

## **ABORTION, ENGLISH COMMON LAW, AND FETAL PAIN**

By Nick Gier, Professor Emeritus, University of Idaho ([nickgier@roadrunner.com](mailto:nickgier@roadrunner.com))

[Abortion, Persons, and the Fetus](#)

[A Woman's Right to Choose Hangs in the Balance](#)

[Catholics May Have Good Reason for Abortion Reform](#)

[The Tribulations of Providing and Obtaining a Legal Abortion](#)

[Animals are People, Too: Overcoming the Myth of Human Uniqueness](#)

With right-wing Republicans dominating the new Congress and more state legislatures, we can expect new threats to abortion rights. On the 38<sup>th</sup> anniversary of Roe v. Wade, I would like to focus on Constitutional issues and the fetal pain controversy.

Many conservatives subscribe to the principle of “originalism” as the only way to interpret the Constitution. This means that we should hold ourselves to the original intent of the authors of the Constitution. The judicial decision can also include common beliefs of late 18<sup>th</sup> Century America.

When I claim that health care is a right, my critics want to know where that is in the Constitution. My response is: Where does it say that a corporation is a person? Five conservative Supreme Court rejected originalism in deciding that corporations have free speech rights with regard to campaign contributions. Similarly, these conservative jurists certainly would not deny the right vote, as early Americans did, to men without property, women, and people of color.

The founders of our country considered only human beings and God as moral and legal persons. God and humans don't share genes and bodily form, but both have rational minds, a view that goes all the way back to the Greek philosopher Aristotle. The concept of a person as a rational being was incorporated into European law, morality, and religion, including both Protestants and Catholics.

For nearly 600 years English Common Law followed the Jewish tradition in holding that the fetus was not a person until birth. (God “breathed into his nostrils the breath of life, and man became a living being” [Gen. 2:7].) 17<sup>th</sup> Century English jurist Sir Edward Coke believed that abortion is murder only after the fetus is “born alive,” when “it is accounted a reasonable creature.”

In 1765 Sir William Blackstone, agreeing with the Catholic Church, moved the cut-off point back to when the fetus “quickens in the womb.” (Catholic canon law was not changed to conception until 1917.) “Quickening in the womb” is the English phrase for the Catholic criterion, drawn from Aristotle, of the fetus “being formed in the womb.” This is essentially the same as the standard of “viability,” which the Supreme Court made law in 1973.

A recent book on Blackstone claims that, primarily because his legal textbooks were read in every law school in the American colonies, he “had the greatest influence on the thinking of our founding fathers.” The conservative American Blackstone Institute praises him to the hilt, because the founders “referred to Blackstone more than to any other English or American authority.”

Eight states now have laws that required doctors to read a script on fetal pain to all women considering abortion. Bioethicist Arthur Caplan criticizes such laws because they "reduce the process of informed consent to the reading of a fixed script created and mandated by [conservative] politicians not doctors." Women in these states, during the most vulnerable time of their lives, are now subjected to a lecture designed by anti-abortion politicians and not based on the best medical evidence.

The most recent study on fetal pain was issued the Royal College of Obstetricians and Gynecologists in March 2010. Its conclusion is that "current research shows that the sensory structures are not developed or specialized enough to respond to pain in a fetus of less than 24 weeks." This supports Roe v. Wade very well: using the best medical evidence, the justices set 22-24 weeks as the point of viability, the point at which the fetus can live outside the womb.

What is most remarkable is the convergence of ancient philosophy, English Common Law, and contemporary science. Aristotle believed that at three months the fetus becomes a “sensitive” soul, one that “quicken in the womb” and is able to perceive its surroundings. He believed that the fetus becomes a rational soul at six months, and St. Thomas Aquinas followed Aristotle in saying that the fetus received the rational soul late in pregnancy. Sure enough, the first high level neo-cortical brain waves begin at about 33 weeks. (See [www.class.uidaho.edu/ngier/fetalbrain.htm](http://www.class.uidaho.edu/ngier/fetalbrain.htm).)

Some Christians will object that what makes humans different from animals is that they are created in the “image of God” (Gen.1:26). Nowhere in the Bible is this concept explained; it is rarely mentioned; and in the New Testament it refers mainly to Christ. Early Church Fathers fell back on Greek philosophy for the meaning that humans are created as moral and rational beings. That is why Aquinas decided to place the infusion of the divine image late in pregnancy.

The main problem with the traditional view of personhood is that we now know that animals can show intelligent, emotional, and moral behavior without large cortexes. (Alex the Parrot, with a brain the size of a peeled walnut, is able to combine seven colors, five shapes, and four materials, could identify 80 different objects.) Animal fetuses also quicken in the womb; they also become viable; they also have unique genetic identities; and they also feel pain. Furthermore, according to Ecclesiastes, animals are created with the same divine breath (3:19).

We can no longer make a moral distinction between our lives and those of our fellow creatures. We should therefore reject the fallacy of “specieism,” which privileges humans as the only beings with a serious moral right to life. I challenge all of us to embrace a consistent pro-life position that respects the dignity and value of all living beings. Good luck with major changes in diet!

Nick Gier taught religion and philosophy at the University of Idaho for 31 years.