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The Need for Logic and Consistency in Fetal Rights

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THE NEED FOR LOGIC AND CONSISTENCY IN FETAL RIGHTS

For some people, any mention of fetal rights raises fears of Big Brother invading privacy, ending advances in women's rights, and forcing medical care on unconsenting adults. Others see the recognition of fetal rights as an advancement of their personal views on abortion.

Abortion and women's rights. The manner in which Americans deal with both of these issues has a definite impact on society, but the focus on these issues has ignored the importance of advances in fetal rights. Consequently, fetal rights are in a state of confusion. Advances in medicine and science and the consequent implications at the moral and societal level have combined to create a body of law which defies both logic and precedent.[1] The problem is further complicated by the fact that fetal rights issues enter into almost every area of the law, touching tort recovery for injuries, occupational qualifications, discrimination, criminal laws, property inheritance, and child abuse and neglect.[2] Each of these legal disciplines has its own precedents and purposes.[3] There is no reason to expect each state to deal with fetal rights in exactly the same fashion, but many states suffer common internal inconsistencies. These problems could be solved if the state legislatures would view the problem holistically and begin to draft and redraft laws that are workable, fair, and consistent.

This Note will first discuss the history of fetal rights and then analyze some inconsistencies in the current state of the law. It will not focus on specific remedies. Readers may want to consider, as possible solutions, the effectiveness of (1) a federal law which would focus on the rights of the fetus and control the actions of the

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1. Charles H. Baron, *If You Prick Us, Do We Not Bleed?: Of Shylock, Fetuses, and the Concept of Person in the Law*, 11 L. MED. & HEALTH CARE 52 (1982). Inconsistencies in the legal treatment of the unborn reflect social values and policies considered by lawmakers. *Id.* at 55.

2. *See* Toth v. Goree, 237 N.W.2d 297 (Mich. Ct. App. 1975) (tort case questioning whether there is a cause of action for wrongful death of a fetus); Roe v. Wade, 410 U.S. 113 (1973) (Supreme Court holding that a fetus is not a person within the meaning of the Fourteenth Amendment); International Union v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (majority and concurrence conflicting over how significant the rights of fetuses are in an occupational discrimination case); Industrial Trust Co. v. Wilson, 200 A. 467 (R.I. 1938) (property case questioning whether fetus should receive income from a trust from date of decedent's death or child's birth); *In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447 (Fam. Ct. 1990) (court questioning whether state has the power to protect fetus from abuse or neglect by parents).

3. Baron, *supra* note 1, at 55. A fetus is considered a person for some purposes, but not all. *Id.* The granting of personhood status varies from one area of the law to another. *Id.*

states; or (2) a Model Fetal Rights Act which would provide a holistic example for the individual state legislatures.

I. DEVELOPMENT OF FETAL RIGHTS

A. INTRODUCTION

Historically, legal rights focused on the mother, and the fetus was treated as part of her.[4] The unborn were generally not afforded separate rights.[5] There were exceptions to this rule however, usually created in attempts to protect the health and welfare of the future children.[6]

In 1798, an English probate court decided a case involving the debate over whether children conceived, but not born, at a testator's death should be able to inherit from a decedent's will.[7] One of the judges explained that the unborn should be able to inherit from the will because they were more than mere nonentities:

> Let us see what this non-entity can do. He may be vouched in a recovery . . . . He may be an executor. He may take under the Statute of Distributions . . . . He may take by devise. He may be entitled under a charge for raising portions.[8] He may have an injunction; and he may have a guardian.[9]

Throughout history, fetuses have frequently been granted specific rights that have evolved with time. The unborn, however, "have never been recognized in the law as persons in the whole sense."[10] The remainder of this section will outline the development of fetal rights up to the present time in the areas of tort law,

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4. Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 601 (1986). This was true because historically a fetus was not considered an independent entity that could enjoy rights hostile to the mother's rights. *Id.* at 599. Today, courts have determined that pregnant women and their fetuses often have adverse interests. *Id.* at 600.

5. *Id.* at 599.

6. *Id. See also* William J. Curran, *A Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women*, 61 MILBANK MEMORIAL FUND Q. 58, 59 (1983). Early Romans adopted a system of fictitious birth so that the unborn could hold rights such as inheriting from a father who had died prior to the child's actual birth. *Id.*

7. Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798). A widow and her children sued to have her husband's will declared void as against the decedent's twin grandsons, who were born shortly after his death. *Id.* at 122. The court determined that several different lives could be used to determine when contingent future interests must be certain to vest or fail, thus allowing the grandchildren to recover. *Id.* at 142.

8. Black's Law Dictionary explains that "raising portions" refers to the fact that after a death, an oldest son often inherited the family land. BLACK'S LAW DICTIONARY 1133 (5th ed. 1985). This son had to give specific sums of money to younger siblings. *Id.*

9. *Thellusson*, 31 Eng. Rep. at 163.

10. Roe v. Wade, 410 U.S. 113, 162 (1973). The Court made this statement in an

criminal and constitutional law, property law, and child protection.

B. TORT LAW

1. *General*

In 1884, *Dietrich v. Northampton*[11] held that there could be no recovery for prenatal injuries.[12] In this case, a woman tripped on a defect on the defendant's highway when she was four to five months pregnant.[13] The court determined that the accident caused a miscarriage, therefore preventing the unborn child from maintaining an action against the tortfeasor.[14] The court reasoned that no duty was owed to a person who did not exist.[15] In 1960, *Smith v. Brennan*[16] discussed the most common reasons historically given for denying recovery to children injured prior to birth: (1) the unborn was considered part of the mother and was owed no independent duty; (2) stare decisis; (3) lack of precedent; (4) difficulty in proving causation; and (5) fear of fraud.[17]

In the middle of the twentieth century, American courts began to recognize causes of action for prenatal injuries as long as the injury was post-viability,[18] the baby was later born alive,[19] and the defendant was a third party.[20] The live-birth requirement allowed courts that were unwilling to grant rights to fetuses to

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attempt to justify its balance of states' interests in fetal rights and women's rights in abortion/privacy. *Id.* at 156-62.

11. 138 Mass. 14 (1884).

12. Dietrich v. Northampton, 138 Mass. 14, 17 (1884).

13. *Id.* at 14-15.

14. *Id.* at 15.

15. *Id.* at 16. It is interesting that some witnesses stated that the infant did live for ten to fifteen minutes after birth, but the court still determined that the child did not survive the premature birth. *Id.* at 15. *See also infra* note 132 (discussing this all-or-nothing problem).

16. 157 A.2d 497 (N.J. 1960).

17. Smith v. Brennan, 157 A.2d 497, 500 (N.J. 1960). In *Smith*, an infant was born injured due to a car accident 75 days prior to birth. *Id.* at 504. The court allowed the boy to recover from the tortfeasor in spite of all of the reasons given for denying recovery. *Id.* at 500-05. The court felt that all of the reasons for denying recovery to children who were injured as fetuses were inadequate: "They deny basic medical knowledge; they ignore the protection afforded unborn children by other branches of the law, and are founded upon fears which should not weigh with the courts." *Id.* at 504.

18. Colautti v. Franklin, 439 U.S. 379, 388 (1979) (viability being the point when there is "reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support"); Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). *Bonbrest* was the first case recognizing a cause of action by a child for injuries received in utero—so long as the injury was post-viability. *Id.* at 142-43.

19. *Bonbrest*, 65 F. Supp. at 140. The court reasoned that a child had demonstrated its ability to survive by subsequently being born alive. *Id.*

20. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 122, at 904-05 (5th ed. 1984). The defendant had to be a third party because American courts prohibited tort actions by minor children against their parents. *Id.*

consider the locus of the rights to be in a live-born child.[21] Tortfeasors compensated living children for burdens inflicted on them as fetuses.[22] Courts reasoned that these children deserved tort recovery due to the fundamental theories that there is a remedy for every wrong and that the tortfeasors should compensate the children for injuries they proximately caused.[23]

Today, all courts allow causes of action by a child who was prenatally injured past viability and later born alive.[24] "All writers who have discussed the problem have joined in condemning the total no-duty rule and agree that the unborn child in the path of an automobile is as much a person in the street as the mother and should be equally protected under the law."[25] Some states have expanded their laws to allow recovery by fetuses who were injured prior to viability,[26] even prior to conception.[27]

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21. Rosa H. Kim, *Reconciling Fetal/Maternal Conflicts*, 27 IDAHO L. REV. 223, 226 (1990). If the locus of rights was in the child, this enabled the courts to avoid any potential conflicts with the rights of the mother while she was pregnant. *Id.*

22. Karen G. Crockett & Miriam Hyman, Note, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HOFSTRA L. REV. 805, 825 (1976). Recovery is given for prenatal injuries to compensate the postnatal child for its inflictions. *Id.* One commentator has explained the intent of tort compensation:

> The fact that courts permit live born infants to recover damages for prenatal injuries does not mean that courts view the unborn as 'persons.' Instead, the courts are interested in protecting the interests of the damaged live born person. The courts are not compensating fetuses, but are instead compensating children who need special medical treatment, schooling, or other services because of the acts of some tortfeasor.

LEONARD H. GLANTZ, *Is the Fetus a Person? A Lawyer's View*, *in* ABORTION AND THE STATUS OF THE FETUS 114 (William B. Bondeson et al. eds., 1983).

23. *See, e.g.*, Crisci v. Security Ins. Co., 426 P.2d 173, 178 (Cal. 1967) (clarifying the general tort rule that the injured deserve to recover for all harm caused—whether anticipated or not); Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477, 489 (Ct. App. 1980) (there should be a remedy for every wrong). *But see* Hughson v. St. Francis Hosp., 459 N.Y.S.2d 814, 818 (App. Div. 1983) (no requirement in the law to provide relief for every injury suffered).

24. KEETON, *supra* note 20, § 55, at 368. *See also* Hughson v. St. Francis Hosp., 459 N.Y.S.2d 814, 815-16 (App. Div. 1983) (explaining that since both can be injured, the duty of informed consent runs to both a mother and her unborn child); Williams v. Marion Rapid Transit, 87 N.E.2d 334, 335 (Ohio 1949). A woman was pregnant when she fell off a bus and injured her viable child. *Id.* at 334. The court allowed the child to recover, because any other ruling apparently would have caused a deprivation of the child's constitutional rights. *Id.* at 340. " 'So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law.' " *Id.* at 339 (quoting PROSSER ON TORTS, § 188).

25. KEETON, *supra* note 20, § 55, at 368.

26. *Id.* at 368-69; Womack v. Buchhorn, 187 N.W.2d 218, 219-23 (Mich. 1971) (*four*-month fetus allowed to sue and recover for injuries sustained in a car accident); Hornbuckle v. Plantation Pipe Line, Co., 93 S.E.2d 727, 728 (Ga. 1956) (child should be allowed to recover for injuries sustained at any point following conception).

27. Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1258-59 (Ill. 1977) (foreseeable that a teenaged girl would eventually have children, so girl's child can recover for injuries caused by a negligent blood transfusion to her mother prior to conception); Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978) (infant had a cause of action for his brain damage due to a negligent caesarean section performed on his mother two years prior to his birth).

2. *Wrongful Death/Wrongful Life*

Traditionally, a woman who suffered a miscarriage was allowed to recover for her own injuries, but she could not recover for the loss of her child, because the child had not been born alive.[28] Today, a majority of states have abandoned this "born-alive" rule[29] and allow wrongful death actions based on miscarriages and stillbirths.[30] Courts reason that holding a tortfeasor liable for injuries only if the fetus is later born alive will reinstate the illogical common law rule of making tortfeasors liable for injuries but immune for deaths.[31] Some states, however, limit these suits by allowing claims only if the fetus was viable at the time of the death.[32]

There have also been recent attempts by children who were born alive to sue for "wrongful life."[33] One court has suggested that genetically defective children could sue their parents for failing to abort.[34]

But see Albala v. City of New York, 445 N.Y.S.2d 108, 109 (1981) (no cause of action for injuries suffered as a result of negligent prior abortion against mother).

28. KEETON, *supra* note 20, § 55, at 369. Courts and legislatures feared double recovery as well as problems with proof of causation and damages. *Id.*

29. Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 735-37 (1986). See a list of the states in the majority at note 150 and of states in the minority at note 151 (as of 1986). *Id.* at 737. *See also* Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (conditioning recovery on live birth is unjust and creates unreasonable and artificial demarcations); Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88 (Ill. 1973). *Chrisafogeorgis* was an action for the wrongful death of a stillborn child and for the personal injuries of the mother, who was struck by a car during her ninth month of pregnancy. *Id.* at 88-89. The court allowed recovery for both, unable to reconcile the discrepancy allowing causes of action for postnatal deaths but not for prenatal deaths. *Id.* at 91.

30. *See, e.g.*, Bolk v. Baldazo, 651 P.2d 11 (Idaho 1982). The court recognized a right to sue for the wrongful death of a viable stillborn child. *Id.* at 15. *See also* Toth v. Goree, 237 N.W.2d 297 (Mich. Ct. App. 1975). In wrongful death actions, the deceased's representative must stand in the shoes of the deceased. *Id.* at 299. When suing for the wrongful death of a fetus, it is the fetus' rights that are being alleged, not the rights of the mother. *Id.*

31. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88 (Ill. 1973). With this requirement, tortfeasors would be rewarded for killing, rather than just maiming, a fetus, and therefore tortfeasors would be discouraged from attempting to save the lives of their victims. *Id.* at 92.

