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## I. INTRODUCTION

> It makes no sense for courts to say an 'abortion' of an unborn child is legal, but the 'wrongful death' of the same child by someone other than the mother is not legal.[1]

On March 17, 1994, the Supreme Court of Montana declared that "the State of Montana recognizes a claim of wrongful death for a stillborn fetus."[2] On January 24, 1994, the Court of Criminal Appeals of Oklahoma determined that an "unborn fetus that was viable at the time of injury is a 'human being'" within the meaning of Oklahoma's homicide statute.[3] Both of these courts declared that their holdings would not affect a woman's right to choose a lawful abortion based on her constitutional right to privacy.[4]

The majority of state courts that have addressed the issue now recognize the possibility of a wrongful death action against a tortfeasor who causes the death of an unborn fetus. While some disagreement exists as to when a fetus is at the proper stage of development to fall within a

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1. D.L. Cuddy, *Letters To The Editor: Free For All-Reversing* Roe v. Wade, WASH. POST, Jan. 28, 1989, at A19.
2. Strzelczyk v. Jett, 870 P.2d 730, 733 (Mont. 1994).
3. Hughes v. State, 868 P.2d 730, 731 (Okla. Crim. App. 1994).
4. *Id.* at 734-35; *Strzelczyk*, 870 P.2d at 733 (Gray, J., specially concurring).

wrongful death statute, the trend is to afford protection for the unborn. Nevertheless, courts continue to uphold a woman's right to have an abortion. This Article examines the development of wrongful death jurisprudence as it relates to unborn children,[5] criminal homicide of unborn children,[6] and abortion.[7] This Article then explores the connections and inconsistencies between these subjects and demonstrates the need for a consistent definition of "person" as it relates to unborn children.[8]

## II. CIVIL LIABILITY

"The right of recovery for the wrongful death of a person is a statutory right."[9] Therefore, a plaintiff's ability to recover for the wrongful death of a fetus in a given state depends upon how the courts in that state interpret their own wrongful death statute. "A particular problem involved in these cases is the need to determine whether the fetus is a 'person' within the meaning of the state's wrongful death statute."[10] In these statutes, both intentional torts and negligence may form a basis for recovery.[11]

From 1884 until 1946, the common law did not allow broad tort recovery by or for the unborn child.[12] During that time period, when a pregnant woman was injured and her child was subsequently born with an injury or deformity, only a small number of courts allowed recovery for the injured child.[13] Courts usually offered two reasons for the denial of recovery: "first, that the defendant could owe no duty of conduct to a person who was not in existence at the time of the action; and second, that the difficulty of proving any causal connection between negligence and damage was too great, and therefore, there was too much danger of

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5. *See infra* notes 9-170 and accompanying text.

6. *See infra* notes 171-292 and accompanying text.

7. *See infra* notes 293-335 and accompanying text.

8. *See infra* notes 336-85 and accompanying text.

9. Sheryl A. Symonds, Comment, *Wrongful Death of the Fetus: Viability Is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 104 (1984); *see, e.g.*, Eich v. Town of Gulf Shores, 300 So. 2d 354, 356-57 (Ala. 1974); Britt v. Sears, 277 N.E.2d 20, 24 (Ind. App. 1971). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 902 (4th ed. 1971); W. L. Heyman, Annotation, *Action for Death of Unborn Child*, 15 A.L.R. 3d 992, 993 (1967).

10. Symonds, *supra* note 9, at 104 n.13.

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 946 (5th ed. 1984) ("[W]rongful death statutes usually provide that an action can be maintained for 'any wrongful act, neglect or default' which causes death.").

12. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884) (holding that a fetus who died when its mother was injured by defendant's negligence was not a "person" for whom suit could be brought).

13. *See* KEETON, *supra* note 11, at 367.

fictitious claims."[14] For example, in *Dietrich v. Inhabitants of Northampton*,[15] the court held that there was no cause of action for prenatal injuries, reasoning that a fetus is part of its mother and not a separate being in its own right.[16] Any injury to the fetus was actually injury to the mother, and she could recover damages.[17]

In 1946, the United States District Court for the District of Columbia departed from the common law rule and allowed a child to seek recovery for prenatal injuries in *Bonbrest v. Kotz*.[18] Distinguishing *Dietrich*, "the court stressed the fact that in *Dietrich* a nonviable child was injured, was born alive, and died less than one hour later."[19] In *Bonbrest*, however, the child lived.[20] The reason these distinctions are important is because live birth and viability are the key issues dividing the court decisions in our country with regard to prenatal torts and criminal homicide of the unborn child. Today every jurisdiction follows the Restatement (Second) of Torts in allowing a child to recover for prenatal injuries as long as the child is born alive.[21]

Courts throughout the country disagree on when liability to the child arises. In some states, courts charged with defining civil liability have adopted differing standards from those used by courts adjudicating criminal liability. "[S]ome courts require 'live birth' as a prerequisite for recovery," others allow recovery "for prenatal injuries to a viable fetus even if the fetus is stillborn because of the injury," and a small number of jurisdictions allow recovery for a nonviable stillborn fetus.[22]

### *A. The "Born Alive" Rule*

In all wrongful death actions, "the primary issue is whether a fetus is a 'person' within the meaning of the applicable wrongful death," criminal, or abortion statute.[23] The most stringent test is the common law born

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14. *See Deitrich*, 138 Mass. at 17.
15. *Id.*
16. *Id.*
17. *Id.*
18. 65 F. Supp. 138 (D.D.C. 1946).
19. Michael P. McCready, Note, *Recovery for the Wrongful Death of a Fetus*, 25 U. RICH. L. REV. 391, 392 (1991); *Bonbrest*, 65 F. Supp. at 139-40.
20. *Bonbrest*, 65 F. Supp. at 140.
21. RESTATEMENT (SECOND) OF TORTS § 869 (1)-(2) (1977).
22. McCready, *supra* note 19, at 394-95.
23. Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99 (1992); *see also* Mone v. Greyhound Lines, 331 N.E.2d 916 (Mass.

alive rule, which requires proof that "(1) The child was born alive and had a living existence separate and independent from that of the mother; and (2) the cause of death was an external force which [occurred while in the womb]."[24]

This "live birth" requirement is met even if the child dies shortly after childbirth.[25] Therefore, even under the common law rule, "[t]he child who is born alive has always been considered a 'person.'"[26] As a person, a child is entitled to any and all protections that are included in wrongful death legislation.[27]

Currently, courts of twelve jurisdictions deny recovery for the wrongful death of a fetus that is not born alive.[28] These courts exclude fetuses not born alive from the class of "persons" protected under the applicable statutes through statutory construction and by looking to legislative intent.[29]

The state of New York first instituted the "born-alive" rule in 1953 in *Kelly v. Gregory*.[30] The New York Supreme Court (an intermediate ap-

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1975).

In Justus v. Atchison, 565 P.2d 122 (Cal. 1977), the California Supreme Court affirmed the dismissal of claims against physicians for the wrongful death of unborn children because "the legislature had sole authority to create law in this area." *Id.* at 128. The court noted that the legislature had expressly chosen to protect the rights of the unborn in other areas and since it had not expressed that intent in the wrongful death statute, the court would not create it. *Id.* at 132. The court, therefore, inferred an affirmative legislative intent to deny recovery for the death of a fetus. *Id.*

24. People v. Hayner, 90 N.E.2d 23 (N.Y. 1949).

25. Kalafut v. Gruver, 389 S.E.2d 681, 684-85 (Va. 1990).

26. Symonds, *supra* note 9, at 108 (citing Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349, 358 (1971)); *see also* Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956) ("If a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover."); Group Health Ass'n v. Blumenthal, 453 A.2d 1198, 1206 (Md. 1983) (whether or not a child had reached "viability" has no role in a wrongful death case where a 19-20 week-old fetus died two and a half hours after birth).

27. Meadows, *supra*, note 23.

28. *See* Estate of Baby Foy v. Morningstar Resort Inc., 635 F. Supp. 741 (D.V.I. 1986); Justis v. Atchison, 565 P.2d 122 (Cal. 1977); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983); Milton v. Cary Medical Ctr., 538 A.2d 252 (Me. 1988); Kuhnke v. Fisher, 683 P.2d 916 (Mont. 1984), *aff'd in part and rev'd in part*, 740 P.2d 625 (Mont. 1987); Smith v. Columbus Community Hosp., Inc., 387 N.W.2d 490 (Neb. 1986); Giardina v. Bennett, 545 A.2d 139 (N.J. 1988); Endresz v. Friedberg, 248 N.E.2d 901 (N.Y. 1969); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Blackman v. Langford, 795 S.W.2d 742 (Tex. 1990); Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969); *see also* Meadows, *supra* note 23, at 104.

29. Meadows, *supra* note 23, at 104.

30. 125 N.Y.S.2d 696 (App. Div. 1953).

pellate court) recognized that a child is legally separate from its mother, and "separability begins at conception."[31] The court emphatically stated that "legal separability should begin where there is biological separability . . . and what we know makes it possible to demonstrate clearly that separability begins at conception."[32] Yet the court concluded that "[i]f the child born after an injury sustained at any period of his pre-natal life can prove the effect on him of the tort, . . . we hold he makes out a right to recover."[33]

As a result of *Kelly*, New York permits recovery for pre-viability[34] injuries if the child is born alive. For example, if a three week old fetus is harmed by tortious conduct and lives to tell about it, the child can recover. Thus, New York will recognize that a fetus is a "person" at conception if it survives birth, but if stillborn, the fetus loses its "person" status and becomes a legal nonentity. If a child in New York sustains life for one millisecond after leaving the womb, the child's estate can sue a tortfeasor for any damages sustained after conception. In cases as late as 1985, New York continued to uphold the born-alive rule.[35]

In *Estate of Baby Foy v. Morningstar Beach Resort, Inc.*[36] the District Court for the Virgin Islands had to decide if a sixteen to eighteen-week old fetus was a "person" within its wrongful death statute.[37] Because the Virgin Islands statute did not define "person," the court looked to other courts in the United States to determine what definition the majority of courts employed.[38] Without deciding upon a definition of a "person" or a precise point of viability,[39] the *Baby Foy* court held that since most courts would find that a fetus under twenty weeks old is not a "person," the sixteen to eighteen-week old fetus in this case "is not a person for purposes of the Virgin Islands Wrongful Death Statute."[40]

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31. *Id.* at 697.

32. *Id.*

33. *Id.* at 698 (emphasis added).

34. The court defined the viability of a fetus as "such a stage of development as to permit continued existence, under normal conditions, outside the womb." *Id.* at 697 (quoting AMERICAN COLLEGE DICTIONARY).

35. *See, e.g.*, Khan v. Hip Hosp., Inc., 487 N.Y.S.2d 700, 704 (N.Y. Sup. Ct. 1985) ("[A]n injured child has a right to an independent cause of action against a physician for in utero injuries . . . only upon birth.").

36. 635 F. Supp. 741 (D.V.I. 1986).

37. *Id.* at 742.

38. *Id.* at 742-43. The court limited its examination to factually similar cases involving fetuses that reached viability but were miscarried or stillborn. *Id.* at 743.

39. *Id.*

40. *Id.* at 744-45 (citing Mace v. Jung, 210 F. Supp. 706, 708 (D. Alaska 1962))

Virginia also utilizes the "born-alive" rule after *Kalafut v. Gruver*.[41] On March 2, 1990, the Supreme Court of Virginia adopted the version of the "born-alive" rule articulated in the Restatement (Second) of Torts[42] and held that "a tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, if the child is born alive."[43] In *Kalafut*, the child was born alive but died less than two hours later.[44] The court permitted the child's estate to recover for his wrongful death under the Virginia Wrongful Death Statute since the child was born alive.[45] Had the childbirth process lasted a little longer and the child been stillborn two hours later, his estate would not have been able to recover.[46]

Texas, the state that defended the unborn in *Roe v. Wade*,[47] also requires live birth prior to recovery for prenatal injuries.[48] The Texas Supreme Court first announced this requirement in 1971.[49] Since that time the only substantive change to the Texas Wrongful Death Statute has been the substitution of the word "individual" for the word "person" in certain parts of the statute.[50]

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(finding that a nonviable four to four and one-half month fetus was not a person under the Alaska Wrongful Death Statute); Green v. Smith, 377 N.E.2d 37, 39 (Ill. 1978) (holding that under the Illinois Wrongful Death Statutes, no cause of action exists for a 14-week fetus unless the fetus had attained viability at the time of the injuries or death); Toth v. Goree, 237 N.W.2d 297 (Mich. Ct. App. 1975) ("[A] three-month-old infant . . . not born alive, is not a 'person' within the wrongful death act."); Poliguin v. MacDonald, 135 A.2d 249, 251 (N.H. 1957) (holding that "if a fetus is non-viable at the time of injury and dies in the womb its representative can maintain no action" under the New Hampshire Wrongful Death Statute); West v. McCoy, 105 S.E.2d 88, 91 (S.C. 1958) (providing no cause of action exists under the South Carolina Wrongful Death Statute for a five-month-old fetus that miscarried).

41. 389 S.E.2d 681 (Va. 1990).

