Taking Roe to the Limits: Treating Viable Feticide as Murder

I. Introduction

The Kentucky Supreme Court recently ruled that the intentional, nonconsensual destruction of a viable fetus did not constitute murder.[1] In *Hollis v. Commonwealth,*[2] the defendant allegedly took his estranged wife behind the barn of his parents' house, told her he did not want the baby she was carrying, and forcibly attacked the fetus *in utero* with his hand. The seven-month-old fetus was delivered stillborn; the mother's uterus and vagina were severely damaged.

The Kentucky Supreme Court held that the defendant's conduct did not constitute murder because the applicable statute[3] employed the term "person" in describing the victim.[4] The court reasoned that, at common law, a fetus was not considered a person for the purposes of homicide because the term "person" applied to a human entity which had been born alive. Because Kentucky's murder statute did not give the term any other meaning, the common law definition applied.[5]

Almost all jurisdictions[6] have unlawful abortion or manslaughter-type statutes[7] that encompass acts such as those in *Hollis.* Unfortunately, the penalties that may be imposed under these statutes[8] are often substantially less severe than those available for murder.[9] For example, the court in *Hollis* noted that the defendant could have been convicted under Kentucky's unlawful abortion statue,[10] which carries a maximum penalty of twenty years imprisonment. Hollis could have faced life imprisonment or death had he been convicted of murder.[11]

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[1]Hollis v. Commonwealth, 652 S.W.2d 61, 65 (Ky. 1983).

[2]652 S.W.2d 61 (Ky. 1983).

[3]Ky. Rev. Stat. § 507.020 (1976).

[4]652 S.W.2d at 64.

[5]*Id.* at 63-64.

[6]The three possible exceptions are Alaska, Hawaii, and New Jersey. While Hawaii and New Jersey do not have unlawful abortion statutes at this time, Alaska's unlawful abortion statute specifically excludes the viable fetus. Alaska Stat. § 18.16.010 (1981). Furthermore, none of these jurisdictions specifically cover viable feticide under any of their homicide statutes.

[7]*See infra* notes 138-40 and accompanying text.

[8]*See infra* note 142 and accompanying text.

[9]*See infra* note 141 and accompanying text.

[10]652 S.W.2d at 65. The Kentucky unlawful abortion statute is codified at Ky. Rev. Stat. § 311.750 (1975). The penalty for violating the unlawful abortion statute is imprisonment for at least ten years and no more than twenty years. Ky. Rev. Stat. § 311.990 (1975).

[11]Under Kentucky law, murder is a Class A felony. In six statutorily-defined situations, however, murder is a capital offense. Ky. Rev. Stat. § 507.020 (1976). The penalty for

Only three states have explicitly attempted to include the viable fetus as a potential murder victim.[12] The vast majority of remaining jurisdictions use "person,"[13] "human being,"[14] or similar terms[15] to describe the victim or to classify the crime of murder. The use of these terms, without statutory definition to the contrary[16] and alternative treatment of viable feticide under other statutes,[17] compels courts to apply the born alive rule in viable feticide cases brought under murder statutes. Legislative action is necessary to abolish this criminal law rule that is obsolete and inconsistent with property and tort law.

The common law born alive rule was based on the limited medical technology and concepts[18] of the era that spawned it. The medical basis of the rule is evident from its application. Property law, which is not dependent upon medical technology, did not apply the born alive rule and protected fetal inheritance rights even at common law.[19] In contrast, criminal and tort law are highly dependent upon medical knowledge. Common law courts developed the born alive rule in response to the period's limited knowledge of fetal development and held that the fetus could not be a potential murder victim.[20] Wrongful death actions did not exist at common law, and knowledge of fetal development was still limited when statutes allowing the tort were enacted. Consequently, early decisions brought under these statutes denied recovery for the death of a stillborn fetus by applying the born alive rule.[21]

Tremendous advancements in prenatal medicine have occurred since the common law period and the enactment of wrongful death statutes. Tort law has recognized these advancements and recovery for the *in utero* death of a viable fetus is now allowed in a majority of jurisdictions.[22]

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the commission of a Class A felony is not fewer than twenty years or more than life imprisonment. KY. REV. STAT. § 532.060(2)(a) (1976). The death penalty is authorized for one convicted of a capital offense. KY. REV. STAT. § 532.030(1) (1976).

[12]*See infra* notes 149-60 and accompanying text.

[13]*See infra* note 125.

[14]*See infra* note 130.

[15]*See infra* note 127.

[16]Several states explicitly define these terms according to the born alive rule. *See infra* note 123 and accompanying text.

[17]Alternative treatment under other statutes creates an obstacle to expanding judicially the murder statute to include the viable fetus under the rules of statutory construction. *See infra* notes 144-46 and accompanying text.

[18]Religious and philosophical concepts of the common law period may have also aided in creation of the born alive rule. For a discussion of this proposition, see Means, *The Law of New York Concerning Abortion and Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411-15 (1968); Note, *The Unborn Child: Consistency in the Law?,* 2 SUFFOLK U.L. REV. 228, 229 (1968).

[19]Note, *supra* note 18, at 230.

[20]Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

[21]*See infra* note 52 and accompanying text.

[22]*See infra* notes 104-05 and accompanying text.

Criminal law, however, has failed to recognize the obsolescence of the born alive rule and continues to deny the viable fetus status as a potential murder victim.[23]

The inclusion of the viable fetus under wrongful death statutes has primarily been a judicial accomplishment.[24] Courts, however, do not have as much freedom to expand criminal law because of statutory construction rules[25] and due process concerns.[26] This Note proposes that legislatures abolish the common law born alive rule as obsolete and inconsistent with property and tort law. Further, this Note examines the issues legislatures will face in drafting murder statutes that include the viable fetus as a potential victim. For example, wording and placement of the statute within a criminal code may be important to judicial acceptance. Viability must be carefully defined in order to avoid void-for-vagueness problems. Equal protection and quality of life concerns are important in deciding whether to include consensual as well as nonconsensual viable feticide. Finally, legislatures will have to decide whether to protect the viable fetus against all forms of criminal attack as opposed simply to including it under the murder statute. Following a discussion of these issues and suggested solutions, a proposed statutory scheme will be introduced.

II. Development and Application of the Born Alive Rule at Common Law

The common law development and application of the born alive rule reflects the period's medical uncertainty regarding prenatal life. While this uncertainty posed practical difficulties for fetal protection in criminal law, it presented no obstacle to protection of fetal property rights.

A. The Development and Necessity of the Born Alive Rule in Early Criminal Law

During the European Middle Ages, all disciplines agreed that the infusion of a rational soul into the developing fetus occurred between conception and birth.[27] Termed "animation,"[28] the infusion was reflected in sufficient fetal development to detect movement.[29] While there was dispute as to exactly when animation occurred,[30] it was agreed that prior to animation the fetus was part of its mother so that its destruction was

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[23]*See infra* notes 122-29 and accompanying text.
[24]*See infra* notes 104, 143 and accompanying text.
[25]*See infra* notes 144-46 and accompanying text.
[26]*See infra* notes 147-48 and accompanying text.
[27]Means, *supra* note 18, at 411.
[28]*Id.*
[29]*Id.* at 412.
[30]Roe v. Wade, 410 U.S. 113, 134 (1973).

not considered homicide.[31] Whether the destruction of an animated fetus, later called a "quickened" fetus, was criminal in any form is still unclear.[32]

Thirteenth century common law apparently considered fetal destruction to be homicide "[i]f the foetus [were] already formed or quickened, especially if it [were] quickened."[33] In a fourteenth century case involving prenatal injury to twins, one born dead and the other born alive but dying shortly thereafter, however, it was held that no felony had been committed.[34] An intermediate position had evolved by the seventeenth century. As enunciated by Sir Edward Coke, the intermediate position has since been accepted as that of the common law:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison,[35] and no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable[36] creature, *in rerum natura*, when it is born alive.[37]

The born alive rule has been attributed to two particular limitations in medical expertise during the common law period.[38] First, the medical profession thought it was impossible to determine whether the fetus was capable of independent existence until that capability was actually demonstrated. Absent even a capability to exist independently, the unborn child was considered to be a part of its mother with no life of its own to be destroyed.[39] Second, the common law medical profession could not determine with adequate certainty the cause of fetal death.[40] This destroyed the requisite causation element: proving that the death of the fetus was the result of the defendant's acts. These medical limitations posed practical difficulties which necessitated the born alive rule for criminal law purposes.

