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Wrongful Death of a Fetus: Does a Cause of Action Arise When There Is No Live Birth

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WRONGFUL DEATH OF A FETUS: DOES A CAUSE OF ACTION ARISE WHEN THERE IS NO LIVE BIRTH?

I. INTRODUCTION

A controversy currently exists over the protections that should be afforded an unborn child.[1] The Supreme Court held in *Roe v. Wade*[2]

1. For cases ruling on the issue of whether a fetus is a "person" for purposes of a wrongful death action, see *infra* notes 6 & 7.

While this Note is limited to consideration of death actions involving fetuses, many controversial issues evolve around the unborn or the "yet to be born" child. For example, preconception torts are becoming more common. *See* 2 S. SPEISER, THE AMERICAN LAW OF TORTS 1152 (1985). For a discussion of the history and the elements of the tort of "wrongful life," see *Azzolino v. Dingfelder: Wrongful Life—The Ultimate Tort*, 1985 DET. C.L. REV. 921. *See also* 2 S. SPEISER, *supra*, at 1185. For a discussion of the case law in the wrongful life context, see *Tort Law*, 72 A.B.A. J. 46 (1986). For a general overview of the rights of the unborn in various fields of the law, see Doudera, *Fetal Rights? It Depends*, TRIAL, April 1982, at 38, 39 (discussing constitutional implications of *Roe v. Wade* and evolution of fetal rights in property law, criminal law, and tort law).

The debate over whether recovery for the death of a fetus should be allowed evolves around the construction of the state's wrongful death statute because no recovery is allowed at common law for the death of anyone, either born or unborn. *See* 1 J. DOOLEY, MODERN TORT LAW 347-48 (1982). For a further discussion of the common law bar to a wrongful death action, see *infra* notes 8-14 and accompanying text.

Death actions, both in the form of derivative actions and direct actions for one's own damages caused by the death of another, were prohibited in the case of *Baker v. Bolton*. *See* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 LAW Q. REV. 431, 432 (1916). In *Baker v. Bolton*, the plaintiff's wife was killed when the stagecoach atop which she was riding flipped over. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808). The husband sued for loss of society and mental distress stemming from her death, but the court dismissed the cause of action. *Id.* While no explicit reason was given in *Bolton* to support the holding, the decision quite possibly stems from a case decided in 1607, *Higgins v. Butcher*. Holdsworth, *supra*, at 432-33. The *Higgins* court held that a master could not sue the killer of his servant because any private action the master might have had for lost services is usurped by the Crown's prosecution for the underlying felony. *Id.*

The passage of the Fatal Accidents Act helped to remedy this common law deficiency to a large extent. *See* Smedley, *Some Order Out of Chaos in Wrongful Death Law*, 37 VAND. L. REV. 273, 273-74 (1984). For the text of the Fatal Accidents Act, see *infra* note 8. However, while each of the states has adopted some type of wrongful death remedy, the development of wrongful death legislation has been bewildering and uncoordinated. Smedley, *supra*, at 276. Some jurisdictions have adopted survival type statutes, others have passed acts patterned after the Fatal Accidents Act, and some states have both. *Id.* For a discussion of the distinction between "survival type" statutes and "wrongful death" or Lord Campbell type legislation, see *infra* note 8. The end result of the haphazard development of wrongful death legislation in this county is that the common law rule still exists and, therefore, controls when an action is not authorized by a state's wrongful death statute. Smedley, *supra*, at 276. For a discussion of the applicability of the common law rule in this country, see *infra* note 11.

that, for purposes of the fourteenth amendment of the United States Constitution, a fetus is not a person.[3] State courts, however, have deter-

2. 410 U.S. 113 (1973). In *Roe*, the Court held that a Texas law, which prohibited abortions before a fetus is viable except for the purpose of saving the mother's life, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 164. For a discussion of the implications of the *Roe* decision upon the rights of a fetus, see *infra* note 3.

Roe adopted a trimester viability approach which appears to be firmly entrenched. *See, e.g.*, Ford, *The Evolution of a Constitutional Right to an Abortion, Fashioned in the 1970s and Secured in the 1980s*, 4 J. LEGAL MED. 271, 307-21 (1983); Special Project, *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 128; Comment, *The Viability of the Trimester Approach*, 13 U. BALT. L. REV. 322, 341-45 (1984).

For a general discussion in support of the *Roe* decision as well as its progeny, see Ford, *supra*, at 271-322; Comment, *supra*, at 322-45. *But see* Walker & Puzder, *State Protection of the Unborn after Roe v. Wade: A Legislative Proposal*, 13 STET. L. REV. 237 (1984) (proposing abrogation of *Roe* through congressional enactment declaring "person" as used in fourteenth amendment to include fetuses from conception). *Cf.* Ford, *supra*, at 279 (Rhode Island law that declared "person" to mean fetus from moment of conception held unconstitutional).

3. 410 U.S. at 158. The *Roe* Court did hold, however, that once a fetus reaches the stage of viability, the state could regulate or even proscribe abortions in the interest of protecting the "potentiality of human life." *Id.* at 162-64. The majority opinion in *Roe* bypassed the issue of recovery for the wrongful death of a fetus:

> [i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.

Id. at 161-62 (citations omitted).

The decision in *Roe*, however, does not necessarily preclude recovery for the wrongful death of a fetus, at least a viable fetus, because the Court noted that allowing such a recovery could be consistent with the state's interest in protecting the potentiality of life that exists during the third trimester. *Id.* at 161-64.

In addition, the decision in *Roe* only defined the term person for purposes of the fourteenth amendment and, therefore, the *Roe* decision does not compel state courts to deny recovery for prenatal wrongful death. *See* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 656 (1980). *Roe* has even been cited as authority to *allow* wrongful death recovery, based on the dicta that the state has a substantial interest in protecting prenatal life. *Id.* at 661. *Roe v. Wade* has been cited by courts taking the opposite position as well. *Id.* at 656-58. Certainly, principles established in *Roe* prohibit denial of a wrongful death recovery. *Id.* at 659. For a discussion of various state interests in protecting potential life, see Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984).

mined that a fetus can be a person under state law in some contexts.[4]

A similar debate exists over whether a fetus can be considered a person for purposes of an action under 42 U.S.C. § 1983 (1982). *See* Note, 34 SYRACUSE L. REV. 1029, 1029-33 (1983). Section 1983 allows any person to bring a civil action against one who, under color of law, has deprived that person of any rights, privileges, or immunities available under the Constitution or state law. 42 U.S.C. § 1983 (1982). The majority of decisions deny a fetus protection under § 1983 relying, in part, on *Roe v. Wade*. Note, *supra*, at 1052-65. However, a narrow reading of the *Roe* decision could restrict its holding to defeating attempts to define a fetus as a person under the fourteenth amendment only, thus permitting the courts to define the term person as including a fetus for § 1983 purposes. *Id. See also* Rice, *Fetal Rights: Defining "Person" Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347, 356-57. *See generally*, Annot., 64 A.L.R. FED. 879, 886 (1983). For a related argument in the wrongful death context, see Kader, *supra*, at 656.

For a discussion of some of the possible ramifications of finding a fetus to be a person under the Constitution, see Parness, *Social Commentary: Values and Legal Personhood*, 83 W. VA. L. REV. 487, 500-03 (1980-1981) (discussing possibility of suits against parents for prenatal negligence, state custody orders to protect fetuses, homicide prosecutions for abortions and parental feticide).

4. *See* Reskin, *Two States Maintain the Status Quo*, A.B.A. J. March 1986, at 104. Reskin suggests that, in a civil context, state courts are willing to define "person" to include a fetus, yet in the criminal context such willingness is rare. *Id.*

For a breakdown of the courts' interpretations of whether a fetus is a person in the area of wrongful death, see *infra* notes 6-7. *See also* Annot., 40 A.L.R.3d 1222, 1228 (1971) (virtually all jurisdictions allow actions for damages for prenatal injuries where injured fetus is subsequently born alive).

The vast majority of courts do not interpret criminal statutes involving homicide to include fetuses within the term person or human being. *See, e.g.*, Clarke v. State, 117 Ala. 480, 23 So. 671 (1897) (murder statute inapplicable when victim is fetus); State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984) (fetus not covered by vehicular homicide statute); White v. State, 238 Ga. 224, 232 S.E.2d 57 (1977) (homicide requires live birth of victim); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (no provision for murder of fetus); State v. Brown, 378 So.2d 916 (La. 1979) (despite legislative amendment, murder does not include killing of fetus); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980) (person as used in vehicular homicide statute excludes fetuses); Minnesota v. Soto, 378 N.W.2d 625 (Minn. 1985) (vehicular homicide law does not include fetuses); State v. Doyle, 205 Neb. 234, 287 N.W.2d 59 (1980) (homicide does not include killing of unborn); New Jersey *ex rel.* A.W.S., 182 N.J. Super. 278, 440 A.2d 1144 (1981) (causing death of fetus not vehicular homicide); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (1982) (not vehicular homicide where death caused is that of fetus); People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949) (murder statute inapplicable where fetus is killed); State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971) (fetus not within term "person" as used in vehicular homicide statute); State v. Amaro, 448 A.2d 1257 (R.I. 1982) (fetus not person for purposes of vehicular homicide law); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923) (independent existence from mother required before murder laws applicable); Harris v. State, 28 Tex. Crim. 308, 12 S.W. 1102 (1889) (murder conviction requires victim's live birth and independent existence); State v. Larson, 578 P.2d 1280 (Utah 1978) (vehicular homicide law does not include fetuses); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978) (no provisions in homicide laws for killing of fetus); Huebner v. State, 131 Wis. 162, 111 N.W. 63 (1907) (killing of fetus not homicide); Bennett v. State, 377 P.2d 634 (Wyo. 1963) (manslaughter does not include killing of unborn child). *But see* Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324

The issue of whether a fetus is a person for purposes of a wrongful death statute has caused a split among the state courts, with a majority of jurisdictions holding that a viable fetus[5] is a person whose death is compensable under a wrongful death statute.[6] Several states, however,

(1984) (term "person" does include viable fetus for purposes of vehicular homicide statute).

Where the state homicide statutes do not explicitly include an unborn child within the definition of homicide, other laws, such as a feticide statute or the general abortion law, usually provide for some type of criminal sanction for killing a fetus. *See* Note, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1142 (1984). However, the penalties under such provisions are typically much less severe. *Id.* at 1119.

Some states have expressly included fetuses within their homicide statutes. *See, e.g.*, CAL. PENAL CODE § 187(a) (West Supp. 1986); ILL. REV. STAT. ch. 38, § 9-1.1 (1981); LA. REV. STAT. ANN. § 14:2(7) (West 1986); UTAH CODE ANN. § 76-5-201(1) (Supp. 1983). *But see* Comment, *Feticide in Illinois: Legislative Amelioration of a Common Law Rule*, 4 N. ILL. U.L. REV. 91, 103-05 (1984) (discussing state of law in Louisiana where, despite statutory amendment, killing of fetus is not homicide); *see also*, Case Note, *Feticide Is Still Legal In Louisiana*, 26 LOY. L. REV. 422 (1980).

5. Viability is defined as that stage of fetal development where the fetus can survive independent of the mother. *Roe*, 410 U.S. at 160 (citing L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971) and DORLANDS' ILLUSTRATED MED. DICTIONARY 1689 (24th ed. 1965)). Whether a fetus is viable is a factual issue that will not be considered in this Note. Unless otherwise indicated, the term "fetus" will be used to represent a viable fetus.

Commentators have focused on various problems involving the *Roe* Court's use of viability as a legal criterion. For example, the attending physician is placed in the position of determining whether a fetus is viable, and thus, whether an abortion is legal. *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 128-29. However, the doctor is given no guidance about whether a fetus is capable of surviving outside the womb and is forced to rely on any of a number of imprecise measures, including fetal weight, fetal lung development, and fetal age. *Id.* at 130-33, 139-44. Some current proposals to replace the viability criterion suggest using conception, live birth, "brain birth" (the capacity of intelligence) and quickening (when the fetus is capable of movement) as criteria. *Id.* at 144-47.