42. RESTATEMENT (SECOND) OF TORTS § 869(1) (1977).

43. *Kalafut*, 389 S.E.2d at 684.

44. *Id.* at 682.

45. *Id.* at 685.

46. For a good discussion of Virginia law on the wrongful death of unborn children, see McCready, *supra* note 19, at 406 (concluding that the "live birth requirement is the most appropriate standard for Virginia at this time").

The tide in Virginia may be turning, however, since the people of that state elected a Republican, George Allen, as governor in 1993. Although he is not staunchly pro-life, he is against the harsh born alive rule as a definition of when life begins. *See* Steven R. Hemler, et al., *Abortion: A Principled Politics*, NAT'L REV., Dec. 27, 1993, at 40, 41.

47. 410 U.S. 113 (1973).

48. Pietila v. Crites, 851 S.W.2d 185, 187 (Tex. 1993) ("[T]here is no wrongful death or survival cause of action for the death of a fetus."); Witty v. American Gen. Capital Distrib., Inc., 727 S.W.2d 503, 505 (Tex. 1987) ("[T]he fetus has no cause of action for the injury until live birth.").

49. Yandell v. Delgado, 471 S.W.2d 569, 570 (Tex. 1971).

50. The statute defines a "person" as "an individual, association of individuals,

Following the change, several cases have challenged the live birth requirement. The first challenge was in *Witty v. American General Capital Distributors, Inc.*,[51] where the mother of a deceased unborn child brought an action against her employer for wrongful death, as well as for the emotional trauma and mental anguish that *she* suffered as a result of losing her baby.[52] The Texas Court of Appeals did not do away with the live birth requirement for wrongful death, but did chip away at it by holding that Mrs. Witty could recover under the Wrongful Death Statute for her emotional distress "as a result of her perception of her child's injury following the accident . . . and for the loss of her baby's society and companionship."[53] The court noted that its holding was "not dependent upon a showing that the child was born alive."[54] The Texas Supreme Court overruled the court of appeals and held that a common law claim for mental anguish is barred by the Worker's Compensation Act, and could not be upheld under the Wrongful Death Act.[55] The court indicated that if the legislature intended "to create a wrongful death action for an unborn fetus, the legislature would have specifically so stated."[56]

In 1990, the Texas Supreme Court again stated in a per curiam opinion that "no cause of action may be maintained for the death of a fetus under the wrongful death statute until the right to bring such action is afforded by the legislature."[57]

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joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation." TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(2) (West 1986 & Supp. 1994). According to the Revisor's Note, the word "individual" was substituted for the word "person" in certain places because the definition of person was too broad. *See id.* § 71.002 Historical Note.

The statute describes the wrongful death cause of action as "[a]n action for actual damages arising from an injury that causes an individual's death." *Id.* § 71.002 (a).

51. 697 S.W.2d 636 (Tex. Ct. App. 1985).

52. *Id.* at 638.

53. *Id.* at 640.

54. *Id.* The court found that the proper test is "whether the act that caused the injury was wrongful and would have given [plaintiff's] child the right to sue if it had survived the injuries." *Id.*

55. Witty v. American Gen. Capital Distrib., Inc., 727 S.W.2d 503, 506 (Tex. 1987).

56. *Id.* at 505.

57. Blackman v. Langford, 795 S.W.2d 742, 743 (Tex. 1990) (per curiam) (quoting *Witty*, 727 S.W.2d at 506 and citing Tarrant County Dist. Hosp. v. Lobdell, 726 S.W.2d 23 (Tex. 1987) (per curiam)).

Finally, in 1992, another Texas Court of Appeals tackled the live birth requirement in *Crites v. Pietilla.*[58] The *Crites* court reversed the trial court's order of summary judgment for the defendants and stated that a pregnant mother has a valid existing claim for mental anguish suffered as a result of the loss of a fetus due to the doctor's negligence.[59] However, the Texas Supreme Court reversed, holding that mental anguish damages for the parents are not recoverable when the only asserted cause of action is negligence toward their unborn child.[60] The court indicated that this result was necessary since there is no wrongful death or survival cause of action for the death of a fetus in Texas.[61]

Courts adopting the "born-alive" rule look at the applicable statute, and if no statutory guidance is given, assume that an unborn child does not fit the definition of "person" so as to fall within the statute's protection. The New York Court of Appeals opinion in *Endresz v. Friedberg*[62] typifies the reasoning of these courts. The *Endresz* court opined that it was a more terrible plight to be alive and injured than to be dead,[63] stating that a surviving fetus had to face impaired health while the deceased fetus did not.[64]

The harsh "born-alive" rule protects the tortfeasor rather than the victim since it rewards lethal tortious conduct by allowing recovery only if the child in the womb survives.[65] This harshness has moved thirty-seven jurisdictions to abolish the "born-alive" rule or "live birth" requirement, and thirty-five of those jurisdictions have replaced it with the rule of

58. 826 S.W.2d 175 (Tex. Ct. App. 1992).

59. *Id.* at 176. The appellate court distinguished this case from *Witty*, in that the Workers Compensation Act did not bar recovery in the case at hand. *Id.*

60. Pietilla v. Crites, 851 S.W.2d 185, 187 (Tex. 1993) (per curiam) (citing *Blackman*, 795 S.W.2d at 743).

61. *Id.*

62. 248 N.E.2d 901 (N.Y. 1969).

63. *Id.* at 903.

64. *Id.*

65. In Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835, 838 (Wash. 1962), the Washington Supreme Court held that "the more just rule is that which permits a claim to recover for prenatal injuries" regardless of live birth. *Id.* In a more recent case out of Washington, a court of appeals held that a viable unborn child's cause of action in wrongful death survives to the personal representative of his or her estate, and in so doing decided not to "revert back to the old twist of common law, which made it more profitable to kill than to injure . . . ." Cavazos v. Franklin, 867 P.2d 674, 677-78 (Wash. Ct. App. 1994).

"viability."

### *B. Viability*

> There is just as much justification to protect a viable fetus in a wrongful death action as there is in a baby who is a week old or a day old and dies.[66]

From 1884, following *Dietrich v. Northampton*,[67] until 1949, the "born-alive" rule dominated caselaw. In 1949, the Minnesota Supreme Court allowed recovery for prenatal injuries that caused the death of the fetus.[68] The court held, however, that to recover for the wrongful death of a stillborn fetus, the injury must occur after viability.[69] Thus, Minnesota became the first state to adopt the "viability rule."[70]

Similar to the courts retaining the "born-alive" rule, jurisdictions that allow a cause of action for the wrongful death of a "viable" fetus focus on the statutory definition of a "person."[71] The concept of viability was first discussed by Justice Boggs of the Illinois Supreme Court[72] in his dissenting opinion in *Allaire v. St. Luke's Hospital*.[73] Justice Boggs argued that a fetus is "capable of independent and separate life, and . . . though within the body of the mother, it is not merely a part of her body . . . ."[74]

The viability requirement has been criticized as being "impossible of practical application" because of the difficulty in ascertaining the moment when viability occurs.[75] As a result, in many close cases, "it will be difficult . . . to determine if recovery shall or shall not be allowed."[76] However, with the advances in medical technology, this objection to the viability rule is becoming less persuasive. In 1973, the year of *Roe v. Wade*, "a twenty-eight week old fetus had about a one in ten chance of surviving," but with today's medical capabilities, "survival of such a fetus . . . is nearly routine."[77]

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66. *Court May Rule if Viable Fetus is a Person*, S.F. CHRON., May 2, 1988, at A2.
67. Dietrich v. Inhabitants of Northampton, 138 Mass. 11 (1884).
68. Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949).
69. *Id.* at 841.
70. *See* McCready, *supra* note 19, at 394.
71. *See generally* Meadows, *supra* note 23.
72. *Id.*
73. 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting), *overruled*, 114 N.E.2d 412 (Ill. 1953).
74. *Id.*
75. Smith v. Brennan, 151 A.2d 497, 504 (N.J. 1960).
76. Green v. Smith, 377 N.E.2d 37, 41 (Ill. 1978) (Ryan, J., concurring).
77. Ethan Bronner, *Medical Advances Refocus That Debate*, BOSTON GLOBE, May 7,

Montana is the most recent state to abandon the "born-alive" rule in favor of "viability." In *Strzelczyk v. Jett*,[78] the plaintiff was due to deliver her baby on January 7, 1990.[79] The child was delivered stillborn on January 17, 1990, two days after her doctor had determined that the child was alive.[80] The case was removed to federal court and the district court certified the question of whether Montana recognized a cause of action for the wrongful death of a viable stillborn fetus to the state supreme court.[81] The Montana high court looked to the language of Montana's wrongful death statute and to its legislative history.[82] The statute provides: "A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."[83] Based on a statutory definition of "unborn child," the court declined to read the word "live" as a requirement for a cause of action.[84] The opinion does indicate, however, that this may be limited to a "full-term fetus."[85]

The Arizona Supreme Court in *Summerfield v. Superior Court*[86] was called upon to decide what the legislature intended by the word "person" in the Arizona Wrongful Death Statute.[87] The Arizona Supreme Court was one of the few courts that discarded the idea that just because the "born-alive" rule was widely accepted when the Wrongful Death Statute was written, it necessarily follows that the legislature intended to adopt

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1989, at 1.

In an Ohio Court of Appeals opinion in 1959, the court noted an example of the bizarre results that can flow from the "born-alive" rule: "Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other?" Stidam v. Ashmore, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959).

78. Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1993).

79. *Id.* at 731.

80. *Id.*

81. *Id.*

82. *Id.* at 732-33.

83. MONT. CODE ANN. § 41-1-103 (1994) Interestingly, a careful reading of this definition tends to indicate that a "live birth" is required for a child to be considered an "existing person."

84. *Strzelczyk*, 870 P.2d at 732-33.

85. *Id.*

86. 698 P.2d 712 (Ariz. 1985) (en banc).

87. *Id.* at 719. The Wrongful Death Statute states in pertinent part:

> When death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages; . . . .

*Id.* (quoting ARIZ. REV. STAT. ANN. § 12-611 (1956)).

the "born-alive" rule.[88] As the court aptly stated:

> It is possible . . . that the legislature was also aware of principles contained in an earlier doctrine: When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows [to her], the one who hurt her shall be fined, according as the woman's husband shall lay upon him: and he shall pay as the judges determine. If any harm follows [to her], then you shall give life for life . . . .[89]

Since the legislature had not defined the word "person," the court was required to do so.[90] The court held that an "overall legislative policy of compensation and protection [of the fetus in other contexts] militates in favor of construing the wrongful death statute to give parents a remedy when their viable child is negligently killed."[91] The majority of the Arizona Supreme Court rejected the premise that "if the viable infant dies immediately before birth it is not a 'person' but that if it dies immediately after birth it is a 'person.'"[92] The defendants in *Summerfield* argued that the court's holding was contrary to the United States Supreme Court's pronouncement that a fetus is not a "person" in *Roe v. Wade*.[93] The court dismissed the argument stating that the "abortion question is not relevant to the issues before us."[94]

In North Carolina, another state adopting the "viability" standard, a plaintiff administrator alleged that the defendant doctor provided negligent prenatal care to the child's mother who delivered a ninth-month stillborn fetus.[95] The court in *DiDonato v. Wortman* interpreted the North Carolina Wrongful Death Statute to mean that an action "exists if the decedent could have maintained an action for negligence or some other misconduct if he had survived."[96] With that in mind, the court held that "any uncertainty in the meaning of the word 'person' should be resolved in favor of permitting an action to recover for the [death] of a viable fetus."[97]

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88. *Id.*
89. *Id.* at 719-20 (quoting *Exodus* 21:22).
90. *Id.* at 720.
91. *Id.* at 721.
92. *Id.* at 722.
93. *Id.* at 723.
94. *Id.*
95. DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987).
96. *Id.* at 491 (citing Nelson v. United States, 541 F. Supp. 816 (M.D.N.C. 1982)).
97. *Id.* at 493.

Before leaving this area, it is noteworthy to mention a few cases on the cause of action termed loss of society. This is a cause of action "for the loss of a broad range of mutual benefits each family member receives from the other's continued

1. Injury When Viable

Unlike the North Carolina Supreme Court, the Ohio Supreme Court, in *Werling v. Sandy*,[98] found that "a viable fetus which is negligently injured . . . and subsequently stillborn," may recover in a wrongful death action pursuant to the Ohio Wrongful Death Statute.[99] However, the court cautioned that for a wrongful death action to lie, the viability of the fetus at the time of the injury must be established.[100] Bound by this limitation, and based on expert testimony, the Ohio Court of Appeals, in another case, refused to find that a twenty-one week stillborn fetus was viable.[101] Therefore, in Ohio, if a nonviable fetus sustains an injury, Ohio courts will not hold the tortfeasor liable.

2. Injury During Non-Viability

In jurisdictions where viability is the benchmark, courts refuse to extend recovery when faced with a "nonviable" fetus fact pattern.

