IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT, SIXTH DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	No. 89-1143
MONICO CAMPOS, Defendant-Appellant.	)	

Appeal from the Circuit Court of Cook County, Illinois
Criminal Division.
The Honorable Themis N. Karnezis, Judge Presiding.

BRIEF OF SENATOR KELLY, REPRESENTATIVE PULLEN AND FOURTEEN OTHER MEMBERS OF THE ILLINOIS GENERAL ASSEMBLY AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE, THE PEOPLE OF THE STATE OF ILLINOIS

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August 9, 1991

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INTEREST OF THE AMICI CURIAE

Amici Curiae consist of sixteen Democratic and Republican members of both chambers of the General Assembly, including Senator Kelly and Representative Pullen, the sponsors of House Bill 3262 and Senate Bill 1942, the legislation which became the Illinois fetal homicide statute, codified at Ill. Rev. Stat. Ch. 38, §9-1.2. All amici support, and many spoke in favor of and voted for, the legislation at issue in this appeal. The disposition of this appeal will directly, and perhaps permanently affect the constitutional authority of the General Assembly to legislate sound public policy on the issue of protecting unborn children outside the context of abortion. Likewise, the invalidation of the Illinois fetal homicide statutes, if successful, will directly, and perhaps permanently, affect their ability to represent their constituents in the Illinois General Assembly.

Senators

Forest Etheredge (R-21st)
George Hudson (R-41st)
Jeremiah Joyce (D-14th)
Doris Karpiel (R-25th)
Richard Kelly (D-39th)

Representatives

Dan Cronin (R-40th)
DeLoris Doederlein (R-65th)
Monroe Flinn (D-114th)
Charles Hartke (D-107th)
Thomas McCracken (R-81st)
Andrew McGann (D-29th)
Myron Olson (R-70th)
Bernard Pedersen (R-54th)
Edward Petka (R-82nd)
Penny Pullen (R-55th)
James Stange (R-44th)

SUMMARY OF ARGUMENT

The Defendant-Appellant (Campos) challenges the well-settled authority of the General Assembly to protect unborn children from the non-consensual assaults of third parties. As the Illinois Supreme Court has clearly stated, because Illinois is a code state, it is exclusively the prerogative of the General Assembly to define crimes. And where, as here, the Illinois General Assembly has a substantial and legitimate interest in protecting unborn children in the non-abortion context, the state may define as criminal the unconsented assault of a third party whose actions kill the unborn child.

This case does not draw into question the legal status of abortion. The right to obtain an abortion, announced in Roe v. Wade, 410 U.S. 113 (1973), is not at issue. In fact, consensual abortions are specifically excluded from the scope of the Illinois fetal homicide statute.[1] The legislative history of the fetal homicide statute makes clear that the purpose for the law was to eliminate a loophole in Illinois criminal law that left pre-viable

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[1] Ill. Rev. Stat. Ch. 38, §9-1.2 (c) provides:

> This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during an abortion, as defined in Section 2 of the Illinois Abortion Law of 1975, as amended, to which the pregnant woman has consented. This Section shall not apply to acts which were committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

The statute is attached as Appendix A.

unborn children in the state unprotected from the non-consensual murderous acts of a third party. The statute is directly related to this legitimate state interest; as this appeal and the other prosecutions under the statute demonstrate, the statute is having its intended effect.[2]

Consensual abortion, which is currently constitutionally protected, and a third party's assault upon a pregnant woman which results in her unborn child's death, are legally distinguishable. State and federal courts which have reviewed fetal homicide statutes have appropriately recognized this. Contrary to the gloss placed on the statute by Campos and his amicus curiae, the ACLU, the Illinois fetal homicide law does not assert the Fourteenth Amendment "personhood" of the unborn. This attempt to bootstrap abortion jurisprudence into this context -- the homicide of an unborn child -- creates nothing more than self-serving confusion and fails to provide this court with any useful guidance.

Roe v. Wade has no relevance whatsoever to Illinois' attempt to protect unborn human life, unless such attempts limit access to abortion. The United States Supreme Court has upheld a state law including a statement that "the life of each human life begins at conception." Webster v. Reproductive Health Services, 109 S. Ct.

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[2] People v. Allong, No. ___ CR ___ (Cook County Cir. Ct. ___); People v. Belanger, No. 86 CF 2234-03 (DuPage County Cir. Ct., July 10, 1987); People v. Anthony Dunn, No. 88 CR 18022 (Cook County Cir. Ct. ___); People v. James Kuchen, No. 87 CR 4317 (Cook County Cir. Ct., Sept. 22, 1988); People v. William Phillips, No. 89 CR ___ (Cook County Cir. Ct. May ___, 1989); People v. Lawrence Wisniewski, No. 87 CR 5492 (Cook County Cir. Ct. ___).

3040 (1989). The Illinois Supreme Court has also stated that it is within the province of the General Assembly to "specifically include the unborn within the potential victims of homicide." People v. Greer, 79 Ill.2d. 103, 116, 402 N.E.2d 203, 209 (1980). Indeed, in People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987), the Illinois Supreme Court upheld the Illinois feticide statute against the same constitutional challenges asserted before this court. State and federal courts which have addressed challenges to state fetal homicide laws based on Roe v. Wade have rejected them.

The unambiguous statements from the highest courts of Illinois and of the United States flatly reject the arguments raised in this challenge to the Illinois fetal homicide statute. As the Illinois Supreme Court recognized in Greer, it is the duty of this court to defer to the Illinois General Assembly as it exercises its legislative prerogative. Accordingly, Campos' challenge to the Illinois fetal homicide statute should be rejected and the constitutionality of statute should be upheld.

ARGUMENT

I. THE ILLINOIS FETAL HOMICIDE STATUTE ADVANCES THE STATE'S LEGITIMATE INTEREST IN PROTECTING UNBORN CHILDREN, OUTSIDE OF THE CONTEXT OF ABORTION, FROM THE NON-CONSENSUAL LETHAL ASSAULT OF THIRD PARTIES.

The legitimacy of the state's purpose in enacting the fetal homicide statute is manifest: Illinois has an important interest in protecting unborn children within the state from lethal assault.

The legislative history of the Illinois fetal homicide statute makes clear that by enacting this law, the General Assembly sought to close a loophole in Illinois criminal law that left pre-viable unborn children in the state unprotected from the assaults of third parties. In extending this protection to the unborn throughout pregnancy, the statute completely abrogated the antiquated common law born alive rule, which the General Assembly had partially overturned by enacting the feticide statute. Ill. Rev. Stat. Ch. 38, §91.1 (1985). To characterize the state's interest as a ministerial concern for complete crime statistics trivializes the state's objective. Campos Brief at 83. Campos' challenge to the legislative purpose behind the fetal homicide statute is unfounded. The challenge should be rejected and the statute upheld.

A. The Legislative History of the Illinois Fetal Homicide Statute Establishes that the General Assembly was Motivated by an Interest in Protecting Unborn Children from Lethal Assault Outside of the Context of Abortion.

The Illinois fetal homicide statute's legislative history reflects a clear understanding in both the Senate and the House of Representatives that Senate Bill 1942 (SB 1942), and its companion bill, House Bill 3262 (HB 3262), were intended to extend protection from homicide to unborn children throughout pregnancy. Statements in opposition to the legislation make clear that the purpose of these bills was fully known. Indeed, it was opposition to extending protection prior to fetal viability that generated vociferous debate. Not a single statement -- either supporting or

opposing the legislation -- made by any one of the seventeen members of the General Assembly who addressed the merits of this legislation lends credence to Campos' assertion that the Illinois fetal homicide statute was enacted merely "to ensure that non-viable fetuses are included in the statistics for crime deaths." Campos Br. at 83.

In explaining the legislation ultimately enacted as the Illinois fetal homicide statute, the bills' sponsors stressed two points. First, that this bill had nothing to do with abortion. ("[T]here is nothing in this legislation that deals with abortion." Senate Bill 1942, 84th Gen. Ass., May 13, 1986, p.66; substantially identical statements at p. 67, 69 (remarks of Senate sponsor Senator Kelly); "It specifically does not apply to any abortion situation, does not apply to the mother involved. It is addressed to situations where a third party attacks or otherwise injures the unborn child or, in fact, kills the unborn child." Senate Bill 1942, 84th Gen. Ass., June 24, 1986, p. D12; substantially identical statements at p. G12 (remarks of House sponsor Representative Pullen)).

Second, the sponsors emphasized that the legislation was necessary to correct a gap in Illinois law which left pre-viable unborn children unprotected from homicide.[3] It was this purpose

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[3] It is worth noting that even those who strongly opposed expanded protection for the unborn recognized the loophole in Illinois' law. An amendment to HB 3262 -- the companion bill to the bill enacted, which also sought to remedy the gaps in the law -- was endorsed by the American Civil Liberties Union, both the Illinois and Chicago chapters of the National Organization for Women, Illinois Planned Parenthood, Illinois Women's Caucus,

and none other that was debated at length in the General Assembly. At issue in these debates was the wisdom of according such protection to the unborn throughout pregnancy; that the purpose of the legislation was to extend such protection was, however, clearly understood. The Senate's most extensive debate began with Sen. Kelly introducing SB 1942 as follows:

> Senate Bill 1942 as amended closes a legal loophole which has been available in the State to a [sic] individual who may perpetrate harm to a pregnant woman, possibly kill her and also kill the unborn child; and the person who perpetrated the crime could, in fact, walk away and not be guilty of any State law. . . Up until now we've had a law which says if a child is viable, which is after three months[4] until term, they would be protected, but between zero and three months there was no protection in the State laws for an unborn child and ...this particular incident did happen where...where an unborn child in this age category was actually killed and there was ...the person who perpetrated the crime was able to just walk away. This would tighten that loophole...

Senate Bill 1942, 84th Gen. Ass., May 13, 1986, pp. 66-7 (emphasis supplied). Likewise, when Rep. Pullen introduced the bill, she stated the need for providing complete prenatal protection from homicide:

> This Bill would create a series of crimes against the unborn which are equivalent to crimes against the born. ... It replaces the current Illinois feticide law which has been found to be, although well-meaning, not adequate for protecting wanted unborn children.

Midwest Women's Political Caucus, and "most of the major women's organizations in this state." Senate Bill 1942, 84th Gen. Ass., May 15, 1986, p. E08 (remarks of Representative Young).

[4] Viability may now occur as early as twenty-two weeks with substantial potential for viability at twenty-four weeks. Nwaesei, et al., Preterm Birth at 23 to 26 Weeks' Gestation: Is Active Obstetric Management Justified?, 157 Am. J. Ob. Gyn. 890 (1987).

Senate Bill 1942, 84th Gen. Ass., June 23, 1986, p. D12.

Those legislators opposed to extending fetal homicide recognized the gap in Illinois' law but found it acceptable. They acknowledged that the legislative purpose was precisely as the bills' supporters claimed. Following Rep. Pullen's explanation of SB 1942, Representative Preston said:

> I wanted to commend the Sponsor of this Bill for being very earnest and forthright in her presentation of the Bill and in her willingness earlier to take care of problems. I believe in the concept of this Bill, but as I explained to Representative Pullen in the past, I cannot support this Bill because of the equation of the intentional homicide of an unborn with the intentional homicide of a human being born alive. Both under this Bill would be murder, and I think the law must make the distinction between the homicide of a fetus and the homicide of an individual born alive.

Senate Bill 1942, 84th Gen. Ass., June 24, 1986, p. D12-E12. Others likewise indicated their understanding. "According to our analysis, you are talking about from the point of conception until...until the end of pregnancy, is that right?" Senate Bill 1942, 84th Gen. Ass., May 13, 1986, p. 68 (remarks of Senator Fawell). Senator Geo-Karis attacked the bill because, in her words, it "g[a]ve the fertilized egg the status of a person." Senate Bill 1942, 84th Gen. Ass., May 13, 1986, p.74; substantially identical statement at p. 75.

In support of his statement that "[t]he purpose of the [statute's] enactment is to assure that non-viable fetuses are included in the statistics for crime deaths," Campos wrenches from context a sentence fragment contained in one of Rep. Pullen's statements in support of the bill. Campos Br. at 83. The

statement, coming from a constituent's letter, points out the injustice and supreme irony of Illinois' criminal law that not only failed to punish a third party who caused the death of an unborn child, but even failed to consider the child a victim for reporting purposes. The full text of the letter, which was read as part of Rep. Pullen's statement, reveals that the constituent had lost a daughter and her unborn child in a car accident caused by a drunk driver. In relevant part, the letter read:

> My personal thanks for sharing the feeling that in some way I had helped to put an end to the negligent fetal homicide crimes against an unborn child. This has been a long 21 month crusade for me filled with much anguish and misunderstanding of an antiquated Code law that allowed a Judge on September 13, 1984 to rule against my granddaughter, Amy Adele, an eight month fetus as not being counted as a victim in a drunken driver's homicide charge only because she wasn't born alive. This was an horrendous, inexcusable insult in that she wasn't allowed the opportunity to be born and died suffocation and injuries sustained as a direct result of the auto crash that also took the life of her mother, my 23 year old daughter, 'Cheryl ...' on July 12, 1984. ... I was elated in knowing that a woman's choice to be pregnant and to have her baby could not be revoked any more by a drunken driver, yet saddened to think that Amy Adele couldn't even be counted in our state's 1984 printed statistics as a victim of a crime.

Senate Bill 1942, 84th Gen. Ass., June 23, 1986, p. A13 (remarks of Rep. Pullen, reading constituent's letter)(underlined portion quoted and relied upon for support by Campos Br. at 83 n.15).

This statement, like all others in the legislative history, reflects that the legislation was intended to eliminate the loophole in Illinois law that left unborn children in the state -- such as Amy Adele -- unprotected by the criminal law. Campos' attempt to characterize the legislative interest as one solely of

recordkeeping is facetious. The fetal homicide statute is reasonably related to a legitimate interest in protecting unborn children in Illinois from non-consensual assaults. Accordingly, the constitutional requirements set forth in People v. Bradley, 79 Ill.2d 410, 403 N.E.2d 1029 (1980), that a criminal statute be "reasonably designed to remedy the evil identified by the legislature," Bradley, 79 Ill.2d at 418, 403 N.E.2d at 1032, are met. Campos' challenge to the validity of the fetal homicide statute's purpose should thus be rejected.[5]

B. The Illinois Fetal Homicide Statute Eliminated the Common Law Born Alive Rule in its Application to the Non-Consensual Killing of Pre-Viable Unborn Children.

By eliminating the criminal law application of the born alive rule, the Illinois fetal homicide statute extended uniform protection from homicide to unborn children throughout pregnancy outside the context of abortion. The born alive rule, required as an evidentiary standard by the primitive state of medical

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[5] Indeed, the Illinois fetal homicide is presumed to be constitutional. See Transcript of March 15, 1989 hearing before Judge Karnezis, at 22 (C.L. Rec. at 76); accord United States v. Carolene Products Co., 304 U.S. 144, 148, 152-54 (1938). This presumption of constitutionality cannot be overcome unless it is shown that the law in question is not rationally related to a legitimate governmental objective. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). The fetal homicide is clearly directly related to the state's "important and legitimate interest in protecting the potentiality of human life" throughout pregnancy. Roe, 410 U.S. at 162-63. See also Harris v. McRae, 448 U.S. 297, 313, 324-25 (1980); accord Beal v. Doe, 432 U.S. 438, 445-46 (1977) (there is "a significant state interest [in protecting the potentiality of human life] existing throughout the course of the woman's pregnancy"); Maher v. Roe, 432 U.S. 464, 478 (1977) ("Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of a fetus . . . throughout the pregnancy").

understanding at early common law, worked increasingly severe injustices by requiring a live birth as a precondition to homicide charges or tort actions based on injuries incurred while the child was in utero, regardless of the clear causation between the act and the death. In light of the outmoded nature of the born alive rule, the General Assembly had previously repealed the rule as it applied to viable unborn children, in response to People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1980), which held that the state homicide statute could not be applied to a stillborn near-term child who died after its mother was murdered. Ill. Rev. Stat. Ch. 38, §9-1.1 (1985); see also, Comment, Feticide in Illinois: Legislative Amelioration of a Common Law Rule, 4 N. Ill. U. L. Rev. 91 (1983). The Illinois fetal homicide statute simply completed the eradication of the born alive rule from the criminal code begun in 1985.

Advances in medical understanding have rendered the born alive rule an evidentiary nullity. See generally, Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L. Rev. 563 (1987). (Attached as Appendix D) Given the primitive status of medical knowledge about fetal development at common law, the corpus delicti of homicide -- a live human being, the death of that being, and causation -- could not be proved, in the case of the killing of an unborn child, unless the child was expelled from the womb and showed signs of life and died thereafter. Thus, because homicide was a capital offense, and because the evidence regarding causation was often speculative, the

common law created the born alive rule as a sharp and definite rule of evidence to ensure that defendants were not wrongly convicted of fetal homicide with uncertain evidence. Id. at 567-592. Thus, the born alive rule was a rule of evidence and not, as it is often assumed, a judgment on the moral status of the unborn child.

Application of the ancient born alive rule to situations, otherwise defined by unprecedented medical technological advances, resulted in anomalous results. Thus, prior to elimination of the born alive rule in Illinois, the same act -- the violent assault on a pregnant woman -- would yield totally different results, depending on whether the child lived for a moment after birth. For example, a pre-viable unborn child, if it were born alive and died thereafter, could be a homicide victim.[6] But a near-term, viable unborn child, that died in utero from the same act, could not be considered a homicide victim. This was precisely the situation in People v. Greer, wherein the Illinois Supreme Court ruled that it would follow the admittedly antiquated born alive rule in absence of clear legislative intent to discard it. 79 Ill.2d at 116, 402 N.E.2d at 209. Taking the Greer court's deference to legislative prerogative as an invitation to eliminate the born alive rule and to thereby extend to the unborn protection from non-consensual killing by third parties, the General Assembly enacted the fetal homicide statute.

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[6] "Viability" was irrelevant at common law. 21 Val. U.L. Rev. at 569 & n.33 (citing Atkinson, Life, Birth and Live-Birth, 20 Law Q. Rev. 134, 135 (1904); A. Taylor, Medical Jurisprudence 413 (7th ed. 1861).

II. ROE V. WADE HAS NO APPLICATION TO THE ILLINOIS FETAL HOMICIDE STATUTE, WHERE, AS HERE, AN UNBORN CHILD IS KILLED BY THE NON-CONSENSUAL ACT OF A THIRD PARTY, OUTSIDE OF THE CONTEXT OF ABORTION.

Roe v. Wade, 410 U.S. 113 (1973), and its progeny place no limitations on the ability of the State to protect unborn human life outside of the context of abortion. The Supreme Court's abortion decisions make clear that it is the woman's Fourteenth Amendment liberty interest that provides the support for the constitutional protection accorded to consensual abortion. Accordingly, any attempt by Campos to cloak his action -- the homicidal assault of an unborn child -- in Roe's privacy protection is without merit.

Defendant-appellant's argument that the Illinois fetal homicide law unconstitutionally protects fetal life prior to viability misreads abortion jurisprudence and ignores totally the express holdings of the United States Supreme Court. Recent Supreme Court decisions, most notably Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040 (1989), make clear that state legislative attempts to protect the unborn -- even the statutory recognition that "life begins at conception" -- are constitutionally sound, especially when they have no impact on abortion.

A. Roe v. Wade Does Not Accord Constitutional Protection to The Non-Consensual Termination of a Pregnancy by a Third Party.

The Illinois Supreme Court has twice ruled that Roe v. Wade does not prohibit the state from legislating to protect unborn children from the intentional wrongdoing of a third party. In People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987), the court upheld the Illinois feticide statute against a Roe-based challenge. While recognizing that Roe created constitutional protection for a woman's decision to obtain an abortion, the court distinguished the non-consensual termination of a pregnancy by a third party as an act which the General Assembly could constitutionally criminalize. 117 Ill.2d at 358-59, 512 N.E.2d at 1199-1200. Likewise, in People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1980), the court found no constitutional bar to the state extending statutory protection to the unborn under the homicide statute.

In Roe v. Wade, the United States Supreme Court held that the constitutional right of privacy, based on the Fourteenth Amendment's liberty clause, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This constitutional protection was rooted firmly in the Court's perspective on the burdens which a pregnancy presented to a woman. Thus, the Court found that

> [t]he detriment the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. . . . In other cases, as in this one, the additional difficulties and continuing stigma of unwed

> motherhood may be involved. All these factors the woman and her responsible physician will consider in consultation.

Id. at 153 (emphasis supplied). In short, the Court gave abortion constitutional protection solely because it was seen as necessary for the woman to realize her constitutionally protected right of privacy. It is only the woman's constitutionally protected privacy interest that, until fetal viability, overrides the state's right to protect unborn human life. In the absence of the woman's privacy interest, the state may assert successfully its interest in fetal life throughout pregnancy. Accordingly, when a woman's privacy is not implicated, such as in this case, the Roe v. Wade doctrine does not apply.

Likewise, in Doe v. Bolton, 410 U.S. 179 (1973), the companion case to Roe v. Wade, the Court defined broadly the woman's "health" interests that protected abortions, even after fetal viability, to include: "all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient. All these may relate to health." Id. at 192. However, even under this expansive definition of "health," each of the listed factors relates directly to the woman's pregnancy-related burdens.

The Supreme Court has repeatedly found the abortion right to be inextricably tied to the woman's interest in freeing herself from an unwanted pregnancy. For example, in Whalen v. Roe, 429 U.S. 589 (1977), the Court stated:

> The constitutional right vindicated in Doe was the right of a pregnant woman to decide whether or not to bear a

> child without unwarranted state interference... If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision...they would not have violated the Constitution.

429 U.S. at 605 n.33 (emphasis supplied). Likewise in Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 (1983), the Supreme Court made clear that the right created in Roe is the woman's liberty to free herself from the burdens of pregnancy and not the right to a dead fetus. Id. at 485 n.8 (upholding requirement that a second physician be present during post-viability abortions to provide additional protection for the life of the unborn child, so long as there is a medical emergency exception to ensure that attention to the child is not at additional risk to mother's health). In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court invalidated a pre-abortion spousal notification requirement based on the unique ways in which pregnancy affects a woman. ("Inasmuch as it is the woman who physically bears the child and who is the one more directly and immediately affected by the pregnancy, as between [she and her husband], the balance weighs in her favor." Id. at 71).

Challenges to fetal homicide statutes under Roe have been rejected by several state and federal courts. State v. Merrill, 450 N.W.2d 318 (Minn. 1990), cert. denied, 110 S. Ct. 2633 (1990),[7] involved the killing of a 28-day-old human embryo. The Minnesota Supreme Court expressly rejected arguments that Roe v. Wade

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[7] State v. Merrill, 450 N.W.2d 318 (1990), cert. denied, 110 S. Ct. 2633 (1990) is attached as Appendix B.

extended any constitutional protection to the killing of a pre-viable fetus outside the context of abortion. While acknowledging the clear holding of Roe -- that a woman's decision to obtain an abortion is constitutionally protected -- the Merrill court properly held that this protection did not extend to the defendant's action.

> The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act. In the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy. This right encompasses the woman's decision whether to terminate or continue the pregnancy without interference from the state, at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability. Roe v. Wade, 410 U.S. at 163. Roe v. Wade protects the woman's right of choice; it does not protect, much less confer on the assailant, a third-party unilateral right to destroy the fetus.

Merrill, 450 N.W.2d at 321-22 (emphasis supplied). Accord Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986)("[I]n order for there to be a violation of Roe v. Wade, the state must directly affect or impose a significant burden on a woman's right to an abortion." Id. at 13.)

In Brinkley v. State, 253 Ga. 541, 322 S.E.2d 49 (1984), the Georgia Supreme Court upheld Georgia's feticide statute:

> Nothing in Roe v. Wade nor Doe v. Bolton is in conflict with our ruling here. There the court dealt with a balance between a woman's right of privacy affording her the choice to decide the question of abortion of her child as against the state's interest in safeguarding health, maintaining medical standards, and in protecting potential life. ... But here we deal with the interest

> of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions. [cit.omit]

253 Ga. at 545, 322 S.E.2d at 53.

The Eleventh Circuit, in Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987),[8] likewise refused to find any conflict between Roe v. Wade and Georgia's feticide statute. The court rejected such assertions as being "without merit." Smith, 815 F.2d at 1388. In a footnote, the court explained Roe's inapplicability to the context of the non-consensual termination of a fetus' life.

> The constitutional limitations upon a state's right to prohibit the destruction of a fetus come into play when the state's interest conflicts with certain constitutional interests of the mother. See Roe v. Wade, 410 U.S. 113 (1973). A mother's interests are in no way infringed upon by the statute in question.

Id. at 1388 n.2.

Legal scholars agree that the holding in Roe v. Wade is limited to the abortion context. In specific reference to the authority of the General Assembly to protect the unborn in Illinois, one commentator wrote:

> Outside the abortion context, states thus remain quite free to choose to protect potential life. In many such settings there will be counterpoised no constitutionally-protected interest. Consequently states need only demonstrate the rationality rather than the compellingness of their own interest in order to implement a particular legislative choice. For example, neither typical criminal acts nor tortious conduct directed against the unborn by strangers implicates any constitutional interest and thus can be legislatively proscribed rather easily. Without maternal consent, no one has a right to assault physically a pregnant woman and her unborn child, or to run over such a woman with

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[8] Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987), is attached as Appendix C.

> a car driven in a negligent manner. Furthermore, in these and many other settings, the state choice to protect potential life can be founded on a range of objectives beyond those germane in Roe.

Parness, Protection of Potential Life in Illinois: Policy and Law at Odds, 5 N. Ill. U. L. Rev. 1, 4 (1984) (emphasis supplied). The interests recognized in Roe v. Wade are clearly inapplicable here.

> The interest [of the state in protecting fetal life] may exist, and may be asserted, from the point of conception. so long as there is no conflict with the woman's right to privacy.
>
> . . .
>
> Roe v. Wade should be interpreted to limit the state's freedom in this area only by prohibiting the state from recognizing and enforcing liability where it would either interfere with the woman's privacy right to terminate her pregnancy or endanger her life or health.
>
> The woman's privacy interest and the state's interest in preserving the health and life of the pregnant woman are the only two interests which Roe v. Wade held to override the state's interest in protecting prenatal life.

Kadur, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 661-62, 664 (1980). See e.g., Parness, Crimes Against the Unborn, Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. Legis. 97 (1985); Parness & Pritchard, To Be or Not To Be: Protecting the Unborn's Potentiality of Life, 51 U. Cin. L. Rev. 257 (1982).

The Illinois fetal homicide statute does not implicate any of the woman's privacy interests which the Supreme Court protected in Roe v. Wade. The Illinois Supreme Court, as well as other state and federal courts, have refused to find a constitutional conflict between the Roe doctrine and statutes which provide prenatal protection outside of the context of consensual abortion. Campos'

claim to the contrary, thus, must fail.

B. Roe v. Wade Does Not Preclude a Finding That Life Begins at Conception, Outside of The Context of Abortion Regulation.

Campos' primary challenge to Illinois' fetal homicide statute is that it "unconstitutionally defines an embryo or fetus as a 'person' from the moment of fertilization until birth." Campos Br. at 79. This argument fails. First, Roe v. Wade prohibited the state from adopting a theory of when life begins only if the state is attempting thereby to justify its regulation of abortion. Outside of the abortion context, the state is free to assert its interest in fetal life, from conception forward; the Court's holding in Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040 (1989), makes this clear.

Second, Campos misreads and mischaracterizes the statute. The Illinois fetal homicide statute nowhere asserts that a fetus or embryo is a "person," nor is the statute an attempt to assert Fourteenth Amendment "personhood." The General Assembly has constitutional authority to define who, or what, will be entitled to legal protection; granting such protection for purposes of this statute does not create additional rights in a different context.

Roe v. Wade prohibits the state from "adopting one theory of [when] life [begins]" if the state is thereby attempting to justify its regulation of abortion. 410 U.S. at 162. This is not, however, an abortion case. This case does not involve an attempt by the state of Illinois to limit access to abortion; instead, the General Assembly has acted to protect unborn children within the

state from lethal assault. To make perfectly clear that it was addressing the non-consensual termination of fetal life, the statute specifically excludes abortion -- legal or illegal -- from its scope. Ill. Rev. Stat. Ch. 38. §9-1.2(c).

Campos relies exclusively upon abortion cases for his claim that the Illinois fetal homicide statute impermissibly incorporates a theory of when life begins. Campos Br. at 79-81 (citing Roe v. Wade; Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), appeal dism'd sub nom., Diamond v. Charles, 476 U.S. 54 (1986) and Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1976)). All of these cases involved state attempts to defend abortion regulations by claiming that human life began at conception. None applies here where the state seeks to protect fetal life outside of the abortion context. Accordingly, Campos' reliance is misplaced.

The Supreme Court's decision in Webster v. Reproductive Health Services, Inc, 109 S. Ct. 3040 (1989), gives short shrift to Campos' argument. The Missouri abortion statute at issue in Webster included a preamble stating that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health and well-being." Webster, 109 S. Ct. at 3049, quoting Mo. Rev. Stat. §§1.205.1(1), (2) (1986). The abortion clinic challenging the Missouri statute claimed that the preamble violated Roe and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982), which prohibited the state from adopting a theory of life for purposes of justifying an abortion regulation. The state argued that the

preamble was "precatory and impose[d] no substantive restrictions on abortions," but that it could be used to interpret other statutes or regulations outside the abortion context. Webster, 109 S. Ct. at 3050. The Court ruled that Roe and Akron Center did not preclude the state from adopting theories of when human life began, provided the theories were not applied to abortion regulation. The Court thus rejected the challenge to the Missouri preamble.

Campos' claim, a fortiori, must fail here. He makes no claim that the fetal homicide statute can be used to regulate abortion. Indeed, the very terms of the statute preclude such application. The Supreme Court's reasoning in Webster applies with even greater force here, in a non-abortion application of a fetal homicide statute.

Moreover, the Illinois fetal homicide statute does not assert Fourteenth Amendment "personhood" for unborn children. The statute treats as homicide the intentional killing of an "unborn child." An "unborn child" is defined as "any individual of the human species from fertilization until birth." Ill. Rev. Stat. ch. 38, §9-1.2(b). The "personhood" of the unborn child is nowhere asserted in the statute. The victim of Illinois' principal homicide statute is not defined as a "person." Rather, Illinois' principal homicide statute defines a homicide victim as "an individual" or "an other." Ill. Rev. Stat. Ch. 38, §9-1 (1989).

In holding that a woman's right of privacy encompassed the right to obtain an abortion, Roe v. Wade necessarily held that unborn children were not considered "persons" as that term is used

in the Fourteenth Amendment of the United States Constitution. 410 U.S. at 157. The Court acknowledged that if the unborn were accorded constitutional personhood status, the woman's privacy-based interest in abortion would fail to override the unborn's right to life guaranteed by the Fourteenth Amendment's due process clause. Id. at 156-57. But Roe's denial of constitutional status does not, as Campos would have this court believe, impose a constitutional limitation on the state's ability to protect the unborn outside of the abortion context. "Though the unborn may not be persons under the Fourteenth Amendment, they may still be persons pursuant to state law and thus merit state protection." Parness, Protection of Potential Life in Illinois: Policy and Law at Odds, 5 N.Ill.U. L. Rev. at 22 n.96. In such a challenge to Minnesota's nearly identical fetal homicide statute, the Minnesota Supreme Court rejected such a claim in Merrill. The court stated:

> [T]he statutes do not raise the issue of when life as a human person begins or ends. The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires "personhood". These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life.

450 N.W.2d at 324 (emphasis in original).

In Smith v. Newsome, the Eleventh Circuit Court of Appeals likewise held:

> The proposition that [petitioner] relies upon in Roe v. Wade -- that an unborn child is not a "person" within the meaning of the Fourteenth Amendment -- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus.

815 F.2d at 1388.

More specifically, Roe's holding that the unborn are not constitutional "persons" cannot be twisted into a constitutional strait jacket prohibiting the General Assembly from protecting unborn children from the murderous assault of a third party.[9] Campos' bald assertion that the Illinois fetal homicide law goes "beyond the realm of legitimate police power," Campos Br. at 81, is unsupported by Roe v. Wade and at odds with the substantial body of state and federal case law which has validated state attempts to provide protection to the unborn outside of the abortion context.