6. *See, e.g.*, Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1970); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Dannos v. St. Pierre, 402 So. 2d 633 (La. 1981); Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainy v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (1980), *modified on other grounds*, 95 N.M. 147, 619 P.2d 823 (1980); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984); Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanente Clinic, 268 Ore. 258, 518 P.2d 636 (1974); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); Presley v. Newport Hosp., 117 R.I.

take the position that a stillborn fetus never achieves the status of a "person" and, therefore, no liability arises for causing its death.[7] This Note will focus on the present state of the law regarding wrongful death recovery for the death of a fetus. Further, this Note will consider the various interpretations among the states of what are essentially similar wrongful death laws.[8] Finally, this Note will focus on three primary justifications underpinning the decisions on this issue and will propose a

177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Witty v. Am. Gen. Capital Distribs., 697 S.W.2d 636 (Tex. Ct. App. 1985); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wisc. 2d 14, 148 N.E.2d 107 (1967).

7. Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stern v. Miller, 348 So. 2d 303 (Fla. 1977); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958) (abrogated by statute, 4 TENN. CODE ANN. § 20-5-106 (1980) (for purposes of wrongful death statute, person includes viable fetus)); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969). *Contra* Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983) (Iowa Supreme Court allowed parents of viable fetus to recover damages under Rule of Civil Procedure 8, which allows parents to recover for death of "minor child").

Finally, it should be noted that the United States District Court in Alaska has held that no recovery is permitted for the wrongful death of a nonviable fetus; however, no Alaska state court decisions have considered wrongful death cases involving the death of either viable or nonviable fetuses. *See* Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962).

8. Wrongful death statutes should be distinguished from survival statutes. Most wrongful death statutes are modeled after Lord Campbell's Fatal Accidents Act of 1846, and create a new cause of action in the decedent's representative for the benefit of certain designated persons. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 945-46 (5th ed. 1984); *see also* Smedley, *supra* note 1, at 273-75.

The pertinent provisions of the Fatal Accidents Act, also known as Lord Campbell's Act, are as follows:

> *[W]hensoever the Death of a Person shall be caused by a wrongful Act*, Neglect or Default, and the Act, Neglect or Default is *such as would (if death had not ensued) have entitled the party injured to maintain an Action* and recover Damages in respect thereof, then and in every such Case, *the Person who would have been liable if Death had not ensued shall be liable* to an Action for Damages, notwithstanding the death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (emphasis added).

By comparison, survival statutes preserve any causes of action vested in the decedent prior to death; no new cause of action is created. W. PROSSER & W. KEETON, *supra*, at 942-43; Smedley, *supra* note 1, at 274-77. The decedent's own cause of action merely passes on to the decedent's estate. W. PROSSER & W. KEETON, *supra*, at 949-50.

For the purposes of this Note, any reference to a wrongful death statute shall mean a Lord Campbell type wrongful death statute unless otherwise indicated.

method of constructing the typical wrongful death statute that will enable courts to allow recovery without engaging in questionable inquiries into the legislative intent underlying the use of the term "person."

II. BACKGROUND

A. *Development of the Right to Recover for Wrongful Death*

The right of a third party to recover damages for the death of another human being did not exist at common law.[9] The basis for the common law preclusion is the felony-merger doctrine, which prohibited a civil recovery for an act that also constituted a felony.[10] To offset the common law, every state has promulgated wrongful death legislation, thus permitting a civil cause of action where previously none existed.[11]

9. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808). Most American jurisdictions adopted the *Bolton* rule. *See, e.g.*, Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1877); Kennedy v. Davis, 171 Ala. 609, 55 So. 104 (1911); Jackson v. Pittsburgh, C., C. & St. L. Ry. Co., 140 Ind. 241, 39 N.E. 663 (1895); Major v. Burlington, C.R. & N.R.R. Co., 115 Iowa 309, 88 N.W. 815 (1902); Carey v. Berkshire R.R., 55 Mass. 475 (1848) (overruled in Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972)).

Prior to England's Fatal Accidents Act, a few states, Kentucky, Arkansas, Michigan, Maine, Massachusetts, and Rhode Island, had carved out their own statutory exceptions to the *Bolton* rule. *See* Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673, 674-76. By the mid-1800s, the state legislatures' focus turned toward compensating the families of those killed in all too common railroad accidents. *Id.* at 678.

The reason behind the near universal adoption of the *Bolton* rule is not readily apparent and, indeed, a few cases allowed recovery for the death of a family member despite the *Bolton* holding. *See* Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1062-67 (1964-1965) [hereinafter cited as Malone, *Genesis*]. For a discussion of the basis of the *Bolton* rule, see *infra* notes 10 & 11. *See also* Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1959-1960).

10. *See* Moragne v. States Marine Lines, 398 U.S. 375, 382-84 (1970). In England, the courts did not allow a civil recovery because an individual found liable for a homicide was himself put to death, with his belongings forfeited to the Crown. *Id.* at 382-83. Thus, there were no assets remaining from which to pay off a subsequent civil judgment. *Id.* For a historical analysis of the *Bolton* rule, see Holdsworth, *supra* note 1.

The adoption of the common law rule by American courts seems strange since the felony-merger doctrine never existed here. *See* Summerfield v. Superior Court, 144 Ariz. 467, 471, 698 P.2d 712, 716 (1985); Malone, *Genesis*, *supra* note 9, at 1063. Massachusetts "set the pattern" for adopting the *Bolton* rule in *Carey v. Berkshire R.R.*, 55 Mass. 475 (1848). Malone, *Genesis*, *supra* note 9, at 1067. While the *Carey* decision articulated no reason for adopting the rule, one possible explanation is that *Carey* involved a claim by the decedent's widow; unlike the early American cases where recovery was allowed, a wife has no property interest in her husband. *Id.* at 1067-69. Therefore, she could not sue for her husband's injuries whether fatal or not. *See id.*

11. *See* W. PROSSER & W. KEETON, *supra* note 8, at 945. For a state by state breakdown of the statutes that address the issue of the wrongful death of a fetus as well as the terminology used in the various statutes, *see* Note, *A Century of Change: Liability for Prenatal Injuries*, 22 WASHBURN L.J. 268, 282-85 (1983). Massachusetts and Hawaii, however, do recognize a common law basis for a wrong-

The wrongful death legislation of most states is modeled after the original Fatal Accidents Act.[12] In analyzing these statutes, state courts have identified two basic elements: (1) that the death be of a person, and (2) that the conduct causing death be of a type that would have entitled the decedent to sue had death not occurred.[13] Since nearly every statute is silent regarding whether the term person includes or excludes a fetus, the state courts have had to rely on statutory construction to determine whether the death of a fetus is compensable under a wrongful death act.[14] The process of statutory construction in this regard has led to much disagreement among the state courts.

The Massachusetts Supreme Court, in *Dietrich v. Inhabitants of Northampton*,[15] was the first court to consider whether a fetus is a person for purposes of a wrongful death statute. The *Dietrich* court held that a nonviable[16] fetus is not a person with standing to sue in court.[17] The court

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ful death suit. *See* Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 443, 369 P.2d 96 (1961) (explicitly rejecting *Bolton* holding) ; Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972) (following United States Supreme Court ruling in Moragne v. States Marine Lines, 398 U.S. 375 (1969), that courts can adopt legislative policy as common law).

12. *See, e.g.*, White v. Yup, 85 Nev. 527, 532, 458 P.2d 617, 620 (1969); Hopkins v. McBane, 359 N.W.2d 862, 863-64 (N.D. 1984); Presley v. Newport Hosp., 117 R.I. 177, 180, 365 A.2d 748, 750 (1976); Lawrence v. Craven Tire Co., 210 Va. 138, 139, 169 S.E.2d 440, 441 (1969). For the text of Lord Campbell's Act, see *supra* note 8.

The texts of the Nevada and Washington statutes do not parallel the Fatal Accidents Act in that they omit the language referring to an act by the defendant that would enable the decedent to sue "if death had not ensued." *See, e.g.*, NEV. REV. STAT. § 41.085 (1986); WASH. REV. CODE ANN. § 4.20.010 (1977). However, the fact that suit is authorized reveals that this clause is implicit. By comparison, North Dakota, Rhode Island, and Virginia all adopted the "if death had not ensued" phraseology. *See* N.D. CENT. CODE § 32-21-01 (Supp. 1985); R.I. GEN. LAWS § 10-7-1 (1985); VA. CODE § 8.01-50 (1984).

What is important is not the exact terminology of a statute, but whether the statute is the Lord Campbell type that creates a new cause of action in the decedent's representative, as opposed to the survival type that only preserves the victim's cause of action. *See* Smedley, *supra* note 1, at 273-77. For a discussion of the differences between survival type and Lord Campbell type statutes, see *supra* note 8.

13. *See, e.g.*, Hopkins v. McBane, 359 N.W.2d 862, 864 (N.D. 1984); Presley v. Newport Hosp., 117 R.I. 177, 180, 365 A.2d 748, 750 (1976); Lawrence v. Craven Tire Co., 210 Va. 138, 140, 169 S.E.2d 440, 441 (1969). The *Presley* court added a third requirement: that the act causing death be performed by a person other than the decedent. *Presley*, 117 R.I. at 180-81, 365 A.2d at 750.

14. For a list of the decisions interpreting wrongful death legislation to include or exempt unborn children from coverage, see *supra* notes 6-7.

15. 138 Mass. 14 (1884).

16. Although the facts indicate that the child was born alive and lived for 10 to 15 minutes, the fetus was "nonviable." *Id.* at 15. The fetus, which was four to five months in development, was injured when the mother slipped and fell on a town road. *Id.* at 14-15. Her fall allegedly triggered a miscarriage and, while it was born alive, the fetus was too underdeveloped to survive. *Id.*

17. *Id.* at 17. The court stated that even had the child survived, it could not sue for any injuries suffered prenatally. *Id.* at 15-16. This conclusion, however,

concluded that a fetus is merely part of its mother and has no separate identity until it is born; therefore, an injury to the fetus is really only an injury to the mother.[18] Thus, the court declared that the sole cause of action belongs to the mother.[19]

Sixteen years later, at the turn of the century, Justice Boggs first articulated opposition to the *Dietrich* rule in his dissenting opinion in *Allaire v. Saint Luke's Hospital*.[20] Justice Boggs argued that once a fetus reaches a stage of development where it is capable of living apart from its mother, it is no longer reasonable to conclude that the fetus is only part of its mother.[21] The district court for the District of Columbia subsequently adopted Boggs' viability theory in *Bonbrest v. Kotz*,[22] in which the court allowed recovery for injuries sustained by a viable fetus during delivery.[23]

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is clearly invalid today. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560 (Fla. Dist. Ct. App. 1976); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Lieber v. Our Lady of Victory Hosp., 43 App. Div. 2d 898, 351 N.Y.S.2d 480 (1974); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962). *See generally*, Annot. 40 A.L.R.3d 1222 (1971) (right of action for prenatal injuries is well established); RESTATEMENT (SECOND) OF TORTS § 869 (1977) (tortfeasor liability for prenatal torts). Justice Holmes refrained from drawing a line for recovery at a point before birth because there was no indication of where to draw such a line. *Dietrich*, 138 Mass. at 16.

18. *Dietrich*, 138 Mass. at 17.

19. *Id.* The *Dietrich* decision also noted that any injuries to the fetus caused by the mother's fall could be recovered by the mother in a separate action, so long as her injuries were not too remote. *Id.* The court noted that this conclusion normally followed from the underlying assumption that the fetus is part of the mother. *Id.* For a discussion of the argument that the parents can bring their own action, which is still advanced by a few courts, see *infra* notes 100 & 154 and accompanying text.

At least one jurisdiction, Florida, still abides by the *Deitrich* reasoning. Florida law requires the complete expulsion or removal of the child from the mother, as well as proof that the umbilical cord had been severed and that the child had had independent circulation of blood, before the child is considered a person born alive. Case Note, *A Child Is Not Born Alive Until He or She Acquires An Existence Separate And Independent From the Mother—Duncan v. Flynn*, 8 FLA. ST. U.L. REV. 137, 139 (1980).

20. 184 Ill. 359, 56 N.E. 638 (1900) (Boggs, J., dissenting). In *Allaire*, the fetus was injured when its mother was pinned between an elevator car and the elevator shaft. *Id.* at 361-62, 56 N.E. at 638. The child was born alive, but deformed. *Id.* Accordingly, *Allaire* did not involve a wrongful death action.

21. *Id.* at 370, 56 N.E. at 641 (Boggs, J., dissenting).

