus*, with malice aforethought.[216] But, it neglected to amend the language of the manslaughter statute, which limited itself to human beings.[217]

Reyes v. Superior Court of San Bernardino[218] exemplified the metaphor of fetus as potential abuse victim.[219] This case dealt with interpreting the language of a statute criminalizing endangerment of a child.[220] Here, an expectant mother used heroin in the last two months of her pregnancy.[221] The term "child" in the statute posed some problems for the court.[222] The court looked to differing punishments for aborting a fetus as compared to endangering a fetus, as well as to explicit statutory language protecting unborn life.[223] Accordingly, the court made the following statement: "[W]hen the Legislature determines to confer legal responsibility on unborn fetuses for certain limited purposes, it expresses in specific and appropriate terms . . . when the Legislature speaks generally of a person . . . it plainly excludes fetuses."[224]

Viability as the Defining Event

Despite this line of cases that viewed fetuses as non-persons (often citing common law as authority), there was a growing judicial trend that was challenging these traditional views and deferring more to growing scientific and medical evidence. One of the first cases that accorded a greater level of status to a late-term fetus was the 1939 California case of *Scott v. McPheeters*.[225] In this case, a physician used metal clamps and forceps to extract a newborn child from the uterus.[226] This procedure caused serious injury to the brain and spine, resulting in permanent

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[215] *Id.*
[216] *Carlson*, 37 Cal. App. 3d at 355.
[217] *Id.*
[218] Reyes v. Superior Ct., 75 Cal. App. 3d 214 (App. Ct. 1977).
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Reyes*, 75 Cal. App. 3d at 220.
[224] *Id.*
[225] Scott v. McPheeters, 92 P.2d 678 (Cal. App. Ct. 1939).
[226] *Id.* at 679.

paralysis in the child.[227] Again, the issue was whether a child could maintain an action for injuries sustained while in utero.[228] Here, the California appeals court relied on medical and scientific authority.[229] The majority opinion cited the dissent of Justice Boggs in the earlier Illinois Supreme Court case of *Allaire*.[230] The court noted that a seven-month old fetus could often live independently of its mother if it happened to be born prematurely.[231] "Who may say that such a viable child is not in fact a human being in actual existence?"[232] The court viewed the authority of precedents pragmatically; they "are valuable so long as they do not obstruct justice or destroy progress."[233] Moreover, the court relied on the dissenting opinions of earlier cases that argued for treating unborn fetuses as having interests equivalent to living children.[234] As the court stated at the end of its opinion, "[t]he fact that this reasoning occurs in a dissenting opinion, which does not controvert the decision of the court in any respect, does not detract from its logical value."[235] The majority's opinion was one of the earliest legal opinions to challenge prevailing legal authority while deferring to new medical and scientific facts regarding the status of the fetus.[236] The court challenged the old appendage metaphor, insisting that the late-term fetus was a unique and separate being, apart from the mother.[237] Although this was not an entirely novel view, it was a departure from traditional views of the fetus in negligence law.[238]

Another landmark medical malpractice case that successfully challenged prevailing common law regarding the status of the fetus was *Bonbrest v. Kotz*,[239] decided in 1946.[240] Here, the court reviewed a case whereby a fetus was killed in utero due to medical malpractice.[241] The

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[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Scott*, 92 P.2d at 681.
[231] *Id.*
[232] *Id.* at 682.
[233] *Id.* at 683.
[234] *Id.*
[235] *Scott*, 92 P.2d at 684.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] Bonbrest v. Kotz, 65 F. Supp. 138 (D. D.C. 1946).
[240] *Id.*
[241] *Id.*

father filed a suit as next friend on behalf of his child.[242] Judge McGuire, in delivering the majority opinion, noted that traditionally in the absence of statute, there could be no action in tort for a prenatal injury.[243] The court noted that the underlying assumption was that "a child *en ventre sa mere* has no juridical existence."[244]

This assumption was formalized by Oliver Wendell Holmes in *Dietrich*.[245] In *Dietrich*, Holmes made no distinction between the mother and her fetus in utero; in his eyes "the unborn child was a part of the mother at the time of injury."[246] For Judge McGuire, on the other hand, there was a real distinction to be drawn between the two cases.[247] Most important was the fact that the fetus in utero was injured by an outside party and not injured by some means transmitted through the mother.[248] The court responded forcefully to Holmes's question as to whether viability was an issue or not.[249] In *Bonbrest*, the fetus was viable; for this court, calling a viable fetus a part of the mother was contradictory.[250] Because the fetus was capable of life outside of the mother, it was not "part" of the mother in any really meaningful sense.[251] The court questioned the distinction different areas of the law made regarding the status of the fetus.[252] For instance, under criminal and property law, a child *en ventre sa mere* (in the mother's womb) was considered to be a human being.[253] On the other hand, negligence theory considered the fetus to be part of the mother and not a distinct entity.[254] As the court stated, "It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world."[255]

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[242] *Id.*
[243] *Id.*
[244] *Bonbrest*, 65 F. Supp. at 140.
[245] Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
[246] *Id.* at 17.
[247] Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. D.C. 1946).
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Bonbrest*, 65 F. Supp. at 141.
[253] *Id.*
[254] *Id.*
[255] *Id.*

The court, in making its claim that an injured fetus may later have standing to sue for damages, looked to the Supreme Court of Canada for guidance.[256] It found the logic of the Court's reasoning to be unassailable:

> If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father my be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.[257]

The court's metaphor of the fetus as a little person has some merit.[258] The majority is correct in claiming that the developed, viable fetus possesses a distinct circulatory system, and has the physical features characteristic of small children.[259] Therefore, it stretches credulity to believe that the fetus is "merely" part of the mother.[260] Moreover, the court was concerned not only with the status of the fetus, but also about being just to the harmed child who possesses no recourse for compensation due to fetal injuries.[261] The court in *Bonbrest* provided yet more judicial ammunition for proponents of the fetus-as-distinct-entity metaphorical view.

A case that arose soon after *Bonbrest* was *People v. Chavez*.[262] This case involved a young woman who was convicted of manslaughter in connection with the death of her newborn child.[263] The fifty-year-old case

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[256] *Id.*
[257] *Bonbrest*, 65 F. Supp. at 141.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] People v. Chavez, 176 P.2d 92 (Cal. App. Ct. 1947).
[263] *Id.* at 92.

echoes several contemporary infanticide cases.[264] In his majority opinion, Judge Barnard noted that under the common law of homicide, a newborn would have to be born alive and completely separated from its mother.[265] The court also noted the difficulty with which one could ascribe humanhood to a newborn: "[t]he mere removal of the baby in such a case or its birth in a normal case does not, of itself and alone, create a human being."[266] The court's view was that a newborn is a human being, regardless as to whether the birth process had been completed.[267] Judge Barnard was critical of the prevailing assumption that a child is not a human being unless fully born, noting that the child during delivery is fully viable and is capable of existence outside of its mother.[268] The court's opinion was yet another challenge to the traditional view of birth as the bright line for humanhood, rather than viability.

A slightly later case that held a fetus to be a "person" was the 1949 case of *Williams v. Marion Rapid Transit*.[269] In this case, Ruth Williams was pregnant and riding on one of the defendant's buses.[270] She fell while getting off the bus, suffering injuries that caused her child to be born prematurely.[271] The child also was injured, suffering from a number of maladies.[272] Again, the question here was whether the child could sue for prenatal injuries, and thus whether the fetus was a person in the eyes of the law.[273] The court cited a section from *American Jurisprudence*:

> It is a general rule of law that in the absence of a statutory provision requiring a different result, a prenatal injury affords no basis for an action in damages in favor of the child. The doctrine of the civil law and the ecclesiastical and admiralty courts that an unborn child may be regarded as in esse for some purposes, when for its benefit, has been characterized as a legal fiction not indulged

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[264] *Id.*
[265] *Id.* at 94.
[266] *Id.*
[267] *Chavez*, 176 P.2d at 96.
[268] *Id.*
[269] Williams v. Marion Rapid Transit, 87 N.E.2d 334, 335 (Ohio 1949).
[270] *Id.* at 335.
[271] *Id.*
[272] The case described the child as "born suffering with heart trouble, and ever since her birth has been anemic and has had spasms, and she has been always, and still is, unable to walk and talk as does a normal person and is in a highly nervous condition; that she is permanently and incurably crippled and will be unable to make a normal gainful living through her lifetime." *Id.*
[273] *Id.*

> in by the courts to the extent of allowing an action by an infant for injuries occasioned before its birth. A reason advanced for this rule is that there is no person in being at the time of the accident to whom the defendant owes a duty of care. There is, however, some difference of opinion on the question.[274]

The majority opinion noted that previous courts would preclude children from suing for prenatal injuries because of the strength of stare decisis.[275] For the court, the ultimate question was whether the injured fetus was a person under the meaning of Article 1, Section 16 of the United States Constitution.[276] The court concluded that at the time of injury, the fetus was viable, and "so far matured that . . . the death of the mother could not have deprived it of life."[277] The court ultimately held that viewing the viable fetus as part of the mother was an unjustified fiction not based on fact.[278]

Another case that deferred to growing medical authority was *Smith v. Brennan*.[279] Here, an infant sued for injuries sustained in a car accident while in utero.[280] Sean Smith, the plaintiff, was born with leg and feet deformities.[281] The state of New Jersey at the time did not recognize a cause of action for prenatal injuries.[282] The New Jersey Supreme Court stated in dicta that courts at the time disagreed with the theory that a fetus was part of the mother, but rather that the infant's existence separate from the mother began before birth.[283] The court went on to state that criminal law treated the unborn child as a separate entity, and that property law accords him status "for purposes beneficial to his interests."[284] Moreover, a posthumous child may recover as a dependent of his deceased father (the thinking being that a child is both a "child in esse" at the time of his father's death and a "posthumous child" when born); an infant child may

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[274]Williams v. Marion Rapid Transit, 87 N.E.2d 334, 335 (1949) (*citing* 52 AM. JUR. 440 § 98).

[275]*Id.* at 336.

[276]*Id.* at 335.

[277]*Id.* at 340.

[278]*Id.*

[279]Smith v. Brennan, 157 A.2d 497 (N.J. 1960).

[280]*Id.* at 498.

[281]*Id.*

[282]*Id.*

[283]*Id.* at 502.

[284]*Smith,* 157 A.2d at 502.

bring an action for wrongful death of its father which occurred before its death.[285]

The court deferred to existing medical authority by stating "that medical authorities recognize that before birth an infant is a distinct entity."[286] The court dismissed the issue as to whether the fetus is a person as "beside the point" because the fetus will indeed become a person (if normal development occurs) when born, and that person will suffer harms due to injuries it received as a fetus.[287] The court finally noted that no court that allowed recovery for an injury to a viable fetus also denied recovery to a child because it survived an injury before it was viable.[288] Therefore, the majority found the viability rule to be of little value.[289] In its view, if a child sustains a harm from an injury suffered while in utero as a fetus, it makes little difference whether the fetus was viable or not.[290]

Later cases, such as *Procanik v. Cillo*[291] addressed the issue of "wrongful life."[292] In this case, the infant plaintiff claimed that the defendant physicians negligently failed to diagnose German measles in his mother.[293] Having been born with congenital rubella syndrome, the plaintiff claimed his parents were deprived of the opportunity to abort him during gestation.[294] The court found that the defendants owed a duty to the infant in this case.[295] The court's language suggested that the infant may have suffered a harm, whereas the fetus that became the infant was only injured.[296] This raises the important distinction between injuries and harms that Judge Proctor alluded to in *Smith v. Brennan*.[297] It seems that only creatures that have interests can be harmed, whereas non-interest-bearing creatures may be injured but not harmed (trees for instance).[298] The court in this case limited its inquiry into the harm suffered by the

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[285] *Id.*
[286] *Id.* at 503.
[287] *Id.*
[288] *Id.* at 504.
[289] *Smith*, 157 A.2d at 504.
[290] *Id.*
[291] Procanik v. Cillo, 478 A.2d 755 (N.J. 1984).
[292] *Id.*
[293] *Id.* at 757.
[294] *Id.* at 760.
[295] *Id.* at 760-64.
[296] *See* Smith v. Brennan, 157 A.2d 497, 499 (N.J. 1960).
[297] Procanik v. Cillo, 478 A.2d 755, 761 (N.J. 1984).
[298] *Id.* at 763.

plaintiff infant and the injury suffered by his preceding fetal life.[299] At one point, the court quotes itself, waxing metaphorically about the harms suffered by one member of a family:

> The foreseeability of injury to members of a family other than one immediately injured by the wrongdoing of another must be viewed in light of the legal relationships among family members. A family is woven of the fibers of life; if one strand is damaged, the whole structure may suffer. The filaments of family life, although individually spun, create a web of interconnected legal interests. This Court has recognized that a wrongdoer who causes a direct injury to one member of the family may indirectly damage another.[300]

The metaphor that a family is a web suggests the interconnectedness as well as the fragility of that organization. Conversely, the court could have described the "chain links" of family life rather than filaments. Filaments suggest something easily broken, whereas links convey something much harder to break. Moreover, the implicit metaphor is that each family member is an individual spider, spinning his or her own web. Each of these webs interconnect, creating an even larger web. Thus, each family member feels any damage done to any part of the web, regardless of its origin. Moreover, this passage raises the issue as to whose interests have been undermined. It seems that the court is focusing its inquiry on the harms suffered by the infant, and not the injury suffered by the fetus.