In 1990, a Missouri Court of Appeals in *Rambo v. Lawson*,[102] held that "a wrongful death action will lie for the tortious killing of a nonviable fetus."[103] In that case, the plaintiff was carrying a nonviable fetus and miscarried after a car accident.[104] The plaintiffs cited the Missouri statutory definition of "unborn child" in support of their argument for recovery, which defined "unborn child" as "[t]he offspring of human beings

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existence including love, affection, care, attention, companionship, comfort, and protection." Hunt v. Chettri, 510 N.E.2d 1324, 1326 (Ill. Ct. App. 1987), *rev'd*, 583 N.E.2d 510 (Ill. 1991).

In *Hunt*, the Fifth District Appellate Court of Illinois determined that "[w]hile parents may love and have affection for an unborn child, the [unborn] child cannot be said to have returned such affection." *Id.* at 1326. Under this reasoning, the court determined that "birth is a proper point at which to begin to measure the loss of a child's society." *Id.*

In 1991, the Supreme Court of Illinois reversed the *Hunt* case and decided that a "rebuttable presumption for loss of society exists for the wrongful death of a stillborn child." Seef v. Sutkus, 583 N.E.2d 510, 512 (Ill. 1991). The court borrowed the reasoning of an Ohio court and stated: "We are unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none . . . Such a distinction could lead to bizarre results." *Id.* (quoting Stridam v. Ashmore, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959)).

98. 476 N.E.2d 1053 (Ohio 1985).

99. *Id.* at 1056.

100. *Id.* at 1054 (emphasis added).

101. Egan v. Smith, 622 N.E.2d 1191, 1193-94 (Ohio Ct. App. 1993).

102. No. WD 41747, 1990 WL 54277 (Mo. Ct. App. May 1, 1990) (opinions of the Court of Appeals in cases transferred to the Supreme Court are not published in the permanent law reports), *overruled by* 799 S.W.2d 62 (Mo. 1990) (en banc).

103. *Id.* at *6-*7.

104. *Id.* at *1.

from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus."[105] The court reasoned that "[b]asing the right to recovery upon the viability of the fetus places the legal basis for recovery for wrongful death upon shifting ground."[106]

The court explained that "[m]edical technology today guarantees the viability of fetuses considered nonviable only a few years ago."[107] In any event, "[t]he time when viability is achieved may vary with each pregnancy . . . ."[108] The court determined that "[i]n light of current medical knowledge we see no principled reason to regard viability as the determinant in wrongful death actions for the death of an unborn child."[109] The court then stated that it understood there is a heightened difficulty in proving that a nonviable fetus was in fact alive at the time of the injury in order to prove causation, but "[d]ifficulty of proof has no bearing on the existence of a cause of action."[110]

In 1990, the Missouri Supreme Court overruled *Rambo v. Lawson*[111] and held that "a nonviable fetus is not a 'person' within the meaning of the wrongful death statute."[112] In the opinion, the court considered a Missouri statute that clearly indicates that viability should never be an issue, but then dismissed the statute as inapplicable because it had to do with abortion, not wrongful death.[113] The statute states:

> 1. The general assembly of this state finds that: (1) The life of each human being *begins at conception;* (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens,

105. *Id.* at *2 (citing MO. REV. STAT. § 188.015(6) (1986)).

106. *Id.*

107. *Id.* In her dissent in Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983), Justice O'Connor noted that, "whereas in 1973 we considered as unusual viability before twenty-eight weeks, ten years later an infant delivered at twenty-two weeks could survive." *Id.* at 457 n.5 (O'Connor, J., dissenting).

108. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976).

109. *Rambo*, 1990 WL 54277, at *3.

110. *Id.* at *5.

111. Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990) (en banc).

112. *Id.*

113. *Id.* at 63. Relying on the statute's legislative history, the court found that the intent was to regulate abortions, not to amend the wrongful death statutes. *See id.* at 64.

> and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.[114]

Since this language does not specifically amend the wrongful death statute, the court held that the legislature must not have intended for it to be interpreted as doing so.[115]

The dissent in *Rambo* attacked the logic of the majority and pointed out that "[w]ith recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary development requirements altogether."[116] Nevertheless, viability is now the rule in Missouri.[117]

In two cases decided on the same day in 1993, the Alabama Supreme Court found a lack of legislative intent to extend the protection of the wrongful death statute to nonviable fetuses.[118] In his dissent to one of the decisions, Justice Maddox stated that the court should allow recovery for a nonviable fetus because it "promote[s] the purpose of the wrongful death statute, which is to prevent the wrongful termination of life, even potential life."[119]

Opinions of the Pennsylvania courts illustrate the problems inherent in using viability as the test for wrongful death. In 1990, the United States District Court for the Eastern District of Pennsylvania faced the question of whether there is a wrongful death cause of action for a nonviable fetus under Pennsylvania law in *AKL v. Listwa.*[120] The court looked for Pennsylvania precedent for guidance on this issue, and found none.[121] Instead, the court considered *Amadio v. Levin,*[122] where the Pennsylvania Supreme Court held that "survival and wrongful death actions lie by the estates of stillborn children for fatal injuries they received while

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114. *Id.* (citing MO. REV. STAT. § 1.205 (1986)) (emphasis added).

115. *Id.* at 64.

116. *Id.* at 68 (Holstein, J., dissenting) (quoting KEETON, *supra* note 11, at 369).

117. *See* May v. Greater Kan. City Dental Soc'y, 863 S.W.2d 941 (Mo. Ct. App. 1993).

118. Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993) (pointing out that no jurisdiction except Georgia has extended a wrongful death statute to include a cause of action for the death of a nonviable fetus absent direct legislative instruction); Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993).

119. *Gentry,* 613 So. 2d at 1245 (Maddox, J., dissenting). Justice Maddox distinguished the state's interest in potential human life in the context of wrongful death actions from its interest in the context of abortion. *See id.* at 1247 (Maddox, J., dissenting).

120. AKL v. Listwa, 741 F. Supp. 555 (E.D. Pa. 1990).

121. *Id.* at 557.

122. 501 A.2d 1085, 1086-87 (Pa. 1985).

viable children [in their mothers' wombs]."[123] The district court noted an observation made by the four justice majority in *Amadio*, that a cause of action would exist whether or not the injury was sustained "at the birth of a child, its viability, or some other arbitrary period of gestation . . . ."[124] The district court refused to rely on this dicta as controlling precedent, however, because two of the four justice majority had stated in their concurrence that because the child in the case was "viable at the time of the allegedly negligent conduct of the defendants . . . the questions involved in circumstances implicating 'viability' in other ways must be left for another day."[125] The three dissenters in that case would have found no cause of action even for a viable fetus.[126] Therefore, the court could not rely on *Amadio* as a reliable determination of whether Pennsylvania recognizes a cause of action for a nonviable fetus. After examining precedent in other states the *AKL* court decided that "the Pennsylvania Supreme Court, faced with this issue, would declare that no cause of action for the wrongful death of a non-viable fetus exists."[127]

In 1992, a Pennsylvania Court of Appeals was again confronted with this question in *McCaskill v. Philadelphia Housing Authority*.[128] A mother of a seventeen-week old fetus brought a wrongful death action.[129] The court found that the fetus was nonviable and therefore no cause of action existed.[130] The court, in reaching its conclusion, did something that Missouri and other states refuse to do; it perused United States Supreme Court abortion cases for guidance.[131] The court said that seventeen weeks is not long enough for viability especially since "the United States Supreme Court recently held that viability now occurs at 23 or 24 weeks of gestation,"[132] therefore, pointing out the connection between the two areas of the law. The court did not consider whether it should treat the United States Supreme Court as a definitive authority in prenatal medicine outside the abortion context.

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123. *AKL*, 741 F. Supp. at 557 (citing *Amadio*, 501 A.2d at 1087).
124. *Id.* (citing *Amadio*, 501 A.2d at 1087).
125. *Id.* (quoting *Amadio*, 501 A.2d at 1101 n.7 (Zappala, J., concurring)).
126. *Id.*
127. *Id.* at 559.
128. 615 A.2d 382 (Pa. Super. Ct. 1992).
129. *Id.* at 383.
130. *Id.* at 384.
131. *Id.*
132. *Id.* (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2810-11 (1992)).

However, in 1993, the Supreme Court of Pennsylvania in *Hudak v. Georgy*,[133] was confronted with this very issue. In *Hudak*, Mrs. Hudak was twenty-four weeks pregnant when she delivered triplets, all born alive.[134] After about twenty minutes, two of the triplets died and the third died ten hours later.[135] All parties stipulated that the triplets were not viable in that they could not sustain life outside the womb.[136] Therefore, the trial court dismissed the wrongful death claim because Pennsylvania law does not recognize a cause of action for the wrongful death of a nonviable fetus.[137] The Pennsylvania Supreme Court reversed, stating that "interjecting the concept of viability into a situation where a child [is] born alive confuses the issue."[138] The court held that viability could not be an issue in this case since the triplets were born alive.[139]

The following four statements summarize Pennsylvania's wrongful death law where a fetus is concerned: (1) a fetus born alive may sue, (2) a fetus born dead, but past the time of viability (twenty-three to twenty-four weeks) may sue, (3) a fetus born alive, prior to twenty-three to twenty-four weeks gestation may sue even though not "viable" under the standard of *McCaskill*, but according to *Hudak*, and (4) a fetus born dead, but not past the time of viability may not sue. Therefore, viability is conclusively presumed at twenty-three to twenty-four weeks, but can be established earlier through evidence of a live birth.

In contrast, the District of Columbia Court of Appeals ruled in *Ferguson v. District of Columbia*[140] that a mother did not have recourse under a survival statute where her fetus died shortly *after* premature delivery.[141] The court had previously "rejected live birth as the line of determining fetal rights" and had held that the fact that a fetus was born alive is irrelevant.[142] The court reasoned that a fetal heartbeat and independent breathing, outside the mother's womb, did not establish viability.[143] Instead, the Court defined viability as the point at which "the fetus has reached such a stage of development that it can live outside the uterus."[144] Since the fetus in this case was at best twenty and

133. 634 A.2d 600 (Pa. 1993).
134. *Id.* at 601.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 602.
139. *Id.* at 603.
140. 629 A.2d 15 (D.C. 1993).
141. *Id.*
142. *Id.* at 17 (citing Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984)).
143. *Id.* at 18.
144. *Id.* (citing Bonbrest v. Kotz, 65 F. Supp. 138, 140 n.8 (D.D.C. 1946)).

one-half weeks old, the court determined that the fetus was not viable under the U.S. Supreme Court's precedent established in abortion cases, and therefore, the mother could not recover even if the fetus was born alive.[145]

3. Viability or Conception, "That is the Question"

"Today, human embryos may be removed from the uterus of the mother and transferred to a recipient surrogate who is then able to deliver the child at full term."[146] "From *conception* onward, the mother and the expected child are separate, living, human organisms having unique genetic qualities."[147] "[I]t is absurd to extend the legal fiction . . . that an unborn child is 'a part of the mother's bowels' until the fetus is viable."[148]

Notwithstanding such statements, only three states have determined that a fetus is a "person" at conception, and of these, one has essentially recanted. This section discusses these three jurisdictions.

In 1956, the Supreme Court of Georgia, in *Hornbuckle v. Plantation Pipe Line Co.*,[149] stated that "a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered."[150] This decision expanded upon an earlier decision by the Georgia Court of Appeals. In *Porter v. Lassiter*,[151] the court stated that when determining whether a cause of action exists for the death of the child, a "fetus becomes a child when it is 'quick' or capable of moving in the mother's womb."[152] Instead of defining "quick," the court found that it was a fact question for the jury.[153] The Georgia Supreme Court followed this case with *McAuley v. Wills*,[154] where it stated that in some situations a duty is owed to an unconceived (meaning nonviable) child. However, the court of appeals, in 1987, rejected this line of reasoning in *Billingsley v. State*.[155]

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145. *Id.* at 19-20.

146. *See* J. SCOTT, ET AL. DANFORTH'S OBSTETRICS AND GYNECOLOGY 833-841 (6th ed. 1990) (cited in Rambo v. Lawson, 799 S.W.2d 62, 64 (Mo. 1990) (Holstein, J. dissenting)).

147. *Rambo*, 799 S.W.2d at 68 (Holstein, J., dissenting) (emphasis added).

148. *Id.*

149. 93 S.E.2d 727 (Ga. 1956).

150. *Id.* at 728.

151. 87 S.E.2d 100 (Ga. Ct. App. 1955).

152. *Id.* at 102.

153. *Id.* at 103.

154. 303 S.E.2d 258 (Ga. 1983).

