

An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women

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IN PRIMITIVE SOCIETIES, ESPECIALLY THOSE OF nomadic, hunting character, with no fixed land and dependence on animal grazing rather than agriculture on fixed estates, most of the basis for governance was contained in the simple doctrines of personal recognition and status.

A person within the group or tribe was a recognized human contributor to the life and work of the community. If a person transgressed the accepted rules of the group, he or she could be cast out and left behind as the group moved on in its regular patterns. The fact of group movement made use of this enforcement method easy and natural. These castaways or outlaws were given no protection and were not regarded as worthy of recognition any more than a stray animal. To this extent, they lost the character of persons. Distinctions between animals and humans were not always clear at birth. It was commonly believed that human women could be made to conceive an animal-like creature by sexual union with an animal. The product of the conception was considered an animal and could be abandoned or killed by the woman or anyone else. The woman would often also be killed if she survived the birth, or be cast out of the society. We would today assume that these births were various types of human

deformities. For example, the child or fetus with a webbed hand or foot deformity, or extra limbs, would be assumed to be an animal, as would the child with a grossly deformed or enlarged head or with protruding eyes or large lop-ears. These beliefs aided the societies in abandoning deformed or handicapped children who would be a burden on the nomadic groups without forcing them to incur legal duties to the children or persons.

The law of status enabled primitive societies to deal with the rights and duties of different types of persons within the group without the need to create elaborate social mechanisms and legal enforcement to install and perpetuate order in the society (Geldart 1924; Graveson 1953). Essentially, status was determined at birth and did not change except due to age (the rites of childhood and manhood) and marriage (mostly confined to women's change of status and tribal or family membership). At birth, the child would join the social status or class of the male parent as hunter, warrior, shepherd, leader, etc. Women's status or class distinctions were less complex or varied at birth. They changed entirely with marriage when all status and obligation to the natural family or tribe were severed irrevocably. A wife who transgressed could be cast out and could not return to the natural group, which felt no legal obligation to her.

Roman Law

Roman codes and the commentaries of Roman jurists acknowledged the concept of *persona*, or natural personality, as the primary subject of law. This concept regarded the person as a single individual. The Roman law later recognized communities or unions of persons as one subject of the law for certain purposes.

The human fetus was not regarded as a legal subject but as merely a part of a woman's body.¹ The fetus had the potential to become a person and the law adopted the "fiction" (a legal term for a binding presumption not necessarily based upon fact) that the unborn person be deemed born whenever it was in its interest to do so.² This fiction

¹ Digest of Roman Laws, 35.2.9.1.

² Digest, 1.5.7; 50.16.231.

could be maintained, however, only if the fetus was later born alive and survived to be recognized as a juristic person.

The most important applications of this law took place when the father died before the birth of the child. The child nevertheless took the status of the father and could inherit equally with other children, although as the last-born of the father. Julianus³ asserted that such a vesting of status and inheritance would be recognized even after a long period of time, as when a pregnant woman was captured by an enemy and stolen away. The later-born child, on return to the group, would inherit as if never absent.

No concept of "viability" existed in Roman law. Under the concepts noted above, the fetus was recognized in the fiction from conception, since the death of the reported father could take place at any time within the previous nine months when the husband could have had sexual union with the mother. However, the law described above related to status and inheritance and did not concern physical protection of the fetus within the woman. Most commentators on the ancient Roman codes assert that little consideration was given to legal punishment for damage to a fetus in utero.

Under Roman law, a *monstrum* was a grossly deformed fetus or child delivered by a woman and assumed to be without human form and intellect. The law of the Twelve Tables provided that such monsters could be abandoned to exposure or killed. Classically, the monster was not considered ever to have been human and thus was never a subject of the law of persons. In later Roman law, distinctions began to be drawn between children of human form who were born deformed and those who were of "monstrous appearance." The latter could be killed, but the former were recognized as persons.

The primitive concept of status was adopted and expanded in Roman law. There were three classifications of personal status: *status liberatis*; *status civitatus*; and *status familius*. The first classification separated the free men from the bound slaves. The second identified the adult Roman citizens of full rights and obligations as distinguished from alien or foreign persons who lacked recognition in commercial or trade areas and in certain familial rights. The last classification related to status due to lack of age of maturity or to status related to marriage and family.

³ Digest, 1.5.26.