The issue of whether a fetus is a person was again addressed in the 1991 case *Johnson v. State of Florida*.[301] This was the first time a prosecutor successfully prosecuted a pregnant woman for prenatal damage to a fetus.[302] In the appellate case, Jennifer Clarise Johnson was appealing two prior convictions of delivering controlled substances to a minor.[303] While pregnant, Johnson ingested cocaine, knowing this would pass to her gestating fetus.[304] The applicable Florida statute read:

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[299] *Id.*

[300] *Id.* at 762-63 (*quoting* Schroeder v. Perkel, 432 A.2d 834, 839 (N.J. 1981)).

[301] Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991).

[302] Julia Epstein, *The Sacred Body in Law and Literature: The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 141 (1995).

[303] *Johnson*, 578 So. 2d at 419.

[304] *Id.*

> [I]t is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter.[305]

Judge Cobb, concurring with the majority opinion of the court, stated that when Johnson ingested cocaine and passed it along to her child, the "infants were 'persons.'"[306] Cobb made the claim that the cocaine was transmitted when the infants were newly born, and not when they were still in utero.[307] Moreover, he claimed that although Florida law does not criminalize transmission of cocaine to a fetus, it does criminalize transmission of cocaine from one person to another.[308] Johnson used cocaine within forty-eight hours of delivering her baby, and therefore Cobb surmised that she had the necessary intent of transmitting cocaine to a live person, and not just a fetus in utero.[309]

As Judge Sharp elaborated in his dissenting opinion, the transmission time was limited to the moment the baby was fully delivered from the mother's vaginal canal to the moment the baby's umbilical cord was cut, roughly sixty to ninety seconds.[310] Sharp, however, challenged the view that cocaine was delivered from mother to infant in that minute and a half.[311] He stated that the blood that flowed through the umbilical cord was the child's and not part of the mother's body.[312]

In 1992, the Supreme Court overturned the lower court's decision.[313] By the early 1990s, nearly 200 women had been prosecuted for drug use during pregnancy.[314] Although many pleaded guilty, the ones who have

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[305]*Id.* (*citing* FLA. STAT. ANN. § 893.13 (1)(c)).

[306]*Id.* at 420.

[307]*Id.* at 420-21.

[308]Johnson v. State, 578 So.2d 419, 420-21 (Fla. Dist. Ct. App. 1991).

[309]Judge Cobb mentions that there was even some evidence that Johnson used cocaine while in labor, further supporting his view that Johnson had the necessary intent. *Id.*

[310]*Id.* at 421.

[311]*Id.*

[312]*Id.* at 422.

[313]Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

[314]Angela L. Knutson, *South Carolina Supreme Court Sends the Wrong Message: If You Are Pregnant and Addicted Tell Your Doctor and You Will Go to Jail*, 20 HAMLINE L. REV. 207, 208 (1996) (*citing* Lynn M. Paltrow, *Criminal Prosecutions Against Women: National Update and Overview* (1992)).

challenged their prosecutions have been successful.[315] Dorothy Roberts has argued that "[t]hese women are not punished simply because they may harm their unborn children. They are punished because the combination of their poverty, race, and drug addiction is seen to make them unworthy of procreating."[316]

Johnson not only exemplifies the venerable person metaphor of the fetus, but also introduces a new metaphor—that of an adversary. As Epstein has noted:

> [s]uch prosecutions necessarily vest fetuses with the status of persons whose rights can be asserted against the rights of their mothers, thereby interpreting an adversarial relation between pregnant women and their fetuses. The legal notions of fetal personhood is relatively new in our legal discourse, and, ironically, results in part from the 1973 United States Supreme Court decision on abortion in *Roe v. Wade*.[317]

Roe v. Wade Influence

Most of the previous cases addressed the status of the fetus vis-à-vis its standing to sue for prenatal injuries, although some focused on its status within a criminal context. This question of the fetus's legal status persisted as an issue in the long line of well-known abortion cases of the last quarter century. Starting with *Roe v. Wade*,[318] the Court looked to a variety of sources to determine the status of the fetus.[319] Justice Blackmun's majority opinion in *Roe* looked to ancient attitudes, the Hippocratic oath, common law, English statutory law, American law, the American Medical Association, as well as the American Public Health Association and the American Bar Association for guidance on this topic.[320] The majority concluded that ancient authorities held liberal attitudes toward abortion, with the exception of the Pythagoreans.[321] By the early Middle Ages, however, Christian sensibilities toward the unborn

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[315] *Id.*; *see also* Epstein, *supra* note 38, at 141.

[316] Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1472 (1991).

[317] Epstein, *supra* note 38, at 142.

[318] Roe v. Wade, 410 U.S. 113, 130 (1973).

[319] *Id.* at 132-57.

[320] *Id.*

[321] *Id.*

coincided with the ancient views of the Pythagoreans.[322] Augustine distinguished between the embryo inamatus (soulless embryo) and embryo animatus (ensouled embryo).[323] Aquinas developed his 40/80 day distinction for male and female formation.[324] And early British commentators such as Blackstone and Coke made distinctions based on quickening.[325] Blackmun noted the confusion surrounding Coke's pronouncements that the killing of a quickened child is "a great misprision, and no murder."[326] Although many American courts followed the rule that the killing of an unquickened fetus was not criminal, others went further and held that the killing of even a quickened child was not murder but rather a great misdemeanor ("misprision").[327]

The court also acknowledged English statutory law that preserved the quickening distinction in the nineteenth century.[328] The American common law received the English common law; for instance, Connecticut criminalized abortion before quickening in 1860.[329] New York more severely punished the killing of a quickened fetus.[330] Although the quickening distinction was preserved throughout the first half of the 19th century, by the end of the century, the distinction disappeared and penalties increased.[331] By the 20th century, almost all jurisdictions prohibited abortion, except to save the life of the mother.[332]

In the 19th century, the American Medical Association (AMA) wanted to expose the fallacy that a fetus was not alive until quickening.[333] In 1859, the AMA pointed to the inconsistency with which the law treated the fetus in utero: rights-bearing for civil purposes yet a non-entity for criminal protection.[334] The major challenge in the 20th century was to recognize some sort of civil status for the fetus when injured prenatally.[335]

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[322]*Id.* at 132.

[323]*Roe*, 410 U.S. at 134.

[324]*Id.* (this distinction stated that ensoulment occurred after 40 days of development for a male fetus and 80 days for a female fetus).

[325]*Id.*

[326]*Id.* at 135.

[327]*Id.* at 136.

[328]*Roe*, 410 U.S. at 138.

[329]*Id.*

[330]*Id.*

[331]*Id.* at 139.

[332]*Id.* at 140.

[333]*Roe*, 410 U.S. at 141.

[334]*Id.*

[335]*Id.* at 162.

The law did impute a fictitious legal standing for property purposes, but did not start to recognize the fetus as a being that could later sue for damages. Of course, by that time, killing the unquickened fetus was a criminal offense in nearly all American jurisdictions.[336]

It is interesting to note that no amicus brief of philosophers is cited in the *Roe* decision. In the 1970s, a variety of American philosophers were struggling with the status of fetal life, notably Michael Tooley, Mary Anne Warren and Judith Jarvis Thompson.[337] The Court primarily looked to three major sources of authority for guidance on this issue: theological writings, common law holdings, and medical findings.[338] Contemporary thinking on the matter by bioethicists and philosophers was noticeably absent in the majority opinion. No criteria of personhood, often debated in the bioethics literature, was ever mentioned in the opinion.

With all of this information in mind, the Court did not view the fetus to be a person within the meaning of the U.S. Constitution.[339] The Court acknowledged the differing views on the subject:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the state has a compelling interest in protecting that life from and after conception. 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.[340]

Because of the inconsistent manner that the law has treated the unborn, and because so many exceptions exist for the practice of abortion, the Court was unconvinced that the fetus was a legal person.[341] In fact, the Court cited a long list of cases from the 1960s and 1970s that held a

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[336] *Id.* at 138.

[337] *See* Marjorie M. Schultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79 (1992).

[338] *Roe*, 410 U.S. at 132-57.

[339] *Id.* at 159.

[340] *Id.*

[341] *Id.*

similar view.[342] Moreover, the Court noted the lack of consensus among different disciplines regarding when life began.[343] Theological authorities differed as to when human life began, common law believed quickening was the significant event, and medical authorities focused on conception, viability and live birth as significant defining events.[344] Although the Court dismissed the person metaphor, it was more persuaded by the pathway metaphor.[345] This metaphor of a path or line or continuum has become a very attractive metaphor for both the courts and for academics in describing the status of the fetus.

A case that was decided three years after *Roe* exemplified the difference between the appendage metaphor and person metaphor. In *Commonwealth v. Edelin*,[346] Dr. Kenneth Edelin performed an abortion by hysterotomy on a seventeen-year-old girl at Boston City Hospital.[347] Dr. Edelin was indicted for the death of the fetus in this case.[348] The Commonwealth prosecutor argued that when the fetus became detached from the placenta, it became a person within the state's manslaughter statute.[349] The defense argued that this charge distorted the state's manslaughter statute, not to mention avoiding the constitutionality of *Wade-Bolton*.[350] The defense concluded that the fetus had to emerge completely from the mother's body before a charge of manslaughter could attach.[351] The trial court reasoned as follows:

> A fetus is not a person, and not the subject of an indictment for manslaughter. In order for a person to exist, he or she must be born. Unborn persons, as I said, are not the subject of the crime of manslaughter. Birth is the process which causes the emergence of a new individual from the body of its mother. Once outside the

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[342]*See generally* McGarvey v. Magee-Women's Hosp., 340 F. Supp. 751 (W.D. Pa. 1972); Byrn v. New York City Health & Hosps. Corp., 286 N.E.2d 887 (N.Y. 1972); Abele v. Markle, 351 F. Supp. 224 (D.C. Conn. 1972); Cheaney v. State, 285 N.E.2d at 270; Montana v. Rogers, 278 F.2d 68, 72 (Cal. 1960), *aff'd sub nom.* Montana v. Kennedy, 366 U.S. 308 (1961); Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970); State v. Dickinson, 275 N.E.2d 599 (Ohio 1971).

[343]*Roe*, 410 U.S. at 159.

[344]*Id.* at 160.

[345]*Id.*

[346]Commonwealth v. Edelin, 359 N.E.2d 4, 24-25 (Mass. 1976).

[347]*Id.* at 6.

[348]*Id.*

[349]*Id.*

[350]*Id.*

[351]*Edelin*, 359 N.E.2d at 24.

> body of its mother, the child has been born within the commonly accepted meaning of that word.[352]

Unfortunately for Dr. Edelin, a unanimous jury found him guilty.[353] He was given a one-year probation, which was reversed by the Supreme Judicial Court in 1976.[354] Despite this turn of events, one commentator noted that this conviction of a physician for manslaughter "sent shock waves through the medical and legal communities."[355] The person metaphor was strongly conveyed to the jurors by images of the fetus.[356]

A 1995 case, *Farley v. Sartin*,[357] brought up the person metaphor yet again.[358] In this case, Cynthia Farley was pregnant anywhere from eighteen weeks to twenty-two weeks.[359] Billy Sartin, the defendant, collided into her car, killing both Cynthia and her fetus.[360] Cynthia's husband, Kenneth, filed a wrongful death action on behalf of Cynthia's fetus (referred to as "Baby Farley" throughout the majority opinion).[361] The defendants argued that Cynthia's fetus was not a person under the wrongful death statutes, and thus there was no cause of action.[362] The court surveyed the history of wrongful death and prenatal torts, noting that one popular view that denied recovery for the tortious death of a viable unborn child was the "single entity" theory that was first raised in *Dietrich*.[363] This "single entity" theory is similar to the appendage metaphor. The majority noted that medical science has disproved this theory and it has been rejected by most jurisdictions.[364] Moreover, the court observed that with the exception of Georgia and Missouri, no cases

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[352]*Id.* at 24-25.
[353]*Id.*
[354]*Id.*
[355]MAYNARD-MOODY, *supra* note 1, at 68.
[356]Commonwealth v. Edelin, 359 N.E.2d 4124 (Mass. 1976); *see also* MAYNARD-MOODY, *supra* note 1, at 68 (*citing* Barbara Culliton, *Edelin Trial: Jury Not Persuaded by Scientists for the Defense*, Science 187 (1975)), ("The jurors reported that they were shaken by the photograph. 'It looked like a baby,' Liberty Ann Conlin told reporters, '. . . it definitely had an effect on me.' Paul Holland commented, 'The picture helped people draw their own conclusions. Everyone in the room made up their minds that the fetus was a person.'")).
[357]Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995)
[358]*Id.* at 522.
[359]*Id.* at 523.
[360]*Id.*
[361]*Id.* at 524.
[362]*Farley*, 466 S.E.2d at 530.
[363]*Id.* at 533-34.
[364]*Id.*

have allowed recovery for injury prior to viability unless there is a live birth.[365] The court concluded that an injustice is committed if a tortfeasor is not punished because "the unborn child had not yet reached viability at the time of death."[366]

Interestingly, the majority stated that the definition of person within the confines of wrongful death statutes does not run afoul of the definition within abortion cases.[367] The court cited one judge who stated:

> The decision to allow abortion does not depend on the same policies and justifications as does the decision to allow a cause of action for the wrongful death of a fetus. While the fetus may not be a 'person' for the purposes of the fourteenth amendment, it may be a 'person' for the purposes of a state's wrongful death statute. Furthermore, while a woman's right to privacy is the policy involved in the abortion decision, the policy that a tortfeasor should not escape liability is involved in the wrongful death decision. One decision does not solve the controversy of the other.[368]