155. 360 S.E.2d 451 (Ga. Ct. App. 1987); *see infra* notes 1-76 and accompanying

Rhode Island is often cited as a state that has held a fetus to be a "person" at conception based on *Presley v. Newport Hospital.*[156] In *Presley*, the mother of a viable stillborn fetus brought a wrongful death action.[157] The court in its analysis first pointed out the illogical conclusions that would result from a "born-alive" rule.[158] The court then noted that this case really did not call into question the impact of viability.[159] Recognizing the ramifications of its holding and the possible difficulties in proving causation, the court reiterated a prior holding[160] where they stated that the "legal right of a child 'to begin life with a sound mind and body,' should not be abridged by difficulties in proof of causation."[161] With *Presley*, Rhode Island seemed to adopt a "post conception" rule allowing recovery at any point after conception. However, in 1991, the Rhode Island high court clarified *Presley* in *Miccolis v. Amica Mutual Insurance Co.*[162]

In *Miccolis*, the court held that a nonviable fetus is not a "person" within the meaning of Rhode Island's wrongful death statute.[163] The fetus in this case was five-weeks old.[164] The Rhode Island Supreme Court rejected the *Presley* court's language about viability, observing that "[t]he philosophic analysis engaged in by the plurality [in *Presley*] was merely dictum, however scholarly and comprehensive may have been the terms in which it was presented."[165] The court reasoned that adopting the rule making a fetus a "person" at conception would "give rise to actions based upon speculation and conditions wherein predictability would be virtually nonexistent."[166] This rationale is difficult to reconcile with prior Rhode Island case law holding that the difficulty of proof is irrelevant to whether a cause of action should be allowed.[167]

The only state to truly abandon both the "born-alive" rule and the "viability" rule is Louisiana, where a fetus is a "person" at conception.[168] Al-

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text.

156. 365 A.2d 748 (R.I. 1976) (plurality opinion).

157. *Id.* at 749.

158. *Id.* at 753.

159. *Id.*

160. Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966).

161. *Presley*, 365 A.2d at 754 (quoting *Sylvia*, 220 A.2d at 224).

162. 587 A.2d 67 (R.I. 1991).

163. *Id.* at 69. It should be noted that the supreme court panel that decided *Miccolis* in 1991 was composed of entirely different justices from the panel that decided *Presley* in 1976. *See also* State v. Amaro, 448 A.2d 1257 (R.I. 1982) (finding that a fetus is not a "person" under the vehicular homicide statute).

164. *Miccolis*, 587 A.2d at 68.

165. *Id.* at 70.

166. *Id.* at 71.

167. *See* Sylvia v. Gobeille, 220 A.2d 222, 224 (R.I. 1966).

168. *See infra* notes 355-74 and accompanying text.

though thirty-seven jurisdictions have abolished the "born-alive" rule or "live birth" requirement for purposes of wrongful death actions,[169] far fewer have abolished this rule when determining whether a fetus is a "person" for purposes of criminal law.[170] A comparison of how courts view the "born-alive" rule and the "viability" rule in the criminal context further illustrates the inconsistency and confusion surrounding the question of when a "person" legally exists.

## III. CRIMINAL LIABILITY

In *Billingsley v. State*,[171] the Georgia Court of Appeals reasoned that because the state penal homicide statute does not define "individual," the legislature must have meant to follow the old common-law "born-alive" rule.[172] Despite the implications of the Georgia Supreme Court's holding in *Hornbuckle*[173] that a fetus is a "person" at conception,[174] the Georgia Court of Appeals refused to recognize criminal liability for killing an unborn fetus, even a fetus that was in its sixth month, or twenty-fourth week.[175] Thus, Ms. Billingsley will go unpunished for killing a sixth month old fetus by crashing into the mother's car while having a .21 blood alcohol content.[176]

The attitude of most jurisdictions is that "[i]n the absence of statute, the term 'person,' 'human being,' 'another,' . . . do not include an unborn fetus for purposes of the crime of homicide."[177] The courts restrict their role to deciding "whether the legislature has defined a crime within constitutional parameters."[178] The reason many states have not expanded the majority view in the civil context of "viability" to criminal law is that "[d]iffering objectives and considerations in tort and criminal law foster the development of different principles governing the same factual situation."[179]

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169. See *supra* notes 66-101 and accompanying text (discussing viability).
170. *See infra* note 186.
171. 360 S.E.2d 451 (Ga. Ct. App. 1987).
172. *Id.* at 452.
173. 93 S.E.2d 727 (Ga. 1956); *see supra* note 150 and accompanying text.
174. *Billingsley*, 360 S.E.2d at 452.
175. *Id.*
176. *Id.* at 451-52.
177. State v. Larsen, 578 P.2d 1280, 1282 (Utah 1978).
178. State v. Merrill, 450 N.W. 318, 324 (Minn.), *cert. denied*, 496 U.S. 931 (1990).
179. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3, at 11-13 (1972).

### A. *The "Born-Alive" Rule*

"In order to be charged with homicide due to prenatal injuries, most states require that a child be born alive and then die from the injuries."[180] American courts began to uniformly adopt the "born-alive" rule during the nineteenth century.[181] This view was adopted from English common law as evidenced by this famous statement from Sir Edward Coke:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great [misdemeanor], and no murder; but if the childe be born alive and dyeth 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.[182]

Historically, the inadequacy of medical technology to determine the cause of death justified this distinction.[183] Today, however, "medical science can determine the proximate cause of fetal death."[184] In fact, the unborn child is viewed as "the second patient."[185]

Despite this fact, and the fact that thirty-seven jurisdictions have recognized a viable fetus as a "person" within the tort context, courts in thirty jurisdictions have refused to extend the protection of the criminal law to the unborn.[186] In so doing, one motivation that has been attribut-

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180. Beth D. Osowski, Note, *The Need for Logic and Consistency in Fetal Rights*, 68 N.D. L. REV. 171, 181 (1992) (citing State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (holding that only a living human being could be the victim of homicide and that the "born alive" rule is the majority rule)).

181. *See* Clarke v. State, 23 So. 671, 674 (Alaska 1898); State v. Cooper, 22 N.J.L. 52, 54-55 (1849) (holding that it is not murder to kill a child before it is born, even if killed in the delivery process).

182. 3 SIR EDWARD COKE, INSTITUTES 50 (1648).

183. Gary V. Perko, Note, State v. Beale *and The Killing of a Viable Fetus: An Exercise in Statutory Construction and The Potential for Legislative Reform*, 68 N.C. L. REV. 1144, 1146 (1990).

184. *Id.* at 1147.

185. J. PRITCHARD, ET AL., WILLIAMS OBSTETRICS 218, 267 (17th ed. 1985). For a good discussion on the medical science of the unborn child, see Clarke D. Forsythe, *Homicide of The Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987).

186. Forsythe, *supra* note 185; *see also* Clarke v. State, 23 So. 671 (Ala. 1898) (discussing which charges a plaintiff can bring and sustain when defendant beat pregnant mother, causing the death of a child subsequently born living); Meadows v. State, 722 S.W.2d 584 (Ark. 1987) (holding that manslaughter statute does not include killing of unborn, viable fetus); Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (holding that murder statute does not include killing of unborn viable fetus, which is not a "human being"); State v. Anonymous, 516 A.2d 156 (Conn. Super. Ct. 1986) (holding that defendant's due process rights would be violated by including unborn, viable fetus as a "human being" under murder statute); State v. McCall, 458 So. 2d 875 (Fla. Dist.

Ct. App. 1984) (holding that crimes of homicide and manslaughter of unborn, viable fetus do not exist); White v. State, 232 S.E.2d 57 (Ga. 1977) (finding evidence insufficient to establish elements of murder because of lack of proof that child was born alive); People v. Greer, 402 N.E.2d 203 (Ill. 1980) (holding that "murder" does not include killing of and eight and one-half month old fetus unless fetus is born alive); State v. Winthrop, 43 Iowa 519 (1876) (holding that it was prejudicial error not to instruct jury that actual independent circulation of child must be established in murder trial); State v. Trudell, 755 P.2d 511 (Kan. 1988) (upholding district court's ruling that aggravated vehicular homicide statute does not include death of a viable fetus, which is not a "human being"); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (dismissing murder indictment because killing of viable fetus is not murder of a "person"); State v. Brown, 378 So. 2d 916 (La. 1979) (holding that although definition of "person" was amended, killing of a fetus is still not chargeable as murder); People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980) (holding that the court's interpretation of negligent homicide statute to include the death of an unborn, viable fetus would improperly invade the province of the legislature), *appeal denied*, 334 N.W.2d 616 (Mich. 1983); State v. Soto, 378 N.W.2d 625 (Minn. 1985) (holding that a viable fetus is not a "human being" under the vehicular homicide statute); Taylor v. State, 66 So. 321 (Miss. 1914) (finding evidence insufficient to establish the elements of infanticide by mother because of inconclusive proof that the child was born alive); State v. Doyle, 287 N.W.2d 59 (Neb. 1980) (finding evidence insufficient to prove manslaughter against mother, because it was not proven beyond a reasonable doubt that child was born alive); State in Interest of A.W.S., 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981) (holding that criminal homicide does not include killing of an unborn fetus, because it is not a "human being"); State v. Willis, 652 P.2d 1222 (N.M. App. 1982) (holding that vehicular homicide statute does not include unborn viable fetus within the definition of "human being"); People v. Hayner, 90 N.E.2d 23 (N.Y. 1949) (finding evidence insufficient to sustain murder conviction because no proof, outside of defendant's confessions, that child was born alive); State v. Beale, 376 S.E.2d 1 (N.C. 1989) (holding that murder does not include killing of viable, unborn child); State v. Sogge, 161 N.W. 1022 (N.D. 1917) (finding prejudicial error when jury instructions did not state that direct proof that child is born alive is required to return murder verdict); State v. Dickinson, 275 N.E.2d 599 (Ohio 1971) (holding that vehicular homicide statute requires evidence that child was born alive); State v. Amaro, 448 A.2d 1257 (R.I. 1982) (holding that a nine-month-old unborn fetus is not a "person," so vehicular homicide cannot be committed against it); State v. Evans, 745 S.W.2d 880 (Tenn. Crim. App. 1987) (holding that viable fetus is not a "person," under vehicular homicide statute); Harris v. State, 12 S.W. 1102 (Tex. Ct. App. 1889) (finding evidence insufficient to sustain murder conviction since there was no corroborating evidence of mother's confessions); State v. Larsen, 578 P.2d 1280 (Utah 1978) (holding that killing of unborn fetus is not included in meaning of automobile homicide statute); Lane v. Commonwealth, 258 S.E.2d 781 (Va. 1978) (finding evidence insufficient to prove that child had been born alive, thus rendering the murder conviction unsustainable); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1985) (holding that murder statute does not include killing of viable, unborn child); Huebner v. State, 111 N.W. 63 (Wis. 1907) (upholding murder conviction of mother because medical evidence was sufficient to show child had been born alive); Bennett v. State, 377 P.2d 634 (Wyo. 1963)

ed to these courts is their desire to avoid judicial activism in this area.[187]

Only when the civil standard requires the child be born alive have courts sought consistency in the criminal law. For example, since there was no precedential guidance in criminal cases, the Florida Court of Appeals looked to how the Florida Supreme Court defined "person" in *civil* law.[188] In *State v. McCall*,[189] the court found that since the "born-alive" doctrine persisted in Florida negligence law[190] and since "penal statutes must be strictly construed,"[191] "'human being' for purposes of the homicide statute is one who has been born alive."[192] *McCall* involved a drunk driver crashing into a woman who was in her ninth month of pregnancy, killing her and her unborn child.[193] The result of this case, and others like it, is harsh, and the Florida Court of Appeals recognized this when it contradicted itself in its holding.[194] The sentence preceding the above definition of "human being" stated that "[w]e do not hold that a viable fetus is not alive nor do we hold that a person should not be punished for causing its death."[195] Nevertheless, the court refused to punish the drunk driver for the death of the fetus.

In June of 1990, the New York Court of Appeals specifically dealt with the application of the "born-alive" rule for the first time. In *People v. Hall*,[196] a twenty-eight to thirty-two week old baby was born alive after its mother sustained a gunshot wound to the abdomen.[197] The baby lived for only thirty-six hours before dying of Hyaline Membrane Disease.[198] The trial court found that prosecution for homicide was possible because the child was born alive, and the appellate court affirmed.[199] The court noted that because the death did not meet the defi-

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(upholding mother's murder conviction when evidence sufficiently showed child was born alive).

187. Perko, *supra* note 183, at 1149.

188. State v. McCall, 458 So. 2d 875, 877 (Fla. Dist. Ct. App. 1984).

189. *Id.*

190. *Id.* (citing Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968)).

191. *Id.* (citing Florida *ex rel.* Lee v. Buchanan, 191 So. 2d 33 (Fla. 1966)).

192. *Id.*

193. *Id.* at 876.

194. *Id.* at 877.

195. *Id.*

196. 557 N.Y.S.2d 879, 880 (N.Y. App. Div. 1990).

197. *Id.*

198. *Id.* at 881-82. Hyaline Membrane Disease is also known as Respiratory Distress Syndrome. *Id.* at 881. Heavy airless and congested lungs are symptomatic of the disease. *Id.* at 882. A doctor testified that the bullet wound to the baby's mother severed the placenta and disrupted the flow of oxygen to the fetus, increasing the chances that the baby would develop the disease following birth. *Id.* at 881.

199. *Id.* at 880.

nition of fetal death in New York, the baby was unquestionably a person within the meaning of the homicide statute.[200] Ironically, had the mother been shot and killed in a dark alley and not found until the next day, there would be no criminal cause of action for homicide of the baby because it would have been "born dead."[201]

As in the civil arena, many states have abandoned the "born-alive" rule within the criminal homicide context as well. Instead, a rule of viability has been established in this area of the law that mirrors the civil law.

