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ARISTOTLE, ABORTION, AND FETAL RIGHTS

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> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities.[1]

I. INTRODUCTION AND OVERVIEW

In December 2006, National Geographic presented a highly acclaimed special on animals in the womb.[2] Through modern technology, the viewers watched the fascinating development of

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

2. *See In the Womb: Animals* (National Geographic Channel television broadcast Dec. 10, 2006).

baby elephants, cuddly preborn puppies, and a host of other living things still in their mothers' wombs. As one prominent commentator pointed out, the show evoked an affective response by the audience, a seemingly natural sense of wonderment coupled with a protective instinct toward such vulnerable and remarkable "babies."[3]

The irony noted by the commentator is that when abortion is involved, showing ultrasound images of a fetus to a mother is considered manipulative and intimidating.[4] Measures meant to ensure that mothers considering an abortion view such ultrasound images have been vigorously opposed.[5] In some cases, these measures have even been struck down by courts.[6] In addition, the protective instincts evoked by a preborn puppy do not seem to be matched by a similar concern for the "products of conception" that is discussed in abortion cases or in the public controversy long swirling around *Roe v. Wade*.[7] While this curious, emotional disconnect in affective reasoning may be of interest to a newspaper columnist, there appears to be a more serious contradiction emerging in the law with respect to legal protections given to a fetus.

In August 2002, an Arkansas district judge placed an unborn child in the custody of the state.[8] The court based its decision on the fact that the mother of the child was using illegal drugs and had declined to receive any prenatal care.[9] The district judge found that the interests of the child were of enough importance and legal significance to warrant placing it in state custody by

3. *See* Kathleen Parker, *The Elephant and the Embryo*, ORLANDO SENTINEL, Dec. 3, 2006, at A23.

4. *See id.*

5. *See* American Civil Liberties Union, *Burdensome Clinic Regulations*, Mar. 6, 1996, http://www.aclu.org/reproductiverights/abortion/16524res19960301.html (describing the showing of ultrasound images as "unnecessary" abortion clinic regulations).

6. *See, e.g.*, Summit Med. Ctr. of Ala., Inc. v. Riley, 318 F. Supp. 2d 1109 (M.D. Ala. 2003) (invalidating a law requiring, among other things, a mother considering an abortion be shown color photographs of the fetus in cases where live birth was not possible).

7. *See, e.g.*, Carhart v. Stenberg**,** 192 F.3d 1142, 1146 (8th Cir. 1999) (describing one method of second-trimester abortion as "remov[ing] the fetus and other products of conception").

8. *See* Arkansas Dep't of Human Servs. v. Collier, 95 S.W.3d 772, 773–74 (Ark. 2003).

9. *Id.*

detaining the mother.[10] The judge ordered the mother to cease using illegal drugs and later found her in contempt for failure to follow those instructions.[11] The judge also ordered that prenatal care be initiated.[12]

Though later reversed on appeal,[13] the district judge's decision reflects a willingness to interfere with the mother's liberties and to subordinate her interests to those of her unborn child in a way that mirrors the premises underlying a developing body of fetal rights law. That development might be called, using the words of Justice Blackmun in another context, a surprisingly "preternatural solicitousness" for a "non-person."[14] In other contexts, courts have held that the mother has an essentially untrammeled constitutional right to terminate the life of that fetus without consequence and with the full protection of the law.[15] The Arkansas judge's ruling suggests that a mother's rights are trumped by the interests of her unborn child in avoiding physical harm, unless of course she decides to abort it—in which case the interests of the child in life itself are wholly disregarded and the mother's right is supreme.[16]

While logic may not be the life of the law in all circumstances, should logic and law be at swords' point? One does not have to be an Aristotelian to recognize the law of non-contradiction. This principle states that it is impossible for a thing to be and not to be at the same time and in the same respect.[17] When it comes to the personhood of the unborn, the law of logic is today sorely challenged by the collision course of fetal rights laws and abortion laws. These two areas of law seem to run on parallel tracks without any connecting principles.

In her dissent to the 1982 Supreme Court case *City of Akron v. Akron Center for Reproductive Health, Inc.*, Justice Sandra Day O'Connor famously predicted that *Roe v. Wade* was on a "collision

10. *See id.*
11. *Id.*
12. *Id.* at 774–75.
13. *Id.* at 781–82.
14. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (suggesting that the Court exhibited "preternatural solicitousness" for corporate well-being and callousness towards the investing public in a securities law case).
15. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding that Texas criminal abortion statutes prohibiting abortion at any stage of the pregnancy, except to save the mother's life, are unconstitutional).
16. *See id.*
17. *See* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, PRINCIPLE OF CONTRADICTION 644 (Robert Audi ed., 1995).

course with itself."[18] Justice O'Connor was speaking, of course, specifically about the trimester framework established by *Roe*.[19] But her comments have an even more salient application when viewed in light of the developing law of "fetal rights." Fetal rights laws confer upon the unborn child the status of a human being who is entitled to the normal protection of the law.[20] In contrast, abortion law relegates the status of the unborn to, at best, "potential human life" in order to safeguard the privacy and interests of the mother.[21] How long can these contradictory ideas continue to coexist?

