

A Fetus By Any Other Name:
How Words Shaped the Fetal Personhood Movement in US Courts and Society

(1884–1973)

by

Carolina Abboud

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Graduate Supervisory Committee:

Jane Maienschein, Chair
George Justice
Gary Marchant
Stephen Pyne

ARIZONA STATE UNIVERSITY

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ABSTRACT

The 1973 Supreme Court case *Roe v. Wade* was a significant event in the story of fetal personhood—the story of whether embryos and fetuses are legal persons. *Roe* legalized abortion care in the United States (US). However, the story of fetal personhood began long before the 1970s. People have been talking about embryos, fetuses, and their status in science, the law, and society for centuries. I studied the history of fetal personhood in the United States, tracing its origins from Ancient Rome and Medieval England to its first appearance in a US courtroom in 1884 and then to the Supreme Court’s decision in 1973.

But this isn’t a history of events—of names and dates and typical details. This is a history of words. In the twenty-first century, words used to discuss embryos and fetuses are split. Some people use humanizing language like “unborn children” and “human life.” Others use technical words like “embryos” and “fetuses.” I studied what words people used historically. I charted how words moved from science to the public to the law, and how they impacted court rulings on fetal personhood.

The use of certain words nudged courts to grant additional rights to embryos and fetuses. In the 1960s, writers began describing the science of development, using words like “unborn child” and humanizing descriptions to make embryos and fetuses seem like people already born. That helped build an idea of embryos and fetuses as having “life” before birth. When people began asking courts to legalize abortion care in the 1970s, attorneys on the opposite side argued that embryos and fetuses were “human life,” and that that “life” began at conception.

In those cases, “life” was biologically defined as when sperm fertilized egg, but it was on that biological definition “life” that judges improperly rested their legal rulings that embryos and fetuses were “potential human life” states had a duty to protect. It wasn’t legal personhood, but it was a legal status that let states pass laws restricting abortion care and punishing pregnant people for their behavior, trends that threaten people’s lives and autonomy in the twenty-first century.

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INTRODUCTION: ON STORIES AND THE IMPORTANCE OF WORDS

A story, I've found, is hardly ever one, single story. Often, it is composed of several stories that intertwine, intersect, or run parallel to one another. The story of my life is tangled with those of my family members, and has at various points unfolded alongside social movements, changed course due to current events, and overlapped with the stories of the many people I have met. Telling a story, then, requires sifting through the various threads that form its fabric and deciding which ones to focus on based on what kind of story you're trying to spin.

It is with that understanding of stories, humans, and history that I have researched and written the story at hand. This is a story about fetal personhood. It is about how, why, and when entities in the womb were granted legal status close to the legal personhood held by those who were already-born. The story of fetal personhood in the United States is no different than any other story; it, too, is made up of many stories. It is a story about science and law. It is about religion and ethics. It is about women's rights and civil rights. It is about eras ancient and modern. It is about language—popular, scientific, and legal. It is about all of those things at the same time.

Others have told a story of fetal personhood before. You'll see me reference them throughout the text. Each researcher chose to focus on different threads, different parts of the story, in order to highlight one aspect or another. Some chose to focus on the Catholic Church, some on US abortion legislation, and some on social discourse around *Roe v. Wade*. I have chosen to focus on language. The purpose of this project is to tell the story of how language influenced the changes in the legal status of embryos and fetuses. Discussions of fetal personhood in the US legal system began in 1884 and persisted into

the 1970s and beyond. Judges, lawyers, scientists, and popular writers were penning their thoughts on embryos, fetuses, and personhood at every stage, and this is the story of how what they wrote did (or did not) influence what legal rights were granted to embryos and fetuses.

This is not a full account of the fetal personhood movement in the United States. I haven't the time nor the space to give a complete report of everything that happened between 1884 and 1973, the start and end dates for this story. However, this is a unique account of the fetal personhood movement, the first to trace the words used in various sectors of society to discuss different aspects of embryos and fetuses and their status in the United States. It is the first story told with its focus on the language that propagated discussions of fetal personhood through time and throughout the country.

Why language? Why focus on the words instead of activists or historical events?

The title of this dissertation—"A Fetus by Any Other Name"—is an allusion to a line from Shakespeare's *Romeo and Juliet*. At one point, Juliet says, "What's in a name? That which we call a rose/ by any other name would smell as sweet." (Shakespeare 2015, Act II, Scene II, Lines 43–44). I'm no Shakespeare scholar, but a surface level reading of the lines reveals that Juliet is implying that what you call something, or someone in the case of Romeo Montague, doesn't matter. Instead, what matters is what something or someone *is*. It doesn't matter that Romeo bears the surname of a rival family; it matters that he loves Juliet.

I disagree. I do think what we call something matters. The name matters; the word matters. Would a rose smell as sweet if we called it something else? The *Oxford English Dictionary* has a list of words for "rose" used in earlier forms of English ("rose, n. 1 and

adj. 1”). If it was spelled “roos,” “roose,” or “roase,” would we still think of it the same way? Would we imagine its scent to be just as sweet? Personally, if those words popped back up in the English lexicon today, we might not. To me, the word “roose,” while perhaps pronounced the same as “rose,” is spelled a lot like “moose” and brings with it certain moose-y baggage (and, potentially, odor).

This is not a frivolous observation. Words do carry meanings that do not necessarily appear in their dictionary definitions. Consider the difference between “hi” and “hello,” for example. Both are greetings, but one brings with it associations of familiarity and informality, while the other can seem more distant. Or think of all the different words we have for the human buttocks. There’s “bottom,” “butt,” “rear,” “fanny,” “booty,” and more—all for the same bit of anatomy on every human body. Yet every word is different, comes with different connotations or common usages. Some are appropriate for a conversation with a professor or the queen of England, and some should best be left at home.

While using the wrong word for one’s gluteus maximus may result in nothing more serious than some acute embarrassment, the differences between other words can have greater impacts. For our story, we’ll be looking closely at words used to refer to *in utero* entities, words like “unborn child” and “fetus.” Right away, I’m betting you have some associations attached to those words already. “Fetus” may sound science-y. It may bring up images of a smooth, hairless form floating in liquid in a lab somewhere. “Unborn child” on the other hand, or its cousin “unborn baby,” may bring up thoughts of children or babies you’ve seen in onesies or swaddled in blankets. “Child” and “baby”

are more humanizing terms than the technical, sterile “fetus,” even though all three terms refer to the same thing: a developing human organism in the womb.

Those are the kinds of words I’ve spent four years studying. I’ve looked at how words like “embryo,” “fetus,” and “unborn child” have moved across languages, through time, and from one sector of society to another. I’ve examined the associations and connotations that clung to words as they moved from Latin to English and from the scientific lab to the courtroom. Words, quite often, can be slippery, tricky things—especially when moving from one context to another. They can embody two separate meanings depending on how one interprets them or what other words surround them. Words like “individual” or even “life” can have vastly different meanings and undermine sentences, legal briefs, even Supreme Court decisions.

For a quick, straightforward example of how words can matter, we’ll turn to 1950s Louisiana. In the Catholic town of New Iberia, a woman called Electa Dore had been providing abortions to local people who found themselves with an unwanted pregnancy (Allured 2018, p. 156). At the time, Louisiana statutes made performing abortions a crime, and in 1954, Electa Dore was convicted of illegally aborting an embryo (Quay 1960; *State v. Dore* (1955)). It was the official charges leveled against Dore that called it an “embryo” (*State v. Dore* (1955), p. 310). Attorneys working for the state of Louisiana had drafted the charges and picked that word to refer to the aborted entity, which had been four to five months along in gestation (p. 310).

However, in their appeal of the 1954 decision, Dore and her attorney challenged that wording. The aborted entity, they argued, was not an “embryo” as described in the charges (*State v. Dore* (1955), p. 310). The entity was in fact a “fetus” (p. 310). The

subtle distinction between “embryo” and “fetus” often comes down to gestational age; anything before eight weeks’ gestation is called an “embryo,” anything after a “fetus” (“fetus” 2013). In showing that the state attorneys had used the wrong word—had called an aborted entity the wrong name—Dore proved that she was not guilty of the charges brought against her. She was charged with aborting an “embryo,” and she had not done so. She had aborted a “fetus.” On Valentine’s Day of 1955, the judge on the appeals court ruled in Dore’s favor. Dore’s conviction was overturned, and her case was remanded for a new trial, presumably with the proper charges (*State v. Dore* (1955), p. 312).

And so, through a Shakespearian-style loophole, Electa Dore remained free from hard labor at the state penitentiary until her next trial, though she and her attorney had not satisfactorily proven she was not an abortionist. Unfortunately, there are no further legal records of Electa Dore’s case. Perhaps she fled Iberia Parish. Or perhaps Electa Dore the abortionist simply vanished, and the woman named Electra Courville went back to her normal life and quietly forgot she’d ever introduced herself as Mrs. Dore in the first place (Allured 2018).

The story of Electa Dore shows us how words matter in general, how calling the same object two different things can have real-world consequences. However, for our purposes, it also shows how critical language is in the realm of law. The United States is governed by laws, and laws are set down in words. So whatever word the law—in Dore’s case, the legal charges brought against her—uses is what the law applies to. Thus, words have quite a bit of power in courtrooms, and small changes in wording can lead to big changes in society, such as whether an admitted abortionist goes to jail or not.

Though words are pivotal in legal matters, they also matter a great deal in social contexts. What everyday folks call something can reveal, at least in part, what they think about those things. Take, for example, the self-described pro-life and pro-choice movements in the twenty-first century US abortion debate. The story of legal and illegal abortions in the United States is one of the stories that makes up the wider tale of fetal personhood. The debate has been going on for some time in the United States, and we'll discuss it as it becomes relevant for us. One thing I want to point out now, however, is that people on different sides of the debate use different words to talk about abortion care and *in utero* entities.

People who oppose legal, accessible abortion care often refer to embryos and fetuses as “babies” or “unborn children” (“Diary of an Unborn Child”). Those humanizing terms—making *in utero* entities seem like already-born children or babies—reveal a common belief shared by people who claim to be pro-life. According to the website for the National Right to Life Council, a pro-life group founded in 1968, they believe that the abortion debate is the “greatest human rights cause of our time” (“Homepage”). In short, they view embryos and fetuses as humans with legal rights, and their language reflects that.

On the other side of the debate, self-described pro-choice individuals use different language. Often, groups like the National Abortion Rights Action League will not directly reference the *in utero* entity (“Statement of Principles”). Instead, they write about the person¹ who is pregnant and their choices, using language to focus on a different part

¹ As this is a project about language and word choice, it is important for me to take a moment to clarify what words I'll be using to discuss pregnancy throughout the text. The term “pregnant person” appears here because not all people who can become pregnant identify as women. Nonbinary people and transgender

of the issue: whether people have a right to legal, accessible abortion care (“Statement of Principles”). When they do reference the *in utero* entity, they use technical, less-humanizing words like “embryo” or “fetus,” which reveals that they do not think of *in utero* entities as humans with rights like the pro-life groups do (“Reproductive Freedom Is a Political Winner Across the Country”). Rather, their focus remains on the choices available to pregnant people, as embodied in the term “pro-choice.”

How such distinct and polarized language developed in the United States is one of the questions that fueled my research into the area of fetal personhood. Was language surrounding embryos and fetuses always so polarized? Was there always such a large divide between people who viewed embryos and fetuses as legal persons and people who did not? How did we get to the point where the words we use to talk about *in utero* entities carry so much baggage? Many people in the United States may think of the Supreme Court case *Roe v. Wade* (1973) as the starting point for the debate over embryonic and fetal rights. That decision was important, granting people the right to access legal abortion care across the country. But people have been discussing embryos and fetuses, their rights under the law, and whether they’re legal persons for quite some time. And the manner in which they’ve been discussed has shifted dramatically, even in the past two hundred years.

men can also be pregnant, and the word “woman” doesn’t encompass them or their experiences. Therefore, “pregnant person” is a more inclusive term. However, historically, “pregnant person” wasn’t the term used by writers to describe someone who was pregnant. While people in history have of course been nonbinary or transgender, it wasn’t recognized in historical language, at least when it came to pregnancy. “Pregnant woman” was the preferred term for many centuries. To avoid introducing linguistic anachronisms and to accurately present the historical documents as they were written, I will use “pregnant woman” or “pregnant women” in the historical chapters of this text. To reflect the inclusivity and the language of 2020 and beyond, I will use “pregnant person” and “pregnant people” in the Introduction and Conclusion of this text.

But why do I care enough about this kind of history to spend four years and countless hours digging into its tiny, dusty cracks, looking for words with hidden meanings or dubious origins?

The answer is manifold and tied into several threads of my identity. First, I've always been someone who loves words and been quite picky about them. When I use a word, I try to make sure it's the right one, a word that not only means exactly what I want to say but also conveys the feeling I want to impart. Put another way, I want the word I choose to have the right definition and also the right baggage. If I was feeling happy on a Sunday morning, I would spend time considering whether it was a happiness more akin to "delighted" or "content." Both mean some form of happiness, but the baggage that comes along with either makes choosing the right word important.

In addition to being picky about my own language, I am also a researcher, interested in where things come from, especially things we see in the present day and accept with little question. The split in language between pro-life and pro-choice groups is an example of such a thing that piques my interest. What events or conflicts in our history shaped the world we live in today? In particular, I'm curious about how scientific ideas or concepts have shaped our world. How did scientific words influence our understanding of what an embryo or fetus is? How do different actors, like pro-life and pro-choice groups, avoid or make use of science? Did science play a role in the fetal personhood movement? This story will attempt to answer those questions.

Finally, I'm a woman, a person who is able to become pregnant. As such, the debate about the legal rights of embryos and fetuses has the potential to impact my life. If embryos and fetuses have legal rights of their own, my own rights and actions may be

curtailed. Legal deference granted to embryos and fetuses may result in less deference being given to my own choices in medical and legal contexts. I want to know how the legal rights of embryos and fetuses came to be. I want to know what kind of language escorted embryos and fetuses to their current legal status, so that I may know how the landscape of legal rights may shift or *be* shifted in the future, possibly using different language.

Throughout various stages of my research, I've run across skepticism from others about how much value words have as objects of study. Isn't it the ideas themselves that matter, not the words used to convey them? Why study the words that pro-life groups use, for example, instead of studying the history of the group, its ideas, and actions? Don't the words they use simply reflect what they think or how they act?

My answer to that is: yes. Yes, very often words serve to reflect pre-existing beliefs. They can be bastions of centuries of human experience and ideology, compressed into a few letters on a page. Sometimes, people choose their words carefully in order to convey those beliefs as clearly as possible. Pro-life groups, for example, don't call themselves "pro-birth" or "anti-choice," just like pro-choice groups don't call themselves "anti-life" or "anti-pregnancy."

But, as one of my dear professors, Dr. Ann Kinzig, once reminded me, most people aren't careful with their words. They use whatever word comes to mind, maybe one that's commonly used in the discussion at hand. It is my contention that sometimes, when people use words without careful consideration of their baggage or implications, those words can take on an agency of their own. They can shape discussions or debates even without anyone intentionally meaning to. One of the best examples of this is the

phrase “global warming” used to encompass global climate change. Overall, it is a correct term: the average temperature of the planet is increasing, damaging ecosystems around the world.

However, when used off-handedly by people during everyday discussions of climate change, the word can turn the discussion in unhelpful directions. If one were to use the phrase “global warming” to explain changes in weather in the Midwest, someone might dispute the claim using anecdotal evidence to “disprove” any “warming” going on. A few years ago, Omaha, Nebraska, experienced temperatures as cold as negative 9 degrees Fahrenheit around Christmas. A skeptic of climate change might point out that such extremely low temperatures must mean that “global warming” isn’t taking place at all. It’s global cooling, if anything! The true cause of those low temperatures lies in the changes going on in air circulation above the Arctic, resulting in cold, Arctic air coming down to far lower latitudes than usual (Oglesby, Bathke, Wilhite, and Roe, 2015). That change in climate is problematic and everyone should be paying attention to it. But phrases like “global warming,” used in place of “climate change,” can derail useful conversations about what’s happening on our planet because people get hung up on whether “warming” is or is not occurring in their region. It’s that kind of language that I contend can influence the way we talk about things and eventually the way we act on things.

In the following chapters, this story will showcase language in all of its many lights: how it reflects people’s beliefs, how it can shift debates in new directions, how it can slip from one field to another and lose or gain baggage along the way, how it can be preserved for decades by institutional practices, how it can change quite suddenly in just

a few years, and how ambiguous words can have serious impacts on the real world. My goal has been to trace the words used in fetal personhood discussions in various time periods and sectors of society. I've studied legal, scientific, and popular documents to see how words move between law, science, and everyday discussions of embryos and fetuses. And I've charted the trajectories of certain words to see how the use of them has influenced decisions on fetal personhood in courtrooms in the nineteenth and twentieth centuries.

This story has five chapters, each encompassing a span of time when a shift occurred in fetal personhood, as well as in the language used to talk about embryos and fetuses. The language I focus on shifts from chapter to chapter, as different words become more significant as discussions of fetal personhood changes in venue and in tone.

The first chapter is a long look through history to trace the origins of terms like “embryo,” “fetus,” and other terms that refer to *in utero* entities, particularly those terms used in the US legal system. I examine how foreign words like the Greek “embryo” and the Latin “fetus” merged into the English language, and how the connotations of each changed as they become common English words. Further, as I study the history of words used to talk about embryos and fetuses, I also investigate the way embryos and fetuses were treated by Western societies. For example, early England, whence the United States inherited much of its common law, did not grant many legal rights to embryos and fetuses, not even the right not to be aborted. However, language used by those courts is similar to language used by modern-day pro-life groups, which indicates our ideas about and language for embryos and fetuses have changed significantly over time. In Chapter 1, I examine the historic relationships between words and societal views of embryos and

fetuses to see how have they've changed throughout time, as well as to have a firm grasp of what connotations came attached to words like "fetus" in more modern eras. Chapter 1 concludes with the first hint of divergence between humanizing terms like "unborn child" and technical, scientific terms like "embryo" and "fetus," a split that began in the late 1800s.

Between Chapter 1 and Chapter 2, I include a brief chapter that explains the US legal system to readers who are unfamiliar with it, as well as establishes what rights embryos and fetuses had under the law in the late 1800s. There were some, including the right to inherit property from fathers who died while the embryo or fetus was in the womb. However, many of the "rights" possessed by embryos and fetuses were created to solve practical problems in the legal system, rather than out of any acknowledgment of *in utero* entities being legal persons.

Chapter 2 picks up during the 1800s, beginning with the first US court case to deal directly with whether an *in utero* entity was a legal person or not. In sharp contrast to the twenty-first century treatment of embryos and fetuses, the judge in the 1884 case *Dietrich v. Inhabitants of Northampton* ruled that a fetus did not count as a legal person and therefore did not have the right to bring a case to court, or have one brought on its behalf. I examine that case and the language it uses to talk about the fetus in question, noting discrepancies between words available at the time and words that the judge chose to use. I continue to examine court cases that revolved around fetal personhood from 1884 to 1946, when the case *Bonbrest v. Kotz* overturned the long-standing decision made in *Dietrich v. Inhabitants of Northampton*. In 1946, a judge ruled that a fetus, if later born alive, *did* have the right to go to court for wrongs done upon it while in the

womb. That right represented the first gain in legal status for embryos and fetuses in centuries. However, the language used in *Bonbrest v. Kotz* introduced questions of what kind of “human” a fetus was—a member of the human species, or a socially-recognized person who merited the appropriate legal rights.

I dig into that tension in Chapter 3, as language from other personhood movements began to slip into the burgeoning fetal personhood movement. To discern how embryos and fetuses began to be viewed as fellow human beings in our society, I examine documents from the Civil Rights and the women’s rights movements that occurred in the United States in the 1950s and 1960s. Language from those documents, such as “inalienable human rights” and references to the Fourteenth Amendment, slipped into discussions of fetal personhood, propelling the movement forward by borrowing terms and ideas from movements designed to fully establish the legal personhood of those already born. At the same time, popular writers started penning articles about the development of embryos and fetuses, how they formed in the womb and how doctors treated them as individual patients. I examine the language in those articles, particularly how the authors framed embryos and fetuses as having “life” before birth and describe *in utero* entities as having personality and agency even in the womb. That kind of framing led to a conception of embryos and fetuses as being nearly the same as already-born humans, and it clearly influenced the intense abortion debate of the 1970s.

I cover that debate in Chapter 4, focusing on the language used by popular writers, activists working for or against the legalization of abortion care, as well as by attorneys and judges deciding the matter in the courts. I examine how embryos and fetuses became subjects in the abortion debate at all, when originally, they had no place

in a discussion about the rights of women and physicians. By introducing embryos and fetuses as objects to be dealt with by the legal system, attorneys shifted the debate in ways that opened the door for new, ambiguous language to slip in. Words used in court rooms across the country were full of ambiguities and double meanings. Was an *in utero* entity a “life” in the biological sense, or a “life” with feelings, memories, and a lifespan ahead of them? Was an embryo an “individual” because it was a singular object, or because it was a particular person? Judges used words like “life” and “individual” without scrutiny in the court decisions that led up to *Roe v. Wade* in 1973. That’s the end date for this story, as the Supreme Court finally answered definitively whether an *in utero* entity was a full legal person. In a nice parallel to *Dietrich v. Inhabitants of Northampton* in 1884, the Supreme Court ruled that they were *not* full legal persons. Instead, the Court decided they were something else, something that has given US states the power to advocate for them in court cases beyond 1973, cases that have seriously infringed upon the rights of women and pregnant people in the United States.

It’s not been an easy story to research and put down in writing. But it is a valuable one, a version of the fetal personhood story that hasn’t yet been told, one that sheds light on how the smallest units of ideas, the words we use to explain them, can have big impacts on one of the most controversial topics in the United States.

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CHAPTER 1: A BRIEF HISTORY OF CERTAIN WORDS AND HOW WE CAME TO USE THEM

As I mentioned in the introduction, our story of fetal personhood in the United States starts in 1884 and ends in 1973. The year 1884 was the first time a US court case dealt specifically with whether or not an *in utero* entity was a legal person, while the year 1973 is when the US Supreme Court issued a firm ruling on the question. The following chapters will tell the story of what role words played in the US fetal personhood discussion. However, starting our discussion of words and their baggage in 1884 won't do. If we jumped right into that first court case, our understanding of the words used by that judge and other writers would be incomplete. We would view the words only with the lens our twenty-first century experiences have provided. In short, we couldn't really be sure what "unborn child" or "fetus" *meant* in 1884.

Thus, we begin our first chapter not in 1884 but thousands of years prior. The idea is to explore the long, nuanced histories of words used to describe embryos and fetuses so that when we step into 1884, we might have a better grasp on what baggage those words bring with them. Unfortunately, due to time and space constraints, we can't explore how words like "embryo" or "fetus" or "infant" were used in every context of every time period. Instead, we'll focus on significant moments in the words' histories—when they immigrated from their original language into English, when they began to be used by the courts, when they became strongly associated with science, et cetera. Those moments of change highlight a word's meaning as well as its baggage and illuminate what was preserved, gained, or lost as a word departed one context and joined another.

In addition, our exploration into the far reaches of history will give us an understanding of how embryos and fetuses were talked about and treated at various points in various countries. By studying the language used to describe embryos and fetuses, we will get a nice look into what people thought of them. In some places, they were given a kind of personhood long before modern times, while in others, they were denied legal personhood in almost all instances. Most intriguing for our story, the words used to refer to *in utero* entities in the past weren't the ones we use to refer to them in the twenty-first century. At least, not in the same way. For instance, some groups granted "*fetuses*" a great deal of personhood, when in the twenty-first century, "fetus" is mostly used by people denying *in utero* entities rights or personhood. Similarly, some groups that used "child" to talk about embryos and fetuses gave them practically no rights in their legal system, despite "child" being the word used by emphatically pro-fetus groups in the twenty-first century.

Words, then, have most certainly changed in meaning and implication throughout their long histories. That's what this chapter is about. We'll see how words moved and transformed with different uses in different contexts, and toward the end of this chapter, we'll see how words began to fall into patterns more familiar to us in the twenty-first century.

The Original Words for In Utero Entities in Old English

Since this is a story primarily about English-speaking people, it makes sense for us to start with the first English words used for *in utero* entities. English, as a language, has been around for a long time and gone through several different iterations. There's Old English, Middle English, early modern English, (actual) modern English, and all of them borrowed or sometimes flat-out stole prefixes, suffixes, entire words, or full grammatical constructions from other languages that have brushed up against it (Hasman 2004). We of the twenty-first century speak what's known as modern English, which has picked up words from Latin, Norman French, fellow Germanic languages, and an extensive roster of words and idioms from one William Shakespeare² ("Modern English" 2013; Watson 2012).

But if we're looking for the origin of English words, we should look at Old English. Old English was the language spoken by the Anglo-Saxon folks that lived in present-day Britain in the early centuries CE. Old English remained the language of the land until around 1150 CE, when Middle English began to emerge. Two words often used for *in utero* entities were the precursors to modern-day English's "child" and "offspring" ("Child, n." 2020; "Offspring, n." 2020). Of course, back in the days of Old English, the words had different spellings and, likely, pronunciations. Some of the spellings include "cild," "childe," "ofsprincg," and "ofsprinc." In quotes from Old English that feature

² The list includes: "anchovy," "batty," "blusterer," "braggartism," "coldhearted," "dog-weary," "eyewink," "fashionmonger," "hedge-pig," "hell-born," "honey-tongued," "leapfrog," "madcap," "majestic," "puppy-dog," "rawboned," "skimble-skamble," "to elbow," "to swagger," "zany," and more.

those words, the words seem to refer to early humans that are in the uterus and out of it. A “cild” could be still in its mother’s womb, or it could be running around outside with the dogs. Same goes for “ofspring.” There was no distinguishing, in language use anyway, between a human in the uterus and outside.

We can see the influence of Old English if we look at the phrase “with child.” That was a way Old English speakers referred to people who were pregnant, as “pregnant” is of Latin origin and didn’t appear in English until later (“Child, n.” 2020; “Pregnant, adj.” 2020). “With child” and “big with child” show how the word “child” applied both *in utero* and after birth. However, as we’ll see when we look at the English court system, just because “child” was used for in womb and out of womb entities, it doesn’t mean that Old English speakers treated in womb entities like children, at least not the way that we treat children in the twenty-first century.

But “child” isn’t the only word for *in utero* entities in English. Other terms came from other languages, words like “embryo” and “fetus.” And although in 2020 “embryo” and “fetus” are technical, science-associated words, in earlier times, those words were more similar to the Old English “child” than we might have guessed.

Aristotle and His Explanations of Embryos

Though it didn’t join the English language until the 1500s CE, the word “embryo” comes from the Ancient Greek word “*embruon*” (“embryo, n. and adj.” 2020; “Embryo” 2013). “*Embruon*” is a word stitched together from the Ancient Greek *em-* meaning

“into” and *bruein* meaning “swell” or “grow” (“Embryo” 2013). So “*embruon*” literally meant “thing that swells or grows,” likely referring to the *in utero* entity swelling inside a woman’s body, which of course swells in turn. In its earliest form, then, “*embruon*” and its descendent “embryo” had no technical meaning. It didn’t have any references to bodily structures that had developed (or not) in the womb, nor did it contain any references to time like the definition of the modern “embryo” does. Our twenty-first century, technical-sounding “embryo” refers only to an *in utero* entity in the first eight weeks of its gestation (“embryo, n. and adj.” 2020). The Ancient Greek “*embruon*” appeared to be purely descriptive in nature, referring to a thing in a womb for, possibly, the entire period of gestation.

To see what “*embruon*” really meant in the mouths and hands of Ancient Greek folks and what they used it to describe, we should examine the word in the context of how Greek scholar Aristotle used it. Admittedly, there were many great Greek scholars—probably more than we know about—but we’re studying Aristotle because his theories about *in utero* entities (and lots of other things) existed nearly entirely intact until the 1600s CE (Smit-Keding 2015). So the meanings he ascribed to words for *in utero* entities, particularly “embryo” since it was originally a Greek word, lasted until at least the 1600s as well.

Aristotle was born in 384 BCE and died in 322 BCE, and in the meantime, he wrote a lot of texts on a lot of topics (Shields 2015). Thankfully, for our purposes, a study of Aristotle’s entire corpus is not necessary. We can focus our attention on two works. The first, *History of Animals*, was a treatise on zoology and marine biology, and the second, *On the Generation of Animals*, was an addendum of sorts detailing more on how

organisms developed in the womb (Aristotle, Cresswell, and Schneider, 1897; Aristotle and Platt, 2008). Though embryology wasn't a field of study yet, Aristotle's pair of texts were some of the first works in that vein in the Western world.

In those two texts, Aristotle talked a lot about *in utero* entities, including how their bodies developed and whether it was more difficult to give birth to a male child or a female child (Aristotle, Cresswell, and Schneider, 1897, Book VII, p. 185). However, his most important theory for our story is when Aristotle decided embryos became human. That transition involved Aristotle's idea of a three-stage process during which developing entities gained three separate souls (Aristotle and Platt, 2008, Book II, chapter 3). Those souls weren't like Christian souls; they weren't spiritual in nature. Rather, they were the forces that, in Aristotle's view, made things alive. Plants and animals had souls; rocks did not. According to Aristotle, three types of souls existed in the world: nutritive, sensitive, and rational. Plants had only the first, most basic kind of soul, the nutritive soul. It made them alive and able to grow. Animals possessed the nutritive soul as well as the second soul, the sensitive soul. That enabled animals to move and sense things in their environment. Humans had all three souls, including the rational soul, which is what separated them from other animals. The rational soul provided humans with reason and intellect, and it was the acquisition of that soul during development that made *in utero* entities human.

At the start of development, then, *in utero* entities didn't possess the rational soul (Aristotle and Platt, 2008, Book II, chapter 3). Aristotle wrote that the woman's menstrual blood, her contribution to the embryo, contained the nutritive soul at the beginning, since it was living matter that came from a living organism. The man's

contribution to the embryo, correctly identified by Aristotle as the man's semen, bore the second soul. When the man's semen came into contact with the woman's menstrual blood during heterosexual intercourse, said semen deposited the sensitive soul into the embryo formed by the mix of blood and semen. Thus, the embryo began developing in the woman's womb and was in possession of the nutritive and sensitive souls. Two out of three. Aristotle puts the arrival of the third soul—that all-important rational soul that makes a thing human—at forty days for male embryos and a startlingly later eighty days for female embryos. It was only then that the embryos became, in Aristotle's theory, human. So any kind of humanity or person-ness, for Aristotle, only vested after a certain point in gestation, which is starkly different from some ideas present in the twenty-first century. Aristotle's idea of the slow, three-step process of gaining humanity stuck around in Western theories of human development for centuries after Aristotle's death.

So that was what Aristotle was referring to when he used words to describe *in utero* entities. Now let's examine what words he actually used. In translations of *History of Animals* and *On the Generation of Animals*, various words appear. We get "embryo" of course, meaning Aristotle likely did use "*embruon*" in his writings. We also see "fetus," which makes sense considering that some dictionaries translate "*embruon*" as "fetus" instead of "embryo." The appearance of "fetus" also confirms that "*embruon*" referred to *in utero* entities at all stages of gestation, before and after the twenty-first century eight-week distinction between an embryo and a fetus. That aligns with the way the word "child" applied to all stages of gestation in Old English. Indeed, along with "embryo" and "fetus," translators also use "child" when translating passages about things going on

before birth. And so “*embruon*” likely wasn’t a technical word like it is today. It was perhaps a common noun just like “child.”

Using Aristotle’s works, we can also see that “*embruon*” wasn’t a very humanizing word either. I mean “humanizing” in the sense that some words can bestow human characteristics or personhood on an *in utero* entity in a way that invites readers or listeners to care about or invest emotion in the object being described. But Aristotle doesn’t spend much time on the human- or person-ness of embryos at all. He mentions when the third soul appears, granting the *in utero* entity passage into being a human, but he doesn’t say much else. There’s not a chapter talking about the development of an embryo’s personality or character, or how it can think or feel things like born humans can.

Indeed, when Aristotle mentions abortion—that act or process that provokes many to talk about killing humans or the ending of a human life—he does so briefly (Aristotle, Cresswell, and Schneider, 1897, Book VII, chapter 3). I’m not sure, actually, what kind of abortion Aristotle is talking about. It could be natural abortions, which is what we in the twenty-first century commonly call miscarriages or spontaneous abortions in medical settings. It’s when a woman’s body terminates the pregnancy without being prompted by abortifacient drugs or physical blows, and it happens quite often, with or without the woman realizing she was pregnant beforehand (Macklon, Geraedts, and Fauser, 2002). Aristotle could also be talking about elective abortions, in which the woman decides to terminate her pregnancy using abortifacient drugs or physical treatments. Those were common in Ancient Greek (and Roman) societies, and such abortions weren’t described as murder unless the pregnant woman received an abortion

without telling the father of the *in utero* entity (Gorman 1998, pp. 22–27). In that case, it was deemed murder because the woman had deprived the man of an heir (Riddle 1992, p. 63).

Either way, Aristotle doesn't comment on how abortions destroy a "person" and doesn't mention how it's the same as killing a human being that has been born. He seems to refer to *in utero* entities in a dispassionate, matter-of-fact way, using "*embruon*" like the Old English version of "child." In light of that, some connotations that may have clung to "*embruon*" as it moved through time and languages include referring to the entire gestational period and a lack of any special markers of personhood, which is vastly different than some of the words used to describe *in utero* entities today. Let's check in on some early uses of the ancestor of "fetus" to see if that's the case there as well.

Et Tu, Fetus?

The *Oxford English Dictionary* tells us that late Middle English got "fetus" originally from the classical Latin "*fetus*," which was a noun that referred to the "bringing forth of young, parturition, breeding, conception, offspring, young while still in the womb" ("Fetus, n." 2020). Right off the bat, we have some interesting things to note. First, like "*embruon*," "*fetus*" didn't appear to have any technical meanings—it didn't refer to what bodily structures the *in utero* entity had formed in the womb, and it didn't designate a gestational time period during which the word applied. "*Fetus*" seems to have applied to the "young" the entire time it was in the womb. But in addition to those

points of interest, with “*fetus*” we get a new one. The *Oxford English Dictionary*’s definition makes it seem like “*fetus*” originally referred to not only the *in utero* entity but also the process of giving birth, as if “*fetus*” was related to a verb form of the word that meant “give birth” along with the noun for “thing that is given birth to.” That’s certainly not apparent in the way twenty-first century English speakers use the word, and the dissimilarities don’t stop there.

To see how the Latin “*fetus*” was actually used in written texts, we’re going to check out some early Latin texts, and a great source for early Latin texts are those written by early Christians. Remember that it’s also a good idea to get a feel for historical Catholic-Christian uses of words for *in utero* entities because Christianity, and specifically Catholicism, have played and continue to play a role in the US fetal personhood debate. Back in the early centuries CE, early Christians were talking about *in utero* entities mostly in the realm of life and death, and often in the context of abortions, intentional ones, it seems.

Influential Christian texts, including *Didache* and the Bible, mention *in utero* entities in several places. *Didache*, a first-century CE book on the teachings of the apostles, states, “You shall not slay the child by abortions. You shall not kill what is generated” (*Didache*). The New Testament of the Bible orders, “Suffer little children and do not prevent them from coming to me” (Matthew 19:14; Mark 10:14; Luke 18:16). In the first quotation, we see a mention of abortion, and the verb “slay” implies that the abortions prohibited are the ones caused intentionally by humans. That further implies that intentional abortions were processes that killed or “slay[ed]” “children,” which the Bible states should be “suffered” rather than terminated in the womb. It appears, then,

that the writers of the Bible and *Didache*, at least, considered intentional abortions to be sins and that *in utero* entities were children or humans that were under God's protection—a kind of spiritual personhood.

That kind of spiritual personhood appears in other early Christian passages. The writers made it clear that beings *in utero* were sacred and shall not be killed. In another section of *Didache*, the text states that people were “murderers of children” if they intentionally aborted their progeny (Allen 1903, p. 4). Likewise, the Christian writer Minucius Felix, who died in 250 CE, declared that killing *in utero* entities counted as infanticide or parricide (the killing of a relative) (Noonan 1967). Augustine of Hippo, later known as St. Augustine after his death in 430 CE, agreed with the others on the idea of intentional abortions as sinful, thus giving *in utero* entities a kind of person status in that it was a sin, or spiritual crime, to kill them (Noonan 1967).

We could quibble about the precise reasoning for why intentional abortions were a Christian sin. Often, people in early centuries considered abortifacients to be a kind of black magic, which wasn't to be resorted to by Christians (Noonan 1967). Also, Christianity as a whole strongly opposed many practices that went on in the Roman Empire, and ancient Romans freely aborted pregnancies without much consideration (Noonan 1967; Gorman 1998). But, whatever the reason for the anti-abortion rule, it is clear enough that Christians back then considered *in utero* life sacred throughout gestation.

It's interesting to note, then, that in translations of early Christian works, the word “fetus” co-mingles with “child” and “offspring” in the same texts. In works about marriage and family written by St. Augustine, for example, “fetus” and “offspring” show

up alongside “child” and “children” in the same way that “*embruon*” did in Aristotle’s works (Noonan 1967; “From ‘On Marriage and Concupiscence’”). It’s kind of strange to see that co-mingling, since today, those Christian folks who oppose abortion mostly use humanizing language like “child” and “baby.” Often, twenty-first century abortion opposers don’t even go for “offspring,” even though that was one of the original Old English words for *in utero* entities.

Latin “*fetus*” meant “offspring,” so perhaps Christian writers co-mingled the words because they were nearly synonyms. That’s very different from today’s use, where “fetus” carries technical connotations and associations with modern science that can dehumanize. In science, certain terms can quickly dehumanize people—a human becomes an organism, made up of organ systems, organs, tissues, cells, organelles, molecules, atoms... Soon it’s not a human but a collection of trillions of cells, and most of them are bacterial cells, not even human ones! But back then, before modern science, before cell theory, “fetus” and “embryo” were different words. In Christian pens, perhaps “fetus” was a word with humanizing connotations, a reference to a child or life made precious by God’s touch and edicts.

And perhaps there was a bit of lingual fraud that helped move that impression along.

“Fetus” v. “Foetus”: Where Exactly that Faux “Foe” Came From

In today’s world, there are two versions of the word “fetus” running around. There’s “fetus” and then there’s its doppelganger “foetus,” with that pesky “o” sneaking

in before the “e.” The words mean precisely the same thing—a developing human (or other organism) after all of its organ systems have begun to form, which in humans is at eight weeks’ gestation (“fetus, n.” 2020). The fraudulent “foetus” appears in works written by those who use British English and its attendant spellings, while “fetus” is used by all other English speakers and by the medical community worldwide, even in the United Kingdom. I say “fraudulent” because the appearance of “foetus” was a case of intentional lingual meddling (Boyd 1967).

The Latin ancestor of “fetus,” as we just learned, is “*fetus*,” with an “e” and no “o.” “Fetus,” then, is the most proper English spelling, deriving from the Latin root “*feo*” meaning “I beget,” i.e. to beget offspring (Boyd 1967).

But not everyone agreed that that’s how it should be. Enter St. Isidore. Isidore was born in Spain in 556 CE to a family that was instrumental in converting Visigothic kings to Catholicism (Henderson 2007). Isidore took after his family in his devotion to Catholicism and became a saint after his death, along with his older brother, younger brother, and his sister. Perhaps it was his Christian ideas about children that got him rethinking the Latin roots for “fetus.” We don’t really know his thought process. We do know that he reimagined the spelling of “fetus” as “foetus,” using the Latin root “*foveo*,” meaning “I cherish” instead of “I beget” (Boyd 1967).

It’s a rare moment of intentional language shift, when someone decided to use, or in this case spell, a word differently because of how they believed the word should function as a tool. Isidore seemed to have thought that fetuses were objects worth cherishing, not just begetting. The “foe” spelling may have subtly shifted perceptions of the *in utero* entities it described. For fluent Latin tongues, “foe” would bring up

connotations of cherishing instead of begetting. That might have encouraged the imbuing of *in utero* entities with humanness as items that were meant to be cherished. Therefore, early Christians may have more easily used the word “foetus” alongside “child.”

It *may* have, but it’s not certain. In our next section, we’ll see some unintentional lingual slop during the Catholic abortion debate in the Middle Ages, during which “fetus” (or “foetus”) continued to appear, though Catholic thinkers began strongly revising their thoughts on how human *in utero* entities were at certain points in gestation.

The Catholic Abortion Debate: A Change in Ideology but Not Language

It may seem like we’re spending a ponderous amount of time on a specific religious group and ignoring other religious groups or other groups entirely. I don’t mean to spotlight only one group’s ideas or one particular narrative about fetal personhood, but the Catholic point of view was influential in two ways. First, changing Catholic views have influenced the story of fetal personhood in US courts. And second, because there are so many people who have read the works written by Catholic thinkers, the way those thinkers used words like “embryo” and “fetus” has had an impact on the character of those words.

Thus, spying on the Catholic abortion debate, which went on from about 1200 CE to the end of the 1500s (before picking back up again not even a century later, which we’ll see in our last section), has social and lingual points of interest (Noonan 1967). We’ll start with the former. Socially, the debate shows that though in the late twentieth

and early twenty-first century the Catholic Church has had a solid stance against all abortions, it wasn't always that way. There have been different views on fetal personhood and the properness of abortions throughout history, even in the Catholic Church. The substance of the debate also starts to bring up ideas that intentional abortions are permitted before a certain point in gestation but not after it—an idea central to many abortion-restricting laws in the United States today. Finally, by examining what Catholic thinkers were thinking about in terms of *in utero* entities, we get into the meat of what one version of fetal personhood is—for Catholics, and probably other Christian groups, it's when the human soul arrives.

Catholic thinkers and theologians—despite what some stories might imply—were often very well-read in the science of the day, which was called natural philosophy back then (Peppard 2015). So it comes as no surprise that many of those thinkers got their understanding of *in utero* development from Aristotle's theories, specifically the three-step ensoulment process we talked about earlier (Aquinas and Mortimer, 1990, p. 480–485). The names for the souls differed from Aristotle's original theory—the “vegetative” soul was the new name for the nutritive soul, et cetera—but after all, it had been over a thousand years since Aristotle first wrote his theories, so we'll forgive the small slippage in language, especially since the main content of his theories went unchanged (Aquinas and Mortimer, 1990, p. 493). Pope Innocent III in the twelfth and thirteenth centuries CE was talking about the point at which *in utero* entities became “vivified,” or received that third Aristotelian soul, and that point became the focus of the Catholic abortion debate (Noonan and Noonan, 2012, p. 232).

But what about the early Christians who were against intentional abortions at any point? “Thou shalt not slay the child by abortions” was still in the Bible. However, though I have a great love for language, it does not do to assume that things written down in texts, even holy ones, reflected the real world exactly as it was. In the Middle Ages, abortions weren’t uncommon, even with the Catholic Church influencing many of the European countries. We see evidence of that in the widespread use of a medical compendium translated into Latin in 1150 CE (“The Canon of Medicine” 2015). The book was written by Abu-Ah al-Husayn Ibn Sina, a Muslim scholar who became known (in a good example of lingual sloppiness) to Europeans as Avicenna. Europeans also called him the Prince of Physicians, as his book *The Cannon of Medicine* became a standard text for European medical students and remained one until the 1600s. In it, Ibn Sina provided thousands of medical techniques and drugs to treat many conditions, and he included information on how to induce abortions (Avicenna and Gruner, 1973). So Europeans were at least aware of how to conduct intentional abortions, and I think it’s a fair guess to say at least some people made use of that knowledge, even though intentional abortions were still a spiritual crime in the Catholic religion.

But a few thinkers began shifting their views starting around 1200 CE. As mentioned above, Pope Innocent III, who reigned from 1198 to 1216, ruled that an intentional abortion was only a sin if performed once the “fetus” (as his words were translated) was “vivified” at forty days’ gestation, when the *in utero* entity received the human soul (Noonan and Noonan, 2012, p. 232). Other Catholic thinkers began coming up with theories that supported a view like that. In 1273, Thomas Aquinas wrote in his *Summa Theologica* that killing in self-defense was not a sin, and later Catholic thinkers

built on that foundation in order to apply a self-defense argument to abortions (Aquinas and Mortimer, 1990, p. 1960–1963; Aquinas, Question 64, Article 7; Noonan 1967). The idea went that if a woman’s life would be in danger because of the pregnancy—if, say, she got pregnant without being married and her family would harm or kill her for it—then terminating the pregnancy via an intentional abortion would not be a sin. Those thinkers established that a woman’s health and safety could be more important than the life of the *in utero* entity (Noonan 1967). We see similar arguments come up in the twentieth century when the US court system begins weighing the rights of the pregnant woman against the rights of the *in utero* entity. In the 1300s, a Catholic scholar called John of Naples used the point of ensoulment as the dividing line between when an intentional abortion done for self-defense was allowed and when it was not (Noonan 1967).

About a century later, the idea had gained enough momentum that it was confirmed as a practice of the Catholic Church when Martin Azplicuetes, known as the “doctor of Navarre,” began counseling popes (three of them, to be exact) in the sixteenth century (Noonan 1967). Azplicuetes fully embraced the forty-day distinction between a fetus that was ensouled (and thus human) or un-ensouled (and not). Intentional abortions before Day 40 were not sinful. That isn’t to say that everyone in the Catholic Church agreed with that view. They didn’t and still don’t today. Between 1572 and 1591, three back-to-back popes went back and forth about whether an intentional abortion before forty days’ ensoulment was okay (Noonan 1967). Pope Gregory XIII decreed that killing anything before forty days wasn’t crime. Then Pope Sixtus V published the papal bull “*Effraenatam*” that strongly declared all abortions to be sins worthy of excommunication

(Brind'Amour 2007). And finally, after Pope Sixtus V's death in 1590, Pope Gregory XIV not only took the papal name of Gregory XIII but also his views, reinstating the forty-day mark that made early intentional abortions okay (Noonan 1967).

So the Catholic abortion debate really was a debate, with different people taking different stances on the issue, but we see that many high-ranking Catholic Church officials did view an intentional abortion before forty days as not sinful. That implies that their view of *in utero* entities had shifted as well. If before *in utero* entities were sacred at any stage and therefore non-abortable, then in the 1500s, *in utero* entities had lost at least some of their sacred status during the beginning period of gestation. The personhood of *in utero* entities got partially downgraded, which was a big social shift for the Middle Ages.

But what about the language? Interestingly enough, despite that big shift in views of *in utero* entities, the language Catholic scholars used to describe them didn't change. We still see "child" and "fetus" intermingling in their documents, just like we saw in writings of earlier Christian thinkers. It seems that despite their changing views, the later Christian thinkers stuck to the same language as the writers whose works they likely read. Even Pope Sixtus V's "Effraenatem," with its strong language condemning intentional abortions,³ features the same terms as everyone else: "fetuses," "offspring," "immature fetuses," "children." (Christopolous 2012).

³ Intriguingly, the full text of the bull, in original Latin or otherwise, is unavailable outside of the Vatican Secret Archives. In every other copy, paragraphs eight, ten, and eleven are missing (Brind'Amour 2007). The numbers 8, 10, and 11 are present, indicating the redaction, but few people know what those paragraphs say. And those people aren't saying.

If the language didn't change, then perhaps the connotations attached to words like "fetus" did. It's possible that the "fetus" used in the texts of people supporting pre-forty-day abortions had lost some connotations of sacredness, more of an inanimate object and less of a human. Some writers, like Thomas Aquinas, even specified whether the *in utero* entity was animated, instead of a default state of inanimate, with words like "*puerperri animati*," where the first word means something like "childbirth" and so likely referred to the "thing given birth to" as we saw in the original Latin "*fetus*" as well, and the second word translates as "inspired" or "animated" (Alarcón). The connotations probably didn't change enormously—after all, they didn't rewrite the sections of the Bible that stated the sacredness of children. But, they were using words like "fetus" to describe something that was, in certain circumstances, abortable, and that would have some effects on how the word was perceived.

The English Are Coming, Speaking French

This would not be a very good background section for our story, about the legal personhood of fetuses in the United States, if we didn't talk about how embryos and fetuses were treated by the English court system. As we'll see in later sections, the US legal system borrowed much from the English version, especially in the realm of common law. Common law—as opposed to statutory law, or laws promulgated by a country's lawmaking bodies—is the law created when a country's courts declare their decisions in court cases, decisions that can amend or overwrite statutory laws or

previously established common law. English common law came to the US because we were originally colonies of England. Specifically, though, the written version of English common law immigrated to the US in the late 1700s via Blackstone's *Commentaries*, a compendium of English common law written by one William Blackstone that we'll talk more about later.