### *B. Viability*

In *State v. Anonymous*,[202] arrest warrant affidavits were supported by findings that a six-month pregnant woman was shot and that she, as well as her viable, healthy, unborn baby, died.[203] In denying to issue an arrest warrant for the murder of the fetus, the court reasoned, as other courts have, that the legislature did not intend "human being" to include an unborn fetus.[204]

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200. *Id.* at 882. "[F]etal death is death prior to the complete expulsion or extraction from its mother of a product of conception; the death is indicated by the fact that after such separation, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles." *Id.* (citing N.Y. PUB. HEALTH LAW § 4160(1) (McKinney 1989)).

201. In a very interesting Kentucky case, a woman was charged with criminal child abuse when she injected cocaine into her jugular vein while eight months pregnant. Commonwealth v. Welch, 864 S.W.2d 280, 280 (Ky. 1993). The baby was born alive with a condition known as neonatal abstinence syndrome, however, it survived this syndrome and was healthy two weeks later. *Id.* at 282. Neonatal abstinence syndrome occurs because the supply of cocaine to the baby stops when the umbilical cord is severed. This causes the newborn to experience withdrawals, much like those symptoms drug addicts suffer in rehabilitation facilities.

First, the court looked at previous authority to determine that a "fetus" is not a "person" in the criminal law context. *Id.* at 281 (citing Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) and Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992)). The court then concluded that even though this baby was born alive, since Kentucky's criminal child abuse statutes make no mention of offenses against prenatal children, the legislature must have intended to exclude that type of behavior from criminal liability. *Id.* at 285. Justice Wintersheimer lamented the majority's conclusion in his dissent, writing that it is with "great sadness and disappointment that . . . in Kentucky the majesty of the law is unable or unwilling to protect the innocent unborn children from harm caused by the conduct of another human being." *Id.* at 286 (Wintersheimer, J. dissenting).

202. 516 A.2d 156 (Conn. Super. Ct. 1986).

203. *Id.* at 156-57.

204. *Id.* at 158.

> If an unborn viable fetus was to be considered a "human being" . . . then, conceivably, a pregnant woman, who smokes and drinks alcoholic beverages during pregnancy and thereby causes the death of her unborn, might be charged with negligent homicide. One would not expect the legislature to have intended such a result unless it said so explicitly.[205]

Yet this expectation seems to vary among jurisdictions since some courts have intervened to stop a mother's actions that are detrimental to her unborn child.

One commentator, Clarke D. Forsythe, has disagreed with this holding:

> "A homicide statute protects all human beings. To construe a homicide statute in such a manner as to exclude an entire class of human beings is to defeat the intention of the legislature . . . . The application of a homicide statute to an unborn child is thus itself a strict construction, an application of the very letter of a homicide statute is to encompass a human being."[206]

Though what Mr. Forsythe suggests may be sound, it is not widely accepted in the criminal law context.[207] For those who, like Mr. Forsythe, would permit recovery for the wrongful death of a fetus, it is fortunate that most jurisdictions have abandoned the "born-alive" rule in the civil law context as outdated and archaic.[208] While many of these jurisdictions have not yet held that life begins at conception, many have taken an intermediate step the rule called "viability."[209]

"Today, it is undisputed that medicine is generally able to prove the *corpus delicti*[210] of the homicide of the unborn child."[211] Because of this, courts deciding criminal cases are beginning to abandon the "born-

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205. *Id.*

206. Forsythe, *supra* note 185, at 610.

207. *See supra* note 186 and accompanying text.

208. *See supra* note 28 and accompanying text.

209. The generally accepted definition of "viability" for purposes of this new standard focuses on the "capability of living." *See, e.g.*, BLACK'S LAW DICTIONARY 1565-66 (6th ed. 1990). It is "[a] term used to denote the power a new-born child possesses of continuing its independent existence." The Missouri definitional statute contains a typical definition: "That stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* (citing MO. ANN. STAT. § 188.015(7) (Vernon 1994)). The constitutionality of this statutory definition was upheld in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63-64 (1976) (upholding the constitutionality of MO. ANN. STAT. § 188.015(7) (Vernon 1994)). It is consistent with the generally accepted definition of viability. *See* BLACK'S LAW DICTIONARY 1565-66 (6th ed. 1990). A "viable child" is similarly defined as an "[u]nborn child who is capable of independent existence outside his or her mother's womb, even if only in an incubator." BLACK'S LAW DICTIONARY 1566 (6th ed. 1990) (citation omitted).

210. The elements of *corpus delicti* of an unborn child are: "(1) proof of pregnancy or the existence of a live fetus, (2) the death of the fetus, and (3) the criminal agency of the defendant (proximate causation)." Forsythe, *supra* note 185, at 577 & n.210.

211. Forsythe, *supra* note 185, at 579.

alive" rule. In 1985, a unanimous Washington Supreme Court, in *State v. Edwards*,[212] expressed its opinion that medical science had rendered the common law rule requiring the victim's survival for a certain period after a crime obsolete:

> Medical science has progressed to such a degree it makes little sense to have a rule which requires death to occur within a particular time to resolve issues of proof. In light of existing scientific knowledge, it would make sense for a modern rule to be based strictly on proof of causation.[213]

In the criminal law context, the most frequently cited case[214] to support the abandoning of the common law "born-alive" rule is *Commonwealth v. Cass*,[215] decided in 1984. In *Cass*, the defendant ran his vehicle into a female pedestrian who was eight and one-half months pregnant, killing the fetus which was later delivered stillborn by Caesarean section.[216] The Supreme Judicial Court of Massachusetts considered the issue one of legislative intent, interpreting the definition of the word "person" within the state's criminal homicide statute.[217] The court explained that it had rejected the "born-alive" rule in the wrongful death context just prior to enactment of the criminal statute,[218] and, therefore, the legislature was presumed to have known of the court's interpretation of the very terms the legislature included in the new statute.[219] The court concluded that "[i]n keeping with approved usage, and giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being.'"[220] The court stated:

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212. 701 P.2d 508 (Wash. 1985).

213. *Id.* at 511. In *Edwards*, the court was discussing whether to abolish the common law "year and a day" rule that required death of a victim to occur within a year and a day of the offense. *Id.* at 510. The court was unable to reject the rule as to the defendant in that case because even though the rule had been abrogated by statute, the statute was not in effect at the time the crime was committed and the "year and a day" rule had been considered a substantive element of the crime under Washington precedent. *Id.* at 511-12.

214. *See, e.g.*, People v. Vercelletto, 514 N.Y.S.2d 177, 179 (N.Y. Co. Ct. 1987) (noting *Cass* as advocating the abandonment of the "born-alive" rule and declining to follow *Cass*); Meadows v. State, 722 S.W.2d 584, 586-87 (Ark. 1987); People v. Davis, 872 P.2d 591, 621 (Cal. 1994) (Mosk, J., dissenting) (discussing *Cass* as supporting the rejection of the common law "born-alive" rule).

215. 467 N.E.2d 1324 (Mass. 1984).

216. *Id.* at 1325.

217. *Id.* (construing MASS. GEN. L. ch. 90, § 24G(b) (1976)).

218. *Id.* (citing Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975)).

219. *Id.* (citing MacQuarrie v. Balch, 285 N.E.2d 183 (Mass. 1972)).

220. *Id.*

> An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb . . . . [h]eretofore the law has not recognized that the pre-born could be the victims of homicide because of difficulties in proving the cause of death; but problems in proving causation do not detract from the personhood of the victim.[221]

The court went on to explain that "[m]edical science now may provide competent proof as to whether the fetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death."[222] In support of its conclusion, the court also noted that it would not want the death of a fetus to go unpunished when it was the result of violence committed against a pregnant woman.[223] Strangely, the court gave little reason behind using viability instead of conception as a demarcation line.[224] A careful reading of its above reasoning shows that the court is still grappling with the issue of when a "person" is a "person."

The next case that is often cited to support the abandonment of the "born-alive" rule in criminal cases is *State v. Horne*.[225] In *Horne*, the Supreme Court of South Carolina recognized that "[i]t would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."[226] In this case, the defendant attacked his wife with a knife and stabbed her repeatedly. Though the mother survived, her full-term and previously healthy fetus suffocated due to the mother's loss of blood.[227] The unanimous opinion of the South Carolina Supreme Court held that a "viable" fetus is a "person" within South Carolina's criminal homicide statute.[228]

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221. *Id.*

222. *Id.* at 1328.

223. *Id.* at 1329 (citing Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970). In *Keeler*, the defendant and his wife had obtained an interlocutory decree of divorce. *Keeler*, 470 P.2d at 618. When the defendant discovered that his wife was carrying another man's child, he said, "I'm going to stomp it out of you," and shoved his knee into her abdomen. *Id.* The eight month old fetus was delivered stillborn. *Id.*

In Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983), the defendant told his wife that he did not want a child when she was seven months pregnant. *Id.* at 61. He then forced his hand into her vagina, killing the fetus. *Id.* at 61-62.

224. *See Cass*, 467 N.E.2d at 1325-26.

225. 319 S.E.2d 703 (S.C. 1984).

226. *Id.* at 704.

227. *Id.*

228. *Id.*

An Oklahoma Court of Criminal Appeals[229] has also recently discarded the "born-alive" rule within the criminal context. In *Hughes v. State*,[230] the court held that a viable fetus which is stillborn is a "person" within Oklahoma's manslaughter statute.[231] The court stated that the purpose of the vehicular homicide statute was to protect human life and "[a] viable fetus is nothing less than human life."[232] The court also pointed out that the Oklahoma Supreme Court had already recognized a wrongful death action for a viable fetus when stillborn, and this case was necessary to resolve the inconsistency between the two areas of law.[233] However, the court stated with vigor that abortion rights are not to be affected by this holding by noting, "We wish to make it absolutely clear that our holding shall not affect a woman's constitutional right to choose a lawful abortion based upon her constitutional right to privacy or a physician's right to perform one. Neither state statute nor case law can render a constitutionally protected abortion unlawful."[234]

## IV. COMPARATIVE LIABILITY

### *A. Inconsistency Within a State: More Protection Under Civil Law*

Arizona is one of the many states that has abandoned the common law "born-alive" rule for wrongful death actions.[235] Following the strange logic of its predecessors, however, Arizona has kept the "born-alive" rule for criminal law.[236]

*Vo v. Superior Court* presented the Arizona Supreme Court with the issue of "whether the killing of a fetus can constitute first degree murder" under Arizona's homicide statute.[237] In the instant case, Vo rolled down the window of his vehicle and fired two shots at a driver of a pick-

229. Oklahoma and Texas are the only two states in the union with literally two state supreme courts. There is a supreme court for final civil appeals and a Court of Criminal Appeals for final criminal appeals.

230. 868 P.2d 730 (Okla. Crim. App. 1994).

231. *Id.* at 735.

232. *Id.* at 734.

233. *Id.* at 735.

234. *Id.* at 734-35.

235. Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985) (en banc).

236. Vo v. Superior Court, 836 P.2d 408 (Ariz. Ct. App. 1992) (excluding an unborn fetus from the definition of "person" in murder statute).

237. *Id.* at 409; ARIZ. REV. STAT. ANN. § 13-1105 (1992). Section 13-1105 states in pertinent part that "[a] person commits first degree murder if: knowing that his conduct will cause death, such person causes the death of another." *Id.* § 13-1005(A)(1).

up truck with whom he had exchanged hand gestures.[238] A pregnant woman, who was a passenger, was shot and killed, as well as her fetus.[239] In analyzing the defendant's motion to dismiss below, the trial court recognized that "the state must establish that an unborn child is a 'person' before first degree murder liability can attach."[240] The trial court rejected the motion to dismiss based on its conclusion that "the unborn . . . child was a human being, and thus a 'person' for purposes of [Arizona's Criminal Homicide Statute]."[241]

On appeal, the Arizona Supreme Court extensively discussed *Summerfield v. Superior Court*,[242] where the court had previously construed "person" to include a viable fetus for purposes of Arizona's wrongful death statute.[243] The court noted the foundations for the *Summerfield* decision, especially the fact that a majority of jurisdictions have found that the word "person" usually does include a viable fetus in the civil law context.[244] The reasoning used in *Summerfield* did not, however, apply to this case where the court was called upon to construe the statutory meaning of "'person' and 'human being' within the limited context of the criminal first degree murder statute."[245] The court emphasized that it was "not embarking upon a resolution of the debate as to 'when life begins,'"[246] though the result of this opinion was to define a fetus as a person for some purposes, and not for others.