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[31] *Id.*

[32] *Id.*

[33] 2 H. Bracton, On the Laws and Customs of England, 341 (S. Thorne trans. 1968).

[34] Winfield, *The Unborn Child,* 8 Cambridge L.J. 76, 78 (1944) (citing Y.B. Mich. 1 Ed. III, f. 23, pl. 18; 3 Lib. Ass. pl. 2).

[35] It is unclear exactly what the term "misprison" meant. Most American courts equate the term with "misdemeanor." See Means, *supra* note 18, at 420.

[36] During the middle ages, the fetus was considered a rational being prior to live birth. *See supra* text accompanying note 27.

[37] 3 E. Coke, Institutes 50 (1817) (footnote omitted).

[38] Note, *supra* note 18, at 229.

[39] Roe v. Wade, 410 U.S. 113, 134 (1973).

[40] Winfield, *supra* note 34, at 90.

B. *Fetus Considered to Be Born in Property Law: Medical Technology Irrelevant to Exercising Property Rights*

The born alive rule was not applied to fetal property rights at common law. According to Blackstone, the fetus was considered actually to be born for many purposes in property law, including inheritance.[41]

While some commentators attribute fetal inheritance rights to the testator's intent rather than to the personhood of the fetus,[42] this does not seem to be the position taken by the common law courts. In 1798 an English court stated: "Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of *other persons.*"[43] One commentator has reconciled the common law's treatment of fetal inheritance rights with the criminal born alive rule by suggesting that the property right only attached at conception but did not vest until live birth had occurred.[44] Although this position has support,[45] American courts following the common law approach have held that the right of inheritance vested upon the testator's death rather than upon the child's birth.[46] "It has been the uniform and unvarying decision of all common law courts in respect of estate matters for a least the past two hundred years that a child *en venture se mere* is 'born' and 'alive' for all purposes for his benefit."[47]

The common law's disparate treatment of the fetus in property and criminal law can be viewed as a result of the different roles medical technology played in those two areas. A murder conviction requires that the prosecution prove that a *death* has occurred as a *result* of the defendant's acts. Because the common law considered the fetus to be part of the mother, without a separate life, death before live birth was conceptually impossible. Furthermore, limitations in medical technology made it impossible to determine that the fetal destruction was the result of the defendant's actions. In contrast, the protection of property rights does not depend upon medical conceptions of separate life and the ability to determine cause of death. The ability to exist independently is not the

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[41]Note, *The Law and The Unborn Child: The Legal and Logical Inconsistencies,* 46 NOTRE DAME LAW. 349, 351 (1971) (citing W. BLACKSTONE, COMMENTARIES 130 (1962)).

[42]*E.g.,* N. SHAW, C. DAMME, LEGAL STATUS OF THE FETUS, GENETICS AND THE LAW, (A. Milunsky, F. Annas, eds. 1976).

[43]Thellusson v. Woodford, 4 Ves. Jun. 227, 323, 31 Eng. Rep. 117, 164 (1798) (emphasis added).

[44]*See, e.g.,* Doudera, *Fetal Rights? It Depends.,* 18 TRIAL 38, 39 (April 1982).

[45]*See* Roe v. Wade, 410 U.S. 113, 162 (1973). The Court stated that the perfection of fetal property rights was generally made contingent upon live birth. The Court, however, did not cite any authority for this broad proposition. *See id.*

[46]*E.g.,* Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907).

[47]*In re* Holthausen's Will, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (Surrogate's Ct. 1941) (citation omitted).

key to exercising property rights; those rights can be exercised by a parent or guardian ad litem. Moreover, the cause of death is irrelevant to a determination of the decedent's property rights. Absent these practical medical difficulties, the born alive rule was unnecessary and the common law developed rules which protected fetal property rights.

III. From Common Law to *Roe:* The Rise of Wrongful Death and Antiabortion Legislation

Until 1800, the status of the fetus in civil and criminal law was settled. During the 1800's, however, the states enacted wrongful death and antiabortion legislation. Under these statutes, protecting the fetus from destruction once again became an issue.

A. Wrongful Death Prior to Roe: Early Recognition of the Born Alive Rule's Obsolescence

Wrongful death actions did not exist at common law,[48] and statutes allowing tort recovery for death were not enacted until the Civil War period.[49] After the enactment of these statutes, remedies for tortious prenatal death became an issue. Similar to homicide, wrongful death recovery is highly dependent upon medical technology. Both require proof that a death occurred as the result of the defendant's acts.[50] If the fetus is considered part of the mother, without separate life, its destruction cannot be considered death—an essential element is missing. Furthermore, if the medical profession cannot determine that the death was the result of the defendant's acts, the element of causation is missing.

The treatment of the fetus under wrongful death statutes from the period of their enactment until *Roe v. Wade*[51] suggested a trend for courts to apply the born alive rule in tort law only when the medical basis for it remained relevant. Early cases denied recovery on the ground that the fetus was part of the mother.[52] Later decisions, however, began to recognize that modern medical technology had demonstrated that the fetus was capable of independent existence prior to live birth. Consequently, these later cases allowed recovery.[53] Implicit in the decisions allowing recovery was the acceptance that causation could be proven.[54] By 1973,

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[48]Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

[49]Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade,* 45 Mo. L. Rev. 639, 642 (1980).

[50]Dietrich v. Northampton, 138 Mass. 14, ____N.E.____ (1884). *See also* notes 39-40 and accompanying text.

[51]410 U.S. 113 (1973).

[52]Kader, *supra* note 49, at 647 (citing Dietrich v. Northampton, 138 Mass. 14, ____ N.E.____ (1884)).

[53]Kader, *supra* note 49, at 646 n.29.

[54]Because causation is an essential element, it must be adequately proven before recovery may be allowed.

the year the Supreme Court decided *Roe v. Wade*,[55] state courts were split on whether parents could recover for the wrongful death of a stillborn viable fetus. Seventeen jurisdictions had allowed recovery[56] and twelve had denied recovery.[57]

B. Antiabortion Statutes: Legislative Attempts to Abolish the Born Alive Rule

Prior to 1821, all American jurisdictions[58] followed the common law born alive rule and did not treat intentional *in utero* fetal destruction as a crime.[59] The first antiabortion legislation was passed in 1821.[60] By the time of the Civil War, antiabortion legislation had become pervasive.[61] Legislation of this type altered the born alive rule by treating intentional *in utero* feticide as a crime. Early statutes retained the quickening distinction by providing substantially lesser penalties for abortions performed before quickening,[62] but during the 1800's the quickening distinction largely disappeared.[63] When the Supreme Court decided *Roe v. Wade*[64]

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[55]410 U.S. 113 (1973).

[56]Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971) (applying District of Columbia law); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557 (Del. Super. Ct. 1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); State v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Fowler v. Woodward, 224 S.C. 608, 138 S.E.2d 42 (1964); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

[57]Bayer v. Suttle, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Dietrich v. Northampton, 138 Mass. 14, ____N.E.____ (1884); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Padillow v. Elrod, 424 P.2d 16 (Okla. 1967); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

[58]England altered the born alive rule in 1803 with the passage of the Miscarriage of Women Act. 1803, 43 Geo. 3, ch. 58.

[59]Note, Roe v. Wade *and the Traditional Standards Concerning Pregnancy*, 47 TEMP. L.Q. 715, 724 (1974).

[60]The first state to pass antiabortion legislation was Connecticut. *Id.* (citing CONN. STAT. tit. 22 §§ 22, 14, 16 (1821)).

[61]*Roe v. Wade*, 410 U.S. at 113.

[62]*Id.*

[63]*Id.*

[64]*Id.*

the born alive rule had been largely abolished, to the extent that criminal penalties were available for intentional *in utero* feticide.[65] Few jurisdictions, however, imposed these penalties based on the newly recognized capacity of the fetus to maintain independent existence prior to live birth. Only four jurisdictions did not impose criminal penalties for abortions performed early in pregnancy.[66] Fourteen jurisdictions imposed criminal penalties regardless of when the abortion was performed, but provided substantially lesser penalties if the abortion was performed prior to when viability[67] was thought to occur.[68] Thirty-one jurisdictions imposed the same criminal penalty whether or not the fetus was capable of independent existence.[69]

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[65]As enunciated by Coke, *in utero* feticide was considered a "great misprison" or misdemeanor. *See supra* note 35 and accompanying text.

[66]In *Roe v. Wade,* the Supreme Court listed those state statutes as follows: ALASKA STAT. § 11.15.060 (1970); HAWAII REV. STAT. § 453-16 (Supp. 1971); N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1972-73); WASH. REV. CODE ANN. §§ 9.02.060 to 9.03.080 (Supp. 1972). 410 U.S. at 140 n.37.