The United States incorporated a lot of English common laws, including ones about fetal legal personhood, or when *in utero* entities are recognized by law. We'll focus on two main areas of law—inheritance and intentional abortions—and the language used in both areas, which was a very different story than the one we just heard about the language used by the Catholic Church.

It turns out that English law on inheritance was actually inherited from another empire—the Roman Empire (Rheinstein and Glendon, 2018). This is a good place to remind the reader that the Romans colonized England from 43 CE to 410 CE and left more than crumbling bathhouses behind. Basic Roman law was written, or rather inscribed, into stone tablets called the Twelve Tables. The inscribers chiseled in Latin, and unfortunately, only pieces of the original Tables survive today (Coleman-Norton). But we do have enough pieces to know that many of the original twelve codes dealt with inheritance, with one of them stating: “Into a legal inheritance he who has been in the womb is admitted if he shall have been born not more than ten months after his father's death” (Coleman-Norton). So Roman law granted an *in utero* entity a kind of placeholder right to their father's estate as long as the entity was born not more than ten months after the father's death.

The words used for *in utero* entities on the Twelve Tables aren't really clear, but they're mostly translated as "child," sometimes just "one" as in "if one is born..." (Coleman-Norton). We see that kind of language in English laws, too, which preserved that inheriting tradition for posthumously born heirs.

We also see that some English statutory laws gave *in utero* entities not even conceived—ones that were simply expected to come about eventually—rights to important things like thrones. In 1536, Henry VIII was king of England and on his third marriage (Pickering 1763, p. 416). That year, Parliament passed an act that removed Mary and Elizabeth, both daughters of Henry VIII, as the king's heirs and gave succession rights to the "issue" that would be produced by him and Jane Seymour, his third wife (p. 424). That issue turned out to be Edward VI, who died not long after taking the throne and was succeeded by both Mary I and Elizabeth I after all ("Henry VIII: His Family and the Tudor Succession").

"Child" and "issue" are both similar to the kinds of words we've been seeing in our story thus far. They're general terms that refer to an *in utero* entity without technical specifications or emotional qualities that we see in words used today. They're also terms that were used in laws that granted *in utero* entities a kind of personhood in that they were allowed to inherit property and thrones.

But strangely enough, those same words appear in English court cases where judges denied *in utero* entities other rights, such as the right not to be aborted. The first English court case about abortion⁴ happened in 1348 CE (Means 1971). In the case, a man beat a pregnant woman. It's unclear whether the beating was a method to induce an

⁴ that we have a record of

intentional abortion or whether he was just a man who went around beating people. Either way, the case is important for our story about fetal legal personhood because the woman was pregnant with twins, went into labor after the beating, and both twins died. One was born dead, while the other was born alive but died two days after the beating. The King's Bench—the highest secular court in the land—heard the case and decided the man was not guilty of any crime (Means 1971). That's right. A man who caused two *in utero* entities to die well into a woman's pregnancy was not guilty of a crime against those entities at common law—even in a place where an *in utero* entity could be heir to an estate as long as it was later born alive.

Thus, it seems like the English had conflicting laws about fetal personhood. Let's dig into the legal reasoning for each set of laws, starting with inheritance. Inheritance is a practical problem, really. All humans die, most humans possess some things, and when they die, those things need to go to another human. Well, what happens when the human who should get the things—the progeny of the deceased—hasn't been born yet? To deal with that problem, the Romans invented what's called a legal fiction when they claimed that an *in utero* entity could be named the heir of their deceased father's estate (Paisley 2006). A legal fiction is a bit of legal handwaving to solve a practical problem, in this case the problem of a man dying while his wife is pregnant (Black 1891, p. 489). That seems to be the extent of the legal reasoning in that area.

With abortion cases, or other death-of-fetus cases as seen above, the reasoning is a little more complicated. In those cases, English judges used several lines of reasoning to support their decision (Means 1971). The first was that they declared anything without a baptismal name, including an *in utero* entity, was not a person and thus it could not be a

crime to kill them. That's not the strongest line of reasoning, though, because in our 1348 case, the second twin was born alive and baptized John, and his alleged killer wasn't guilty of a crime. Moving on to the second line of reasoning, we see a similar kind of logic. Judges declared that *in utero* entities were not *in rerum natura* (Means 1971). That phrase translates as "in reality," and judges used it to mean that the *in utero* entity was not a person in reality and thus couldn't be killed. That reasoning also seems kind of shaky, especially considering the English had a law that prevented pregnant criminals from being hanged after a certain point in gestation because killing the *in utero* entity was not condoned, which we'll get to in a minute.

The final line of legal reasoning, and one that sticks around in US cases later on, is more solid. Judges claimed that when *in utero* entities were killed via physical beatings of the pregnant woman or abortifacient drugs taken by the pregnant woman, there was no way to be certain that it was the beating or the drugs that killed the entity (Means 1971). To a modern reader, familiar with the biological processes involved in development and how beatings and drugs disrupt them, that sounds like weak reasoning, too. But back in the 1300s, folks didn't have imaging technology that enabled them to see inside the uterus. They couldn't witness anything that went on in there. So it was not unreasonable to say that they had no definite proof that the beating/drugs killed the *in utero* entity instead of the entity simply expiring right before the beating/drugs were administered. Laws often have to be certain to be effective—speed limits, for example, are certain: someone was going 55mph in a 45mph zone, not just "going very fast." In cases of fetal death in the Middle Ages, judges couldn't be certain about the exact cause of death.

I mentioned a law prohibiting the execution of pregnant criminals in England. There was one (Means 1971). To avoid being hanged for their crimes, women in prison could claim they were pregnant. Of course, claiming you're pregnant is different than actually being pregnant, and it was hard to know back then, in the days before drugstore pregnancy tests. Therefore, the law decided that if a woman claimed to be pregnant but wasn't yet "quick," she was to be hanged. Being "quick" or having a "quickened" pregnancy meant that the pregnant woman—and others who touched her abdomen at the right moment—could feel the *in utero* entity moving in her womb ("Quicken" 2013). It was a practical and provable sign that a woman was pregnant. Before the point of quickening, women had no reliable, tangible way of knowing whether they were or were not pregnant. Officers of the law had no way of knowing whether they were or were not, either. Therefore, only if a woman was "quick with child" was her execution forestalled until after she gave birth—because only then were officers of the law certain she was pregnant and certain, in turn, that an execution would kill the woman and the *in utero* entity (Means 1971). Unlike in cases of using beatings or drugs to harm an *in utero* entity, a criminal's execution by hanging would certainly cause the *in utero* entity to die as well.

Why English lawmakers cared about the execution of an *in utero* entity is not clear, especially since the English courts did not seem to care about intentional abortions of the same *in utero* entities. The proof-of-death argument, in that the abortifacients may not have been what killed the entity, is seductive but I'm not entirely convinced of it.

Though it is intriguingly murky exactly what kind of personhood English laws bestowed upon *in utero* entities, the language used to describe those *in utero* entities is

also fascinating. They were not the same words used by the Catholic Church. One might expect that because the Romans conquered England, bringing Latin with them, that English courts would use “fetus” like the Catholics. However, that’s not the case. Between the Romans’ departure from England in 410 CE and our court case in 1348 CE, someone else conquered England—French folk from Normandy in 1066 CE at the Battle of Hastings (Clanchy 2012, “Introduction”). The Normans brought French with them, and the English courts used it as their official language. Though English was still a commonly spoken language in the country, French stuck around in the courts as Law French (Baker 2016, “Introduction to Law French”).

Law French introduced several words of import to our story. The first word is “*enfat*,” the French word that the English language later adopted as “infant” in 1382 CE (“infant, n. 1 (and adj.)”). Judges used “*enfat*” and its plural form to refer to *in utero* entities in abortion cases throughout the Middle Ages (Means 1971). They also used a phrase “*e le ventr sa mer*” or “in the womb” (Means 1971). Often, judges used that phrase to modify “*enfat*” to indicate that the infant was definitely in the womb, and “infant *en ventre sa mere*” or “child *en ventre sa mere*” became a common way for US judges to refer to *in utero* entities in the nineteenth and twentieth centuries (*Dietrich v. Inhabitants of Northampton* (1884); *Allaire v. St. Luke’s Hospital* (1900); *Cooper v. Blanck* (1923); *Bonbrest v. Kotz* (1946), etc.).

But though the word “*enfat*” is exciting and new to our story, it still basically meant “child,” and “*enfat e le ventr sa mer*” basically meant “child in the womb,” so the kinds of words used to describe *in utero* entities were the same in English common law as elsewhere in our story, including the Catholic sections. But unlike Catholic writers, the

people using “*enfatis*” in English court cases did not definitively view *in utero* entities as sacred or deserving of protection during gestation. Whatever their reasoning for it, English judges denied *in utero* entities any right not to be aborted, even though they granted them inheritance rights (Means 1971). It’s pretty interesting that such separate views could exist at the same time in a place that was still predominantly Catholic. Even more interesting is that by 1576 CE, during the rule of the very Catholic Queen Mary I, English common law still didn’t punish intentional abortions (Means 1971). We see that in the writings of William Stanford, who wrote on English common law (still in Law French). He included the 1348 abortion case we discussed without commenting on how the old judges were wrong (Stanford 1557, Book I, Chapter 13). Indeed, Mary I didn’t see the need to update that judicial view either, as her husband knighted Stanford later on (Means 1971).

So if English common law didn’t punish abortions, and some Catholics were on the fence about abortion too, did the United States inherit any kind of traditions that granted personhood to *in utero* entities? The answer is yes, and the next two sections of this chapter will show how ideas of fetal personhood emerged in the United States, as well as what kind of language came with them.

The First Hint of a New Fetal Right

In the last section, we focused on English common law, but in Medieval England, there were two separate court systems with different jurisdictions. The first system was

the secular court system that produced England's common law through courts like the Queen's/King's Bench, which had jurisdiction over crimes like theft and murder ("Central Common Law Courts"). Then there was the second system, called the ecclesiastical courts, which had jurisdiction over spiritual or religious crimes ("Ecclesiastical Courts"). In the early Middle Ages (before Henry VIII's new Anglican Church), that meant crimes laid out in Catholic teachings—including intentional abortions ("Ecclesiastical Courts"). So the man in our 1348 court case may have got off without punishment in the common law courts, but he may have gotten his just desserts in the ecclesiastical courts. We see the beginnings of US anti-abortion common law when a judge attempted to move intentional abortions from the ecclesiastical courts to the secular ones (Means 1971).

That judge was Sir Edward Coke, born in 1552 ("Sir Edward Coke"). He's often referred to in English and US sources as Lord Edward Coke because he served as Lord Chief Justice of the King's Bench. Even after his death in 1634, he was well-respected by English and US courts, cited in property, abortion, and tort cases well into the twentieth century (*Murray's Lessee v. Hoboken Land & Improvement Co.* (1856); *Roe v. Wade* (1973); *Dietrich v. Inhabitants of Northampton* (1884)). But Coke didn't have a flawless legal career ("Sir Edward Coke"). He got into trouble with King James I for interfering with other courts in England, was dismissed from the King's Bench, violently abducted his fourteen-year-old daughter and forced her to marry a nobleman,⁵ and got tossed in the

⁵ Though it is fully beyond the scope of this dissertation, I would nevertheless like to say that this episode in Coke's life, the abduction of his daughter, did make me question how much weight we as historians and people should lend to his viewpoint. If treating his daughter in this way was acceptable to him, what did he think the true purpose of the law was? If he committed harms against people, then isn't his view on the legality of other harmful actions suspect at the very least?

Tower of London for nine-months for disagreeing with the crown again. All that aside, folks still thought highly enough of his legal opinion that they accepted a new common law ruling on intentional abortions that had limited credible historical basis and didn't come from a case heard before any English court (Means 1971).

Coke's ruling appears in one of his volumes on English common law, *The Third Part of the Institutes of the Laws of England*, which he wrote after his retirement (Coke 1680). On page fifty, in the section about murder, Coke writes:

If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision and no murder: but if the child be born alive, and dieth of the Potion, Battery or other cause, this is murder: for in Law it is accounted a reasonable creature, *in rerum natura*, when it is born alive. ... And so horrible an offence should not go unpunished. And so was the Law holden in Bracton's time, *Si aliquis qui mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; & maxme si fuerit animatum, facit homicidium*. And herewith agreeth Fleta: and herin the Law is grounded upon the Law of God... (Coke 1680, p. 50).

Coke wrote in English, so he actually used the word "child" as an English word; it's not a translation. We see him using "child" to refer to the *in utero* entity at all points in gestation the same way "fetus" and "infant" functioned in other sources. By making intentional abortions after quickening a "heinous misprision," Coke gives the "child" the right not to be aborted after that point in gestation. Again, we see the words "quick" or "quickened" like we saw them in the English law prohibiting the executions of criminals

quick with child. I suspect that Coke also used quickening as the division between legal and illegal abortions because it was a practical, tangible, provable dividing line. And though quickening has a fascinating interplay with abortion laws and medical practice, we can't dwell on it here. For now, we should focus on why Coke wrote his much-quoted pronouncement and what legal basis it had.

In his passage, Coke references authorities from earlier centuries in an attempt to show that prior English common law prohibited intentional abortions at any stage. However, closer scrutiny of his cited authorities—Bracton and Fleta—shows that they weren't reporting actual common law (Means 1971). It's not clear what they were writing about, but they weren't reporting the laws enforced during an earlier time in England.

That leaves us with the question of why Coke tried to change the legality of abortions in common law. One theory has to do with the split between secular courts and ecclesiastical courts, as well as the religious climate in England during Coke's lifetime (Means 1971). Remember that in 1534, King Henry VIII broke with the Catholic Church to annul his marriage with Catherine of Aragon and marry Anne Boleyn. Thus, though he later beheaded Boleyn, Henry VIII became head of the freshly-formed Anglican Church. Nineteen years after that religious shift, Mary I ascended the throne and tried to change England back to Catholicism, through violent means at times, earning her the moniker Bloody Mary. Then, when Elizabeth I assumed the throne in 1558, she reverted the country to their father's new religion. That religious whiplash may have numbed English folks to the power of religious institutions; if they could be altered so easily because of political reasons, why should common people listen to them (Means 1971)? That

numbness likely extended to the ecclesiastical courts, the only courts vested with the power to punish intentional abortions.

From his writings, Coke thought intentional abortions were a crime—heinous ones according to his *Institutes*—and wanted them punished. If folks weren't heeding the ecclesiastical courts and their punishments, intentional abortions may have been going unpunished. Coke may have attempted to correct that gap, and he explained why intentional abortions should be punished in his *Third Institutes* (Coke 1680, p. 50). The first thing to note is that Coke placed his anti-abortion statement in the section titled “Reasonable creature, in rerum natura,” indicating that he considered *in utero* entities, at least post-quickening, to be reasonable creatures, or possessing reason like other humans (p. 50). Perhaps that idea slopped over from Aristotle's theory of the rational, human soul. Secondly, Coke placed that section in the chapter titled “Murder,” indicating that he considered *in utero* entities to be humans or persons that could be murdered (p. 47).

Unfortunately for women's rights in later centuries, Coke's views didn't die with him. His *Third Institutes* was actually published in 1644, ten years after his death. Then, over a century later, William Blackstone wrote his own law compendium, known as Blackstone's *Commentaries*, and included Coke's paragraph nearly word for word without challenging any part of it (Blackstone 1765, p. 125–126). US lawyers borrowed a lot from Blackstone's *Commentaries*, including that paragraph, which was still quoted in court cases well into the twentieth century, along with numerous other references to Edward Coke. So, what Coke said of *in utero* entities had big impacts.

But despite reversing centuries of English common law, Coke used the same words that other judges had used to describe *in utero* entities. He personally used “child,”

and he quoted a Latin writer who used traditional Latin words for referring to both childbirth and thing given birth to. Coke may have changed what value English, and later US, courts put on *in utero* entities, but he used the same words to do so. That means those words could have changed shape under the weight of that new value while not changing what entities they referred to, which is one of the big patterns we've seen so far in our story.

So far, we've seen that though views of fetal personhood changed dramatically from Aristotle's time to Coke's, the language used to describe *in utero* entities remained very similar, slopping from ancient sources to Medieval sources, and from Latin to French to English. Words like "*embruon*," "*fetus*," "child," and "*enfant*" were general ways of referring to offspring not yet born, and sometimes after birth as with "child" and "infant." None of those words were technically or scientifically connoted like "embryo" and "fetus" are today. They also were not consistently imbued with emotive or humanizing value, as folks at various times in various places wrote about aborting "children" or not aborting "fetuses" after a certain gestational age.

But in the next section, we're going to see how that began to change. Language for *in utero* entities began to split, through intention or not, into the beginnings of the technical and emotive vocabulary lists seen in the late twentieth and early twenty-first centuries.

Welcome to the 1800s.

The Foundations of Familiar Language

In the 1800s, two groups began paying more attention to conception. The first group, scientists, began delving into what happened biologically at the moment of conception and how organisms developed afterward. Meanwhile, the second group, composed of officials in the Catholic Church, began making declarations about what was happening spiritually at the moment of conception. They declared that humans received their souls at conception and that all intentional abortions after that moment were, once again, sins meriting excommunication. Along with those discoveries and declarations came new words for *in utero* entities from the scientific realm and new ways to describe *in utero* entities from folks who opposed intentional abortions.

We'll talk about the scientists first since we haven't focused on modern science much yet. Aristotle's ideas had a long lifespan, from the fourth century BCE into the 1600s CE, but his views on developing humans, and other Greeks' views on anatomy, began crumbling in the 1500s CE with a man named Andreas Vesalius. Vesalius was an anatomist who began hacking away at Greek theories—as well as some dead bodies (Ball 1910). Through dissections of human cadavers and examinations of bones pilfered from graveyards, Vesalius developed a new understanding of human anatomy. Closer to our twenty-first century understanding of anatomy, those theories and thousands of illustrations were published in Vesalius's 1543 book, *De humani corporis fabrica libri septem*, or *On the Fabric of the Human Body in Seven Books* (Vesalius 1543). He included a section on *in utero* entities, and when describing the anatomy of a developing human, he used the word "*foetus*" (p. 383). Though Vesalius wrote in Latin, not English,

his use of the word “foetus” is relevant because it was one of the first times that word was associated with modern, post-Greek science, science that was more experimental or interventional than purely observational. In other words, “*foetus*” began to gain the technical, scientific patina we associate with it today.

Other scientists helped dismantle Aristotle’s views on how organisms developed, too. English physician William Harvey, most famous for his work with blood circulation, lent a hand by looking for eggs inside female deer in England in the 1650s (Harvey 1651, pp. 396–430); Maienschein 2003, p. 23). Harvey was looking for eggs inside deer because he thought eggs were the female contribution to offspring, not female menstrual blood, as Aristotle thought. As noted by historian of science Jane Maienschein, Harvey’s idea of an egg probably wasn’t what we think a mammalian egg is (Maienschein 2003, p. 24). The idea of cells hadn’t been invented yet, so Harvey wasn’t looking for the single-celled reproductive unit produced in female ovaries. Likely, the “eggs” he discovered in the deer were amniotic sacs (p. 24). However, for our purposes, his scientific inexactitudes aren’t a fatal flaw. That’s because in his 1651 book, written in Latin, Harvey uses “*foetus*” and its declensions just like Vesalius did (Harvey 1651). And we have proof, in the form of a 1653 version of the same text published in English, that English readers of the time were also seeing “foetus” in a scientific medical context, as Harvey uses the same word in the 1653 translation (Harvey 1653, p. 430–431). Harvey continues to use familiar English phrases like “woman with childe” in his English text as well as the newer “foetus,” which reveals that “child” hadn’t moved out of scientific language quite yet (p. 430–431). The phrase “woman with childe” appears in the Latin version with the “*embryonem*” to indicate the pregnancy or *in utero* entity, which shows

how the word “embryo” was also starting to move into science as well (Harvy 1651, p. 454).

In a similar vein, if you’ll excuse the pun, two brothers named William and John Hunter later established that the pregnant woman and the *in utero* entity had separate circulations of blood. They began their work dissecting the bodies of pregnant women in 1750, mapping out the blood vessels of the pregnant woman and the *in utero* entity (Wagoner 2017). The Hunters published their discoveries in their 1774 book, *Anatomia Uteri Humani Gravidi Tabulis Illustrata (The Anatomy of the Human Gravid Uterus Exhibited in Figures)*. Each figure in the book has a description in Latin as well as in English. The Hunters use “*foetus*” in the Latin text and “child” in the English text (Hunter 1774, Tabula VI, Plate VI). That mixing of the two terms shows that “fetus” was beginning to be associated with modern science, though scientists still hadn’t established distinct gestational periods during which separate words (“embryo” versus “fetus,” for example) applied.

That changed in 1771 when the first edition of the *Encyclopedia Britannica* defined the word “embrio” as “the first rudiments of an animal in the womb, before the several members are distinctly formed; after which period it is denominated a foetus” (Maienschein 2003, pp. 24–25). There, finally, we see a distinction appearing between what “embryo” (or “embrio”) referred to and what “fetus” (or “foetus”) referred to. It’s not the eight-week distinction we have in the twentieth or twenty-first centuries, but it is the start of it. Indeed, our own understanding of what differentiates a fetus from an embryo has to do with when all of the organ systems are present in their early forms, or

when the entity begins to look human (Miklavcic and Flaman 2017). That strongly resembles the idea of distinct formation seen in the *Britannica* definition.

As our story moves into the 1800s, Aristotle's ideas of development began to fall out of favor entirely. Scientists began coming up with more distinctions in gestation because of the rise of cell theory and the expansion of developmental science.

One of those scientists was Karl Ernst von Baer, who finally got a look at the mammalian egg as we define it today (Maienschein 2003, pp. 32–33). Not an amniotic sac, not another spherical body inside a female mammalian reproductive tract—but an egg. An ovum. Thus, Aristotle's theory that a woman's menstrual blood was her contribution to the embryo finally collapsed. After that discovery, von Baer began investigating the early developmental stages of animals. In 1834, he published a paper about his work with frog embryos, which fit into the burgeoning scientific field of cell theory (Maienschein 2003, p. 35).

Most people today know something about how living things are made of cells. But it wasn't possible for people to know that until there was a way to see things as small as cells. That came about in the early 1600s with the invention of the microscope, and Robert Hooke was one of the early skilled users of the new technology (Cobb 2012). But it wasn't really possible for scientists to see cells until Antonie van Leeuwenhoek invented the single-lens microscope in the 1670s (Cobb 2012). Using his version of the microscope, Leeuwenhoek examined a semen sample and witnessed thousands of squiggling particles within the fluid. He called those particles “animalcules,” a common term at the time for the thousands of independent, moving *things* scientists were seeing via microscope (Cobb 2012).

Those *things* later turned out to be cells, and for a while, scientists weren't sure where cells actually came from. In the 1830s, scientists Theodor Schwann and Matthias Schleiden hypothesized that cells arose from a structureless fluid and then went on to be the organized components of living bodies (Maienschein 2003, pp. 37–38). But in the 1850s, scientists like Rudolf Virchow and Robert Remak finally riddled out that cells were the unit of life and that life only came from other life (p. 39). So, they reasoned, cells came from other cells that had divided in two to reproduce. Thus, they established that organisms had to develop via a long process of cell division.

With a way to view cells and an understanding of cellular division, scientists had the tools necessary to begin chronicling what happened after conception. As they used methods to stop organisms' development at certain stages and study what the cells had formed, they needed new words to refer to the developing organism in the new stages they were observing. That need gave rise to the word "morula" in 1875, "gastrula" and "blastomere" in 1877, and "zygote" in 1891 ("morula, n." 2020; "gastrula, n." 2020; "blasto-, comb. form." 2020; "zygote, n." 2020). Those words appeared because of a need to describe something discovered through the process of science, and they did not apply to any object outside of the scientific world. "Fetus" and "embryo" may have come from early words meaning "offspring" or "child" and thus could act as neutral descriptors throughout much of human history, but the new words of the 1800s could not. They were words that came out of science, and therefore, when applied to *in utero* entities, they came with strong ideas of biology, cell theory, and other technical meanings that did not (and still don't) make it easy to think of the entities they described as humans or persons like the people you meet on the street.

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To see what our other group was up to in the same time period, we'll jump back to the 1600s in Europe, when folks in the Catholic Church also began poking holes in Aristotle's theory of human development. Though many Catholic thinkers were writing on how Aristotle's ideas might not match up with reality, one of the most influential ones was a physician named Paul Zacchias (Noonan 1967). In 1621, he wrote *On Medico-Legal Questions*, a book in which he examined the process of human development in the womb—and most importantly, when that pivotal rational soul arrived. Remember that since Aristotle's time, it was the rational soul that made an organism human, instead of just an animal, and Aristotle's theory held that the third soul arrived after souls #1 and #2. The Catholic Church had fixed the date of ensoulment at forty days' gestation (Noonan 1967). But Zacchias wasn't convinced. In his book, Zacchias attacked Aristotle's description of the slow process of gaining three souls in the womb. Zacchias didn't see why the rational soul took so long to arrive, and didn't think physical markers of pregnancy like quickening had anything to do with how many souls an *in utero* entity had. Thus, he argued that the developing human must receive its rational soul at conception (Noonan 1967).

In 1644, Pope Innocent X endorsed Zacchias's views when he named him the General Proto-Physician of the Whole Roman Ecclesiastical Estate (Noonan 1967). So there we see a change in personhood as defined by the Catholic Church. For a long time, Catholics had figured that a thing became a person when it got its rational soul, and that that happened at forty days' gestation. But with Zacchias's (and others') works, some

members of the Church shifted to the view that the human soul arrived at conception, and therefore, deductively, the *in utero* entity became a person at conception, too.

Later declarations made by Pope Clement XI reveal that the Catholic Church as a whole was indeed shifting toward that view. In 1701, Pope Clement XI made the Feast of Immaculate Conception a feast of universal obligation (Noonan 1967). The feast had been around before Pope Clement XI's reign, but making it a feast of universal obligation put extra emphasis on how central it was to Catholic doctrine. It put the feast on the official Catholic calendar, to be celebrated on December 8th every year. The idea of immaculate conception is that the Virgin Mary, who gave birth to Jesus without any input from a human man, was free from original sin at the moment of her own conception. Original sin is the idea that all humans, according to Catholics and some other Christians, are innately sinful, resulting from the bad acts of Adam and Eve ("Original sin" 2013). So in celebrating that the Virgin Mary didn't have original sin from her conception, Pope Clement XI and others were not only claiming that the mother of Jesus was an especially holy person in her own right but also that someone's human nature could be determined at the moment of conception (Noonan 1967). At conception, Mary was not a person who carried original sin, and so at conception, Mary was necessarily a person.

That trend of focusing on conception and associating personhood with that moment continued into the 1800s. In 1854, Pope Pius IX extended Pope Clement XI's decree by proclaiming that it was Church dogma that the Virgin Mary was free from sin at conception (Pope Pius IX 1854). Church dogma is the official doctrine of the Catholic Church, and so Pope Pius IX was really making it clear that the Virgin Mary was a pure person. At that time, he also made it clear that a human's soul was present at conception,

and not infused later in gestation, as noted in his papal bull titled *Ineffabilis Deus* that contained the two changes to Church dogma (1854). But while declaring a human *in utero* entity is a person at conception as Church dogma was pretty serious, Pope Pius IX didn't stop there. He didn't leave the idea as just a theory, one of many that form the doctrines of the Catholic Church.

In 1869, he changed the Church's abortion rules (Noonan 1967). Remember that during the abortion debate within the Church in the Middle Ages, the Church changed its views on intentional abortions so that any abortions performed before the fortieth day of gestation, before the *in utero* entity was "formed" or "vivified," were permitted and not sinful. Intentional abortions after forty days were still sins that resulted in one's excommunication. In 1869, Pope Pius IX dropped the reference to "ensouled fetus" from the abortion rules. In one stroke, Pope Pius IX made it so that all intentional abortions, before or after forty days' gestation, were sins that merited excommunication. With that move, he gave *in utero* entities the religious right not to be intentionally aborted from the moment of conception. Combined with the early declarations, that change returned a layer of sacredness to *in utero* entities, at least in Catholic eyes. Any *in utero* entity was a person as far as the official doctrine of the Catholic Church was concerned.

Even with the changes, there wasn't a big shift in the language used in official Catholic documents. They seemed to stick with the Latin traditions and language used by previous popes and theologians. But other folks in the 1800s were thinking along the same lines as the Catholic Church officials. Those nineteenth-century proponents of *in utero* entities' person-ness *did* push language in a new direction.

One such person was Horatio Storer, a physician practicing in the United States in the 1800s (Reagan 1997, Chapter 2). Storer's most memorable contribution to society, however, was outside of the clinic. In 1857, he started a movement against intentional abortions by convincing the American Medical Association to create a Committee on Criminal Abortions. At the time, abortions in the US were illegal. The illegality stemmed from both Edward Coke's proclamation in 1644 and from 1830s laws that criminalized all abortions because the procedures were so dangerous to women (Means 1971). Storer, however, thought anti-abortion laws should be stricter, and his movement became known as the physicians' crusade against abortion (Diamond 2006).

To spread his views and influence regular people and state legislatures, Storer wrote several works promoting his anti-abortion thoughts. In *On Criminal Abortion in America*, published in 1860, Storer claimed that it was murder to willfully kill "a human being at any stage of its existence" (Storer 1860, p. 1). There we see not only thoughts about *in utero* entities and intentional abortions similar to the Catholic Church's, but we also see language similar to the emotional, humanizing language used by anti-abortion writers in 2020. In the above quote, Storer refers to the *in utero* entity as a "human being," not any of the scientific words that researchers were churning out in the 1800s, even though he was a physician, educated in the ways of science. Storer did use "embryo" or "foetus" every once in a while (though not "morula" or "gastrula"), but he mostly used terms like "child" and "human" (Storer 1860). With his works and his own advocacy, Storer and his fellow crusaders did pressure state legislatures into passing stricter anti-abortion laws, thus transferring their views of *in utero* personhood into the US legal system—and perhaps their strong, emotive language as well. We'll see what

language did or did not infiltrate into the US court system in the next chapters, starting with the 1884 decision in *Dietrich v. Inhabitants of Northampton*.

Conclusion

Thus concludes our brief exploration of where words like “child,” “embryo,” and “fetus” came from. For much of Western history, those words were used in similar ways. Writers used them to refer to *in utero* entities throughout the entire period of gestation. In English, a woman was “with child” from the moment of conception to the moment she gave birth. In Greek and Latin, “embryo” and “fetus” fulfilled similar functions. The way those words remained the same even as views of *in utero* entities shifted, and at times reversed, is quite different than the state of our language in 2020. Nowadays, words like “fetus” and “unborn child” have much more baggage attached to them; using one or the other often indicates one’s view on whether a fetus is a person or not.

But our jaunt through history shows that that polarized language is a recent trend. The very beginnings of it were just appearing in the late 1800s, with the creation of new scientific terms and the start of a new anti-abortion movement in the United States. That indicates that perhaps language was not so critical during early discussions of fetal personhood. Perhaps people used the words they had on hand, so to speak, and applied new meaning or value to those words, rather than changing what words they used. Or perhaps the shifts in what people thought about *in utero* entities simply weren’t big enough shifts to prompt a corresponding shift in language. Perhaps the issue of fetal

personhood wasn't as pressing, as heated, as it has been in more modern times. It could be that the neutral, consistent language reflected people's generally low interest in the personhood or humanity of *in utero* entities at the time. The judges ruling in early English court cases certainly didn't indicate that they were deciding a case mired in social or political tension. They seemed like everyday, unremarkable court cases.

The purpose of this story is to examine how language, how word choice, may reflect people's views on fetal personhood or even influence how society at large treats embryos and fetuses. To that end, we can say with certainty that words *can* change in meaning or connotation along with people's changing views. For Catholic Church officials, a "*fetus*" was at first a person only at forty days' gestation, then a person at the moment of conception, and at various points people were permitted to or prohibiting from abortion them. We can also say that words do move between different areas of society, becoming more common in one area and less common in another. We saw that with "embryo" and "fetus" as they began moving out of everyday use and into scientific use, where they gained new meaning and applied to only certain periods of gestation.

And as for the landscape of language in 1884, we can say that the word "child" was still a very common way for English-speakers to refer to *in utero* entities. But the use of that word, and the disuse of more specific terms like "embryo" and "fetus," did have impacts in the early fetal personhood court cases. It began in 1884's *Dietrich v. Inhabitants of Northampton* and continued to cause misunderstandings in the courts for over sixty years.

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CHAPTER 1.5: THE LEGAL STATUS OF EMBRYOS AND FETUSES IN THE UNITED STATES IN 1884

We've now established what words were used to indicate embryos and fetuses in the United States in 1884, as well as the baggage and associations that came with those words. But this story is two-pronged. We're concerned about words and their meanings, yes, but we're also concerned about the impact words can have on other things—in this case, legal rulings about the personhood of embryos and fetuses in US courts. As mentioned before, the first court case of interest to our story occurred in 1884, which was why we charted the history of our chosen words up until then. But in order to see what impact those words have on embryonic and fetal personhood, we have to establish a benchmark of what legal rights *in utero* entities enjoyed *before* our story starts so that we can have a clearer understanding of what changed due to the employment and impact of certain words. That way, when we get to 1973 and the end of our story, the *after* will be that much more distinct.

Getting a good grip on the legal status of embryos and fetuses in the late nineteenth century means achieving a passable grip on the legal system of the United States. There are entire books dedicated to this study; indeed, law students spend three years and hundreds of thousands of dollars learning to understand US law. But for our purposes, a casual understanding will be sufficient. This brief chapter will touch on a few kinds of US law relevant to our story, what standing embryos and fetuses had in those areas of law in the 1880s, and concludes with a quick note on my methods for finding, sorting, and classifying the court cases that form the backbone of our main story.

US Law and an Archaeological Dig Site Have a Lot in Common

We've not had much opportunity for extended metaphors yet, so let's try one out here. It goes like this: Imagine that the different sections of US law are different shards of pottery dug up in the same patch of dirt by a team of archaeologists. Because all the pottery shards came from the same one-meter-square area and in the same stratum of the soil, it's clear that they all came from the same culture. But each of the shards is slightly different than the others. This piece is older. This piece is newer. This one has more designs engraved into it. This one has a nicer coat of paint. And so on. The pieces don't all fit neatly together into a single vase, and trying to put them together into a single vase or even two vases wouldn't work, even with copious amounts of gorilla glue and duct tape. The shards were formed by different processes at different times by different people and for different purposes.

And that is US law. It has several different realms, all with their own histories and peculiarities. Lawyers study one kind of law, or maybe a few subsections of one kind, and practice in that area without much overlap in any other area. A lawyer who specializes in contracts probably won't spend much time litigating civil rights cases in the Supreme Court. And a lawyer who does personal injury law probably won't be writing or defending patents for a major biotech company. The labyrinthine and sprawling profile of US law is an interesting study on its own, but the most important takeaway here is that different realms of law do not have to agree with each other. In fact, different areas of law often conflict in their stances on things, including the legal status of embryos and

fetuses, but we'll get to that in a second. For now, let's quickly go through the main areas of law in our story.

The vast majority of the cases we'll be discussing fall into two categories: tort law and criminal law. As alluded to above, there are many differences between those two categories, but we're aiming for a casual understanding of law, so we'll give a casual description of each, using different scenarios where a dead body shows up.

The word *tort* in tort law comes from the medieval Latin word *tortum*, meaning “wrong, injustice,” which later morphed into a Middle English word meaning “wrong” or “injury” (“tort” 2013). That history illuminates the general idea of tort law, which is to address injuries suffered by someone due to the wrongful act or negligence of someone else (Black 1910, p. 1161). If that sounds like a regular crime to you, you're not alone. I thought so, too, at first. But the trick of tort law is that tort cases are civil cases, not criminal cases. The difference between those two kinds of cases is big in US law. In criminal cases, the state levels charges against someone and assigns a judge and jury to determine whether someone committed a crime and what the penalty will be (jail time, a big fine, whatever) (Black 1910, pp. 299–301). In civil cases, there is no jail time on the table. The courts take civil cases to decide noncriminal disagreements between members of society (Black 1910, p. 203).

To skim over the nitty-gritty of differences between civil and criminal cases, we'll focus on defining what a tort case looks like, using a dead body. Not every dead body shows up as a result of a crime. Some people are murdered, and some people die of natural causes—but there are other people who die because of accidents. For example, if a house caught on fire because of some bad electrical wiring and after putting out the fire,

the firefighters found a dead body in the wreckage, there hasn't (most likely) been a murder, or even a crime. The state attorney, most likely, won't file a murder charge against whoever did the electrical wiring for the house. The electrician won't be arrested and put in jail to await trial. Rather, the relatives of the deceased would file a tort case against whoever was to blame for the mistake that caused the house to catch fire. The dead person suffered an injury (death) because someone else did wrong (made a mistake in their electrical work), and the family of the deceased wants the person in the wrong to make up for it by paying some amount of money.

That's a very simplified explanation of one kind of tort case called a wrongful death suit, in which someone died when they shouldn't have based on someone else's mistake or negligence ("Wrongful Death Action").

So tort law is our most common category of case, but the second most prominent is criminal law, where the state charges someone with a crime, and that person goes to trial to be found innocent or guilty and accept their punishment (Black 1910, pp. 299–301). However, there are as many kinds of crimes as there are laws on the books. We won't be discussing theft or robbery (and the curious difference between robbery and burglary), nor felony tax evasion or racketeering. In most cases in our story, the crime at hand is abortion. In those cases, the "dead body" is either an aborted (and thus dead) embryo, an aborted (and thus dead) fetus, and/or a woman who received an abortion and died from the procedure. How much weight each dead body received—whether an expelled embryo was as serious as a dead woman—is something the courts have had to grapple with along the way, and we'll look at that history in Chapter 4, when the 1970s brings discussions of abortion to a head.

While tort and abortion cases constitute the two biggest chunks of our assembled court cases, some other areas come up as well. The first we've already touched on—property law (Black 1910, pp. 955–956). In Chapter 1, we discussed how the Romans dealt with certain inheritance matters, and the need to deal with those matters didn't disappear overnight or even over two thousand years. People in the United States were still dying in ways that were slightly inconvenient to the heirs of their estate, so US property law was still contested and construed in the courts. Property law (for our purposes) comes in when someone dies, leaving behind a dead body and everything that body used to own. Who got to lay claim to the previously-owned possessions was a question the courts answered here and there throughout our story.

Like the sporadic property cases, a few other kinds of cases appeared during my research that are interesting to mention and fall broadly into the area of family law. In the early centuries in the existence of the United States, some states passed various Bastardy Acts, requiring men who contributed to pregnancies outside of a marriage to pay for the education and maintenance of the illegitimate, or bastard, children born from those pregnancies (Lasok 1967; Garbis 1969; Reviere 1979). I found a few cases where courts debated whether or at what point a fetus became a “bastard child” as defined by the law involved (*Helper v. Nelson* (1893); *Brown v. State* (1932); *Zepeda v. Zepeda* (1963)). Other cases similarly questioned how much child support a father owed a pregnant woman and the fetus in the womb (*Gilpin v. Gilpin* (1950)), or how much worker's compensation a fetus was owed due to the death of the father while the fetus was still in the womb (*Applications of Clarke* (1957); *Texas Emp. Ins. Ass'n v. Shea* (1969)). We'll discuss those as they become relevant to the story.

Finally, I want to mention a special kind of court case that appeared frequently in the 1970s in the lead-up to *Roe v. Wade* in 1973. As far as the actual events or actions that led to the cases, they count as criminal abortion cases like the ones mentioned above. A woman received an abortion, which was a crime, and state attorneys prosecuted the abortion provider for it. However, the cases in the 1970s took on a different tone, as many were brought to court and then appealed to higher levels of courts by the woman or abortion provider in order to challenge the legality of the law they had broken. Those cases fall into a kind of constitutional law, as the arguments focused on whether laws regulating abortions were constitutional or not. As we'll see in Chapter 4, they played a large role in building momentum to the Supreme Court's decision in *Roe* in 1973.

With that, we conclude our brief tour of US law, hopefully imparting a firm enough grip on the different kinds that the next section will make sense, for we now turn our attention to how embryos and fetuses had different and conflicting status in various sections of the law even before our story starts in 1884.

The Before: What Kind of Rights Embryos and Fetuses Had from Previous Time Periods

In this chapter, I've been using the words "rights" and "legal status" as rough substitutes for the words "personhood" or "legal person" because legal personhood is a complex topic that I wanted to spend some time discussing. In Chapter 1, I mentioned that at various points embryos and fetuses had gained or lost a kind of personhood or person-ness. I referenced how the Catholic Church changed how much spiritual

personhood it afforded *in utero* entities—or how much they considered the entities to have souls or to be sacred enough not to be aborted. And I referenced that toward the end of the nineteenth century, words like “unborn child” seemed to endow an embryo or fetus with more person-ness than new scientific words like “blastula” or “morula.” In those instances, I used “personhood” in the colloquial sense of how much various individuals or institutions considered embryos and fetuses to be human people on their own while still in the womb. That is a valid use of the word “personhood,” as the dictionary definition is “the quality or condition of being an individual person,” but the legal meaning of “person” or “personhood” is more specific than that general definition—and the tension between those two kinds of personhood is a major point of our story (“personhood” 2013).

As we’ll see in Chapter 3, the term “personhood” didn’t come about in English until 1944 CE, but the term “person” definitely existed far before then, in common parlance and in the legal lexicon (“personhood, n.” 2020). In 2019, a definition of a “legal person” is “an individual, company or other entity which has legal rights and is subject to obligations” (“Legal Person”). What rights or obligations a legal person has or doesn’t have has been established, amended, and modified by various laws and court cases in the US throughout the centuries. Giving a full accounting of what “person” means in legal terms in 2019 would be the subject of its own paper. However, there are certain rights or privileges that a legal person has that feature heavily in our story, and that’s what we’ll spend some time on here.

A primary component of personhood in the court system at least is the ability to bring a suit in court, or having standing in a court (Kester 1993). For example, in the

1880s, embryos and fetuses did not have standing to bring personal injury suits in court (*Dietrich v. Inhabitants of Northampton* (1884)). The question had not come up in the US court system, and therefore, embryos and fetuses had not yet been recognized as legal persons who could 1) sustain damages or injury because of a tort, or 2) bring a suit against the person responsible for those injuries.

However, in the area of property law, embryos and fetuses *did* have a kind of standing. While in the womb, they could have guardians appointed to them to stand for them in the courtroom when a matter of inheritance was up for judgment (Osowski 1992; Hammack 2013). That right stemmed from the ancient Roman rule of inheritance that enabled children who were conceived before their father's death and later born alive to inherit their father's property after birth. "Born alive" is an important feature of that right; a fetus that died in the womb didn't inherit anything. The right didn't vest until after birth. It was a retroactive right, a legal fiction created to fix a practical problem in the realm of inheritance. The English incorporated that right into their own laws, which were later imported to the Colonies and then US law after the American Revolution.

Another sort-of aspect of personhood imported from the English was something we talked about in Chapter 1—the "right" not to be aborted (Means 1971). I use "sort-of" and quotation marks around "right" because it's not specifically stated in any legal codes that a legal person has the right not to be killed. That right is implied by the existence of homicide statutes; a legal person has the right not to be killed because it is illegal to kill someone. The same logic applies to abortion statutes. Because Edward Coke, retired judge, wrote from the comfort of his retirement that it was a "heinous misdemeanor" to abort a "child" after it had quickened in the womb, he was implying that post-quickening,

a fetus had enough person-ness to have the right not to be aborted (Coke 1680, pp. 50–51). As previously discussed, Coke’s doctrine, repeated by legal writer Blackstone, was shipped from England to the Colonies and incorporated into common law and legal practice, as seen in the number of US court cases that cite both Coke and Blackstone (Cases citing Coke: *Rosen v. Louisiana State Bd. of Med. Examiners* (1970); *State, Use of Odham v. Sherman* (1964); *Cooper v. Blanck* (1923); *Powers' Estate v. City of Troy* (1968); *Allaire v. St. Luke’s Hospital* (1900); *Chrisafogeorgis v. Brandenburg* (1973); *Byrn v. New York City Health & Hosps. Corp.* (1972); *Sinkler v. Kneale* (1960); *Mallison v. Pomeroy* (1955); *Krantz v. Cleveland, Akron, Canton Bus Co.* (1933); *McGarvey v. Magee-Womens Hosp.* (1972); *Drobner v. Peters* (1921); *Byrn v. New York City Health & Hosps. Corp.* (1972); *Amann v. Faidy* (1953); *State v. Dickinson* (1971); *Keeler v. Superior Court of Amador Cty.* (1969); *Chrisafogeorgis v. Brandenburg* (1972); *Magnolia Coca Cola Bottling Co. v. Jordan* (1935); *State v. Atwood* (1909); *Roe v. Wade* (1973); *Keeler v. Superior Court* (1970); *Damasiewicz v. Gorsuch* (1951)).

(Cases citing Blackstone: *People v. Belous* (1969); *Stemmer v. Kline* (1942); *Britt v. Sears* (1971); *Allaire v. St. Luke’s Hospital* (1900); *Chrisafogeorgis v. Brandenburg* (1973); *Steggall v. Morris* (1953); *State v. Atwood* (1909); *Porter v. Lassiter* (1955); *State v. Harris* (1913); *Sinkler v. Kneale* (1960); *Medlock v. Brown* (1927); *Mallison v. Pomeroy* (1955); *Gilpin v. Gilpin* (1950); *Rosen v. Louisiana State Bd. of Med. Examiners* (1970); *Ryan v. Pub. Serv. Coordinated Transp.* (1940); *Verkennes v. Corniea* (1949); *Woods v. Lancet* (1951); *State, Use of Odham v. Sherman* (1964); *Foster v. State* (1923); *Roe v. Wade* (1973); *Amann v. Faidy* (1953); *Baldwin v. Butcher* (1971); *Cheaney v. State* (1972); *Hornbuckle v. Plantation Pipe Line Co.* (1956); *Rainey v. Horn*

(1954); *Todd v. Sandidge Const. Co.* (1964); *McGarvey v. Magee-Womens Hosp.* (1972); *Shousha v. Matthews Drivurself Serv., Inc.* (1962); *Cooper v. Blanck* (1923); *Zepeda v. Zepeda* (1963); *Kine v. Zuckerman* (1924); *Damasiewicz v. Gorsuch* (1951); *Tucker v. Howard L. Carmichael & Sons* (1951); *Keeler v. Superior Court* (1970); *Williams v. Marion Rapid Transit* (1948); *Hatala v. Markiewicz* (1966)).

Though Coke inspired the practice of deeming abortion post-quickening a misdemeanor in the courts, actual US statutes limiting or prohibiting abortion didn't begin appearing until the 1820s, starting with Connecticut in 1821 (Quay 1960; Hammack 2013). New York and nine other states followed suit, codifying Coke's notion that abortion post-quickening was a crime (Quay 1960). It is tempting to think that because states were now writing statutes prohibiting abortion post-quickening they were granting embryos and fetuses with more person-ness. But looking at history shows a different story. The anti-abortion legislation passed in the 1820s and 1830s resulted from many social and medical factors (Mohr 1978; Means 1968). First, any medical procedure had a high risk of death attached to it, due to the lack of sterilization in the medical field. Infections after surgeries were quite common, and many women who received abortions died from them (Deysine et al. 2004, pp. 1–2). So one reason for the anti-abortion legislation, particularly the statutes that prohibited abortions via instruments like knives or metal scoops, was to protect women from dying. Another reason for the legislation had to do with the state of the medical field at the time. Physicians as a professional group were trying to establish and maintain credibility in a crowded field full of apothecaries, midwives, and other practitioners of what passed for medicine in the 1800s (Moscucci 1993, pp. 10–12; Ehrenreich and English, 1973, pp. 3–5; Crilley 2014). Many abortion

providers were not physicians but instead midwives or other women, and to establish themselves as the main medical providers in the US, physicians pushed for legislation that outlawed abortions, thus disrupting the practice of non-physicians who provided them (Crilley 2014). The fact that those providers could go to jail likely also pleased the physician crowd.

Then in the 1860s, anti-abortion legislation progressed further, as briefly discussed in Chapter 1. Starting in 1857, physician Horatio Storer and others pushed for the criminalization of all abortion procedures, before and after quickening. Unlike the legislation of the 1830s, Storer made it clear that his views were not motivated by medical concerns for the pregnant woman but instead by the fact that it was murder to kill “a human being at any stage of its existence” (Storer 1860, p. 1). Storer’s physician’s crusade against abortion and his influence with the American Medical Association convinced many state legislatures to pass harsher anti-abortion laws, prohibiting any abortions at any stage of gestation (Caron 2008). In that way, embryos and fetuses gained another level of person-ness in that it was illegal to abort them from conception onward. It is useful to note, however, that many women continued to seek abortions, and many medical practitioners continued to provide them, indicating that what person-ness was granted by the law did not always reflect how everyday people viewed embryos and fetuses (Crilley 2014). That is something to keep in mind. We focus on legal personhood because it is a concrete and traceable concept, and we can measure the impact words had on it. But what was in the law did not, and does not, perfectly reflect the views of people in society at the time, as we’ll see in later chapters.

