When Abortion Was a Crime: A Historical Perspective

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ARTICLES

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CHARLES I. LUGOSI*

ABSTRACT

Were unborn children ever considered to be human beings, and, if so, persons too? Historically, fetuses were considered both human beings and legal persons. The modern day position — that fetuses and embryos are not human beings or persons — is contrary to the common law and the early history of the United States. At one time, killing a fetus was a crime.
I. COMMON LAW

The history of the common law reveals that laws against homicide protected all human beings, including unborn children. When a pregnant mother felt her baby move within her (quickening), this was considered evidence that the woman was "with child." Blackstone's *Commentaries on the Laws of England* describes the right to life as "a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."¹ In Blackstone's lifetime, legal protection of the fetus from homicide began at "quickening," when it was assumed that life began for the unborn child.² In the thirteenth century, Bracton and Fleta stated that killing an unborn child where there was evidence of "quickening" was homicide.³ As the common law developed over several hundred years, famous legal authorities, including Fleta, Staunford, Lambarde, Dalton, Coke, Blackstone, Hawkins and Hale, referred to the unborn human being as either a "child" or "unborn child," and never as "potential life."⁴ As such, there was never an issue of "personhood."

The English common law, according to the learned jurist Henry de Bracton of the twelfth century,⁵ categorized the killing of an unborn child

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2. See id. at 125-26.
5. Bracton, trained in law and theology, wrote a treatise called *On the Laws and Customs of England* sometime before 1259. He is regarded as one of the leading authorities on the common law of England, and was frequently cited by Lord Coke and Sir William Blackstone, who are also held among the greatest legal minds in English history. See generally Edward Coke, *The Third Part of the Institutes of the Laws of England*, in HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE (2d Series, R.H. Helmholtz & Bernard D.
that had begun to stir in the womb as homicide, "the slaying of man by
man." The unborn child was accorded the status of a human being and
harming it in any way constituted a crime. Bracton summarized the law:
"If there is anyone who strikes a pregnant woman or gives her a poison
which produces an abortion, if the foetus be already formed or animated,
and especially if it be animated, he commits homicide."\footnote{7}

In the thirteenth century, Fleta restated Bracton's statement, and
varied it to acknowledge legal protection for the unborn child that is
formed and has a soul:

He, too, in strictness is a homicide who has pressed upon a
pregnant woman or has given her poison or struck her in order to
procure an abortion . . . if the foetus was already formed and
quickened . . . A woman also commits homicide if, by a potion
or the like, she destroys a quickened child in her womb.\footnote{8}

Infants were recognized as human beings, whether they were killed in
their mother's womb or after their births. As an evidentiary rule, not until
the infant was out of the mother's body and determined not to be a
"monster," was there conclusive proof that the unborn child was a human
being.\footnote{9} This practice is said to be the reason why the "born alive" rule
developed.\footnote{10} This rule stated that harming an unborn child in its mother's
womb was murder, provided that the infant lived long enough to be born
and viewed.\footnote{11}

The historical record of prosecutions for feticide is scant. In one of
the two known cases, the \textit{Twinslayer's Case},\footnote{12} the hearing was adjourned
and the accused was later unavailable for trial because he was transferred to

\footnotesize{Reams, Jr. eds., W.S. Hein Co. 1986) (1648); William Blackstone, Commentaries on
(1769).

http://www.lifeissues.net/writers/tay/tay_03foundingfather.html#a4 (last visited Nov. 23,
2005).

7. 3 Henry de Bracton, On the Laws and Customs of England II 4 (S.E. Thorne
Trans., 1968).

8. 1 Fleta 23 (Selden Soc., ed. 1955).

9. A. Horne, The Mirror of Justices 139 (Selden Soc. Ed., 1895); see also A.

10. Mark S. Scott, Quickening in the Common Law: The Legal Precedent Roe

11. Id. at 229.

12. Y.B. Mich. 1. Edw. 3, f. 23, pl. 18 (K.B. 1327); see also Sir Anthony
Fitzherbert, Graund Breadcrumb, tit. Corone, f. 251, pl. 146 (3d ed. 1565) (like most
Year Book cases this case is anonymous, and for convenience it was named the
Twinslayer's Case by Cyril C. Means in his article The Phoenix of Abortional Freedom, 17
N.Y.L.F. 335 (1971)).}
another jurisdiction to face other charges. In the other, the Abortionist’s Case, the indictment failed for lack of proof of causation.