[67]The term "viability" subjectively means the point at which the fetus achieves the capacity for independent existence, with or without artificial aid. Objectively, the term is harder to define. The Supreme Court has used "potential for survival" and "reasonable likelihood of survival." *See infra* notes 99-102 and accompanying text.

[68]According to the Supreme Court, the following state statutes, based on Model Penal Code § 230.3, imposed less severe penalties for abortions performed before the fetus was considered viable:

> ARK. STAT. ANN. §§ 41-303 to 41-310 (Supp. 1971); CAL. HEALTH & SAFETY CODE §§ 25950-25955.5 (West Supp. 1972); COLO. REV. STAT. §§ 40-2-50 to 40-2-53 (Supp. 1967); DEL. CODE ANN. tit. 24, §§ 1790-1793 (Supp. 1972); 1972 Fla. Sess. Law Serv., 380-382; GA. CODE §§ 26-1201 to 26-1203 (1972); KAN. STAT. ANN. § 21-3407 (Supp. 1971); MD. ANN. CODE, art. 43, §§ 137-139 (1971); MISS. CODE ANN. § 2223 (Supp. 1972); N.M. STAT. ANN. §§ 40A-5-1 to 40a-5-3 (1972); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); OR. REV. STAT. §§ 435.405 to 435.495 (1971); S.C. CODE ANN. §§ 16-82 to 16-89 (Law. Co-op. 1962 & Supp. 1971); VA. CODE §§ 18.1-62 to 18.1-62-3 (Supp. 1972).

410 U.S. at 140, n.37 (citation form altered).

[69]The Supreme Court noted that the following state statutes were similar to sections 1194, 1195, and 1196 of the Texas Penal Code which were under consideration in *Roe v. Wade:*

> ARIZ. REV. SAT. ANN. § 13-211 (1956); 1972 Conn. Acts 1 (Spec. Sess.) (in 1972 Conn. Legis. Serv. 677 (West 1972)), and CONN. GEN. STAT. §§ 53-29, 53-30 (1968) (or unborn child); IDAHO CODE § 18-601 (1948); ILL. REV. STAT., ch. 38, § 23-1 (1971); IND. CODE § 35-1-58-1 (1971); IOWA CODE § 701.1 (1971); KY. REV. STAT. § 436.020 (1962); LA. REV. STAT. ANN. § 37-.1285(6) (West 1964) (loss of medical license) (but see § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); ME. REV. STAT. ANN., tit. 17, § 51 (1964); MASS. GEN. LAWS ANN., ch. 272 § 19 (West 1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, Kudish v. Bd. of Registration, 356 Mass. 98, 248 N.E.2d 264 (1969); MICH. COMP. LAWS § 750.14 (1948); MINN. STAT. § 617.18 (1971); MO. REV. STAT. § 559.100 (1969); MONT. CODE ANN. § 94-401 (1969); NEB. REV. STAT. § 28-405 (1964); NEV. REV. STAT. § 200.220 (1967); N.H. REV. STAT. Ann. § 585:13 (1955);

IV. Recognizing the Freedoms of *Roe v. Wade*

While the Supreme Court has identified constitutional limits on a state's ability to punish intentional feticide, these limitations only apply prior to the capability of the fetus to exist independently. A majority of states now treat the viable fetus as a person for civil purposes but not for criminal purposes. Legislative reform is needed to resolve this inconsistency.

A. Roe v. Wade: *Permission to Treat the Viable Fetus as a Person*

In *Roe v. Wade*[70] the Court struck down a Texas abortion statute[71] which prohibited all abortions, except those necessary to save the life of the mother.[72] The plaintiff, a pregnant woman, sought a declaratory judgment that the statute was unconstitutional. Four major interests were considered by the Court in determining the case: (1) the mother's right to privacy under the fourteenth amendment; (2) the unborn child's fundamental right to life under the fourteenth amendment; (3) the state's interest in protecting the health of the mother; (4) the state's interest in protecting the potential life of the fetus. The Court's resolution[73] of these issues is important in ascertaining the limits of permissible criminal protection of the fetus.

The first interest the Court considered was the mother's right to privacy. Within the penumbra of the fourteenth amendment's guarantee of liberty, the mother has a fundamental right to privacy in determining whether or not to bear a child.[74] The Court recognized the mother's right to privacy, but specifically refused to hold that it was absolute.[75] The mother's right had to be balanced against any compelling state interest.[76] The state asserted that the unborn, as "persons," have a fundamental

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N.J. Stat. Ann. § 2A:87-1 (West 1969) ("without lawful justification"); N.D. Cent. Code §§ 12-25-01, 12-25-02 (1960); Ohio Rev. Code Ann. § 2901.16 (Page 1953); Okla. Stat. Ann., tit. 21, § 861 (1972); Pa. Stat. Ann., tit. 18, §§ 4718, 4719 (Purdon 1963) ("unlawful"); R.I. Gen. Laws § 11-3-1 §§ 4718, 4719 (1963) ("unlawful"); R.I. Gen. Laws § 11-3-1 (1969); S.D. Comp. Laws Ann. § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953) Vt. Stat. Ann. tit. 13, § 101 (1958); W. Va. Code § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957). 410 U.S. at 118-19, n.2.

[70]410 U.S. 113 (1973).

[71]Tex. Penal Code Ann. §§ 1191 to 1194, 1196 (Vernon 1933).

[72]Tex. Penal Code Ann. § 1196 (Vernon 1933).

[73]For a discussion of alternative solutions available to the Court, see Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy,* 31 Buffalo L. Rev. 107 (1982).

[74]410 U.S. at 153.

[75]*Id.*

[76]*Id.* at 154.

right under the fourteenth amendment not to be deprived of life without due process of law. The Court noted that such a finding would override the mother's right to privacy,[77] but held that the fetus had never been considered a person under the fourteenth amendment.[78] The Court specifically refused to answer the question whether or not life begins at conception.[79] Despite its determination that the fetus could not be considered a "person" under the fourteenth amendment, the Court found two state interests which, at some point in the gestation period, become compelling interests and override the mother's privacy right.[80]

The Court found the state acquired a compelling interest in protecting the mother's health at the end of the first trimester of pregnancy.[81] At this point, the state could establish reasonable regulation to protect the mother's health.[82] Prior to this point, the decision to terminate a pregnancy belonged to the woman's physician, free from state interference.[83]

The state also acquired a legitimate interest in the potential life of the child.[84] The Court found that the state's interest in the child became compelling at the point of viability,[85] when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[86] The Court held that the state could proscribe abortion, except where it is necessary to protect the life or health of the mother,[87] once the child became viable.

In summary, *Roe* permits states to abolish the common law born alive rule where the medical basis for it has been undermined by technology: at the point of viability. It is after this point that the state is permitted to provide criminal penalties for intentional feticide. The Court did not limit the type of legislation which may cover viable feticide[88] nor the severity of penalties that could be imposed for it. Therefore, the states are free to make these determinations on their own. It is within the limits of *Roe* for state legislatures to provide full protection to a viable fetus, which includes treating viable feticide as murder. Yet without legislative action, the viable fetus will remain virtually unprotected against criminal attack.

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[77] *Id.* at 156-57.
[78] *Id.* at 158.
[79] *Id.* at 159.
[80] *Id.* at 162-63.
[81] *Id.* at 163.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 160 (footnote omitted).
[87] *Id.* at 163-64.
[88] The Court referred, nonetheless, to "tailored legislation." *Id.* at 165.

B. *The Subjective and Changing Meaning of Viability*

Roe permits the states to provide criminal penalties for intentional feticide after the point of viability. The Court noted in *Roe* that the medical profession usually set viability at approximately twenty-eight weeks.[89] Since *Roe,* the Court has altered the definition of viability and further refined the limits of permissible state intervention.