II. DEVELOPMENT OF FETAL RIGHTS LAWS

American law has for some time been moving in the direction of recognizing unborn children as "persons." Thirty-four of the fifty states have statutes criminalizing the killing of an unborn child outside the domain of now-legal abortions.[22] While not all of these

18. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458 (1982) (O'Connor, J., dissenting).

19. *See id.* at 458–59.

20. *See infra* Part II.A–C.

21. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000) (affirming, among other things, that the state has a legitimate interest in protecting potential human life, but found that interest subordinate to the privacy and safety of the mother).

22. *See* ALA. CODE § 13A-6-1 (LexisNexis 2000 & Supp. 2006) (establishing that a fetus at any stage of development is a person for the purposes of state laws dealing with murder, manslaughter, criminally negligent homicide, and assault); ALASKA STAT. §§ 11.41.150–.180, .280–.289 (2006) (criminalizing murder, manslaughter, negligent homicide, and assault of an unborn child); ARIZ. REV. STAT. ANN. §§ 13-1102 to -1105 (2001 & Supp. 2006) (stating that an unborn child at any stage of development is considered a person for purposes of the state's murder and manslaughter statutes); ARK. CODE ANN. § 5-1-102(13)(b)(i)(a) (2006) (defining a person under Arkansas's murder, manslaughter, and negligent homicide laws to include unborn children of twelve weeks or greater gestation); CAL. PENAL CODE § 187 (West 1999) (defining murder as the killing of a human being "or a fetus"); FLA. STAT. ANN. § 782.09 (West 2000 & Supp. 2007) (criminalizing the unlawful killing of an "unborn quick child" as murder in the same degree had the crime been committed against the mother); GA. CODE ANN. §§ 16-5-28, -29, -80 (2003 & Supp. 2006) (criminalizing the acts of assault, battery, and feticide of an unborn child at any stage of development); IDAHO CODE ANN. §§ 18-4001, -4006 (2004) (defining murder and manslaughter as including the killing of a human embryo or fetus); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2002) (establishing, as a crime, the intentional homicide of an unborn child); IND. CODE ANN. §§ 35-42-1-1, -3, -4 (West 2004 & Supp. 2006) (killing of a viable fetus is murder, voluntary manslaughter, or involuntary manslaughter); Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004) (ruling that a viable fetus is a "person" for purposes of KY. REV. STAT. ANN. § 507.020 (LexisNexis 1999), which criminalizes murder of a "person"); LA. REV. STAT. ANN. §§ 14:32.5–.8 (1997 & Supp. 2007) (establishing first-, second-, and third-degree feticide); MD. CODE ANN., CRIM. LAW

states provide complete protection for the unborn, all provide at least some level of protection. For example, in California, the death penalty may be imposed for the killing of a fetus.[23] The California Supreme Court has ruled that "fetal viability is not a required element" of fetal murder under the California statute criminalizing such conduct.[24] Pennsylvania law imposes the same penalty for the murder of an unborn child as for the murder of any other person[25]—the only exception being that the death penalty

§ 2-103 (LexisNexis Supp. 2006) (stating that the term "person" includes a viable fetus for purposes of criminal law); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (holding that the killing of a viable unborn child is "murder" under the common-law definition of the term); MICH. COMP. LAWS § 750.322–.323 (2004) (MICH. STAT. ANN. § 28.554–555 (2006)) (killing of a viable fetus is manslaughter); MINN. STAT. §§ 609.266–.2691 (2006) (criminalizing murder and manslaughter of an unborn child); MISS. CODE ANN. § 97-3-19(1)(d) (2006) (defining murder as including the deliberate killing of an unborn child); MO. ANN. STAT. § 1.205 (West 2000) (stating that an unborn child is a "person," construed to apply to manslaughter and murder statutes in *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992) and *State v. Holcomb*, 956 S.W.2d 286 (Mo. App. 1997)); NEB. REV. STAT. ANN. §§ 28-391 to 28-3,101 (LexisNexis 2003 & Supp. 2006) (criminalizing murder, manslaughter, motor-vehicle homicide, and assault of an unborn child); NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2006) (imposing manslaughter for a person who willfully kills an unborn quick child); N.D. CENT. CODE §§ 12.1-17.1-01 to 12.1-17.1-06 (1997) (criminalizing murder, manslaughter, negligent homicide, and assault of an unborn child); OHIO REV. CODE ANN. §§ 2903.01–.06 (West 2006) (applying murder, manslaughter, and homicide statutes to the "unlawful termination of another's pregnancy"); OKLA. STAT. ANN. tit. 21, § 691 (West Supp. 2007) (stating that definition of "human being" for purposes of homicide statute includes an unborn child); 18 PA. CONS. STAT. ANN. §§ 2601–2609 (West 2006) (criminalizing homicide, manslaughter, and assault of an unborn child); R.I. GEN. LAWS § 11-23-5 (2002) (criminalizing the "willful killing of an unborn quick child" as manslaughter); S.C. CODE ANN. § 16-3-1083 (Supp. 2006) (making a separate offense for the death or bodily injury of an unborn child); S.D. CODIFIED LAWS § 22-16-1.1 (2006) (criminalizing fetal homicide if the person knew or reasonably should have known that the mother was pregnant); TENN. CODE ANN. § 39-13-107 (2006) (stating that a viable fetus is an "individual" for purposes of being a victim under criminal law); TEX. PENAL CODE ANN. §§ 1.07, 19.01 (Vernon 2003 & Supp. 2006) (criminalizing the "death" of an "individual" and defining an unborn child as an "individual" who dies if not born alive); UTAH CODE ANN. § 76-5-201 (2003) (stating that criminal homicide includes causing the death of an unborn child at any stage of its development); VA. CODE ANN. § 18.2-32.2 (2004) (making a felony of killing another's fetus); WASH. REV. CODE. ANN. § 9A.32.060(1)(b) (West 2000) (defining manslaughter as applying to killing of unborn quick child); W. VA. CODE ANN. § 61-2-30 (LexisNexis 2005) (recognizing an embryo or fetus as a victim for criminal law); WIS. STAT. ANN. §§ 940.01–.02, 940.04–.06 (West 2005) (stating that homicide and murder statutes apply to unborn children).