Did the unborn child have the unquestioned status of “a human being in actuality”? Was it “in rerum natura”? That is, the unborn child was a person in law in the whole sense of the word. Confusion occurred when legal commentator Sgt. William Staunford in the fifteenth century erroneously concluded from not understanding the facts of the Abortionist and Twinslayer cases that an unborn child was not a human being until it was born alive. Staunford stated:

It is required that the thing killed be in rerum natura. And for this reason if a man killed a child in the womb of its mother; this was not a felony, neither shall he forfeit anything . . . . And . . . if a man beats a woman . . . who was carrying twins, so that . . . one of the children . . . was born and . . . two days afterward through the injury he had received he died . . . this was not a felony . . . .

In the treatise Institute of the Laws of England, Lord Edward Coke corrected the misapprehension that an unborn child was not a human being until it was born alive. An unborn child was affirmed to be a human being, in rerum natura, at the point of quickening, when the now animated unborn child was presumed to come alive. Coke also refuted Staunford’s error by implying that the Twinslayer’s Case was never binding as law. The killing of an unborn child was murder when live birth provided proof of causation and retroactive evidence that the infant was both a human being and alive at the time the harm was committed. Coke’s restatement of the law both corrected Staunford and harmonized with Bracton:

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 child dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for

14. Sir Anthony Fitzherbert, Graunde Abridgement, tit. Corone, f. 255, pl. 263 (3d ed. 1565), 338, f. 217, pl. 263 (4th ed. 1577) (Like most Year Book cases this case is anonymous, and for convenience it was named the Abortionist’s Case by Cyril C. Means in his article The Phoenix of Abortional Freedom, 17 N.Y.L.F. 335 (1971)).
15. See id. at 231.
16. See id. at 231-32.
17. See id.
18. See id.
20. See id. at 232 (citing William Lambarde, Eirenarcha, or Of the Office of the Justices of Peace 217-18 (1st ed. 1581)).
21. See id. at 234 (citing Regina v. Sims, Golsdb. 176, 75 Eng. Rep. 1075 (K.B. 1601)).
in law it is accounted a reasonable creature, in rerum natura, when it is born alive. And the book in 1 E. 3 was never holden for law. And 3 Ass. p. 2 is but a repetition of that case. And so horrible an offense should not go unpunished. And so was the law holden in Bractons [sic] time . . . \(^\text{22}\)

Two later commentators, Sgt. Hawkins\(^\text{23}\) and Sir William Blackstone, followed Coke's analysis of the law.

Two other commentators, however, Michael Dalton and Sir Matthew Hale, repeated Staunford's error that an unborn child was not a human being until it was born.\(^\text{24}\) The errors by Staunford, Dalton, and Hale are understandable; the science of embryology in the fifteenth and sixteenth centuries could not yet prove that an invisible unborn child nurtured in its mother's womb was alive and a human being. Nonetheless, this created a legal fiction that set the stage for the inevitable legal result that if an unborn child was not a human being until birth, it was not a legal person until birth. It was this error that was to be repeated by Justice Blackmun in *Roe v. Wade*\(^\text{25}\).

Blackstone agreed with Coke that abortion was the homicide of an unborn human being. Further, he defined murder to be the unlawful killing of a human being:

Murder is therefore now defined, or rather described, by Sir Edward Coke; "when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied."\(^\text{26}\)

In elaborating on the elements of murder, Blackstone described a "person" as a "reasonable creature in being":

[T]he person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing . . . To kill a child in it's [sic] mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of

\(^{22}\) Coke, *supra* note 5, at 50.


the potion or bruises it received in the womb, it is murder in such as administered or gave them.\(^{27}\)

Blackstone, in the seventeenth century, confirmed it was a crime for a woman to kill her unborn child after quickening. The infant in the mother’s womb was equated with human life. It was assumed, as a matter of law, that human life began at quickening:

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb . . . this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.\(^{28}\)

Unborn children were not only regarded as human beings; in the eyes of the law, they were regarded as persons.

