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# Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life

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# NOTE

# INCONSISTENCIES IN THE LEGAL STATUS OF AN UNBORN CHILD: RECOGNITION OF A FETUS[1] AS POTENTIAL LIFE

## I. INTRODUCTION

In 1973, the Supreme Court in *Roe v. Wade*,[2] held that a state has a legitimate interest in protecting the "potentiality of human life."[3] The Court also concluded that the constitutional right to privacy protects a woman's decision to terminate her pregnancy.[4] Balancing a mother's constitutional right to privacy in her body, and a state's interest in protecting potential life, the Court wrote that a state's interest in protecting potential life becomes compelling only at the point of viability.[5] Thus, a state may regulate or proscribe abortion subsequent to viability.[6] However, a state may not prohibit an abortion necessary to protect the life or health of the mother.[7] Despite a state's interest in protecting potential life, the health of the mother is placed above the potential life of the fetus.[8]

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1. In this Note, the terms "human being" and "person" will be used interchangeably. The terms "unborn child" and "fetus" will also be used interchangeably. In addition, the term "fetus" will apply to the unborn throughout gestation. Technically, the term "embryo" is used to describe an unborn child from the third through the eighth week of development. *See* KEITH L. MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 53 (5th ed. 1993). The ninth week of gestation marks the beginning of the fetal period. *See id.* at 93. The name change signifies the development of an embryo into a recognizable human form. *See id.*

2. 410 U.S. 113 (1973).

3. *Id.* at 150, 164-65 (explaining legitimacy of a state's interest in potential life).

4. *See id.* at 153.

5. *See id.* at 163. "Viability" is defined as "a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." Colautti v. Franklin, 439 U.S. 379, 388 (1979). Viability is reached between the twenty-fourth and twenty-eighth week of gestation. *See Roe*, 410 U.S. at 160.

6. *See Roe*, 410 U.S. at 164-65.

7. *See id.*

8. *See id.*

On September 14, 1999, the House of Representatives approved a bill that would provide an unborn fetus legal protections independent of the mother.[9] The Unborn Victims of Violence Act of 1999 (the "Bill")[10] treats as a separate federal crime, injury or death to an unborn child caused by a third party while committing a federal offense against the mother.[11] The Bill defines the term "'unborn child'" as "a child in utero."[12] The phrase "'child in utero'" or "'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."[13] By attempting to enact a new statute that would endow an unborn child with the same legal protections granted to a "person," the legislature avoided both determining when a fetus attained personhood and construing any existing statutes to encompass the unborn.

Both the Supreme Court's "potential life" holding in *Roe* and the House of Representatives' attempt to expand protections granted to an unborn child illustrate the efforts of courts and legislatures to determine the legal status of a fetus without deciding when a fetus becomes a "person." This Note explores further the treatment of the unborn as potential life without the resolution of its status as a person. Part II discusses the treatment of a fetus under civil and criminal common law. Part III argues that the protection afforded a fetus under current civil and criminal law is based on a fetus' status as a "potential human life" rather than a fetus' status as a "person." Part III also argues that the lack of uniformity in the treatment of a fetus under wrongful death statutes and homicide statutes is due to the refusal of courts and legislatures to determine when a fetus acquires personhood entitling it to the full protections of the law. Finally, Part IV proposes that potentiality beginning at conception is the better standard for determining the legal standing of an unborn child.

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9. *See* Julie Rovner, *Congress Considers Bill to Protect Fetuses*, LANCET, Sept. 25, 1999, at 1105, *available at* 1999 WL 9764142.

10. The Unborn Victims of Violence Act of 1999 provides in part: "Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense . . . ." H.R. REP. No. 106-332, pt. 1, at 2 (1999).

11. *See* Rovner, *supra* note 9, at 1105.

12. H.R. REP. No. 106-332, pt. 1, at 2.

13. *Id.*

## II. PRENATAL RIGHTS UNDER COMMON LAW

### A. *Wrongful Death Action*

Traditionally, common law did not recognize a civil cause of action for the wrongful death of a person.[14] Because a cause of action died with the victim, the victim's heirs or dependents received no compensation.[15] As a result, a tortfeasor was immune from all civil liability when the injuries were severe enough to kill the victim.[16] To alleviate this harsh impact, the English Parliament enacted the Fatal Accidents Act of 1846, also known as Lord Campbell's Act.[17] Lord Campbell's Act allowed relatives of a victim to recover damages from the tortfeasor in a civil action.[18]

Despite the acknowledgment of a wrongful death cause of action by English law, courts in the United States refused to abandon the common law and recognize civil liability for wrongful death.[19] The courts proffered various rationales for their refusal to limit the disparity that resulted from recognizing a civil suit to recover damages for injuries caused by a tortfeasor while failing to allow a suit to recover damages when the same conduct caused the victim's death.[20] Such reasons included the notion that courts were not the proper forum for attaching a pecuniary value to human life.[21] Some courts argued that calculating the monetary value of human life was impossible.[22] These courts also reasoned that compensating a loss of life with money would

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14. *See* Farley v. Sartin, 466 S.E.2d 522, 525 (W. Va. 1995) ("At common law, there was no cause of action for the wrongful death of a person.").

15. *See id.*

16. *See id.* Under English common law, three restrictions limited the civil liability of a tortfeasor in a personal injury suit. *See id.* at 525 n.6. First, the victim's cause of action died with the tortfeasor. *See id.* Second, the victim's suit died with him. *See id.* Third, the relatives and dependents of the victim had no cause of action against the tortfeasor for financial losses and emotional pain caused by the death of the victim. *See id.*

17. *See id.* at 525. Lord Campbell's Act provided in part:

> "[W]henever the death of a person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action may be maintained if brought within twelve months after [the] death in the name of [the] executor or administrator for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused."

*Id.* (quoting Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 100 n.9 (1992)) (alterations in original).

18. *See id.*

19. *See id.*

20. *See id.* at 525-26.

21. *See id.* at 526.

22. *See id.*

undermine the Christian belief in the sanctity of life.[23] Other courts feared that recognition of a wrongful death cause of action would result in large verdicts.[24]

Despite the resistance of courts to a wrongful death cause of action, in 1847, the New York Legislature passed the first wrongful death statute in the United States.[25] Today, every state has enacted a wrongful death statute that allows specific beneficiaries and/or the estate of a decedent to recover damages against a tortfeasor for the losses resulting from the victim's death.[26]

However, the enactment of wrongful death statutes by state legislatures raised the issue of whether a wrongful death action could lie for the death of a child caused by injuries inflicted in utero. Under traditional tort law, a child had no personal injury cause of action for harm suffered in utero, even if he or she was subsequently born alive.[27] The common law advanced the "single entity" theory, which asserted that an unborn child and its mother were a single entity because an unborn child "was not 'an independent biological entity.'"[28] Thus, under common law, a fetus was not a human being and not a legal person.[29]

Until 1946, the majority of courts followed this common law approach.[30] Courts advanced two reasons for denying tort recovery to a child born alive for injuries sustained in utero.[31] First, courts were concerned about the danger of fraudulent claims due to the difficulties associated with establishing that a particular defendant's misconduct actually caused the fetus' injury.[32] Second, because an unborn child was not recognized as a human being under the single entity theory, it had

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* Justus v. Atchison, 565 P.2d 122, 131 (Cal. 1977).

28. *Farley*, 466 S.E.2d at 526 (quoting Barbara E. Lingle, Comment, *Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?*, 44 ARK. L. REV. 465, 468-69 (1991)).

29. *See* Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 718 (1999).

30. *See* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 934 (1995).

31. *See id.*

32. *See id.* at 934-35.

no legal existence at the time of the injury.[33] Thus, a defendant owed a fetus no duty of care.[34]

Justice Holmes relied on this single entity view in *Dietrich v. Inhabitants of Northampton*[35] to deny recovery for injuries suffered by a fetus in utero when the mother fell on a defective sidewalk.[36] The court explained that a child had no separate standing to sue for prenatal injuries, since he or she was a part of the mother at the time of the injury.[37] However, any damage to the fetus was recoverable by the mother as part of her suit.[38]

A majority of jurisdictions have abandoned this traditional approach and have extended wrongful death statutes to allow recovery of pecuniary damages from the wrongdoer when a child is born alive and subsequently dies from its prenatal injuries.[39] The dissenting opinion by Justice Boggs in *Allaire v. St. Luke's Hospital*[40] reflects the initial impetus for change. Applying the single entity theory, the majority held that no cause of action lay for injuries suffered by a fetus in utero.[41] However, Justice Boggs argued in his dissent, that a separate cause of action should exist when a fetus is injured after reaching viability and is subsequently born alive.[42] According to Justice Boggs, the single entity approach fails when applied to a fetus that is injured

33. *See id.* at 934; Parsi, *supra* note 29, at 718-19 (discussing Justice Holmes' holding in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), that a fetus has no standing to sue, at least in civil court, for injuries sustained in utero).

34. *See* Klasing, *supra* note 30, at 934.

35. 138 Mass. 14 (1884).

36. *See id.* at 14, 17.

37. *See id.* at 17.

38. *See id. Dietrich* illustrates the fetus-as-appendage metaphor, which recognizes "the fetus not as a being, which can be harmed, but rather a part of the mother, which may be injured." Parsi, *supra* note 29, at 719. The problems posed by this theory are evident when a fetus is compared to an internal organ. *See id.* at 719-20. While an organ is necessary for the health of a person, a fetus is not. *See id.* Second, an organ possesses no intrinsic identity; it has no purpose except when attached to a person. *See id.* at 720. An unborn child is at least a potential life, which will acquire an independent purpose. *See id.* Third, even if the mother is allowed to recover for injuries to the fetus as a part of her injuries, once born, the live child, with its independent existence, must suffer the effects of the prenatal injuries. *See id.*

39. *See* Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 273 (1982).

40. 56 N.E. 638, 640 (Ill. 1900) (Boggs, J., dissenting).

41. *See id.* at 640 (Boggs, J., dissenting) (reasoning "[t]hat a child before birth is, in fact, a part of the mother, and is only severed from her at birth"). In 1953, the Supreme Court of Illinois overruled *Allaire*. *See* Amann v. Faidy, 114 N.E.2d 412, 417-18 (Ill. 1953). In *Amann*, the court held that the Illinois Wrongful Death Act allows recovery for the death of a child who is born alive, but dies from prenatal injuries inflicted at the stage of viability. *See id.*

42. *See Allaire*, 56 N.E. at 641-42 (Boggs, J., dissenting).

and born alive with that injury, since the ramifications of that injury are now borne by an independent and separate entity, and not the mother.[43]

The single entity theory remained dominant until 1946 when a federal court held that a viable fetus is separate from the mother and has standing to maintain a suit for injuries inflicted in utero.[44] In *Bonbrest v. Kotz*,[45] the district court asserted that the failure to allow a child, who is born alive, to maintain a suit for prenatal injuries inflicted at the stage of viability, fosters "'a wrong . . . for which there is no remedy.'"[46] In dicta, the court noted that "[f]rom the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception—which it is in fact."[47]

### B. *Criminal Liability*

During the nineteenth century, American courts uniformly adopted the Born Alive Rule in the context of criminal law:[48]

> 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 misprision [i.e., 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

43. *See id.* at 641 (Boggs, J., dissenting) (stating that the single entity theory "sacrific[es] truth to a mere theoretical abstraction [when it] say[s that] the injury [is] not to the child, but wholly to the mother").

44. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (distinguishing *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), on the basis that *Dietrich* involved a non-viable fetus whereas *Bonbrest* involved a viable fetus). The *Bonbrest* court offered the following explanation for its holding:

> As to a viable child being "part" of its mother—this argument seems . . . to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element. . . . Modern medicine is replete with cases of living children being taken from dead mothers.

*Id.* at 140.

45. 65 F. Supp. 138 (D.D.C. 1946).

46. *Id.* at 141 (quoting Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337, 345).

47. *Id.* at 140 (emphasis added). *En ventre sa mere* is defined as "[i]n its mother's womb." BLACK'S LAW DICTIONARY 369 (6th ed. 1991). The phrase describes an unborn child. *See id.*

48. *See* Mary Lynn Kime, Note, Hughes v. State: *The "Born Alive" Rule Dies a Timely Death*, 30 TULSA L.J. 539, 541-42 (1995).

> is accounted a reasonable creature, *in rerum natura*, when it is born alive.[49]

Under the Born Alive Rule, a fetus was not considered a living human being until after birth.[50] Because English common law defined homicide as the killing of one human being by another,[51] no criminal liability was imposed for the killing of a fetus.[52] Under the Born Alive Rule, homicide laws protected a child only after he or she was born alive[53] and had attained an existence independent and separate from the mother.[54]

The Born Alive Rule was premised on a lack of sophisticated medical knowledge and high prenatal mortality rates.[55] This lack of adequate medical technology rendered impossible the conclusion that a fetus was alive until birth.[56] Although quickening[57] established that a child was alive in utero, the difficulties associated with ascertaining

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49. Katharine B. Folger, Note, *When Does Life Begin ... or End? The California Supreme Court Redefines Fetal Murder in* People v. Davis, 29 U.S.F. L. REV. 237, 240 (1994) (quoting Keeler v. Superior Court, 470 P.2d 617, 620 (Cal. 1970)) (alteration in original) (footnote omitted); *see also* Klasing, *supra* note 30, at 952 (omitting the word "misprision" and inserting the word "misdemeanor"). *In rerum natura* is defined as "a 'living human being.'" Folger, *supra*, at 240 n.26.

50. *See* Folger, *supra* note 49, at 240-41.

51. *See id.* at 239; *see also* BLACK'S LAW DICTIONARY 506 (6th ed. 1991) (defining criminal homicide as, "purposely, knowingly, recklessly or negligently caus[ing] the death of another human being"). Criminal homicide statutes have defined a covered person as "a human being who has been born and is alive." N.Y. PENAL LAW § 125.05(1) (McKinney 1998); *see also* MODEL PENAL CODE § 210.0 (1980).

52. *See* Kime, *supra* note 48, at 539-40.

53. Live birth consists of expulsion of the fetus from the womb and evidence of life. *See* Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 568 (1987). At least one author has recognized:

> A child is considered alive if the child has an independent life of its own for some period, even momentarily, after birth, as evidenced by respiration or other indications of life, such as beating of [the] heart and pulsation of arteries or heart tones in response to artificial respiration, or pulsation of [the] umbilical cord after being severed.

Kime, *supra* note 48, at 541 n.24 (quoting BLACK'S LAW DICTIONARY 74 (6th ed. 1990)).

54. *See* Parness & Pritchard, *supra* note 39, at 268-69 (discussing People v. Smith 129 Cal. Rptr. 498 (Ct. App. 1976) and State v. Brown, 378 So. 2d 916 (La. 1979)).

55. *See* Folger, *supra* note 49, at 240; Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 175 (1998).

56. *See* Michael J. Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, 1998 ARMY LAW. 23, 24.

57. "Quickening is the first physical movement that is felt by the mother of the fetus in the womb." Kime, *supra* note 48, at 541. "Quickening" occurs between the twelfth and sixteenth week of pregnancy. *See* Wendy L. Schoen, Note, *Conflict in the Parameters Defining Life and Death in Missouri Statutes*, 16 AM. J.L. & MED. 555, 565 (1990). The common law quickening doctrine presumed "that the child was first 'endowed with life' at quickening." Forsythe, *supra* note 53, at 573.

whether the child had died prior to, or during, labor and the delivery process contributed to the acceptance of the Born Alive Rule.[58]

The impossibility of determining whether and when a fetus was living and when and how it died led to the difficulty of ascertaining whether a defendant's misconduct was the cause of a fetus' death.[59] In homicide cases, the Born Alive Rule provided an evidentiary standard for proving the *corpus delicti*[60] of the homicide of an unborn child.[61] Adoption of the Born Alive Rule avoided the difficulty of establishing a causal link between a defendant's misconduct and a fetus' death based solely on speculation.[62]

## III. THE CURRENT LEGAL STATUS OF A FETUS AS "POTENTIAL HUMAN LIFE"

"The legal status of the unborn . . . var[ies] from jurisdiction to jurisdiction, from context to context, according to our purposes."[63] This inconsistent treatment of a fetus reflects "the 'cipher metaphor.'"[64] The cipher metaphor assumes that a fetus "has no intrinsic status, but only

58. *See* Kime, *supra* note 48, at 541.

59. *See id.*; *see also, e.g.*, Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (noting that the reason for the common law approach was a lack of certainty in establishing whether the fetus was alive at the time the accused committed the act); Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994) (explaining that common law refusal to protect a fetus as a "person" was based on difficulty in establishing whether the fetus was alive at the time of the defendant's conduct).

60. *Corpus delicti* is defined as "the objective proof or substantial fact that a crime has been committed." BLACK'S LAW DICTIONARY 239 (6th ed. 1991). The elements of *corpus delicti* of a crime against an unborn include the following: "(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 53, at 577.

61. *See* Folger, *supra* note 49, at 239-40. Clarke Forsythe argues that the Born Alive Rule served an evidentiary purpose rather than a substantive definition of human being in the context of homicide. *See* Forsythe, *supra* note 53, at 589. The following example illustrates the illogical result stemming from the application of the single entity view and the Born Alive Rule:

> If the rule was truly a substantive definition of human being, and a fetus only became a human being at birth, then injuring an unborn child *in utero* would not be injuring a human being. In that case, the death of the child out of the womb could not satisfy the *corpus delicti*, because the criminal agency of the defendant—the moral connection between the infliction of the injury and the resulting death—would not exist.

*Id.*

62. *See* Folger, *supra* note 49, at 240.

63. BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 4 (1992).

64. Parsi, *supra* note 29, at 716.

what persons confer upon it."[65] Thus, the worth of a fetus is merely a matter of social construction rather than its moral status as a "person."[66]

This view is apparent in the attempt by courts to determine the legal status of a fetus within the context of wrongful death statutes and homicide statutes without resolving whether a fetus possesses the intrinsic qualities necessary for attaining personhood.[67] Instead, courts have relied on legislative intent, the rules of statutory construction, the purpose of wrongful death liability and homicide convictions, logic, precedent, and changes in medical science to ascertain the degree of legal protection that should be granted to a fetus.[68]

### *A. Wrongful Death*

A majority of jurisdictions have extended the term "person" in their wrongful death statutes to include a child injured in utero.[69] However, courts remain split as to the extent the term "person" applies to an unborn child.[70] Courts disagree on two issues in the area of prenatal torts.[71] First, courts disagree regarding the developmental stage at which a fetus must be when injured.[72] Second, courts disagree over whether recovery is limited to a fetus who is born alive and subsequently dies as a result of the prenatal injuries, or whether beneficiaries may receive damages for the wrongful death of a stillborn child.[73]

Three major approaches have developed in the attempt to define the term "person" when applying a wrongful death statute to a fetus: a fetus that is born alive; a viable unborn fetus; and a non-viable unborn fetus.[74]

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65. *Id.*

66. Kayhan Parsi asserts that fetal worth is a matter of social construction and convention on the metaphysical level. *See id.* However, Parsi distinguishes fetal status on the epistemological level, which is not purely of social convention. *See id.*

67. *See, e.g.*, Vo v. Superior Court, 836 P.2d 408, 415 (Ariz. Ct. App. 1992) ("'The much larger metaphysical question of when does life begin? is *not* the subject of this opinion.'") (quoting Hollis v. Commonwealth, 652 S.W.2d 61, 61 (Ky. 1983)) (capitalization omitted).

68. *See* discussion *infra* Part III.A-B.

69. *See* Kime, *supra* note 48, at 550.

70. *See* Charles M. Kester, Note, *Is There a Person in That Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm*, 82 GEO. L.J. 1643, 1648 & n.23 (1994).

71. *See id.* at 1648 & n.23.

72. *See id.*

73. *See id.*

74. *See* Michael P. McCready, Note, *Recovery for the Wrongful Death of a Fetus*, 25 U. RICH. L. REV. 391, 394-96 (1991). In the legal context, viability and non-viability refer to the

1. Born Alive

In *Endresz v. Friedberg*,[75] the New York Court of Appeals dismissed a wrongful death suit for the death of a viable, unborn fetus.[76] New York's wrongful death statute provides damages to "'[t]he personal representative ... of a decedent.'"[77] Relying on the term "decedent," the court reasoned that a "decedent" cannot exist without a person being born alive.[78]

The court also referred to the treatment of a fetus in other areas of the law.[79] The court noted that, under property and inheritance laws, the rights of an unborn child do not perfect until live birth.[80]

Acknowledging that a child who is born alive may maintain a personal injury suit to recover damages for prenatal injuries, the court distinguished the impact of the injuries on a child who is subsequently born alive and a child who dies in utero. The court noted that natural justice demands "recognition of the legal right of every human being to begin life unimpaired by physical or mental defects [caused by] the negligence of another."[81] However, the court asserted that such an argument does not apply to an unborn child who will never endure the difficulties associated with impaired mental or physical health.[82]

Another argument proffered by the court in support of its holding involves the problems associated with damages and causation.[83] Damages in a wrongful death action are limited to pecuniary losses.[84]

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point in prenatal development at which the fetus is injured and a cause of action may, or may not, arise. *See id.*

75. 248 N.E.2d 901 (N.Y. 1969).

76. *See id.* at 906.

77. *Id.* at 903 (quoting New York's wrongful death statute) (alteration in original). New York's wrongful death statute provides in part:

> "The personal representative ... of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued."

*Id.* (quoting N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967)) (alteration in original). New York's wrongful death statute is representative of wrongful death statutes in other states. *See* Farley v. Sartin, 466 S.E.2d 522, 526 (W. Va. 1995) (describing that, after New York adopted a wrongful death statute, every other state followed by enacting a similar wrongful death statute).