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[9] Roe itself contradicts this claim. The majority approvingly sets forth numerous contexts in which the unborn are accorded legal recognition and protection. 410 U.S. at 161-62 (unborn accorded varying degrees of protection under criminal law, tort law, inheritance and property law, as well as having guardians ad litem appointed on their behalf).

C. Illinois has a Compelling Interest in Protecting Unborn Human Life Throughout Pregnancy Under Webster v. Reproductive Health Services

Even if Roe v. Wade applied to the non-abortion context of fetal homicide, the Illinois fetal homicide statute must be considered constitutional under Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040 (1989), because it advances Illinois' "compelling interest" in protecting unborn human life throughout pregnancy. Campos' argument is flawed for its exclusive reliance on pre-Webster decisions. His argument that the General Assembly is constitutionally precluded from protecting pre-viable unborn human life crumbles in light of Webster's clear language to the contrary.

The Supreme Court now recognizes that the State's interest in protecting prenatal life is "compelling" throughout pregnancy, not just after viability. In Webster, the Court upheld the constitutionality of a Missouri statute that mandated fetal viability testing at 20-weeks gestational age. 109 S.Ct. at 3057. Chief Justice Rehnquist, in an opinion joined by Justices White and Kennedy, determined that the State has a "compelling interest" in protecting "potential human life" throughout pregnancy, and rejected the "rigid trimester analysis" of Roe v. Wade as "unsound in principle and unworkable in practice." Id. at 3055-58. The plurality saw no reason to restrict the State's interest in protecting "potential human life" to viability. Id. at 3057. A fourth member of the Webster Court -- Justice Scalia -- urged that Roe v. Wade be overruled. Id. at 3064.

A fifth member -- Justice O'Connor -- shares the view that the State's "compelling interest" extends throughout pregnancy. In Thornburgh, Justice O'Connor reiterated her views, first expressed in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), that "[t]he State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" 476 U.S. at 828. In Akron Center, Justice O'Connor, after analyzing why "Roe's outmoded trimester framework" (Thornburgh, 476 U.S. at 828) should be rejected (Akron Center, 462 U.S. at 459), pointed out the irrationality of denying the State's compelling interest in fetal life until viability:

> In Roe, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. Although the Court refused to "resolve the difficult question of when life begins," id., at 159, the Court chose the point of viability -- when the fetus is capable of life independent of its mother -- to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

Id. at 460-61 (emphasis in original).[10] See also dissenting opinion of Justice White in Thornburgh, 476 U.S. at 794 ("the Court's choice of viability as the point at which the State's interest [in fetal life] becomes compelling is entirely arbitrary").[11] Thus, Illinois has a constitutionally-recognized "compelling interest" in protecting unborn human life throughout pregnancy even in the context of abortion.

III. THE ILLINOIS FETAL HOMICIDE STATUTE IS CONSISTENT WITH THE DEVELOPING PROTECTION OF THE UNBORN CHILD IN ILLINOIS AND THROUGHOUT THE COUNTRY.

As the Illinois Supreme Court observed in Greer, legal protection and recognition for the unborn has expanded to parallel a better medical understanding of the unborn. In light of increased understanding of the humanity of the unborn and due to technological advances which permit proof of causation involving prenatal harm, Illinois, through its common law and through

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[10] Accord, Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, 505 (O'Connor, J., concurring in part in the judgment and dissenting in part) ("the State possesses a compelling interest in protecting and preserving fetal life, [which] interest is extant throughout pregnancy").

[11] In Thornburgh, Justice White (joined by Justice Rehnquist) stated:

> [O]ne must . . . recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Id. at 792.

legislative action, has progressively expanded the scope of protection accorded to unborn children within the state.

Like all common law states, Illinois has long recognized that the unborn could take property by devise and intestate succession. These property rights vest while the child is in utero and are not dependent on live birth. Similarly, from conception forward, the unborn are considered lives in being for purposes of the Rule Against Perpetuities. In addition, Illinois courts are empowered to appoint a guardian ad litem for "persons not in being," Ill. Rev. Stat. Ch. 110 1/2 §20-5(d) (1989), during the sale or mortgage of certain real estate, or during the judicial disposition of future interests in any real or personal property. Ill. Rev. Stat. Ch. 110, §2-501 (1989).

Tort law protection for unborn children has been extended consistently in Illinois' common law; it is also statutorily protected. Judge Boggs' path-breaking dissent in Allaire v. St. Luke's Hospital, 184 Ill. 359, 368-74, 56 N.E. 638 (1900), arguing that a wrongful death cause of action should be recognized for the death of an unborn child, has become law in most states, including Illinois. See W. Prosser, Torts §55 (4th ed. 1971). Illinois has also recognized a right of recovery for prenatal injuries. Renslow v. Mennonite Hospital, 67 Ill.2d 348, 367 N.E.2d 1250 (1977). This cause of action is not limited to injury sustained to a viable fetus. Daley v. Meier, 33 Ill.App.2d 218, 178 N.E.2d 691 (1961)(injury to fetus of one month gestation). A wrongful death action for the death of a viable unborn child has also been

judicially recognized. Green v. Smith, 71 Ill.2d 501, 377 N.E.2d 37 (1978). However, by statute, the General Assembly has eliminated any viability requirement for tort actions. Ill. Rev. Stat. Ch. 70, §2.2 (1989) (added by P.A. 81-946, effective January 1, 1980).

Recognizing that Roe v. Wade does not preclude the states from acting to protect fetal life outside the context of abortion, an increasing number of states have codified a crime for homicide or manslaughter of an unborn child. To date, at least thirteen states have adopted such statutes.[12] Challenges to these statutes based on Roe v. Wade have been uniformly rejected. In addition, Massachusetts and South Carolina have expanded their common law definition of homicide to include viable unborn children. See Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984).

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[12] Ariz. §13-1103(A)(5); Cal. Penal Code §187(a) (West 1988); Fla. Stat. Ann. §782.09 (West 1976); Ga. Code Ann. §16-5-80 (Harrison 1990); Iowa Code §707.7 (West 1979); Mich. Comp. L. Ann. §750.322 (West 1991); Minn. Stat. Ann. §609.266 (1986 Supp.); Mo. Ann. Stat. §565.026 (West 1979); Nev. Rev. Stat. §200.210 (1987); N.M. Stat. Ann. §30-3-7 (Michie 1990 Supp.); N.D. H.B. 1557 (to be codified at N.D. Cent. Code, Title 12); Okla. Stat. tit. 24, §39-13-107, §39-13-214; R.I. Gen. Laws 11-23-5 (Michie 1981).

On May 13, 1991, New Hampshire enacted a fetal homicide statute protecting unborn children throughout pregnancy. HB 350-FN, to be codified at N.H. Rev. Stat. Ann. Ch. 75, §631:1.

IV. CONCLUSION

By enacting the Illinois fetal homicide statute, the Illinois General Assembly eliminated a loophole in the law that left pre-viable unborn children in the state unprotected from the non-consensual lethal assault of third parties. The statute does not implicate any of the constitutional privacy issues presented by consensual abortion. As state and federal courts across the country have held, such statutes do not conflict with Roe v. Wade. Illinois' legitimate state interest in protecting unborn children outside the abortion context is directly advanced by the statute. Therefore, Campos' challenge should be rejected and the constitutionality of the Illinois fetal homicide statute should be upheld.

Respectfully submitted,

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August 9, 1991

APPENDIX A

Final legislative action, 86th General Assembly:

P.A. 86-806—June 21, 1989

P.A. 86-834—June 26, 1989

P.A. 86-1012—Nov. 2, 1989

See Ill.Rev.Stat. ch. 1, ¶ 1105 as to the effect of (1) more than one amendment of a section at the same session of the General Assembly or (2) two or more acts relating to the same subject matter enacted by the same General Assembly.

9-1.1. § 9-1.1. Repealed by P.A. 84-1414, § 2, eff. Sept. 19, 1986; P.A. 85-293, Art. II, § 21, eff. Sept. 8, 1987.

P.A. 85-293, Art. II, the Final 84th General Assembly Combining Revisory Act, resolved multiple actions of the 84th General Assembly.

9-1.2. Intentional homicide of an unborn child

§ 9-1.2. Intentional Homicide of an Unborn Child. (a) A person commits the offense of intentional homicide of an unborn child if, in performing acts which cause the death of an unborn child, he without lawful justification:

(1) either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child or knew that such acts would cause death or great bodily harm to the pregnant woman or her unborn child; or

(2) he knew that his acts created a strong probability of death or great bodily harm to the pregnant woman or her unborn child; and

(3) he knew that the woman was pregnant.

(b) For purposes of this Section, (1) "unborn child" shall mean any individual of the human species from fertilization until birth, and (2) "person" shall not include the pregnant woman whose unborn child is killed.

(c) This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, as defined in Section 2 of the Illinois Abortion Law of 1975, as amended,[1] to which the pregnant woman has consented. This Section shall not apply to acts which were committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

(d) Penalty. The sentence for intentional homicide of an unborn child shall be the same as for first degree murder, except that the death penalty may not be imposed.

(e) The provisions of this Act shall not be construed to prohibit the prosecution of any person under any other provision of law.

Amended by P.A. 85-293, Art. III, § 13, eff. Sept. 8, 1987.

[1] Paragraph 81-22 of this chapter.

9-2. Second degree murder

§ 9-2. Second Degree Murder. (a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

(1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

(2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code,[1] but his belief is unreasonable.

(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.

(d) Sentence.

Second Degree Murder is a Class 1 felony.

Amended by P.A. 84-1450, § 2, eff. July 1, 1987.

[1] Paragraph 7-1 et seq. of this chapter.

For application of P.A. 84-1450, see Historical Note following ch. 37, ¶ 702-7.

9-2.1. Voluntary manslaughter of an unborn child

§ 9-2.1. Voluntary Manslaughter of an Unborn Child. (a) A person who kills an unborn child without lawful justification commits voluntary manslaughter of an unborn child if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the unborn child.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an unborn child commits voluntary manslaughter of an unborn child if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code,[1] but his belief is unreasonable.

(c) Sentence. Voluntary Manslaughter of an unborn child is a Class 1 felony.

(d) For purposes of this Section, (1) "unborn child" shall mean any individual of the human species from fertilization until birth, and (2) "person" shall not include the pregnant woman whose unborn child is killed.

(e) This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, as defined in Section 2 of the Illinois Abortion Law of 1975, as amended,[2] to which the pregnant woman has consented. This Section shall not apply to acts which were committed pursuant to usual and customary

APPENDIX B

fairness that occurred when it forced some property owners to pay for the new lines, but then later changed its "policy" in the middle of the project.

The majority suggests that to give petitioners due process in this situation would "interfere with the government's ability to efficiently provide utility services." It is important to put this claim in perspective. What we are talking about here is a city-wide public improvement project that conferred no particular benefit on the petitioners. All that due process requires is some sort of notice and a public hearing at which the preliminary plans would be revealed and the public's questions of who would pay and how much would be answered. Granted, this procedure could slow down the project; but, at least, the process would be open and fair. Efficiency is not everything. In the present case, the majority's decision, coming as it does at the expense of fundamental fairness, over-emphasizes the constitutional value of efficiency.

(3) *Equal Protection Analysis*

The fourteenth amendment to the United States Constitution requires that, for purposes of economic regulation, governments must treat similarly situated persons alike unless a rational basis exists for distinguishing them. *See Little Earth of United Tribes, Inc. v. County of Hennepin*, 384 N.W.2d 435, 441 (Minn.1986). For the reasons set forth by Judge Schumacher in his dissent at the court of appeals, I believe that the city had no rational basis for requiring some, but not all, property owners to install their own gaslines and pressure regulators. *See Smith v. City of Owatonna*, 439 N.W.2d 36, 43–44 (Minn.App.1989) (Schumacher J., dissenting). I also believe that this case does not involve six projects as outlined by the court of appeals, *id.* at 41–42, but one city-wide project. Moreover, Mr. Martin testified at trial, without explanation, that the old low pressure system was replaced with a new low pressure system along a section of Main Street about two blocks from petitioner Smith's property, thus eliminating the additional expense of a pressure regulator for those property owners. The majority can point to no rational basis for this disparate treatment because none exists. I believe that this dissimilar treatment of property owners on the same street, as well as the other dubious distinctions made by the city, establishes the arbitrary and, therefore, unconstitutional nature of the city's actions beyond a reasonable doubt.

For all of the above reasons, I believe that the petitioners were deprived of a legitimate property interest such that they are entitled to due process and just compensation. In addition, I believe that the petitioners were denied equal protection under the law. Accordingly, I would reverse the court of appeals and reinstate the decision of the trial court.

POPOVICH, Chief Justice (dissenting).

I join the dissent of Justice YETKA.

WAHL, Justice (dissenting).

I join the dissent of Justice YETKA.

STATE of Minnesota, Plaintiff,

v.

Sean Patrick MERRILL, Defendant.

No. C7–89–766.

Supreme Court of Minnesota.

Jan. 19, 1990.

After motion to dismiss charges of first and second-degree murder of unborn child was denied, the District Court, Olmsted County, O. Russell Olson, J., certified questions for appellate review. The Supreme Court, Simonett, J., held that: (1) unborn child homicide statutes do not deny equal protection, and (2) statutes are not unconstitutionally vague.

Certified questions answered.

Kelley, J., filed an opinion concurring in part and dissenting in part.

Wahl, J., filed a dissenting opinion which Keith, J., concurred.

1. Constitutional Law ⇐48(3)

Person challenging constitutional validity of a statute has heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.

2. Criminal Law ⇐9

There are no common-law crimes in Minnesota.

3. Constitutional Law ⇐70.3(4)

Role of the judiciary is limited to deciding whether a statute is constitutional, not whether it is wise or prudent legislation.

4. Constitutional Law ⇐250.1(2)
Homicide ⇐8

Defendant who assaults a pregnant woman causing the death of the fetus she is carrying is not similarly situated with woman who seeks to have an abortion, so that unborn child homicide statutes do not violate the equal protection clause on that basis. U.S.C.A. Const.Amend. 14; M.S.A. §§ 609.2661, 609.2662.

5. Abortion and Birth Control ⇐.50

Woman's constitutionally protected right to privacy encompasses the woman's decision whether to terminate or continue pregnancy without interference from the state, at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability.

6. Abortion and Birth Control ⇐1.30

Even laws which directly impact on abortion are constitutional so long as the statute itself does not impinge on the woman's decision.

7. Abortion and Birth Control ⇐.50

State's interest in protecting the potentiality of human life includes protection of the unborn child, whether an embryo or a nonviable or viable fetus, and protects the woman's interest in her unborn child and her right to decide whether it shall be carried in utero.

8. Criminal Law ⇐13.1(1)

Criminal statute is void for vagueness it it fails to define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement; if the description of the forbidden conduct is vague or if its wording leaves doubt as to which persons fall within the scope of the law, the statute may violate due process. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐13.1(1)

Statute imposing criminal penalties must meet a high standard of certainty.

10. Criminal Law ⇐13.1(1)

Requirement that criminal statute give fair warning of conduct prohibited does not excuse criminal liability simply because the victim proves not to be the victim the defendant had in mind.

11. Criminal Law ⇐25

Doctrine of transferred intent applies when the intent being transferred is for the same type of harm; if the harms are different, the intent is not transferable.

12. Homicide ⇐17

Harm intended to mother is substantially similar to the harm suffered by fetus which is killed as a result of assault on the mother, so the doctrine of transferred intent applies.

13. Homicide ⇐8

Unborn child homicide statutes provide adequate notice to potential violators, even though the violator may not know that the woman who he assaults is pregnant and even though the woman herself may not have been aware of the pregnancy. M.S.A. §§ 609.2661, 609.2662.

14. Homicide ⇐8

Unborn child homicide statutes are not fatally vague for failure to define the phrase "causes the death of an unborn child" on theory that they leave uncertain when death occurs or when life begins. M.S.A. §§ 609.2661, 609.2662.

15. Homicide ⇐1

Statutes prohibiting murder of unborn child do not require that the living organism in the womb in its embryonic or fetal state be considered a person or a human being, and do not require that the state prove that it is. M.S.A. §§ 609.2661, 609.2662.

Syllabus by the Court

The fetal homicide statutes enacted in 1986 do not, with respect to defendant, offend the Equal Protection Clause; nor are the statutes void for vagueness under the Due Process Clause.

Kevin A. Lund, Patterson, Restovich, Lund Law Offices, Ltd., Asst. Olmsted County Public Defender, Rochester, for defendant.

Hubert H. Humphrey, III, Atty. Gen., St. Paul, and Raymond F. Schmitz, Olmsted County Atty., Rochester, for plaintiff.

Heard, considered, and decided by the court en banc.

SIMONETT, Justice.

Defendant has been indicted for first- and second-degree murder of Gail Anderson and also for first- and second-degree murder of her "unborn child." The trial court denied defendant's motion to dismiss the charges relating to the unborn child but certified for appellate review two questions:

1. Do Minn.Stat. §§ 609.2661(1) and .2662(1) (1988) [the unborn child homicide statutes] violate the fourteenth amendment of the United States Constitution as interpreted by the United States Supreme Court in *Roe v. Wade*, by failing to distinguish between viable fetuses and nonviable fetuses and embryos, and by treating fetuses and embryos as persons?
2. Are [said statutes] void for vagueness?

On November 13, 1988, Gail Anderson died from gunshot wounds allegedly inflicted by the defendant. An autopsy revealed Ms. Anderson was pregnant with a 27- or 28-day-old embryo. The coroner's office concluded that there was no abnormality which would have caused a miscarriage, and that death of the embryo resulted from the death of Ms. Anderson. At this stage of development, a 28-day-old embryo is 4- to 5-millimeters long and, through the umbilical cord, completely dependent on its mother. The Anderson embryo was not viable. Up to the eighth week of development, it appears that an "unborn child" is referred to as an embryo; thereafter it is called a fetus. The evidence indicates that medical science generally considers a fetus viable at 28 weeks following conception although some fetuses as young as 20 or 21 weeks have survived. The record is unclear in this case whether either Ms. Anderson or defendant Merrill knew she was pregnant at the time she was assaulted.

Defendant was indicted for the death of Anderson's "unborn child" under two statutes entitled, respectively, "Murder of an Unborn Child in the First Degree" [1] and "Murder of an Unborn Child in the Second Degree." [2] These two statutes, enacted by the legislature in 1986, follow precisely the language of our murder statutes, except that "unborn child" is substituted for "human being" and "person." *See* footnote 4, *infra*. The term "unborn child" is defined as "the unborn offspring of a human being conceived, but not yet born." Minn.Stat. § 609.266(a) (1988).

1. Minn.Stat. § 609.2661 (1988), provides in part:
   Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced to imprisonment for life:
   (1) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another;
   * * *

2. Minn.Stat. § 609.2662 (1988), provides in part:
   Whoever does either of the following is guilty of murder of an unborn child in the second degree and may be sentenced to imprisonment for not more than 40 years:
   (1) causes the death of an unborn child with intent to effect the death of that unborn child or another, but without premeditation;
   * * *

This legislative approach to a fetal homicide statute is most unusual and raises the constitutional questions certified to us. Of the 17 states that have codified a crime of murder of an unborn, 13 create criminal liability only if the fetus is "viable" or "quick." Additionally, two noncode states have expanded their definition of common law homicide to include viable fetuses. *See Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984). Arizona and Indiana impose criminal liability for causing the death of a fetus at any stage, as does Minnesota, but the statutory penalty provided upon conviction is far less severe. Ariz.Rev.Stat.Ann. § 13-1103(A)(5) (1989) (5-year sentence); Ind.Code Ann. § 35-42-1-6 (Burns 1985) (2-year sentence).

[1-3] Before discussing the Minnesota statutes, three preliminary observations must be made. First, to challenge successfully the constitutional validity of a statute, the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *E.g., Wegan v. Village of Lexington*, 309 N.W.2d 273, 279 (Minn.1981); *Contos v. Herbst*, 278 N.W.2d 732, 736 (Minn.1979), *appeal dismissed sub nom., Prest v. Herbst*, 444 U.S. 804, 100 S.Ct. 24, 62 L.Ed.2d 17 (1979). Second, there are no common-law crimes in this state. Minnesota is a "code state," *i.e.*, the legislature has exclusive province to define by statute what acts constitute a crime. *State v. Soto*, 378 N.W.2d 625, 627 (Minn.1985). And, third, the role of the judiciary is limited to deciding whether a statute is constitutional, not whether it is wise or prudent legislation. *AFSCME Councils 6, 14, 65, and 96 AFL-CIO v. Sundquist*, 338 N.W.2d 560, 570 (Minn.1988). We do not sit as legislators with a veto vote, but as judges deciding whether the legislation, presumably constitutional, is so.

3. In the trial court, defendant also raised issues relating to substantive due process and cruel and unusual punishment. The trial judge did not certify those issues to us.

I.

Defendant first contends that the unborn child homicide statutes violate the Equal Protection Clause. Defendant premises his argument on *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which, he says, holds that a nonviable fetus is not a person. He then argues that the unborn child criminal statutes have impermissibly "adopted a classification equating viable fetuses and nonviable embryos with a person." [3]

Assuming the relevance of defendant's stated premise, defendant has failed to show that the statutory classification impinges upon any of his constitutional rights. The equal protection clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike under the law. *Matter of Harhut*, 385 N.W.2d 305, 310 (Minn.1986). Defendant does not claim, nor can he, that he is within the class the statutes are designed to benefit, namely, unborn children. Rather, it appears, defendant is claiming he is in the class burdened by the law.

If we understand defendant correctly, he is claiming the statutory classification, by not distinguishing between viable and nonviable fetuses, exposes him to conviction as a murderer of an unborn child during the first trimester of pregnancy, while others who intentionally destroy a nonviable fetus, such as a woman who obtains a legal abortion and the doctor who performs it, are not murderers. In other words, defendant claims the unborn child homicide statutes expose him to serious penal consequences, while others who intentionally terminate a nonviable fetus or embryo are not subject to criminal sanctions. In short, defendant claims similarly situated persons are treated dissimilarly.

[4, 5] We disagree. The situations are not similar. The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to

have her pregnancy terminated by one legally authorized to perform the act. In the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy. This right encompasses the woman's decision whether to terminate or continue the pregnancy without interference from the state, at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability. *Roe v. Wade*, 410 U.S. at 163, 93 S.Ct. at 731. *Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus.

[6] As defendant points out, the United States Supreme Court has said that an unborn child lacks "personhood" and is not a person for purposes of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. at 158, 93 S.Ct. at 729. The focus of that case, however, was on protecting the woman from governmental interference or compulsion when she was deciding whether to terminate or continue her pregnancy. "[T]he right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." *Maher v. Roe*, 432 U.S. 464, 473, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484 (1977). Significantly, the *Roe v. Wade* court also noted that the state "has still *another* important and legitimate interest in protecting the potentiality of human life." *Roe v. Wade*, 410 U.S. at 162, 93 S.Ct. at 731 (emphasis in original). Even laws which directly impact on abortion are constitutional so long as the statute itself does not impinge on the woman's decision. *See, e.g., Webster v. Reproductive Health Services*, — U.S. —, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (state prohibition of use of public facilities and employees to perform abortion unless life of woman endangered upheld). In our case, the fetal homicide statutes seek to protect the "potentiality of human life," and they do so without impinging directly or indirectly on a pregnant woman's privacy rights.

[7] The state's interest in protecting the "potentiality of human life" includes protection of the unborn child, whether an embryo or a nonviable or viable fetus, and it protects, too, the woman's interest in her unborn child and her right to decide whether it shall be carried *in utero*. The interest of a criminal assailant in terminating a woman's pregnancy does not outweigh the woman's right to continue the pregnancy. In this context, the viability of the fetus is "simply immaterial" to an equal protection challenge to the feticide statute. *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987).

We conclude that sections 609.2661(1) and 609.2662(1) do not violate the Fourteenth Amendment by failing to distinguish between a viable and a nonviable fetus.

II.

A more difficult issue, as the trial court noted, is whether the unborn child criminal statutes are so vague as to violate the Due Process Clause of the Fourteenth Amendment. Defendant claims the statutes are unconstitutionally vague because they fail to give fair warning of the prohibited conduct and because they encourage arbitrary and discriminatory enforcement.

[8, 9] A state criminal statute is void for vagueness if it fails to define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). A statute imposing criminal penalties must meet a high standard of certainty. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn.1985). If the description of the forbidden conduct is vague, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689–90, 88 S.Ct. 1298, 1306, 20 L.Ed.2d 225 (1968), or if its wording leaves doubt as to which persons fall within the scope of the law, *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939), the statute may violate the Due Process Clause.

A.

Defendant first contends that the statutes fail to give fair warning to a potential violator. Defendant argues it is unfair to impose on the murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy.

[10] The fair warning rule has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind. Homicide statutes generally provide that a person is guilty of first- or second-degree murder upon proof that the offender caused the death of a person with intent to cause the death of that person *or another*. *See, e.g., State v. Sutherlin*, 396 N.W.2d 238, 240 (Minn.1986). Because the offender did not intend to kill the particular victim, indeed, may not even have been aware of that victim's presence, does not mean that the offender did not have fair warning that he would be held criminally accountable the same as if the victim had been the victim intended. W. LaFave & A. Scott, *Handbook on Criminal Law* 254 (1972).

[11–13] In this case, the indictments charge defendant for first and second degree murder of an unborn child under section 609.2661(1) and section 609.2662(1) for causing the death of an unborn child with "intent to effect the death of the unborn child or another, to-wit: Gail Stephanie Anderson, an adult female." [4] Ordinarily, the doctrine of transferred intent applies when the intent being transferred is for the same type of harm. If the harms are different, intent is not transferable. W. LaFave, *supra*, at 248. For example, an intent to murder cannot substitute for the intent required to convict for the malicious destruction of property that may have inadvertently been damaged during the murderous assault. In this case, defendant seems to be arguing that an intent to kill the mother is not transferable to the fetus because the harm to the mother and the harm to the fetus are not the same. We think, however, the harm is substantially similar. The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude. We conclude, therefore, that the statutes provide the requisite fair warning.

B.

[14] Defendant next contends that the unborn child criminal statutes are fatally vague because they do not define the phrase "causes the death of an unborn child." As a result, defendant argues, the statutes invite or permit arbitrary and discriminatory enforcement. *See, e.g., State v. Peterfeso*, 283 Minn. 499, 501–02, 169 N.W.2d 18, 19 (1969).

Defendant argues that the statute leaves uncertain when "death" occurs, or, for that matter, when "life" begins. People will differ on whether life begins at conception or at viability. People may differ on whether death is the cessation of brain activity (an activity not present in an embryo) or the cessation of a functioning circulatory system. The problem, says defendant, is that absent statutory criteria, judges and juries will provide their own definitions which will differ, leaving the statutes vulnerable to arbitrary and discriminatory enforcement. This argument, we think, attempts to prove too much.

Some background is necessary to put the issue in its proper perspective. In 1985 this court, in *State v. Soto*, 378 N.W.2d 625 (Minn.1985), held that when the legislature referred to the death of a "human being" in the homicide statutes, the term "human being" was being used in its well-established common-law sense of a person born alive. Consequently, we held that the homicide statutes did not apply to the death of an 8-month-old fetus yet unborn. The legislature was free, of course, if it wished to do so, to create a crime to cover feticide.

4. Apparently the parties agree that the word "another," as it is used in the feticide statutes, refers to another person.

Traditionally, the crime of feticide imposed criminal liability for the death of a "viable" fetus, that is, a fetus at that stage of development which permits it to live outside the mother's womb, or a fetus that has "quickened," that is, which moves within the mother's womb.

Apparently in response to *Soto*, the legislature has enacted criminal statutes to cover feticide. In so doing, it has enacted very unusual statutes which go beyond traditional feticide, both in expanding the definition of a fetus and in the severity of the penalty imposed. The statutes in question impose the criminal penalty for murder on whoever causes the death of "the unborn offspring of a human being conceived, but not yet born."

Whatever one might think of the wisdom of this legislation, and notwithstanding the difficulty of proof involved, we do not think it can be said the offense is vaguely defined. An embryo or nonviable fetus when it is within the mother's womb is "the unborn offspring of a human being." Defendant argues, however, that to cause the death of an embryo, the embryo must first be living; if death is the termination of life, something which is not alive cannot experience death. In short, defendant argues that causing the death of a 27-day-old embryo raises the perplexing question of when "life" begins, as well as the question of when "death" occurs.

[15] The difficulty with this argument, however, is that the statutes do not raise the issue of when life as a *human person* begins or ends. The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires "personhood". These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life.

Defendant wishes to argue that causing the death of a living embryo or nonviable fetus in the mother's womb should not be made a crime. This is an argument, however, that must be addressed to the legislature. Our role in the judicial branch is limited solely to whether the legislature has defined a crime within constitutional parameters. Indeed, in this case, our role is further limited to answering only the two specific questions certified to us for a ruling. We answer both questions no.

Certified questions answered.

KELLEY, J., concurs in part, dissents in part.

WAHL and KEITH, JJ., dissent.

KELLEY, Justice (concurring in part, dissenting in part):

I concur in the majority opinion that Minn.Stat. §§ 609.2661(3) and .2662 (1988) do not violate the Equal Protection Clause of the United States Constitution. Likewise, I concur in the conclusion that the two statutes on their face are not void as violative of the Due Process Clause. Therefore, I join Part I and Part II A of the Court's opinion. However, because I conclude that the unborn child criminal statutes are fatally vague so as to invite, or permit, arbitrary and discriminatory enforcement, I would hold they unconstitutionally infringe upon the Due Process Clause, and, accordingly, would reverse. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21, 15 L.Ed.2d 447 (1966); *State v. Peterfeso*, 283 Minn. 499, 501, 169 N.W.2d 18, 19 (1969).

Each of the statutes under attack in this appeal employs the phrase "causes the death of an unborn child." As appellant points out, neither statute defines the phrase, nor does either set out particularized standards to afford guidance to a court or a jury for use in construing the phrase. In short, both statutes leave when "death" occurs, or, for that matter, when "life" commences undefined. Absent such definition, it seems to me the phrase "causes the death of an unborn child" is burdened with ambiguity which, by its very nature, invites arbitrary and discriminatory enforcement. The result, as I see it, is that by necessity trial courts are left to wrestle with metaphysical, medical and legal concepts relative to the commencement and cessation of life in order to apply these statutes in a criminal prosecution.

The statutes' ambiguous phraseology almost inevitably requires at some point during the criminal proceeding involving a charge of feticide that the trial judge, in order to administer them, determine when life begins in order to rule on motions or to structure jury instructions. Without adequate definitional standards for guidance, it is not only possible, but probable, in my opinion, that different judges might resolve the issue differently. A representative but nonexclusive listing of types of issues likely to arise in the course of a feticide prosecution include: Should death be defined as cessation of brain activity? Is there life before brain activity? Should death be defined as a cessation of function of the circulatory system? If so, is there life before that even though brain activity has not been commenced? Does life not commence until viability and death only when the fetus is destroyed thereafter? Does life commence at the moment of conception and death occur when the embryo is thereafter exterminated? The fact that any of these and, perhaps, other similar questions may be logically answered in the affirmative, I think, serves to illustrate that, absent statutory criteria, the present statute permits judges freedom to make rulings and charge juries according to their own predilections; and juries are free to decide what conduct is prohibited in each case—results that are, or could be, both arbitrary and discriminatory. *See, e.g., Peterfeso*, 283 Minn. at 501, 169 N.W.2d at 19.

It cannot be gainsaid that few topics today compel as fierce public debate and evoke the passionate convictions of as many of our citizens as does the issue of when "life" in a fetus begins. In view of the stridency of that debate, it appears conceivable, perhaps even predictable, that two juries having the same evidence could arrive at the same factual conclusions, but due to divergent and strongly held beliefs arrived at a dissimilar legal result. By way of example, in the case before us, one jury sharing a common viewpoint of when life commences could find the defendant guilty of fetal murder, whereas another whose members share the view that life was nonexistent in a 26 to 28-day-old embryo, could exonerate the appellant.

The likelihood of discriminatory enforcement is further enhanced when the discretionary charging function possessed by a grand jury is considered. The decision to charge must be concurred in by only a majority of the panel. Minn.R.Crim.P. 18.07. Thus, the decision to charge or not may well pivot on the personal philosophical and moral tenets of a majority of the potential panel—a majority whose beliefs may vary from grand jury panel to grand jury panel.