32. *See* Simmons v. Howard Univ., 323 F. Supp. 529, 529 (D.D.C. 1971) ("The increasing weight of authority supports the proposition that a viable unborn child, which would have been born alive but for the negligence of defendant, is a 'person' within the meaning of the wrongful death statutes."); Salazar v. St. Vincent Hosp., 619 P.2d 826 (N.M. Ct. App. 1980). The *Salazar* court determined that the legislature must have only intended recovery for viable fetuses, since only viable fetuses were protected by the criminal statute when the wrongful death statute was enacted. *Id.* at 826-30. Criminal law was relevant because civil liability evolved from criminal law. *Id.* at 830.

33. Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477 (Ct. App. 1980). A child with Tay-Sachs disease sued medical testing laboratories and her doctor for wrongful life. *Id.* at 480. She claimed that due to negligence, a testing laboratory gave her parents incorrect information concerning their status as carriers of the disease. *Id.* at 479-80. The parents relied on the results of the testing either in conceiving or in failing to abort. *Id.* at 480. The court held that the child could recover damages if proved. *Id.* at 488-89.

34. *Id.* at 488. *See also* Margery W. Shaw, *Conditional Prospective Rights of the Fetus,*

3. *Informed Consent*

Informed consent is a term which signifies that a person has agreed to something after receiving a full disclosure of relevant facts.[35] For example, a surgeon must disclose any serious risks prior to surgery so that a patient can weigh the benefits and dangers and make an intelligent decision as to whether or not to submit to surgery.[36]

In one New York case, an infant claimed medical malpractice against her mother's physician due to tortuously inflicted prenatal injuries.[37] The court explained that the doctor had a duty to receive informed consent from the patient prior to medical treatment,[38] and, in this case, both the mother and the fetus were patients.[39] Obviously the fetus could not consent, but the parent could consent on the child's/fetus' behalf as he or she could for any other child who is unable to give legal consent.[40] Here, the mother was time-barred from claiming battery due to lack of informed consent, but the infant was not.[41] Fetuses often have this extended statute of limitations due to the fact that minors may have until a certain age to file suit.[42]

4. *Forced Surgery*

Traditionally, the law has opposed compelled bodily intrusions on nonconsenting adults,[43] but this right has been subject to

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5 J. LEGAL MED. 63 (1984). "Severely defective newborns have been allowed to die," as have elderly with terminal illnesses. *Id.* at 97. Deformed fetuses can only be allowed to die by removing them from the mother. *Id.* If deformed fetuses have a right to die, then parents and doctors have duties to fulfill this right. *Id. But see* Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951, 1961 (1986) ("federal 'Baby Doe' legislation has significantly reduced parental authority to reject aggressive medical treatment even for those children who will inevitably be disabled.").

35. ZeBarth v. Swedish Hosp. Medical Ctr., 499 P.2d 1, 8 (Wash. 1972) (request for an "informed consent" instruction in a suit for paralyzation due to radiation therapy).

36. *Id.*

37. Hughson v. St. Francis Hosp., 459 N.Y.S.2d 814 (App. Div. 1983). The nature of the injury was not revealed, but it arose due to the doctor's failure to obtain adequate informed consent. *Id.* at 815.

38. *Id.* at 816.

39. *Id.* at 817. *See also* Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?* 79 CAL. L. REV. 499 (1991). Two potential patients present themselves when a pregnant woman visits her doctor. *Id.* at 502.

40. *Hughson*, 459 N.Y.S.2d at 817.

41. *Id.* at 816, 818. The court denied that a child's claim was simply derivative of the mother's action, thus the child had a cause of action. *Id.* at 818. If the child's action was derivative of the mother's, then the infant would not be able to sue for injuries if the mother decided not to sue or found herself time-barred. *Id.* The court also clarified that though the infant's claim could be called something other than informed consent, it arose from a failure to disclose the risks that a fetus alone may encounter by the treatment. *Id.*

42. Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978).

43. Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1583-88 (1979)

exceptions. Surgeries have been permitted to remove evidence of crimes.[44] Vaccinations have been forced.[45] Incompetents have had organs removed for family members.[46] Pregnant women have been frequent exceptions to this general rule opposing compelled bodily intrusions.[47] Although some cases have held that a pregnant woman can decide the fate of her child,[48] many have determined that the state's interest in the life of the fetus outweighs the intrusion into the lives of the parents.[49] Courts often

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(punishment, pain, and bodily intrusions seldom allowed); McFall v. Shimp, 10 Pa. D. & C.3d 90, 90-92 (1978) (man's first cousin not forced to undergo further testing for compatibility of tissue or to donate bone marrow for transplantation if sufficient compatibility were present); *In re* George, 630 S.W.2d 614 (Mo. Ct. App. 1982) (man identified in adoption records as the father of a man with leukemia not compelled to undergo a blood test to help the sick man identify compatible donors); *Boy at Center of Suit for a Marrow Donor is Dead of Leukemia*, N.Y. TIMES, Nov. 20, 1990, at B9. In the *Times* article, the mother of a boy refused to consent to having son tested for compatibility for bone marrow donation to his half-brother. *Id.* The court stated that forcing the test would violate the boy's constitutional right to privacy. *Id.*

44. United States v. Crowder, 543 F.2d 312, 316-17 (D.C. Cir. 1976) (forced surgical removal of a bullet from defendant's arm allowed in order to use the bullet as evidence), *cert. denied*, 429 U.S. 1062 (1977); Schmerber v. California, 384 U.S. 757, 758-59 (1966) (sample of blood removed by force for use as evidence). *See also* Regan, *supra* note 43, at 1585 (cases dealing with surgical searches, such as bullets, draw a line between superficial incisions (which are permissible) and further intrusions into the body (which are not)). *Compare* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) *with* Winston v. Lee, 470 U.S. 753 (1985) (forced surgical removal of bullet would violate suspect's constitutional rights) *and* Rochin v. California, 342 U.S. 165 (1952) (forced pumping of criminal suspect's stomach violated his right of due process and shocks the conscience).

45. Jacobson v. Massachusetts, 197 U.S. 11 (1905). Small pox vaccinations were compulsory upon a showing of a real or substantial relationship between state action and general welfare. *Id.* at 30-39.

46. Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969). The court granted a mother's petition to remove a kidney from her incompetent son to be transplanted into her dying son. *Id.*

47. Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192-93 (1987). A five-year survey of attempts to override maternal refusals of medical treatment revealed twenty-one such endeavors. *Id.* Fifteen court orders were sought and thirteen overrides were granted. *Id. E.g.*, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (per curiam), *cert. denied*, 377 U.S. 985 (1964). In *Raleigh*, a hospital was given authority to administer a blood transfusion to a pregnant woman against her wishes in order to protect her child. *Id.* at 537-38.

48. *E.g.*, *In re* A.C., 573 A.2d 1235 (D.C. App. 1990). The court determined that unless a pregnant woman is incapable of giving informed consent, she should decide on the medical treatment for herself and her child. *Id.* at 1237. The court reversed a lower court's order compelling a woman to have a caesarean section (for the health of the fetus). *Id.* As to the woman and her child, however, the reversal was moot, since the surgery had already been performed and neither had survived. *Id.*

49. Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981). If doctors say that a fetus is at serious risk, a woman may be forced to have a caesarean section despite her refusal. *Id.* at 458. In this case, there was 99% certainty that the baby would not survive a normal delivery, and 50% chance that the mother would not survive. *Id.* at 459. Doctors determined that a caesarean section would give both an almost 100% chance of survival. *Id.* The court found that the state has an interest in the life of an unborn, living human being. *Id.* at 460. The intrusion into the parents' lives is outweighed by a state's duty to protect living, unborn human beings from meeting their deaths before being given an opportunity to live. *Id.* Doctors Bowes and Selgestad described a similar situation from a medical case report. Watson A. Bowes & Brad Selgestad, 58 OBSTET. & GYNECOL. 209, 209-10 (1981) (citing Colorado's Children's Code, located at COLO. REV. STAT. § 19-1-104(3)

distinguish between viable and nonviable fetuses in this area as well.[50]

C. CRIMINAL AND CONSTITUTIONAL LAW

1. *Abortion*

The Supreme Court has taken an historical account of abortion throughout time.[51] In ancient Greece and Rome, abortion was common.[52] The practice was "resorted to without scruple,"[53] unless a mother aborted a fetus without the approval of the father.[54] If the mother procured an abortion without this consent, the father could bring legal action against her for violating his right to his child.[55] The charge was homicide, but it was not based on the fetus' right to life; rather, it was based on the father's right to an heir.[56] A father could also require that an abortion be performed if he chose not to acknowledge the child.[57] It is also interesting to note that the Hippocratic Oath opposed abortion at the time it was written (which was some time prior to the first century A.D.).[58] At that time, however, the Oath was simply an isolated ethical code that was inconsistent with the practices of the medical profession.[59]

(1973)). A woman with a problem pregnancy was admitted to the hospital with labor problems. *Id.* Doctors proposed a caesarean section, but the woman refused. *Id.* A hospital psychiatrist examined the patient and reported that she was competent to decide whether or not to submit to surgery. *Id.* The hospital attorneys decided to seek a court order mandating the caesarean section. *Id.* A Juvenile Court judge declared the child dependent and neglected and thus ordered the surgery, citing the Colorado Children's Code allowing orders of treatment when it is in the best interests of a child. *Id.* at 210. In addition to forced caesarean sections, courts have also compelled blood transfusions. Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (per curiam), *cert. denied*, 377 U.S. 985 (1964). A hospital received authority to administer a blood transfusion to a Jehovah's Witness, contrary to her wishes, in order to protect her unborn child. *Id.* at 537-38. The court determined that the unborn are entitled to the protection of the laws. *Id.* at 538.

50. *See, e.g.*, Taft v. Taft, 446 N.E.2d 395 (Mass. 1983). Due to religious reasons, a pregnant woman refused an operation that would have prevented the premature birth of her four-month-old fetus. *Id.* at 396. The courts reversed the lower decision and forbade the surgery. *Id.* at 397. The court stated that there were not any cases that compelled surgery on a pregnant woman to protect a pre-viable fetus. *Id.* at 397 n.4.

51. *See* Roe v. Wade, 410 U.S. 113, 130-47 (1973).

52. RICHARD HARROW FEEN, *Abortion and Exposure in Ancient Greece: Addressing the Status of the Fetus and the 'Newborn' from Classical Sources, in* ABORTION AND THE STATUS OF THE FETUS at 290-91 (William B. Bondeson et al., eds., 1983).

53. LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH 1, 10 (A Supp. to the Bulletin of the history of Med. 1943).

54. FEEN, *supra* note 52, at 291.

55. *Id.* at 290-91.

56. *Id.* at 291.

57. *Id.* at 290-91. Once a child was born, a father could also choose to abandon his newborn, thereby causing a death by "exposure." *Id.* at 285-86.

58. *Id.* at 296.

59. *Id.* The Hippocratic Oath was intended as a religious manifesto for members of a

English common law held that abortion prior to quickening[60] was not indictable,[61] but abortion beyond that point was either a felony or a misdemeanor.[62] Early criminal abortion statutes preserved this distinction by making it a capital crime to abort after quickening but a lesser crime prior to quickening.[63] By the mid-nineteenth century, those American states that had abortion statutes generally followed the preexisting English law.[64] By the late 1950s, however, most American jurisdictions banned abortion unless it was necessary to save the mother's life.[65] This view prevailed until 1973, when the United States Supreme Court delivered the landmark abortion decision of *Roe v. Wade*.[66] Since 1973, the Supreme Court has decided many cases affecting a woman's

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Pythagorean cult entering the medical profession. *Id.* The Pythagoreans believed that life began at conception. *Id.*

60. State v. Timm, 12 N.W.2d 670, 671 (Wis. 1944). A fetus is "quick" as soon as the mother can feel movement within her womb. *Id.*

61. Roe v. Wade, 410 U.S. 113, 132 (1973).

62. *Id.* at 134. It is disputed whether aborting a quick fetus was a felony or a misdemeanor. *Id. See* ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW 188 (3d ed. 1982). It was a misdemeanor to cause a miscarriage of a quick fetus unless the operation was necessary to save the mother's life. *Id.*

63. *Roe*, 410 U.S. at 136. In 1803, Lord Ellenborough's Act made abortion of quick fetuses a capital crime but established less severe penalties for abortions performed prior to quickening. *Id.*

64. *See* CONN. GEN. STAT., tit. 20, § 14 (1821). In 1821, Connecticut became the first state to enact abortion legislation when it adopted the part of Lord Ellenborough Act which criminalized abortions of quick fetuses. *Id.* Connecticut also criminalized abortion prior to quickening in 1860. CONN. PUB. ACTS, c. 71, § 1 (1860). *See also* Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395 (1961). This source contains a more detailed description of the statutes within the states at this period. *Id.* at 435-38. *See generally Roe*, 410 U.S. at 147-50. There are three general reasons to explain the nineteenth century criminal abortion statutes: (1) to discourage illicit sexual conduct, (2) to protect women from the real hazards of early abortions, and (3) to protect states' interests in prenatal life. *Id.*

65. *Roe*, 410 U.S. at 139. *See also* Quay, *supra* note 64, at 447- 520 (detailed appendix of abortion statutes within the United States and its territories up to 1960).