78. *See Endresz*, 248 N.E.2d at 903.

79. *See id.* at 904.

80. *See id.*; *see also, e.g.*, UNIF. PROBATE CODE § 2-108 (Working Draft No. 5 1969) ("Relatives of the decedent conceived before his death *but born* thereafter shall inherit as if they had been born in the lifetime of the decedent.") (emphasis added).

81. *Endresz*, 248 N.E.2d at 903.

82. *See id.*

83. *See id.* at 903-04.

84. *See id.* at 903.

The court reasoned that "proof of pecuniary injury and causation is immeasurably more vague than in suits for prenatal injuries" and "the [l]egislature did not intend to authorize the maintenance of a wrongful death action where there are no 'elements whatever upon which a jury could base any conclusion that a *pecuniary injury* has been suffered by the plaintiff.'"[85] The court summarized its position in the following manner: "[T]here is but a 'conditional prospective liability . . . created when an unborn child . . . is injured' through the wrongful act of the defendant, and such liability attaches only upon fulfillment of the condition that the child be born alive."[86]

*Justus v. Atchison*[87] presented the California Supreme Court with the issue of whether a stillborn fetus is a "person" under the state's wrongful death statute.[88] Deferring to legislative intent, the court denied recovery to the parents of an unborn fetus injured when the defendant negligently failed to provide proper obstetrical and surgical care during delivery.[89] The court asserted that the legislature occupied the field with regard to recovery in wrongful death actions when it enacted the wrongful death statute.[90] Thus, whether the court may permit recovery for the wrongful death of an unborn fetus depended on "whether the [l]egislature intend[ed the wrongful death statute] to provide a cause of action for the wrongful death of a stillborn fetus."[91]

The court examined the treatment of unborn fetuses in other areas of the law to determine legislative intent. Referring to property law, the court acknowledged that, an unborn child has a property interest under inheritance law, and may be represented by guardians *ad litem*.[92] However, perfection of this interest is contingent upon live birth.[93] The court also explored the status of a fetus for purposes of compensation in a personal injury suit.[94] Recovery for prenatal injuries is limited to a child who is born alive.[95] The court then examined the legal status of a

85. *Id.* (quoting Butler v. Manhattan Ry. Co., 38 N.E. 454, 455 (N.Y. 1894)) (emphasis added).

86. *Id.* at 905 (quoting Keyes v. Constr. Serv., 165 N.E.2d 912, 915 (Mass. 1960)) (alterations in original).

87. 565 P.2d 122 (Cal. 1977).

88. *See id.* at 124.

89. *See id.* at 124-25, 130-32.

90. *See id.* at 129.

91. *Id.*

92. *See id.* at 131.

93. *See id.*

94. *See id.*

95. *See id.*

fetus under California's criminal law.[96] In *Keeler v. Superior Court*,[97] the California Supreme Court had interpreted the term "human being" in California's homicide statute to exclude an unborn child.[98] Subsequent to *Keeler*, the California Legislature redefined the term "human being" to include a "fetus" as a murder victim.[99] The *Justus* court thus concluded that, in the absence of express legislative mandate, the term "person" in California's wrongful death statute may not be construed to include an unborn fetus.[100]

The *Justus* court further justified its refusal to recognize a fetus as a "person" by distinguishing the loss suffered by the parents of a stillborn child from the loss of a child born alive.[101] The court observed that a meaningful child-parent relationship does not begin until birth.[102] It commented:

> The parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb; but the mother and father of a child born alive have seen, touched, and heard their baby, have witnessed his developing personality, and have started the lifelong process of communicating and interacting with him.[103]

2. Viable, Unborn Child

In 1949, Minnesota was the first state to reject the Born Alive Rule and adopt a viability standard for determining the legal status of a fetus in the context of a wrongful death action.[104] Following *Verkennes v. Corniea*,[105] other courts also adopted the viability rule as the criterion for deciding whether a fetus is a "person," a "human being," or an "individual" under their state's wrongful death statute.[106] These courts have reasoned that the following rationales offered in support of the common law approach are not "maintainable":

96. *See id.* at 131-32.
97. 470 P.2d 617 (Cal. 1970).
98. *See id.* at 628-31.
99. *See Justus*, 565 P.2d at 132.
100. *See id.*
101. *See id.* at 133.
102. *See id.*
103. *Id.*
104. *See* Klasing, *supra* note 30, at 941.
105. 38 N.W.2d 838 (Minn. 1949).
106. *See* Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) (noting that the majority of jurisdictions allow wrongful death actions for the death of an unborn child who has reached viability); *see also* Klasing, *supra* note 30, at 941-51 (discussing how different courts apply the concept of viability in civil cases).

> (1) [There is a] lack of precedent; (2) an unborn child is a part of its mother until birth and has no juridical existence; (3) such action would open the door to fraudulent claims the proof of which would be speculative and difficult; and (4) the cause of action for the wrongful death of an unborn viable child should be created by the [l]egislature instead of being recognized by the courts.[107]

Although courts have offered various reasons for permitting recovery of damages for the wrongful death of a viable, unborn child, these courts have advocated adoption of the viability rule without inquiring into whether a viable fetus possesses the characteristics necessary for personhood.

In *Verkennes*, the Minnesota Supreme Court, for the first time, addressed the issue of "whether the . . . administrator of the estate of an unborn infant, which dies prior to birth as the result of another's negligence, has a cause of action on behalf of the next of kin of [the] unborn infant under [Minnesota's] wrongful death statute."[108] The court held that Minnesota law provides a cause of action for the wrongful death of a viable fetus.[109] Thus, under Minnesota's wrongful death statute, the representative of an unborn child may recover damages for the wrongful death of the child, if the injury that causes the subsequent death is inflicted after the fetus becomes viable.[110]

Rejecting the single entity theory, the *Verkennes* court based its conclusion on the following reasoning:

> "[I]f, . . . [the unborn child] reaches the prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, . . . it is but to deny a palpable fact to argue there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life . . . ."[111]

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107. Baldwin v. Butcher, 184 S.E.2d 428, 434 (W. Va. 1971).

108. *Verkennes*, 38 N.W.2d at 839.

109. *See id.* at 841.

110. *See id.*

111. *Id.* at 840 (quoting Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting)) (some alterations in original).

The *Verkennes* court asserted that the single entity theory is also irreconcilable when applied to a viable fetus who is born alive, since the child, not the mother, endures the incapacity and inconvenience resulting from the injury.[112]

The Minnesota Supreme Court also rejected arguments cited by other courts that advocated continued adherence to the Born Alive Rule.[113] The *Verkennes* court recognized that the absence of precedent acknowledging a wrongful death action for the death of a viable, unborn child does not justify granting immunity to a party whose wrongful conduct causes the death of a fetus.[114] The court also agreed with other jurisdictions that found the fear of fraudulent claims insufficient to deny recognition of an otherwise meritorious claim.[115] The court similarly maintained that the issue of whether an unborn fetus is entitled to protection under Minnesota's wrongful death statute is limited to a determination as to whether a fetus has such a right, and that the difficulties associated with implementing a viability standard are irrelevant.[116]

In *Summerfield v. Superior Court*,[117] the Arizona Supreme Court interpreted the term "person" in Arizona's wrongful death statute to encompass a viable, unborn child.[118] The *Summerfield* court rejected the notion that a lack of precedent requires continued adherence to the common law.[119] The court noted that, because the legislature failed to define the term "person" in the statute, the court has the obligation to construe the word in accordance with the treatment of an unborn child

112. *See id.* at 840 ("'If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation....'") (quoting Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337, 344).

113. *See id.* at 841.

114. *See id.* ("'The absence of precedent should afford no refuge to those who by their wrongful act ... have invaded the right of an individual....'") (quoting Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946)).

115. *See id.*

116. *See id.* ("'We are concerned here only with the right and not its implementation.'") (quoting Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946)).

117. 698 P.2d 712 (Ariz. 1985).

118. *See id.* at 724.

119. The court refused to "assume that the Territorial Legislature of 1887 was necessarily supplied with or interested in the erudite reasoning or thorough research which supported Holmes' decision, [rejecting wrongful death causes of action for stillborn fetuses] made three years earlier." *Id.* at 720. Rather, the court chose to "study ... the statute, the best method to further the general goal of the legislature in adopting such a statute, and common law principles governing its application." *Id.*

in other areas of the law.[120] Consequently, the court concluded that legislative policy regarding the compensation and protection of a fetus requires the court to construe the wrongful death statute so as to allow the parents of a viable fetus who is negligently killed to recover damages.[121]

In *Stidam v. Ashmore*,[122] the Ohio Court of Appeals inquired as to "whether an action may be maintained for the wrongful death of a viable, unborn child which is subsequently stillborn."[123] The court argued that both the language of the state's wrongful death statute and logic lead to the conclusion that a wrongful death cause of action exists when the victim is an unborn, viable fetus.[124] First, the test for determining the existence of a right under Ohio's wrongful death statute is whether the injury "'would have entitled the party injured to maintain an action and recover damages if death had not ensued.'"[125] If the tortfeasor's negligent conduct had injured the unborn child, but had not caused its death, the child would have been able to recover in tort for the injuries inflicted in utero.[126]

Second, the court offered the following twin hypothetical to emphasize the "bizarre results" associated with recognizing a cause of action if death occurs after birth, while prohibiting all recovery if death occurs before birth:

> 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? Surely logic requires recognition of causes of action for the deaths of both, or for neither.[127]

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120. *See id.* at 720-21.

121. *See id.* at 721.

122. 167 N.E.2d 106 (Ohio Ct. App. 1959).

123. *Id.* at 106.

124. *See id.* at 107.

125. *Id.* (quoting Ohio's wrongful death statute). The Ohio wrongful death statute provides in part:

> "When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued ... the person who would have been liable if death had not ensued ... shall be liable to an action for damages, notwithstanding the death of the person injured...."

*Id.* (quoting Ohio's wrongful death statute) (alterations in original).

126. *See id.* at 107-08 (citing to *Jasinsky v. Potts*, 92 N.E.2d 809, 812 (Ohio 1950), which held that tort law recognizes a cause of action for prenatal injuries).

127. *Id.* at 108.