In *Planned Parenthood v. Danforth,*[90] the plaintiffs asserted that the Missouri abortion statute[91] was unconstitutional because it failed to incorporate *Roe*'s trimester approach and if denied viability only as the stage of fetal development when the life of the child could be sustained indefinitely,[92] with or without artificial aid. The Court, recognizing viability as a flexible and subjective term, held that it was not the proper legislative or judicial function to define the term "viability" according to a point in the gestational period.[93] Viability should be determined on a case-by-case basis by the attending physician.[94]

Three years later, the Court changed the definition of viability. In *Colautti v. Franklin,*[95] the Court struck down the Pennsylvania abortion statute[96] as void for vagueness.[97] The statute required physicians to use a standard of care defined by statute to preserve the life of a fetus being aborted when the fetus was or may have been viable.[98] The Court held that the statute was unconstitutional because it failed to distinguish clearly between "viability" and "may be viable."[99] According to the Court, viability is reached when, in the judgment of the attending physician, there is a *reasonable likelihood* that the fetus can achieve sustained survival outside the mother's womb, with or without artificial aid.[100] *Roe* required potential survival;[101] *Colautti* required the reasonable likelihood of it.

Developments in medical technology since *Roe* have reduced the time needed for a fetus to reach viability. As these developments continue, viability is likely to occur even earlier in the gestation period.[102] The

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[89]*Id.* at 160.

[90]428 U.S. 52 (1976).

[91]Mo. Rev. Stat. §§ 559.100, 542.380, 563.300 (1969).

[92]The Court never addressed the constitutionality of defining viability so as to require that the life of the child could be sustained indefinitely.

[93]428 U.S. at 64.

[94]*Id.*

[95]439 U.S 379 (1979).

[96]Pa. Stat. Ann. tit. 35 § 6605(a) (Purdon 1977).

[97]439 U.S at 396.

[98]Pa. Stat. Ann. tit. 35 § 6605(a) (Purdon 1977).

[99]439 U.S. at 392-93.

[100]*Id.* at 388.

[101]410 U.S. at 163.

[102]For a criticism of the viability approach for these reasons, see Note, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion,* 27 U.C.L.A. L. Rev. 1340 (1980).

Supreme Court specifically anticipated this in *Danforth* when it forbade states to define viability in terms of a point in gestation.[103]

C. *Fetal Protection Since* Roe: *Inconsistency Between Tort and Criminal Law*

1. *The Viable Fetus as a Person in Wrongful Death Actions.—Since Roe*, the early trend to allow recovery for the death of a stillborn viable fetus[104] has continued; recovery is now allowed in a majority of jurisdictions.[105] Of the twenty-eight states which allow recovery, sixteen states do so under statutes which describe the decedent as a "person."[106] Recovery has been justified on the bases of differing legislative intent, logic

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[103]428 U.S. at 64.

[104]*See supra* text accompanying notes 53-57.

[105]Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557 (Del. Super. Ct. 1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Pehrson v. Kistner, 301 Minn. 229, 222 N.W.2d 334 (1974); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hospital, 95 N.M. 150, 619 P.2d 826 (N.M. Ct. App. 1980); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1956); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanete Clinic, 268 Or. 258, 518 P.2d 636 (1974); Presley v. Newport Hosp. 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 224 S.C. 608, 138 S.E.2d 42 (1964); Nelson v. Peterson, 524 P.2d 1075 (Utah 1975); Vaillancourt v. Medical Center Hosp. of Vermont, Inc., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto. Ins. Co. 34 Wis. 2d 14, 148 N.W.2d 107 (1967); TENN. CODE ANN. § 20-5-106(a)(b) (1980). Currently, eleven jurisdictions deny recovery. Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Duncan v. Flynn, 358 So.2d (Fla. 1978); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Wascom v. American Indem. Corp., 348 So. 2d 128 (La. Ct. App. 1977); Olejniczak v. Whitten 605 S.W.2d 142 (Mo. Ct. App. 1980); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.W.S.2d 65 (1969); Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382 (1975); Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969). The remaining jurisdictions have not considered the issue.

[106]DEL. CODE ANN. tit. 10, § 3704(a) (1974); D.C. CODE ANN. § 16-1-2701 (1981); ILL. ANN. STAT. ch. 70, § 1 (Smith-Hurd 1959); KY. REV. STAT. § 411.130 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 229, § 2 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 600.2922 (Supp. 1983-84); MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1983); NEV. REV. STAT. § 40.085(2) (1979); N.M. STAT. ANN. § 41-2-1 (1982); OHIO REV. CODE ANN. § 2125.01 (Page 1976 & Supp. 1983); R.I. GEN. LAWS § 10-7-1 (1969); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976); VT. STAT. ANN. tit. 14, § 1491 (1974); WIS. STAT. § 895.04 (1982).

and justice, and recognition of modern medical advancements. The first justification is logically invalid. The latter two are logically valid but apply equally to criminal law.

Recovery for the wrongful death of a stillborn viable fetus has been allowed on the basis of legislative intent.[107] Some courts have held that the legislature intended to include the stillborn viable fetus as a potential decedent.[108] While this may be true of statutes which refer to the decedent as a "minor child,"[109] it is doubtful in the case of statutes that describe the decedent as a person. First, most of the wrongful death statutes were enacted soon after most states codified the common law, including its position on murder. It is doubtful that a state legislature would have intended to include the viable fetus as a "person" under the wrongful death statute but to exclude it from the same term under the murder statute. Second, when these statutes were enacted, knowledge of prenatal development was limited.[110] Legislatures could not have intended to include or exclude the stillborn viable fetus under the wrongful death statute.[111] Therefore, legislative intent cannot provide a logical justification for allowing the viable fetus to be treated as a person in tort but not in criminal law.

A second justification offered for allowing recovery for the wrongful death of a stillborn viable fetus is based on notions of logic and justice.[112] Recovery has been allowed on the rationale that it is illogical to deny recovery simply because a child did not survive long enough to be born, but to allow recovery for a child who is born alive but dies shortly thereafter, especially if the two are at the same period of gestation when the negligent act occurs.[113] It has also been argued that it is unjust to allow a tortfeasor who inflicts injury serious enough to cause *in utero* death to escape liability, while imposing liability on a tortfeasor who delivers a less serious injury.[114] A child who survives tortious prenatal

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[107]Kader, *supra* note 49, at 646.

[108] *See, e.g.,* Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 356 (1976).

[109]Seven states that have allowed recovery have statutes that refer to the decedent as a child. ALA. CODE § 6-5-391 (1975); GA. CODE ANN. § 51-4-4 (1982); IDAHO CODE § 5-310 (1979); IND. CODE § 34-1-1-8 (1982); OR. REV. STAT. § 30.010 (1981); UTAH CODE ANN. § 78-11-6 (1953); WASH. REV. CODE § 4.24.010 (1962).

[110]Kader, *supra* note 49, at 648.

[111]*Id.*

[112]*Id.* at 646.

[113]*Id.* at 646, n. 32 (*citing* Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974); Stidam v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959); Libbee v. Permanete Clinic, 268 Or. 258, 518 P.2d 636, 639 (1974); Baldwin v. Butcher, 155 W. Va. 431, 438-39, 184 S.E.2d 428, 432 (1971)).

[114]Kader, *supra* note 49, at 647 (citing Eich v. Town of Gulf Shores, 293 Ala. 95, 97, 300 So. 2d 354, 355 (1974); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 360-61, 331 N.E.2d 916, 920 (1975); White v. Yup, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969); Stidam

injuries is permitted to recover for them in all jurisdictions. Consequently, not allowing recovery for tortious *in utero* death results in allowing the more harmful tortfeasor to escape liability. These two arguments can be applied with equal force to the viable fetus in criminal law. It is illogical that two fetuses capable of independent existence are treated so differently simply because one survives the attack until shortly after birth but the other dies shortly before birth. Furthermore, it is unjust for the attacker who is brutal enough successfully to kill a fetus *in utero* to face a substantially lesser penalty than the less brutal attacker who faces life imprisonment or death.[115]

The final reason given for allowing recovery for the death of a stillborn viable fetus is based on the realization that the common law is not always applicable to modern society. Some courts that have accepted the reasoning that limited knowledge of prenatal life precluded any legislative intent to include the stillborn viable fetus under the wrongful death statute have allowed recovery on the ground that the common law is not static and therefore any prior meaning of the term "person" should not determine the issue.[117] These courts note the advancements that modern medicine has made in the area of prenatal life. The notion that the fetus is part of the mother, which supported earlier decisions denying recovery,[118] has been rejected in many later cases.[119] Furthermore, courts have either accepted modern medicine's ability to determine causation[120] or have asserted that the difficulty of such proof should not necessitate dismissal of the cause at the pleading stage.[121] In the years since *Roe,* a majority of jurisdictions have recognized the obsolescence of the born alive rule and have treated the viable fetus as a person for the purposes of tort law.

