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ARTICLE

TECHNOLOGY AND THE LEGAL DISCOURSE OF FETAL AUTONOMY

Caroline Morris*

ABSTRACT

The relationship between society, medicine, and the law is multi-faceted and complex. This Article examines the process of, and the influences on, the construction of fetal personhood in the legal discourses in American and Commonwealth case law and statutes. It demonstrates how the physical and visual separation of the fetus, as made possible by medical advances, has influenced the development of legal doctrine relating to the rights of the fetus.

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I. INTRODUCTION

In the early 1980s, the United States experienced an unprecedented rise in the number of cases in which judges, law-enforcement officers, and physicians sought to regulate and control the behavior of pregnant women.[1] Pregnant drug addicts were often charged with delivering drugs to a minor, and sometimes convicted and detained for the sake of their fetuses.[2] Women who refused medical procedures that their physicians thought would benefit their fetuses were subject to orders for forced surgery[3] or

1. A number of fetal rights cases are detailed in Judith Rosen, *A Legal Perspective on the Status of the Fetus: Who will Guard the Guardians?*, *in* ABORTION RIGHTS AND FETAL 'PERSONHOOD' 29-50 (Edd Doerr & James W. Prescott eds., 1990) [hereinafter FETAL 'PERSONHOOD']. *See also* Ruth Ann Strickland & Marcia Lynn Whicker, *Fetal Endangerment Versus Fetal Welfare*, *in* EXPECTING TROUBLE: SURROGACY, FETAL ABUSE AND NEW REPRODUCTIVE TECHNOLOGIES: DISCRETION OF PROSECUTORS IN DETERMINING CRIMINAL LIABILITY 55-84 (Patricia Boling ed., 1995) [hereinafter EXPECTING TROUBLE].

2. Johnson v. Florida, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd* 602 So. 2d 1288 (Fla. 1992); *In re* Baby X., 293 N.W.2d 736 (Mich. Ct. App. 1980). *See also* EXPECTING TROUBLE, *supra* note 1, at 58-63, and especially 70-71 (policies of State Attorneys General on fetal abuse prosecutions).

3. *See In re* A.C., 533 A.2d 611 (D.C. 1987), *rev'd* 573 A.2d 1235 (D.C. 1990); Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457, 460 (Ga. 1981). Few

charged with fetal neglect.[4] In some cases, third party guardians were appointed for fetuses to advance their welfare.[5]

Historically, there is a long line of cases compensating the mother for prenatal death or injury of a wanted potential child due to a third party's actions. Recent cases differ, however, because they punish the pregnant woman herself for acting as the fetus's adversary.[6] A number of reasons have been posited for this shift from compensating the mother to protecting the fetus. This Article focuses on the reason most often articulated by the courts and legislatures: the fetus is a person[7] and therefore has

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cases have been reported, but see Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Veronica E.B. Kolder, et al., *Court-Ordered Obstetrical Interventions,* 316 NEW ENG. J. MED. 1192 (1987); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans,* 74 CAL. L. REV. 1951 (1986), for discussions of cases that have not made it into the law reports.

4. Grodin v. Grodin, 301 N.W.2d 869 (Mich. 1980); Matter of Smith, 492 N.Y.S.2d 331 (Fam. Ct. 1985); C. v. C., 476 N.Y.S.2d 991 (Fam. Ct. 1984).

5. Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964) ("the unborn child is entitled to the law's protection . . ."); *In re* Jamaica Hosp., 491 N.Y.S.2d 898, 900 (Sup. Ct. 1985) ("the state has a highly significant interest in protecting the life of a mid-term [i.e. non-viable] fetus, which outweighs the patient's right to refuse a blood transfusion on religious grounds"); Crouse Irving Mem'l Hosp. v. Paddock, 485 N.Y.S.2d 443 (App. Div. 1985); Wisconsin *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482 (Wis. Ct. App. 1995), *rev'd* 561 N.W.2d 729 (Wis. 1997); Susan Goldberg, *Of Games and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503, 523-24 (1991); Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L.J. 703, 727 n.86-87 (1986).

6. There is still considerable conflict in cases asserting fetal rights, a conflict which I consider to be sourced in whether the law-makers and enforcers value the pregnant woman and the choices she makes with regard to her fetus. Particularly where harm to the fetus occurs at the hands of a third party (for example, the woman is beaten by her partner or injured in a car accident) and the fetus was wanted by the woman, the courts are more likely to compensate the woman for her loss. However, when the woman acts independently, and smokes, drinks, lives in "inappropriate" conditions or undertakes some other course of undesirable action, courts seem more willing to punish the woman for her behavior and use the rhetoric of fetal rights to do so.

7. *See* Danos v. St. Pierre, 402 So. 2d 633, 638 (La. 1981) ("A human being exists from the moment of fertilization and implantation"); Baldwin v. Butcher, 184 S.E.2d 428, 432 (W. Va. 1971) (holding that a fetus is a person under West Virginia's wrongful death statute, since "'biologically speaking' such a child is, in fact, a presently existing person, a living human being"). *See also* Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995); UK comments during debate on the Alton Bill in Deborah L. Steinberg, *Adversarial Politics: The Legal Construction of Abortion, in* OFF-CENTRE: FEMINISM AND CULTURAL STUDIES (Sarah Franklin et al. eds., 1991) [hereinafter OFF-CENTRE].

the right to be free from harm, the right to be born healthy,[8] and the right to life.[9]

Underlying this notion of fetal rights, less often articulated but just as often present, was a concealed expression of hostility toward women who defied social norms and preferred their own judgment to that of medical and legal authority figures. Typical of this fetal-protective, woman-hostile stance are the following comments, the first made by a Michigan narcotics officer involved in prosecuting women for drug use during pregnancy, and the second by a director of a fetal alcohol syndrome program on a Native American reservation:

> If the mother wants to smoke crack and kill herself, I don't care.... Let her die, but don't take that poor baby with her.[10]

> If a woman is pregnant, and if she is going to drink alcohol, then, in very simple language, she should be jailed.[11]

As the 1990s come to a close, and the tide may be turning against fetal rights claimants,[12] this Article reflects on the source of the rise of fetal rights. What enabled the judiciary, law-enforcement officers, and physicians to champion the cause of fetal rights to such effect? The rise in fetal rights cases may well have been unprecedented, but it was certainly not unheralded. An investigation of law considering fetal status provides one of the clues to understanding the source of the concept of fetal rights.

The law currently cannot envision and address the pregnant woman as a uniquely constituted entity. The fetus and the pregnant woman provide a dilemma for the law: one person or two? Case law and statutes regarding fetal personality reveal that the law's conception of the pregnant woman is like a gestalt picture. As the fetus comes into view, the woman disappears. Look

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8. *See* Grodin v. Grodin, 301 N.W.2d 869 (Mich. 1980); Smith v. Brennan, 157 A.2d 497 (N.J. 1960); Matter of Smith, 492 N.Y.S.2d 331 (Fam Ct. 1985); C. v. C., 476 N.Y.S.2d 991 (Fam. Ct. 1984).

9. *See* Douglas v. Town of Hartford, 542 F. Supp. 1267 (Conn. 1982); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984).

10. CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE 102-03 (1993).

11. *Id.* at 121.

12. *See* Slattery v. Clinton, No. 96 Civ. 2366, 1997 U.S. Dist. LEXIS 3700, at *9-10 (S.D.N.Y. Mar. 28, 1997) (fetuses are not persons for census purposes); Young v. St. Vincent's Med. Ctr., 673 So. 2d 482 (Fla. 1996) (fetus is not a person for the purposes of Florida's wrongful death statute); Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) (no cause of action may be maintained by or on behalf of a fetus against unintentional prenatal maternal neglect); Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (reversing Wisconsin *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482 (Wis. 1995)). *See also* EXPECTING TROUBLE, *supra* note 1, at 72-73.

closely at the woman, and the fetus fades out of focus. Woman or fetus: the law cannot accommodate both parties and their interests at once. Fetal rights cases reflect the courts' wrestling with the question of who should be considered subordinate to whom.

An examination of the fetal rights phenomenon presents us with questions of status as well as identity. When the law considers the identity of the fetus and the woman, it necessarily comments on the relative status of the parties. Given the law's inability to deal with the pregnant woman as she is (something more than one person, yet something less than two), the law considers the status of two parties, "woman" and "fetus" rather than "pregnant woman." Upholding fetal status therefore depends on downgrading the woman's status or vice versa.[13] This status also confers rights. Subordinates usually experience worse treatment and hold fewer rights than dominant persons or groups. Now and historically, women have been treated as subordinate to men, blacks to whites, and children to adults. What the fetal rights cases simultaneously mask and express is that pregnant women, under the rhetoric of fetal rights, have been characterized as subordinate to their fetuses, and have thereby experienced a loss of status and accompanying rights.

How did this reversal in status come about? Like all legal change, this legal change did not occur in a vacuum; it was influenced by the cultural and social context within which this shift to fetal rights occurred. One influential factor, and one which will be the primary focus of this Article, is that from the late 1960s, advances in medical technology began to provide society with pictures of the fetus in the womb, seemingly independent and taking on a human form.[14] These pictures in turn gained mean-

13. As Frances Olsen writes, the devaluation (and disempowerment) of women is directly linked to the valuation of fetal life. In a society where pregnant women and their choices are not valued, "[f]etal life [is valued] when people with power value it." Frances E. Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 128 (1989) [hereinafter *Unraveling Compromise*].

14. Even if the object at the center of the ultrasound image could not be recognized as a human form, the text accompanying the pictures made it clear what one was supposed to see. However, it is not always so easy to identify the blurry ultrasound pictures as a "baby." The persuasiveness of these pictures relies on the viewer being told what to see. For instance, Celeste Condit points out that in the anti-abortion film, *The Silent Scream*, "the ultrasound image is so vague that without commentary many viewers would not have had the faintest idea what they were watching (as has been the case in my classes where I have shown students just the ultrasound image, without the sound or prior commentary). It is often very hard to see the fetus in this image. . . . The commentary, however, artfully tells the viewer

ing in the context of a climate of hostility towards pregnant women, especially when the women were seen to be acting inimicably towards their fetuses.[15] To receptive eyes and ears, image and message combined. The image of the fetus as baby became the message: the fetus was a baby. These pictures were usually accompanied by text referring to the fetus in personal terms such as: "the baby," "the child," "your son," or "Kathy."[16] Moreover, the fetus was often described as having the attributes of individuated personhood such as a personality, thoughts, and emotions. Once the message that the fetus was a baby was accepted, the conclusion seemed to follow inexorably that babies are people and people have rights. Pictures provided by ultrasound, combined with the supporting text describing the fetus as a person, blurred the boundary between fetus and baby, and thus made it easier to see the fetus as an independent rights-bearer.[17]

This Article considers the relationship between such changes in perception of the fetus *in utero* and the assertion of fetal rights. It investigates the process of fetal separation from the maternal body as created by the courts and legislatures and pins these developments to the rise of the medical language and images of fetal autonomy. This Article also discusses the importance of fetal separation as a historical precondition for legal recognition and then traces the development of this concept of fetal separation through to an assertion of fetal personality and then fetal rights. Much of this development has taken place in the United States. However, this occurrence in the United States is not a unique phenomenon. Similar legal systems are showing signs of following the United States' approach to characterizing the nature and rights of the fetus. This Article examines in par-

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what to see." CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE 86-87 (1990).

15. Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction,* 13 FEMINIST STUD. 271-72 (1987) [hereinafter *Fetal Images*].

16. KNIGHTS OF COLUMBUS, DIARY OF AN UNBORN CHILD (1989), *cited in* SUSAN FALUDI, BACKLASH 421 (1991).

17. Petchesky concentrates on the socio-political expression of this phenomenon. Accepting her analysis of the process of fetal separation through technology and particularly images, this Article seeks to extend Petchesky's inquiry into the legal field in order to see the role fetal separation plays in judicial discourse and the framing of a fetal rights jurisprudence.

ticular the approaches of the four major Commonwealth jurisdictions: Australia, Canada, Great Britain, and New Zealand.[18]

Part II of this Article discusses how technology and the accompanying language, and those who use them, combine to influence the law relating to fetal rights. Part III provides a historical overview and a comparative study of the different attitudes displayed in the law towards the person of the fetus as seen in the criminal laws relating to fetal destruction and induced abortion. Part III also addresses the recent changes in Anglo-American jurisprudence of fetal personhood and separability. Part IV responds to the assertion of fetal rights by arguing that the pregnant woman's voice is missing from this discourse and that separability is the wrong approach. What is needed instead is an awareness that the law must consider the pregnant woman as having a unique legal status, one requiring the development of a woman-centered jurisprudence.

II. LAW, LANGUAGE, AND TECHNOLOGY

The language of the law is the means by which legal rules are formulated, principles expressed, and social practices condemned, condoned, or upheld. Language is not neutral but political.[19] This concept encapsulates a complex relationship between words and social relations that has developed because "language plays a major role in generating reality."[20] Language is part of the process by which we ascribe meaning to the world; it "constructs, interprets, and reflects political reality."[21] The process of creating, and thus knowing the world through language creates a set of social relationships based on power as "discourse puts into

18. These jurisdictions have been chosen because, as major common law jurisdictions in Western society, they provide the best comparisons for testing the spread of this phenomenon outside of the United States. For example, this Article does not address the laws of South Africa or India because even though they are common law jurisdictions, they have too many other influences (such as South Africa's Romano-Dutch influences or India's religious/non-Western background) which complicate comparisons.

19. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988) [hereinafter *Law-Language*].

20. Ruth Hubbard, *Have Only Men Evolved?*, *in* WOMEN LOOK AT BIOLOGY LOOKING AT WOMEN: A COLLECTION OF FEMINIST CRITIQUES 7 (Ruth Hubbard et al. eds., 1979).

21. ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 9 (1988). As I have noted, it is political language intertwined with imagery which is a particularly potent tool for fetal rights advocates.

play a privileged set of viewpoints."[22] Through discourse, certain ideas and practices become visible and known while others become invisible. Certain groups become dominant, others subordinate.[23]

Law itself is both a language system[24] and a power system, in which society's power relations are expressed through the language of law in cases and statutes. Legal reality is created in the courts and the legislatures, where language is the process by which experience is abstracted and turned into legal doctrine. Law is the authorized discourse of the State, and can create, dismantle, or reinforce social hierarchies depending on the prevailing ideology.[25] Courts and legislatures are where the States construct reality and where social or scientific language is translated into legal language and thus legal reality.

This Article works from the premise that not only is there a nexus between language and social power relations, but that there is also a politics within language — a gendered politics.[26] If it is true that *what* is said may generate a particular reality, then even more important is an understanding that *who* speaks and chooses which words are used, and how the discourse is framed and evolves, is also a political act.

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22. *Id.* at 10.

23. *See* Nancy Fraser, *The Uses and Abuses of French Discourse Theories for Feminist Politics*, 9 THEORY CULTURE AND SOC'Y, 51, 65 (1992). The author writes, "discursive dominance [is linked] to societal inequality."

24. *See, e.g.*, PETER GOODRICH, READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES (1986) [hereinafter GOODRICH, READING THE LAW]; PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS (1990).

25. This is true regardless of whether it is openly articulated or clouded by the rhetoric of precedent and objectivity. Goodrich comments that:

> The legal text inevitably expresses how society ought to live, how social arrangements are best ordered and how individuals ought to behave, but it does so somewhat covertly and always in relation to a particular case. The legal text can always cover its tracks and can always appear to be simply restating previous law or doctrine.

GOODRICH, READING THE LAW, *supra* note 24, at 196.

26. Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodernist Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1031 (1992):

> Identifying the gendered character of . . . discourses can therefore be a feminist strategy for challenging the extensive and complicated network of social and cultural practices which legitimate the subordination of women. The assumption underlying this strategy is that language is a mechanism of power, that there is always more at stake in the relationship of gender and language than "just" a question of literary style — indeed, that style itself can constitute a powerful socializing apparatus.

The world view and experiences of those who have the power of language necessarily influences their choice of what is said. Because the language of law is the authorized discourse of the State, legal institutions and the language they use serve to legitimate state ideology. The way lawyers, judges, and legislators perceive the world determines how they shape it. Those who speak in the legal world are typically men, whereas those who are silenced are typically women. This relationship between legal-language politics and gender politics presents us with the following question: "[a] language which presents itself as universal, and which is in fact produced by men only, is this not what maintains the alienation and exploitation of women in and by society?"[27]

This Article will demonstrate that the language employed by the medical profession and the judiciary in discussing the pregnant woman and her fetus played a significant role in the creation of fetal rights and the correlative subordination of women. Before considering the judicial and medical discourse of pregnancy, however, it is helpful to examine the law and the medical profession's perception of the pregnant woman, as it is this perception that translates into the language of pregnancy. This change in perception influences the development of doctrine that flows from the intersection of law and science.

A. *Persons, Autonomy, and the Law*

Questions concerning the legal status of the fetus necessarily implicate the legal status of the pregnant woman. Mired in a binary tradition, the law historically has had difficulties shaping a jurisprudence around the pregnant woman.[28] Pregnant women pose a conundrum for the legal system which sees all of its subjects as individual persons. The pregnant woman, however, is something different: not one person, not exactly two, but something in between.

This fluid conception of the pregnant woman is not one which sits well with the adversarial orientation of the law. Legal and social issues relating to abortion, fetal protection policies,

27. Luce Irigaray, *Women's Exile*, 1 IDEOLOGY & CONSCIOUSNESS 62, 63 (1977).

28. Anne Morris and Susan Nott, *The Law's Engagement with Pregnancy*, *in* LAW AND BODY POLITICS - REGULATING THE FEMALE BODY 53 (Jo Bridgman and Susan Millns eds., 1995) [hereinafter LAW AND BODY POLITICS]. *See also* ROBERT GOLDSTEIN, MOTHER-LOVE AND ABORTION 47-54 (1988) (discussing the dyadic framework which first psychology and then the law have imposed upon the pregnant woman).

and fetal rights are typically framed as conflicts of rights: the woman's right to privacy versus the fetus's right to life; the woman's right to control her body, or to refuse medical treatment, or to work versus the fetus's right to be born healthy. These conflicts are not surprising because one of the law's functions is to arbitrate and the questions it considers are necessarily constructed in terms of conflict. Conflict requires adversaries, and therefore the law must conceptually separate the fetus from the woman in order to frame and resolve the dispute.

The idea that the pregnant woman cannot be seen as the proper party to decide questions relating to the fetus finds its source in the prevalence of the "medical model" of pregnancy where the fetus and the woman exist as separate and opposing entities.[29]

B. *Scientific Imagery and Discourse as a Basis for Fetal Rights*

In the debate over abortion and fetal rights, legal doctrine has been marked by its reliance on medical technology, utilizing its terminology and imagery to create the rules that bind women's bodies. Why is it that the law has spoken with the voice of the medical profession? Why not the voice of women, shaping doctrine according to their experiences of pregnancy?

Some explanation may be found in an investigation of the characteristics claimed in common by law and science. Law pretends to be objective, to be the voice of reason. Law claims to be rational, objective, abstract, and principled. It establishes itself as authoritative by virtue of its supposed neutrality; it appears fair and just because of its reliance on facts, rather than feelings, reasoned and therefore reasonable, unbiased and thus universally applicable.[30] Legal discourse, having been constructed according to these premises, is thus able to represent its pronouncements as Truth.[31] In these respects, the law aligns itself with traditional understandings of science. Science is also

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29. *See Law-Language*, *supra* note 19, at 537-44.

30. *See* Frances Olsen, *Feminism and Critical Legal Theory: An American Perspective,* 18 INT'L. J. SOC. L. 199, 201 (1990).

31. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW 18, 18 (David Kairys ed., 1982) ("Routinely, the justificatory language of law parades as the unquestionable embodiment of Reason and Universal Truth").

presented as objective and neutral; it uses facts, not interpretation.[32]

The voices of pregnant women, on the other hand, are individualized and subjective; they do not privilege the authority of the medical profession, but their own experiences. These experiences cannot be verified according to scientific standards and norms and do not lend themselves readily to the development of legal doctrine. Placing the experiences of women at the center of the debate over fetal development and personhood would weaken the role of law-makers and physicians by giving them less control over the process of pregnancy and birth. This control began when doctors took prenatal care and birthing away from mid-wives. The doctors relocated the process from the home to the hospital with its high-tech equipment, where the woman can be monitored, assessed, told what to eat, what to drink, how to act: in short, controlled.[33] This control has increased with the development of prenatal technologies, fetal medicine, and premature baby care.

It is also crucial to note the roles of visual imagery and scientific terminology in the discourse of fetal personhood. In a culture that privileges the empirical methodology of knowing by perception, photographs have the advantage of "the *appearance* of objectivity, of capturing literal reality."[34] What we see intuitively seems to represent a state of objective reality. Celeste Condit presents the case for the particular persuasiveness of rhetoric and image over rhetoric alone:

> Visual forms of persuasion present special problems of analysis [for the viewer]. Visual images seduce our attention and demand our assent in a peculiar and gripping fashion. Many audiences are leery of verbal constructions, which only "represent" reality, but because we humans tend to trust out own senses, we take what we *see* to be true. Therefore our trust in what we see gives visual images particular rhetorical potency. . . . It is in the translation of visual images into verbal

32. On the sexism currently embedded in our present notions of science as practiced by men, see SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986).

33. On the medicalization of pregnancy, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 66-91 (1984) [hereinafter POLITICS OF MOTHERHOOD]; ANN OAKLEY, THE CAPTURED WOMB (1984) [hereinafter THE CAPTURED WOMB]; ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 78-84 (1985) [hereinafter WOMAN'S CHOICE].

34. *Fetal Images, supra* note 15, at 263, 269.

meanings that the rhetoric of images operates most powerfully.[35]

When the outside world can view the fetus through the camera lens, then other parties can enter the debate over fetal personhood in a way that does not rely on the woman's experiences. Once represented on videotape and in photographs, the image of the fetus (and the fetus itself) is no longer a part of the woman who carries it. It is separate, autonomous, and part of the public world — its very nature up for debate. No longer must we rely on the word of a pregnant woman for confirmation of its existence. Judges and physicians can begin to impose their views of fetal personhood over the views of the woman, using the intertwined tools of law and science as the hallmarks of their justification. The ability to view the fetus while *in utero* has enabled actors other than the pregnant woman to decide on the value of the fetus. Moreover, the role of the woman in valuing the fetus is diminished when doctors and judges enter into the debate over transforming the moral status of the fetus into legal status. Because it has become separable from the woman, existing as an independent entity, the prevailing arbiters in society have been able to claim some objectively-based right to assess its value. They can do so on a basis that appears more acceptable and objectively-based than the religious claims over fetal souls and personality that earlier dominated the discussion of fetal rights. With the ascendancy of science and the shift from a woman-centered experience of pregnancy to a physician-centered one, the views of the woman carrying the fetus surrender their authority to doctors and law-makers.

1. Fetal Separation/Fetal Personification: the Role of Technology

> [T]he foetus is a being separate in its individuality, in its integrity, and in its development, [thus] it is easy enough to establish that it is a being independent of its mother . . . . In fact, not only is the foetus not a part of its mother's body, but if there is a question of one being subordinate to the other, it is the mother who is biologically subordinated to the foetus.[36]

How does the fetus come to be seen as a separate human self? The importance of recognition of the fetus as human is a

35. CONDIT, *supra* note 14, at 81.

36. Warren Murray, *The Nature and the Rights of the Foetus*, 35 AM. J. JURIS. 149, 166 (1990).

crucial part of the process of personification: "[t]he social status of personhood is accorded through recognition and acceptance by others. Recognition and empathy registered by observers are especially important criteria for assessing levels of selfness."[37] The likelihood of expressions of empathy with, and social recognition of, the fetus as a human being increase as the fetus develops.[38] The more distinctly human it looks, the more likely we are to regard it as a human being and to treat it as such. Moreover, when we are told by the authoritative voice of the medical profession that the form we see through ultrasound or *in utero* cameras is a person, we are even more likely to accept these pronouncements as true.

Advances in obstetrical technology have enabled us to perceive the fetus as human at earlier and earlier stages of prenatal development. It has been claimed that:

> This technology itself has had a tendency to allow us to identify fetuses as persons much earlier if we decide to. My point is that there may be a socio-biological force working here. If you can identify with a person when you see the fetus this imprints on you the idea that there is one of us here that we can't neglect. The technology itself has a powerful logical grip in terms of identifying personhood.[39]

In the last thirty years, rapid advances in technology have enabled one to peer into the previously mysterious womb.[40] Prior to the development of these technologies it was difficult for those not related to the woman or those removed from the pregnancy to justify the personhood of the fetus except on moral or theological grounds.

Ultrasound scanning allows the fetus to be seen as a recognizably human form within the first twelve weeks of gestation.[41] High frequency waves are passed through the woman's abdominal wall until they hit tissue of a different density.[42] When this

37. CLIFFORD GROBSTEIN, FROM CHANCE TO PURPOSE: AN APPRAISAL OF EXTERNAL HUMAN FERTILIZATION 85 (1981).

38. CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES 143-44 (1988).

39. John Fletcher, *Emerging Ethical Issues in Fetal Therapy*, *in* RESEARCH ETHICS 96 (Kare Berg & Knut E. Tranoy eds., 1983).

40. For a discussion of the development of these techniques, especially ultrasound, see THE CAPTURED WOMB, particularly chapter seven, entitled "Getting to Know the Fetus," *supra* note 33, at 155-86.

41. J. PRITCHARD ET AL., WILLIAMS OBSTETRICS 268 (17th ed. 1985), *cited in* Kathleen Rauscher, *Fetal Surgery: A Developing Legal Dilemma*, 31 ST. LOUIS U. L.J. 775 (1987) [hereinafter WILLIAMS OBSTETRICS].

42. *Id.*

occurs, some of the waves bounce back.[43] The pattern of the returning waves is then transformed into an image which is displayed on a monitor.[44] The technology of ultrasound enables us to open up the "black box" of pregnancy and peer inside the womb. What ultrasound allows us to see, however, is a highly selective image. We see a recognizably human shape. The shadowy pictures simultaneously suggest similarities between the fetus on the screen and a newborn baby, such as fingers, toes, and a human form, while obscuring the differences such as the underdeveloped lungs and central nervous system.[45] Nonetheless, because the picture on the screen *looks* like a baby, we are drawn to identify with it as such. Women report that the process of visualizing the fetus through ultrasound (in those cases where the pregnancy is desired) "makes the baby more real" and the fetal image "more our baby."[46] The fetus's sex can be determined, and the fetus can be observed and given a name. A personality may be attributed to it, and it may be imbued with other characteristics of social personhood by those not immediately involved in the pregnancy. Steven Maynard-Moody provides this description of how the fetus, previously only capable of being imagined or perhaps its movements felt, becomes a tangible reality for one woman viewing her ultrasound image:

> At first, it is hard to make sense of the swirling unstable pattern of light and dark, but when the fetus is still, one can soon distinguish its head, and then, a little less clearly, its torso. . . . I at least, was unprepared to see that figure emerge from the previously unintelligible swirls . . . . The pictures shocked me, . . . surprised me by its concrete actuality . . . .[47]

The development and use of the fetoscope, an internal camera which enables physicians to look inside the uterus and view the fetus in order to check for abnormalities, further enabled this process of transforming the unknown fetus into a known baby form.[48] Although the fetoscope only allows the viewing of parts of the fetus at a time, parents are able to see the fetus in detail.[49] This facilitates a sense of closeness with the fetus and identification with the fetus as a person.[50]

43. *Id.*
44. *Id.*
45. CONDIT, *supra* note 14, at 86-87.
46. *Fetal Images, supra* note 15, at 279.
47. STEVEN MAYNARD-MOODY, THE DILEMMA OF THE FETUS 89 (1995).
48. ROBERT H. BLANK, FETAL PROTECTION IN THE WORKPLACE 9-10 (1993).
49. *Id.*
50. *Id.*

Fetal surgery is the most radical of these techniques which in part serve to individualize the fetus, and it is also probably the most crucial in the creation of an independent persona for the fetus. In the early 1980s, doctors at the University of California, San Francisco ("UCSF") began experimenting with treating the fetus directly, rather than administering medications to the mother which would be absorbed through the placenta.[51] The first efforts involved blood transfusions directly into the fetus's abdomen to treat anemia, and the treatment of fetal goiter by injecting medication into the amniotic fluid where the fetus could ingest or absorb it.[52] Limited attempts at fetal surgery followed.[53] By 1989, the UCSF Fetal Treatment Program had undertaken seventeen cases of surgery performed directly on the fetus.[54] The fetuses, the youngest at eighteen weeks' gestation, were partially removed from the uterus, operated on, and then placed back in the uterus to continue gestation until term.[55] Although in most cases the fetal outcome was poor (only four of the original seventeen survived long after birth, and of those only two remain alive and healthy),[56] the celebrated case of "Baby Blake" highlights the ability of new medical techniques to separate the woman from the fetus.