The law divided “persons” into two categories: natural and artificial. According to Blackstone, “[n]atural persons are such as the God of nature formed us.”\(^{29}\) Artificial persons, on the other hand, were corporations that were “created and devised by human laws for the purposes of society and government.”\(^{30}\)

A natural person enjoyed rights that were both absolute and relative. Absolute rights, such as the inherent right to life, belong to every human being in their natural state. Blackstone observed, “the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.”\(^{31}\) He further noted that the main purpose of law ought to be “to explain, protect, and enforce such rights as are absolute.”\(^{32}\) Blackstone cautioned that when a human being enters society, a part of that individual’s natural inherent right to liberty is surrendered in conformance to laws that protect the personal security and absolute rights of other human beings.\(^{33}\)

For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also

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27. Id. at 198.
29. Id. at 119.
30. Id.
31. Id. at 120.
32. Id.
33. Id. at 121-22. Blackstone’s views were later adopted by Alexander Hamilton. See ALEXANDER HAMILTON, THE FARMER REFUTED, Papers 1:86-89, 121-22, 135-36 (Feb. 23, 1775).
have the same power; and then there would be no security to individuals in any of the enjoyments of life.34

These “enjoyments of life” are vested in the security of the person, and are inherent natural God-given rights. Blackstone defined the right of personal security as “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”35 English constitutional law required that personal liberty of natural persons must yield when it conflicts with the paramount inherent right to security of the person, which includes the right to life and bodily integrity of other natural persons. This constitutional law doctrine established security of the person as a value paramount to that of personal liberty. Consequently, a woman could not legally justify abortion on demand, and take the life of another human being, as an ordinary matter of exercising her right to liberty.

Lord Justice Harcourt, in the 1713 case of Beale v. Beale,36 cited Coke as authority for the proposition that a court of equity ought to protect the interests of unborn children:

As to the other objection, it would be very bad in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for, but as the law in many respects, regards an infant in ventre sa mere, so as to allow such child to be vouched; also as the mother may be guilty of the murder of a child in ventre sa mere, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison: so there is more reason that equity should consider such child, in order to its being provided for; and therefore this posthumous child may be well looked upon, in equity, to be living at her father’s death in ventre sa mere.37

In 1795, in Doe v. Clarke, Lord Chief Justice Eyre interpreted the words “living children” in a will to include an unborn human being.38 Justice Sir Frances Buller concurred, observing it was “now settled” that an unborn child is considered “as born for all purposes for his own benefit.”39 Buller elaborated further on the Clarke opinion in a later case, Thellusson v. Woodford, and identified three important rules that were foundational to the common law.40 First, an unborn child was considered “absolutely born” when, at the very least, “such consideration would be to his benefit.”41 That was the legal logic that historically protected the

34. BLACKSTONE, supra note 1, at 121.
35. Id. at 125.
36. 24 Eng. Rep. 373 (Ch. 1713).
37. Id.
39. Id. at 618.
40. 31 Eng. Rep. 117 (Ch. 1798).
41. Id. at 125.
unborn child, as abortion was never presumed to be for the child's benefit. The second rule is that unborn children are persons, and as such, "are entitled to all the privileges of other persons."42 Third, there was no reason to confine these rules to executory devises, for unborn children "should be considered generally as in existence."43

In 1798, the court in Thellusson rejected the argument that an unborn child was a legal non-entity.44 Lord Hardwicke had previously concluded that an unborn child was a person in rerum natura, and according to both the civil and common law the unborn child was "to all intents and purposes a child as much as if born in her father's life-time."45 In legal matters affecting the unborn child, the civil law presumed the unborn child to be born and living for all legal purposes in cases where that presumption would benefit the child. Justice Buller listed examples of what an unborn child can do: "He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may have an injunction; and he may have a guardian."46

In explaining his decision in Thellusson, Justice Buller cited numerous foundational authorities that clearly settled the law establishing that unborn children were simultaneously human beings and persons:

In Wallis v. Hodson, Lord Hardwicke says, "The principal reason I go upon in the question is, that the Plaintiff was en ventre sa mere at the time of her brother's death, and consequently a person in rerum natura, so that both by the rules of the Common and Civil Law she was to all intents and purposes a child as much as if born in her father's life-time."

In the same case Lord Hardwicke takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: but notwithstanding he states the rule to be, that such child is to be considered living to all intents and purposes. . . .