2. *The Born Alive Rule Still Applied in Criminal Law.*—The *Roe* prohibition against criminally punishing intentional feticide applies to nonviable fetus only. After viability, the states are free to punish inten-

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v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959); Presley v. Newport Hosp., 117 R.I. 177, 184, 365 A.2d 748, 752 (1976); Baldwin v. Butcher, 155 W. Va. 431, 443-44, 184 S.E.2d 428, 435 (1971); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967)).

[115]*See infra* notes 141-42 and accompanying text.

[116]Kader, *supra* note 49, at 648 (citing Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967)).

[117]Kader, *supra* note 49, at 648.

[118]*See supra* note 52 and accompanying text.

[119]According to one commentator, the last decision to deny recovery on the ground that the fetus was part of the mother was rendered more than 30 years ago. Kader, *supra* note 49, at 647.

[120]Kader, *supra* note 49, at 649 n.50 (citing Christafogeorgis v. Brandenberg, 55 Ill. 2d 368, 371-72, 304 N.E.2d 85, 90-91 (1973); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 360, 331 N.E.2d 916, 919 (1975)).

[121]Kader, *supra* note 49, at 649 n.51.

tional feticide as murder unless an abortion is necessary to save the mother's life. Post-*Roe* decisions, however, have applied the born alive rule unless the homicide statute specifrically included the viable fetus.[122] Despite recognition that a viable fetus is capable of independent existence, courts continue to hold that, at common law, the terms used to describe the victim applied only to those born alive and, absent statutory definition to the contrary,[123] the common law definition applies.[124] Terms which have been held to require application of the born alive rule in post-*Roe* decisions are "person,"[125] "human being,"[126] and "individual."[127] Furthermore, a statute which neither described the victim nor classified the crime by a description of the victim[128] was recently held to require application of the born alive rule.[129]

It is highly likely that courts will continue to apply the born alive rule in cases brought under homicide statutes that fail to describe the

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[122]State v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980) (*in utero* killing of eight and one-half-month-old fetus not murder); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (intentional killing of seven-month-old fetus not murder); State v. Brown, 378 So. 2d 916 (La. 1979); State v. Gyles, 313 So. 2d 799 (La. 1975) (prenatal death of eight-month-old fetus resulting from defendant's act of beating pregnant woman with a stick not murder); Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976) (physician's failure to provide care for twenty-two to twenty-four-week-old fetus not manslaughter unless fetus was born alive); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980) (*in utero* death of nine-month-old fetus resulting from automobile accident not negligent homicide), *appeal denied,* 417 Mich. 1006, 334 N.W.2d 616 (1983); State v. Doyle, 205 Neb. 345, 287 N.W.2d 59 (1980) (in prosecution for manslaughter of an infant, the state must prove that the infant had been born alive and achieved independent and separate existence); State *ex rel.* A.W.S., 182 N.J. Super. 278, 440 A.2d 1144 (1981) (viable fetus not a potential victim under vehicular homicide statute); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (1982) (viable fetus not a human being under the vehicular homicide statute); State v. Amaro, _ R.I. _____, 448 A.2d 1257 (1982) (nine-month-old fetus not a person within the meaning of the vehicular homicide statute); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978) (fact that infant breathed a few times after being born alive was not sufficient to show it had acquired independent existence and therefore was not a possible victim of murder).

[123]Several states define these terms within their statutes, but do so according to the born alive rule. ALA. CODE § 13A-6-1(2) (1982); COLO. REV. STAT. § 18-3-101(2) (1973); HAWAII REV. STAT. § 707-700(1) (1976); MONT. CODE ANN. § 45-2-101(27) (1983); N.H. REV. STAT. ANN. § 630:1 (1974); N.Y. PENAL LAW § 125.05 (McKinney 1975); OR. REV. STAT. § 163.005(3) (1983); TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon 1974).

[124]*E.g.*, People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

[125]Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976); State v. Doyle, 205 Neb. 234, 287 N.W.2d 59 (1980); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978).

[126]State v. Brown, 378 So. 2d 916 (La. 1979); State v. Gyles, 313 So. 2d 799 (La. 1975); State *ex rel.* A.W.S., 182 N.J. Super. 278, 440 A.2d 1144 (1981); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (1982); State v. Amaro, ____R.I. ____, 448 A.2d 1257 (1982).

[127]People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

[128]MICH. COMP. LAWS ANN. § 750.316 (West 1968 & Supp. 1983).

[129]People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980).

victim or that describe the victim in common law terms. Unfortunately, the vast majority of jurisdictions employ common law terms to describe the victim of homicide. Twenty-two states describe the victim or classify the crime of murder as an offense against a "person."[130] Eighteen states use the term "human being"[131] and two states describe the murder victim as an "individual."[132] Of the remaining majority jurisdictions, four provide no description,[133] and one describes the victim as a "reasonable creature in being."[134] Only three states have attempted specifically to include the viable fetus under their murder statutes.[135]

In most states, conduct such as the defendant's in *Hollis* only may be punished as unlawful abortion should the born alive rule be applied to their murder statutes.[137] In a few jurisdictions, it is possible that the

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[130]ALA. CODE § 13A-6-1(1) (1982); ALASKA STAT. § 11.41.100 (1983); ARIZ. REV. STAT. ANN. § 13-1105 (1978); ARK. STAT. ANN. § 41-1502(1)(b) (1977); COLO. REV. STAT. § 18-3-101(1) (1973); CONN. GEN. STAT. ANN. § 53a-54(a) (West 1958 & Supp. 1984); DEL. CODE ANN. tit. 11, § 636(d)(1) (1974 & Supp. 1982); HAWAII REV. STAT. § 707-701(1) (1976); IOWA CODE ANN. § 707.2 (West 1979); KY. REV. STAT. § 507.020 (1975 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970); MINN. STAT. ANN. § 609.185 (West 1964 & Supp. 1984); MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1983); NEB. REV. STAT. § 28-303 (1943); N.H. REV. STAT. ANN. § 630:1-a (1974); N.Y. PENAL LAW § 125.27 (McKinney 1975); OHIO REV. CODE ANN. § 2903.02(A) (Page 1982); S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-16-4 (1979 & Supp. 1983); VA. CODE § 18-2-32 (1950 & Supp. 1982); WASH. REV. CODE ANN. § 9A.32.030(1) (1977); W. VA. CODE § 61-2-1 (1977).

[131]FLA. STAT. ANN. § 782.04(1)(a) (West 1976 and Supp. 1984); GA. CODE § 16-5-1(a) (1982); IDAHO CODE § 18-4001 (1979); IND. CODE § 35-42-1-1 (1982); KAN. STAT. ANN. § 21-3401 (1981); ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (1984); MO. ANN. STAT. § 565.003 (Vernon 1979); MONT. CODE ANN. § 45-5-101(1) (1981); NEV. REV. STAT. § 200.010 (1983); N.J. STAT. ANN. § 2C:11-2(a) (West 1982); N.M. STAT. ANN. § 30-2-1(A) (1984); N.D. CENT. CODE § 12.1-16-01 (1976 & Supp. 1983); OKLA. STAT. ANN. tit. 21, § 701.7 (West 1983); OR. REV. STAT. § 163.005(1) (1983); 18 PA. CONS. STAT. ANN. § 2501(a) (Purdon 1983); R.I. GEN. LAWS § 11-23-1 (1981); WIS. STAT. ANN. § 940.01(1) (West 1982); WYO. STAT. § 6-2-101(a) (1983).

[132]ILL. ANN. STAT. ch. 38, § 9-1(a) (Smith-Hurd 1979 & Supp. 1984); TEX. PENAL CODE ANN. § 19.02(a) (Vernon 1974).

[133]MD. ANN. CODE art. 27, § 407 (1982); MICH. COMP. LAWS ANN. § 750.316 (1968 & Supp. 1984); N.C. GEN. STAT. § 14-17 (1981); VT. STAT. ANN. tit. 13, § 2301 (1974 & Supp. 1984).

[134]TENN. CODE ANN. § 39-2-201 (1982).

[135]CAL. PENAL CODE § 187 (West Supp. 1984); LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984); UTAH CODE ANN. § 76-5-201(1) (Supp. 1983).

[136]652 S.W.2d 61 (Ky. 1983). *See supra* text accompanying notes 1-5.