23. *See* People v. Davis, 872 P.2d 591, 593 (Cal. 1994).

24. *Id.* at 594.

25. *See* 18 PA. CONS. STAT. ANN. § 1102(a)(2) (West 2006).

may not be imposed for the murder of an unborn child.[26] In addition to imposing criminal penalties for killing an unborn child, every state now provides civil remedies for intentionally or negligently injured unborn children.[27]

A. Fetal Rights in Tort Law—Wrongful Death and Injuries Caused by Negligence

1. Common Law and the "Born Alive" Rule

Among the first steps in recognizing fetal rights was to allow a child who had been "born alive" to bring a civil action against a party who had in some way injured the child before birth. Known as the "Born Alive" Rule, this right was readily recognized at common law[28] and favorably spoken of by Sir William Blackstone, Sir Edward Coke, and other prominent English jurists of the seventeenth century.[29] The "Born Alive" Rule allowed recovery only in cases where a child had been born alive—it did not allow recovery for the wrongful death of a fetus.[30] This law was gradually accepted in the United States until every jurisdiction allowed recovery for prenatal injuries if the child was born alive.[31] But this development of the law did little to further the recognition of a fetus as a "person" before birth.

Fetal rights were not materially furthered by this recognition, arguably because it is only reasonable for a child who has suffered prenatal injuries to have some legal recourse upon birth. Justice

26. *See id.*

27. *See* Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) (citing RESTATEMENT (SECOND) OF TORTS § 869 reporter's note on subsec. (1) (1982); KEETON ET. AL., PROSSER AND KEETON ON TORTS § 55 at 368 (5th ed. 1984)).

28. *See* Mary Lynn Kime, Note, *Hughes v. State: The "Born Alive" Rule Dies a Timely Death*, 30 TULSA L.J. 539, 540–41 (1995) (explaining that "[b]y the seventeenth century, the English common law fully embraced the 'Born Alive' Rule" which imposed civil liability for injury to a fetus so long as the child was born alive).

29. *Id.* at 541–42 n.27 (citing SIR EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND *50; SIR WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *198).

30. *See id.* at 541 (explaining the rationale for the live-birth requirement—specifically that the "primitive knowledge of human life in the womb" made it difficult, if not impossible, "to establish that the child was alive in the womb at the time of the defendant's [wrongful] acts").

31. *Id.* at 541–42. *See* Womack v. Buchhorn, 187 N.W.2d 218, 219–22 (Mich. 1971) (describing the historical timeline by which U.S. jurisdictions began allowing recovery for prenatal injuries).

McGuire confirmed this notion when he stated in *Bonbrest v. Kotz*[32] that "[i]f a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy . . . ."[33] These questions naturally arise: If it inflicts a wrong to injure a child prenatally, is it not the infliction of a greater wrong to kill a child prenatally? And should there not be a remedy for tortious conduct resulting in the death of the unborn child? The next step logically was to allow recovery for wrongful death. Accordingly, courts, such as those in Minnesota, began extending fetal rights laws to provide protection for the unborn in cases where the infant was not born alive.

2. *Minnesota Disregards the "Born Alive" Rule*

In 1949, the Minnesota Supreme Court, in *Verkennes v. Corniea*,[34] became the first to allow recovery under a wrongful death theory for a stillborn child.[35] Verkennes's wife and child died as a result of allegedly negligent hospital care.[36] The child was not born alive.[37] A lower state court granted the defendant hospital's motion for a demurrer under the reasoning that the child decedent, whom the plaintiff was claiming the wrongful death of, was never a person in being.[38] The Minnesota Supreme Court disagreed with this reasoning and allowed the father to recover even though the child had not been born alive.[39] The court required that the child be viable at the time the injuries were sustained.[40] The court considered viability to be the point in time when the child was capable of life independent of the mother.[41]

32. 65 F. Supp. 138 (D. D.C. 1946). In this case, the court held that an infant, through her father and next friend, had a right of action for injuries she suffered as a result of allegedly being removed from her mother's womb through professional malpractice. *Id.* at 142–43.