22. 65 F. Supp. 138 (D.D.C. 1946). Like the *Allaire* court, the *Bonbrest* court did not reach the question of wrongful death. *Id.* at 142. Instead, it involved prenatal injury to a fetus due to the negligent treatment of the mother by the defendant physicians. *Id.* at 139. The issue was whether the physicians owed any duty to an unborn child. *Id.*

23. *Id.* at 140. The district court relied upon Justice Boggs' reasoning to conclude that it would be contradictory to consider a fetus, capable of life independent of the mother, to be a part of the mother. *Id.* at 141. The court also emphasized that the physicians inflicted the injury directly upon the fetus during

Shortly thereafter, Minnesota became the first state to allow a wrongful death action for negligence that resulted in the stillbirth of a viable fetus, in *Verkennes v. Corniea.*[24] In *Verkennes*, the Supreme Court of Minnesota relied almost entirely upon Justice Boggs' dissent in *Allaire* and upon the *Bonbrest* opinion to conclude that "[i]t seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes . . . ."[25]

From Justice Boggs' dissent in *Allaire*, and the subsequent decisions in *Verkennes* and *Bonbrest*, a majority position has evolved allowing a wrongful death recovery for fatal injuries inflicted upon a fetus.[26]

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delivery, thus distinguishing *Dietrich*, where the injury was "transmitted" through the mother. *Id.* at 140. The cases no longer distinguished between injury inflicted directly upon the fetus or transmitted through the mother. For a list of the courts rejecting the *Dietrich* reasoning, see *supra* note 6.

24. 229 Minn. 365, 38 N.W.2d 838 (1949). Unlike *Bonbrest*, *Verkennes* involved an initial injury to the mother; the defendant physician's negligence resulted in both the death of the mother and her fetus when the mother's uterus ruptured during delivery. *Id.* at 366-67, 38 N.W.2d at 839.

25. *Id.* at 370-71, 38 N.W.2d at 841.

26. For a list of the courts taking the majority position, see *supra* note 6.

At least three courts have rejected the viability distinction in deciding how developed the fetus must be before a wrongful death recovery is permissible. In a case dealing with a pre-*Roe* abortion statute, Indiana abandoned its original fetal wrongful death decision, which limited recovery to cases where the fetus was quick, and apparently now recognizes a cause of action for wrongful death of a fetus from the point of conception. *See* Cheaney v. Indiana, 259 Ind. 138, 145-46, 285 N.E.2d 265, 268 (1972), *cert. denied*, 410 U.S. 991 (1973) (case arising in pre-*Roe* abortion context).

Another court has explicitly adopted the point of conception as the point at which one becomes a person for purposes of a wrongful death statute. Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976). In *Presley*, the court held that a fetus is a person from the moment of conception. *Id.* at 188-89, 365 A.2d at 754. The *Presley* court felt that the viability distinction was illogical. *Id.* at 188, 365 A.2d at 752-53.

By comparison, the Georgia Court of Appeals has held that a fetus is a person from the time that it becomes "quick," that is, capable of movement. Porter v. Lassiter, 91 Ga. App. 712, 716-17, 87 S.E.2d 100, 102-03 (1975). In allowing a cause of action for the death of a four and one-half month old fetus, the *Porter* court based its holding on a Georgia Supreme Court ruling that allowed recovery for prenatal injuries to a quick fetus. *Id.*, 87 S.E.2d 102-03 (citing Tucker v. Carmichael, 208 Ga. 201, 203-04, 65 S.E.2d 909, 911 (1951)).

Many of the cases limiting a cause of action to the death of a viable fetus either did not consider whether recovery could be allowed for non-viable fetuses, or explicitly withheld deciding the issue. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 574, 651 P.2d 11, 15 (1982) (court withheld judgment concerning nonviable fetuses); Odham v. Sherman, 234 Md. 179, 185, 198 A.2d 71, 73 (1964) (dividing line for recovery should be drawn "at least" at viability); Moen v. Hanson, 85 Wash. 2d 597, 601, 537 P.2d 266, 268 (1975) (no decision rendered concerning nonviable fetus).

In addition, an appellate court in Texas allowed recovery for the death of a fetus without indicating how advanced the pregnancy was. *See* Witty v. American General Capital Distributors, 697 S.W.2d 636 (Tex. Ct. App. 1985). However it appears that the fetus was not viable, being only 4 months at the time of death.

B. *The Present State of the Cause of Action for the Wrongful Death of a Fetus*

Although a majority of courts agree that recovery for the wrongful death of a fetus is permissible, the justifications proffered by these courts are quite divergent.[27] Similarly, although a distinct minority of courts deny a cause of action for the wrongful death of a fetus, these courts advance diverse justifications.[28] Additionally, it is not uncommon for courts in either the majority or the minority to assert several justifications in support of their position.[29]

1. *Majority Position*

a. Legislature Intended to Provide for Recovery for the Wrongful Death of a Fetus

The acceptance of any common law basis for a right to recover for wrongful death is relatively rare.[30] Therefore, the courts are left with the task of interpreting Lord Campbell-type wrongful death legislation to determine whether the legislature intended to allow a cause of action for the wrongful death of a fetus.[31] One approach in this respect is

See Note, *A Wrongful Death Action Can Be Maintained For Prenatal Injuries Causing the Stillbirth of a Fetus*, 17 TEX. TECH. L. REV. 983 (1986).

Finally, Illinois now permits, by statute, a cause of action for the death of a fetus from the moment of conception. ILL. REV. STAT. ch. 70, § 2.2 (Supp. 1985). For a discussion of the Illinois approach, see Parness, *Protection of Potential Human Life in Illinois: Policy and Law at Odds*, 5 N. ILL. U.L. REV. 1, 22-28 (1985) (analyzing development of cause of action for death of fetus).

27. For a discussion of the rationales advanced by courts in the majority, see *infra* notes 30-83 and accompanying text.

28. For a discussion of the rationales underlying the minority position, see *infra* notes 85-103 and accompanying text.

29. *See, e.g.*, Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc) (allowing cause of action); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc) (denying cause of action for wrongful death of fetus); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985) (adopting majority position allowing recovery).

30. For a discussion of a possible common law basis for the recovery of wrongful death damages, see *infra* notes 74-80 and 86-90 and accompanying text.

For an argument encouraging a common law approach to allowing recovery in order to avoid the complexities of statutory construction, see Note, *Wrongful Death and the Stillborn Fetus: A Common Law Solution to a Statutory Dilemma*, 43 U. PITT. L. REV. 819, 830-35 (1981-1982). There are, however, problems inherent in this approach, namely the historical acceptance of the *Bolton* rule and the preclusion of the field through legislation. *See id.* at 831-32.

31. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 576, 565 P.2d 122, 129, 139 Cal. Rptr. 97, 104 (1977) (en banc) (quoting Pritchard v. Whitney Estate Co., 164 Cal. 564, 568, 129 P. 989, 992 (1913)) ("Because it is a creature of statute, the cause of action for wrongful death 'exists only so far . . . as the legislative power may declare.' "); Stern v. Miller, 348 So. 2d 303, 307 (Fla. 1977) (court "confined to a determination of the legislature's intent"); Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977) (quoting Drabbels v. Skelly Oil Co., 155 Neb. 17, 23-24, 50 N.W.2d 229, 232 (1951)) (since no common recovery is recognized, cause of action "may not be maintained unless . . . it is afforded by

demonstrated by the North Dakota Supreme Court's decision in *Hopkins v. McBane.*[32] In that case, the court held that the ordinary definition of a person includes a fetus.[33] The court then determined that the ordinary definition controls when construing the wrongful death statute.[34]

A second approach taken by courts in determining the legislative intent behind a wrongful death statute is to analogize to the protections accorded fetuses in other areas of law.[35] For example, in *Summerfield v. Superior Court*,[36] the Supreme Court of Arizona relied, in part, on the state's manslaughter,[37] abortion[38] and property laws[39] to determine whether the legislature intended to provide a cause of action for the death of a fetus.[40] The court found an overall legislative policy to provide protection for fetuses and concluded that allowing recovery was

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legislative enactment"); Hogan v. McDaniel, 204 Tenn. 235, 239, 319 S.W.2d 221, 223 (1958) (abrogated by statute) ("Where a right of action is dependent upon the provisions of a statute . . . [the court is] not privileged to create such a right under the guise of a liberal interpretation of it."); Lawrence v. Craven Tire Co., 210 Va. 138, 141-42, 169 S.E.2d 440, 442 (1969) (quoting both *Drabbels* and *Hogan*).

32. 359 N.W.2d 862 (N.D. 1984). *McBane* involved a malpractice suit filed by the mother of a viable fetus. *Id.* at 863. The trial court had granted the defendant physician's motion for summary judgment. *Id.* For a further discussion of *McBane*, see *Wrongful Death*, 61 N.D.L. REV. 104 (1985).

33. *McBane*, 359 N.W.2d at 865. The court relied, in part, on a statute that defined an unborn child to be a person to the extent necessary to protect the child's interests in the event of his or her birth. *Id.* at 864. Aside from holding that the normal meaning of the term "person" is understood to include the unborn, the court reasoned that a fetus is alive before birth, and can therefore experience death before birth. *See Wrongful Death*, *supra* note 32, at 105.

Like the court of North Dakota, the courts in Georgia have also found that the English common law definition of a person includes fetuses that are capable of movement. *See* Tucker v. Carmichael, 208 Ga. 201, 203-04, 65 S.E.2d 909, 911-12 (1951).

34. *McBane*, 359 N.W.2d at 865.

35. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982) (drawing from state's intestacy laws); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc) (relying on Arizona's manslaughter and abortion statutes and on property laws).

36. 144 Ariz. 467, 698 P.2d 712 (1985) (en banc). In *Summerfield*, the parents of a full-term child brought a malpractice action. *Id.* at 470, 698 P.2d at 715. The basis of the complaint was the defendant's failure to treat the mother's diabetes which was the cause of the fetus' death. *Id.*

37. ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (Supp. 1985) (manslaughter includes knowingly or recklessly causing death of fetus at any stage of development if death stems from injury to mother that would have been murder had mother died).

38. ARIZ. REV. STAT. ANN. § 36-2301.01(C) (Supp. 1985) (requirement that second physician attend abortion procedure of viable fetus for purposes of preserving life of any viable fetus born alive).

39. ARIZ. REV. STAT. ANN. § 14-2108 (1975) (relatives of decedent conceived before decedent's death inherit as any other relative upon their birth).

40. *Summerfield*, 144 Ariz. at 476, 698 P.2d at 721.

consistent with this policy.[41] Similarly, in *Volk v. Baldazo*,[42] the Idaho Supreme Court relied on Idaho's intestacy laws in finding a legislative intent to protect fetuses.[43]

Yet another argument, made in *O'Grady v. Brown*,[44] is that the legislature implicitly intended to include a fetus within the coverage of the wrongful death statute because the legislative policy behind such statutes would be advanced only if recovery were allowed.[45] The Missouri statute at issue in *O'Grady* had a two-fold purpose: (1) compensating the decedent's survivors, and (2) deterring harmful conduct by ensuring that tortfeasors pay for the consequences of their actions.[46] The court observed that a denial of recovery for the death of a fetus frustrates both of these goals, since, in the absence of recovery, parents are not compensated and tortfeasors are not deterred.[47]

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41. *Id.*

42. 103 Idaho 570, 651 P.2d 11 (1982).

43. *Id.* at 574, 651 P.2d at 14. The Idaho statute involved allowed parents to bring an action for the wrongful death of their minor children. *Id.* The court held that no minimum age requirement is implied in the statute because, traditionally, a viable fetus has legal rights. *Id.* For a discussion of the inconsistencies involved when legislation protects the interest of unborn children in the areas of tort, criminal and property law while allowing abortion, see Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

44. O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983).

45. *Id.* at 908-10. The lawsuit arose when the mother's uterus ruptured due to alleged negligent treatment, and the full-term fetus was stillborn. *Id.* at 906. For discussions of *O'Grady*, see Casenote, *Recovery for the Wrongful Death of a Viable Fetus in Missouri*, 52 U.M.K.C. L. REV. 692 (1983-1984) [hereinafter cited as Casenote, *Recovery*]; Casenote, *Wrongful Death—"Person," As Used in Missouri's Wrongful Death Statute, Includes a Viable Human Fetus*, 22 J. FAM. L. 770 (1983-1984).

46. *O'Grady*, 654 S.W.2d at 908-10. For a discussion of the legislative purposes of Missouri's statute, see Casenote, *Recovery*, *supra* note 45, at 701. Other jurisdictions have made similar policy analyses. *See Summerfield*, 144 Ariz. at 479, 698 P.2d at 721; *Volk*, 103 Idaho at 574, 651 P.2d at 14-15.