42. Id. at 164.
43. Id.
44. Id. at 162.
45. Id. at 163.
46. Id. In Thellusson, the court cites numerous older English authorities that establish that an unborn child is a legal person equal to that of a human being who has already been born. For example, Doe v. Clarke, one of the cited cases, holds that "whenever such consideration would be for his benefit, a child en ventre sa mere shall be considered as absolutely born." Id. at 164 (quoting Doe v. Clarke, 126 Eng. Rep. 617, 618 (C.P. 1795)). Goodtitle v. Wood, also referred to by the court, finds to the same effect there was no difference between a born and unborn child. Id. (citing Goodtitle v. Wood, 125 Eng. Rep. 1136 (C.P. 1740)).
Lancashire v. Lancashire and Doe v. Clarke go upon the same principle. In both a child en ventre sa mere was held to be a child living at the death of the testator. . . . In Doe v. Clarke, the words "that whenever such consideration would be for his benefit, a child en ventre sa mere shall be considered as absolutely born" were used by me, because I found them in the Book [Watkin’s Treatise Upon Descents 142], from whence the passage was taken. But there is no reason for so confining the rule. Why should not children en ventre sa mere be considered generally as in existence? They are entitled to all the privileges of other persons. . . .

Goodtitle v. Wood is an authority to the same point. The effect is, that there is no difference between a child actually born and a child en ventre sa mere. In Lancashire v. Lancashire Judge Grose says, "I know of no argument founded on law and natural justice, in favour of the child, who is born during his father’s life, that does not equally extend to a posthumous child; and I think, that, when once the law has interfered, and presumed in favor of one child, it would stop far short of justice, if it did not raise the same presumption in favor of the other."47

The Master of the Rolls, Richard Pepper Arden, who was also known as Lord Alvanley, agreed with Justice Buller; he too decided that the law had settled that an unborn child was "a life in being" and that unborn children "are considered to all intents and purposes as actually born."48

It was significant that Lord Alvanley pointedly declined to accept the invitation of distinguished counsel to make new law. In stark contrast to the judicial activism that characterized the Supreme Court of the United States during the time of the Roe v. Wade49 decision, Alvaney felt that making new law was contrary to "the first principles of judicial determination, and would vest a most dangerous power in the Judges."50 It was "a power, which no Judge would wish to possess."51 The function of the judge was a declaratory one alone: "the Judges are to declare the law, not to make the law."52 Legal reform was up to the legislative branch of

48. Id. at 169. In coming to this conclusion, the senior judge (the Master of the Rolls) relied on the case of Long v. Blackall, and a string of similar cases since the statute of William and Mary. Id. (citing Long v. Blackall, 30 Eng. Rep. 1119 (Ch. 1797)). There was only one case in which to a "certain extent" an unborn child was not considered to all intents and purposes as in existence: "the case of a descent in Common Law" where intermediate rent and profits belonged to the heir at law and the requirement there be a tenant to the praecipe. Id. (citing Basset v. Basset, 26 Eng. Rep. 918 (Ch. 1744)).
51. Id.
52. Id.
government: "if an inconvenience arises, the legislature, not the Judges, must apply the remedy."^53

Legal protection of the unborn from homicide expanded as medical science advanced.^54 In England, for example, doctors generally believed that abortion prior to quickening was the killing of human life and a crime.^55 As medical knowledge became even more sophisticated, and the concept of quickening became obsolete, laws were enacted in England and in the United States to prohibit abortion prior to quickening without regard to gestation. In England, Lord Ellenborough's Act of 1803 was the first Anglo-American statute passed that made abortions prior to quickening a criminal act (but not a capital crime, as was the case with an abortion after quickening).^56 The Act was amended in 1837, abolished the quickening distinction and made abortion at any time during pregnancy a crime by both the doctor and the pregnant woman.^57

Lord Ellenborough's Act made it a felony punishable by death without benefit of clergy to cause and procure the miscarriage of any woman who was quick with child.^58 If the woman was not yet quick (in the first trimester) with child, the crime was still a felony, but punishable by a maximum sentence of 14 years:

And whereas it may sometimes happen that Poison or some other noxious and destructive Substance or Thing may be given, or other Means used, with Intent to procure Miscarriage or Abortion where the Woman may not be quick with Child at the Time, or it may not be proved that she was Quick with Child; be it therefore further enacted, That if any Person or Persons, from and after the said first Day of July in the said Year of our Lord One thousand eight hundred and three, shall wilfully and maliciously administer to, or cause to be administered to, or taken by any Woman, any Medicines, Drug, or other Substance or Thing whatsoever, or shall use or employ, or cause or procure to be used or employed, any Instrument or other Means whatsoever, with Intent thereby to cause or procure the Miscarriage of any Woman not being, or not being proved to be, quick with Child at the Time of administering such Things or using such Means, that then and in every such Case the Person or Persons so offending, their Counsellors,