By my count, 12 of the 15 states which have feticide statutes have variously imposed criminal liability for causing the death of an unborn fetus based on whether the fetus is "viable" or "quick." Such statutes are more likely to pass constitutional muster because they provide an objectively ascertainable point during the maturation of the fetus which will trigger culpability. Counsel for appellant has suggested that in the interest of upholding the constitutionality of the statutes we "read into" them a fetus viability requirement, which, in effect, would generally limit prosecution for fetal "death" after viability, and, specifically, in this case would result in the dismissal of Counts II and IV of the indictment. The majority opinion did not directly discuss this contention, and, I think properly so. Generally, determination of the factual predicate for criminal responsibility is within the province of the legislature, and not in the courts by a strained judicial "construction."

Recently, in *State v. Olson*, 435 N.W.2d 530 (Minn.1989), we declined to construe

the word "death," as it appears in the "general" homicide statute, as brain death, but instead left the development of the appropriate definition to the legislature. In so doing, we noted that where "* * * the issue raised is of profound human interest, prudence dictates, we think, that the legislature should first be given an opportunity to consider the legal implications of brain death." *Id.* at 535. For reasons similar to those therein expressed, I think the proper forum for defining life's onset and its cessation in these feticide statutes is the legislature.

In conclusion, I would answer the second certified question in the affirmative.

WAHL, Justice (dissenting).

The trial court, in the order certifying the two issues before us for appellate review, noted that "the Minnesota crimes against unborn children statutes represent the most sweeping legislative attempt in the country to criminalize actions of third parties which harm fetuses and embryos." We are asked to determine whether two of those statutes pass constitutional muster. Because I conclude that they do not, I respectfully dissent. I concur with the dissenting opinion of Justice Kelley in its conclusion that Minn.Stat. §§ 209.2661(1) (Murder of Unborn Child in First Degree) and 209.2662(1) (1988) (Murder of Unborn Child in Second Degree), as drafted, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution under the "void for vagueness" doctrine. I would also answer the first certified question in the affirmative.

The first question certified asks:

Do Minn.Stat. §§ 609.2661(1) and 609.2662(1), (1988) violate the fourteenth amendment of the United States Constitution, as interpreted by the United States Supreme Court in *Roe v. Wade*, by failing to distinguish between viable fetuses and nonviable fetuses and embryos, and by treating fetuses and embryos as persons?

The majority opinion, in answering this question, has focused solely on defendant's equal protection claim and finds no violation of the Fourteenth Amendment on that ground. Assuming the court's analysis has properly addressed defendant's equal protection concerns, the question as certified to us also raises a question of substantive due process. The constitutional requirement of due process not only concerns matters of criminal procedure, but also limits "the manner and extent to which conduct may be defined as criminal in the substantive criminal law." W. LaFave & A. Scott, *Criminal Law* § 20 at 136 (1972). By failing to distinguish between viable fetuses and nonviable fetuses and embryos, sections 609.2661(1) and 609.2662(1) have run afoul of the defendant's right to substantive due process.

Defendant is charged with murder of an unborn child in the first degree carrying a sentence of life imprisonment, Minn.Stat. § 609.2661(1), and murder of an unborn child in the second degree, carrying a sentence of imprisonment for not more than 40 years, Minn.Stat. § 609.2662(1).[1] These statutes track, respectively, the language and sentences of murder in the first degree, Minn.Stat. § 609.185(1) (1988), and murder in the second degree, Minn.Stat. § 609.19(1) (1988), with one exception. In both sections 609.2661(1) and 609.2662(1), the actor, to be guilty of murder and to be sentenced for murder, must cause the death, not of a human being, but of an unborn child. An unborn child is the unborn offspring of a human being conceived, but not yet born. Minn.Stat. § 609.266(a) (1988). Thus an unborn child can be a fertilized egg, an embryo, a nonviable fetus or a viable fetus.

The law with regard to murder is clear. Murder is the "unlawful killing of a human being by another * * *." *Black's Law Dictionary* 918 (5th ed. 1979). The term murder implies a felonious homicide, *Pilcher v. State*, 16 Ala.App. 237, 238, 77 So. 75, 76 (1917), which is the wrongful killing of a human being. 4 W. Blackstone, *Commentaries* *188–89. A nonviable fetus is not a human being, nor is an embryo a human being, nor is a fertilized egg a human being. None has attained the capability of independent human life. *People v. Smith*, 59 Cal.App.3d 751, 756, 129 Cal.Rptr. 498, 502 (1976). Each has the potentiality of human life. In this potential human life the state has an important and legitimate interest—an interest which becomes compelling at viability. *Roe v. Wade*, 410 U.S. 113, 162–163, 93 S.Ct. 705, 731, 35 L.Ed.2d 147 (1973). Only at viability does the fetus have the "capability of meaningful life outside the mother's womb." *Id.* 410 U.S. at 163, 93 S.Ct. at 732. As one constitutional scholar has put it, "viability constitutes nothing less than the operative fact that makes a fetus like other human beings, and that therefore requires that a fetus be accorded state protection similar to that accorded the rest of humanity." L. Tribe, *American Constitutional Law* § 15–10 at 1357 (1988).

Though the statute under which the court in *People v. Smith* concluded that only a viable fetus could become an object of murder differs from Minnesota's fetal homicide statutes, the court's analysis is relevant on this point:

> The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.

People v. Smith, 59 Cal.App.3d at 757, 129 Cal.Rptr. at 502. Our decisions have recognized this principle. In a civil case we have allowed the personal representative of an "unborn child" to maintain a wrongful death action. *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949). We concluded in *Verkennes* that a cause of action would only arise "where independent existence is possible * * *." *Id.* at 370–71, 38 N.W.2d at 841.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." Life, liberty and property are fundamental rights. "When a fundamental right is involved, due process requires a state to justify any action affecting that right by demonstrating a compelling state interest." *Garner v. Memphis Police Dept.*, 710 F.2d 240, 247 (6th Cir.1983), *aff'd on other grounds sub nom. Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (invalidating on due process grounds a statute authorizing the police to use deadly force against any felon fleeing arrest). "Laws which infringe on fundamental rights must be 'narrowly drawn to express only the legitimate state interests at stake.'" *Id.* 710 F.2d at 247 (quoting *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)).

The fundamental right involved in the case before us as far as defendant is concerned is his liberty. He is charged with two counts of murder of a woman who was 26 to 28 days pregnant at the time of her death. For the death of the 28-day embryo he is further charged with murder of an unborn child in the first degree and murder of an unborn child in the second degree for which he may be sentenced to life imprisonment and 40 years. The state does not have a compelling interest in this potential human life until the fetus becomes viable. *Roe v. Wade*, 410 U.S. at 162–163, 93 S.Ct. at 731. Sections 609.2661(1) and 609.2662(1) are not narrowly drawn to distinguish between viable fetuses, nonviable fetuses and embryos, so as to express "only the legitimate state interests at stake." Unless the words "unborn child" in sections 609.2661(1) and 609.2662(1) are construed to read "viable unborn child," the reach of these statutes is unconstitutionally broad. The first certified question must be answered in the affirmative.

KEITH, Justice.

I concur in the dissent of Justice WAHL.

1. Sections 609.2661(1) and 609.2662(1) are criminal statutes. Criminal statutes must be strictly construed in favor of the defendant. LaFave & Scott, 1 *Substantive Criminal Law* § 2.2(d) at 108 (1986).

APPENDIX C

court recites the rates provided by Congress in the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA). Holland, the party now claiming a higher market rate in Denver, did not provide evidence of the higher market rate other than the evidence relating to Holland's own rates. In the absence of other indicia of the local market rate the district judge compared the EAJA rates with her knowledge of the prevailing market rate and found the EAJA rates reasonable. The judge's order makes clear that she views the EAJA amounts as an indicia of reasonableness in this case. Although additional reasons should have been articulated, we cannot say that reference to the EAJA amounts to an abuse of discretion.

The district judge further indicated that she considered a duplication of efforts among the attorneys, law students, and legal assistants as a relevant factor in establishing the hourly rates. She states in her order that although plaintiff can staff the case as she chooses, it would not be reasonable to award fees for all of this time at the highest hourly rate. The district court took this duplication of effort into account in setting the hourly rates for junior associates, law students, and legal assistants.

The district court is uniquely qualified to establish the reasonable hourly rate multiplier in computing attorneys' fees. We will disturb the trial court's determination only where there has been a clear abuse of discretion or where the court provides no reasons for the award as a whole. We find no abuse of discretion here. The reasons given by the court are adequate.

AFFIRMED.

Richard James SMITH, Sr., Petitioner-Appellant,

v.

Lanson NEWSOME, Warden and Michael Bowers, Respondents-Appellees.

No. 86-8325.

United States Court of Appeals, Eleventh Circuit.

April 17, 1987.

Georgia inmate convicted of aggravated assault, four counts of armed robbery and violation of feticide statute, filed application for federal habeas corpus relief. The United States District Court for the Northern District of Georgia, No. C85-4443A, Robert H. Hall, J., denied relief, and petitioner appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) Georgia feticide statute was not unconstitutionally vague; (2) Georgia feticide statute did not violate equal protection; and (3) petitioner's joint trial with codefendant was not unduly prejudicial to him.

Affirmed.

1. Homicide ⇐8

Georgia feticide statute prohibiting willful killing of an unborn child so far developed as to be ordinarily called "quick" was not unconstitutionally vague; Georgia case law adopted common law understanding of "quick", medical and lay testimony at trial indicated mother of unborn child in question was far enough along in pregnancy for fetus to be "quick", and mother herself testified that she had felt and recognized unborn child move in her prior to its destruction. O.C.G.A. § 16-5-80.

See publication Words and Phrases for other judicial constructions and definitions.

2. Homicide ⇐8

Georgia feticide statute prohibiting destruction of a "quick" fetus did not unconstitutionally conflict with *Roe v. Wade* ruling that an unborn child was not a "person" within the meaning of the Fourteenth Amendment, as mother's interests were in no way infringed upon by feticide statute. O.C.G.A. § 16-5-80; U.S.C.A. Const. Amend. 14.

3. Homicide ⇐8

Final clause of feticide statute, defining offense as one resulting from "an injury to the mother of such child, which would be murder if it resulted in the death of such mother" did not render statute unconstitutionally vague, but rather contributed specificity to the offense by requiring jury to make factual finding that defendant's actions would have constituted murder had they resulted in death to mother. O.C.G.A. § 16-5-80.

4. Constitutional Law ⇐250.1(2)
Homicide ⇐8

Georgia feticide statute did not violate equal protection by creating two arbitrary and capricious classifications along with offense of criminal abortion where criminal abortion statute did not require actual destruction of fetus and feticide statute required an act that would constitute murder if resulting in the death of the mother. O.C.G.A. §§ 16-5-80, 16-12-140.

5. Criminal Law ⇐622.2(11)

Defendant was not entitled to severance of his case from that of his codefendant where there was sufficient evidence against both defendants to support their convictions and evidence against defendant, positively identifying him as the man who shot pregnant woman, was not slight.

L. David Wolfe, L. David Wolfe & Associates, Atlanta, Ga., for petitioner-appellant.

Eddie Snelling, Jr., Law Dept., State of Georgia, Paula K. Smith, Atlanta, Ga., for respondents-appellees.

* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE and KRAVITCH, Circuit Judges, and BROWN *, Senior Circuit Judge.

VANCE, Circuit Judge:

Richard James Smith, Sr. appeals a denial of his application for habeas corpus relief. In a joint trial with a co-defendant held in the Superior Court of Fulton County, Georgia, Smith was convicted of aggravated assault, four counts of armed robbery and violation of Georgia's feticide statute. Smith's convictions were affirmed by the Supreme Court of Georgia in *Brinkley v. State*, 253 Ga. 541, 322 S.E.2d 49 (1984), where the court specifically considered the constitutionality of the feticide statute and the trial court's refusal to grant a severance of parties. We affirm the district court's denial of habeas corpus relief.

[1] Smith argues that the Georgia feticide statute, O.C.G.A. § 16-5-80,[1] is unconstitutionally vague. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Specifically, Smith contends that in deciding whether the statute has been violated, a jury must arbitrarily determine and apply each member's understanding of the term "quick." We disagree. The case law of Georgia has long adopted the common law understanding of "quick": when the fetus is so far developed as to be capable of movement within the mother's womb. *Sullivan v. State*, 121 Ga. 520, 48 S.E. 949 (1904). Medical and lay testimony at trial indicated that the mother of the unborn child in question was far enough along in her pregnancy for the fetus to be "quick," and in addition the mother herself testified that she had felt and recognized the unborn child move within her prior to its destruction.

1. Section 16-5-80 reads in pertinent part:

A person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily call "quick" by any injury to the mother of such child, which would be murder if it resulted in the death of such mother.

[2] Smith also contends that the feticide statute is unconstitutional because there is no unlawful taking of a human life, and because the statute contradicts the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The former contention is frivolous. There is no constitutional impediment unique to the prohibition of conduct that falls short of the taking of a human life. The latter contention is equally without merit. The proposition that Smith relies upon in *Roe v. Wade*—that an unborn child is not a "person" within the meaning of the Fourteenth Amendment—is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus.[2]

[3] Smith also argues that the final clause of the feticide statute, which defines the offense as one resulting from "an injury to the mother of such child, which would be murder if it resulted in the death of such mother," renders the statute unconstitutionally vague. Rather than adding vagueness, this clause contributes specificity to the offense. A jury must make a factual finding that defendant's actions, had they resulted in death to the mother, would have constituted murder. Juries have been deciding murder cases for centuries and are clearly competent to make such a finding.

[4] Smith also contends that the statute violates equal protection because it creates two classifications that are arbitrary and capricious. Smith notes that O.C.G.A. § 16–12–140 punishes the offense of criminal abortion with imprisonment for not less than one year nor more than ten years, while the Georgia feticide statute requires a life sentence. Criminal abortion is the unlawful administering of "any medicine, drugs, or other substance whatever to any woman or ... use [of] any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion." Smith argues that the offense perpetrated by the individual performing a criminal abortion would be no different than feticide if at the time of the act the unborn child was determined to be quick. Smith however overlooks two important distinctions between the two statutes. First, the criminal abortion statute does not require the actual destruction of a fetus. Secondly, the feticide statute requires an act that would constitute murder if resulting in the death of the mother. This requirement changes the entire character of the offense. States ordinarily distinguish offenses and vary the severity of sentences according to the degree of mental culpability inherent in the offenses. Retribution is a legitimate goal of the criminal law. The distinction between the sentences required by the Georgia feticide statute and the Georgia criminal abortion statute are thus rationally related to legitimate governmental purposes.[3]

[5] Smith's contention that the trial court should have severed his case from that of his co-defendant is also without merit. Smith asserts that a much stronger case against his co-defendant unduly prejudiced his own trial. The district court found, under the standard in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), that there was sufficient evidence against both defendants to support their convictions. *See also Brinkley v. State*, 253 Ga. 541, 322 S.E.2d 49, 53 (1984). Contrary to Smith's contention the evidence against him was not slight. He was positively identified by a witness as the man who shot the mother. The trial court specifically found that Smith and his co-defendant were acting in concert and that evidence against one would be admissible against the other. Under these circumstances, Smith has not shown that he suffered prejudice amounting to a denial of due process. *See Demps v. Wainwright*, 666 F.2d 224, 227 (5th Cir. Unit B), *cert. denied*, 459 U.S. 844, 103 S.Ct. 98, 74 L.Ed.2d 89 (1982).

AFFIRMED.

2. The constitutional limitations upon a state's right to prohibit the destruction of a fetus come into play when the state's interest conflicts with certain constitutional interests of the mother. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). A mother's interests are in no way infringed upon by the statute in question.

3. Since the statutory scheme does not invoke any suspect classification, it need only be rationally related to legitimate governmental purposes.

Emory SEARCEY, et al., Plaintiffs-Appellees,

v.

Alonzo CRIM, et al., Defendants-Appellants,

United States of America, Intervenor-Defendant, Appellee.

No. 86–8681.

United States Court of Appeals, Eleventh Circuit.

April 17, 1987.

"Peace activists" brought suit challenging school officials' denial of their request to place literature on school bulletin boards and in offices of school guidance counselors, while allowing other outside groups and military recruiters to place their literature there. The United States District Court, Northern District of Georgia, No. C84–751A, Marvin H. Shoob, J., 642 F.Supp. 313, granted plaintiffs' motion for summary judgment in part and denied it in part, and defendants appealed. The Court of Appeals, Kravitch, Circuit Judge, held that Board of Education's policy, barring "peace activists" from presenting career opportunities information on bulletin boards, in guidance offices, and at school career days, violated plaintiffs' First Amendment rights, even assuming that bulletin boards, guidance offices, and school career days constituted mere nonpublic forums.

Affirmed in part; vacated in part; and remanded.

1. Constitutional Law ⇐90.1(1)

Government violates First Amendment when it denies speaker access even to nonpublic forum, where Government does so solely to suppress point of view speaker espouses on otherwise includable subject. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐90.1(4)

Before it decides whether Government-owned property from which speaker was denied access constitutes traditional public forum, designated public forum, or purely nonpublic forum, court must first develop all of the relevant facts that bear on character of property. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐46(1)

District court should not have decided constitutional issue, relating to whether board of education had denied speaker access to traditional public forum, designated public forum, or purely nonpublic forum, where board's refusal failed First Amendment scrutiny even under nonpublic forum analysis. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐90.1(4)
Schools ⇐72

Board of Education's policy, barring "peace organizations" from presenting career opportunities information on school bulletin boards, in guidance offices, and at school career days, violated organizations' First Amendment rights, even assuming that bulletin boards, guidance offices and school career days were mere nonpublic forums, where Board opened such forums to other organizations for disseminating information about career opportunities in military and failed to offer any suggestion as to why it was reasonable to deny plaintiff organizations' these limited access rights. U.S.C.A. Const.Amend. 1.

Warren C. Fortson, Bruce H. Beerman, Fortson and White, Atlanta, Ga., for defendants-appellants.

APPENDIX D

Valparaiso University Law Review

"Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms"
Clarke D. Forsythe

VOLUME 21, NUMBER 3 SPRING 1987

HOMICIDE OF THE UNBORN CHILD: THE BORN ALIVE RULE AND OTHER LEGAL ANACHRONISMS

Clarke D. Forsythe*

> The task of the historian of law is not merely one of recounting the growth of jurisdiction of courts and legislatures or of detailing the evolution of legal rules and doctrines. It is essential that these matters be related to the political and social environments of particular times and places. Broadly conceived, legal history is concerned with determining how certain types of rules, which we call law, grew out of past social, economic, and psychological conditions, and how they accorded with or accommodated themselves thereto.[1]

The Minnesota Supreme Court, in *State v. Soto*,[2] was recently asked to decide whether the state vehicular homicide statute encompassed a viable unborn child by the statutory phrase "human being." The court held that the statute did not encompass an unborn child and affirmed the trial court's dismissal of an indictment against the defendant who killed an unborn child of 8½ gestational months. The court adopted the "born alive rule"—the common law rule that only persons "born alive" can be subject to homicide.[3] By this decision, the court joined 22 other state courts which have adopted the born alive rule.[4]

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1. G. Haskins, Law and Authority in Early Massachusetts viii (1960).
2. State v. Soto, 378 N.W.2d 625 (Minn. 1985).
3. 378 N.W.2d at 628.
4. *See infra* note 161 and accompanying text. Shortly before this article was published, the Arkansas Supreme Court adopted the born alive rule. Meadows v. State, 722 S.W.2d 584 (Ark. 1987). The majority did not examine the purpose or origin of the born alive rule but perceived the issue to be "whether a court ought to create a new common law crime." *Id.* at 585. Starting with this premise, the majority concluded that the court should "defer the creation of new crimes to the legislature." *Id.* at 586. Justice Hays dissented. He disagreed with the issue as framed by the majority and reasoned that the court "would not in any sense be 'creating' a crime" but would merely be interpreting and applying the state manslaughter

Since the Minnesota Supreme Court's decision in *Soto*, the Minnesota Legislature has reversed the decision and the born alive rule by passing comprehensive legislation that recognizes certain crimes against the unborn.[5] Despite the reversal of *Soto* by the Minnesota Legislature, however, the decision is still of enduring importance for its representative lack of analysis of the common law and of the origin and meaning of the "born alive" rule, as well as its assessment of the scope of judicial authority in adopting or rejecting the "born alive" rule in the context of contemporary law and medicine.

This article will review the reasoning of the *Soto* court as well as that of other courts which have construed homicide statutes as applied to the unborn child. An examination of the origins and reasons for the born alive rule will reveal that at common law the rule was entirely an evidentiary standard, mandated by the primitive medical knowledge and technology of the era, and that the rule in its origin was never intended to represent any moral judgment on the criminality of killing an unborn child *in utero*.[6] A second phase in the development of the born alive rule occurred when English and American courts in the 19th imposed a gloss on the common law rule by engaging in elaborate tests of live birth.[7] These tests, conceived in a context of primitive medical science, disregarded the simple evidentiary nature of the born alive rule and focused not simply on proof of life, as the common law did, but on a medically erroneous notion of "independent existence" that has since been repudiated.[8] More recently, a third phase in the

statute. *Id.* at 588.(Hays, J., dissenting). Starting from this premise, Justice Hays examined the purpose of the born alive rule. He concluded that the rule "is outmoded and entirely discredited." *Id.* at 589. "We are not bound by outmoded notions founded on a lack of information when scientific knowledge provides clear and reliable information." *Id.* Judge Hays rejected the notion that due process would be violated by the rejection of the born alive rule, reasoning that the criminality of the reckless conduct which led to the vehicular homicide "could hardly have been in doubt." *Id.*

5. MINN. STAT. ANN. § 609.266 (1987 Supp.). Illinois has also recently enacted a comprehensive statute establishing certain crimes against the unborn child. ILL. REV. STAT. ch. 38, ¶¶ 9-1.2, 12-3.1 (1986 Supp.) (repealing and superceding the Illinois Feticide Law. ILL. REV. STAT. ch. 38, ¶ 9-1.1 (1985)) (hereinafter ILLINOIS STATUTE).

6. *See infra* notes 84-139 and accompanying text.

7. Westerfield recognized these to be "elaborated versions" of the test of live birth in English law. Westerfield, *The Born Alive Doctrine: A Legal Anachronism*, 2 S.U.L. REV. 149, 151-52 (1976). *See infra* notes 174-214 and accompanying text. "Some of the cases have gone to ridiculous lengths. . . ." People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92, 94 (1947). "Rough and rule of thumb tests were applied by the earlier cases. . . ." Singleton v. State, 33 Ala. App. 536, 540, 35 So. 2d 375, 387 (1948). "Some of the cases dealing with infanticide, erring it is true because of the inherent humanness of the common law, have been blinded by overzealous charity to the extent that all reasonable inferences to be gathered from the evidence are ignored and the State is required to prove that the baby was born alive beyond any possible doubt rather than beyond all reasonable doubt." *Id.*

8. *See infra* notes 211-14 and accompanying text.

development of the rule began when modern American courts further distanced themselves from the common law origin of the born alive rule. Ignoring the evidentiary origins altogether, and thus the reasons for the adoption of the rule, modern courts, like the *Soto* court, have often imposed a moral gloss upon the born alive rule and have erroneously assumed that the rule was the common law substantive definition of a "human being" or "person".[9] As a result, despite the medical advances which have eliminated the original evidentiary reasons necessitating the rule at common law, most modern courts still hold to the rule with a tenacity that is unwarranted in light of their unlearned examination of the rule.[10] Analysis of the born alive rule within the context of contemporary law and medicine will reveal the obsolescence of that rule and the propriety of a judicial construction of the word "person" or "human being" to encompass the unborn child under vehicular homicide and homicide statutes. Finally, this article proposes comprehensive criminal legislation encompassing various crimes against the unborn child.

II. THE *STATE v. SOTO* DECISION

In early 1985, a Minnesota county grand jury indicted John Soto for causing the death of an 8½ month old fetus by negligently operating his motor vehicle while under the influence of alcohol.[11] Soto drove into a vehicle operated by Mrs. Jannet Anne Johnson, who was 8½ months pregnant at the time. Mrs. Johnson suffered fractures but survived the accident. At the hospital, a physician initially found an abnormal fetal heartbeat and an abnormal position of the child in the uterus. No fetal heartbeat was detectable several hours later. The child, stillborn after a Caesarean section, was estimated to be 36-38 weeks gestational age, nearly full term. An autopsy attributed the death to "intercranial hemorrhage associated with closed head trauma."[12] Thus, although the child was not born alive, the evidence clearly established the *corpus delicti* of the crime of homicide—that the child had been alive at the time of the accident, and that Soto's actions in causing the accident were the proximate cause of the child's death.[13] The

9. *See Infra* notes 216-30 and accompanying text.

10. *See infra* notes 216-30 and accompanying text.

11. MINN. STAT. ANN. § 609.21 (1984) provides in relevant part:

> Whoever causes the death of a human being not constituting murder or manslaughter as a result of operating a vehicle . . . is guilty of criminal vehicular operation resulting in death.

State v. Soto, 378 N.W.2d 625, 627 n.3 (Minn. 1985).

12. 378 N.W.2d at 627.

13. "[T]he expression *corpus delicti* as understood in homicide cases, means the body of the crime, and consists of two component parts, the first of which is the death of the person alleged to have been killed, and the second that such death was produced through criminal agency." State v. Sogge, 36 N.D. 262, 271, 161 N.W. 1022, 1023 (1917); BLACK'S LAW DIC-

trial court dismissed the indictment, however, holding that the viable fetus was not a human being within the Minnesota statute.[14] The court reasoned that only persons "born alive" were encompassed by the statute.

The Minnesota Supreme Court affirmed on appeal and adopted the "born alive" criterion on which the trial court relied, offering two essential reasons for its decision. First, the court emphasized that Minnesota is a "code state" where "the legislature has exclusive province to define" crimes. Penal statutes are to be strictly construed, therefore, and the creation of crimes is the prerogative of the legislature.[15] Second, the court concluded that the common law rule, which existed at the time of the enactment of the Minnesota statute, was that only those children "born alive" could be the subject of a homicide. The court inferred that the statute encompassed that common law rule and concluded that, due to the strict construction of penal statutes, this criminal rule could only be changed by the legislature.

The Minnesota Attorney General argued that the state courts of Minnesota had already recognized a wrongful death action for a viable unborn child,[16] and since the common law of torts in Minnesota recognized a viable fetus to be a human being, such a construction should be adopted with respect to the criminal vehicular homicide statute. The supreme court, however, rejected this construction for two reasons.[17] First, the court stated that such a construction for the remedial purpose of awarding damages to the next of kin was distinguishable from such a construction for the penal purpose of criminal law.[18] Second, while the court could "exercise its common law powers to fashion a remedy for a civil wrong," the court concluded that it had no such common law powers with respect to criminal statutes. By such an exercise, the court "would be drastically rewriting the homicide statutes under the guise of 'construing' them."[19] Accordingly, the Minnesota Supreme Court, based on the common law, case law from other jurisdictions, rules of statutory interpretation of criminal statutes, and statutory history, held that "it is not within our judicial province, under the guise of

TIONARY 310 (5th ed. 1979).

14. 378 N.W.2d at 627.

15. *Id.*

16. Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949). The Minnesota Supreme Court reaffirmed *Verkennes* in Pehrson v. Kistner, 301 Minn. 299, 222 N.W.2d 334 (1974).

17. 378 N.W.2d at 630. By contrast, the South Carolina Supreme Court adopted such a parallel construction when such an argument was proffered, concluding that it would be "grossly inconsistent" if it did not apply the same construction for both statutes. State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984).

18. 378 N.W.2d at 630. *Cf.* People v. Greer, 79 Ill. 2d 103, 115, 402 N.E.2d 203, 209 (1980) (citing "[d]iffering objectives and considerations in tort and criminal law").

19. 378 N.W.2d at 630 (citing State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984), and People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980)).

interpretations, to hold that the words 'human being' as used in Minnesota Statute Section 902.21 (1984) encompass a viable 8½ month old fetus."[20]

The key assumption in the court's decision was the notion that the born alive rule was a substantive standard of criminal law which defined the criminality of the killing of an unborn child. This assumption is implied by the court's conclusion that to reject the born alive rule and apply the homicide statute to an unborn child would violate the strict construction of a penal statute by creating a "new crime." Assessment of this assumption requires an inquiry into the origin and function of the born alive rule.

III. The Medical Context of the Born Alive Rule

The born alive rule is a rule of medical jurisprudence. The rule was a product of the law's application of available medical knowledge to the death of the unborn child during the 16th and 17th centuries. An accurate understanding of the origin and function of the born alive rule requires an understanding of the state of medical science at the time the rule arose in the common law.

A. Defining Some Basic Concepts—"Quickening" and "Live Birth"

At common law, medical jurisprudence involving pregnancy revolved around two basic concepts—quickening and live birth. Quickening is the first physical sensation by the mother of the fetus in the womb. This usually occurs between the 16th and 18th weeks of pregnancy, approximately the middle of the second trimester.[21] Today, while still an important physical and emotional reality for women, quickening has little medical or legal significance in understanding pregnancy. It was superceded as a relevant indication of pregnancy in the early 20th century by new pregnancy tests.[22] It

20. 378 N.W.2d at 630.

21. "Quickening" is defined as "the first recognizable movements of the fetus, appearing usually from the sixteenth to the eighteenth week of pregnancy." DORLAND'S ILLUST. MED. DICT. 1105 (26th ed. 1985). Modern medical technology with ultrasound technology has observed that "it is not until the 10th or 11th week that fetal movements become prominent and are sufficiently forceful to change the position of the fetal body." R. GOODLIN, CARE OF THE FETUS 3-4 (1979). Strong and brisk fetal movements are observable in the first trimester. *Id.*

There may have been a common law distinction in language between "quick with child" and "quickening" or "with quick child." According to this argument, the former phrase referred merely to being pregnant, without regard for whether the child had moved in the womb. The later phrases were equivalent and referred to the movement of the child in the womb or being pregnant at that stage. *See* Regina v. Wycherley, 8 C & P 262, 173 Eng. Rep. 486 (N.P. 1938); 1 J. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 253 (11th ed. 1860); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 824 (1973).

22. Quickening "provides only corroborative evidence of pregnancy and itself is of little

survives in law and medicine as little more than a quaint reminder of human fallibility and past medical ignorance.

Prior to this change, however, during the period of the formulation of the common law, quickening was the most important point in pregnancy in both law and medicine. It was assumed that the fetus first became alive at quickening.[22] At common law, the primitive state of medical knowledge made quickening legally significant, "since quickening was determinable, at least by the mother, in a time when little else about the fetus was readily understood."[24] Later, in the 19th century, physicians came to understand that the fetus was alive at conception.[25] Nevertheless, prior to the 20th century, quickening remained the first reliable proof that the mother was pregnant.[26]

"Live birth", on the other hand, is the objective clinical observation that a fetus, upon coming out of the womb, is alive. "Whenever the infant at or after birth breathes spontaneously or shows any other sign of life such as heart beat or definite spontaneous movement of voluntary muscles, a live birth is recorded."[27] Live birth is not synonymous with pregnancy brought to full term. Nor does live birth imply a viable fetus.[28] Live birth is not associated with any particular time in gestation. As it is defined in many vital records statutes, any expulsion of the fetus from the womb showing evidence of life is called a live birth "irrespective of the duration of pregnancy."[29]

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diagnostic value." J. PRITCHARD, P. MACDONALD, & N. GANT, WILLIAMS OBSTETRICS 218 (17th ed. 1985) (hereinafter WILLIAMS OBSTETRICS).

23. 1 J. BECK, *supra* note 21, at 462. Taylor states that "at the time when medicine was in its infancy, it was considered that the foetus only received vitality when the mother experience the sensations of its motion!" A. TAYLOR, MEDICAL JURISPRUDENCE 530 (7th ed. 1861). "A child is not living, the mother is not quick, until the 16th or 18th week after conception." Hall v. Hancock, 32 Mass. (15 Pick.) 255, 256 (1834) (argument of counsel).

24. Note, *The Nonconsensual Killing of An Unborn Infant: A Criminal Act?*, 20 BUFFALO L. REV. 535, 536 (1971).

25. 1 J. BECK, *supra* note 21, at 462-63; REESE'S TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 195 (D.J. McCarthy 8th ed. 1911).