Approaching the case as one of statutory construction of a criminal statute, the court noted that Arizona became a "code" state after the legislature completely re-wrote the criminal code in 1977 and abolished all common law causes of action.[247] Therefore, the court placed constraints on itself as to the development of the law that did not affect the *Summerfield* court.[248] The court then reasoned that since the legislature specifically amended Arizona's manslaughter statute[249] to include liability for causing the death of an "unborn child" when the statute had previ-

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238. *Vo*, 836 P.2d at 409.
239. *Id.*
240. *Id.* at 410.
241. *Id.* (citing Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); Mune v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975)). The court was construing ARIZ. REV. STAT. ANN. §§ 13-1105(A)(1), 13-1101(3) (1992). Section 13-1101(3) states that "'[p]erson' means human being" in the context of this homicide statute. *Id.* § 13-1101(3).
242. 698 P.2d 712 (Ariz. 1985) (en banc); *see supra* note 88 and accompanying text.
243. *Vo*, 836 P.2d at 412.
244. *Id.*; *see supra* note 242 and accompanying text.
245. *Vo*, 836 P.2d at 412.
246. *Id.*
247. *Id.* at 413.
248. *Id.* at 418-19.
249. ARIZ. REV. STAT. ANN. § 1103(a)(1) (1992).

ously referred only to "persons," the legislature must have intended to "exclude a fetus from other statutes in which it is not specifically included."[250] The court concluded that because the legislature did not intend to include a fetus in the definition of a "person" for purposes of the murder statute, and the Arizona Supreme Court "does not have the power to expand the criminal law through evolving common law principles" as the *Summerfield* court did, the creation of a cause of action for the murder of a fetus must be left to the legislature.[251]

Interestingly, the court summed up its opinion by stating that "[t]he much larger metaphysical question of *when does life begin?* is not the subject of this opinion."[252] Again, this court and other state courts avoid the central question by stating, that as in *Vo* and *Summerfield*, that the word "person" can mean different things in different contexts.[253] The central issue they avoid is whether a fetus is a "person."

The North Carolina Supreme Court also construed the term "person" to include a viable fetus under the North Carolina Wrongful Death Act in *DiDonato v. Wortman*.[254] Only two years after the *DiDonato* decision, however, the same court decided not to allow the same protection for the unborn within the criminal law context.[255]

In *State v. Beale*,[256] the North Carolina Supreme Court granted certiorari to decide whether the unlawful killing of a viable but unborn child was murder.[257] Once again, the "fear that expansive judicial interpretations will create penalties not originally intended by the legislature"[258] prevented the overturning of the archaic, "born-alive," rule in the criminal law scenario.[259] The court reasoned that because it found no "clear

250. *Vo*, 836 P.2d at 414. Another argument the court asserted to support its conclusion that the "born-alive" rule should apply in the criminal context was that when the legislature enacted the new criminal code in 1977, the "born-alive" rule was in effect and the legislature was presumed to adopt the common law when codifying a statute "by its common law name." *Id.* at 413.

251. *Id.* at 419.

252. *Id.* at 415.

253. *Id.* at 412.

254. 358 S.E.2d 489, 491-92 (N.C. 1987).

255. *See* State v. Beale, 376 S.E.2d 1 (N.C. 1989).

256. *Id.*

257. *Id.*

258. 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1994). This phrase was used to justify the rule for strict construction of penal statutes. *Id.*

259. *Beale*, 376 S.E.2d at 4.

legislative intent to change the common law rule that the killing of a viable but unborn child is not murder" and because "criminal statutes must be strictly construed," it would not extend application of the murder statute to a fetus.[260] The court stated that "any extension of the crime of murder . . . is best left to the discretion and wisdom of the legislature,"[261] and "ignored the irony that Mrs. Beale, had she survived, could have recovered monetary damages for the baby's death, but could not have obtained criminal punishment against her husband for killing her unborn child."[262]

Vermont and West Virginia are two more examples of states that have wisely left the "born-alive" rule in a lonely grave for civil law, yet have resurrected it for criminal law.

In *State v. Oliver*,[263] the Supreme Court of Vermont held, similar to the *Vo* court, that the legislature intended the word "person" to mean "individuals who have already been born."[264] The court reasoned that since the "born-alive" rule was widely accepted at the time the legislature drafted the state's penal code, "the legislature would have defined 'person' to include a viable fetus had it intended to change the rule."[265] The court also revisited the familiar language requiring that "[p]enal statutes . . . are to be strictly construed in a manner favorable to the accused."[266]

The Supreme Court of Appeals of West Virginia arrived at the same result for similar reasons in *State ex rel. Atkinson v. Wilson*.[267] Two justices dissented in the case, and discussed well-reasoned points. First, Justice McGraw criticized the court's refusal to modify the archaic "born-alive" rule as "nothing but an abdication of duty in the face of controversy."[268] His terse simplification of the law, as stated by the majority, was that "[i]n simple terms, you can, under our law, collect but not convict."[269] Justice McHugh voiced similar concerns, and assured that "this court *could* properly determine that an individual could be prosecuted for the killing of a viable unborn child."[270]

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260. *Id.*
261. *Id.*
262. Perko, *supra* note 183, at 1153.
263. 563 A.2d 1002 (Vt. 1989).
264. *Id.* at 1003.
265. *Id.* at 1004 n.5.
266. *Id.* (citing *In re* Hough, 458 A.2d 1134, 1136 (Vt. 1983)).
267. 332 S.E.2d 807 (W.Va. 1985).
268. *Id.* at 812 (McGraw, J. dissenting).
269. *Id.*
270. *Id.* at 813 (McHugh, J. dissenting).

### *B. Inconsistency With Prior Precedent Within a State*

In an opinion that conflicts with its own precedent, the Supreme Court of Missouri, in *State v. Knapp*,[271] found that causing the death of a viable unborn child is perpetrating the death of a "person" within the meaning of Missouri's involuntary manslaughter statute.[272] What is interesting about this case is that the court looked to other sections of the Missouri code for a definition of a "person."[273] First the court stated that "[i]n determining legislative intent, the reviewing court should take into consideration statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed."[274] Then the court looked to a statute it asserted was enacted as part of a larger bill to regulate abortions that provided a definition of a "person" which included all unborn children beginning with conception.[275] This is the same statute that the Missouri Supreme Court in *Rambo v. Lawson* said was not applicable to wrongful death claims because it dealt with

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271. 843 S.W.2d 345 (Mo. 1992) (en banc).

272. *Id.* at 348.

273. *Id.* at 347.

274. *Id.* (citing State v. White, 622 S.W.2d 939, 944 (Mo. 1981) (en banc), *cert. denied*, 456 U.S. 963 (1981)).

275. *Id.* The statute referred to was MISSOURI REVISED STATUTE § 1.205 (1986), which states in pertinent part:

> 1. The general assembly of this state finds that:
> (1) The life of each human being begins at conception;
> (2) Unborn children have protectable interests in life, health, and well being;
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
> 3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
> 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

*Id.*; *Knapp*, 843 S.W.2d at 346-47.

abortion.[276] In that case, the court said that if the legislature had intended that statute to apply to the wrongful death law, it would have so stated.[277] Nevertheless, although the statute did not specifically state that it applied to the manslaughter statute in *Knapp*, the court found that it did.[278] The rule "what's good for the goose is good for the gander" apparently does not apply in Missouri.

### C. *California and the Abolition of Viability: More Protection Under Criminal Law*

Very recently, the California Supreme Court overturned the "born-alive" rule for purposes of criminal law, and even jumped past viability to a new standard of "postembryonic" stage development.[279] In *People v. Davis*,[280] the California Supreme Court was called upon to define the word "fetus" in California's murder statute.[281] The mother in *Davis* suffered a gunshot wound that led to the stillbirth of her twenty-three to twenty-five week old fetus.[282] At trial, medical testimony indicated that while fetus viability at that stage was possible, it was unlikely that the fetus would survive outside the womb.[283] The trial court instructed the jury that a finding of fetal viability was necessary to convict the defendant guilty of murder.[284] The jury found the defendant guilty, and he argued on appeal that the definition of viability given to the jury should have focused on the "probabilities, not possibilities" of independent fetal survival.[285]

The Supreme Court of California determined that viability was not even a part of the statute and should be done away with as a benchmark for liability.[286] In so doing, the majority overruled a previous court of appeal decision which had relied on *Roe v. Wade* concluding that "[i]t fol-

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276. *Rambo v. Lawson*, 799 S.W.2d 62, 64 (Mo. 1990) (en banc).

277. *Id.*

278. *Knapp*, 843 S.W.2d at 348-49. One factor was that the manslaughter statute was modified as part of the same overall bill, but no direct references were made and the language of the definitional section was broad enough to apply to the entire body of Missouri law. *Id.*

279. People v. Davis, 7 Cal. 4th 797 (1994).

280. *Id.*

281. *Id.* at 800; *see* CAL. PENAL CODE § 187 (West 1994).

282. *Davis*, 7 Cal. 4th at 801.

283. *Id.*

284. *Id.*

285. *Id.* The court did not give the jury the standard jury instruction that defines viability, CALJIC 8.10, which defines a viable fetus as "one who has attained such form and development of organs as to be normally capable of living outside of the uterus." *Id.*

286. *Id.* at 802.

lows that such destruction cannot constitute murder or other forms of homicide, whether committed by a mother, father . . . or a third person."[287] The *Davis* court explained that "[t]he *Roe* decision . . . forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent."[288] In other words, when the state's interest in protecting the life of an unborn child is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail.[289]

Finally, the court decided that it would use a general medical definition of the word "fetus" in the absence of a legislative definition: "Generally . . . a fetus is defined as 'the unborn offspring in the postembryonic period, after major structures have been outlined.'"[290] This period occurs in humans seven or eight weeks after fertilization and is a factual question for the trier of fact.[291]

California has taken bold steps to update the definition of "fetus" to current medical technology in the criminal context but has left intact the harsh "born-alive" rule in civil wrongful death law. All that needs to be done, it would seem, is to amend the wrongful death statute to include fetuses, and the California Supreme Court would probably do away with the "born-alive" rule altogether. Although avoiding, once again, to determine the question of when life begins and a clear definition of "person," this court surpasses all but one other state in giving the unborn the protection they deserve.[292]

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287. *Id.* at 804 (citing People v. Smith, 129 Cal. Rptr. 498 (Cal. App. 1976)).

288. *Id.* at 807 (quoting Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 114 (1985)); *see also* Patricia A. King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1979). Professor King states:

> Where the protectable interests of fully mature members do not conflict with those of less mature members, there is no justification for ignoring the latter's claims . . . . In . . . criminal law, when that interest does not oppose a protected interest of the mature mother, the state should not hesitate to vindicate it.

*Id.* at 1678.

289. *Davis*, 7 Cal. 4th at 807.

290. *Id.* at 810 (quoting THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 281 (1987)).

291. *Id.*

292. A pro-life organization called The National Right to Life in Sacramento, California, called the ruling a "logical protection" for the unborn. *Killing Nonviable Fetus Can Be Murder, Court Says*, HOUS. POST, May 17, 1994, at A8.

## V. THE NEED FOR CONSISTENT LIABILITY AND THE ROLE OF ABORTION IN FOSTERING INCONSISTENCY

### A. *Introduction*

Since the decision by the United States Supreme Court in *Roe v. Wade*, abortion has been a hot topic of debate for politicians, doctors, mothers, women's movements, law schools, and citizens in general. Although limiting a state's ability to protect the unborn child in abortion law, *Roe* helped to push wrongful death law away from the harsh "born-alive" rule into a more tempered "viability" rule, which though still unsound, provides a better result. The entire debate seems to rest on whether a fetus is a "person" and at what stage a fetus becomes a "person" under the various civil and criminal state statutes and common law. Although many courts try to explain that abortion law is separate and distinct from tort or criminal law, there would be an "inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act."[293] Many courts still argue that the issue may be considered separately because the word "person" can have different meanings in different contexts.

### B. *What does* Roe v. Wade *say?*

It will be beneficial to study the beginning of the debate to understand where we now stand. Although abortion law has existed since the Biblical times, and possibly before, *Roe*[294] turned what had been a state by state issue into a national one. Despite assertions to the contrary by the Court, one commentator has declared that in *Roe*, the Supreme Court legalized abortion "from conception to birth for any and no reason."[295] Another interesting result of the case is that "[t]oday, abortion is subject to less regulation in the United States than in any other country in the Western world."[296] The *Roe* Court summarized its holding as follows:

> (a) For the stage 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.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

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293. Toth v. Goree, 237 N.W.2d 297, 301 (Mich. App. 1975).

294. 410 U.S. 113 (1973).

295. Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *After* Webster: *Some Lessons From Lincoln*, 1991 B.Y.U. L. REV. 519 (1991).

296. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 112 (1987) .

> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[297]

This result is reached only by reaching several other sub-results, but because wrongful death cases do not involve a balancing against the mother's fundamental interests, the right to privacy will be left for other commentators.[298] The issue relevant to a wrongful death discussion is the same as in tort and criminal homicide statutes; the courts and legislatures must decide whether a fetus is a person and if so, when does it become a person.

The first question the Court must answer is whether a fetus is a "person." The Court, in an opinion written by Justice Blackmun which some say he will "carry to his grave,"[299] stated emphatically that a fetus is not a "person."[300] Although, the Court came to this decision to allow abortion, the justices noted "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[301] However, the Court decided it need not resolve the question of when life begins to resolve the case.[302] This is disingenuous. By striking down anti-abortion laws, the Court in effect decided that life does not begin until viability. To rule otherwise would mean that the Court would be giving women the freedom to commit murder.[303]

The majority in *Roe* then seems to say that once a fetus reaches viability, the state can regulate abortion.[304] This is not the case, however, because after viability the state may regulate abortion only as it "reasonably

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297. *Roe*, 410 U.S. at 164-65.