The twin hypothetical illustrates the "absurd" and illogical result of rewarding the tortfeasor by allowing him or her to escape liability if his or her negligent conduct inflicts injuries severe enough to cause a fetus' death before birth.[128] In essence, "the greater the harm inflicted, the better the opportunity that a defendant will be exonerated."[129] The court asserted that, as the Ohio Supreme Court had already determined, because there is a cause of action when death occurs after birth, there is "no valid reason" for denying recovery of damages to a child who dies before birth.[130]

In *Werling v. Sandy*,[131] an Ohio court again, for other reasons, held that a viable fetus is a "person" under the wrongful death statute even if it dies in utero.[132] The Ohio Supreme Court concluded that the purpose of the "statute is to provide a remedy whenever there would have been an action in damages had death not ensued."[133] The court therefore relied on the remedial nature of the wrongful death statute.[134] The court argued that the purpose of a wrongful death statute is "to alleviate the inequity perceived in the common law" by removing the immunity enjoyed by a tortfeasor whose conduct is severe enough to cause an unborn child's death.[135] In addition, the court held that, because a remedy under the wrongful death statute is intended to compensate parents for the loss of parenthood, the parent of a viable fetus, subsequently stillborn, has standing under the statute.[136]

The court further argued that "[t]he requirement of birth in this respect is an artificial demarcation."[137] The Born Alive Rule does not allow recovery for the wrongful death of a child if the trauma inflicted by a third party kills the child in utero; but, if the injury is less serious so that the child survives, the law permits recovery.[138] If the fatality is immediate, the suit cannot prevail, but if the death is delayed by a few hours, even minutes, beyond birth, the claim can succeed.[139]

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128. *See id.*
129. Werling v. Sandy, 476 N.E.2d 1053, 1055 (Ohio 1985).
130. *See Stidam*, 167 N.E.2d at 108.
131. 476 N.E.2d 1053 (Ohio 1985).
132. *See id.* at 1056.
133. *Id.* at 1054.
134. *See id.*
135. *Id.* at 1054, 1055.
136. *See id.* at 1054.
137. *Id.* at 1055.
138. *See id.* (using the twin hypothetical espoused by the court in *Stidam v. Ashmore*, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959)).
139. *See id.* (using the twin hypothetical espoused by the court in *Stidam v. Ashmore*, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959)).

In *Baldwin v. Butcher*,[140] the West Virginia Supreme Court of Appeals also expanded its wrongful death statute to provide compensation for the wrongful death of a viable, unborn child.[141] The court rejected the arguments frequently offered in support of the common law approach.[142] First, the *Baldwin* court asserted that the fear of fraud and the difficulties associated with proving causation and damages do not justify barring meritorious claims, since such issues have "no bearing upon the validity of the cause of action."[143]

Second, the court reasoned that, if a child is injured at the stage of viability, the third party's liability should not turn on whether "the death occurs just before [birth] or just after the child is born."[144] Relying on the twin hypothetical first introduced in *Stidam*, the court noted "[t]he injustice and the patently illogical result of" allowing an action for the wrongful death of a fetus injured after viability and subsequently born alive, but denying an action for the wrongful death of a fetus injured after viability and subsequently stillborn.[145]

Third, the *Baldwin* court demonstrated "[t]he incongruity and ... injustice of the" single entity theory.[146] In the absence of a cause of action for the wrongful death of a viable, unborn child, the injury inflicted on a fetus remains uncompensated.[147] The court emphasized that, even under the single entity theory, the law does not permit a mother to recover damages for the death of a stillborn child as a part of her tort suit.[148] Thus, the failure to recognize a viable, unborn child as within the wrongful death statute results in "no recovery ... for a tort which is separate and independent [from the tort] which caused the injuries of the mother."[149] The court offered the following example to illustrate the "incongruity and the injustice" of failing to encompass a fetus within the wrongful death statute: A doctor who is negligent in the delivery of a child may be liable if he injures the child and the child is

140. 184 S.E.2d 428 (W. Va. 1971).
141. *See id.* at 436. In 1995, the West Virginia Supreme Court of Appeals expanded its holding in *Baldwin* to provide protection to a nonviable fetus. *See* Farley v. Sartin, 466 S.E.2d 522, 523 (W. Va. 1995).
142. *See Baldwin*, 184 S.E.2d. at 434, 436.
143. *Id.* at 434.
144. *Id.* at 435.
145. *See id.*
146. *Id.*
147. *See id.*
148. *See id.*
149. *Id.*

subsequently born alive, but he is immune from all liability if his misconduct causes the death of the unborn child.[150]

Finally, the court examined the rights possessed by an unborn child under common law.[151] The court recognized that the law provides processes for protecting property belonging to an unborn child by allowing "'[an unborn child to] have a legacy, [to] own an estate, and [to have] a guardian . . . assigned to it.'"[152] The *Baldwin* court noted that it is "'illogical, unrealistic, and unjust . . . for the law to withhold its processes . . . for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.'"[153]

The North Carolina Supreme Court, in *DiDonato v. Wortman*,[154] also adopted the viability standard to determine that a nine-month-old stillborn fetus is a "person" covered under the wrongful death statute.[155] The court stated:

> The language of [the] wrongful death statute, its legislative history, and recognition of the statute's broadly remedial objectives compel [the court] to conclude that any uncertainty in the meaning of the word "person" should be resolved in favor of permitting an action to recover for the destruction of a viable fetus *en ventre sa mere*.[156]

The court relied on the language of the statute, which provides in part:

> When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person . . . that would have been so liable . . . shall be liable to an action for damages . . . .[157]

The court construed this language to mean that a beneficiary may maintain a wrongful death action "if the decedent could have maintained an action for negligence or some other misconduct if he [or

150. *See id.*

151. *See id.* at 435-36.

152. *Id.* at 436 (quoting Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d. 909, 910 (Ga. 1951)).

153. *Id.* (quoting Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d 909, 911 (Ga. 1951)).

154. 358 S.E.2d 489 (N.C. 1987).

155. *See id.* at 493.

156. *Id.*

157. *Id.* at 490 (quoting N.C. GEN. STAT. § 28A-18-2 (1984)) (second and third alterations in original).

she] had survived."[158] Because a child born alive could recover in tort for prenatal injuries, the court concluded that the wrongful death statute encompasses a viable fetus, which dies in utero.[159] The *DiDonato* court also reasoned that recognizing a viable, unborn child within the wrongful death statute furthers the policies underlying the enactment of a wrongful death statute, namely, to "compensat[e the] beneficiaries of the decedent's estate for their loss[] and . . . deter dangerous conduct."[160]

3. Nonviable, Unborn Child

In recent years, a few courts have rejected both the Born Alive Rule and the viability rule in an effort to expand their state's wrongful death statute to include unborn fetuses from the moment of conception.[161] In 1976, the Rhode Island Supreme Court in *Presley v. Newport Hospital*[162] refused to address the plaintiff's allegation that the fetus was viable at the time of the injury that subsequently caused her death.[163] The court limited its inquiry to "whether . . . the language of [the wrongful death statute] permit[ted] a reading of the word 'person' to include a fetus which die[d] *en ventre sa mere*."[164] Allowing the parents of the unborn child to sustain their suit, the court held that "the decedent, whether viable or nonviable, [is] a 'person' within the meaning of the Wrongful Death Act."[165] As a basis for its holding, the court referred to the rationale adopted by courts in rejecting the Born

158. *Id.* at 491.

159. *See id.* at 492-93.

160. *Id.* at 493.

161. However, a majority of jurisdictions have refused to acknowledge wrongful death actions for children injured prior to viability and who are not born alive. *See* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790 (S.D. 1996). To support its conclusion, the *Wiersma* court cites *Gentry v. Gilmore*, 613 So. 2d 1241, 1242 (Ala. 1993) (thirteen-week-old fetus); *Ferguson v. District of Columbia*, 629 A.2d 15 (D.C. 1993) (nonviable fetus); *Humes v. Clinton*, 792 P.2d 1032, 1035 (Kan. 1990) (sixteen-and-one-half-week-old fetus); *Angelini v. OMD Corp.*, 575 N.E.2d 41, 43 (Mass. 1991) (nonviable fetus); *Fryover v. Forbes*, 446 N.W.2d 292, 292 (Mich. 1989) (nonviable fetus); *Wallace v. Wallace*, 421 A.2d 134, 135 (N.H. 1980) (ten to twelve-week-old fetus); *Guyer v. Hugo Publishing Co.*, 830 P.2d 1393, 1393 (Okla. Ct. App. 1991) (three-and-one-half-month-old fetus); *Coveleski v. Bubnis*, 634 A.2d 603, 608 (Pa. 1993) (eight-week-old fetus); *Miccolis v. AMICA Mutual Insurance Co.*, 587 A.2d 67, 68 (R.I. 1991) (five-week-old fetus); *West v. McCoy*, 105 S.E.2d 88 (S.C. 1958) (five-week-old fetus).

162. 365 A.2d 748 (R.I. 1976).

163. *See id.* at 754.

164. *Id.* at 750.

165. *Id.* at 754. Although the majority declined to give weight to the viability issue, the decedent in *Presley v. Newport Hospital* was actually a viable fetus. *See id.* at 749. Thus, when the Rhode Island Supreme Court was confronted with an action for the wrongful death of a nonviable fetus, the court held that the state's wrongful death statute did not recognize such a cause of action. *See Miccolis*, 587 A.2d at 69.

Alive Rule in favor of the viability test.[166] The *Presley* court inferred that, if reason leads to the conclusion that live birth is an artificial demarcation, then "it [is] seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become . . . nonentities."[167] The court further relied on its holding in *Sylvia v. Gobeille*,[168] in which it permitted a cause of action by an individual who sued for injuries sustained as a nonviable fetus.[169]

In *Rambo v. Lawson*,[170] the Missouri Court of Appeals held that Missouri law recognizes a cause of action for the wrongful death of a nonviable fetus.[171] The court first noted that viability is no longer an accurate demarcation for determining the legal status of a fetus.[172] Because of advances in medical technology, an unborn child, which was once considered nonviable, may now be kept alive outside of the womb.[173]

The court also relied on the language of Missouri's wrongful death statute to reach its conclusion: "'[A] cause of action for wrongful death will lie whenever the person injured would have been entitled to recover from the defendant but for the fact that the injury resulted in death.'"[174] The court maintained that, "[j]ust as a viable fetus could develop into a person capable of maintaining a cause of action, so could a nonviable fetus develop into such a person" able to bring a personal injury suit for the harm inflicted by the tortfeasor.[175]

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166. *See Presley*, 365 A.2d at 753-54.

167. *Id.* at 754.

168. 220 A.2d 222 (R.I. 1966).

169. *See Presley*, 365 A.2d at 753. In *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966), the Rhode Island Supreme Court explicitly refused to determine whether a child must be born alive in order to bring a suit for injuries inflicted in utero, before the fetus reaches viability. *See id.* at 224.

170. No. WD 41,747, 1990 Mo. App. LEXIS 654, at *1 (Mo. Ct. App. May 1, 1990).

171. *See id.* at *19. The Missouri wrongful death statute allows parents to maintain a wrongful death action for the loss of a "minor child." *See id.* at *1 n.1 (citing MO. REV. STAT. § 537.080(1) (1986)).

172. *See id.* at *6.

173. *See id.*; *see also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 457 & n.5 (1983) (O'Connor, J., dissenting) (noting that, in 1973, viability before twenty-eight weeks was rare, but that, just ten years later, a twenty-two-week-old fetus was capable of surviving outside the womb); Wallace v. Wallace, 421 A.2d 134, 139 (N.H. 1980) (Douglas, J., dissenting) (commenting "that with 'recent advances in technology, viability has been pushed back from the twenty-eighth to the twentieth week of pregnancy'") (quoting Robert M. Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAW. 5, 12 (1970)).