26. *See infra* notes 49-58 and accompanying text.

27. WILLIAMS OBSTETRICS, *supra* note 22, at 2.

28. It was generally recognized at common law and is acknowledged today that previable children may be born alive. *See infra* notes 35-36, 132-34 and accompanying text. *See* A. TAYLOR, *supra* note 23, at 413-14; J. CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE 410-11 (1st Am. ed. 1835).

29. *See, e.g.*, ILL. REV. STAT. ch. 111 ½, ¶ 73-1(5) (1985):

> Live birth means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Id. "Live birth" definitions virtually identical to that in the Illinois statute are found in the following statutes: ALASKA STAT. § 18.50.370(8) (1983); ARIZ. REV. STAT. ANN. § 36-301(6) (1976); ARK. STAT. ANN. § 82-501(f) (1981); GA. CODE ANN. § 88-1701(9) (1982); HAWAII REV. STAT. § 338-1(2) (1976); IOWA CODE ANN. § 144.1(10) (West 1972); KAN. STAT. ANN. § 65-2401(2) (1980); MD. HEALTH-GEN. § 4-201(b) (1982); MO. REV. STAT. § 193.020(4) (1983); N.J. STAT. ANN. § 26:8-1 (1984); N.M. STAT. ANN. § 24-14-2E (1981); N.Y. PUB. HEALTH LAW § 4130 (McKinney 1977); N.D. CENT. ANN. § 23.02.1-01(7) (1978); OKLA. STAT. ANN. tit. 63, § 1-301(e) (West 1984); R.I. GEN. LAWS § 23-3-1(e) (1979); TENN. CODE ANN. § 78-3-102(9) (1983); VA. CODE § 32.1-249(7) (1979); W. VA. CODE § 16-5-1(f) (1979); WYO. STAT. § 35-1-401(a)(v) (1977).

Finally, a third medical phenomenon in pregnancy—viability—is important in modern medical jurisprudence. "Viability" is the physical maturation or physiological capability of the fetus to live outside the womb.[30] Viability varies in individual cases depending on many circumstances, including the length of gestation and the child's weight, but is generally obtained today between 24-28 weeks gestation.[31] Although viability is a point in pregnancy that is emphasized in the law today,[32] it played no role in the development of the common law concerning the unborn child.[33] A.S. Tay-

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30. DORLAND'S ILLUST. MED. DICT. 1455 (26th ed. 1985).

31. Viability depends on the individual fetus, but may occur between 24-28 weeks. Medical journal studies calculate survival rate by birth weight and gestational age. *See, e.g.*, Gilstrap, *Survival and Short-Term Morbidity of the Premature Neonate*, 62 OB. GYN. 37 (1985) (28% survival at 25 weeks; 88% survival at 28 weeks); Goldenberg, *Neonatal Mortality in Infants Born Weighing 501 to 1,000 Grams*, 151 AM. J. OB. GYN. 608 (1985); Kraybill, *Infants with Birth Weights Less Than 1,001 gm: Survival, Growth and Development*, 138 AM. J. DIS. CHILD. 837 (1984); Goldenberg, *Survival of Infants with Low Birth Weight and Early Gestational Age, 1979 to 1981*, 149 AM. J. OB. GYN. 508 (1984) (18% survival at 24 weeks; 67% survival at 28 weeks); Milner & Beard, *Limit of Fetal Viability*, 1:8385 LANCET 1079 (1984) (16% survival at 24 weeks; 58% survival at 27 weeks); Hirata, *Survival and Outcome of Infants 501 to 750 gm: A Six-Year Experience*, 102 J. PEDIATRICS 741 (1983); Worthington, *Factors Influencing Survival and Morbidity with Very Low Birth Weight Delivery*, 62 OB. GYN. 550 (1983) (37% survival at 25 weeks; 82% survival at 29 weeks); Herschel, *Survival of Infants Born at 24 to 28 Weeks' Gestation*, 60 OB. GYN. 154 (1982) (28% survival at 24 weeks; 92% survival at 28 weeks); Koops, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 PEDIATRICS 969 (1982) (11% survival at 25 weeks; 84% survival between 28 and 31 weeks); Philip, *Neonatal Mortality Risk for the Eighties: The Important of Birth Weight/Gestational Age Groups*, 68 PEDIATRICS 122 (1981) (11% survival at 25 weeks; 62% survival at 28 weeks); Dillon & Egan, *Aggressive Obstetric Management in Late Second-Trimester Deliveries*, 58 OB. GYN. 685 (1981) (36% survival at 24 weeks; 76% survival at 25 weeks); Bowes, *Results of the Intensive Perinatal Management of Very-Low-Birth-Weight Infants (501 to 1,500 Grams)*, 23 J. REPRO. MED. 245 (1979); Hack, *The Low-Birth-Weight Infant: Evolution of a Changing Outlook*, 301 NEW ENG. J. MED. 1162 (1979).

32. *See* Roe v. Wade, 410 U.S. 113 (1973); People v. Smith, 50 Cal. App. 2d 751, 129 Cal. Rptr. 498 (1976) (rewriting a criminal statute to encompass a viability standard); State v. Brown, 378 So. 2d 916 (La. 1979) (rewriting a criminal statute to encompass a viability standard); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) (applied a homicide statute to the unborn child but incorporated a viability limitation).

33. Atkinson, *Life, Birth and Live-Birth*, 20 LAW Q. REV. 134, 135 (1904); A. TAYLOR, *supra* note 23, at 413. *See infra* notes 103-27 and accompanying text. *See also* S. KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 134-48 (1984); Dellapenna, *The*

lor, in his treatise, stated that charges of murder could be brought for the death of a child born alive before seven months.[34]

> The English law does not act on the principle that a child, in order to become the subject of a charge of murder, should be now viable, i.e., with a capacity to live. . . . The capability of a child continuing to live has never been put as a medical question in a case of alleged child murder; and it is pretty certain, that if a want of capacity to live were actually proved, this would not render the party destroying it irresponsible for the offense.[35]

However, Taylor noted that, for purposes of proof in cases of alleged child murder, attention must be paid to the age of the unborn child. Since a previable child was more susceptible to natural death, causation might be due to natural causes and not criminal acts, and causation was a necessary element in the proof of any crime.[36]

History of Abortion: Technology, Morality and Law, 40 U. PITT. L. REV. 359, 366-407 (1979); Bryn, *supra* note 21, at 815-27; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1267-73 (1975).

34. A. TAYLOR, *supra* note 23, at 413.

35. *Id.* Taylor directly disputes Chitty, who, in his treatise, makes the following statement:

> When we consider that the object of the law is to prevent injuries to infants having capacity to maintain a separate existence, it should seem essential that *such* a capacity should be proved in order to complete the offense of infanticide or of concealment of *birth*, and that, consequently, it is important to prove the existence of that capacity.

J. CHITTY, *supra* note 28, at 415 (emphasis in original). Chitty's statement is not supported with any authority and seems to be more a suggestion of what the law should be in Chitty's opinion, rather than any statement of what the law was. Chitty also makes a distinction between a charge against the mother and one against a stranger, for he says that a mother should not be charged with murder of an infant born before seven months gestation, "but in a strict judicial view, if there be a mere *possibility* of the child, born alive within seven months, being by extreme care or under any circumstances kept alive for any considerable time, it should seem that the culprit, who deprives the infant of all chance, ought to be held criminally responsible." *Id.* at 410 (emphasis in original).

36.

> One of the first questions which a witness has to consider in a case of alleged child murder, is that which relates to the age or probable degrees of maturity which the deceased child may have attained in utero. The reason for making this inquiry is, that the changes of natural death, in all new-born children, are great in proportion to their immaturity; and that supposing them to have survived birth, the signs of their having respired are commonly obscure. It is found that the greater number of children who are subjects of these investigations have reached the eighth or ninth month of gestation: yet charges of murder might be extended to the wilful destruction of children at the seventh month or under, provided the evidence of life after birth was clear and satisfactory.

A. TAYLOR, *supra* note 23, at 413.

B. Medicine and Prenatal Development at Common Law

Medical treatises and writings on medical jurisprudence during the 16th through 19th centuries testify to the primitive state of medical technology and the resulting evidentiary limitations which gave rise to the quickening doctrine and the born alive rule. During those years, the mere detection of pregnancy, first for midwives and then later for physicians, was one of the most perplexing and debated subjects.[37] Beyond doubt, pregnancy and fetal development were even less understood before those years.

In the early 17th century, the famous physician Paolo Zacchia (1584-1659) stated that it was most difficult to determine pregnancy during the first four months but easier thereafter.[38] Samuel Farr wrote in 1787 that "the most certain and most common" signs of pregnancy "may be taken about the time when half the gestation is complete."[39] Valentine Seaman, in his 1800 work, *The Midwives Monitor and Mothers Mirror*, stated that the first signs of conception—"obstruction of the periodical discharge, hardness of the breasts and colouring of the rings around the nipple; nausea, drowsiness, lividness under the eyes, toothache, headache, etc."—were uncertain. However, the "[m]otion of the child between the fourth and fifth months [was] the most undoubted sign. . . ."[40] The earlier "signs" were all equivocal because they all could have other causes, such as "an obstruction of the periodical discharges from disease." As a result, "there appears to be no unequivocal sign, whereby that state [pregnancy] can with certainty be determined, till between the fourth and fifth months, when the child quickens, that is, when its motions are distinctly felt."[41] For this reason, early treatises on obstetrics and midwifery generally contained a chapter on "the signs of pregnancy."[42]

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37. Obstetrics as a branch of medical science was not regularly practiced as a discipline by physicians until the 19th century. Until the middle of the 19th century, female midwives, not physicians, cared for women throughout pregnancy and delivery. "With respect to obstetrics and gynecology, women midwives were the chief practitioners." Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of The Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20, 28 (1984). "Obstetrics was not a man's profession in America until the middle of the nineteenth century." S. MASSENGILL, A SKETCH OF MEDICINE AND PHARMACY 294 (2d ed. 1942). "[S]ome women absolutely refuse having a man to attend them in their labours, or at least not till they are convinced of being in a critical or dangerous situation, and oftentimes not until they are beyond the reach of the greatest skill." V. SEAMAN, THE MIDWIVES MONITOR AND THE MOTHERS MIRROR iv (1800). *See generally* A. OAKLEY, THE CAPTURED WOMB: A HISTORY OF THE MEDICAL CARE OF PREGNANT WOMEN 17-33 (1984).

38. 1 P. ZACCHIA, QUAESTIONUM MEDICOLEGALIUM 49 (1701).

39. S. FARR, ELEMENTS OF MEDICAL JURISPRUDENCE 4 (1787), *reprinted in* T. COOPER, TRACTS ON MEDICAL JURISPRUDENCE (1819).

40. V. SEAMAN, *supra* note 37, at 26.

41. *Id.* at 70-72.

42. *See, e.g.*, V. SEAMAN, *supra* note 37, at 25-26; F. MAURICEAU, THE DISEASES OF

John Burns, in the 1817 edition of his *Principles of Midwifery*, stated that "when women have any doubt with regard to their situation, they generally look forward to the end of the second quarter of pregnancy, as a period which can ascertain their condition," for then "the motion of the child is first perceived, or it is said to quicken. . . ." But, he added, "it is not to be supposed, that the child is not alive till the period of quickening, though the code of criminal law is absurdly founded on that idea. The child is alive from the first moment that it becomes visible, but the phenomena of life must vary much at different periods."[43] An 1826 medical treatise likewise expressed the near impossibility of determining the existence of pregnancy for purposes of legal proof before the end of the sixth month:

> We have taken a wide range in the examination of 'authorities' on the subject, and the result is that we can find *no one invariable sign, nor can form any combination of symptoms so unequivocal, as to enable us to pronounce its existence under oath*, for all have occasionally proved deceptive. Before deciding, our examinations should be frequently repeated, and then, *only* should a final decision be seldom hazarded 'before the end of the sixth month.'[44]

WOMEN WITH CHILD 14 (H. Chamberlen trans. 8th ed. 1755); N. CULPEPER, THE MIDWIFE 101 (1672); W. MONTGOMERY, AN EXPOSITION OF THE SIGNS OF SYMPTOMS OF PREGNANCY (2d London ed. 1857). *See generally* 1 J. BECK, *supra* note 21, at 249-333; A. DEAN, PRINCIPLES OF MEDICAL JURISPRUDENCE 37-79 (1854); A. TAYLOR, *supra* note 23, at 527; A. OAKLEY, *supra* note 37, at 17-18.

The first obstetrics texts were treatises on midwifery. Such treatises were written and relied upon for the facts of pregnancy up through the middle of the nineteenth century. *See* 1 J. BECK, *supra* note 21, at 255 n.1. *See generally* J. AITKEN, PRINCIPLES OF MIDWIFERY (3d ed. 1786); AN AMERICAN PRACTITIONER, LONDON PRACTICE OF MIDWIFERY (6th ed. 1826); S. ASHWELL, A PRACTICAL TREATISE ON PARTURITION (1828); S. ASHWELL, A PRACTICAL TREATISE ON THE DISEASES PECULIAR TO WOMEN (3d Am. ed. 1855); J. BLONDEL, THE POWER OF THE MOTHER'S IMAGINATION OVER THE FETUS EXAMINED (1729); J. BLUNDELL, LECTURES ON THE PRINCIPLES AND PRACTICE OF MIDWIFERY (1842); H. BRACKEN, MIDWIFE'S COMPANION (1737); E. CHAPMAN, TREATISE ON THE IMPROVEMENT OF MIDWIFERY (1733); T. DAWKE, THE MIDWIFE RIGHTLY INSTRUCTED (1736); T. DENMAN, AN INTRODUCTION TO THE PRACTICE OF MIDWIFERY (1802); H. DEVENTER, THE ART OF MIDWIFERY IMPROVED (3d ed. 1728); W. DEWEES, A COMPENDIOUS SYSTEM OF MIDWIFERY (8th ed. 1837); W. DEWEES, A TREATISE ON THE DISEASE OF FEMALES (11th ed. 1860); W. DEWEES, A TREATISE ON THE PHYSICAL AND MEDICAL TREATMENT OF CHILDREN (8th ed. 1842); R. GOOCH, A PRACTICAL COMPENDIUM OF MIDWIFERY (2d Am. ed. 1835); R. GOOCH, AN ACCOUNT OF SOME OF THE MOST IMPORTANT DISEASE PECULIAR TO WOMEN (2d ed. 1848); A. HAMILTON, OUTLINES OF THE THEORY AND PRACTICE OF MIDWIFERY (1st Worcester ed. 1794); J. MAUBRAY, THE FEMALE PHYSICIAN OR THE WHOLE ART OF NEW IMPROVED MIDWIFERY (1723); W. MONTGOMERY, AN EXPOSITION OF THE SIGNS AND SYMPTOMS OF PREGNANCY (2d London ed. 1857); J. RAMSBOTHAM, PRACTICAL OBSERVATIONS IN MIDWIFERY (1822); W. SMELLIE, AN ABRIDGMENT OF THE PRACTICE OF MIDWIFERY (1786); R. TUITE, COMPENDIUM OF OPERATIVE MIDWIFERY (1828); A. VELPEAU, AN ELEMENTARY TREATISE ON MIDWIFERY (Charles Meigs trans. 1st English ed. 1831).

43. 1 J. BURNS, THE PRINCIPLES OF MIDWIFERY 174-75 (4th Am. ed. 1817).

As late as 1854, Dr. Wooster Beach (1794-1868) wrote in his treatise on midwifery that "the only infallible signs of pregnancy are . . . the movement of the child," and the "beating of the fetal Heart."[45] But, he added, "we should never forget that a female may be pregnant, and neither of these signs be present, because neither of them are available until after quickening, and even then the child may die."[46] A.S. Taylor stated that the earliest time that pulsations of the fetal heart could be heard was about the fifth month, "but they will be best heard between the sixth and eighth."[47] Wharton, in his 1905 text, concluded that "the positive diagnosis of existing pregnancy can be made only in the second half. . . ."[48]

Before quickening, therefore, it was virtually impossible for either the woman, a midwife, or a physician to confidently know that the woman was pregnant, or, it follows, that the child *in utero* was alive. As a result, the common law adopted the quickening doctrine as a presumption that the child was first "endowed with life" at quickening. An 1872 New York court, in *Evans v. People*,[49] described the evidentiary function of the quickening doctrine as adopted by the common law:

> But until the period of quickening there is no evidence of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life.[50]

A greater understanding of quickening among physicians was evident by the middle of the 19th century. Thomas Denman, a widely cited authority on the subject, confirmed the greater understanding of quickening in 1829:

> The changes which follow quickening have been attributed to various causes. By some it has been conjectured, that the child then acquired a new mode of existence; or that it was arrived to such a size as to be able to dispense with the menstruous blood, before retained in the constitution of the parent, which it dis-

44. AN AMERICAN PRACTITIONER, LONDON PRACTICE OF MIDWIFERY 77 n.v (6th ed. 1826) (emphasis in original).

45. W. BEACH, AN IMPROVED SYSTEM OF MIDWIFERY 65 (1854).

46. *Id.*

47. A. TAYLOR, *supra* note 23, at 535.

48. 3 WHARTON & STILLE'S, MEDICAL JURISPRUDENCE 11 (5th ed. 1905). *See also* State v. Osmus, 73 Wyo. 183, 190, 276 P.2d 469, 470 (1954) ("She showed no signs of pregnancy whatever. . . ."); People v. York, 262 Ill. 620, 105 N.E. 35 (1914).

49. 49 N.Y. 86 (1872).

50. *Id.* at 90.

> turbed by its quantity or malignity. But it is not now suspected, that there is any difference between the aboriginal life of the child, and that which it possesses at any period of pregnancy, though there may be an alteration in the proofs of its existence, by the enlargement of its size, and the acquisition of greater strength.[51]

Beck, in his treatise on medical jurisprudence, noted that the medical profession—though not yet the law—had abandoned the doctrine as medically insignificant:

> It is important to understand the sense attached to this word [quickening] formerly, and at the present day. The ancient opinion, on which indeed the laws of some countries have been founded, was, that the foetus became animated at this period—that it acquired a new mode of existence. This is altogether abandoned. The foetus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received.[52]

Beck denounced the continued reliance upon the concept of quickening by the law, which punished harm to the fetus more severely after quickening then before. "The error consists in denying to the foetus any vitality until after the time of quickening. The codes of almost every civilized country have this principle incorporated into them; and accordingly, the punishment which they denounce against abortion procured after quickening, is much severer than before."[53]

51. T. DENMAN, AN INTRODUCTION TO THE PRACTICE OF MIDWIFERY 287 (3d ed. 1829); W. SMELLIE, *supra* note 42. *See also* T. DENMAN, *supra* note 42, at 133-34 (on quickening). Taylor in 1861 stated that "no evidence but that of the female can satisfactorily establish the fact of quickening." A. TAYLOR, *supra* note 23, at 530-31.

In contrast, the Michigan Supreme Court has recently stated:

> But quickening is only evidence of life. It is not conclusive. It is now known that a fetus is capable of movement long before that movement is felt by the mother. Quickening is nothing more than discernable movement.

Larkin v. Cahalan, 389 Mich. 533, 540, 208 N.W.2d 176, 180 (1973).

52. 1 J. BECK, *supra* note 21, at 276. *See also* 3 WHARTON & STILLE'S, *supra* note 48, at 7 ("This symptom [quickening] was formerly given much weight, because at that time the child was supposed to receive its spiritual nature—to become animate. Such ideas have now become entirely obsolete in the scientific world. The time perfecting the child is at its conception. After then, in all ways, it is merely a question of growth and development"); N. EASTMAN, EXPECTANT MOTHERHOOD 8 (3d ed. 1957) ("[Quickening] is an old term derived from an idea prevalent many years ago that at some particular moment of pregnancy life is suddenly infused into the infant.").

53. 1 J. BECK, *supra* note 21, at 462. *See also* W. BEACH, *supra* note 45, at 82.

Nevertheless, understanding the nature of quickening and being able to prove that the child was alive *in utero* at any particular moment after quickening were two different things. The physiological development of the child was not well understood until the 20th century. In *The Midwife*, Nicholas Culpeper (1616-1654) wrote in his chapter, "The Formation of the Child in the Womb" that "this is the difficultest piece of work in the whole book, nay in the whole study of Anatomy, because such Anatomies are hard to be gotten. . . ."[54] Hamilton, in his 1794 treatise, stated: "Nothing, however, but general circumstances relating to the particular order and progress of the successive germination or evolution of the viscera, extremities, vascular system, and other parts of the human fetus, can be ascertained, as it is beyond the power of anatomical investigation."[55] John Burns, in the 1809 edition of his *Obstetrical Works*, stated that "three weeks after impregnation . . . no fetus is to be found in the uterus."[56] From the perspective of the 1980's, it is incredible that Seaman's 1800 treatise on midwifery advised women and physicians on the signs of a pregnancy with twins and implied that it was impossible to determine the existence of twins until after the delivery of the first child, at which time the evidence for twins was "swelling continuing after the birth of the first child. . . ."[57]

As a result of this primitive knowledge of human life *in utero*, the health of the child *in utero* could not be established unless and until the child was observed outside the womb. Writers on medical jurisprudence noted that, even after quickening, it was extremely difficult to determine whether the child died before or during labor and subsequent expulsion from the womb.[58] Moreover, it was nearly impossible to attribute the injury or death of the child to one cause or another and thus to distinguish between natural causes and inflicted injuries. As a result, live birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts. A.S. Taylor concisely explained the rationale for the born alive rule:

54. N. CULPEPER, THE MIDWIFE 47 (1672).

55. A. HAMILTON, *supra* note 42, at 57.

56. J. BURNS, BURNS' OBSTETRICAL WORKS 7 (2d ed. 1809).

57. V. SEAMAN, *supra* note 37, at 36, 96.

58. The difficult questions for physicians and lawyers were "Has the infant died before delivery? Has it died during delivery? Has it died at the moment of birth, in consequence of deformity of the mother, or congenital disease?" M. RYAN, A MANUAL OF MEDICAL JURISPRUDENCE 137, 138 (1st Am. ed. 1832). *See also* G. MALE, AN EPITOME OF JURIDICAL OR FORENSIC SCIENCE 188, *reprinted in* T. COPPER, TRACTS ON MEDICAL JURISPRUDENCE (1819). *Cf.* People v. Hayner, 300 N.Y. 171, 176, 90 N.E.2d 23, 25 (1949) (where there is no "eye or ear witness . . . evidence of live birth precedent to speedy death is of a nature practically impossible to medical science.") (citing Atkinson, *supra* note 33, at 147, 149). *See also* Gavigan, *supra* note 37, at 24 ("The difficulty of proving the live-birth, as well as the related issue of when the infant became a 'reasonable creature in being', plagued the criminal law.").

> It is well known that in the course of nature, many children come into the world dead, and that others die from various causes soon after birth. In the latter, the signs of their having lived are frequently indistinct. Hence, to provide against the danger of erroneous accusation, the law humanely presumes that every newborn child has been born dead, until the contrary appears from medical or other evidence. The onus of proof is thereby thrown on the prosecution; and no evidence imputing murder can be received, unless it be made certain by medical or other facts, that the child survived its birth and was actually living when the violence was offered to it.[59]

D.J. McCarthy offered the same rationale for the born alive rule in the first decade of the 20th century.[60]

Proof of live birth, even through the middle of the 20th century, was an extremely difficult task if there were no direct witnesses. In 1904, an English commentator noted the unreliability of evidence of live birth when the child was born in secret. "Should the child soon die, someone (often it is not a medical man) must be present and observe both the birth and a subsequent clear vital act; otherwise, there can be no reliable evidence of live birth, for an expert can certify few opinions."[61] If there was no evidence of live birth, there could be no reliable proof that death did not occur prior to birth and was not due to natural causes.

Within the past 15 years, however, a scientific revolution has taken place in obstetrics and fetology—that branch of medicine that deals with the fetus *in utero*. Today, the unborn child is viewed as "the second patient."[62] The medical technologies of real time ultrasound, fetal heart monitoring, fetoscopy, and *in vitro* fertilization, have caused a fundamental revision in the care of the fetus and the understanding of fetal development. These technologies did not exist before 1965.[63] The specific evidence necessary to prove the *corpus delicti* of the homicide of the unborn child *in utero* consists of three elements, proof of which was made possible by recent developments in fetology. The elements are (1) proof of pregnancy or the existence of a live fetus, (2) the death of the fetus, and (3) the criminal agency of the defendant (proximate causation).[64]

59. A. TAYLOR, *supra* not 23, at 411.

60. There is this important point in the nature of the medical evidence required, namely, that it must prove satisfactorily that the child was born alive; in other words the burden of proof that a living child was destroyed is thrown upon the prosecution. The law humanely assumes that a dead child has been born dead, until the contrary is shown, because so many children do thus actually come into the world, and many others die very soon after, from various causes; and in these latter, the signs of their having lived are frequently indistinct.
MEDICAL JURISPRUDENCE AND TOXICOLOGY, *supra* note 25, at 208.

61. Atkinson, *supra* note 33, at 142. *See also* State v. Osmus, 73 Wyo. 183, 202, 276 P.2d 469, 476 (1954).

62. WILLIAMS OBSTETRICS, *supra* note 22, at 267.

63. *See* M. HARRISON, M. GOLBUS & R. FILLY, THE UNBORN PATIENT: PRENATAL DIAGNOSIS AND TREATMENT 1-9 (1984); B. NATHANSON, THE ABORTION PAPERS 17, 120 (1983).

The first element of the *corpus delicti* of the homicide of the unborn child is the existence of a live fetus at the time of the acts in question. Depending on the gestation of the pregnancy, the fact of pregnancy might be quite obvious. The symptoms of pregnancy that would help to prove the existence of a live fetus are divided into three groups: "positive signs, probable signs, and presumptive evidence."[65] The three positive signs are fetal heart action, active fetal movements, and sonographic determinations.[66] Proof of these signs would necessarily prove both the existence of pregnancy and the existence of a live fetus. Today, fetal heart action can be detected by fetoscope, by use of the doppler principle with ultrasound, and by sonography.[67] In addition, other techniques for proving the existence of a live unborn child include amniocentesis, amnioscopy, radiography, and fetography.[68]

Prior to the development of this technology, and especially in the 19th century, fetal heart action could be determined only by the less reliable

See generally DANFORTH & SCOTT, OBSTETRICS AND GYNECOLOGY (5th ed. 1986); KLAUS & FARANOFF, CARE OF THE HIGH RISK NEO-NATE (3d ed. 1986); KNUPPEL & DRUKKER, HIGH RISK PREGNANCY - A TEAM APPROACH (1986); W. KUNZEL, FETAL HEART MONITORING: CLINICAL PRACTICE & PATHOPHYSIOLOGY (1985); A. KURJAK, THE FETUS AS A PATIENT (1985); WILLIAMS OBSTETRICS, *supra* note 22, at 267-93; QUEENAN, MANAGEMENT OF THE HIGH RISK PREGNANCY 135-238 (2d ed. 1985); BEARD & NATHANIELSZ, FETAL PHYSIOLOGY AND MEDICINE: THE BASIS OF PERINATOLOGY (2d rev. ed. 1984); CREASY & RESNICK, MATERNAL-FETAL MEDICINE: PRINCIPLES AND PRACTICE (1984); P. CALLEN, ULTRASONOGRAPHY IN OBSTETRICS AND GYNECOLOGY 159-76 (1983); A. BARSON, FETAL & NEONATAL PATHOLOGY: PERSPECTIVES FOR THE GENERAL PATHOLOGIST (1982); BISHOP & BISHOP, PERINATAL MEDICINE: PRACTICAL DIAGNOSIS AND MANAGEMENT (1982); BORRUTO, HANSMANN, & WLADIMIROFF, FETAL ULTRASONOGRAPHY (1982); BURROW & FERRIS, MEDICAL COMPLICATIONS DURING PREGNANCY 98-105 (2d ed. 1982); E. QUILLIGAN & N. KRETCHMER, FETAL & MATERNAL MEDICINE (1980); W. VAN BERGEN, OBSTETRIC ULTRASOUND: APPLICATIONS AND PRINCIPLES (1980); R. GOODLIN, CARE OF THE FETUS (1979); LONGO & RENEAU, FETAL AND NEW BORN CARDIOVASCULAR PHYSIOLOGY (1978); FETAL PHARMACOLOGY (L. Boreus ed. 1973); ANTENATAL DIAGNOSIS (A. Dorfman ed. 1972); W. WINDLE, PHYSIOLOGY OF THE FETUS (1971); PHYSIOLOGY OF THE PERINATAL PERIOD (U. Stave ed. 1970); FOETAL AUTONOMY (G. Wolstenholme & M. O'Connon eds. 1969); G. MONIF, VIRAL INFECTIONS OF THE HUMAN FETUS (1969).

64. *See infra* note 210.

65. WILLIAMS OBSTETRICS, *supra* note 22, at 211.

66. *Id.* at 211-13.

67. *Id.* at 211. *See also* Erskine, *Failure of Nonstress Test and Doppler-Assessed Umbilical Arterial Blood Flow to Detect Imminent Intrauterine Death*, 154 AM. J. OB. GYN. 1109 (1986).

68. WILLIAMS OBSTETRICS, *supra* note 22, at 267.

means of stethoscope. In 1861, A.S. Taylor wrote that the earliest time at which fetal heart pulsations could be heard by stethoscope was "about the fifth month, but they will be best heard between the sixth and eighth."[69] He noted that "[t]he sound of the foetal heart is, however, not always perceptible; when the child is dead, of course, it will not be met with; but its absence is no proof of the death of the child. . . ."[70] Because of this state of medical knowledge, it was virtually impossible to prove the existence of a live child and, therefore, the *corpus delicti* of homicide before the sixth or eight months, during the third trimester of pregnancy. Evidence of a live child *in utero* in the last trimester, while stronger, was still not sufficient for proof of the *corpus delicti*.

"Probable" signs or "presumptive" evidence of pregnancy have never been sufficient to meet the standards of proof of the criminal law. While there are seven "probable" signs of pregnancy, even today none is "sufficiently accurate to provide positive proof of pregnancy."[71] Finally, mere "presumptive" evidence involves "largely subjective symptoms and signs" detected by pregnant women, including cessation of menses, changes in the breasts, discoloration of the vaginal mucosa, increased skin pigmentation, and the appearance of abdominal striae, and physical perception of pregnancy, including nausea and fetal movement. But these also, by their very nature, are not positive signs.[72]

The two other elements of death and causation in the *corpus delicti* of homicide are intertwined. In the hypothetical case of a vehicular accident, the condition of the child *in utero* can be determined through fetal heart monitoring. It is now "established unequivocally that the fetus breathes throughout most of pregnancy" and these movements can be observed with real-time sonography.[73] Furthermore, the fetal heartbeat can be detected as early as seven weeks gestation by real-time sonography, with trunk movement detected as early as eight weeks and limb movement detected as early as nine weeks.[74] An ultrasound transducer is commonly used to monitor fetal distress. In the aftermath of a vehicular accident, no fetal heartbeat might be evident upon arrival at the hospital. Due to intraabdominal hemorrhaging and possible damage to internal organs, surgery might be medically indicated for the health of the mother. Upon delivery of the child through a Caesarean section, a physician might determine that the death of the stillborn child was the result of placental abruption, caused by a massive trauma to the mother in the accident, and the resulting suffocation of

69. A. TAYLOR, *supra* note 23, at 533.
70. *Id.* at 532.
71. WILLIAMS OBSTETRICS, *supra* note 22, at 216.
72. *Id.* at 217-19.
73. *Id.* at 279.
74. *Id.*

the child *in utero* within minutes.[75] A further examination of the child's skin could determine the time of death. If several hours ensued between the death of the child and its stillbirth, maceration or discoloration of the skin could develop. The skin would loosen and show signs of degeneration. The presence of none of these signs would indicate, in conjunction with the previous fetal heart monitoring, that death had occurred within a short time period.[76] This proof of the *corpus delicti* of homicide of the unborn child *in utero* is made possible by modern medical technology.

Today, it is undisputed that medicine is generally able to prove the *corpus delicti* of the homicide of the unborn child. A stark difference in recent cases from older cases that have considered the born alive rule is that whereas the older courts labor over the medical evidence and discuss it in great detail, the courts now often have conclusive medical testimony in the record before them and take for granted the ability of medicine to prove the constituent elements of the crime.[77] For example, in *Commonwealth v. Cass*,[78] the Massachusetts Supreme Court matter-of-factly disposed of the medical evidence in two sentences.