53. Id.
57. Id. at 162.
Aiders, and Abettors, knowing of and privy to such Offence, shall be and are hereby declared to be guilty of Felony, and shall be liable to be fined, imprisoned, set in and upon the Pillory, publickly or privately whipped, or to suffer one or more of the said Punishments, or to be transported beyond the Seas for any Term not exceeding fourteen Years, at the Discretion of the Court before which such Offender shall be tried and convicted.\(^{59}\)

In 1832, the English Court of Appeal in *Rex v. Senior* upheld a manslaughter conviction of a male midwife who had killed a full-term baby with a knife by breaking and compressing the infant’s skull while the rest of the baby was in the birth canal during the birthing process.\(^{60}\) The midwife’s defense was that the baby was only partially born and as such, was not a human being. This defense was rejected at trial and on appeal. Joseph Senior served a sentence of one year for manslaughter.\(^{61}\)

In 1848, Justice Maule, in the case of *Regina v. West*,\(^{62}\) instructed that the jury had to find the defendant guilty of murder if, with the intent to commit an abortion, she had done anything to cause the premature birth and consequent death of a child.\(^{63}\) Ann West forced her “right hand” “into the private parts” of Sarah Henson, who was six months pregnant; West used a pin in Henson’s womb, causing the male child to be prematurely born.\(^{64}\) After five hours of languishing, the child died.\(^{65}\) Despite these facts, however, the jury returned a verdict of not guilty of this capital crime.\(^{66}\)

In 1871, the High Court of Admiralty, in the case of *The George and Richard*, ruled that unborn children were entitled to sue for the wrongful death of a parent.\(^{67}\) This right to litigate was granted by Parliament in 1846, when Lord Campbell’s Act established a civil action and the right to compensation to surviving family members, including children, where a parent was killed in an accident.\(^{68}\)

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59. *Id.* (emphasis added).
61. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 331.
67. L. R. 3 Adm. & Ecc. 466 (1871).
II. AMERICA

Prior to the American Revolution, abortion was rare; once a woman was "quick" with child,\(^69\) it was assumed there was a live baby in her womb.\(^70\) The local colonial law followed the English common law and regarded a mother's unborn child as a human being and a person.

After the War of Independence, English constitutional and common law remained the source of American legal doctrine. At the forerunner to the University of Pennsylvania, Philadelphia law professor James Wilson taught that human life began at quickening and that the law protected the unborn child from the beginning of its existence. Wilson ultimately served as a justice on the United States Supreme Court from 1789 to 1798, and was one of only six men who signed both the Declaration of Independence and the Constitution. He stated that:

With consistency, beautiful and undeviating, human life from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and in some cases, from every degree of danger.\(^71\)

The inalienable right to life, as part of the Declaration of Independence, can thus trace its origins to the English common law. It was a lesson well learned by Professor Wilson's former students, which included President George Washington, Vice President John Adams, and Secretary of State Thomas Jefferson.\(^72\)

In 1818, in the case of United States v. Palmer,\(^73\) a non-abortion case, the United States Supreme Court considered the meaning of the word "person." Chief Justice Marshall found that there was no difference in the meanings of "person" and "human being."\(^74\) In interpreting a federal piracy statute, Chief Justice Marshall declared that the words "any person or persons are broad enough to comprehend every human being" and "the whole human race."\(^75\) Nevertheless, Marshall, noting that the legislation he

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69. JOHN BOUVIER'S LAW DICTIONARY 1010 (1839) defined "quickening": "The motion of the foetus, when felt by the mother, is called quickening, and the mother is then said to be quick with child. This happens at different periods of pregnancy in different women, and in different circumstances, but most usually about the fifteenth or sixteenth week after conception . . . ."
70. Id.
74. Id.
75. Id.
was interpreting did not involve crimes against the human race, confined
the definition of "person" to those under the jurisdiction of the United
States. Chief Justice Marshall cited no authority for the proposition that
there was no difference in the meanings of "person" and "human being,"
because there was no need to. The common law already attributed legal
personality to the unborn human being in probate, property, tort, and
criminal law.