As the ancient Roman law developed into the modern law of continental Europe, it was becoming clearer that the law of persons or personality was a part of the definitional law (What is law? What is man? What is a juristic person?) and the law of status was of a comparative or relational nature (Where does X stand in relation to Y? What is the higher value to be protected?).

The Early Common Law

The writings of Blackstone in his *Commentaries on the Laws of England* (1769) provide us with the early framework or theory of the common law. Blackstone wrote of the rights of persons and the rights of things. He defined a "right" as a legally protected interest, a capacity residing in one person to control, with the assent and assistance of the state, the actions of other persons. He recognized natural and artificial persons as having rights under the law. Natural persons were human beings, the creatures of God. Artificial persons were created under law and called corporate bodies and bodies politic or municipal.

The rights of persons were divided into those considered *absolute* and those considered *relative*. (The distinction was roughly what the Roman law would have considered the law of personality and the law of status.) Blackstone based the absolute rights of persons on their natural development in reason, in the state of nature, irrespective of the existence of an organized society or legal state. The absolute rights of freeborn Englishmen were those of personal security, personal liberty, and personal property. Relative rights were created by law and concerned three classes of persons: the highest officials of the realm in the executive and legislative branches; the holders of governmental, military, and clerical office of particular importance and subjects and aliens under British law; and privately recognized relationships such as husband and wife, parent and child, and master and servant.

Blackstone held that the principal aim of society was to protect individuals in the enjoyment of their absolute rights. Under the first absolute right of personal security, Blackstone wrote of the security of life itself. In Section 252 of Book I he asserted:

Life is the immediate gift of God, a right inherent by nature in each individual; and it begins in contemplation of law as soon as an infant is able to stir in its mother's womb.

This expression in Blackstone was quoted widely in the English courts to support the crime of abortion after quickening. Blackstone asserted that the "modern law" (of the later eighteenth century) did not look upon abortion in so atrocious a light as former ages and held it merely as a "heinous misdemeanor" and not a felony. The act became a felony only if the child were born alive and killed by the mother or another.

Pollock and Maitland in their monumental *History of English Law* ([1895]1968, 437) observed that under early English law women's lives were as well protected as those of men of equal rank in the society. It was a maxim of later English common law that a woman could never be outlawed as in ancient and Roman law, even after marriage, and remained always under the protection of some man or family. A woman of full age (21 years) who was not married was, after the Norman Conquest, accorded all rights to sue, be sued, to contract, make seal and bond, all without a guardian.

Blackstone described the beginning of life at quickening as the point at which the law's absolute protection would begin. He did not place his observations in any context of the protection of women's welfare or rights in general or in relation to the fetus or child. He took his holding in part from Sir Edward Coke's *Third Institute*, published in 1644, where Coke had observed that if an action were taken which resulted in the killing of the fetus in the womb after quickening, it was a "great misprision" (a misdemeanor) but not murder. Presumably, the action against a woman prior to quickening, even if an abortion or miscarriage occurred, was no crime at all. This position was further supported by what followed in the same section of the *Institute* where Coke asserted that if a man were to counsel a woman to kill the fetus in her womb and she later delivered a child and then killed it, the man would be an accessory to murder. Yet, at the time of counseling "no murder would be committed of the child in utero matris."

From Coke through Blackstone and onward in the English common law until 1803, the law of abortion remained the same. In 1803, Lord Ellenborough's Act made all abortions by drugs or poisons a crime and after quickening made the crime a felony punishable by death. In 1837, all reference to quickening was removed, but the penalty of the felony was reduced to a prison term of 15 years to life. Later statutes made all attempted abortions by the woman herself or by another a felony whether the woman was pregnant at the time or not.

By the late nineteenth century, the English law of abortion seems to have removed references to quickening except in matters of proof of pregnancy. In Patterson's *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person* (1877,314) it was asserted:

When human life begins.—The first important rule is that from the time any woman has conceived *or become quick with child* and wholly irrespective of legal marriage existing or not the law begins to throw out its defences around the mother, so as to secure the continuance of life to the child . . . (emphasis added).