> The fetus died in the womb and was delivered by Caesarean section. It was determined by autopsy that the fetus was viable at the time of the incident and that it died as a result of internal injuries caused by the impact of the vehicle operated by the defendant.[79]

The parties "stipulated that doctors were able to detect a fetal heartbeat after the collision and that the fetus expired as a result of injuries received in the collision."[80] A live unborn child, subsequent death, proximate causation by the defendant—all the necessary elements which the common law could not prove were clearly proved in *Cass*.

Review of the historical and medical evidence indicates that, throughout the period of the common law, both the quickening doctrine and the born alive doctrine related entirely to evidence of life. Without the modern technological window into the womb, quickening was the first reliable indication that the child *in utero* was alive. Yet, even the occurrence of quickening at some time during the course of pregnancy could not prove that the unborn child, at the time of the acts in question, was alive. The mere fact

75. Placental abruption is the separation of the placenta from the uterine wall before the delivery of the fetus. WILLIAMS OBSTETRICS, *supra* note 22, at 395-407.
76. This scenario occurred in State v. Evans, No. 22292 (Montgomery Co., Tenn. Cir. Ct. Feb. 6, 1986), *appeal docketed*, No. MD 86-112-III (Tenn. Ct. App. May 9, 1986).
77. *See, e.g.*, Commonwealth v. Cass, 292 Mass. 799, 467 N.E.2d 1324 (1984); State v. Soto, 378 N.W.2d 625, 627 (Minn. 1985).
78. 392 Mass. 799, 467 N.E.2d 1324 (1984).
79. *Id.* at 800, 467 N.E.2d at 1325.
80. *Id.* at 807 n.7, 467 N.E.2d at 1329 n.7.

that the mother had felt the child at some time did not prove that is was still alive at the time of the material acts or that death was not due to natural causes.[81] Even after the woman had "quickened," it was virtually impossible to determine whether the fetus was alive at the moment of any injury, or had survived labor and delivery, unless the child was born alive and observed thereafter.[82] Only an examination of the child after live birth could prove that the fetus had not died from natural causes after quickening or during the process of birth. Given the state of medical technology until the 20th century, the only sufficient proof that the material acts caused the death of a live unborn child was its birth alive and death thereafter.[83] In fact, a review of the common law authorities indicates that the common law had such great difficulty in determining, as a matter of medical evidence, when and whether the unborn child was alive that the law was forced to rely on evidence that the child, no matter what stage of gestation, was born alive.

IV. The Born Alive Rule at Common Law

A. *The Common Law Authorities on the Born Alive Rule*

Common law authority on the law of homicide of the unborn child dates back to the 13th century and the writing of Bracton (d. 1268). Bracton held that the killing of a quickened fetus ("already formed or animated") was homicide.[84] Fleta, likewise, in the chapter on homicide in his treatise (1290?) held that it was homicide to kill a fetus "already formed and quickened" or "a quickened child" in the womb.[85] Neither Bracton nor Fleta expressly required that the child be born alive for the killing to constitute a homicide.[86]

However, a contemporary of Bracton and Fleta, Andrew Horne, adopted the born alive rule in his treatise, *The Mirrour of Justices*, written by the early 1300's:

> Of infants killed ye are to distinguish, whether they be killed in their mothers womb or after their births; in the first case it is not adjudged murder; for that none can judge whether it be a child before it be seen, and know whether it be a monster or not; . . .[87]

By emphasizing the need for observation of the child, Horne demonstrated the evidentiary function of the born alive rule. *The Mirrour of Justices* is apparently the earliest common law authority which acknowledged a born alive rule.

Subsequent common law authorities, William Staunforde and William Lambarde in the 16th century, also adopted the born alive rule. Staunforde (1509-1558) wrote that it was "not a felony" to kill a child in the mother's womb because "the thing killed has no baptismal name; second, because it is difficult to judge whether he killed it or not, that is, whether the child

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81. The child may have died from labor or delivery. *See* 1 J. Beck, *supra* note 21, at 378 (on signs of the death of the child before or during delivery). *See* Dellapenna, *supra* note 33, at 378.

82. *See* Dellapenna, *supra* note 33, at 370, 377, 378. "In infanticide cases an element additional to the required elements of the usual homicide case must be established by the State beyond a reasonable doubt, namely that the deceased babe was born alive, it being axiomatic that one cannot kill something already dead." Singleton v. State, 33 Ala. App. 536, 540, 35 So. 2d 375, 378 (1948).

83. *See supra* notes 54-61 and accompanying text. *See also* Gavigan, *supra* note 37, at 20.

84. If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide.

2 Bracton On The Laws and Customs of England 341 (S. Thorne trans. G. Woodbine ed. 1968). Bracton wrote in the 13th century during the time of Henry III. *See* 2 W. Holdsworth, A History of English Law 232 (4th ed. 1936) (Methuen & Co. Reprint 1971). Bracton looked to see whether the child was alive ("aminated"). Did it move? If so, its death was the death of a live human being and therefore homicide. Bracton did not require any live birth rule, although, given the medical technology of the day, it is questionable whether one could tell that the fetus was ever "animated" unless the mother could so testify or unless it was observed outside the womb (live birth).

85. He, too, in strictness is a homicide who has pressed upon a pregnant woman or had given her poison or has struck her in order to procure an abortion or to prevent conception, if the fetus is already formed and quickened, and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by a potion or the like, she destroys a quickened child in her womb.

2 Richardson & Sayles, Fleta 60-61 (Selden Society ed. 1955). Fleta wrote during the time of Edward I. *See* 2 W. Holdsworth, *supra* note 84, at 319, 321. John Selden recognized Fleta as authority for the law on this point. Atkinson, *supra* note 33, at 142 (citing J. Selden, Dissertations on Fleta (1647)). Fleta also rested the rule on whether the "fetus" or "child" had "quickened." If so, it was homicide even if the child was "destroyed" in the womb. Fleta also did not require a live birth rule.

86. It is not completely clear why Bracton and Fleta did not expressly require any born alive rule but held that the killing of the child even in the womb was homicide. Their construction of the law, however, was influenced by canonists of the 12th-13th centuries, such as Raymond of Pennaforte (d. 1275). J. Connery, Abortion: The Development of the Roman Catholic Perspective 97, 102 n.39 (1977). Roland Bandinelli (d. 1181) held that even the will to kill amounted to homicide, whether or not the death of the human being followed. *Id.* at 93. Under such an interpretation of the law, medical evidence of the death of the fetus and of causation, which was the function of the born alive rule, would not be necessary.

87. A. Horne, The Mirrour of Justices 209 (1903 ed.) (Rothman Reprint 1968); 2 J. Reeves, History of the English Law 358-59 (2d ed. 1787) (Rothman Reprint 1969).

Reeves, in his History of the English Law, affirms that the rule around the time of Glanville and Bracton, was "that if, after the fetus was formed and animated, any one struck a woman and so caused an abortion, or even if any thing was given to procure an abortion, it was homicide." *Id.* at 10-11. *See also* 3 J. Reeves, History of English Law at 120.

died of this battery of its mother or through another cause."[88] Lambarde (1536-1601) held that the killing of a "childe newly borne" is "felony of the death of a man" but "if a childe be destroyed in the mothers belly, is no manslayer nor Felone to be imprisoned upon this Statute."[89] In the next

88. It is required that the thing killed be *in rerum natura*. And for this reason if a man killed a child in the womb of its mother: this is no felony, neither shall he forfeit anything, and this is for two reasons: First because the thing killed has no baptismal [sic] name; Second, because it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause. Thus it appears in the [Abortionist's Case (1348)]. And see [The Twinslayer's Case (1327)] a stronger case. . . .

W. STAUNFORDE, LES PLEES DEL CORON CAP. 13, 21 (1557) (Prof. Books Limited ed. 1971). (This translation is from Destro, *supra* note 33, at 1271).

Staunforde relied on two 14th century cases—a 1327 case, Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327) (denominated The Twinslayer's Case), and a 1348 case, Anonymous, Y.B. Mich. 22 Edw. 3 (1348) (dominated The Abortionist's Case). *See* Means, *The Phoenix of Abortional Freedom: Is A Penumbral or Ninth-Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336-43 (1971). Cyril Means contended that these two cases established a common law "liberty" to abortion. *Id.* In the Twinslayer's Case, the defendant was "released to Mainpernors", or bailed. BLACK'S LAW DICTIONARY 859 (5th ed. 1979). The writ was not dismissed; the proceeding was only adjourned. When the chief justice ordered the defendant to be brought in under the writ, he was not available, being under arrest in another town on another charge. Because of the incomplete resolution of the case, and because there was no question of the sufficiency of the indictment, The Twinslayer's Case cannot stand as any authority on the law of the homicide of the unborn child. Dellapenna, *supra* note 33, at 366-67; Destro, *supra* note 33, at 1267-73; Byrn, *supra* note 21, at 817-19. The 1348 Abortionist's Case, however, more clearly demonstrates the evidentiary problems of the common law:

> One was indicted for killing a child in the womb of its mother, and the opinion was that he shall not be arrested on this indictment since no baptismal name was in the indictment, and also it is difficult to know whether he killed the child or not, etc.

Anonymous, Y.B. Mich. 22 Edw. 3 (1348) (quoted in Destro, *supra* note 33, at 1270). Coke held that the 1327 case "was never holden for law," and that the 1348 case was "but a repetition of that [the 1327] case." E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1628) (Garland Pub. reprint 1979). An English scholar in 1942 concluded that these cases were decided on the evidentiary grounds. Winfield, *The Unborn Child*, 4 U. TORONTO L.J. 278, 280 (1942), *reprinted in* 8 CAMBRIDGE L.J. 76, 79 (1942). *See also* Gavigan, *supra* note 37, at 23; Davies, *Child-Killing in English Law*, 1 MOD. L. REV. 203 (1937) "Staunforde, Lambard and Hale [were] impressed by the difficulty of proving that the death of a live-born child was occasioned by a defendant's prenatal acts. . . ." *Id.* at 209.

Nevertheless, regardless of what proposition of law these cases stand for, they are only authority in American law if they have been accepted by American courts as authoritative. Van Ness v. Packard, 27 U.S. (2 Pet.) 137, 144 (1829); Untied States v. Robert Worrall, 2 Dall. 384 (D. Pa. 1798); Parker v. Foote, 19 Wend. 309 (N.Y. 1838). Apparently, the only American court which has cited them is the opinion of Justice Holmes, rejecting a cause of action in tort for prenatal injuries, a decision later overturned, Dietrich v. Northampton, 138 Mass. 14, 15 (1884), *rev'd*, Torigan v. Waterton News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

89. If the mother destroy her childe newely borne, this is felony of the death of a man, though the childe have no name, nor be baptized. And the Justice of Peace may deale accordingly. But if a childe be destroyed in the mothers belly, is no manslayer nor Felone to be imprisoned upon this Statute.

W. LAMBARDE, EIRENARCHA, OR OF THE OFFICE OF JUSTICES OF PEACE 217-18 (1581 ed.) (De Capo Press Reprint 1970). *See generally* B. PUTNAM, EARLY TREATISES ON THE PRACTICE OF THE JUSTICES OF THE PEACE IN THE FIFTEENTH AND SIXTEENTH CENTURIES (1924 ed.) (Oxford Studies in Social and Legal History vol. 7, No. 3, reprint 1974). The immateriality of the baptismal name is clear in Lambarde's construction of the law. Lambarde states that it is a felony if a newly born child is killed, but neither manslaughter nor felony if the child is destroyed in the mothers belly "upon this statute." W. LAMBARDE, at 218. Which statute Lambarde is referring to is difficult to determine from the context. In any case, Lambarde's statement cannot be taken to be anything beyond or different from Staunforde's rule.

As a justice of the peace on February 22, 1586, Lambarde bound over a woman, Sara Gold, and "committed to the gaol," "for destroying her child whereof she was delivered that day." WILLIAM LAMBARDE AND LOCAL GOVERNMENT 42 (C. Read ed. 1962). It is unclear from this passage whether the child was stillborn or born alive and died thereafter. It is also unclear whether the death was from infanticide or from an abortion, "Destroying her child" may denote abortion as that was common language used to refer to abortion in that day. "Delivered that day" may well have been a premature birth resulting from the abortion. In any case, it is simply unclear from this passage.

90. Note also in murder, or other homicide, the party killed must be In Esse (. . . in rerum natura, for If a man kill an Infant in his mothers wombe, by our law, this is no felony: neither shall he forfeit any thing for such offense: and whether (upon a blow or hurt given to a woman with child) the child die within her body, or shortly after her delivery, it maketh no difference. . . .

M. DALTON, THE COUNTREY JUSTICE (1618 ed.) (Walter J. Johnson Inc. reprint 1975).

91. *See* Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); Shedd v. State, 178 Ga. 653, 173 S.E. 847, 848 (1934); Clarke v. State, 117 Ala. 1, 23 So. 671, 674 (1898).

92. 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 misprision, and no murder: but if the childe be born alive; and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.

century, Michael Dalton (d. 1648), in another treatise designed to assist justices of the peace, *The Countrey Justice*, stated that "in murder, or other homicide, the party killed must be in esse (in rerum natura . . .)." Killing the child in the womb was "no felony."[90]

The common law authorities who have had the most impact on American law, and who have been accepted by American courts as the authority for the common law, are the 17th century authority, Sir Edward Coke (1552-1634), and the 18th century authority, Sir William Blackstone (1723-1780). Coke and Blackstone were repeatedly adopted by American courts as authorities for the general legal principles governing the killing of the unborn child and for the born alive rule.[91] Coke held that when the woman "be quick with childe," the killing of an unborn child "is a great misprision, and no murder." However, if "the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive."[92]

During Coke's time, the born alive rule, and its evidentiary foundation, were enunciated in the 1601 *Sim's Case*[93] where it was stated:

> [T]he difference is where the child is born dead, and where it is born living, for if it be dead born it is no murder, for non constat [it cannot be proved], whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the batteror shal be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.[94]

The *Sim's Case* has been cited as authority for the born alive rule in American courts.[95]

Blackstone, in his *Commentaries*, closely followed Coke:

> [T]he person killed must be 'a reasonable creature in being and under the king's peace,' at the time of the killing . . . To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.[96]

Blackstone held that the killing of a child in the womb was nevertheless "a very heinous misdemeanor."[97] Blackstone noted that because it was "difficult to prove the child's being born alive . . . in the case of the murder of bastard children by the unnatural mother," England enacted a presumptive rule of evidence that in the case of concealment of the death of a bastard child "the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead."[98] Blackstone noted that such a statute was contained "in the criminal codes of many other nations of Europe; as the Danes the Swedes, and the French."[99] Finally, Blackstone suggested that it was common "in England, upon trials for this offense, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by it's parent) is admitted to convict the prisoner."[100] The statute made concealment "almost conclusive evidence" of murder.[101] The born alive rule was apparently not enough to enable the law to prove a case, and the statute was enacted to remedy the situation.

In his section on the "law of persons," Blackstone wrote that "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us. . . ."[102] The most basic right of persons was the "right of personal security" which consists of "a person's legal and uninterrupted enjoyment of his life. . . ."[103] Blackstone held that life was "a right inherent by nature in every individual." That

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E. COKE, *supra* note 88, at 50.

At approximately the same time that Coke wrote, according to Francis Mauriceau (1637-1709), the killing of an unborn child after quickening was apparently a capital offense, while killing the fetus before quickening was punished with a fine.

> As Prudence is necessary to enable a Chirurgeon or Midwife to Assure a Woman that she is with Child, or not, and of a true or false Conception: so it is likewise as much for them to know how far she is gone, to the end they maybe certain whether the Infant be yet quick or no, which is of great Moment: Because, according to the Law, if a big-bellied Woman miscarry by a Wound, he that struck her deserves Death, in case the child were quick, otherwise he is only condemned in a pecuniary Punishment.

F. MAURICEAU, *supra* note 42, at 29.

Cyril Means dismissed Coke with *ad hominem* arguments. Means, *supra* note 88, at 345-47. But it is clear that Both English and American law accepted Coke as authoritative. *See, e.g.*, Payton v. New York, 445 U.S. 573, 594 (1980) (Coke was "widely recognized by the American colonists as the greatest authority of his time on the laws of England. . . ."). Coke carried considerable authority with English and American lawyers. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 283-84 (5th ed. 1956). Coke's rule on the homicide of the unborn child "is the view generally accepted in modern times". Davies, *supra* note 88, at 209. Despite Means' *ad hominem* attack, Means, *supra* note 88, at 345-47, there is support for Coke's holding that the killing of a quickened fetus was a great misdemeanor. Gavigan, *supra* note 37, at 28-29 (citing the 1732 case of *Eleanor Beare*).

Means' construction of the law and criticism of the common law authorities has been thoroughly analyzed and refuted. *See* S. KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 134-48 (1984); Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 65-68 n.125 (1985); Gavigan, *supra* note 37, at 22-23 ("Means has made a fundamental error in interpretation"); Dellapenna, *supra* note 33, at 363; Gorby, *The 'Right' to an Abortion, The Scope of Fourteenth Amendment 'Personhood' and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1; Destro, *supra* note 33, at 1267-73; Byrn, *supra* note 21, at 815-27.

93. Regina v. Sims, Gouldsb. 176, 75 Eng. Rep. 1075 (K.B. 1601). Sims has been cited as authority for the born alive rule in American courts. *See* Hall v. Hancock, 32 Mass. (15 Pick.) 255, 256 (1834) (argument of counsel, citing Gouldsb. 176).

94. 75 Eng. Rep. at 1076. *Non constat* is a latin phrase meaning "it does not appear; it is not clear or evident." BLACK'S LAW DICTIONARY 948 (5th ed. 1979). Matthew Bacon emphasized the evidentiary reasons for the born alive rule. 5 M. BACON, A NEW ABRIDGMENT OF THE LAW OF ENGLAND 121 (6th ed. 1807).

95. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 256 (argument of counsel).

96. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198 (1765 ed.) (U. of Chi. Press Facsimile 1979) (hereinafter W. BLACKSTONE).

97. 1 W. BLACKSTONE, *supra* note 96, at 126.

98. 4 W. BLACKSTONE, *supra* note 96, at 198 (citing "An Act to prevent the destroying and murthering of bastard children," 21 Jac. I. c. 27 (1623)). *See* Gavigan, *supra* note 37, at 24 n.33; Davies, *supra* note 88, at 213.

99. 4 W. BLACKSTONE, *supra* note 96, at 198.

100. *Id.*

101. *Id.*

102. 1 W. BLACKSTONE, *supra* note 96, at 119.

103. *Id.*

right to life "begins in contemplation of the law as soon as an infant is able to stir in the mother's womb," or, in other words, by the time of quickening.[104] Given the context of this passage in his section on the "law of persons", Blackstone affirmed that the unborn child was considered to be a person at quickening, when it was first determined to be alive.[105]

Blackstone's discussion on the right to life of persons, as compared with his description of the law of homicide, indicates that the born alive rule was not a substantive element in the criminal law defining a human being. An unborn child could not be considered a "person" with a right to life and personal security at quickening, and yet not be considered a "human being" when that right to life and personal security was denied by the killing of the child in the womb. The implicit contradiction in Blackstone only arises from the assumption that the born alive rule was substantive. There is no contradiction when the born alive rule is recognized to be an evidentiary principle that was required by the state of medical science of the day. Thus, Blackstone held that the unborn child was a "person" with a right to life at quickening, but recognized that proof of the denial of that right at common law could not be obtained without live birth.

Two other common law authorities on which American courts have relied are William Hawkins (1673-1746) and Sir Matthew Hale (1609-1676). Hawkins, held that "the causing of an Abortion" to "a Woman big with Child" was "a great Misprision" and not murder, "unless the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary."[106] Hale held that "if a woman be quick or great with child" and "the child within her is killed, it is not murder nor manslaughter by the law of England, because is it not yet in

104. *Id.*

105. *Id.* at 125-26; J. NOONAN, PERSONS AND MASKS OF THE LAW 47 (1976) ("From the time God formed the human being in the womb, Blackstone declared, a person existed.").

At common law, the terms "human being" and "person" were "synonymous". Meadow v. State, 722 S.W.2d 584, 585 (Ark. 1987). Modern dictionaries, like the common law, uniformly define a "person" as "a human being". *See* BLACK'S LAW DICTIONARY 1028 (5th ed. 1979); FUNK & WAGNALL'S DICTIONARY 489 (1984); WEBSTER'S NEW WORLD DICTIONARY 1061 (1984).

106. And it was anciently holden, That the causing of an Abortion by giving a Potion to, or striking, A Woman big with Child, was Murder: But at this Day, it is said to be a great Misprision only and not murder, unless the Child be born alive, and died thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary, And in this Respect also, the Common Law seems to be agreeable to the Mosaical which as to the purpose is thus expressed, If men stive and hurt a Woman with Child, so that her Fruit depart from her, and yet no Mischief follow, he shall be surely punished, according as the Woman's husband will Lay upon him, and he shall pay as the Judges determine; And if any Mischief follow, then thou shalt give Life for Life.

1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 31, § 16, p. 78 (1716 ed.) (Garland Pub. reprint 1978).

rerum natura. . . ." But, "if the child is born . . . this is murder."[107]

The adoption of the principle *in rerum natura* by Staunforde, Coke, and Blackstone to explain the born alive rule further demonstrates the evidentiary nature of the rule. The latin phrase, *in rerum natura*, means in English "in the nature of things; in the realm of actuality; in existence."[108] Coke and Blackstone understood the phrase to mean "reasonable creature in being."[109] Staunforde, Dalton, Coke, and Hale held that the unborn child is *in rerum natura* when it is born alive. Staunforde reasoned that since the subject of homicide had to be *in rerum natura*, the unborn child could not be the subject of homicide because one could not prove the cause of the injury.[110] Coke's description of this rule is especially interesting, for he held that "in law [the unborn child] is accounted a reasonable creature, in rerum natura, when it is born alive."[111] In other words, Coke is referring to a legal presumption ("in law it is accounted"). This presumption was required because of the evidentiary problems which surrounded live birth.

Coke's statement that the child is "in rerum natura when it is born alive" does not mean that the common law did not view the unborn child as a human being or person before it was born alive. As noted above, Blackstone viewed the unborn child as a person, but not one that could be the subject of homicide, because the evidentiary problems prevented proof of the *corpus delicti* of homicide in the case of a stillborn child.[112] In addition, some English cases, citing Coke's explanation of the rule *in rerum natura*, indicate that the unborn child was not considered *in rerum natura* only in the law of homicide, where the evidentiary problems prevented proof with certainty of the criminal agency of the death of the unborn child. For other purposes, such as inheritance—where it was not necessary to prove with

107. If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura . . . But if a man procures a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kills the infant, this is murder.

1 HALE, PLEAS OF THE CORN 433 (1778). *See also* Edward Hyde East's (1764-1847) treatise, 1 E. EAST, PLEAS OF THE CROWN 227-28 (1803). *But see* Millar v. Turner, 1 Ves. Sen. 85, 27 Eng. Rep. 907 (1747), where Lord Chancellor Hardwick stated that "the destruction of [the unborn child] is murder; which shews the laws considers such infant as a living creature. . . ." *Id.* at 86, 27 Eng. Rep. at 908. *See also* Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257 (1834) (argument of counsel).

108. BLACK'S LAW DICTIONARY 714 (5th ed. 1979).

109. *Cf.* E. COKE, *supra* note 88, at 50; 4 W. BLACKSTONE, *supra* note 96, and accompanying text.

110. *See supra* note 88 and accompanying text.

111. E. COKE, *supra* note 88, at 50.

112. *Cf.* 1 W. BLACKSTONE, *supra* note 96, at 119. *See also* 4 W. BLACKSTONE, *supra* note 96, at 198.

certainty that the child at the precise moment was dead or alive—the unborn child was recognized as a person *in rerum natura* in the womb.[113] Likewise, for the same reason, the legal significance of quickening as evidence of life was limited to criminal cases and was not material in inheritance cases.[114] In *Wallis v. Hodson*, the Lord Chancellor wrote that "the plaintiff was *in ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's life time."[115] Likewise, Lord Chancellor Harcourt, in *Beale v. Beale*,[116] relied on Coke's statement of the *in rerum natura* rule to find a posthumous child "to be *living at her father's death in ventre sa mere*."[117] An 1820 Mississippi court, in *State v. Jones*,[118] held that a slave could be the subject of murder and affirmed the capital sentence of the murderer. In dictum, the court considered "an unborn child" to be "a reasonable creature," along with "lunatics" and "idiots."[119] Black's Law Dictionary, citing civil law, states that the unborn child, prior to quickening, is *in rerum natura*. "[*In rerum natura*] is a broader term than *in rebus humanis*: e.g., before quickening, he is *in rebus humanis* as well as *in rerum natura*."[120] The distinction between *in rerum natura* and *in rebus humanis* in this passage indicates that the unborn child was considered a human being even before its life was first discernable, since it considered even a pre-quickened child *in rerum natura* and considered a quickened, unborn child *in rebus humanis*.

The use of the phrase, *in rerum natura*, in the law of homicide and inheritance thus indicates that, as applied to the unborn child, it referred to nothing more significant than a "living human being." Because of problems of proof, the common law created the presumption for purposes of homicide that the unborn child was only *in rerum natura*, or a living human being, upon live birth. The use of the rule *in rerum natura* to determine homicide indicates that the common law pronounced the killing of the unborn child to be homicide when it could be determined to be alive, and due to the state

113. Bryn, *supra* note 21, at 820. *See also* Davies, *supra* note 88, at 205-06 (arguing that the born alive rule and the rule *in rerum natura* was one of "convenience", citing III STEPHEN, HISTORY OF CRIMINAL LAW at 2). *See also* Destro, *supra* note 33, at 1271 ("In the case of infanticide, the child, according to Staunforde, was clearly *in rerum natura* (in existence) at the time it was killed, a fact which at the time could not be substantiated in the case of an abortion.").

114. *See* Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257 (1834) (Shaw, C.J.).

115. Wallis v. Hodson, 2 A. & K. 114, 117, 26 Eng. Rep. 472, 473 (Ch. 1740).

116. Beale v. Beale, 1 P. Wms. 244, 24 Eng. Rep. 373 (Ch. 1713).

117. *Id.* at 246, 24 Eng. Rep. at 373.

118. State v. Jones, 1 Miss. (1 Walker) 83 (1820).

119. *Id.* at 85.

120. BLACK'S LAW DICTIONARY 901 (Rev. 4th ed. 1968) (citing CALVINUS, LEX). The fifth edition does not include the reference to CALVINUS, LEX.

of medicine, the law presumed this to occur upon live birth.

Finally, the practical application of the born alive rule also demonstrates that the rule was an evidentiary and not a substantive moral definition of a human being at common law. In practice, the born alive rule was applied to proscribe as homicide the killing of a child even if the mortal injuries were inflicted while the child was still *in utero*.[121] If the rule was truly a substantive definition of human being, and a fetus only became a human being at birth, then injuring an unborn child *in utero* would not be injuring a human being. In that case, the death of the child out of the womb could not satisfy the *corpus delicti*, because the criminal agency of the defendant—the moral connection between the infliction of the injury and the resulting death—would not exist.[122] The child would not be a human being both at the time of the injury and the time of the death. If the born alive rule was a substantive rule, then homicide could only result from injuries inflicted after birth, because only then would they be inflicted on "a human being." The common law, however, did not adopt this proposition. Rather, the common law considered the injury of the child *in utero* to be a constituent part of the homicide of the unborn child, as long as it died out of the womb. The law necessarily found the injury to the child *in utero* to be an injury to a human being in order to find the subsequent death after birth to be a homicide.

The common law authorities are all so brief in their statement of the law that it is difficult to obtain a complete and accurate understanding of what they meant without resort to an analysis of the broader medical context of the law of crimes in that day.[123] It is clear, however, that the common law punished as homicide the "killing of any human creature."[124] The breadth of this common law definition is significant. The common law did not confine homicide to a select subgroup of human creatures called "persons."[125] It did not distinguish between "persons" and "human beings," but protected all "human creatures."[126] "The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority."[127]

121. *See supra* notes 92, 96 and accompanying text. *See* Davies, *supra* note 88, at 209.

122. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 34 (1972).

123. *See* Dellapenna, *supra* note 33, at 363.

124. BLACK'S LAW DICTIONARY 867 (Rev. 4th ed. 1968).

125. *See supra* notes 102-05 and accompanying text. *Cf.* Shedd v. State, 178 Ga. 653, 654, 173 S.E. 847, 848 (1934) (wherein it was stated that the independent circulation test is used "for determining when a child becomes a human being *in such a sense as to become the subject of homicide*.") (emphasis added).

126. BLACK'S LAW DICTIONARY 867 (Rev. 4th ed. 1968). *See supra* notes 92, 96 and accompanying text.

127. Commonwealth v. Mink, 123 Mass. 422, 425 (1877).

The determination of whether the unborn child was a living human being was plagued by a number of medical considerations. First, the incidence of infant mortality was very high during the period of the common law.[128] Second, medicine could not determine with any reliability the existence of a live child until the 16-18th week of gestation. Third, the law could not determine the cause of the death *in utero* with any degree of certainty after quickening. With this unreliability and uncertainty, the law was wary of imposing the capital sentence in suspected cases of the killing of an unborn or newly born child. As a result, the law adopted the presumption that the new born child was born dead, unless positive evidence was provided of live birth.[129] Amos Dean wrote that "[t]he law in this country requires not merely *presumptive*; but *actual proof* that the child was born alive. The legal presumption is, that the child was born as it is found; viz., divested of life. To rebut this presumption nothing short of clear positive proof is sufficient."[130] Most scholars who have examined the born alive rule have concluded that it was based on these problems of proof.[131]

128. Chitty stated, in his 1835 treatise, that "on an average, one child in sixteen, or between that number and twenty, is usually dead before delivery. . . ." J. CHITTY, *supra* note 28, at 416. Infant mortality "probably averaged around 150 per 1000 live births throughout the nineteenth century." A OAKLEY, *supra* note 37, at 32. *See also* People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92, 94 (1947); Singleton v. State, 33 Ala. App. 536, 542, 35 So. 2d 375, 380 (1948).

129. *See supra* notes 59, 60 and accompanying text. *See* Davies, *supra* note 88, at 214.

130. A. DEAN, *supra* note 42, at 168 (emphasis in original). *See also* MEDICAL JURISPRUDENCE AND TOXICOLOGY, *supra* note 25, at 226.