A more recent case that exemplified the child metaphor of the fetus was the 1997 case *Whitner v. State of South Carolina*.[369] In this case, Cornelia Whitner pled guilty to criminal child neglect for causing her baby to be born with cocaine in its system.[370] During her third trimester of pregnancy, Whitner consumed crack and was sentenced to eight years in prison.[371] In Whitner's petition for post conviction relief, she claimed ineffective assistance of counsel because her lawyer failed to advise her the statute she was prosecuted under may not apply to prenatal drug use.[372] Her petition was granted but the state appealed.[373] The statute in question read as follows:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to

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[365] *Id.*
[366] *Id.*
[367] *Farley*, 195 W.Va. at 534.
[368] *Id.* at 534-35.
[369] Whitner v. State, 492 S.E.2d 777 (S.C. 1997).
[370] *Id.* at 780.
[371] *Id.*
[372] *Id.* at 782.
[373] *Id.*

> provide . . . the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.[374]

The court noted that "child" under the state's Children's Code means any person under the age of eighteen.[375] Thus, the court focused on whether a fetus is a person.[376] The court observed that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges."[377] The court specifically cited a 1960 case, *Hall v. Murphy*,[378] where a newborn died four hours after birth due to prenatal but post-viable injuries.[379] The court in *Hall* found that the appellants' claim that the fetus was merely an appendage to the mother to be "unsound, illogical and unjust" and found no medical basis for the assumed identity of mother and child.[380] The court concluded that a viable fetus is not a mere appendage but is indeed a child.[381] The *Whitner* court looked to other cases that asserted the same person metaphor: that a viable fetus is a person.[382] Throughout the opinion, Justice Toal referred to the unborn viable child.[383] He surveyed a number of cases from other states, noting that not all states construe a fetus as a child, whether or not it is viable.[384] In Massachusetts, for example, the Superior Court found two cases (*Commonwealth v. Cass*[385] and *Commonwealth v. Lawrence*[386]) to "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated."[387] The *Whitner* court was not persuaded by this line of

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[374] *Whitner*, 492 S.E.2d at 782.
[375] *Id.*
[376] *Id.*
[377] *Id.* at 785.
[378] 113 S.E.2d 790 (S.C. 1960).
[379] *Id.*
[380] *Id.*
[381] *Id.*
[382] *Whitner*, 492 S.E.2d at 785.
[383] *Id.*
[384] *Id.*
[385] 467 N.E.2d 1324 (Mass. 1984).
[386] 536 N.E.2d 571 (Mass. 1989).
[387] *Whitner*, 492 S.E.2d at 783 (*citing* Commonwealth v. Pelligrini, No. 87970, slip op. (Mass. Super Ct. 1990)).

argument.[388] The court found no ambiguity in the statute and no ambiguity with the word "person."[389] Justice Finney reflected his incredulity in his dissenting opinion.[390] Finney claimed that the word "child" in the statute means a child in being and not a fetus.[391] He outlined two important points: the child abuse statute imposes criminal liability upon a person who has legal custody of a child (a concept inapplicable to a fetus) and statutory harms that are criminalized can only be directed toward a child and not a fetus.[392]

Finally, it is worth noting one more case that addressed the "person" status of a fetus. In *Douglas v. Town of Hartford*,[393] Rosalee Douglas was nearly six months pregnant.[394] She was hit so hard by a police officer that the blows caused serious physical injuries to her baby, Paul Douglas.[395] The plaintiff argued that her fetus was a person within the meaning of 42 U.S.C. § 1983 and was due damages under the statute.[396] The court noted that although several federal courts had ruled that a fetus is not entitled to civil rights and constitutional protections under Sec. 1983, the trend in the state courts was to expand the rights of the fetus in a wide variety of contexts.[397]

LEGAL STATUS OF EMBRYONIC LIFE

Each of the previous cases addressed the status of fetal life. The legal status of early embryonic life suddenly became an issue in the 1970s and 1980s. An early case was *Del Zio v. Presbyterian Hospital*.[398] In this case, the Del Zios underwent IVF treatment.[399] Dr. William Sweeney of New York Hospital performed the procedure.[400] One day after the fertilized ova was placed in the incubator, Dr. Vande Wiele, Chairman of

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[388]*Id.* at 785.
[389]*Id.*
[390]*Id.*
[391]*Id.*
[392]*Whitner*, 492 S.E.2d at 787.
[393]Douglas v. Town of Hartford, 542 F. Supp. 1267, 1269 (D.C. Conn. 1982).
[394]*Id.*
[395]*Id.*
[396]*Id.*
[397]*Id.*
[398]Del Zio v. Presbyterian Hosp., 1978 U.S. Dist. LEXIS 14450, at *1 (1978).
[399]*Id.*
[400]*Id.*

Obstetrics/Gynecology of Columbia ordered the contents of the test tube to be destroyed.[401] Dr. Wiele was concerned about the safety of the procedure, as well as the competence of Dr. Sweeney.[402] The plaintiffs sued both for intentional infliction of emotional distress as well as conversion of property.[403] Although the court did not squarely address the status of the embryo in this case, the plaintiff's conversion theory strongly suggests that they treated the embryo as their property, rather than as a person.[404]

Some philosophers, notably Engelhardt, have defended the notion of viewing embryonic material as property.[405] For instance, he states that we could imagine ourselves buying and selling zygotes as if they were products.[406] He regards the fetus "as a special form of very dear property . . . [and that] privately produced embryos and fetuses are private property."[407] The metaphor of the embryo as private property frames the issue of fetal life very differently than if we think of the fetus as a potential murder victim or a potential plaintiff. Although *Del Zio* reflects this view, other cases depart from viewing embryos strictly as property. *Davis v. Davis* is perhaps the most famous case that attempted to assess the status of frozen pre-embryos.[408] The Supreme Court of Tennessee held that the fate of a couple's fertilized ova, which the court called "pre-embryos," should ordinarily be decided by "the party wishing to avoid procreation" if the other party has the reasonable possibility of achieving parenthood by other means and the parties have not made an agreement regarding their disposition.[409] Being a case of first impression, there was little legislative guidance available.[410]

In this case, Mary Sue Davis and Junior Davis were in the throes of a divorce.[411] The only area of contention between the Davises was the disposition of seven frozen embryos as part of the dissolution of their

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[401] *Id.*
[402] *Id.*
[403] *Del Zio*, 1978 U.S. Dist. LEXIS 14450, at *1.
[404] *Id.*
[405] *Id.*
[406] ENGELHARDT, *supra* note 55, at 156.
[407] *Id.* at 255.
[408] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
[409] *Id.*
[410] *Id.* at 589.
[411] *Id.*

marriage.[412] Mary Sue Davis wanted control of the embryos to implant them later; Junior Davis opposed this plan, arguing that he wanted to keep the embryos frozen until he decided whether he wanted to later become a father outside of marriage.[413] The trial court ruled in favor of Mary Sue Davis, stating that the embryos were human beings from conception.[414] The Court of Appeals, however, reversed the lower court's ruling, stating that it violated Junior Davis's constitutional rights not to procreate where no pregnancy took place.[415] The Court of Appeals eventually awarded the parties with joint control of the embryos.[416]

By the time the Supreme Court of Tennessee reviewed the case, the two parties again changed their views about the fate of the embryos.[417] Mary Sue (who was now remarried) wished to donate them; Junior wanted to discard them.[418] In the absence of any cryopreservation disposition agreement between the parties, as well as a complete lack of any case law to guide the court, this was a case of first impression.[419]

In reviewing the trial court's opinions, the court acknowledged the differences in status that are suggested by using different labels in trying to describe prenatal life, such as pre-embryo, embryo, fetus and so forth.[420] The court also cited the testimony of Dr. Jerome Lejeune, a French geneticist. Dr. Lejeune frequently referred to the four-cell pre-embryos as "early human beings," "tiny persons," and "kin."[421] Dr. Irving King, the fertility specialist who treated Mary Sue, countered Dr. Lejeune's contention, calling the entity up to fourteen days a pre-embryo.[422]

The trial court was persuaded by Dr. Lejeune's testimony, agreeing with his assertion that the distinction between pre-embryos and embryos was an artificial one and that the eight-cell entities in question were indeed "children in vitro."[423] The trial court awarded custody of the pre-embryos

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[412] *Id.*
[413] *Davis*, 842 S.W.2d at 589.
[414] *Id.*
[415] *Id.*
[416] *Id.*
[417] *Id.* at 590.
[418] *Davis*, 842 S.W.2d at 590.
[419] *Id.*
[420] *Id.* at 592-93.
[421] *Id.* at 593.
[422] *Id.*
[423] *Davis*, 842 S.W.2d at 594.

to Mary Sue, arguing that in their "best interests" they should be allowed to be born.[424]

Although Mary Sue abandoned her argument regarding the pre-embryos' right to be born, the American Fertility Society, among other organizations, persuaded the Tennessee Supreme Court to consider this issue of the pre-embryos' status.[425] The court embraced the lower court's ruling in this matter.[426] For instance, the Court of Appeals reasoned that a Tennessee wrongful death statute required live birth before a wrongful death action could take place.[427] Being a viable fetus without live birth is simply not enough, in this court's eyes.[428] Moreover, the court had held in a number of cases that live birth must occur in order for a fetus to become a person.[429]

The court also looked to Tennessee statutes, which reflected the trimester approach of *Roe v. Wade*.[430] The court noted that this approach gave embryos a greater status as they developed, but that even after viability, fetuses did not merit the same respect as live infants.[431] The court also noted that Tennessee's murder and assault statutes criminalized an attack or homicide of a viable fetus.[432]

The court then cited both *Roe v. Wade* and *Webster v. Reproductive Health Services*.[433] The court held that the unborn have never been regarded as "persons in the whole sense."[434] Although the court agreed with this view, the court was troubled by the intermediate court's awarding of joint custody of the pre-embryos to both parties.[435] The court found fault with the intermediate court's reliance on the Tennessee statutes modeled after the Uniform Anatomical Gift Act.[436] The court

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[424] *Id.*

[425] *Id.*

[426] *Id.*

[427] *Id.* at 594-95.

[428] *Davis*, 842 S.W.2d at 595.

[429] *Id.* at 594-95 (*citing* Hamby v. McDaniel, 559 S.W.2d 774, 777 (Tenn. 1977); Durrett v. Owens, 371 S.W.2d 433, 434 (Tenn. 1963); Shousha v. Matthews Drivurself Serv., 358 S.W.2d 471, 476 (Tenn. 1962); Hogan v. McDaniel, 319 S.W.2d 221, 244 (Tenn. 1958)).

[430] *Id.* at 595.

[431] *Id.*

[432] TENN. CODE ANN. § 39-13-107, 214 (1998).

[433] *Davis*, 842 S.W.2d at 595 (*citing* Roe v. Wade, 410 U.S. 113 (1973); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)).

[434] *Id.* (*citing* Roe v. Wade, 410 U.S. 113, 162 (1973)).

[435] *Id.* at 595.

[436] *Id.* at 596 (*citing* TENN. CODE ANN. § 68-30-101 to 68-30-111 (1998)).

made the distinction between the status of tissue (which the statutes cover) and the status of the embryo.[437] The court argued that the statutes did not cover the pre-embryos because of their potential for life.[438]

The court was also troubled by the lower court's reliance on *York v. Jones*.[439] In this case, a couple sued the Jones Institute for Reproductive Medicine in Virginia because the Institute refused to transfer their "frozen embryo" to a California fertility clinic.[440] Because there was a cryopreservation agreement between the parties, the court argued that this created a bailment relationship.[441] In relying on this case, however, the intermediate court failed to define the interest Mary Sue and Junior Davis had in their pre-embryos.[442] It did imply, however, that the Davises had a property interest in their pre-embryos.[443]

The status of frozen embryos emerged again in the 1997 case *Kass v. Kass*.[444] The Kasses underwent IVF treatment at a Long Island IVF facility and executed a cryopreservation disposition agreement.[445] In the agreement, they stated that in the event of a divorce legal ownership of the zygotes would be determined in a property settlement.[446] The Kasses eventually filed for divorce.[447] Maureen Kass wanted sole custody of the pre-embryos.[448] Steve Kass wanted the IVF program to retain the pre-embryos for study and research.[449] The trial court awarded Mrs. Kass custody of the pre-embryos.[450] The court reasoned that the pre-embryos were not mere property but still did not have the status of persons.[451] Moreover, the court determined that the father's procreative rights in this situation were no greater than in a conventional *in vivo* fertilization, and therefore the woman had sole discretion to their disposition.[452] The court

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[437] *Id.*
[438] *Davis*, 842 S.W.2d at 596.
[439] *Id.* (*citing* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989)).
[440] *York*, 717 F. Supp. at 424.
[441] *Id.* at 425.
[442] *Id.*
[443] Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992).
[444] Kass v. Kass, 235 A.D.2d 150 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).
[445] *Id.* at 151.
[446] *Id.* at 152.
[447] *Id.* at 153.
[448] *Id.*
[449] *Kass*, 235 A.D.2d at 153.
[450] *Id.* at 154.
[451] *Id.*
[452] *Id.*

also determined that the agreement the Kasses executed was not dispositive; it ultimately gave Mrs. Kass the exclusive control of the pre-embryos.[453] The appellate court disagreed and found that the Kasses' informed consent document reflected the couples' mutual intent.[454] The Court of Appeals of New York, reviewed the case and rendered a decision in May of 1998.[455] This court affirmed the appellate court's decision that the Kasses' cryopreservation agreement controlled the fate of the frozen embryos.[456] This view seems to be in accord with the view proposed by John Robertson that progenitors hold a "bundle of rights" with regard to the pre-embryos.[457] This bundle can be exercised through the use of disposition agreements, as in this case.[458] The court quickly dismissed the person metaphor, stating that pre-zygotes are not persons for constitutional purposes: "The relevant inquiry thus becomes who has dispositional authority over them. Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to 'special respect.'"[459]

Once again, this case exemplified the property metaphor of the embryo. In response to the opinion, John Kerry, executive director of the New York State Catholic Conference stated: "I think the fundamental problem here is that the unborn children are being treated as if they were products, not human beings with all the attendant sanctity and dignity attributable to human life."[460] On the other hand, Janet Benshoof, president of the Center for Reproductive Law and Policy argued: "The court is honoring the contract and not treating frozen embryos as though they are a special class of property that fall outside of contract law. It's a very good opinion. It's straightforward. It uses contract law and gives guidance to everyone in the field."[461]

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[453] *Id.*
[454] *Kass*, 235 A.D.2d at 154.
[455] Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).
[456] *Id.* at 175.
[457] *Id.* at 179.
[458] *Id.*
[459] *Id.*
[460] Raymond Hernandez, *Court Blocks Use of Embryos Without Ex-Husband's Consent*, N.Y. TIMES, May 8, 1988, at B2.
[461] *Id.*

Moral Status of Embryonic Life

In addressing the status of the embryo, one must be careful about a few things. First, one should understand the scientific facts. Can biological distinctions be drawn between the pre-embryo, the embryo and the fetus? Do these differences matter morally or legally or both? Second, one should ask whether these entities have a different status ex utero. *Roe v. Wade* only considered the status of the fetus in utero, whereby a woman's privacy interests had to be addressed.[462] But is there a difference between a pre-embryo *in utero* and a frozen pre-embryo stored *ex vivo* in a fertilization clinic?