In 1990 "Baby Blake" was born nine weeks premature.[57] At 24 week's gestation, surgeons had cut through his mother's uterus, entered the fetal body under the left arm, and repaired the diaphragmatic hernia that had allowed his internal organs to spill over into his chest cavity, preventing the lungs from developing.[58] Blake Schultz was then returned to the womb to recuperate and was born seven weeks later.[59] The Schultz case heralded a new era in the fetus-physician relationship and in the pregnant woman-physician relationship.

As cases of fetal surgery increased after the Schultz success, the fetus came to be regarded more and more as a second patient

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51. DANIELS, *supra* note 10, at 38.

52. *See id.*

53. *See id.* These early attempts involved the insertion of needles directly into the fetus's body either to drain urine from the bladder where there was urinary-tract blockage, or to drain fluid from the brain in cases of hydrocephalus.

54. *See id.* at 38-39.

55. *See id.* at 39.

56. *See id.*

57. *See id.* at 36.

58. *See id.*

59. *See id.*

(notably not a secondary patient) with its own medical concerns and interests.[60] For the purposes of medical care, the fetus can be contrasted with the woman whose uterus it is in, and treated separately as an independent being. Its physical connection to the mother is seen as inconsequential. When woman and fetus could be separated from each other during the pregnancy, not simply visually, but also to a degree and for a period of time physically as in the case of surgery, this led to the increasing perception of the fetus as an independent individual. The woman became marginalized[61] or invisible as our gaze was directed to the image of the fetus, and our attention focused on the humanness of its form.

Aside from these stunning developments in fetal medicine, this century's improved hygiene standards and better primary medical care have served to lessen the rate of miscarriage and infant mortality. Today it is much more likely that a pregnant woman, if she decides not to have an abortion, will safely give birth and that the child will grow to adulthood. This fact makes it easier to think of the potential child as an actual child; given today's standards of prenatal care and child health, investing in a perception of the fetus as a "pre-born" baby is likely to pay off.[62]

60. On developments in fetal surgery, see Harriet L. Hornick, *Mama vs. Fetus*, 39 MED. TRIAL TECH. Q. 536, 538-45 (1993) [hereinafter *Mama vs. Fetus*]; Jeffrey L. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1 (1983); Bonnie Steinbock, *Maternal-fetal Conflict and In Utero Fetal Therapy*, 57 ALB. L. REV. 781 (1994); Katherine A. Knopoff, Comment, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499 (1991). A major obstetrics text contains the following statement connecting fetal personhood and fetal rights: "Quality of life for the mother and her infant is our most important concern. Happily, we live and work in an era in which the fetus is established as our second patient with many rights and privileges comparable to those previously achieved after birth." WILLIAMS OBSTETRICS, *supra* note 41, at 867-71.

61. The pregnant woman has been referred to in such inanimate terms as the "maternal environment," the "operating womb," and the fetus's "intensive care unit." *See* DANIELS, *supra* note 10, at 40 n.23.

62. *But see* NANCY SCHEPER-HUGHES, DEATH WITHOUT WEEPING 273 (1992) (discussing the detachment expressed by mothers towards their newborn children in poor Brazilian society where "birth signifies [not] new life, [but] the threat of premature death").

2. Sexual Politics and the Control of Women: the Role of Technology in Fetal Rights Advocacy

Although technology itself is morally neutral, it can be and is employed for political ends.[63] We may identify with the fetus as human or we may choose not to.[64] Although the images of fetuses that we see on monitors and fetuses operated on outside the womb appear objective, they exist in a context where pregnancy has become the domain of the medical profession, outside of women's control, where scientific processes and discourse are valued over women's experiences.[65] Feeling empathy for the fetus due to its appearance as human can lead to a positing of the woman as its enemy, especially when she does not behave in a way that furthers the fetus's interests. At the same time that technologies render the fetal form more and more baby-like, they also serve an important purpose for fetal rights advocates. Ultrasound scanning, fetoscopy, and surgery on fetuses still *in utero* have made it possible to view the woman and fetus as essentially separate beings, and thus have facilitated the perception that the fetus is an autonomous, independent being. The representation of the fetus in isolation, abstracted from the body of the woman within which it is located, facilitates a perception of the fetus as a being that deserves no fewer rights than the woman.[66]

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63. How different women see fetal images depends on the context of the looking and the relationship of the viewer to the image and what it signifies. . . . [There are] important differences between the meanings of fetal images when they are viewed as "the fetus" and when they are viewed as "my baby."

Fetal Images, supra note 15 at 280-81. On the other hand, Petchesky also notes that "women may see in fetal images what they are told they ought to see." *Id.* Instructive is this comment regarding the role of ultrasound technology in inculcating the "correct" maternal attitude towards their fetuses:

> When a mother undergoes ultrasound scanning of the fetus, this seems a great opportunity for her to meet the child socially and in this way, one hopes, to view him as a companion aboard rather than as a parasite. . . . Doctors and technicians scanning mothers have a great opportunity to enable mothers to form an early affectionate bond to their child by demonstrating the child to the mother. This should help mothers behave concernedly towards the fetus.

A.R. Dewesbury, *What the Fetus Feels*, B. M. J. 481 (1980), *cited in* THE CAPTURED WOMB, *supra* note 33, at 185.

64. THE CAPTURED WOMB, *supra* note 33, at 185.

65. *See supra* note 33.

66. As Barbara Katz Rothman writes, the view of the fetus as a separate being induced by these representations is reinforced by the prevailing "medical model of pregnancy, as an essentially parasitic and vaguely pathological relationship, [which]

As these technologies have enabled and encouraged us to see the woman and fetus as separate entities, they have also opened up a way for judges and law-makers, spurred on by physicians, to assert control over pregnant women through the rhetoric of upholding fetal rights. Women who do not conform to their doctor's judgment as to what is the best course of action can now be forced to conform through the assertion of fetal rights or claims to be protecting the fetus's interests.[67] Doctors have even gone so far as to assert that women who do not accept their decisions are acting for "occult" reasons — that they wish, for no medically-related reason, to shirk the responsibilities of motherhood by letting the fetus die and are not prepared to tell the physician this.[68] Good mothers, it is implied, should always wish to do what Doctor considers best for the fetus and unquestioningly take his advice.

Judicial attempts to control pregnancy may also stem from what has been termed "fetus-envy."[69] The predominantly male judiciary may experience "envy for a woman's impressive capacity to become pregnant and to carry out the transformation of a

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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.'" Barbara Katz Rothman, *When a Pregnant Woman Endangers her Fetus*, HASTINGS CTR. REP., Feb. 1986, at 24, 25.

67. Sometimes, however, the patient does not accept the doctor's decision. Such a case may occur for different reasons: fear of surgery, prejudice, ignorance, difficulty with the language, or inadequate rapport between doctor and patient. However, if all these factors are overcome and the patient continues to refuse the medical proposal, a suspicion of an occult [secret] reason arises. *It is probable that the patient hopes to be freed in this way of an undesired pregnancy* . . . .

J. R. Lieberman et al., *The Fetal Right to Live*, 53 OBSTETRICS & GYNECOLOGY 515 (1979), *cited in* Belinda Bennett, *Pregnant Women and the Duty to Rescue: A Feminist Response to the Fetal Rights Debate*, 9 LAW IN CONTEXT 70, 76 (1991) (emphasis in original).

68. *Id.*

69. Sherry F. Colb, *Words that Deny, Devalue and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101 (1992). As Frances Olsen writes in *A Finger to the Devil*, DISSENT, Summer 1991, at 377, 380: "Women *create* children; children do not just happen. To think a zygote is baby is to devalue women's work." *See Unraveling Compromise*, *supra* note 13, at 120-21: "Treating a fetus as morally equivalent to a child obscures the active role that mothers play in procreation and is yet another example of society's tendency to devalue the work that women do." This devaluation of the work that pregnant women do during pregnancy has a long history in the law, where women are typically viewed as storage containers for the fetus which grows itself. *See also* Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J.L. & RELIGION 73 (1993).

zygote into a baby inside her body."[70] As male and female roles in reproduction are so markedly unequal, cases and laws which seek to make the authoritative voice in the pregnancy someone other than the mother (either a judge, a physician, a law-enforcement officer, or the father), are endeavors to recast the importance of the male role in pregnancy.[71] These attempts to reassert or increase the male role in pregnancy can also be viewed as symptomatic of the devaluation of women and the work they do in pregnancy.

3. Fetal Images: the Abortion Debate and Popular Culture

Assertions of fetal personhood in the abortion debate initially rested on religious and moral grounds.[72] The fetus was imbued with a soul, the possession of which was the mark of personhood, and no one had the right to take the life of another except for God. Underpinning this justification for the fetal right to life was a moral subtext wherein the good, innocent fetus which did not deserve to die was pitted against the sinful and sex-loving woman who preferred not to pay the price for her fun but, rather, to conveniently abort the fetus.[73]

As the abortion debate progressed, the religiously-based affirmations of fetal personhood fell out of favor. Instead, anti-abortionists supported their claims of fetal personhood not by the fetus's possession of a soul, but on its human characteristics. This shift in anti-abortion discourse was facilitated by technology which made the fetus visible to the outside world. The fetus was identified as a baby in the minds of the public in various ways: photographs of late-term fetuses juxtaposed with new-born babies; constant references to the fetus as a "baby" or "(unborn) child"; and a simplistic biological reductionism that posits no difference between an unfertilized egg and an adult human.[74] Photographs of early fetuses which focus on the easily recognizably human features of a fetus such as fingers and toes, and elide the

70. Peach, *supra* note 69.

71. *See id.*

72. WOMAN'S CHOICE, *supra* note 33, at 329-32.

73. *See id.* at 244-52, 338-39.

74. CONDIT, *supra* note 14, at 79-89; WOMAN'S CHOICE, *supra* note 33, at 334-35; Zoe Sofia, *Exterminating Fetuses: Abortion, Disarmament, and the Sexo-Semiotics of Extraterrestrialism,* DIACRITICS, Summer 1984, at 47.

differences such as the translucent skin, undeveloped brain, placenta, and umbilical cord were commonly used.[75]

The 1985 anti-abortion film *The Silent Scream* purports to depict a real-life abortion.[76] It combines *in utero* film of a 12 week old fetus with a voice-over telling the viewer what the fetus is experiencing and how it feels about it. The film's soundtrack explicitly connects the image of the human-looking fetus with the viewpoint that the fetus is a feeling, thinking human:

> Now for the first time, we have the technology to see abortion from the victim's standpoint. Ultra-sound imaging has allowed this . . . we are going to watch a child being torn apart, dismembered, disarticulated, crushed and destroyed by the unfeeling steel instruments of the abortionist. . . . It does sense aggression . . . . One can see it moving . . . . a pathetic attempt to escape . . . . [T]here is no doubt that this child senses the most mortal danger available. . . . Now this little person at twelve weeks is a fully formed, absolutely identifiable human being.[77]

This use of fetal imagery is not confined to the abortion debate. *Life* magazine ran a series of photographs of *in utero* embryos and fetuses, first in 1965, and most recently in November 1996.[78] These photographs depict the fetus as an active, rumbus-

75. For example, an anti-abortion billboard sponsored by the Right to Life Media Campaign of Illinois showed a photo of a fetus that emphasized its human features along with the words: "They're forgetting someone." CONDIT, *supra* note 14, at 84.

76. PATRICIA JAWORSKI, *Thinking About The Silent Scream*, *in* FETAL 'PERSONHOOD', *supra* note 1, at 55-56.

77. *Id.* Jaworski conducted a panel discussion of eminent neuroscientists who refuted the basic premise of *The Silent Scream* by pointing out that although "no-one wants a fetus to feel pain and terror, . . . it has to be realized that a brain must exist before pain and terror can be felt — and not only must the brain exist it must reach a certain level of development" (i.e. the cerebral cortex must have a certain minimum number of neurons and synaptic connectors) and this stage does not occur in the fetus before the seventh month of pregnancy. *Id.* at 59-60.