The Progress of Personality and Status Law

Under both English and American legal theory, the development of the law both in regard to personality and in regard to status has been toward removing distinctions and providing equality of all persons under the law, no matter what their limitations of capacity or class distinction in the past. In regard to persons, the effort has been to provide all human beings *born alive*, whatever their physical or mental disability, with equality of personhood and status. In America all of the law in this area including the law of status became, by the nineteenth century, an integral part of "the law of persons" (Dwight 1894). Casebooks and treatises were published on the law of persons and the subject was generally required in the curriculum of most law schools during the late 1900s and on into the new century (Barbour 1890; Woodruff 1895; Chadman 1899; Smith 1899; Spencer 1911; Cooley 1913; Tiffany 1917; Derby 1927; McCurdy 1927). In America, the law, covered under what the British would still have called personal rights and status, was incorporated into law-school courses on the law of persons and domestic relations. In the middle of the current century, the personhood parts of the courses tended to disappear, and domestic relations or family law became the predominant subject area in the curriculum. The law of personal rights, formerly thought to be founded mainly in the traditional common law, was to receive its greatest emphasis and all new applications in the later years of this century in federal constitutional law.

In England, however, the movement was more theoretical. There was no written constitution codifying human rights concepts. The

greatest influence in the development of English law in this area was Sir Henry Maine's assertion in *Ancient Law* ([1861]1959:141):

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of progressive societies has hitherto been a movement from Status to Contract.

The influential words in the above quotation, the words that fired the legal philosophers' imagination for years and decades to come, were in Maine's conclusion: "that the movement of progressive societies has hitherto been a movement from Status to Contract." The *progressive* change was therefore toward personal freedom based upon agreements between men negotiated on the basis of social equality. It was a movement away from the previously static society, the conservative society, based upon social classes determined and unchangeable from birth.

Sir Henry Maine's concept of legal history was a perfect fit with the industrial age, with the growing dominance of the commercial entrepreneur over the landed gentry (Graveson 1953). The Socialist political movement grasped his meaning completely as did the pragmatic philosophers. However, social classes and the privilege of the high-born did not die quickly in Britain. Distinctions in regard to the status of master and servant, husband and wife, as well as privilege of inherited nobility continued to influence English law. But Maine was a historian, not a political radical. His observation contained the often-overlooked qualification that the movement of progressive societies had "hitherto" been from status to contract. He did not predict that it would *always* be such or that such movement was inevitable.

The Status Rights of Women

Part of the movement alluded to by Sir Henry Maine was in the field of the rights of married women. The law of that area had always been

one of status, although based upon the contract of marriage. The implication from Maine's thesis was that women could change the character of their duties and obligations within marriage. They could change, by mutual agreement with their husbands and under the law, the underlying obligations of married women regarding child bearing and child rearing. Although this position is clear from his thesis, neither Maine nor the other commentators on the status movement gave particular notice to these implications. In part, this was due to the continued influence of the ecclesiastical law and courts upon English law at least until 1857 (Graveson 1953).

American Medicolegal Developments

After the mid-1800s in both England and America, the crime of abortion was generally recognized as were both spontaneous and induced miscarriages and births. The most influential legal medicine textbook on both sides of the Atlantic was Alfred Swaine Taylor's *Manual of Medical Jurisprudence* (1844) which appeared in multiple editions over four decades. In Clark Bell's American editions of Taylor, beginning in 1892, the chapter on criminal abortion began by distinguishing the medical and legal concepts of abortion. It was pointed out that in obstetrical practice abortion was understood as the expulsion of the fetus before the sixth month of gestation. After that, it was described as premature labor intended to deliver a viable child. In the law of both England and America, however, no such distinction existed; abortion was legally deemed to cover any expulsion of the fetus at any period before natural full term. The chapter went on to point out that it was incorrect to assert that criminal abortion was rarely ever attempted before the third month. In fact, it was indicated that in medical practice such abortions were becoming common in the second month shortly after the woman was able to be sure that she was pregnant.

Medical readers were cautioned that only *violent abortions* were criminal. On the other hand, those that were natural or accidental produced "miscarriages" without criminal intent or consequences. Violent abortions could be caused by mechanical means and by medicinal substances intended to be irritants to the womb or bowels. They were said to work with greater certainty in proportion to the advance of the pregnancy.

A succession of editions contained the observation, "It is to be regretted that members of the medical profession have on several occasions misused their professional knowledge and have exposed themselves to prosecutions for this crime" (Taylor [1844]1892,529). Nevertheless, Taylor's influential text, after the mid-1800s, in the later editions of the chapter, began to accept and to endorse the practice of therapeutically induced premature labor. The author admitted that the practice had been condemned by many as immoral and illegal. However, it was observed that many reputable doctors were inducing premature labor in certain cases of disease, deformity of the pelvis, and excessive vomiting from pregnancy. The author then argued that it was "impossible to admit that there can be any immorality in performing an operation to give a chance of saving the life of a woman, when, by neglecting to perform it, it is almost certain that both herself and the child will perish." The chapter went on in conclusion: "Any question respecting its illegality cannot be entertained; for the means are administered and applied with the bona fide hope of benefiting the female, and not with any criminal design."