The pre-embryo develops during the first two weeks after fertilization.[463] After fertilization, which occurs in the ampulla of the oviduct, the first cleavage divisions occur (consisting of 2 to 16 cells).[464] The zygote is then termed a blastocyst.[465] By the fourth day of development, the blastocyst is free in the uterus.[466] By the fifth to sixth day, the blastocyst hatches and begins implanting.[467] During the next few days, the blastocyst is fully implanted.[468] And by the thirteenth or fourteenth day, the primary stem villi as well as the primitive streak appears.[469] According to Larsen:

> The appearance of the primitive streak established the longitudinal axis and thus the bilateral symmetry of the future adult: the tissues to the right of this structure give rise to the right side of the body, and the tissues to the left of it give rise, in general, to the left side of the body.[470]

In *Davis*, the Tennessee Supreme Court made a distinction between the pre-embryo and embryo based on the point of pluripotency.[471] Only

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[462]According to John Robertson, *Roe v. Wade* has no impact on the legal status of the embryo ex utero. Abortion law never applied to the destruction of embryos before pregnancy occurs, therefore Roe need not be reversed for states to protect extracorporeal embryos. JOHN ROBERTSON, CHILDREN OF CHOICE 104 (1994).

[463]*Id.*

[464]*Id.*

[465]*Id.*

[466]*Id.*

[467]ROBERTSON, *supra* note 462.

[468]*Id.*

[469]*Id.*

[470]WILLIAM J. LARSEN, ESSENTIALS OF HUMAN EMBRYOLOGY 49 (1998).

[471]Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992).

when the cells of the pre-embryo lose their ability to form any type of cell (pluripotency) and start to form the different structures of the embryo, does the pre-embryo become an embryo.[472] *Davis* held that the entity that exists before the development of embryonic structures, the pre-embryo, should have a different legal status from that of the embryo.[473] The court rejected the argument that the embryo and pre-embryo should have the same legal status because both have identical genetic structures.[474] The court understood that "certain features of the pre-embryo — its lack of a nervous system, its ability to turn into more than one individual, and its inability to develop without further intervention (transfer to a uterus) — justify ascribing to the pre-embryo a different moral status from that of the implanted embryo."[475] One legal commentator points out, however, that a pre-embryo's genetic information is determined at conception, regardless of whether that pre-embryo splits into twins.[476] This view is echoed by Clifford Grobstein, a retired embryologist, who argues that "the pre-embryo is unquestionably human in biological terms."[477] He contends that the scientific definition of a human requires a certain number, size and shape of chromosomes, a certain sequence of nucleotides in its DNA, and a certain sequence of amino acids in its proteins.[478] He thinks that the pre-embryo meets all of these requirements, and therefore, is biologically human.[479] Unfortunately, Grobstein seems a bit confused when he asserts that being a human is at least a minimal requirement for personhood. As many philosophers have argued, to be a person does not require membership in the species *Homo Sapiens*. Personhood has a variety of psychological requirements that could be met with an entity with a different biological structure (such as E.T.) or no biological structure (such as HAL from *2001: A Space Odyssey*).

In addition to having a unique genetic structure, Grobstein argues that pre-embryos are undoubtedly alive.[480] They exchange respiratory gases,

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[472]Vicki G. Norton, *Unnatural Selection: Nontherapeutic Reimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1634 (1994).

[473]*Id.* (*citing Davis*, 842 S.W.2d at 596-97).

[474]*Id.* (*citing Davis*, 842 S.W.2d at 593).

[475]STEINBOCK, *supra* note 6 at 215.

[476]Norton, *supra* note 472 at 1635.

[477]CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN 65 (1988).

[478]*Id.*

[479]*Id.*

[480]*Id.* at 66.

metabolize chemicals and will continue to divide.[481] Even at this low-level of organization, Grobstein argues that these cells are unique because of their capability to divide many times and to specialize into more complex cell structures.[482] Moreover, he states that this ability of the pre-embryo to grow points to a "profound potential" of the pre-embryo to become an "undeniable person."[483] This language goes beyond the language of the American Fertility Society (AFS).[484] The AFS's policy statement concerning the status of the pre-embryo suggests that it is not even human life.[485] But Grobstein contends that the pre-embryo is undeniably human in its genetic structure and alive.[486]

Perhaps the strongest criticism against the use of the term pre-embryo has come from John Marshall, a clinical neurology professor and a member of the Warnock Committee:

> The term "pre-embryo" was not heard of prior to all of this debate [on embryo experimentation]. From the time of fertilization up to about the eighth week the entity was called "embryo." Suddenly this term "pre-embryo" is now in every paper and every symposium. Some scientists are saying that they had been thinking along these lines already in 1975. It is surprising that if they had been thinking about it as far back as 1975, they never actually used the term until now. It seems like a public relations manoevre to make people think that the experts are against embryo experimentation, but that it is alright to experiment on the "pre-embryo" as if the latter was somehow different.[487]

This discussion reveals that there is not only confusion as to pre-embryos' moral and legal status, but that there is also some debate over their biological status. Grobstein argues that pre-embryos are, in fact, alive and genetically human.[488] But so what? As George Annas has stated, if a fire broke out in a laboratory where pre-embryos were stored and where a two-month old baby was trapped, and there was only enough time to save the

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[481] *Id.*
[482] GROBSTEIN, *supra* note 477, at 66.
[483] *Id.* at 67.
[484] *Id.* at 94-95.
[485] *Id.*
[486] *Id.* at 66-67.
[487] STEINBOCK, *supra* note 6, at 214.
[488] GROBSTEIN, *supra* note 477, at 66-67.

baby or the pre-embryos, but not both, who would forsake the baby to save the pre-embryos?[489] As Steinbock notes, these kinds of sentiments strongly suggest that no one equates pre-embryos with children, or even pets.[490]

Even if Grobstein is correct that a human life exists within the pre-embryo, when does this human life begin? At fertilization? Robert Edwards, the embryologist who collaborated with Patrick Steptoe on the first "test tube" baby, questions the assumption that fertilization confers human status.[491] Does this matter in the discussion as to whether pre-embryos are persons or property? The answer depends upon what set of criteria is used for such concepts as personhood and property. The metaphors we use strongly shape our moral sentiments toward certain creatures, whether person or property.

The concepts of personhood and property are idealized and abstract. We tend to associate personhood with biological humans, and similarly, we tend to associate property with non-human entities (whether alive or inanimate). These assumptions, however, are faulty and inadequate in assessing the moral worth of certain entities. Ronald Dworkin, for instance, does not think the issue of personhood is that crucial.[492] He develops two interests, derivative and detached, to protect human life.[493] A derivative interest would claim that a fetus is a person from the moment of conception and that it should be protected from that moment onward.[494] A detached interest protects the intrinsic value of human life, but not any particular human life.[495] Dworkin subscribes to the second interest.[496] Dworkin believes that the derivative-interest folks are engaging in a contradiction when they argue that fetuses are persons, yet permit abortions in the cases of rape or incest.[497] This is because it is never morally permissible to take the life of a person (except in self-defense).[498] Therefore, derivative interest folks do not really believe the fetus is an

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[489] STEINBOCK, *supra* note 6, at 215.

[490] *Id.*

[491] ROBERT EDWARDS, LIFE BEFORE BIRTH: REFLECTIONS ON THE EMBRYO DEBATE 49-54 (1989).

[492] RONALD DWORKIN, LIFE'S DOMINION 13 (1994).

[493] *Id.*

[494] *Id.*

[495] *Id.*

[496] *Id.* at 12-24.

[497] DWORKIN, *supra* note 492, at 32.

[498] *Id.*

actual person.[499] Rather, Dworkin argues that everyone condemns abortion (even pro-choice folks) because of the detached interest view.[500] We all (or almost all) treat human life as sacred, and think "it is intrinsically a bad thing, a kind of cosmic shame, when human life at any stage is deliberately extinguished."[501] Dworkin expands his theory beyond just human life to encompass endangered species of animals.[502] He states again that "[w]e consider it a kind of cosmic shame when a species that nature has developed ceases, through human actions, to exist."[503] Although this article also reaches Dworkin's ultimate conclusion, it diverges from his in that it holds that a fetus primarily derives its moral status from persons in a strict sense because it is some form of human life. In a derivative framework, pet animals have moral statuses similar to human fetuses, not because of biologies, but because animal pets are persons in a weak social sense (as construed by persons in a strict sense). Moreover, this view avoids certain metaphysical overtones entailed by the use of "sacred" which has strong religious roots. It is a secular argument that attempts to bridge parochial differences over the status of the embryo.

It is unnecessary for a person to be biologically human. If we are going to abide by the criteria set forth by philosophers such as Tooley, Warren and Engelhardt, then personhood does not entail biological humanhood.[504] Thus, a creature with a very different genetic structure can be classified as a person. Conversely, property need not exclude something that is biologically human.

Although laypersons often refer to property as "things," legally, property has a more refined meaning. As one commentator has noted, "property-as-thing" confuses for two reasons: "property-as-thing" is not the same as subjects of property, and "property-as-thing" neglects to encompass intangible subjects of property.[505] It is a "dynamic" rather than a static set of rights. Property, then, is "dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or

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[499] *Id.* at 19-20.
[500] *Id.* at 19.
[501] *Id.* at 13.
[502] DWORKIN, *supra* note 492, at 75.
[503] *Id.*
[504] *Id.*
[505] ARTHUR R. BAUER, LEGAL AND ETHICAL ASPECTS OF FETAL TISSUE TRANSPORTATION 60-61 (1994).

subjects."[506] Because it is a very flexible concept, it provides courts with some amount of discretion in analyzing cases concerning reproductive technologies. The appendage and person metaphors so often used in describing fetal life are inadequate to fully capture the moral status of early embryonic life. They are persons in a very weak social sense, somewhat akin to animal pets, and thus the objects of our moral regard. They also have certain property characteristics, but they are not mere things. As George Annas has argued:

> [E]mbryos could just as easily be considered neither products nor people, but in some other category altogether. There are many things, such as dogs, dolphins, and redwoods that are neither products nor people. We nonetheless legally protect these entities by limiting what their owners or custodians can do with them. Every national commission worldwide that has examined the status of the human embryo to date has placed it in this third category; neither people nor products, but nonetheless entities of unique symbolic value that deserve society's respect and protection.[507]

Similar to sentient animals, embryos and early fetuses occupy a special place in our web of duties and rights.