The *O'Grady* court also relied upon a now repealed Missouri feticide statute for support. *See* Casenote, *Recovery*, *supra* note 45, at 772. For a discussion of legislation protecting the unborn and the relevance of such statutes in the wrongful death field, see *supra* notes 35-43 and accompanying text.

In contrast to the compensatory statutes discussed above, Alabama has a punitive statute. *See* W. PROSSER & W. KEETON, *supra* note 8, at 946. Despite the punitive purpose of its statute, Alabama has also held that by allowing recovery for the death of a fetus, the purpose of its statute is fulfilled. Eich v. Town of Gulf Shores, 293 Ala. 95, 98, 300 So. 2d 354, 356 (1974). For a commentary on the *Eich* case, see Recent Decisions, *Wrongful Death-Prenatal Injuries*, 5 CUM.-SAM. L. REV. 362 (1974-1975). For a further discussion of punitive damages in this context, see Sales & Cole, *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984).

Several other jurisdictions have occasionally recognized the availability of punitive damages even though their wrongful death statutes are compensatory in nature. *See id.* at 1149-50. The trend to allow punitive damages in a survival action is even greater. *Id.* at 1150-51.

47. *O'Grady*, 654 S.W.2d at 908. *See also* Eich v. Town of Gulf Shores, 293

A second line of cases that analyzes legislative intent focuses upon the second prong of a Lord Campbell-type statute, namely the requirement that a decedent have had the right to sue for the act that caused death had death not occurred.[48] This analysis evolved through the interpretation of two related Iowa statutes: Iowa's wrongful death statute[49] and Iowa Rule of Civil Procedure 8.[50] First, in *Weitl v. Moes*,[51] the court interpreted the wrongful death statute to be a survival type statute that merely preserves any cause of action that the decedent had at the time of death.[52] The *Weitl* court reasoned that since the fetus had never been born alive, it could not have brought a law suit at the time of its death and, therefore, no cause of action was preserved.[53]

Subsequent to *Weitl*, the same court allowed a father to recover damages for the death of his unborn child in *Dunn v. Rose Way, Inc.*[54] In

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Ala. 95, 98, 300 So. 2d 354, 356 (1974) (allowing cause of action furthers statutory purpose of deterring harmful conduct); *Summerfield*, 144 Ariz. at 476, 698 P.2d at 721 (allowing suit furthers legislative policies of compensating survivors and protecting unborn); *Volk*, 103 Idaho at 574, 651 P.2d at 14-15 (purpose of statute is deterrence). By comparison, the North Carolina Supreme Court, noting the compensatory nature of its wrongful death statute, denied recovery in *Gay v. Thompson*, stating "it can hardly be seriously contended that the death of a foetus represents *any* real pecuniary loss to the parents." 266 N.C. 394, 399, 146 S.E.2d 425, 428 (1966) (quoting Comment, *Developments in the Law of Prenatal Wrongful Death*, 69 DICK. L. REV. 258, 267 (1965)) (emphasis in original).

48. For a discussion of the cases focusing on the second element of a cause of action under the Lord Campbell-type statute, see *infra* notes 49-73 & 100-03 and accompanying text.

49. 47 IOWA CODE ANN. § 633.336 (West 1976) ("When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased . . . ."). For a discussion of the various statutes that are applicable in a "wrongful death" action under Iowa law, see Fitzgerald v. Hale, 247 Iowa 1194, 1196-97, 78 N.W.2d 509, 510-11 (1956).

50. IOWA R. CIV. P. 8 ("a parent may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child").

51. 311 N.W.2d 259 (Iowa 1981). In *Weitl*, Linda Weitl received treatment for bronchitis and hyperventilation. *Id.* at 261. The plaintiffs alleged that the defendants, the treating physicians and the hospital, were negligent. *Id.* Plaintiffs further alleged that defendants' negligence caused Mrs. Weitl to suffer brain damage and blindness and caused her late-term child to be stillborn. *Id.* Weitl's three children brought a loss of society claim on which they ultimately prevailed. *See* Note, *Child's Right to Sue for Negligent Disruption of Parental Consortium*, 22 WASHBURN L.J. 78, 91-93 (1982-1983). Linda Weitl's husband brought suit for wrongful death which the court dismissed. *Weitl*, 311 N.W.2d at 273.

52. *Weitl*, 311 N.W.2d at 270.

53. *Id.* at 270-71. The court also focused on earlier versions of the wrongful death statute in support of its claim that a child, never being born alive, cannot have a cause of action to pass on to the parents. *Id.* at 272. An earlier version of the statute stated that the causes of action of a party do not die with the party. *Id.* The court concluded that a fetus could not be a party to a tort action. *Id.* Thus, the statute had always been construed to exclude recovery for fetal deaths. *Id.*

54. 333 N.W.2d 830 (Iowa 1983). The plaintiff's wife, unborn child and two-year old daughter were all killed in an automobile accident. *Id.* at 831.

Dunn, the father sued under Rule 8 of Iowa Rules of Civil Procedure, which allows parents to sue for the death of a minor child.[55] The reason the court allowed the suit in *Dunn* but not in *Weitl* is the different nature of the Iowa wrongful death action and an action pursuant to rule 8: the *Dunn* court interpreted rule 8 to involve a right of the parents to recover for the harm suffered by them due to the death of their child, and not a right of the decedent.[56] The effect of *Dunn* is that the legal status of the fetus becomes irrelevant since the person whose standing is at issue is the parents.[57]

In the same year the Iowa Supreme Court decided *Dunn*, the *O'Grady* court adopted a similar type of analysis.[58] Missouri's wrongful death statute, like the wrongful death statute of many other states,[59] premises recovery by a survivor on the requirement that "if death had not ensued," the decedent would have been "entitled . . . to recover

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Among the numerous counts that the plaintiff brought were three counts seeking recovery under Iowa's wrongful death law and three counts seeking damages under Iowa Rule of Civil Procedure 8. *Id.* These six counts were based on the death of the viable fetus. *Id.* The lower court dismissed all the claims for the unborn child's death. *Id.* at 830. Relying on *Weitl*, the Iowa Supreme Court upheld the dismissal of the wrongful death action. *Id.* at 831. However, the court ruled that since rule 8 provides an action for the damages of the parents, a rule 8 claim for the death of a viable fetus is permissible, *Weitl* notwithstanding. *Id.* at 832-33.

For a discussion of *Dunn*, as well as a comparison of rule 8 with Iowa's wrongful death statute, see Casenote, *Surviving Parents Have a Claim Under Rule 8 of the Iowa Rules of Civil Procedure for Damages Resulting from Deprivation of an Unborn Child's Companionship, Society and Services*, 33 DRAKE L. REV. 185 (1983-1984); Comment, *Dunn v. Rose Way, Inc.: No Recovery for Wrongful Death of a Viable Fetus Under Section 611.20 of the Iowa Code*, 70 IOWA L. REV. 545 (1984-1985).

55. *See Dunn*, 333 N.W.2d 830. For the language of rule 8, in comparison to Iowa's wrongful death statute, see *supra* notes 49-50.

56. *Dunn*, 333 N.W.2d at 832-34. The predecessor to rule 8 was intended to compensate the father, and sometimes the mother, for the expenses and loss of services that they incur as a result of their minor child's death. *See* Comment, *supra* note 54, at 549-50. Such damages were not recoverable under Iowa's "wrongful death statute" because that statute allowed only the decedent's estate to recover damages suffered by the decedent. *Id.* at 548. Iowa's wrongful death statute is a hybrid statute—originally it was enacted as a survival statute. *Id.* However, it does contain some wrongful death elements. *Id.*

57. *See Dunn*, 333 N.W.2d at 832-33. The legal status of the fetus refers to whether the fetus had a right to sue at the time of its death. *Id.* The defendants in *Dunn* had asserted that under settled Iowa law, a fetus has no legal status. *See* Casenote, *supra* note 54, at 190. The majority easily dismissed this argument by noting that the legal status of the parent, rather than that of the fetus, was determinative. *Id.*

58. *O'Grady*, 654 S.W.2d at 910-11. While not citing *Dunn* for this proposition, the court noted the wrongful death action was a new action and not one belonging to the decedent. *Id.* at 910. The decedent's right to sue *at the time of death* is irrelevant to the extent that the wrongful death action is not derivative. *Id.*

59. For a discussion of various examples of wrongful death legislation, see *supra* notes 12-13.

damages . . . ."[60] Although noting that other courts have conditioned recovery on the existence of a right to sue either at the time of injury or the time of death,[61] the court interpreted the "if death had not ensued" language to allow recovery for any act by the defendant that would have given the decedent a legally cognizable action "but-for" his or her death.[62] Again, as under the *Dunn* analysis, the court deemed irrelevant the ability of the fetus to bring suit because the court found that Missouri's wrongful death action creates a new cause of action that belongs to the survivors, not the decedent's estate.[63] If the injured fetus could have sued during its life had it been born and survived, then the survivors have a cause of action under the statute.[64]

The most recent decision allowing a cause of action for the wrongful death of a fetus is *Amadio v. Levin*.[65] In *Amadio*, the parents of the decedent alleged that the negligence of four treating physicians caused their full-term child to be stillborn.[66] Although the Pennsylvania Supreme Court interprets its wrongful death statute as being "basically

60. MO. REV. STAT. § 537.080 (1982).

61. *O'Grady*, 654 S.W.2d at 910. For a discussion of the minority position which conditions recovery on the existence of a right to sue at the time of death, see *infra* notes 100-03 and accompanying text.

62. *O'Grady*, 654 S.W.2d at 910. The *Summerfield* court explicitly adopted this but-for test as well. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720 (citing *O'Grady*, 654 S.W.2d at 910). For a discussion of the *Summerfield* approach, see *infra* notes 71-73 and accompanying text.

63. *O'Grady*, 654 S.W. 2d at 910. The Missouri court reinforced its position by noting that the term "person" implicitly includes fetuses, because such an interpretation is the only one consistent with legislative policy. *Id.* at 908-09. For a discussion of this aspect of *O'Grady*, see *supra* notes 45-47 and accompanying text.

64. *O'Grady*, 654 S.W.2d at 910. The but-for requirement was easily satisfied because under established Missouri law, a fetus injured *in utero* that survives birth has a cause of action for its injuries. *See* Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953). In reaching its decision, the *O'Grady* court specifically rejected the holding in *Lawrence v. Craven Tire Co. O'Grady*, 654 S.W.2d at 910 (citing Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969)). The *O'Grady* court noted that while Virginia's wrongful death statute is a survival type statute, which merely preserves the decedent's own causes of action, Missouri's wrongful death statute creates a new cause of action. *O'Grady*, 654 S.W.2d at 910. Thus, the decedent need not have actually had a legally cognizable cause of action at the time of death. *Id.* For a discussion of the *Lawrence* court approach, see *infra* notes 100-03 and accompanying text.

The focus of the *O'Grady* court's analysis was the nature of the defendant's conduct, not the legal status of the decedent at the time of death. *See O'Grady*, 654 S.W.2d at 910. Among other courts, there is some disagreement concerning the time the action actually accrues. *Compare* Odham v. Sherman, 234 Md. 179, 186, 198 A.2d 71, 74 (1964) (Gray, J., dissenting) (action accrues at time injury first occurs) *with Lawrence*, 210 Va. at 140, 169 S.E.2d at 441 (action accrues at time death occurs).

65. 509 Pa. 199, 501 A.2d 1085 (1985).

66. *Id.* at 200, 501 A.2d at 1085-86.

derivative" in nature,[67] it still followed the general reasoning of *O'Grady* and *Dunn*.[68] The majority argued in *Amadio*, that since recovery is allowed in instances of prenatal injury, this implicitly means that an unborn child is an "individual" with a right to be free from prenatal injuries;[69] if a fetus is an individual at the time of injury it is also an individual at the time those injuries happen to cause death.[70]

Similarly, in *Summerfield*, the court explicitly adopted the "but-for" test advanced in *O'Grady*.[71] The Arizona court stated that but for the fact that death had occurred, the fetus would have been born alive and would have been entitled to sue for the prenatal injuries.[72] Under this approach, a fetus fits within the statutory language that requires the decedent to have had the right to sue had death not occurred.[73]

b. The Possibility of a Common Law Basis for Wrongful Death Recovery

Although no court has relied on it in allowing a cause of action for the wrongful death of a fetus, a few courts have suggested a possible common law basis for wrongful death action.[74] If a common law cause

67. *See* Carrol v. Skloff, 415 Pa. 47, 48, 202 A.2d 9, 10 (1964). *Carrol* was overruled by Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985).