78. Carole A. Stabile, *Shooting the Mother: Fetal Photography and the Politics of Disappearance*, CAMERA OBSCURA, Jan. 1992, at 179, 183-90. The first publication of such photographs in the popular media was in the June 1962 issue of *Look* magazine. Petchesky describes the *Look* text and pictures:

> [I]t featured the now-standard sequel of pictures at one day, one week, seven weeks and so forth. In every picture the fetus is solitary, dangling in the air (or its sac) with nothing to connect it to any life-support system but a clearly defined umbilical cord. In every caption it is called "the baby" (even at forty-four days) and is referred to as "he" — until the birth, that is, when "he" turns out to be a girl. Nowhere is there any reference to the pregnant woman, except in a single photograph at the end showing the newborn baby lying next to the mother, both of them gazing off the page allegedly at "the father."

tious little tyke: "it can make an impressively hard fist and the punches and kicks are plainly felt by the mother."[79] Textually and visually (for the woman is nowhere to be seen and little-discussed in these articles), the fetus predominates. Even an advertisement for a Volvo uses ultrasound pictures to make its pitch to the consumer.[80] The filtering of this sort of imagery into everyday life makes the woman who carries the fetus invisible and of secondary importance, while the fetus appears at center-stage, free-floating, and autonomous.

Some claim that intra-uterine photographs such as those used in presentations by pro-life activists have had little impact: "interviews show that with rare exceptions, these presentations, including the slide shows, were persuasive only to those people who had sought them out because they were already troubled or concerned about abortion. . . . [T]hey served to deepen already existing pro-life commitments."[81] However, this view may no longer hold. References to the fetus in personal, rather than medical terms which originate in ultrasound and fetal photography, are becoming increasingly common in social and legal discourse.[82]

C. *Individuality and Rights*

The increasing tendency to see the fetus as an individuated entity, unconnected to the pregnant woman, has significant import to liberal legal thought. To be an individual is to be distinct and distinguishable from others, to have a wholly unique identity and a socially-accepted sense of selfness and singularity. In the liberal jurisprudence of rights, this independence — separation from others in society — is central to having one's status as a rights-bearer accepted by the state and other legal actors.[83]

Petchesky concludes: "From their beginning, such photographs have represented the fetus as primary and autonomous, the woman as absent and peripheral." *Fetal Images, supra* note 15, at 268 (citations omitted).

79. Stabile, *supra* note 78, at 186.

80. A Volvo ad shows a large ultrasound picture with the caption: "Is something inside telling you to buy a Volvo?" *Id.* at 195.

81. POLITICS OF MOTHERHOOD, *supra* note 33, at 150-51 (commenting on a pro-life campaign that used intra-uterine photograph slides as part of its presentations).

82. *See infra*, text accompanying notes 125-130.

83. *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 389 (1984): "[R]ights theory conceptualizes a society composed of self-interested individuals whose conflicting interests are mediated by the state. . . ."; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 216 (1990): "[R]ights analysis treats each individual as a

When the fetus was perceived as essentially connected to the woman, it could not fulfill the conditions for becoming a rights-holder. Yet when scientific advances enabled the fetus to be seen as separate from the woman, it became easier to view the fetus as an independent being and, therefore, one which holds rights against others.

This phenomenon has been termed "rights fetishism," where the very assertion of rights comes to stand for something greater.[84] Rights theories are bound up with notions of social and legal status. To claim a right is not simply to say that one's interests in food or free speech or property or freedom should be recognized and acknowledged as valid by the state and other legal actors. Rather, rights-claims also serve the symbolic purpose of allowing one to claim a place as a member of the legal and social community.[85] Assertions of fetal rights are essentially making the claim that fetuses deserve to stand on an equal social and legal footing with other members of the human community.

In the case of the fetus, rights-claims and independence are interlinked and interdependent. At the same time that scientific advances in obstetrics have enabled us to see the fetus as an independent, autonomous entity, there has been a rise in the number of cases and statutes granting "rights" to the fetus — either explicitly termed as such, or framed in the language of fetal needs or protection. There is a close correlation between social and medical perceptions of the fetus as separate, and legal willingness to decide cases on that premise.[86] The medical sepa-

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separate unit, related only to the state rather than to a group or to social bonds." On rights theories in general see *id.* at 146-72.

84. Valerie Kerruish, Jurisprudence as Ideology 157-65 (1991).

85. According to this understanding of rights-claims, slaves, women and other groups historically denied rights were not making merely abstract claims about participating in the legal system; they were also seeking to lose their subordinate, dependent status and be acknowledged as full members of society.

86. Donna Greschner articulates the closeness of the fit between fetal separation and fetal rights:

> The . . . language and concept that permeates and has special significance in legal discourse on creation is rights. The traditional, male-stream formulation of rights is that of trumps attaching to separate individuals. A person is separate from and independent of all others, possessing rights as a means of stopping others from infringing upon his space, his autonomy, his freedom to do what he wants. Visualizing the foetus as a miniature man fits perfectly and circularly with the ascription of rights to the foetus: if the foetus is a separate man, he must have rights, and if a foetus has rights he must be a separate man. Either way, the foetus has rights that always override, or must at least be balanced against, the conflicting rights of mothers.

rability of the fetus has made claims for legal personhood stronger and perhaps more acceptable to a secular society than those couched in theological terms.[87] Sheila Noonan puts it concisely:

> The relevance [the fetal separation process] holds for legal doctrine must be underscored. The foetus thereby enters legal discourse constructed as a unique entity with a separate legal status. This serves to reinforce its situation . . . [where] the foetus is increasingly displaced and detached from the pregnant woman. That a foetus in fact relies on the body of its mother for survival is thereby obviated and obscured. . . . [I]n this fashion, the foetus unambiguously achieves centrality as a potential "victim" bearing interests which warrant protection.[88]

III. The Fetus In Law

This section provides an historical overview of the different attitudes displayed in the law towards the personhood of the fetus, primarily through an investigation of criminal laws relating to fetal destruction and induced abortion.[89] The section then assesses recent changes in Anglo-American jurisprudence of fetal personhood. In doing so, this section will trace the later influence of medical science on the law's ability to portray the fetus as a separate entity from the woman. This measure of physical and later visual fetal separability appears to be the touchstone of fetal personhood and other, lesser, fetal rights.

Donna Greschner, *Abortion and Democracy for Women: A Critique of* Tremblay v. Daigle, 35 McGill L.J. 633, 652 (1990).

87. We should also note that claims for fetal personhood can be employed for reasons other than desiring that the fetus gain full legal status. These may be benign, such as the desire to compensate a woman for the death of a near-term, wanted fetus, or to allow a child to claim for injuries in the womb that disable it through life; or they may be expressions of hostility towards a pregnant woman who acts in a way society, or an individual judge, regards as irresponsible (for example, drug addicts who give birth to babies born with drug addictions and other serious health problems). Typically, these other reasons (i.e. non-fetus-centered) have been the norm, not the exception.

88. Sheila Noonan, *Theorizing Connection*, 30 Alberta L. Rev. 719, 723 (1992).

89. Criminal law was chosen because it was often the primary or only branch of law within a jurisdiction, other legal interests being recognized much later. This Article also does not consider the issue of workplace fetal protection policies and its concern with the process of fetal personification. *See* Blank, *supra* note 48. *See also* Suzanne Samuels, Fetal Rights, Women's Rights-Gender Equality in the Workplace (1995).

A. *Penalties for Causing the Death of a Fetus: Early Views*

Historically, whether or not the death of an *in utero* fetus was regarded as murder depended upon whether the fetus was considered to have legal personhood. Ancient codes, while granting the fetus some value,[90] nonetheless held that its value was not equal to that of the pregnant woman, implicitly denying the fetus personhood at law. For instance, the 1728 B.C. Babylonian Code of Hammurabi stated that money could compensate for the fetus's death while the death of the woman required another woman's death as compensation.[91]

> 209: If a[n] [individual] struck [a]nother [individual's] daughter and has caused her to have a miscarriage, he shall pay ten shekles of silver for her fetus.
>
> 210: If that woman has died, they shall put his daughter to death.[92]

The woman's personhood was acknowledged in law, while the fetus was considered something less.

Ancient Roman law explicitly accorded no personality to the fetus. It was considered *pars viscerum matris* (part of the bowels of the mother).[93] This legal position incorporated the Stoic belief that the soul did not enter the body until live birth.[94] Thus, causing fetal destruction, although recognizably damage to an entity of some sort, was not the same as the death of a born person. Later, Christian Rome accorded some value to the fetus, but only insofar as this recognition demonstrated the authority of the head of the household (the *paterfamilias*).[95] The fetus, like other members of the household, was subject to the command of the *paterfamilias* and was legally regarded as his property rather than as an independent human being.[96] Indeed, the *paterfamilias* could order the fetus to be destroyed, or punish his wife if she did so without his consent.[97]

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90. *See* LAW REFORM COMMISSION OF CANADA, CRIMES AGAINST THE FOETUS 5 (1989) (commenting on the Sumerian (2000 B.C.), Assyrian (1500 B.C.), Hammurabic (1300 B.C.), Hittite (1300 B.C.) and Persian (600 B.C.) Codes). *See also* Eugene Quay, *Justifiable Abortion: Medical and Legal Foundations*, 49 Geo L.J. 395, 399-422 (1961) [hereinafter *Justifiable Abortion*].

91. *See* ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 175 (James B. Pritchard ed. & W.F. Albright trans., 1955).

92. *Id.*

93. *See Justifiable Abortion*, *supra* note 90, at 413.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

The Bible also regarded the fetus as something less than the woman. Its destruction was to be punished by a fine, whereas harm to the woman was punishable by the death of another:

> And if men strive together, and hurt a woman with child, so that her fruit depart . . . he shall surely be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow, then shalt thou give life for life.[98]

Later Christian theology was divided on whether the destruction of a fetus or embryo was murder, some lesser crime, or no crime at all.[99] The Western Christian Church position became clearer in 1100 AD, when Ivo Chartres proscribed abortion, but held that the destruction of an "unformed" fetus was not murder.[100] This distinction between the personhood of the formed and unformed fetus rested on the belief of St. Thomas of Aquinas, who maintained that fetal ensoulment (and thus fetal personhood) occurred at the first movement of the fetus. Fifty years later, in the *Decretum*, Gratian affirmed this view.[101] As consolidated by the *Decretalium Collectiones*, Gratian's treatise became known as the *Corpus Juris Canonici*.[102] The *Corpus Juris* served as the basis of canon law for the next seven hundred years, and influenced the common law until well into the nineteenth century.[103]

This moment of first fetal movement thus became an important factor in the law's determination of fetal personhood and in

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98. *Exodus* 21:22-23.

99. For instance, Luker notes that the Church Councils of Elvira and Ancyra penalized only those abortions committed after the woman had also committed another sexual crime, such as adultery or prostitution. Early Christian thought divided on the issues of whether the destruction of an unformed embryo (i.e. one believed not to have a soul) was murder, and different sources of ecclesiastical law not only differed on the penalties for abortion, but also on the crucial threshold question of whether it was a crime. POLITICS OF MOTHERHOOD, *supra* note 33, at 12-13.

100. *Justifiable Abortion*, *supra* note 90, at 429. Fetal movement, also known as "vivification" or "animation," was thought to occur after 40 days for a male embryo and 80 days for a female. In cases of doubt, the fetus was to be considered female. This was probably evidence of a permissive attitude towards abortion, as it condoned abortions at a later stage of pregnancy. *See also* POLITICS OF MOTHERHOOD, *supra* note 33, at 13.

101. *See* POLITICS OF MOTHERHOOD, *supra* note 33, at 13. *See also Justifiable Abortion*, *supra* note 90, at 428.

102. *See* POLITICS OF MOTHERHOOD, *supra* note 33, at 13. The *Corpus Juris* was replaced by a new code in 1917.

103. *See id.*

the criminal sanctions that might follow its destruction.[104] Over time, the determination of fetal movement/ensoulment shifted from the strict theological formula of 40 days for male fetuses and 80 for females, to a reliance on the woman's first experience of fetal movement.[105] The point of first movement was commonly known as "quickening." Common law and canon law both relied on this distinction but dealt with it in different ways. Henry de Bracton's treatise on medieval canon law, *The Law and Customs of England*, followed the formed-animated/unformed-unanimated distinction in determining the personhood of the fetus and stated that "[i]f there be anyone who strikes a pregnant woman or gives her poison whereby he causes an abortion if the fetus be already formed or animated, and especially if it be animated, he commits homicide."[106]

In the seventeenth century, the great common law jurist Sir Edward Coke considered quickening an important factor in determining the level of criminal sanction for abortion, but placed more importance on the Stoic view of personhood being contingent on live birth:

> If a woman be quick with childe, and by a 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 misprison and no murder; but if the childe be born alive and dyeth of the potion, battery or other cause, this is murder; for in the law it is accounted a reasonable creature in rerum natura, when it is born alive.[107]

While continuing to recognize the relevance of quickening, the "born alive" standard was accepted and built on by such jurists as Hale and Blackstone:

> If a woman be quick or great with child, or if she takes, or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura. . . . But if a man procures a woman with child to destroy her infant, once born, and the child is born,

104. Quickening usually occurs in the second trimester of pregnancy. Luker notes that dependence on this criterion meant that in practice, first trimester abortions, and possibly later ones, given the subjective nature of quickening, were not considered as murder by the law. *See id.* at 14.

105. *See Justifiable Abortion, supra* note 90.

106. HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND III, ii, 4 (George E. Woodbine ed. & Samuel E. Thorne trans., Harvard Univ. Press 1977).

107. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 40 (1648).

> and the woman in pursuance of that procurement kills the infant, this is murder.[108]
>
> [I]f any woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanour.[109]

B. *Anglo-American Common Law of Fetal Death*

Although the legal position of the fetus that resulted from the standards of quickening and live birth varied over the centuries and across the Anglo-American legal world, the general position was that an abortion brought on before quickening was considered no crime at all. Abortions after quickening were held by canon law to be homicide, though not murder.[110] The common law, although considering post-quickening abortions a crime, saw them in a lesser light than the death of a born child.[111]

For example, in the United Kingdom, Lord Ellenbrough's Act of 1803[112] criminalized all abortions, but made those after quickening a capital offense, and those prior to quickening a lesser crime. Thirty-four years later under Queen Victoria, the 1837 statute 1 Vict. ch 85, § 6 abolished the quickening distinction and dropped the death penalty for abortion.[113] Likewise, in the United States, the case of *Commonwealth v. Bangs* held that

108. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *443 (1778).

109. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129-30.

110. *See* DE BRACTON, *supra* note 106.

111. This was true whether it was the result of an attempt to procure an abortion or as an act of infanticide. Stanley B. Atkinson, *Life, Birth, & Live-birth*, 20 L.Q. REV. 134, 139-45 (1904) notes a series of infanticide cases in the mid-nineteenth century that explicitly declared that a murder verdict could not be sustained in an infanticide prosecution unless the child was born alive. *See, e.g.*, R. v. Poulton 5 C. & P. 329 (1832); R. v. Enoch 5 C. & P. 539 (1833); R. v. Handley 13 Cox C.C. 79 (1874).

112. 43 Geo. 3, ch. 58 (Eng.).

113. As in the other British colonies, this pattern was largely followed in Canada. In 1810, New Brunswick passed a law largely modeled on Lord Ellenbrough's Act, as did Prince Edward Island in 1836. In 1837, Newfoundland incorporated English criminal law into its legal system (including the statute of 1837). Upper Canada abolished the quickening distinction in its prohibition of abortion in 1841, as did New Brunswick in 1842. Initially, Canadian law proscribed only those abortions performed by third parties, but in 1849 New Brunswick criminalized abortions performed by the woman herself. New Brunswick's move was followed by Nova Scotia

"[t]here can be no sentence upon this verdict . . . if an abortion had been alleged and proved to have ensued, the averment that the woman was quick with child at the time is a necessary part of the indictment."[114] The case of *Commonwealth v. Parker* similarly found that abortion with the woman's consent was not punishable unless quickening had occurred.[115] The 1872 New York case of *Evans v. People* summed up the pre-twentieth century position regarding the law of 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.[116]

It is important to note that the point at which a fetus gained personhood, or some other, lesser value in the law's eyes, depended on its state of development — a medical criterion. The fetus gained some value after quickening, or when born. Personhood, depending on whether common or canon law had jurisdiction, was attained either when the fetus could be felt or seen. Particularly salient is the fact that at common law, the fetus generally was not considered legally a person until it was literally separated from the body of the woman. Already fetal rights were based on the concept of separability. In the 20th century this concept increasingly became the preserve of the medical profession.

C. *Viability as the Criterion for Fetal Separability*

The recognition of the fetus as a physical entity (rather than a moral or theological conception of the fetus's rights, interests, or personhood) is still strongly evident in the modern common law's regulation of abortion. However, as medical science has

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in 1851. In 1869, the Canadian Parliament consolidated the provincial law and adopted the New Brunswick abortion provisions as applicable to all provinces.

114. 9 Mass. (9 Tyng) 386, 387 (1812), applied in State v. Cooper, 22 N.J.L. 52 (1849) (specifically relying on the 1803 Act of Lord Ellenbrough).

115. 50 Mass. (9 Met.) 263 (1845).

116. 49 N.Y. 86, 88-90 (Sup. Ct. 1872).

progressed in sophistication, the reliance on quickening or live birth has been replaced by the standard of fetal viability.[117]

Viability is a useful measurement for the law, as it brings with it an aura of objectivity and has the endorsement of the medical profession. Viability now appears to be the new standard by which the issue of fetal personhood is implicitly determined. For instance, in the United Kingdom, abortion (providing certain circumstances are satisfied) is legal up until 24 weeks, which is generally regarded as the earliest threshold of viability.[118] Similarly, *Roe v. Wade*,[119] while explicitly refusing to grant the fetus personhood,[120] relied on viability as the principle governing the extent and scope of abortion rights.[121] The Court recognized that viability could occur between 24 and 28 weeks, but set the point at 28 weeks, after which the States could legitimately restrict a woman's right to abort.[122]

Judicial and political views on the point of viability are changing. What appears to be influencing this change is the perceived increasing ability of medical science to keep the prematurely born alive at earlier and earlier stages of development. In legal and political argument, assertions about viability are often presented as unarguable fact. For example, Ronald Reagan once claimed that fetuses had been born alive "even down to the three month stage and have lived to . . . grow up and be normal human beings."[123] Claims about the shifting back of the viability threshold were also made by Justice Sandra Day O'Connor in *Akron Center for Reproductive Health v. City of Akron*, when she sug-

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117. Viability is the capacity for independent life outside the womb, or the point at which the fetus can be physically separated from the mother and survive.

118. *See* Abortion Act 1967, § 1(1) (Eng.) (as amended 1990). The Act originally set the time limit for legal abortions at 28 weeks.

119. 410 U.S. 113 (1973).

120. *Id.* at 158-59.

121. *Id.* at 163-64.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb. . . . If the State is interested in protecting fetal life after viability, it may go as far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id.

122. *Id.*

123. DANIELS, *supra* note 10, at 18.

gested that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."[124]

Although these views had no basis in actual medical reality,[125] they took hold and influenced the development of doctrine. These statements provide an excellent proof of the maxim that it is not what the truth is, but what people think is the truth that counts.

The same is true with respect to legislation. The 1988 Alton Bill, a Private Member's Bill in the British Parliament, sought to reduce the upper legal limit for an abortion from 28 to 18 weeks. Although the Bill ultimately failed, two years later legislation was successfully introduced which reduced the limit for legal abortion to 24 weeks.[126] The debate that surrounded the Alton Bill is notable in that it exemplifies the shifting of the abortion debate from a moral issue to one to be decided on scientific/medical grounds.[127] The fetus at 18 weeks was characterized by its

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124. 462 U.S. 416, 442 (1983) (dissenting). *See also* Planned Parenthood v. Casey 505 U.S. 833 (1992) (The Court in *Casey* upheld viability but rejected the trimester analysis.).

125. The threshold of fetal viability has hovered around the 24 week (6 month) point for most of this century. Compare the 1903 edition of WILLIAMS OBSTETRICS: "A foetus born at this period will attempt to breathe and move its limbs but always perishes within a short time" with the 1989 edition: "A foetus born at this period will attempt to breathe but almost always dies shortly after birth" *supra* note 41, at 90. However, there have been significant advances in the ability to keep fetuses born at 28 weeks (6 1/2 to 7 months) alive. In 1903, prognosis was gloomy: "as a rule, it cannot be raised, even with the most expert care, although an occasional case is found in the records," while the outlook was much more optimistic in 1989: "The infant [of seven months], with expert care, most often will survive." *See* MAYNARD-MOODY, *supra* note 47, at 81. Maynard-Moody details several medical studies which result in the consensus that fetuses younger than 22 weeks and/or weighing less than 500 grams are considered non-viable. *See id.* at 79-80. Certainly there is no evidence that the fetal viability threshold is moving into the first trimester, as claimed by Ronald Reagan, Justice O'Connor, and various British Members of Parliament. Cynthia Daniels notes that although fetuses of 24 weeks gestation have shown a 50% chance of survival and those of 23 weeks a 10% chance, Harvard Medical School studies showed that "the odds become infintesimal before twenty-three weeks." The crucial factor in fetal viability is lung development which generally does not occur until the 23rd or 24th week. DANIELS, *supra* note 10, at 18.

126. *See* Abortion Act, § 1(1), *supra* note 118. The Abortion Act of 1967 set out the circumstances for legal abortion in the UK (before 28 weeks). The Abortion Act was amended by § 37 of the Human Fertilisation and Embryology Act of 1990 (mainly addressing embryo experimentation) which reduced the limit for legal abortion to 24 weeks. The Alton Bill was introduced in the meantime to try to lower the limit for legal abortion to 18 weeks. For an extended discussion of the Alton Bill, *see* OFF-CENTRE, *supra* note 7.

127. "Political technologies advance by taking what is essentially a political problem, removing it from the realm of political discourse, and recasting it in the neutral language of science. Once this is accomplished the problems have become technical

supporters as a fully (or nearly so) formed human being and repeatedly referred to a "child," "baby," or "person." Consider these statements made during debate on the Bill:

> [At] 18 weeks, a foetus is fully formed, with all major organs, except its lungs, intact. . . .
>
> The only difference between babies born . . . after 28 weeks and those born at 18 weeks is that the latter are smaller . . . [they] react to outside stimuli and feel pain.
>
> [B]abies aborted after 18 weeks . . . they are perfectly normal children.
>
> [T]he child has rights too. The child has rights in law. . . . Choice should not be given to only one person. There is no-one to speak for the child but us.[128]

When lowering the time limit for legal abortion was again discussed two years later, the British House of Commons explicitly relied on medical opinion in setting fetal viability at an earlier point in time — at 24 rather than 28 weeks.

> It would be a great mistake for the House to set aside the opinion of established medical bodies. . . . We are not entitled to cast aside all these opinions as though they did not matter, or to pluck out of the air a figure that we think might be better.[129]

Further, the House displayed considerable faith in the ability of medical advances to bring back the point of fetal viability, claiming that "medical techniques are advancing so rapidly that, long before 20 years is up, we shall regard a termination within 20 weeks as ludicrous . . . . By that time, medical techniques will be so good that a foetus will be viable much earlier than that."[130]

D. *The Language of Fetal Separability in the Courts*

So far, this Article has concentrated on the legal recognition of the fetus in the context of criminal law. However, fetal rights have been recognized in other contexts. For example, in the law of property and inheritance a fetus would be granted the status of a person for inheritance purposes if it existed at the time of the testator's death. In tort law, claims could be made for prenatal

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ones for specialists to debate." HUBERT DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 196 (1983).

128. OFF-CENTRE, *supra* note 7, at 180, 183, 186.

129. Sally Sheldon, *The Law of Abortion and the Politics of Medicalisation*, *in* LAW AND BODY POLITICS, *supra* note 28, at 115.

130. *Id.*

injuries resulting in the fetus's death or the birth of a disabled child.[131]

However, none of these rights could be exercised by the fetus while still a fetus.[132] Fetal property "rights" were primarily a mechanism for effecting the wishes of the testator or trustee, and did not vest until live birth.[133] Likewise, civil claims for the torts of wrongful life or wrongful death could not be sustained unless the fetus had been born alive or had at least reached the point of viability.[134] The civil law mirrored the criminal law criteria for fetal separability as a pre-condition for rights-exercising; that is the "born alive" rule and the point of fetal viability determined whether or not damages could be recovered for actions done to the fetus *in utero*.[135]

The forefront of legal change appears to be in judicial considerations of the rights exercisable by, or on behalf of, the fetus prior to birth. The cases in which the rights of the fetus have been addressed show the law in a state of flux. Courts are uncomfortably aware that the issue of fetal rights-bearing is not an easy legal issue that can be decided in isolation from its social, moral, and political context. In some jurisdictions, courts continue to adhere to the traditional common law rule, recognizing fetal rights only once the fetus is born; others have shown themselves to be more sympathetic to claims of pre-birth or pre-viability fetal rights. This friction in the law can be traced back to an increasing perception that law has not kept pace with science. Fetal rights case law legitimates its holdings by reference to medical developments, but the date of the decision strongly influences the way in which the court is prepared to lean. Earlier

131. Certain rights of guardianship and the ability to be a beneficiary under a trust also existed. In the Commonwealth, *see* Watt v. Rama (1972) V.R. 353; de Martell v. Merton & Sutton Health Auth., 3 All E.R. 820 (Q.B. 1992); Medhurst v. Medhurst [1984] 46 O.R.2d 263; Montreal Tramways v. Leveille [1933] 4 D.L.R. 337 (fetus may recover for injuries inflicted while in the womb, provided it is later born alive); Thellusson v. Woodford 32 Eng. Rep. 1030 (1805) (fetus is a life in being for the purpose of the rule against perpetuities and other succession purposes).

132. A better way of thinking about these early rules relating to fetuses is that the law simply took into account the fact that the woman was pregnant, not that it was prepared to grant rights to the fetus per se.

133. *See supra* note 131. For a survey of U.S. law on this point, *see Mama vs. Fetus*, *supra* note 60, at 538-45; Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600-02 (1986); Shannon S. Sullivan, Comment, *Maternal Liability*, 20 J. MARSHALL L. REV. 747, 749-53 (1987).

134. Sullivan, *supra* note 133, at 749-53.

135. C. v. S., 1 All E.R. 1230, 1234 (1987).

cases rely on the fact that the fetus is seen to be so intimately connected with the mother that it cannot possibly exercise rights independently of her, while some later cases point out that the fetus can now be viewed as independent of the mother and so should also be considered a rights-bearer. A common refrain in these cases is that to award a fetus rights, or treat it as an independent human being, is to advance the law so as to keep pace with medical developments.

1. United States of America

The courts began to work with the concept of fetal separability in the United States of America. In 1884, *Dietrich v. Northampton* was the first case to consider whether there could be recovery for injury to a fetus.[136] Having slipped on the street while four or five months pregnant, the mother gave birth prematurely to a fetus which lived possibly ten or fifteen minutes before dying. The mother recovered damages for her injuries and then sued for the wrongful death of the fetus. Justice Holmes denied her cause of action, saying "no case . . . has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb."[137] The crucial factor here was that "the unborn child was a part of the mother at the time of the injury."[138]

The *Dietrich* rule, holding that there could be no recovery for prenatal injury (as the fetus was born alive but was still denied a cause of action), remained intact until the 1940s. The *Dietrich* court made no explicit distinction between pre-viable and viable fetuses, or those born alive and those born dead: it simply denied recovery for all fetal injuries, regardless of developmental stage.