There exists almost virtual consensus that embryos and fetuses lack the criteria that would place them within the category of persons in a strict sense.[508] Persons in a strict sense possess criteria such as self-consciousness, rationality, a minimal moral sense and freedom.[509] Engelhardt's two-tiered definition of persons—persons in the strict sense and persons in the social sense—would leave no room for embryos and early fetuses.[510] Warren's set of criteria for personhood (consciousness, self-consciousness, reasoning, self-motivated activity and language) would not encompass early fetal life either.[511] Some kind of interest principle, argued by philosophers such as Tooley and Steinbock, would also find the embryo and early fetus to be lacking as well.[512] So what kind

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[506] BLACK'S LAW DICTIONARY 1216 (6th ed. 1990).
[507] STEINBOCK, *supra* note 6, at 216.
[508] ENGELHARDT, *supra* note 55, at 119-20.
[509] *Id.* at 115-20.
[510] *Id.*
[511] *Id.*
[512] *See generally* STEINBOCK, *supra* note 6, at 216.

of argument could one offer to protect the embryo and early fetus? One of the more popular arguments is the potentiality argument.[513] This argument states that because embryos and early fetuses have such a strong potential to become persons, they should then be treated as if they were persons.[514] This view has been criticized by a number of people.[515] Engelhardt simply states that only actual persons have actual rights; potential persons only have potential rights.[516] The common example given is that of the president; an actual president has actual rights and duties, a potential president only has potential rights and duties.[517]

Instead of using potential, however, let us use the words possible and probable. For instance, when Bill Clinton ran for president in 1992, he was an actual presidential candidate, but only a possible president. When he became elected, he became an actual president-elect but still a probable president. A week before his inauguration in January of 1993, he was still an actual president-elect, but became a highly probable president. Only after he was inaugurated by Chief Justice Rehnquist did Clinton become an actual president, with all the rights and duties that office possesses. John Noonan uses a similar argument whereby he argues that spermatozoa can become possible persons, although the chances are quite small (one in hundreds of million).[518] Assume a spermatozoa is a minutely possible person. Once the sperm reaches the egg and produces a zygote, that zygote then has a good probability of becoming a person (about one out of two).[519] Do possibilities and probabilities change our views toward certain things? Indeed they do. We tend to take more seriously probabilities as opposed to mere possibilities. That is the reason jurors in a criminal trial have to believe beyond a reasonable doubt (about a 95 percent probability) that the defendant committed the crime. Even in a civil trial setting, a mere possibility is not sufficient enough to hold someone accountable for a tort. A more-likely-than-not standard is usually the minimal standard, whereas the clear and convincing standard is the more stringent standard. So how does a fifty percent probability that a zygote will develop into a person influence our thinking? Well, of

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[513]ENGELHARDT, *supra* note 56, at 110-13.
[514]*Id.*
[515]*Id.*
[516]*Id.*
[517]*Id.*
[518]STEINBOCK, *supra* note 6, at 63.
[519]*Id.*

course, a probable person still does not have the same rights and duties that an actual person does. Yet a fifty percent probability seems to indicate that the zygote merits some level of rights (but not full rights). Moreover, a probable person can hardly be the bearer of duties, considering that even persons in the social sense cannot bear duties (but can possess rights).

Although only persons in the strict sense can bear both duties and rights, we can only assign rights to persons in the social sense. For instance, Engelhardt distinguishes between a variety of persons: persons in a strict sense he calls persons(1).[520] He labels children who have nearly all the rights of strict persons as persons(2).[521] He labels people with severe dementia who were once strict persons but are no longer as persons(3).[522] He labels severely retarded people who have never been persons in a strict sense nor never will be as persons(4).[523] And he labels permanently unconscious people who will never become persons in a strict sense as persons(5).[524] Although Engelhardt offers a nuanced description of persons in the social sense, for some reason he denies this status to certain higher animals.[525] His very own view argues against a speciesism whereby only human beings have moral status.[526] If being biologically human is not a necessary condition to be a person in the strict sense, then it certainly is unnecessary to be a person in the social sense.[527] The metaphors we frequently use in describing animal pets (as "children" for instance) suggest that they are persons in a weak social sense.[528] Engelhardt places creatures such as infants, the severely retarded and the severely demented into the category of persons in a social sense.[529] But he regards animals, who are sentient and have the ability to suffer, as non-persons.[530] One may argue that animal pets have a strong derivative status because of our relationship with them. Pet owners commonly refer to their pet animals as companions or members of the family. Dog owners

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[520] ENGELHARDT, *supra* note 55, at 119.
[521] *Id.*
[522] *Id.*
[523] *Id.*
[524] *Id.*
[525] ENGELHARDT, *supra* note 55, at 113-15.
[526] *Id.*
[527] *Id.* at 116-17.
[528] *Id.* at 129.
[529] *Id.* at 115-17.
[530] ENGELHARDT, *supra* note 55, at 113-15.

especially have very close relationships with their dogs. Prohibitions against torturing animals suggest that animals have more value than mere nonpersons. Yet we commonly euthanize animals by the millions. How do we reconcile this seeming contradiction? Pet animals have a special status in our moral community, so special that animal pets may be considered persons in a weak social sense. Creatures who are persons in a weak social sense should be contrasted with creatures such as infants, the severely retarded and the severely demented. They are persons in a strong social sense. We are prohibited from torturing persons in the weak social sense as well as persons in a strong social sense. Yet we commonly euthanize persons in a weak social sense whenever we take sick or lost dogs to the ASPCA. Similarly, embryos and fetuses are commonly aborted, although we are morally prohibited from torturing a sentient fetus or injuring a fetus that will become a harmed person. Like our pet animals, embryos and fetuses (who are probable persons) are persons in a weak social sense. To be more precise, fetuses are persons in a weak social sense, embryos are persons in a weaker social sense, and pre-embryos are persons in a weakest social sense. Similarly, pet animals are persons in a weak social sense, whereas animals used for research purposes and animals bred for consumption are persons in a weaker social sense. The distinction between pet animals and animals bred for food and research has to do with their relational status to other persons. Placing early embryos on a level lower than animals bred for consumption, is because early embryos lack sentience or the ability to feel pain. Therefore, they should not have greater rights than creatures that do have these characteristics. However, this does not completely denigrate the status of the early embryo. Because of its probable personhood, the early embryo should be treated with some modicum of respect. These gradations suggest that these entities possess a modest level of rights, but do not possess an absolute right to life. Moreover, this metaphor of a person in a weak social sense seems to conform with our moral intuitions. We want to protect both animals (because of their ability to suffer) and fetuses (because of their probable personhood), yet we recognize they do not possess an absolute right to life. In fact, even persons in a strict sense lack absolute rights.

Persons' relationships to animals has received greater attention over the last two decades.[531] Animals were not completely ignored in earlier times, but their moral status was not controversial. Aristotle conceded that animals had certain faculties, such as nutrition, locomotion and sensation, but lacked thought.[532] The Stoics believed that animals existed solely to serve man's interests.[533] Christian thinking towards animals was even less charitable.[534] Because of scriptural pronouncements, animals possessed merely instrumental value.[535] Descartes viewed animals as mere automata.[536] Hobbes believed that one had no obligations to animals because of the impossibility to convenant with them.[537] Human superiority was reflected through man's use of speech, reason and religion.[538] Cartesianism rationalized cruel treatment toward animals by depriving them of an immortal soul (for how could a compassionate God permit creatures with immortal souls to live so miserably?).[539] Only during the modern period did Western views of animals start to change. Dogs and cats became quite common in early modern English households.[540] For Bentham, a creature's moral status was not due to its ability to think or reason but rather its ability to suffer and feel pleasure.[541] And for contemporary ethicists, such as Erich Loewy, it is this ability to suffer that is the *sine qua non* of moral status.[542] Keith Thomas argues that the modern sensibility toward animals has been quite ambiguous.[543] Although official pronouncements tended to condemn animals to a lowly status, the behavior of people towards animals suggests otherwise. Similarly, our moral sensibilities toward the status of the fetus has been one of ambiguity, and not, as John Noonan argues, "an almost absolute value in history."[544]

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[531] *See* KEITH THOMAS, MAN AND THE NATURAL WORLD: A HISTORY OF THE MODERN SENSIBILITY (1983). The following discussion is borrowed from Thomas's book.

[532] *Id.*

[533] *Id.*

[534] *Id.*

[535] *Id.*

[536] *See* THOMAS, *supra* note 531.

[537] *Id.*

[538] *Id.*

[539] *Id.*

[540] *Id.*

[541] *See* THOMAS, *supra* note 531.

[542] ERICH LOEWY, FREEDOM AND COMMUNITY: THE INTERDEPENDENCE OF ETHICS (1993).

[543] *Id.*

[544] *Id.*

This ambiguity has been reflected in the few American cases concerning early embryos that have made it to court. For instance, in the aforementioned case *York v. Jones*,[545] the federal court that heard the case applied property law principles to the case, and did not consider the early embryos to be persons.[546] Conversely, the jury in *Del Zio* rejected the theory that the early embryo in question was property.[547] In trying to define the status of the pre-embryo, the *Davis* court relied entirely on the amicus brief offered by the American Fertility Society.[548] The AFS offered the conventional analysis that the embryo may occupy one of any categories or statuses: person, property or an intermediate position.[549] Although some deference was given to the scientific testimony of Dr. Lejuene, the court relied much more heavily on the pronouncements of a professional body, in this case the AFS.[550] John Robertson, who sat on the Ethics Committee of the AFS, provided the testimony for the organization.[551]

Davis v. Davis offered a new way of thinking about early embryos. Not just appendages of the mother, but not exactly persons (or even distinct entities such as late-term fetuses), the pre-embryo was classified as "unique."[552] This view echoes the earlier view of Richard Wasserstrom, who argued "that the fetus is in a distinctive, relatively unique moral category, in which its status is close to but not identical with that of a typical adult."[553] Yet the *Davis* court's description of the pre-embryo as being unique is not nearly as conservative as Wasserstrom's, which places the status of the fetus on much higher ground.[554]

LEGISLATION

Beside case law, state legislatures have promulgated rules regarding certain procedures involving embryonic/fetal life.[555] A few states, for

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[545]York v. Jones, 717 F. Supp. 421, 427 (E.D. Va. 1989).
[546]*Id.*
[547]*Id.*
[548]Davis v. Davis, 842 S.W.2d 588, 596-97 (Tenn. 1992).
[549]*Id.* at 597.
[550]*Id.* at 594.
[551]*Id.*
[552]*Id.*
[553]Richard Wasserstrom, *The Status of the Fetus*, HASTINGS CTR. MAG., (1975).
[554]*Id.*
[555]For a good review of current legislation, *see* Christine L. Feile, *Human Embryo Experimentation: Regulation and Relative Rights*, 66 FORDHAM L. REV. 2435 (1998).

instance, ban the frozen embryo process completely. They are Minnesota,[556] Michigan[557] and Illinois.[558] Similarly, there is little legislative guidance with egg donation. Only four states (Oklahoma,[559] Texas,[560] Florida[561] and Virginia[562]) have laws on egg donation. The laws in these states treat egg donation like sperm donation, transferring all parental rights to the recipient. Regarding the embryo, the only state that explicitly defines the embryo is Louisiana.[563] Louisiana law defines the human embryo as "an in vitro fertilized human ovum . . . composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child."[564] The in vitro fertilized ovum is a "juridical person" that has the capacity to sue and be sued and is not considered property.[565] If the ovum fails to develop over a thirty six-hour period, then it is considered non-viable and is not considered a juridical person.[566] Moreover, the Louisiana law prohibits any commercial use of the embryo and also prohibits creating embryos strictly for research purposes.[567]

Louisiana's statutes seem to reflect Canadian rather than American values. A 1996 bill in the Canadian Parliament (Bill C-47), in fact, sought to prohibit any commercial use of the embryo, as well as prohibit creation of research embryos. Louisiana's stance on fetal life is one of the most conservative in the United States. This state wants to protect prenatal life to the greatest extent possible, as allowed under the Constitution.[568] On the other hand, a number of other states provide for only certain kinds of protection for the embryo or fetus, compatible with *Roe* and its progeny.[569]

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[556]*See* MINN. STAT. ANN. § 145.422 (West 1998).
[557]*See* MICH. COMP. LAWS ANN. § 333.2685 (West 1998).
[558]*See* 720 ILL. COMP. STAT. 510/6 (7) (West 1999).
[559]*See* OKLA. STAT. ANN. tit. 10, § 554 (West 1999).
[560]*See* TEX. FAM. CODE ANN. § 151.102 (West 1999).
[561]*See* FLA. STAT. ANN. § 63.212 (1) (I) (West 1998).
[562]*See* VA. CODE ANN. § 32.1-289.1 (Michie 1998).
[563]*See* LA. REV. STAT. ANN. § 9:121 (West 1999).
[564]*See* LA. REV. STAT. ANN. § 121-133 (West 1991).
[565]*See* LA. REV. STAT. ANN. § 124 (West 1998).
[566]*See* LA. REV. STAT. ANN. § 129 (West 1998).
[567]*See* LA. REV. STAT. ANN. § 122 (West 1998).
[568]June Coleman, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331 (19__).
[569]For instance, in Arizona, experimentation on live or dead fetuses/embryos produced from induced abortions is strictly prohibited, except for diagnostic purposes. *See* ARIZ. REV. STAT. § 36-2302. In Arkansas, the state regulates the disposal of dead fetuses, which are defined as human conception products that die before expulsion from their mothers. *See* ARK. STAT. ANN. § 20-17-

With regard to research on dead embryos and fetuses, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research recommended that dead fetuses be treated in the same manner as other human cadavers, pointing out that "moral concern should extend to all who share human genetic heritage, and that the fetus, regardless of life prospects, should be treated respectfully and with dignity."[570] On the federal level, the Human Embryo Research Panel described the preimplantation embryo as a "developing form of human life" that "does not have the same moral status as infants and children" because of the "absence of developmental individuation . . . the lack of even the possibility of sentience" and the "very high rate of natural