The common law historically protected the unborn child after
quickenning to the fullest extent possible in accordance with the medical
knowledge of the day. It was assumed that the fetus was not alive prior to
quickenning because medical knowledge was not advanced enough to
determine if a woman was, in fact, pregnant prior to fetal movement. The
first American criminal law statutes, enacted between 1820 and 1840,
prohibited only post-quickenning abortions. This was because the
common law, as it existed at the time of the American colonies,
criminalized abortion only after the time of quickenning.

In 1821, the state of Connecticut passed legislation, designed to
protect women's health, which made procuring an abortion after
quickenning a felony. Illinois and New York passed similar laws. Other
states followed suit. Twenty-five states modeled their laws after New
York. However, as scientific knowledge advanced regarding when
human life began in the womb, so did the criminal laws that extended
protection to the unborn prior to quickenning. Quickenning had become an
obsolete concept. The scientific evidence was irrefutable: from the time of
conception, the new life in the womb was fully human and a living member
of the human species.

In 1835, medical science began serious consideration of the evidence
that suggested human life began at conception. In 1840, the state of
Maine was the first American jurisdiction to pass legislation modeled after
Lord Ellenborough's Act to ban the abortion of infants, whether quick or
not. The science of embryology was in its early stages and medical
lecturers began teaching that human life began at conception instead of at

76. See id. at 643.
77. Forsythe, supra note 54.
78. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW
79. Id.
80. GROSSBERG, supra note 56, at 160.
81. Conn. Stat., Tit. 20, §§ 14, 16 (1821).
82. Ill. Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827); N. Y. Rev. Stat., pt. 4,
c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828)
83. See Scott, supra note 10, at 259.
84. See THEODORIC ROMEYN BECK & JOHN B. BECK, ELEMENTS OF MEDICAL
JURISPRUDENCE (Websters and Skinners ed. 1823).
85. Taylor, supra note 72.
quickenings. In 1843, Dr. Martin Berry discovered that conception began when sperm entered an ovum. Human “conception” was observed under a microscope not long after, motivating physicians to become politically active against abortion.

In 1847, the American Medical Association (AMA) adopted its first code of medical ethics, and introduced the guidelines by declaring that religion and morality were at the foundation of medical ethics. Between 1839 and 1855, Professor Hugh L. Hodge at the University of Pennsylvania Medical School, and Professor David Humphreys Storer at the Harvard Medical School, raised awareness of medical studies about the growing number of abortions and the advances of science that proved human life began at conception. Dr. Hodge taught that the unborn child was not a part of its mother’s body, but was an independent being. In 1853, Dr. Tracy maintained that a tiny embryo, no bigger than a grain of wheat, was “a human being,” “one of the human family,” and entitled to have its life “carefully and tenderly cherished.”

Dr. Storer’s son, Horatio Robinson Storer, who trained in medicine at Harvard and studied embryology, led the political movement against abortion. Dr. Horatio Storer blamed “ignorance prevalent in the community respecting the actual and separate existence of foetal life in the early months of pregnancy” for the rise in the number of abortions, especially among married Protestant women.

In 1857, Dr. Horatio Storer chaired a committee of the Massachusetts Medical Society that recommended reforming the laws concerning abortion. The committee advocated recognition of the unborn child as the victim of an abortion. Further, it recommended that the offense be upgraded from a misdemeanor to a felony, and that the offense was committed by any attempt to procure a miscarriage. In 1859, Dr. Horatio Storer authored a series of nine papers in the North American Medico-Chirurgical Review. In his first article, he argued, according to moral law, that “the willful killing of a human being at any stage of its existence is

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87. Id.
92. Id. at 5.
murder." He advanced the proposition that fetal life exists before quickening has taken place, and that human life begins at conception. Accordingly, he urged that abortion was unjustifiable and ought always to be a crime. Dr. Storer's collection of articles were published in the book *Criminal Abortion in America*, and reviewed by the editors of the *Boston Medical and Surgical Journal*. The editors suggested that physicians warn their patients as to the criminal nature of abortion and cautioned physicians not to become morally complicit.

Dr. Horatio Storer also chaired the American Medical Association's Special Committee on Criminal Abortion. The 1859 Report of the AMA on Criminal Abortion took a firm stance, calling abortion the "unwarrantable destruction of human life." Ignorance of when human life began remained the foremost reason why abortions were becoming common. The general population, including mothers, still believed that unborn babies were not alive until after the period of quickening. Doctors were "careless" in their attitudes toward the fetus. There was a lack of uniformity among inter- and intrastate laws that protected the unborn. The American Medical Association adopted a resolution calling upon state legislatures to pass laws to protect unborn human life from the time of conception and urged state medical associations to lobby for change.