174. *Rambo*, 1990 Mo. App. LEXIS 654, at *11 (quoting the interpretation of MO. REV. STAT. § 537.080 (1986) in *O'Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983)).

175. *Id.* In addressing whether an action for wrongful death can stand when no sustainable life exists, the District of Columbia Court of Appeals responded:

However, in 1990, the Missouri Supreme Court overruled the Missouri Court of Appeals' holding.[176] The majority held that a fetus is not a "person" within the wrongful death statute.[177] Today, the viability rule governs the legal status of a fetus in wrongful death actions in Missouri.[178]

### *B. Homicide Statutes*

Despite the willingness of courts to abandon the Born Alive Rule in the area of tort law, with respect to homicide statutes, courts have been reluctant, in the absence of express legislative mandate, to expand the term "person" to include an unborn child.[179] Courts have consistently advanced two reasons for their refusal to expand criminal liability beyond the Born Alive Rule. First, the area of criminal law is purely statutory; thus, the presumption that the legislature intended to adhere to common law principles is limited.[180] Second, differing rules of statutory interpretation apply to criminal law and tort law.[181] As a result, courts have avoided addressing the issue of whether a fetus is an actual "person" entitled to full and equal legal protection under criminal law.

#### 1. Born Alive Rule—Murder Statutes

Courts have advocated continued acceptance of the Born Alive Rule when interpreting murder statutes, despite advances in medical technology that have weakened the rationale underlying the common law approach.[182] At the same time, many of these same courts have abandoned the Born Alive Rule in their recognition of an unborn, viable

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> The concept underlying our survival statute is that the representative is merely bringing a lawsuit that decedent could have brought had he or she not died. Where the fetus emerges from the mother without the developmental capacity to survive, it would contradict the theory of a survival action to provide a cause of action to the representative of the fetus. Absent clear indication of contrary legislative intent, it would be anomalous to view an action as one that could have been brought by the fetus had the fetus not died when the fetus had never developed the capacity to survive in the first place.

Ferguson v. District of Columbia, 629 A.2d 15, 17 (D.C. 1993).

176. *See* Rambo v. Lawson, 799 S.W.2d 62, 62 (Mo. 1990).

177. *See id.* at 63-64.

178. *See, e.g.*, May v. Greater Kan. City Dental Soc'y, 863 S.W.2d 941, 949 (Mo. Ct. App. 1993) (affirming the rule set forth by Missouri's Supreme Court in *Rambo* as controlling).

179. *See* Klasing, *supra* note 30, at 950-51.

180. *See* discussion *infra* Part III.B.1.

181. *See* discussion *infra* Part III.B.1.

182. *See* Kime, *supra* note 48, at 543-44. For an explanation of the traditional common law rationale for adhering to the Born Alive Rule, see *supra* Part II.B.

fetus as a "person" or "human being" within the wrongful death statute.[183] To reconcile "this inconsistency,"[184] courts have cited the "[d]iffering objectives and considerations in tort and criminal law [that] foster the development of different principles governing the same factual situation."[185]

In *State ex rel. Atkinson v. Wilson*,[186] when presented with the question of whether a fetus is protected under West Virginia's murder statute, the West Virginia Supreme Court of Appeals phrased the issue as "whether [the court had] the authority to alter the common law rule that an unborn child cannot be the victim of a murder."[187] In *Baldwin v. Butcher*,[188] this same court permitted a wrongful death action for the death of a viable, unborn child.[189] Nonetheless, the *Atkinson* court refused to extend the same protection to an unborn, viable fetus under its murder statute.[190] The court distinguished its "power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties."[191] Thus, when the court interpreted the wrongful death statute to include a viable fetus, it was acting within its authority.[192] The court explained that it did not, however, have the power to extend the same protection to a viable fetus under the murder statute.[193]

The court also explained that policy reasons require courts to defer to their respective legislatures when creating new crimes.[194] First, because the legislature consists of individuals "proportionately elected at . . . frequent intervals . . . [it] is more closely attuned to and representative of the public will than" the courts.[195] Second, the legislature has the capacity to consider various factual situations and to

183. *See* Kime, *supra* note 48, at 544.
184. *Id.*
185. People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980).
186. 332 S.E.2d 807 (W. Va. 1984).
187. *Id.* at 809.
188. 184 S.E.2d 428 (W. Va. 1971).
189. *See id.* at 436. The Supreme Court of Appeals of West Virginia has since extended the state's wrongful death statute to cover nonviable fetuses as well. *See* Farley v. Sartin, 466 S.E.2d 522, 534 (W. Va. 1995) (recognizing an unborn, nonviable fetus as a "person" within West Virginia's wrongful death statute).
190. *See State ex rel. Atkinson*, 332 S.E.2d at 812.
191. *Id.* at 810.
192. *See id.*
193. *See id.*
194. *See id.*
195. *Id.*

grade "the penalties to match the severity of [particular] offenses."[196] The courts, conversely, are limited to issuing a judgment based solely on the facts before them.[197]

*Vo v. Superior Court*[198] required the Arizona Court of Appeals to "decide whether the killing of a fetus can constitute first degree murder under" Arizona's homicide statute.[199] Despite the Arizona Supreme Court's holding in *Summerfield v. Superior Court*[200] permitting a tort action for the wrongful death of a viable, unborn fetus,[201] the *Vo* court excluded a viable, unborn fetus from the definition of "person" in the context of criminal homicide.[202] The court distinguished its power to expand the definition of "person" in a civil action such as that in *Summerfield* from its authority to extend the applicability of a homicide statute.[203] First, the court identified Arizona as a "code state"[204]—Arizona had abolished all common law crimes and only the legislature retained authority to define and create crimes.[205] Thus, the courts are "legislatively precluded from creating new crimes by expanding the common law through judicial decision."[206] Because the legislature is presumed to have been aware of the viability standard articulated by the *Summerfield* court when enacting the murder statute, its failure to expressly define the term "person" to include a viable fetus reflects the legislature's intent to exclude an unborn, viable child from the protection of the murder statute.[207]

196. *Id.*

197. *See id.*

198. 836 P.2d 408 (Ariz. Ct. App. 1992).

199. *Id.* at 409. Arizona's murder statute provides in part: "'A person commits first degree murder if: 1. Knowing that his conduct will cause death, such *person* causes the death of *another* with premeditation.'" *Id.* at 411 (quoting Arizona's first degree murder statute). According to the *Vo* court, "the term 'another' refers by implication to 'another person.'" *Id.* at 411 n.2 (citing to *State v. Larsen*, 578 P.2d 1280, 1282 (Utah 1978), which construed Utah's automobile homicide statute). Section 13-1101(3) of Arizona's homicide statute defines the term "'person'" as "'a human being.'" *See id.* at 411 (quoting Arizona's homicide statute).

200. 698 P.2d 712 (Ariz. 1985).

201. *See id.* at 724.

202. *See Vo*, 836 P.2d at 418, 419.

203. *See id.* at 417-18.

204. *See id.* at 417. A "'code' state" is defined as a state in which "the [l]egislature has the exclusive province to define by statute what acts constitute a crime." People v. Davis, 872 P.2d 591, 599 (Cal. 1994).

205. *See Vo*, 836 P.2d at 417-18.

206. *Id.* at 417.

207. *See id.* at 413, 414.

Second, Arizona's wrongful death statute is a remedial statute,[208] which must be liberally construed to provide a remedy.[209] Conversely, a court must interpret criminal statutes to give "fair warning" so as to preserve a defendant's constitutional right to due process.[210] Thus, the court could "not expand the scope of a crime by judicial decision to punish a defendant for an act that was not criminal when it was performed."[211] In effect, the *Vo* court held that, in the absence of an express legislative mandate, it may not criminalize the killing of an unborn fetus.[212]

In *People v. Greer*,[213] the Illinois Supreme Court dealt with the issue of whether the killing of an unborn fetus constituted murder, an issue of first impression for the court.[214] The court noted the illogical results of the Born Alive Rule, which conditioned liability "on the precise time when the fetus expire[d]."[215] If the fetus was born alive, took a single breath, and subsequently died, the defendant could be convicted for homicide.[216] However, if the fetus died during birth, or immediately before birth, the defendant escaped all criminal liability.[217] Despite the court's recognition of a cause of action for the wrongful death of a viable, unborn fetus,[218] the court refused to recognize a viable, unborn fetus as an "individual" under the murder statute.[219]

The court offered two reasons for its allegiance to the common law rule in the criminal context. First, it referred to the Supreme Court's holding in *Roe v. Wade* that an unborn child, viable or nonviable, is not a person entitled to equal protection under the Fourteenth Amendment

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208. *See* Volk v. Baldazo, 651 P.2d 11, 14 (Idaho 1982) (stating that wrongful death statutes are remedial in nature).

209. *See, e.g.*, Summerfield v. Superior Court, 698 P.2d 712, 721 (Ariz. 1985) (noting that a wrongful death statute must be construed to reach its "remedial objective of compensating survivors").

210. Constitutional "[d]ue process requires that a criminal statute give fair warning of the conduct which it prohibits." Hughes v. State, 868 P.2d 730, 735 (Okla. Crim. App. 1994); *see also Vo*, 836 P.2d at 413 ("'The first essential of due process is fair warning of the act which is made punishable as a crime.'") (quoting Keeler v. Superior Court, 470 P.2d 617, 626 (Cal. 1970)).

211. *Vo*, 836 P.2d at 413.

212. *See id.*

213. 402 N.E.2d 203 (Ill. 1980).

214. *See id.* at 206. Illinois' murder statute "provides that '[a] person who kills an individual without lawful justification commits murder.'" *Id.* (quoting an Illinois murder statute) (alteration in original).

215. *Id.* at 207.

216. *See id.*

217. *See id.*

218. *See, e.g.*, Green v. Smith, 377 N.E.2d 37, 39 (Ill. 1978).