The writer boldly admitted that the advice might not have legal protection: "It is true that the law makes no exception in favor of medical men who adopt this practice . . . or surgical operations" It was nevertheless a recommended procedure when intended to save the life and health of the woman. The justification for the procedure was clearly stated as the *necessity* to aid the patient: "It should be shown that the delivery was not to take place naturally without seriously endangering the life of the woman."

The chapter-author advised practitioners who elected to conduct such therapeutically induced labor to hold a consultation with other practitioners and receive their concurrence in the determination. For some specialist obstetricians with large practices (and, by implication, unchallenged reputations) this step would not be as necessary as for general practitioners, the author observed.

In an extensive historical review of abortion which was the basis of a doctoral dissertation in law at Columbia, J.W. Dellapenna (1979, 407) recently identified the Taylor textbook discussion as among the very few reputable criticisms of the criminal law abortion restrictions in England and America prior to the end of the second decade of the twentieth century.

It is of further interest to examine the widely used Taylor edition

of 1934 then under the editorship of the best known medicolegal specialist in the world at the time, Dr. Sydney Smith of the University of Edinburgh. (The American editions were discontinued after the death of Clark Bell, the American lawyer who had fostered the field so extensively in the late nineteenth century.) Smith had moved the discussion of therapeutic procedures up to the front of the chapter for its medical readership, and it was now openly entitled "justifiable abortion" rather than the euphemistic and tentative title of the past. Again, the author admitted to a legal vulnerability for the position he took that some abortions were justified ethically and legally. The section began:

The law of this country [U.K.] does not specifically recognize any interference with pregnancy as justifiable, and any medical man must remember this when he contemplates emptying a pregnant uterus.

The chapter went on to indicate that the only reasons which would justify "induction of labor" were to save the life of the mother or to save the life of the child. It was observed that "some religions" would not accept the first reason, but this text indicated that it was not concerned with religious viewpoints. The conclusion was stated: "It cannot be done [justified abortion] for the sake of family honor nor other ethical reason."

The Era of Therapeutic Abortion

The law books continued to condemn "criminal abortion" in America and Great Britain during the decades before World War II and until the current general reform movement. Most of the statutes did not make all abortions improper; they covered only those abortions called "criminal abortions" often without defining the medical procedure itself. This broadness of legal language left gaping open the interpretation of "therapeutic" abortions as well as natural or accidental miscarriages.

Dellapenna (1979,407) described the era of legalized, induced abortions as dating from 1967 to the present. His time span is, in my judgment, much too short. The period began much earlier both in England and

America. The choices open to women, however, were never either clear or comfortable. Poor women had no real choice but self-induced abortion or infanticide (the traditional mode of disposition of the spontaneous abortion or the term child for centuries) except resort to the incompetent, clandestine abortionist. Death was not an uncommon result for the woman who went to an "illegal" abortionist. What few criminal prosecutions took place in this era were brought against the outlawed abortionist who caused the death of a woman in the crudest most obvious form.

Dellapenna wrote as if this was a fairly enlightened era. It was not. For the impoverished woman, it was a nightmare often ending in death or serious illness and sterility. For other women of better circumstances who wished abortions, it was often a lonely search for a cooperative physician. If the medical reasons were clear and acceptable, perhaps some secure practitioner could be found. The circumstances for the acceptable "therapeutic abortion" needed to be without a breath of question, often meaning that the woman had to "prove" her necessity by unremitting suffering before the procedure would be performed. The medical community's often tyrannical hypocrisy was practiced to the hilt on many a desperate woman. Widespread social condemnation gave no comfort to the woman after the procedure was completed, no matter how "justified" medically, even by the highest and most diversified "consultation" from other physicians and psychiatrists.

There was great fear of prosecution for "illegal abortions" in the medical community, but very few were ever sought by the police. As early as 1859, the famed Dr. Walter Channing (1859, 135) observed that there had, to his knowledge, never been a conviction for criminal abortion in Massachusetts, although "instances occur every day." He added, "I believe there has never been one in this State, this moral State by eminence, and perhaps in none is this crime more rife."