In 1871, the AMA's Committee on Criminal Abortion, referring to the unborn as "human life," offered a resolution that was adopted by the American Medical Association, which stated, "it [is] unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of one respectable consulting physician, and then always with a view to the safety of the child, if that be possible."

With objective science informing medical doctors that human life began at conception, coupled with the political activism of the AMA, the doctors aggressively informed the public that human life began at conception and that unborn human beings were in need of greater protection from abortion. By the time the Civil War was over, the same states that ratified the Reconstruction Amendments had overwhelmingly passed strong anti-abortion laws to protect unborn human beings from abortion.

93. *Id.* at 13.
94. *Id.*
95. *Id.* at 15.
96. *See id.* at 15-16.
97. 12 TRANSACTIONS OF THE AM. MED. ASSN. 73-78 (1859).
98. *Id.*
99. *Id.* at 75.
100. *Id.* at 28, 78.
101. 22 TRANSACTIONS OF THE AM. MED. ASSN. 258 (1871).
Francis Wharton, in *American Criminal Law*, writing in 1846, illustrated how medical science had informed the criminal law. As medical science advances, so has legal protection for the unborn:

There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder. If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide, even though the child is still attached to the mother by the umbilical cord. It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law. . . . It appears, then, that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another. . . . [T]he infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards.\(^{103}\)

Physicians and moral reformers in the United States who opposed abortion lobbied for the suppression of information about abortion.\(^{104}\) These efforts culminated in 1873 with Congress passing the Comstock Law that banned dissemination of material pertaining to abortion.\(^{105}\) By 1887, abortion was considered a crime against unborn human beings regardless of the age or size of the fetus.\(^{106}\) Whereas in early America abortion was not a crime prior to the fourth or fifth month of gestation when there was evidence of quickening, jurisprudence had evolved to afford complete protection to the unborn.


\(^{104}\) Rhode, supra note 78, at 204.

\(^{105}\) See id. The official name of the original Comstock Law was “An Act for the Suppression of, Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use,” Act of March 3, 1873, ch. 258, 17 Stat. 598–99 (making it a crime to sell, lend, give away, publish, or possess devices or literature pertaining to birth control or abortion).

\(^{106}\) Lamb v. State, 10 A. 208, 208 (Md. 1887).
III. FEMINISTS OPPOSE ABORTION\(^{107}\)

In 1848, a group of women and men, including Lucretia Mott and Elizabeth Cady Stanton, met in Seneca Falls, New York to discuss women’s grievances and issued a document modeled after the Declaration of Independence.\(^{108}\) The resulting “Declaration of Sentiments” highlighted inequality, unfairness in law and marriage, and sought the vote for women.\(^{109}\) These early feminists believed in “the family of man” and claimed the position to which they were entitled “by the laws of Nature and of Nature’s God.”\(^{110}\) The Declaration stated in part: “We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life liberty and the pursuit of happiness.”\(^{111}\) Nowhere in the document was asserted the right to an abortion or even a superior status to that of the unborn. In fact, the feminists of the early eighteenth century were staunchly pro-life and detested abortion as another method by which men subordinated women.\(^{112}\)

The early feminists also viewed abortion as a threat to motherhood and marriage.\(^{113}\) In 1792, Englishwoman Mary Wollstonecraft urged that women must respect nature and let pregnancy take its course, as it was the first duty of a woman not to destroy the embryo in her womb.\(^{114}\) Elizabeth Cady Stanton, a leader of the American Women’s Rights movement, declared, “It is a mother’s sacred duty to shield her children from violence from whatever source it may come.”\(^{115}\) Stanton rejected the hypocrisy of men who complained of social and economic oppression and “played the tyrant” at home, over their women whom they treated as slaves.\(^{116}\) Women were denied the constitutional and legal protections afforded to men. Stanton, along with Susan B. Anthony, took the position that women were

\(^{107}\) A substantial portion of this section was previously published by me in an article entitled Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death, 48 St. Louis U. L. J. 425 (2004), and is reprinted with permission of the Saint Louis University Law Journal, © 2004 Saint Louis University School of Law, St. Louis, Missouri.