66. 410 U.S. 113 (1973). The *Roe* Court divided gestation into trimesters and prescribed different rules for abortions in each. *Id.* at 164-65. During the first trimester, a state cannot ban or closely regulate abortion, because it has no valid or compelling interest in fetal health. *Id.* at 163-64. A state can, however, require that abortions be performed by licensed physicians. *Id.* at 165. During the second trimester, a state may protect an interest in a mother's health by regulating abortion procedures in ways that are reasonably related to her health, but no flat bans are permitted. *Id.* at 163-64. The state may still not protect a fetus' life during this period. *Id.* During the third trimester, the fetus is viable, and the state has a compelling interest in this life. *Id.* The state can regulate or proscribe abortion unless it is necessary to preserve the life or health of the mother. *Id.* at 164-65. The woman's interest is fundamental and can only be outweighed if there is a compelling state interest and the state's statute is narrowly drawn to that interest. *Id.* at 152-55. The Court initially concluded that a woman's right to privacy included abortion. *Id.* at 153-54. However, the state argued that the fetus was a "person" within the meaning of the Fourteenth Amendment. *Id.* at 156-57. If so, the Fourteenth Amendment would have guaranteed the fetus'/person's right to life. *Id.* After an analysis of the term "person," as it was used throughout the United States Constitution, the Court concluded that none of the references had prenatal applications. *Id.* at 157-58. The Court then concluded that since abortion laws were much freer throughout the nineteenth century (than in the 1970s), a fetus should not be considered a "person" within the meaning of the Fourteenth Amendment. *Id.* at 158.

right to have an abortion, but none have directly overturned *Roe*.[67]

Roe v. Wade has had substantial impact on the legal status of the fetus well beyond abortion. Courts cite *Roe* as support for cases ranging from civil tort actions[68] to murder.[69]

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67. *See* Maher v. Roe, 432 U.S. 464 (1977) (state may refuse to provide Medicaid funding for nontherapeutic abortions); Colautti v. Franklin, 439 U.S. 379 (1979) (invalidated a statute that required a determination of whether a fetus was viable before abortion); Harris v. McRae, 448 U.S. 297 (1980) (states or federal government may refuse to fund medically necessary abortions); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (a requirement of a second physician at abortions reasonably furthers a state's compelling interest in protecting the lives of viable fetuses); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Court striking a state law requiring use of the abortion method providing the best opportunity for the unborn child to survive). *But see* Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (Justices White, Kennedy, and Rehnquist calling the rigid trimester system of *Roe* " 'unsound in principle and unworkable in practice' "); Fowler, *The War Within the States*, 41 NAT'L REV. 35, 35-36 (1989) ("Whatever the disputes about the Supreme Court's *Webster* decision, virtually everyone understands it as an invitation to state regulation of abortion."); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 121 (1989) (*Webster* left the Court with four justices prepared to affirm *Roe v. Wade* (Blackmun, Brennan, Marshall, and Stevens), four to eviscerate (White, Scalia, Kennedy, and Rehnquist), and Justice O'Connor somewhere in between); James Bopp and Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157 (1989). In *Webster*, the Court did not strike any of Missouri's abortion regulations. *Id.* at 158. "This new willingness to uphold state regulation of abortion is a marked change" from previous cases. *Id.*

Since *Webster*, two justices have resigned: Brennan and Marshall, both of whom would affirm *Roe*. The two new justices, David Souter and Clarence Thomas, have both been appointed by Republican President George Bush. The Republican Party (and President Bush) commonly advocates that increased power of decision be given to the states and that abortion be outlawed or at least more closely regulated.

The United States Supreme Court granted certiorari to hear a case from the Third Circuit concerning abortion regulations. Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3445 (U.S. Jan. 21, 1992) (No. 91-942). The Third Circuit court held that it was constitutional for the state to require either parental consent for females under 18 or a court ruling that consent was not required. *Id.* at 707-09. The court also upheld the statute requiring a doctor to give pre-abortion counseling and then wait 24 hours before performing an abortion. *Id.* at 703-07. Advocates on both sides of the abortion issue have said that they expect the Supreme Court to use *Planned Parenthood* to either undermine or overturn *Roe v. Wade*. *High Court to Hear Abortion Case: Stage Is Set for Roe vs. Wade*, STAR TRIBUNE, Jan. 22, 1992, at 1A, 11A. However, law professors Laurence Tribe (Harvard) and Susan Bloch (Georgetown) both stated that they doubt that the Court will use *Planned Parenthood* to overturn *Roe*. *Id.* at 11A. The justices said they would review the provisions of the state law which require a 24-hour waiting period, pre-abortion counselling by the doctor, recordkeeping requirements, and husband notification. *Id.* *Planned Parenthood* will be argued in April of 1992 and probably decided by July. *Id.* *Cf.* Walter Dellinger, *What Comes After Roe v. Wade?* N.Y. TIMES, Sept. 3, 1991, at A23. It may be possible for Congress to pass a law upholding *Roe* by using its ability to enforce the Fourteenth Amendment's guarantee of liberty. *Id.*

68. *See In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447, 449 (Fam. Ct. 1990) (since *Roe* says states can mandate that a woman complete a pregnancy after viability, it follows that states must protect the fetus from abuse and neglect at this point); Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88, 94 (Ill. 1973) (Ryan, J., dissenting) (judge in a wrongful death case claimed his position that a fetus was not a person was supported by the *Roe* decision); Toth v. Goree, 237 N.W.2d 297, 301 (Mich. Ct. App. 1975). In *Toth*, a woman suffered a miscarriage of a nonviable fetus due to a car accident. *Id.* The court stated that it was necessary to read precedent in light of *Roe*, since *Roe* had had a considerable impact on the legal status of the fetus. *Id.*

69. People v. Smith, 129 Cal. Rptr. 498, 502 (Ct. App. 1976) (killing of pre-viable fetus

2. *Other Crimes*

In order to be charged with homicide due to prenatal injuries, most states require that a child be born alive and then die from the injuries.[70] Of the states that have codified murder of the unborn (excluding legal abortions) or have expanded their common law to include it, a few impose liability at every stage of development.[71] Most retain some development requirement, such as viability or quickness.[72] One state distinguishes the killing of a quick child from the killing of a mother, by clarifying that killing the unborn is manslaughter, while killing the mother is murder.[73]

In those states that have not codified murder of the unborn, judges frequently apply their states' murder statutes to the intentional deaths of fetuses (excluding abortions with the mother's consent), even though "fetuses" are not specifically included in the statutes.[74] Quite often, judges need to construe a certain term

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is not murder, since *Roe* says there is no human life until viability); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980). In *Wallace*, the court stated as follows:

> We remark also in passing that it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus (*Roe v. Wade*), and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts.

Id. at 137.

70. State v. Soto, 378 N.W.2d 625 (Minn. 1985). The overwhelming majority of jurisdictions within the United States which have considered the issue have held that a criminally caused death of a fetus is not homicide unless the fetus was born alive. *Id.* at 628-29.

71. State v. Meril, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 110 S. Ct. 2633 (1990). Minnesota, Arizona, and Indiana impose liability at any stage of development. *Id.* at 321. Arizona and Indiana have penalties that are less severe (than murder of a born person) for the killing of a fetus, but Minnesota's penalties for murder of a fetus and for murder of a born person are identical. *Id. See also* ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (1989) (five year sentence for "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred"); IND. CODE ANN. § 35-41-1-6 (Burns 1985) (two year sentence that does not apply to legal abortion); MINN. STAT. § 145.412 (1990) (legal abortions excluded from Crimes Against Children statute).

72. *See, e.g.*, CAL. PENAL CODE § 187 (West 1988) (with the exception of legal abortions, killing of a fetus with malice aforethought is murder); People v. Hamilton, 774 P.2d 730 (Cal. 1989), *reh'g denied*, 110 S. Ct. 1961 (1990) (refining case law by explaining that there is a need to show a fetus attained viability before it will be considered murder); IOWA CODE ANN. § 707.7 (West 1979) (Class "C" felony—feticide—to intentionally terminate a pregnancy after the second trimester); WIS. STAT. ANN. § 940.04 (1982). If someone other than the mother destroys the life of an unborn child, that person could be fined $5,000 or be imprisoned for three years, or both. *Id.* If the fetus was quick, the imprisonment can increase to fifteen years. *Id.*

73. State v. Willis, 457 So. 2d 959, 960 (Miss. 1984). The court also clarified that the manslaughter charge and the murder charge do not merge. *Id.* For a discussion of the history of the quickening distinction, see *supra* notes 62-65.

74. People v. Apodaca, 142 Cal. Rptr. 830 (Ct. App. 1978). The defendant was convicted of murder of a 22-24-week-old fetus after having repeatedly struck and raped its mother with an avowed intent to kill her unborn child. *Id.* at 833-34. The murder was considered a crime against the fetus, and the rape was considered a crime against the mother. *Id.* at 840.

In addition, courts have extended the statutes to fetuses in vehicular homicide.

within a statute (such as "person"[75] or "child"[76]) to include a fetus.

3. *Discrimination*

Two relevant areas of discrimination which relate to fetuses are (1) discrimination against the fetus and (2) discrimination against the mother due to her pregnancy or ability to become pregnant.

a. Discrimination Against a Fetus

Most courts have held that a person cannot claim a civil rights violation under section 1983 of chapter 42 of the United States Code[77] for actions that occurred while the person was still a fetus.[78] However, there are two notable exceptions: *Douglas v. Town of Hartford*[79] and *Crumpton v. Gates*.[80]

In *Douglas*, the plaintiff was a fetus at the time he allegedly

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Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). The *Cass* court indicated that, in the future, recovery for the death of a fetus caused by a drunk driver would be allowed. *Id.* at 1325. The court held that the state's vehicular homicide statute applied because the legislature did not distinguish between pre-born and born individuals by using the term "person" in the statute. *Id.* at 1325-27. The court also could not discover any reason to uphold an arbitrary distinction based on birth. *Id.* at 1325-26. *But see* Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983). In *Hollis*, an estranged husband of a pregnant woman forced his hand into her vagina, intending to destroy the child. *Id.* at 61-62. The Kentucky Supreme Court ruled that the man could be charged with first degree assault and illegal abortion, but not with homicide. *Id.* at 65.

75. *E.g.*, Commonwealth v. Cass, 467 N.E.2d 1324, 1325-26 (Mass. 1984). A viable fetus is a person for purposes of vehicular homicide statute. *Id.*

> [T]he word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb. As will be shown later in this opinion, heretofore the law has not recognized that the pre-born could be the victims of homicide because of difficulties in proving the cause of death; but problems in proving causation do not detract from the personhood of the victim . . . .

Id. at 1325.

76. *E.g.*, *In re* Baby X, 293 N.W.2d 736, 738-39 (Mich. Ct. App. 1980) (child abuse statute applied to unborn).

77. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

78. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979) (holding that 1983 actions are derivative actions); Harman v. Danials, 525 F. Supp. 798, 802 (W.D. Va. 1981) (no civil rights protections for fetuses); Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974), *aff'd in part mem.* 516 F.2d 898 (5th Cir. 1975) (no civil rights protections for the unborn).

79. 542 F. Supp. 1267 (D. Conn. 1982).

80. 947 F.2d 1418 (9th Cir. 1991).

suffered injuries due to police officers beating his mother.[81] The plaintiff sued the city and fictitious police officers for police brutality in violation of section 1983 and the Fourteenth Amendment.[82] The court held that a fetus should be considered a person under section 1983, basing its opinion on the trend in state courts toward greater legal rights for the unborn.[83]

In *Crumpton*, six-year-old John H. Crumpton IV also brought a civil rights action under section 1983.[84] His claim against Los Angeles Police Chief Daryl Gates (among many others) alleged that the killing of his father violated his constitutional rights.[85] The district court, relying on *Roe*, granted summary judgment in favor of the defendant, since John was a two-month-old fetus when his father was killed and thus not a "person" within section 1983.[86] The court of appeals overturned the lower court's decision, distinguishing Crumpton's situation from other cases involving physical injuries to a fetus caused by beating of pregnant mothers.[87] The court of appeals claimed that physical injuries exist at the time of the beating—when the victim is a fetus (and not a "person").[88] However, John Crumpton IV's injuries (the loss of a familial relationship with his father) existed only after his birth.[89] Therefore, John H. Crumpton IV was a "person" at the time of his injury and

81. Douglas v. Town of Hartford, 542 F. Supp. 1267, 1269 (D. Conn. 1982). The plaintiff claimed that he was physically injured when his mother was hit on the head with a night stick after she attempted to aid her sister in a dispute with police officers. *Id.*

82. *Id.* at 1268-69. The mother (also a plaintiff) was a black adult who claimed that she had done nothing to justify the beating. *Id.* at 1269. The infant plaintiff claimed that he was entitled to relief for the alleged civil rights violation. *Id.* at 1268. The defendant argued that since the plaintiff was a fetus at the time of the injury, he could not be considered a "person" under the statute. *Id.* at 1268-69.

83. *Douglas*, 542 F. Supp. at 1270. The court then cited, as examples, a Connecticut negligence case (Simon v. Mullin, 380 A.2d 1353 (Conn. Super. Ct. 1977)), a California murder case (Justus v. Atchinson, 139 Cal. Rptr. 97 (1977)), and an Illinois wrongful death case (Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88 (Ill. 1973)). *Id.* at 1270.