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801 (1995). Moreover, non-therapeutic research on live fetuses is prohibited; research on dead embryos or fetuses is permitted only with the permission of the mother. *See* ARK. STAT. ANN. § 20-17-802 (1995). No commercial exchange with fetuses or embryos is permitted either. *See* ARK. STAT. ANN. § 20-17-802(c) (1995). In California, non-therapeutic research on live embryos or fetuses is prohibited; such research is permissible with dead fetal remains. *See* CAL. [HEALTH & SAFETY CODE § 123440 (1996). Florida has a statute that requires a person who induces the termination of a viable fetus to use the same kind of professional skill as would be needed to preserve the life of a viable fetus intended to be born. *See* FLA. STAT. § 390.001 (1996). Moreover, non-therapeutic research on a live fetus is prohibited. *See* FLA. STAT. § 390.001 (6) (1996). Indiana prohibits non-pathological experiments on fetuses. *See* IND. CODE ANN. § 16-34-2-6 (1997). Kentucky prohibits the commercial exchange of viable aborted children for experimentation. *See* KY. REV. STAT. § 436.026. Maine prohibits the use of conception products in research. *See* ME. REV. STAT. ANN. tit. 22, 1593 (1992). Massachusetts prohibits non-therapeutic experimentation on live fetuses. *See* MASS. ANN. LAWS ch. 112, 12J (1991). Michigan limits non-therapeutic research to certain cases (when the research does not substantially jeopardize the health or life of the embryo or if the embryo is not the product of a planned abortion). *See* MICH. COMP. LAWS ANN. 333.2685 (1992). Minnesota permits research on embryos only when it is harmless to the conceptus. *See* MINN. STAT. ANN. 145.422 (1989). Missouri and Montana prohibit non-therapeutic research on live fetuses. *See* MO. REV. STAT. § 188.037 (1996). Montana also criminalizes the intentional killing of a prematurely born fetus. *See* MONT. CODE ANN. § 50-20-108 (1997). Nebraska prohibits the commercial sale of live fetuses for research purposes as well as non-therapeutic research on the fetus. *See* NEB. REV. STAT. § 28-342 (1996). New Hampshire prohibits the transfer of a pre-embryo to a uterine cavity. *See* N.H. REV. STAT. ANN. 168-B:15 (1994). North Dakota criminalizes the use of a fetus in research except to preserve the life or health of fetus or mother. *See* N.D. CENT. CODE 14-02.2-01 (1991). Ohio also prohibits the selling of fetuses or experimentation upon fetuses. *See* OHIO REV. CODE ANN. 2919.14 (1997). Oklahoma also prohibits the sale of fetuses as well as non-therapeutic experimentation on fetuses resulting from abortion or intended to be aborted. *See* OKLA. STAT. § 1-735 (1996). Pennsylvania criminalizes non-therapeutic research on conceptuses. *See* 18 PA. CONS. STAT. ANN. 3216 (1997). Rhode Island bans experimentation on live embryos except for the life or health of the mother. *See* R.I. GEN. LAWS. § 11-54-1 (1994). Tennessee prohibits not only experimentation upon and sale of fetuses, but also prohibits the photographing of aborted fetuses without the consent of the mother. *See* TENN. CODE ANN. § 39-15-208 (1997).

[570]Nikki Melina Constantine Bell, *Regulating Transfer and Use of Fetal Tissue in Transplantation Procedures: The Ethical Dimensions*, 3 AM. J.L. & MED. 282 (1994).

mortality at this stage."[571] With this premise, it was clear that the Panel would approve some forms of research, although some members objected to the creation of embryos specifically for this purpose.[572] Finally, in 1993, President Clinton issued an order directing the National Institute of Health (NIH) not to allow funding for projects which involve creation of embryos for research but allowing funding of research on so-called "spare" embryos which were created for in vitro fertilization but not used.[573] Currently, federal funds cannot be used for the creation of research embryos.[574] Yet, no federal legislation exists to govern the private sector.

The Human Research Panel's pronouncement on the status of the embryo reflects fairly mainstream American values, which try to strike a balance between competing rights.[575] The right to privacy that has been developed in the judiciary suggests a strong individual rights approach to reproductive health law. Yet, there are examples where individual states have taken a more activist approach in assessing the status of the embryo. For instance, Louisiana has decided to extend rights to the embryo, and in Minnesota, feticide is equivalent to homicide.[576] These countervailing trends suggest that strong individual rights, which were sanctioned by *Roe*, have been met with an opposing force. Yet the opponents of *Roe* typically cast their rhetoric in the language of rights, too. Even the Supreme Court in *Planned Parenthood v. Casey*, argued "[t]hat the woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the state's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[577]

The American system, perhaps more than any in the world, exemplifies a deep-seated ambivalence about the status of embryos and fetuses. The traditional appendage metaphor, common among judicial opinions earlier in this century, gave way to the person metaphor in later

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[571]Report of the Human Embryo Research Panel, Ethical Considerations in Pre-Implantation Embryo Research, Vol. 1, no. 50 (Sept., 1994).

[572]The Reporter on Human Reproduction and the Law, Nov.-Dec., 1994.

[573]*Id.* at 138.

[574]Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-78, 111 Stat. 1467 (1988).

[575]*Id.*

[576]MINN. STAT. ANN. § 609.2662 (West 1999).

[577]Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

cases. This was due, in part, to the growing medical knowledge of fetal development. Judges became increasingly deferential to this new evidence. A new property metaphor emerged with cases such as *Davis* and *Kass*. Embryos posed even further challenges for legal analysts. The variety of metaphors used strongly suggest that one "master" metaphor will fail to capture adequately the nature of embryonic life. Just as animals are used for different purposes, thus conferring status upon them, embryos and fetuses should be treated the same way. Although animals may be used in an instrumental manner, that does not mean we can do anything we want with them. Our use of animals, whether as food, clothing, companions or research subjects entails a variety of rules and regulations. Similarly, our use of embryonic and fetal life should entail a certain amount of rules and regulations, without seriously undermining important scientific research and progress.

THEORIES OF PERSONHOOD

> Fetal research opponents describe the procurement of fetal tissue as "harvesting babies" and planned abortion as murder. This language is more metaphorical than technical; it expresses their values and political goals. Time and again the words chosen by fetal research opponents simultaneously confer personhood to the fetus, an unborn child is metaphorically more a person than is a nonviable fetus in utero, and challenge the authority granted experts by the use of technical jargon.[578]

> [I]t is puzzling to me why so little attention should be paid to the interests of sentient animals, who can suffer, and so much concern expressed on behalf of beings, who, we have good reason to believe, cannot experience harm or suffering at all.[579]

> If I have any beliefs about immortality, it is that certain dogs I have known will go to heaven, and very, very few persons.[580]

In discussing the moral status of embryos and fetuses, the issue of personhood has dominated the discussion in bioethics. The person

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[578]MAYNARD-MOODY, *supra* note 1, at 131.
[579]STEINBOCK, *supra* note 6, at 189.
[580]*Id.*

metaphor, while important, is only one of many metaphors in describing the unborn. The moral status of embryos and fetuses may be analogized to higher animals, in that although their status is conferred, it does not give us permission to use them simply instrumentally. Using our moral and metaphorical imagination, we can create a richer notion of what the status of embryos and fetuses is.

"Persons, not humans, are special," according to Engelhardt.[581] On the other hand, Stanley Hauerwas contends that "[m]y Uncle Charlie is not much of a person, but he is still my Uncle Charlie."[582] Hauerwas's observation concerning his uncle seems to conform to most people's moral sympathies. Is personhood that important when assessing the moral worth of entities?

The short answer is that it depends. For certain philosophers, such as Engelhardt, personhood is of the utmost importance.[583] Only persons can make demands of respect, earn praise or be blamed.[584] For certain theologians, humanhood is what matters. For instance, William May believes that moral worth attaches to being a member of the human species and not any other attribute.[585] Although "a born-again Texan Orthodox Catholic," Engelhardt espouses a secular set of criteria for personhood that is not co-extensive with being biologically human.[586] On the other hand, theologians such as May confer moral worth on any entity that exhibits human biological characteristics.[587] For others, such as Erich Loewy, the present or future capacity to suffer is what gives an entity moral worth.[588] For Bonnie Steinbock, whether a fetus is a person or not is not what matters.[589] Rather, the question we should be asking is whether the fetus has interests.[590] Finally, James Walters appeals to

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[581]ENGELHARDT, *supra* note 55, at 135.

[582]Stanley Hauerwas, *Must a Patient Be a Person to Be a Patient? Or, My Uncle Charlie is Not Much of a Person But He is Still My Uncle Charlie*, *in* STEPHEN E. LAMMERS & ALLEN VERHEY, MORAL MEDICINE: THEOLOGICAL PERSPECTIVES IN MEDICAL ETHICS 273 (1987).

[583]ENGELHARDT, *supra* note 55, at xi.

[584]ENGELHARDT, *supra* note 55, at xi.

[585]William E. May, *Reverencing Human Life in its Generation*, THE NEW TECHNOLOGIES OF BIRTH AND DEATH, 72-73 (Franciscan Herald Press, 1980).

[586]ENGELHARDT, *supra* note 55, at xi.

[587]May, *supra* note 585, at 72.

[588]LOEWY, *supra* note 542.

[589]STEINBOCK, *supra* note 6.

[590]*Id.*

personhood as a conceptual ideal, but does not slavishly adhere to it.[591] For him, the closer a being approximates self-consciousness, the greater is its moral status.[592]

In trying to determine criteria for personhood and biological humanhood, we are engaging in a task as old as Aristotle. He was perhaps the first Western philosopher to categorize living things based on certain attributes.[593] He argued in Book II of *Psychology* that all living things have certain faculties, such as nutrition, sensation, appetite, locomotion and thought.[594] Although plants only have the faculty of nutrition, animals have faculties for touch, locomotion and perhaps even imagination.[595] Even granting the possibility that animals may have imaginations was quite advanced; this view should be contrasted to Descartes' later view of animals, which he viewed as mere automata.[596]

Although Aristotle reserved thought only for human beings, there existed other views among the ancient Greeks. For instance, Pythagoras developed the idea of animism, whereby both animals and humans share the same kind of souls.[597] These souls can be reincarnated from animals to man and back again.[598] Another view, mechanism, reduced both animals and human beings to mere machines.[599] Xenophon developed another popular view, teleological anthropocentrism, which argued that everything in the world was placed for man's benefit or profit.[600]

For certain ancient writers, such as Aristotle, biology was highly significant.[601] Only human beings had the capability of thought, and were therefore more worthy of respect than animals.[602] This belief that privileges membership in the species *Homo Sapiens* has been aptly

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[591] WALTERS, *supra* note 15.

[592] *Id.*

[593] RENFORD BAMBRAUGH, THE PHILOSOPHY OF ARISTOTLE 250 (New American Library, 1963).

[594] *Id.*

[595] *Id.*

[596] *Id.*

[597] Robert S. Brumbaugh, *Of Man, Animals, and Morals: A Brief History*, *in* ON THE FIFTH DAY: ANIMALS RIGHTS AND HUMAN ETHICS 6 (Richard Knowles Morris & Michael W. Fox, ed., Acropolis Books, 1978).

[598] *Id.*

[599] *Id.*

[600] *Id.*

[601] Philip E. Devine, *The Species Principle and the Potentiality Principle*, *in* BIOETHICS: READINGS AND CASES 136 (Prentice-Hall 1987).

[602] *Id.*

dubbed speciesism.[603] Phillip E. Devine advances an argument whereby membership within the human species is what morally matters.[604] He postulates that any member of the human species, from its earliest development to its latest decay, is protected by this principle.[605] For Devine, the biological humanity of an organism is recognizable in its genetic structure.[606] He contrasts this view of biological humanity with Joseph Fletcher's view.[607] Fletcher's view suggests that an organism is human if it has opposable thumbs, is capable of face-to-face coitus, and has a 1400-gram brain.[608] Devine wants to emphasize that a human organism that lacks opposable thumbs but is still genetically human is nevertheless a human being (albeit perhaps a defective one).[609] One reply to Devine's analysis may be "so what." Just because a creature is biologically human it does not follow that that organism merits greater respect than another intelligent creature that lacks human biology. He responds to the critic who charges that he is being merely chauvinistic in preferring members of his own species over others by modifying his original species principle.[610] His modified species principle asks that in assessing the moral worth of another, a human being must determine whether that "other" possesses a certain level of intelligence.[611] Therefore, the intelligent Martian deserves protection against killing (unlike less intelligent creatures). Intelligence, however, sounds like a criterion of psychological personhood, rather than biological humanhood. In fact, intelligence appears on Joseph Fletcher's often-cited list of indicators of humanhood:[612]

(1) Minimal intelligence
(2) Self-awareness
(3) Self-control
(4) A sense of time

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[603] *Id.*
[604] *Id.*
[605] *Id.*
[606] Devine, *supra* note 601, at 136.
[607] *Id.*
[608] *Id.*
[609] *Id.*
[610] *Id.*
[611] Devine, *supra* note 601, at 136.
[612] It should be noted that Fletcher's humanhood is coextensive with psychological personhood and not biological humanhood.

(5) A sense of futurity
(6) A sense of the past
(7) The capability to relate to others
(8) Concern for others
(9) Communication
(10) Control of Existence
(11) Curiosity
(12) Balance of rationality/feeling
(13) Idiosyncrasy Change/changeability
(14) Neo-cortical function[613]

Engelhardt offers a well-analyzed distinction between "being human" and personhood. Engelhardt views humanhood as a taxonomic classification whereby a member of the family Hominidae exhibits certain biological characteristics, such as long limbs, pentadactyl hands and feet, and increased neural development.[614] For Engelhardt these biological features become morally important only when they characterize persons.[615] Being human is important because human beings usually are self-conscious, rational and possess a moral sense.[616] But such attributes are not the sole reserve of human beings. Engelhardt has not wavered from his commitment to persons vis-a-vis humans for several years. For instance, in an essay written in the early 1980s, he uses the term human merely as taxonomy, whereby a human is in "the genus homo in the family hominidae of the suborder anthropoidae of the order primates of the class mammalia."[617]

Most philosophers seem to agree with Engelhardt that biological characteristics of humanhood are morally irrelevant. Caroline Whitbeck echoes Engelhardt's contention that human biology is morally irrelevant.[618] She argues that having a certain chromosomal pattern is not significant, because human people have the same pattern as human tissue, yet we are reluctant to argue that hair (or even the heart) has moral

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[613]JOSEPH FLETCHER, HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS 15 (Prometheus Books, 1979).