\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) RHODE, supra note 78, at 203.


\(^{115}\) Address by Elizabeth Cady Stanton on Woman’s Rights, available at http://ccsba.rutgers.edu/docs/eccswoman4.html (last updated July 12, 2001).

\(^{116}\) See id.
depersonalized, and, consequently, dedicated their lives to emancipation.\textsuperscript{117} Abortion was called "child murder" in Anthony's newsletter, \textit{The Revolution}.\textsuperscript{118} Stanton too opposed abortion, saying, "[w]hen we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."\textsuperscript{119}

\textbf{CONCLUSION}

The modern day position – that fetuses and embryos are not human beings or persons – is contrary to the common law and early history of the United States. Historically, fetuses were, in fact, considered both human beings and legal persons. Consequently, the rationale for legalized abortion is premised on an inaccurate set of "facts" and should be revisited.

\textbf{BIOGRAPHICAL PROFILE OF AUTHOR}

Professor Charles I. Lugosi joined the St. Thomas University School of Law in 2003, after fifteen years of private practice in Canada following graduation from the University of Western Ontario with a law degree in 1979. A member of the bars of Ontario and British Columbia, Professor Lugosi was a member of a legal team that set a record for the highest personal injury settlement on behalf of an infant in British Columbia, earning him a lifetime achievement award as a trial lawyer who demonstrated exceptional skill, experience, and excellence in advocacy. As a criminal defense attorney, Professor Lugosi achieved an 88.8% success rate in homicide cases. In 1997, Professor Lugosi won a narrow decision in the Supreme Court of Canada that overturned the previous law of search and seizure, establishing constitutional limits on police powers to enter a private dwelling without a warrant.

In 2000, Professor Lugosi began postgraduate studies at the University of Pennsylvania, where he earned his Master of Laws and Master of Bioethics degrees, and completed a clinical internship at the Philadelphia Children's Hospital. Professor Lugosi began his teaching career as a Visiting Professor at the University of Western Ontario Law School, where he taught Bioethics, Biotechnology and Human Rights.

\textsuperscript{117} Susan B. Anthony voted in the 1872 presidential election. For that she was convicted of a crime. Her argument under the Fourteenth Amendment failed. Had she been a man, she would have been seen as fulfilling her civic duty and never would have been prosecuted. \textit{See} Excerpts of Proceedings, United States v. Anthony, \textit{available at} http://www.pbs.org/stantonanthony/resources/index.html (last visited Nov. 16, 2003). \textit{See also} Declaration of Sentiments (1848) Seneca Falls Convention, \textit{available at} http://www.fordham.edu/halsall/mod/Senecafalls.html (last updated Nov. 1998).

\textsuperscript{118} The REVOLUTION 4(1):4, July 8, 1869. This was referenced by Serrin Foster in \textit{The Feminist Case Against Abortion}, \textit{available at} http://www.feministsforlife.org/hot_topics/commonw.htm (last visited Nov. 16, 2003).

\textsuperscript{119} Letter to Julia Ward Howe, October 16, 1863, recorded in Howe's diary at Harvard University Library. \textit{See also} The American Feminist 10:1 (Spring 2003) at 2.
Currently Professor Lugosi is completing his Doctor of Juridical Science Degree and teaching constitutional law and theory, constitutional criminal procedure, and bioethics at the St. Thomas University School of Law. Professor Lugosi has recently published articles on the ethics of killing one conjoined twin to free the other; the use of DNA to free the factually innocent; the loss of freedom of speech in public areas outside abortion clinics; the moral and legal arguments in favor of extending constitutional personhood to the unborn; and the case for preserving civil liberties and the rule of law after 9/11. His articles have appeared in a variety of publications, including law review journals published at the University of Texas, Temple University, University of Denver, George Mason University, and Saint Louis University. Professor Lugosi has appeared on national television in Canada as a guest of 100 Huntley Street, contributed to legal symposia hosted by law school journals in St. Louis and Philadelphia on the subjects of teaching criminal law and the balance between civil liberty and national security, and in 2004 was the only American based scholar invited to present a paper about respecting human life in Iran to the First Legal Medicine Congress of Islamic Countries. Professor Lugosi is a constitutional advisor to the leader of Canada's Christian Heritage Party, Ron Gray, and is a peer reviewer for Issues in Law and Medicine.