33. *Id.* at 141 (quoting the Supreme Court of Canada in Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337, 344–45).

34. 229 Minn. 365, 38 N.W.2d 838 (1949).

35. *See id.* at 370–71, 38 N.W.2d at 841.

36. *Id.* at 366–67, 38 N.W.2d at 839.

37. *Id.* at 366, 38 N.W.2d at 839.

38. *Id.*

39. *Id.* at 370–71, 38 N.W.2d at 841.

40. *See id.* (concluding that where an unborn child is viable—having a "capacity for a separate and independent existence"—but is later destroyed through a wrongful act, then a cause of action under Minnesota's wrongful-death statute arises).

41. *See id.* at 368, 38 N.W.2d at 840 (quoting Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting)).

3. Tort Recovery in Other States

In following years, courts were split as to whether a child had to be born alive in order to recover damages in a civil action. The Minnesota view was that a plaintiff could recover in a wrongful death action in the case of a viable stillborn child,[42] whereas courts in other states, such as Indiana, held to the common-law "born alive" rule.[43]

But would courts take a third step? Would they grant civil protection to a pre-viable fetus? In 1976, the Rhode Island Supreme Court, in *Presley v. Newport Hospital*,[44] stated that:

> Reliance on the viability distinction has been spurned in several cases concerning prenatal injuries to individuals who survive birth and are forced to carry the scars of their early injuries through life. A recent line of cases has cast the viability distinction aside as an anomaly owing its existence to long outmoded concepts of both science and law.[45]

The court went on to state that:

> Simple precepts of logic have carried this small area of the law to a point far removed from the position adopted by Mr. Justice Holmes in *Dietrich v. Northampton* . . . . The momentum of that logic together with our previous holding in *Sylvia* carry us now to the inescapable conclusion that viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability when enlisted to serve the same purpose, is a

42. *See id.* at 370–71, 38 N.W.2d at 841.

43. *See, e.g.*, Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002) (requiring a child to be "born alive" for purposes of state's wrongful death statute); Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 636–37 (Ind. 1991) (quoting the "born alive" rule found in the RESTATEMENT (SECOND) OF TORTS § 869 (1979) with approval). *See also* IND. CODE ANN. § 35-41-1-14 (West 2004) (defining "human being" as an individual who has been "born and is alive").

44. 365 A.2d 748 (R.I. 1976).

45. *Id.* at 752.

veritable *non sequitur*.[46]

Viability as the borderline of personhood had collided with logic and logic was deemed the winner. But logic's victory was both partial and temporary. *Presley* came to represent only a small minority of the courts and was later rejected, as dictum, in *Miccolis v. AMICA Mutual Insurance Co.*[47] Gradually, however, the shift toward full recognition of fetal rights continued.

With regard to the current status of wrongful death law as it pertains to the fetus, the Arkansas Supreme Court recently stated in *Aka v. Jefferson Hospital Ass'n*:[48]

> Thirty-two jurisdictions permit a wrongful-death action on behalf of a viable fetus. (Of those thirty-two jurisdictions, four permit an action for an unviable fetus (Connecticut, Missouri, South Dakota, and West Virginia)). Four jurisdictions permit an action, even for unviable fetuses, but have a live birth or stillbirth requirement (Louisiana, Maryland, Oklahoma, and Pennsylvania). One jurisdiction permits an alternative remedy by allowing an action for damages resulting in stillbirth caused by negligence (Florida). One jurisdiction noted in dicta that a wrongful-death action might be permitted but declined to reach the merits on procedural grounds (Utah). Three jurisdictions prohibit an action for an unborn nonviable fetus but have not reached the issue of whether a viable fetus may maintain an action (Alaska, Oregon, and Rhode Island). Four jurisdictions have no case law on the issue (Colorado, Guam, Puerto Rico, and Wyoming). Only nine jurisdictions, including Arkansas, reject a wrongful-death action for a viable fetus.[49]

In *Jefferson Hospital*, the Arkansas Supreme Court reversed its prior position on the viability issue.[50] Accordingly, Arkansas no longer rejects wrongful death actions for a viable fetus.[51]

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46. *Id.* at 753.

47. 587 A.2d 67, 70 (R.I. 1991) (contending that *Presley* dealt solely with a full-term viable fetus and therefore "the philosophic analysis engaged in by the plurality was merely dictum, however scholarly and comprehensive may have been the terms in which it was presented").

48. 42 S.W.3d 508 (Ark. 2001).

49. *Id.* at 515 n.2.

50. *Id.* at 516–18 (overruling *Chatelain v. Kelley*, 910 S.W.2d 215 (1995) after the Arkansas legislature amended the definition of "person" in its criminal code to afford protection to unborn viable fetuses).

51. *See id.* at 517–18.