If there were no prosecuted doctors in Channing's time, there was even less of an effort at enforcement in later decades. Medical authorities were allowed to practice freely and to expand their concepts of therapeutic abortion and the classic "D and C" (dilation and curettage) without clear laws to set fair and equitable criteria for the application of these medical standards to the troubled women of the era.

Interrelationships of Personhood and the Status of Women

The American states began to incorporate the medical concept of therapeutic abortion into their criminal abortion laws in the 1940s, first through case law and later by statutory changes. The more liberal policies allowed abortions where there was danger to the life or health of the woman. The stricter laws limited the exception to danger to life. Often, the case law or the statute (as in the national Criminal Code of Canada at present) required the physician to obtain the concurrence of colleagues or of a hospital committee on the necessity for therapeutic abortions.

It seems clear that during this period a philosophy of law was being applied holding that the life of the pregnant woman had a higher *relative value* (thus a status-like concept) than the potential life and potential personhood of the fetus. Some religious groups, especially Roman Catholics, consistently opposed this viewpoint. The Catholic position was that the mother and the child (the fetus from conception being possessed of a soul) were of equal value, and one could not be acted against (as by a craniotomy at birth) for the benefit of the other (O'Malley 1919).

American law up to the 1973 abortion decisions in the Supreme Court seems never to have accepted the Catholic viewpoint. The life of the mother, and often her health, could be protected during pregnancy and at birth. The wider application of Caesarean sections largely eliminated the need to damage or destroy a fetus at premature or full-term birth, but the principle of relative value of the mother over the fetus predominated except in Catholic hospitals.

It should be noted that the application of the law of relative value was available only under a concept of medical necessity. It was not considered a matter of choice by either the woman or the physician. The concept of necessity was applied on the basis that both values could not be preserved. This is not the same as the concept of self-defense. In the application of self-defense, the two values, two persons, are equal. The attacked person is allowed to return deadly force against the other person, the attacker, in an ethically justified manner. Catholic philosophy rejected the self-defense argument in abortion and childbirth decisions, even when the life of the mother was threatened by continuing the pregnancy (O'Malley 1919; Coppens 1897).

Case law in the United States in the field of torts has had difficulty with the concept of personhood in prenatal injuries. It was generally agreed that the early common law allowed no recovery to the woman or the child for prenataally caused injuries because, as Justice Holmes found in *Dietrick v. Northhampton*⁴ in 1884, the fetus had no legal status. When the case law began to be liberalized in the early 1950s, the concept of personhood, not status, was applied in order to find a duty on the part of the defendant to take care in avoiding harm.⁵ Without this duty to a person, no cause of action would lie. The personhood of the fetus was found, however, to exist only after viability, defined as that stage in pregnancy when the fetus could exist independently of the mother if separated by miscarriage or premature birth. This was clearly a personhood argument since it was applied in order to find a separate being from the mother. Also, these cases generally required that, in addition to the injury having been imposed only after viability, the fetus had to go on to be born alive. This requirement was consistent with the most ancient concept of personhood, that is, that the fetus has only potential for becoming a person. The ancient Roman fiction would have projected the concept of personality back into the pregnancy period in order to protect the life and welfare of the child later born alive. Tort damages were of no use to a dead fetus. The only legal benefit that could occur was to a live child who had been damaged and now was deformed or disabled as a result of the prenatal injury.

As more legal claims were litigated under the new rule, it became clear at trial that the medical evidence often did not support the legal theory. Claims based upon deformity in the fetus could be supported by medical evidence only if the injury or exposure (such as, to radiation) was sustained during the early stages of pregnancy and fetal development, not after viability. In fact, most claims for damages due to trauma injury in the late phases of pregnancy failed to have any medical evidential support. This discrepancy between medical evidence and the legal theory of personhood was recognized in the case law as early as 1956, and hence the viability rule was abandoned in most states. The majority rule is now supportive of tort actions for prenatal injuries

⁴ 138 Mass. 14 (1884).

⁵ *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

at any time in pregnancy, but the great majority of decisional law still requires that the child be born alive in order for an action to lie on behalf of the child. Of course, if the woman has a miscarriage or produces a dead child, she can bring a tort action for her own personal damages of pain and suffering and medical bills and any permanent disability due to the injury to herself.