Nevertheless, by the 1800s, embryos and fetuses had collected a few legal rights, such as the “right” not to be aborted at any stage. To recap, they also had the right to inherit property as long as they were born alive, but they did not have any standing in the courts to sue for prenatal injury. Those limited rights didn’t stop people from bringing court cases that involved embryos and fetuses. There was still plenty of debate and discourse about what counted as a person in what situations and for what reasons. That’s what we’ll dig into in the next chapters, as soon as we establish how I found and analyzed the 1,260 court cases that matched my criteria.

The Two Big Shifts in Fetal Rights

To find the material for this story, I turned to the legal database Westlaw and searched for all the US court cases between 1884 and 1973 that included the words “embryo” or “fetus.”⁶ My search returned 1,260 cases, and I read all of them. I had to in order to determine which ones were relevant or irrelevant to our storyline. Irrelevant cases were those that mentioned “embryo” or “fetus” only in passing. Sometimes, the judges writing those opinions weren’t even referencing developing organisms. “In embryo” was a common phrase in the early twentieth century used to describe things early in their development, even if they weren’t biological entities (“embryo” 2013).

⁶ For those concerned that I overlooked cases that dealt with *in utero* entities but didn’t use “embryo” or “fetus,” rest assured. US judges frequently use previous court cases and their precedents when writing their own decisions. If a court case was important to the fetal personhood storyline but used “unborn child,” “infant en ventre sa mere,” or other words instead of “embryo” or “fetus,” judges in the cases I found cited that case, and I included it in my analysis.

Judges referred to businesses in embryo, contracts in embryo, ideas in embryo, et cetera. Many cases found their way to the irrelevant pile because of that phrase. I also didn't include cases where "embryo" or "fetus" was used to describe a human organism, but that organism wasn't central to the case. Judges sometimes used "embryo" or "fetus" in metaphors or analogies to elucidate another part of the case.

Relevant cases, on the other hand, were those that centered on an embryo or fetus. The cases hinged upon whether the embryo or fetus was a legal person. Examples of relevant cases included ones such as whether an embryo or fetus counted as a child under states' bastardy acts (*Brown v. State* (1932); *Zepeda v. Zepeda* (1963)), whether an embryo or fetus had the right to sue for prenatal injuries, and specifically in abortion cases, at what point an embryo or fetus became something that it was a crime to expel from a womb.

My sorting strategies left me with 198 cases between 1884 and 1973, which was far more manageable. Next, I sorted them into two categories, depending on whether they contributed to legal doctrine in a major way. *Dietrich v. Inhabitants of Northampton* in 1884, for example, was a major case, since it established the precedent that *in utero* entities did not have standing in a court to sue for prenatal injuries. Likewise, *Bonbrest v. Kotz* in 1946 was a major case, as it overturned Dietrich's precedent and granted certain *in utero* entities the right to sue for their prenatal injuries. Finally, *Roe v. Wade* is the major case at the end of our story, as it in a way decided the limits of fetal personhood that had been debated in the courts in the years before it.

However, not only the major cases are important to our story. The cases in between legal milestones matter, too. The US legal system works in a sort of cumulative

fashion in many areas of law. Judges write their own decisions, but they often reference many other decisions made in similar cases. The body of judicial decisions that build upon or amend certain areas of law is called common law. Sometimes, judges look to established common law or use earlier decisions as precedents for the kind of case at hand. Judges are required to defer, for instance, if a higher court already established a relevant precedent. Local courts in Arizona must defer to the Arizona Supreme Court, and all courts in the US must defer to the United States Supreme Court on matters of federal law. Even when judges defer to previous decisions, they can slightly alter their decision and advance a slightly newer view of law on the matter. In that way, judges can make incremental changes to precedents over the years. When legal standards begin shifting, judges often make note of that in their decisions, referring to changing tides or a shift in judicial opinion on certain matters.

Two major shifts in the legal status of embryos and fetuses occurred between 1884 and 1973. The first dealt with the standing of fetuses in tort cases, as referenced above. In 1884, a judge ruled that *in utero* entities did not have standing in the courtroom, but after about a dozen court cases on the matter, a certain class of fetus gained the right to sue for prenatal injuries in the courtroom in 1946 (*Dietrich v. Inhabitants of Northampton* (1884); *Bonbrest v. Kotz* (1946)). The second shift had to do with the rising tension of the rights of fetuses versus the rights of women, particularly in the area of abortion, in the 1960s and 1970s. How much did a fetus's right not to be aborted weigh against a woman's right not to be pregnant? The Supreme Court gave an answer to that question with their decision in *Roe* in 1973, which was the first time a US court ruled on the matter of whether an embryo or fetus was a legal person in its entirety (*Roe v. Wade*

(1973)). The Court wasn't debating one component or another component of legal person-ness; they were deciding whether an embryo or fetus was a "person" as included in the Fourteenth Amendment of the US Constitution (*Roe v. Wade* (1973); Hammack 2014). And in a narratively pleasing reflection of our first case in 1884, the Court ruled that an embryo or fetus was not a "person." (Though they did limit abortions to a certain period of gestation for reasons that are related to embryonic and fetal person-ness, which we'll discuss later.)

To see exactly how those shifts shifted and how words played a role in the shifting, read on. We'll begin the next chapter with our first case, *Dietrich v. Inhabitants of Northampton*. We'll follow the chain of court cases dealing with fetal legal personhood, tracking what rights *in utero* entities are granted, and how that intermingles with how society is talking about them, until the Supreme Court finally answers the question of whether embryos and fetuses are full legal persons.

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CHAPTER 2: FETAL RIGHTS GAIN GROUND FOR THE FIRST TIME IN CENTURIES

In 1973, at the end of our story, much of the discussion around embryos and fetuses revolved around whether they were people, in a legal and social sense. Did we think of them as human beings just like those already born? Did we need to give them the same rights? But as we just saw, in the late 1800s, embryos and fetuses were thought not to have much personhood in either sense. There were some people who held that *in utero* entities were human beings to be protected—like Horatio Storer and officials of the Catholic Church—but as far as the US legal system was concerned, embryos and fetuses hadn't made any significant gains in personhood in centuries.

The question at hand in this chapter is how embryos and fetuses gained their first new legal right in the United States: the ability to sue for an injury done to them before birth. This is especially intriguing because the first case where that question came up resulted in the judge denying a fetus legal standing in the court, and thus any personhood as far as the case was concerned. That case, *Dietrich v. Inhabitants of Northampton*, serves as the official starting point of our story in 1884. We'll examine that decision, the words that appeared within it, and how those words continued the tradition of denying fetal personhood, even when some science of the early 1900s called the logic of *Dietrich* into question. Then, we'll see how—despite an indifferent public—judges on US courts worked toward granting a new aspect of legal personhood to embryos and fetuses using *the same words* found in cases that denied that personhood for so long. This chapter concludes with the reversal of the *Dietrich* decision and an awarding of a new legal right to fetuses in the case *Bonbrest v. Kotz* in 1946.

While it would be too grand a claim to say that words alone drove the shift in embryonic and fetal rights between 1884 and 1946, given the way that US courts operate, it is not too bold to claim that words were the linguistic fulcrums upon which many of our cases turned. And since we're talking about a span of sixty-two years, dozens of cases, and the many attorneys and judges who contributed to the final decisions, there was ample opportunity for words and their meanings to slip and slop in ways that ended up seriously impacting embryonic and fetal personhood.

The Curious Case of a Short Opinion that Dominated the Courts for 62 Years

Dietrich is not a glamorous case. The incident that led to the court case took place sometime in 1884, though the court documents don't specify when, and involved a bad piece of civil engineering (*Dietrich v. Inhabitants of Northampton* (1884), p. 14). One day in a town called Northampton, Massachusetts, someone slipped on a dodgy bit of road (p. 14). That someone happened to be a pregnant woman, and the fall she took caused her to give birth to a premature fetus (p. 15). The woman was only four or five months pregnant, and the fetus survived only ten or fifteen minutes before dying (pp. 14–15). From the court documents, it is unclear whether the birth and death of the fetus occurred on the road itself or at a nearby hospital, and for this case, it doesn't matter.

We can see right away from the court documents that it was a civil tort case. There was no crime committed, only an accident, and at the conclusion of the case, there was no innocent or guilty verdict (p. 17). Instead, the husband of the woman who fell

sued the town for the faulty road. We see the husband's name, Peter Dietrich, reflected in the title of the case, as well as the town, referenced as "Inhabitants of Northampton" (p. 14). Mr. Dietrich was not injured in the road incident, so he was serving as a stand-in for both the pregnant woman, who wanted money to compensate for her injuries, and the fetus that died, as the Dietrich family also wanted money to compensate for its injury and death (p. 15). In US courts, someone like Peter Dietrich can go to court for someone else, like his wife or a dead relative, *but* whoever he or she is standing in for must have the right to go to court in the first place. That right, the ability to bring an action or appear in court, is called standing and features heavily in this case, as to have standing, one must be a person as recognized by law ("stand" 2013; "Standing"; *Dietrich v. Inhabitants of Northampton* (1884), p. 14, 16).

The decision in *Dietrich* has several features of interest. First, the case had already been heard by lower courts in Massachusetts, where the woman received compensation, before it appeared in front of the Supreme Judicial Court of Massachusetts, which had the final word on the matter (*Dietrich v. Inhabitants of Northampton* (1884), p. 15). That's relevant because the Supreme Judicial Court of Massachusetts was the highest court in the state, which meant all lower courts in Massachusetts had to abide by its decision, the precedent it set, and other courts in different states also took a look at the court's decision when deciding similar cases. Three judges sat on the bench of the Supreme Judicial Court of Massachusetts in 1884, and the one who wrote the decision for the case was named Oliver Wendell Holmes, Jr., who later became a justice (and then Chief Justice) of the United States Supreme Court (p. 14; "Oliver W. Holmes, Jr.").

What was his opinion on the case? Well, that's where the most interesting features lie. In the case of *Dietrich v. Inhabitants*, asking whether the town owed the dead fetus (and by extension, the Dietrich family) money for its injuries, Judge Holmes decided *no* (*Dietrich v. Inhabitants of Northampton* (1884), p. 17).

He doesn't spend long discussing the matter; his written decision is only two pages (*Dietrich v. Inhabitants of Northampton* (1884)). In short, Holmes agreed with a lower court's prior decision and denied that the lawsuit could be maintained, as a "child" like the one described the case was "not a 'person'" under Massachusetts law (p. 14). He explains that assessment by stating, "as the unborn child was a part of the mother at the time of injury, any damage to it...was recoverable by her" (p. 17). So Holmes rejected the idea that the fetus was its own legal person in favor of making it part of the pregnant woman and her person-ness. If the fetus was part of the pregnant woman, it wasn't its own legal person and therefore could not have standing in court (p. 16). Personhood denied.

As seen in the quotes above, Holmes referred to the fetus as an "unborn child," "child," or "infant" (*Dietrich v. Inhabitants of Northampton* (1884), p. 14, 15, 17). He sprinkled in one or two uses of "embryo" or "fetal," but on the whole, he relied on language that toward the end of the 1800s was on the more-humanizing or personifying end of the spectrum of words that could be used for an embryo or fetus (pp. 15–16). We saw advocates for fetuses like Horatio Storer and the Catholic Church also using words like "child" in their statements to emphasize how embryos and fetuses were like already-born children, or humans with their own rights and lives. Holmes seemed immune to the

humanizing effects of those words. He used them throughout his decision but decided, quite clearly, that an “unborn child” was not a legal person (p. 14, 16).

We saw in Chapter 1 that old English courts used words like “child” in their decisions as well, decisions in which they denied that it was a crime to abort a “child” in the womb. Was Holmes following their lead? Did his use of “unborn child” come from them? A closer look at the text of the *Dietrich* decision provides an answer. In the third paragraph, Holmes references Edward Coke’s old dictum of “if a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder” (*Dietrich v. Inhabitants of Northampton* (1884), p. 15). Holmes dismisses the relevance of Coke’s dictum in the case at hand, which goes to show that the different areas of US law in the courts often don’t impact each other (p. 16). But the important thing is that Holmes references Coke, restating that statement of his, and in doing so, introduces the term “child” in reference to the fetus in the case. Several times when Holmes uses the word “child,” it is in reference to the “quick with child” in the quotation from Coke (pp. 15–16). That word slops over from Coke’s 1644 book into the 1884 case.

That partially explains why “child” appeared in Holmes’s decision, but what about “infant”? Well, we can perform a similar exercise with that word. One of Holmes’s other sources was William Blackstone’s *Commentaries*, discussed in Chapter 1 (*Dietrich v. Inhabitants of Northampton* (1884), p. 15). In his discussions of embryos and fetuses—which involves a restatement of Coke’s dictum—Blackstone used not “child” but “infant” to refer to the *in utero* entity (Blackstone 1765, p. 125–126). So perhaps the

word “infant” in Holmes’s decision slopped over from the Blackstone *Commentaries* on his bookshelf.

Indeed, it is when not referencing or dealing with Coke or Blackstone that Holmes uses other words like “embryo” or “fetal” to describe the fetus (*Dietrich v. Inhabitants of Northampton* (1884), p. 15–16). Of course, we should be careful not to overinterpret or overstate the directness of that lingual sloppage, but it does seem likely that if Holmes had a reference to Coke or Blackstone open on his desk while writing his *Dietrich* decision, the words from those men all those centuries ago may have found their way more easily into the decision than if Holmes had not referenced them at all.

Or perhaps Holmes used “unborn child” and “infant” in his decision because they were the only words available in US legal parlance at the time. Sure, “fetus” and “embryo” were widely used by scientists in the 1800s, but maybe the legal system hadn’t given them formal legal definitions yet.

Fortunately, several legal dictionaries from the late 1800s are accessible today, and they all contain similar definitions to one another. The dictionaries collectively debunk the idea that legal professionals didn’t have working definitions of “fetus” and “embryo.” Admittedly, the definitions for “embryo” are a bit lackluster and aren’t relevant for *Dietrich*, since the *in utero* entity was four or five months into gestation, putting it firmly in the realm of fetus. We’ll focus on the definition of “fetus” and how it was actually a better choice for Holmes to use in his decision than either “child” or “infant.”

Since Holmes actually used “child” and “infant,” let’s take a look at their definitions. According to John Bouvier’s *A Law Dictionary*, published in 1883, the word

“child” meant in 1884 legal terms: “the son or daughter in relation to the father or mother” (Bouvier 1883, pp. 309–310). One might think that that definition neatly encompassed *in utero* entities, as those are technically sons and daughters in the sense that they are the offspring of two parents. However, the rest of the definition disrupts that interpretation, as it focuses on children who have been born and what rights they have. Indeed, the word “born” appears four times in the first three paragraphs, while the word “unborn” appears nowhere (p. 309). The definition of children, then, did not seem to include “unborn children,” and there’s not a separate entry for “unborn children” either. So it’s a little suspect that Holmes and other legal professionals relied on “child” and “unborn child” in discussions of embryos and fetuses, when the legal definition of them didn’t clearly define what “child” meant in the context of the courts.

What about “infant”? Looking there, we find another quandary, for the legal definition of “infant” was anyone under the age of twenty-one years (Bouvier 1883, pp. 793–795). Again, one might think an *in utero* entity counted under that definition, as they are definitely under twenty-one years old. But the definition also lists out all of the rights that those individuals might have. So an “infant,” then, was a legal person, in possession of legal rights. A quick double-check on the definition of “person” indicates that someone had to be born to be a person in legal terms, including an infant (pp. 408–409). The definition of “infant” is interestingly bereft of any mention of a newborn infant. However, glancing down to the next entry reveals that the definition of “infanticide” fixed that gap by stating that “infanticide” was the “murder of a newborn infant” (Bouvier 1883, p. 795). It goes on to say, even more interestingly, that infanticide was distinct from “foeticide” or “abortion” in that infanticide was the murder of an infant that

was born alive, i.e. out of the womb and no longer an *in utero* entity (p. 795). That distinction in the “infanticide” definition seems to make it clear than in “infant” was not something inside a womb, but rather a person who had been born.

So far, it looks like Holmes wasn’t using words as prescribed by the law dictionaries of the day. But let’s check a few more. If “foeticide” was a legal term, as mentioned in the “infanticide” definition, then “foetus” must have been too. Indeed, Bouvier included a definition of “foetus” as “An unborn child. An infant *in ventre sa mere*” (Bouvier 1883, pp. 671–672). “Unborn child” did have a place in the legal dictionary after all, but it was encompassed in the definition of “foetus” (p. 671). Why didn’t Holmes use “foetus” instead of “unborn child”? The definition of “foetus” even specifies that the word “embryo” was used until the middle of the fourth month of gestation, which was admittedly not quite right, even for the time (p. 672). The eight-week distinction between embryo and fetus was already well in place by 1884 (Marshall 1893, p. 505), but we can perhaps forgive the legal world for missing that point.

If “foetus”⁷ was exactly what Holmes was referring to in the *Dietrich* case—an *in utero* entity four or five months into gestation—why didn’t he use it? Why was his decision not: a fetus at four or five months is part of the pregnant woman for tort purposes? Why use “infant” and “child,” both far more general terms and able to be applied to all stages of *in utero* gestation according to the language of the times? That non-specificity is quite crucial to the rights—or lack of—embryos and fetuses had in tort cases until 1946, not simply because Holmes didn’t use words in accordance with their

⁷ Even with that historically erroneous spelling.

legal definitions but because of another aspect of Holmes’s legal reasoning and how those nonspecific words played into it.

Part of Holmes’s reasoning in *Dietrich* was that the “infant [died] before it was able to live separately from its mother” (*Dietrich v. Inhabitants of Northampton* (1884), p. 16). That lack of independent life was, for Holmes, a contributing factor to the denial of personhood. Though Holmes’s main argument rested on the fact that the fetus was injured in the womb, which is what Holmes seemed to be saying made it part of the woman, the claim about independent life is one that will show up repeatedly before this chapter is done. Perhaps it is my scientific background coming out, but it seems like Holmes was making a scientific claim when he brought up whether the fetus could “live separately from its mother” (p. 16). He had real-world proof that the Dietrich fetus could not live independently, as the fetus died ten or fifteen minutes after its premature birth, but the claim itself—of when a fetus can live independently—does ring of medical science.

Holmes doesn’t treat it as a scientific claim, doesn’t mention science or cite any scientific sources in his decision, but what he did do—intentionally or not—was tie those nonspecific words, “child” and “infant,” to the idea of *not* being able to live independently from the pregnant woman and therefore *not* being a legal person with standing in the courtroom. Because “child” and “infant” at the time could be used to refer to an *in utero* entity at any stage of gestation, Holmes made a more sweeping decision than he might have otherwise. Though his case dealt with a four-to-five month fetus, the precedent he established said that “unborn children” or “infants” in the womb were not legal persons. If he’d been clearer in his wording, perhaps if he’d used the legal “foetus”

or attached a gestational age to his final statements, the decision might have been narrower and more specific. But he didn't. He removed the chance of embryos and fetuses of any gestational age having standing in tort cases, and partially based it on what was at the time (and as later judges frequently pointed out) shaky reasoning.

Tying the idea of not living independently to the entire gestational timeline was a mistake, in that it misled later courts. As far back as Aristotle, people knew that prematurely born humans could survive independently by some point in the pregnancy (Aristotle 2008, Book IV). For Aristotle, it was the eighth month of gestation, sometimes the seventh. We'll talk about what it was in the late 1800s and early 1900s in a bit. The point is that Holmes mixed some things up in his decision by using old language from Coke, Blackstone, and legal tradition at large, and how that language was interpreted and repeated in later cases had serious impacts on when embryos and fetuses did receive standing in tort cases.

Those cases are our next topic, but let's wrap up *Dietrich* by mentioning one more thread it established in our story. It's a long-term thread that runs from 1884 to 1973 (and beyond), and does have many facets that come from both the legal and the medical worlds, but it boils down to this: the tension between when a fetus becomes separate from the pregnant woman, when the woman's personhood is more dominant, and when the fetus's is. That tension lies dormant for a few decades until we get to the 1960s and 1970s, where it gets inflamed and partially resolved in 1973 with *Roe*. But keep an eye on how the rise of fetal rights in tort cases helps give later fetal rights proponents a foothold in the legal world about whether a fetus is and when it becomes a legal person.

The Case of a Horrific Elevator Ride and Other Cases that Followed the Dietrich Precedent

If *Dietrich v. Inhabitants of Northampton* had been an isolated case in 1884 that no one paid attention to, fetal rights in tort (or in general) might have had a different trajectory. But the *Dietrich* decision didn't sit idly gathering dust in a Massachusetts courthouse. In 1900, the question of fetal tort rights came up again, and the judges in *Allaire v. St. Luke's Hospital* paid attention to *Dietrich*.

Though both cases dealt with prenatal injuries and the right to recover damages for them, the fact pattern (as legal professionals call it) was a little different in *Allaire* (*Allaire v. St. Luke's Hospital* (1900)). The story starts when Ada A. Allaire checked into St. Luke's Hospital in Chicago, Illinois, on February 2, 1896, to give birth to the fetus in her womb (p. 359). After Mrs. Allaire checked in, the hospital staff escorted her to an elevator to be ferried to the next floor up. In 1896, elevators consisted of a platform with a chair bolted to it, and that platform journeyed up and down the elevator shaft without any walls of its own, so a passenger could reach out and touch the elevator shaft itself. It's unclear from the court documents what went wrong with the elevator machinery. In the sudden lurch resulting from the malfunction, Mrs. Allaire was thrown out of her chair and got caught between the elevator platform and the wall of the shaft. She sustained bruises and injuries to the left side of her body, including her hip, thigh, and side. Bones broke, skin tore, and according to the court decision, Mrs. Allaire was "mangled" (p. 362).

The court documents don't specify how the hospital staff freed Mrs. Allaire, but they managed. And mangled or not, Mrs. Allaire was still pregnant and gave birth four days later on February 6, 1896, presumably at the same hospital (*Allaire v. St. Luke's Hospital* (1900), p. 362). The son she gave birth to also had great injuries to the left side of his body—his foot, leg, side, and hand were “wasted, withered, and atrophied,” according to the judges (p. 362). But the newborn, named Thomas Edwin Allaire, survived despite his injuries, and the Allaire family took St. Luke's Hospital to court so Mrs. Allaire and Thomas Allaire could sue for their own respective injuries. However, the lower courts of Illinois got hung up on whether Thomas Allaire had the right to sue for injuries that happened before he was born, and so the case got appealed to the Supreme Court of Illinois, which decided the matter in 1900 (p. 365).

Right away, we can see big differences between *Dietrich* and *Allaire*. The most obvious is that Thomas Allaire, unlike the unnamed fetus in *Dietrich*, lived through the *in utero* injury and survived after he was born. So there was a living individual—a four-year-old boy—taking part in *Allaire*. Whether four-year-olds had the right to sue for injuries done to them was not at issue in *Allaire*; at four years old, Thomas was a legal person with rights as listed by the law dictionaries under “infant” or “person.” The issue was whether he could recover for something that happened to him in the womb—if the fetus he'd been counted as a legal person when the injury occurred. The second big difference between *Allaire* and *Dietrich* was that in *Allaire*, the injury in question occurred only a few days before the fetus was scheduled to be born at the end of a natural gestation period. When the horrific elevator accident ensued, the fetus in Mrs. Allaire's

uterus was nine or ten months old, far older than the four to five month old fetus in *Dietrich*.

Despite those differences, however, the reasoning set out in *Allaire* was nearly identical to that in *Dietrich*. The Supreme Court of Illinois denied Thomas Allaire the right to recover for prenatal injuries (*Allaire v. St. Luke's Hospital* (1900), p. 368). Their reasoning came down to a quotation they borrowed from the lower appellate court that heard *Allaire* before them:

That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. . . . that an unborn child may be regarded as in esse [in existence, legally] for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie. (*Allaire v. St. Luke's Hospital* (1900), p. 368).

There, we see the fractured nature of US law when appellate court dismisses the “legal fiction” used in other areas of US law, like property, to grant embryos and fetuses some personhood (*Allaire v. St. Luke's Hospital* (1900), p. 368). The court deemed it irrelevant for tort cases, relying instead on the logic of the fetus being part of the pregnant

woman. However, in that same paragraph, we can also see the judges anticipating a later development in fetal rights when they say, “it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant” (p. 368). After fetuses gained more rights and personhood, cases of women being held responsible for injuries to fetuses *in utero* did come to the courts starting in the 1980s.

But, for the purposes of *Allaire* in 1900, the Supreme Court of Illinois agreed with the appellate court’s reasoning, which rested on the logic presented by Holmes in *Dietrich*, cited heavily in the decision as well (*Allaire v. St. Luke’s Hospital* (1900), p. 369).

The decision in *Allaire* either began a trend of deferring to Holmes’s precedent in *Dietrich* or was an example of a trend that would have arisen anyway, no matter where the second case of prenatal tort appeared. After *Allaire*, more cases dealing with the same issue—an injured *in utero* entity seeking to recover for its injury—popped up in different states and at different court levels, and many of the judges cited both *Dietrich* and *Allaire* and decided their cases in similar ways. Some of the cases after *Allaire* included:

A case in New Hampshire in 1908 dealing with a pregnant woman who suffered an unnamed injury and recovered for damages to herself and the fetus because the “foetus [was] deemed to constitute a part of the mother’s person” (*Prescott v. Robinson* (1908), p. 523).

A case in Wisconsin in 1916 featured a pregnant woman involved in a car accident when she was five months into her pregnancy (*Lipps v. Milwaukee* (1916)). The fetus was later born alive and suffered from fits due to the prenatal injuries, but the court

denied it the right to recover damages for the injuries because at the time of injury the “child,” according to the court, could not have been born viable (p. 915). Thus, the court claimed that because a “nonviable child cannot exist separate from the mother, it must, in the law of torts, be regarded as a part of its mother” (p. 917).

A case in Georgia in 1922 involved a pregnant woman who was struck by a train while two months into her pregnancy (*Davis v. Murray* (1922)). Seven months after the collision, the fetus was born alive, but the court ruled that the woman had the only right to recover damages, as the fetus was “part of her person” (p. 826).

In a case in Pennsylvania in 1924, another pregnant woman was involved in a car crash one month and eleven days before she gave birth to an infant with a deformed hand (*Kine v. Zuckerman* (1924)). The court denied recovery for the prenatal injury, but permitted the living infant to receive money for the suffering she was experiencing post-birth due to the injury (p. 231). We’ll get back to that convoluted reasoning in a later section.

A 1927 case in Louisiana arose when a pregnant woman was walking on the sidewalk when she got hit by a truck (*Youman v. McConnell* (1927)). She was seven months into her pregnancy and gave birth to a stillborn infant, and the court ruled that neither the woman nor the dead infant could recover damages for the death of the infant because stillborn infants were regarded as never having been in existence for legal purposes (p. 317).

More car accidents happened in the 1930s in Ohio and Texas, resulting in two instances of fetuses being born alive but not allowed to recover for prenatally-inflicted

injuries (*Krantz v. Cleveland* (1933); *Magnolia Coca Cola Bottling Co. v. Jordan* (1935)).

And into the 1940s, courts were denying embryos and fetuses of various gestational ages to right to recover for prenatal injuries, relying on past precedent and statements of law made by the American Law Institute, which published *Restatement of the Law of Torts* Volume 4 in 1939 (Prosser). Made up of lawyers, judges, and law professors, the American Law Institute was, and still is, an organization that summarizes US common law and drafts model legislation states can then adopt. In the 1940s, judges followed the decisions in previous courtrooms and declared a person who injured an embryo or fetus in the womb had no liability for that injury (*Ryan v. Public Service Coordinated Transport* (1940); *Stemmer v. Kline* (1942)).

From those cases, it's clear that the *Dietrich v. Inhabitants of Northampton* decision wasn't an anomaly. Other courts denied fetuses the personhood and standing required to recover for their prenatal injuries (or deaths in some circumstances, for which relatives of the dead fetus tried to sue). Without looking at the sources cited in the cases, one might assume the similar decisions were independent results that didn't have anything to do with each other. But that conclusion quickly unravels with a look at the judges' citations—all of them cited *Dietrich v. Inhabitants of Northampton*, and many quoted the relevant passages mentioned above. The judges deciding matters of prenatal injury looked to *Dietrich* for guidance, and they took Holmes's ruling seriously enough to quote it and, more importantly, to decide the *same way* even in instances where the embryos or fetuses were far older than the four to five month old fetus in *Dietrich*. And some of those fetuses, the ones injured in month nine or ten of gestation, just before they

were due to be born, *could* live independently from the pregnant woman, as evidenced by the fact that they did live after their premature births or, as in *Allaire v. St. Luke's Hospital*, were born only a few days after they were injured in the womb.

To be colloquial, *What gives?* How could judges read the *Dietrich v. Inhabitants of Northampton* decision, see that Holmes's reasoning was founded in the fetus not being able to live independently, and deny standing to the fetuses that could, very much, live on their own? I am no crusader for fetal legal rights, but this jump in logic, this glossing over of key facts, interests me greatly. My theory about the over-application of Holmes's legal reasoning rests on the use of language. I think that because Holmes used "child" and "infant" in the key statements of his decision—the places where he really set out his opinion—he made that more-sweeping generalization discussed above. He attached the lack of standing in tort cases to "unborn children" and "infants" in the womb. Thus, judges reading his decision later (perhaps cursorily or in a hurry) denied standing in tort cases to any "unborn child" or "infant" in the womb, any fetus *in utero*, even if that fetus was far enough along in gestation to live independently.

Such a claim is hard to prove, as we cannot know what was in the minds of the judges when they wrote their decisions. We can know only what they put on the page. But what they put on the page does reflect their thought processes, and many of them were not thinking about the distinction between different gestational ages in the womb. Many of them wrote about embryos and fetuses in the same way no matter their gestational age—by referencing them as "unborn children," "children," or "infants."

Yes, the language of many of the court cases mirrored the language in Holmes's *Dietrich* opinion. Instances of "unborn child," "child," and "infant" abounded. Other

terms did appear as well, such as “infant en ventre sa mere” and the less-frequent “foetus,” but the former term was similar to and used interchangeably with “child” or “infant,” and we’ll get to words like “foetus” in a minute. But for now, we can clearly see that words slopped over from the *Dietrich* decision, as well as from the old legal sources that Holmes cited, sources like Coke’s and Blackstone’s works. Judges quoted *Dietrich*, introducing the terms Holmes used, and then they referenced the passages they quoted, which required them to use the words Holmes used in order for them to state their opinions on his opinion. Similarly, judges cited Coke and Blackstone, sometimes via the *Dietrich* quotes, and sometimes of their own accord. In that way, they introduced more instances of “child” and “infant” into their decisions, meaning that they ended up reinforcing the idea—intentionally or not—that any embryo or fetus injured in the womb did not have standing to recover damages for their injury in the courtroom.

Why did the same words keep appearing over the span of sixty years? The answer may have something to do with the structure of the US court system and the way that US judges write their decisions. Courts in the United States often base their rulings on rulings made by other courts in the past. Often, the first thing in a judge’s written opinion is their summary of all the relevant cases decided previously (*Allaire v. St. Luke’s Hospital* (1900); *Prescott v. Robinson* (1908); *Lipps v. Milwaukee* (1916); *Davis v. Murray* (1922); *Kine v. Zuckerman* (1924); *Youman v. McConnell* (1927); *Krantz v. Cleveland* (1933); *Magnolia Coca Cola Bottling Co. v. Jordan* (1935); *Ryan v. Public Service Coordinated Transport* (1939); *Stemmer v. Kline* (1942)). As seen in most, if not all, of the court cases mentioned above, many judges explore the legal issues present in their cases by considering what other judges wrote about those issues in the past. For example, the

judges in *Allaire* discussed the reasoning and decision made by the court beneath them, and they also cited prior cases that dealt with the same issue, like *Dietrich*. In the court's opinion for *Allaire*, the judges on the Supreme Court of Illinois actually only contributed two novel sentences to their own opinion (*Allaire v. St. Luke's Hospital* (1900), p. 368). Nearly every other paragraph in the document was a quotation from another court, and sometimes those quotations contained quotations from still more courts. Because of that habit of extensively quoting prior cases, language from those earlier cases was incorporated into newer cases. "Unborn child" was a common legal term in 1884, and it stayed a common legal term at least in part because judges of later cases kept citing passages where it was used.

Yet it is not sufficient to say that the recycling of language and quotations was the only reason why "unborn child" and "infant" kept showing up in court documents. Language is a complicated thing influenced by thousands of factors. However, just because we can't know all of the factors behind the continued reuse of the same words doesn't mean we shouldn't take note of instances where we *can* pinpoint moments where words slipped from one text into another. The frequent quoting of prior court cases is one such instance. Another is the continued use of the same legal sources.

It appears, then, that well into the 1940s, judges in prenatal tort cases were denying embryos and fetuses the right to have standing in courtrooms. The pregnant woman was the legal person permitted to recover damages to her own self and, to an extent, the injuries sustained by the embryo or fetus. But the court decision that reversed the *Dietrich* precedent was issued in 1946, only four years after the latest case mentioned above. How, then, did fetuses gain that new aspect of personhood? What were the forces

pushing for fetal rights? It couldn't be just one judge in 1946 getting a new, wild idea, right? Let's take a look at some other things that were going on in the early 1900s besides the main chain of court precedents on prenatal injury tort.

Judges Question Specifics—and Get Specific with Their Language

Though it may seem like it from the cases I cited above, judges in the US court system do not always make the same decisions on the same issues. Court documents are not homogenous; judges often debate with past courts in their written opinions, and one judge or justice on a panel of judges who disagrees with the court's official opinion can write an opinion of dissent from the court's decision or agree but with different reasoning. So though many courts ruled the same way Holmes did on the matter of prenatal injuries, some judges disagreed.

We're going to talk about three judges in three cases that all have three things in common. The first is a dissent from the official court opinion in *Allaire* in 1900, which was penned by Justice Carroll Boggs⁸ (*Allaire v. St. Luke's Hospital* (1900)). The second is the decision of the court in *Cooper v. Blanck* in 1923, which was authored by Judge Westerfield (*Cooper v. Blanck* (1923)). And the third is a small section from *Kine v. Zuckerman* in 1924, the decision of which was written by Judge Gordon, Jr. (*Kine v. Zuckerman* (1924), p. 228). Though they are different kinds of documents—one a dissent,

⁸ Alas, in this instance, Carroll is a man's name, though I was hopeful for a moment that the justice was a woman.

one an official decision, and one only a few sentences long—they share three important features. The first is that the authors of each question the precedent set in *Dietrich* and wonder whether a fetus did gain standing in tort cases at some point in gestation. The second is that they all reference some kind of scientific or medical authority to support their arguments. And the third is that unlike in the cases previously discussed, the judges in those particular sections chose to use more specific language than the general “unborn child” and “infant.” The judges—when discussing scientific details—used words like “foetus” and “embryo” and introduced a point in gestation where such entities would acquire the person-ness necessary to have standing in a tort case. In this chapter, we’re investigating how fetuses gained that very right, so we should investigate whether it was the science the judges referenced that pushed them to acknowledge fetal person-ness. Did science in the twentieth century make it obvious and clear that fetuses should be counted as legal persons?

The first document that questioned whether a court should follow the precedent in *Dietrich* was Boggs’s dissent from the official decision in *Allaire v. St. Luke’s Hospital* (*Allaire v. St. Luke’s Hospital*, pp. 368–374). Remember that case was about a pregnant woman, due to give birth that week, who was mangled in an elevator accident and gave birth to a similarly mangled infant (p. 359). The court denied that the then-infant had the right to sue for the injuries it sustained while it was a fetus in the womb (p. 368). Boggs, however, disagreed. The most relevant section of his dissent is as follows:

A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in

the womb, it reaches that prenatal age of viability when the destruction of life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother. (*Allaire v. St. Luke's Hospital*, p. 370).

There, Boggs brings up the idea that at some point in gestation, the fetus and the pregnant woman ceased to be a single being (and represented by a single person in court, the pregnant woman). He claims in the text that fetuses reached a “prenatal age of viability,” or a point where the fetus could continue to live and grow outside of the womb, should it be ejected early or should the pregnant woman die (p. 370). For that reason, Boggs argued for the infant in *Allaire v. St. Luke's Hospital* to be granted the standing necessary to receive money for the injuries sustained in the womb (p. 374).

A similar argument appeared in the official court decision in *Cooper v. Blanck*. The case was heard by the Court of Appeal of Louisiana, Parish of Orleans, in 1923 (*Cooper v. Blanck* (1923)). A woman and her husband filed a lawsuit after a chunk of plaster fell from the ceiling of their apartment and struck the woman, who happened to be pregnant at the time (p. 353). She gave birth to an infant who showed signs of injury from the plaster avalanche and who died three days after its birth (p. 353). The Court of Appeal of Louisiana decided that the fetus at the time of injury, in the ninth month of gestation, was a person in legal terms and therefore had the right to sue for its own prenatal injuries, a right which passed to its nearest relatives (mom and dad) after it died (p. 353). Judge

Westerfield wrote the opinion for the court and rested part of his reasoning on the fact that fetuses born prematurely often do survive to grow and develop like infants born at the end of the usual gestation period (pp. 354–355). He discussed how likely survival was at different points in gestation and referenced the idea of viability, just like Boggs did in his dissent, which Westerfield quoted at length (p. 357).

Finally, a year after *Cooper v. Blanck*, the case *Kine v. Zuckerman* came to the Court of Common Pleas of Pennsylvania, Philadelphia County (*Kine v. Zuckerman* (1924)). The case arose after a pregnant woman was in a car accident one month and eleven days before she gave birth to the fetus in her womb (p. 227). The resulting infant had a physically deformed hand, allegedly from the accident, and the question was whether the infant could sue for the injury it sustained in the womb (227). We’ve already mentioned *Kine v. Zuckerman* in passing, as the court ultimately decided to deny the right to sue for prenatal injury—in favor of permitting the infant to sue for the suffering it experienced from the hand injury *after* birth (p. 231). However, despite ultimately falling in line with *Dietrich v. Inhabitants of Northampton* and cases like it, the judge writing the opinion, Judge Gordon, Jr., was sympathetic to the idea of a fetus becoming a legal person while still in the womb. He wrote that the court might “disregard the common law rule which merges the mother and child into one being during this period [gestation]” and the court could “advanc[e] the time at which the child acquires all the rights of an individual, and thus make the law conform with the fact” (p. 228). There, Gordon gets at the same idea as Boggs and Westerfield, referencing the idea that at some point, a fetus becomes a separate legal person from the pregnant woman and thus should be able to sue for injuries inflicted upon it after that point (p. 228).

So the judges agreed on the general idea that at some point in gestation, a fetus became a legal person, but how did they justify themselves? Well, they all used a little bit of science—some more than others.

To back up his point about the fetus at one point becoming separate and independent from the pregnant woman, Boggs mentions in his dissent: “Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother” (*Allaire v. St. Luke’s Hospital* (1900), p. 370).

There, Boggs explicitly calls on medical science and what medical scientists had proven in order to justify his claim that at some point the fetus attains a kind of biological independence, an ability to sustain its own life even if the pregnant woman.

Likewise, Westerfield in the *Cooper v. Blanck* decision includes tables of medical data on prematurely born infants’ likelihood of survival (*Cooper v. Blanck* (1923), p. 355). The table starts with infants born after six months of gestation, for which the survival rate was 30 percent, and ends with infants born after eight and a half months of gestation, for which the survival rate was 91.6 percent (p. 355). He also mentions that “While the earliest period at which a foetus may be said to be viable, is still a matter of considerable doubt, the medical authorities expressing the opinion that the controlling factor is the weight of the embryo, the fact that the foetus is in an advanced stage of pregnancy, viable and in fact possessed of prenatal life is indisputable” (p. 355). In that

quote, Westerfield directly calls on “the medical authorities,” which is admittedly a bit vague, but is a reference to the field of medicine and its credibility at large.

And finally, Gordon in *Kine v. Zuckerman* states that, “Modern scientific research in the domain of embryology has demonstrated that the foetus is an identity independent of the mother. It has its own blood circulation, and draws from its mother only the elements which nourish it and stimulate its growth” (*Kine v. Zuckerman* (1924), p. 228). It is a vague reference, like Westerfield’s “medical authorities,” but Gordon clearly built some of his reasoning on a foundation provided by scientists and their work. That connection is made especially strong by the fact that the sentences about modern embryology come directly before the sentences I previously quoted about the court advancing the point at which the fetus became a legal person. The two quotations follow one after the other (p. 228).

So we see the judges referring to science and scientific facts, but where did those facts come from? Anyone can say that scientists or medical researchers have proven something, and while US judges usually don’t make up facts to prove their cases, we should check out exactly where their scientific facts came from. Perhaps the vagueness of the claims and references arose from the judges simply summarizing what they read in scientific or medical books or papers.

But, in a rather large disappointment, neither Boggs nor Gordon cite their sources (*Allaire v. St. Luke’s Hospital* (1900); *Kine v. Zuckerman* (1924)). Throughout Boggs’s dissent and Gordon’s decision in *Kine v. Zuckerman*, they faithfully cited the previous court cases or statutes they draw their quotations from, but when they call on “medical science” (*Allaire v. St. Luke’s Hospital* (1900), p. 370) and “modern scientific research in

the domain of embryology” (*Kine v. Zuckerman* (1924), p. 228), they omit any sources. They give us no idea where they got their information about medicine or embryology.

However, both judges’ language changes when they begin discussing scientific details. In Boggs’s dissent, he uses “foetus in the womb,” “foetus,” and “foetal” in and around the paragraphs quoted above and once when he referenced “medical learning” in another passage (*Allaire v. St. Luke’s Hospital* (1900), p. 370, p. 371). All of those instances are exceptions to the more frequent use of “child” and “infant” to refer to the fetus in *Allaire*.⁹ Likewise, “foetus” appears only once in the *Kine v. Zuckerman* decision, when Gordon mentions that “Modern scientific research in the domain of embryology has demonstrated that the foetus is an identity independent of the mother” (*Kine v. Zuckerman* (1924), p. 228). Every other time Gordon mentions the fetus in *Kine v. Zuckerman*, he uses words like “infant,” “child,” “unborn child,” “child *en ventre sa mere*,” and “infant *en ventre sa mere*” (pp. 227–231). The one use of “foetus” was an anomaly in Gordon’s diction—I think because the word slopped over from whatever medical or embryological text he read in order to glean the information about the fetus’s biological independence. I think something similar occurred in Boggs’s dissent; he uses “foetus” only in the sections where he references medical science, and so the word may have slopped over from whatever text on medical science Boggs read while researching his dissent.

⁹ He does use “foetal life” in one other instance, when he brings up *Dietrich*. However, a close reading of the sentence in which it was used reveals that the sentence came almost verbatim from Holmes’s written opinion, where he also used “foetal life,” indicating another moment of words slopping from one document to another, even if Boggs didn’t put the sentence in quotation marks to indicate he meant it as a direct quotation (p. 371).

It is difficult to place 100 percent certainty in that theory, as neither cites his sources, and language transfer isn't always so direct, but I think there's a high likelihood that it is correct, especially when we look at the language in Westerfield's opinion in *Cooper v. Blanck*. Unlike the other judges, Westerfield did include a citation to his source (*Cooper v. Blanck* (1923), p. 354). He got the tables and data about premature infants from *Wharton & Stille's Medical Jurisprudence, Volume 3* (p. 354). A medical jurisprudence book is a kind of reference for legal professionals about medical facts and how they might impact legal matters. For example, medical jurisprudence books discussed how to tell whether a woman became pregnant before or after her husband's departure on a ship—in order to determine whether the resulting kid was the husband's or some other guy's (Wharton and Stillé 1905, pp. 23–26; Beck 1850, p. 209).

In *Cooper v. Blanck*, Westerfield drew upon *Wharton & Stille's* in order to discuss when a fetus became viable, or able to live if born prematurely (p. 354). We see that uses of “foetus” and “embryo” abound in quotations Westerfield borrowed from *Wharton & Stille's* and in sentences Westerfield wrote discussing the quotations (pp. 354–355). For example, Westerfield writes: “The question for consideration here is therefore whether the fact that the injury was inflicted prenatally alters the situation. In other words, when, in contemplation of law, does life begin. Is it at the time of conception of the mother, as an ovum or at a more advanced stage of pregnancy, as an embryo, or when nearing the final stage of pregnancy as a foetus or only when physically separate from the mother by birth” (*Cooper v. Blanck* (1923), p. 354).

We see there that Westerfield, in his own words, discusses different stages of gestation—when the entity is an “ovum,” an “embryo,” and a “foetus”—and at what

point in gestation the entity gains legal status of its own (p. 354). That paragraph directly prefaces Westerfield's discussion of the table from *Wharton & Stille's* about premature births and the likelihood of surviving (p. 355). In the quotations from *Wharton & Stille's*, the English word "fetus" appears, as well as the French words "*embryons*" and "*foetus*," which slip into Westerfield's language in the following paragraph (written in his own words, not quoted from *Wharton & Stille's*): "While the earliest period at which a foetus may be said to be viable, is still a matter of considerable doubt, the medical authorities expressing the opinion that the controlling factor is the weight of the embryo, the fact that the foetus is in an advanced stage of pregnancy, viable and in fact possessed of prenatal life is indisputable" (*Cooper v. Blanck* (1923), p. 355).

However, as in Boggs's dissent and *Kine v. Zuckerman*, the rest of Westerfield's language about embryos and fetuses consists of words like "child," except when he quotes from documents such as Boggs's dissent that also use "foetus" and such (*Cooper v. Blanck* (1923), pp. 352–361). So words like "foetus" and "embryo" in *Cooper v. Blanck* were coming from—or had a strong chance of coming from—sources outside of the judge's own mind, sources that included scientific information. Indeed, near the end of his decision, Westerfield uses the time-specific words to indicate when he thinks *in utero* entities should be acknowledged as legal persons. He states: "If it is to be objected that there is no period of gestation mentioned at which the embryo may be said to be a child, we reply that we are now considering the case of a foetus which had advanced to the final stage of gestation, just prior to parturition, a stage of prenatal life, when all authorities, medical and legal, agree the foetus is viable" (*Cooper v. Blanck* (1923), p. 360).

There, Westerfield specifically segments gestation into periods of the entity being an “embryo” and periods of it being a “foetus” (p. 360). Westerfield claims that when the entity is far into the fetal stage—as was the case in *Cooper v. Blanck*—the entity may, and should, be considered a legal person with the right to have standing in a tort case. Unlike in *Dietrich v. Inhabitants of Northampton*, which featured the general term of “unborn child” being applied to the entire period of gestation, Westerfield in *Cooper v. Blanck* makes use of the more specific terms “embryo” and “fetus” to indicate when the rights of a legal person vest in an *in utero* entity (*Dietrich v. Inhabitants of Northampton* (1884); *Cooper v. Blanck* (1923)). For Westerfield, a “foetus” that was “viable” merited those rights (*Cooper v. Blanck* (1923), p. 358). It is good to note that the fetuses in both *Allaire v. St. Luke’s Hospital* and *Kine v. Zuckerman* were also well into their gestations—eight or nine months along—which is another similarity among the three cases that perhaps made it easier for the judges to take the positions they did (*Allaire v. St. Luke’s Hospital* (1900); *Kine v. Zuckerman* (1924)). Fetuses further along in gestation had a better chance of surviving, as seen in Judge Westerfield’s tables (*Cooper v. Blanck* (1923), p. 355).

However, before we conclude that the judges used “modern” medical science and terms to justify their arguments, let’s take a closer look at exactly what science they were referencing. The tables that helped prove Westerfield’s point came from *Wharton & Stille’s*—and the authors of *Wharton & Stille’s* quoted them from another source entirely: the thesis of Paul Berthod, “*La Couveuse et le Gavage a la Maternité de Paris* [The Incubator and Gavage Feeds at the Paris Maternity Hospital]” (*Cooper v. Blanck* (1923), p. 354; Berthod 1887). That thesis was published in 1887, thirty-six years before

Westerfield decided the *Cooper v. Blanck* case. How “modern” was the scientific data in the thesis, then? We could debate the proper definition of “modern,” but it is most relevant that Berthod’s data, which he gathered and wrote a thesis on for a medical doctorate, was present in the world at just about the same that Holmes decided *Dietrich v. Inhabitants of Northampton*. Berthod’s thesis came out three years after the *Dietrich* decision, but humans have been aware that fetuses born prematurely could survive since *homo sapiens* first started giving birth. Aristotle in his work, *On the Generation of Animals*, included statements that fetuses born in the later months of gestation were likely to survive into infancy (Aristotle 2008, Book IV). He had a theory that those born in month six were more likely to survive than those born in month seven—a theory disproved by Berthod’s and other data—but the point remains that it wasn’t *new* science that prematurely born fetuses could survive and thrive as infants. So can we really say that it was the developments of science in the twentieth century that pushed Westerfield to his conclusion?