The "allegiance to reason" alluded to in *Presley*[52] should render irreconcilable this growing recognition of fetal rights in tort law with the constitutional right of abortion recognized in *Roe v. Wade*.[53] When is the act of intentionally causing the death of a viable or non-viable fetus "wrongful"? Since the Supreme Court has held that a woman has a constitutional right to have an abortion, jurisdictions allowing for recovery in cases involving the wrongful death of a fetus must make an exception for legalized abortion. A wrongful death action may not be brought where the person who caused the death of the fetus was a doctor acting at the behest of the mother. But if jurisdictions recognize the reality of prenatal death, does that not imply prenatal life? And if that "life" has a right independent of its mother, does not abortion itself bring death, even if not legally wrongful?

The way out of this dilemma typically chosen by the courts is to shift the focus to consent. A legal abortion is done with the consent of the mother; in a wrongful death or personal injury action on behalf of a fetus, the mother has not consented to the death of the fetus.[54] Although the absence of the mother's consent seems to be the deciding factor at the moment in deciding whether the destruction of the unborn child is lawful or not, it is not, on its face, an entirely satisfying solution. If tort law recognizes preborn life and a preborn right to live independent of the mother, why should there be no consideration of these "rights" when they collide with the intentional decision of the mother to destroy that life?

B. Fetal Rights in Criminal Law—Fetal Homicide

1. Common Law

In the same way that tort law, given the "momentum of logic"

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

53. *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

54. *See* People v. Davis, 872 P.2d 591, 599 (Cal. 1994); People v. Ford, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991); State v. Merrill, 450 N.W.2d 318, 321–22 (Minn. 1990). *See also* Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 197 (1998) (distinguishing *Roe v. Wade* from fetal homicide legislation on the grounds that the latter purports to criminalize the killing of a fetus without the mother's consent, whereas the *Roe* decision "does not protect, much less bestow on an assailant, the right to destroy a fetus").

referred to in *Presley*,[55] has been marching inexorably in the direction of recognizing the rights of a fetus, criminal law has also been making strides in the same direction. The criminal law, at least in recent years, has been moving briskly toward the recognition of the personhood of the unborn. States have enacted legislation that imposes harsh penalties for the killing of an unborn child.[56] This was, of course, not always the case.

Crimes involving murder, or "homicide," were originally part of the common law.[57] The common law treatment of a fetus is still referenced today as a guide for how statutes based on and incorporating common-law crimes should be understood.[58] Discussion of the criminal killing of a fetus at common law is inextricably linked to the history of abortion because both relate to the termination of a pregnancy.

The primary common-law authorities on the criminal treatment of the fetus are Bracton, Coke, and Blackstone. Bracton's statement on the subject early in the thirteenth century in his *Laws and Customs of England* is usually taken as a starting point. Bracton indicates that the concept of quickening affected the determination of fetal homicide: "If there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused an abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."[59] Blackstone agreed that "quickening" was a necessary element of any killing of an unborn child, and stated:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth, in her body, and she is delivered of a dead child; this, though not murder, was by the

55. *Presley,* 365 A.2d at 753.

56. *See supra* note 22 and accompanying text.

57. *See* Keeler v. Super. Ct. of Amador County, 470 P.2d 617, 620–22 (Cal. 1970) (reviewing the historical origins and development of common-law "abortional homicide").

58. *See, e.g.*, Meadows v. State, 722 S.W.2d 584, 585 (Ark. 1987); State v. Anonymous, 516 A.2d 156, 158–59 (Conn. Super. Ct. 1986); Larkin v. Cahalan, 208 N.W.2d 176, 180 (Mich. 1973); State v. Loomis, 97 A. 896, 896–97 (N.J. 1916).

59. *See* Salazar v. St. Vincent Hosp., 619 P.2d 826, 828 (N.M. Ct. App. 1980) (quoting 2 BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 279 (Twiss ed. 1879)).

> ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.[60]

Coke concurred with Blackstone:

> If a woman be quick with childe, and by potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.[61]

Simply stated, at common law, the killing of an unborn child was not a murder. The common law considered such a killing to be a lesser crime. And while the common law did recognize that the killing of an unborn child was wrong, in the eyes of the criminal law, a fetus was not afforded the rights of a child that had been born alive.

The controversy about criminalizing the taking of viable fetal life has been long and contentious. Coke's view—that an unborn child cannot be the victim of a murder since it is not yet a person in being—still has its adherents. Others continue to contend that if a child were to be killed while yet unborn, the perpetrator should be punished as though he had murdered an adult. The decisions of courts have reflected this disagreement, using various rationales to support their positions.[62] While some courts have ruled that one who kills an unborn child must be punished to the full extent of the law as if they had killed an adult, other courts have disagreed.[63]

60. SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *129–30.

61. SIR EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND *50.

62. *See* People v. Dennis, 950 P.2d 1035 (Cal. 1998) (finding that where defendant killed his former wife and her unborn child, the fetal homicide was included under California Penal Code section 190.2(a)(3), which provides that a person may be sentenced to life in prison without the possibility of parole or death if convicted of more than one murder); People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991) (upholding an Illinois Statute that imposes a penalty for the intentional homicide of an unborn child which is the same as the penalty for first degree murder, except that the death penalty may not be imposed; the defendant was sentenced to twenty years in prison for the intentional homicide of a fetus); Commonwealth v. Bullock, 868 A.2d 516 (Pa. Super. Ct. 2005) (upholding sentence of lower court where defendant killed his girlfriend and her unborn child, even though sentence was greater for the murder of the mother than it was for the murder of the child).