68. The court relied on *Sinkler v. Kneale*, in which the Pennsylvania Supreme Court held that a fetus is an "individual" for purposes of permitting an action for prenatal injuries. *Id.* at 204, 501 A.2d at 1087 (citing Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960)).

69. *Id.* at 204, 501 A.2d at 1087. The court did not specify whether this holding is limited to viable fetuses. *Id.* at 199-208, 501 A.2d at 1085-89. However, the opinion implied recovery is available from conception in that the court interpreted *Sinkler* as holding "that a child en ventre sa mere is a separate individual from the moment of conception . . . ." *Id.* at 204, 501 A.2d at 1087.

70. *Id.*

71. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720 (citing O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983)).

72. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720.

73. *Id.*

74. *See* Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 114 (1962); Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972). Nevertheless, most state courts recognize only a statutory right to recover for wrongful death. *See, e.g.*, Huebner v. Deuchle, 109 Ariz. 549, 550, 514 P.2d 470, 471 (1973) (right to recover wrongful death damages wholly statutory and can be granted or withheld at pleasure of legislature); Justus v. Atchison, 19 Cal. 3d 564, 573-74, 565 P.2d 122, 127-28, 139 Cal. Rptr. 97, 102-03 (1977) (throughout California's history, court has embraced view that no common law action for death of another existed; cause of action exists only by statute); Egbert v. Wenzl, 199 Neb. 573, 575, 260 N.W.2d 480, 482 (1977) (action for wrongful death is pure creature of statute); Gay v. Thompson, 266 N.C. 394, 395, 146 S.E.2d 425, 426 (1966) (common law gives no right of action for tortious killing of another); Incollingo v. Ewing, 444 Pa. 299, 302-03, 282 A.2d 206, 226 (1971) (at common law, no recovery for wrongful death was allowed; condition was remedied by legislature).

The Arizona Supreme Court, in reversing its previous denial of a wrongful death recovery for the death of a viable fetus, criticized reliance upon the *Bolton*

of action were accepted, it would obviate the need to discern the legislative intent underlying wrongful death legislation. In *Gaudette v. Webb*,[75] a case dealing with the wrongful death of an adult, the Massachusetts Supreme Court adopted the Massachusetts wrongful death legislation as the state's common law.[76] As authority for its position, the court relied on *Moragne v. States Marine Lines*, which held that established legislative policy can become part of the common law.[77]

Like the court in *Gaudette*, the *Summerfield* court also questioned whether the common law barred recovery for wrongful death.[78] The court recognized the weak basis for the common law rule, and cited *Moragne* and *Gaudette* as providing a basis for wrongful death recovery at common law.[79] However, the court refused to rely on a common law analysis and instead interpreted the state wrongful death statute as providing recovery.[80]

c. Policy Factors Militating In Favor of Allowing Wrongful Death Actions for the Wrongful Death of the Unborn

A third major consideration that several courts have focused upon is whether recovery for the wrongful death of a fetus should be allowed as a matter of policy.[81] The majority position contains two policy argu-

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rule for several reasons. *Summerfield*, 144 Ariz. at 471, 698 P.2d at 716. First, the court noted that the *Bolton* common law rule is premised upon the felony-merger doctrine. *Id.* at 471, 698 P.2d at 712. The court reasoned that, since this doctrine never existed in the United States, the foundation for the *Bolton* rule collapses. *Id.* Second, the court noted that Arizona had only adopted English common law up until 1776. *Id.* Since the *Bolton* rule had not been established until 1808, the court indicated that reliance on the common law to bar recovery "may be misplaced." *Id.*

Similarly, the Oklahoma Supreme Court stated that, by allowing a cause of action for the death of a fetus, they were "changing" their common law to adapt to modern life. Evans v. Olson, 550 P.2d 924, 928 (Okla. 1976). The court recognized that the right to recovery "accrues solely by virtue of statute." *Id.* at 927. However, the court expounded on the fact that a common law right to recover did exist for prenatal injuries. *Id.* Based on this premise, the court stated that a cause of action could be allowed in cases where the child is stillborn due to its injuries. *Id.* at 928.

75. 362 Mass. 60, 284 N.E.2d 222 (1972) (reversing Carey v. Berkshire R.R., 55 Mass. 475 (1884) (adopting *Bolton* rule as the law of Massachusetts)).

76. *Id.* at 71, 284 N.E.2d at 228.

77. 398 U.S. 375, 390-92 (1969). The Supreme Court permitted a cause of action under the common law where none was previously provided. *Id.* at 409. The basis for the common law action was a federal wrongful death statute. *Id.* at 390-92.

78. *Summerfield*, 144 Ariz. at 471-72, 698 P.2d at 716.

79. *Id.*

80. *Id.* at 473, 698 P.2d at 718. The court stated, "[w]e conclude, at a minimum, that statute and precedent have combined to produce a cause of action with common law attributes." *Id.*

81. For a comparison of the competing policy rationales, see *infra* notes 82-84 & 91-99 and accompanying text.

ments. First, the majority notes that the general purposes of the wrongful death statute, in all but two states, are to compensate the survivors of the decedent and to deter the type of conduct that causes the death of another;[82] these goals are met only if recovery is allowed.[83] In addition, several courts have argued that it is both illogical and inequitable to allow a tort action where a fetus is injured but to deny relief where the more egregious result of death occurs, because to do so is to reward a tortfeasor for killing his victim.[84]

2. *The Minority Position*

Not surprisingly, the rationales asserted by those minority of courts that deny a cause of action for the wrongful death of a fetus are responsive to the arguments advanced by the majority of courts that permit recovery. Most courts holding the minority view argue that to find a legislative intent to include fetuses under a wrongful death act is to improperly create a cause of action not provided for by statute or in the common law.[85]

In the vanguard of the minority is *Justus v. Atchison.*[86] The *Justus* court explicitly rejected the notions advanced in *Moragne.*[87] The court

82. *See* W. PROSSER & W. KEETON, *supra* note 8, at 946. For a discussion of legislative policy behind the wrongful death legislation, see *supra* notes 45-47 and accompanying text.

83. *See, e.g., Summerfield*, 144 Ariz. at 479, 698 P.2d at 721 (allowing cause of action for wrongful death of fetus fulfills policy of law to protect and compensate); *Volk*, 103 Idaho at 574, 651 P.2d at 14-15 (legislative purpose is deterrence; allowing recovery for stillbirth furthers this purpose); Weitl v. Moes, 311 N.W.2d 259, 276 (Iowa 1981) (Larson, J., dissenting) (to construe term "person" to include fetus provides remedy for inflicted injury); *O'Grady*, 654 S.W.2d at 908 (both purposes of wrongful death statute are met if cause of action for wrongful death of fetus is permitted); *McBane*, 359 N.W.2d at 865 (N.D. 1984) (statute must be liberally construed to facilitate remedial purpose); *cf.* Eich v. Town of Gulf Shores, 293 Ala. 95, 98, 300 So. 2d 354, 356 (1974) (wrongful death statute is punitive, allowing recovery for causing stillbirth furthers punitive goal).

84. *See, e.g., Summerfield*, 144 Ariz. at 476, 698 P.2d at 721 (sensible to allow cause of action where fetus dies from its injuries, since action is allowed if fetus is born alive); *Amadio*, 509 Pa. at 205, 501 A.2d at 1088 (court no longer sanctions "a legal doctrine that enables a tortfeasor who causes death to escape *full* liability, while rendering one whose wrongdoing is less severe in its consequences answerable in a wrongful death or other negligence action merely because his victim survives birth") (emphasis in original); Endresz v. Friedberg, 24 N.Y.2d 478, 492, 248 N.E.2d 901, 908, 301 N.Y.S.2d 65, 76 (1969) (Burke, J., dissenting) ("absurd" to allow recovery if fetus is injured but born alive, but not if fetus is so badly injured that it dies *en utero*); Presley v. Newport Hosp., 117 R.I. 177, 187, 365 A.2d 748, 753 (1976) ("it makes poor sense to [allow] the tortfeasor whose deed brings about a stillbirth to escape liability but [hold liable] one whose wrongdoing is less severe . . . merely because his victim survives birth"). *See also McBane*, 359 N.W.2d at 864-65 (same, quoting *Presley*).

85. For mention of a court adopting this view, see *supra* note 31.

86. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc).

87. *Id.* at 573, 565 P.2d at 128, 139 Cal. Rptr. at 103 (rejecting Moragne v.

held that the passage of the wrongful death act evinced an intent on the part of the legislature to "occupy the field" of wrongful death recovery.[88] Therefore, the court held, in direct contrast to *Moragne*, that the court was precluded from expanding the allowable cause of action any further than that provided for by statute.[89] The court went on to conclude that the use of the term person evinced a clear intent to preclude any cause of action for the death of a fetus.[90]

In response to those courts that rely on policy considerations in support of recovery,[91] some courts have relied almost entirely on policy arguments to deny a cause of action for the wrongful death of a fetus.[92] For example, in *Graf v. Taggert*,[93] the New Jersey Supreme Court premised its denial of a cause of action on the ground that damages are too speculative in a case where the decedent is never born alive.[94] Likewise, in *Endresz v. Friedberg*,[95] the New York Court of Appeals dismissed a father's suit for the wrongful death of his unborn twins because it believed any damage award would be too speculative.[96] Moreover, the *Endresz*

States Marine Line, 398 U.S. 375 (1970); Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972)). The California court found that the legislature believed no right of action existed for wrongful death. 19 Cal. 3d at 574, 565 P.2d at 128-29, 139 Cal. Rptr. at 103-04. In light of this finding, the court reasoned that the legislature intended to create a new cause of action based only on the statute. *Id.*

88. *Justus*, 19 Cal. 3d at 574, 565 P.2d at 128-29, 139 Cal. Rptr. at 103-04. The *Justus* court admitted that in some instances, it could liberally construe legislation. *Id.* In this case, however, the court found that the wrongful death statute was so broad, the legislature intended to preclude any judicial intervention in the field. *Id.* In other words, since the legislature attempted to provide for so many contingencies, there were no statutory "gaps" to fill. *Id.*

For a discussion of the evolution of California's wrongful death statute and an analysis attempting to justify the *Justus* court's interpretation, see Comment, *Justifying the Denial of Wrongful Death Actions to Cohabitants*, 20 SAN DIEGO L. REV. 417 (1982-1983).

89. *Justus*, 19 Cal. 3d at 574, 565 P.2d at 128-29, 139 Cal. Rptr. at 103-04.

90. *Id.* at 579, 565 P.2d at 133, 139 Cal. Rptr. at 107. For a more extensive discussion of the legislative intent behind the wrongful death statutes, see *supra* notes 30-73 and accompanying text.

91. For a discussion of the policy arguments of the majority position, see *supra* notes 81-84 and accompanying text.

92. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

93. 43 N.J. 303, 204 A.2d 140 (1964). In *Graf*, the plaintiff sued the driver of a car that had collided with hers. *Id.* at 304-05, 204 A.2d 141. The plaintiff's seven-month fetus was stillborn as a result of the accident. *Id.*

94. *Id.* at 311, 204 A.2d at 145. The New Jersey court stated that, in the case of a prenatal death, "there can be no evidence from which to infer pecuniary loss to the surviving beneficiaries." *Id.* The court found that, at the most, the beneficiaries could prove their own ages and socio-economic status in an attempt to show the extent of their loss. *Id.*

95. 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

96. *Id.* at 484, 248 N.E.2d at 903-04, 301 N.Y.S.2d at 69.