84. Crumpton v. Gates, 947 F.2d 1418, 1419 (9th Cir. 1991). The details of the case were more fully described by the National Law Journal. Gail Diane Cox, *9th Circuit Ponders Fetal Rights*, NAT'L' L. J., Apr. 22, 1991, at 3, 30. There were outstanding federal warrants for John H. Crumpton III and Jane E. Berry, yet the Los Angeles Police Department chose to put the pair under surveillance rather than arrest them. *Id.* at 3. The police watched the suspects for 18 days as they stole a car and prepared to rob a bank. *Id.* The officers set a trap for them by their getaway car. *Id.* Mr. Crumpton did not have a gun, and Ms. Berry's gun was not fired, yet in the end the officers shot him in the back 40 times and shot her 13 times, claiming the pair ignored a demand to surrender and reached for their waistbands. *Id.* Mr. Crumpton died. *Id.* Ms. Berry survived and seven months later gave birth to John Crumpton IV. *Id.*

85. *Crumpton*, 947 F.2d at 1419.

86. *Id.* at 1420.

87. *Id.* at 1422.

88. *Id.*

89. *Id.* "[A] familial right cannot arise until a fetus is born and suffers from not having a parent." *Id.*

could claim a violation of his rights under section 1983.[90]

b. Discrimination Against a Mother

Women have historically been discriminated against on the basis of their pregnancy or ability to become pregnant.[91] The recent *International Union v. Johnson Controls*[92] holding overturned a company policy forbidding women of child-bearing age (whose infertility was not medically documented)[93] from working in certain areas of a battery plant.[94] The Supreme Court decided that the policy was facially discriminatory and that Johnson Controls failed to establish that gender was a bona fide occupational qualification for the job.[95] The Court based its decision on Title VII,[96] stating that pregnant employees must be treated the same as other employees in work-related issues, unless the pregnancy affects their ability to work.[97] The Court held that the safety of the unconceived fetuses of employees was not essential to battery

90. *Id.* at 1423-24.

91. *See* Muller v. Oregon, 208 U.S. 412 (1908). The Court held that women in the laundry business could not work more than ten hours a day. *Id.* at 423. The Court stated as follows:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of [the] woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

92. 111 S. Ct. 1196 (1991).

93. International Union v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989). The court of appeals clarified that "medically documented" means that the women need some medical confirmation that they cannot bear children. *Id.* at 877-78. The women were not encouraged to change their status by some sterilization procedure. *Id.* at 878.

94. *Id.* The policy was an attempt by the company to protect future children from the harmful effects of the high lead concentrations in the plant. *Id.* at 877.

95. International Union v. Johnson Controls, 111 S. Ct. 1196 (1991).

96. 42 U.S.C. § 2000e(k) (1988).

97. *International Union*, 111 S. Ct. at 1203 n.3. This Pregnancy Discrimination Amendment added subsection (k) to section 701 of the Civil Rights Act of 1964. *Id.*

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as persons not so affected but similar in their ability or inability to work . . . .

Id. Though working while in advanced pregnancy is a risk for the fetus, Congress has determined that the employer can only consider the employee's ability to do her job. *Id.* at 1207. *See also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Id.* at 684.

manufacturing.[98] The fetuses were not customers[99] (comparing the fetuses to airline passengers)[100] or third parties[101] (such as prison inmates).[102] Therefore, decisions about their health and welfare should have been left to the future parents, rather than to the employers.[103]

D. PROPERTY LAW

Property law has been far more consistent than the other areas of law previously discussed. Historically, if the fetus existed at the time of the death of a testator, then the fetus was treated as a person for the purpose of inheritance, as long as the fetus was eventually born alive.[104] The Rule Against Perpetuities required that an interest in property had to vest, if at all, no later than twenty-one years after some life in being at the time the interest was created.[105] A period of gestation was added to this twenty-one-year period—typically nine months.[106] This indicates that the probate courts recognize life from the probable point of conception. One court summarized the history of property law: "It has been the uniform and unvarying decision of all common law courts in respect to estate matters for at least the past two hundred years that a child 'in ventre sa mere' is 'born' and 'alive' for all purposes for his benefit."[107]

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98. *International Union*, 111 S. Ct. at 1206.

99. *Id.* at 1205-06.

100. *Id.* (citing Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)). In *Criswell*, the Court considered age-related abilities as relevant to the job of a flight engineer due to the safety of the passengers. *Criswell*, 472 U.S. at 401.

101. *International Union*, 111 S. Ct. at 1205-06.

102. *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321 (1977)). In *Dothard*, the Court allowed discrimination on the basis of gender, allowing a prison to hire only male guards in maximum-security male penitentiaries where contact was possible. *Dothard*, 433 U.S. at 331. The Court said that gender was related to the guard's ability to maintain prison security. *Id.* at 334-37.

103. *International Union*, 111 S. Ct. at 1207.

104. Christian v. Carter, 137 S.E. 596, 597 (N.C. 1927). Fetuses were recognized in this fashion, because it was presumed that their parents' neglect was due to oversight or mistake. *Id. See also* Cowles v. Cowles, 13 A. 414 (Conn. 1887) (legally recognized the fetus through the right of inheritance).

105. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 3.17 (1984). John Chipman Fray made the classic statement describing the common law principle limiting the creating of nonreversionary future interests: "No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest." *Id.*

106. Perkins v. Inglehart, 39 A.2d 672, 676 (Md. 1944). This case deals with a residuary clause in a will. *Id.*

107. *In re* Holthausen's Will, 26 N.Y.S.2d 140, 143 (Sur. Ct. 1941). The grandson of a testator born more than eight months after testator's death was determined to be alive and in being at the testator's death. *Id. But see In re* Peabody, 158 N.E.2d 841 (N.Y. 1959). In this case, a woman created a trust for her issue, and then attempted to amend it while she was pregnant. *Id.* at 842. If the fetus had been "beneficially interested" by the trust, the woman would not have been able to amend without the consent of the fetus. *Id.* The court

Current medical advances have raised new property law issues as well.[108] For example, many current laws do not speak of any period of gestation, but instead refer to children conceived before a testator's death.[109] This change allows recovery for children who were the products of in vitro fertilization and who were implanted months after fertilization.[110]

E. CHILD PROTECTION

Neglect and parental termination proceedings are neither tort[111] nor criminal.[112] In *In re Valerie D.*,[113] the court clarified that termination policies were part of the custody proceedings that were intended to protect children's welfare and health;[114] thus, prenatal conduct of the mother should be binding.[115] Other courts have added that unborn children should be protected by these custody laws, since the laws were intended to be preventative as well as remedial.[116] Courts often cite, as precedent, cases that have determined that a "child has a legal right to begin life with a sound mind and body."[117] Consequently, women have

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refused to bestow an eight-month-old fetus with the status of a "person beneficially interested," holding that the mother only needed the consent of the born persons. *Id.* at 845.

108. *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980). The Court determined that human-made, live micro-organisms are patentable. *Id.* at 309.

109. *Compare* Thellusson v. Woodford, 31 Eng. Rep. 117, 163 (Ch. 1798) (holding that property rights could only be expanded to those children who were "in the womb at the death of the testator") *with* UNIF. PROBATE CODE § 2-108 (1969) (extending the group to those conceived before the testator's death).

110. CAL. PROB. CODE § 6150(c) (West 1991). "A person conceived before but born after testator's death or after the time the devise is to take effect in enjoyment, as the case may be, takes if answering the class description." *Id.*

111. *Mother's Prenatal Conduct May Be Basis for Termination of Her Parental Rights*, 17 FAM. L. REP. 1526 (1991). *See also* Long v. Long, 255 N.W.2d 140 (Iowa 1977). Tort actions are different from custody proceedings because in tort, injury must be proved before damages *can* be recovered. *Id.* at 143. In addition, rather than a protection goal, tort law attempts to compensate the injured. Crisci v. Security Ins. Co., 426 P.2d 173, 178 (Cal. 1967).

112. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.2(e) (1986). Criminal law's broad aim is to prevent harm to society. *Id.* This is accomplished with punishment and threats of punishment. *Id.*

113. 595 A.2d 922 (Conn. App. Ct. 1991), *cert. granted in part*, 221 Conn. 903, __ A.2d __ (Conn. 1991).

114. *In re* Valerie D., 595 A.2d 922, 924 (Conn., App. Ct. 1991), *cert. granted in part*, 221 Conn. 903, __ A.2d __ (Conn. 1991).

115. *Id.* at 925; *In re* Baby X, 293 N.W.2d 736, 738 (Mich. Ct. App. 1980) ("The prenatal period is only pertinent because it is the sole asserted basis for establishing jurisdiction based on neglect.").

116. Long v. Long, 255 N.W.2d 140, 143 (Iowa 1977). A mother and stepfather appealed from an order terminating their parental rights. *Id.* at 141. "[Parental] termination proceedings are not like tort actions where injury must be proved before damages may be recovered. Our termination statute is preventative as well as remedial." *Id.* at 143.

117. Smith v. Brenna, 157 A.2d 497, 503 (N.J. 1960) ("[I]t is immaterial whether before birth a child is considered a person in being. And regardless of analogies to other areas of

been charged criminally and with child neglect when their children were born with positive toxicology results.[118] Many of these criminal charges have been unsuccessful. Consequently, prosecutors have begun to arrest mothers for delivering drugs to their infants in the short time after birth but before the umbilical cord is severed.[119]

Protection orders serve this same preventative goal and have been used to protect the health and welfare of a fetus.[120] In *In re Gloria C.*, a woman requested a protection order in favor of her fetus to protect the unborn child from her husband.[121] The court granted the order, holding that birth is not a condition precedent to protection[122] and stating that there are many ways to harm a fetus without harming the mother, so a protective order for her

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the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body."); Rosa H. Kim, *Reconciling Fetal/Maternal Conflicts*, 27 IDAHO L. REV. 223, 230 (1990) ("In instances where courts have enforced the interests of the fetus against the mother, they have justified their holdings by finding a right to be born with 'sound mind and body' or by finding a 'compelling state interest' in protecting fetal life, a rationale derived from *Roe v. Wade*."); *In re* Baby X, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980). "Since a child has a legal right to begin life with a sound mind and body, we believe it is within this best interest to examine all prenatal conduct bearing on that right." *Id.* at 739 (citing Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971) (eight year old's suit for brain damage due to pre-viability car accident)).

118. *E.g.*, *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280 (App. Div. 1990). Mothers were charged with neglect when their children were born with a positive toxicology for cocaine. *Id.* at 281. The judge determined that the children were neglected because "a positive toxicology for cocaine in a newborn constitutes 'actual impairment . . . .'" *Id.* at 283. *See also* MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1991) (anyone physically dependent on an addictive drug at birth is included within the definition of an abused child); N.J. STAT. ANN. § 30:4C-11 (West 1981):

> Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application . . . may be filed . . . seeking that the Bureau of Childrens Services accept and provide such care or custody of such child as the circumstances may require . . . . The provisions of this section shall be deemed to include an application on behalf of an unborn child . . . .

Id. *But see* Reyes v. State, 141 Cal. Rptr. 912 (Ct. App. 1977). The court held that a child endangerment statute did not apply to fetuses when the mother used heroin during pregnancy. *Id.* at 914.

119. *See, e.g.*, Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). A majority held that a pregnant woman violated a statute regarding delivery of controlled substances to a child. *Id.* at 419-20. The court stated that this was the only logical conclusion, since the infant was born and a real person when the drugs passed through the umbilical cord. *Id.* *But see* State v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991). The statute did not apply to this span of life after birth but prior to severance of the umbilical cord. *Id.* at 53. *See generally* Rorie Sherman, *Courts Disagree on Mothers' Liability*, NAT'L L.J., May 13, 1991, at 30. In a National Law Journal/Lexis poll, a majority said that the mother "should be held criminally responsible when she abuses substances during pregnancy and, as a result, gives birth to an impaired child." *Id.*

120. *In re* Gloria C. v. William C., 476 N.Y.S.2d 991, 995 (Fam. Ct. 1984).

121. *Id.* at 991. The woman's husband beat her in an attempt to cause a miscarriage. *Id.*

122. *Id.* at 998.

was insufficient.[123]

F. SUMMARY

The areas of tort law, criminal law, constitutional law, property law, and child protection have each developed in a unique fashion. Similar trends flow through multiple areas, such as "born-alive" and viability requirements. But more important than the history and development of fetal rights is the current state of the law. It is imperative to question whether each area of the law is consistent, while adequately addressing the problems it purports to confront.

II. ANALYSIS OF CURRENT LAW

A. INTRODUCTION

We all have an interest in future generations. The health, welfare, and quality of life of these children depends on the actions we take today. The physical health, financial stability, and moral/social values of our children will also be impacted by the laws and court decisions concerning unborn children. To this end, the Supreme Court decided that states have legitimate and important interests in "protecting the potentiality of human life"[124] and in promoting quality of life after birth.[125] This could be achieved by promoting a fetus' interest in being born healthy[126] or by recognizing an unborn's interest in either not being conceived or not being born.[127]

Individual development in each area of the law as it attempts to meet these interests is justifiable, but the resulting status quo is not necessarily logical, consistent, or adequate. Advances in medical technology have changed our perceptions about the unborn. As scientists reveal more information about the individuality of the

123. *Id.* at 992. The court cited, as an example, the ingestion of drugs that are harmless to an adult but dangerous to a fetus. *Id.*

124. Roe v. Wade, 410 U.S. 113, 162 (1973).

125. *Id.* at 163.