131. *See* People v. Guthrie, 417 Mich. 1006, 334 N.W.2d 616 (1983) (Ryan, J., dissenting from denial of leave to appeal); Damasiewicz v. Gorsuch, 197 Md. 417, 437, 79 A.2d 550, 559 (1951); Note, *Judicial Recognition of Feticide: Usurping the Power of the Legislature?*, 24 J. FAM. L. 43, 45 (1985-86); 3 W. HOLDSWORTH, *supra* note 84, at 315; Dellapenna, *supra* note 33, at 344-79; Gavigan, *supra* note 37, at 24; Davies, *supra* note 88, at 209, 213, 214, 218; Note, *supra* note 24, at 536-37; Comment, *Is The Intentional Killing Of An Unborn Child Homicide?*, 2 PAC. L.J. 170, 176 (1971); Note, *The Role of the Law of Homicide In Fetal Destruction*, 56 IOWA L. REV. 658, 660 n.13 (1971); Note, 20 SO. CAL. L. REV. 357, 358 (1947). *See supra* notes 58-60 and accompanying text. *But see* King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. LAW REV. 1647, 1657-59 (1979). King's analysis and conclusion that the born alive rule was a common law definition of "personhood" is seriously flawed. Her inquiry does not reach back farther than the case of Winthrop v. State, 43 Iowa 519 (1876), the only case on the homicide of the unborn child that she examines in any depth. Moreover, she seems to make no distinction between the treatment accorded the unborn child under inheritance law and under criminal law. *Cf. supra* notes 113-17 and accompanying text. Finally, her statement that "[l]ive birth was an adequate and uncomplicated standard", 77 MICH. L. REV. at 1657, is repudiated by abundant evidence. *See, e.g.*, Westerfield, *supra* note 7, at 149-51; Note, *Proving Live Birth in Infanticide*, 17 WYO. L.J. 237 (1963); *supra* notes 58-61 and accompanying text and *infra* note 210 and accompanying text. *See also* Westerfield, *supra* note 7, at 149-55. Westerfield's conclusions as to the reason for the born alive rule are unclear. He seems to waver between the conclusion that it was an evidentiary standard and the conclusion that it was a moral definition of human being. *Id.*

Although the born alive rule prevented a prosecution for homicide in any case in which a child was stillborn, the punishment for the killing of a child born alive as homicide did not depend on the gestational age of the unborn child. A fetus may not have quickened and yet be born alive. Such a fetus, however, might well be of such developmental immaturity as not to be able to survive. Yet, if an act produced a miscarriage and the fetus was born alive but died thereafter, the actor could be charged with homicide under the common law rule.[132] Similarly, a fetus might not be viable and yet be born alive. This infant might die soon after birth.[133] If the fetus was born alive at common law and later expired, the actor could be indicted for homicide.[134] In an 1848 English case, *Regina v. West*,[135] the act of the defendant killed a child of six months gestation—"so much earlier than the natural time that it is born in a state much less capable of living."[136] The evidence indicated that the child died after live birth due to its prematurity. Nevertheless, the judge, in applying the born alive rule, instructed the jury that this was "murder."[137]

Despite the common law's technological inability to prove pregnancy before quickening, or to prove homicide before live birth, other prophylactic penal measures were in place which prevented the killing of the child *in utero* without requiring proof of the *corpus delicti* of homicide. Although the common law could not prove homicide in the womb, it proscribed acts which would terminate gestation after the first evidence of life in the womb, quickening. This was the role played by abortion statutes, which were originally applicable to midwives. Such regulations on midwives were enacted in the American colonies as early as the eighteenth century. In Virginia, an ordinance was passed by which "[m]idwives were pledged to expose infanticide, to summon other midwives in suspicious cases and not to induce abortion or charge exorbitantly."[138] New York City also passed an ordinance in 1716 prohibiting midwives from procuring miscarriage.[139] Thus, although

132. Beck noted that a child could be born alive at three months, which would most likely be before quickening, but might not survive. 1 J. BECK, *supra* note 21, at n.404.

133. For example, in State v. Lewis, 429 N.E.2d 1110 (Ind. 1981), *cert. denied*, 457 U.S. 1118 (1982), a 5½ month to 6 month gestational fetus was born alive but died two hours after birth.

134. Russell states the rule as follows: "If a person intending to procure abortion causes a child to be born so soon that it cannot live, and it does in consequence, this is murder, though no bodily injury be inflicted on the child." 2 RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 670-72 (1865 ed.) (Garland Pub. reprint 1979).

135. Regina v. West, 2 C. & K. 784, 175 Eng. Rep. 329 (1848).

136. *Id.* at 787, 175 Eng. Rep. at 330.

137. *Id.* The judge's conclusion was based on the born alive rule and not on any English statute.

138. S. MASSENGILL, *supra* note 37, at 294. *See generally* Davies, *supra* note 88, at 212.

139. Horan & Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in NEW PERSPECTIVES ON HUMAN ABORTION 199 (Hilgers, Horan & Mall, eds. 1981).

medical technology may have prevented prosecutions for homicide, other preventive laws were adopted.A review of these common law authorities, understood in the context of the medical environment of the day, demonstrates that the common law protected the unborn child from the earliest moment in pregnancy that is could be determined to be alive. The conditioning of homicide upon live birth was due to the problems of proving the cause of death of a live human being. Nevertheless, the common law held that the killing of a child born alive at any period of pregnancy who died thereafter was homicide.

B. Other Common Law Rules of Medical Evidence

Another common law rule of evidence is analogous to the born alive rule in demonstrating the relationship between medicine and the common law. The "year and a day" rule, which was adopted to govern proof of death in homicide cases, created the presumption that if a victim did not die within a "year and a day" of the attack, his death could not have been caused by the attack.[140] Like the born alive rule, the "year and a day" rule is of nearly ancient origin and can be traced back to the Statutes of Gloucester (1278) in the reign of King Edward I.[141]

The "year and a day" rule is generally acknowledged to have been a rule of presumptive evidence adopted by the common law because of the primitive state of medical science at common law. Coke explained, as the reason for the rule, that if the alleged murder victim "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life the rule of law ought to

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Well before the so-called drive of the American Medical Association (AMA) in the 1860's against abortion, physicians opposed the killing of the unborn child at any time of pregnancy. John Burns, in his OBSTETRICAL WORKS, stated, in a lecture to students:

> . . . I must remark, that many people at least pretend to view attempts to excite abortion as different from murder, upon the principle that the embryo is not possessed of life, in the common acceptation of the word. It undoubtedly can neither think or act; but upon the same reasoning, we should conclude it to be innocent to kill the child in the birth.
>
> Whoever prevents life from continuing, until it arrive at perfection, is certainly as culpable as if he had taken it away after that had been accomplished. I do not, however, wish from this observation, to be understood as in any way disapproving of those necessary attempts which are occasionally made to procure premature labour, or even abortion, when the safety of the mother demands this interference, or when we can thus give the child a chance of living, who otherwise would have none.

J. BURNS, *Observations on Abortion*, in BURN'S OBSTETRICAL WORKS 34-35 (1809). *See also* G. MALE, ELEMENTS OF JURIDICAL OR FORENSIC MEDICINE 156 (2d ed. 1818).

140. E. COKE, *supra* note 88, at 53.

141. *See, e.g.*, State v. Hefler, 310 N.C. 135, 138-39, 310 S.E.2d 310, 313 (1984) (citing Statutes of Gloucester, 6 Edw. I, c. IX (1278)).

be certain."[142] In *Louisville, E. & St. L. R. Co. v. Clarke*,[143] the Supreme Court adopted this explanation of the rule. Professor LaFave has likewise stated that the rule was created as an "absolute rule of law" by judges in an age "when doctors knew very little about medicine."[144] He concludes that "the difficulty in proving that the blow caused the death after so long an interval was obviously the basis of the rule. Now that doctors know infinitely more, it seems strange that the year-and-a-day rule should survive to the present. . . ."[145]

In fact, many states have abolished the rule in whole or part. Several modern American courts have rejected the "year and a day" rule in criminal cases for precisely the reason that this evidentiary limitation has become obsolete. In the past decade, seven states by court decision have abandoned the rule, or refused to apply or extend it.[146] A few modern courts have refused to abolish the rule, on the understanding that the rule was substantive and on the corresponding rationale that the change in such a rule is best left to the legislature.[147]

In 1985, a unanimous Washington Supreme Court, in *State v. Ed-*

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142. E. COKE, *supra* note 88, at 53.

143. Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230, 239 (1894) (quoting E. COKE, *supra* note 88, at 53).

144. *See* W. LAFAVE & A. SCOTT, *supra* note 122, § 35 at 266-67.

145. W. LAFAVE & A. SCOTT, *supra* note 122, § 35 at 266.

146. Of the ten decisions rendered on the rule in the past decade, seven state courts have either abolished the rule or refused to apply in the case before them. State v. Edwards, 104 Wash. 2d 63, 701 P.2d 508 (1985) (recognizing an anachronism in applying state's three year and a day statute); State v. Hefler, 310 N.C. 135, 310 S.E.2d 310 (1984) (refused to extend to involuntary manslaughter); People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143 (1982); State v. Hudson, 56 Or. App. 462, 642 P.2d 331, *pet. for review denied*, 293 Or. 146, 651 P.2d 143 (1982) (state statute modeled after New York penal code, which abolished rule); Commonwealth v. Lewis, 381 Mass. 411, 409 N.E.2d 771 (1980); State v. Young, 77 N.J. 245, 390 A.2d 556 (1978); State v. Sandridge, 5 Ohio Ops. 3d 419, 365 N.E.2d 898 (1977). As early as 1960, Pennsylvania abolished the rule by judicial decision. Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960). Some states have abolished the rule by statute. People v. Snipe, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6 (1972); People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934). A majority of states have older decisions adopting the rule, which have not been recently reexamined. Manning v. State, 120 Ga. App. 844, 182 S.E.2d 690 (1971); State v. Dailey, 191 Ind. 678, 134 N.E. 481 (1922); Sizemore v. Commonwealth, 347 S.W.2d 77 (Ky. 1961); State v. Moore, 196 La. 618, 199 So. 661 (1940); State v. Warner, 237 A.2d 150 (Me. 1967); State v. Brown, 21 Md. App. 91, 318 A.2d 257 (1974); Martin v. Copiah Co., 71 Miss. 407, 15 So. 73 (1893); State v. Keerl, 20 Mont. 508, 75 P. 362 (1904); Debney v. State, 45 Neb. 856, 64 N.W. 446 (1895); State v. Huff, 11 Nev. 17 (1876); Elliott v. Mills, 335 P.2d 1104 (Okla. 1959); Cole v. State, 512 S.W.2d 598 (Tenn. Crim. App. 1974); Aven v. State, 102 Tex. Crim. App. 478, 277 S.W. 1080 (1925); Clark v. Commonwealth, 90 Va. 360, 18 S.E. 440 (1893).

147. Three courts have retained the rule on the rationale that change is best left to the legislature. State v. Minster, 302 Md. 240, 486 A.2d 1197 (1985); State v. Zerban, 617 S.W.2d 458 (Mo. Ct. App. 1981); Matter of J.N., 406 A.2d 1275 (D.C. App. 1979).

wards,[148] in the course of examining the new state statute providing for a three year and a day limitation, concluded that medical science had rendered the common law rule obsolete.

> Medical science has progressed to such a degree it makes little sense to have a rule which requires death to occur within a particular time to resolve issues of proof. In light of existing scientific knowledge, it would make sense for a modern rule to be based strictly on proof of causation.[149]

Justice Utter noted that "[t]here is . . . disagreement as to whether the rule is one of evidence, or procedure, or is an element of the crime of murder." But, he noted, that those courts "which have found the rule either procedural or evidentiary have felt free to abolish the rule retroactively."[150] While some courts have concluded that any change in the "year and a day" rule is best left to the legislature, no court could be heard to retain the "year and day rule" on the premise (used to retain the born alive rule) that attaching criminality to a killing after such an extended period of time would be the creation of a "new crime."[151]

The common law adopted the born alive rule and the "year and a day" rule as evidentiary presumptions, because both deal with proof of death, and the law governing the determination of life and death, according to Coke, "ought to be certain."[152] Holdsworth cited both rules as analogous rules of evidence which were required to prove that "death was sufficiently connected with the act."[153]

A final area in which common law criminal principles have been abandoned by modern courts due to modern medical evidence is in the definition of death itself. In *Swafford v. State*,[154] the Indiana Supreme Court rejected the traditional common law definition of death—the cessation of all bodily function—for purposes of homicide. Instead, the court accepted "brain death", or the irreversible cessation of total brain function, as "a standard by which death may be determined."[155] The "brain death" standard was

148. State v. Edwards, 104 Wash. 2d 63, 701 P.2d 508 (1985).
149. *Id.* at 69, 701 P.2d at 511.
150. *Id.* at 68-69, 701 P.2d at 511.
151. No court has suggested that a "new crime" would be created by abolishing the rule as to deaths occurring after a year and a day. Indeed, the rule has been described as "senselessly indulgent toward homicidal malefactors." Commonwealth v. Lewis, 381 Mass. 411, 415, 409 N.E.2d 771, 773 (1980).
152. E. COKE, *supra* note 88, at 53. Chitty also held that the definition of life birth is tied to the need for "certainty" in the criminal law. J. CHITTY, *supra* note 28, at 415. The presumptions were adopted because of "the inherent humanness of the common law. . . ." Singleton v. State, 33 Ala. App. 563, 540, 35 So. 2d 375, 378 (1948).
153. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 315 (5th ed. 1942).
154. 421 N.E.2d 596 (Ind. 1981).
155. *Id.* at 600.

adopted because the court "was unable to ignore the advances made in medical science and technology during the last two decades."[156]

In its adoption of the quickening doctrine, the born alive rule, and the year and a day rule, the common law thus can be seen to have closely followed the medical evidence of the day. It could not be proved that the child *in utero* before quickening was alive so the law adopted the presumption that the child was first alive at quickening and made the production of a miscarriage thereafter a grave offense. Likewise, the law could not prove the *corpus delicti* of homicide until the unborn child was observed alive outside the womb, so the law adopted the presumption that children are stillborn unless there was evidence of a live birth. It was not until a live birth occurred at any time of gestation that the law could prove life, death, and causation, and with such evidence, the common law punished the resulting death as homicide.

V. THE APPLICATION OF THE BORN ALIVE RULE BY AMERICAN COURTS

The reception and understanding of the born alive rule by American courts is evidenced in the approximately 45 reported American appellate opinions on the homicide of the unborn or newly born child. One of these opinions was handed down at the close of the 18th century.[157] Six were delivered in the 19th century.[158] Eighteen were delivered between 1900 and 1970.[159] Twenty have been rendered since 1970.[160] Today, 22 states by

156. *Id.* at 602.
157. State v. McKee, 1 Add. 1 (Pa. 1791).
158. State v. Prude, 76 Miss. 543, 24 So. 871 (1899) (dictum); Joseph v. State, 34 Tex. Crim. 446, 30 S.W. 1067 (1895); Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889), *later appeal*, 30 Tex. App. 549, 17 S.W. 1110 (1891); State v. Winthrop, 43 Iowa (Runnells) 519 (1876); Abrams v. Foshee, 3 Iowa 274 (1856) (dictum).
159. Bennett v. State, 377 P.2d 634 (Wyo. 1963); People v. Ryan, 9 Ill. 2d 467, 138 N.E.2d 516 (1956); State v. Osmus, 73 Wyo. 183, 276 P.2d 469 (1954); People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949); Singleton v. State, 33 Ala. App. 536, 35 So. 2d 375 (1948); People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (1947); Logue v. State 198 Ga. 672, 32 S.E.2d 397 (1944); Jackson v. Commonwealth, 165 Ky. 295, 96 S.W.2d 1014 (1936); Shedd v. State, 178 Ga. 653, 173 S.E. 847 (1934); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917); People v. York, 263 Ill. 620, 105 N.E.2d 35 (1914); Taylor v. State, 108 Miss. 18, 66 So. 321 (1914); State v. O'Neall, 79 S.C. 571, 60 S.E. 1121 (1908); Huebner v. State, 131 Wis. 162, 111 N.W. 63 (1907); Allen v. State, 128 Ga. 53, 57 S.E 224 (1907); People v.Eldridge, 3 Cal. App. 648, 86 P. 832 (1906) (dictum).
160. State v. Soto, 378 N.W.2d 625 (Minn. 1985); State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985) (dictum); Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984); State *ex rel.* Atkinson v. Wilson, 334 S.E.2d 807 (W. Va. 1984); State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984); Hollis v. Commonwealth, 652 S.W.3d 61 (Ky. 1983); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (1982); State v. Amaro, 448 A.2d 1257 (R.I. 1982); *In re* A.W.S., 182 N.J. Super. 278, 440

court decision still hold to the born alive rule.[161] Three state courts have abandoned the rule.[162] Several other states have abandoned the rule to one degree or another by statute.[163] Many of the decisions adopting the rule

A.2d 1144 (1981); State v. Brown, 378 So. 2d 916 (La. 1980); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980); State v. Doyle, 205 Neb. 234, 287 N.W.2d 59 (1980); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978); State v. Larsen, 578 P.2d 1280 (Utah 1978); White v. State, 238 Ga. 224, 232 S.E.2d 57 (1977); State v. Gyles, 313 So. 2d 799 (La. 1975); State v. Collington, 259 S.C. 446, 192 S.E.2d 856 (1972); State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

161. By court decision, 22 states retain the born alive rule in the law of homicide. Singleton v. State, 33 Ala. App. 536, 35 So. 2d 375 (1948); State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); White v. State, 238 Ga. 224, 232 S.E. 2d 57 (1977); State v. Winthrop, 43 Iowa (6 Runnells) 519 (1876); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980), *pet. for leave to appeal denied*, 417 Mich. 1006, 334 N.W. 2d 616 (1983); Taylor v. State, 108 Miss. 18, 66 So. 321 (1914); State v. Doyle, 205 Neb. 234, 287 N.W.2d 59 (1980); *In re* 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); People v. Hayner, 330 N.Y. 171, 90 N.E.2d 23 (1949); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917); State v. Dickinson, 28 Ohio St. 65, 275 N.E.2d 599 (1971); State v. McKee, 1 Add. 1 (Pa. 1791); State v. Amaro, 448 A.2d 1257 (R.I. 1982); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889); *appeal*, 30 Tex. App. 549, 17 S.W. 1110 (1891); State v. Larsen, 578 P.2d 1280 (Utah 1978); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978); State *ex rel.* Atkinson v. Wilson, 332 S.E. 2d 807 (W. Va. 1984); Huebner v. State, 131 Wis. 162, 111 N.W. 63 (1907); Bennett v. State, 377 P.2d 634 (Wy. 1963). Shortly before this article was published, Arkansas became the 24th state to adopt the rule by court decision. Meadows v. State, 722 S.W.2d 584 (Ark. 1987).

A Connecticut trial court recently refused to issue a murder warrant for the killing of a viable, unborn child, holding that such is not a human being within the meaning of the state homicide statute. State v. Bonnie Foreshaw, (Superior Court, Judicial district of Hartford-New Britain at Hartford, June 9, 1986) (Barall, J.).

See generally, Annot., *Homicide Based on Killing An Unborn Child*, 40 A.L.R. 3d 444 (1971); Annot., *Proof of Live Birth In Prosecution For Killing Newborn Child*, 65 A.L.R. 3d 413 (1975); Comment, *The Nonconsensual Killing Of An Unborn Child: A Criminal Act?*, 20 BUFFALO L. REV. 535 (1971); Webb, *Is the Intentional Killing of an Unborn Child Homicide?*, 2 PAC. L.J. 170 (1971).

162. State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985); Commonwealth v. Cass, 392 Mass. 799, 476 N.E.2d 1324 (1984); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984). A Tennessee criminal court has recently convicted a defendant of the vehicular homicide of a viable, unborn child. State v. Evans, No. 22292 (Montgomery Co., Tenn. Cir. Ct. Feb. 6, 1986), *appeal docketed*, No. MD 86-112-III (Tenn. Cr. App. May 9, 1986). This case is now on appeal to the Tennessee Court of Criminal Appeals, where oral argument was held on September 18, 1986. *Id.*

163. At least three states have statutes allowing a criminal indictment for "feticide". IOWA CODE ANN. § 707.7 (West 1979); GA. CODE ANN. § 26-1105 (1983); MICH. STAT. ANN. § 28-554 (West 1982). These statutes have been upheld against claims of unconstitutionality. Brinkley v. State, 253 Ga. 541, 322 S.E.2d 49 (1984); State v. Willis, 457 So. 2d 959 (Miss. 1984). *See also* State v. Burke, 368 N.W.2d 182 (Iowa 1985).

See generally Comment, *Feticide in Illinois: Legislative Amelioration of a Common Law Rule*, 4 N. ILL. U.L. REV. 91 (1983); Comment, *Feticide in California: A Proposed Statutory Scheme*, 12 U. CAL. D. L. REV. 723 (1979).

were rendered before the developments in medical science that have eliminated the evidentiary reasons for the born alive rule. These decisions were made during a time when the nature of medical science prevented sufficient proof of the *corpus delicti* of the homicide of the unborn child. In recent decisions which have adopted the born alive rule, few courts have closely analyzed the origin or purpose of the rule or compared its function with the modern state of medical evidence.

American decisions on the born alive rule evidence three stages of development or application of the born alive rule. Some, including the earliest American decision do not explicate any particular test of "live birth." These courts follow the common law rule without explanation or discussion. Others, especially those rendered between 1850 and 1950, cite the rule without discussing its origin, but then impose a judicial gloss on the rule by engaging in elaborate tests of "live birth."[164] Like the original adoption of the born alive rule, the adoption of these tests can be traced to the current medical understanding of the day.[165] A third stage can be discerned in the

One conviction has been obtained under the Illinois feticide law, ILL. REV. STAT. ch. 38, § 9-1.1 (1985). People v. Shum, #82-C-6130 (Cook County, Illinois Circuit Court), *appeal dismissed* on appellant's motion, #84-3021 (Appellate Court of Illinois, First District, December 23, 1985). Another prosecution is ongoing. People v. Allong, #86 C 7414 (Cook County, Illinois Circuit Court, filed June 25, 1986), Chicago Tribune, May 19, 1986, at § 2, p. 6., col. 5.

At least one state includes the unborn child directly within its homicide statute. CAL. PENAL CODE § 187(a) (West Supp. 1986). *But see* People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (limiting word "fetus" to mean viable fetus). Two other states have enacted separate, comprehensive homicide statutes to encompass the unborn child. MINN. STAT. ANN. § 609.266 (1987 Supp.); ILL. REV. STAT. ch. 38, ¶ 9-1.2 (1986 Supp.) (repealing and superceding the Illinois Feticide Law, ILL. REV. STAT. ch. 38, § 9-1.1 (1985)). Four other states have manslaughter statutes which encompass quick, unborn children. FLA. STAT. ANN. § 782.09 (1976); MISS. CODE ANN. § 97-3-37 (1973) (homicide, manslaughter of quick unborn child); OKLA. STAT. ANN. ch. 21, § 713 (1983) (manslaughter of quick unborn child); R.I. GEN. LAWS § 11-23-5 (1981) (manslaughter of quick unborn child). Louisiana defines "person" in its criminal code as "a human being from the moment of fertilization." LA. REV. STAT. ANN. § 14:2(7) (1986). *But see* State v. Brown, 378 So. 2d 916 (La. 1979) (construed legislative amendment to statutory definition of "person" as too indefinite to include unborn from conception and limited amendment to viable child). New Mexico specially penalizes injury to a pregnant woman. N.M. STAT. ANN. §§ 30-3-7, 66-8-101.1 (1986 Supp.).

164. *See* Westerfield, *supra* note 7, at 152; Note, *Fetus As A Human Being Within Meaning of Homicide Statute When It Reaches the State of Viability*, 23 VAND. L. REV. 854 (1970). *See generally*, Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines*, 52 MARQ. L. REV. 105 (1968); Note, *Proving Live Birth in Infanticide*, 17 WYO. L.J. 237 (1963).

165. Nineteenth century courts adopted notions of blood circulation which have since been recognized to be erroneous. "This independent circulation criterion was based on the antiquated and incorrect biological and medical assumption that the mother's blood flowed through the fetus." Krimmel & Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725, 734 (1977) (citing Atkinson, *supra* note 33, at 143-44, 152-53). *See also* Davies, *supra* note 88, at 207-08. Dean, in his 1854 treatise, still held to this notion. A. DEAN, *supra* note 42, at 188.

most recent courts which have adopted the rule. These courts do not examine the origins or history of the rule, but merely assume the rule to be a substantive element of the common law crime of homicide which reflected the common law's rejection of the criminality of killing the unborn child. Because of this perception of the rule, these courts, like those which consider the year and a day rule to be substantive,[166] refuse to declare it obsolete, without legislative approval, for fear of legislating a "new crime."[167] Finally, three courts have recently abandoned the born alive rule in the case of the homicide of a viable fetus. Of these, only the Massachusetts Supreme Court recognized the rule as a rule of presumptive evidence.[168] The other two courts did not articulate this rationale or articulated no rationale at all.[169] Whether this judicial abandonment of the born alive rule will establish a new, fourth, stage remains to be seen.

Apparently, the earliest reported American decision involving allegations of the homicide of a newborn infant is the 1791 case of *State v. McKee*.[170] The case was tried under a 1718 Pennsylvania statute which made concealment of the death of a newborn a crime.[171] The court adopted the born alive rule under English common law. Contrary to later courts which would engage in strict elaborate tests of "live birth," the court stated merely that "[p]resumptive evidence of the birth alive is sufficient."[172] The court noted (quoting Blackstone without citation) that in England "it became usual, in trials of this offense, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption, that the child whose death was concealed was, therefore, killed by the mother, was admitted to convict her on this statute." Pennsylvania statutes of 1786 and 1790 declared that "concealment shall not be sufficient evidence to convict the mother, without probable presumptive proof that the child was born alive."[173] The jury subsequently found the accused not guilty.

Beginning in the middle of the 19th century, American courts began to articulate two primary tests for live birth: (1) a breathing test, and (2) a "separate existence" or "independent circulation" test, which carried a

166. *See supra* notes 140-56 and accompanying text.
167. *See, e.g.*, State v. Gyles, 313 So. 2d 799 (La. 1975).
168. Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984).
169. *See* State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984).
170. 1 Add. 1 (Pa. 1791).
171. 1 Add. at 1 (citing Act of 31st May 1718, § 8). This was apparently modeled after the English statute, 21 Jac. I, c. 27 (1623), *supra* note 98. *See* Gavigan, *supra* note 37, at 24 n.33; 4 W. BLACKSTONE, *supra* note 96, at 198.
172. *McKee*, 1 Add. at 2-3.
173. *Id.* at 2.

more rigorous standard of proof. An 1856 Iowa case, *Abrams v. Foshee*,[174] began the judicial gloss on the born alive rule that resulted in these elaborate tests of live birth. The court, in dictum, stated: "To support an indictment for infanticide, at common law, the rule, as uniformly recognized, is that it must clearly appear that the child was wholly born, and was born alive, having an independent circulation and existence."[175] Subsequently, the Iowa Supreme Court, in *State v. Winthrop*,[176] adopted the "independent circulation" test for live birth. A breath or two was not sufficient under this test.

Likewise, the Texas Court of Appeals in 1889, in *Harris v. State*,[177] held that it was necessary for the state to prove that the child "had an existence independent of the mother."[178] The physician testified that he could not "say positively whether the child was ever alive, or whether if had ever breathed."[179] The court, however, accepted evidence of air in the lungs as sufficient to corroborate the live birth. But the court reversed the conviction because the record contained no evidence as to how the child died.[180]

In this century, the South Carolina Supreme Court in *State v. O'Neall*,[181] reversed a conviction of manslaughter, because there "was no testimony that the child had ever breathed, or was alive at the time of its birth."[182] A surgeon testified that "he could not tell that the child had ever been alive."[183] But, in dictum, the court adopted the "independent circulation" test, citing authorities to the effect that "independent circulation was necessary." "[T]he fact that it has breathed for a moment is not conclusive proof" of live birth.[184]

The Georgia Supreme Court, in *Shedd v. State*,[185] reversed a conviction because of lack of direct evidence of the live birth. A physician performed an autopsy eight or nine days after the infant was first buried. After examining the lung, the doctor testified that "this child breathed after it

174. 3 Iowa 274 (1856). *See* 1 J. BECK, *supra* note 21, at 494-543 (detailing the indications of live birth).
175. 3 Iowa at 279 (citing 3 GREENLEAF ON EVIDENCE § 136).
176. 43 Iowa (6 Runnells) 519 (1876) (citing Rex v. Enoch, 5 C & P 539, 172 Eng. Rep. 1089 (1833); Regina v. Trilloe, 1 C. & M. 650, 169 Eng. Rep. 103 (1842)).
177. 28 Tex. App. 308, 12 S.W. 1102 (1889), *appeal*, 30 Tex. App. 549, 17 S.W. 1110 (1891).
178. *Id.* at 308, 12 S.W. at 1103.
179. *Id.* at 309, 12 S.W. at 1103.
180. *Id.*
181. 79 S.C. 571, 60 S.E. 1121 (1908).
182. *Id.* at 572, 60 S.E. at 1122.
183. *Id.*
184. *Id.* at 573, 60 S.E. at 1122 (citing State v. Winthrop, 43 Iowa (Runnells) 519 (1876)).
185. 178 Ga. 653, 173 S.E. 847 (1934).

came into the world."[186] But, the court rejected this as "not an unqualified statement of opinion that the child was born alive, or that it had acquired 'independent circulation and existence' separate from the mother."[187] Subsequently, the court, in *Logue v. State*,[188] held that the confession of the defendant that "the baby did live five or ten minutes, that is cried," together with the testimony of a physician that his autopsy showed that the infant was born alive, was sufficient to prove the *corpus delicti*.[189] Recently, in *White v. State*,[190] the court has adhered to the "independent existence" test. The court reversed this conviction, however, because, although the pathologist testified "that the infant's lungs were filled with air, indicating that she had breathed on her own," the pathologist "never testified that the infant had achieved an independent and separate existence from its mother."[191]

In 1936, in *Jackson v. Commonwealth*,[192] the Kentucky Supreme Court applied the "separate existence" test, holding that it was not sufficient to show that the child had breathed. The court affirmed the conviction, citing evidence that doctors had examined the body and concluded that the lungs floated on water and had a color which suggested breathing after birth.

In 1963, the Wyoming Supreme Court, in *Bennett v. State*,[193] adopted the born alive rule and devoted a substantial part of its opinion to discussing the difference between the breath and independent circulation tests. Even as late as 1963, the court found that "there is no satisfactory answer as to when an independent circulation exists."[194] The expert witness was, however, "definite and positive" that the child was born alive.[195] The court affirmed the conviction, finding that the evidence was sufficient to establish live birth and the criminal agency of the defendant.[196]

Other courts have adopted the more lenient "breath" test. In 1980, in *People v. Greer*,[197] the Illinois Supreme Court adopted the born alive rule. In dictum, the court stated that "a single breath" is sufficient to prove live birth.[198] In 1907, in *Huebner v. State*,[199] the Wisconsin Supreme Court

186. *Id.* at 656, 173 S.E. at 849.
187. *Id.*
188. 198 Ga. 672, 32 S.E.2d 397 (1944).
189. *Id.* at 676, 32 S.E.2d at 399.
190. 238 Ga. 224, 232 S.E.2d 57 (1977).
191. *Id.* at 224, 232 S.E.2d at 57.
192. 96 S.W.2d 1014 (Ky. Ct. App. 1936).
193. 377 P.2d 634 (Wyo. 1963).
194. *Id.* at 636.
195. *Id.*
196. *Id.* at 639.
197. 79 Ill. 2d 103, 402 N.E.2d 203 (1980).
198. *Id.* at 111, 402 N.E.2d at 207.

purported to adopt the "independent circulation" test but it accepted evidence of breathing alone. Three physicians performed an autopsy and numerous tests, all of which showed that the lungs contained air—"practically conclusive evidence that the child had breathed several times."[200] The three physicians all testified "that in their judgment the child was born alive and breathed. . . ."[201] The court affirmed the conviction, finding sufficient evident for the verdict.