219. *See Greer*, 402 N.E.2d at 208.

of the United States Constitution.[220] Second, the court acknowledged that recognizing a fetus as a person under tort and property laws, while refusing to grant a fetus legal protection under criminal law, creates a lack of uniformity in American jurisprudence.[221] The court noted, however, that this lack of uniformity has not prevented other jurisdictions from extending the benefits of tort law to unborn fetuses while refusing to extend the protections of criminal law to them.[222]

As in *Greer*, some courts have relied on the Supreme Court's decision in *Roe* to strengthen their justification for making live birth the demarcation for conferring legal status on a fetus under criminal law.[223] However, other courts have not interpreted the Supreme Court's holding as a restraint on their ability to abandon the Born Alive Rule in this context.[224] These courts have established viability as the standard for determining when a fetus becomes a "person," "human being," or "individual" for purposes of criminal homicide.[225]

In *Hollis v. Commonwealth*,[226] the Kentucky Supreme Court also refused to abandon the Born Alive requirement and declared that a viable fetus is not a "person" within the murder statute.[227] However, the court narrowly interpreted the holding in *Roe* as solely "declar[ing] that the mother's right to privacy in the early stages of her pregnancy, and her health in the last stage of pregnancy when the fetus is viable, have constitutional protection before the life of the fetus."[228] The *Hollis* court refused to view the *Roe* decision as establishing a standard for determining when a fetus should be recognized as a "person."[229] The *Hollis* court also commented on the constitutional problems associated with interpreting the term "person" in the state's murder statute to include a viable, unborn fetus.[230] The court pointed to the difficulties inherent in determining whether a particular fetus was viable at the time of its injuries or death and whether the defendant knew, or should have

220. *See id.*
221. *See id.* at 208-09.
222. *See id.*
223. *See, e.g.*, People v. Davis, 872 P.2d 591, 597 (Cal. 1994).
224. *See, e.g.*, Hughes v. State, 868 P.2d 730, 734-45 (Okla. Crim. App. 1994).
225. *See id.* at 731; *see also* Klasing, *supra* note 30, at 956-59 (describing how viability became the standard for applying homicide statutes to unborn fetuses in Washington, Massachusetts, South Carolina, and Oklahoma).
226. 652 S.W.2d 61 (Ky. 1983).
227. *See id.* at 65 (holding that the unwanted death of a viable fetus is actionable under Kentucky's abortion statutes thereby preempting coverage by the state's general murder statutes).
228. *Id.* at 63.
229. *See id.*
230. *See id.* at 64.

known, beyond a reasonable doubt, that he was killing a viable fetus.[231] Without specific legal guidelines, a jury's resolution of these factual questions would be based on speculation.[232]

Courts have also relied on the treatment of an unborn, viable fetus by various jurisdictions under their criminal homicide statutes to support the exclusion of an unborn child as a murder victim. For example, despite the North Carolina Supreme Court's holding in *DiDonato v. Wortman*[233] that a viable fetus is a human being under the Wrongful Death Act,[234] the same court, in *State v. Beale*,[235] refused to extend the murder statute to include a viable, unborn child.[236] Noting that Massachusetts, South Carolina, and Wisconsin courts had abandoned the common law requirement,[237] the *Beale* court stated that "the overwhelming majority of courts which have considered the issue [have] concluded that the killing of a viable but unborn child is not murder under the common law."[238]

2. Born Alive Rule—Vehicular Manslaughter Statutes

When presented with the issue of whether to apply the limitations of the Born Alive Rule to vehicular homicide statutes, courts have again sought assistance from legislative intent, the rules of statutory construction, and interpretation of their state's wrongful death statute, restraining from determining whether a fetus possesses the characteristics necessary for personhood.

Courts which previously held that their state's wrongful death statute did not include recovery for the wrongful death of an unborn, viable child, also denied that a defendant could be criminally liable for the death of such a fetus under their vehicular homicide statute.[239] In *State v. McCall*,[240] the Florida District Court of Appeals was presented with the issue of determining whether an unborn, full-term fetus is a

231. *See id.*
232. *See id.*
233. 358 S.E.2d 489 (N.C. 1987).
234. *See id.* at 495.
235. 376 S.E.2d 1 (N.C. 1989).
236. *See id.* at 4.
237. *See id.* at 2-4 (describing *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984); *State v. Horne*, 319 S.E.2d 703 (S.C. 1984); and *Foster v. State*, 196 N.W. 233 (Wis. 1923)).
238. *Id.* at 3.
239. *See* Klasing, *supra* note 30, at 954 (noting that "[o]nly when the civil standard requires the child be born alive have courts sought consistency in the criminal law").
240. 458 So. 2d 875 (Fla. Dist. Ct. App. 1984).

"human being" within its vehicular homicide statutes.[241] Due to the lack of precedent in the area of criminal homicide,[242] the court relied in part on the construction of the word "person" within Florida's Wrongful Death Act.[243] Based on the persistence of the Born Alive doctrine in negligence law and the strict construction of penal statutes, the court held that "there are no such crimes as vehicular homicide and D[riving] W[hile] I[ntoxicated] manslaughter of a viable but unborn child."[244] However, the court followed its holding with the statement: "We 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."[245] Thus, the court implicitly asserted that determining the legal status of a viable fetus under vehicular homicide statutes does not necessitate an inquiry as to what constitutes personhood.

Even those courts which had previously endowed a viable fetus with legal status for purposes of the wrongful death statute reconciled their reluctance to recognize a viable fetus for purposes of vehicular homicide. These courts justified the inconsistency by distinguishing their authority in the areas of criminal and tort laws based on legislative intent, differing objectives, and the differing rules of statutory construction. In *State v. Soto*,[246] the Minnesota Supreme Court held that the accused was not liable under the vehicular homicide statute[247] for the death of an eight-and-one-half-month-old viable fetus.[248] The fetus died

241. *See id.* at 876. Florida's vehicular homicide statute imposes criminal liability for "'the killing of a human being' by the reckless operation of a motor vehicle." *Id.* (quoting FLA. STAT. ch. 782.071 (1983)). Florida's driving while intoxicated manslaughter statute "provides that any person who causes the death 'of any human being' by the operation of a motor vehicle while intoxicated shall be guilty of manslaughter." *Id.* (quoting FLA. STAT. ch. 316.1931(2) (1983)).

242. Florida had never dealt with a case involving the homicide of an unborn child. *See id.* at 877.

243. *See id.* (citing to *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977), which excluded viable fetuses, subsequently stillborn, from the definition of "person" for purposes of recovery under Florida's Wrongful Death Act).

244. *Id.*

245. *Id.*

246. 378 N.W.2d 625 (Minn. 1985).

247. Minnesota's vehicular homicide statute provides in part: "'Whoever causes the death of a *human being* not constituting murder or manslaughter as a result of operating a vehicle ... is guilty of criminal vehicular operation resulting in death.'" *Id.* at 627 n.3 (quoting MINN. STAT. § 609.21(1) (1984)) (alteration in original).

248. *See id.* at 630. The court refused to impose criminal liability because:

> The common law, case law from other jurisdictions, our rules on statutory interpretation of criminal statutes, and the statutory history have convinced us that it is not within our judicial province, under the guise of interpretation, to hold that the words "human being" as used in [Minnesota's vehicular homicide statute] encompass a viable [eight-and-one-half-month-old] fetus.

in utero due to injuries sustained when the defendant, under the influence of alcohol, drove his car into an intersection and collided with the vehicle driven by the viable, unborn child's mother.[249]

However, in *Verkennes v. Corniea*,[250] the same court allowed the beneficiaries of an unborn, viable fetus to recover damages under Minnesota's wrongful death statute.[251] The *Soto* court distinguished its holding in *Verkennes* on three bases. First, the wrongful death statute provides a civil remedy that "focuses on compensating a future interest of a survivor, not a present interest of a decedent."[252] Second, because Minnesota is a "code state," the legislature deprived the courts of authority to use its common law power to create new crimes.[253] Finally, other jurisdictions that have allowed recovery for the wrongful death of viable fetuses, have rejected the use of civil tort law precedent to impose criminal liability for the killing of an unborn child.[254] For all of these reasons, the court concluded that, by inferring that the legislature intended homicide statutes to cover the actions of a defendant who kills a viable, but unborn, child, the court "would be drastically rewriting the homicide statutes under the guise of 'construing' them."[255]

After determining that an unborn fetus is a "person" under Rhode Island's Wrongful Death Act,[256] the Rhode Island Supreme Court determined whether an unborn fetus is a "person" within the state's vehicular homicide statute in *State v. Amaro*.[257] The *Amaro* court first distinguished its holding in *Presley* based on the different rules of statutory construction that govern the area of tort law as opposed to those that control the area of criminal law.[258] While a wrongful death statute is remedial in nature and subject to liberal interpretation, a homicide statute is penal in nature and, thus, the "defendant must be

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*Id.*

249. *See id.* at 626-27.

250. 38 N.W.2d 838 (Minn. 1949).

251. *See id.* at 841. Minnesota's wrongful death statute provides that "'[w]hen death is caused by the wrongful act or omission of any person . . . , the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission.'" *Id.* at 839 (quoting MINN. STAT. ANN. § 573.02 (West 1949)). This statute has also been called the "Death by Wrongful Act Statute." *See, e.g., Soto*, 378 N.W.2d at 630.

252. *Soto*, 378 N.W.2d at 630.

253. *See id.*

254. *See id.*

255. *Id.*

256. *See* Presley v. Newport Hosp., 365 A.2d 748, 754 (R.I. 1976).

257. 448 A.2d 1257, 1258 (R.I. 1982).

258. *See id.* at 1259-60.

given the benefit of any reasonable doubt as to whether the act charged is within the meaning of the statute."[259]

Second, the court examined the intent of the legislature.[260] The court inferred that, since the legislature's familiarity with the common law rule is presumed in the absence of an express mandate to the contrary, the legislature intended to preserve the Born Alive Rule when it enacted the vehicular homicide statute.[261] The court concluded that Rhode Island's vehicular homicide statute does not recognize an unborn fetus as a "person."[262]

3. Viable, Unborn Child—Murder Statutes

In *State v. Horne*,[263] the Supreme Court of South Carolina unanimously held that the killing of a viable fetus constituted homicide within its murder statute.[264] In reaching this holding, the court focused on its "duty to develop the common law of South Carolina to better serve an ever-changing society as a whole."[265] The court also noted that "[i]t would be grossly inconsistent . . . 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."[266] The court, however, declared that liability will be imposed only if the state proves the viability of the fetus beyond a reasonable doubt.[267]

4. Viable, Unborn Child—Vehicular Manslaughter Statutes

Courts that seek to expand criminal liability to include punishment for causing the death of an unborn child rely on their recognition of a fetus as a person under wrongful death statutes to strengthen their reasoning in favor of abandoning the Born Alive Rule. *Commonwealth v. Cass*[268] was one of the first cases to abandon the common law rule in the context of vehicular homicide statutes.[269] The court extensively discussed its decision to impose criminal liability for the death of a

259. *Id.* at 1259.
260. *See id.* at 1259-60.
261. *See id.* at 1259.
262. *See id.* at 1260.
263. 319 S.E.2d 703 (S.C. 1984).
264. *See id.* at 704. South Carolina's murder statute provides: "'*Murder*' is the killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1985).
265. *Horne*, 319 S.E.2d at 704.
266. *Id.*
267. *See id.*
268. 467 N.E.2d 1324 (Mass. 1984).
269. *See* Klasing, *supra* note 30, at 957.

viable, unborn child. The court first examined its holding in *Mone v. Greyhound Lines, Inc.*,[270] which held that a viable fetus is a "person" within the wrongful death statute.[271] The *Cass* court also reasoned that its decision was in accord with the legislature's intent.[272] Since the vehicular homicide statute was enacted subsequent to the court's decision in *Mone*, the court presumed that the legislature was aware of the *Mone* court's rejection of the common law.[273]

The court then examined the statute in light of the rule that "'[i]n construing a statute, words are to be accorded their ordinary meaning and approved usage.'"[274] Based on this rule of statutory construction, the court inferred that the term "person" is synonymous with the term "human being."[275] The court concluded that "[a]n 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."[276]

The court also explained that it had a duty to redefine the meaning of the common law in light of scientific advances which have undermined the rationale underlying the Born Alive Rule.[277] "Medical 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 [the fetus'] death."[278] The court further clarified its position by asserting that the difficulty of proving causation and the fear of speculation are not sufficient to consider the killing of a fetus as homicide.[279]

However, the court declined to apply its new rule to the defendant due to a lack of fair warning and the possibility of constitutional objections, even though the court realized that it was unlikely that the defendant acted in reliance of the prior state of the law.[280] While the

270. 331 N.E.2d 916 (Mass. 1975).