126. *E.g.*, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (per curiam), *cert. denied*, 377 U.S. 985 (1964). The health of the child was promoted by requiring the mother to have a blood transfusion while pregnant. *Id.* at 537-38.

127. Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477, 488 (Ct. App. 1980) (refusing to shield the parents from liability for the child's pain and suffering if the parents refuse to abort a fetus they know to be seriously impaired); Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63 (1984). Shaw argued that society should prevent conception by requiring genetic counseling and carrier testing to reveal who could pass on deleterious genes, and then encourage the use of contraceptives or sterilization by making the parents liable in tort at the moment of conception. *See id.* at 93.

fetus,[128] perform amazing fetal surgeries,[129] and save babies who previously would have fallen victim to premature births and severe deformities,[130] the focus of many legal rights has turned from the mother to the fetus.[131]

These advances have obvious benefits to society, yet they also create problems as courts and legislatures attempt to incorporate complex fetal rights issues into the status quo while still maintaining the same level of rights for everyone else affected.[132]

B. TORT LAW

1. *General*

Recovery by fetuses in tort law has been complicated by many factors.[133] However, most of these factors should be irrelevant when considering the purpose of tort law. Tort recoveries are

128. Jeffrey L. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J. L. & MED. 1, 2 (1983). Most obstetricians prefer to view a mother and fetus as a single entity with single interests. *Id.* This is easier because that single interest is furthered by proper maternal care. *Id.* But these attitudes are changing as advances in fetal diagnosis and care clearly distinguish a fetus and a mother for treatment purposes and thus necessitate different types of care and treatment. *Id.*

129. Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499 (1991). Surgeons can now operate on fetuses while they are still developing in the womb. *Id.* at 503. The most frequent and successful surgeries are those which treat hydrocephalus (preventing severe mental and physical brain damage) and those which treat obstructed urinary tracts. *Id.* at 503-04. *See also* Sandra Blakeslee, *Fetus Returned to Womb Following Surgery*, N.Y. TIMES. Oct. 7, 1986, at C1. In this case, a fetus was removed from the mother, operated on, and then returned to the womb. *Id.*

130. *See supra* notes 128 and 129 (describing these life-saving procedures).

131. Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986). The shift, and thus potential conflict with care of the mother, has occurred because of the technology that enables doctors to visualize the fetus, detect abnormalities, correct problems, and advise about the detrimental effects of various substances and activities. *Id.* at 1951.

132. Johnsen, *supra* note 4.

> [C]ourts (as well as legislatures) have felt constrained by the existing law as developed for born persons and have considered the granting of fetal rights an all-or-nothing proposition. They have mistakenly viewed their options as being limited to either granting the fetus personhood status without regard to either the context or the parties involved, or denying the very existence of the fetus. It is thus not surprising that these lawmakers have extended the rights of persons to fetuses when faced with instances of clear harm and injustice, such as when an assailant negligently or willfully destroys a fetus through violence to a pregnant woman.
>
> Courts have also employed unnecessarily simplistic reasoning when adopting the other extreme and refusing to recognize the existence of the fetus at all.

Id. at 609-10.

133. Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982). Examples of these complicating factors follow: (1) There are survival and wrongful death actions if not born alive, and wrongful life if born alive but injured. *Id.* at 270- 71. Many different parties have actions. *Id.* at 271. (2) The actions can be determined by injuries at many different stages of development. *Id.* (3) Many people question whether we should protect the unborn, the mother, or both. *Id.* at 271-72.

intended to compensate for the harms inflicted by a tortfeasor.[134] Keeping this objective in mind, it is apparent that many courts and legislatures have based their opinions on faulty reasoning.[135] Courts often feel compelled to rest their decisions on the holding of *Roe v. Wade*. For example, many judges have difficulty holding a third person liable for an injury to a fetus when a mother can intentionally terminate the fetus at the same stage of development.[136] Relying on *Roe* in tort cases is in error for many reasons. First, the Court did not hold that a fetus has no rights, or even no constitutional rights.[137] The Court held that a fetus has no Fourteenth Amendment rights.[138] Second, the Court upheld the right to abortion due to the importance of a mother's right to privacy.[139] Wrongful death and tort recoveries do not infringe on constitutionally protected rights of privacy.[140] Third, there were balanc-

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134. *See supra* note 22 and accompanying text (discussing of the purpose of the tort recoveries).

135. Williams v. Marion Rapid Transit, 87 N.E.2d 334 (Ohio 1949).

> [T]he courts recognized the beneficence of the common law for the protection of unborn infants against the criminal conduct of others and as to inheritance and property rights without saying that such protection and rights exist as exceptions or statutory declarations. But when they follow the principle of the *Dietrich* case and deny a cause of action to infants on the ground that the unborn child is not a separate and legal entity, they do nothing to reconcile the contradiction or . . . the anomaly between the common law rights in favor of the infant, which they recognize, and the natural right of the infant to have compensation for pre-natal injuries negligently inflicted, which they do not recognize.

Id. at 338-39.

136. *See, e.g.*, Toth v. Goree, 237 N.W.2d 297, 298, 302 (Mich. Ct. App. 1975). There is an inherent conflict in holding a third party liable for negligently but unintentionally causing a pregnancy to end, when a mother can intentionally terminate the pregnancy at the same time. *Id.* The same argument has been made in dissenting opinions. *See* Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88, 95 (Ill. 1973) (Ryan, J., dissenting).

> With the leeway conferred upon the States within which they may authorize or proscribe abortion by statute, it would appear that, to avoid apparent or actual inconsistencies in the law, any right of action created for the wrongful death of an unborn child should be correlated with the provisions of the statute pertaining to abortions.

Id. at 95.

137. *See* Roe v. Wade, 410 U.S. 113, 158 (1973). *But see* McGarvey v. Magee-Womens Hosp., 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). This was a pre-*Roe* case that held that a fetus has no protections under the Constitution. *Id.* at 754.

138. *Roe*, 410 U.S. at 158.

139. *Id.* at 154.

140. Parness & Pritchard, *supra* note 133, at 274. Parness and Pritchard added that courts often cite reasons in addition to reliance on *Roe*, such as speculative damages and proof of causation, but then condemned these reasons as well because they only pertain to the difficulty of proof. *Id. See also* Wallace v. Wallace, 421 A.2d 134, 140 (N.H. 1980) (Douglas, J., dissenting) ("In whatever manner the United States Supreme Court chooses to define 'persons' for [F]ourteenth [A]mendment purposes, it is *not* binding on this court with regard to . . . death actions."); Toth v. Goree, 237 N.W.2d 297, 305 (Mich. Ct. App. 1975) (Maher, J., dissenting) ("We are not concerned with the right of a mother to freely terminate her pregnancy at a certain stage. Rather we have the case of a wrongful and unwanted termination. Certainly a tortfeasor cannot invoke the mother's privacy rights to defend his wrongdoing.").

ing tests (such as mothers and their doctors versus the states) used in *Roe* which do not apply to tort cases.[141] Fourth, the viability divisions so clearly delineated by *Roe*[142] are irrelevant when considering the purposes of tort recovery.[143] Tort recovery is meant to compensate,[144] so it should not matter whether a fetus was injured before or after the point at which survival outside of the womb is possible.[145] Since harm to a child may have been caused by acts prior to the child's conception, viability requirements also unfairly prevent compensation for these injuries.[146]

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141. *Roe*, 410 U.S. at 164-65. The mother's potential interests in whether to give birth and the state's potential interests in the health of the mothers and fetuses sometimes conflict. *Id.* at 162-63. These interests were balanced in *Roe*, using the trimester system. *Id.* at 163-65. In the first trimester of pregnancy, the woman's interests outweigh the state's. *Id.* at 163-64. In the second trimester, the state's interest in the mother's health outweighs the state's interest in the fetus and the woman's interest in abortion. *Id.* In the third trimester, the state's interest in the potentiality of human life outweighs the woman's interest in abortion. *Id.* at 164-65.

142. *Id.* at 162-66.

143. Smith v. Brennan, 157 A.2d 497, 504-05 (N.J. 1960) (infant born injured due to car accident prior to infant's birth).

> The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.
>
> Although the viability distinction has no real justification, it is explainable historically. The Dietrich case announced a theory that an unborn child was part of its mother. The first dissent from this proposition, by Justice Boggs in the Allaire case pointed out that an unborn child who could sustain life apart from its mother could not be considered part of her. The logical appeal of Justice Boggs' approach, coupled with the understandable conservatism of the earlier courts who broke with the Dietrich theory, resulted in a rule of recovery limited by the viability distinction. But the usefulness of that distinction has disappeared with the modern repudiation of the Dietrich theory. And since it has no cogent medical reason to support it, and no relevancy to the harm resulting from prenatal injury, we do not believe that it has any place in the determination of the question of liability for wrongful conduct.

Id. See also Lenow, *supra* note 128, at 28. "An unborn child's rights should not depend upon the fetus reaching the *Roe* Court's elusive 'point of viability' before a state may protect them." *Id.* The point does not have to be earlier or later, just more appropriate. *Id.* at 28-29. The decision is best suited to an interdisciplinary ad hoc committee. *Id.* at 29. *Cf.* James J. Diamon, *Humanizing the Abortion Debate*, AMERICA, July 19, 1969, at 36-37. "In this day of DNA synthesis, test-tube incubation, intra-uterine transfusions, talk in high circles of chromosomal manipulation and *in vitro* generation, the 20-week survivability standard is about as sacred as the four-minute mile." *Id. But cf.* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). Uncontradicted medical evidence suggests that a "20-week fetus is *not* viable." *Id.* at 515 (quoting Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 420 (D. Mo. 1987)).

144. *See supra* note 22 and accompanying text for a discussion of the purpose of tort recovery.

145. Smith v. Brennan, 157 A.2d 497, 504 (N.J. 1960); Wallace v. Wallace, 421 A.2d 134, 135 (N.H. 1980). Viability does not matter if the fetus is later born alive, because then the action is for the suffering of a live person. *Id.* at 135-36.

146. David A. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965); William J. Maledon, Note, *The Law of the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971). "It is as irrational to choose birth, quickening, or viability as the point at which life is to be legally protected as it is to choose

2. *Wrongful Death and Wrongful Life*

Wrongful death suits are obviously not intended to compensate the fetus, since the fetus is no longer alive. Instead, these recoveries are intended to compensate the people who are harmed by the loss of the fetus.[147] Viability should only be considered if courts and legislatures really believe that parents are harmed by the death of their fetuses only after the magical point of viability and not before. Certainly there needs to be some end to liability,[148] but that line should be drawn according to the proximity of the cause instead of the fetus' development.[149]

The possibility of a wrongful life suit would be terrifying for any parent who is morally opposed to aborting a fetus due to its deformities. In *Curlender v. Bio-Science Laboratories*,[150] the court suggested that parents could be sued for not aborting children who would be born deformed.[151] In this case, the legislature stepped in and prevented suits of this type,[152] but the possibility remains for other jurisdictions to follow the suggestion of the California court. Suing parents for not aborting deformed children is consistent with the purpose of protecting future children, but inconsistent with the *Roe* holding, which grants women the freedom to choose whether or not to abort a fetus.[153]

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the age of six months, seven years, or the age of adult majority as the Roman law essentially did." *Id.* at 371.

147. *See supra* note 22 (discussing the purpose of tort recovery). *Contra* Amadio v. Levin, 501 A.2d 1085 (Pa. 1985). The real objective of these lawsuits was not to compensate the parents of the deceased children for their emotional distress. *Id.* at 1088. This compensation theory perpetuates the mistake that an unborn child is inseparable from the mother. *Id.* The recovery is intended to pay for the economic losses (funeral and medical expenses) of the child's estate. *Id.*

148. Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88, 92 (Ill. 1973) (Ryan, J., dissenting) (line should be birth because of its definiteness, preciseness, and observability); Wallace v. Wallace, 421 A.2d 134, 136 (N.H. 1980). In *Wallace*, the viability distinction was created in an attempt to increase the circle of liability beyond birth. *Id.* Including pre-viable fetuses within this circle would extend liability even more. *Id.* The zone of liability should not be based on logic or science, but some reasonable limit to liability. *Id.* "The ordinary meaning of death presupposes live birth .... Life may begin with conception but causes of action do not." *Id.* at 136-37.

149. There are two incompatible views as to determining the cause of an injury. *See* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928). With fetal rights issues, states could apply either Cardozo's foreseeability approach, *see id.* at 101, or Andrew's dissent espousing the directness approach. *See id.* at 103-04.

150. 165 Cal. Rptr. 477 (Ct. App. 1980).

151. Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477 (Ct. App. 1980). The court could not discover a sound public policy that would protect parents from answering for the misery, pain, and suffering they inflict on their children and felt that abortion would prevent this harm to the children. *Id.* at 488.

152. CAL. CIV. CODE § 43.6(a) (West 1982). "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive." *Id.* This also cannot be raised as a defense in an action against a third party. *Id.*

153. Roe v. Wade, 410 U.S. 113 (1973).

3. *Informed Consent*

Considering a fetus to be a patient with a right to receive informed consent could be viewed as duplicative, since the doctor must go through the parent anyway. Cases requiring this informed consent and extending the period of recovery for fetuses are further examples of attempts to protect fetuses and to strengthen their rights.[154] This demonstrates that courts believe fetuses need protection from dangerous surgeries and medical procedures. Parents must make conscious decisions on behalf of the health and welfare of the child.