63. *See* cases cited *supra* note 62.

2. State Unborn Victims of Violence Acts

It has not been until recently that state legislatures have enacted laws that give the same criminal-law protection to a fetus as to a child who has been born alive. Thirty-four states now have fetal homicide laws that provide at least some level of criminal law protection for the unborn.[64] Of these thirty-four states, twenty-four have laws that protect the fetus from conception until birth.[65] To give some examples:

Alabama

On July 1, 2006, the Alabama legislature amended the Code of Alabama to include as a "person" or "human being," "an unborn child in utero at any stage of development, regardless of viability."[66] An unborn child is to be so considered for purposes of the state laws dealing with murder, manslaughter, criminally negligent homicide, and assault.[67]

Arizona

Arizona's murder and manslaughter statutes apply fully to any "unborn child in the womb at any stage of its development."[68] For purposes of establishing the level of punishment for violent crime, a victim who is "an unborn child shall be treated like a minor who is under twelve years of age."[69]

Minnesota

Since 1968, Minnesota has considered the killing of an unborn child at any stage of development to be murder (first-, second-, or third-degree), or manslaughter (first- or second-degree).[70] Minnesota has also established a felony murder rule, making it a felony to cause the death of an unborn child during the commission of a felony.[71] Additionally, causing the death of an unborn child through the operation of a motor vehicle is criminal

64. *See* sources cited *supra* note 22.
65. *See* sources cited *supra* note 22.
66. *See* ALA. CODE § 13A-6-1 (LexisNexis 2000 & Supp. 2006).
67. *See id.*
68. *See* ARIZ. REV. STAT. ANN. §§ 13-1102 to -1105 (2001 & Supp. 2006).
69. *See id.* § 13-604.01(L).
70. *See* MINN. STAT. §§ 609.2661–.2665 (2006).
71. *See id.* §§ 609.2662, .268.

vehicular operation.[72]

Ohio

If an unborn child is killed at any stage of prenatal development, it is aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, negligent homicide, aggravated vehicular homicide, or vehicular homicide.[73]

The legislation adopted by these four states is representative of legislation that has been enacted in twenty-four states.[74] Whatever the distinctions in these criminal law regimes, they all share a necessary premise: in the eyes of the criminal law, an unborn child is a person no different from a fully grown, fully developed human being. Indeed, the penalties that these states impose upon those who kill an unborn child are the same as the penalties imposed upon one who would kill an adult,[75] with one typical exception. Most states do not allow the death penalty to be imposed for the killing of an unborn child.[76]

C. Fetal Rights in Criminal Law—Federal Unborn Victims of Violence Act

The Unborn Victims of Violence statutes enacted in various states are simply reflective of the Federal Unborn Victims of Violence Act passed in April of 2004.[77] This law, commonly known as "Laci and Connor's Law,"[78] was named after a 2003 case in which Scott Peterson was convicted of killing his then-pregnant wife, Laci

72. *See id.* § 609.21, subdiv. 3.

73. *See* OHIO REV. CODE ANN. §§ 2903.01–.07 (West 2006).

74. *See* Leventhal, *supra* note 54, at 177–79.

75. *See* sources cited *supra* note 22 and accompanying text (listing states which apply murder and manslaughter statutes to persons who cause the death of an unborn child).

76. *See, e.g.*, GA. CODE ANN. § 16-5-80(c)–(e) (2003 & Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/9-1.2(d) (West 2002); KY. REV. STAT. ANN. § 507A.060 (LexisNexis 1999 & Supp. 2006); LA. REV. STAT. ANN. § 14:32.6(B) (1997 & Supp. 2007); MD. CODE ANN., CRIM. LAW § 2-103(h) (LexisNexis Supp. 2006); NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2006); 18 PA. CONST. STAT. ANN. § 1102(a)(2) (West 2006); R.I. GEN. LAWS § 11-23-5(a) (2002); S.C. CODE ANN. § 16-3-1083(A)(2)(d) (Supp. 2006); S.D. CODIFIED LAWS § 22-16-1.1 (2006); VA. CODE ANN. § 18.2-32.2 (2004).

77. *See* 18 U.S.C. § 1841 (Supp. IV 2004).

78. President Bush Signs Unborn Victims of Violence Act of 2004, http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html.

Peterson.[79] Laci mysteriously disappeared on Christmas Eve, 2002.[80] At the time she went missing, Laci was eight months pregnant with the child that she and Scott planned to name Connor.[81] A jury found that Peterson killed his wife and their unborn child and threw their bodies into the ocean.[82] Peterson was convicted not only of the murder of his wife, but also of the murder of their unborn child.[83] Peterson was eventually sentenced to death for the crime.[84]

The Federal Unborn Victims of Violence Act was passed by Congress and signed into law by the President partially in response to the Peterson case.[85] The Act recognizes unborn children as victims when they are injured or killed during the commission of a federal or military crime.[86] The Act provides in part:

> (a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.
>
> (2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.[87]

This statute again has a stubborn premise. In the eyes of federal criminal or military law, an unborn child, at least in some circumstances, can be considered a victim of a crime deserving of the same protection as is afforded to the mother.[88] Again, the only real distinction is that the death penalty may not be imposed for

79. *Peterson Guilty of Murder*, CNN.COM, Dec. 14, 2004, http://www.cnn.com/2004/LAW/11/12/peterson.verdict/index.html.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Peterson Sentenced to Death for Wife's Slaying*, CNN.COM, Mar. 15, 2005, http://www.cnn.com/2005/LAW/03/16/peterson.case/index.html.