271. *See id.* at 917.

272. *See Cass*, 467 N.E.2d at 1325-27.

273. *See id.* at 1325.

274. *Id.* (quoting Hashimi v. Kalil, 446 N.E.2d 1387, 1389 (Mass. 1983)) (alteration in original).

275. *See id.*

276. *Id.*

277. *See id.* at 1328.

278. *Id.*

279. *See id.* at 1328-29.

280. *See id.* at 1329. The court noted that every jurisdiction that has addressed the status of an unborn fetus in the context of homicide cases has declined to recognize the killing of an unborn fetus as homicide. *See id.* The only jurisdiction to hold that their homicide statutes cover unborn, viable fetuses are those that are mandated to do so by statute. *See id.*

court recognized that the defendant had notice that his conduct was criminal, he could not have foreseen the increased punishment resulting from the one specific consequence of his conduct.[281]

*State v. Knapp*[282] presented the Missouri Court of Appeals with the issue of "whether a viable fetus is a 'person' within the meaning of [Missouri's] involuntary manslaughter statute."[283] The court held that a viable fetus is within the purview of the statute.[284] Citing *O'Grady v. Brown*[285] and *Roe v. Wade*, the court recognized that Missouri had a legitimate interest in protecting a viable child.[286]

In *O'Grady*, the court held that a viable fetus is within the scope of Missouri's wrongful death statute.[287] The court also noted the Supreme Court's comment in *Roe* that "'in assessing the state's interest recognition may be given to the . . . claim that as long as *potential* life is involved, the state may assert interests beyond the protection of the pregnant woman alone.'"[288]

The *Knapp* court relied on the *O'Grady* court's analysis as well as legislative intent to support its abandonment of the common law Born Alive Rule. It asserted that, because the manslaughter statute was enacted subsequent to the *O'Grady* decision, in the absence of an explicit pronouncement to the contrary, the legislature is presumed to have included viable fetuses as persons within the statute.[289]

However, unlike the *Cass* court, the *Knapp* court declined to restrain application of its new rule by applying it prospectively.[290] The court noted that "'[w]hile the exact consequences may not have occurred to [defendant], the criminality of his conduct could hardly have been in doubt.'"[291]

Relying on Massachusetts' abandonment of the Born Alive Rule; the Oklahoma Court of Criminal Appeals in *Hughes v. State*[292] also rejected the Born Alive Rule.[293] In addition to the arguments proposed

281. *See id.*
282. No. WD 44098, 1991 Mo. App. LEXIS 1883, at *1 (Mo. Ct. App. Dec. 3, 1991).
283. *Id.* at *2.
284. *See id.*
285. 654 S.W.2d 904 (Mo. 1983).
286. *See Knapp*, 1991 Mo. App. LEXIS 1883, at *4-*5.
287. *See O'Grady*, 654 S.W.2d at 910.
288. *Id.* at 909 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)) (alteration in original).
289. *See Knapp*, 1991 Mo. App. LEXIS 1883, at *6-*7.
290. *See id.* at *10-*11.
291. *Id.* at *11 (quoting Meadows v. State, 722 S.W.2d 584, 589 (Ark. 1987) (Hays, J., dissenting)).
292. 868 P.2d 730 (Okla. Crim. App. 1994).
293. *See id.* at 731.

by the *Cass* court, the *Hughes* court also based its decision on the purpose of its vehicular manslaughter statute and the desire to consistently apply criminal and civil law, the latter of which already recognized prenatal tort rights.[294] The purpose of Missouri's manslaughter statute is to protect human life.[295] "[T]he term 'human being' in . . . its plain and ordinary meaning . . . includes a viable human fetus," thus protecting an unborn, viable child under the statute.[296] Second, the court stated that its redefinition of the common law is supported by the abandonment of the Born Alive Rule, and the subsequent allowance of wrongful death actions for the death of a viable, unborn fetus.[297]

5. Nonviable, Unborn Child—Murder Statutes

Although courts have been reluctant to expand the scope of homicide statutes to include an unborn child, a minority of courts have abandoned the Born Alive Rule in the absence of express legislative mandate to the contrary, and extended protection under homicide statutes to viable fetuses.[298] Courts have been even more reluctant to extend protection under homicide statutes to pre-viable fetuses. However, courts have not invalidated legislation extending protection to an unborn fetus in the area of criminal law. This fact provides additional support to the argument that the legal status of a fetus as a "person" is not based on the objective determination that a fetus possesses some intrinsic quality that is necessary for personhood.

In response to the California Supreme Court's affirmation of the Born Alive Rule in *Keeler v. Superior Court*,[299] the California Legislature amended California's murder statute, California Penal Code section 187.[300] Section 187 was originally enacted in 1872 and governed criminal prosecutions for homicide when *Keeler* was decided.[301] The murder statute provided that "'[m]urder is the unlawful killing of a human being, with malice aforethought.'"[302] Relying on the plain

294. *See id.* at 734. The Oklahoma Supreme Court, in *Evans v. Olson*, 550 P.2d 924 (Okla. 1976), recognized a statutory cause of action for the wrongful death of a viable fetus. *See id.* at 927-28.

295. *See Hughes*, 868 P.2d at 734.

296. *Id.*

297. *See id.*

298. *See generally supra* Parts II.B, III.B.1-2 (discussing criminal liability).

299. 470 P.2d 617 (Cal. 1970).

300. *See* Folger, *supra* note 49, at 244.

301. *See id.* at 242.

302. *Keeler*, 470 P.2d at 619 n.2 (quoting CAL. PENAL CODE § 187 (West 1872)).

language of the statute, the court held that the killing of a viable fetus can not be prosecuted as murder unless the fetus is born alive.[303]

Subsequent to *Keeler*, the California Legislature amended the California Penal Code to expressly allow criminal liability for the killing of a fetus.[304] However, the legislature left the term "fetus" undefined.[305] Subsequent cases read the requirement of viability into the statute.[306] For example, in *People v. Smith*,[307] the California Court of Appeals held that viability is an essential element of murder under the revised murder statute.[308] The *Smith* court reasoned that "one cannot destroy independent human life prior to the time it has come into existence."[309]

Despite precedent that consistently construed section 187 of California's Penal Code to include viability as an essential element of fetal murder, the California Supreme Court in *People v. Davis*[310] interpreted the term "fetus" according to the medical-legal dictionary.[311] "[T]he [*Davis*] court . . . held that the third-party killing of a fetus is murder under section 187 where 'the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.'"[312]

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303. *See id.* at 622-24.

304. *See* Folger, *supra* note 49, at 244. The amended California Penal Code section 187 defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187(a) (West 1994 & Supp. 2001). Although fetal murder constitutes a crime in California, the state does not recognize a crime of fetal manslaughter. *See* Folger, *supra* note 49, at 245 n.68.

305. *See* Folger, *supra* note 49, at 238.

306. Viability was read into the California statute after the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). Folger, *supra* note 49, at 247. *See generally id.* at 245-54 (explaining the development of the viability requirement under California's revised murder statute).

307. 129 Cal. Rptr. 498 (Ct. App. 1976).

308. *See id.* at 503-04.

309. *Id.* at 502.

310. 872 P.2d 591 (Cal. 1994).

311. *See id.* at 599; *see also* Folger, *supra* note 49, at 238 (quoting People v. Davis, 872 P.2d 591, 602 (Cal. 1994)).

312. Folger, *supra* note 49, at 238 (quoting People v. Davis, 872 P.2d 591, 602 (Cal. 1994)). An interesting point to note is that in *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), "the expert testimony . . . concluded 'with reasonable medical certainty' that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival." *Id.* at 619 (quoting the expert witness). In *Davis*, "the prosecution's medical experts testified [that] the fetus' statistical chances of survival outside the womb were between 7 and 47 percent . . . [and] [t]he defense medical expert testified [that] . . . 'its chances were only 2 or 3 percent.'" *Davis*, 872 P.2d at 593 (quoting expert witnesses).

6. Feticide Statutes

Although courts have been unwilling to expand the term "person," "individual," or "human being" in homicide statutes to include unborn fetuses from the moment of conception, courts have extended such protection when the legislature enacts separate homicide statutes expressly including an unborn child from the moment of fertilization.[313] However, while feticide statutes protect an unborn child from the moment of fertilization, they protect a fetus only as a "potential life" and not as a "person."[314] Because feticide statutes are intended to protect an unborn child as a "potential life," they do not provide a fetus the same protection afforded to a person under criminal law.[315] The statutory penalty imposed on a criminal defendant who causes the death of a fetus is "far less severe" than the punishment imposed for killing a "person."[316]

In *State v. Merrill*,[317] the Minnesota Supreme Court examined the constitutionality of the state's feticide statute,[318] which criminalized the intentional killing of an unborn child, regardless of its developmental stage.[319] The court commented that fetal homicide statutes are intended to protect the "'potentiality of human life' [which] includes protection of the unborn child, whether an embryo or a nonviable or viable fetus."[320] The *Merrill* court expressly stated that the feticide statute does not require "the living organism in the womb in its embryonic or fetal

313. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (West 1989 & Supp. 2000) (manslaughter); 720 ILL. COMP. STAT. ANN. 5/9-1.2(a), (b) (West 1993 & Supp. 2000) (intentional homicide of an unborn child); IND. CODE ANN. § 35-42-1-6 (West 1998) (intentional termination of a human pregnancy to prevent live birth or remove a dead fetus); MINN. STAT. ANN. § 609.266(a) (West 1987) (defining "unborn child" for the purposes of its unborn child murder statute). *See generally* LA. REV. STAT. ANN. § 14:2(7) (West 1997) (defining the term "person" in the criminal code to include an unborn child from the moment of fertilization and implantation).

314. *See, e.g.*, State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990).

315. *See* Kime, *supra* note 48, at 548-49.

316. *See Merrill*, 450 N.W.2d at 321; *see also, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1103(A)(5), (B), 13-701(C)(2) (classifying feticide as a class three felony punishable by a three-and-one-half-year sentence for a first offender); IND. CODE. ANN. §§ 35-42-1-6, 35-50-2-6 (classifying feticide as a Class C felony punishable by a four year sentence).