[137]ALA. CODE § 13A-13-7 (1982); ARK. STAT. ANN. § 41-2551 (1977); COLO. REV. STAT. § 18-6-102(1) (1978); CONN. GEN. STAT. ANN. §§ 53-29, 53-31 (West 1958); DEL. CODE ANN. tit. 11, § 651 (1974); D.C. CODE ANN. § 16-2701 (1981); IDAHO CODE § 18-605 (1979); ILL. ANN. STAT. ch. 98, 81-26 § 6(-1) (Smith-Hurd Supp. 1980); IND. CODE § 35-42-1-6 (1982) (called "feticide"); IOWA CODE ANN. § 707.7 (West 1979) (called "feticide"); KAN. STAT. ANN. § 21-3407 (1971); KY. REV. STAT. § 311.750 (1983); ME. REV. STAT. ANN. tit. 22, § 1598(3) (1964); MD. HEALTH CODE ANN. § 20.210 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 112, § 12N (West 1983); MICH. COMP. LAWS ANN. § 750.14 (1968); MINN. STAT.

conduct would be punished under a special manslaughter statute.[138] Most of these statutes, however, require that the death of the fetus be the result of injuries sustained by the mother that would be considered murder if the mother had died.[139] This type of statute has been interpreted to require that the defendant possess the intention to kill the mother;[140] an attacker who intends to kill only the fetus is not included. While these unlawful abortion and manslaughter statutes impose criminal penalties for conduct such as that in *Hollis,* they do not provide the full protection allowed by *Roe.* If conduct is considered murder, most jurisdictions permit a sentence of life imprisonment.[141] The penalties under the unlawful

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ANN. § 145.412 (West Supp. 1984); MONT. CODE ANN. § 50-20-109 (1983); NEB. REV. STAT. § 28-300 (1943); N.H. REV. STAT. ANN. § 585:13 (1974); N.M. STAT. ANN. § 30-5-3 (1984); N.Y. Penal Law § 125.45 (McKinney 1975); N.C. GEN. STAT. § 14-44 (1981); N.D. CENT. CODE § 14-02.1.04(5) (1981); OHIO REV. CODE ANN. § 2912.12(A) (Page 1982); 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-17-5 (1979); TENN. CODE ANN. § 39-4-201 (1982); TEX. STAT. ANN. art. 4512.5 (Vernon 1976); VT. STAT. ANN. tit. 13, § 101 (1974); VA. CODE § 18:2-71 (1982); W. VA. CODE § 61-2-8 (1977); WIS. STAT. ANN. § 940.04 (West 1982); WYO. STAT. § 35-6-110 (1977).

[138]1983 Ariz. Legis. Serv. 268 (West); FLA. STAT. ANN. § 782.09 (West 1976); GA. CODE ANN. § 16-5-80(a) (Supp. 1983) (called "feticide"); MISS. CODE ANN. § 97-3-37 (1972); MO. STAT. ANN. § 565.026 (Vernon 1979); NEV. REV. STAT. § 200.210 (1979); OKLA. STAT. ANN. tit. 21, § 713 (West 1983); R.I. GEN. LAWS § 11-23-5 (1981); WASH. REV. CODE § 9A.32.060(1)(b) (1977).

[139]1983 Ariz. Legis. Serv. 268 (West); FLA. STAT. ANN. § 782.09 (West 1976); GA. CODE ANN. § 16-5-80(a) (Supp. 1983); MISS. CODE ANN. § 97-3-37 (1972); MO. STAT. ANN. § 565.026 (Vernon 1979); R.I. GEN. LAWS § 11-23-5 (1981).

[140]*E.g.*, State v. Harness, ____Mo.____, 280 S.W.2d 11, 14 (1955) construing MO. REV. STAT. § 559.090 (1949)).

[141]ALA. CODE § 13A-5-6(1) (1982) (or not more than 99 years); ARIZ. REV. STAT. ANN. § 13-703 (1956 & Supp. 1983) (or death); CAL. PENAL CODE § 190 (West 1970 & Supp. 1984) (or death); COLO. REV. STAT. § 18-1-105 (1978 & Supp. 1983) (or death); CONN. GEN. STAT. ANN. § 53a-35(a)(2) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4205(b)(1) (1979); D.C. CODE ANN. § 22-2404(a) (1981); FLA. STAT. ANN. § 775.082(1) (West 1976) (or death); GA. CODE ANN. § 16-5-1(d) (1982) (or death); HAWAII REV. STAT. § 707-606(b) (Supp. 1983); IDAHO CODE § 18-4004 (1979) (or death); IOWA CODE ANN. § 902.1 (West 1979 & Supp. 1984); KAN. STAT. ANN. § 21-4501(a) (Supp. 1984); KY. REV. STAT. § 507.020 (1975) (or death); LA. REV. STAT. ANN. § 14:30 (West Supp. 1984) (or death); ME. REV. STAT. ANN. tit. 17-A, § 1251 (1964 & Supp. 1983); MD. ANN. CODE art. 27, § 412 (1982) (or death); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970) (or death); MICH. COMP. LAWS ANN. § 750.316 (Supp. 1984); MINN. STAT. ANN. § 609.185 (West 1964 & Supp. 1984); MISS. CODE ANN.§ 97-3-21 (Supp. 1983); MO. ANN. STAT. § 565.008(2) (Vernon 1979); MONT. CODE ANN. § 45-5-102(2) (1983) (or death); NEB. REV. STAT. § 28-105(1) (1943) (or death); NEV. REV. STAT. § 200.030(4)(b) (1983); N.H. REV. STAT. ANN. § 630:1-(d) (1974); N.M. STAT. ANN. § 30-2-1 (1984) (or death); N.Y. PENAL LAW § 60.06 (McKinney 1975) (or death); N.C. GEN. STAT. § 14-17 (1981) (or death); N.D. CENT. CODE § 12..1-16-01 (Supp. 1983); OHIO REV. CODE ANN. § 2929.02(B) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.9(A) (West 1983) (or death); OR. REV. STAT. § 163.115(3) (1983); PA. STAT. ANN. tit. 18, § 1102(a) (Purdon 1983) (or death); R.I. GEN. LAWS § 11-23-2 (1981); S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 22-6-

abortion or manslaughter statutes, however, are substantially less severe.[142] The continued application of the born alive rule to intentional, nonconsensual viable feticide renders criminal law inconsistent with property and tort law. It not only denies the viable fetus treatment as a person, but also denies the viable fetus the full protection allowed under *Roe*. This inconsistency should be resolved by abolishing the born alive rule and including the viable fetus as a potential homicide victim.

1(1) (1979 & Supp. 1983) (or death); TENN. CODE ANN. § 39-2-202(b) (1982) (or death); TEX. PENAL CODE ANN. § 12.32 (Vernon Supp. 1984) (or not more than 99 years); UTAH CODE ANN. § 76-3-203(1) (Supp. 1983); VT. STAT. ANN. tit. 13, § 2303(a) (Supp. 1984); VA. CODE § 18..2-10(b) (1982); WASH. REV. CODE § 9A.32.030(2) (1977); W. VA. CODE § 61-2-2 (1977); WIS. STAT. ANN. § 939.50(3)(a) (West 1982); WYO. STAT. § 6-2-101(b) (1983) (or death). Contra ALASKA STAT. § 12.55.125 (Supp. 1983) (not more than 99 years imprisonment); ARK. STAT. ANN. § 41-901(1)(a) (Supp. 1983) (not more than 40 years imprisonment); ILL. ANN. STAT. ch. 38, § 1005-8-1(1) (Smith-Hurd 1982) (not more than 40 years imprisonment); IND. CODE § 35-50-2-3 (1982) (40 years imprisonment); N.J. STAT. ANN. § 2C:11-3 (West 1982).