At the current time, further tort law developments are taking place in this field. The latest areas of tort liability go considerably beyond issues of direct injury to the fetus *in utero*. They concern issues of wrongful birth or wrongful life and can involve injuries to "persons" not born at the time of injury to the prospective mother (Trolzig 1980, 15-30). The theory of American tort law seems to be moving in the direction of allowing recovery for negligence in not preventing or not providing information to the mother to enable her to prevent a later birth of a defective child. These cases would still seem to require that the child be born alive, thus continuing the concept that potential personhood must become vested in the actual birth in order to relate back to a period of injury. The fiction of the Roman law is extended into the idea of a "foreseeable person" to whom a duty is owed. It seems to be "foreseeable" that any normal young woman may later have a child, even if she were not married at the time, and thus a duty of care is owed to her to avoid harm which may injure a later-born child (genetic defects, etc.).⁶

The movement to reform the abortion laws on a status basis in favor of women's rights, and in order to eliminate the "enforcement costs" of an abortion law system which was not working, received substantial support in the late 1950s with the publication of Granville Williams's book, *The Sanctity of Life and the Criminal Law* (1957) and the adoption of a reform, model law on the subject (as a part of a more general criminal law reform) by the American Law Institute. In particular, the new law emphasized protection of the life and health of the mother, but also authorized therapeutic abortion where the fetus was severely deformed. This was the first full recognition of a

⁶ *Renslow v. Menmonite Hosp.*, 67 Ill.2d 348, 367 N.E.2d 1250 (1977); *Curlender v. Bio-Science Laboratories*, 106 Cal. App.3d 811, 165 Cal.Rptr. 477 (1980); Curran, William J., and E. Donald Shapiro. 1982. *Laws, Medicine and Forensic Science*. 3d. ed. Boston: Little, Brown.

quality of life standard for evaluation of relative values in the status of the fetus and the choices of the pregnant woman.

The American Constitutional Viewpoint: Privacy, Personhood, and Status

The Supreme Court decisions of January 1973 brought together legal policy examinations of the issues of personhood and privacy under the United States Constitution. The Court did not seem to have realized that a review of the development of the law of personal status might also have been useful to the decision.

The failure to recognize status as an issue seems largely to have been due to the earlier incorporation of the English law of status and personal rights into the American law of persons in the nineteenth century, as indicated earlier in this paper.

The constitutional concept of privacy was used by the Court in its 1973 decisions to allow the woman and her doctor to decide issues related to her pregnancy, including whether to continue to carry the child or to have an abortion, free of legal interference. Had the Court chosen to use Sir Henry Maine's historical approach, this freedom could have been viewed as part of the release of the woman from status controls, allowing her to change legal relationships by free agreement. The danger in using a privacy argument was that it removed all legal involvement, even those laws protective of women, such as licensing of abortion services, availability of services, etc. In an earlier paper (Curran 1971,621-26) before the 1973 decisions, I had warned of this problem in a discussion of public health issues in abortion law reform.

The Court chose to deal with the personhood-related issues in the cases through an examination of the developmental stages of the fetus *in utero*. The first trimester was found to present little danger to the woman in abortion procedures in relation to the dangers of a complicated or risky pregnancy. Consequently, the Court felt that the woman's privacy should be complete and no laws could interfere with her decision and that of her physician taken in her overall best interests. The second trimester was found more risky for abortions and so the state was found justified in enacting public health laws to protect the mother, but not to force protection of the fetus, even if normal in

development. On a relative value basis, the woman's rights were still being found to outweigh those of the fetus.

Only after viability was the personhood of the fetus recognized as entitled to protection under the Constitution's Fourteenth Amendment. The Court chose to assert, under this concept, that the states could have a "compelling interest" to protect the potential personhood of the fetus only after viability. The Court rejected any effort to recognize personhood from the point of conception as a futile argument about "when life begins."

The Court asserted that the state, in "promoting its interest in the potentiality of human life," could prohibit abortion after viability. However, the Court added its support of the necessity rule of therapeutic abortion discussed earlier in this paper. It was indicated that the states could regulate abortion after viability, "except where it is *necessary*, in appropriate medical judgment, for the preservation of the life or health of the mother" (*Roe v. Wade*) (emphasis supplied).

Strong support for the position that the Supreme Court's legal, philosophical reasoning was very close to the theory of relative values in the law of status is indicated in the concluding paragraph in the *Wade* decision where Justice Blackmun asserted:

This holding, we feel, is consistent with the *relative weights* of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the Common Law, and with the demands of the profound problems of the present day (emphasis added).

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