In *Endresz*, viable fetal twins suffered injuries in an auto accident and were stillborn. *Endresz*, 24 N.Y.2d at 481, 248 N.E.2d at 902, 301 N.Y.S.2d at 67.

court also found that proof of causation would be too speculative in the case of prenatal deaths.[97] The majority position contends that concerns over proof of causation and damages should not prohibit bringing a cause of action.[98]

Another dimension of the *Endresz* holding illustrates yet another point around which the minority and majority positions diverge. Several courts in the majority reason that to allow a tort action where a fetus is injured, yet deny relief where the more egregious result of death occurs, is to reward the tortfeasor for killing his victim.[99] However, the *Endresz* court espoused a view to the contrary by reasoning that compensation is necessary when a child is born burdened with the "scars" of another's wrongdoing, but not when a child is stillborn.[100]

Finally, in contrast to the position adopted by Pennsylvania, Iowa, and Missouri, is the position taken by the Virginia Supreme Court in *Lawrence v. Craven Tire Company.*[101] Like Pennsylvania, the Virginia

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However, the court stated that proof of loss due to the death of an unborn child was too "vague" to permit recovery. *Id.* at 483, 248 N.E.2d at 903, 301 N.Y.S.2d at 69. Thus, the court reasoned that "the Legislature 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 from the loss of the unborn child.' " *Id.* (quoting Butler v. Manhattan Ry. Co. 143 N.Y. 417, 421-22, 38 N.E. 454, 455 (1894)).

See also Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966). The *Thompson* court relied extensively on the *Graf* decision, terming it "scholarly and excellent." *Id.* at 400, 146 S.E.2d at 429. The *Thompson* court ruled that "it can hardly be seriously contended that the death of a *foetus* represents *any* real pecuniary loss to the parents." *Id.* at 399, 146 S.E.2d at 429 (emphasis in original).

97. *Endresz*, 24 N.Y.2d at 484, 248 N.E.2d at 903, 301 N.Y.S.2d at 69 (speculation regarding causation impermissibly increased in case of stillborn fetus).

98. *See, e.g.*, Mone v. Greyhound Lines, Inc., 368 Mass. 354, 359-60, 331 N.E.2d 916, 919 (1975) (nature of damages cannot justify denial of right of action; damages in death of fetus no more speculative than in normal tort action); *Endresz*, 24 N.Y.2d at 492, 248 N.E.2d at 909, 301 N.Y.S.2d at 76 (Burke, J., dissenting) (difficulty in proving causation and damages is no bar to recovery for prenatal injuries nor is difficulty of proof any different in other tort actions); *Amadio*, 509 Pa. at 205, 501 A.2d at 1088 (difficulties of proof should never bar one's right to bring cause of action); Presley v. Newport Hosp., 117 R.I. 177, 189, 365 A.2d 748, 754 (1976) (difficulties in proving causation should not block attempts to prove causal relation).

99. For a discussion of the cases advancing this policy argument, see *supra* note 84 and accompanying text.

100. *Endresz*, 24 N.Y.2d at 483, 248 N.E.2d at 903, 301 N.Y.S.2d at 68-69. Several judges have argued that sufficient compensation is available in that the parents can bring their own actions. *See, e.g.*, *Graf*, 43 N.J. at 312-13, 204 A.2d at 146 (mother can bring own action for both mental and physical injuries); *Endresz*, 24 N.Y.2d at 484-85, 487-88, 248 N.E.2d at 904, 906, 301 N.Y.S.2d at 69-70, 72 (mother has cause of action for her injuries, father may sue for funeral expenses and loss of consortium, but recovery for wrongful death would be "windfall"); *Amadio*, 509 Pa. at 237, 501 A.2d at 1104 (Flaherty, J., dissenting) (parents can recover for emotional distress in separate action, allowing wrongful death suit is double recovery).

101. 210 Va. 138, 169 S.E.2d 440 (1969).

courts consider their wrongful death statute to be derivative.[102] With this presumption, the *Lawrence* court argued consistently with the *Weitl* court, stating that since an unborn child has no right to maintain an action, no action vests in the parents upon the fetus's death.[103] The *Lawrence* court maintained that if an unborn child had the standing to sue before it was born, it would necessarily follow that his or her beneficiaries should be able to bring a survival action for injuries the fetus suffered *in utero*, even in a case where the fetus is subsequently stillborn for an unrelated reason.[104]

III. ANALYSIS

A. *Does the Interaction of the Common Law Rule and Legislative Intent Act As a Bar to Recovery?*

When a court holds that the legislative intent behind wrongful death legislation precludes a statutory cause of action for recovery, the effect is to completely bar any wrongful death recovery for the death of a fetus because the common law in almost every jurisdiction provides for no cause of action.[105] The courts denying recovery under a wrongful

102. *See id.* at 140, 169 S.E.2d at 441; Sherley v. Lotz, 200 Va. 173, 176, 104 S.E.2d 795, 797-98 (1958) (wrongful death statute creates no new cause of action but continues right of decedent to bring action). *But see* Wilson v. Whitaker, 207 Va. 1032, 1036, 154 S.E.2d 124, 127 (1967) (wrongful death statute creates new cause of action; no right of action survives decedent); Anderson v. Hygeia Hotel Co., 92 Va. 687, 691, 24 S.E. 269, 271 (1896) (in passing wrongful death act, legislature "plainly did not intend to continue or cause to survive [decedent's] right of action for the injury, but to substitute for it . . . a new and original right of action"). Interestingly, both *Wilson* and *Sherley* cite the *Anderson* court in support of their respective holdings. *See* Wilson v. Whitaker, 207 Va. 1032, 1036, 154 S.E.2d 124, 127 (1967); Sherley v. Lotz, 200 Va. 173, 176, 104 S.E.2d 795, 797-98 (1958).

103. *Lawrence*, 210 Va. at 142, 169 S.E.2d at 442. The court stated that a child *en ventre sa mere* cannot maintain an action for personal injury. *Id.* at 140, 169 S.E.2d at 441. Therefore, since the fetus had no right to sue at the time of death, no right to sue passes on to the survivors. *Id.* The court even went so far as to cite the *Dietrich* rationale that a fetus is part of the mother until birth. *Id.* at 142, 169 S.E.2d at 442.

104. *Id.* at 140, 169 S.E.2d at 441.

A dissenting justice of the Rhode Island Supreme Court made a similar argument in Presley v. Newport Hospital, 117 R.I. 177, 201-02, 365 A.2d 748, 758 (1976) (Kelleher, J., dissenting). *Presley* stemmed from a malpractice action. *Id.* at 178-79, 365 A.2d at 749. A physician had prescribed drugs to induce labor; this allegedly negligent treatment resulted in the child's stillbirth. *Id.* In his dissent, Justice Kelleher argued that the term "person" must be given its ordinary meaning. *Id.* at 196, 365 A.2d at 757 (Kelleher, J., dissenting).

105. *See, e.g.*, *Justus*, 19 Cal. 3d at 573-75, 565 P.2d at 128-29, 139 Cal. Rptr. at 103-04 (holding that legislature intended to "occupy the field," thus precluding judicial intervention); Stern v. Miller, 348 So. 2d 303 (Fla. 1977) (subsequent legislation was implicit approval of prior judicial interpretation of statute). For a discussion of the various modes of interpretation of legislative intent, see *supra* notes 30-73 & 85-90 and accompanying text. For a discussion of the common law of wrongful death, see *supra* notes 9-26 and accompanying text.

death statute reason that to allow a cause of action in the case of a fetus is to expand the recovery beyond what the legislature explicitly contemplated.[106] In addition, while courts do expand the common law, the minority position is that any expansion of wrongful death recovery is improper since a wrongful death action is strictly a creation of statute.[107]

It is submitted that the reasoning of a minority of courts, to deny recovery by drawing on the lack of a common law basis for recovery and a restrictive interpretation of legislative intent, impairs legal analysis and defies logical reasoning. These courts rely on what amounts to a "constructive legislative intent," in that the minority gleans a legislative intent to deny a cause of action for the wrongful death of a fetus from the legislature's use of the term "person."[108] It is suggested that such a finding goes beyond an analysis of actual legislative intent because, as several courts have noted, the state legislatures had not actually considered whether the term person should include an unborn child.[109]

By so reasoning, the minority of courts are effectively reinstating the common law rule, a rule, it is suggested, with no logical or just basis.[110] Indeed, the decision in *Baker v. Bolton*,[111] which first established

106. For a discussion of the minority position, see *supra* notes 85-103 and accompanying text.

107. *See, e.g., Justus*, 19 Cal. 3d at 579-80, 565 P.2d at 132, 139 Cal. Rptr. at 107 (strict construction necessary when legislative intent is clear); Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977) (strict construction necessary to accomplish legislative objectives); *Weitl*, 311 N.W.2d at 217 (court's interpretive role limited to what legislature explicitly provides for in statute); Egbert v. Wenzl, 199 Neb. 573, 574, 260 N.W.2d 480, 481 (1977) (had legislature intended recovery for death of fetus, it would have specifically provided for it); Hogan v. McDaniel, 204 Tenn. 235, 241, 319 S.W.2d 221, 225 (1958) (abrogated by statute) (cannot expand recovery beyond what is unambiguously provided for in statute); *Lawrence*, 210 Va. at 213, 169 S.E.2d at 441 (court will not "presume" legislature intended any meaning of term "person" that is broader than common meaning).

108. The exact reasons for yielding to the legislature vary. *Compare Lawrence*, 210 Va. at 140, 169 S.E.2d at 441 (court refused to "presume" that legislature intended "person" to include fetus) *with Justus*, 19 Cal. 3d at 575, 565 P.2d at 128, 139 Cal. Rptr. at 108 (legislature intended to "occupy the field") *and* Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977) (past judicial interpretations exclude fetuses from class of "persons" and legislature is presumed to know this construction).

109. *See, e.g., Summerfield*, 144 Ariz. at 471, 698 P.2d at 717-18 ("it is most likely the legislature never adverted to the fetus/person issue"); *Justus*, 19 Cal. 3d at 579, 565 P.2d at 132, 139 Cal. Rptr. at 107 (court was "not so naive as to believe that the Legislature entertained any intent at all with respect to fetuses"); Britt v. Sears, 150 Ind. App. 487, 494, 277 N.E.2d 20, 24-25 (1971) (legislature "very probably gave no thought to whether they were creating an action for pre-natal injury or pre-natal death"); *Weitl*, 311 N.W.2d at 275 (Larson, J., dissenting in part) ("legislature could not be presumed to have had an intent" as to recovery for fetal death); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 360 n.8, 331 N.E.2d 916, 919 n.8 (1975) (legislative history no help in defining term "person" within context of wrongful death statute).

110. For a discussion of the basis for the common law rule, see *supra* note

the common law rule, has been criticized as nothing more than an unsubstantiated statement of law with no authority whatsoever for support.[112] While it is true that the *Bolton* decision logically follows from the felony-merger doctrine, that doctrine cannot justify adherence to the common law rule in this country because it never existed in America.[113] Furthermore, as *Moragne* and *Gaudette* indicate, the lack of recovery under English common law need not prohibit recovery presently because the right to recover for wrongful death has become so established today, as evidenced by the proliferation of wrongful death legislation, that the right to recover can be incorporated as part of the common law.[114]

In contrast to the courts permitting recovery, the California Supreme Court in *Justus* is the only court following the minority rule that considered the possibility of adopting the right to recover as part of the common law.[115] The *Justus* court refused to adopt a common law right to recovery, instead ruling that the wrongful death statute revealed a legislative intent to preclude judicial intervention to allow recovery for the death of a fetus.[116] In a concurring opinion, however, Justice Tobri-

10. *See also Summerfield*, 144 Ariz. at 471, 698 P.2d at 716 (discussing questionable bases for common law rule).

111. 170 Eng. Rep. 1033 (1808). For a discussion of *Bolton*, see *supra* note 9.

112. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808). As Prosser has phrased it, "in 1808, Lord Ellenbourgh, whose forte was never common sense, held without citing any authority that a husband had no action [for his wife's death]." W. PROSSER, THE LAW OF TORTS 901 (4th ed. 1971).

113. *Summerfield*, 144 Ariz. at 471, 698 P.2d at 716.

114. For a discussion of the possibility of adopting statutory provisions as part of the common law, see *supra* notes 11 & 35-40 and accompanying text.

An additional, but somewhat weaker, argument considered by the Arizona Supreme Court in *Summerfield* was that the common law rule from *Bolton* has never been the common law in the United States. *See Summerfield*, 144 Ariz. at 471, 698 P.2d at 716. Since *Bolton* was decided in 1808, and Arizona, like most states, had adopted the English common law only up to 1776, the *Summerfield* court questioned whether American common law had incorporated the *Bolton* decision. *Id.* If, however, any basis for the common law rule existed prior to 1776, this argument fails; thus, even the *Summerfield* court did not place great reliance on the argument. *Id.* at 472, 698 P.2d at 717-18. Additionally, most states had explicitly adopted the *Bolton* rule by judicial decision, and therefore, there would not be any common law basis for recovery in these jurisdictions. For a discussion of the American courts adopting the *Bolton* decision, see *supra* note 9. However, if the *Bolton* rule were adopted as the common law by judicial decision, these courts should be able to reject the *Bolton* rule by judicial decision as well. *See Gaudette*, 362 Mass. at 60, 284 N.E.2d at 222 (overruling Carey v. Berkshire R.R., 55 Mass. 475 (1848), which had adopted the *Bolton* holding); *see also* Evans v. Olson, 550 P.2d 924, 927-28 (Okla. 1976) (court "updating" its common law to reflect present knowledge and modern society).