298. The discussions are virtually too numerous to count, *see, e.g.*, Harry F. Tepker, *Abortion, Privacy and State Constitutional Law: A Speculation If (Or When)* Roe v. Wade *is Overturned*, 2 EMERGING ISSUES ST. CONST. L. 173 (1989); Dohn Delvin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could* Roe v. Wade *be Alive and Well in the Bayou State?* 51 LA. L. REV. 685 (1991).

299. *High Court's Blackmun Will Exit the Bench*, HOUST. CHRON., April 6, 1994, at 1.

300. *Roe*, 410 U.S. at 156-58, 162.

301. *Id.* at 156-57.

302. *Id.* at 159.

303. "Whoever prevents life from continuing, until it arrives at perfection, is certainly as culpable as if he had taken it away after that had been accomplished." MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 35 (1992) (citing JOHN BURNS, OBSERVATIONS ON ABORTION 34 (1809)).

304. *Roe*, 410 U.S. at 160-63.

relates to the preservation and protection of maternal health."[305] The Court also stated that a fetus may become viable as early as twenty-four weeks but usually around twenty-eight weeks.[306] If that is true, it would seem that a state cannot regulate abortion until after the seventh month of pregnancy.[307] As this discussion shows, the term "viability" was really given life by the Supreme Court in *Roe*, and as one commentator suggests, the pro-life movement and pro-choice movement alike have been "grappling with viability" ever since.[308] State courts interpreting wrongful death statutes and criminal homicide statutes have been struggling as well.

### C. Webster v. Reproductive Health Services

In *Webster v. Reproductive Health Services*,[309] the Court had the opportunity to decide precisely when human life begins. The case centered around Missouri's statutory definition of an "unborn child."[310] Although leaving the rigid trimester approach in *Roe* alone, *Webster* moved the demarcation line of viability down from twenty-eight weeks to twenty weeks.[311] The plurality wrote that when Missouri's legislature enacted section 188.029, it created a "presumption of viability" at the gestational age of twenty weeks.[312] The court was expanding on its earlier assertion that "the time when viability is achieved may vary with each pregnancy . . . ."[313]

*Webster* chipped away at *Roe* in its basic philosophy of human life. Blackmun accorded very little significance to a nonviable or even a viable fetus until it reached the last two months of growth. In *Webster*, the

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305. *Id.* at 163.

306. *Id.* at 160.

307. As previously noted, one commentator has suggested that *Roe* "ushered in abortion on demand from conception to birth for any reason or no reason in every state." Forsythe, *supra* note 295, at 520-21 n.7. "*Roe* held that the states could prohibit abortion after viability 'except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* (citation omitted). But the Court then expanded the exception for "health" of the mother to make it impossible for states to prohibit any abortion after viability. "The Court held that *Roe* and *Doe v. Bolton*, 'are to be read together,' and the Court defined 'health' in *Doe* as 'all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors relate to health.'" *Id.* (citation omitted) (citing Doe v. Bolton, 410 U.S. 179 (1973)).

308. John W. Kennedy, *Pro-Life Movement Struggles For Viability*, CHRISTIANITY TODAY, Nov. 8, 1993, at 40.

309. 492 U.S. 490 (1989).

310. *Id.* at 501; *see supra* note 275 and accompanying text.

311. *Webster*, 492 U.S. at 515-16.

312. *Id.*

313. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976).

Court stated that states have a "compelling interest" in protecting the life of the unborn child "throughout pregnancy."[314] Once again, the issue of when life begins was at the center of the argument, even though the Court refused to say or even acknowledge that fact.

### *D.* Planned Parenthood v. Casey

In her dissent in *Akron v. Akron Center for Reproductive Health*,[315] Justice O'Connor made a clear observation. She stated that whereas in 1973 the Court considered as unusual viability before twenty-eight weeks, ten years later an infant delivered at twenty-two weeks could survive.[316] She went on to say that advances in medical knowledge in the last seven years only bolster her conclusion that "technological improvements will move backward the point of viability" and, therefore, the framework of *Roe* "is clearly on a collision course with itself."[317]

In 1992, *Roe v. Wade* clashed with itself in *Planned Parenthood v. Casey*.[318] The Court in *Casey* rejected the rigid trimester framework of *Roe* but made clear that *Roe* was not overruled; its standards were merely modified.[319] The Court announced that "[l]iberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term."[320] Therefore, the Court concluded that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."[321] The Court offered two

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314. *Webster*, 492 U.S. at 519.

315. 462 U.S. 416 (1983).

316. *Id.* at 457 (O'Connor, J., dissenting). Justice O'Connor noted that "recent studies have demonstrated increasingly earlier fetal viability." *Id.* at 456 (O'Connor, J., dissenting).

317. *Id.* at 458.

318. 112 S. Ct. 2791 (1992).

319. *Id.* at 2818.

320. *Id.* at 2816.

321. *Id.* Justice O'Connor stated that at the "heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." She further opined:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be ground for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without

reasons for its conclusion: stare decisis and the concept of viability, specifically, "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[322] The Court did, however, abandon the theory that an abortion is a fundamental right, terming it a protected liberty interest, and also it deciding to analyze abortion regulations under the "undue burden" test rather than the strict scrutiny test applied in the past.[323]

### *E. Courts and the Abortion Issue*

It is noteworthy that at least twenty-eight reported cases from seventeen jurisdictions expressly state that the purpose for nineteenth century laws banning abortion was at least in part to protect the life of the unborn child.[324] As a result of the decision of Supreme Court of the United

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> more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

*Id.* at 2807.

322. *Id.* at 2817.

323. *Id.* at 2819. Before *Casey*, the right to terminate a pregnancy was characterized as a fundamental right under the due process clause of the Fourteenth Amendment. *See* Roe v. Wade, 410 U.S. 113, 154-56 (1973). Where a fundamental right is being infringed upon by state action, the Court applies the strict scrutiny standard, which requires that the state have a "compelling state interest" in the activity being regulated, and that the regulation be "closely tailored" to achieving that interest through the least restrictive means possible. *Id.* After *Casey*, abortion was no longer a fundamental right, so the Court adopted a new test—the undue burden test—which allows a state to regulate an activity as long as the statute's purpose or effect is not a substantial obstacle to engaging in that activity. *Casey*, 112 S. Ct. at 2820. Accordingly, states can now regulate abortion during all phases of the pregnancy, as long as it does not constitute an undue burden. *Id.* For example, the Court stated that it is not an undue burden for a state to require a reasonable waiting period before allowing a woman to have an abortion. *Id.* at 2825. *See generally* Stefanie L. Black, *Competing Interests in the Fetus: A Look Into Paternal Rights After* Planned Parenthood v. Casey, 28 WAKE FOREST L. REV. 987 (1993).

324. Forsythe, *supra* note 295, at 531 n.44 (citing Rosen v. Louisiana Bd. of Medical Examiners, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); Trent v. State, 73 So. 834, 836 (Ala. Ct. App. 1916); Dougherty v. People, 1 Colo. 514, 522-23 (1872); Passley v. State, 21 S.E.2d 230, 232 (Ga. 1942); Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934); State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901); Joy v. Brown, 252 P.2d 889, 892 (Kan. 1953); State v. Miller, 133 P. 878, 879 (Kan. 1913); State v. Watson, 1 P. 770, 771-72 (Kan. 1883); State v. Rudman, 136 A. 817, 819 (Me. 1927); Smith v. State, 33 Me. 48, 57-59 (1851); Hans v. State, 22 N.W.2d 385, 389 (Neb. 1946), *vacated*, 25 N.W.2d 35 (Neb. 1946); Edwards v. State, 112 N.W. 611, 613 (Neb. 1907); State v. Siciliano, 121 A.2d 490, 495 (N.J. 1956); State v. Gedicke, 43 N.J.L. 86, 89-90, 96 (1881); State v. Hoover, 113 S.E.2d 281, 283 (N.C. 1960); State v. Powell, 106 S.E.2d 133 (N.C. 1921); State v. Tippie, 105 N.E. 75, 77 (Ohio 1913); State v.

States, state supreme courts are limited in how they can define "person" for the purposes of other statutes. To accomplish their individual goals they must either rule in line with *Roe* and *Casey*, or they must justify their opinion as not affecting those decisions.

For example, in *Rambo v. Lawson*,[325] a Missouri Court of Appeals found that a fetus was a "person" at conception.[326] So as not to conflict with United States Supreme Court precedent, the Missouri Supreme Court overturned the case, stating:

> We do not question the Supreme Court's decision in *Roe v. Wade* that the viability of a fetus plays a major role in determining when a woman may obtain an abortion and when the state may restrict her right.
>
> Only the unique relationship between a mother and her fetus requires the striking of this balance between the woman's fundamental right to privacy and the state's interest in protecting fetal life. That unique relationship explains the imposition of the concept of viability in governing abortion rights. Otherwise, we find no reason, especially given the rapidity and inevitability of medical progress, to deny all rights inherent in personhood to a nonviable fetus.[327]

Apparently, because of the unique relationship between a mother and her fetus, a woman is allowed to perform a harmful action that would not be allowed by others. One justice of the Montana Supreme Court explained this conclusion by noting that wrongful death involves negligence, whereas abortion involves the "intentional, consensual act by a woman and her physician, which the law specifically allows."[328]

The Arizona Supreme Court explained that the "word 'person' can mean different things in different contexts."[329] The court noted that while *Roe* balanced the rights of a fetus against those of its mother and

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Barker, 28 Ohio St. 583, 586 (1876); Wilson v. State, 2 Ohio St. 319, 321 (1853); Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936); State v. Auspland, 167 P. 1019, 1022-23 (Or. 1917); State v. Atwood, 102 P. 295, 297 (Or.), *aff'd on reh'g*, 104 P. 195 (Or. 1909); State v. Steadman, 51 S.E.2d 91, 93 (S.C. 1948); State v. Howard, 32 Vt. 380, 399-401 (1859); Anderson v. Commonwealth, 58 S.E.2d 72, 75 (Va. 1950); Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949); State v. Cox, 84 P.2d 357, 361 (Wash. 1938); People v. Lovell, 242 N.Y.S.2d 958, 959 (1963) (abortion legislation was "designed to protect the natural right of unborn children to life").

325. No. WD 41747, 1990 WL 54277 (Mo. Ct. App. May 1, 1990) (opinions of the Missouri Court of Appeals that are transferred to the Missouri Supreme Court are not published), *overruled by* 799 S.W.2d 62 (Mo. 1990) (en banc).

326. *Id.* at *2.

327. *Id.* at *3 (citing D. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965)).

328. Strzelczyk v. Jett, 870 P.2d 730, 733 (Mont. 1994) (Gray, J., concurring).

329. Summerfield v. Superior Court, 698 P.2d 712, 723 (Ariz. 1985).

concluded that the mother's right to privacy outweighed the fetus's right to life, it "'neither prohibits nor compels' the inclusion of a fetus as a person for the purposes of other enactments."[330] The court then distinguished between the will of the mother in obtaining an abortion and the will of the tortfeasor against that of the mother in negligence.[331] In this author's opinion, it then made the mistake, which many "green" lawyers make in cross examination, and offered one statement too many: "In fact, it may further the policy of *Roe* by permitting the state to protect 'a woman's right to continue her pregnancy by recognizing [recovery] . . . for harm caused by interference with that right."[332]

In the recently decided California Supreme Court case of *People v. Davis*,[333] Chief Justice Lucas, writing for the majority, took great care to distinguish abortion from facts presented by the case in question—assaults on pregnant women that cause fetal death.[334] The court went on to say that although abortion cases must balance rights of the fetus against a mother's right to privacy, the only rights involved in criminal homicide cases are those of the child.[335]

### *F. What Does It All Mean?*

What is a person? When does life begin? These are the questions courts refuse to answer explicitly yet indirectly answer in nearly every opinion cited above. "Having written the unborn out of the Constitution . . . the *Roe* majority effectively held that the woman's constitutional right of privacy overrides a state's interest in protecting the life or health of the unborn."[336] Scientific evidence and public sentiment are most often cited as the reasons courts rule the way they do in wrongful death, homicide, and abortion cases, and the next sections examine both.

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330. *Id.*

331. *Id.*

332. *Id.* (citing David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 664 (1980)).

333. 7 Cal. 4th 797 (1994).

334. *Id.* at 809-10.

335. *Id.* When a fetus is born alive, many states say that their analysis in deciding whether a cause of action in wrongful death exists has nothing to do with abortion, simply because in their particular case the baby was born alive. *See* Group Health Ass'n v. Blumenthal, 453 A.2d 1198, 1199 (Md. 1983).

336. Marlan C. Walker & Andrew F. Puzder, *State Protection of the Unborn After* Roe v. Wade: *A Legislative Proposal*, 13 STETSON L. REV. 237, 255 (1984). The law has long been full of constructive creations, such as was noted in 1798: "Let us see, what the non-entity can do. He may be vouched in a recovery . . . He may be an executor. He may take under the Statute of Distributions. He may take by devise . . . He may have an injunction; and he may have a guardian." Thellusson v. Woodford, 31 Eng. Rep. 117, 163 (Ch. 1798).