We can perform the same exercise with the facts mentioned by Boggs and Gordon. While neither cited their sources, they did specify the details that made them sympathetic to the idea of fetal legal status. Boggs centered his science on the idea of the fetus surviving a premature birth or the death of the pregnant woman—both facts that had been proven centuries ago by the survival of prematurely born infants (*Allaire v. St. Luke’s Hospital* (1900), p. 370). Gordon, on the other hand, brought up another detail that showed the fetus was independent of the pregnant woman. He mentions that the fetus “has its own independent blood circulation,” which sounds at first blush like a “modern” scientific discovery, perhaps from the twentieth century (*Kine v. Zuckerman* (1924), p.

228). But in reality, the brothers John and William Hunter showed that the pregnant woman and fetus had separate blood circulation in the 1700s (Wagoner 2017).

So while we can say that Boggs, Westerfield, and Gordon did use more scientific terms like “embryo” and “fetus” to make a claim that at some point in gestation, the *in utero* entity should gain legal personhood—we cannot conclude that it was twentieth century science that prompted them to do so. Even though they cited scientific details, we can’t claim it was twentieth century science that pushed them to acknowledge fetal personhood; the science they included had been around for a century or more. So why was it only in the twentieth century that some courts began considering fetuses as legal persons in tort cases? If it wasn’t twentieth century science, perhaps it had something to do with the public sector.

The Public’s Language and Lack of Interest in Fetal Personhood

Though we’ve talked about them in their professional capacity thus far, judges are people too. They not only judge society but take part in it. So perhaps there was something going on in wider society—a movement for fetal personhood similar to what we’ll see in the 1970s—that pushed judges to grant fetuses another aspect of personhood in 1946. Let’s take a look at some articles written for the public to see what the general feeling about fetuses and their person-ness might have been.

I took a sample of 5,000 *New York Times* articles written between 1884 and 1946 that featured the word “embryo,” “fetus,” or “unborn child,” as those seemed to be

common terms for developing entities. And while studying one source, *The New York Times*, is not representative of all of society, a corpus of 5,000 articles from a well-respected news source gives a fair-enough impression to work with, especially considering that *The New York Times* catered to a well-educated and well-off sector of society, a sector US judges were likely a part of.¹⁰

Between 1884 and 1946, several different kinds of articles featured discussions of embryos and fetuses. Most of the articles I found were written by staff at *The New York Times*, but there were some opinion pieces submitted by readers or non-staff contributors. And while the various writers had their own writing tics, I identified some trends in language that may shed some light on how *The New York Times*-reading sector of the public viewed embryos and fetuses.

One kind of article that frequently appeared in *The New York Times* was a report on new science or research going on at the time. Some reports were full-length pieces written on a single subject, like 1889's "Cultivating the Oyster," which included information about a professor's research into why most young oysters did not grow into full size, big enough to be harvested and eaten. Such reports had titles like "Seeds Found with Mummies Are Dead" (1892), "Embryo Mosquitoes Kill a Dog" (1899), "Found Dinosaur in Egg" (1923), or "Seeds that Are Centuries Old Grow Like New" (1925). Right away, we can see the wide variety of science covered by writers at *The New York Times*, and we can also see that there was a bit of an argument raging about whether centuries-old seeds could grow into plants (the answer was: it depends on the plant).

¹⁰ In addition, I had access to the archives of *The New York Times*, and the articles were easily searchable for individual words and spanned the time period I was interested in. Although an ideal sample would be wider-ranging, sometimes research methods must be practical rather than perfect.

Other reports on science, however, were shorter—more of a sampling plate of interesting tidbits. Those reports, published consistently throughout our time period, bore the title “Progress in Science” and consisted of a list of short, one- or two-sentence descriptions of new research being carried out. One such article from 1892 included bits about the structural soundness of steel, improved engines, the strength of bridges, flowers that changed colors in various solutions, the mental capacities of men, new insight into “the mystery of the Maya codices,” the energy found in coal and nitro-glycerin, and, relevant to our story, notes on how animals developed into “monsters and monstrosities.” (“Progress in Science” 1892). It is unclear whether the “monsters” referred to were species of animals that were frightening *or* animals that developed abnormally, bearing physical defects or abnormal characteristics at birth. The term “monster” had been used for centuries to describe animals, including humans, born with physical defects, and the author of the 1892 article claimed that “monsters” (whatever the author meant by that term) arose not from “changes in the embryo” but rather “modifications of the process of organic evolution” (“monster, n., v., and adj.”). That is all the explanation there is, which is frustrating, but the writer’s word choice gives us an insight as to what was going on with view of embryos and fetuses at the time.

Like the author of “Progress in Science,” many writers showed they were well aware of the term “embryo” by using it frequently to describe the early stages of plants and animal development. The articles listed above all included instances of “embryo,” as seen in the sentence “In one egg was an embryonic dinosaur in perfect form” (“Found Dinosaur in Egg” 1923). Likewise, in “Seeds Found with Mummies Are Dead,” the writer says when discussing under what conditions an old seed may grow, “...the embryo

must be vital, that sufficient heat must be applied to induce germination, that there must be necessary air, and, what is equally important, moisture” (1892). Writers discussing plant and animal development favored the word “embryo,” not using “fetus” hardly ever, which could perhaps be explained by the popularity of the word “embryo” used in an adjectival sense. Many articles in *The New York Times* featuring the word “embryo” in my search results showed it being used to describe the early stages of something, and it didn’t have to be in biological development. For example, an article in 1900 was called “Embryo Duelists Arrested,” and the writer uses “embryo” to describe two men that had agreed to duel after a disagreement in the court room but were prevented from ever having that duel. Thus, they were “embryo” duelists, or ones that had never fully developed. Other articles showed “embryo” being used the same way, often in the phrase “in embryo,” like a “business in embryo” was one that was just beginning. So perhaps writers discussing science were already familiar with the word “embryo” to mean something early in its stages, which encouraged them to use it over “fetus,” even if “fetus” may have been more appropriate, though it is hard for me to judge that, as writers omitted mention of gestational ages of animals they discussed.

The articles mentioned thus far are ones about plants and animals. The writers showed no inclination to grant either plant or animal embryos personhood, based on their neutral language, but their language shifted in articles written about science or research on humans. A few interesting trends appeared in articles that featured human-focused science, articles that had titles like “Danger to Life in Roentgen Rays” (1907), “Progress Toward the Control of Sex” (1911), “Does Alcoholism in Parents Injure Children by Heredity?” (1912), “Discovery May Aid Pre-Natal Health” (1929), and “Rabbits Born in

Glass” (1934). The first trend is that writers for *The New York Times* did not shy away from quoting from the researchers they interviewed or read papers by. Some articles were simply a transcription of a researcher talking about their work (“Scientist Declares Habits Are Inherited” 1931). In quotations from scientists, words like “embryo” and “fetus” appear often, examples of scientists using the language invented by members of their field to indicate specific periods in gestation (“Discovery May Aid Pre-Natal Health” 1929; “Siamese Twins to Be Separated” 1915; “Finds Body Fixes Its Oxygen Supply” 1933; “5 Babies Are Fed on 2-Hour Plan” 1934). For example, in a 1934 article about a woman who had quintuplets, the writer includes this quote: “‘I think there was a possibility of sextuplets,’ said Dr. A. R. Dafoe. ‘I believe six embryos formed and one did not mature.’” (“5 Babies Are Fed on 2-Hour Plan” 1934).

However, when *The New York Times* writers referred to embryos or fetuses, they often used “unborn child” (“Progress Toward the Control of Sex” 1911; “Does Alcoholism...” 1912; “Use of Quinine or Alcohol Blamed As Pre-Natal Cause of Deafness” 1936). For example, in the 1911 article “Progress Toward the Control of Sex,” the writer states, “When women are about to become mothers are dosed with adrenalin, a drug made from these organs, it is found that the pulse of the unborn child is retarded.” In some articles, there are quotations from scientists using “embryo” or “fetus,” while *The New York Times* writer uses “unborn child” or something similar. The author of “Use of Quinine or Alcohol Blamed As Pre-Natal Cause of Deafness” in 1936 quoted a medical doctor as saying quinine may “‘readily permeate the placenta, may be toxic to the fetus’” while the writer titles a subsection in the article as “Consequences to the Unborn.” In other occasions, *The New York Times* writer does use “embryo” to describe developing

humans, but it is clear from the text of the article that the writer read a report by or listened to an address by a scientist in preparation for writing the article. So we see perhaps scientific words slipping from scientists' writings or speeches into the writers' vocabulary. For example, an article titled "Chemical Human Embryo!" may seem like an indicator that the writer was using scientific terms to describe developing humans (1910). But when we take a closer look, we see that the first sentence of the article goes, "The Mexican Consul at Trieste reports that Prof. Herrera, a Mexican scientist, has succeeded in forming a human embryo by chemical combination" ("Chemical Human Embryo!" 1910). The "reports" implies that there was a physical document or announcement involved, which *The New York Times* writer had access to. Perhaps that was where "human embryo" came from, as the word "embryo" does not appear throughout the rest of the article.

For the most part, then, writers of *The New York Times* used words like "unborn child" or "babies" to describe developing humans in the womb. As we saw in Chapter 1, those kinds of words were on the more humanizing end of the spectrum, as opposed to scientific words like "embryo" or "fetus." Did the use of those words reflect the writers' or the public's interest in seeing embryos and fetuses treated as people?

Another category of *The New York Times* article consisted of reports of news that had something to do with a human embryo or fetus. My favorite example is a 1903 article titled "Forgives Errant Princess," in which the writer conveys the dramatic story of the Crown Princess of Saxony possibly reconciling with her husband and the Court of Saxony after she ran away from the court while pregnant to have an affair ("Forgives Errant Princess" 1903). The writer refers to the princess's *in utero* entity as an "unborn

child,” which follows the trend seen in this category of articles. In news stories that feature no mention of science or research, the writers for *The New York Times* refer to embryos and fetuses as “unborn child” or “unborn baby” (“Keeper Laverty’s Accuser on Trial” 1886; “Killed by a Jealous Husband” 1892; “‘Comet’ Kills Two” 1906; “Condemned Man Can’t Wed” 1912; “Sentence Wife Slayer to 25 Years in Prison” 1920; “Court Holds Woman’s Labor Belongs to Her Husband” 1925; “Woman Faces Noose in England Today” 1926; “Nurse Ends Life Begging Marriage” 1927).

One might hypothesize from that trend that the writers gave the “unborn children” they wrote about some characteristics of people when mentioned—giving their lives the same weight as the lives of the adults they discussed. Not so. We can see quite the opposite when we examine the articles about death and murder, always delightful things to discuss. In the 1892 article “Killed by a Jealous Husband,” the writer describes “a cold-blooded murder” in which a husband, convinced his wife was having an affair, stabbed her three times. The woman was pregnant at the time, and when she died, the “unborn child” as termed by the writer, did too. However, the writer mentions only *one* murder. The subheading for the article is: “Brutal murder in the Italian Colony of Providence, R. I.” And the final sentence of the article reads: “Five children are rendered motherless by *the* murder (italics added).” Two instances of the singular “murder,” not one instance of plural “murderers” as one might expect if the writer considered the “unborn child” to be person enough as to count as being murdered.

We can do a similar number-based exercise with a 1906 article titled “‘Comet’ Kills Two.” The writer describes how a train called “The Comet” smashed into a horse and buggy carrying a man and a pregnant woman. The writer describes the deaths in

sequence, starting with the “mangled horses,” the relating how the man was “ground to pieces,” and the woman whom “the wheels passed over.” And while the writer mentions early in the piece that the train killed “Walter Williams [the man], and killed his young wife and her unborn child,” the writer doesn’t mention the “unborn child” again—nor is the embryo or fetus reflected in the title. Although it could be said that five organisms died—two horses, one man, one woman, and one fetus—the title of the article is “‘Comet’ Kills Two”; the writer left the horses and the embryo or fetus out of the death count, indicating the status of the “unborn child” was, for the writer, more akin to the status of the horses than to the two adult humans.

As a final example, the 1920 article “Sentence Wife Slayer to 25 Years in Prison” follows the trend of writers not really acknowledging embryos or fetuses as people even when they refer to them as “unborn child.” The writer of “Sentence Wife Slayer to 25 Years in Prison” describes a courtroom sentencing of a man who had committed “the murder of his bride, Ruth Wanderer, and her unborn child.” There, it seems like the writer might be saying that the “unborn child” was also murdered, but a second murder is not reflected in the title of the article, and the writer later describes the moment “in which Mrs. Wanderer was slain”—not “Mrs. Wanderer and her unborn child.” It is unclear whether the legal charges against Mr. Carl Wanderer included two murderers or just one—as discussed in Chapter 1.5, under criminal law, there could be legal repercussions if an embryo or fetus was killed. But, the *New York Times* writer didn’t seem to place much weight on the “murder” of the “unborn child,” indicating that perhaps people in the early 1900s weren’t convinced that embryos and fetuses were people, nor concerned that their person-ness be recognized.

There is one exception to the above trend. In 1935, a series of *New York Times* articles ran, featuring a debate between a Catholic archbishop and an executive of the American Birth Control League about whether contraceptives counted as “killing an unborn child” (“Links Birth Control and Dillinger ‘Mob’” 1935; “Defending Birth Control” 1935; “Archbishop Murray’s Statement” 1935). The first article was written by a *New York Times* reporter on 17 August 1935 and described how Archbishop John Gregory Murray of St. Paul, Minnesota, had said in an interview that, “I see little difference in killing an unborn child and a living person” (“Links Birth Control and Dillinger ‘Mob’ 1935). The archbishop was replying to a criticism birth-control advocate Margaret Sanger had made of him after he announced that contraception was banned in his congregation, in line with a papal letter from 1932. Four days later, *The New York Times* published a Letter to the Editor from Marguerite Benson, the executive director of the American Birth Control League (“Defending Birth Control” 1935). She stated the archbishop’s claim was incorrect as “birth control was the prevention of conception,” implying that there was no “child” to be killed or murdered. On 3 September 1935, *The New York Times* published another Letter to the Editor from Reverend Ignatius W. Cox, who weighed in on the debate and said that the archbishop’s murder comments had been about abortion, not contraception, and that Marguerite Benson’s outrage was misplaced (“Archbishop Murray’s Statement” 1935). The point we can take away from those articles is that there were some who considered embryos and fetuses as people and wanted to defend them as such, but those people were often affiliated with the Catholic Church, and we’ll talk about its influence in Chapter 3.

The main takeaway here is that *The New York Times* articles didn't seem to be reflecting any strong fetal personhood movement among the public. Even when writers reported on court cases dealing with issues of fetal legal personhood in court cases, they didn't spend time arguing for or against fetal rights. They simply related the events as they had occurred in the courtroom ("Girl of 4 Sues for Prenatal Accident" 1920; "Mother Loses Odd Suit" 1928). In fact, in the 1920 article "Girl of 4 Sues for Prenatal Accident," in which the writer describes how the pregnant woman was bitten by a horse and gave birth to a deformed infant, who later sued for the injury, the strongest claim the writer makes about personhood is: "Attorneys who discussed the case agreed that the chief legal obstacle...is the difficulty of proving that the child would not have been deformed had there been no accident, and also whether a cause of action arose at the time in behalf of the plaintiff, then unborn." The writer didn't include any mention of public outrage or even interest in the legal personhood of fetuses, and no Letters to the Editor or other opinion pieces appeared to that effect from 1884 to 1946.

So if it wasn't the court of public opinion pushing the change in judges' opinions on fetal personhood, what was it?

A Right Is Gained...Using Some Wrong Words

By now we've reviewed many court cases to do with fetal legal rights in the early twentieth century, and we haven't answered the question of how fetuses gained their first new right in centuries in 1946. It wasn't because judges were motivated by new science

on embryos and fetuses. It wasn't because judges were responding to an intense public demand for embryos and fetuses to be treated like already-born humans. Some judges did use more technical language—like “foetus” and “viable”—to partition gestation into sections and deem fetuses legal persons near the end of their *in utero* development. Perhaps that indicates an increased awareness of science in some judges. But that wasn't the main trend in judicial decisions. What was? Well, let's look at a few cases that came to the courts in the 1940s to find out.

We already discussed court decisions, or parts of decisions, where judges agreed that a fetus should become a legal person at some point for tort purposes. We went over Boggs's dissent in *Allaire v. St. Luke's Hospital*, Westerfield's decision in *Cooper v. Blanck*, and Gordon's discussion on fetuses in *Kine v. Zuckerman*. But there was another case where a judge decided to grant a fetus the right to recover for prenatal injuries. And in that decision, the judge didn't discuss any science whatsoever.

The case, *Stemmer v. Kline*, came to the Circuit Court of New Jersey, Middlesex County, in December of 1940 (*Stemmer v. Kline* (1940)). “Stemmer” in the name of the case refers to Jacob Stemmer, Jr., who was an infant¹¹ suing for injuries that occurred while he was in his mother's womb (*Stemmer v. Kline* (1940), p. 15). According to the court documents, while Pauline Stemmer was pregnant, the physician William Kline treated her to X-ray treatments for an unnamed condition (p. 16). Jacob Junior was later born and, according to the court, was “a microcephalic and an idiot without skeletal

¹¹ in the legal sense of being under 21 years old.

structure, sight, speech, hearing, or the power of locomotion” (p. 16). He was five years old when Judge Oliphant decided *Stemmer v. Kline* in 1940 (p. 16).

In his decision, Oliphant focused not on how far along in gestation the fetus had been when injured (indeed, the documents don’t specify gestational age beyond the fetus being “quick”), and not on how independent the fetus was from the pregnant woman at the time. Instead, Oliphant spent his seven page decision discussing the various areas of law where embryos and fetuses were held to be legal persons and wondering why that wasn’t the case in tort law (*Stemmer v. Kline* (1940), pp. 16–19). For example, Oliphant notes that an “infant” in the womb could have a guardian appointed for it, could have an estate bequeathed to it, and could be killed (via abortion) in such a way that someone could be held criminally responsible (p. 16). As evidence, Oliphant cites a multitude of court cases, including *Dietrich v. Inhabitants of Northampton* (which he dismisses as irrelevant to *Stemmer v. Kline* because the fetus in *Dietrich v. Inhabitants of Northampton* died, which was not the case for *Stemmer v. Kline*) and *Allaire v. St. Luke’s Hospital* (p. 19, 19–20). In the discussion of *Allaire v. St. Luke’s Hospital*, Oliphant pays special attention to Boggs’s dissent, though not the sections that I quoted about the science of embryos and fetuses. Rather, Oliphant says: “Justice Boggs held the action could be maintained and said ‘If, in delivering a child, a physician, acting for a compensation, should wantonly or by actionable negligence injure the limbs of the infant, and thereby cause the child, although born alive and living, to be maimed and crippled in body or members, it would be abhorrent to every impulse of justice or reason to deny to such a child a right of action against such physician to recover damages for the wrongs

and injuries inflicted by such physician.’ This reasoning is unanswerable” (*Stemmer v. Kline* (1940), p. 20).

So we see there that Oliphant isn’t focusing on Boggs’s argument about the fetus eventually becoming viable and therefore a separate legal person from the pregnant woman. Rather, Oliphant dwells on Boggs’s legal reasoning for a case in which a born-alive child should be able to recover for injuries inflicted upon it as a fetus.

And while we previously examined Boggs’s dissent, as well as *Cooper v. Blanck* and *Kine v. Zuckerman*, for their scientific reasoning, it would be inaccurate to say that those cases turned on science alone. In all three documents, the judges made legal arguments to support their decisions as well. Boggs, in particular, articulated two legal snags that previous courts, including some English courts in prior centuries, had claimed obviously prevented courts from granting legal personhood to injured fetuses (*Allaire v. St. Luke’s Hospital* (1900), pp. 373–374). The first problem, as presented by Boggs, was that courts could not be sure that the fetus was even alive in the womb when the alleged injury occurred (p. 374). We saw that reasoning in Chapter 1 when we discussed why old English courts didn’t punish people for providing women with abortions; there was no way to prove that the abortion methods were what actually killed the fetus. However, Boggs states, that kind of reasoning didn’t apply in cases where the fetus was born alive, as if it was born alive, it had to be alive when the injury occurred (p. 374).

The second commonly-proposed snag to granting fetuses the right to sue for injuries revolved around the lack of a contract or duty to the fetus (*Allaire v. St. Luke’s Hospital* (1900), pp. 373–374). In his dissent, Boggs brings up the case *Walker v. Railway Co.*, which was a case that arose in Ireland in 1891 after a pregnant woman on a

train befell some accident, was injured herself, and later gave birth to a child who was a “cripple,” according to Boggs (p. 373). The Irish court denied the born-alive child the right to recover damages for that injury because the railway company didn’t know of the fetus’s existence, hadn’t sold the fetus a ticket to ride the train, and thus didn’t have any legal duty to provide a safe, accident-free train ride to the fetus (373). Therefore, because the railway company didn’t have a legal duty to keep the fetus safe on the train, the company wasn’t in any legal trouble for not doing so. They had, in legal terms, breached no duty (p. 373). Boggs challenges that logic by using the case of a physician treating a pregnant woman in a hospital—exactly the circumstance in *Allaire v. St. Luke’s Hospital* and in *Stemmer v. Kline* (pp. 373–374). According to Boggs, if a physician is treating a pregnant woman, the physician is aware of the fetus in the womb, and, especially if contracted by the pregnant woman to help her give birth to said fetus, has a legal duty not to injure the fetus in the process (p. 374).

Like Boggs, Oliphant pokes similar holes in prior decisions to deny fetuses legal standing in tort cases. He claims that because physician William Kline was aware that Pauline Stemmer was pregnant, he had a duty not to injure the fetus while providing Pauline her medical treatments (*Stemmer v. Kline* (1940), p. 28). The last paragraph of the *Stemmer v. Kline* decision reads: “I do conclude, however, that whereas here the defendant is a doctor, and he knew or should have known of the existence of the child, that he owed a duty to the child, and if that duty was disregarded and through his negligence the child was injured while the mother was quick, if it is born viable, and action should lie on behalf of the child for the damages occasioned it and for any

consequential damages resulting therefrom to its parents” (*Stemmer v. Kline* (1940), p. 28).

There, we see Oliphant resting his final decision on the fact that the physician had a legal duty to care for the fetus and the breach of that duty is what gave the fetus standing to sue for damages. Oliphant does mention that the pregnant woman has to be “quick” (or to have felt the fetus moving in the womb) and that the fetus has to “born alive” (capable of living separate from the pregnant woman) for the fetus to be able to recover—and those requirements do have some ring of biology to them, but it is not *because* the fetus is quick or viable that Oliphant grants it the right to sue (*Stemmer v. Kline* (1940), p. 28). It is because a legal wrong was done to it—a breach of duty—that the fetus can recover damages. Being quick or viable were simply boxes to check on the way to the courtroom.

To look at *Stemmer v. Kline* from another angle, we can see that the language Oliphant uses confirms that he was making a legal, not scientific argument. His words to describe the fetus consisted of the traditional legal language of “child,” “unborn child,” “child en ventre sa mere,” and “infant” or “infant en ventre sa mere” (*Stemmer v. Kline* (1940), pp. 15–28). He doesn’t use “embryo” or “fetus” like Boggs, Westerfield, or Gordon because he didn’t consult any sources other than legal ones—court cases, mostly, along with a few state statutes. Oliphant made his decision in *Stemmer v. Kline* entirely about how different areas of law gave embryos and fetuses some kind of personhood while tort law did not. Granted, in any area of law, a fetus had to be born alive in order to receive the benefits of its legal personhood (p. 17). A fetus designated an heir to an estate while in the womb could inherit said estate only if born alive. If it was stillborn, it didn’t

inherit anything. But the fetus in *Stemmer v. Kline* was born alive, as evidenced by the resulting child being five years old in 1940, so Oliphant was making an argument in line with the requirements for fetal personhood in other areas of law.

Unfortunately for Oliphant, William Kline appealed the decision to a higher court, the Court of Errors and Appeals of New Jersey, which reversed the decision in 1942 (*Stemmer v. Kline* (1942)). The 1942 reversal was not a unanimous decision (p. 459). Of the fifteen judges who weighed in, ten were for reversal and five were for affirming Oliphant's original decision (p. 459). But ten was bigger than five, so the court reversed Oliphant's ruling, basing their decision on previous cases that had denied fetuses standing in tort cases, as well as a section of *Restatement of the Law of Torts* (p. 455). *Restatement of the Law of Torts* was a compilation of US common law dealing with torts, as summarized by the American Law Institute in 1939 (Prosser 1939). Their view on prenatal tort cases was: "A person who negligently causes harm to an unborn child is not liable to such child for the harm" (Prosser 1939, paragraph 869). And that was what the Court of Errors and Appeals of New Jersey went with.

But fetuses weren't left without their tort rights for long. In March of 1946, a judge for the District Court of the United States for the District of Columbia handed down his decision in a case called *Bonbrest v. Kotz*. Yes, we made it to the oft-mentioned and as-yet unexplained *Bonbrest v. Kotz* decision. It was about an instance of prenatal injury, but the question the court faced was *whether* the lawsuit was even permitted under the law (*Bonbrest v. Kotz* (1946), p. 139). The judge didn't award any monetary compensation at the end—he simply decided whether or not the case could proceed in the courts (p. 143). The story behind the case goes like this: A pregnant woman was giving

birth in a hospital, and during delivery, one of her physicians injured the neonate while it was being born (p. 139). That neonate, later named Bette Gay Bonbrest, survived and took the physicians to court over the injury (p. 138). A canny reader will note that this is almost exactly the kind of circumstance Boggs described in 1900 where it would be clear that a fetus had the right to sue for an injury done to it (*Allaire v. St. Luke's Hospital* (1900), pp. 373–374).

Indeed, the judge deciding the case, Judge McGuire, thought so too. In his decision, he claims that the circumstances in *Bonbrest v. Kotz* were most definitely distinct from the circumstances in *Dietrich v. Inhabitants of Northampton* and cases like it, since the injury was done directly to the fetus (making it clear exactly what caused the fetus's troubles) and that the fetus survived the ordeal and lived to tell the tale—or, rather, sue for it (*Bonbrest v. Kotz* (1946), p. 140). Like Oliphant in *Stemmer v. Kline* (1940), McGuire goes on to bring up the schisms in the way different areas of law were treating embryos and fetuses at the time, some granting legal personhood and others (particularly tort law) not (*Bonbrest v. Kotz* (1946), p. 140–143). He asks: “Why ‘part’ of the mother in the law of negligence [tort law, for our purposes] and a separate entity in that of property and crime? Why a human being under the civil law, and a non-entity under the common law?”¹² (p. 140).

¹² I know we've been using the term “civil law” to indicate court cases where there's two citizens legally duking it out with each other, as opposed to criminal law where it's the state prosecuting a citizen for a crime. However, in the endlessly slippery language of the US legal world, there is another use of “civil law” that means the laws that came from statutes used in Europe, especially Rome (like the laws of property and inheritance), as opposed to common law, which indicates the laws established by decisions made by judges in the courtroom (like the fact that abortion is federally legal, as established in *Roe*). Here, McGuire is using the second version of “civil law,” so don't let it throw you off. (“civil law” 2013).

Obviously, from that quotation, we can see that McGuire was very much considering whether embryos and fetuses counted as separate entities and human beings in the eyes of the law—exactly what we’ve been talking about. And his answer to the questions he poses is that fetuses of a certain kind should be legal entities and human beings in the area of tort law. His main point can be seen in a quotation¹³ from the Supreme Court of Canada when they faced a similar situation: ““To my mind it is but natural justice that a child, if born alive and *viable* (italics supplied by McGuire) should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.”” (*Bonbrest v. Kotz* (1946), p. 142).

The Supreme Court of Canada permitted a born-alive infant to recover for injuries sustained in the womb, and McGuire followed suit, permitting Bette Gay Bonbrest to go ahead with her case against the physicians who attended her birth (*Bonbrest v. Kotz* (1946), p. 142, 143). Like Oliphant in *Stemmer v. Kline* (1940), McGuire based the *Bonbrest v. Kotz* decision on legal matters. He pointed out all the areas in which fetuses were treated like legal persons and then decided to permit fetuses legal standing in tort cases as well. It was a moment of making US law more cohesive and less wildly split on the matter of fetal standing. The answer to the big question for Chapter 2—why did fetuses gain a new legal right in 1946—turns out to be: Because of judges. It was judges who were pushing for fetuses to be recognized as legal entities in cases of prenatal injury. Sure, Holmes denied such standing in *Dietrich v. Inhabitants of Northampton* and many judges followed suit, but as we’ve seen, other judges saw the flaws in the logic of *Dietrich v. Inhabitants of Northampton* and aimed to reduce the dissonance between the

¹³ Like the rest of our judges, McGuire loved to quote other courts to back himself up.

rights embryos and fetuses had in property and criminal law.¹⁴ From the way judges discussed embryos and fetuses in their decisions, they weren't advocating for their rights because of some great passion for defending *in utero* entities. Rather, it seemed that judges were advocating for cohesion in their own discipline. It was a professional discussion among judges about how pieces of the legal field did not fit with each other.

But we're not done with McGuire's *Bonbrest v. Kotz* decision yet. We've covered the important parts of the legal precedent he set—that a born-alive infant could recover for injuries sustained in the womb as long as it was viable at the time. And dozens of cases after *Bonbrest v. Kotz* adopted that position just like prior courts had adopted the *Dietrich v. Inhabitants of Northampton* decision. Post-*Bonbrest*, the majority of cases that fit the above criteria resulted in the infants receiving compensation for their prenatal injuries. It was a major shift in tort law and fetal rights (Some cases include: *Verkennes v. Corniea* (1949); *Damasiewicz v. Gorsuch* (1951); *Amann v. Faidy* (1953); *Steggall v. Morris* (1953); *Rainey v. Horn* (1954); *Porter v. Lassiter* (1955); *Mallison v. Pomeroy* (1955); *Hornbuckle v. Plantation Pipe Line Co.* (1956); *Sinkler v. Kneale* (1960); *Shousha v. Matthews Drivurself Serv., Inc.* (1962); *Hatala v. Markiewicz* (1966)).

However, McGuire didn't use the same explanation of viability as previous judges. Like prior courts, he referenced medical jurisprudence books and the fact that at some point fetuses could live after the pregnant woman died and that the fetus and the pregnant woman had separate circulations—all those old facts we've already discussed

¹⁴ Many judges, like Oliphant in *Stemmer v. Kline* (1940), viewed the anti-abortion laws of the US to be protective of the fetus and thus granted the fetus a kind of legal standing in that it was illegal to abort one. However, I would like to push back against that interpretation under the evidence provided in Chapter 1.5 that many anti-abortion laws were put into place to protect women's health, not safeguard embryos and fetuses. But we'll deal with that more in Chapter 4.

(*Bonbrest v. Kotz* (1946), p. 141, footnote 14). But he also did something new. His decision in *Bonbrest v. Kotz* hinged upon the fetus being viable, and when he explains what he means by “viable,” he writes the following paragraph:

As to a viable child being ‘part’ of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable of extra-uterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not ‘part’ of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.
(footnote 11) (*Bonbrest v. Kotz* (1946), p. 140).

There, we can see a technical term popping up—“foetus”—when McGuire uses “infant” and “child” and the like for the rest of his decision (*Bonbrest v. Kotz* (1946), pp. 138–143). And, we also see that McGuire set a different kind of precedent in our story: he was the first judge in our stack of cases to use footnotes in his decision (p. 143). Footnote 11, as seen at the end of the above paragraph, is particularly interesting.

Following it down to the footnotes section at the end of the decision, we find that footnote 11 reads: “By the eighth week the embryo or foetus, as we now call it, is an unmistakable human being, even though it is still only three-quarters of an inch long.

***’ *Ourselves Unborn*, p. 69, Corner, Yale University Press, New Haven, 1944 (representing substance of the Terry Lectures at Yale in March, 1944).”¹⁵

The book McGuire references, *Ourselves Unborn*, was written by George Washington Corner, a researcher who worked in the field of embryology in the early twentieth century and was well-published and often-referenced by other scientists as being a good one (Buettner 2012). McGuire seems to be using a quote from *Ourselves Unborn* to declare that a well-respected scientist viewed a “foetus” at eight weeks as a human being—just like McGuire was arguing that a fetus was a legal human being the same as any human already born.

But, McGuire either didn’t read the rest of the passage on page 69 of *Ourselves Unborn* or he didn’t mind perpetrating a small literary crime. For Corner wasn’t talking about whether or not the fetus at eight weeks was a human being with a born-human’s consciousness or legal separate-ness from its mother (Corner 1944, p. 69). By reading a few more paragraphs on, we can see that when Corner said the fetus was “an unmistakable human being,” he meant that by week eight, you could tell that the fetus was of the human species, rather than another vertebrate mammal species, as early embryos of many species look quite alike (p. 69). On page 70, Corner writes: “Thus to the seeing eye the human embryo from egg to birth is an archive in which is written the evidence of its descent as an animal, a vertebrate, an amniote, a mammal, a primate.”

¹⁵ There is another sentence in footnote 11, quoted from the same book, about how people in China deemed their children to be a year old at birth, to account for the time spent developing in the womb. However, that tradition as of 2019 is no longer practiced in most parts of China, and it is unclear when it went out of practice. I suspect George Washington Corner, the author of the sentence, might not have confirmed the exact history of the tradition, and anyway, it is not relevant for our discussion, so I will omit it.

Corner is explaining in his book how examining human embryos can reveal common traits between early stages of human development and early stages of other species' development (Corner 1944, pp. 56–70). “Unmistakable human being” was his way of saying that by week eight of gestation, you knew the fetus was a *homo sapiens*, not a dog (p. 70). In addition, Corner uses the correct spelling of fetus in his book. The sentence cited by McGuire actually reads, “By the eighth week, the embryo, or fetus, as we now call it, is an unmistakable human being,” with the term “fetus” written instead of “foetus” as McGuire unfaithfully quotes it (p. 69).

Does that matter for *Bonbrest v. Kotz* directly? It's unclear. McGuire's argument relies on legal logic, not scientific claims, though he does use science to support himself, as made apparent by the other sources cited in his footnotes. He includes references to the nineteenth edition of the *American Illustrated Medical Dictionary* (to say that “viable” means a fetus can live outside the uterus), as well as *Physiology and Anatomy* by Esther Greisheimer (to show that a “fertilized human ovum is a one-celled individual”) (*Bonbrest v. Kotz* (1946), footnote 8; footnote 13). That quotation from *Physiology and Anatomy* also concerns me, seeing as it contains the word “individual” (footnote 13). Like “human being,” “individual” can be used to indicate that an entity is a person with their own independent life—as opposed to the biological meaning of “individual” as an organism distinct from the parent organism with no other connotations of having thoughts, feelings, or personal preferences about your life.

Indeed, McGuire includes a footnote on the definition of “person” from *Webster's New International Dictionary, Second Edition*: “(1) a specific kind or manifestation of individual character; (2) a being characterized by conscious apprehension, rationality and

a moral sense; a being possessing or forming the subject of personality, hence an individual human being; a particular individual; (3) (c) one as distinguished emphatically from things or animals.” (*Bonbrest v. Kotz* (1946), footnote 13).

McGuire footnotes that definition at the end of the sentence: “Why a ‘part’ of the mother under the law of negligence and a separate entity and person in that of property and crime?” (*Bonbrest v. Kotz* (1946), p. 140). I take that to mean McGuire was defining “person” to indicate what he thought a person recognized in the legal world meant—someone with a personality and rationality and moral sense, someone that sounds a lot like an already-born human being. Was that McGuire’s opinion of what a fetus was? Did he use Corner’s “unmistakable human being” to subtly imply that scientists viewed fetuses as human beings with personalities and individual character?

Guessing at someone’s intention by examining where they placed their footnotes might not be completely accurate, but I think it is worth considering why McGuire found an everyday definition of “person” that described a thinking human being, instead of relying on the old legal definition of “person” that described someone upon whom the law acts and provides for. Why did he reach out to other sources—a scientist’s book, a biology textbook, a regular dictionary—when so many other judges, even judges who agreed with his decision, made do with medical jurisprudence books and legal references. Could it be that McGuire reflected an early social trend of viewing fetuses as people in the everyday sense?

Now that we’ve shown how fetuses gained a new legal right, we’re going to spend some time discussing who viewed fetuses as people in a non-legal sense, when those impressions arose, and how the idea of fetuses as people became more inflamed on

the way to *Roe v. Wade*. Though judges were the main advocates for fetus's legal standing in tort cases, other actors get involved as fetuses become more person-like than they have been in our story so far.

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CHAPTER 3: VARIOUS PERSONHOOD MOVEMENTS ARISE, AND MOST "PERSONS" IN THEM ARE ALREADY BORN

Though we've spent pages discussing the legal rights of embryos and fetuses, and though we've seen that humans have been discussing the person-ness of *in utero* entities for centuries, the word "personhood" didn't appear in the English language until about 1944, according to the *Oxford English Dictionary* ("personhood, n."). That date aligns neatly with the end of Chapter 2 and the beginning of this chapter, Chapter 3. We saw in Chapter 2 that fetuses gained a new legal right, or aspect of their legal person-ness, thanks to sixty-two years of judges pushing to reconcile different areas of law and their varying treatments of embryos and fetuses. In this chapter, we're going to look at the period after *Bonbrest v. Kotz* and before the start of *Roe v. Wade*, from 1946 to 1970.

In the second half of the twentieth century, personhood emerged as a widely-discussed idea in the United States. The end of World War II and the Holocaust left the US public with an impression of large-scale crimes against humanity and what it looked like when humans were stripped of their rights as persons. Meanwhile, the Civil Rights Movement and the beginning of a second women's rights movement filled public discourse with ideas of who counted as a person, as well as what legal rights a person had and what social privileges they should be able to enjoy. While none of those discussions involved embryos or fetuses at the outset, language from the post-war Nuremberg Trials and the various civil rights movements slipped and slopped into the emerging movement for fetal rights near the end of the 1960s, helping fetuses gain status as a group in need of their own legal rights.

But personhood in the 1950s and 1960s wasn't just about legal rights as we saw the courts discussing in Chapter 2. A different flavor of personhood appeared in the writings of people advocating for equal treatment for women and African-Americans—a more nebulous, hard-to-pin-down idea of a person being someone who has a life and interests. Outside of the pursuit for the legal aspects of personhood, we'll see trends that engaged the public in building a more social idea of fetal personhood as well. From popular news and magazine articles to the establishment of a new medical field, there were trends afoot that encouraged folks in the United States to view or consider embryos and fetuses as more than simple collections of cells in a uterus but as individuals with their own stories and concerns.

In that way, we'll chart how the discussion of fetal personhood moved beyond the mostly-tame judicial discussions we saw in Chapter 2 and toward the impassioned, strongly polarized discussions that sprang up at the beginning of the 1970s on the way to *Roe*. And we'll see that while fetuses were becoming more of social persons, their legal personhood was still in a kind of limbo state that set the stage for the Supreme Court's decision in 1973.

An International Agreement on Personhood: The Nuremberg Trials

World War II did not impact every aspect of life in the United States in the late 1940s and beyond, it is fair to claim that World War II commanded the attention of the country both during the war itself and after the bombs and bullets stopped flying. The

international trials held in Germany after the war are particularly relevant for our story. There, the international community, with the United States playing a major role, declared and decried the crimes against humanity perpetrated by the Nazi regime and how terribly they had treated people in general (Bosch 2018, chapter 1). For while humans as a whole haven't historically been great at identifying or defining the rights and dignity of persons, we do on occasion spot that they have been violated. The trials held in Nuremberg, Germany, were a forum in which the victorious nations, particularly the United States, stated to the world that humans had certain rights simply because they were human, and that they were to be treated with the respect and dignity due to them as persons.

Neither embryos nor fetuses were mentioned at Nuremberg or by the Nazis, but later documents about embryos and fetuses mention both Nuremberg and Nazis. That shows that the ideas of personhood stirred up by World War II did linger and did have an impact on subjects not obviously related to the war, such as fetal personhood.

When World War II ended, the victorious side—known as the Allies and consisting of the US, the United Kingdom, France, and the Soviet Union—put many high-ranking officials of the Nazi regime on trial for crimes they committed during the war (Bosch 2018, chapter 1). While we often lump all of the trials together as “the Nuremberg Trials,” several different proceedings actually took place. Two of those are most important here.

The first one is probably the most well-known—the trying of twenty-four high-ranking Nazi officials in front of the International Military Tribunal in Nuremberg, Germany, between November of 1945 and October of 1946 (Hippel 2006, p. 106). Each of the Allied nations sent judges and prosecutors to make up the International Military

Tribunal, and the accused were tried under international law. The accusations against the defendants included conspiring to commit war crimes and crimes against humanity, ordering the performance of medical experiments without subjects' consent, and murdering and mistreating large groups of people (Hippel 2006, pp. 106–107; *Nuremberg Military Tribunals: Indictments* 1946, pp. 3–12).

The second trial also occurred in Nuremberg, Germany, and took place in the same courtroom in the Palace of Justice, but it did not involve international law or the International Military Tribunal. Officially named *United States of America v. Karl Brandt, et al.*, it is more commonly known as the Doctors Trial, where the Nazi doctors and medical officers who tortured and experimented on prisoners in concentration camps were tried for their crimes (*Nuremberg Military Tribunals: Indictments* 1946, pp. 3–12). As evidenced by the name of the trial, the Doctors Trial involved only the United States, and those on trial faced United States judges, prosecutors, and US law from December of 1946 to August of 1947 (United States Holocaust Memorial Museum, Washington, DC, “The Doctors Trial”). The United States prosecuted the Nazi doctors for performing the medical experiments mentioned in the trial of the high-ranking Nazi officials. Such experiments included keeping people in tanks of ice water to see how long they lived and how best to treat them afterward; infecting healthy people with malaria to test how best to cure them; deliberately injuring people with mustard gas to see how best to treat their wounds; transplanting bones from one person to another person; forcing people to drink seawater by providing no other food or water; poisoning people to see the effects of various poisons on human bodies; and many, many more (*Nuremberg Military Tribunals: Indictments* 1946, pp. 3–12). Both the International Military Tribunal proceedings and the

Doctors Trial played important roles in the story of personhood, even if they didn't specifically talk about embryos or fetuses.

The first, and perhaps most important, thing to note is that by their very existence, the Nuremberg and Doctors Trials were an example of people holding other people accountable for acts and tortures committed against human beings. By doing so, the countries involved in the trials at Nuremberg declared that it was a crime to torture and kill human beings in the above ways during war time or any other time—simply because the victims were human beings. Their humanity, the fact that they were people, was what made the acts committed against them criminal. In the opening statement of the trial, US chief prosecutor Robert H. Jackson stated, “They [the Nazis] took from the German people all those dignities and freedoms we hold natural and inalienable rights in every human being” (“Opening Statement before the International Military Tribunal”). The emphasis on attacks against “persons” and their inherent rights and dignities was present throughout Jackson’s hours-long opening statement, and the indictments against the defendants share the same focus of crimes against people (*Nuremberg Military Tribunals: Indictments* 1946). The indictments list “Crimes against Humanity,” “the subjection of thousands of persons” to brutalities, and the enslavement of “millions of persons,” among other crimes.

In emphasizing that people have “natural and inalienable rights” because they are human beings in the context of trials for genocide and macabre “medical” experiments, the International Military Tribunal and the US courts clearly stated that humans, by virtue of being humans, had the right not to be hurt or killed by others. While that may have been clear before in individual countries’ legal codes—murder, for example, being

proscribed everywhere—having the victorious side of the then-largest war in history declaring it on an international stage with whatever pomp and circumstance was present at the Palace of Justice in Nuremberg, certainly had a magnifying effect. The Nuremberg Trials brought ideas of the “dignities” and “rights of a person” to the forefront.

Such strong endorsements of such rights and forceful denouncements of crimes against them resulted in a set of codes for how to preserve people’s rights. The Nuremberg Principles, for example, defined the extent to which people could be held responsible for crimes committed during a war, as well as what war crimes were (“No. 251: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.” 1951). Principle VI is most relevant for our story, as it stated that the various acts committed by the members of the Nazi party—murder, enslavement, torture—were, in fact, war crimes and crimes against humanity (Nuremberg Principle VI). Admittedly, some question how effectively the Nuremberg Principles have been enforced, as later court cases in various countries have veered away from the principles’ original terms (*Hinzman v. Canada (Minister of Citizenship and Immigration)* (2006), paragraph 157). But the effectiveness of the Nuremberg Principles isn’t our main interest in them; it is the fact that they were declared at all that tells us European and US societies at the time were thinking about the rights of people—or their personhood.

Further, we can leave aside the Nuremberg Principles in favor of the more-relevant Nuremberg Code, which originated from the Doctors Trial and contained guidelines for how the subjects of medical research were to be treated so as not to repeat the Nazi experiments (United States Holocaust Memorial Museum, Washington, DC, “Nuremberg Code”). The Nuremberg Code, which has been incorporated by the US

Department of Health and Human Services as well as institutional review boards for scientific research, consists of ten statements. While it behooves anyone in science to be familiar with all ten, only three of them have much bearing here.

It is not that the Nuremberg Code and Trials directly applied any of their reasoning to embryos and fetuses. No one mentioned embryos or fetuses during the trials, and the Nuremberg Codes discuss scientific experimentation, not the medical treatment of human beings, developing or otherwise. However, Nuremberg Codes 1, 4, and 5 do declare, respectively, that a person has to consent to any medical experiments performed upon them, that there should be no unnecessary physical or mental suffering or injury, and that no one should conduct an experiment if they think the subjects are going to die from it (United States Holocaust Memorial Museum, Washington, DC, “Nuremberg Code”). Thus, ideas of how to treat individuals during medical experiments were linked with the idea of people having inalienable human rights, just as the Doctors Trial was linked to the first Nuremberg Trial through time and place. Therefore, it follows—in a tenuous way, certainly, but not a dismissible way—that the treatment of people during any medical procedure might be linked in some minds to people having inalienable human rights. Why bring this up? Because the culmination of our story, *Roe v. Wade* in 1973, has to do with a medical procedure (abortion) being performed on either one person (the pregnant woman) or two people (the pregnant woman and the embryo or fetus).

Again, I’m not trying to draw a direct link or even a strong correlation between the two events. The justices in *Roe v. Wade* don’t mention the Nuremberg Code, and the reasons why women were or weren’t permitted to receive abortions weren’t based in the

Code, either. Instead, I'm pointing out that the Nuremberg Trials were big events that brought up ideas of personal rights and personhood in a big way. It would be close-minded to ignore such a big push for a respect for persons when telling a story about personhood. Ideas that a "person" had the right not to be killed or tortured were floating around in the 1950s, and they may have increased how sensitive people were to ideas of personhood.

Bonbrest v. Kotz took place in 1946, when trials in Nuremberg were still going on. The *Bonbrest* documents don't include any references to Nuremberg, but the fact that a US court was increasing the rights that fetuses had in the courtroom at the same time as the Nuremberg courts were declaring what rights humans had in general is too much of an overlap to overlook. So as we move forward, keep in mind that ideas around the "rights of a person" were present in the late 1940s because we'll see that same language in movements that arose post-Nuremberg.

People Fighting for Rights Outside of the Womb: American Civil and Women's Rights Movements

The discussion of human rights and dignities didn't go away after the judges at Nuremberg read their final sentences. Rather, in the United States, the discussions shifted to new areas. In the 1950s and 1960s, this country saw two groups of people step forward to assert that they were not being treated as the persons they were and that they wanted both full legal personhood as well as the more nebulous social personhood. Those two

ideas of personhood showed up in full force in both the Civil Rights Movement, in which African-Americans advocated for an end to racist discrimination in laws and society, and the second version of the US women's rights movement, in which women advocated for an end to sexist discrimination in laws and society. Like the Nuremberg Trials, neither advocacy movement mentioned embryos or fetuses explicitly (or even implicitly), but both movements popularized the idea of personhood in the United States, and their language slipped into the fetal personhood movement that emerged toward the end of the 1960s.

In fact, one of the first cases in the Civil Rights Movement featured a direct reference to the Nazis. In 1954, the case *Brown v. Board of Education of Topeka* was decided by the US Supreme Court. It is a familiar case in which the Court ruled that the segregation of public schools based on the long-standing doctrine of "separate but equal" was unconstitutional (*Brown v. Board of Education* (1954), p. 488, 495). The unanimous opinion by the nine Supreme Court justices ordered segregated schools to desegregate based on the authority of the Fourteenth Amendment to the US Constitution. *Brown v. Board of Education* was, of course, one of the first victories of the Civil Rights Movement, even though actual desegregation took years of struggle and strife to achieve (*Brown v. Board of Education* (1955); "School Segregation and Integration").