85. *See* Sheryl Gay Stolberg, *Washington Talk; From CNN to Congress, Legislation by Anecdote*, N.Y. TIMES, May 8, 2003, at A26. The legislation was pending in Congress for four years, but gained significant support after the Peterson case. *Id.*

86. 18 U.S.C. § 1841 (Supp. IV 2004).

87. *Id.* § (a)(1)–(2)(A).

88. *Id.* § (a)(2)(A).

the killing of an unborn child under this Act.[89] In defining the phrase "unborn child" the statute states:

> As used in this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.[90]

This language is very similar to that which is found in many of the Unborn Victims of Violence Acts that have been adopted by the states.[91] It should be noted that the federal act also contains an "except in cases of legal abortion" provision.[92]

There has been much debate as to whether statutes that criminalize the killing of unborn children will in some way infringe upon the right of a woman to choose to have an abortion. Those who consider themselves to be "pro-choice" generally oppose the passage of such laws.[93] This opposition is based on the quite understandable belief that the granting of rights to the fetus, independent of rights granted to the mother, is a "slippery slope strategy" to restricting abortion choice.[94] One such "pro-choice" group has stated:

> [Unborn Victims of Violence Acts] would give separate legal status to any fertilized egg, embryo, or fetus, even if the woman is unaware that she is pregnant. Feminists argue that the House's passage of [the Federal Unborn Victims of Violence Act] was not meant to protect women, that instead it was meant to lay the groundwork for dismantling *Roe v. Wade* by giving the fetus rights separate from the mother.[95]

The logic of this view is unassailable. For those who believe that a

89. *Id.* § (a)(2)(D).

90. *See id.* § (d).

91. Statutes with language similar to that used in the Federal Unborn Victims of Violence Act defining an "unborn child" include: ARIZ. REV. STAT. ANN. § 13-1105(C) (2001 & Supp. 2006); MISS. CODE ANN. § 97-3-37(1) (2006); OHIO REV. CODE ANN. § 2901.01(B)(1) (West 2006).

92. 18 U.S.C. § 1841(c) (Supp. IV 2004).

93. *See, e.g.*, American Civil Liberties Union, *What's Wrong with Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses,* ACLU.COM, July 31, 1996, http://www.aclu.org/reproductiverights/fetalrights/16530res19960731.html.

94. *See* Rick Montgomery, *Fetal Rights Going Too Far?*, THE NEWS & OBSERVER (Raleigh-Durham, N.C.), July 10, 2006, http://www.newsobserver.com/114/story/459068.html.

95. Rebecca Farmer, *Fetal Rights' Initiatives Concern Abortion Rights Supporters,* NATIONAL NOW TIMES, Fall 2001, http://www.now.org/nnt/fall-2001/fetalrights.html.

woman has an absolute right to abort, the provisions of laws that recognize the rights of the fetus threaten a collision course. Are not the premises of the two right-creating regimes irreconcilable?

Here, as elsewhere, the courts have once again generally resorted to the consent of the mother as the distinguishing factor between legalized abortion and the offenses that these statutes criminalize.[96] The courts reason that since the child is still a part of the mother's body, if the mother gives her consent there is no crime in bringing about the death of the unborn child through legalized abortion.[97] Put more bluntly, the child has a right to life against everyone in the world except its mother. The only person who may, with the law's blessing, end the life of the unborn child is the child's mother.

D. Other Developing Areas of Fetal Rights

The principal fetal rights developments outlined above have been accompanied by other examples of the growing recognition of fetal rights. For example, recent cases have extended fetal rights to areas never considered in the common law, and track more closely with the reasoning of the Arkansas lower court that placed an unborn child in protective custody. Judges have required specific actions of expectant mothers in the interests of their unborn children, such as ordering cesarean sections,[98] detaining expectant mothers who use illegal drugs,[99] and even charging expectant mothers who use illegal drugs with supplying drugs to minors.[100] The special significance of these developments is that they are explicitly directed to resolving conflicts between the mother and her unborn child. Here, the collision of premises is direct and unavoidable. A mother's intentions are disregarded when they threaten the legitimate interests of the child in her womb. The interference with the mother's prerogatives has gone to the most basic of her rights, the right to liberty—including possible imprisonment—to ensure that her unborn child receives adequate prenatal protection.

For example, in *Jefferson v. Griffin Spalding County Hospital*

96. *See* sources cited *supra* note 54 and accompanying text.
97. *See* sources cited *supra* note 54 and accompanying text.
98. *See* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E. 2d 457, 459 (Ga. 1981).
99. *See* Arkansas v. Collier, 95 S.W.3d 772, 773 (Ark. 2003).
100. *See* Whitner v. State, 492 S.E.2d 777, 778–79 (S.C. 1997).