However, by the mid-1940s, medical science had progressed to the point where the concept of viability was gaining more prominence. During the same period, the courts also introduced the important criterion of live birth as a prerequisite to maintaining a cause of action. In the wrongful life case of *Bonbrest v. Kotz*,[139] the court implicitly overruled *Dietrich's* absolute denial of recovery for all prenatal injuries (in both wrongful life and wrongful death cases) by introducing a distinction between viable

136. 138 Mass. 14 (1884).
137. *Id.* at 15.
138. *Id.* at 17.
139. 65 F. Supp. 138 (D.D.C. 1946).

and non-viable fetuses. The former could recover (provided they were born alive), the latter could not.[140] This new rule was based on an explicit refutation of the view that the fetus was at all times during the pregnancy, "a part of the mother." As obstetrics had become more sophisticated by this time, the court was able to say of the viable fetus:

> [I]t is in the womb, but it is capable now of extra-uterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element. . . . It has . . . 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.[141]

The court concluded that given the fetus's independence after reaching viability, a fetus subsequently born alive should be able to recover for injuries inflicted *in utero*.

By the 1960s, courts were prepared to go even further in recognizing fetal independence. *Smith v. Brennan*, decided in 1960, is generally cited for the proposition that "a child has a legal right to begin life with a sound mind and body."[142] Also notable is that the court eliminated viability as a pre-condition for recovery in wrongful life cases.[143] From conception, the un-

140. *See id.* at 140-41. *Bonbrest* later came to stand for the proposition that a cause of action existed for viable fetuses in both wrongful life and wrongful death cases. *See* Farley v. Sartin, 466 S.E.2d 522, 528 n.13 (W. Va. 1995). Only a handful of U.S. jurisdictions continue to deny recovery in fetal wrongful death cases. *See id.* at 528 n.12.

141. Bonbrest v. Kotz, 65 F. Supp. at 140-41.

142. Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960). It is on this principle that a number of prosecutions for prenatal fetal neglect have been based. *See supra* text accompanying note 4.

143. The court was careful to note that different considerations might apply in wrongful death cases. *See id.* at 501. It seems that the court was not aware of the earlier 1953 case of Kelly v. Gregory, 125 N.Y.S.2d 696 (App. Div. 1953), which also considered viability irrelevant to recovery for prenatal injuries so long as the child was born alive. The court in *Kelly* took the conflation of legal and biological separability right back to the point of conception:

> [L]egal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its develop-

born child was a distinct biological entity, which deserved protection from legal wrongs at all stages of pregnancy.[144] This view of the separateness of the fetus from the woman was recently taken to its ultimate conclusion in 1995, when the West Virginia Supreme Court of Appeals recognized a cause of action for the wrongful death of a non-viable fetus.[145]

By describing the fetus as a "separate entity" and an "independent person," *Bonbrest* and *Brennan* laid the groundwork for the recognition of fetal rights. By simply talking about it as if it were independent, the judiciary was able to establish an independent persona for the fetus and to use its authority to codify this particular view. Because of the use of this type of language in the courts and legislatures, by the 1980s the independence of the fetus was generally taken for granted.[146] Little ink is devoted in the cases to sustaining this point. A legal culture which was conducive to fetal rights recognition was thereby created. In the past two decades, courts have continued to speak the language of fetal independence, but increasingly attached the notion of fetal rights to fetal independence.[147] Moreover, when the pregnant woman was seen as doing something against the interests of the fetus, jeopardizing its health or even its life, courts were swift to step in and assert the rights of the fetus over the woman.[148]

The linking of fetal independence and fetal rights is not surprising. As discussed previously, liberal legal theory considers independence a precondition for rights-bearing. It is also not surprising that the assertion of fetal rights has been employed to

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> ment is not to destroy its separability: it is rather to describe the conditions under which life will not continue.

Id. at 697. *See also* Bennett v. Hymers, 147 A.2d 108 (N.H. 1958).

144. "Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress." Smith v. Brennan, 157 A.2d at 504.

145. Throughout its reasoning, the court referred to the non-viable fetus as "the child" and the "unborn child." Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

146. We should note that by this time ultrasound images of the fetus were commonplace and a pervasive part of the abortion debate.

147. *See e.g.,* Greater Southeast Community Hosp. v. Williams 482 A.2d 394, 397 (D.C. 1984) (sustaining a wrongful death action for a viable fetus): "Inherent in our adoption of Bonbrest is the recognition that a viable fetus is an independent person with the right to be free of prenatal injury." *See also* Douglas v. Town of Hartford, 542 F. Supp. 1267, 1270 (Conn. 1982) ("[T]he Court finds that recent and well-established trends . . . have expanded the legal rights of the fetus in a wide variety of contexts. . . . Accordingly, the Court denies the defendants' requests to dismiss the claims of Paul Douglas [fetus]").

148. *See supra* text accompanying notes 2-6, and cases cited therein.

override the autonomy of pregnant women. Both law and medicine have typically seen women's bodies as a site of control. When liberal jurisprudence intersects with the medicalization of pregnancy, an expected result is that fetal rights would be used to control the actions of pregnant women.

2. Commonwealth

The United States has lead the development of this area of the law. Nowhere else have there been so many cases asserting fetal rights, nor such sustained consideration and development of the concept of fetal separability. However, an examination of the jurisprudence of fetal rights in the four main Commonwealth jurisdictions: Australia, Canada, the United Kingdom, and New Zealand, demonstrates that the movement of fetal separation leading to fetal rights is not strictly limited to the United States.

Although only a sprinkling of Commonwealth cases consider fetal rights, there is a noticeable judicial trend reliant on technology and science to portray the fetus as a separate entity, which mirrors the United States' shift from the traditional common law position. This shift leads to the conclusion that the Commonwealth is moving in the same direction as the United States, albeit slowly due to the lack of fetal rights cases and the less active role of judges.

The general common law position, as understood in Commonwealth jurisdictions, is summarized in the British case *C. v. S.*,[149] an attempt by the father of an unborn child to obtain an injunction to prevent the woman from having an abortion. In denying the claim, Her Ladyship Heilbron J says:

> The authorities, it seems to me, show that a child, after it has been born, and only then in certain circumstances based on his or her having a legal right, may be a party to an action brought with regard to such matters as the right to take, on a will or intestacy, or for damages for injuries suffered before birth. In other words, the claim crystallises on the birth, at which date, but not before, the child attains the status of a legal persona, and thereupon can exercise that legal right.[150]

Lady Heilbron's comments rest on a solid bedrock of precedent — one at which Commonwealth judges have been timid to chip away. In Australia,[151] Canada,[152] Great Britain,[153] and New

149. 1 All E.R. 1230, 1234 (Q.B. 1987).

150. *Id.*

151. Watt v. Rama (1972) V.R. 353 (holding that a plaintiff suffering injuries at and after birth can recover from a defendant for negligent conduct before birth)

Zealand,[154] the judiciaries have consistently adhered to the "born alive" rule. Nonetheless, if we examine each country in turn we can see signs in the more recent cases that the ideas of fetal independence and personality are taking hold in the minds of Commonwealth judges.

The Commonwealth judiciaries are at a much earlier stage than their American brethren in their consideration of the concept of fetal separation, autonomy, and rights-bearing. However, this disparity is not caused by different levels of prenatal medical care and technology among the countries, as Australia, Canada, Great Britain, New Zealand, and the United States all have access to similar levels of prenatal medical care and technology. Rather, the disparity has arisen because cases concerning fetal rights outside the United States are few; there simply has not been much opportunity for a judiciary favorable to such ideas to

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applied in K. v. T. (1983) 1 Q.R. 396. *See also* In the Marriage of F. & F., Fam. Ct. of Austl., slip op. (Brisbane Jul. 12, 1989) (holding that an unborn child has no legal personality or rights until birth).

152. *See* Medhurst v. Medhurst [1984] 46 O.R.2d 263 (holding a husband could not commence action for an unborn child, since an unborn child is not a person); Montreal Tramways v. Leveille [1933] 4 D.L.R. 337 (holding a child injured before birth can recover damages after birth); Morgentaler v. The Queen [1988] 1 S.C.R. 30; Borowski v. A.G., 1 S.C.R. 342 [1989].

153. *See* de Martell v. Merton & Sutton Health Auth., 3 All E.R. 820 (Q.B. 1992) (holding that the time of birth of a child injured *in utero* and subsequently born alive can be accelerated to the moment of injury so that the child may be deemed to have a legal personality at the time of injury and therefore be capable of bringing a cause of action for the *in utero* injury); Thellusson v. Woodford 32 Eng. Rep. 1030 (1805); Caller v. Caller 2 All E.R. 754 (1966); Paton v. Trustees of BPAS, 2 All E.R. 987 (Q.B. 1978) (holding that a husband had no right to enjoin his wife from having an abortion); *In re* F., Fam. 122 (1988) (holding that an unborn child has no independent existence from its mother and has no legal rights).

154. As regards the law of inheritance and succession, and paternity law, New Zealand law is in line with the rest of the Commonwealth. The law relating to personal injury is found in the Accident Compensation Act, 1972 (N.Z.) (consolidated by the Accident Rehabilitation and Compensation Insurance Act, 1992 (N.Z.). In *O'Rourke v. Accident Compensation Corp.*, Accident Compensation Appeal Authority, 76/94 (March 14, 1994), Mr. Blackwood (unpublished opinion on file with author), the Appeal Authority held that only persons are covered by the Act, and because fetuses are not legal persons, they could not recover for prenatal injuries. The criminal law also follows the Commonwealth line: a fetus does not become a human being until fully separated from the body of its mother. Crimes Act, 1961, § 159 (N.Z.); Police v. O'Connor [1992] 1 N.Z.L.R. 87 (holding that it is not an abuse of discretion for a judge to close the proceedings from the public when the court's integrity is threatened by a defendant's desire to attract media); Wilcox v. Police [1994] 1 N.Z.L.R. 243 (holding that blocking the entrance of a medical clinic was a trespass because an unborn child is not a person and not in need of protection, and even if the fetus were a person, the harm done to them was not unlawful); C. v. C. [1975] 2 N.Z.L.R. 710 (holding an unborn child is not a member of the family).

work with them in the courts.[155] There also appears to be greater deference to precedent in the Commonwealth countries.[156]

When such cases do present themselves, the Commonwealth judiciaries have, in the main, preferred to hold steadfastly to traditional rulings and not delve into questions of personhood which involve moral, social, and scientific considerations. In short, outside the United States, rarely are fetuses considered to have any rights other than those which vest upon live birth.

a. Australia

At present, the traditional common law "born-alive" view still holds in Australia.[157] However, the most recent case which has addressed the issue of fetal interests shows the court positing a continuum of rights for the fetus from conception until birth. In *In re K. (deceased)*,[158] decided by the Tasmanian Supreme Court in 1996, the court considers whether the frozen embryo of a now-deceased man and his widow is a child of the marriage for inheritance purposes. At first glance, this case does not appear any different from those very early decisions which grant such

155. This is due in part to the litigious nature of American society.

156. Judicial restraint, rather than judicial activism, is still the preferred modus operandi for Commonwealth judges, as evidenced by the reluctance to disturb long-settled rulings on fetal rights in the cases that follow. This restraint is not restricted to fetal rights cases, but characterizes the entire system. In *The Law-Making Power of the Judiciary,* ESSAYS ON THE CONSTITUTION 269 (Philip A. Joseph ed., 1995), Professor Bruce V. Harris writes of "the strong [judicial] loyalty to the Diceyan understanding of parliamentary supremacy in New Zealand" while Sir Geoffrey Palmer compares the actions of the New Zealand judiciary to Salome's "dance of the seven veils, the judges rehearsing all the alluring things they can do. . .but seldom actually doing it." NEW ZEALAND'S CONSTITUTION IN CRISIS 21 (1992) (quoting Oscar Wilde, *Salome* in PLAYS 319 (Penguin Books, Hamondsmith 1954)).

157. *See* Watt v. Rama, (1972) V.R. 353 (personal injury suit claiming compensation for injuries suffered by fetus in the womb. Court explicitly stated that no duty of care could be owed to an unborn child); K. v. T., (1983) 1 Q.R. 396 (The court dismissed an application for an injunction by a man to prevent the respondent, who was pregnant by him, from having an abortion. The court declined to recognize the fetus as a rights-bearer or in need of protection. On appeal to the High Court of Australia, Chief Justice Gibbs affirmed the Brisbane Supreme Court's decision stating "a foetus has no right of its own until it is born."); Attorney-General for the State of Queensland *ex rel.* Kerr v. T. (1983) 57 A.L.J.R. 285, 286. *See also* In re the marriage of F. & F., Fam. Ct. of Austl., slip op. (Brisbane Jul. 12, 1989) (Court refused to grant an injunction to a man against his recently separated wife to prevent her from aborting her fetus.). Central to the court's determination was its conclusion that the marriage had irretrievably broken down. The court stated: "to grant the injunction would be to compel the wife to do something in relation to her own body which she does not wish to do. That would be an interference with her freedom to decide her own destiny." *Id.* at 15.

158. (1996) 5 T.R. 365.

rights to a fetus *en ventre sa mere*, provided it is born alive; technology has simply changed the possible times of implantation. However, this case is notable for its conflation of the stages of fetal development:

> If a child en ventre sa mere is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded an embryo. That would be so whether or not two cells, four cells or a developed foetus was existent. . . . [There is from fertilization] a potential for birth.[159]

The court does not consider viability, but rather the potential for life (or birth), as the important factor in the ability to inherit.[160] It reasons that there is no difference between an implanted fertilized egg and a near-term fetus,[161] an assertion which has interesting implications for the abortion debate and future cases concerning fetal rights.[162] Buttressing this point is the court's references throughout its opinion to the embryo or fetus in personal terms, continually describing it as "the child" or "the unborn child." By conflating the differences between born children, fetuses, and embryos, it would appear that the court is laying the groundwork for a perception that the human life that exists at all of these stages is morally and legally equivalent.[163]

In sum, the Australian courts have not had many opportunities to grapple with questions of fetal rights and personhood. In most cases where they have, such rights have been denied. Nonetheless, a line of thought is evident which posits no salient difference between the embryo and the fetus at any stage of development. What we see in Australia is the beginning of some tension in the law relating to fetuses. There is some wavering from the traditional stance that a fetus becomes an independent human only when born, as *In re K. (deceased)* focuses on the potential for independent life from the moment of fertilization.