For our story, there are two points of interest in the *Brown v. Board of Education* case. The first is that a group called the American Veterans Committee submitted an *amicus curiae* brief to the Supreme Court on behalf of Oliver Brown and those fighting for desegregation in schools (Brief of American Veterans Committee, Inc. (A.V.C.)). The committee submitted a brief multiple times, as *Brown v. Board of Education* was argued

before the Supreme Court more than once. In the first paragraph of their 1952 brief, the veterans state that they fought in World War II to defend the democratic principles of the United States, including the elimination of racial discrimination (Brief of American Veterans Committee, Inc. (A.V.C.), pp. 1–2). Further, they state that the segregation involved in *Brown v. Board of Education* was “of the same cloth as the racism against which we fought in World War II” (p. 2). There, the veterans compare racism in the United States to the Nazis in World War II, thus establishing a link between *Brown v. Board of Education* and the trials that went on in Nuremberg. As we’ll see later, they weren’t the only ones who drew on Nuremberg to make their case.

The second point of interest in *Brown v. Board of Education* is that the Court based their decision on the Equal Protection Clause in the Fourteenth Amendment (1954, p. 488). One of the broadest, vaguest amendments to the Constitution, the Fourteenth Amendment has been used by courts in a variety of decisions, including *Brown v. Board of Education*, *Roe v. Wade*, and other racial and gender discrimination cases (*Roe v. Wade* (1973); *Reed v. Reed* (1971); *Browder v. Gayle* (1956)). It features prominently in the Civil Rights story, the women’s rights story, and later (perhaps following the example set by the previous movements) the fetal personhood story (“14th Amendment”). The Fourteenth Amendment has five sections, but the most referenced is the first section, which states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (“14th Amendment”).

Based on the number of references to “persons,” perhaps it is easy to understand why the Fourteenth Amendment played such a starring role in movements to do with the rights of people and their personhood. Basically, the Fourteenth Amendment guarantees that every “person” in the United States deserves equal protection under the laws of the federal and state governments; they can’t be discriminated against by the law based on qualities that are irrelevant to the goals of the law (“Equal Protection”). African-Americans and women asserted that being non-white or non-male did not matter as far as the law went, and therefore it was illegal for the law to discriminate against non-whites and non-males. Their “personhood,” or right to be people with full rights in the United States, was ensured and mandated by the Fourteenth Amendment.

Two years later, a similar case called *Browder v. Gayle* followed the same pattern as *Brown v. Board of Education*. The 1956 case, heard by the US Supreme Court, was a civil case that was very similar to the criminal case that resulted from Rosa Parks refusing to give up her seat on the Montgomery, Alabama, city bus to a white person (*Browder v. Gayle* (1956), F. Supp. 707). A district court ruled that four women, African-American like Parks, had the right to remain seated and that segregation on city buses¹⁶ was unconstitutional based on the Fourteenth Amendment (p. 711, 717). The Supreme Court affirmed the lower court’s decision later that year, thus establishing that the

¹⁶ Discrimination on inter-state bussing had been ruled unconstitutional several years prior (*Morgan v. Virginia* (1946)).

Fourteenth Amendment was a good legal foothold for people seeking to become full persons in the eyes of the law (*Browder v. Gayle* (1956), S. Ct. 323).

But legal rights weren't the only rights involved in the Civil Rights Movement. Court cases abounded, of course, and the Fourteenth Amendment saw a lot of use in court decisions, but many of the rights that African-Americans were fighting for weren't solely legal ones. *Brown v. Board of Education* was a court case, but the issue within the case was equal access to education. The Supreme Court stated in its decision that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," which makes a bridge between the legal right to education and the opportunity to socially advance or be a successful member of society (*Brown v. Board of Education* (1954), p. 493). In that way, the Court seems to indicate that while the right to education must be guaranteed by law, education itself has more to do with being a person in the social sense, as a member of society, a "good citizen," as they say elsewhere in the same passage (p. 493). We've discussed before the differences between being a legal person, recognized as having rights and responsibilities by the law, and being a social person—a human being with a life and consciousness. Those two different ideas of personhood can be hard to keep straight, but the difference and overlap between them becomes important in discussions of fetal personhood.

The Supreme Court alone didn't make the connection between legal personhood and social personhood. In his 1963 televised address on civil rights, President John F. Kennedy made it clear that social personhood—being treated equally as a member of society, as a human being—was a key component to the Civil Rights Movement ("Civil Rights Movement"). Kennedy began his address by pulling on language from old US

documents like the Declaration of Independence, reminding the American people that “all men are created equal” and that the United States protects the “rights of man” and the “rights of all those who wish to be free” (“Civil Rights Movement”).¹⁷ However, Kennedy then asserted that “law alone” could not solve the problems of discrimination present in the United States at the time (“Civil Rights Movement”). According to Kennedy, African-Americans needed not only “equal rights” but “equal opportunities,” referencing a kind of social personhood not attainable through changes in the law (“Civil Rights Movement”). While Kennedy mentioned voting rights as a problem to be solved—a facet of legal personhood—he also mentioned the desegregation of consumer spaces, which links to ideas of being treated as human being outside of the law, as well as lifting the “social and economic oppression” experienced by African-Americans (“Civil Rights Movement”). So Kennedy, too, was aware that the Civil Rights Movement wasn’t only about establishing legal rights for African-Americans but social ones as well, to be treated equally as members of society.

After Kennedy’s televised address, civil rights activist Dr. Martin Luther King, Jr., sent a telegram to the White House commending the speech (Cohen 2014, p. 339). King also went over many of the same topics in his “I Have a Dream” speech given at the Lincoln Memorial in 1963. In it, King, too, referenced the Declaration of Independence and the “inalienable rights” held by people because they were people, language that we saw earlier in the Nuremberg Trials (King 1963). And while King focused on African-

¹⁷ JFK does use only “man,” “men,” “he,” and “his” in the 1963 address, which is perhaps telling, as the women’s rights movement of the 1960s had only just begun pushing for women to be treated the same as men in law and government.

Americans wanting their “citizenship rights” to be treated as legal persons the same as white men, he also stated that African-Americans were “robbed of their dignity by signs stating ‘For Whites Only’” (King 1963). In that way, King also pushed for more than legal equality. Given, segregation and discrimination were matters handled by US courts, but the way King mentioned “dignity” indicated a different kind of personhood, one that had to do with African-Americans being worthy of the same respect that white people were, which was something that courts couldn’t directly adjudicate.

Efforts by civil rights leaders like King resulted in the Civil Rights Act of 1964, which stated, “All persons shall be entitled to the full and equal enjoyment of public places and goods without discrimination” (Civil Rights Act of 1964). The law ostensibly established that African-Americans were the same in the eyes of the law as white people, with the same legal personhood, but given that there was a Voting Rights Act of 1965 and a Civil Rights Act of 1968, the 1964 act perhaps wasn’t as effective as was hoped for. Legally, African-Americans had all the rights of a US citizen, but socially, things weren’t changing. One person who pointed that out was Malcom X, civil rights activist and black nationalist.

In his 1964 speech, “The Ballot or the Bullet,” Malcom X made clear that gaining civil rights was not the same as gaining full human rights, and his language reflected that he didn’t want only legal change but social and economic change as well, pushing for fuller social personhood for African-Americans. “We suffer political oppression, economic exploitation, and social degradation,” he said, linking legal and social personhood together by discussing black neighborhoods and where the money of people in those neighborhoods went (X 1964). Further, Malcolm X declared that he was taking

the civil rights movement “from the level of civil rights to the level of human rights,” creating a distinction between civil or legal rights and the rights inherent in human beings because they are human (X 1964). If that language sounds familiar, it should, as it was similar to the language used at Nuremberg. Indeed, Malcom X spoke about accusing governments of genocide and taking them to the international courts at the United Nations. He referenced the Russian government mistreating the human rights of Jewish people in Russia, as well as “Uncle Sam” in America “violating the human rights of twenty-two million Afro-Americans” (X 1964). Malcom X rounded off that section of his speech with a reference to Nazi Germany, making it abundantly clear that he considered the human rights violations in the United States to be of the same type and scale as those that occurred in Nazi Germany and were punished at the Nuremberg Trials (X 1964).

Leaders of the Civil Rights Movement weren't the only ones to capitalize and draw on the language and ideas of personhood stirred up by the Nuremberg Trials. Women pushing for their own legal and social personhood also borrowed language relating to “inalienable human rights,” as well as the popular Fourteenth Amendment. While an earlier women's rights movement had achieved for women the right to vote in 1920, the movement that began in the 1960s focused on a different set of goals, including equal access to education and an end to discrimination in the workplace (Greenhouse and Siegel 2012, p. 4).

One of the early efforts in the new movement was John F. Kennedy's Presidential Commission on the Status of Women, which was an investigation into women's status in education and the workplace (Presidential Commission on the Status of Women 1963). The commission was led by Eleanor Roosevelt until her death in 1962 and was comprised

of white women with the time and financial security to serve on such a committee. That led to the commission reporting unevenly on the status of all women in the United States at the time, but we'll get to some other perspectives in a moment. The text of the executive order that established the commission in December of 1961 mentioned both women's legal personhood, by stating that "women's basic rights" were being impeded, and their social personhood, by stating that "women should be assured the opportunity to develop their capacities and fulfill their aspirations" (Kennedy 1961). Just like in *Brown v. Board of Education* and the speeches of Martin Luther King, Jr., and Malcolm X, the Presidential Commission on the Status of Women was to investigate not only women's legal rights but their rights and abilities to participate fully in society via proper education and work opportunities. The areas of investigation included: "employment policies and practices, including those on wages"; "federal social insurance and tax laws"; "differences in legal treatment of men and women in regard to political and civil rights, property rights, and family relations"; and others in the vein of education, work, and home life (Presidential Commission on the Status of Women 1963).

The commission published its report, titled *American Women*, in 1963. Significantly, the commission argued for the need of a Supreme Court case that ruled women had equal rights based on the Fourteenth Amendment, which aligned with the trend we saw in the Civil Rights Movement (Presidential Commission on the Status of Women 1963). Similarly, the commission advocated for better education for women, including graduate school, which at the time was not as accessible by women as it was for men, as well as counseling to educate women about all the opportunities available outside of women's traditional roles. Other recommendations of the commission included

offering paid maternity leave to women in the workplace and assistance with childcare so women could enter the work force in the first place (Presidential Commission on the Status of Women 1963). Both of those suggestions would enable women to establish and advance their careers—not strictly a tenet of legal personhood but an important component of social personhood, in that being able to work enables people to have an income, purchasing power, and “fulfill their aspirations,” as Kennedy’s executive order mentioned (Kennedy 1961).

Most women in the 1960s focused on advocating for equal education, equal treatment in the workplace, and equal treatment under the law. Reproductive rights, often a major area of discussion in women’s activism in the twenty-first century, wasn’t a major focus in the early 1960s (Greenhouse and Siegel 2012, p. 4). After the federal agency in charge of enforcing the Civil Rights Act of 1964 refused to take action against help-wanted ads that discriminated between men and women, a women’s organization responded by writing a “Bill of Rights” specifically for women. That organization, the National Organization for Women, formed in 1966 to push for workplace equality, and their “Bill of Rights” focused on that end (Greenhouse and Siegel 2012, p. 36). Most of the rights emphasized the prohibition of sex discrimination in employment, access to maternity leave and tax deductions, as well as child care and equal education opportunities (“Bill of Rights”). Only near the end of the document did reproductive rights appear (“Bill of Rights”). The National Organization for Women did demand that women have the right to “control their reproductive lives,” but only because controlling her reproduction facilitated a woman’s access to education and employment (Greenhouse and Siegel 2012, pp. 36–37). In 1967, at the time of the publishing of “Bill of Rights,”

reproductive autonomy was a right necessary to fulfill other goals, not a goal in itself, at least for the National Organization for Women.

That began to change near the end of the decade. Reproductive rights, including access to abortion and contraception, began to be folded into discussions about women's human rights and personhood. That inclusion fed into the tension between women's rights and the legal and social rights of fetuses, a tension we saw as far back as *Dietrich v. Inhabitants of Northampton* and one that increased when fetal personhood became a topic of discussion in the early 1970s. A statement by the National Association for Repeal of Abortion Laws, formed in 1969 at a Chicago conference, marked the shift succinctly by stating that they recognized "the basic human right of a woman to limit her own reproduction" (Greenhouse and Siegel 2012, p. 40).¹⁸ There we see again a mention of human rights, beyond civil or legal rights, said by an organization aiming to repeal restrictive abortion laws and grant women the legal right to control her reproduction as well.

At the Chicago conference where the National Association for Repeal of Abortion Laws began, women's rights activist Betty Friedan gave a speech and used language that made clear that this new goal of the women's movement was tightly bound to women's personhood (Greenhouse and Siegel 2012, p. 39–43). Friedan declared that "there is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process"

¹⁸ It is good to note here that there were individuals and organizations seeking to reform abortion laws prior to the late 1960s. Those groups pushed for the relaxing of abortion laws on behalf of doctors, who were penalized for performing abortions that were medically necessary but illegal according to the law. Starting in the late 1960s, more people began pushing for the repeal, not relaxation, of those laws on behalf of women and their rights, instead of doctors' rights to practice medicine.

(Friedan 1970). There we see “human dignity” slipping into the women’s rights discourse, when we’ve already seen it at Nuremberg and in the Civil Rights Movement. “Personhood,” as well, made several appearances in Friedan’s speech, notably when she said that women needed to move to “human personhood, to self-determination, to human dignity,” making it clear that to Friedan, personhood wasn’t just a legal right, but linked to self-determination and the dignity that African-American leaders also sought, to be respected as human beings within society (Friedan 1970). Friedan, like other civil rights leaders, stated that in 1969, “Women are not taken seriously as people. Women are not seen seriously as people” (Greenhouse and Siegel 2012, p. 39). Her broad use of “people” there indicates that Friedan meant women weren’t seen as “people” with “personhood” and “dignity” anywhere in society, in terms of the law or social interactions—and that the right to control their own reproduction was a huge gap in women’s rights and personhood.

Following that speech and surely other events and trends, Friedan and other activists like her began pushing for women’s reproductive rights not just as necessary to fulfill their rights to education and employment but as “inalienable human right[s]” on their own (Friedan 1970; Greenhouse and Siegel 2012, p. 41). Like Kennedy’s Presidential Commission on the Status of Women, however, Friedan and many other prominent women’s rights activists were white and not physically or mentally disabled. For them, arguing for women’s reproductive rights meant pushing for access to abortion care and contraception. For other women in the United States, controlling their own bodies meant something different. In the twentieth century, many women of color, including black and Hispanic women, and women with disabilities were subjected to

forced sterilization procedures, often without their knowledge and consent (Novak and Lira 2018; Antonios and Raup 2012). People committed to state institutions, including prisons and institutes for people with mental disabilities, could be sterilized without their consent based on laws passed in the early twentieth century, fueled by racism and other prejudices.

In the late 1960s and early 1970s, women of color agreed with Friedan and others that women should have the right to control their own bodies. They supported the decriminalization of abortion—but added that forced sterilization of women of color and women with disabilities also had to end (Greenhouse and Siegel 2012, p. 45). In 1969, civil rights leader Frances Beal in *Double Jeopardy: To Be Black and Female* opposed both restrictive abortion laws and forced sterilization. She called the latter procedures “outright surgical genocide” and “outrageous Nazi-like procedures,” directly linking back to Nazi Germany and the Doctors Trial at Nuremberg (p. 49–52). She stated that the procedures were a form of “dehumanizing brutality” and “as nefarious a program as Germany’s gas chambers and in a long term sense, as effective and with the same objective” (Beal 1969). For Beal and other women of color, the right to control their bodies included the right to have children (to *not* be sterilized) as much as the right not to have children (to use contraceptives and have access to abortion care).

So language from Nuremberg about a person’s “inalienable rights” and “human dignity” moved into the African-American Civil Rights Movement and the women’s rights movement. And the rights of a “person” did not include legal rights alone but also the rights to opportunity and advancement in society, establishing that “personhood” was

not only a legal idea but also a social one. Case in point, the women's rights movement folded reproductive rights into a woman's "inalienable rights."

Personhood Language Moves into the Womb

But as the Civil Rights and women's rights movements were developing certain definitions and uses of personhood, people began advocating for the personhood of fetuses as well—and the same language that secured rights and attention for women and people of color began to appear in arguments for fetal rights.

In 1966, an attorney named Robert M. Byrn published an article in the *Duquesne University Law Review* to persuade the legal community not to repeal or relax anti-abortion laws because fetuses had rights just like other human beings (Byrn 1966; Greenhouse and Siegel 2012, p. 86–88). His language drew specific parallels between what he viewed as the fetus's struggle to gain personhood and recognition as the struggle faced by African-Americans in the US (Byrn 1969). For example, Byrn stated, "Like a person whose skin pigment is other than white, the unborn child is recognizable as a human being simply because he is a human being. His status must be governed by this fact and not by the irrelevances of size, shape, and color" (1969). There, Byrn obviously referred to the African-American Civil Rights Movement, as well as used "unborn child" to imply that a fetus is the same as an already-born child.

Interestingly, Byrn's second sentence, starting with "His status," seems to allude to the Equal Protection Clause of the Fourteenth Amendment, which had been used to

prohibit discrimination based on factors (like race or sex) that have nothing to do with the law's goal (Byrn 1969). Byrn seemed to be making a case that "size, shape, and color" were "irrelevan[t]" factors that should not weigh in how an "unborn child" is "governed." Later Byrn borrowed language from and specifically referenced the Fourteenth Amendment when he added, "legislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be as discriminatory, as "irrational," and as inimical to the equal protection clause as the legislative classification of races" (Byrn 1969). The "equal protection clause" he mentioned, though not capitalized, is clearly the Fourteenth Amendment's clause of the same name, and was the clause used to declare racial discrimination illegal. So we see that language slopped over from other personhood and civil rights movements into the fetal personhood movement, where it was used in part to counter the arguments of women's activists that abortion care was necessary for women to achieve their full rights and personhood.

Byrn didn't change his mind about the matter, later serving as one of the attorneys who wrote the National Right to Life Committee's *amicus* brief for *Roe v. Wade* in 1973 (Greenhouse and Siegel 2012, p. 86). The National Right to Life Committee began as a Catholic organization, which we'll discuss in a later section, and it wasn't the only Catholic organization to crusade for fetal rights. A letter from New Jersey's Catholic bishops in 1970 declared their intent to protect "human life" by speaking for the rights of the "unborn child" (Greenhouse and Siegel 2012, p. 81). They, too, tapped into the language floating around civil rights movements at the time, citing that contained in a woman's "egg cell" was "the blue-print for the development of the whole human person" (p. 83) Leaving aside the slight scientific inaccuracy of all the

“blueprints” being located in the “egg cell” instead of the more-accurate “fertilized egg” or “joined egg and sperm” or “early embryo,” the bishops referenced that said egg cell was the beginning of a human *person*, which seems significant, given the emphasis in discourse at the time of “persons” in the sense of the Fourteenth Amendment.

Additionally, at the end of their letter, the bishops cited passages from other texts, including the UN “Declaration on Rights of the Child” and the US Declaration of Independence, again channeling the language of legal and international human rights with phrases like “inalienable Rights” and the fact that the U.N. declared that “the child...needs special safeguards and care, including appropriate legal protection, before as well as after birth” (Greenhouse and Siegel 2012, p. 84). Finally, to really make their case, the bishops included a quote stating that abortion was “nothing but murder,” written by “Lutheran Theologian Dietrich Bonhoeffer, Martyred by the Nazis” (p. 85). So it seems even Catholic bishops were aware that referencing the Nazis on the subject of human or fetal rights was a persuasive way to go.

Thus, at the beginning of the 1970s, the stage of personhood and civil rights was set with many players all using the same kind of language—often in opposition to one another. The tension between women’s rights and fetal rights, both of which drew on the tradition of “inalienable human rights” granted by the Declaration of Independence and the legacy of the more recent World War II, was high. Many women viewed the right to control their body as an inalienable right, one that included abortion, while many others viewed fetuses’ right to life as an inalienable right. Whose right weighed more would be answered in a way by *Roe* in 1973.

Back to Church: Catholic Officials Push for Fetal Personhood

Though 1960s references to the Fourteenth Amendment and inalienable human rights were new additions to the discussion of fetal personhood, the fetal personhood discussion itself was not new in the 1960s. True, it began emerging in a new way in the 1960s, thanks to the civil rights movements and novel societal perceptions of fetuses (which we'll discuss in the next two sections). But even before Nuremberg and the invention of the word "personhood," there was one group that had been advocating for the person-ness of embryos and fetuses off and on for centuries: the Catholic Church.

In Chapter 1, we saw that officials in the Catholic Church did change their minds about when an *in utero* entity gained its spiritual status as a person in Catholicism. In the early days of the Catholic Church, embryos were humans to be protected (and not aborted for any reason) as soon as the woman knew she was pregnant (Noonan 1967). That changed slightly in the Middle Ages with Catholic scholars like Thomas Aquinas and others writing of a period before ensoulment when a woman could seek an abortion for certain reasons without facing spiritual judgment or excommunication. However, by 1869 and Pope Pius IX, the Catholic Church had begun reverting back to its earlier stance of no abortions at any time due to embryos being spiritual persons from the moment of conception. And that advancement of spiritual person-ness, a kind of social personhood if you will, didn't stop at the turn of the century.

A few years later, the Church published the 1917 Codex Iuris Canonici (or the Code of Canon Law, for those who don't speak Latin). Canon Law is the body of

Catholic rules and doctrine that every Catholic has to follow, and the 1917 version featured a new position on abortion care (“1917 Codex Iuris Canonicus,” Canon 985). Previous Catholic laws had declared that anyone who provided an abortion or otherwise caused the death of an embryo or fetus would be excommunicated from the Catholic Church. Canon 985 in 1917 added that the pregnant women who received abortions would also be excommunicated for the act (“1917 Codex Iuris Canonicus”). Punishing both the abortionist and the pregnant woman with excommunication was a way for the Catholic Church to place even more value on the lives of embryos and fetuses, affording them more protection and emphasizing that the Church hierarchy deemed an embryo or fetus just as much of a person as people already born. (Noonan 1967)

Interestingly, the words used in the 1917 Codex Iuris Canonicus followed the same pattern we saw in earlier Church documents. Despite considering embryos and fetuses to be people, the same as children already born, the writers of Canon 985 used the Latin “*fetus*” to talk about the entities that needed to be protected (“1917 Codex Iuris Canonicus”). We’ve already discussed the shifts in meaning “fetus” has undergone throughout the centuries, as well as the Catholic Church’s penchant for continuing to use “fetus” despite the growing scientific connotations it attained in the 1800s—as seen in *The New York Times* articles we looked at in the last chapter; writers used “fetus” almost exclusively in scientific contexts or when quoting scientists.

However, the trend of using “fetus” in Catholic Church soon faded out of official Church documents. In 1930, Pope Pius XI issued an encyclical, or papal letter, called *On Christian Marriage*, in which he reinforced how valuable the lives of embryos and fetuses were in the context of a healthy marriage and family life (Pius XI 1930). In the

encyclical, Pius XI condemned the idea of abortion as a cruel and wicked practice, quoting the opinions of Church authorities from centuries ago. In a quote from the Bishop of Hippo (no other name given), Pius XI retained the bishop's original language, which referred to the *in utero* entity as a "fetus," just like the 1917 Canon Laws (Pius XI 1930). But when Pius XI refers to *in utero* entities in his own words, without quoting an older source, he used the words "infant" and "child." Specifically, he stated that "Upright and skillful doctors strive most praiseworthy to guard and preserve the lives of both mother and child," and that "Those who hold the reins of government should not forget that it is the duty of public authority...to defend the lives of the innocent... Among whom we must mention in the first place infants hidden in the mother's womb." Clearly, Pius XI was no longer using the language common in Church documents for so long. He didn't use "fetus" except in quotations; rather, he used humanizing words like "infant" and "child," along with adjectives like "innocent" to further make it seem like *in utero* entities had traits and qualities like already-born humans and therefore deserved protection.

It is interesting to note that we see a similar pattern in documents from the Catholic Church as we saw in US court documents. The authors of such documents both brought old language into the twentieth century by quoting exactly scholars and thinkers from earlier time periods, when language was different. But unlike the judges we looked at, Pius XI didn't use the older language when he wasn't explicitly using quotations from older works. He began using a new set of vocabulary more similar to the kinds of words used by pro-life groups in the twenty-first century, words meant to make it seem like *in utero* entities were individuals or fully-endowed human beings from the moment of

conception onward. Indeed, by describing “infants” as “hidden in the womb,” Pius XI made it seem that fetuses are fully-formed beings just biding their time for nine months until they come out of the womb as human beings.

The next Catholic pope, Pius XII, continued Pius XI’s legacy not only in choosing the same papal name but also in choosing to use the same humanizing language as his predecessor. In an address to Italian midwives in October of 1951, Pius XII again condemned the practice of abortions as immoral and urged the midwives to discourage it among the people who sought guidance from them. In the English translation of his address, Pius XII referred to *in utero* entities in several ways, though never as an “embryo” or “fetus” (Pius XII 1951). Often, he referred to them as “children,” drawing no distinction between a “child” still in the womb and children that had already been born.

Additionally, he frequently referred to *in utero* entities as “new life,” which is a new term in our story (Pius XII 1951). By using “new life,” Pius XII reinforced the Catholic doctrine that spiritual life begins at conception, and thus so does spiritual personhood. The word “life,” however, might be a form of slippage in language, just as with the use of science in *Bonbrest v. Kotz*. In *Bonbrest v. Kotz*, Judge McGuire used a quotation from Corner’s embryology book, that at a certain point the *in utero* entity was “an unmistakable human being,” to make the argument that the fetus in *Bonbrest v. Kotz* had been a human being—a *person*—with the attendant legal rights at the moment of the relevant injury. The slippage between what Corner meant by “human being” (in that the fetus looked like a member of the human species as opposed to another species) and what McGuire wanted to prove (that the fetus was a person at that point in development) is

subtle and significant. In the same way, what Pius XII meant by “life” (that a new *person* had come into existence and needed protection) is different than what a scientist might use “life” to mean (to distinguish that an organism is alive instead of dead).

So intentionally or not, Pius XII introduced a new moment of sloppy or overlapping language with the term “new life.” It was a term adopted and used by the Second Vatican Council, held in 1965 to update and revise the “Pastoral Constitution on the Church in the Modern World,” as described in a document that emerged from the council sessions (Paul VI 1965). In the document, the words “life” or “human life” describe *in utero* entities the same way Pius XII used the terms in 1951 (Paul VI 1965). By 1965, the tensions in the US over whether embryos and fetuses should be considered “people” were rising. By using humanizing terms that endowed embryos and fetuses with humanity and “life” that was more than the biological kind, the Catholic Church nudged their church constituents to talk about and think of embryos and fetuses as people in a social sense, beings who were “innocent” and “could not defend themselves,” an entirely different kind of personhood than the legal kind we’ve discussed thus far.

However, the Catholic Church wasn’t content to restrict its influence to within the Catholic community. In the late 1960s, the debate about abortion was heating up in the public sphere. We saw feminists like Betty Friedan beginning to push for women’s rights to abortion as part of their fundamental personhood, and we saw others, like attorney Robert Byrn pushing for fetuses’ rights not to be aborted as part of their fundamental personhood. As we saw above, the Catholic Church had been anti-abortion and pro-fetus—or “new life”—for decades, with popes making speeches and writing letters to persuade their audience of Catholics to defend fetal rights. While some other religious

groups, including other Christian religions and many individual Catholic preachers and church-goers supported women's right to safe and accessible abortions at least at the beginning of pregnancy or where pregnancy would endanger the pregnant woman (Greenhouse and Siegel 2012, p. 30, 70, 71, 77; United States Conference of Catholic Bishops 1968), the high-ranking officials of the Catholic Church did not.

In fact, in 1967, the National Conference of Catholic Bishops founded an organization called the Right to Life League, whose goal was to advocate for strict abortion legislation in individual states in the United States (Cassidy 1990; Karrer 2011). A few years later, the organization changed its name to the better-known National Right to Life Committee, which is one of the largest self-proclaimed pro-life groups in the United States in 2019, though it is no longer directly affiliated with the Catholic Church. According to the director of the Committee in 1973, the United States would not have had a pro-life movement without the Catholic Church (Williams 2010, p. 116).

So we see that the Catholic Church's influence wasn't just among its own followers. It formed organizations such as the National Right to Life Committee and others in order to influence state legislation about abortion—and it wrote briefs for Supreme Court cases on abortion, including *Roe v. Wade* in 1973. Which meant the Catholic Church and its officials were spreading ideas of embryos and fetuses having very definite spiritual personhood, increasing the amount of discussion about fetal personhood in general, and helping build a case for both fetuses having both legal and social person-ness.

“Life Before Birth” Explained: Popular Science Articles and People

But the enthusiasm of the Catholic Church wasn't the only thing shaping the US public's view of embryos and fetuses in the second half of the twentieth century. There were other forces influencing perceptions of embryos and fetuses, forces quite separate from any ideological or legal theory about what a person was or what rights and privileges they had. One area in which embryos and fetuses gained quite a bit in their social status as people was in popular articles, published in outlets like *Today's Health*, *Parents*, *Redbook*, and *The New York Times Magazine*. In Chapter 2, we saw that *The New York Times* didn't feature many articles where the person-ness of embryos or fetuses was directly mentioned or commented upon. In the early 1900s, words like “embryo,” “fetus,” or “unborn child” were used as plain nouns, lacking strong connotations of personhood. Writers didn't write about embryos or fetuses as if they had their own lives or interests; they were objects acted upon by scientists or pregnant woman, or they were otherwise passive in the narratives presented in the articles. One article, for example, featured the motives and life story of the Crown Princess of Saxony, not the fetus in her uterus.

The treatment of embryos and fetuses changed in the 1950s and 1960s. Thanks to new information from scientists working in embryology and development, writers had more insight into what happened in a pregnant woman's uterus—and the way they wrote about that information led to a new gain in social personhood for embryos and fetuses. They emerged as characters in stories about “life before birth.”

Featuring titles like “Secrets of Life Before Birth” (Carlisle and Carlisle 1952), “Drama of Life Before Birth” (1965), and “The Fascinating Story of Life Before Birth” (Liley and Day 1966), the articles published in the 1950s and 1960s introduced the idea that the timeline of human life doesn’t begin at birth and end with death. According to the articles, life begins at conception and involves dozens of major events and actions on the part of the embryo or fetus while still in the womb. There was now information about what happened to an embryo or fetus before birth—and writers began to use more humanizing, personifying language to explain how developing humans behaved, experienced sensation, even how they *thought* about things before they were born. Which, in turn, fueled ideas of embryos and fetuses being people beyond and outside of the legal sense.

So what story were these writers presenting, exactly? The story varied by article and by writer, but many articles either showcased an intriguing episode during *in utero* development—like when a fetus first begins to use its lungs—or they gave a full run-through of everything that happens in the womb, from the moment the sperm fertilized the egg to when the fetus emerges during birth.

An example of the first kind of article is 1955’s “Breathing Before Birth,” published in *Today’s Health*. The article’s main point was to tell the public that at some point, movement begins occurring in the fetus’s lungs. A quote from the article nicely encapsulates what, precisely, that movement is: “...evidence indicates that the fetus engages in occasional expansion of the chest cavity from the fifth month on, starting at about the same time the expectant mother first feels life.” To me, “occasional expansion of the chest cavity” doesn’t sound like the “breathing” mentioned in the article’s title.

The author or authors (unclear from the source material) seem to have exaggerated the fetal activity in order to make a more attention-grabbing headline. Breathing before birth? That sounds implausible and exciting! However, what that exaggeration did was give the fetus more human-seeming attributes than it actually possessed based on the scientific evidence cited. Human beings breathe; by saying fetuses also breathe, the author made it seem like fetuses are more similar to already-born humans than readers previously thought. To compound that humanization, the author used also used the words “babies” and “infant” (along with “fetus”) to refer to the *in utero* entity. So there were many factors at work in “Breathing Before Birth” that made it seem like fetuses are more human than perhaps the actual science of occasional chest expansion supported.

Similar articles describing interesting episodes during *in utero* development also featured increased humanization of the embryo or fetus. The 1956 article “Baby Makes Own Blood” described how the “unborn baby” or “fetus” produces its own blood supply—like an independent human—instead of relying on blood from the pregnant woman. Likewise, 1964’s “The Unborn Baby’s Movements” focused on how the “unborn baby” or “fetus” begins to move “early in uterine life” (Burton). Both of those articles, by assigning actions like moving or blood-making to fetuses, made developing humans seem more like already-born humans, people who take action on their own to do certain activities. Another article in 1950, “How Life Begins for a Baby,” went beyond granting fetuses agency and endowed the fetus with consciousness in order to describe in detail what it feels like to be born from the fetus’s point of view (Clay). Referring to the fetus as an “unborn child” or “baby,” the author described the process with sentences like: “There might be pain in the sudden opening of the parachute-like foldings in the tiny

lungs” (Clay 1950). By projecting what fetuses may feel while being born, the author situated the reader inside the fetus’s mind, therefore encouraging the reader to think of themselves and the fetus as the same thing—a person with thoughts and feelings.

More obvious humanization techniques appeared in other “life before birth” articles that walked the reader through the entire process of development, from conception to birth. Many begin with a statement that life begins at conception. A 1965 article claimed that, “The birth of a human life really occurs at the moment the mother’s egg cell is fertilized by the father’s sperm cell,” while an article in 1967 agreed that conception is when “a new life begins” (“Drama of Life Before Birth”; Conniff 1967). When describing the process of that “new life” developing, some articles used the more neutral “it” to talk about the embryo or fetus, but others used the personifying pronoun of “he.”¹⁹ An article in 1952 discussed “what happens to a baby before he is born,” indicating that 1) it is a “baby” in the womb, 2) that “baby” is human enough to merit being referred to as “he” instead of “it”, and 3) the “baby” has a span of life before “he” is born during which things happen to “him” (Carlisle and Carlisle 1952).

Despite such strong human characterizing at the start of the articles, most of them did describe the process of development faithfully according to the science of the times. Most articles mentioned fertilization, cell division, the point where an embryo becomes a fetus. Indeed, for articles that emphasized the humanness of embryos and fetuses, it was surprising how many of them used technical, scientific terms to refer to the entity. “Four-week-old embryo,” “eight week-old-fetus” (Carlisle and Carlisle 1952), “ovum,” “morula” (“Babies Before Birth” 1962), “zygote” (Conniff 1967)—they were all present

¹⁹ never “she”

in one article or another. However, liberally mixed in with the technical vocabulary were humanizing terms like “baby,” “unborn baby,” “unborn child” (Carlisle and Carlisle 1952; Liley and Day 1966; Conniff 1967), “growing baby” (“Drama of Life Before Birth” 1965), and “unborn human being” (Conniff 1967). So it was a strange mix of technical, possibly dehumanizing words intermixed with non-technical, very humanizing words. How did readers interpret that? It’s hard to say, but at the very least, we can conclude that the authors were implying that embryos and fetuses *are* humans, just ones at earlier stages of development.

Bolstering that conclusion are instances in the articles where the authors made claims of the embryo or fetus being recognizably or distinctly human. Like Judge McGuire in *Bonbrest v. Kotz*, some of the article authors seem to have read or heard the claim that a fetus at eight weeks’ gestation is “recognizably a human being.” Remember that a similar phrase came up in *Bonbrest v. Kotz* when McGuire wanted to prove that an embryo or fetus was a human (and thus person) even while in the womb. Remember also that McGuire cited as proof a statement made by embryologist George Washington Corner that at eight weeks a developing human was unmistakably a human being—as opposed to mistakenly being identified as another species. McGuire misinterpreted a scientific claim about how different species develop to support his claim that a fetus by eight weeks was a human being the same as any other already born. It’s impossible to tell whether the authors of popular articles misinterpreted the claim on purpose or were just repeating a phrase they had heard floating around in the public ether; the authors didn’t cite their sources. However, we can theorize that claims like “By the end of eight weeks, the embryo will have become a recognizably human fetus” might have had a similar

effect as the sentence in *Bonbrest v. Kotz* (Conniff 1967). Phrases such as that one and “In the seventh week, the baby bears the features and all the internal organs of the future adult” make it seem like fetuses are not just human organisms (different from other species, like Corner intended) but rather human *beings*—just like the human beings reading the articles (“Babies Before Birth” 1962).

That kind of lingual slop—the difference between being a member of the human species and being an independent human being—was often accompanied by a kind of scientific slop in how the authors described the behavior of embryos and fetuses. Just as we saw in the 1955 “Breathing Before Birth” article, other articles also emphasized particular actions or moments that made the embryo or fetus seem more like an already-born human. One article in 1952 claimed that fetuses and infants had the same reactions to noises they heard (Carlisle and Carlisle 1952). An article in 1962 mentioned the “baby” smiling while in the womb (“Babies Before Birth” 1962). Other articles mentioned when the heart begins to beat or when the fetus begins to breathe (“Drama of Life Before Birth” 1965; Conniff 1967). One mentioned the fetus sucking its thumb (“Drama of Life Before Birth” 1965), while another discussed a fetus moving, seeing, untangling itself from the umbilical cord, and learning (Liley and Day 1966).

However, many of the actions mentioned in the articles weren’t exactly what the authors claimed them to be. As we discussed with “Breathing Before Birth,” the mentions of fetuses “breathing” at eleven weeks’ gestation isn’t a fair description of what was happening. The fetus isn’t breathing; its lungs inflate and deflate occasionally, sucking in amniotic fluid instead of air. Embryos and fetuses in the womb receive all of their oxygen from the umbilical cord that connects them to the pregnant woman. Even though their

lungs are moving, they aren't gaining oxygen on their own through their own "breathing" efforts. Sloppy labeling of biological processes like that helped encourage readers to view embryos and fetuses as humans doing the same things born-humans do, while in the womb. We can perform the same analysis on the mentions of fetuses smiling or sucking its thumb. While I don't doubt the veracity of the reporting, I do doubt that the fetuses do those actions for the same reasons or in the same ways that already-born children do.

Finally, while all of the articles implied that embryos and fetuses have the qualities of a human, some authors stated it outright. "He is an active and lively human being" before birth, claimed one article in 1966 (Liley and Day). Those same authors went on to characterize the fetus as a kind of overlord of the pregnant woman's body, stating, "This tiny human being dominates his environment. At three months, he has succeeded in taking over his mother's body and has altered it to suit his own needs." That statement grants not only the title of "human being" to the fetus but also strong agency as seen in the verbs "dominates," "taking over," and "alters" (Liley and Day 1966).

With authors granting such agency to *in utero* entities as well as referring to them with humanizing terms, they made it seem like the span of a person's life began at conception and that people experienced significant, often-transformative events before they were born. Such articles likely had a large impact on the minds of public readers, as scholars of literature have noted that writing about other people—of different races, of a different sex—can foster empathy between the reader and people they previously did not know or care much about (Johnson 2012). This group of authors happened to be extending their readers' empathy to embryos and fetuses, building a connection between

the reader and *in utero* entities by emphasizing how similar embryos and fetuses are to the already-born reader reading about them.

But in addition to that vein of articles, there was also another genre of popular writing that made it seem like embryos and fetuses were people. Instead of chronicling “life” stories, the authors of these articles advanced arguments for how pregnant women should take care of their embryo or fetus before birth and why that was so important. This genre of article was directed at pregnant women, often using “you” to speak to them directly, and made a case for caring for embryos and fetuses in the same way women were supposed to care for their born-children: by feeding them properly, protecting them from illnesses, and keeping them safe from previously unforeseen dangers (France 195?; “German Measles Menace” 1945; US Public Health Service 1950; Burke 1951).

Many such articles were written by medical doctors, registered nurses, or professors of pregnancy or infant care (France 195?; Burke 1951; Holt 1958). While reading, whenever I noted the author had an advanced degree in a scientific or medical field, I expected the article to contain technical words like “fetus” or “embryo” and few instances of humanizing language like “baby” or “unborn child.” That was not the case, however. Perhaps to engage their non-scientist audience or to avoid frightening any readers away with technical jargon, the scientists and medical doctors writing for pregnant women used about the same mix of technical and non-technical words in their articles—contributing to the humanizing of embryos and fetuses, even beyond the content of their articles.

That content included messages to pregnant women on what to do as well as what not to do. High on the list of Things To Do was eating well. Several articles informed

pregnant women that if they ate properly during pregnancy, that ensured that their “baby” would also be nourished properly in the womb (Burke 1951). While some of them did place more emphasis on the pregnant woman than on the embryo or fetus—spending most of the article detailing what women should and should not eat—the purpose of the article was to ensure fetal health in the womb, encouraging pregnant women and other readers to consider an “unborn child” something to be taken care of separately from the pregnant woman herself (Apgar 1965).

Other articles, from a variety of popular sources, emphasized that same sort of care for embryos and fetuses by warning pregnant woman of things not to do during pregnancy. In the mid-1900s, there was not yet a vaccine for the German Measles, also called rubella. In the twenty-first century, people in the US get the MMR vaccine to protect against the measles, the mumps, and rubella (Ross 2017), which prevents people from getting any of those illnesses—and more importantly for our story, prevents pregnant women from contracting rubella during pregnancy. If an embryo or fetus is exposed to rubella *in utero*, it can develop congenital defects like deafness, visual impairment, and nerve damage (O’Neil 2014). Those effects were known in the 1940s, and writers urged women to avoid contact with German Measles in articles such as “German Measles Menace” in *Time* magazine (1945).

Another danger for pregnant women to avoid was syphilis, an infection often transmitted via sexual intercourse or from pregnant women to their fetuses *in utero*. By 1950, the drug penicillin had hit the market; it treated syphilis and prevented severe neurogenerative effects of the later-stages of the disease if administered before the infection progressed too far. Therefore, in 1950, the US Public Health Service published

the pamphlet “Protecting the Unborn Baby” to warn women to seek treatment if they were pregnant and had been exposed to syphilis. The last sentence, written in red capital letters, sums up the pamphlet nicely. “DON’T RISK YOUR BABY’S LIFE,” it says, “SEE YOUR DOCTOR IMMEDIATELY.” That emphasis on the “baby’s life” makes it seem like embryos and fetuses have lives of their own, separate and distinct from the pregnant woman’s, and that to protect it, they should be treated to a doctor’s care the same as any born human.

Other articles abounded, warning pregnant women about other threats such as x-rays or causes of fetal malformations or the effect the women’s emotions could have on their child’s life later²⁰ (Fasten 1950; Strattan 1954; Holt 1958). Though the topics varied, what they all had in common was that they made it clear that the embryo or fetus was someone to be taken care of and shielded from harm. That’s not an entirely new idea—women have likely felt protective of their pregnancies for millennia—but what was new was how articles about how to care for and protect the “unborn child” flooded the public discussion. All that emphasis on how and why to care for embryos and fetuses likely contributed to people seeing them as individual people, separate from pregnant women and deserving of their own kind of care. Which, interestingly enough, correlated with the creation of a new field of medicine to provide that care: fetology.

²⁰ This was debunked to varying degrees over the years. Women’s thoughts and emotions do not impact the embryo or fetus. However, if a pregnant woman is in a state where she experiences high amounts of cortisol or severe undernourishment, the embryo or fetus’s development can be altered.

A New Patient and a New Aspect of Personhood

Advancements in the scientific understanding of development didn't result in just new stories about embryos and fetuses. Article after article about "life before birth" revealed stories where that life was endangered—when embryos or fetuses faced perils in the womb—and about the new field of medicine arriving in the late 1960s to treat them. Indeed, embryos and fetuses weren't becoming only characters in their own life stories, but also became their own patients in the new field of fetology, treated as their own persons, separate from the pregnant women gestating them.

Before the 1960s, the medical fields that dealt with pregnancy care were gynecology and obstetrics, often smushed together and abbreviated as OB/GYN. If we take a second to look at the root of each field name, we can see more clearly the shift that occurred when fetology began appearing on the medical scene in 1963. "Gynecology" has two root words in it: "gyneco" and "logy" ("gynaecology, n."). "Logy" means "the study of," so it doesn't carry much meaning in our discussion, but "gyneco" does—it means "woman" ("gynaeco-, comb. form."). So gynecology is the study of women—not embryos or fetuses. That makes sense, since gynecology as a field includes the care of women's bodies at all phases of life—not just when women are pregnant and carrying an embryo or fetus.

Perhaps, one might think, that's why the word "obstetrics" joined up with "gynecology" to denote pregnancy care; maybe "obstetrics" means something about embryos or fetuses. But not so. "Obstetrics" comes from the Latin word "*obstetrix*," which means "midwife," descended from the Latin verb "*obstare*" or "to be present" as

in “present at birth” (“obstetrics, n.”) So both “gynecology” and “obstetrics” are women-focused words; one is the study of women’s bodies, while the other indicates the women present during the birthing process. Thus, the new field of “fetology,” meaning “study of fetuses,” was quite a departure from the older medical fields, as it focused explicitly and entirely on the fetus.²¹

I am not claiming that fetology isn’t a necessary medical field. Indeed, it developed in the 1960s due to specific needs, one of them being the problem of Rh factors in the blood. Many popular articles in the 1960s chronicled how doctors were beginning to study and treat the problems that occurred when the pregnant woman had one Rh status—either negative (Rh-) or positive (Rh+)—and the fetus had the other. That mismatch prompted an immune response in the woman’s body to reject the fetus as a foreign organism inside the woman, resulting in stillbirths or miscarriages (Lake 1966). In explaining the Rh problem to lay readers, authors positioned the fetus as its own being, another patient for the doctor, and placed the fetus and the pregnant woman somewhat in opposition (Kerr 1967; Blank 1967). The pregnant woman’s body was taking one action—to eliminate the fetus—and the fetus was taking another action, “fighting to live” as one article in 1967 put it (Blank 1967). Most of the women discussed in the articles did want their fetuses to survive, but in describing the two opposing forces, the authors highlighted that the fetus had its own interests—to live—which made it more obvious that the fetus was a separate human being or separate person from the pregnant woman.

²¹ For anyone familiar with the history of male physicians medicalizing childbirth and taking it out of the realm of female midwives—obstetricians stole the name of their profession from the midwives they ousted.

Problems with mismatched Rh factors weren't the only things under the umbrella of fetology. People working in the field also looked into the influences that the prenatal period could have on the fetus's physical, behavioral, and mental developments (Bieniarz 1970). A tool that helped in that study was the development of the ultrasound for use in monitoring pregnancies. While most people today hear "ultrasound" and think of nurses rolling scanners over big, round, pregnant abdomens slathered in thick, clear gel, ultrasounds and their technology began a long way away from pregnant women. It's actually a long story, starting when scientists began studying soundwaves in the 1800s. In the early 1900s, various militaries continued that research to develop technology that could use soundwaves to detect shapes in water (Newman 1998). Such research resulted in SONAR (or *SOund Navigation And Ranging*) technology used in World War I. And it's fun to note that the technology received a surge of interest in 1912 when the *Titanic* sank in the middle of the Atlantic thanks to the underwater portion of an iceberg that went undetected with tragic results. However, it took thirty more years for ultrasound technology to come into medical practice. Diagnostic ultrasound—used to detect shapes or masses inside bodies—rolled into the medical world in 1942 (Levi 1997). However, most doctors used ultrasounds to (unsuccessfully) scan brains or to (successfully) locate cancerous tumors. In fact, one of the first doctors to develop ultrasound for use in pregnancies published his first big paper on how he saved a woman's life when he used ultrasound to correctly diagnose her as having a huge ovarian cyst instead of terminal, inoperable stomach cancer (Willocks 1996).

In experimenting with what ultrasound technology detected in human bodies, that doctor, Ian Donald, later noticed that sacs filled with water in the body, like the bladder,

resulted in clear ultrasound images (Newman 1998). He found that another sac filled with water was a woman's pregnant uterus—and thus, pregnant women became excellent testing ground for the new technology (Newman 1998). There had already been pictures—taken with traditional cameras—of embryos and fetuses at various stages of development. Many popular articles explaining the processes of development included pictures of different stages (“In the Sixth Week of Life” 1949; “The Human Embryo” 1950; “Babies Before Birth” 1962). Most of those images were basic images showing cells or early embryos and fetuses in a neutral way, like how you might photograph a grape. But one article in *Life* magazine in 1965 took the photos to a new level by using a portrait style of photography—in particular, taking zoomed-in pictures of the fetus's face or tiny hands (“Drama of Life Before Birth” 1965). Those images, especially the portrait-style ones, may have assisted in bringing attention to embryos and fetuses because they allowed the public to *see* them, where before they could only read descriptions of what they looked like.