[614]ENGELHARDT, *supra* note 55.

[615]*Id.*

[616]*Id.* at 138.

[617]*Id.* at 189.

[618]Carol Whitbeck, *The Moral Implications of Regarding Women as People: New Perspectives on Pregnancy and Personhood*, ABORTION AND THE STATUS OF THE FETUS 255.

status.[619] Mary Anne Warren argues that being a human being in the genetic sense does not grant a creature moral status automatically.[620] She, like Engelhardt, offers a certain set of criteria for personhood: 1) consciousness and the ability to feel pain; 2) reasoning; 3) self-motivated activity; 4) capacity to communicate; and 5) presence of self-concepts and self-awareness.[621] We can see that Warren's list of personhood criteria encompasses not only psychological traits (self-awareness, self-motivated capacity), but biological traits as well (ability to feel pain, capacity to communicate). This suggests that the gulf between biological humanhood and psychological personhood is not that great. For instance, if a creature lacked the psychological traits of reasoning, self-motivated activity and self-awareness, yet possessed the ability to feel pain and communicate, we would be quite reluctant to claim that this creature is a nonperson. In sharp contrast to Warren's high criteria of personhood (which is similar to Michael Tooley's high standard of personhood)[622] is John Noonan's contention that presence of a genetic code is what grants moral status to a creature.[623] Noonan offers a simple approach: if you are conceived of human parents, you are therefore human and deserving of moral status.[624] Noonan makes no distinctions based on the psychological criteria that Engelhardt uses.[625]

Some, however, contend that the psychological criteria Engelhardt uses in defining personhood (self-consciousness, rationality, a moral sense and a sense of freedom) are just as arbitrary as the biological criteria for humanhood.[626] Don Marquis raises this issue, and then offers Joel Feinberg's defense of these psychological categories.[627] Feinberg argues that certain criteria are morally irrelevant (such as race, sex or species

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[619] *Id.*

[620] Mary Anne Warren, *On the Moral and Legal Status of Abortion, in* Thomas Mappes and Jane Zembaty, eds., BIOMEDICAL ETHICS 418 (McGraw-Hill, 1981).

[621] *Id.*

[622] Ruth Macklin, *Personhood in the Bioethics Literature*, 61 MILBANK MEMORIAL Q. HEALTH & SOC'Y, 35, 40 (1983). Tooley's high standard is as follows: "An organism possesses a serious right to life [*i.e.*, is a person] only if it possesses the concepts of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity." With his theory, Tooley admits that infanticide is a permissible practice.

[623] *Id.* at 52.

[624] *Id.* at 41.

[625] *Id.*

[626] Don Marquis, *Why Abortion is Immoral*, 86 J. PHIL. 183, 187 (1989).

[627] *Id.* at 186-87.

membership).[628] However, only because of the very nature of being conscious and rational can we as persons assume rights and duties.[629] Feinberg, in another article, concedes that although only persons can have duties, animals can be the bearers of rights, although they are incapable of exercising rights themselves.[630]

It seems, then, that being a person, as opposed to being biologically human, entails certain important psychological features. For some, such as Engelhardt, the psychological characteristics of rationality and self-consciousness are important.[631] For others, such as Hauerwas and Robert Solomon, it is the social context whereby beings have status that is paramount.[632] Solomon is critical of Engelhardt's rigid classifications because they seem to exclude many people.[633] How many people are truly rational, self-conscious and free? What if someone believes the end of the world is near? Or practices witchcraft? Do these people fall outside of the realm of persons? Solomon would be reluctant to make such a claim.[634] For him, our very notion of personhood is a peculiarly Western construct.[635] Similarly, Mark Johnson argues that the very metaphor of person is masculinist in its conception.[636] Moreover, he would argue, it is radial, whereby sane, white, heterosexual males occupy the prototypical categories, and everyone else (females, nonwhites, children, senile elderly, mentally handicapped) occupy the outlying regions (and higher primates occupy the furthest regions).[637] For both Solomon and Johnson, the

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[628] *Id.* at 186.

[629] *Id.* at 187.

[630] Joel Feinberg, *The Rights of Animals and Unborn Generations, in* T. BEAUCHAMP & L. WALTERS, CONTEMPORARY ISSUES IN BIOETHICS, 155-156 (2d ed. 1982).

[631] ENGELHARDT, *supra* note 55, at 105.

[632] Robert Solomon, *Reflections on the Meaning of (Fetal) Life, in* ABORTION AND THE STATUS OF THE FETUS, 217.

[633] *Id.* at 216.

[634] *Id.*

[635] *Id.* at 215.

[636] MARK JOHNSON, MORAL IMAGINATION (Chicago: Univ. of Chicago Press 1993). Johnson believes that trying to define person entails a number of problems: "[W]hat is going to define the concept person? Is it our material, physical being? Our biological self? Our social and interpersonal selves defined by roles? Our psychoanalytic self? Our developmental self (as in stages of life)? Our autobiographical self? Our legal self? Our theological self? Our political self? Everyone of these complex conceptions of selfhood and personality presuppose a massive background of values, folk theories, cognitive models, and so forth that give it meaning and reality. To think that anybody could grasp what the concept means as it is 'understood in itself' is to strain credibility beyond the breaking point." *Id.* at 97-98.

[637] *Id.*

person metaphor seems to reflect certain bourgeois values of rational self-interest and liberty. Solomon finds the concept of personhood to be an ultimately social construct and intrinsic value to be a social convention that serves the good of society as a whole.[638]

Similar to Engelhardt and Warren, Daniel Dennett also offers a set of criteria or conditions to judge personhood.[639] His conditions are the following:

(1) rationality;
(2) a state of consciousness (or intentional predicates);
(3) an attitude taken toward it;
(4) ability to reciprocate;
(5) verbal communication; and
(6) self-consciousness.[640]

The concepts of personhood as outlined by Engelhardt, Warren and Dennett may be characterized as idealized concepts of personhood. Like John Rawls's representatives in the original position, these concepts of persons are models and not flesh and blood human beings.[641] A recurring critique of both Rawls's theories and these concepts of personhood is that they are too abstract and do not really reflect the way "real" people live and behave.[642] This critique has some merit. As Solomon and Johnson have mentioned, these idealized concepts of personhood will inevitably leave out certain classes of people. Solomon believes that the notion of personhood reflects a Western bias toward rationality, as a way to subjugate less rational beings.[643] Johnson also believes that the idealized concept of "person" encompasses a narrow set (heterosexual, white, sane males) while excluding others.[644] A richer, more pluralistic notion of person is needed.

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[638]Solomon, *supra* note 632, at 209-26.

[639]Daniel Dennett, *Conditions of Personhood*, *in* PUZZLES, PARADOXES AND PROBLEMS (Peter A. French and Curtis Brown, eds., St. Martin's Press 1987).

[640]*Id.*

[641]ONORA O'NEIL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 211 (Cambridge University Press, 1990).

[642]*Id.* at 212.

[643]Solomon, *supra* note 632, at 215.

[644]JOHNSON, *supra* note 636, at 97.

With these critiques in mind, Engelhardt hedges his bets by allowing for a second class of persons, what he calls persons in the social sense.[645] These entities lack certain psychological criteria, such as rationality, yet we as persons in the strict sense have deemed them worthy enough to be within the moral community of quasi-persons.[646] This looser category of social persons encompasses entities that are on the periphery; the severely retarded, the those with severe dementia and infants.[647] All of these creatures share some human biology and yet they do not qualify for personhood in the strict sense.[648] For instance, a severely handicapped infant that dies shortly after birth has the attributes of a biological human. Yet it lacks any psychological traits that would make it a person. For Noonan, such creatures are human (conceived of human parents) and deserving of moral respect.[649] For Engelhardt, such creatures are probably nonpersons, exhibiting none of the psychological criteria of persons.[650] Although they may merit our sympathies, they cannot demand our respect.

These categories of what constitutes a person vis-a-vis a biological human is important in the controversy over the fetus and embryo. For instance, Engelhardt argues that only persons can demand respect, earn praise or be blamed.[651] Persons are the constituents of the moral community. Perhaps a better metaphor would be to call persons the stewards of the moral community. Persons have both rights and duties within the moral community of "spaceship earth." Persons in the social sense, as well as nonpersons, can only be assigned rights, but not duties. Therefore, the retarded, the senile, and even certain animals have certain rights but not duties.

For Kant, persons matter because only persons can offer consent to do certain things.[652] Within this consent-based theory (which Engelhardt calls his principle of permission) only persons can offer their consent.[653] Things, on the other hand, can never offer consent to act because they lack

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[645]ENGELHARDT, *supra* note 55, at 116.
[646]*Id.* at 117.
[647]*Id.*
[648]*Id.*
[649]Macklin, *supra* note 622, at 41.
[650]ENGELHARDT, *supra* note 55, at 117.
[651]*Id.* at 119.
[652]O'NEIL, *supra* note 641, at 138.
[653]*Id.* at 138.

capacities for agency.[654] Here is where the difference between personhood and biological humanhood becomes significant. If a biologically human organism is a thing rather than a person, then it has only instrumental value. The biological human nonperson cannot give consent because it lacks the capacity to give consent. Therefore, if the fetus is merely a biologically human organism, it can be treated in an instrumental fashion.

Right away, however, we encounter some problems. For instance, not all things have merely instrumental value. Most people treat Leonard da Vinci's Mona Lisa as having intrinsic value, and some people even treat an Action Comics #1 issue as having more than mere instrumental value. However, these things do not have value in and of themselves. Only persons can grant things (but not other persons) certain value. Therefore, if no person ever valued (or will value) the first issue of Action Comics, it would be rather unproblematic if it was disposed of.

Kant seems to make the distinction between persons and non-persons, prompting Robert Nozick to comment that utilitarianism is appropriate for animals whereas deontology is reserved for persons only.[655] Using animals for our benefit, however, is not unproblematic. As Keith Thomas argues, our Western sensibility toward animals has shifted quite dramatically during the modern period.[656] We now debate whether we can morally use animals for our own purposes. However, this debate has its limits. Although we condemn the torture of animals, we do permit widespread animal slaughter for our consumption. This brings up a quandary. If the human fetus and embryo are nonpersons, and if many adult mammals have claims to social person status, why is abortion or fetal research a more troublesome moral issue than human consumption of animals? Philosophers like Engelhardt who deny the personhood status of fetuses (only within his secular moral framework and not within his personal religious framework) are denying that our sensibilities are shaped not just by psychology but by biological morphology as well. For instance, an eight-week-old fetus shares many of the morphological characteristics of a newborn. It is visibly humanoid in shape. Most people who are tolerant of abortion have certain visceral responses to

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[654] *Id.*

[655] ENGELHARDT, *supra* note 55, at 113.

[656] THOMAS, *supra* note 531, at 300.

seeing such a creature being destroyed.[657] Why does such a response exist? To some extent, we have been socialized into a sentimentalized view of infancy and childhood. If a being looks like an infant, then it deserves the care that an infant would normally receive. Anything that is a diminutive version of a human being seems to automatically receive persons' sympathy, regardless as to whether the entity exhibits traits of personhood. This has little to do with the fetus's potential for becoming a person. Rather, the fetus's appearance suggests that this is a vulnerable, living entity, in and of itself. The child metaphor is a powerful one; it strongly suggests that the fetus is more than just a clump of cells but rather a vulnerable creature that deserves our care and affection based upon human sympathy.

Of course, this does not stand up to logical scrutiny. Just because an entity looks like an infant, it does not follow that that entity deserves the same level of care or respect that an infant deserves. But the power of images is undeniable. Part of the success of the film *E.T.* is that E.T. is not only a person but actually looks like a human being. Contrast E.T. with HAL in the film *2001: A Space Odyssey*. Whereas E.T. is a young extra-terrestrial that exhibits certain humanoid features, such as an enlarged cranium and bipedal locomotion, HAL the computer lacks any of these humanoid characteristics. Although HAL meets the criteria of strict personhood that Engelhardt outlines, HAL does not evoke the sympathy that E.T. does. Moreover, both E.T. and HAL, being persons, have the capacity to suffer. According to Erich Loewy, any creature that has the ability to suffer deserves moral regard. If, therefore, the fetus can suffer (and not just feel pain), then the fetus deserves some moral worth.[658] Yet, for some reason, our moral sympathies seem to be stronger with creatures that share our humanoid (or at least mammalian) features.

With regard to the fetus, does it matter whether it is a person or a biological human? One would think that if the fetus was a person, we would then be prohibited from taking its life, except in self-defense. But Judith Jarvis Thompson's classic analysis takes us to task for such thinking. Her argument is that we normally have no duty to rescue

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[657]Tooley would argue that such visceral responses are merely that-visceral-with no sound moral reasoning behind them. He would argue that our revulsion at infanticide is a cultural taboo no different than earlier cultural taboos against oral sex or masturbation. *See* Macklin, *supra* note 622, at 45.