159. *Id.* at 373.

160. The court did not take this position to its logical conclusion and recognize the potential human life in sperm and eggs. *See Unraveling Compromise*, *supra* note 13, at 128-30.

161. *In re* K. 5 T.R. at 373.

162. Following this reasoning, anti-abortion activists could make the claim that if, as under present abortion law, a near term fetus cannot be aborted, yet there is no difference between a near term fetus and an implanted fertilized egg, why should we permit such an egg to be destroyed?

163. This is a sharp shift in reasoning from the early inheritance cases which saw considering fetuses as potential beneficiaries of wills or trusts as a means of effecting the testator's wishes.

This shift in the discussion of fetal rights mirrors the much earlier development of the U.S. talk of fetal separability. However, given the infrequency with which such cases come before the courts in Australia, it may be some time before we can accurately predict where this initial talk of fetal independence will lead.

b. Canada

The Canadian Supreme Court tip-toed around the issue of fetal rights for some time, as seen in the *Morgentaler*[164] and *Borowski*[165] cases. Finally, however, the Canadian Supreme Court could no longer avoid confronting the issue of fetal rights. In 1989, the Quebec Court of Appeal, in *Tremblay v. Daigle*, issued an injunction restraining a woman from obtaining an abortion on the basis that her reasons for wishing to terminate the pregnancy were "not sufficiently serious to deprive the unborn child of the right to be carried to term and to be born."[166] The Quebec Court said that the father's request required it to pronounce on the status of the fetus;[167] it took up the challenge implicit in his request for an injunction and ruled:

> The child conceived but not yet born . . . constitutes a reality which must be taken into consideration. It is not an inanimate object, nor anyone's property, but a living human entity, distinct from that of the mother that carries it, which two human beings have given existence to, which they procreated, and which, at first blush, is entitled to life and to the protection of those who conceived it.[168]

The court does not explicitly rest its conclusion on the ability of science to separate and sustain the fetus outside the body of the pregnant woman. Nonetheless, this pronouncement appears to rest on this assumption. The fetus is granted the right to life, overriding the woman's right to abort, on the basis of being a living entity, something human as opposed to property, and something that is independent of the mother-vessel. The court later makes the point that granting fetal rights is dependent on the ability to cast the fetus as a being distinct from all others:

164. Morgentaler v. The Queen [1988] 1 S.C.R. 30 (The Supreme Court expressly refrained from pronouncing on the status of the fetus in ruling on the constitutionality of Canada's abortion legislation.).

165. Borowski v. A.G. [1989] 1 S.C.R. 342 (The Supreme Court again skirted the issue of the fetus's right to life in a challenge to the abortion provisions of the Criminal Code.).

166. [1989] 59 D.L.R. (4th) 609, 614.

167. *Id.* at 612.

168. *Id.* at 613.

"[t]here was a time when the unborn child did not possess at law any of the attributes of judicial personality. He was part of the mother's body as if he were one of her organs."[169] The court then recognizes that there has been a shift in societal perceptions of the fetus: "this approach has long since been rejected. Historically, our society began to recognize in the fetus an individuality of its own . . . ."[170] Changing social perceptions thus induce a change in fetal jurisprudence.[171] Now that we can see the fetus as separate from the woman who carries it, it is a short and seductive step to the conclusion that we should mark this fact legally.

This conclusion got short shrift from the Supreme Court on appeal.[172] The court engaged in an analysis of the interplay between the common law, the Quebec Charter, and the Quebec Civil Code to conclude that the Quebec Court of Appeals had erred and the fetus was not a person. However, what is interesting is the fact that the Supreme Court expressly disavowed the idea that scientific arguments could be of any assistance in the debate over fetal personhood.[173] By sidestepping scientific reasoning and language, the court managed to say that issues of fetal rights and personhood were social and moral questions only, to be answered by the legislature, and not a matter for the judiciary. Canada appears unique in this respect.[174]

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169. *Id.* at 616.

170. *Id.*

171. Even when these perceptions are wrong (or inaccurate conclusions are drawn on the basis of the fetus's external appearance). The court opines that "[at 20 weeks] . . . its members, its organs, and its nervous system are formed; it has taken on human form and it is on the verge of viability outside the mother's body." *Id* at 628.

172. Tremblay v. Daigle [1989] S.C.R. 530.

173. "Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits." *Id.* at 553.

174. Nonetheless, it seems quite clear that the court was aware that in the past the issue of fetal rights depended in part for its resolution on the state of scientific development. Had it not, there would have been no need to remove scientific debate from the criteria it might use to determine fetal personhood. The court took a similar approach in *R. v. Sullivan* [1991] 63 C.C.C. (3d) 97, where it relied on the legislative definition of "human being" in § 223 of the Canadian Criminal Code, which it considered equivalent to "person" in § 220. The court decided, relying on the statutory definition, that because the fetus had not fully proceeded from the mother's body when it died due to the midwives' negligence, the fetus was not a "human being" and therefore not a "person" either. *See also* R. v. Marsh [1979] 2 C.C.C. (3d) 1; K. Mark McCourt, *Foetus Status After* R. v. Sullivan and Lemay, 29 ALBERTA L. REV. 916 (1991). What is worthy of note in these cases is the conflation

Fetal personhood has also been recognized in the Canadian courts in a series of short decisions relating to wardship and *parens patriae* applications. However, it is difficult to discern the basis on which the court has declared the fetus to be a child and, furthermore, one in need of care and protection. Generally, such declarations have been made with little or no underlying reasoning.[175]

c. Great Britain

Like Canadian courts, British courts have displayed a rather cautious attitude when considering the issue of fetal rights. Again and again, fetal dependence and connection comes through as a rationale for refusing fetal rights.[176] To these courts, the fetus is a part of the woman, and therefore something

of the terms "human being" and "person." "Human being" is a scientific term, while "person" is typically a moral assessment.

175. *See* Re Children's Aid Society of City of Belleville, Hastings County and T et al. [1987] 59 O.R.2d 204, 205: "[A] child "en ventre sa mere" is indeed a child .... I am still of the view, ... that an unborn child can be found to be in need of protection." (no discussion of the basis for this conclusion); Re Baby R. [1988] 53 D.L.R. (4th) 69 (overturning the lower court's conclusion that a fetus could be taken into custody by child welfare services as the lower court had given no basis for extending the definition of child past that found in the relevant child welfare legislation). Also decided on a similar basis was Re Children's Aid Society for the District of Kenora and J.L. [1981] 134 D.L.R. (3d) 249. Moreover, Canadian common law had previously only granted fetal custody orders with the proviso that they take effect only when the fetus was born, not before. K. v. K. [1933] W.W.R. 351; Solowan v. Solowan [1953] 8 W.W.R. 288. *Compare* Re A. (in utero) [1990] 72 D.L.R. (4th) 722, 730 where the court said that although the fetus "has developed virtually all the attributes of a person in law, without in fact being one. As such, the [foetus] in this case may truly be likened to a person ...." Nonetheless, the *parens patriae* jurisdiction was an inappropriate one to use for taking custody of the fetus. For commentary on the fetus/child welfare cases, *see* T. B. Dawson, *Re Baby R: A Comment on Fetal Apprehension,* 4 CANADIAN J. WOMEN AND THE L. 265 (1990); Susan A. Tateishi, *Apprehending the Fetus en ventre sa mere: A Study in Judicial Sleight of Hand,* 53 SASK. L. REV. 113 (1989). It may be that the pervasiveness of images of fetal independence as expressed in popular culture has become so persuasive that the judiciary in these fetal custody cases took it for granted that the fetus was indeed an independent being with a right to be protected from maternal harm by being guaranteed the right to prenatal care.

176. Paton v. Trustees of BPAS, 2 All E.R. 987, 990 (Q.B. 1978) (court dismissed husband's petition for an injunction restraining his wife from obtaining an abortion. The court recognized that fetuses did have rights in inheritance and other succession cases for prenatally inflicted injury on the condition that the fetus will be conceived. Furthermore, the court declined to extend to the *in utero* fetus any substantive rights until live birth); *In re* F., Fam. 122, 143 (1988) (The court refused to make a wardship order for a near-term fetus carried by a mother who was mentally unstable, led a nomadic lifestyle and who had proved incapable of caring for her first child. The court reasoned that "[s]ince an unborn child has, ex hypothesi, no existence in-

subordinate to her. Thus, the fetus cannot be thought of as independent, nor can it have rights that override the woman's. However, what the adoption of this approach does is set the stage for the time when the balance might be tipped in favor of the fetus. Once the courts come to see the fetus as separable, as have their Parliamentary colleagues, how long will it be before they see the fetus as an entity deserving of rights, or as worthy of legal personhood?

Despite the strong statements in *C. v. S.* and *In re F.* in the late 1980s, by the early 1990s British courts began to follow their American counterparts in their talk of fetal separation. In 1992, S, a Nigerian woman in the late stages of labor was admitted to a hospital. The fetus was in the "transverse lie" position, "the elbow projecting through the cervix and the head being on the right side."[177] S and her husband refused consent to an emergency cesarean on religious grounds. S's doctors applied to the court for an order permitting them to perform the operation.[178]

In making the order, Sir Stephen Brown P. clearly talks the language of fetal separation. He describes S as the "patient" and the fetus as "yet unborn," "the child," "the unborn child," and "the baby."[179] Sir Stephen also seeks to impose a maternal-fetal bond which S has clearly refused. S is described as "the mother" and the judgment contains an implicit rebuke to S who has put her life and beliefs above that of the fetus.[180] Sir Stephen notes the failure of surgeons to persuade S to have the cesarean: "the only means of saving her life, and I also emphasize *the life of her unborn child* [emphasis added]. The surgeon is emphatic. He says . . . the baby cannot be born alive if a Cesarean operation is not carried out."[181] S, in refusing medical advice, is painted here as a bad mother; she values her own autonomy over the fetus she carries, and her own judgment to that of her doctors.

d. New Zealand

New Zealand law on the status of the fetus is neither cogent nor cohesive. Rather, it is scattered over a number of branches

dependent of its mother, the only purpose of extending the jurisdiction to include a foetus is to enable the mother's actions to be controlled." Id. at 139).

177. *In re* S., Fam 123, 124 (1993).

178. *Id.*

179. *Id.* at 124.

180. *Id.*

181. *Id.*

of the law and is somewhat incomplete and contradictory. This has left some opportunity for judges sympathetic to the advocates of fetal rights to imbue the fetus with some legal personality.

Potential for recognizing fetal personality was discussed by the Court of Appeal in *R. v. Henderson*.[182] Henderson was charged under § 182 of the Crimes Act (crime to cause death of fetus older than 20 weeks) for causing the death of fetus whose age was variously estimated as being between 24 and 26 weeks' gestation. Although the court refused to decide the issue of when exactly a fetus became a child,[183] it did say:

> In both dictionary and ordinary parlance, and as § 182 and its antecedents show, in legislative language, *the word child embraces a foetus*. Thus to say that a woman is with child or is carrying a child is a common expression at least once the mother is aware and has published the fact. . . . The foetus in this case was of about 26 weeks' gestation. It was therefore well past the 20 weeks gestation period referred to in § 187A(3) of the Crimes Act . . . . We are of the opinion that the ordinary and natural meaning of the word "child" is such as to include the foetus in the present case.[184]

Evident in the court's reasoning is the assumption that if abortion is allowable when the fetus is nearly viable, it might then acquire a new legal status after viability. However, there is some indication that the court is prepared to go further than this point and accord increased legal rights to a non-viable fetus, as it remarks: "there is no need to impose a test of capability of birth and no onus on the Crown to prove that the child was capable of being born alive. It is sufficient that it was alive."[185] The court bolstered this conclusion by opining that "it now appears that the legal definition of human being in section 159 . . . no longer coincides with medical opinion."[186] In *Henderson*, the court equates a living being with a "human being" and questions the born alive rule as a basis for legal status as a human being. As the court did not override § 187A of the Crimes Act, one may tentatively conclude that the court has shown itself willing to consider a new legal status for fetuses between the ages of 20 weeks and birth,

182. [1990] 3 N.Z.L.R. 174.

183. A child is a human being when born alive. Crimes Act, *see supra* note 154.

184. R. v. Henderson [1990] 3 N.Z.L.R. at 177-78 (emphasis added).

185. *Id.* at 183.

186. *Id.* at 181 (*citing* REPORT OF THE ROYAL COMMISSION OF INQUIRY: CONTRACEPTION STERILISATION AND ABORTION IN NEW ZEALAND 249 (1977)).

and has used medical judgments regarding the viability of fetuses to come to this point.

Following *Henderson*, there was a series of cases concerning criminal trespass, where the courts were urged to rule that the fetus was a "person" in whose aid one could claim the defense of necessity. For example, anti-abortion activists who were charged with trespass into an abortion clinic raised the defense of necessity to save the lives of the fetuses. These cases are interesting for the fact that they were the first time New Zealand courts were confronted with images of *in utero* fetuses and explicit references to the fetus in personal terms.[187]

The New Zealand courts' vacillation in dealing with the legal status of the fetus as seen in *Henderson* and the criminal trespass cases demonstrate the complexity and the many considerations that go into the issue of fetal personhood and fetal rights. However, the latest case to confront the question of fetal personhood, *In re Baby P.*,[188] displayed no such hesitation in taking judicial notice of fetal rights assertions and, moreover, upholding them. In fact, this is probably the only case in the Commonwealth to consider fetal personhood favorably and furthermore, one which bases its considerations of fetal personality and rights explicitly on the technology-generated images which portray the fetus as independent, such as ultra-sound pictures.