115. *Justus*, 19 Cal. 3d at 573, 565 P.2d at 128, 139 Cal. Rptr. at 103 (finding legislature intended to "occupy the field" of wrongful death, making it impermissible to follow the *Moragne* approach).

116. *Id.*

ner argued that the legislature did not intend to preclude the court from recognizing a common law cause of action for wrongful death.[117] He argued that since the legislature did not explicitly preclude "[j]udicial expansion and refinement" of wrongful death concepts, the court was free to follow the lead established by the Supreme Court in *Moragne*.[118] Indeed, Justice Tobriner's view would appear to totally undercut the basis of the majority opinion in *Justus*, thus permitting judicial evolution of a common law right to recovery.

B. *The Lord Campbell Type Statute Cannot Be Read as a Bar to a Cause of Action for the Wrongful Death of a Fetus: A Suggested Interpretation of the "Had Death Not Ensued" Language*

Regardless of whether a court is unwilling to recognize a common law cause of action for wrongful death of a fetus, a court must still allow the action if the wrongful death statute permits it. Therefore, courts are forced to interpret the statute and, in so doing, a few have found that the use of the term "person" reveals a legislative intent to permit suit in the case of a fetus.[119] In comparison, several courts in the minority have concluded that the legislature had intended to preclude a cause of action for the death of a fetus by using terms such as person or child.[120] Again, it is suggested that such an argument is tenuous at best. It is quite unlikely, as many courts have openly conceded, that the legislatures, when passing their wrongful death statutes, ever considered whether the term person encompassed a fetus.[121]

117. *Id.* at 586, 565 P.2d at 136, 139 Cal. Rptr. at 111 (Tobriner, J., concurring) (arguing that there is no basis for concluding the legislature intended to preclude courts from allowing recovery in instant case but that policy concerns do support the majority's decision).

118. *Id.*

119. *See, e.g.*, Porter v. Lassiter, 91 Ga. App. 712, 715-16, 87 S.E.2d 100, 102 (1955) (statute required death of child, and definition of child deemed to include fetus from point of quickening); *Volk*, 103 Idaho at 573, 651 P.2d at 14-15 (statute required death of "minor child," court held term minor child implied upper age limit only and therefore viable fetus easily fits within definition of term "minor child"); *Hopkins*, 359 N.W.2d at 865 ("it is commonly understood that an unborn child is a . . . person").

120. *See, e.g.*, *Justus*, 19 Cal. 3d at 574-75, 565 P.2d at 129, 139 Cal. Rptr. at 105-07 (had legislature intended to include fetus within definition of person, it would have specifically done so); Stern v. Miller, 348 So. 2d 303, 307 (Fla. 1977) (legislature did not intend to include fetus within definition of term person); Egbert v. Wenzl, 199 Neb. 573, 575-76, 260 N.W.2d 480, 482 (1977) (common law did not recognize fetus as being person; thus, if legislature intended meaning other than at common law, it would specifically state it); Hogan v. McDaniel, 204 Tenn. 235, 242-45, 319 S.W.2d 221, 224-25 (1958) ("[i]t is inconceivable that the legislature contemplated the creation of [a cause of action for the wrongful death of a fetus]."); *Lawrence*, 210 Va. at 140-41, 169 S.E.2d at 441-42 (common understanding of term "person" does not include fetus).

121. For a discussion of the legislature's intentions in using the term person or similar phrases, see *supra* notes 30-73 and accompanying text.

If, as is suggested here, no legislative intent based on the use of the term person can be found,[122] then it is submitted that in determining whether a cause of action exists under a Lord Campbell type statute, the proper focus becomes whether the injured "person" would have had the ability to maintain an action had death not occurred.[123] Assuming that the state legislatures did not consider whether a fetus is a person,[124] it is suggested that so long as a fetus is of the class who could sue for the wrongful act if death had not occurred, then there is no violation of legislative intent by allowing a cause of action for the wrongful death of a fetus.

In *Weitl*, the Iowa Supreme Court denied recovery for the wrongful

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An additional argument made by some courts that hold the legislature intends to preclude recovery in cases of prenatal wrongful death hinges upon legislative inaction. *See Justus*, 19 Cal. 3d at 578-79, 565 P.2d at 131-32, 139 Cal. Rptr. at 106-07; Stern v. Miller, 348 So. 2d 303, 306 (Fla. 1977). The *Justus* court noted that on two previous occasions the court had held that unborn children were not included within statutory terms. In *Keeler v. Superior Court*, the California Supreme Court held that the homicide statute did not apply to the killing of a fetus. Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). In *People v. Yates*, the court held that a fetus was not a minor child for purposes of a child support statute. People v. Yates, 114 Cal. App. Supp. 782, 298 P. 961 (1931). The *Justus* court noted that in these two prior instances, the legislature amended the applicable statutes so as to abrogate the courts' holdings. *Justus*, 19 Cal. 3d at 578-79, 565 P.2d at 131-32, 139 Cal. Rptr. at 106-07. By comparison, the *Justus* court suggested that, since the legislature had not responded to court decisions denying a cause of action for the wrongful death of a fetus, the legislature had revealed its "clear" intent to exclude fetuses from the statute's coverage. *Id.* at 580, 565 P.2d at 132, 139 Cal. Rptr. at 107. Similarly, the *Stern* court argued that since the legislature had not amended the wrongful death statute to negate the court's past holdings, the legislature must have acceded to the court's interpretation. Stern v. Miller, 348 So. 2d 303, 306-07 (Fla. 1977).

It is submitted that legislative inaction is not necessarily an accurate indication of legislative intent. Legislative inaction should never be used in determining legislative intent until after a court has ruled on a disputed interpretation. Additionally, inquiries into legislative inaction do not always yield a definitive conclusion regarding the legislature's intent. *See Summerfield*, 144 Ariz. at 475-76, 698 P.2d at 723-24. For example, in *Summerfield*, the defendants argued that the legislature did not intend to allow recovery for a prenatal death, as evidenced by the defeat of a bill that would have allowed recovery. *Id.* However, the *Summerfield* court refused to impute an intent based on the rejection of the bill because the bill was primarily concerned with regulations in the highly controversial area of abortion. *Id.*

122. For a breakdown of the terms used in the various state statutes, see Note, *supra* note 11, at 282-85. It is submitted that regardless of whether a statute refers to a person, or a child or some other being, the proper analysis would not change.

123. This had-death-not-occurred language is, of course, the second element of the Lord Campbell type statute. For a discussion of the Lord Campbell Act, see *supra* note 8.

124. For a discussion of why it is inappropriate to focus upon legislative intent in using terms such as "person," see *supra* notes 105-118 and accompanying text.

death of a fetus.[125] However, two years later, in *Dunn*, the same court allowed a cause of action for the wrongful death of a fetus pursuant to Rule 8 of the Iowa Rules of Civil Procedure.[126] It is submitted that the true difference between these two decisions involves only the different nature of the recovery allowed by each statute. Iowa's wrongful death statute, being derivative in nature, merely preserves any rights the decedent had at the time of death.[127] Under a proper analysis of a derivative wrongful death statute, recovery can be denied by requiring a person to be born alive before any right to sue accrues.[128] In comparison, Rule 8 of the Iowa Rules of Civil Procedure is a Lord Campbell type wrongful death statute, pursuant to which the parents recover for their own damages, not for those suffered by the decedent.[129] In a proper analysis of a Lord Campbell type statute, the right of the fetus to sue at the time of death is irrelevant.[130]

It is suggested that the proper analysis of the had-death-not-ensued language of the Lord Campbell type statute requires the same analysis as the *Dunn* court gave Rule 8. Thus, if a wrongful death statute is of the survival type, that is, providing a recovery derivative in nature, a court might deny recovery for the wrongful death of a fetus by requiring that the fetus be born alive before any right of action accrues. However, under the Lord Campbell type statute, which gives the survivors their own cause of action for their own injury, the fetus need not have survived birth. All that would be required is that had the fetus survived birth, he or she could have brought an action for damages. Indeed, this view was taken by the Missouri Supreme Court in *O'Grady*,[131] and adopted by the Arizona Supreme Court in *Summerfield*[132] and the Pennsylvania Supreme Court in *Amadio*.[133]

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125. *Weitl*, 311 N.W.2d at 270-71. For a discussion of the *Weitl* decision, see *supra* notes 51-53.

126. *Dunn*, 333 N.W.2d at 831-33. For a discussion of the *Dunn* case, see *supra* note 54-57 and accompanying text.

127. *Weitl*, 311 N.W.2d at 270. For a comparison of wrongful death statutes with statutes of the derivative type, i.e., survival statutes, see *supra* note 8.

128. *See Lawrence*, 210 Va. at 140, 169 S.E.2d at 441 (to allow action of deceased fetus to pass to survivors requires that child *en ventre sa mere* be able to maintain action for injuries). For a further discussion of *Lawrence*, see *infra* notes 142-47 and accompanying text.

129. *Dunn*, 333 N.W.2d at 831-33 (Iowa wrongful death action is suit on behalf of decedent, rule 8 is action on behalf of survivors).

130. *Id.* The court noted that "[w]hat is involved here is a right of recovery given to a parent. The parent's loss does not depend on the legal status of the child; indeed, the absence of the child is the crux of the suit." *Id.* at 833.

131. 654 S.W.2d 904 (Mo. 1983). For a discussion of the *O'Grady* court's interpretation of the second prong of the Lord Campbell type statute, see *supra* notes 58-64 and accompanying text.

132. 144 Ariz. 467, 698 P.2d 712 (1985). For a discussion of the *Summerfield* court's interpretation of the had-death-not-ensued language, see *supra* notes 71-73 and accompanying text.

133. 509 Pa. 199, 501 A.2d 1085 (1985).

The *O'Grady* court held that the had-death-not-ensued language imposed a but-for requirement upon recovery for wrongful death.[134] Thus, if the defendant's conduct would have entitled the decedent to sue but-for the fact that such conduct caused the decedent's death, the survivors have their own cause of action for wrongful death.[135] The *Summerfield* court elaborated on the *O'Grady* interpretation by holding that the second prong of a Lord Campbell type wrongful death statute refers "to the circumstances under which the injury arose and the nature of the wrongful act . . . ."[136] Therefore, under this analysis, what matters is whether the defendant's conduct is legally actionable. If the child is born alive and would then be entitled to sue, the parents have their own legal action notwithstanding the fact that the child was not born alive. Under this analysis, a cause of action would accrue to the survivors for the wrongful death of a fetus because state courts unanimously hold that a surviving child can sue for injuries he or she suffered prenatally.[137] In the most recent pronouncement on the wrongful death of a fetus, *Amadio*, the Pennsylvania Supreme Court seemed to take this same approach by focusing on whether the defendant's conduct is actionable in general.

In *Amadio*, the court held that since a fetus is an individual capable of recovering for prenatal injury, logic dictates that a fetus is also an individual under the wrongful death statute.[138] In his concurring opinion, Justice Zappala highlighted the parallel between the *Amadio* and *O'Grady* analyses by stating that the right to proceed with an action for wrongful death stems from "the tort which produces death and not the death caused by the tort."[139] According to Justice Zappala's view, the "cause of action arises out of the unlawful violence or negligence."[140] As under the *O'Grady* and *Summerfield* decisions, the *Amadio* court properly focused upon whether the nature of the act gives rise to a cause of

134. *O'Grady*, 654 S.W.2d at 910.

135. *Id.*

136. *Summerfield*, 144 Ariz. at 475, 698 P.2d at 720 (quoting Barragan v. Superior Court, 12 Ariz. App. 402, 405, 470 P.2d 722, 725 (1970)). The *Summerfield* court explicitly adopted the *O'Grady* analysis. *See id.*

137. W. PROSSER & W. KEETON, *supra* note 8, at 368. For a discussion of some of the older cases first recognizing a right of a child to recover for injuries inflicted prenatally, see Annot., 40 A.L.R. 1222 (1971).