[142]ALA. CODE § 13A-13-7 (1982) (12 months imprisonment); ARIZ. REV. STAT. ANN. 13-701(B)(2) (1956) (5 years imprisonment); ARK. STAT. ANN. § 41-2553 (1977); (5 years imprisonment); CONN. GEN. STAT. ANN. §§ 53-29, 53a-35a(6) (West 1960 & Supp. 1984) (5 years imprisonment); DEL. CODE ANN. tit. 11, § 4205(b)(4) (1974) (10 years imprisonment); D.C. CODE ANN. § 22-201 (1981) (10 years imprisonment); FLA. STAT. ANN. § 775.082(3)(c) (West 1976) (15 years imprisonment); IDAHO CODE § 18-605 (1979) (5 years imprisonment) ILL. ANN. STAT. ch. 38, § 1005-8-1(5) (Smith-Hurd 1982) (7 years imprisonment); IND. CODE § 35-50-2-6 (1982) (5 years imprisonment); IOWA CODE ANN. § 902.9(1) (West 1979) (25 years imprisonment); KAN. STAT. ANN. § 21-4501(d) (Supp. 1984) (10 years imprisonment); KY. REV. STAT. § 311.990(14) (1983) (20 years imprisonment); ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(c) (1964) (5 years imprisonment); MD. HEALTH CODE ANN. § 20-210(b) (Supp. 1983) (3 years imprisonment); MASS. GEN. LAWS ANN. ch. 112, § 12N (West. 1983) (5 years imprisonment); MICH. COMP. LAWS ANN. § 750.503 (1968) (4 years imprisonment); MISS. CODE ANN. § 97-3-25 (1972) (20 years imprisonment); MISS. CODE ANN. § 97-3-25 (1972) (20 years imprisonment); MO. ANN. STAT. § 565.031 (Vernon 1979) (10 years imprisonment); MONT. CODE ANN. § 46-18-213 (1983) (10 years imprisonment); NEB. REV. STAT. § 28-330 (1943) (5 years imprisonment); NEV. REV. STAT. § 200.210 (1983) (10 years imprisonment); N.H. REV. STAT. ANN. § 585:13 (1974) (10 years imprisonment); N.M. STAT. ANN. § 31-18-15 (1981) (3 years imprisonment); N.Y. PENAL LAW § 70.00(2)(d) (1975) (7 years imprisonment); N.C. GEN. STAT. § 14-1.1(a)(8) (1981) (10 years imprisonment); N.D. CENT. CODE § 12.1-32-01(3) (Supp. 1983) (10 years imprisonment); OHIO REV. CODE ANN. § 2929.21(B)(1) (Page 1982) (6 months imprisonment); OKLA. STAT. ANN. tit. 21, § 715 (West 1983) (4 years imprisonment); PA. STAT. ANN. tit. 18, § 1103(3) (Purdon 1983) (7 years imprisonment); R.I. GEN. LAWS § 11-23-3 (1981) (20 years imprisonment); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976) (5 years imprisonment); S.D. CODIFIED LAWS ANN. § 22-6-1(8) (Supp. 1983) (2 years imprisonment); TENN. CODE ANN. § 39-4-201(b)(1) (1982) (10 years imprisonment); VT. STAT. ANN. tit. 13, § 101 (1974) (10 years imprisonment); VA. CODE § 18-2-10(d) (1982) (10 years imprisonment); WASH. REV. CODE § 9A.20.020(1)(b) (Supp. 1984) (10 years imprisonment); W. VA. CODE § 61-2-8 (1977) (10 years imprisonment); WIS. STAT. ANN. § 940.04 (West 1982) (not more than 15 years imprisonment); WYO. STAT. § 35-6-110 (1977) (14 years imprisonment). *Contra* GA. CODE ANN. § 16-5-80(b) (Supp. 1983) (life imprisonment); MINN. STAT. ANN. § 609.10 (West Supp. 1984) (life imprisonment); TEX. HEALTH CODE ANN. art. 4512.5 (Vernon 1976) (life imprisonment). Three states appear not to punish the conduct. *See supra* note 6. Alternatively, three states have attempted to include the viable fetus under their murder statutes which equates the penalties. *See supra* note 135.

Including the viable fetus under wrongful death statues has been, primarily, a judicial accomplishment.[143] Two obstacles, however, prevent courts from interpreting murder statutes to include the viable fetus: the rules of statutory construction and procedural due process.

Under rules of statutuory construction, courts will give effect to legislative intent if it can be ascertained.[144] Where conduct can be covered under two conflicting acts, courts presume that the legislature intended the more specific legislation to prevail.[145] Because unlawful abortion statutes, and manslaughter statutes in a few states, specifically deal with intentional viable feticide, courts presume that the legislature intended for acts such as those in *Hollis* to be covered by the unlawful abortion law or manslaughter statute.[146]

Procedural due process also prevents judicial inclusion of the viable fetus under murder statutes. One aspect of procedural due process requires that an individual be given fair warning that certain conduct is prohibited by the statute.[147] Judicial expansion of the definition of the murder victim would fail to give the defendant the requisite fair warning because he would not be informed that his acts constituted murder until after the acts had been committed.[148] Including the viable fetus under the murder statute must be, therefore, the result of legislation.

V. Legislative Reform: Problems and a Proposed Statutory Scheme

Several problems arise in enacting valid murder statutes that include the viable fetus. Inconsistent use of terms describing victims in a code may create difficulties for judicial enforcement. Several constitutional and policy problems may be encountered. The subjective meaning of viability creates due process concerns. Limiting the proscribed conduct to non-consensual viable feticide may subject the statute to equal protection attack, while including consensual feticide may also create difficulties. These problems can be solved, however, and a statutory scheme which includes the viable fetus as a potential murder victim is possible.

A. Drafting a Murder Statute to Include the Viable Fetus

The three jurisdictions that have attempted to include the fetus[149] under their murder statutes have used two approaches: Louisiana and

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[143]*See supra* note 104.

[144]Hollis v. Commonwealth, 652 S.W.2d 61, 64 (Ky. 1983) (citing City of Bowling Green v. Board of Educ., 443 S.W.2d 243, 247 (Ky. 1969)).

[145]652 S.W.2d at 64.

[146]*Id.*

[147]Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[148]Hollis, 652 S.W.2d at 64.

[149]Cal. Penal Code § 187 (West Supp. 1984); La. Rev. Stat. Ann. § 14:2(7) (West Supp. 1984); Utah Code Ann. § 76-5-201(1) (Supp. 1983).

Utah have redefined the term"person"[150] or "human being"[151] to include the fetus; California has redefined murder to include the killing of a fetus.[152] The first approach has resulted in wording deficiencies[153] and the second has been criticized for placement deficiencies.[154]

In 1974, the Louisiana legislature attempted to include the fetus as a potential murder victim by redefining the term "person" in the definitional section of the penal code.[155] The murder statute, however, used the term "human being" to describe the victim.[156] In a case brought two years after the amendment, the Louisiana Supreme Court held that because the term "human being" had not been redefined to include the fetus, the born alive rule applied and the defendant therefore was not guilty of murder.[157]

Consistent terminology within a code section may also be relevant. While California has redefined murder to include the fetus,[158] the murder statute is placed under a broad section entitled "Of Crimes Against the Person." One commentator has suggested that this scheme may not be accepted by the judiciary,[159] and denies the fetus protection against all forms of criminal attack.[160]

The best solution to the wording and placement problems is to reword the section title to read "Of Crimes Against the Person or Viable Fetus." Murder should then be rdefined as the unlawful killing of a person or viable fetus. This would show a clear intent to include the viable fetus as a potential murder victim and would permit legislatures to redefine all forms of criminal attack to include the viable fetus.

B. Constitutional and Policy Considerations in Affording the Viable Fetus Full Protection in Criminal Law

Legislatures will have several issues to consider in drafting statutes that include the viable fetus as a potential victim of criminal attack. Some of these issues involve constitutional safeguards that legislatures must incorporate into the statute. Others involve policy considerations that will have important implications regarding the extent and conditions of protection for the viable fetus in criminal law.

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[150]LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984).

[151]UTAH CODE ANN. § 76-5-201(1) (Supp. 1983).

[152]CAL. PENAL CODE § 187 (West Supp. 1984).

[153]State v. Gyles, 313 So. 2d 799 (La. 1975).

[154]*See infra* note 159.

[155]LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984).

[156]LA. REV. STAT. ANN. § 14:30 (West 1976 & Supp. 1984).

[157]State v. Brown, 378 So. 2d 916 (La. 1979).

[158]CAL. PENAL CODE § 187 (West Supp. 1984).

[159]Note, *Feticide in California: A Proposed Statutory Scheme,* 12 U.C.D. L. REV. 723, 733 (1979). This proposition has not proven to be true. There has since been a successful prosecution under the statute for viable feticide. *See* People v. Apodaca, 76 Cal. App. 3d 479, 486, 142 Cal. Rptr. 830, 835 (1978).

[160]Note, *supra* note 159, at 725.

As a matter of due process, a criminal statute must give a person of ordinary intelligence fair notice that the conduct he contemplates is prohibited.[161] To provide such notice, a statute should include a definition of viability. The Supreme Court has defined fetal viability as the potential capacity and as the reasonable lilkelihood of potential capacity to live outside the mother's womb, albeit with artificial aid.[162] While the Court has not expressly distinguished the two definitions, they are inherently different. Viewed on a continuum, "potential capacity" implies that any possibility of survival is sufficient, whereas "reasonable likelihood" implies that the fetus' chances of survival must be fairly good. Legislatures should use the "reasonable likelihood" definition for two reasons. Because the reasonable capacity to survive will generally occur later in gestation than the mere potential capacity to survive, the chances of medical agreement as to whether viability had actually been achieved are greater. Furthermore, the reasonable likelihood standard reflects the latest view held by the Court. A murder statute that includes the viable fetus as a potential victim should define viable as having the reasonable likelihood of potential capacity to live outside the mother's womb, albeit with artificial aid.