However, most of the embryos and fetuses in the photos were either dead already or were going to die as a result of the procedure that opened the uterus enough to let a photographer stick a lens inside (Morgan 2009, p. 206). Ultrasounds ushered in a new awareness of embryos and fetuses by enabling people, especially pregnant women in the doctor's office, to see their own embryo or fetus in their body—alive. Early ultrasound scanners provided single images, frozen in time, but ultrasound technology developed in the late 1960s provided a way of viewing the embryo or fetus in the uterus in real-time (Newman 1998). Pregnant women, their spouses, doctors could see the living fetus

moving in the uterus—which likely contributed to the feeling or opinion that embryos and fetuses were people in some minds.

It certainly helped doctors view the fetus as a medical patient separate from the pregnant woman. They now had a way of seeing what the fetus looked like and could improve surgical techniques with the help of real-time images of what was happening inside of the uterus. In that way, fetuses (more than embryos, as fetuses were more advanced in development) gained a measure of personhood in becoming their own medical patients. A writer for *The New York Times* magazine noted the shift in medical thinking when he stated, “The March of Dimes [a nonprofit organization focused on maternal and infant care] has made much of ‘the rights of the fetus’ to be treated as a patient.” (Conniff 1967) But the writer went one step further and directly tied medical personhood to other kinds of personhood when he added, “What can such rights be other than legal rights? And if the fetus has legal rights, is it not a person?” He used those rhetorical questions in order to advance an argument against relaxing anti-abortion laws in the US—if a fetus is a person with legal rights, then permitting women to have abortions would be violating the fetus’s rights as a person (and a medical patient).

He also brings up the Nazis in the same paragraph to say that aborting fetuses because of a “defect” is no better than what the Nazis did to Jewish people in concentration camps. Thus, with the help of that writer—James C. G. Conniff—we have come full circle in linking the fetal personhood movement to the Nazi war crimes and the trials at Nuremburg that defended the inalienable rights of all people. But just because writers were advocating for fetuses to have more legal rights did not mean those legal

rights were actually gained. In fact, the courts hadn't made much progress on fetal rights since *Bonbrest*.

The Courts Collectively Disagree About Fetal Personhood

While embryos and fetuses did seem to be gaining new status as social persons, their legal personhood was in a sort of limbo. *Bonbrest v. Kotz* did grant born-alive fetuses the right to recover for injuries inflicted upon them when they were viable, but cases that came to the courts after 1946 reveal that US judges were still grappling with various aspects of that right as well as what other rights *in utero* entities should have. Their legal personhood was far from settled.

Though we focused on prenatal tort cases in Chapter 2, a few other kinds of cases popped up in the 1900s that had judges considering whether embryos or fetuses were people in the legal sense. One kind of case showed up only a few times—just five cases between 1884 and 1973—but in those cases, judges had to directly consider exactly when an embryo or fetus became a person. Or rather, a bastard.

By “bastard,” I mean the original sense of a child born out of wedlock to unmarried parents, which was still quite a social *faux pas* in the late 1800s and early 1900s. It was enough of a hardship for the children that many states passed laws called Bastardy Acts (or some variation), requiring the fathers of the illegitimate progeny to pay for the child's “maintenance” and education (*Brown v. State* (1932); *State ex rel. Discus v. Van Dorn* (1937); *Inman v. Willinski* (1949); *Zepeda v. Zepeda* (1963); *B. v. S.* (1972)).

It was essentially nineteenth century child support. A woman who found herself pregnant out of wedlock went to the court while pregnant to petition the court to haul in the alleged father, confirm through some means that he was the father, and compel him to pledge to pay what the law required him to.

But the wrinkle was that the woman didn't get any money while she was pregnant. Payments began only after the woman gave birth to the bastard child. But what happened if the fetus was stillborn? Did the man have to pay the cost of childbirth, as he often did for live births? A case arose in 1949 centered on that question (*Inman v. Willinski* (1949)). As quoted in the court documents, the law on the books in Maine mentioned that the woman had to be "delivered of a bastard child" in order to qualify for any money from the father of said child (*Inman v. Willinski* (1949), p. 126). In 1949, the court ruled that the "bastard child" in the phrase "delivered of a bastard child" meant a living human being (p. 122). Therefore, the man in question didn't owe any money to the woman who had just given birth to a stillborn fetus, as the court declared the fetus had never been alive, for legal purposes. It wasn't a person, as it had never lived. So there we see a fetus being denied status as a "living human being" and legal person under the Maine bastardy act.

But judges weren't all in agreement about that kind of thing. In a similar case in 1932 in Indiana, featuring a stillborn illegitimate fetus, the judge decided similarly to the judge in the 1949 case (*Brown v. State* (1932)). Because the "child" was born dead, and the money as stated in the Bastardy Act could only go to the bastard child, there was never a possible recipient for the money (*Brown v. State* (1932), p. 265). However, in Ohio in 1937, the judge of another case involving a stillborn illegitimate fetus ruled that

the man *did* have to pay the costs of the woman's pregnancy and childbirth because those costs would have been incurred whether the fetus was stillborn or not (*State ex rel. Discus v. Van Dorn* (1937), p. 87). In that case, the judge didn't rule that the stillborn fetus was a person even if stillborn, but he didn't deny the pregnant woman's suit due to the fetus's *non-person-ness* either. So there was a split on what to do about a stillborn fetus under different state Bastardy Acts.

Then, in 1963, a different kind of question came to the courts of Illinois. The case *Zepeda v. Zepeda* featured a born-alive infant suing his father for the wrongful act of making him a bastard in the first place (*Zepeda v. Zepeda* (1963)). The case fell under tort law, as the infant alleged that being a bastard had caused him great hardship—just like being injured by the wrongful act of another counted as a tort in other cases we've seen (*Zepeda v. Zepeda* (1963), p. 255). So the court in *Zepeda v. Zepeda* had to consider whether a tort could be committed against “one not yet in being”—i.e. could the man be responsible for committing a tort against the illegitimate embryo created out of wedlock (p. 250). Well, the question seemed to spook the court. They dismissed the case, writing in the official decision that they didn't want to make a too-sweeping judgment that might cause the courts to be flooded with far too many similar cases (p. 262). But *Zepeda v. Zepeda* shows that the rights of embryos and fetuses had not been fully set by the courts. How much person-ness did they collectively want to accord an embryo or fetus? How much was reasonable? Could they grant embryos and fetuses too many rights—enough to overwhelm the courts with spurious claims and flimsy cases?

Flooding the courts was a real concern for many judges in the twentieth century. Judges presiding over cases discussed in Chapter 2 often ruminated for a few sentences

on how granting fetuses the right to sue for prenatal injuries could open up the floodgates for people suing for all kinds of actions that may or may not have harmed an embryo or fetus (e.g.: *Krantz v. Cleveland* (1933), p. 453; *Stemmer v. Kline* (1940), p. 26). A 1920 article in *The New York Times* mentioned a court case in which a born-alive child sued the owner of a horse because the horse had bitten the child's mother while she was pregnant. As a result, the child had "never been able to walk, but [sat] most of the time, with one leg crossed over the other, in a position similar to that a horse sometimes assumes while standing" ("Girl of 4 Sues for Prenatal Accident" 1920). She also was "unable to talk, but [made] a guttural noise resembling the neigh of a horse" and her "neck [was] said to be unusually long" and that she "[swung] her head from side to side almost constantly." However, the reporter did note the child's features were still "attractive." US judges didn't want cases like that in their courtrooms—where the alleged prenatal injury obviously did not result in the effects claimed by the infant's attorneys. From *The New York Times* article, it isn't clear what the judge decided in the horse case.

But as seen in the bastard cases above, sometimes it wasn't only judges deciding how much personhood to accord to embryos and fetuses. It was state legislatures who enacted the Bastardy Acts, and it was the judges' job to interpret whether those statutes applied to cases of stillborn fetuses. In other words, judges had to determine the boundaries of who or what counted as a person in instances where laws had already made a pronouncement. Other examples of that phenomenon include cases in which born-alive infants sought compensation for the deaths of their fathers that occurred during their own gestation (*Morgan v. Susino Construction Co* (1943); *LaBlue v. Specker* (1960); *Nelson v. Galveston* (1980); *Herndon v. St. Louis* (1912)). In many of those cases, a man died

while working his job or because of someone else's mistake, opening the incident up to civil suits in court. The man's family could sue to recover damages for the man's death under the state's wrongful death statute. From a layperson's perspective, wrongful death cases are very similar to tort cases. A person made a mistake or acted negligently, and someone (instead of being injured as in a tort case) died. The dead person can't sue for the accident, but the family of the dead person can.

Some state legislatures, in writing their wrongful death statutes, included "posthumous children" in their list of people who can go to court for compensation for someone's death (*Morgan v. Susino Construction Co.* (1943), p. 422). If that sounds familiar, it should, because that's how inheritance laws and customs had worked for centuries. As far back as Ancient Rome, infants born within nine months after their (assumed) father's death could inherit his estate (Paisley 2006). But just as we discussed with inheritance laws, the posthumous children counted in wrongful death statutes had to be born alive in order to make their case in court. So though the wrongful death occurred during the embryo or fetus's gestation, it wasn't an embryo or fetus making its case in court. It was a born infant. Which raises the question, just like the inheritance laws, of whether this particular right, the right to sue for a father's wrongful death, really belonged to the *in utero* entity—or to the born-alive infant. I didn't find any cases where a family brought a case on behalf of a stillborn or miscarried fetus to sue for the father's wrongful death. In a case like that, the mother or another relative could have served as a fetus's representative and received compensation on its behalf. But without any such cases, it seems like judges weren't *really* considering the embryo or fetus's rights in a

wrongful death case. Instead, they were affirming that an infant did suffer after birth because their father had died, and thus the infant deserved compensation for the loss.

It is a fine distinction, one that we saw the judge in *Kine v. Zuckerman* make back in Chapter 2. He decided to permit the infant to receive compensation for the suffering it experienced after birth—not the injury itself that occurred during gestation. In the bastard cases and even in *Bonbrest v. Kotz*, where there was a living infant party to the case, it seems like judges were more likely to grant legal rights of one kind or another for a prenatal incident if the infant came out of the womb alive.

But of course, after *Bonbrest v. Kotz*, cases came to the courts challenging that judicial tendency. In the area of prenatal tort law, which we focused on in Chapter 2, new cases began arising post-*Bonbrest* that tested how far judges would be willing to go in granting legal personhood to embryos and fetuses. What if the embryo or fetus died in the womb, and was thus stillborn, as a result of the prenatal injury? What if the embryo or fetus wasn't viable at the time of injury but survived to be born alive (and show signs of the injury) sometime later? Fetal personhood in the legal world truly was not a done deal, as the collective answer for those questions given by the US courts was, *We're not sure*.

Some courts did grant embryos and fetuses rights even if they died or weren't viable. A case in 1949 in Minnesota called *Verkennes v. Corniea* featured very similar conditions to those in *Bonbrest v. Kotz*. A pregnant woman was at the hospital to give birth, but her uterus ruptured and she began hemorrhaging badly (*Verkennes v. Corniea* (1949), p. 366). The hospital called her physician, who did not show up, and both the pregnant woman and the fetus died (p. 366). Obviously, the fetus—which was about to be born—was past the point of being viable, and the judge granted the living husband the

right to recover from the hospital and physician for the fetus's injury and death because the fetus was capable of independent existence at the time of injury/death and thus counted as a legal person (pp. 370–371). Other cases came out along the same lines. The 1955 Georgia case *Porter v. Lassiter* also involved a viable fetus that died, and the judge granted the fetus legal personhood separate from the pregnant woman so its relatives could recover for its injury and death. And a Georgia case in 1956, *Hornbuckle v. Plantation*, permitted a born-alive child to recover for an injury sustained while it was a non-viable embryo, early on in gestation. The judge in *Hornbuckle v. Plantation* ruled that way because there had to be a legal way to provide justice for every wrong that came to the courts to be redressed—which is similar to the reasoning found in *Bonbrest v. Kotz* (*Hornbuckle v. Plantation* (1956), p. 404).

The reasoning in many post-*Bonbrest* cases was actually quite similar to that found in *Bonbrest v. Kotz*. Judges discussed precedents set by other courts, whether the embryo or fetus was viable and independent, how other areas of law treated embryos and fetuses, and that wrongs that came to the courts needed to be able to be legally addressed.

But, not all judges agreed with the trend begun by *Bonbrest v. Kotz*. They were fully aware of such a trend, as seen by their references to *Bonbrest* in their written opinions, and decided not to go along with it. The judge in the 1951 case *Drabbels v. Skelly Oil Co.* ruled that a fetus was part of the pregnant woman until birth according to the law (*Drabbels v. Skelly Oil Co.* (1951), p. 232). He cited cases like *Dietrich v. Inhabitants of Northampton* and *Allaire v. St. Luke's Hospital* to justify himself and even admitted that medical science may have proven that viable fetuses could live outside the womb (p. 231). However, he said that medical science should not be able to change the

law *ipso facto*, which is a Latin phrase essentially meaning “just because” (p. 232).

Therefore, the judge ruled that the family of the dead fetus at issue in *Drabbels v. Skelly Oil Co.* was not permitted to recover damages on the fetus’s behalf. A judge in *Howell v. Rushing* in 1953 decided the same way, ruling that a fetus born dead did not have any right to recover for the injury or death. Those cases show us that for some judges, an *in utero* entity didn’t have much legal personhood at all; becoming a legal person with standing in a court hinged directly upon the fetus being born alive, just like in other areas of law we’ve discussed.

To make my point about judges being split on the legal personhood of embryos and fetuses, there were 103²² prenatal tort cases in US courts after *Bonbrest v. Kotz* and before 1973. Describing them all here would be both tedious and unilluminating,²³ as the judges fell into the several categories outline above. Many agreed that a fetus born alive that was viable when injured deserved to count as a legal person and therefore recover damages for its injuries (*Damasiewicz v. Gorsuch* (1951); *Tucker v. Howard L. Carmichael & Sons* (1951); *Woods v. Lancet* (December 1951); *Amann v. Faidy* (1953); *Rainey v. Horn* (1954); *Tursi v. New England Windsor Co.* (1955); *Muschetti v. Charles Pfizer & Co.* (1955); *Prates v. Sears, Roebuck & Co.* (1955); *Mitchell v. Couch* (1955); *Mallison v. Pomeroy* (1955); *Worgan v. Greggo & Ferrara, Inc.* (1956); *Keyes v. Construction Service, Inc.* (1960); and many more). Some judges disagreed, however, and wrote decisions that agreed with *Dietrich v. Inhabitants of Northampton* and *Allaire v. St. Luke’s Hospital* (*Woods v. Lancet* (June 1951); *Amann v. Faidy* (1952); *Marlow v.*

²² Included in the original count of 198 court cases overall, mentioned in Chapter 1.5.

²³ For transparency’s sake: yes, I did read them all. I read all 1,260 cases that came up in my original Westlaw search.

Krapek (1969)). Some judges went a step further than *Bonbrest v. Kotz* and permitted viable-when-injured but stillborn fetuses to recover for injury and death (*Poliquin v. Macdonald* (1957); *Wendt v. Lillo* (1960); *State, Use of Odham v. Sherman* (1964); *Gullborg v. Rizzo* (1964)). Others denied such recovery for dead fetuses (*Marko v. Philadelphia Transp. Co.* (1966); *Padillow v. Elrod* (1967); *Powers' Estate v. City of Troy* (1968); *Lawrence v. Craven Tire Co.* (1969)). Some judges permitted recovery for born-alive infants injured before the point of viability (*Kelly v. Gregory* (1953); *Bennett v. Hymers* (1958); *Sinkler v. Kneale* (1960); *Daley v. Meier* (1961); *Delgado v. Yandell* (1971); *Labree v. Major* (1973)). And some judges went so far as to consider granting recovery for embryos or fetuses that died before the point of viability due to a prenatal injury (*George v. Commercial Credit Corp.* (1964)). Others did not (*Carroll v. Skloff* (1964); *Rapp v. Hiemenz* (1969)).

One trend I do want to point out among the sea of cases is exemplified in the 1960 case *Smith v. Brennan*, which came to the Supreme Court of New Jersey after a pregnant woman got into a car accident and gave birth to a living, but injured, infant (*Smith v. Brennan* (1960), p. 355). It was a unanimous decision by the court for the infant to receive compensation for the prenatal injuries, with all seven justices signing the court's opinion, written by Justice Proctor (p. 368). In the opinion, Proctor does the usual do-sie-do of citing all previous relevant cases, including *Dietrich v. Inhabitants of Northampton*, *Allaire v. St. Luke's Hospital*, *Stemmer v. Kline*, *Bonbrest v. Kotz*, *Verkennes v. Corniea*, *Drabbels v. Skelly Oil Co.*, *Howell v. Rushing*, and more (pp. 359–361). However, Proctor also brings in some support for his position that comes from outside the legal

world. Like McGuire in *Bonbrest v. Kotz*, Proctor reaches out to “medical authorities” to prove his point (pp. 362–363).

In particular, Proctor cites a few medical jurisprudence books, like Beck’s *Medical Jurisprudence*, as well as some embryology books, like George Washington Corner’s *Ourselves Unborn* (*Smith v. Brennan* (1960), p. 363). In fact, Proctor cites the *same page* of Corner’s book as McGuire: page 69. That was where the line about a fetus being “an unmistakable human being” came from. Proctor uses page 69 to support his sentence: “Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother’s body” (p. 362).

It’s the same subtle literary forgery that McGuire pulled off. In *Ourselves Unborn*, Corner is talking about the development of a human organism in the womb and the point at which it becomes recognizable as a human fetus instead of some other species’s fetus (Corner 1944, p. 69). Proctor, on the other hand, is saying that a “child” is “in existence” at all stages of development, with “in existence” sounding quite similar to the legal phrase “*in esse*,” which is used to denote when someone is “in being” and a person, as opposed to the phrase “one not yet in being,” as we saw in *Dietrich v. Inhabitants of Northampton* and other cases that ruled a fetus was not a legal person (*Smith v. Brennan* (1960), pp. 362–363).

Later, Proctor again borrows some language from “medical authorities” when he says, referring to the quote above: “In addition, as we said above, medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation” (*Smith v. Brennan* (1960), p. 367).

There, again, Proctor creates a slippage in ideas between the biological and legal world. Biologically, yes, the embryo or fetus is an “entity” separate from the pregnant woman—it is not the same as another organ in her body, as it received genetic material from two parents. But being a “distinct biological entity” does not mean the same thing as being an independent legal entity. Corner’s work didn’t touch on that aspect of independence from the pregnant woman. Whether an “unborn child” is a “distinct” legal entity cannot be answered by looking at Corner’s description of how a fertilized egg cell develops into an embryo or fetus.

Proctor uses those quotations to support the Supreme Court of New Jersey’s position that a born-alive child injured before it was viable, as was the case in *Smith v. Brennan*, should be able to recover for the injury because from the moment of conception, it was a distinct legal entity from the pregnant woman. According to “medical authorities.”

The Fetal Personhood Movement Borrowed from Other Movements

I’m not saying that Proctor and the Supreme Court of New Jersey were wrong to decide their case like they did. I am not weighing in on how much personhood the US courts should grant embryos and fetuses in tort cases. Rather, I’m pointing out that ideas about persons and personhood in the twentieth century were not clean-cut. The courts disagreed—with valid reasoning on both sides—about whether embryos or fetuses were legal persons. And some judges reached into science to support their decisions,

inadvertently mixing different ideas of what being a human person means. Yes, biologically, embryos and fetuses are human organisms. But that isn't the same idea as being a legal person.

This chapter has been about how ideas and language can slip and slop from one area into a tangential area. Ideas of personhood at the Nuremberg Trials slipped into discussions about how African-Americans and women weren't being treated equally as persons—in the eyes of the law or society. Which then slipped into discussions about what “inalienable rights” or “personhood” embryos or fetuses had as discussions of women's rights and abortions came to the table in the 1960s. Meanwhile, writers were describing the lives of fetuses before birth like they were smaller versions of already-born humans, doctors were treating embryos and fetuses as patients separate and distinct from pregnant women, and the Catholic Church was pushing for an end to all abortion care to protect “innocent” “new life” in the womb.

By the time 1970 rolled around, different views on embryos and fetuses abounded in the United States. Popular writers were describing them as human beings with their own personalities. The science of development had been turned into a story of “life” of embryos and fetuses before birth, a life that was “dramatic” and “fascinating.” People arguing for the personhood of embryos and fetuses were using as evidence documents from America's founding and references to Nazis. Amid all the talk of embryos and fetuses, courts were adding to the legacy of *Bonbrest v. Kotz*, leaning toward granting standing to viable fetuses if they were later born alive—or even nonviable or stillborn ones. But *Bonbrest* rested at least in part on a slippery misinterpretation of science. The

judge in *Bonbrest* used a scientist's description of a fetus as "an unmistakable human being" to prove a fetus was a legal human person.

That slipperiness was only the start. In the 1970s, arguments about embryos and fetuses in the courts became very slippery. The words that slipped and slopped and greased the machinery were words from the 1960s, brought into courtrooms across the United States, including Supreme Court House for *Roe v. Wade* in 1973.

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CHAPTER 4: HOW EMBRYOS AND FETUSES BECAME COMPELLING AND INTERESTING "POTENTIAL HUMAN LIFE": THE JUDICIAL PATH TO ROE

Thus far in our story, we've been working toward the tumultuous early years of the 1970s, particularly 1973. That's because by the 1970s, the debate about whether to legalize abortion was gaining momentum. For our purposes, in our quest to understand how and when embryos and fetuses gained aspects of personhood, a significant mark of personhood is possessing the right not to be killed by another person. In terms of embryos and fetuses, that right or possible right can appear as the right not to be aborted. So this chapter will focus on the history of women, developing entities, and abortion care in the United States, especially as it concerns the circumstances of the early 1970s and the decision in *Roe v. Wade* in 1973, the conclusion of our tale.

The history of abortion in the United States, however, began long before 1973. We haven't touched much on it so far because it is best treated as a continuous story from the mid-1800s until 1973, instead of being chopped up into pieces for analysis along the way. This chapter, however, will not be a full history of abortion legislation and abortion debate in the United States. For in-depth discussions of the nuances involved in abortion history, I refer the reader to other sources focused solely and explicitly on the abortion movement. In particular, I recommend Linda Greenhouse and Reva Siegel's *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* for the overview of the movement they provide as well as the large and diverse selection of primary sources they include.

Instead, we're going to focus on the words and terms used throughout the history of abortion discussions in the United States. Specifically, we'll be looking at what nouns

laws and courts referred to when declaring when or whether abortions could legally take place. In other words: Who or what was being aborted? The answer to that question is not as obvious as you might think. The object of the verb “abort” changed a few times between the mid-1800s and the early 1970s, and those changes reveal shifts in thinking about abortions in various parts of society. They show how courts and legislatures revised their positions on abortion laws. They also show how the US public began to differ on what they thought the abortion discussion was about, as well as how people on opposite sides began talking past each other, so to speak. The changes also illuminate how the Supreme Court came to their decision in *Roe v. Wade*. In their decision they in fact denied that embryos and fetuses were persons in a legal sense, but in doing so, they implemented a new term floating around in the abortion discourse. The *Roe* decision didn’t hang on whether a developing human entity was an embryo or a fetus or a legal person. Rather, it turned on the recently-popularized phrase “potential human life.”

The First Object of “Abort”: Women

Though we’ve discussed already Coke’s dictum on abortions, published in his *Third Institutes* in 1644, Coke was a judge, which meant any of his pronouncements advanced common law. Remember that common law is the body of law established and amended by judges’ decisions in court cases. So while Coke’s decree about the legality of abortion appeared in English common law and then early US common law, the first US statutes on abortion didn’t appear until the mid-1800s (Means 1971; Quay 1961). As it

was those statutes, rather than Coke's dictum, that appeared in the court cases on abortion in the nineteenth and twentieth century, a discussion of them is well warranted and, in fact, necessary to understanding the situation of the 1970s.

As with US common law, US statutory law in the 1800s developed similarly to English statutory law, and between 1803 and 1861, England passed several laws dealing with abortion (Quay 1961). There was the 1803 Miscarriage of Women Act (43 Geo. 3, c. 58), which made giving a "potion" to a woman to induce an abortion a felony, and a follow-up Offences against the Person Act in 1828 that made inducing an abortion with surgical instruments a felony as well (9 Geo. 4, c. 31 (1828)). Acts passed in 1837 and 1861 increased the punishment for inducing an abortion and expanded the actions that counted as attempting to induce an abortion, respectively. Though no clear record exists of why US state legislatures began passing anti-abortion statutes in the 1800s (Means 1968), given how similar the US anti-abortion statutes were to the English ones, lawmakers may have taken cues from the English.

In 1821, Connecticut was the first US state to produce a statute dealing with abortion, and its statute largely mirrored the first section of the 1803 English Miscarriage of Women Act, sometimes referred to as Lord Ellenborough's Act after one of its supporters (Quay 1961; Conn. Stat. tit. 22, sections 14, 16). The text of Section 14 of the 1821 Connecticut statute read as follows: "Every person who shall, willfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison or other noxious and destructive substance, with an intention him, her or them, thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, and shall be thereof duly convicted, shall suffer

imprisonment, in new-gate prison, during his natural life, or for such other term as the court having cognizance of the offence shall determine” (Conn. Stat. tit. 22, section 14, at 152, 153 (1821)).

In more modern phrasing, the law stated that anyone who gave a woman a drug or medicine to cause her to miscarry, when her pregnancy was past the point of quickening, would serve a life sentence in prison (or a different punishment if the court saw fit). In 1830, Connecticut amended the statute to add that causing a miscarriage via instruments was also a crime, though the 1830 statute lowered the punishment for both crimes to between seven and ten years in prison (Conn. Laws ch. 1, section 16, at 255).

Other US states (or territories) followed suit and adopted similar statutes dealing with abortions. Illinois passed a law against using a “noxious substance” to procure an abortion in 1827 (Ill. Rev. Code section 46, at 131 (1827)), with a punishment of up to three years in prison for anyone who did so. A year later, in 1828, New York passed several restrictions on abortion, one of them very similar to Connecticut’s 1821 statute in that it prohibited any attempt to “procure the miscarriage of any such woman,” in which “any such woman” was a pregnant woman, and punished the attempt with a fine of up to \$500 or up to a year in jail (N.Y. Rev. Stat. pt. IV, tit. VI, section 21, at 578 (1828-1835)). Ohio, Indiana, Missouri, Arkansas, and Iowa (a territory at the time) passed similar laws in the 1830s, and the trend of states passing abortion legislation continued into the 1860s and up to the 1890s (Quay 1961).

Though individual states, in the way of US lawmaking, did pass their own statutes with various exceptions and conditions, many statutes had very similar wording.²⁴ A version of the phrase, “Every person who shall willfully administer to any pregnant woman any medicines, drugs, substance or thing whatever, or shall use and employ any instrument or means whatever with intent thereby to procure the miscarriage of such woman,” appeared in dozens of states’ nineteenth century statutes (Ala. Acts ch. 6, section 2 (1840-1841)). Those states included Alabama, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.²⁵

In each of those statutes, a variant of the phrase “to procure the miscarriage or abortion of any pregnant woman” appeared when condemning the act of abortion. From a

²⁴ I must thank Eugene Quay for compiling all of the abortion statutes passed in various states at various times in a very convenient appendix to his article in *The Georgetown Law Journal*. I disagree with some of his arguments, but I am grateful for his work in compiling.

²⁵ (Ala. Acts ch. 6, section 2 (1840-1841); Howell Code ch. 10, section 45 (1865); Cal. Pen. Code section 274 (Deering 1886); Conn. Stat. tit. 22, sections 14; Colo. Gen. Laws, Joint Res., Mem., and Priv. Acts of the Terr. of Colo. Legis. Asm. 1st Sess., section 42, at 296-297 (1861); Del. Laws ch. 226, section 1, at 522 (1883); Ga. Laws No. CXXX, section III, at 113 (1876); Hawaii Pen. Code section 1 (1850); Idaho (Terr.) Laws, section 42, at 435 (1863-1864); Ill. Rev. Code section 46, at 179 (1833); Ind. Rev. Stat. section 3, at 244 (1838); Iowa (Terr.) stat. 1st Legis., 1st Sess., section 18, at 145 (1838-1839); Kan. (Terr.) Stat. ch. 48, section 39 (1855); La. Rev. Stat. section 24, at 138 (1856); Me. Rev. Stat. ch. 160, section 14 (1840); Md. Laws ch. 179, section 2, at 315 (1868); Mass. Acts & Resolves ch. 27 (1845); Mich. Rev. Stat. ch. 153, section 34 (1846); Minn. Stat. at Large vol. II, ch. 54, Sec. 29, section 1, 2, 3, at 987 (1873); Mo. Rev. Stat. art. II, section 36, at 168 (1835); Mont. (Terr.) Laws section 41, at 184 (1864); Neb. Gen. Stat. ch. 58 section 39 (1873); Nev. (Terr.) Laws ch. 28, section 42, at 63 (1861); N.H. Laws ch. 743, section 1, at 708 (1848); N.J. Laws at 266 (1849); N.Y. Rev. Stat. pt. IV, ch. 1, tit. VI, section 21, at 578 (1828-1835); N.C. Sess. Laws ch. 351, section 2 (1881); Ohio Gen. Stat. section 111(1), at 252 (1841); Pa. Laws No. 374, section 87, 88 (1860); R.I. Gen. Laws ch. 277, section 22, at 977 (1896); S.C. Acts No. 354, section 2, at 547-48 (1883); Tenn. Acts ch. CXL, section 2, at 188-89 (1883); Utah Comp. Laws tit. IX, ch. III, section 142 (1876); Vt. Acts No. 33, section 1 (1846); Wash. (Terr.) Stats. ch. II, section 38, at 81 (1854); Wis. Rev. Stat. ch. 169, section 58, 59 (1858); Wyo. (Terr.) Laws 1st Sess., ch. 3, section 25, at 104 (1869).)

twenty-first century perspective, when many people who support abortion laws aim to protect the embryo or fetus (Pain-Capable Unborn Child Protection Act; House Bill 481), it seems strange that the object of the verb “abort” is “woman.” Why were lawmakers focusing on the women instead of the embryo or fetus? To compound the strangeness, many statutes from the 1800s hardly mention the embryo or fetus at all. Some, like Wyoming, say, “to procure the miscarriage of any woman then being with child,” mentioning the embryo fetus by referencing that the woman is “with child” or pregnant (Wyo. (Terr.) Laws 1st Sess., ch. 3, section 25, at 104 (1869)). But in that Wyoming law, there is no other mention of the embryo or fetus. Lawmakers in that instance didn’t include a reference to any developing entity being aborted.

It would be untrue to say no legislatures made reference to aborting an embryo or fetus. For four states or territories in the 1800s, the main point of the abortion statute was to punish the destruction of a “child” (Ark. Rev. Stat. ch 44, div. III, art. II, section 6 (1838); Miss. Code sections 8, 9, at 958 (1848); Ore. Stat. ch. III, section 13, at 187 (1853–1854); Va. Acts tit. II, ch. 3, section 9, at 96 (1848)). The laws of Arkansas, Mississippi, Oregon, and Virginia all went something like this: “Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall employ any instrument or other means with intent thereby to destroy such child, and thereby shall cause its death, unless the same shall be necessary to preserve the life of the mother, or shall have been advised by a regular physician to be necessary for such purpose, shall be deemed guilty of manslaughter” (Ark. Rev. Stat. ch 44, div. III, art. II, section 6 (1838)).

There, the lawmakers explicitly prohibit any attempt “to destroy such child” and label the crime as manslaughter. Not all four statutes called the crime manslaughter, but the phrase “to destroy such child” was present in the statutes, meaning “child” was the object of any illegal abortive action instead of the woman. However, in the Arkansas statute above, there is mention of an exception to the prohibition of abortion. If necessary to save the “life of the mother,” a physician may proceed with an abortion without risk of being punished for a crime. So even in statutes where the “child” is the grammatical focus, there is still some hint that lawmakers may have been thinking of the life and safety of the pregnant woman as well.

Sections about destroying the life of the child don’t appear only in the laws of Arkansas, Mississippi, Oregon, and Virginia. Fifteen other states and territories had similar provisions in their nineteenth century abortion statutes (see list of statutes above). However, those sections appeared alongside sections with phrasing like “to procure the miscarriage or abortion of a woman,” which means that thirty-five of the thirty-nine states or territories that had abortion statutes in the nineteenth century had sections of their laws where the object of the abortion and the focus of the statute was the woman herself, with minimal mention of the embryo or fetus. That indicates rather strongly that lawmakers were not solely—or even mostly, going by the numbers—concerned with the life of the embryo or fetus. They seemed to be concerned about the pregnant woman.

I am not the first person to make this observation. A well-cited legal scholar, Cyril C. Means, Jr., wrote articles on it for law journals in the 1960s and 1970s, and in the 1970s, several courts cited his work or otherwise referenced the idea of 1800s abortion laws being written by state legislatures for the protection of women (Means 1971; Means

1968; *People v. Belous* (1969); *Babbitz v. McCann* (1970); *Steinberg v. Brown* (1970), at p. 750; *Abele v. Markle* (1972), at p. 811). From various scholars, including Means, a solid theory has arisen to explain the grammatical, and thus legal, focus on women found in nineteenth century abortion legislation. For a fuller explanation, I point the reader toward Means's 1968 article on New York's abortion laws (Means 1968), but the broad strokes of the theory go something like this:

In the 1800s, the realm of medicine wasn't as organized or professional as it is in the twenty-first century. Nor was it as safe for people to go see medical providers. Sometimes, going to the doctor was the thing that killed you. For example, any kind of surgery in the nineteenth century was a dangerous proposition. Antisepsis wasn't invented until the 1860s when a surgeon working in England, Joseph Lister, began using carbolic acid to care for patients' surgical wounds (Osborn 1986). Furthermore, the techniques didn't catch on in the United States for several more decades; even into the 1910s, surgeons in the United States weren't uniformly using antisepsis for surgeries (Abboud 2017). The lack of antisepsis meant that patients who underwent surgery had a high chance of dying from bacterial infections after they got all sewn up. In addition, the system of carefully educating, training, and licensing physicians that we enjoy in 2020 wasn't around in the 1800s. While schools like Harvard Medical School did exist, the process of receiving an education and position as a physician wasn't as regulated, and many medical providers didn't go to medical school at all. They were apothecaries or, frankly, quacks who offered medicines and services that were dicey at best (Young 2014). Swallowing a draught of "medicine" could very well mean taking a swig of some fatal poison.

All in all, that means seeking out abortion care in the 1800s was very often more dangerous than continuing a pregnancy and giving birth. Thus, we see legislatures outlawing abortion procedures—both surgical and medicinal (via “noxious substances”)—with, in all likelihood, the aim of protecting the women from dying of abortion remedies (Means 1968).

The link between the state of 1800s medical care and the intent of 1800s abortion statutes may seem tenuous based on that information alone. However, looking carefully at the text of the statutes reveals more evidence in support of the above theory. In nearly all statutes, the wording goes: “Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means” to produce an abortion will be “imprisoned in the penitentiary” (Wash. (Terr.) Stats. ch. II, section 37, at 81 (1854) used for example). We see there that it is the person providing the medicine or the person wielding the instruments who is punished by the law. Legislatures aimed to restrict the actions of abortion-providers, physicians or quacks, to keep them from harming women with their dubious techniques. The woman herself was frequently not punished for seeking an abortion, as one would expect if lawmakers were really looking to punish or condemn the desire or effort to terminate an embryo or fetus. There were some exceptions, some states adding women as offenders of the law in later,²⁶ but the majority of laws, even into the 1970s, didn’t name the woman as a criminal.

²⁶ For example: Ariz. Rev. Stat. (Pen. Code), section 455 (1887); Conn. Gen. Stat. Rev., section 53-30 (1958); Idaho Rev. Stat. (Pen. Code), section 6795 (1887).

Furthermore, if we widen our gaze to look at the statutes surrounding the ones dealing directly with abortions, we find that some states passed statutes prohibiting the sale or advertisement of contraceptives at around same time (Ind. Rev. Stat. section 1998 (1881); Mich. Laws ch. 106, section 2, at 175 (1869)). One could interpret those statutes as part of the attempt to encourage women to give birth instead of preventing or terminating pregnancies, but given the actual text of the statutes, I find that unlikely. A Michigan law from 1869 prohibited the advertisement or sale of “recipes or prescriptions” “for the cure of chronic female complaints or private diseases, or recipes of prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion” (Mich. Laws ch. 106, section 2, at 175 (1869)). If lawmakers were out to prevent contraception or abortions alone, why would they also prohibit remedies for “chronic female complaints”? I interpret such a phrase to mean menstrual cramps or other symptoms of menstruation, and I doubt that lawmakers were really so cruel as to prevent women from accessing treatments for menstruation symptoms. Indeed, according to Michigan’s law, women were not punished for seeking such solutions. Lawmakers were punishing those who advertised or sold them—the potential quacks with their potential poisons.

There is plenty more to discuss in this realm of medical history, including the tension between midwives and physicians at the time, but I want to mention one final piece of evidence that drives home that lawmakers were punishing the surgical or medical element of abortion instead of directly advocating for the life of an embryo or fetus. It’s about the phrasing of the thirty-nine statutes listed above. Almost all of them, going back to Connecticut’s 1821 statute, list as the criminal action the administration of

the “noxious substance” or the attempt to cause a miscarriage or abortion. The laws often don’t stipulate that the attempt be successful, that an abortion was actually accomplished (Conn. Stat. tit. 22, section 14, at 152 (1821)). A court in New Jersey in 1858, when interpreting the New Jersey abortion statute, ruled that “The guilt of the defendant is not graduated by the success or failure of the attempt. It is immaterial whether the *foetus* is destroyed, or whether it has quickened or not” [italics in original] (*State v. Murphy* (1858), p. 114). If courts deemed that the aliveness of the fetus was “immaterial,” that someone could be guilty of an abortion crime even if they failed, it seems that the gist of the crime was to perform dangerous surgery on someone or give them dangerous substances. It doesn’t seem like the life of the embryo or fetus was the main focus of many legislatures, as even the statutes who punished the intent “to destroy [a] child” included an exception to the law. If the abortion was necessary “to preserve the life of [the] mother,” then it was legal (Ore. Stat. ch. III, section 13, at 187 (1853–1854) used for example). The pregnant woman’s life was the thing laws protected in all circumstances, not the life of the embryo or fetus.

So the first abortion statutes in the United States weren’t, as some might believe based on twenty-first century discourse, pro-fetus. They were implemented to protect women’s safety. That isn’t to say they were the best or most fair laws ever devised. Nineteenth century women still became pregnant when they didn’t want to be, and they still sought out abortions, illegal or otherwise (Acevedo 1979). But the laws didn’t stem from the same motivation to protect fetal rights as some twenty-first century abortion restrictions like the various fetal heartbeat bills or fetal pain bills (Wax-Thibodeaux and Cha 2019; Sheppard 2011).

Without going into tedious detail, the court cases that appeared between 1884 and the 1970s confirm the above analysis. The cases often centered on abortionists being tried for manslaughter because the pregnant woman died of the abortion (*State v. Harris* (1913)), on judges determining whether an abortion took place before or after quickening (*State v. Patterson* (1919)), and whether the actions of an accused abortionist matched the language of the statute to permit a conviction (*State v. Grissom* (1930), *People v. Rankin* (1937), *State v. Cox* (1938), *Trent v. State* (1916)). If murder or manslaughter charges were mentioned, it was usually the pregnant woman who had died (*Lee v. State* 1921, *State v. Harris* 1913). In fact, in one 1945 case, *Territory v. Young*, the abortionist was convicted under the Territory of Hawai'i's 1935 abortion statute (nearly identical to the nineteenth century statutes) even though the fetus was dead in the womb at the time of the abortion (*Territory v. Young* (1945), p. 161). The court ruled that the phrase "with child" in the statute meant the physical condition of the pregnant woman, irrespective of whether or not the fetus had any "vitality" (p. 160). So even though the fetus was dead, the abortionist was convicted, supporting the idea that the statutes and their interpretations were to prevent the use of dangerous medicines or instruments upon women.

Overall, a detailed analysis of the first abortion statutes in the United States shows that they did not derive from lawmakers aiming to protect fetal life. It didn't seem like embryos or fetuses were purposefully endowed with the right not to be killed via abortion. If that right was present, it was a byproduct of laws prohibiting dangerous medical practices. So the claims made by judges from Chapter 2, claims about embryos and fetuses being treated as persons in criminal law (e.g. abortion statutes), seem to be

not quite as solid as the judges were implying. Since that was a major building block in the legal argument for granting viable, born-alive fetuses the right to sue for prenatal injuries, it puts the granting of that right in doubt as well.

This is not to say no one in the 1800s was looking out for embryonic and fetal rights specifically. The Catholic Church, as mentioned in Chapter 3, was a strong proponent for the protection of fetal life for its own sake. The same was true for physician Horatio Storer, who appeared in Chapter 1 and who lobbied for more restrictive abortion laws in the late 1800s and early 1900s. He also had a hand in the American Medical Association's declaration that no physician should perform abortions (King 1992). So there were people campaigning for fetal rights in the nineteenth century, but the laws focusing on women remained on the books well into the twentieth century. They didn't start changing until the 1960s brought women's rights and fetal rights into conflict.

Women and Physicians Challenge 1800s Abortion Laws

For about a hundred years, the abortion legislation of the 1800s remained on the books in most US states, maintaining the framework of women being the object of abortions and abortion-providers being the criminal actors (Quay 1961; Greenhouse and Siegel 2012, p. 3). Some state legislatures amended the laws in minor ways over time, but the prohibition of abortion except in cases to preserve the pregnant woman's life remained in place until the 1960s rolled around.

The 1960s, as discussed in Chapter 3, ushered in a new stage of the women's rights movement that had perhaps been going on for as long as mankind had been the ones in charge. A part of the new-ness of the 1960s women's rights movement was the emphasis women began placing on their right to have accessible abortion care (Greenhouse and Siegel 2012, p. 38). At first, the demands stemmed from women's desire to be equal participants in the workplace, and unplanned pregnancies disrupted that goal (Greenhouse and Siegel 2012, p. 36). But as the 1960s progressed, more women, like prominent activist Betty Friedan, began arguing that the right of women to control their own bodies was essential to their own personhood (p. 38).

However, women searching for equal rights and personhood weren't the only ones questioning the restrictive legislation that governed abortions. Various people for various reasons pushed for a relaxing of the 1800s-style laws (Greenhouse and Siegel 2012, p. 35). Many women simply didn't want to be pregnant when they found they were, and thus they resorted to illegal or "back-alley" abortions because the care they wanted wasn't necessary to preserve their lives. Though the true number of illegal abortions taking place in the United States in the 1960s is hard to know for certain, physician and researcher Christopher Tietze estimated based on data from the 1970s that over 17,000 illegal abortions took place in New York City alone per year before *Roe v. Wade* in 1973 (Tietze 1975). Extrapolating that number to the rest of the United States, you end up with a lot of illegal abortions taking place. Hundreds of thousands in all likelihood. And since providing abortions was illegal, those hundreds of thousands of abortions often took place in unclean, unsafe conditions, resulting in women dying from

botched abortion procedures. Therefore, some people pushing for the legalization of abortion did so under the justification of a public health crisis (Calderone 1960).

People had other reasons, not related to women's health, for wanting abortion care to be legal and more accessible. For example, some wanted women to have access to abortion care to prevent unsustainable population growth, which was already a concern in the 1960s (Greenhouse and Siegel 2012, p. 55). But the major arguments for legalizing abortions did center on women's health—and women weren't the only ones pushing for change. We noted earlier that the nineteenth century abortion laws punished not the women seeking abortions but the ones providing them. So in the 1960s, it wasn't only women's actions being restricted; it was also physicians'. Many physicians claimed that the 1800s-style laws interfered with physicians' ability to practice medicine (*US v. Vuitch* (1969); *People v. Belous* (1969); *Roe v. Wade* (1970)). Physicians were often the ones charged with violating the law when they performed abortions, and their medical licenses and livelihoods were at risk if they performed an abortion not strictly sanctioned by the law of their state.

The most compelling medical reason for relaxing the anti-abortion laws had to do with the sole exception provided in most statutes. Abortions were legal for a licensed physician to perform if, and only if, the abortion was necessary to preserve the woman's life. In the nineteenth century, that kind of language made sense. Pregnancy and childbirth were safer for women to undergo than invasive surgeries or suspect drug regimens. But by the 1960s, the world of medicine had changed: physicians used antisepsis, hospitals were much cleaner, better techniques and medicines had been invented. At some point, having an abortion in the early stages of pregnancy had become

safer than going through with a pregnancy and giving birth (Means 1971). So in the 1960s, a law stating that an abortion was legal *only* if it was necessary to preserve the woman's life was nonsensical. Going by the numbers, any pregnant woman who had an abortion was potentially saving her own life, as pregnancy and childbirth were the far more dangerous option. But that wasn't quite how abortion laws were being interpreted, and women and physicians were not content with the single statutory exception (Greenhouse and Siegel 2012, p. 120).

In 1962, the American Law Institute proposed a new abortion statute as part of a model penal code (American Law Institute 1962). Made up of lawyers, judges, and law professors, the American Law Institute was, and still is, an organization that drafts potential legislation that lawmakers can then use in writing or passing legislation in their states ("About ALI"). Their 1962 model penal code featured a more relaxed abortion statute than those based in the nineteenth century. The proposed statute, Section 230.3 on abortion, permitted licensed physicians to terminate a pregnancy if the woman's physical or mental health was at risk, if the resulting child would have a "grave" physical or mental "defect," or if the woman had been a victim of rape, incest, or "other felonious intercourse" (ALI 1962). Twelve states in the 1960s adopted the proposed abortion statute, including Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, South Carolina, and Virginia (Greenhouse and Siegel 2012, p. 24).

Many states, however, did not adjust their abortion statutes. In the 1960s, the New York abortion statute stated that both women seeking abortions and those providing abortions would go to jail if the abortion wasn't necessary to save the woman's life

(Greenhouse and Siegel 2012, p. 127). Many wealthy women, often white women, resorted to having a psychiatrist certify that the woman had stated she would kill herself if she continued with her pregnancy (p. 127), thus forcing her abortion to fit within the bounds of the abortion statute. Those pushing for a more relaxed statute in New York argued for a statute like the one proposed by the American Law Institute. Women should have been able to seek abortions if they had been raped, victims of incest, or if they were carrying “a severely deformed child” (Greenhouse 1970). New York Assemblyman Albert H. Blumenthal sponsored such a reformed abortion bill in the New York State Legislature in 1969, but the bill didn’t pass.

With only a few states adjusting their abortion statutes, women and physicians tried out a new avenue for amending the laws—the courts (Greenhouse and Siegel, p. 131). Based on the sorting method I used for my corpus of court cases, there were twenty-two cases between 1969 and 1973 that featured a woman, a physician, or both challenging a state’s abortion law. An early case from 1969, *People v. Belous*, neatly lays out the general arguments made in the courts for repealing restrictive abortion laws (*People v. Belous* (1969)). And since the case was cited often by later cases, it is a good place for us to see what arguments were being advanced on behalf of women’s and physicians’ rights.

People v. Belous was decided by the Supreme Court of California in 1969, and it arose when a California physician Leon Phillip Belous was convicted of providing an abortion that was illegal under the California abortion statute (*People v. Belous* (1969), p. 954–957). The California statute was first put in place in 1850 (p. 957) but was amended in 1967 so that in 1969 it permitted abortions to take place in accredited hospitals if they

were approved by three licensed physicians or surgeons (p. 982, footnote 2). In addition, the woman's physical or mental health had to be at risk, or the pregnancy had to result from rape or incest, or the woman had to be under fifteen years old (p. 982, footnote 2). Under the California statute, women, abortion-providers, and those who recommend women get abortions could be punished for their involvement in the crime, if the abortion did not qualify as legally exempt (p. 960).

According to the court's opinion, Belous's actions consisted of referring a pregnant woman to another physician for an abortion and receiving a small fee for the referral (p. 958). Belous claimed in his testimony that he believed if he didn't provide the referral, the pregnant woman would go to Tijuana to receive an abortion (p. 959). Belous maintained that abortions in Tijuana were so dangerous that the woman's life was very much at risk should he deny her a referral to a doctor in the United States (p. 959). In determining Belous's guilt or innocence, the Supreme Court of California discussed both women's and physicians' constitutional rights and how the California statute may have infringed upon them.

The court in *People v. Belous*, along with many other courts, framed women's right to abortions under the right to privacy implied by several amendments of the Constitution (p. 963). In laypeople terms, a "right to privacy" is the right that people in the United States have to conduct their lives without interference from either state or federal governments ("Privacy"). It's not the most clearly-defined right ever granted to the American people, as it's not outright stated in the Constitution or any of its amendments. An early invocation of the right to privacy occurred in the Supreme Court case *Griswold v. Connecticut* in 1965. In that case, the US Supreme Court ruled that

contraceptives were, in fact, legal to use by married couples because whatever went on in the privacy of a married couple's bedroom was none of the government's business (*Griswold v. Connecticut* (1965)). The use of contraceptives, therefore, was a private decision and could not be interfered with by the government.