138. *See Amadio*, 509 Pa. at 204-05, 501 A.2d at 1087. For a further discussion of the Pennsylvania court's analysis, see *supra* notes 65-70 and accompanying text.

139. *Amadio*, 509 Pa. at 229, 501 A.2d at 1100 (Zappala, J., concurring) (quoting Centofanti v. Pennsylvania R.R. Co., 244 Pa. 255, 262, 90 A. 558, 561 (1914)).

140. *Amadio*, 509 Pa. at 229, 501 A.2d at 1100 (Zappala, J., concurring) (quoting Birch v. Pittsburgh C.C. & S.L. Ry., 165 Pa. 339, 346, 30 A. 826, 827 (1895)). It is submitted that Justice Zappala's argument focuses on whether the defendants' conduct is of a type that would have entitled the decedent to sue if he had survived.

action, not upon whether the decedent is capable of suing when death occurs.[141]

It is submitted that this second prong of the Lord Campbell type statute should control in interpreting whether a wrongful death action is permissible under the statute. No clear indication of legislative intent can be found in the use of a term such as "person." Indeed, the second prong of the statute can be viewed as a modifier of the first prong: if a party is one who would have been legally entitled to sue for the wrongful act inflicted upon him, then that party's survivors are entitled to bring a wrongful death action. The fact that in the case of a prenatal death the court might not recognize the child's cause of action as having accrued, since the child was never born alive, is irrelevant. The unborn child's potential cause of action can die with the child because the parents are bringing their own action, not the child's action.

To the contrary to this position, the *Lawrence* court has relied on this

141. The Pennsylvania court views its wrongful death statute as being a derivative action: "[t]he death action technically is a new cause of action, however it too is basically derivative." Carrol v. Skloff, 415 Pa. 47, 48, 202 A.2d 9, 10 (1964) (overruled by *Amadio*). This position presents a potential point of confusion with the *Amadio* approach in that, it is arguable that in order to properly allow the parents to recover for the death of a fetus under a derivative statute, the fetus must have had the right to sue before it died. *See Lawrence*, 210 Va. at 142, 169 S.E.2d at 442. For an analysis of the *Lawrence* court rationale, see *infra*, notes 142-47 and accompanying text. This same criticism is applicable in regard to the *Amadio* court's decision to allow suit for the death of a fetus based on its survival statute, since a survival statute is also derivative and requires that the child be born alive. *See Amadio*, — Pa. at —, 501 A.2d at 1087, 1089. It is submitted that a wrongful death recovery under Pennsylvania law is not derivative. The fact that it is a *new* cause of action by the decedent's survivors for their own injuries, as opposed to the decedent's own cause of action, means it is not truly a derivative action. *See* W. PROSSER, *supra* note 112, at 901; *see also* Harvey v. Hassinger, 315 Pa. Super. 97, 102-03, 461 A.2d 814, 816 (1983) (citing Pezzulli v. D'Ambrosia, 344 Pa. 643, 647, 26 A.2d 659, 661 (1942)) (wrongful death is new cause of action whereas survival action only preserves decedent's right of action in his or her representatives). The death action could not be derivative because the decedent could never have had the right to sue for the damages available under the wrongful death statute. Such right exists solely in the survivors and is only "derivative" in the sense that the right exists only because of the death of the decedent. *See* W. PROSSER, *supra*, at 902.

Moreover, the difference in the nature of the recovery allowed under Pennsylvania's wrongful death and survival statutes demonstrates that Pennsylvania's wrongful death recovery is not derivative. The damages allowable in Pennsylvania under a survival action include loss of past and future earnings that the decedent would have accrued, decedent's pain and suffering, and medical expenses. McClinton v. White, 285 Pa. Super. 271, 277, 427 A.2d 218, 221 (1981). In contrast, damages for wrongful death include the loss suffered by the beneficiaries under the statute: earnings by decedent that would have benefited the beneficiaries, services and gifts that the decedent would have provided the beneficiaries, medical expenses, and funeral expenses. *Id.* The categories of damages are basically distinct except for some overlap in regard to medical expenses and possible future earnings. For a general discussion of the distinction between a derivative action and a nonderivative action, see *supra* note 8.

second element of a wrongful death statute to deny recovery for the wrongful death of a fetus.[142] In *Lawrence*, the court viewed the recovery allowable under its Lord Campbell type wrongful death statute as derivative in nature,[143] although the Virginia courts have not actually labeled the cause of action as derivative.[144] Specifically, the *Lawrence* court implicitly viewed the Virginia wrongful death statute as derivative by holding that unless the decedent had the right to sue at the time of death, no right to sue could pass to the decedent's survivors.[145] Since the court refused to recognize any right in an unborn child to sue, naturally no right to recovery passes to the unborn child's parents.[146] It is suggested that the *Lawrence* court's analysis is actually an analysis of a survival action and is simply incorrect under a wrongful death statute. The court's analysis ignores the conditional phrase in a Lord Campbell type wrongful death statute: a cause of action for wrongful death exists when the decedent himself would have been able to sue *if* he had survived. Obviously, the right of the decedent himself to sue is conditional upon the decedent surviving the tort, but nothing in the wrongful death statute reasonably can be construed to require that the decedent's right to go to court must have existed before death. In effect, the *Lawrence* court's analysis mistakenly equates the ability to sue under a survival statute with the ability to sue under a Lord Campbell type wrongful death provision.[147]

142. *Lawrence*, 210 Va. at 140, 169 S.E.2d at 441 (if decedent has no right to sue at time of death, no wrongful death action passes to decedent's representatives). For a discussion of the *Lawrence* court's opinion, see *supra* notes 100-04 and accompanying text.

143. *Id.*

144. In fact, prior decisions by the Virginia Supreme Court have held that its wrongful death statute is not derivative. *See, e.g.*, Wilson v. Whittaker, 207 Va. 1032, 1036, 154 S.E.2d 124, 129 (1967) (holding wrongful death act does not cause action to "survive," but creates "new right of action"); Anderson v. Hygeia Hotel Co., 92 Va. 687, 691-92, 24 S.E. 269, 271 (1896) (holding wrongful death act not derivative—actually new cause of action and not survival of decedent's own action). It is submitted that the *Lawrence* court's holding contradicts the clear precedent of both *Wilson* and *Anderson*. For a discussion of the confusing interpretation by the *Lawrence* court of its wrongful death statute, see *supra* note 103.

145. *See Lawrence*, 210 Va. at 140-41, 169 S.E.2d at 441.

146. *Id.*

147. The *Lawrence* court attempted to support its conclusion by proposing an interesting hypothetical: suppose an unborn child is injured but ultimately dies before birth for unrelated reasons. *See id.* The *Lawrence* court opined that allowing a cause of action for the wrongful death of a fetus would also require allowing a survival action for the injuries suffered by the fetus. *Id.* However, such is not the case. Even assuming that damages could be proven in the court's hypothetical, recovery can indeed be denied using the court's own reasoning. Since the hypothetical involves a survival action, the court would require that the right to sue exist in the decedent before birth. However, since the *Lawrence* court refused to recognize that an unborn child can bring an action, no cause of action survives the death of the fetus to be passed on to its representatives. Thus, under the court's hypothetical, a survival action would not lie. *See also*

C. *Policy Considerations—The Balance is in Favor of Allowing Recovery*

The preceding sections have discussed the problem in discerning a legislative intent behind wrongful death legislation and have proposed a construction of the Lord Campbell type statute that would allow a cause of action for the wrongful death of a fetus, without an unnecessarily strained construction of the wrongful death legislation. The question still remains whether a recovery for the wrongful death of a fetus should be allowed at all. It is submitted that the policies underlying a typical wrongful death statute militate strongly in favor of recovery.

Most courts are in agreement that the two primary purposes of a wrongful death statute are to compensate the decedent's survivors and to deter dangerous conduct.[148] In light of these legislative purposes, it is entirely consistent to allow recovery for the wrongful death of a child, regardless of whether that child survives birth. It is submitted that the majority is simply proposing a fair and logical approach. One individual should not be liable for conduct that causes injury while a second individual is not liable for similar conduct which causes death. To hold otherwise has been criticized as "rewarding" the tortfeasor for killing his victim.[149] The equity in the majority approach is illustrated by considering the hypothetical of identical twins where both are simultaneously injured by the same act, but one dies just prior to birth whereas the second dies after birth.[150] There is neither a logical nor just reason for allowing a cause of action for the death of the second twin, while denying an opportunity for compensation for the death of the first twin.

The New York Court of Appeals, in *Endresz*, attempted to justify the minority position by asserting that compensation is just when a child survives birth and must therefore face a life burdened with the result of another's negligence.[151] However, according to the court, no compensation would be required if the child is never born alive.[152] This argu-

Presley v. Newport Hosp., 117 R.I. 177, 196, 365 A.2d 748, 756 (1976) (Kelleher, J., dissenting) (wherein Justice Kelleher posits hypothetical similar to that of *Lawrence* court).

148. For a discussion of the policy concerns behind wrongful death legislation, see *supra* notes 81-84 and accompanying text.

149. *See, e.g., Summerfield*, 144 Ariz. at 476-77, 698 P.2d at 722 (illogical to deny recovery if fetus dies immediately before birth but allow recovery if it dies immediately after birth); *Endresz*, 24 N.Y.2d at 491-92, 248 N.E.2d at 908, 301 N.Y.S.2d at 75-76 (Burke, J., dissenting in part) (denying recovery for stillbirth leads to incongruous results); Presley v. Newport Hosp., 117 R.I. 117, 188-89, 365 A.2d 748, 753 (1976) (illogical to deny recovery for death of any fetus); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967) ("absurd" result to impose liability for injury but not death).

150. The Ohio Court of Appeals advanced this hypothetical in Stidham v. Ashmore, 109 Ohio App. 431, 432, 167 N.E.2d 106, 108 (1959).

151. *See Endresz*, 24 N.Y.2d at 483, 248 N.E.2d at 903, 301 N.Y.S.2d at 68-69 (compensation only required where negligence of another causes one to begin life impaired).

152. *Id.*

ment is incorrect, however, in that under the wrongful death legislation, the purpose is not to compensate the victim; the purpose is to compensate the survivors for the losses they suffer.[153] Therefore, regardless of whether the stillborn child really suffered any damages, the parents still are entitled to compensation.[154]

IV. CONCLUSION

It is submitted that no valid reason exists today for refusing to allow a cause of action for the wrongful death of a fetus. The legislatures have remedied the unjust common law rule that precluded any recovery for the death of another, but it is submitted that the current legislation should be construed as protecting the unborn child as well. If it is not, an outdated, inadequate, and unjust common law rule that should have never even existed in the United States is effectively reinstated. There is no barrier, it is suggested, to the state courts interpreting the term person to include a fetus. Indeed, under the proposed construction of the typical wrongful death statute, allowing recovery is entirely appropriate. Justice and logic require that the interpretive gap in the laws of some states, which allows a death to go uncompensated, be filled. As Justice Cardozo once stated, "[d]eath statutes have their roots in dissatisfaction with the archaisms of the law . . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."[155]

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153. *See* W. PROSSER & W. KEETON, *supra* note 8, at 949. The law in New York clearly follows the principle that damages recoverable under a Lord Campbell type statute are the pecuniary losses suffered by the statutory beneficiaries and not any loss suffered by the decedent. Fornaro v. Jill Bros., Inc., 42 Misc. 2d 1031, 1032-34, 249 N.Y.S.2d 833, 836-38 (1964), *rev'd on other grounds*, 22 A.D.2d 695, 253 N.Y.S.2d 771, *aff'd*, 15 N.Y.2d 819, 205 N.E.2d 862, 257 N.Y.S.2d 938 (1965).

154. For a related argument, see *Amadio v. Levin* wherein the three dissenting judges, in three separate opinions, argued that the parents could recover for their own mental distress in separate actions and that allowing a wrongful death action would allow a double recovery. Amadio v. Levin, 509 Pa. 199, 230, 237, 501 A.2d 1085, 1101, 1104, 1105 (1985) (Nix, Flaherty, and Hutchinson, JJ., dissenting). However, a suit for wrongful death allows recovery for much more than just mental distress. For a discussion of the damages recoverable under the Pennsylvania wrongful death statute, see *supra* note 141. Thus, the dissenters' position in *Amadio*, like that of the majority in *Endresz*, denies the parents the full recovery that is proper under a Lord Campbell type wrongful death statute.

155. Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937).