4. *Forced Surgery*

Forced surgeries do not follow the general tort law concerning volunteerism.[155] Usually, one individual is not obligated to help another, even if failing to do so will result in death.[156] There are certain exceptions to this general rule for carriers, innkeepers, employers, shopkeepers, social guests, prisoners, students, and others with special relationships.[157] Criminal and child protection statutes have sometimes recognized duties of parents to aid children,[158] and tort law may extend these duties to parents as well,[159] but surgery on a fetus is far more intrusive than requiring a parent

154. *See, e.g.*, Hughson v. St. Francis Hosp., 459 N.Y.S.2d 814, 816-18 (App. Div. 1983).

155. Kim, *supra* note 117, at 239. The rule that one person is not obliged to help another suggests that freedom of choice (of whether or not to aid someone) is more important than protecting human life. *Id. See also* KEETON, *supra* note 20, at 375. The law has traditionally refused to impose moral obligations on strangers to aid other human beings. *Id.*

156. See KEETON, *supra* note 20, at 375. This is true even if a life depends on a simple act from a stranger in a position to help. *See also* Sidwell v. McVay, 282 P.2d 756 (Okla. 1955). A 16-year-old boy lost his hand from hammering on a homemade explosive. *Id.* at 758. The boy was at the neighbor's house, and the neighbors witnessed what he was doing, but they only told him not to make a mess and to get away from the shed so he would not blow it up. *Id.* The court said that the neighbors had no duty to prevent the boy's accident. *Id.* at 759. Sometimes courts have not extended a duty to aid even when that person's act may have added to the victim's peril. Osterlind v. Hill, 160 N.E. 301 (Mass. 1928). In *Osterlind*, the defendant rented a canoe to someone he knew to be intoxicated. *Id.* at 302. The canoe tipped, and the intoxicated man called for help for a half an hour. *Id.* The defendant ignored the calls, and the man drowned. *Id.* The court held that the defendant had no duty to help the drowning man. *Id.*

157. KEETON, *supra* note 20, at 376-77; Yu v. New York, New Haven & Hartford R.R., 144 A.2d 56 (Conn. 1958) (carrier had duty to make reasonable efforts to aid passenger in danger); Parrish v. Atlantic Coast Line R.R., 20 S.E.2d 299, 305 (N.C. 1942) (if plaintiff was injured through the fault of the defendant in not taking the proper precautions to protect travelers, then the defendant should have helped the plaintiff, rather than leave him unconscious for almost an hour).

158. KEETON, *supra* not 20, at 377; CAL. PENAL CODE § 270 (West 1988) (misdemeanor to willfully omit to furnish necessary medical care to one's child); Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499, 523 (1991) (affirmative duty on parents through child neglect statutes to aid their children based on the special parent-child relationship).

159. KEETON, *supra* note 20, at 377.

to seek medical care for an ill child.[160]

Since forced surgery naturally raises issues of privacy, courts have questioned whether *Roe* prohibits surgery. One court argued that since a greater includes a lesser, a mother can refuse surgery if she can abort.[161] Others have rejected the *Roe* analysis, claiming the privacy right is not implicated, since a mother has chosen to give birth.[162]

5. *Summary*

Notice the inherent conflicts in the current state of tort law. Some children have injuries caused by the actions of tortfeasors

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160. Knopoff, *supra* note 39, at 525. Donald Regan has made personal predictions concerning a parent's obligation to submit to surgery for a child. Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). Regan believes that if a case were presented in order to determine whether a parent had a duty to donate a kidney or bone marrow to a born child, it would be likely that no duty would be found. *Id.* at 1586. This is in spite of the fact that neither donating one kidney nor donating bone marrow have long term effects on the donor. *Id. See also* Committee on Ethics of the Am. College of Obstetricians and Gynecologists Op. No. 55, Patient Choice: Maternal-Fetal Conflict (Oct. 1987) *reprinted in* IRA MARK ELLMAN, ET AL., FAMILY LAW, 1152 (1991).

> The role of the obstetrician should be one of informed education and counsellor . . . . The use of courts to resolve . . . conflict . . . is almost never warranted. Obstetricians should refrain from performing procedures that are unwanted by pregnant women. The use of judicial authority to implement treatment regimens in order to protect the fetus violates the pregnant woman's autonomy. Furthermore, inappropriate reliance on judicial authority may lead to undesirable societal consequences, such as the criminalization of noncompliance with medical recommendations.

Id. Professor Tribe discussed this issue from a constitutional perspective. When someone's bodily integrity is at stake, procedurally adequate protections are needed because physical pain is irreparable and final. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1329-37 (1988). A Pennsylvania state court phrased the concept even more vividly.

> For a society, which respects the right of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.

McFall v. Shimp, 10 Pa. D. & C. 3d 90, 92 (1978).

161. Lenow, *supra* note 128, at 23. It is odd that a state can require a mother to have fetal surgery and then have no recourse if she chooses to abort. *Id. See also* Kevin M. Apollo, Comment, *The Biological Father's Right to Require a Pregnant Woman to Undergo Medical Treatment Necessary to Sustain Fetal Life*, 94 DICK. L. REV. 199 (1989). Perhaps fathers of unborn children should be able to require treatment when the mother objects. *Id.* at 199-200.

162. *In re* Gloria C. v. William C., 476 N.Y.S.2d 991, 997 (Fam. Ct. 1984) (fetus was granted a protection order). *See also* Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987).

> Fetal rights theorists assume that *Roe*'s analysis of the scope of the abortion right also determines a woman's rights in the coerced medical treatment context. But the pregnant woman's right to shape her own medical care and that of her unborn child draws upon a wider range of precedents, demands a distinct analysis and balancing test, and requires a fresh examination of *Roe* itself.

Id. at 14-15 (footnote omitted).

and yet are unable to recover, due to the stage of their development when the torts were committed. Why should tortfeasors be exempt from these burdens? Why should the children and the children's families pay for the mistakes of others?

Tort recovery requires the establishment of many factors. Causation is always a factor, and it should not be treated any differently here. If the plaintiff cannot prove causation using any of the acceptable means, then the plaintiff fails. But if a duty exists and medical advances enable the plaintiff to sufficiently prove causation, and that cause is not so remote as to shock the conscience, then the only fair result is to hold the tortfeasor liable.

Plaintiffs in wrongful death and wrongful life cases should recover using the same logic. The triers of fact consider many factors in order to determine the extent of recovery allowed in a given case. These same triers of fact are equally qualified to judge the loss inflicted on a plaintiff when the victim is a fetus.

There are benefits to the medical and scientific advances concerning fetuses, but if left unchecked, it is possible that the benefits will be outweighed by the harms. Forced medical care and surgery are intrusive to pregnant women but are often necessary for the life or health of the child. Forced abortions of deformed fetuses assumes that some legislature or court could define what would be an acceptable form.

Courts frequently hold that the state's interests in the life or health of the fetus outweigh the rights of the mother. Does the state not have an equally strong interest in the life of the proverbial drowning person?[163] If so, the state should force the expert swimmer to rescue the drowning victim. Certainly a mother has closer ties to her unborn child—probably even a "special relationship." But if the freedom to choose whether or not to aid another person is so important, then why is a special relationship enough to coerce actions as intrusive as surgery upon nonconsenting adults? If courts are going to allow these medical procedures, they need to explain the distinctions between the instances when a court can force an adult to submit to surgery and treatment and other cases (such as volunteerism and abortion) when adults are left to their own consciences.

163. *E.g.*, Osterlind v. Hill, 160 N.E. 301 (Mass. 1928) (defendant in position to assist did nothing while drowning man called for help).

C. CONSTITUTIONAL LAW

1. *Definition of a Person*

Roe v. Wade held that a fetus is not a person within the meaning of the Fourteenth Amendment.[164] This holding should not apply to fetal rights in other contexts.[165]

The debate over personhood status still causes many problems. Courts have had difficulty including fetuses within certain precedents and statutes. Some courts simply declare that fetuses are persons for certain purposes.[166] Many other courts believe that the decision must be "all-or-nothing": either the fetus is a person and therefore entitled to all of the rights of any other person, or it is not a person and has no rights in its current state.[167]

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164. Roe v. Wade, 410 U.S. 113, 158 (1973).

165. Parness & Pritchard, *supra* note 133, at 269 ("*Roe* Court only held that a previable fetus is not a 'person' enjoying fourteenth amendment protection"); Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960) ("The semantic argument whether an unborn child is a 'person in being' seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what everyone will concede to be a person in being.").

166. Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703 (1986). It is more appropriate to say that a fetus is not a person but does have certain rights than it is to say that sometimes a fetus is a person and sometimes it is not. *Id.* at 738.

167. Johnsen, *supra* note 4, at 609-10. *See also* William Saletan, *If Fetuses Are People. . .*, 201 NEW REPUBLIC 18 (1989). A month after the Supreme Court reinstated a Missouri statute declaring that life begins at conception, a federal lawsuit was filed against state officials for jailing a fetus of a female prisoner without due process. *Id.* The complaint stated that it was a violation of the Thirteenth Amendment to jail one person for the crime of another. *Id.* Other people in the state wondered about changes in the welfare payments, food stamp allowances, and other possibilities with nine months added to everyone's age. *Id.* There were some interesting arguments before the Ninth Circuit concerning this same philosophy. Gail Diane Cox, *9th Circuit Ponders Fetal Rights*, NAT'L L.J., Apr. 22, 1991, at 3, 30. A case that was recently before the Ninth U.S. Circuit Court of Appeals (Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991)), concerned a child who was born after police officers shot both of his parents (his father died after 40 shots; his mother survived with 13). *Id.* at 3. The child is now eight years old and is suing for the death of his father. *Id.* Prior to oral arguments, the plaintiff's attorney said he looked forward to listening to conservative judges trying to say that a fetus is a person for abortion purposes, but not a person who can have standing to sue. *Id.* at 30. At the trial, the plaintiff's attorney argued that the child should have a cause of action for the deprivation of the familial right not to have one's father killed by the police. *Id.* The defense attorney argued that when the man was killed, there was no "father" because there was no individual to whom he could be father. *Id.* A judge asked, "Why wouldn't coming into the world with a dead father be an injury?" The judge then asked, "You're not disputing the fetus is a person now, are you?" *Id.* The court in *Crumpton* held that the child could recover due to the deprivation of familial rights. Crumpton v. Gates, 947 F.2d 1418, 1422-24 (9th Cir. 1991). *Cf.* Towne v. Eisner, 245 U.S. 418 (1918). In *Towne*, the plaintiff tried to recover money collected by the government for income tax. *Id.* at 424. Justice Holmes commented about the power of words, which could also be applied to the word "person" in the fetal rights context: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id.* at 425.

2. *Discrimination Against a Fetus*

In *Douglas v. Town of Hartford*[168] and in *Crumpton v. Gates*,[169] the courts found civil rights violations under section 1983 of chapter 42 of the United States Code due to actions against a fetus.[170] The *Crumpton* court carefully noted that while the action occurred when the plaintiff was a fetus, the harm did not occur until birth.[171] According to section five of the Fourteenth Amendment, Congress was given the power to enact section 1983 in order to enforce the Amendment.[172] However, section 1983 does not provide any substantive rights and has no protections because it is only a remedy.[173] Plaintiffs need an "independent substantive basis for relief."[174] Since it was an attempt to enforce the provisions of the amendment, the Act should have the same meaning as the Fourteenth Amendment.[175] It logically follows then, that since a fetus is not a person within the meaning of the Fourteenth Amendment,[176] a fetus should not have any rights under section 1983.[177]

The *Crumpton* court indicated that the time of injury was important.[178] Why should recovery for civil rights violations be determined simply by the point at which the injury occurred? The *Crumpton* court attempted to draw a clear distinction between physical injuries and the loss of a father.[179] The court stated that John Crumpton IV was not harmed by the loss of his

168. 542 F. Supp. 1267 (D. Conn. 1982).

169. 947 F.2d 1418 (9th Cir. 1991).

170. For a discussion of the facts of the cases, see *supra* text accompanying notes 79-90.

171. Crumpton v. Gates, 947 F.2d 1418, 1422 (9th Cir. 1991).

172. *Id.* at 1420. *See also* N.B.T., Note, *Douglas v. Town of Hartford: The Fetus as Plaintiff Under Section 1983*, 35 ALA. L. REV. 397, 399 (1984). The Act was originally entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Id.*

173. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 601, 617 (1979); 42 U.S.C. § 1983(A)(1) (1988). Section 1983 authorizes redress for violations of constitutional and statutory rights, but it is not itself a source of substantive rights. *Id.* It is a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes. *Id.* Senator Edmunds also clarified the authorization of § 1983 on the floor of the Senate. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). All civil suits which § 1983 authorizes are based on the plaintiff's right as a citizen, because the act only gives remedies. *Id.*

174. *Crumpton*, 947 F.2d at 1420.