317. 450 N.W.2d 318 (Minn. 1990).

318. Minnesota's feticide statute "provides in part: Whoever does any of the following is guilty of murder of an unborn child in the first degree . . . (1) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child." *Id.* at 320 n.1 (quoting MINN. STAT. § 609.2661(1) (1988)). The statute defined "[t]he term 'unborn child' [as] 'the unborn offspring of a human being conceived, but not yet born.'" *Id.* at 320-21 (quoting MINN. STAT. § 609.266(a) (1988)).

319. *See id.* at 322 (holding that Minnesota's feticide statute is constitutional).

320. *Id.*

state be considered a person or a human being."[321] Criminal liability only requires that the genetically human embryo have the capacity to develop into a human being.[322]

In *People v. Ford*,[323] the Appellate Court of Illinois addressed the constitutionality of Illinois' feticide statute.[324] The court noted that the purpose of the feticide statute is to protect the potentiality of human life.[325] The court reasoned that the imposition of liability for the killing of an unborn fetus would deter others from engaging in such harmful conduct, thus protecting potential human life.[326] The *Ford* court asserted that the issue of when a fetus acquires personhood is irrelevant in determining criminal liability.[327] The court reasoned that liability only requires that the unborn child have had the capacity to develop into a human being and that the defendant's conduct deprived the fetus of this opportunity.[328]

## IV. POTENTIALITY AS THE STANDARD FOR DETERMINING THE LEGAL STATUS OF AN UNBORN CHILD

The treatment of a fetus under wrongful death statutes and homicide statutes of varying states reveals that courts confer legal standing on a fetus independent of its personhood. The method of analysis adopted by courts balances various factors, such as legislative intent, the purpose of the statute involved, logic, the rules of statutory construction, precedent, and developments in medical technology. Courts are able to manipulate the treatment of an unborn child under wrongful death and homicide statutes by altering the factors they consider in their determination. Application of a similar methodology leads to the conclusion that the better standard is one which recognizes a fetus as "potential life" and confers legal standing on a fetus at conception.

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321. *Id.* at 324.
322. *See id.*
323. 581 N.E.2d 1189 (Ill. App. Ct. 1991).
324. *See id.* at 1198. The court concluded that Illinois' feticide statute is constitutional. *See id.* at 1201. Illinois' feticide statute provides in part: "'A person commits the offense of intentional homicide of an unborn child, if [he] perform[s] acts which cause the death of an unborn child.'" *Id.* at 1198 (quoting 720 ILL. COMP. STAT. 5/9-1.2(a) (1987)). The "statute defines an 'unborn child' as 'any individual of the human species from fertilization until birth.'" *Id.* (quoting 720 ILL. COMP. STAT. 5/9-1.2(b)(1) (1987)).
325. *See id.* at 1200.
326. *See id.*
327. *See id.* at 1201.
328. *See id.*

First, consistency with the holding in *Roe v. Wade*[329] requires the protection of potential human life in the absence of a countervailing fundamental right or a more compelling state interest.[330] The *Roe* Court asserted that the state has a legitimate and compelling interest in protecting the potentiality of human life.[331] However, the Court also determined that a woman has a constitutional right to privacy and that right includes the choice to continue or terminate a pregnancy.[332] This right to choose outweighs the state's interest in protecting potential life until viability.[333] Thus, the Court identified viability as the demarcation when the state's interest in potential human life outweighs a woman's right to privacy allowing the state to forbid abortions after viability.[334] However, the Court also asserted that the state's interest in protecting the life and health of the mother, an existing human life, is more compelling than the state's interest in preserving the potential human life of a viable fetus, thus permitting abortions after viability when medically necessary to ensure maternal health.[335]

When a similar balancing analysis is applied to the conduct of a third party, which causes the termination of potential life, protecting potential life from conception does not interfere with any constitutionally protected fundamental right of the third party. The state's interest in protecting potential human life is greater than an assailant's interest in causing the death of a fetus. Moreover, a woman's right to continue her pregnancy outweighs a defendant's interest in terminating the pregnancy.[336] Courts have upheld the constitutional validity of feticide statutes, which protect an unborn child from the moment of conception.[337] Applying the same rationale, courts have concluded that a feticide statute does not deprive a defendant of any countervailing right.[338] Courts assert that, while the decision in *Roe* grants a woman the right to terminate her pregnancy under certain

329. 410 U.S. 113 (1973).

330. *See id.* at 163-64 (holding that the state's interest in protecting the life of a viable fetus is compelling and legitimate, but may be sacrificed to protect the life of the mother).

331. *See id.*

332. *See id.* at 153.

333. *See id.* at 163-64.

334. *See id.*

335. *See id.* at 163-65.

336. A woman's right to continue her pregnancy is constitutionally protected. *See id.* at 153.

337. *See, e.g.*, People v. Ford, 581 N.E.2d 1189, 1201 (Ill. App. Ct. 1991); State v. Merrill, 450 N.W.2d 318, 324 (Minn. 1990); *see also supra* Part III.B.6 (discussing the constitutionality of feticide statutes).

338. *See Ford*, 581 N.E.2d at 1200; *Merrill*, 450 N.W.2d at 321.

circumstances, "it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[339]

Second, under *Roe v. Wade*, protection of a fetus from conception would subject a woman to governmental interference and compulsion, restraining her right to decide whether to terminate or continue the pregnancy.[340] However, the expansion of a civil or criminal statute to include an unborn fetus, viable or nonviable, within the definition of the word "person" does not increase governmental interference in the conduct of third parties. Civil and criminal statutes that impose liability for the death of a fetus are by nature reflective of already valid criminal statutes. By constraining conduct that causes the death of a fetus, they are merely outlawing the already illegal infliction of harm against the mother.

Moreover, although liability under feticide statutes does not require that the defendant, or the pregnant woman, be aware of the pregnancy, the imposition of liability is not inconsistent with other homicide statutes. Under the doctrine of transferred intent, criminal conduct may not be excused simply because the defendant's victim proves not to be the victim the defendant had in mind.[341] Thus, just as a defendant is liable for homicide if he or she intends to kill one person and mistakenly kills another he or she did not know was present, a defendant should be liable for the homicide of a fetus even if he or she intended only to kill the mother.

Third, "'potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward.'"[342] The only interest that increases during pregnancy is the probability that the potential life will be fulfilled.[343] The compelling interest in preserving the probability of human life is more effectively fulfilled if a fetus is protected during the most crucial period in fetal development; the first trimester, which is before the viability stage.[344] Due to the vulnerability of a fetus to outside influences, an unborn child is more likely to die from injury inflicted

339. *Merrill*, 450 N.W.2d at 322.

340. *See id.*

341. *See Merrill*, 450 N.W.2d at 323.

342. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 600 n.7 (1991) (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)).

343. *See id.* at 607 n.56.

344. *See* Tony Hartsoe, *Person or Thing—In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 193 (1995).

before reaching viability than if such harm were inflicted after viability.[345]

Fourth, conferring legal status on an unborn child at the moment of conception provides a bright-line standard. A viability test "is impossible of practical application."[346] The point in prenatal development at which a fetus attains viability depends on multiple factors including "the period of gestation, the health and hereditary makeup of the fetus, the characteristics of the mother, and the availability and quality of prenatal medical care."[347] Thus, proving viability is difficult.[348] As a result, the determination of the legal status of an unborn child based on viability will be based on speculation.[349] The point of viability also shifts as medical technology advances increasing the survivability of a fetus outside the womb at earlier stages in development.[350] Allowing a cause of action from the moment of conception eliminates the costs and effort associated with repeatedly reevaluating the standard as medical science continues to progress.[351]

Finally, a standard based on conception more effectively furthers the purposes of wrongful death statutes and homicide statutes. Allowing recovery under wrongful death statutes for the death of a fetus regardless of viability provides compensation for a recognized loss, since a woman has a constitutional right in the potential human life. The imposition of severe penalties for wrongful conduct which causes the death of a fetus will also deter others from committing similar crimes.[352] In addition, such a standard will protect the interests of the mother and her right to decide to continue the pregnancy.[353]

## V. CONCLUSION

At first glance, the debate regarding the legal status of a fetus for purposes of wrongful death statutes and homicide statutes seems to center on whether a fetus is a "person" and at what stage of development a fetus becomes a "person." However, closer scrutiny reveals that the status of a fetus in society is evaluated within a socially

345. *See id.*

346. Smith v. Brennan, 157 A.2d 497, 504 (N.J. 1960).

347. Jim Hutcherson, Note, *North Carolina Recognizes a Cause of Action for the Wrongful Death of a Viable Fetus*—DiDonato v. Wortman, 23 WAKE FOREST L. REV. 849, 867-68 (1988).

348. *See* Hartsoe, *supra* note 344, at 192.

349. *See id.*

350. *See id.* at 192-93.

351. *See id.* at 194.

352. *See* People v. Ford, 581 N.E.2d 1189, 1200 (Ill. App. Ct. 1991).

353. *See* State v. Merrill, 450 N.W.2d 318, 321-22 (Minn. 1990).

constructed framework without regard to whether a fetus possesses the intrinsic qualities necessary for personhood. The use of a subjective criterion created by society, rather than an objective standard based on the elements of personhood, has allowed courts to deal with cases where the conduct of a third party causes the death of a fetus without addressing the difficult issue of whether a fetus is a "person." Moreover, such a standard has resulted in the diverging treatment of a fetus under wrongful death statutes and homicide statutes.

The legal system has determined the extent to which a fetus should be protected under civil and criminal law by balancing various factors such as legislative intent, rules of statutory construction, the purpose of wrongful death liability and homicide convictions, logic, precedent, and changes in medical science. As demonstrated in this Note, applying a comparable methodology leads to the conclusion that the legal personality of potential life should commence at the moment of potentiality, namely conception. While courts, legislatures, scientists, and philosophers may never be able to resolve the question as to whether a fetus is a "person," extending the protections granted to a human being to a fetus, as a potential human life, from the moment of conception will provide consistency in the law, more effectively fulfill the social framework under which the legal status of a fetus is evaluated, and coincide with our innate reactions that a fetus has value, even though we are unable to exactly identify why or what.

*Mamta K. Shah*[*]

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* I dedicate this Note to my parents, Kanu and Meena Shah, as a testimonial to their unconditional love and never-ending devotion as my teachers and my spiritual guides. They have instilled in me a respect for the sanctity of knowledge, and they have given me the gifts of spirituality, inner strength, confidence, opportunity, and a strong work ethic inspiring me to succeed in every facet of my life. I extend my most sincere gratitude to my sister, Sapna Shah, for being my guardian angel and for bringing laughter into my life. I would also like to thank Professor Burton C. Agata without whose time and assistance this Note would never have come to be. Lastly, I would like to thank the staff of the *Hofstra Law Review*, especially the editors on the Managing Board, William Gartland, Lisa Sconzo, and Bradley Luria, and editors Karen Geduldig and Russell Hirschhorn, for their hard work and dedication to excellence.

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