A third test articulated by a minority of courts may be called the "capability of independent existence" test.[202] The California Court of Appeals, in *People v. Chavez*,[203] held that "a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed."[204] In the 1948 case of *Singleton v. State*,[205] the Alabama Supreme Court accepted proof of a live birth at that point "where in the natural course of events a birth which is already started would naturally be successfully completed."[206] The court implicitly recognized that the born alive rule distinguished between living and dead human beings in stating that the rule was a necessary requirement, "it being axiomatic that one cannot kill something already dead."[207]

As compared to the common law requirement of live birth and the modern definition of live birth found in many vital records statutes, the "breath" test adopted by American courts is not measurably different. Such statutes record a live birth if, upon birth, the child "breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles."[208] But, these statutory definitions presuppose a direct witness.[209] The evidence introduced in many American decisions under the "breath" test was designed to prove live birth in the absence of direct witness. Expert medical testimony based on an autopsy was admitted to show that the infant breathed. Many of these decisions demonstrate that proof of live birth was extremely difficult.[210]

199. 131 Wis. 162, 111 N.W. 63 (1907).
200. *Id.* at 165, 111 N.W. at 64.
201. *Id.* at 166, 111 N.W. at 64.
202. *See* People v. Wang, 132 Misc. 2d 554, 490 N.Y.S.2d 423, 426 (N.Y. Sup. Ct. 1985).
203. 77 Cal. App. 2d 621, 176 P.2d 92 (1947).
204. *Id.* at 626, 176 P.2d at 94.
205. 33 Ala. App. 536, 35 So. 2d 375 (1948).
206. *Id.* at 541, 35 So. 2d at 378-79.
207. *Id.*
208. *See supra* note 29.
209. *See, e.g.*, Huebner v. State, 131 Wis. 162, 111 N.W. 63 (1907); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917).
210. The state of medical technology up to the 20th century reveals that evidentiary problems dictated few prosecutions, few convictions, and lenient sentences for the killing of

In contrast to the "breath" test which was narrowly designed to determine the existence of life after birth, the "separate existence" or "independent circulation" test developed by American courts in the 19th century was based on contemporary medical theories of maternal and fetal physiology. In particular, courts relied on "the antiquated and incorrect biological and medical assumption that the mothers' blood flowed through the fetus."[211] In the 1940's, courts began to reject these tests in prenatal tort cases when medical science repudiated the notion of "separate existence" as medically erroneous.[212] Rather, courts began to recognize that the unborn child has "existence as a separate creature from the moment of conception."[213] In repudiating these outdated notions, medical science brought

any unborn or newborn child. *See* Josef v. State, 34 Tex. Crim. 446, 30 S.W. 1067 (1895) (conviction of infanticide of newborn reversed); Taylor v. State, 108 Miss. 18, 66 So. 321 (1914) (conviction reversed); Harris v. State, 30 Tex. App. 549, 17 S.W. 1110 (1891) (reversal of conviction of infanticide of newborn child; confession of defendant not corroborated as to the corpus delicti); State v. Osmus, 73 Wyo. 183, 276 P.2d 469 (1954) (reversal of conviction of manslaughter of newborn child); State v. Merrill, 72 W. Va. 500, 78 S.E. 699 (1913); State v. Voges, 197 Minn. 85, 266 N.W. 265 (1936) (conviction reversed); Fletcher v. State, 68 S.W. 173 (Tex. Crim. App. 1902). *See, e.g.*, People v. Ryan, 9 Ill. 2d 467, 471, 138 N.E.2d 516 (1956) (fetus stillborn, state had burden of proving the child has been alive when act performed); Brown v. State, 95 Miss. 670, 49 So. 146 (1909); Singleton v. State, 33 Ala. App. 536, 35 So. 2d 375 (1948); State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938) (conviction reversed); Denham v. Commonwealth, 239 Ky. 771, 40 S.W.2d 384 (1931) (conviction reversed).

Prosecution for the homicide of an unborn or newly born child required proof of (1) pregnancy (if prosecution is against the mother), (2) live birth, (3) death after live birth, and (4) causation of death by the defendant, all beyond a reasonable doubt. *See generally*, Annot., *Proof of Live Birth in Prosecution For Killing Newborn Child*, 63 A.L.R. 3d 413 (1975); Annot., *Pregnancy as Element of Abortion or Homicide Based Thereon*, 46 A.L.R. 2d 1393 (1956); Annot., *Necessity, To Warrant Conviction of Abortion, That Fetus Be Living At Time of Commission of Acts*, 16 A.L.R. 2d 949 (1951). *See also*, Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72 (1950); Wasy v. State, 234 Ind. 52, 123 N.E.2d 462 (1955).

211. Krimmel & Foley, *supra* note 165, at 734. Dean, in this 1854 treatise, adopted this erroneous medical notion. A. DEAN, *supra* note 42, at 188. Although William Harvey raised the question in 1651, it was not until 1876 that Paul Zweifel, a Swiss Obstetrician, demonstrated that the viable fetus respires through the placenta. LONGO & RENEAU, *supra* note 63, at 1.

212. For example, the Alabama Supreme Court in 1972 in Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972) overruled its decision in Stanford v. St. Louis & San Francisco Ry. Co., 214 Ala. 611, 103 So. 566 (1926), which denied any cause of action for prenatal injury even for a child born alive. In rejecting *Stanford*, the *Huskey* court specifically rejected Stanford's rationale which "was based upon the prevailing medical opinion *of that day*, that a fetal child was a party of the mother and not a 'person' until it was born." *Id.* at 54, 265 So. 2d at 596 (emphasis original). The court noted that the notion that "a child before birth is part of the mother is no longer correct medical fact." *Id.* at 55, 265 So. 2d at 598. Rather, the court noted that "proof of a causal connection between the prenatal injury and death is not considered speculative in view of current medical knowledge." *Id.*

213. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93, 96 (1960) ("having existence as a separate creature from the moment of conception"); Byrn v. New York City Health and Hosp. Corp., 38 A.D.2d 316, 324, 239

about what Professor Prosser called "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[214]

In recent years, as a result of the impact of medical science, the third stage in the development of the born alive rule began, as courts have been asked to reconsider the born alive rule and to declare it obsolete.[215] Perhaps the most widely-noted opinion on the homicide of the unborn child is that of the California Supreme Court in *Keeler v. Superior Court of Amador County*.[216] *Keeler* may be viewed as the first of the "modern" decisions on the rule, insofar as it was faced both with the application of the rule to a stillborn viable fetus when the *corpus delicti* was clearly proved and with the contention that the rule contradicted modern scientific knowledge. These two factors characterize nearly all recent decisions on the rule and sharply distinguish them from the cases that preceded *Keeler*.

Writing for the majority in *Keeler*, Justice Mosk wrote an extensive opinion reviewing the rule at common law, in English decisions and American cases, citing Bracton, Hale, Hawkins, Coke, and Blackstone. Throughout, the court assumed that the rule was a substantive element at common law, which designated the unborn child as non-human. The court further assumed that the legislature intended to incorporate the common law rule as a definition of human being. Based on these assumptions, the court refused to discard the common law rule as obsolete, raising "jurisdictional" and "constitutional" obstacles.[217] As a matter of jurisdiction, "the power to define crimes and fix penalties is vested exclusively in the legislative branch."[218] As a matter of constitutional principle, the retroactive application of the statute to the case before the court would violate due process.[219]

N.Y.S.2d 722, 729, *aff'd* on other grounds, 31 N.Y.2d 194, 335 N.Y.S.2d 290, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973) ("in the contemporary medical view, the child begins a separate life from the moment of conception"); Gleitman v. Cosgrove, 49 N.J. 22, 36 n.3, 227 A.2d 689, 696 n.3 (1967) ("it was noted thirty years ago that the increase in knowledge of embryology had revealed that the infant has separate existence from the moment of conception") (Francis J., concurring), *rev'd in part*, Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497, 502 (1960) ("Our criminal law regards an unborn child as a separate entity."); Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); W. PROSSER, LAW OF TORTS 336 (4th ed. 1971).

214. *See* W. PROSSER, *supra* note 213, at 336. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 558-62 (1962).

215. *See, e.g.*, State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

216. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

217. *Id.* at 631, 470 P.2d at 624, 87 Cal. Rptr. at 488.

218. *Id.*

219. *Id.* at 634, 470 P.2d at 626, 87 Cal. Rptr. at 490.

For these reasons, the *Keeler* court held that the homicide statute incorporated the born alive rule.

Despite the *Keeler* court's comprehensive survey of the common law *statement* of the rule, the court never examined the *purpose* of the rule. Justice Mosk, writing for the court, failed to heed the admonition of Professor Haskin that a judge, who by his very nature must often don the cloak of a historian of law, may not merely recount the growth and jurisdiction of courts and legislatures or detail the evolution of legal rules and doctrines if he is to accurately apply the law.[220] It fell to Justice Burke, in dissent, to articulate the evidentiary nature of the born alive rule. He noted that the common law considered the unborn child "to be a human being," but that the born alive rule "had a value in differentiating as accurately as was then scientifically possible, between life and nonlife."[221] Moreover, he emphasized that "[t]he common law reluctance to characterize the killing of a quickened fetus as a homicide was based solely upon a presumption that the fetus would have been born dead."[222] This was due to "the state of the medical art in the 17th, 18th and 19th centuries."[223] *Keeler* has since been overturned by legislation with respect to viable unborn children.[224]

Subsequently, courts in the 1970's and 1980's that have retained the born alive rule have invariably followed the general assumptions and reasoning in the *Keeler* opinion. For example, in 1980 in *People v. Greer*,[225] the Illinois Supreme Court refused to reject the born alive rule, because, the court reasoned, "[w]e cannot alter that decision or create a new offense."[226] Implicitly, the court assumed that the born alive rule signified a substantive element in the criminality of killing the child *in utero*. The Florida Supreme Court, in 1984 in *State v. McCall*,[227] adopted the born alive rule. The court rejected the state's argument that the rule should be abandoned because it was archaic and noted that other courts had rejected such an argument by concluding that change in "such a complex and controversial area of the law should be made by legislative action rather than judicial action."[228] In addition, the court emphasized that, unlike other

220. *See supra* note 1 and accompanying text.
221. 2 Cal. 3d at 641, 470 P.2d at 631, 87 Cal. Rptr. at 495.
222. *Id.* at 643, 470 P.2d at 633, 87 Cal. Rptr. at 497.
223. *Id.*
224. CAL. PENAL CODE § 187(a) (West Supp. 1986).
225. 79 Ill. 2d 103, 402 N.E.2d 203 (1980).
226. *Id.* at 116, 402 N.E.2d at 209. The Illinois General Assembly responded to the *Greer* decision by passing a feticide statute in 1981. ILL. REV. STAT. ch. 38, ¶ 9-1.1 (1985). A new bill recently passed by the Illinois General Assembly and signed by Governor Thompson on September 19, 1986 completely overrules *Greer* and repeals and supercedes the Feticide Law. Illinois Statute, *supra* note 5.
227. 458 So. 2d 875 (Fla. Dist. Ct. App. 1984).
228. *Id.* at 876.

states, Florida had not applied its wrongful death statute to viable unborn children.[229] The court reasoned that "[p]enal statutes must be strictly construed" and that "substantive changes in long-standing common law rules are best left to the legislature."[230] Here too, the court assumed that the born alive rule was a substantive element of the common law crime of homicide.

There are, nevertheless, indications that a fourth stage in the development of the born alive rule, in which the rule is abandoned by courts as an anachronistic rule of evidence, is underway. Recently, the Massachusetts Supreme Judicial Court has more closely analyzed the origin and function of the born alive rule. In *Commonwealth v. Cass*,[231] the child died in the womb and was delivered by Caesarean section. The medical expert was able to determine "by autopsy that the fetus was viable at the time of the incident and that it died as a result of internal injuries caused by the impact of the vehicle operated by the defendant."[232] Chief Justice Hennessy engaged in a concise, logical, and tightly reasoned analysis of whether a homicide statute encompasses an unborn viable child. First, he noted that "giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being.' "[233] Moreover, "[a]n offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb."[234] Accordingly, the plain language of the homicide statute encompassed the unborn child.

Chief Justice Hennessy then turned to the born alive rule, as a com-

229. *Id.* at 877 (citing Stokes v. Liberty Mutual Ins. Co., 213 So. 2d (Fla. 1968); Stern v. Miller, 348 So. 2d 303 (Fla. 1977)).
230. 458 So. 2d at 877.
231. 392 Mass. 799, 467 N.E.2d 1324 (1984). *See generally*, Note, *Commonwealth v. Cass*, 7 W. ENG. L. REV. 309 (1984); Note, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119 (1984).
232. 392 Mass. at 800, 467 N.E.2d at 1325.
233. *Id. See also* BLACK'S LAW DICTIONARY 1028 (5th ed. 1979) ("person: In general usage, a human being . . . ")' WEBSTER'S NEW WORD DICTIONARY 1061 (2d College ed. 1984) ("person: 1. a human being . . . "); FUNK & WAGNALLS STANDARD DESK DICTIONARY 489 (1984) ("person 1. any human being . . . ").
234. 392 Mass. at 801, 467 N.E.2d at 1325. *But see* Henn, *Criminal Law — Vehicular Homicide of A Viable Fetus — Judicial Statutory Amendment*, 70 MASS. L. REV. 201 (Winter 1859-86). Henn calls this reasoning "disingenuous, and linguistically and logically unsound." *Id.* at 204. Henn ignores the fact that homicide involves the killing of a "human being", not the killing of a "person". BLACK'S LAW DICTIONARY 661 (5th ed. 1979). Second, he ignores the definition of "person" in current dictionaries, which equate "person" with "human being". BLACK'S LAW DICTIONARY 1028 (5th ed. 1979); WEBSTER'S NEW WORD DICTIONARY 1061 (2d College ed. 1984); FUNK & WAGNALLS STANDARD DESK DICTIONARY 489 (1984). Third, he ignores the common law's conception of a "person" as including any living human being, including the unborn child from the time it is able to "stir" in the womb. 1 W. BLACKSTONE, *supra* note 96, at 125.

mon law rule of construction that might dictate a different application of the word "human being," and endeavored to "reexamine the grounds upon which this ancient rule was laid down."[235] He concluded that "the law has not recognized that the preborn could be the victim 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."[236] The "rationale offered for the rule since 1348 is that 'it is difficult to know either [the defendant] killed the child or not . . . That is, one could never be sure that the fetus was alive when the accused committed his act."[237] Accordingly, because the born alive rule was a rule of evidence, it could not be applied where the medical evidence, as in *Cass*, proved the *corpus delicti* of homicide, since "[t]o apply a rule grounded in difficulty of proof would be illogical."[238] Because the born alive rule was rendered useless by the medical evidence in *Cass*, no rule of construction could detract from the ordinary meaning of the word "human being." Amidst the cacophony of disputes raised by other courts over the common law authorities, the meaning of "personhood," the strict construction of penal statutes, the reluctance to "create new crimes," and notions of judicial restraint, the Massachusetts Supreme Court in *Cass* cut to the core of the born alive rule, recognizing it as an evidentiary, not a substantive, principle, whose reason for being has now been extinguished.

The decision of the court in *Cass*, however, does not stand alone. The South Carolina Supreme Court in *State v. Horne*[239] applied the state homicide statute to a stillborn child, implicitly acknowledging the born alive rule to be evidentiary in nature. The *Horne* court, like the *Cass* court, rejected the born alive rule but ruled that application of the homicide statute to the killing of an unborn child would be prospective.

An opinion which models that of the *Cass* court in its reasoning and investigation of the purpose of the born alive rule was written in 1983 by Justice James Ryan of the Michigan Supreme Court, now on the United States Court of Appeals for the Sixth Circuit. The Michigan Court of Appeals denied the application of the state homicide statute to a stillborn child in *People v. Guthrie*.[240] The Michigan Supreme Court denied leave to appeal.[241] In dissent therefrom, Justice Ryan urged that the born alive rule be reexamined. He concluded that the rule was "a common law rule of proof," a "procedural 'rule' born of a seventeenth century essay and designed to accommodate the state of seventeenth century scientific

235. 392 Mass. at 806, 467 N.W.2d at 1328.
236. *Id.* at 801, 467 N.E.2d at 1325.
237. *Id.* at 806 n.5, 467 N.E.2d at 1328 n.5.
238. *Id.* at 807 n.7, 467 N.E.2d at 1329 n.7.
239. 282 S.C. 444, 319 S.E.2d 703 (1984).
240. 97 Mich. App. 226, 293 N.W.2d 775 (1980).
241. 417 Mich. 1006, 334 N.W.2d 616 (1983).

knowledge. . . ."[242]

> The 'rule' is generally understood to derive from the impossibility, 300 years ago, of determining whether and when a fetus was living and when and how it died, and the consequent necessity to preclude the fundamental inquiry whether a fetal death was a human death . . . At the time [of Coke] the only evidence available of the humanity of a victim of a homicide was evidence of live birth. That evidence, therefore, was what was required in any homicide growing out of an attack upon a fetus.[243]

Justice Ryan did not expressly urge abandonment of the rule without a full argument and an examination of other issues in the case, but he nonetheless contended that "since the reason for its existence has vanished—the impossibility of proving the humanness of the viable unborn—the rule should likewise vanish."[244] In this general conclusion that the rule was evidentiary, Justice Ryan adds support to the later decisions in *Horne* and *Cass* in recognizing the capacity of the judiciary to reject an obsolete rule of evidence.

VI. The Strict Construction of Penal Statutes and the Homicide of the Unborn Child

Homicide statutes are, by their very nature, penal statutes. An ancient and venerable principle of statutory construction is that penal statutes should be strictly construed.[245] This reflects the humaneness of the common law in preventing penal statutes from being broadly construed to punish persons unaware of the law's proscriptions. In retaining the born alive rule in recent years, despite arguments favoring abolition, American courts have assumed that the common law born alive rule was a substantive part of the law of homicide and made a substantive part of American statutes. Since 1970 and the *Keeler* case, states have consistently urged that the rule be abandoned. When faced with the contention that the rule is obsolete, the courts have fallen back on the rule of statutory construction that penal statutes must be strictly construed. As a substantive part of the law of homicide, the rule cannot be rejected except by the legislature, they have reasoned. The *Soto* court offered the analogous rationale that, in a code state, like Minnesota, as opposed to a common law state, the legislature has the exclusive prerogative to "create crimes." A third objection to abandoning the born alive rule is that a retroactive application of a homicide statute to encompass the particular child before the court would violate due process,

242. *Id.* at 1012, 334 N.W.2d at 617, 619.
243. *Id.* at 1008, 334 N.W.2d at 617.
244. *Id.* at 1011, 334 N.W.2d at 619.
245. *See generally* 3 SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 59.03 (4th ed. 1986).

because such an application of a homicide statute to the killing of an unborn child could not be foreseen by the offender.

All these objections may be seen as different aspects of the principle of procedural due process. The rule of strict construction of penal statutes and the rule against retroactive application are indeed venerable principles of law. Nevertheless, they do not automatically apply in every application of a penal statute. The policy and reason for these rules, and the nature of the statutory interpretation called for, must be considered. Whether these rules require the retention of the common law born alive rule can only be answered after consideration of their purpose and of the values which underlie the proscription of homicide in the particular case.

The rule of strict construction of penal statutes has been said by Chief Justice Marshall to be "not much less old than construction itself."[246] Several rationales, "all of them grounded in a policy of tenderness for the rights and freedoms of individuals who find themselves caught in the toils of the law," support the rule.[247] "[T]he lawmaking body owes a duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty . . . The burden lies on the lawmakers, and in as much as it is within their power, it is their duty to relieve the situation of all doubts."[248] The rule helps "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."[249]

The rule of strict construction of penal statutes, however, is subordinate to the rule of reliance on the plain language of a statute. Even when applying penal statutes, one must adhere to the plain language of the statute.[250] The strict construction of penal statutes, as Chief Justice Marshall said, "is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ."[251]

The plain language of a homicide statute, and the ordinary meaning of the word "human being," encompass an unborn child. The very fact that the born alive rule has been recognized as an anachronism, even by courts which defer to the legislature in retaining the rule, is evidence that following the rule departs from the plain language of a homicide statute. The

246. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).
247. 3 SANDS, *supra* note 245, at § 59.03.
248. Snitkin v. United States, 265 F. 489, 494 (7th Cir. 1920).
249. Bell v. United States, 349 U.S. 81, 83 (1955).
250. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).
251. *Id.* at 95.

unborn child, by its intrinsic biological nature, is a human being from conception. It can be nothing else. Obstetrics concerns "human embryos" and "human development."[252] In his text, Blechschmidt writes:

> A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum.[253]

Moore defines a zygote in his textbook, *The Developing Human*, as follows:

> Zygote. This cell results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is *the beginning of a human being*.[254]

Greenhill and Friedman state in their text, *Biological Principles and Modern Practice of Obstetrics*, that the term "conception refers to the union of the male and female pronuclear elements of procreation from which a new living being develops."[255] Patten emphasizes in his text on human embryology that "[i]t is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."[256] Likewise, Arey writes in his classic on *Developmental Anatomy* that "[t]he formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual."[257] It is, thus, indisputable scientific fact that a new human being exists at conception.

The application of a homicide statute to an unborn child is thus itself a strict construction, an application of the very letter of a homicide statute to encompass a human being. A contrary application narrows the plain language of the statute. Even if the most narrow reading was required, a literal application of a homicide statute to encompass every "human creature" would encompass the unborn child.

252. WILLIAMS OBSTETRICS, *supra* note 22, at 139-43.
253. E. BLECHSCHMIDT, THE BEGINNING OF HUMAN LIFE 16-17 (1977).
254. K. MOORE, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 1, 13 (3d ed. 1982) (emphasis in original).
255. GREENHILL & FRIEDMAN, BIOLOGICAL PRINCIPLES AND MODERN PRACTICE OF OBSTETRICS 17 (1974).
256. C. CORLISS, PATTEN'S HUMAN EMBRYOLOGY: ELEMENTS OF CLINICAL DEVELOPMENT 30 (1976) (emphasis in original).
257. L. AREY, DEVELOPMENTAL ANATOMY 55 (Rev. 7th ed. 1974).

The strict construction of penal statutes is also subject to the analogous rule that the obligation of the court is to effectuate the intent of the legislature or the statutory purpose.[258] A homicide statute, by definition, punishes "the killing of one human being by the act, procurement, or omission of another."[259] A homicide statute protects all human beings. To construe a homicide statute in such a manner as to exclude an entire class of human beings is to defeat the intention of the legislature.

A number of policy rationales have historically supported the rule of strict construction of penal statutes. One rationale is that a strict construction will serve to ensure adequate notice to the community of the provisions of the law and of the requirements by which citizens are expected to abide.[260] But this rationale is itself limited by the fair warning given by statutes which prohibit acts that are *malum in se*.[261] "An act malum in se is defined as a wrong in itself; an act involving illegality from the very nature of the transaction."[262] The policy of adequate notice is satisfied "where the function of notice and warning is assisted by common knowledge and understanding of conventional values as in the case of offenses which are malum in se."[263] As a result, the rationale of adequate notice is more logically applicable to offenses that are *malum prohibitum*, since the intrinsic evil that distinguishes an offense as *malum in se* is itself "fair warning."[264]

It can hardly be denied that the killing of an unborn child *in utero* is *malum in se*. It has been proscribed by the common law for over 600 years.[265] The degree to which the common law proscribed such killing was limited by the available evidence under the medical technology of the time.[266] The ancient common law considered the killing of a child *in utero* as homicide without limitation.[267] Later, Blackstone called the killing of a quickened unborn child *in utero* "a very heinous misdemeanor."[268] Coke

258. *See, e.g.*, Valdes v. State, 443 So. 2d 221, 222 (Fla. Dist. Ct. App. 1983); State v. Millett, 392 A.2d 521, 525 (Me. 1978).

259. BLACK'S LAW DICTIONARY 661 (5th ed. 1979).

260. *See, e.g.*, Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931).

261. 3 SANDS, *supra* note 245, at § 59.03; W. LAFAVE & A. SCOTT, *supra* note 122, at 95. *See* State v. Mellenberger, 163 Or. 233, 95 P.2d 709 (1939).

262. Grindstaff v. State, 214 Tenn. 58, 69, 377 S.W.2d 921, 926 (1964).

263. 3 SANDS, *supra* note 245, at § 59.03. *See also* People *ex rel.* Ricco v. Zambino, 75 Misc. 2d 608, 348 N.Y.S.2d 688 (1973).

264. *See* Standard Food Products Corp. v. O'Connell, 296 N.Y. 52, 69 N.E.2d 559 (1946); People v. Shakun, 251 N.Y. 107, 167 N.E. 187 (1929); People v. Phyfe, 136 N.Y. 554, 32 N.E. 978 (1893); 3 SANDS, *supra* note 245, at § 59.03.

265. *See supra* notes 84-107 and accompanying text. *See* Byrn, *supra* note 21, at 816. *See* cases collected in State v. Harris, 90 Kan. 807, 136 P. 264 (1913); State v. Farnam, 82 Or. 211, 161 P. 417 (1916).

266. *See supra* notes 23-61 and accompanying text.

267. *See supra* notes 84-86 and accompanying text.

268. *See supra* note 96.

considered the killing of a quickened fetus as "a great misprision."[269] And, if the fetus was born alive at any stage of gestation, the offense was homicide. Thus, the common law protected the unborn child at the earliest point in pregnancy that it could be determined to be alive.[270] And, as the evidentiary limitations fell by increased knowledge and advancing technology, the law increasingly protected the unborn child.[271] Given such a longstanding historical prohibition against the killing of unborn children, "fair warning" is given by the intrinsic evil of killing a human being. The due process rationale, therefore, does not justify an application of the strict construction rule which would retain the born alive rule under such circumstances.

Moreover, the proper inquiry at stake in the "fair warning" rationale is the general, not specific, knowledge of the offender.[272] The issue is not whether the offender knew that his conduct was prohibited by "Section 201.222 of the Criminal Code" but whether he knew that his conduct was wrong. As applied to the intentional killing of an unborn child, the inquiry is whether the offender had fair warning that he was killing a human being. Although it will be immediately contended that the born alive rule indicates that the offender could not have known that he was killing a human being, this argument is flawed for two reasons. First, this rebuttal assumes that the born alive rule was a substantive definition of a human being, and the evidence indicates that it was not. Second, the issue is not whether the offender knew of a common law rule that artificially limited the scope of a homicide statute, but whether he knew in ordinary every day terms that he was killing a human being. In common knowledge, it is recognized that an unborn child is a human being.

The strict construction of penal statutes especially does not require the retention of the born alive rule in the case of reckless or vehicular homicide. It is incongruous to apply the "fair warning" rationale to retain the born alive rule when an unborn child is killed in a vehicular accident. Vehicular homicide does not require a specific intent to kill a human being. When a vehicular accident is the cause of death, the offender need not know how many human beings are present in the car he hits in order to be guilty of the homicide of all. The criminality is in the nature of the reckless conduct.[273] Fair warning is provided by the recklessness of the conduct which threatens all human lives.

269. E. COKE, *supra* note 88, at 50.

270. *See supra* notes 23-26, 37-53 and accompanying text.

271. *See* Dellapenna, *supra* note 33, at 389; Witherspoon, *supra* note 92, at 29.

272. *See generally* W. LAFAVE & A. SCOTT, *supra* note 122, at 95. In Bouie v. City of Columbia, 378 U.S. 347 (1964), the decision which is most often cited for the rule against the retroactive application of judicial decisions in the field of criminal law, the Court specifically noted that "petitioners' conduct cannot be deemed improper or immoral" and distinguished the case from a situation where conduct might be deemed improper or immoral. *Id.* at 362 n.9.

273. *See generally* W. LAFAVE & A. SCOTT, *supra* note 122, at 208-17, 586-94.

A second rationale supporting the strict construction of penal statutes is that strict construction "is a useful means to protect the individual against arbitrary discretion by officials and judges."[274] The status of the law of wrongful death, the rights accorded the fetus under property law, the history of criminal statutes protecting the unborn, and the widely acknowledged obsolescence of the born alive rule signify that the *exclusion* of the unborn child from a homicide statute, and not the inclusion, is arbitrary.[275] The very nature of a homicide statute is to protect human beings, since homicide is, by definition, the killing of a human being.[276] The common law was limited by its inability to determine when and whether the unborn child was ever alive.[277] Now that modern medicine enables society to recognize, as a matter of scientific fact and definition, that the unborn child is a *living* human being from conception, and now that such can be proved by modern medical technology, a homicide statute, literally applied, must encompass the unborn child.[278] Thus, it is a strict or literal construction itself which requires that a homicide statute encompass the unborn child. Conversely, it is arbitrary discretion or loose construction which excludes the unborn child, a human being, from the class of persons protected by a homicide statute. "The rule of strict construction does not require that penal statutes be given the narrowest reading that the words of the statute will allow."[279] Other courts have concluded that the strict construction of penal statutes does not require the retention of common law rules of evidence, like the year and a day rule, or the common law definition of death as the cessation of all bodily functions, when developments in medical science eliminate the evidentiary reasons for those rules, even if the abandonment of such common law rules means the extension of the statute to factual patterns beyond the strict confines of the common law.[280]

274. 3 SANDS, *supra* note 245, at § 59.03.

275. *See supra* note 163 and accompanying text. *See generally* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980); Note, *Wrongful Death of the Fetus: Viability Is Not A Viable Distinction*, 8 U. PUGET SOUND L. REV. 103 (1984); Note, *A Century of Change: Liability for Prenatal Injuries*, 22 WASHBURN L.J. 268 (1983); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 355 (1971).

276. BLACK'S LAW DICTIONARY 661 (5th ed. 1979).

277. *See supra* notes 23-26, 37-61 and accompanying text.

278. *See* Commonwealth v. Cass, 392 Mass. 799, 801, 467 N.E.2d 1324, 1325 (1984) ("In keeping with approved usage, and giving terms their ordinary meaning, the 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."). The court in Byrn v. New York City Health and Hosp. Corp., for example, conceded that the unborn child is a human being. "It is human, if only because it may not be characterized as not human, and it is unquestionably alive." 31 N.Y.2d 194, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

279. 3 SANDS, *supra* note 245, at § 59.06.

280. *See supra* notes 140-56 and accompanying text.

Accordingly, in strictly construing homicide statutes, courts must recognize that the born alive rule did not originate as a substantive definition of human being. It was not a limitation on the "class" of human beings.[281] Nor was it a rule which reflected on the "status" of the fetus at common law.[282] Rather, it served as the essential proof of distinction between live and dead human beings, since, as one court stated in explaining the rule, it is "axiomatic that one cannot kill something already dead."[283] Since the born alive rule was never a substantive element of the law of homicide, but merely an evidentiary one, it cannot accurately be said that the application of a homicide statute to unborn human beings, who can be shown to have been killed, is the creation of a "new crime" when the statute is now simply applied to those human beings, who, at the time the born alive rule was created, could not be proved to have ever been alive.[284] When courts invoke the rule of strict construction to justify not applying a homicide statute to the unborn child, they invariably assume that the common law born alive rule was a substantive definition of human being.[285] But, when the evidentiary nature of the born alive rule is comprehended, the born alive rule, as an obstacle to the application of a homicide statute to encompass all human beings, falls apart, and a strict construction of homicide statutes encom-

281. *Cf.* Hollis v. Commonwealth, 652 S.W.2d 61, 63 (Ky. 1983).

282. *Cf.* Hollis, 652 S.W.2d at 62.

283. *See* Singleton v. State, 33 Ala. App. 536, 540, 35 So. 2d 375, 378 (1948).

284. *Cf.* Note, *Judicial Recognition of Feticide: Usurping the Power of the Legislature?*, 24 J. FAM. L. 43 (1985-86):

> The born alive rule was adopted by the American courts for several reasons. First, because medical science was relatively crude and lacked sophisticated techniques in the area of forensic medicine, the important nexus between the conduct of the defendant and the death of the fetus was premised on mere speculation. Second, a presumption that the fetus would not be born alive existed due to the high prenatal mortality rates which resulted from this same limited medical knowledge. Finally, it was presumed that a mother was not capable of acting rationally during childbirth; thus, she would be excused from killing her fetus by this irrational conduct.

Id. at 45. The first two reasons proffered by this writer are entirely evidentiary in nature, occasioned by the state of medical technology. Neither of these reasons relates to any value judgment that the law placed on the life of the fetus. The third rationale, as the writer notes, has no relation to homicide by third parties:

> The rationales relied upon by the American courts are no longer viable in light of contemporary medical technology which allows accurate proof of causation. Medical science has progressed to the point where the modern day presumption is that a viable fetus will be born alive. Furthermore, the mental condition of the mother is irrelevant when the fetus dies as a result of another individual's assault upon her.

Id. at 46. In light to these conclusions, it is inconsistent for this writer to conclude that an interpretation of a criminal statute which takes into account the origin and obsolescence of the born alive rule is "judicial usurpation". A court does not create a "new crime" by recognizing that the rule is evidentiary in nature and by rejecting that rule of evidence as obsolete. *See also* Comment, *The Non-consensual Killing of An Unborn Infant: A Criminal Act?*, 20 BUFFALO L. REV. 535, 536-37 (1971).

285. *See supra* note 226-30 and accompanying text.

passes all human creatures, including the unborn child.