1. Public Sentiment

The Alan Guttmacher Institute, a private organization funded by Planned Parenthood, reported 1,590,800 abortions performed in 1988.[337] The federal Centers for Disease Control (CDC) reported 1,303,980 abortions in 1982 and 1,268,987 abortions in 1983.[338] Approximately "two percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind."[339] The remainder are elective and are "performed on women who for various reasons do not wish to be pregnant at this time."[340] Many of these women may choose abortion to avoid bringing a child into the world in a socially and financially impoverished state; others reason that their moral responsibilities to existing children take precedence.[341] "Abortion permits a young girl to establish her sexual identity through occasional sexual intercourse without appearing to be sexually available contrary to traditional family-supported moral values."[342] This rationale helps explain why "the number of legal abortions increased by more than fifty percent in the six years following the Supreme Court's decision in *Roe v. Wade*."[343]

A recent Gallup Poll showed how divided Americans are on abortion: more than three-fourths believe abortion is murder, yet a majority also believe abortion should be a woman's right, unfettered by government.[344] In 1993, the Hyde Amendment was re-enacted, banning federal financing of abortion for indigent women except in cases of rape, incest, or risk to the life of the woman.[345] Another Gallup survey done in late

337. Henshaw & Van Vort, *Abortion Services in the United States, 1987, 1988*, 22 FAM. PLAN. PERSP. 102 (1990).

338. CENTERS FOR DISEASE CONTROL, MORBIDITY AND MORTALITY WEEKLY REPORT: ABORTION SURVEILLANCE, 1982-83 11SS (Feb. 1987).

339. *Id.*

340. *Constitutional Amendments Relating to Abortion, 1981: Hearings on S.J. Res. 17, S.J. Res. 18, and S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 158 (1981).

341. Margaret G. Farrell, *Revisiting* Roe v. Wade: *Substance and Process in the Abortion Debate*, 68 IND. L. J. 269, 278 (1993).

342. *Id.* at 279 (citing ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY & REPRODUCTIVE FREEDOM 221, 222-23 (rev. ed. 1990)).

343. *Id.*

344. John W. Kennedy, *supra* note 310 (study commissioned by Chicago based Americans United for Life).

345. Paul Savoy, *The Coming New Debate on Abortion*, TIKKUN, Sept.-Oct. 1993, at 27.

1993 shows that seventy-three percent of Americans support a prohibition on abortion after the first trimester of pregnancy; even forty-six percent of those identified as strongly pro-choice agree that abortion should be limited to the first trimester.[346]

With this information, the reader may have trouble discerning what public sentiment actually is. Because abortion has become a topic lumped together with politics and religion as a cocktail no-no, many views, other than the extreme left and right, are not adequately voiced. It is clear, however, that most of America would probably not have a problem if the Congress or the Supreme Court ruled that abortion after the third or fourth month was illegal.[347]

2. Medical Science

"The unborn child, by its intrinsic biological nature, is a human being from conception. It can be nothing else."[348] Dr. Blechschmidt wrote:

> A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum.[349]

Patten emphasizes in his text on human embryology that "[i]t is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."[350] Scientific evidence therefore suggests that "a new human being exists at conception."[351]

Even without reliance on these expert opinions, one commentator presents a compelling argument based on the medical and legal definition of the end of life. "[T]he irreversible cessation of all functions of the brain, as measured by a flat electroencephalogram (EEG)," is a universally accepted method for determining death, just as "the presence of brain-wave activity is a 'vital sign' of life."[352] When "[b]rain-wave activity is consistently present by eight weeks after conception" and the heart has already been beating since three weeks after conception it is difficult to

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346. Hemler, *supra* note 46, at 40.
347. *Id.*
348. Forsythe, *supra* note 185, at 608-09.
349. E. BLECHSCHMIDT, THE BEGINNING OF HUMAN LIFE 16-17 (1977).
350. C. CORLISS, PATTEN'S HUMAN EMBRYOLOGY: ELEMENTS OF CLINICAL DEVELOPMENT, 30 (1976).
351. Forsythe, *supra* note 185, at 609.
352. Hemler, *supra* note 346, at 40.

deny that an the eight-week-old fetus meets the most widely accepted definition of life.[353]

> Furthermore, eight weeks is designated by scientists as the end of the embryonic period and the beginning of the fetal period. By then, every internal organ and external feature found in an adult human being has been established . . . . Surely we are a compassionate society to seek to err on the side of the "little ones" (Latin meaning of "fetus"), by prohibiting abortion after the onset of brain-wave activity.[354]

## VI. LOUISIANA AS THE MODEL

Louisiana is probably the only state to have the rule that a fetus is a "person" at conception.[355] In *Danos v. St. Pierre*,[356] the Louisiana Supreme Court, in a five-four opinion, found that a "stillborn child has no rights, and can transmit none."[357] In following this reasoning and the "born-alive" rule, the court did not allow recovery for the wrongful death of a six and one-half month stillborn fetus.[358] On rehearing, the court reexamined its definition of a fetus.[359]

The court granted rehearing for the sole purpose of deciding whether parents may recover for the in utero wrongful death of their baby.[360] In rejecting the "born-alive" rule, the court said that "[i]t would be totally illogical and arbitrary for the cause of action to depend on whether the child lives outside the womb for a few minutes."[361] The court stated what is, arguably, the most logical written jurisprudence in this area:

> The loss to the parents of a child who otherwise would have been born normal is substantially the same, whether the tortfeasor's fault causes the child to be born dead or to die shortly after being born alive, and a cause of action for the loss should be recognized in either event, at least in the absence of specific legislation expressing a contrary intent. Moreover, a decision not to recognize a cause of action when the child is born dead would benefit the tortfeasor who causes a more serious injury, since the tortfeasor would have to pay damages if his fault causes a child to be born disabled, but would not have to pay any damages if his fault causes prenatal death.[362]

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353. *Id.*
354. *Id.*
355. Danos v. St. Pierre, 402 So. 2d 633, 636 n.2 (La. 1981) (5-4 decision).
356. *Id.*
357. *Id.* at 636.
358. *Id.*
359. *Id.* The decision on rehearing was a stronger 6-3 vote. *Id.*
360. *Id.* at 637.
361. *Id.* at 638.
362. *Id.* (footnote omitted).

Another basis for the court's decision was that the Louisiana Legislature in Acts 1976, No. 256, stated that a "human being exists from the moment of fertilization and implantation."[363] "The denial of valid claims in order to discourage fraudulent ones . . . disregards the very essence of the judicial process."[364] The Louisiana court recognized that it is illogical and wrong to say that a fetus is not a person until some arbitrary cut-off time such as "viability" or "live birth."[365] Any other result is nonsensical, but unfortunately, only one state has recognized this. Ironically, the holding of the Louisiana Supreme Court reaffirmed a similar decision that dates back to 1923.[366]

This holding was reaffirmed by the Court of Appeals for the Fourth Circuit of Louisiana in *Adams v. Denny's Inc.*[367] In that case, the court upheld the concept that the wrongful death of a fetus is not an "injury" to the mother, but rather an "injury" to the child, because a fetus is a separate "person" from the mother at conception.[368]

In summary, it would appear that Louisiana[369] is the only state to adopt the idea that a fetus is a "person" at conception. Many of the Louisiana courts have justified their opinions by looking to legislative intent[370] or plain meaning,[371] or, in a rare case, by deferring to Supreme Court abortion law.[372] Other courts have denounced abortion law as irrelevant to their analysis.[373] Can these bodies of law truly be distinguished? Many of the arguments used in the abortion debate are strikingly similar to some of the reasoning employed by most of the "born-alive" and "viability" jurisdictions.[374] Although other jurisdictions have not yet

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363. *Id.*

364. *Id.*

365. *See id.*

366. *Id.* at 638-39 (citing Johnson v. South N. O. Lt. and Traction Co., No. 9048 (Orl. App. 1923), *cert. denied*, No. 26443 (La. 1924)).

367. 464 So. 2d 876 (La. Ct. App. 1985).

368. *Id.* at 877-78.

369. Louisiana may be the only state to adopt this rule, but statements endorsing such a position have been common in religious literature for centuries. *See, e.g., Psalm* 139:16 (God knew us before we were formed); Ephesians 2:10 (God knew our purpose and the works for which we were created, even before we were born).

370. *See, e.g., supra* note 116 and accompanying text.

371. *See, e.g., supra* note 221 and accompanying text.

372. *See, e.g., supra* note 132 and accompanying text.

373. *See, e.g., supra* note 277 and accompanying text.

374. *Compare* Discussion Guide to ONE IN A MILLION (Mars-Hill Productions 1986) (on file with author) ("(1) No one knows for sure when human life actually begins; (2) The emotional and psychological side effects are not very significant when having an abortion before a fetus is viable; (3) Human value is based upon the relative potential of a human being to contribute to the good of society.") *with* SARAH WEDDINGTON, A QUESTION OF CHOICE 160, 248 (1992).

done so, Louisiana has discovered the inherent problems with drawing lines such as "born alive" and "viability."

## VII. CONCLUSION

State courts in our country have been struggling for years, especially in the last twenty years, with the definition of "person." To one who has never attended a law school class, the concept that the word "person" could assume different meanings in different contexts must be disturbing. The only other time in American history that this author recalls the United States having different legal meanings for the word "person," other than when referring to unborn children, is in the context of slavery,[375] and it took this country hundreds of years to realize the outright falsity and immorality of that distinction.[376]

The major problem for states is that after *Roe v. Wade* all states are bound by the Supreme Court's definition of a "person." So, even if a state is bold enough to make conception the point at which a "person" is defined, like Louisiana[377] and Missouri,[378] it still must qualify its opinions by stating that this definition does not affect a woman's right to choose. In order to clearly resolve the ridiculous inconsistencies between and within the states, we as a society need to accept the premise that conception marks the beginning of human life. Were this definition to attain broad support, public sentiment and political leaders would eventually succeed in pressuring the Supreme Court to permit states to write laws protecting unborn children.

One of the biggest hurdles, according to many state supreme courts,[379] is the difficulty of proving causation in the civil or criminal context when dealing with early stages of pregnancy. Certainly there will be cases where proof is difficult, but these cases "should be no more frequent, nor the difficulties any greater, than as to many other medical problems."[380] Commentators discussing the problem have "joined in

375. *See* Commonwealth v. Carver, 26 Va. (5 Rand.) 660, 688-90 (Brockenbrough, J., dissenting) (arguing that a slave can be a person and a thing, and such a theory will not interfere with "the full enjoyment of the right of property").

376. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988).

377. *See supra* notes 355-74 and accompanying text.

378. *See supra* notes 102-17 and accompanying text.

379. *Compare supra* note 110 *with* note 211 and accompanying text (discussing jurisdictions which have reexamined this theory).

380. KEETON, *supra* note 11, at 368 (citing Woods v. Lancet, 102 N.E.2d 691 (N.Y. 1951)); *see Woods*, 102 N.E. 2d at 695.

condemning the total no-duty rule and agree that the unborn child in the path of an automobile is as much a person in the street as the mother, and should be equally protected under the law."[381] Viability only confuses the issues because surely "[t]he loss inured by the mother of a three-month old fetus should be no less compensable than that of the mother of a seven-month old fetus."[382]

Professor Prosser best summed up the arbitrariness of "viability" as a standard by saying that:

> [I]t is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[383]

From the foregoing analysis it might appear that recognition of the rights of unborn children by courts is imminent, but state courts are reluctant to take this step and risk being overruled by the United States Supreme Court under its precedent concerning abortion law. It is therefore unlikely that a frontal attack on the right to abortion will succeed in establishing rights for an unborn child, especially when the Supreme Court remains inclined not to overturn its decisions.[384] This avenue is also made more difficult because the natural voice for the unborn child, the mother, is often positioned as the unborn child's adversary in abortion cases that arise before the Court. How then may we seek protection for the unborn?

Those who seek a uniform definition of "person" that places proper value on an unborn child should begin to focus more on wrongful death law and criminal homicide law because in each of those contexts, the child's parents assume the role of protectors and advocates for the rights of that child and their interests are not adverse.[385] The emotional power

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381. KEETON, *supra* note 11, at 368.

382. David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 660 (1980) (quoting Timothy P. Reilly, Recent Case, 46 U. CIN. L. REV. 266, 275 (1977)).

383. *Id.* at 369 (citations omitted).

384. *See supra* note 322 and accompanying text.

385. For other methods that have been used to restrict abortion as a corollary to finding that conception is the point when a "person" exists, see *Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989) (maintaining that proper response to Operation Rescue is to overturn *Roe v. Wade*); Kelly L. Faglioni, Note, *Balancing First Amendment Rights of Abortion Protestors with the Rights of Their "Victims,"* 48 WASH. & LEE L. REV. 347 (1991) (discussing civil disobedience to counter abortion); Jean Rosenbluth, Note, *Abortion As Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. CAL. L. REV. 1237 (recommending criminal

of parents pleading for legal recognition of their unborn children may sway societal views and incite political action. From the aforementioned cases, it is apparent that most state supreme courts are willing to change the definition of "person" or "fetus," but only if state legislatures lead the way by changing the relevant wrongful death statutes and penal code provisions. A step by step approach, beginning with the "born alive" states, should have the effect of changing public attitude towards unborn children. Only when the public is changed, will the United States Supreme Court change.

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liability for illegal abortions because fetuses must have equal protection under the law).