Under the Children, Young Persons and Their Families Act of 1989, judges are empowered to make care and protection orders for children at risk. In *In re Baby P.*, Judge Inglis of the Family Court was asked to make a protection order for a fetus of about 38 weeks gestation. The mother's relationship with the father was marked by violence, and the woman would not consent

187. Police v. O'Connor [1992] 1 N.Z.L.R. 87 (The case involved several members of the anti-abortion group, Operation Rescue, who were charged with trespass into an abortion clinic. A friend of the defendants, who themselves remained silent to highlight the fact that the unborn lacked a voice, attempted to address the judge on the subject of "killing babies," but the Judge dismissed their actions as an attempt to politicize her courtroom.); Police v. O'Neill [1993] 3 N.Z.L.R. 712 (The court skirted pronouncing on the issue of fetal personality, claiming that it was not necessary for it to do so to resolve the case.); Wilcox v. Police [1994] 1 N.Z.L.R. 243, 248-49 (The court addressed the issue of whether a fetus could be a person for the purposes of the defense of necessity, but did not resolve the point conclusively. It said that there was no evidence of parliamentary intent that the Trespass Act should be interpreted inconsistently with the traditional common law provisions. But the court then equivocated in its conclusions and proceeded to consider the case on the basis that the fetus *was* a person under the Trespass Act (however, the case was decided on other grounds)).

188. [1995] N.Z.F.L.R. 577.

to a restraining order against the father for herself. Thus arose the typical situation for an assertion of fetal rights — the mother clearly acting against the fetus's best interests, coupled with photographic evidence from inside the womb of the viable and apparently autonomous fetus.

Despite the fact that the Act refers explicitly to the subject of a protection order as being a "boy or girl under the age of 14 years"[189] (and thus presumably excluding fetuses as age is usually counted from birth, not conception), an order was made for the fetus to be taken into custody. His Honour's use of language in making the order is illuminating. Judge Inglis talks not of a fetus but of "Baby P, whom scans show to be a little boy in good health."[190] He thus bases his perception of the fetus's personhood on the image made by ultrasound. The fact that Baby P is as yet unborn does not deter His Honour from stating "he is a young human being . . . Baby P has all the characteristics of independent human personality. . . . [H]e is already an infant human being, a 'child'."[191]

His Honour at first seems to justify calling Baby P a child (with all the rights born children hold under the Act) on the basis that Baby P is viable, and relies on the evidence of ultrasound scans. However, he later remarks that the "stage of development need not necessarily regulate the interpretation of the expression 'child'."[192] Viability then, is not the determining factor in according fetuses rights of protection.[193] Indeed, His Honour considers the possibility of extending the court's protective jurisdiction to cover fetuses of fewer then 20 weeks gestation.[194] Judge Inglis claims that his interpretation of the fetus as equivalent with a child "does no more than recognise medical and physiological re-

189. Children, Young Persons, and Their Families Act, 1989, § 2(1) (N.Z.).

190. *In re* Baby P. [1995] N.Z.F.L.R. at 578. On this point, the very name given to the case is interesting, i.e., "Baby P," rather than P (*in utero*), or a reference according to the mother's name. Not only is the fetus characterized as a child, but it also takes center stage, its mother being relegated to the sidelines.

191. *Id.* It seems that in this court's view of personality one becomes a person, with all the rights thereof, simply by looking like one.

192. *Id.* at 579. In Judge Inglis' view, there is no difference between the born and the unborn: "[T]here is nothing in any context to suggest a legislative intention that unborn "children" should to any less extent be protected from harm, be entitled to have their rights upheld, or be entitled to have their welfare promoted."

193. As we saw in *In re* K., (1996) 5 T.R. 365, this notion from *Bonbrest* of independent human life not being contingent upon viability seems to be catching hold in the Antipodean jurisdictions.

194. *In re* Baby P. [1995] N.Z.F.L.R. at 579.

ality."[195] He further comments "there is room to argue that an unborn child beyond 20 weeks must be treated as having the status of a human being, for whatever might be said about the common law medical science has not stood still."[196] Employing rationality, the purported touchstone of scientific discourse, His Honour says "I can see no rational basis . . . for reading down the meaning of the word 'child' to include only a child that has been born alive."[197]

His Honour deliberately eschews using the word "fetus" — language which might point to a lesser status for Baby P, preferring to employ instead the terms "baby," "little boy," and "unborn child" which connote independence and the characteristics of personhood. Claims to avoid euphemism "in speaking of the baby of an unborn child" are bolstered by quoting Lord Denning who also said "I am going to speak of the unborn child. The old common lawyers spoke of a child *en ventre sa mere*. Doctors speak of it as the foetus. In simple English it is an unborn child inside the mother's womb."[198] However, this linguistic sleight of hand conflates a number of terms unequivalent in their connotative and denotative meanings, and rather than avoiding euphemism (for if these terms *are* the same, why not use the word "fetus"?), it enables the judge to paint the picture most favorable to an assertion of fetal rights. By referring to the fetus as if it is already a person (indeed Baby P has his own personality, according to Judge Inglis) it is a small step to acknowledge rights for those we consider to have satisfied the criteria for becoming a rights-bearer.

Judge Inglis, like his brother Australian judges, also clearly articulates the issue of control that is at stake here. His conclusion? The mother is irresponsible and silly and needs to be controlled to protect the fetus:

> She . . . has an infatuation with a violent young man. . . . It is quite clear to any sensible person that there is no hope whatsoever for their relationship but of course [the mother] is too immature to understand the dangers, which to any sensible adult are obvious. . . . Something obviously has to be done to bring this young woman to her senses and although she may

195. *Id.* at 580.

196. *Id.* at 581. Compare with the reports on fetal viability in DANIELS, *supra* note 10, at 18.

197. *Id.* at 583.

198. *Id.* at 578 (quoting the statement of Lord Denning in Royal College of Nursing of the United Kingdom v. DHSS [1981] App. Cas. 801, 802).

believe that she is exercising a right to behave as she wishes, she is going to have to realise that, as all people have to realise sooner or later, that with rights and freedoms come responsibility, and it is obvious to all at present that she is not in any way responsible.[199]

e. *The Developing Commonwealth View*

In the traditional Commonwealth view, rights which vest in a fetus in the womb are nonsensical. Nonetheless, in a few recent cases, namely *In re K (deceased), R. v. Henderson*, and *In re Baby P (an unborn child),* there is a willingness to posit fetal life as independent of the woman who carries it. The *leit-motif* which underscores these cases is the ability of science to separate the fetus from the mother and present it as an independent being. U.S. case law and U.K. statutes reveal a socio-cultural context where images of independent fetal life have become ordinary and commonplace, where the picture of the fetus as a baby becomes the message that the fetus is a baby. This slippage between image and ideology takes place in the courts and the legislatures as well as on billboards and magazines. The Commonwealth judiciaries do not seem so eager to follow their American counterparts: nonetheless, there are indications that they have taken the first steps along the path to asserting fetal rights.

IV. Responding to the Assertion of Fetal Rights

Fetal rights can be a powerful tool for controlling the pregnant woman. In several cases, fetal rights have been invoked to determine the lifestyle, diet, and appropriate kinds of medical treatment. Fetal rights have also been used to restrict present and future behavior, and the movement of pregnant women.[200] In relation to the fetus, the pregnant woman has been made to bear burdens which are not imposed upon other members of society, even as between close family members such as mother and born child.[201] What is done to pregnant women in the name of

199. *Id.* at 583-84.

200. *See* Gallagher, *supra* note 3.

201. For instance, in the case of *McFall v. Shimp,* 10 Pa. D. & C.3d 90 (1978), where the court was asked to compel a relative of a man desperately in need of a bone marrow transplant to submit to surgery, the court declared it had no authority to do so, even though this would likely result in the applicant's death. The court said, "[f]or our law to *compel* defendant to an intrusion of his body . . . would defeat the sanctity of the individual, and would impose a rule which would know no limits,

fetal rights has resulted in the abridgment of women's rights to liberty, privacy, equal treatment, due process, self-determination, and bodily integrity.[202]

The ability of courts to assert fetal rights successfully has in large part depended on their use of the language of fetal separation, which in turn has been taken from the medical discourse of pregnancy. "The language used by legal linguists to conceptualize and control sexuality, pregnancy, abortion, and birth has been heavily influenced by two powerful and male-dominated institutions: organized religion and the medical profession."[203] The language of pregnancy and fetal separation and personality is therefore a distinctly gendered discourse. It is language in which women are described as machines whose function is to produce a particular product — a live and healthy baby.[204] This century has seen doctors usurp women's and midwives' roles in pregnancy, and put themselves in charge of "quality control." It is doctors who deliver the product in a clean, sterile setting, removing the birthing process from women's hands and abstracting them from the experience. When the machine malfunctions, it is seen as proper and logical that the physician should step in to correct the matter, and obtain judicial sanction if necessary. The separation of women from the birthing process is also reflected in the separation of women from their "products," as in the case of surrogacy contracts.[205] "[M]edical accounts of pregnancy have constructed a model which defines the pregnant woman as having an identity separate and distinct from that of the emerging

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and one could not imagine where the line would be drawn." *Id.* at 91. Nonetheless, forced surgeries in the name of fetal rights do just that.

202. *See* SAMUELS, *supra* note 89; Gallagher, *supra* note 3.

203. Greschner, *supra* note 86, at 647.

204. *See* GENA COREA, THE MOTHER MACHINE (1985).

205. *See* Greschner, *supra* note 86, at 648-49. Susan Ince provides an insightful account of the "baby-producing machine" view of women in her article *Inside the Surrogate Industry, in* TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 99-115 (Rita Arditti et al. eds., 1984). Janice Raymond devotes a large part of her book, WOMEN AS WOMBS (1993), to an analysis of the medical language of pregnancy and birth in the context of new reproductive technologies. She concludes:

> Women's experiences of self, of reproduction, and of pregnancy are subsumed or negated by the system of technological reproduction. Women are not present in the medical language, which speaks only of "maternal environments" and "alternative reproductive vehicles." In the popular discourse about surrogacy, women who enter into surrogate arrangements have called themselves "baby-sitters" for "other people's children."

Id. at xv.

child."[206] Both of these phenomena have served to devalue the role of the woman in the pregnancy: she does little, and if her actions do not benefit the fetus, she may always be monitored and corrected by an authority figure.

What is missing from this language is the voice of the pregnant woman. Just as pregnant women have been sent to the margins of the images of *in utero* fetuses, they are also at the margins of the discourse of pregnancy. How women experience pregnancy, both physically and emotionally, should be the guide in constructing a legal discourse relating to the relationship between the woman and her fetus.[207] At the risk of stating the obvious (yet it seems to have been overlooked in the development of this language and doctrine), it is the woman who is pregnant, not the doctor, not the judge. The fetal-maternal relationship can be the proper subject of law only if we place the experiences of the pregnant woman at the center of the debate. Catharine MacKinnon writes:

> The legal position of the fetus cannot be considered separately from the legal and social status of the woman in whose body it is . . . . It "is" the pregnant woman in the sense that it is in her and of her and hers more than anyone's. It is "not her" in the sense that she is not all that is there. In a legal system that views the individual as a unitary self and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her.[208]

The law's "one person or two" dilemma is misdirected and ill-conceived, for pregnancy is experienced as an alteration of the body:[209] not one, not two. Rather, the process of turning a zygote into a baby is something new, for which there is no name currently used in law or medicine. Women should not deny the potency of images of fetal separation; what is needed is the construction of a woman-centered discourse of pregnancy which directly challenges the language of separation which attaches to and infuses such images.

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206. *Law-Language*, *supra* note 19, at 549.

207. Donna Greschner comments that "[a] phenomenological account of pregnancy should make us wary of adopting anything other than processual language. Women use processual language to describe their experience: 'My period is late'; 'I am pregnant'; 'I am going to have a baby.'" *See supra* note 86, at 649.

208. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1316 (1991).

209. *Law-Language*, *supra* note 19, at 549.

V. Conclusion

The language of fetal autonomy and separation which was increasingly voiced in the courts and legislatures during the 1980s did not suddenly materialize from thin air. Law's language did not create itself divorced from the social context in which it operated. Rather, this language had its roots in advances in prenatal medicine which enabled physicians for the first time to view the living fetus inside the womb and, moreover, to see the fetus as a being separate from the pregnant woman. Still pictures and videos accompanied by texts which described the fetus in personal terms both ascribed the fetus with the features of independent personhood and served to perpetuate the notion that the fetus had achieved the status of an individuated being — a person, no less. These images and language soon filtered into the popular and political debate over fetal personhood, and ultimately, into legal discourse.

The law's use of the language of fetal independence was facilitated by the adversarial model of legal debate. It fit neatly into the prevailing medical model of pregnancy, where fetus and woman were seen as opposing entities, competing for the use of a shared space. What both the legal and medical discourses of pregnancy lack is the voice of pregnant women: while the views of advocates for the fetus resound clearly through this debate, the voices of pregnant women are subdued and seen as lacking the requisite authority to speak. Women speaking subjectively of their own experiences, cannot always be made to conform to medical models and theories, and are not always compliant in following doctor's orders. The language of fetal rights, therefore, is a useful technique for placing the control of pregnancy in the hands of primarily male authority figures and the systems they have created.

There are signs that those claiming a place in society for the fetus as an independent person are not listened to as often as they were in the 1980s. Nonetheless, the space is not being filled by what women have to say about pregnancy. In order to take back pregnancy on women's own terms, to reclaim this aspect of the law that imprints itself on women's bodies, a language of pregnancy derived from women's experiences must take the place of the voices of law-makers and physicians. Women's autonomy demands no less.