In *Griswold v. Connecticut*, the Supreme Court based their decision on the Ninth Amendment and the Fourteenth Amendment of the Constitution, the latter of which we've already seen used in various personhood movements (*Griswold v. Connecticut* (1965), p. 481, 487).²⁷ The Ninth Amendment says that all rights not explicitly granted to the government in the Constitution or its amendments are retained by the people ("Ninth Amendment"). Such a right would include, then, the right to have privacy to use contraception without government interference. The Fourteenth Amendment we've already discussed a bit, and as noted in Chapter 3, it's complicated and hard to pin down. In *Griswold*, a justice of the Court mentioned that the Fourteenth Amendment prevents people from being stripped of their other amendment rights (like the Ninth) without due process (*Griswold v. Connecticut* (1965), p. 486). So, loosely, the Fourteenth Amendment protected people's Ninth Amendment right to conduct their lives privately, and therefore the private decision to use contraceptives.

In the way of the US court system, both the Ninth and the Fourteenth Amendments came into play in abortion cases, as abortion cases were similar to *Griswold* in that many lawyers and judges interpreted them as matters of privacy. So in *People v. Belous*, the Supreme Court of California stated that women had the right to decide

²⁷ There was also some discussion of the First Amendment providing a right to privacy as well, but the judicial history of that interpretation was too long to include for the little additional benefit it provided.

whether or not to bear children because that right was encompassed in their right to privacy (p. 963). To support themselves, the court cited *Griswold v. Connecticut* and other cases involving the right to privacy and the Fourteenth Amendment (p. 963). In *People v. Belous* and other cases, that was very often how women framed their right to abortion care: their right to privacy, guaranteed by Constitutional amendments, included the right to decide privately whether to have children or not (other cases).

But *People v. Belous* wasn't only about women's rights; it was a physician on trial, as it was in many other cases (*People v. Belous* (1969); *US v. Vuitch* (1969); *Rosen v. Louisiana* (1970); *Steinberg v. Brown* (1970); *Corkey v. Edwards* (1971)). To prove he was not in the wrong when he recommended women get abortions, Belous argued that the language of the California abortion statute was too vague for him to know what was legal and what was not (*People v. Belous* (1969), p. 960). In the United States, if a law is too vague for a person of common intelligence to determine what actions are legal and what actions are illegal, then the law is no good. It's unconstitutional. That's because the Fourteenth Amendment, in the running for the most versatile Constitutional amendment, states that people in the United States have a right to due process of law (Fourteenth Amendment). Having that right prevents people in the United States from being thrown into jail for any old reason. In order to be put in jail and therefore deprived of your liberty, you have to break a law, face a jury of your peers, and be convicted. If a law is so unclear, so vague, that a reasonable person can't tell whether they'll be arrested for taking a certain action, the law isn't in compliance with the spirit of the Fourteenth Amendment and is thus unconstitutional. Belous made the claim that the phrase "necessary to preserve" the pregnant woman's life in the California statute was too vague to be easily

understood (p. 960). In his testimony, he claimed he was preserving the pregnant woman's life by referring her to an abortion provider because letting her go to Tijuana for an abortion would put her in serious danger (p. 959).

Fortunately for Belous, the Supreme Court of California agreed with his (and his lawyers') argument. The court ruled that the California abortion statute was too vague to be easily understood (*People v. Belous* (1969), p. 955). Thus, the statute both "improperly infring[ed]" on women's right "to choose whether to bear children" and served as a poor basis for convictions of abortion crimes (p. 955). Arguments based on the Ninth and Fourteenth Amendment were successful in striking down a law that had originated in the 1800s, which benefited the women and physicians originally constrained by such a law.

However, advocating for legal change in the courtroom isn't quite the same as advocating for legal change in a state legislature. When pursuing change in the legislature, you make your arguments and wait to see if the lawmaker(s) take your side. When pursuing change in the courts, you make your arguments—and someone else argues back. *People v. Belous* was a victory for women and physicians, the original subjects of nineteenth century abortion legislation. But because people were arguing that states' laws were unconstitutional, states had to send their own representatives to court to argue that the laws *were* constitutional. And those representatives didn't shape their arguments around women's and physicians' rights. They aligned themselves with the third body in the tricky three-body problem abortions were becoming. States' representatives began arguing on behalf of the embryo or fetus.

A New Object in the Abortion Debate and the State's Compelling Interest

Up until the cases of the late 1960s and early 1970s, the judicial discussion of abortion had focused mostly on the actions and rights of women and physicians. We saw that US nineteenth century abortion laws didn't have much to say about the embryo or fetus. It was women being aborted, not the embryos or fetuses in their wombs. A few statutes did use phrases such as "destroy the child," but those states were in the minority, and most also had statutes focused on the woman herself (Quay 1961). But when people began challenging state abortion laws in the courts, the focus of the discussion began to grow to encompass a new area. The representatives of state governments, attorneys general and similar officers, didn't combat the claims of women and physicians in a direct way. They countered women's and physicians' claims by bringing up another element involved in abortion care: the embryo or fetus.

Though it may seem like an obvious strategic move for twenty-first century readers, who have been long surrounded by arguments made on behalf of embryos and fetuses, this isn't a shift we should accept without scrutiny. How did state attorneys introduce embryos and fetuses into the legal debate on abortion? Embryos and fetuses didn't ask for representation; the women carrying the embryos and fetuses didn't ask for representation on their behalf. As discussed in Chapter 2, courts rarely assigned rights to embryos or fetuses that weren't born alive. How could state attorneys assign themselves the duty to defend in-womb biological entities?

And make no mistake, the position of state attorneys was one of defense. In various court decisions, they were "protecting" (*Babbitz v. McCann* (1970), p. 301; *Doe*

v. Bolton (1970), p. 1055; *Corkey v. Edwards* (1971), p. 1253) or “preserv[ing]” (*Doe v. Scott* (1971), p. 1394) the embryo or fetus against those who would seek to “destroy” it (*Steinberg v. Brown* (1970), p. 746). Under what legal principle did state attorneys claim that duty?

The answer lies in a phrase that appears in many of the twenty-two cases between 1969 and 1970 (*Babbitz v. McCann* (1970); *Doe v. Bolton* (1970); *Doe v. Scott* (1971); *Steinberg v. Brown* (1970); *Corkey v. Edwards* (1971); *Byrn v. New York Hospital* (1972); *Young Women’s Christian Ass’n* (1972); *Crossen v. Attorney Gen. of Com. of Ky.* (1972); *Cheaney v. State* (1972); *Abele v. Markle* (1972); *Roe v. Wade* (1973)). The phrase is new to our story and appears most frequently as “compelling state interest,” though the variants “state’s compelling interest” or “the state has a compelling interest” also pop up. What is a “compelling state interest”? Well, according to the state attorneys in the cases listed above, it is the reason why the state can horn in on abortion care, even if the original nineteenth century restrictions no longer logically apply thanks to safer medical and surgical conditions.

The idea of a “compelling state interest” is new to our story in 1969, but the first use of it occurred in the 1957 Supreme Court case *Sweezy v. New Hampshire* (1957). In *Sweezy* and other early cases mentioning the phrase, judges claimed that if someone’s fundamental right was at stake, a state needed a “compelling interest” in order to infringe on people’s freedoms or liberties when pursuing a governmental aim (Siegel 2006). For example, in *Sweezy v. New Hampshire*, the state of New Hampshire wanted Professor Sweezy to answer questions on the content of his lectures and his involvement in the Progressive Party, a socialist political party in the 1950s (Siegel 2006). Sweezy refused,

which earned him a contempt of court conviction, which was overturned in the Supreme Court case because the state of New Hampshire hadn't demonstrated a compelling enough interest for why they needed to know about his political affiliations. Without that compelling interest, the state of New Hampshire, according to the Supreme Court, did not have the right to infringe on Sweezy's First Amendment right not to answer the state's invasive questions (Siegel 2006).

The "compelling state interest" idea stayed within the realm of First Amendment rights until the 1960s, when judges began to use it in cases dealing with equal protection of the laws (Siegel 2006). In 1969, for example, the Supreme Court used the idea to strike down voting rights restrictions because the state didn't have a compelling enough interest in restricting people's right to vote. It must be noted that by the 1960s, the test of whether or not a state had a compelling enough interest to infringe on people's liberties had become bound up in the legal idea of strict scrutiny (Siegel 2006). US courts apply strict scrutiny when they're reviewing laws passed by states that might be advancing some sort of discrimination or infringing on a fundamental right ("Strict Scrutiny"). When reviewing the law, the court has to decide whether the state was furthering a compelling governmental interest with the law and made the law specific enough that it didn't unduly infringe on people's rights or liberties. Essentially, courts use strict scrutiny and the compelling state interest test when they need to look a little harder at a law that seems to be discriminatory or infringing on people's constitutional rights.

Why does that all matter? Well, because even though the idea had been around since 1957, there still wasn't a clear definition of what counted as a compelling state interest. How much of an interest did the state need to have? How compelling did it need

to be? It was unclear. The courts seemed to go on a case-by-case basis, and if they had a consistent set of criteria for what counted as “compelling,” it’s not obvious from the court decisions.

So when state attorneys introduced the idea into abortion legislation cases, it was vague enough that they didn’t have many hoops to jump through to come up with a “compelling interest” that enabled abortion laws to remain standing. They decided that a large interest of the state was “the preservation of life,” where “life” meant that of an embryo or fetus (*Doe v. Scott* (1971), p. 1394). The state’s compelling interest appeared in *People v. Belous*, when the attorney general for California urged that “the state has a compelling interest in the protection of the embryo and fetus and that such interest warrants the limitations on the woman’s constitutional rights” to choose whether to bear children (p. 967–8). It appeared in the 1970 case *Babbitz v. McCann* when the state “urge[d] that the state’s interest in protecting the embryo [was] a sufficient basis to sustain the statute” (p. 301). It appeared in the 1972 case *Young Women’s Christian Ass’n of Princeton New Jersey v. Kugler* when the attorney general of New Jersey asserted that “the State ha[d] a compelling interest in preserving the life of the embryo or fetus which justifie[d] the prohibitive abortion legislation” (p. 1074).

In that way, the state attorneys changed the object of the verb “abort.” While the statutes at issue in the courts still used the nineteenth century “procure an abortion upon a woman” phrasing, by bringing up embryos and fetuses at all, the state attorneys were inserting them as the true objects of the abortion procedure. Thus, the question in the courtroom was reframed to be about the embryo or fetus’s life along with the woman’s and physician’s constitutional rights. The reframing of the question was persuasive

enough that courts agreed in 1971's *Corkey v. Edwards* that the "state's power to protect children" could be used "to protect a fertilized egg or embryo or fetus during the period of gestation" based on the "plenary power of government" (p. 1253). And in *Byrn v. New York City Health & Hospitals* (1972), the court was compelled enough by the state's position that it appointed a guardian to the "unborn infants" about to be aborted in New York hospitals (*Byrn v. New York City Health & Hospitals* (1972)). That guardian was appointed even though the embryos or fetuses had, at least, a still-living mother, and he was appointed without the consent of those women. Events like that made it clear that in the New York courtroom at least, the question of whether abortion was legal had shifted its focus. No longer was it solely about the infringements on women's and physician's rights. Now it was a comparison of the competing interests of women/physicians and the embryo/fetus—all because attorneys had labeled embryos and fetuses with a new term, "compelling state interest."

So by the 1970s, there was division in courtrooms about what abortion laws were doing. Were they aimed at guiding physicians and protecting women's health? Or were they aimed at protecting the state's interest in the lives of embryos and fetuses? The women-physician side was talking about the laws in one way, while the attorneys representing states were talking about them in a completely different way, bringing in a new kind of thing touched on by abortion laws.

Embryos and Fetuses Become Individuals

If we're seeing a shift in language occurring in legal debates about embryos and fetuses, the next question is whether that shift was confined to the legal sphere alone. Was there a similar shift in language or framing of embryos and fetuses in the public discourse on development? The answer, after a review of dozens of articles in popular publications, turns out to be *yes and no*.

Many articles published about embryos and fetuses in popular sources exhibited the same trends as articles from the 1950s and 1960s. Authors, a mix of professional writers and medical doctors, unselfconsciously mixed humanizing and technical language ("fetus" and "baby," for example) in their writing, and they also characterized the embryo or fetus as having agency in their story of "life before birth." The subjects of articles still included how embryos and fetuses developed in the womb and how physicians treated them as their own patients before birth (Gore 1970; Irwin 1970; Carrington and Jacobs 1970; Arehart 1971, "Baby on the Way"; Connell 1971; "Prenatal Blood Test Predicts Babies' Sex" 1970; "What if Your Baby Is Born Prematurely?" 1971; Arehart 1971, "Sounding out the Womb"). In the 1970 *Redbook* article "How the Fetus Is Nourished," for example, Dr. Elsie R. Carrington and writer Evelyn Jacobs discussed how embryos and fetuses grow and develop before they're born (Carrington and Jacobs, 1970). The authors use technical words like "ovum" and "fetus" alongside "baby" and "child" when describing the *in utero* period. In another example, the 1971 article "Baby on the Way," published in *Parents* magazine, professional writer Joan Lynn Arehart mentions in the first paragraph that there were "nine months of life before the baby is born," again

expanding the story of human life to include the prenatal period. Arehart also grants the *in utero* entity its own agency by stating that “the growing baby will parasitically tap his mother’s [nutritional] reserves, endangering her health” (Arehart 1971, “Baby on the Way”).

However, not all 1970s articles were rehashings of topics already written about in the 1950s and 1960s. In the early 1970s, two new topics emerged into the public discussion of embryos and fetuses: genetic counseling and *in vitro* fertilization (IVF). The language used for those topics, how the authors described and narrated the processes involved, *did* shift the discussion of embryos and fetuses. Authors writing in those new areas began introducing more discussion of the “individual” nature of embryos and fetuses, a theme that will appear in other areas of our story with significant consequences.

But what do I mean by the talk of “individuality” for embryos and fetuses? Let’s take the articles on genetic counseling as examples. In the early 1960s, physicians had begun using a process to collect and analyze fetal DNA while the fetus was still in the womb (Gore 1970). Originally, physicians used the technique to check whether the fetus’s Rh status matched that of the pregnant woman. Remember that if the pregnant woman and the fetus didn’t have the same Rh status, both positive or both negative, the pregnant woman could develop an immune reaction to the fetus and spontaneously abort it (Mayo Clinic Staff). Physicians needed to check Rh statuses to prevent any such occurrences.

Toward the end of the 1960s, physicians began applying those same processes to other ends. Namely, genetic counseling. Genetic counseling is popular enough in the twenty-first century that people pursue master’s degrees in the area to learn how to do it

properly. The basic premise, nowadays and back in the 1970s, is that physicians sample some fetal DNA and test it for any abnormalities. Then, counselors help the pregnant woman, and her partner if they're involved, decide whether or not to continue with the pregnancy. In the twenty-first century, the medical testing involves a physician drawing blood from the pregnant woman's arm, locating fetal DNA floating freely in her blood, and running tests on that (Abboud 2014). In the 1970s, the process was a little more involved. To find fetal DNA before the revelation about it being in the woman's bloodstream, physicians had to draw a sample of the fluid surrounding the fetus in the uterus (Zhu 2017). The fluid, called amniotic fluid, contained fetal DNA from the fetus's shed skin cells or ejected bodily waste. To get some fluid, physicians inserted a needle through the pregnant woman's abdomen, into the uterus, and into the fluid—ideally without pricking the fetus. In the twenty-first century, making an incision, however small, into the sterile environment inside the uterus is generally considered to be a bad thing, avoided if possible. But in the 1970s, amniocentesis was all they had, so off they went, despite the non-trivial risk of causing a miscarriage (Brind'Amour 2008).

Once a physician had the sample of fetal DNA, they created an image of the fetus's chromosomes in order to survey them for abnormalities like missing, broken, or conjoined chromosomes. That image is called a karyotype. As most 1970s articles on genetic counseling explain, once the physician had the karyotype, he or she could advise the pregnant woman and her husband (most articles were about married heterosexual couples) on what the embryo or fetus might come out like: whether it had a genetic disorder or not (Gore 1970; "Prenatal Blood Test Predicts Babies' Sex" 1970; Berg 1971; Arehart 1971, "Prenatal Diagnosis"; "The Body: From Baby Hatcheries to 'Xeroxing'

Human Beings” 1971; Cole 1971). That way, the parents could prepare for raising an “abnormal” child or seek an abortion, thanks to some states’ relaxed abortion laws permitting abortion in the case of fetal deformity. Articles on genetic counseling always mentioned abortion as an option to terminate a pregnancy, some of them detailing the pregnancies that married couples terminated versus the ones they continued to term (Gore 1970).

But the very discussion of parents evaluating an embryo or fetus, via their chromosomes or DNA, and then choosing whether to continue or terminate the pregnancy brings up notions of selecting a specific embryo or fetus. Those notions weren’t present in articles from the 1950s or 1960s, when authors wrote about an embryo or fetus simply developing in the womb. In those descriptions, it was a generic embryo or fetus, without any specific traits or features, a blank entity that could exist in any woman’s womb. Writing about selecting a particular embryo or fetus for its particular characteristics was a shift in the discussion.

Basing the selection on an embryo or fetus’s DNA was another shift. Earlier articles didn’t focus much on DNA or chromosomes at all. The focus was on developmental stages—a heart forms first, then comes other organs, and oh look a hand! But 1970s articles in popular publications, such as *Redbook*, *Time*, and even *Vogue*, introduced the DNA component of development quite strongly. In a 1971 *McCall’s* article, professional writer Roland Berg spends time explaining what the odds were of a specific embryo or fetus inheriting a genetic disorder (Berg 1971), focusing the discussion on one particular embryo or fetus instead of any or all that a couple could produce. Berg, neither a physician or scientist, then explains the basics of chromosomes

and DNA to let the reader know how those odds came about, stating along the way that “Every individual inherits a unique genetic package.” There, we see Berg referring to an embryo or fetus as a specific “individual” and tying that individuality to their “unique genetic package,” or DNA. Before, authors mixed their terms and called an embryo a “fetus” or a “baby” or an “unborn child,” using technical and humanizing terms and granting every term some aspect of human-ness because of the agency they granted the embryos and fetuses in the text. But in the new articles, notions of “individual” and “uniqueness” were slipping into stories about very specific embryos or fetuses. The discussion drifted toward a particular embryo or fetus, instead of a generic one used like a model in science class to explain biological development. And while, yes, the authors were correct in saying an embryo or fetus has a “unique” set of chromosomes or DNA individually theirs, the word “individual” can have several meanings, which we’ll explore a bit later on.

Popular articles about IVF published in similar venues in the early 1970s followed the same pattern as the genetic counseling ones, and augmented the connection between having a unique set of chromosomes and being an individual. IVF, like genetic counseling, was a newer scientific field. Researchers had been working on fertilizing animals using *in vitro* methods since the 1930s (Zhu 2009). But researchers and physicians didn’t start trying IVF on humans until the 1970s (Zhu 2009). Their aim was to help infertile women and men have children of their own, by taking an egg from a woman and sperm from a man and combining the two in a lab before placing the fertilized egg back into the woman’s fallopian tube or uterus to continue developing. Writers covering the topic often used singular language like I just did: *an* ovum (or egg)

came out of the woman, and it alone was fertilized by sperm, to become *an* embryo implanted back into the woman's body (Zimmerman 1970; "The Body: From Baby Hatcheries to 'Xeroxing' Human Beings" 1971; Edwards and Fowler 1970).

Additionally, in a 1970 *Women's Home Journal* article, professional writer David R. Zimmerman states that a "new being" came about after the merging of the parents' "genetic endowments," therefore tightly linking the establishment of a unique DNA set with the beginning of a "new being." Later in the article, Zimmerman replaces "being" with "individual" when he says, "During fertilization, the correct number of chromosomes from each parent are assembled to form the new individual" (Zimmerman 1970). So the focus was on a single, or individual, embryo forming during the IVF process, and during fertilization, the fertilized egg became a new "individual." There is a subtle difference between those two uses of "individual." One is referencing the singleness of the entity: there is only *one* embryo being discussed. The other references something else, the quality of being an "individual," a single human being or person distinct from a group ("Individual" 2013). An individual in the latter sense is also an individual in the first sense, but there is additional meaning attached to the "individual" who is also a person. They are not only singular; they are distinctive or original, a *someone* instead of a *something*. A ball or a piece of cake can be set aside individually. One individual ball or an individual piece of cake. But neither ball nor cake is "an individual."

Other uses of "individual" slipped into articles not on genetic counseling or IVF. An author writing for *Redbook* in 1971 wrote on how a fetus develops in the womb. But unlike writers from the 1960s, that writer, physician Elizabeth Connell, began the story of

development with the formation of eggs in the woman's ovaries while *she* was in the womb of her own mother (Connell 1971). Connell, who was a medical doctor, frames her article as being about how "the birth of a particular individual occurs at all," and as such recounts a single egg's entire development from when it first appears in the woman's ovary during her own fetal development to how it matures during the woman's adult life and then finally to when it meets a sperm in the woman's fallopian tube and becomes fertilized. *That* fertilized egg becomes the fetus featured in the title of Connell's article, "How the Fetus Develops." So there is a great deal of emphasis placed on how unlikely it was for one egg to have even the chance to develop into the one fetus ("the fetus") Connell describes. She says it is "amazing that *a* child is conceived, nurtured and arrives on earth" (emphasis added). "Only one of these sperm will fertilize the egg," she adds. *One* sperm. *The* egg. "Why this one particular sperm?" she asks. "Why this one particular egg?" She doesn't supply an answer, but the questions themselves reveal her focus on the one-ness, the particular-ness of the developing embryo.

Thus, a new framing was beginning to emerge in the 1970s. Writers were talking about specific embryos and fetuses in the womb, occasionally describing them as "individuals," and linking that individuality to the unique set of DNA that forms during fertilization. Those writers were a mix of doctors (scientifically-trained) and professional writers (not scientifically-trained), which mirrors how scientific terms were slipping into public discourse. But the shift to talking about specific embryos and fetuses wasn't the only one going on in the public discourse about embryos and fetuses. Articles on genetic counseling, IVF, and other topics of fetal development remained fairly neutral in tone. They featured some humanizing terms, some technical terms, and did grant embryos and

fetuses some level of human personality, but they didn't feature a split in language or word use like we saw in the documents of 1970s court cases. Writers describing scientific or medical processes didn't seem to be part of the abortion debate, even though articles on genetic counseling featured many references to abortion.

However, writers directly weighing in on the abortion debate weren't so equal-opportunity with their language. A new section of popular literature began appearing as more cases came to the courts about the legality of abortion. And the language in those articles, speeches, and books were showing the kind of polarized vocabulary we in the twenty-first century are so used to.

The Vocabulary Dichotomy in the Abortion Debate and New Slippage

Readers in the twenty-first century are used to the polarized language that appears in dinner conversations, news articles, and legal debates about embryos, fetuses, and abortions. Usually, anyone who supports women having access to abortion care talks a lot about the women themselves and refers to “embryos” and “fetuses.” Anyone who does not support the idea of accessible abortion care focuses on “babies” and “unborn children” and, possibly, some mention of murder. That is not always the case, of course. Though it can be hard to hear more moderate views over the clamor of self-described pro-life or pro-choice camps, people can and do have intermediate views on abortion. As with most topics, there is a spectrum of views.

But that prominent, conflicting, polarized language wasn't always so loud in the public discourse. We've seen that for much of human history, words to refer to embryos and fetuses were the same, whether one thought of them as people or not. The courts in England in the Middle Ages denied embryos or fetuses any protection against being aborted, thus denying them personhood in that area, and yet referred to them as "children." On the other hand, the Catholic Church for most of its history did grant embryos and fetuses a kind of spiritual personhood, usually protecting them from being aborted. But Church officials stuck with traditional terms like the Latin "*fetus*" to describe the supposed spiritual persons in the womb.

We saw the beginning of lingual polarization in the late 1800s, when words like "embryo" and "fetus" became more tightly associated with science, while words like "child" stayed in the public realm. But the terms continued to mingle in public articles throughout most of the twentieth century. So when did the two sets of vocabulary really begin to diverge? It was when the legal status of abortion care became a topic of public conversation.

I cannot claim to have reviewed all literature on the abortion debate in the early 1970s. I have been limited by the availability of source material and the searching methods of the databases I have access to. Time also has been an inescapable constraint. However, based on the dozens of documents I have examined, it is clear that in the early 1970s, as public opinion fractured about abortion, popular language reflected it. The following evidence and conclusions should come as no surprise, as the language is not too dissimilar from what we read in the twenty-first century—and because the split mirrors almost exactly the split in language of 1970s court documents.

That is to say, people who supported more accessible abortion care framed their arguments around women and mentioned embryos and fetuses sparingly, if at all. When they did mention *in utero* entities, they used “embryo” or “fetus” or other technical terms (Falk 1970, “Some Thoughts on Strategy,” in Greenhouse and Siegel 2012, p. 163; Wahlberg 1971). For example, in a 1969 article titled “Everywoman’s Abortions: The Oppressor Is Man,” published in the New York publication *Village Voice*, author Susan Brownmiller recounted a public event in which women protested for the right to have abortions. Brownmiller’s article focused on the women’s arguments for legalizing abortions and didn’t feature hardly any mention of the embryos or fetuses potentially being aborted (Brownmiller 1969). Women quoted in the article talked about being pregnant, but their arguments, which Brownmiller seemed to support, centered on women’s rights, not the biology of embryos and fetuses. Likewise, an article by Hope Spencer in 1972, published in *New York* magazine, focused on women’s positions when it came to abortion care, citing reasons why safe, legal abortions were necessary for women to have access to (Spencer 1972). Spencer references “fetuses” only once, and that reference occurs in a quotation made by a male politician, not for a substantive purpose.

Even an article not strictly engaging with the abortion debate, per se, followed the pattern. In 1972, *Time* magazine published an article written about a young girl missing her thymus gland (“A Thymus for Maggie” 1972). The author begins the article by referencing the polarized nature of the abortion debate by saying, “Medical and ethical debate over liberalized abortion laws has centered on the woman and the unborn child.” But the author goes on to say that anti-abortion laws also have implications for a third

group of people. They may harm patients who might benefit from transplants from aborted “fetuses.” For the rest of the article, the author seems to be in support of legal abortions because it gives patients, like the young girl Maggie, the chance to be treated with fetal tissues, like thymus glands. After the first line, the author uses only “fetus” to describe aborted *in utero* entities, falling into the pattern of not using humanizing language like “baby” or “child” when writing in support of legal abortions.

On the other hand, people who did not support accessible abortions framed their arguments around embryos and fetuses, focusing on their rights, and referring to them as “unborn children,” “child,” and “baby.” In 1970, a physician in Louisiana wrote a statement explaining why he would not perform abortions (Knapp 1970).²⁸ The gist of it was that abortion was killing a human being, the same as if the physician went out and killed his neighbor for a reason other than self-defense. The physician claimed he thus would not “kill” a “baby” or “child” in the womb, unless the “baby [was] killing its mother” (Knapp 1970).

That same year, a committee of the New Jersey Assembly held a hearing on whether they should repeal the statute criminalizing abortion (Greenhouse and Siegel 2012, pp. 97–99). One woman testified at the hearing to say that at first, she had wanted an abortion to terminate her sixth, and unwanted, pregnancy. But she didn’t go through with the abortion and was grateful in the end that she did not. She testified to explain how abortion wasn’t the right answer, even in cases of an unwanted pregnancy. Her use of “child,” “baby,” “bud of life,” and “the unborn,” preserved via a transcript of her

²⁸ The statement was published in the *Journal of the Louisiana State Medical Society*, which is not quite a public or popular source, but it reflected sentiments and writings of the time well enough for me to include it.

testimony, showcases again that people not in favor of legalizing abortion often used humanizing language to refer to the embryo or fetus (pp. 97–99).

More examples abound, including an advertisement showing the image of a healthy, already-born (possibly several months old) child with the caption of “Is This Life Worth 8¢?” (Greenhouse and Siegel 2012, p. 112). The ad refers to the born-child as a “life” worth saving and then asks people to save “unborn children” by writing to their government representatives (for the price of postage, which was 8¢ from 1971 to 1974). Likewise, a letter written by Richard Nixon to the Catholic Archbishop of New York, Terrence Cardinal Cooke, referenced the “right to life” possessed by “unborn children” (Greenhouse and Siegel 2012, p. 157). Neither Nixon nor the advertisement mentioned the women pregnant with the “unborn children” being advocated for, just like many of the articles focused on women’s rights didn’t mention the interests of the embryo or fetus to be aborted.

Thus we see the same split we saw in the arguments prepared by those debating the legality of abortion in the courtroom. State attorneys focused their arguments on the embryo and fetus and the state’s compelling interest in them. And attorneys for the women and physicians challenging state statutes focused on the rights of women and physicians. It seems, then, that people outside of the courtroom also disagreed on what, fundamentally, the abortion debate was about. One side argued for the rights of women, while the other advocated for embryos and fetuses.

But in the writings advocating for embryos and fetuses, a new term began popping up. We’ve been dealing with words like “baby” and “child” since the beginning of our story, and they’ve appeared in English writings since English first became a thing

that could be written down. In the early 1970s, however, writers began referencing embryos and fetuses as “human life”—and with that term came another example of slippage introduced through sloppy language.

Anti-abortion advocates frequently referred to embryos and fetuses as “human life” or “human beings” (Greenhouse 1970; Wilke and Wilke 1971; *Abortion and Social Justice* 1972). But not all of them explained exactly what they meant by using that term. In 1971, one pair of authors did in their book *Handbook on Abortion*. Obstetrician Jack Wilke and nurse Barbara Wilke, a married couple, wrote *Handbook on Abortion* in a question-and-answer format to go over what they considered to be the salient points of the abortion debate. Both Wilkes were leaders of the Right to Life movement, and *Handbook on Abortion* provides a good range of terms used by self-described “pro-life” individuals (Greenhouse and Siegel 2012, p. 99). In addition, it was a popular text, selling 1.5 million copies in the first eighteen months of its publication (p. 100). Therefore, it is a solid source to analyze for our purposes.

The first thing to note about the Wilkes’ writing is that they used their words intentionally. We know that because they titled a section of *Handbook on Abortion* “The Words We Use” (Wilke and Wilke 1971, pp. 130–131). In that section, the Wilkes explain that words like “product of conception,” “fetal tissue,” “glob or protoplasm,” and “other high sounding phrases” were “all direct denials of the humanity of the growing child” (p. 130). There, the Wilkes take aim at words similar to “embryo” and “fetus,” words with technical associations, and claim they are de-humanizing. They strip the “humanity” from the “growing child,” according to the Wilkes (p. 130). The Wilkes then advocate for using more humanizing terms. They say, “If you are convinced that this is a

human life, call it as such. Then consistently speak of ‘he’ or ‘she,’ not ‘it,’ and speak of the ‘unborn,’ ‘pre-born,’ or ‘developing child’ or ‘baby’” (p. 130). So the Wilkes were aware of the split in language surrounding the abortion debate, and they clearly preferred humanizing terms like “baby” or “child.” See also that they refer to the embryo or fetus as “a human life,” which is a term they use throughout their book alongside “baby,” “child,” and the others. In fact, the Wilkes write that, for them, “the entire abortion question” hinges on whether an embryo or fetus in the womb is “human life” (p. 6). But what do they mean by that?

In a chapter called “When Does Human Life Begin?,” the Wilkes take a biological approach (p. 9). They claim:

When, however, at fertilization, the 23 chromosomes from the sperm join 23 chromosomes from the ovum, a new being is created. Never before in the history of the world nor ever again will a being identical to this one exist. This is a unique being, containing within itself a genetic package, completely programmed for and already moving toward adult human existence. It has, by any standard, a life of its own and in no way is part of the mother or the father. We call it a fertilized ovum and soon thereafter a zygote. Nothing will be added to this being between the moment of fertilization and its ultimate death as an old man except time, nutrition, and oxygen. It is all there in toto at that moment, merely not fully developed.

(Wilkes, p. 11).

There, the Wilkes tie the existence of a “new being” to the moment of fertilization. The merging of maternal and paternal chromosomes in a unique way is when “human life” begins for the Wilkes. That language is similar that of other public writings on embryos and fetuses, notably the idea that a “genetic package” that is “unique” results in a “new being.” Note also that the Wilkes refer to the embryo as having “a life of its own,” not “life” of its own. That *a* in front of “life” is significant. We often write “a life” in sentences like: “He had a long life.”; “She had a full life.”; “They had a happy life together.” Those sentences aren’t referring, really, to biological life. They’re referring to a life in the social sense, the life you spend with someone you love, for instance, one full of memories and other non-biological ideas. In a chapter titled “When Does Human Life Begin?,” where that “life” seems to mean biological life, the use of “a life” is an anomaly. But in that chapter, the Wilkes claim a “human life” is a biological entity of the human species with its own unique DNA (p. 11).

But in other sections of their book, the Wilkes take a more political approach to explain what “human life” is. In a chapter called “Is This Human Life?,” the Wilkes lay out an explanation of what “human life” is based on legal documents and political history (pp. 6–8). They say, of an embryo or fetus, “If human, he (or she) must be granted the same dignity and protection of his life, health, and well-being that our western civilization has always granted to every other human person” (p. 6). They follow that up with, “For two millennia in our western culture, written into our Constitution and Bill of Rights, specifically protected by our laws, and deeply imprinted into the hearts of all men has existed the absolute value of honoring and protecting the right of each person to live. This has been an inalienable and unequivocal right” (p. 6) By bringing up the

Constitution and Bill of Rights, the Wilkes make it clear that they are discussing the legal rights of humans. They hammer home that the United States have always protected the legal right to life by mentioning that:

Never in modern times, except by Hitler, has a nation put a price tag of economic or social usefulness on an individual human life as the price of its continued existence.

Never in modern times, except by Hitler, has a nation demanded a certain physical perfection as a condition necessary for the continuation of life.

Never since the ancient law of paterfamilias in Rome, has a major nation granted to a father or mother total dominion over the life or death of their child.

Never has our national legally allowed innocent humans to be deprived of life without due process of law. (Wilkes, *Handbook on Abortion* 1971, p. 6–7).

We can see that the Wilkes fall into trends that we noted in Chapter 3, including referencing World War II and old US documents, including the Fourteenth Amendment's due process clause, to support their own idea of who should have legal personhood. And it is a very legal personhood being built up by the Wilkes. The Wilkes reference "life" or "human life" in the context of what rights the law grants living humans simply because they are living humans. The Wilkes claim that a "human life" has inalienable rights as mentioned in the Constitution and Bill of Rights.

And yet, the Wilkes are not talking about born-humans as was the case at Nuremberg or during the drafting of the Constitution and Bill of Rights. They apply the

term “human” as in “legal person” to embryos and fetuses still in the womb. They state, “It makes no difference to vaguely assume that human life is more human post-born than pre-born. What is critical is to judge it to be, or not to be, human life” (p. 7). And later, they ask, “Judge it to be a human person? Then join us in fighting for his right to live, with all the energy and resources at your command” (p. 8). Since the Wilkes are “fighting for [embryos’ and fetuses’] right to live,” we can conclude that they judge embryos and fetuses to be “human person[s]” before they’re born.

So the Wilkes have two explanations for what “human life” is. It is the thing created after the moment of fertilization, identifiable by its unique genetic code. And it is a thing that has the right to live based on centuries of legal history. Those are vastly different things, and yet in the Wilkes’ book, they slip together without much scrutiny because the Wilkes use the same term, “human life,” to refer to both things. That slippage between those two ideas means the Wilkes never really make it clear *why* an embryo or fetus counts as a legal “human life.” The Wilkes explain that “human life” is legally protected, and then they explain how biological “human life” comes to be at the moment of fertilization. But they don’t spend long explaining why living cells of the human species (“human life,” biologically) gets to be a human person with legal rights (a “human life,” legally).

The only spot I found an explanation was when the Wilkes pose a question about the legal rights of the “unborn child” and whether viability has anything to do with when the “unborn child” attains those rights (p. 22–23). The Wilkes brush off any requirement that a fetus be viable to have rights. They state, “To make a judgment of an unborn child’s right to live or not in our society by his mental or physical competence, rather

than merely by the fact that he is human and alive, brings only too close the state's determination of a person's right to continued life as measured by their mental or physical competence or whatever the current price tag is" (p. 23). There, the Wilkes obliquely reference the danger of a state, possibly Nazi Germany, deciding that mentally or physically "incompetent" humans don't deserve to live. But buried in their reference to such tyrannical states is the phrase "rather than merely by the fact that he is human and alive." It is that phrase the Wilkes use to justify the "unborn child's right to live." It shouldn't be based on mental or physical competence, the Wilkes say. It should be based on whether the entity is human and alive. That's the only place I found where the Wilkes make a claim for why an "unborn child" should be a legal person. And it's not much of an argument. All they're saying is that because the "unborn child" is biologically human and biologically alive, because it has biological "human life," then it gets to count as legal "human life" as well, a legal person. They seem to be defining the requirements of the legal "human life" by stating the requirements of biological "human life." According to the Wilkes, anything that is alive (not dead) and a member of the human species gets to be a legal human person.

The Wilkes weren't the only ones to make use, intentionally or unintentionally, of the slippage between biological "life" and "life" as mentioned in historical US documents. Remember that in Chapter 3, others who advocated for the legal personhood of embryos and fetuses referenced historical documents as well. Those included the Declaration of Independence, the Fourteenth Amendment to the US Constitution, and the United Nations "Declaration on Rights of the Child." Those documents all contain references to people's "right to life." Meanwhile, the name of the "Right to Life"

movement contains that pesky “life” as well, though it is unclear exactly what kind of life members of the movement advocate for. Perhaps both, as in the case of the Wilkes.

But why does this instance of slippage matter? So what that some people thought being biologically alive meant you got legal rights, too? Just because the Wilkes and their colleagues thought so didn’t make it true. That’s entirely correct. The Wilkes had no power to declare that any biologically human, biologically alive entity received legal rights. But the US courts did. The courts in the 1970s had the power, and were being brought cases that gave them the position, to possibly bestow full legal rights on embryos and fetuses. And the term “human life” played a big role in those cases, bringing with it both of its slippery, separate meanings.

Courts Seriously Discuss “Potential Human Life,” a Term of Murky Provenance

As we near the end of our story, some readers may be wondering why it’s important to tell this story at all, a story of words and their changing meanings, instead of another story, perhaps one more focused on legal theory or historical events. It’s a fair question. Our story so far has required detailed study of small changes, delicate patterns, and the intangible nature of connotations, associations, and implications. Why spend so much time on such small pieces of the wider story of embryonic and fetal personhood, a story that has spanned centuries and has been authored by such formidable institutions as the Catholic Church and the US Supreme Court? Why have we faithfully, doggedly, sometimes-tediously tracked our set of words through thousands of years and thousands

of documents? Isn't there a better way to get at the topic of embryonic and fetal personhood?

There are hundreds of different ways to approach this topic. People have written hundreds of books on it, each of them slightly different, each of them valuable and worthwhile. But the reason I chose to focus on words is simple. It's the same reason why I decided to structure this story around major court decisions. It's because in court cases, when judges write down the court's final decision, what they call something is what it *is*. To be more concrete, if a judge says a woman is guilty of illegally aborting an "embryo," then the woman goes to jail for aborting an "embryo." If, however, the woman can show that instead, she aborted a "fetus," the court has to let her go. No jail time. No three years' hard labor in Louisiana. Remember this story? It's the first court case we discussed, about the abortionist Electa Dore in 1955 Louisiana (*State v. Dore* (1955)). She was acquitted of an abortion crime because she proved that she hadn't aborted the thing alleged in her charges. The court's ruling turned on whether she had aborted an "embryo" or not. If the thing aborted wasn't an "embryo," she wasn't guilty.

That's why I have so dutifully traced words and their histories throughout the early US fetal personhood debate. Because when the courts began ruling, explicitly, on whether embryos or fetuses were full legal persons under the US Constitution, it mattered what words they used to refer to embryos and fetuses. Whatever word they used, "embryo" or "child" or something else, that was the thing, the entity, that either received legal personhood or was denied it. And so as we come to the climax of our story, we find that one last term is making its way into the courts, a term that's slippery and vague and gets codified into US common law anyway. The term is: "potential human life."

That first time that term appears in a US court case is in 1970. That year, women in the state of Georgia challenged the constitutionality of the Georgia abortion statute, and a three-judge district court ruled on the matter in *Doe v. Bolton* (1970). The arguments made by the women and by the state attorney general, Arthur K. Bolton, were much the same as we've previously discussed. The women argued that they had a constitutional right to privacy that permitted them to seek and receive abortions, and that the statute was so vague as to what counted as a legal versus illegal abortion that the rights of healthcare professionals to practice medicine were also being unconstitutionally infringed upon (*Doe v. Bolton* (1970), p. 1051). The state, on the other hand, argued that it had enough interest in the process of abortion, to protect the woman and the embryo or fetus, that the Georgia statutes were constitutional in their requirements (p. 1055).

To settle the matter, the Georgia district court split the difference, so to speak. The court ruled that yes, women did have a right to privacy that encompassed a right to abort a pregnancy (*Doe v. Bolton* (1970), p. 1055). But, the court continued to say that “the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone” (p. 1055). But what interests are those? The court clarifies in the next paragraph that, “Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the potential of independent human existence” (p. 1055). And therefore, the court concludes, “A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision” (p. 1055). Essentially, the court said three things in quick succession: 1) Women do have a right to abort pregnancies; 2) But once there's

an embryo, a “potential human life,” it’s not just her decision alone; and 3) The state does have an interest in protecting its citizens enough to interfere with *how* abortions get carried out. The court ruled that the Georgia statutes were not allowed to limit the reasons for which a woman could seek an abortion, but the statutes could require women to speak with licensed physicians, get their permission, and obtain an abortion in a licensed and accredited hospital.

But that part of the decision isn’t the most significant for us. The most significant part of *Doe v. Bolton* is that the court used the term “potential human life” to refer to an embryo or fetus. In doing so, the court subtly shifted the conversation. It wasn’t about an “embryo” or a “fetus”; the court’s ruling didn’t hinge on those words or those entities. It hinged on the idea of there being “a potential human life” that the state had an interest in. The court in *Doe v. Bolton* made a “potential human life” something that could be judicially considered and judicially handled. It made “potential human life” a real thing, something laws could be applied to, something the state could go to court to protect.

Given, the court in *Doe v. Bolton* did not grant embryos and fetuses any federal constitutional rights (1970, p. 1055). In their written decision, the court explicitly denies them those rights, just as it denies them a legal guardian to represent them in the case (p. 1055, footnote 3). But the court did introduce the term and did bring it into the realm of adjudication by US courts. No longer was “human life” just something anti-abortion activists like the Wilkes were talking about. Now it was something the courts were talking about, with serious implications.

Other courts continued the trend of introducing “potential human life,” “human life,” or other, similar phrases into the discussion of abortion statutes. A district court in

Louisiana in 1970 mentioned that “the ‘moment’ of conception or some stage of development very close to this ‘moment’ is the point at which distinctively human life begins” (*Rosen v. Louisiana* (1970), p. 1223). An Ohio district court said in a 1970 case that “human life” or “new life” comes into being at the moment of conception (*Steinberg v. Brown* 1970, p. 746). Likewise, the North Carolina district court in *Corkey v. Edwards* (1971) said that after fertilization, there was a “unique physical entity with the potential to become a person” (p. 1253). A dissenting opinion in the Illinois case *Doe v. Scott* the same year referenced “the protection of potential human life” (p. 1396). Similarly, a dissenting judge in the 1972 New Jersey case *Young Women’s Christian Ass’n of Princeton, N. J. v. Kugler* said, “It must be remembered that the fundamental right with which we are here concerned can only be exercised by destroying potential life” (p. 1082). Without getting tedious, courts throughout 1972 used “newly formed human life” (*Abele v. Markle* 1972), “potential human life” (*Crossen v. Attorney* (1972); *Cheaney v. State* (1972)), and “human life” (*Abele v. Markle* (1972)) when discussing the legal status of embryos and fetuses.

Notice that in several of the above quotations, judges identify a “potential human life” beginning after the sperm fertilizes the egg. That’s the same biological explanation of when “human life” begins that we saw in the Wilkes’ *Handbook on Abortion* and in other popular articles about embryos or fetuses. The courts often relied upon that explanation as well. When conception or fertilization took place, when sperm fertilized egg, when a new, unique set of chromosomes formed, that was when a “new being” or a “human life” came into existence (*Rosen v. Louisiana* (1970), pp. 1223–1224; *Steinberg v. Brown* (1970), p. 746–747; *Corkey v. Edwards* (1971), p. 1253; *Cheaney v. State*

(1972), p. 145, p. 147; *Rodgers v. Danforth* (1972), p. 259; *Abele v. Markle* (1972), p. 235; *Byrn v. New York City Health & Hospitals* (1972), p. 200).

And there arises the same kind of slippage as we noted in *Handbook on Abortion*. In that book, the Wilkes' logic that a biological human life was equal to a legal human life, or person, held no weight beyond their own opinion. Seeing the slippage between biological life and legal life occurring in US courts is more concerning. For example, in the 1970 case *Steinberg v. Brown*, the court defines "life" using the *Webster New International Dictionary of the English Language*, in its second edition, published in 1934. That definition for "life" was: "that quality or character (that) distinguishes an animal or plant from inorganic or dead organic bodies and which is especially manifested by metabolism, growth, reproduction and internal powers of adaptation to the environment" (*Steinberg v. Brown* (1972), p. 746). That is a biological definition of life. Something that is not dead and can grow, adapt, or reproduce has "life." The court goes on to say that, "Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life just given" (p. 746). So for the court in *Steinberg v. Brown*, biological life commences when fertilization happens. Nothing amiss there; I agree that an embryo is alive, as defined by the *Webster* definition of "life." But then a few paragraphs later, the court claims, without amending the definition of life, that, "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it" (p. 746–747). There, without any consideration of the difference between biology and law, the court declared that a biological "human life" counted, ipso

facto, as a “human life” that deserved protection under the Fifth and Fourteenth Amendments of the Constitution.

Why is that the case? I’m neither contending nor denying that a biological human life counts as a legal human life. My own personal opinion on the matter is not the point. The point is that the judges of a US court did not provide an explanation for why a biological definition of “life” was the same as the “life” that appears in the Constitution in the famous phrase “life, liberty, or property” (Fifth and Fourteenth Amendments). Is it the same “life”? Perhaps. Many people think so. But it seems sloppy at the very least, dishonest at the very worst, to define an embryo or fetus as a “human life” based on the biological definition and then assume a few sentences later that it also gives them the “right to life” as mentioned in the Constitution.

Steinberg v. Brown wasn’t the only case to include the slippage. The court in the 1972 case *Cheaney v. State* came to a similar sort of conclusion in stating that “a State interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling” (p. 147). There again, ideas about a “potential human life” beginning at conception (a biological event) mix with ideas about the state having a “compelling interest” (a legal bestowal) in the same “potential human life.” Other courts fell into the same easy, sloppy language, often less cleanly stated than the examples in *Steinberg* and *Cheaney*. The gist of the slippage occurs when courts define a “human life” as beginning at conception and then continue to weigh the state’s legal interest in said “human life” without telling the reader why the biological fact of life implied or demanded any legal action on behalf of the state.

The above observations fit into a trend that other scholars have noted: the increased presence of science in law, and, more concerningly, the increased reliance upon scientific facts to make legal decisions (Markey 1984). It is not a new trend; legal professionals have been writing about it since at least the 1980s, and *Roe v. Wade* was decided in 1973. But neither has the trend abated (see *Ass'n for Molecular Pathology v. Myriad* (2013)). As a scientist, I don't think legal questions should be answered solely with scientific facts. In the instance of *Roe v. Wade* and similar cases, the way judges substituted biological descriptions of *in utero* development for true probing of the legal status of embryos and fetuses, it seems inappropriate. Howard T. Markey, a chief judge for a federal circuit court of appeals, said that science and law are different fields with different aims (Markey 1984). Science is a technical, value-free, and non-humanistic method to learn the truth of how the physical world works. Law, on the other hand, is the nontechnical, value-laden, and humanistic method by which society decides how it should operate. In Markey's view, no court should base a decision on science alone if that choice resulted in legal questions being overlooked (Markey 1984).

However, this *is* a story about how things get overlooked thanks to language slopping over from science to the public to the law and back again. And as such, I do have a few suggestions about why the leap from biological life to legal life seemed so easy for the courts to make at the time. Remember that public writers in the 1950s, 60s, and 70s were writing articles that described how embryos and fetuses developed before birth, characterizing them with agency and human-ness. Well, pieces of those stories found their way into court decisions and briefs filed by attorneys arguing cases.