The major due process issue arises from the Supreme Court's requirement that viability be determined on a case-by-case basis by the attending physician.[163] Because a physician is required to determine viability, it may be argued that a person of ordinary intelligence would not know at the time of the offense that he was attacking a viable fetus.[164] The Supreme Court, however, has held that it is not unfair to impose the risk of crossing the line on "one who deliberately goes perilously close to an area of proscribed conduct."[165] This risk has been imposed on the defendant in a viable feticide case brought under California's murder statute.[166] The California decision should be followed in other jurisdictions that include the viable fetus under their murder statutes.

In addition to due process concerns, including the viable fetus under a murder statute raises equal protection issues. While the focus of this Note has been nonconsensual viable feticide, consensual viable feticide must also be encompassed within the prohibited conduct in order to avoid equal protection attack. Under *Roe v. Wade,*[167] the state may punish viable feticide because its interest becomes compelling at the point of viability.[168] The state's interest is no less compelling when the pregnant woman consents to an abortion than when a fetus is destroyed by someone else without her consent. Treating the pregnant woman less severely without a legitimate justification violates equal protection.

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[161]Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[162]*See supra* notes 100-01 and accompanying text.

[163]Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

[164]People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978).

[165]Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) (footnote omitted).

[166]People v. Apodaca, 76 Cal. App 3d 479, 486, 142 Cal. Rptr. 830, 835 (1978).

[167]410 U.S. 113 (1973).

[168]*Id.* at 163.

Creating two classes of defendants, the mother and the third persons, and punishing one class substantially less severely than the other denies third parties equal protection, unless the state can show a compelling reason for the disparate treatment of the two groups. While states may face political opposition to treating consensual viable feticide as murder, two arguments may be advanced for such treatment. First, at present, viability occurs sufficiently late in pregnancy that the mother has a reasonable length of time in which to decide whether or not to bear a child. Her right to privacy is not being denied altogether but merely is limited to the time prior to when the state's interest becomes compelling. Second, in all but three jurisdictions,[169] post-viability feticide is punishable even if committed with the mother's consent unless a compelling reason for the abortion exists.

One justification for treating the mother differently from third parties exists when the mother's life or health is at stake. *Roe* permits the proscription of abortion at viability *except* where it is necessary to preserve the life or health of the mother.[170] Therefore, while a statute must include consensual viable feticide to meet equal protection requirements, it also must make an exception where the life or health of the mother requires it.

A second exception may be justified where the life or health of the child is in doubt. A case of this nature raises the life versus quality of life argument: whether no life is preferable to a life which must be endured with severe physicial or mental defects. While this question often arises in wrongful life actions,[171] a legislature that desires to impose penalties for feticide must consider the issue. The Supreme Court has set no clear judicial guidelines regarding the resolution of this controversial policy issue. In *Roe,* the Court reasoned that the states could impose criminal penalties for abortion when the fetus became viable because at that point the child would be presumed to have the capability for a meaningful life.[172] While the Court never explained what a "meaningful life" is, the use of the term "meaningful" suggests a preference for quality of life. The Supreme Court, however, in *Colautti v. Franklin*[173] stated that viability is reached once a reasonable likelihood of sustained survival exists.[174] "Sustained survival" can exist under extremely miserable conditions. *Colautti*, therefore, suggests a preference for life, regardless of its quality.

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[168] *Id.* at 163.

[169] *See supra* note 6.

[170] 410 U.S. at 163-64.

[171] For a discussion of wrongful life actions in general, see Note, *Wrongful Life: An Infant's Claim to Damages,* 30 BUFFALO L. REV. 587 (1981). For a discussion of issues raised when a child initiates a wrongful life action against the child's own parents, see Note, *Child v. Parent: A Viable New Tort of Wrongful Life?* 24 ARIZ. L. REV. 391 (1982).

[172] 410 U.S. at 163.

[173] 439 U.S. 379 (1979).

[174] *Id.* at 388.

The decision to exclude an abortion that is performed where the health of the child is in doubt is a policy decision to be made by the legislature. Legislatures should realize, however, that they are making this decision implicitly when they enact homicide statutes that include the viable fetus. It is not a policy consideration that can be ignored. A decision to exclude from a statute an abortion performed where the health of the child is in doubt is a choice for quality of life.[175] A decision not to make such an exclusion is a choice for life regardless of its quality.

The final consideration that legislatures will face is how far to extend viable fetal protection. While this Note has focused only on affording the viable fetus protection under a murder statute, the viable fetus is susceptible to all forms of criminal attack, including manslaughter, negligent homicide, vehicular homicide, assault, and battery. Providing full protection to the viable fetus means protecting it against all forms of attack.

C. Proposed Statute

The following is a proposed statutory scheme for including the viable fetus under murder statutes. It is intended to illustrate how legislatures can include the viable fetus in a statutory scheme, not to suggest that the viable fetus should be protected only against intentional criminal attack that results in death *in utero*.

CRIMES AGAINST THE PERSON AND VIABLE FETUS

§1 Definitions and Limitations

(a) Viable Fetus: A viable fetus is a fetus that, in the judgment of the attending physician on the particular facts of the case, has a reasonable likelihood of sustained survival outside the mother's womb, with or without artificial support.

(b) Limitations

(1) Nothing in this Act shall be construed as prohibiting an abortion which, in the judgment of a licensed physician, is necessary to preserve the life or health of the mother.

(2) Nothing in this Act shall be construed as prohibiting an abortion where, in the judgment of a licensed physician, the life or health of the fetus is endangered.[176]

§2 Murder is the unlawful killing of a person or viable fetus with (jurisdiction's appropriate *mens rea*).

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[175]It must be noted that the choice of whether or not to exclude an abortion when the child's health is endangered may establish an argument for the acceptance or rejection of wrongful life actions in the jurisdiction. If the legislature chooses life over quality of life, a tort defendant could argue that the choice should be applied to a wrongful life action as well.

[176]This limitation could be omitted in states whose legislatures determine that life is more valuable than no life.

VI. Conclusion

Without legislation that includes the viable fetus as a potential victim of criminal attack, the viable fetus remains inadequately protected from attacks such as the one that recently occured at an Indianapolis, Indiana high school. There, a fourteen-year-old pregnant student was stabbed by two female classmates who stated that they were going to kill the mother and her baby. The six-month-old fetus was later delivered stillborn as a result of the stabbing.[177] The attackers were charged[178] with feticide,[179] a crime that carries a maximum penalty of five years.[180] The Indiana murder statute[181] carries a maximum penalty of forty years' imprisonment,[182] but uses the term "human being" to describe the victim. The born alive rule would have been applied, rendering a murder conviction unobtainable.

The born alive rule was necessary during the early common law period in which it was established. Medical technology was too limited to provide proof that the death of a stillborn fetus was caused by the acts of an attacker and that the fetus was capable of independent existence. These medical impediments have been removed, as recognized by the term "viable" itself and by the change in tort law to allow recovery for the wrongful death of a stillborn viable fetus.

The criminal law should abolish the born alive rule at the point the fetus has reached viability. It is at this point that the state acquires a compelling interest in the fetus and criminal penalties for its destruction are constitutionally permissible. Abolishing the born alive rule in criminal law must be the result of legislative initiative because the rules of statutory construction and due process will restrain courts from so acting.

While the legislatures will face problems in drafting statutes that include viable fetus as a potential victim of criminal attack, these obstacles are surmountable. Careful consideration of the issues and careful draftsmanship of a statutory scheme can provide full protection to the viable fetus, yet remain within the limits imposed by *Roe v. Wade*.[183]

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[177] Indianapolis Star, Oct. 16, 1984, § 1, at 1, col. 1. One of the attackers was 17 and the other was 14. The attack was apparently motivated by the victim's involvement with the older girl's boyfriend.

[178] *Id.*

[179] Ind. Code § 35-42-1-6 (1982).

[180] *Id.* § 35-50-2-6 (1982). An additional three years imprisonment is allowed where aggravating circumstances are present.

[181] *Id.* § 35-42-1-1 (1982).

[182] *Id.* § 35-50-2-3 (1982).

[183] 410 U.S. 113 (1973).