175. Note, *supra* note 172, at 399.

176. Roe v. Wade, 410 U.S. 113, 158 (1973).

177. Note, *supra* note 172, at 398. "[T]he *Roe* holding realistically presents a severe impediment of granting a fetus a constitutionally-based section 1983 action[.]" *Id.* at 405. "Unless the federal courts are willing to overturn the *Roe* doctrine completely, philosophical purity thus requires that a fetus not be considered a 'person' under section 1983." *Id.*

178. Crumpton v. Gates, 947 F.2d 1418, 1422 (9th Cir. 1991).

179. *Id.*

father until his birth.[180] Considering the possible emotional, physical, and financial impact on his mother from the death of his father, it is easy to imagine that John may have been harmed at the time of his father's death. Further, the *Crumpton* court stated that any physical injuries to a fetus from beating a pregnant woman harm the fetus at the time of the beating.[181] While this is certainly true, it does not negate the fact that the injuries may not disappear at that child's birth. Both the child who was physically harmed and the fatherless child will be harmed at birth, so why should only one recover?

While the *Crumpton* court attempted to distinguish precedents by drawing a fine line around the point of injury,[182] the *Douglas* court ignored all precedent and logic and instead based its opinion on the trend in state courts toward greater legal rights for the unborn.[183] While this may be noble, it does not appear to be constitutional.[184] *Roe v. Wade* is one of the seemingly clear Supreme Court precedents concerning a fetus' rights, and yet *Douglas* and *Crumpton* conflict with this precedent. The distinctions are not strong enough in these recent cases to set them apart from the *Roe* holding.

3. *Discrimination Against Women*

Some authors claim that fetal rights laws discriminate against women.[185] If the real purposes of forcing surgeries (allowing recovery in tort and property and making child protection and criminal statutes applicable to fetuses) is to protect the children, then the logical and nondiscriminatory way to proceed would be to regulate harmful conduct based on the proximity to future life. Pregnancy is a foreseeable event,[186] and is necessary for the survival of our society. All of those involved should be equally

180. *Id.*
181. *See id.*
182. *See id.*
183. *See* Douglas v. Town of Hartford, 542 F. Supp. 1267, 1270 (D. Conn. 1982).
184. *See* Note, *supra* note 172, at 398-99 (discussing the conflict with United States Supreme Court decision).
185. Johnsen, *supra* note 4. Fetal rights laws threaten a pregnant woman's autonomy. *Id.* at 620. Those laws only harm women because only women are able to bear children. *Id.* *But see* Parness & Pritchard, *supra* note 133. Due to the privacy interests of a mother (while pregnant), fathers are more readily exposed to liability for fetal injuries than are mothers, even though the injuries are identical. *Id.* at 297.
186. *See* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1258 (Ill. 1977). In this case, a 13-year-old girl was given an improper blood transfusion that later caused problems for her child. *Id.* at 1251. The court stated that since it was foreseeable that this girl would later become pregnant, her infant could recover for the negligence or willful misconduct, even though the act occurred years prior to the infant's conception. *Id.* at 1258-59.

responsible for the harm to future life.[187] Therefore, viability and gender should both be irrelevant.

There are many ways to cause harm to a child based on its prenatal life. The danger may be caused by factors prior to conception, such as genetic disorders,[188] diseases,[189] improper medical treatments,[190] and a high risk of tubal pregnancy.[191] During pregnancy, the health of the fetus may be endangered by substandard nutrition of the mother,[192] taking over-the-counter or street drugs,[193] smoking by the mother or anyone with whom the mother comes into contact,[194] drinking alcoholic beverages,[195] and exercising or having sexual intercourse late in pregnancy.[196]

The right to reproduce has been protected by the Supreme

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187. *See* Carol A. Simon, Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 90 (1978).

> Given medical science's growing awareness of the numerous ways in which the parents may permanently impair the child's physical and mental well-being, the inconsistent and illogical exoneration of the parents becomes increasingly egregious and unjust. The act is culpable, whether committed by a stranger or by a parent. It is the act which is tortious and the identity of the actor should be of no legal significance.
>
> . . . .
>
> Holding that parent to the reasonably prudent expecting parent standard will ensure liability for behavior that unreasonably endangers the fetus. At the same time, such a standard, by balancing the interests of the parents and the unborn child, will prevent liability for conduct in which the reasonable parent would participate.

Id.

188. Shaw, *supra* note 34, at 75-76. There are more than 3,000 cataloged genetic diseases. *Id.*

189. *Id.* at 67-69. Examples of diseases dangerous to the fetus are insulin-dependent diabetes, thyroid disease, ovarian tumors, rubella, and AIDS. *Id.*

190. *See, e.g.*, Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1251 (Ill. 1977). In this case, a 13-year-old girl was given an improper blood transfusion that later caused a problem for her child. *Id.*

191. Gallagher, *supra* note 162, at 44.

192. Note, *supra* note 187, at 73.

193. *Id.*; Grodin v. Grodin, 301 N.W.2d 869, 869-70 (Mich. Ct. App. 1980) (son and father sued mother and doctor for taking/prescribing drugs which discolored son's teeth); Carol S. Larson, *Overview of State Legislative and Judicial Responses*, THE FUTURE OF CHILDREN 72-84 (1991). A woman was arrested under the state criminal child support statute for " 'failing to follow her doctor's advice' to stay off her feet, refrain from sexual intercourse, refrain from taking street drugs, and to seek medical attention if she experience difficulties with the pregnancy." *Id.* at 74. The case was dismissed, because the court determined that the legislature did not intend the statute to be used to regulate the conduct of a pregnant woman. *Id. See also Widespread Use of Drugs by Pregnant Women Is Found*, N.Y. TIMES, Aug. 30, 1988, at A1. Surveys of selected hospitals found wide differences in drug use by pregnant women in different areas of the country. *Id.* Of urine tests of pregnant women during labor in a Sacramento hospital, 25% showed evidence of amphetamine, cocaine, or heroin use. *Id.*

194. Simon, *supra* note 187, at 74.

195. Shaw, *supra* note 34, at 73. A fetus exposed to levels of alcohol throughout pregnancy may develop Fetal Alcohol Syndrome, resulting in mental growth retardation, facial anomalies, and other congenital defects. *Id.*

196. Simon, *supra* note 187, at 75.

Court,[197] but like all other rights, it is not absolute.[198] Some people believe the legal duty not to conceive can extend to relationships that are not incestuous or age-related.[199]

Another possible harm to a fetus comes from workplace exposures, such as the lead used in battery plants as described in *International Union v. Johnson Controls.*[200] The Supreme Court decided that it was discriminatory to forbid women of child-bearing age from working in the plant.[201] The majority opinion implied that if the company had been subjected to tort liability that threatened the survival of the business, the answer may have been different.[202] The Court also noted that the odds of future liability on the employer's part were remote.[203] It is appalling that the Supreme Court would even suggest that tort liability may justify discrimination against pregnant women but physical harm to their children does not. Waiting for tort liability may assure the Court of a real injury, but that point will be too late for the injured plaintiff.

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197. Skinner v. Oklahoma, 316 U.S. 535 (1942). "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring," and that is unconstitutional. *Id.* at 536.

198. See *infra* note 199 for a discussion of exceptions to the right to reproduce.

199. Shaw, *supra* note 34, at 93. There is a legal duty not to conceive children out of certain incestuous and consanguineous relationships. *Id.* Retarded adults have been legally sterilized as long as they have first been afforded due process. *Id.* When genetic counseling or carrier testing has revealed there is a likelihood of passing on deleterious genes, use of contraceptives should be required. *Id.* If a couple conceives in spite of this, the child should have a tort action at the moment of conception. *Id.*

200. 111 S. Ct. 1196 (1991); Marja-Lusa Lindbohn et al., *Effects of Paternal Occupational Exposure on Spontaneous Abortions*, 81 Am. J. Pub. Health 1029 (1991). The exposure to certain work-related substances by males may cause an increased number of miscarriages by their wives. *Id.*

201. International Union v. Johnson Controls, 111 S. Ct. 1196, 1209-10 (1991). The Court stated that Congress has decided that a woman should be left to decide whether her reproductive or economic role is more important. *Id.* at 1210.

The Court avoided far too many issues in its decision. It could have demanded studies to determine the exact risks to fetuses from mothers and fathers and to determine how harmful lead is for both parents prior to and during pregnancy. A decision of this type should balance the proximity of harm to the child with the rights of all involved. Was there a less restrictive means to handle the harmful environment? The Court of Appeals determined that this issue was waived because it was not adequately presented. International Union v. Johnson Controls, 886 F.2d 871, 890-91 (7th Cir. 1989). Requiring a person to decide between a job and a family is not a realistic solution. Whether or not to continue working is not always a real choice. Economic factors often necessitate that both parents work, so the real choice becomes whether or not to risk having children. Perhaps the potential parents could have been transferred to another job for equal pay. Perhaps the business should have been required to find a less harmful way to run the plant.

202. *International Union*, 111 S. Ct. at 1209. The incremental cost of hiring women due to possible damages would not justify discrimination against them, but the Court clarified that this is not a case in which costs threaten the survival of the business. *Id.*

203. *Id.* at 1199. "If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." *Id.*

Justice White's concurring opinion was far more persuasive.[204] He claimed that although this policy did not satisfy Title VII, that did not mean that the company had to invalidate its entire policy.[205] The Justice pointed out that the possibility of tort liability is not quite so remote, considering that warning the parents of the danger will not prevent the injured child, as an innocent third party, from suing the company.[206] Complying with federal laws (such as Title VII) does not necessarily preempt state tort liability (as the majority suggested).[207] Also, although tort liability requires negligence, it is difficult to determine today what will be considered negligent when the injured chooses to sue.[208] Justice White felt that protecting an unborn child was as legitimate a state interest as protecting other third parties.[209] He also claimed that neither precedent nor Title VII required the Court to exclude women (from a harmful work environment) who were already pregnant.[210]

4. *Summary*

Abortion will be a controversial subject for generations— perhaps forever. There is some inherent conflict in discussing both fetal rights and abortion, but advocates on both sides of the issue should be able to admit that it is in our best interests to have healthy children. In order to accomplish this, some protection for unborn children is needed. People (not just women) will have to give up some of their rights, but that does not signal the end of all freedoms, or the end of abortion, or even the end of working in battery plants. It simply means that some rights will have to be curtailed in order to best meet the goals of our society.

Other than the feared impact on abortion, there is no logical reason to deny a fetus a remedy under section 1983. Courts

204. *Id.* at 1210 (White, J., concurring).

205. *International Union*, 111 S. Ct. at 1215 (White, J., concurring). Today, Johnson Controls allows women to work in jobs that were previously banned, and it no longer has any fetal protection policy. *Bureau of Nat'l Affairs, Inc., BNA's Corporate Couns. Wkly.*, Feb. 5, 1992, at 8. The union is now pushing the company to clean up the job sites and to settle the claims.

206. *Id.* at 1210-11.

207. *Id.* at 1211. *See also* English v. General Elec. Co., 110 S. Ct. 2270 (1990) (action under state law for intentional infliction of emotional distress was not preempted by the Energy Reorganization Act); California Fed. Sav. and Loan Ass'n v. Gurerra, 479 U.S. 272, 292 (1987) (state statute requiring the provision of leave to employees disabled by pregnancy not preempted by the Pregnancy Discrimination Act).

208. *International Union*, 111 S. Ct. at 1211 (White, J., concurring).

209. *Id.* at 1213. "On the facts of this case, for example, protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons (*Dothard*) or flying airplanes (*Criswell*)." *Id.*

210. *Id.* at 1214.

should not have to attempt to clarify the exact point at which a fetus/person is injured, as Judge Boochever did in *Crumpton*,[211] in order to achieve a just result. *Crumpton* is a good example of how we could achieve better results by focusing more on the needs of future generations.

D. CRIMINAL LAW

Homicide generally requires a victim who was human and alive.[212] At early common law, a fetus could be "murdered" thirty-eight days to eighty days after conception; however, that child had to be first born alive and then die from the injuries in order to be considered a homicide victim.[213] Though the born-alive rule is less common today, it does still exist in a majority of jurisdictions[214] and severely limits the number of chargeable homicides of the unborn.

It is difficult to dispute that a fetus meets the requirements of being both alive and human (at least at some point in the nine month gestation). Therefore, a fetus should be "worthy" of being murdered. Many will argue that a fetus is not the equivalent of a born human being, but even so, that does not render the intentional killing of an unborn child any less revolting or any less deserving of punishment. Some may worry about the implications to abortion, but legislators should be well aware of how to draft statutes with exceptions.

Perhaps some legislatures feel that feticide requires a different state of culpability; if so, this should be defined within the statutes. Illegal abortion[215] and manslaughter[216] are inferior charges for such crimes. "Illegal abortion" sounds as though the procedure was consented-to but technically flawed. Manslaughter is generally "of a less cruel and aggravated character than [murder] and deserving of less punishment."[217] Neither correctly describes the

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211. Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991).

212. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.1(c) (2d ed. 1986).

213. *Id.*

214. State v. Soto, 378 N.W.2d 625 (Minn. 1985). The overwhelming majority of jurisdictions within the United States that have considered the issue held that a criminally caused death of a fetus is not homicide unless the fetus was born alive. *Id.* at 628-29.

215. *See* Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983). The estranged husband of a pregnant woman forced his hand into wife's vagina, intending to destroy the child. *Id.* at 61-62. The Kentucky Supreme Court ruled that the man could be charged with illegal abortion, but not with homicide. *Id.* at 65.

216. *See* State v. Willis, 457 So. 2d 959 (Miss. 1984). Killing an unborn child is manslaughter, but killing the mother is murder. *Id.* at 960.