Authority, the Georgia Supreme Court upheld a lower court's ruling requiring an expectant mother to have a cesarean section delivery.[101] The doctors at Griffin Spalding County Hospital determined that the mother had complete placenta previa.[102] The doctors further determined that if a natural birth was attempted, there was a 99% chance that the child would die and only a 50% chance that the mother would survive the ordeal.[103] The expectant parents, because of religious beliefs, refused to consent to a cesarean section.[104] The hospital then sought an injunction ordering the mother to give birth via cesarean section in order to preserve the life of the child.[105] The lower court, in issuing an order to authorize the cesarean section, stated:

> Because the life of defendant and of the unborn are, at the moment inseparable, the Court deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live. Accordingly, the plaintiff hospitals are hereby authorized to administer to defendant all medical procedures deemed necessary by the attending physician to preserve the life of defendant's unborn child.[106]

In this case, the court was willing to "infringe upon the wishes of the mother" in order to give the unborn child an opportunity to live.[107] It should be noted that this case was decided in 1981, when it was illegal in the state of Georgia to abort a viable fetus.[108]

In an analogous example that occurred in 2004, Melissa Ann Rowland was charged with murder for delaying a cesarean section that could have saved the life of one of her twins.[109] Ms. Rowland was ultimately convicted of child endangerment and sentenced to eighteen months probation after the defense showed at trial that

101. 274 S.E.2d at 460.

102. *Id.* at 458. A placenta previa occurs when the placenta becomes positioned between the baby and the birth canal. *See id.* In this particular case, it was virtually impossible for the complete placenta previa to correct itself prior to delivery. *See id.*

103. *See id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. *Utah C-Section Mom Gets Probation* (CBS News broadcast, April 19, 2004) (transcript available at http://www.cbsnews.com/stories/2004/03/12/national/main605537.shtml).

she had a "mental illness."[110] The murder charge that Ms. Rowland originally faced is freighted with irony. Ms. Rowland had no right to choose to expose her fetus to the risk of natural birth. That was a crime. But she could have, at any time during her pregnancy, asked for and received a legal abortion. That would not have been a crime; instead, that would have been a constitutional right. Since she did not ask for an abortion, she was faced with a murder charge when she did not have a timely cesarean section in order to save the life of one of her children. To the baby in her womb, it is tempting to say that it is a distinction without a difference.

III. CONCLUSION—THE COLLISION OF LOGIC

The laws of logic are absolute. They are the rules of thought itself. But premises are not absolute. They may be in error, may be subjective, and may be the subject of controversy. But once the premises are established, the law of logic is sure and inexorable. The continuing affirmation of an absolute right to abortion—and its corollary, the lack of any rights afforded to the fetus in the womb—and the accelerating of protections for the rights of the unborn, even against its mother, appear to be based on premises that are irreconcilable. The "collision" which Justice O'Connor alluded to is imminent and unavoidable.[111] Put simply, the laws and court decisions granting rights to the unborn and those upholding the constitutional right to abortion conflict with each other and the law of non-contradiction. Almost every state allows for "abortion on demand" and there are, practically speaking, few restrictions on a woman's ability to obtain an abortion.[112] In order to justify legalized abortion, it must be argued that the aborted fetus has not yet attained legal "personhood."[113] Indeed, it has no rights independent of its mother for protection from the intentional act of ending its life when that decision is made by the mother. But it may be held to have rights superior to its mother when its health is threatened.[114]

The law of non-contradiction establishes that it is impossible

110. *Id.*

111. *See supra* Part I.

112. *See generally* Stenberg v. Carhart, 530 U.S. 914, 1012 (2000) (Thomas, J., dissenting) (suggesting that the Court's holding imposes "unfettered abortion on demand").

113. *See* Roe v. Wade, 410 U.S. 113, 156–57 (1973) (addressing whether a fetus is a person within the meaning of the Fourteenth Amendment).

114. *See supra* Part II.D.

for a thing to be and not to be at the same time and in the same respect.[115] It should then be true that an unborn child cannot be a person and a non-person at the same time and in the same respect. The solutions proposed by scholastic reasoning in these cases come down to the most fundamental of logical fallacies: the "*ipse dixit* fallacy." This fallacy states that a proposition is true simply because someone says it is, and is little short of a naked appeal to authority.[116] Exasperated parents may resort to this. "Because I said so" ends the argument. But it is an unsatisfactory long-term solution for parent-child interaction. And it is more than unsatisfactory as a foundation for the law. The reason that a fetus is a being and a non-being, has a right to life and does not have a right to life, has rights against its mother and has no rights against its mother is ultimately because the law says so—nothing more. Does not an "allegiance to reason," with its recognition of "the momentum of logic," suggest that this continuing contradiction be rethought in current law?

115. *See* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 17, at 644.

116. *Ipse dixit*: Something asserted but not proved. BLACK'S LAW DICTIONARY 847 (8th ed. 2004).