VII. The Relevance of *Roe v. Wade* to the Homicide of the Unborn Child

In addition to the rule of strict construction of penal statutes, several state courts, in examining the application of homicide statutes to the unborn child, have considered the Supreme Court's decision in *Roe v. Wade*[286] to be an additional limitation on the application of homicide statutes to the unborn child.[287] These decisions have unnecessarily broadened *Roe's* scope beyond its constitutional context and have erroneously extended *Roe* to hold that states have no interest in protecting the lives of unborn children even against nonconsensual acts by third parties. An accurate reading of *Roe* dictates, as scholars have increasingly concluded, that it does not apply to the context of nonconsensual third party acts against the unborn child.[288]

In *Roe v. Wade*, the Supreme Court held that a woman has a fundamental constitutional right to abortion, based on the constitutional right to privacy premised on the Fourteenth Amendment Liberty Clause. The Court held that, in the first trimester of pregnancy, the abortion decision must be left to the woman and her physician.[289] Since the state has no compelling interest in the first trimester that would justify regulation, the Court said, the state can ensure the safety of the abortion procedure, but cannot otherwise regulate the procedure or restrict abortion for any reason.[290]

In the second trimester, the Court held that the abortion decision is to be left to the woman in consultation with her physician. The state has a compelling interest in protecting maternal health in the second trimester, however, and, therefore, can regulate the procedure, but not the abortion decision, "in ways that are reasonably related to maternal health."[291] The Court held that the state's interest in protecting the life of the fetus exists throughout pregnancy and grows in strength as pregnancy develops, but becomes compelling only at the end of the second trimester, when the Court estimated that viability may occur.[292] However, as balanced against the fundamental right to abortion in the second trimester, the state has no compelling interest in the life of the fetus and, therefore, cannot act to protect

286. 410 U.S. 113 (1973).
287. *See, e.g.*, People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498, 501 (1976); Hollis v. Commonwealth, 652 S.W.2d 61, 63 (Ky. 1983).
288. *See* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 Harv. J. on Legis. 97, 110-19 (1985); Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 629 (1980).
289. *Roe*, 410 U.S. at 164.
290. *Id.* at 149-50, 164.
291. *Id.* at 163-64.
292. *Id.* at 162-64.

the life of the fetus if this would violate the abortion right.[293]

In the third trimester, the Court held that the state has compelling interests in the health of the mother and in the life of the fetus as balanced against the abortion right.[294] The state can thus restrict abortion, except where abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[295] Although this rule implies that abortion can be substantially regulated in the third trimester, the rule creates a "health" exception that is so broad as to in fact constitute the rule itself. The health exception in the third trimester incorporates a broad definition of health, which was defined by the Court in the companion case to *Roe v. Wade*, *Doe v. Bolton*.[296] The Court stated that these two cases must be read together[297] and this includes the *Doe v. Bolton* health definition:

> [T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health.[298]

Accordingly, all such factors require the state to allow abortions in the third trimester.[299] The lower federal courts have broadly interpreted this health definition.[300] As a result, the exception becomes the rule, and abortion is, for all intents and purposes, a constitutional right from conception to birth for virtually any reason.[301]

In opposition to this right, the state of Texas, in *Roe v. Wade*, argued that a fetus was a "person" within the meaning of the Fourteenth Amendment.[302] But the Court held that, as balanced against the woman's right to

293. *Id.* at 163-64.
294. *Id.* at 163-65.
295. *Id.* at 164, 165.
296. 410 U.S. 179 (1973).
297. *Id.* at 189.
298. *Id.* at 192.
299. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986).
300. *See, e.g.*, American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 299 (3d Cir. 1984) ("It is clear from the Supreme Court cases that 'health' is to be broadly defined."), *aff'd*, 106 S. Ct. 2169 (1986).
301. Recently, in *Thornburgh*, the Supreme Court struck down a statute which would have required the attending physician during a post-viability abortion to use that method of abortion which would be most conducive to preserving the life of the viable fetus, unless there was a "significantly greater risk" to maternal health from that particular method. The Court held that this language required an unconstitutional "trade off" during a post viability abortion between the women's health and the life of the fetus. 106 S. Ct. at 2183 (quoting Colautti v. Franklin, 439 U.S. 379, 400 (1979)).
302. 410 U.S. at 156.

privacy under the Liberty Clause of the Fourteenth Amendment, the fetus was not a "person" with constitutional rights under the Fourteenth Amendment.[303]

It is frequently argued that, as a result of *Roe*, the state cannot define the unborn child in a statute as a "person" in any context.[304] In support of this claim, that portion of the *Roe* opinion is cited where Justice Blackmun wrote that "[w]e need not resolve the difficult question of when life begins."[305] This argument ignores the fact that *Roe* dealt with the definition of "person" in the context of constitutional rights, under the language of the Fourteenth Amendment, and in the context of being balanced against the woman's right to privacy under the Fourteenth Amendment. In *Roe v. Wade*, such a definition of "person" was struck because it was used to deny a constitutional right to abortion under the Fourteenth Amendment. When the Court in *Roe* stated that "the unborn have never been recognized in the law as persons in the whole sense,"[306] it was merely making an observation to support its definition of "person" as used in the Fourteenth Amendment, not setting forth a command.

Professor Jeffrey Parness has written that *Roe v. Wade* addressed "the limited consensual abortion setting."[307] The decision "does not preclude governmental conduct extending protection and respect for the unborn."[308] Furthermore, he writes: "While the decision in *Roe* declares that the state may not protect the potential life of the human fetus from the moment of conception, it does so only in the very narrow context of the mother's abortion decision."[309] Under *Roe v. Wade*, therefore, the right to abortion is encompassed within the woman's right to constitutional privacy. The fetus is not a "person" for purposes of the Fourteenth Amendment and has no constitutional rights that would outweigh the exercise of the woman's Fourteenth Amendment rights. The fetus' rights, and the state's interest, or lack of interest, in protecting maternal health and in protecting the life of the fetus, were distinctly balanced against the woman's right to privacy in the context of consensual abortion.

In addition, however, it must be noted that, even in the abortion context, the Court in *Roe* affirmed the state interest in protecting fetal life.[310] This reasoning was relied on by the Alabama Supreme Court to allow

303. *Id.* at 156-59.
304. *See, e.g.*, People v. Smith, 59 Cal. App. 3d 751, 756, 129 Cal. Rptr. 498, 501 (1976).
305. 410 U.S. at 159.
306. *Id.* at 163-64.
307. Parness, *supra* note 288, at 97.
308. *Id.*
309. *Id.* at 103.
310. 410 U.S. at 163-64.

wrongful death recovery for a viable, stillborn fetus.[311] As one scholar has concluded, citing *Roe*, "the interest [in prenatal life] may exist and may be asserted. . . ."[312]

Several courts however have applied the *Roe* decision without regard to its context or meaning. In *People v. Smith*,[313] a husband was charged under a murder statute with savagely beating his wife with the intent to kill her previable unborn child.[314] The California court construed *Roe* as declaring the unborn child to be a "nonperson" in all contexts and thus to be outside the class of victims of the homicide statute.[315] "Legally," the court said, "a fetus is not a person."[316] The Court in *Roe*, however, said no such thing. Rather, it stated that a fetus merely was not a person possessing constitutional rights within the meaning of the Fourteenth Amendment, when balanced against the fundamental right of abortion. But, based on *Roe*, the California court stated that "[t]he underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence."[317] Here, the court did not delineate the context in which the fetus was held not to be a "person"—the Fourteenth Amendment. Indeed, the Supreme Court expressly left open the question of when human life begins.[318] In addition, the *Smith* court failed to recognize that this holding on the status of the fetus resulted from being directly balanced against the woman's right to constitutional privacy under the Fourteenth Amendment Liberty Clause.

Likewise, in *Hollis v. Commonwealth*,[319] the Kentucky Supreme Court relied upon broad statements in *Roe* without regard for their context. "Viewed in the context of *Roe*," Justice Leibson wrote, "Kentucky has a 'compelling' interest in the life of the fetus when it reaches the stage of viability sufficient to legislate legal sanctions punishing those who destroy it, subject to the limitations that such sanctions shall not apply where the life or health of the mother is involved."[320] This of course ignores the fact that Kentucky's interest is called "compelling" only within the context of being balanced against the fundamental right of abortion. The notion of a "compelling interest" was created by the fundamental rights analysis under the Due Process Clause.[321] When not balanced against that fundamental right,

311. Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974).
312. Kader, *supra* note 288, at 661-62.
313. 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).
314. *Id.* at 753, 129 Cal. Rptr. at 499.
315. *Id.* at 765, 129 Cal. Rptr. at 501.
316. *Id.*
317. *Id.* at 757, 129 Cal. Rptr. at 502.
318. *Roe*, 410 U.S. at 159.
319. 652 S.W.2d 61 (Ky. 1983).
320. *Id.* at 63.
321. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 409-10 (1978).

Kentucky may assert an interest in fetal life at any period of gestation.[322]

Other judges have recognized the limits of the Court's decision in *Roe*. The Louisiana Supreme Court, in the 1979 case of *State v. Brown*,[323] adhered to the born alive rule and held that a homicide statute only encompasses those born alive. It did not rest its decision on *Roe v. Wade*, though it mentioned the decision in passing. Justice Blanche, dissenting, recognized that *Roe* "was limited to the regulation of the voluntary abortion."[324] Moreover, he pointed out that, while *Roe* involved the right of privacy of the mother, "no countervailing privacy right" was presented in the case of unconsented violent acts by a third party.[325] Justice Blanche concisely summarized the proper context of *Roe*:

> While *Roe* absolutely prohibits state regulation of a mother's voluntary abortion during the first trimester, nothing in the decision prohibits the state's regulation of other forms of feticide. *Roe* does not prevent a state from adopting a particular theory as to when life begins, but rather prohibits the state from using this theory to override the rights of the pregnant woman.[326]

The principle that an unborn child is not a "person" within the language of the Fourteenth Amendment does not mean that a fetus may not be a human being or person in other contexts.[327] So too, the principle that the unborn child does not have constitutional rights when balanced against the woman's constitutional right to privacy does not at all mean that the fetus may not have common law or statutory rights when balanced against the criminal acts of a third party. "*Roe v. Wade* does not purport to limit the state's efforts to protect the potentiality of life represented by the unborn in any other context."[328] Judges and scholars, who have taken a closer look at the language and context of the *Roe* decision, have noted *Roe's* inapplicability to nonconsensual acts by third parties as proscribed by homicide statutes.[329] *Roe v. Wade* is not directed to nonconsensual acts by third parties. It is not a bar to judicial or statutory recognition of the rights of

322. *See* Parness, *supra* note 288, at 97, 103.
323. 378 So. 2d 916 (La. 1979).
324. *Id.* at 919.
325. *Id.*
326. *Id.*
327. *See* People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978) (affirming homicide of viable fetus at 22-24 weeks gestation). *See also, e.g.*, Parness, *supra* note 288, at 103; Parness, *Protection of Potential Human Life in Illinois: Policy and Law at Odds*, 5 N. ILL. U. L. REV. 1 (1984); Parness and Pritchard, *To Be Or Not To Be: Protecting The Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 258, 263, 267-69 (1982); Kader, *supra* note 275, at 640-41, 651, 656-57.
328. Kader, *supra* note 275, at 664.
329. *See supra* note 327.

the unborn child against tortious or criminal acts of third parties.

VIII. MODEL LEGISLATION

Because the born alive rule was entirely a legal presumption of evidence, it is entirely appropriate for modern courts, with the knowledge of modern medicine, to apply criminal statutes to encompass unborn children as victims. Indeed, given modern medical knowledge, it is the only application that makes sense. Nevertheless, because courts have misapplied *Roe v. Wade*, and because they have failed to inquire into the origin and meaning of the born alive rule, courts have been reluctant to apply criminal statutes in this manner. Accordingly, legislation is needed, especially where, as in Minnesota, a narrow court decision retaining the born alive rule has been rendered.[330]

Legislation in this area may take any number of approaches. A narrow approach might encompass merely an amendment to a state vehicular homicide statute to encompass the unborn child. On the other hand, a comprehensive statute, providing full protection to the unborn child, could apply to the crimes of intentional homicide, voluntary manslaughter, involuntary manslaughter, and battery to the unborn. This approach was adopted in the Minnesota statute which overturned *State v. Soto*[331] and, more recently, by the Illinois General Assembly.[332] Either of these approaches, in turn, could encompass only a viable fetus or more broadly apply to the unborn child from conception. The Minnesota and Illinois legislation apply to the unborn child from conception.

In proposing such legislation, the legislator initially must decide whether to draft narrow or comprehensive legislation. The experience in two states has been that narrow legislation has not fared well in the courts, not on constitutional grounds, but for reasons of statutory construction. In Louisiana, in response to *State v. Gyles*,[333] and in California, in response to *Keeler v. Superior Court*,[334] state legislatures accepted the invitation to enact legislation to eliminate the born alive rule in the law of homicide. The Louisiana legislation consisted of an amendment to the definition of "person" in the penal code to explicitly encompass the unborn child from conception.[335] The California legislation added the phrase "or a fetus" to the term "human being."[336] In both states, the courts limited the amendments

330. *See* Parness, *supra* note 288, at 163.
331. *See supra* note 5.
332. Illinois Statute, *supra* note 5.
333. 313 So. 2d 799 (La. 1975).
334. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
335. LA. REV. STAT. ANN. § 14:2(7) (West 1986).
336. CAL. PENAL CODE § 187(a) (West Supp. 1986).

to encompass only viable unborn children.[337] In addition, an amendment to one section of the penal code—like a vehicular homicide section—may not be applied by the courts to other sections—like the homicide or battery sections. For these reasons, a comprehensive model is offered here.

Drafting a legally coherent comprehensive statute that will pass legal and constitutional attack requires attention to many details: including a clear understanding of the law of homicide, manslaughter, and battery; a clear definition of terms in the statute; and an understanding of the theoretical evidentiary issues that may arise, the significance of *Roe v. Wade*, and the applicable sentencing law. The comprehensive model legislation offered in Appendix A creates the offenses of intentional homicide, voluntary manslaughter, involuntary manslaughter, battery, and aggravated battery against the unborn child. For purposes of simplicity and to avoid unnecessary conflicts, the language and elements of these provisions should generally track parallel sections in the existing state criminal code.

Section 1 of the model creates the crime of intentional homicide of the unborn child. To commit "intentional homicide of the unborn child", the offender must (a) intend to cause the death or to do great bodily harm to the pregnant woman or the unborn child, and (b) know or reasonably should know that the woman is pregnant. A stronger tighter bill might delete the "reasonably should know" language. Although this is common language in intentional homicide statutes, the controversial nature of this legislation may caution against the use of the broader language. For the sake of accuracy, the crime should be denoted "intentional homicide of the unborn child," not "murder" of the unborn child. But if the parallel state statute uses "murder," then the new bill may track that language.

In general, the acts must be proved to have proximately caused the death of the child. All elements of the crime must be proved beyond a reasonable doubt. These principles are implicit in the bill as a criminal statute, however, and need not be expressly provided in the bill. Unborn child is defined in a medical sense as "any individual of the human species from fertilization until birth." "Conception," if used, should be precisely defined as synonymous with fertilization.[338] "Without lawful justification" is included as an element in order to exclude from the coverage of the law acts done in self-defense.

337. State v. Brown, 378 So. 2d 916 (La. 1979); People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

338. Although a few medial dictionaries do not equate "conception" and "fertilization", *see, e.g.*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 296 (26th ed. 1985) ("conception"), most authorities equate these terms. *See* BLAKISTON'S GOULD MEDICAL DICTIONARY 305 (4th ed. 1979); TABER'S CYCLOPEDIC MEDICAL DICTIONARY 368 (15th ed. 1985); MOSBY'S MEDICAL AND NURSING DICTIONARY 258 (1983); BUTTERWORTH'S MEDICAL DICTIONARY 400 (2d ed. 1978); MELLONI'S ILLUSTRATED MEDICAL DICTIONARY 108 (2d ed. 1985); URDANG DICTIONARY OF CURRENT MEDICAL TERMS 91 (1981); BLACK'S MEDICAL DICTIONARY 217 (33d ed. 1981). William's Obstetrics provides a chart on "human *preimplantation* stages", which refers to the 2-cell stage which has been "washed from the fallopian tube 1½ days *after conception*." WILLIAMS OBSTETRICS, *supra* note 22, at 89 (Fig. 5-7) (emphasis added).

The penalty for intentional homicide of the unborn child is the same as that generally imposed for murder or intentional homicide elsewhere in the penal code. This is not an extreme or novel penalty. The former Illinois Feticide Law, now superceded by the Illinois comprehensive bill, imposed such a penalty.[339] As with the Illinois Feticide Law, the penalty in this model prohibits the imposition of capital punishment.

Section 2 of the model creates the crime of voluntary manslaughter of the unborn child. The essential element of "voluntary manslaughter of the unborn child" is an act committed "under a sudden and intense passion resulting from reasonable provocation."[340] The offense is committed if, with such state of mind, the person endeavors to kill someone but negligently or accidentally causes the death of an unborn child. Voluntary manslaughter may also be committed if the offender kills an unborn child under the unreasonable belief that his acts were necessary for self-defense or for defense of property.

Section 3 of the bill creates the crime of involuntary manslaughter of the unborn child. "Involuntary manslaughter" is committed when one "recklessly" kills an unborn child by acts which are "likely to cause death or great bodily harm." In addition, the section specifically states that when the death of the unborn child is caused by the driving of a motor vehicle the crime is reckless homicide and not voluntary manslaughter. This exception is intended to provide for the prosecution of such actions under separate reckless homicide sections of the penal code, which in many states may carry a lesser penalty than involuntary manslaughter. In states where the crimes are not distinct, there is no need to exclude vehicular homicide from the coverage of this section.

The carefully drawn langauge of this section ("likely to cause death or great bodily harm") precludes bizarre or unexpected prosecutions against the unwary. For example, no bartender who serves liquor will or could be prosecuted for involuntary manslaughter of the unborn child. First, the mere serving of liquor is not "likely" to "cause death or great bodily harm to an unborn child." Second, the *serving* of the liquor could not be the proximate cause of any harm. Third, the serving of liquor would not be "reckless"—a state of mind which is expressly required by the legislation. These same explanations would equally apply to the producer of chemicals. The pregnant woman who ingests the liquor, or is employed by the chemi-

339. Illinois Statute, *supra* note 5.

340. *See* W. LAFAVE & A. SCOTT, *supra* note 122, at 572.

cal producer, is expressly excluded from the provisions of the bill, in order to avoid any arguable conflict with the constitutional right to privacy under *Roe v. Wade*.[341]

Sections 4 and 5 of the model establish the crimes of battery and aggravated battery against the unborn child. "Battery of an unborn child" is committed when one intentionally causes bodily harm to an unborn child. "Aggravated battery" is a battery by a person who intentionally causes great bodily harm or permanent disability or disfigurement. These sections are necessary to overturn decisions such as *State v. Love*,[342] where a conviction for battery against an unborn child, who was shot in the head *in utero* but survived, was reversed on the basis of the born alive rule.

This model legislation, by its express terms, does not affect the right to abortion. For two reasons, none of these offenses impinges on a woman's right to abortion or invokes the restraints of *Roe v. Wade*. First, each offense expressly excludes acts committed during any abortion, lawful or unlawful, *to which the woman consents*. The exclusion is broadly drafted to encompass even "unlawful" abortions, so as to exclude from its coverage any abortion that might technically run afoul of any existing abortion statute. Otherwise, any technical violation of an abortion statute might be construed as violating this model legislation, which, in turn, would cast the constitutionality of the model legislation into doubt and give rise to a constitutional challenge. Thus, the exclusion of any consented abortion from the scope of the legislation would exclude the pregnant woman and her physician from the reach of the statute.

At the same time, however, the legislation must be clearly drafted to prevent the artful argument by an offender that the act which resulted in the injury or death to the mother or child was simply an "abortion." This is possible since an abortion may be defined as the premature expulsion of the fetus from the womb. "Abortion" thus must be defined in the bill as one to which the women "consented." This prevents the word "abortion" from being artfully used to include any termination of a pregnancy which might result from violent acts committed by a third party or from a vehicular accident. Such artful interpretations, of course, would fundamentally undermine the legislation. Moreover, the entire purpose of the legislation is directed at acts by third parties to which the mother has not consented and against an unborn child, where the pregnancy, but for the unconsented acts of the third party, would be brought to term. The requirement that the abortion must be one to which the mother consented delineates this distinction.

341. *See generally* Beal, *"Can I Sue Mommy?" An Analysis of A Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984).
342. 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984).

The second manner in which this legislation precludes attacks based on *Roe v. Wade* is in its definition of "person." Throughout the legislation, "person" is defined to exclude "the pregnant woman whose unborn child is killed." Thus, early self abortions, as may be anticipated by new medical technology, would be excluded. This exclusion would also avert attacks on the legislation by those who might conceive that it would be applied against pregnant women who ingest alcohol, drugs, or tobacco during their pregnancy. These issues raise separate legal and constitutional concerns that do not need to be addressed by this legislation, and which, if addressed by the legislation, might call its clear constitutionality into doubt.[343] With these two provisions, the legislation creates no conflict between the constitutional rights of the pregnant woman and the statutory rights of the child. At the same time, only the pregnant woman is excluded, and any other woman can violate the statute by injuring the pregnant woman or her child.

The express provisions of the legislation are also drafted in order to be consistent with traditional principles of due process. "Intentional homicide of the unborn child", by its very name, requires an intent to do harm to the unborn child. An offender who commits "voluntary manslaughter of the unborn child" must do so while intending to kill another with "a sudden and intense passion." In *Mullaney v. Wilbur*,[344] the Supreme Court specifically upheld such a state of mind in a criminal statute, as long as the burden is on the state to prove its existence or absence beyond a reasonable doubt. The model also provides that voluntary manslaughter may be committed by one, who, while intending to kill someone, "negligently or accidentally" kills an unborn child. This simply incorporates the longstanding rule in criminal law of "transferred intent."[345] In other words, while possessing this intent, there may be a difference between the result the offender intends and the result he achieves. There may be an unintended victim. Yet, the law transfers the intent from the intended victim to the unintended victim.[346] "The law is well settled that where a person shoots at one with intent to kill and murder, but kills one whom he did not intend to injure, he is not absolved from answering to the crime of murder."[347] Finally, the model provides that one may also commit "voluntary manslaughter" by "intentionally or knowingly" killing an unborn child if he does so while "unreasonably" believing that he has lawful justification.

One who commits "involuntary manslaughter" may do so "unintentionally" if the acts are "likely to cause death or great bodily harm" and those acts are done "recklessly." For this crime, the offender need not know

343. *See supra* note 341.
344. 421 U.S. 684 (1975).
345. W. LAFAVE & A. SCOTT, *supra* note 122, at 198.
346. W. LAFAVE & A. SCOTT, *supra* note 122, at 198.
347. People v. Marshall, 398 Ill. 256, 263, 75 N.E.2d 310, 313 (1947).

of the pregnancy. In other words, he need not know of the existence of the unborn child. This lack of knowledge in committing "involuntary manslaughter" is unobjectionable when one considers that the offender is being held accountable for the foreseeable outcome of his "reckless" acts. In an analogous situation, that of vehicular homicide, an offender obviously need not know how many people are in a car he hits in order to be held accountable for the death of any or all. The offender who does not know of the existence of the unborn child, and the reckless driver who does not know of the existence of particular people in the car he hits, may equally commit involuntary manslaughter.

Finally, the express provisions of the model provide that, to commit "battery" or "aggravated battery," the offender must "intentionally or knowingly" cause bodily harm to the unborn child. This necessarily means that he must "know" of the pregnancy, for he could not otherwise "intentionally" cause harm to the unborn child. Indeed, this provision requires a greater state of mind than simply "knowing" of the pregnancy: he must also know of the existence of the unborn child and intend to do it harm. These elements parallel traditional criminal law concepts which are consistent with due process. By tracking the language of the existing state criminal code, the potential ambiguity of new language will be prevented and the new legislation can rely upon statutes which have presumably already been tested and have passed legal and constitutional muster.

This model legislation is drafted to proscribe acts directed against the unborn child, and not simply acts directed against the mother as provided in some legislation.[348] A statute drafted to punish only acts against the mother would not adequately protect against acts directed at the unborn child. For example, acts by an offender who is incensed that the woman is pregnant may well be directed specifically at the unborn child and designed to kill it, though not specifically intended to harm the mother. In the 1983 Kentucky case of *Hollis v. Commonwealth*,[349] an estranged husband discovered from a third party that his wife was pregnant and, upon discovering her, "told her he did not want a baby, and then forced his hand up her vagina intending to destroy the child and deliver the fetus."[350] Likewise, in the *Keeler* case,[351] under similar facts, an estranged husband found his wife to be pregnant and shoved his knee into her abdomen, declaring "I'm going to stomp it out of you."[352] These acts might not be covered or penalized as homicide under legislation designed merely to prohibit acts directed against

348. *See, e.g.*, Illinois Statute, *supra* note 5. *See also* N.M. STAT. ANN. 30-3-7, 66-8-101.1 (Supp. 1986).

349. 652 S.W.2d 61 (Ky. 1983).

350. *Id.*

351. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

352. *Id.* at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482.

the mother, because they were not done with intent "to kill or do great bodily harm to the mother," whatever their effect might have been. Violent acts directed at the unborn child, though not intended to harm the mother, whatever their effect, might be completely unrestricted or only lightly penalized by legislation which focuses exclusively on the mother. Of course, actions which kill or injure the mother are presumably covered under already existing sections of the penal code.

Courts which have failed to understand the born alive rule and, therefore, have declined to abandon it, nevertheless have encouraged state legislation to proscribe violent acts against the unborn. For example, the Michigan Court of Appeals, in *People v. Guthrie*,[353] stated:

> Although we find that the "born alive" rule is archaic and should be abolished in prosecutions brought under the negligent homicide statute, the abolition of the rule is a matter for action by the Legislature . . . Respectfully, we urge the Legislature to make the necessary amendments to the statute.[354]

Hence, if the judiciary will not interpret the plain statutory language of a homicide statute to encompass all human beings, it is certainly within the authority of the state legislature to do so.

IX. CONCLUSION

The born alive rule, like the quickening doctrine, was adopted as a common law rule of evidence solely because the state of medical knowledge and technology during the period of the common law compelled the creation of these rules in order to prove that the unborn child in the womb was alive. One cannot be convicted of killing an unborn child today, and one could not be convicted during the period of the common law, without proof of the *corpus delicti* of the crime: that the unborn child was alive at the time of the acts in question, and that the acts in question were the proximate cause of the death of the unborn child.

Professor John Noonan has written of "masks of the law"—ways of classifying individual human beings so that their humanity is hidden and disavowed."[355] In its origin, the born alive rule was *not* a mask of the law. It was not a way of classifying the unborn to deny their humanity. The state of medical science was the mask which forced the rule upon the creators of the common law to instill certainty in the law in a matter of life

353. People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983).

354. 97 Mich. App. at 237-38, 293 N.W.2d at 780-81; *see also* State v. Gyles, 313 So. 2d 799, 802 (La. 1975).

355. J. NOONAN, PERSONS AND MASKS OF THE LAW 19 (1976).

and death. But the 19th century judges, by imposing a judicial gloss on the common law rule with elaborate and intricate tests of live birth, and more particularly, the judges of the 1970's and 1980's who continue to adhere to the rule after it has become irrational, have turned the rule into a mask of the law.

Modern courts either fail to inquire into the purpose of the born alive rule, or they assume, based on what is known of the unborn child today, that the common law knew as much, and thus that the born alive rule was not evidentiary but substantive—a reflection that the common law simply did not attempt to protect the life of the unborn child. To paraphrase Professor Haskin, these judges have merely recounted the growth of the law and detailed the evolution of the born alive rule, but they have failed to determine how the born alive rule grew out of past social conditions, and how it accorded with or accommodated itself thereto.[356] The born alive rule, like the quickening doctrine and the year and a day rule, was entirely an "accommodation" of the common law to the brute technological facts, or medical ignorance, of the day. Since the technology and medical knowledge has improved to the point of eliminating many, if not all, of the evidentiary problems which confronted the common law, it no longer makes sense in law or medicine for the law to retain an evidentiary principle that does not rationally relate to contemporary facts. Tort law has recognized this fact by concluding that proof problems do not preclude the cause of action but are merely one aspect of the plaintiff's burden of proof.[357] Criminal law, and thus the courts that consider homicide cases, must also recognize this fact by strictly construing homicide statutes to encompass all human beings and by leaving the problems of proof for the state to prove beyond a reasonable doubt. If Holmes' dictum applies anywhere, it applies to the continued application of the born alive rule to the unborn child: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[358]

356. *See supra* note 1 and accompanying text.

357. Note, *Wrongful Death of the Fetus: Viability Is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 114-17 (1984). *See also* Note, *Wrongful Death of a Fetus: Does a Cause of Action Arise When There is No Live Birth*, 31 VILL. L. REV. 669 (1986).

358. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). "[W]hen the reason of a law ceases, the law itself should cease." Commissioners of Brown County v. Butt, 2 Ohio 348, 351-52 (1826).

APPENDIX A

"CRIMINAL OFFENSES AGAINST THE UNBORN CHILD"

"Amends the Criminal Code to create the offense of intentional homicide of an unborn child, voluntary manslaughter of an unborn child, involuntary manslaughter of an unborn child, battery of an unborn child, and aggravated battery of an unborn child."

Sec. 1. Intentional Homicide of an Unborn Child. (a) A person commits the offense of intentional homicide of an unborn child if, in performing acts which case the death of an unborn child, he without lawful justification:

(1) either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child or knew that such acts would cause death or great bodily harm to the pregnant woman or her unborn child: or

(2) he knew that his acts created a strong possibility of death or great bodily harm to the pregnant woman or her unborn child; and

(3) he knew that the woman was pregnant.

(b) For purposes of this Section, (1) "unborn child" shall mean any individual of the human species from fertilization until birth, (2) "person" shall not include the pregnant woman whose unborn child is killed, (3) "abortion" shall mean the use of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(c) This section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, lawful or unlawful, for which the pregnant woman has consented. This section shall not apply to acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

(d) Penalty. The sentence for intentional homicide of an unborn child shall be the same for murder, except that the death penalty may not be imposed.

(e) The provisions of this Act shall not be construed to prohibit the prosecution of any person under any other provision of law.

Sec. 2. Voluntary manslaughter of an unborn child. (a) A person who kills an unborn child without lawful justification commits voluntary man-

slaughter or an unborn child if at the time of the killing he is acting under a sudden and intense passion resulting from reasonable provocation by another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the unborn child.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an unborn child commits voluntary manslaughter of an unborn child if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in section X of this Code, but his belief is unreasonable.

(c) Sentence. Voluntary Manslaughter of an unborn child is a Class X felony.

(d) For purposes of this Section, (1) "unborn child" shall mean an individual of the human species from fertilization until birth, (2) "person" shall not include the pregnant woman whose unborn child is killed, (3) "abortion" shall mean the use of any instrument, medicine, drug, or any other substance or device, to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(e) This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, lawful or unlawful, for which the pregnant woman has consented. This Section shall not apply to acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

Sec. 3. Involuntary Manslaughter and Reckless Homicide of an Unborn child. (a) A person who unintentionally kills an unborn child without lawful justification commits involuntary manslaughter of an unborn child if his acts, whether lawful or unlawful, which cause the death are likely to cause death or great bodily harm to some individual or an unborn child, and he performs them recklessly, except in cases in which the cause of death consists of the driving of a motor vehicle, in which case the person commits reckless homicide of an unborn child.

(b) Sentence.

(1) Involuntary manslaughter of an unborn child is a Class X felony.

(2) Reckless homicide of an unborn child is a Class X felony.

(c) For purposes of this Section, (1) "unborn child" shall mean any individual of the human species from fertilization until birth, (2) "person" shall not include the pregnant woman whose unborn child is killed, and (3) "abortion" shall mean the use of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(d) This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, lawful or unlawful, for which the pregnant woman has consented. This Section shall not apply to acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

(e) The provisions of this Section shall not be construed to prohibit the prosecution of any person under any other provision of law, nor shall it be construed to preclude any civil cause of action.

Sec. 4. Battery of an Unborn Child. (a) A person commits battery of an unborn child if he intentionally or knowingly without legal justification and by any means causes bodily harm to an unborn child.

(b) For purposes of this Section, (1) "unborn child" shall mean any individual of the human species from fertilization until birth, (2) "person" shall not include the pregnant woman whose unborn child is harmed, and (3) "abortion" shall mean the use of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(c) Sentence. Battery of an unborn child is a Class X misdemeanor.

(d) This Section shall not apply to acts which cause bodily harm to an unborn child if those acts were committed during any abortion, lawful or unlawful, for which the pregnant woman has consented. This Section shall not apply to acts which are committed pursuant to usual and customary standards of medial practice during diagnostic testing or therapeutic treatment.

Sec. 5. Aggravated battery of an unborn child. (a) A person who, in committing battery of an unborn child, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement, commits aggravated battery of an unborn child.

(b) Sentence. Aggravated battery of an unborn child is a Class X felony.