217. State v. Hutter, 18 N.W.2d 203, 206-07 (Neb. 1945).

premeditated destruction of a fetus against the wishes of the mother.

E. PROPERTY LAW

In attempts to assure the future wealth of a child, property law has long advanced the rights of fetuses. Perhaps this area of law has been a front-runner in protecting the interests of future children because fetuses and embryos have been given some rights in their present states.[218] In one case, a child who was born after the testator's death not only was able to receive a trust inheritance from his father, but also received income from the trust from the date of his father's death prior to his birth.[219]

The state of Louisiana treats an in vitro fertilized human ovum as a juridical person, entitling it to sue and be sued.[220] The statutes require that such an embryo be given an identity by the medical facility, and upon motion, a court will appoint a curator to protect the embryo's rights.[221] This juridical person cannot be intentionally destroyed by any person.[222] These rights given to an embryo are all examples of the expansion of the rights of the unborn, not only pre-viability, but pre-implantation into a human being.

Still, some argue that when considering the state's legitimate interest of promoting the unborn's potential for life, treating the fetus' property interests as contingent on birth could actually undermine an interest in potential life. They predict that there might be an incentive to abort a fetus to avoid sharing an inheritance or trust with posthumously born issue.[223] This is interesting to ponder, but hopefully too remote to be a real threat.

F. CHILD PROTECTION

Child neglect and criminal laws often were not written to

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218. LA. REV. STAT. ANN. § 9:121 (West 1991). "A 'human embryo' for the purposes of this Chapter is an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child." *Id. See infra* notes 119-22 (discussing a few examples of rights held in the embryo's present state).

219. Industrial Trust Co. v. Wilson, 220 A. 467 (R.I. 1938).

220. LA. REV. STAT. ANN. § 9:124 (West 1991). "As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility . . . which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained." *Id.*

221. *Id.*

222. *Id.* at § 9:129. "A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person." *Id.*

223. Parness & Pritchard, *supra* note 133, at 265-67.

include passing drugs to fetuses,[224] yet many courts are using evidence of drug use while pregnant to pursue criminal charges[225] as well as charges of neglect.[226] Since treatment of one child can be used as evidence toward neglect allegations involving a second child,[227] prenatal treatment has been used as probative evidence of neglect of the future child.[228] One judge argued that petitioners were not seeking a charge for neglect of the fetus but, instead, for the child born with positive toxicology result[229]—even though all the acts by the mother which caused the charge occurred when the child was a fetus.[230]

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224. State v. Gray, 1990 WL 125695 (Ohio App.) (Appendix A—from Court of Common Pleas). Neglect is characterized by acts of omission, but ingestion of drugs is an act of commission. *Id.* at 5. A woman who was twelve weeks pregnant was charged by a county court in North Dakota with reckless endangerment of her fetus for inhaling paint vapors. DeAnne Hilgers, *Cass Fetal Safety Case a 'First'*, FARGO FORUM, Feb. 11, 1992, at A1, A12. The North Dakota "reckless endangerment" statute describes the crime as follows: "A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another." N.D. CENT. CODE § 12.1-17-03 (1985). The Assistant Cass Country State's Attorney, Stephen Dawson, said he thinks "the statute anticipates protecting unborn children" even though the legislature did not specifically include the unborn within the statute. DeAnne Hilgers, *Fargo Attorney Wants Greywind Case Reconsidered*, FARGO FORUM, Feb. 11, 1992, at A6.

225. Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). A woman violated a statute regarding delivery of a controlled substance by delivering drugs to her child through the umbilical cord. *Id.* at 419-20. *See supra* note 224 (discussing a North Dakota county example).

226. *E.g.*, *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280 (App. Div. 1990). Mothers were charged with neglect when their children were born with a positive toxicology for cocaine. *Id.* at 281. The judge determined that the children were neglected because "a positive toxicology for cocaine in a newborn constitutes 'actual impairment.'" *Id.* at 283.

227. *In re* Baby X, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980); State v. Gray, 1990 WL 125695 (Ohio App.) (Appendix A—from Court of Common Pleas) ("The absurdity of this argument is clear, for how can one owe a duty of care, protection or support to the child to be born without owing the same duty to the fetus."); *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 283 (App. Div. 1990). The judge determined that a single act of misconduct can support a finding of neglect, and that act may occur prior to a child's birth. *Id.*

228. *In re Baby X*, 293 N.W.2d at 739.

229. *Id.* The judge determined that it was proper to consider the newborn's withdrawal symptoms in neglect proceedings. *Id.* at 741.

230. *In re Stefanel Tyesha C.*, 556 N.Y.S.2d at 285. The North Dakota case, *supra* note 224, involved similar logic. The defendant had been convicted eleven times in eleven months for inhaling volatile chemicals. DeAnne Hilgers, *Fargo Attorney Wants Greywind Case Reconsidered*, FARGO FORUM, Feb. 11, 1992, at A6. Assistant Cass County State's Attorney Stephen Dawson said he based this charge of reckless endangerment on her criminal history and an investigation of her—not as protection for the fetus. *Id.* The defendant was sentenced to nine months at the North Dakota State Farm. DeAnne Hilgers, *Cass Fetal Safety Case a 'First'*, FARGO FORUM, Feb. 11, 1992, at A1, A12. Defendant Greywind, who pleaded guilty after refusing an attorney, was later allowed to withdraw her plea. Marilynn Wheeler, *Fargo Woman Becomes Pregnant Cause*, GRAND FORKS HERALD, Feb. 13, 1992, at 1A. Hours after she was released on bail, she was arrested again—this time for illegal inhalation of chemical vapors. Stephen J. Lee, *Fargo Paint Sniffer Caught Again*, GRAND FORKS HERALD, Feb. 14, 1992, at 1A, 9A.

If this case continues to trial, it may prove to be an interesting test of North Dakota's fetal protection policies. Greywind expressed her desire to abort the fetus, and Judge Georgia Dawson authorized the sheriff's department to transport her to any medical appointments. *Id.* Attorney Dawson has said that even if Greywind aborts the fetus, he will prosecute her for reckless endangerment of the fetus prior to the abortion. *Id.* If the fetus is aborted, the trial will concern a charge to protect a fetus which no longer exists, based on

Some courts also have difficulty accepting that a child has a right to be born with a sound mind and body.[231] It is especially difficult to accept such a right, considering that this requirement would necessitate a holding that all pre-born individuals have a right to medical treatment while many born individuals do not.[232] In this area, it appears that the fetus has been granted greater rights than other persons.

In order to get a protection order for a fetus, one judge attempted to draw links to homicide[233] and property law[234] and yet deny the reasoning of tort law.[235] Apparently he felt that the distinctions and similarities were obvious, because the judge failed to cite logical reasons why these actions were more like homicide and property than they were like tort law.[236]

The criminal and neglect charges for passing drugs to fetuses are wrought with the same difficulties as many other fetal areas. The decisions are saturated with confusing arguments, simply because judges and prosecutors lack precedents and statutes to allow them to protect fetuses. As with other areas, the rights/desires of a fetus to be born healthy conflict with the mother's desire to consume illegal drugs. Given the importance of the fetal interest and the illegality of the maternal desire, prosecutors and social workers should not have to wait until a child is born with drug problems before appropriate steps can be taken.

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a statute which may never have been intended to protect the unborn, by a State's Attorney who claims the charge was not to protect the fetus.

231. Nelson, *supra* note 29, at 736 (no cases holding that living persons, much less fetuses, have the right to be healthy); Becker v. Schwartz, 413 N.Y.S.2d 895 (1978). A child cannot expect life without deformities. *Id.* at 900. This child was born with Down's syndrome and then sued for wrongful life because her mother was not informed of increased risk for older mothers. *Id.* at 897. The court held that there is no precedent to hold that a child has a fundamental right to be born as a whole, functional human being. *Id.* at 900.

232. Nelson, *supra* note 29, at 736.

233. *In re* Gloria C. v. William C., 476 N.Y.S.2d 991 (Fam. Ct. 1984). The legislature defined homicide as including unborn children over 24 weeks. *Id.* at 994. The court reasoned that this legislature would not intend to preclude the issuance of an order of protection against a third party to prevent actions that could result in injury or death of a fetus. *Id.* at 995.

234. *Id.* "Although the child's property interest is not realized until birth, it is recognized while the child is yet a fetus." *Id.*

235. *Id.* at 998. Since injury is not prerequisite to a protection order, tort rationale supporting birth as prerequisite is not applicable. *Id.* at 997-98.

236. *Id.* at 991-98. The link to homicide was poor because the legislature specifically limited the right to unborn children over 24 weeks—this fetus was younger. The judge failed to reason why property law was relevant and did not discuss the fact that property law basically protects the child. Tort law was excluded, simply due to the injury requirement.

G. RAMIFICATIONS

Different jurisdictions and areas of the law treat fetuses in unique ways. This is nothing new to our legal system, but the ramifications of these discrepancies have become problematic. In some cases there may be too many contrasting precedents for the triers of fact.[237] In others, advances in medicine have left jurisdictions without any precedents, and the judges search desperately for decisions on which to hang their hats.[238] There are also cases in which judges feel compelled by moral convictions (or a desire for justice), causing them to make decisions that are not logical.[239]

The greatest cause of the problem has been the overemphasis on abortion. Certainly fetal rights and abortion are related issues, but our society cannot afford to ignore fetal rights issues just to avoid dealing with the abortion controversy. Fears, ignorance, and other problems have led us into the current state of confusion. Without serious consideration and a multitude of changes, fetal rights laws will continue to be formed by haphazard decisions. Advances in science and medicine and changes in our social and moral structure will render the situation even more complex. Confusing and inconsistent laws are not just mere inconveniences: they can create injustice and cause entire generations to be unprotected from countless threats at the most vulnerable point in their lives.

III. CONCLUSION

It is obvious that a child's health and welfare is affected by many circumstances that occur prior to birth.[240] Protection of our

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237. *Id.* *See supra* note 236 (discussing some of the precedents this judge considered).

238. *See supra* note 66 and accompanying text (clarifying that in many situations that hook has been *Roe v. Wade*); Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1986). "Thus the Roe viability 'line' becomes not only a limit on the woman's freedom to choose abortion, but also an affirmative grant of legal rights and entitlements to the fetus, conferring more than the very [F]ourteenth [A]mendment personhood status the Supreme Court explicitly found inapplicable." *Id.* at 42.

239. Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991). *See supra* text accompanying notes 178 to 184 (discussing the problems with the *Crumpton* holding). *See also* Wallace v. Wallace, 421 A.2d 134, 138 (N.H. 1980) (Douglas, J., dissenting).

> No one ever asserted that adults were not 'persons' because they had to survive the injury to sue. The illogic of the rule led to the passage of 'wrongful death' or 'survivor' acts . . . . The majority asserts that a cause of action for an aborted child 'benefits only the parents.' That principle also is valid if applied to the death of a fourteen-year-old child or an elderly person with no living relatives.

Id. at 138.

240. *See supra* notes 187-96 and accompanying text (discussing some of these harms).

children is a worthwhile goal, and it needs to be addressed in a deliberate, consistent fashion.

A Model Fetal Rights Act could be drafted by a host of specialists from all the applicable areas of law. These experts could formulate a logical, consistent act with the intention of protecting our children. It is not necessary that every state adopt this act or that the results be identical, but it would at least encourage legislatures to examine their own laws and redraft poorly written sections.

Abortion will most likely be controversial for some time to come, but that does not need to hinder the greater goal of protecting life—at whatever stage the state deems it to begin. One possible approach is to consider each area of law and ask certain questions: (1) Will this injury harm the child/fetus/embryo? and (2) Is there a balancing of rights necessary? Some examples of this system follow:

1. Area: Tort law recovery when the fetus was prenatally injured and the child was born alive. Question 1: Yes, the child is harmed. Question 2: No. Balancing of rights is not necessary, because a tortfeasor's rights are not violated by demanding recovery for a prenatal injury, so long as the other tort requirements are met. Solution: Recovery should be allowed for injuries at any stage of development or even preconception.

2. Area: Abortion. Question 1: Yes, the unborn are harmed. Question 2: Yes, there is a balancing of rights required between the mother's privacy or other rights and the rights of the fetus. Solution: Let each state balance these rights according to its own values. The state could determine that abortion is never allowed, allowed until some stage, or allowed for some reasons.

3. Area: Activities harmful to the fetus, but not illegal (such as smoking and harmful jobs). Question 1: Fetus is harmed, by definition. Question 2: The rights of many are involved and must be balanced. Solution: States should handle this much like the abortion question—deal with each harmful situation (or group of situations) and balance according to the proximity of harm to the fetus and the intrusiveness to others involved. The state could determine that an activity such as smoking is always allowed, allowed until some stage, allowed at some level, or allowed for some reasons.

4. Area: Illegal drug use. Question 1: Yes, the fetus is harmed. Question 2: This activity is illegal by definition, so no balancing of rights is necessary. Solution: Arrest violators for committing these illegal acts and for harming the child.

These solutions are not perfect, but they are logical and consistent. Just raising the questions would send legislatures in the right direction. Eventually *Roe v. Wade* could cease to be the cornerstone for so many fetal rights decisions. Courts could rely on statutes that were drafted with a holistic perspective, balancing the rights of all those affected. In any case, something does need to be done. Changes are necessary not just for the lawyers and judges, but for the future of our children.

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