A dissenting judge in *Doe v. Scott* wrote a description of how embryos and fetuses develop in the womb, spanning several pages and including landmarks like when the fetus has “recognizable knees, ankles and toes,” when brain waves can be detected, when the heart beats, and when the fetus can “kick its legs” or suck its thumb (*Doe v. Scott* (1971), p. 1393). The judge also includes a paragraph on how embryos or fetuses had distinct behavior patterns, “discernible differences in vividness, reactivity and responsiveness”—in other words, different personalities in the womb (p. 1394). And the judge includes the old phrase “an unmistakable human being,” quoted from a law review article by Robert M. Byrn, whom we’ve mentioned before (p. 1394).

Another dissenting judge, this time in *Abele v. Markle* (1972), did something similar, mentioning that a “unique genetic pattern” formed at fertilization, brain waves appeared at seven weeks’ gestation, and that the fetus has its own blood circulation, separate from the pregnant woman (p. 235).

In other cases, judges brought up the idea that doctors treated women and fetuses as separate patients, an idea we saw forming in articles about the new medical field of fetology. In a New York case, a judge wrote, “Every respected doctor, specializing in this field, treats the unborn child as a second patient different and individually distinct from the mother” (*Byrn v. New York City Health and Hospitals* (1972), p. 211). There, we see the idea of two patients as well as the idea of the fetus being “individual” and “distinct” from the pregnant woman. Similar ideas circulate in other cases as well, when judges draw on court decisions dealing with whether pregnant women who refused a certain medical procedure (like a blood transfusion) could be forced to have it on behalf of the

other patient, the embryo or fetus (*Byrn v. New York City Health and Hospitals* (1972), p. 326).

A brief submitted to the Supreme Court in 1971 for *Roe v. Wade* contains all kinds of tactics used by writers from earlier decades. There are discussions of the pregnant woman and fetus being separate medical patients (Brief for Appelle, Henry Wade (1971), p. 30). Following that comes a truly detailed list of milestones that occur in *in utero* development, including phrases that characterize the embryo or fetus as a human (p. 32–55). “The brain in configuration is already like the adult brain,” the authors note, “and sends out impulses that coordinate the function of the other organs” (p. 38). “In the third month,” they add later, “the child becomes very active. By the end of the month he can kick his legs, turn his feet,” etc. (p. 41). And before the third month is over, the authors claim, “Every child shows a distinct individuality” (p. 44). The brief authors also state clearly that “By the beginning of the second month the unborn child, small as it is, looks distinctly human” (p. 34).

Given that judges and attorneys do not live in a separate legal world away from the rest of society, it doesn’t seem implausible that they read popular articles about embryonic and fetal development. Perhaps those articles had an impact on how judges and attorneys viewed embryos and fetuses—as humans with their own lives and activities before birth. Some of the information in the *Roe v. Wade* brief even came from a book titled *A Child Is Born: The Drama of Life Before Birth*. Note the second half of the title and how similar it is to the titles of dramatic “life before birth” articles we discussed (Brief for Appelle, Henry Wade (1971)). Note also that that book is by Lennart Nilsson, who took the portrait-style, humanizing photographs of the embryos and fetuses that

graced the cover of *Life* magazine in the 1960s (“Drama of Life Before Birth” 1965). The book features similar photographs. Clearly, then, at least the attorneys who wrote the *Roe v. Wade* brief had read a book dramatizing life before birth. That same information then made its way into the hands of Supreme Court justices when they read the brief before deciding the case.

Thus, the story of words in the early 1970s wasn’t self-contained in any one area. The words for embryos and fetuses did overlap and slop from the scientific sector to the public sector to the legal sector and back again. “Potential human life” appeared in court cases, and then it appeared in articles from *The New York Times* when *NYT* authors discussed those cases (Greenhouse 1970; Warren 1973; “Respect for Privacy” 1973). But when “potential human life” appeared in court cases, it had a serious legal impact, introducing a new term for courts to use when referencing embryos and fetuses, and introducing slippage between biology and the law. Suddenly, a “human life” was an entity judges could act on. They agreed that states had an interest in “potential human lives,” and they decided the legality of abortion care with those ideas in mind.

For twenty-first century readers, the first abortion case to come to mind may be the Supreme Court case *Roe v. Wade* in 1973. But judges did make decisions in the abortion cases that appeared in the early 1970s before *Roe*. Some courts decided in favor of women and physicians, striking down abortion statutes as too restrictive or unconstitutional (*People v. Belous* (1969); *Babbitz v. McCann* (1970); *Doe v. Scott* (1971); *Young Women’s Christian Ass’n v. Kugler* (1972)). Other courts sided with the states, ruling the statutes to be fine the way they were (*Rosen v. Louisiana* (1970); *Steinberg v. Brown* (1970); *Corkey v. Edwards* (1971); *Crossen v. Attorney* (1972);

Cheaney v. State (1972); *Rodgers v. Danforth* (1972)). The Supreme Court's decision in *Roe v. Wade* in 1973 is the climax of our story, where the law of the land was settled about whether embryos and fetuses counted as legal persons. At least for a time. The fetal personhood debate continued after *Roe*, and it expanded into new legal areas. But the Supreme Court in *Roe* answered the question at the center of our story, first raised in *Dietrich v. Inhabitants of Northampton* in 1884 and poked and prodded in the intervening century. We'll finally get the official answer on whether an embryo or fetus was a legal person while still in the womb. And we'll get to see what word the Supreme Court used when granting or denying that personhood.

The Supreme Court Denies Constitutional Personhood But Grants Something Else

One of the functions of the Supreme Court is to make a final decision on legal decisions that lower US courts disagree about ("About the Supreme Court"). As we've seen, the courts were split on what to do about states' existing abortion statutes, which was one of the reasons why the Supreme Court agreed to hear *Roe v. Wade* in 1971. Therefore, it is no surprise that the fact pattern of *Roe v. Wade* was similar to that of other abortion cases.

In Texas in 1970, there was a woman who was pregnant and wanted an abortion (*Roe v. Wade* (1973), p. 120). The Texas abortion statutes at the time, first enacted in 1857, permitted women to have abortions only when their lives were in danger (Texas Statute). As the woman, identified as Jane Roe in court documents, was not in danger of

dying, Texas physicians denied her an abortion. Roe then filed a lawsuit against the state of Texas alleging the abortion statutes to be unconstitutional.

In the meantime, Roe did receive an abortion, but her case remained a valid one for the courts to consider because she could find herself in the same situation again, pregnant and wanting an abortion (*Roe v. Wade* (1973), p. 125). A district court in Texas heard the case in 1970 and decided in her favor, declaring the Texas statutes unconstitutional, but the state of Texas appealed the case to the Supreme Court, which issued a final ruling in 1973.²⁹ Along the way, the district court consolidated *Roe v. Wade* with another abortion case, *Doe v. Bolton*. However, the Supreme Court decided that the woman in *Doe v. Bolton* didn't have standing in the case as she wasn't pregnant when she challenged the abortion statute. In addition, attached to the original *Roe v. Wade* case was a physician who was also challenging the laws for violating his right to practice medicine how he saw fit. But the Supreme Court deemed he didn't have sufficient standing either (*Roe v. Wade* (1973), p. 126) and dismissed him as a party to the case.

Thus, the main question of *Roe v. Wade* was whether Roe had a right to have an abortion beyond what the Texas statutes permitted or whether the state of Texas's abortion statutes were constitutional and could remain in place. The arguments presented by both sides were very similar to the ones we've discussed in other cases, all the way back to *People v. Belous* in 1969. Roe and her attorneys argued that the Supreme Court should rule the Texas abortion statutes unconstitutional. Roe contended that the Ninth and Fourteenth Amendment granted her a right to privacy that encompassed her right to

²⁹ It is rare for a case to go directly from a district court to the Supreme Court, bypassing an appeals court. Such a jump is only made in extraordinary cases.

have an abortion without the state interfering. Roe's side also included the First, Fourth, and Fifth Amendments as protecting women's right to privacy, and included references the involvement of physicians in providing abortion care ("Roe v. Wade"). In the oral arguments before the Supreme Court, attorney Sarah R. Weddington argued the case for Roe's side, and in keeping with patterns we've seen before, she focused her language on the woman herself. For example, she spoke of women finding a physician who will "perform it on her," where "it" is an abortion ("Roe v. Wade," Oral Arguments 1972, 00:10:21). She rarely mentioned the embryo or fetus, instead speaking of women's pregnancies and using "fetus" when she did reference an *in utero* entity ("Roe v. Wade," Oral Arguments 1972, 00:09:29).

On the other side, the state of Texas chose to advocate for the rights of the embryo or fetus. The Texas attorneys claimed that the embryo or fetus was a person within the meaning of the Constitution and the Fourteenth Amendment ("Roe v. Wade," Oral Arguments 1972). In their oral arguments before the Court in 1972³⁰, the state of Texas, represented by Robert C. Flowers, focused almost entirely on their argument that the embryo or fetus was a legal person ("Roe v. Wade," Oral Arguments 1972). Flowers spoke of the embryo or fetus as a "child," "baby," "unborn child," "human being," "human life," "person," and "potential life" ("Roe v. Wade," Oral Arguments 1972, 00:29:57; 00:48:28; 00:38:38; 00:43:27; 00:46:51; 00:31:39; 00:31:19). The Supreme Court justices, when asking question of Flowers, did use "fetus" to describe *in utero* entities, but Flowers mostly refrained from following suit, sticking to the more

³⁰ The Supreme Court heard oral arguments for *Roe v. Wade* twice, once in 1971 and again in 1972 before finally issuing their ruling in January of 1973.

humanizing language (00:44:33). Likely, that was to augment his argument that embryos and fetuses were human beings or human persons. Flowers claimed that the fetus was a human life, a human person, from the moment of conception and that laws permitting abortions were permitting the killing of another legal person.

Based on what either side was advocating for, the Supreme Court had to decide two issues. First, there was the question of whether women had a constitutional right to terminate their pregnancies, based in their right to privacy. Second, there was the separate question of whether the embryo or fetus was a legal person with constitutional rights. Those two, distinct questions reflect the split in the public discussion on abortion. One side framed it as a women's issue, while the other side framed it as an issue of fetal rights. Two separate discussions—women's rights and personhood, and fetal rights and personhood—were bound up into the abortion question.

The Supreme Court had to offer an opinion on each question as well as how they related to each other in the context of abortion care. Their ruling would set the law of the land on abortion care for all similar cases that came after *Roe v. Wade*. Indeed, some courts dealing with abortion cases changed their opinions after the ruling on *Roe v. Wade* came out (*Nelson v. Planned Parenthood Ctr. of Tucson, Inc.* (1973)). After *Roe v. Wade*, courts relied on the Supreme Court's rulings entirely (*State v. Strance* (1973); *Henrie v. Derryberry* (1973); *Doe v. Israel* (1973); *Coe v. Gerstein* (1973); *Doe v. Rampton* (1973)). So what did the Court decide, and how did they say it?

On the matter of whether women had a right to privacy that included abortions, the Supreme Court agreed that they did. The Court's opinion, supported by seven justices (with two dissenting), acknowledged that women's right to privacy, guaranteed by the

Ninth and Fourteenth Amendment, *did* include the right to terminate a pregnancy (*Roe v. Wade* (1973), p. 153). That was in line with most other courts' decisions on abortion cases. On the whole, judges seemed unlikely to say that women couldn't have abortions under any circumstances. However, the Supreme Court linked women's right to have abortions to physicians' rights to oversee abortion care. The Court may have booted the physician from having standing in *Roe v. Wade*, but they did specify that women should decide whether to have an abortion under the guidance of a licensed physician (p. 163). In their opinion, they state "that prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (p. 112). So the decision to have an abortion belonged to the woman and the physician both, just as women and physicians had been arguing for years. Sarah R. Weddington did her job in convincing the Court that the Texas abortion statute was too restrictive.

Did the attorney for Texas, Robert C. Flowers, do his job as well? Was the Court convinced that a fetus was a person with constitutional rights? Despite Mr. Flowers's extensive use of humanizing language, the Court ultimately did not agree that an embryo or fetus was a legal person with full constitutional rights (*Roe v. Wade* (1973), p. 158). In their opinion, the Court relies on the language of the Constitution and its Amendments as well as prior cases to come to their conclusion. The language of the Constitution and Amendments, they write, does not indicate that the word "person" includes "the unborn" (p. 157–158). They emphasize that "persons" mentioned in certain amendments often have to be "born" or otherwise engaged in activities that indicates they have been born, such as running for governmental office (p. 157). Likewise, when the Court reviews cases

in the area of prenatal tort, they conclude that any *in utero* entity granted recognition or standing as a legal person had to be born alive (p. 161–162). In cases of stillborn children, the Court states that such entities were granted standing to fulfill the parents’ interests, not for their own sake (p. 162). They note, too, that in the area of property law, embryos or fetuses have to be born alive in order to attain any actual rights (p. 162). Therefore, the Court concludes that “the unborn have never been recognized in the law as persons in the whole sense” (p. 162). The Court did not uphold that in *Roe v. Wade*. Embryos and fetuses were not granted legal personhood.

That might have been the conclusion of our story. In the last two chapters, we’ve been following the build-up of both the women’s rights movement and the fetal rights movement. Embryos and fetuses had seemed to be gaining ground. Writers were characterizing them as more and more human, a new medical field had arisen to treat them specifically as patients, and lawyers and other activists were advocating for their legal rights. Meanwhile, women were advocating for their own legal rights and to be treated as full persons equal to men in the areas of work, education, and the law. In the area of abortion care, women pushed for the right to bodily autonomy as consistent with their personhood, which built tension between the women’s movement and the fetal movement. The Supreme Court’s ruling that fetuses were not legal persons should have resolved that tension. Women had the right to terminate pregnancies. Fetuses weren’t persons who had a constitutional right to life.

But that’s not the final outcome of *Roe v. Wade*. And looking at the language in use at the time, we shouldn’t expect it to be the outcome, either. In deciding the two questions listed above—women’s right to abortions and whether fetuses were persons—

the Supreme Court used the familiar language we've seen throughout our story. They spoke of women when deciding women's rights. And when deciding fetal personhood, they used a mix of "embryo," "fetus," and "unborn children." We've seen those words many times. In cases about prenatal tort, judges wrote of "unborn children," and we know the Supreme Court read those cases when deciding *Roe v. Wade*. In popular articles from the 1950s to the 1970s, authors used "embryo" and "fetus" alongside "children" or "unborn children," so it is not a surprise the Court mixed them in their own writing.

But there was another category of terms, including "human life" and "potential human life," floating around in the 1970s, too. Those terms represented the slippery discussion people were having about biological human life and legal human life. It turns out the Supreme Court was not immune to such slipperiness, and the Court's final decision on abortion rested directly on the slippage inherent in those terms.

Though the Supreme Court acknowledged that women did have a right to have abortions, the Court did not grant women an unlimited right to do so (*Roe v. Wade* (1973), p. 154). The state of Texas alleged that it had an interest in regulating abortion care, and the Supreme Court agreed (p. 150). The Court writes:

The third reason [for the state to be involved in abortion care] is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within

her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life [*sic*] birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone. (*Roe v. Wade* (1973), p. 150)

In that passage, the Supreme Court does several things. First, they reference the argument made by the state of Texas that the state has an interest in protecting the “new human life” that forms at “the moment of conception” (p. 150). There, we see how the state attorneys used the same kind of language that the Wilkes and others did, asserting that “a new human life” forms at conception. According to the state of Texas, the state has the right, therefore, to interfere in abortion care to protect that life. The Supreme Court does not commit to the idea that “life” begins at conception but doesn't clarify what kind of “life” they mean. Biological life is very much present at or even before conception. The fertilized egg is alive post-conception, and pre-conception the woman's egg and the man's sperm are also biologically alive. So perhaps the Supreme Court meant to say that they don't agree that a legal “life,” with all the rights of a human person, begins at conception.

The Supreme Court doesn't make a clear statement either way. But the Court does say that, even if “life” in actuality doesn't begin at conception, the state may still intervene in abortion care to protect “potential life” (*Roe v. Wade* (1973), p. 150). The Court doesn't exactly say why the state has the right or duty to protect “potential life.”

It's taken as a given every time the Court references such a right or duty. Later, the Court says, "As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life" (p. 154). The phrase "As noted above" refers the reader back to the passage I quoted at length, starting with "The third reason," not a passage where the Court traces the history and logic behind why the state has an interest in potential life.

So far, our study of the US court system has shown it to be an institution very fond of citing the legal history behind rulings in cases. The Supreme Court in *Roe v. Wade* lists out all of the previous abortion cases heard between 1969 and 1970 as well as many of the prenatal tort cases from the early twentieth century (*Roe v. Wade* (1973), p. 154–155; p. 161–162). It seems slightly suspect that the Supreme Court wouldn't explain the legal or historical grounding behind why the state has such an interest in potential life. Perhaps, as attorney Mr. Flowers claimed in his oral arguments, the "definition of a person" (or a "life" perhaps) is "so basic" or "so fundamental that the framers of the Constitution had not even set out to define [it]" ("Roe v. Wade," Oral Arguments 1972, 00:29:18).

Whatever the reason, the Court acknowledged that the state has an interest in protecting "potential life." Therefore, the Court also granted the state the right to interfere in abortion care as soon as the state's interest in "potential life" becomes "compelling" (*Roe v. Wade* (1973), p. 163). So, the Supreme Court agreed with the other courts that state's interference in abortion was a matter of "compelling state interest." And that compelling interest, the Court decided, was the "potential life."

Thus, we see embryos and fetuses being relabeled by the Supreme Court. A “fetus” was not a legal person, according to the Court. Neither was an “unborn child.” But the same *in utero* entity, relabeled as a “potential life,” did have some legal weight. It wasn’t a person, but it was something the state had a “compelling interest” in. It’s not what the state of Texas asked for, but it was something more than nothing.

The state of Texas had argued that a “human life” or “person” came into existence at conception, and therefore the state could proscribe abortions to protect any conceived “life.” The Supreme Court, as noted above, didn’t go that far. They ruled that the state’s compelling interest in the embryo or fetus wasn’t established at conception. For the first trimester of pregnancy, women could exercise their constitutional right to have abortions, as long as they made the decision in conjunction with a physician (*Roe v. Wade* (1973), p. 112). As for when the state could interfere with abortions, the Court says, “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 capacity of meaningful life outside the mother’s womb” (p. 163). After that point, the Court continues, the “state may go so far as to proscribe abortion” unless necessary to save the life or health or the pregnant woman (p. 163–164). That’s how the Court resolved the tension between women’s interests and the interests of *in utero* entities. Women had their constitutional right to abortion from conception to when the fetus became viable, the timing of which goes unspecified by the Court. After the point of viability, the state’s interest in protecting “potential life” became compelling and could override the woman’s constitutional right.

For the Texas statutes at issue in *Roe v. Wade*, the Court's decision meant they could not stand (*Roe v. Wade* (1973), p. 164). The statutes permitted abortion only “for the purpose of saving the life of the mother,” which was too broad (p. 164). The Court had ruled that women could have first-trimester abortions approved by licensed physicians and done in licensed hospitals, without limiting the reasons for getting one. Restricting the reasons for which women could have an abortion went against the Court's ruling, and so the Court struck down the laws.

For the wider story of fetal personhood, the Court's decision sidestepped its own ruling.

The Potential Meanings of “Potential Life”

True, the Court explicitly stated that “the unborn” weren't full legal persons. But viewed through the lens of language, the Court's written opinion undermined that decree to a large extent. As noted above, the Court writes, “With respect to the State's important and legitimate interest in potential life, the ‘compelling’ point is at viability” (*Roe v. Wade* (1973), p. 163). Looking closely at the language, it is clear that the Court attached the state's compelling interest to “potential life.” Not an “embryo,” not a “fetus,” not any other noun that indicates a particular stage of gestation. The Court says the compelling interest doesn't mature until viability, which is after the embryo becomes a fetus. So the Court could have said “the State's important and legitimate interest in a viable fetus” and not changed their decision in a practical or logistical way. Abortions would still be

allowed before viability and still be proscribed after viability, which is the practical effect of *Roe v. Wade*.

But the Court didn't say "viable fetus." Even though the Court uses "fetus" in the very next sentence, the Court positions "potential life" as the object of the prepositional phrase indicating what the state has a compelling interest in. That established a wider area of interest than "viable fetus" would have. A viable fetus is an *in utero* entity from the point of viability until birth. "Potential life" is not so clear. What did the Court mean when using that term?

The Court, unfortunately, doesn't provide a clear explanation in their opinion. But we can get at the meaning of "potential life" by looking at it in tandem with another word. In several places, the Court used "prenatal life" as a synonym for "potential life," even though the words don't mean exactly the same thing (*Roe v. Wade* (1973), p. 155, 156). Both terms refer to the embryo or fetus in the womb, and the state, according to the Court, has an interest in both. But the terms actually mean very different things. "Prenatal life" refers to something that is living, or is alive, in the prenatal period, or before birth. Is an embryo or fetus "prenatal life"? Uncontestably. During pregnancy, there is something alive in the womb before birth. It is a biological description of an *in utero* entity, focusing on the fact that it is living (not dead) and is prenatal (not postnatal).

But "potential life" refers to something different. If the Court was speaking of life biologically, as indicated by "prenatal life," why does there need to be "potential" before "life"? An embryo or fetus is alive. It is not "potential life" in that something has not yet come alive. There is something alive. There is life, biological life, in existence in the womb. So when used in concert with "prenatal life," "potential life" takes on a different

meaning. It implies there is some kind of “life” that is still in a potential stage. Maybe it will come into existence, and maybe it won’t. And since “potential life” for the Court’s purposes refers to all stages of gestation, the only moment where “potential” would change to “actual” is at the moment of birth. At birth, according to the Court and the Constitution, a human organism becomes a full legal person (*Roe v. Wade* (1973), p. 157–158). So the “life” in “potential life” seems to mean the more social or legal kind of “life.” But in switching between “prenatal life” and “potential life” to refer to embryos and fetuses, the Court demonstrates some slippage in what kind of “life” they’re talking about.

The Court ruled that embryos and fetuses had no legal personhood. They state so in their opinion firmly and explicitly, using historical legal details to support themselves (*Roe v. Wade* (1973), p. 158). But they did grant some legal weight to “potential life” by agreeing that the state has a compelling state interest. In granting that compelling interest, the Court also granted some person-ness to “potential life.” Why else would the state have a compelling interest? If “potential life” didn’t mean a “potential person,” why would the state need to protect it? The lack of clarity around the state’s interest in “potential life” is working against us here, but it seems reasonable that the Court agreed to protect viable fetuses because they agreed that there was some person-ness in them that shouldn’t be ignored by law.

How could that be? How could the Court grant any sense of legal person-ness to “potential life” when all of the reasoning for why an embryo or fetus *was* “potential human life” is grounded in the biological definition of life? We saw it over and over again, judges and lawyers explaining the biological facts of development as a way to

support their idea that embryos and fetuses were “potential human life.” Those biological details, explaining biological life, were wrapped up in and obscured by the term “potential life,” which the Supreme Court then granted legal weight to. How could a scientific term be given legal weight and ideas of person-ness without any explanation?

We know how it happened in the public sphere. Popular writers explained the science of development, using “fetus” and “baby” interchangeably and giving *in utero* entities agency and personality. Their descriptions helped craft the idea that embryos and fetuses were human beings, the same as already-born people walking around outside, and were simply biding their time in the womb before being born. So there were already ideas of embryos and fetuses being the same as, or close to, already-born people. Then language from the Civil Rights movement and the women’s movement, both personhood movements themselves, slopped over into discussions of embryos and fetuses. That language helped create the idea that the little persons waiting in the womb were also legal persons with constitutional rights.

But in the public realm, those were just ideas. The Wilkes wrote about the personhood of embryos and fetuses, but they didn’t have any power to grant them constitutional rights. When the Supreme Court ruled in *Roe v. Wade*, they codified that clumsy syllogism into law: Biologically, the life of an individual human organism begins at conception when a unique set of chromosomes forms; therefore, a human individual, a human life or potential life, also forms at conception and should be given legal weight.

There you have it. Words helped construct the fetal personhood movement, which then ushered in an era of legal weight and consideration given to potential human life.

Conclusion

By 1973, then, the conversation about abortion had become something entirely different than what it was at the start. In the 1800s, the legal language about abortion indicated that the woman was the primary focus and the one the state aimed to protect from dangerous medical procedures. After *Roe v. Wade*, the focus was on the state's interest in protecting embryos and fetuses under the guise of "potential life," a term with major implications unaddressed by the Supreme Court's ruling. "Potential life" is packed with ambiguity and heavily connoted with ideas of personhood. The Supreme Court officially denied embryos and fetuses personhood but granted them a new kind of standing steeped in ideas of personhood anyway. Legal history and common law traditions had almost resolved the fetal personhood debate in the negative. If looking at common law cases and historical documents, embryos and fetuses weren't legal persons. But language slipped into the Court's opinion that transmuted the discussion and nudged it in a new direction.

It opened a lot of doors for how states could advocate for the wellbeing of embryos and fetuses. After *Roe v. Wade*, embryos and fetuses didn't disappear from the public or legal spotlight. Pro-life organizations like the National Right to Life Committee continued to campaign for fetal rights and for states to recognize the fetus as a legal person (Schoen 2015, pp. 170–171). In 1980, while running for president, Ronald Reagan said, "With regard to the freedom of the individual for choice with regard to abortion, there's one individual who's not being considered at all. That's the one who is being

aborted” (The Editorial Board of *The New York Times* 2018). In the 1980s and early 1990s, the widespread use of crack cocaine and the use of it by pregnant women engendered the idea that embryos and fetuses should be protected from their mothers’ abuse of the drug during pregnancy (The Editorial Board of *The New York Times* 2018).

Embryos and fetuses weren’t legal persons, but state laws acted upon them anyway. States began passing laws to label embryos and fetuses as “legal victims” (New Hampshire Senate Bill 66; State of Tennessee Public Chapter No. 1006; “State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women” 2018). The US Congress passed the Unborn Victims of Violence Act of 2004 to much the same effect. First introduced in Congress in 1999, the law claims a “child in utero” is “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb” (Unborn Victims of Violence Act of 2004). It also claims that such an organism can be a legal victim if injured or killed while someone is committing a federal crime of violence. The law didn’t make embryos and fetuses legal persons, but it gave them another right and didn’t tie that right to a certain point in development. Any developing *Homo sapiens* in the womb was something the law could protect.

It wasn’t just strangers who could be charged with committing violence against an embryo or fetus. In 2011, Bei Bei Shuai was charged with murder after attempting to commit suicide while she was pregnant (The Editorial Board of *The New York Times* 2018). Shuai lived, but the fetus died two days after a premature birth. Other women have also been charged with such crimes as child abuse, neglect of a minor, manslaughter, and second-degree murder for behaviors they undertook while pregnant (The Editorial Board of *The New York Times* 2018). Embryos and fetuses still aren’t persons, but state

prosecutors have advocated for them like they are separate from the pregnant women carrying them and just as vulnerable to abuse or violence as already born children.

So even though the arc of fetal personhood in 1970s abortion cases ended with a denial of personhood for *in utero* entities, the ideas of the movement and the language involved continued to position embryos and fetuses as the victims of crimes, the objects of laws, the wards of states, and the clients of state prosecutors.

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CONCLUSION: IF THE NARRATIVE SHIFTED BEFORE, IT CAN SHIFT AGAIN

So concludes our story. In the span of a century, embryos and fetuses went from being entities with only fictitious legal rights to ones with enough legal status to prompt states to defend their potential lives. Language, in its various uses, facilitated the transformation, sliding across boundaries and between fields, from science to law to popular literature. Words oftentimes didn't survive the transitions with their original meanings and baggage intact. "Life" in biology became "life" of a different sort in popular writing and court documents. An "individual" embryo became an "individual," full stop. That old phrase from early twentieth century embryology, "unmistakably human," became not an observation of an organism's species but a clear, actionable rationale for why an embryo or fetus should be treated like an already-born person.

Though I have done my best to investigate whether uses of words were intentional or not, it is hard to be certain about how much human intention drove the changes in language, particularly those that occurred in the 1970s abortion debates. Some folks, like the Wilkes, were quite purposeful about their language. They used "unborn child" to advance their claims of embryonic and fetal personhood. Others, like the popular writers of the 1950s, 1960s, and 1970s, likely were not advancing a social-legal argument about the person-ness of embryos and fetuses. Their uses of "baby" or "unborn child" or even "life before birth" were likely to intrigue readers. Making the article's content relevant to the average reader by describing embryos and fetuses as "children" or "humans" was probably a literary tactic to keep readers engaged. The articles were, after all, full of science and technical explanations that could have otherwise alienated casual readers.

Turning them into stories, narratives of “life before birth,” may have been the work of savvy writers.

People directly involved in the legal debates about fetal personhood, I suspect, were more intentional. Words in court briefs had to do the work of persuading a judge to one side or the other, and the difference between “unborn child” and “fetus” was already apparent. Judges writing court opinions absorbed those words and, purposefully or not, made them into law. The tricky difference between biological “life” and an individual’s “life” was thus codified in the judicial phrase “potential human life,” which judges ruled the state had an undeniable interest in.

From my view, the piece of language that had the most impact was the slippage between biological “life” and an individual’s “life,” leading to the definition of a “new life” beginning at the moment of fertilization. The idea of a “life” or “life” beginning when sperm fertilizes egg didn’t go away after *Roe v. Wade* in 1973. If we take a look at a 1992 Supreme Court case, we see it pop up again. In the case *Planned Parenthood v. Casey*, the Supreme Court agreed to increase the legal status of embryos and fetuses once again. In the Court’s decision in *Planned Parenthood v. Casey*, the Court extended the states’ compelling interest in embryos and fetuses all the way to the moment of fertilization. As of that case, states had a compelling interest in potential human life from the moment of fertilization (*Planned Parenthood v. Casey* (1992)). No longer was it just the pregnant person’s life and agency involved in the first trimester of pregnancy. Now, the state had an interest in the “life” of an embryo at fertilization, when the pregnant person doesn’t even know they’re pregnant.

That Supreme Court decision had consequences. Because the state now had an interest so early in pregnancy, state legislatures could pass laws that regulated abortion care at any point during pregnancy. Previously, the decision in *Roe v. Wade* constrained state regulation to the latter two trimesters of pregnancy. From 1992 onward, states passed laws that required abortion clinics to have specific equipment, specific relationships with nearby hospitals, even specific hallway widths (“Targeted Regulation of Abortion Providers”). Such abortion regulations often cause clinics to close due to high costs associated with them (Benson and Nash 2013). For example, not all clinics can afford to build a full operating theater, especially when most abortions in the twenty-first century are done via medication (two pills), not operations.

The idea that “life” begins at fertilization or conception still persists in twenty-first century. As of 2020, some states require abortion providers to give people seeking abortions certain information about pregnancy and abortion (Stam 2012). Several informational pamphlets state that life begins at conception (“Handbook” 2018, p. 6). But discussions of abortion care aren’t the only places where that idea shows up.

The idea that an individual life, a potential person, begins the moment sperm fertilizes egg also appears in discussions of *in vitro* fertilization (IVF). People who are infertile for one reason or another can seek IVF treatments in order to produce their own genetic offspring or to become pregnant using donated sperm or egg cells (Mayo Clinic Staff “In vitro Fertilization”). IVF treatments can vary, but most kinds include a sperm cell fertilizing an egg cell outside of the body in a laboratory setting. Thus, through the process of IVF, many, many fertilized eggs are created. Some researchers estimate there are hundreds of thousands of fertilized eggs frozen in storage across the United States

alone (Tamar 2015). And, based on the idea of a fertilized egg being an individual life, with a unique set of chromosomes, some people are going to court over who has what rights over the frozen cells.

The high number of fertilized eggs being stored after IVF has come under discussion for many reasons: high cost of storage, questions of how long they should be stored, the indecision people feel over what to do with them (Tamar 2015). But sometimes, the question of frozen fertilized eggs or embryos is more specific. In some situations, the man and woman whose sperm and egg cells created the embryos decide they no longer want to be a couple, married or unmarried. During divorce or separation proceedings, the question arises of how to divvy up property, assets, and children. In cases of IVF, that means embryos, which count as different legal objects depending on the state.

Before 2018, when people went to court to decide who got to decide what to do with the embryos, most judges ruled in favor of the person who wanted *not* to use the embryos (Cha 2018). The theory was that no one should be forced to be a parent. Some judges ordered the embryos destroyed if the man and woman disagreed about what to do with them. However, a law in Arizona, effective July 1, 2018, declared that custody of disputed embryos had to go to the party who wanted to help them “develop to birth” (Cha 2018; Cauterucci 2018). Such a sentiment falls in line with the idea that fertilized eggs, or early embryos, should be treated as potential human life. The Thomas More Society, an antiabortion group, began assisting in court cases featuring disputed embryos in order to convince judges that embryos are “children” that need to be protected.

In a similar vein, as of 2018, Louisiana deems embryos to be “juridical persons,” a kind of personhood status granted to businesses and other entities that enables them to engage in legal activities like lawsuits (Cauterucci 2018). In Louisiana, then, embryos—not born alive, not viable, not even implanted in a uterus—have legal rights like standing, which we saw granted to viable-when-injured, born-alive fetuses in *Bonbrest v. Kotz* in 1946. The legacy of that decision is still alive and viable: in Louisiana, embryos named “Emma” and “Isabella” sued the woman who provided the egg cells because she was “violating her ‘high duty of care and prudent administration’ owed to them” (*Loeb v. Vergara* (2018), p. 300). The alleged neglect was leaving the embryos frozen for three years in storage and not giving them a chance to be born (p. 300). In 2018, the case was still ongoing, with no final decision rendered.

However, the fact that someone brought a case on behalf of frozen embryos, in a state where such embryos were a kind of legal person, and alleged that the embryos had been “neglected,” just like already-born children can be—illustrates how common it has become to think of embryos being persons from the moment of conception. Despite the Arizona law and the attempted Louisiana court case, the issue of whether IVF embryos are legal persons, or instead legal property, has not been fully fleshed out nor agreed upon by the courts. I’m not claiming anything of the kind. Rather, I am pointing out that ideas of early embryonic personhood have become widespread in the United States.

Other evidence of that abounds, outside of the IVF realm. In 2020, the Wisconsin state legislature attempted to establish legal personhood for embryos at the moment of fertilization (Mills 2020). Five more states have tried to pass similar acts, attempting to

strike the word “born” from their state constitutions. That would result in constitutions applying to “the unborn” as well.

It appears, then, that the narratives describing embryos and fetuses as having “life before birth” carried a lot of influence. In 2020, it is hard to have a conversation about pregnancy or abortion care without having to answer the question of whether an embryo or fetus is a person. For the sake of transparency, I will say that I don’t think embryos become persons at the moment of fertilization. I understand that people have various opinions on the matter, and that religious, ethical, and other personal views factor into it. But given that around 30 percent of fertilized embryos end up being expelled naturally from the body without ever implanting or developing further, I think it’s a hard thing to claim that every fertilized egg is a person the same as someone already born (Macklon, Geraedts, and Fauser, 2002).

My personal view, however, is not the conclusion I’ve drawn from my four years of research into this topic. After examining all the news stories, all the legal documents, all the words and surrounding language, I’ve come to the conclusion that in the twentieth century as well as in 2020, there’s a narrative missing from our discussion. In the 1970s, the discussion of legal abortion care shifted away from focusing on women and physicians and toward focusing on embryos and fetuses. As noted in Chapter 4, that shift occurred when the abortion debate moved into the courts, and state attorneys began bringing up embryos and fetuses in order to justify outdated nineteenth century abortion restrictions. Now, embryos and fetuses are a major focal point of the discussion about abortion care, along with IVF and other topics.

But, my question is, what happened to the discussion of pregnant people? Where were the narratives about people's experiences while they were pregnant? Where were the articles describing how pregnant people's bodies develop and change? Where were the "life during pregnancy" articles? Why didn't the science of that side of pregnancy make it into the courtrooms the same way the science of fetal development did?

If writers and attorneys spent time explaining the science of fetal biology, why didn't they talk about the physiological changes going on in the bodies gestating embryos and fetuses? Some people, of course, were discussing the biology of being pregnant, but that kind of information got left out of the dominant public discussions of fetal personhood, as well as the legal arguments about abortion care. To me, that was an oversight, erasing one side of the equation, so to speak. How could we as a society decide anything about the legal status of embryos and fetuses without talking about how embryos and fetuses impacted the lives, biological and social, of the people gestating them? There should have been more talk in the 1970s of facts like this: When an embryo implants in someone's uterus, it burrows into the lining of the uterus, possibly without the person's knowledge or consent (Rama and Rao 2003). If not aborted or miscarried, the embryo will remain inside the pregnant person's uterus for ten months. That means that cells not of someone's own genetic makeup will be in one of their organs for a little under a year.

Furthermore, after the embryo digs into the uterine wall, it begins creating the placenta (Rama and Rao 2003). The placenta is the organ, produced by the embryo not the pregnant person, that anchors the embryo firmly to the uterine wall. The placenta grows blood vessels that dig into the lining of the uterus to find the arteries of the

pregnant person in order to connect directly with the pregnant person's cardiovascular system. The placental vessels proliferate intensely. Through those vessels, the placenta sends chemicals into the pregnant person's bloodstream to stimulate the person's body to make hormones like progesterone. Those hormones alter the pregnant person's body to be more hospitable to the developing embryo and enable the pregnancy to continue.

Because of the placenta's stimulation, the pregnant person's body changes to accommodate an embryo they may still not know of or want in their body. Those hormones, particularly progesterone, cause a number of changes that bring the pregnant person discomfort and pain ("Body Changes and Discomforts"). For example, thanks to hormones, the pregnant person's digestive system slows down, often resulting in constipation (Mayo Clinic Staff "1st Trimester"). In addition, the valve between the pregnant person's stomach and esophagus relaxes, which means stomach acid can flow up into the esophagus, causing heartburn for the pregnant person (Mayo Clinic Staff "1st Trimester Pregnancy: What to Expect"). The placenta also sends signals to make the pregnant person's blood volume to increase ("Body Changes and Discomforts"). That means there are more liters of blood flowing through the pregnant person's body than there were before. The increase in volume can cause the pregnant person's blood vessels to swell, which can result in hemorrhoids, nosebleeds, varicose veins, increased urination, and high blood pressure ("Body Changes and Discomforts"; Mayo Clinic Staff "1st Trimester"). High blood pressure can lead to preeclampsia, a dangerous condition for pregnant people that can result in death of the pregnant person, as well as the embryo or fetus. The pregnant person's breasts also swell and can become painful, and they can experience severe fatigue (Mayo Clinic Staff "1st Trimester").

Aside from the placenta's influence, the mere presence of a growing embryo or fetus causes more damage to the pregnant person's body. First of all, the uterus expands to accommodate the embryo or fetus ("Body Changes and Discomforts"). That in turn stretches the skin of the pregnant person's abdomen, which can cause pain, itchiness, and scarring. The weight of the embryo or fetus, along with the amniotic fluid in the uterus, puts pressure on the pregnant person's lower back, which causes back pain. The weight also puts pressure on the pregnant person's nerves, causing pain in various places. The weight puts pressure on the pregnant person's bladder, causing urination problems during gestation and afterward. And the weight puts pressure on the pregnant person's pelvic floor, the group of muscles that supports the uterus, bladder, and other pelvic organs. The pressure can cause the pelvic floor to strain or tear, which can lead to incontinence and pain.

As one might suspect, the expanding of the uterus pushes the pregnant person's other abdominal organs out of the way (Packham 2016). The uterus pushes the bladder down toward the pelvic floor, while the stomach gets shoved up all the way to breast-level. The uterus pushes the liver up next to the stomach and forces the intestines into a new formation around the swollen uterus. The uterus can compress the pregnant person's lungs, which can cause them to feel breathless. And overall, the uterus puts pressure on the pregnant person's blood vessels, causing dizziness or lightheadedness ("Body Changes and Discomforts").

Pregnancy is a complicated process, and I can't list all the symptoms of it here, but I will add a few more details about other things a pregnant person may experience overall. They might feel nauseous or vomit frequently (Mayo Clinic Staff "1st

Trimester”). They may experience mood swings (Mayo Clinic Staff “1st Trimester”). Their skin may darken in places, including their face (Mayo Clinic Staff “Pregnancy Week by Week”). The gums in their mouth may bleed more easily (Mayo Clinic Staff “Pregnancy Week by Week”). They may have painful leg cramps or have trouble sleeping (Mayo Clinic Staff “Pregnancy Week by Week”). They may get urinary tract infections (Mayo Clinic Staff “Pregnancy Week by Week”). And the embryo or fetus may leach calcium from the pregnant person’s bones, resulting in bone fragility or osteoporosis (“Pregnancy, Breastfeeding and Bone Health”).

Like pregnancy, birth is also a complicated process with many dangers and a risk of death. Most pregnant people give birth either through Caesarean sections (C-sections) or through vaginal delivery. During a C-section, a pregnant person has the skin of their abdomen and their uterus cut open (Mayo Clinic Staff “C-Section”). The surgery can result in heavy bleeding, injury to the bladder or intestines, or complications that require the uterus to be removed entirely. After the surgery, the person can experience infections in their uterus, infections in their stitched-up wound, blood clots, or dangerous complications in later pregnancies.

If a pregnant person delivers vaginally, the first thing that happens is the opening at the base of the uterus, called the cervix, begins to dilate. “Dilate” is a nice word for “get wider,” and the cervix widens until it is about ten centimeters in diameter, or about four inches (Mayo Clinic Staff “Stages of Labor”). After that, the pelvic bones themselves begin to separate, pulling apart so there’s about four inches between them. Muscles begin to contract intensely, resulting in serious pain for the pregnant person, which can last four or more hours. As the fetus begins to slide down the birth canal, the

pregnant person's pelvic muscles may rip, and the tissue between their vagina and anus may rip or be cut by the physician (Butler 2017). Pregnant people may bleed during delivery and afterward, if a piece of placenta clings to the lining of the uterus. And if serious damage occurs to the pelvic floor, the person's pelvic organs (uterus, bladder, and others) may slide down into the vagina or protrude outside of the body (Butler 2017). If the delivery goes poorly, the pregnant person may die, as do one in every 4,000 pregnant people do in the United States (Butler 2017).

There is more to giving birth than just those details, and the side effects of giving birth can linger long after a person leaves the hospital. They experience bleeding from the vagina for weeks afterward ("Recovering from Birth"). As well, they can experience cramping, problems with their thyroid gland, as well as depression and other emotional or mental health problems.

To me, that all sounds horrible. I am not pregnant, and I don't want to be pregnant, and I was astounded that the articles I read about pregnancy and delivery described the changes to a pregnant person's body as "amazing" and "exciting" (Mayo Clinic Staff "1st Trimester"). I understand that many people go through pregnancy willingly or even gladly because they want to have children. That's a good thing, or else I wouldn't exist. But those people, if they got pregnant because they wanted kids, consented to go through pregnancy and delivery. They agreed to have those things happen to their body.

But if we took the body changes I described out of the context of pregnancy, we end up with a list of painful, damaging experiences. Bones separating, tissues tearing, an alien organ burrowing into one of yours—those things sound like torture. (They might

feel like torture, too.) If someone didn't want that happening to their body, if they didn't want to be pregnant, experiencing pregnancy would be terrible. It would not be "amazing" or "exciting"; it would be long and painful and traumatic.

Which brings us back to the imbalance in the current discussion of abortion care and other pregnancy topics. If we agree that the idea of an embryo becoming a person at fertilization is a common one in US society—if states create legislation to declare embryos legal persons—why are there no arguments that an embryo-person causing such injuries to another person's body is something close to torture? If it's such a common idea that an embryo is a person, why is that person allowed to harm another person (as in the case of an unwanted pregnancy)? How could states condone or require (as they do after six weeks or twenty-four weeks, whatever limit they put on legal abortion care) one person, the embryo/fetus, to do those things to another person, the pregnant person?

Put another way, how did the historical discussion of legal abortion care not include details of what happens to a person's body when they're pregnant? Why did the arguments of women in the 1970s focus so much on vague constitutional rights to privacy? Why weren't attorneys including the biology of *this* kind of development to counter the biology being incorporated by attorneys advocating for embryos and fetuses?

I have a theory about why the experience of pregnancy wasn't folded into the original pro-abortion legal arguments. One person was responsible for drafting the legal reasoning for why abortions should be legal in the twentieth century. The first legal brief, written to challenge abortion laws in court, was developed by a student in his last year at NYU School of Law (Greenhouse 1970). Roy Lucas focused his final project on how to challenge restrictive abortion laws in the courts, and he included arguments about

constitutional rights like the right to privacy. Attorneys who later appeared in court to challenge restrictive abortion laws used Lucas's model arguments to develop their cases.

One thing to note about Lucas is that he was a man. Likely, he didn't have any personal experience with pregnancy and perhaps had never considered what it would be like to be pregnant, let alone pregnant when you don't want to be. Perhaps he didn't approach abortion the same way that I and other women do. He was writing a school paper, and then a theoretical legal brief, about overturning outdated laws. He wasn't interested in abortion regulations because he himself might become pregnant one day. I, on the other hand, first and foremost approach the topic of abortion care as someone who may be pregnant someday and may not *want* to be pregnant. I may experience all the unpleasantness of pregnancy, and if I don't want to be pregnant, it may be a horrible ten months. For me, it's not about a vague right to privacy. It's about avoiding a terrible fate that might bring me pain and possibly death.

So how come we've been discussing pregnancy, gestation, abortion, and fetal personhood without that perspective? Why is there such little mention of the narrative pregnant people experience? Why do we only talk about the embryo or fetus's "life before birth"? Where are all the words about what pregnant people experience—their "life" and their individuality?

The US fetal personhood movement and its language have overshadowed and erased people's experiences during pregnancy from the discussion of abortion care, IVF, and other topics. It happened fifty years ago, and the lack of pregnancy narratives from the point of view of pregnant people has become so normal that no one seems to miss those narratives. We talk about the "life" of the embryo or fetus, and we talk about the

privacy and autonomy rights of pregnant people. I think privacy and autonomy are serious topics, and I think they do play a role in discussions of pregnancy and abortion care. But they're not the only things we should be bringing up when explaining how people experience pregnancy and abortion.

If the focus of the discussion shifted in the 1970s, it can shift again. We can use language to restore the experience of pregnancy to the conversation. Instead of saying "the embryo develops in the womb," we can say, "the pregnant person gestates the embryo in their uterus." Instead of saying "the fetus grows in the uterus," we can say "the pregnant person's uterus expands to accommodate the fetus, squeezing other organs out of the way and putting pressure on the pregnant person's vital systems." Instead of saying "the embryo or fetus depends on the mother for nutrients," we can say, "the embryo grows an organ that digs into the pregnant person's uterus and alters blood vessels to take nutrients from the pregnant person's bloodstream."

If we restore the pregnant person's narrative to the conversation, we can begin to have a more reasonable, less polarized discussion of abortion care and other topics. We can stop focusing on the biology of embryos and fetuses in isolation but start including the biology of the pregnant person as well. That way, the pregnant person won't seem so cruel for terminating the "life" of an embryo or fetus. They'll instead seem reasonable and sane for protecting their own life.

It is well within our power of language to steer the conversation in a more fruitful, less one-sided direction.

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APPENDIX A

LIST OF COURT CASES USED FOR ANALYSIS

Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884)

Robinson v. State, 128 Ind. 397, 27 N.E. 750 (1891)

Helfer v. Nelson, 1893 WL 302 (Ohio Cir. Ct. May 1893)

Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), overruled in part by Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953)

Edwards v. State, 79 Neb. 251, 112 N.W. 611 (1907)

Prescott v. Robinson, 74 N.H. 460, 69 A. 522 (1908)

Munk v. Frink, 81 Neb. 631, 116 N.W. 525 (1908)

State v. Atwood, 54 Or. 526, 102 P. 295, on reh'g, 54 Or. 526, 104 P. 195 (1909)

State v. Harris, 90 Kan. 807, 136 P. 264 (1913)

Trent v. State, 15 Ala. App. 485, 73 So. 834 (Ala. Ct. App. 1916)

Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916)

State v. Patterson, 105 Kan. 9, 181 P. 609 (1919)

State v. Bassett, 1921-NMSC-016, 26 N.M. 476, 194 P. 867

Lee v. State, 124 Miss. 398, 86 So. 856 (1921)

Davis v. Murray, 29 Ga. App. 120, 113 S.E. 827 (1922)

Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923)

Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923)

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Kimbrow v. Harper, 1925 OK 478, 113 Okla. 46, 238 P. 840, overruled in part by Reed v. Whitney, 1945 OK 354, 197 Okla. 199, 169 P.2d 187

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