[658]LOEWY, *supra* note 542, at 2.

another.[659] The state cannot morally coerce people to save others, even if their lives depend on it.[660] Her argument has been criticized because it wrongly analogizes a stranger's duty to another, whereas a mother is hardly a stranger to her fetus.[661] But is this true? A stranger is one who is unknown. Can we claim that by merely occupying a part of the mother's body, the fetus is a known entity, a moral intimate? Typically, a stranger becomes an acquaintance or a friend through social discourse. One would be at a loss to describe a relationship that did not entail some sort of social exchange. If, between two parties, one initiated social contact, but the other either failed or was incapable of reciprocating, we would be hard pressed to describe such a situation as a social exchange. Although mothers develop a certain kind of bond with their gestating fetus, this relationship fully blossoms when the infant is born. And even then, the child's social status would not require one to sacrifice himself for the child's sake. It would be morally impermissible for the state to coerce family members to act in a supererogatory manner toward other family members. One is reminded of certain legal cases where the courts have refused to coerce family members to undergo bone marrow transplants to save relatives.[662]

Legally, the distinction between personhood and being biologically human is significant on two levels, constitutionally and statutorily. The Supreme Court in *Roe v. Wade* addressed the issue of personhood, citing both appellee's arguments and amicus briefs.[663] The appellee, however, conceded that no case has held a fetus to be a person within the meaning of the Fourteenth Amendment.[664] Justice Blackmun, in his majority opinion, held that in every instance where the word person is used in the Constitution, it is meant post-natally and not prenatally.[665] Unfortunately, Blackmun relies on the legal practice of abortion during the nineteenth

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[659]*Id.* at 2.

[660]*Id.*

[661]Carolyn Whitbeck, *Women as People: Pregnancy and Personhood*, 13 PHIL. & MED. 251, 254 (1983).

[662]*See* Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990) (holding that adopted mother of two twins could refuse to consent to submit her adopted twins to blood tests to determine if the twins could donate bone marrow to their biological father); *see* Hart v. Brown, 289 A.2d 386 (Conn. 1972) (holding that parents of twin boys could consent to transferring a kidney from one twin to his ill brother).

[663]Roe v. Wade, 410 U.S. 113, 157 (1972).

[664]*Id.*

[665]*Id.*

century as evidence that the word person, as used in the Fourteenth Amendment, does not include the unborn.[666] Relying on historic precedent to determine the morality or legality of a practice is a bit shaky. For instance, let's suppose that slavery was still a legal practice in some states. Someone defending the practice would be hardly justified at looking at nineteenth century practice as any legitimization of the practice. The mere fact that slavery was widely practiced in certain parts of the United States in the nineteenth century would not legitimize its current practice.

Ronald Dworkin agrees that the fetus has never been a constitutional person, nor can it be declared a legal person if it seriously impairs a person's interests.[667] In *Webster v. Reproductive Health Services*,[668] the Court had to address the constitutionality of a Missouri statute that defined human life as beginning at conception and that unborn children have protectable interests in life, health, and well being.[669] The Court found such language to merely reflect a value of the state preferring childbirth over abortion, and that this language offers protection to unborn children similar to tort and probate law.[670]

The other level of legal recognition is on the statutory level. In *State v. Merrill*[671] the Supreme Court of Minnesota had to address the following statutes:

> Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced to imprisonment for life:
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> (7) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another . . .[672]
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> Whoever does either of the following is guilty of murder of an unborn child in the second degree and may be sentenced to imprisonment for not more than forty years:
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> (1) causes the death of an unborn child with the intent to

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[666]*Id.*
[667]DWORKIN, *supra* note 492, at 168.
[668]Webster v. Reproductive Health Servs., 492 U.S. 490 (1990).
[669]*Id.* at 501.
[670]*Id.* at 519.
[671]State v. Merrill, 450 N.W.2d 318 (Minn. 1990), *cert. denicd*, 496 U.S. 931.
[672]MINN. STAT. ANN. § 609.2661(1) (1988).

> effect the death of that unborn child or another, but without premeditation . . .[673]

Merrill was appealing a conviction whereby he was convicted for the death of Gail Anderson's "unborn child."[674] Anderson died of gunshot wounds, and an autopsy revealed that Anderson was pregnant with a twenty-seven or twenty-eight day embryo.[675] After hearing arguments on both sides, the court held that:

> [T]he statutes do not raise the issue of when life as a human person begins or ends. The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo or fetus is ensouled or acquires "personhood." These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life.[676]

The court's opinion looks only to the biological status of the fetus. It ignores issues of consciousness and rationality that encumber the personhood debate in the bioethics literature. Rather, the court adopts an approach that could easily be written by John Noonan. The court did distinguish this case from that of a mother aborting her fetus, which is a protected constitutional activity. In *Merrill*, the mother did not consent to having her fetus aborted.[677] The majority did consider the interest of the mother, but did not consider the status of the fetus independently.[678] One

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[673]MINN. STAT. ANN. § 609.2662(1) (1988).
[674]*Merrill*, 450 N.W.2d at 320.
[675]*Id.*
[676]*Id.* at 324.
[677]*Id.* at 321.
[678]*Id.*

commentator claims that none of the justices on the Minnesota Supreme Court considered the status of the embryo or fetus independently.[679] This would be the case if the embryo was *ex utero*.[680] In short, the court determined that the statute protects human life and not personhood.[681]

The *Merrill* case bears on the personhood debate in important ways. The court wanted to avoid the complex questions of personhood that have plagued bioethicists for years.[682] In doing so, the court looked only to biological status and committed the fallacy of biological speciesism. The court believed that there is more consensus over the biological status of the embryo or fetus than there is over the personhood status.[683] Even this, however, is a questionable claim. Among philosophers there is mostly consensus, but some dissent persists.[684] There is no paradigmatic set of criteria of personhood that would satisfy everyone in every situation. Our notions of personhood are heavily indebted to modern philosophers such as Locke and Kant, and their ideas have been shaped by contemporary philosophers such as Nozick, Engelhardt, Warren and Tooley. But as Mark Johnson has argued, the concept "person" is so complex that to argue that one set of criteria would suffice for all time is the height of folly.[685] The concept of personhood is a useful analytic tool, but it cannot be the *sine qua non* of moral status.

The person metaphor, however, does have an undeniable power. Take, for instance, the medieval "homonculus" view that the sperm itself contains a fully formed miniature human being that grows to baby size after it is introduced into an egg.[686] The eighteenth century writer Laurence Sterne popularized this view in *Tristram Shandy* which held that the homonculus "consists as we do, of skin, hair, fat, flesh, veins, arteries, ligaments, nerves, cartilages, bones, marrow, brains, gland, genitals, humors, and articulations—a being of as much activity—and in all senses of the word, as much and as truly our fellow-creature as my Lord

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[679] *Merrill*, 450 N.W.2d at 320.
[680] *Id.* at 324.
[681] *Id.*
[682] *Id.*
[683] *Id.*
[684] Macklin, *supra* note 622, at 41.
[685] JOHNSON, *supra* note 636, at 98.
[686] George J. Annas, *What Should We Do With Surplus Potential Humans?* WASH. POST, Mar. 31, 1985, at K01.

Chancellor of England."[687] George Annas sees a modern counterpart in the language of former President Ronald Reagan, who argued in 1984 that "until and unless someone can establish that the unborn child is not a living human being, then that child is already protected by the Constitution."[688] Annas has noted that

> [T]he human embryo is equal to more than the sum of its constituent parts. Not only does it have the complete genetic complement of a unique human being, it is also a powerful symbol of human regeneration and the future of the human race. We can thus value it and afford it legal protection from exploitation even though we do not similarly value or protect either the human egg or sperm.[689]

Does it serve us to insist upon the traditional metaphors of person or property in describing fetuses and embryos? Our metaphorical imagination is often stunted when faced with creatures such as fetuses and embryos. Judges and policymakers often describe such creatures as being in a special category that deserve special respect. Animals occupy a similar category.

Our metaphorical imagination regarding animals has a rich and long history. In the Ark myth, God commands Noah to save only the animals, suggesting that animals are morally innocent as well as vulnerable creatures.[690] Animals have been tortured for sport, used for food and have been raised as household companions. We seem to have refined our modern sensibilities toward animals, yet we still hold almost contradictory views towards them. Torturing animals is considered morally reprehensible, but the humane slaughter of them is considered a permissible practice. If, as some have argued, animals suffer and have interests, then such practices would be more troublesome than the destruction of spare embryos or even early fetuses which have no present interests (albeit perhaps future interests). Although the person metaphor has dominated the bioethics literature, it is evident that a variety of metaphors have been used in legal opinions. As important as personhood is, we should not allow debate concerning embryos and fetuses to be

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[687] *Id.*
[688] *Id.*
[689] *Id.*
[690] *See* Genesis 5:5.

dominated by such a metaphor. Many objects, both inanimate and animate, deserve our sympathy and care, regardless as to whether they meet any strict criteria of personhood. For instance, there are more federal regulations in place for the protection of animal research subjects than for human subjects.[691] This suggests that we do not simply use animals as instrumental means, but rather have stringent rules that guide us in our behavior.

Another interesting metaphor is that of the symbol. Bioethicists frequently refer to the embryo and/or fetus as a powerful symbol of our humanity.[692] What does this exactly mean? Certain animals have evolved into powerful cultural symbols. The dove represents peace, the hawk represents war and the owl represents wisdom (at least in certain Western traditions). But what does the fetus and embryo represent? One commentator claims that

> [The fetus] is a symbol of hope and renewal, and its unseen development a source of amazement. Fetal life is the shared story of the human experience: no matter how diverse our postnatal lives, the fetus tells of our biological past and future. Although people disagree vehemently about abortion's morality, abortion, whether for medical or other reasons, is always a tragedy....For parents the wanted fetus becomes a touchstone for our hopes, just as the unhealthy or unwanted one is a source of anxiety and dread.[693]

Embryos and fetuses represents a variety of things. Metaphorically, they are chameleon-like, with no definitive "status" or role. As Bartha Knoppers has argued:

> [t]he absence of a definitive legal status does not serve to deprive the embryo of legal protection. Biological reality avoids the treatment of the embryo and foetus as *in abstracto* entities, since they are undergoing constant development and are intertwined with their "sources"—living persons, holders of rights and freedoms. It is precisely this absence of status which has forced creative and viable solutions. Neither person nor thing, the "humanity" of the

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[691]Feinberg, *supra* note 630, at 155.
[692]MAYNARD-MOODY, *supra* note 1, at 184.
[693]MAYNARD-MOODY, *supra* note 1, at 184.

> embryo and foetus benefits from the kaleidoscope of state intervention ranging from fundamental rights, to criminal law, to private law or even, specific legislation. From these various modalities of intervention has emerged a regime of protection with multiple tools adapted to different stages of human life, to different technologies and to the interests involved. Paradoxically, in the long run, these diverse approaches provide better protection.[694]

Similarly, the moral status of embryos and fetuses need not be definitively defined in order to arrange for certain protections. Animals occupy a variety of roles in our culture; very few would argue that animals are persons in a strict sense or mere things in the most mundane sense. Yet we seem to be able to create rules that protect their conferred interests. Why should embryos and fetuses be any different?

CONCLUSION

Embryos and fetuses occupy a moral status not entirely dissimilar from that of higher animals. The great variety of metaphors used to describe both the unborn and animals strongly suggest that they lack a definitive status. The many metaphors also suggest that there are a plurality of contexts we must be attentive and sensitive toward. These different contexts shape which morally relevant criteria (sentience, ability to suffer) will exert greater influence.

Our metaphorical understandings of embryos and fetuses shape our moral relationships with them. For instance, the philosophers surveyed above adhere rigidly to a strong definition of personhood. Their metaphor of person seems to include only those creatures that fit the rigid set of criteria they have developed. The philosophers' use of personhood is a somewhat useful heuristic, but it fails to fully capture the moral complexity of embryos and fetuses. On the other hand, the legal opinions analyzed here seem to be closer to the truth when they concede that although fetuses and embryos may not be persons in the full sense, they are still entitled to certain kinds of respect and moral regard. Thus, the metaphor that seems most appropriate is the notion of stewardship. This suggests that we as human beings and persons act as stewards with regards to embryos and fetuses. This is quite similar to our moral relationship to

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[694]Knoppers & Pascal-Rossi, *supra* note 5.

animals, as well as the environment. In fact, there is a sizeable literature that discusses human beings' moral stewardship of environmental resources for future generations.

The metaphor of steward suggests a certain moral regard that does not necessarily invoke the traditional metaphors of person, property or appendage. Thus, this approach does not offer a new metaphor for embryos and fetuses, but rather a new metaphor for our relationship with these human entities. The metaphor of stewardship suggests that these creatures *are* within our moral regard. We are not permitted to treat them as mere things. Rather, they have certain intrinsic and conferred interests.

Moral stewardship suggests that we as human beings and persons view human embryos and fetuses with a special kind of regard. Although they lack the criteria to be persons in a strict sense, their development into participants within the human community requires that we treat them with a modicum of respect. This *prima facie* duty of respect for the unborn does not mean that it is absolute, of course. As we have seen in many cases, if the rights of the mother conflict with that of the fetus, the mother's rights are the ones that are usually respected. But this does not necessarily denigrate the status of the unborn to a mere thing. The cases analyzed above illustrate the types of decisions courts make when faced with the issue of embryonic and fetal status. The judges in earlier cases would often rely on common law precedent or their own intuitions. Later judges would also acknowledge the burgeoning medical knowledge regarding embryos and fetuses. This kind of quasi-casuistic approach has served American judges well, considering the sheer number of cases that have come before the courts.

The variety of metaphors we use troubles us at times, yet we are still able to create rules that protect prenatal life while balancing those interests with the rights of others. Moral stewardship does not mean we sacrifice all other values to promote the interests of prenatal life. Rather, it does suggest that we have certain *prima facie* duties to the unborn that may be overridden in certain circumstances. Such an approach values prenatal life in a way that is both humane and fair.