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THE JURIDICAL STATUS OF THE FETUS: A PROPOSAL FOR LEGAL PROTECTION OF THE UNBORN

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What claims to protection can be asserted by a human fetus? That question, familiar to philosophy and religion, has long haunted law as well. While the philosophical and theological issues remain unresolved, and are perhaps unresolvable,[1] I believe that we can no longer avoid some resolution of the legal status of the fetus. The potential benefits of fetal research,[2] the ability to fertilize the human ovum in a laboratory dish,[3] and the increasing awareness that a mother's activities during pregnancy may affect the health of her offspring[4] create pressing policy issues that raise possible conflicts among fetuses, mothers, and researchers. This Article probes the juridical status of the fetus, assessing what it should be in the light of recent developments in case law,[5] legislation,[6] medicine, and technology.[7]

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1. The moral status of the fetus has been extensively discussed. *See generally* D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY (1970); THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (J. Noonan ed. 1970) [hereinafter cited as MORALITY OF ABORTION]; THE PROBLEM OF ABORTION (J. Feinberg ed. 1973); Wertheimer, *Understanding the Argument*, 1 PHIL. & PUB. AFF. 67 (1971).

2. In 1974 Congress passed the National Research Act, which established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The National Commission was given a mandate to investigate and study research involving the living fetus, and to recommend whether and under what circumstances such research should be conducted or supported by the Department of Health, Education, and Welfare. National Research Act, Pub. L. No. 93-348, § 213, 88 Stat. 342 (1974). Congress was concerned that unconscionable acts involving the fetus might have been performed in the name of scientific inquiry.

3. *See All About That Baby*, NEWSWEEK, Aug. 7, 1978, at 66; *The First Test-Tube Baby*, TIME, July 31, 1978, at 58.

4. *See* note 154 *infra* and accompanying text.

5. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

6. *See, e.g.*, the following statutes and regulations, all of which regulate fetal research: National Research Act, Pub. L. No. 93-348, § 213, 88 Stat. 342 (1974) (congressionally mandated moratorium on research on the living human fetus); HEW Additional Protections Pertaining to Research, Development, and Related Activities Involving Fe-

Section I reviews the Supreme Court's landmark decision in *Roe v. Wade*[8] and assesses its helpfulness in defining fetal status. I contend that, while the Court's opinion leaves many issues unresolved,[9] it provides a sketchy base upon which to construct a definition. *Roe* is useful because it relies on the biological stages of fetal development, especially viability, rather than attempting a philosophical determination of when human life begins. I argue, however, that *Roe* furnishes inadequate guidance for reconciling fetal interests with conflicting interests of the mother. In particular, it fails to illuminate the resolution of arguable claims on behalf of the previable fetus. Should fertile women be permitted to work in environments that might endanger the health of their offspring? In attempting *in vitro* fertilization, followed by transfer of the fertilized ovum into a mother's womb, should the physician be able to use several eggs and discard those fertilized ova that are not implanted?[10] Moreover, *Roe* fails to define adequately what protection should be afforded viable fetuses before birth. Does *Roe* permit abortion of a viable fetus when the mother asserts that continued pregnancy would cause her great mental anguish?[11]

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tuses, Pregnant Women, and Human in Vitro Fertilization, 45 C.F.R. §§ 46.201-211 (1978); ARIZ. REV. STAT. ANN. § 36-2302 (West Supp. 1978); CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1978); ILL. ANN. STAT. ch. 38, §§ 81-18, -26, -32 (Smith-Hurd 1977); IND. CODE ANN. § 35-1-58.5-6 (Burns 1977); KY. REV. STAT. § 436.026 (1975); LA. REV. STAT. ANN. § 14:87.2 (West 1974); ME. REV. STAT. tit. 22, § 1593 (Supp. 1978); MASS. ANN. LAWS ch. 112, § 12J (Michie Law. Co-op 1975); MINN. STAT. ANN. § 145.422 (1973); MO. ANN. STAT. § 188.035 (Vernon Supp. 1979); N.D. CENT. CODE §§ 14-02.2-01, -02 (Supp. 1977); 35 PA. STAT. ANN. tit. 35, § 6605 (Purdon 1974); S.D. COMP. LAWS ANN. § 34-23A-17 (1976); UTAH CODE ANN. § 76-7-310 (1978).

7. *See* note 3 *supra; see also* text at notes 123-33 *infra*.

8. 410 U.S. 113 (1973).

9. This Article does not address the problems of constitutional interpretation raised by *Roe*. These issues have been explored in several excellent articles. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973); Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

10. The Ethics Advisory Board of the Department of Health, Education, and Welfare studied this research and has issued a report and recommendations concerning the conditions under which such research should be conducted and supported. 44 Fed. Reg. 35,033 (1979).

11. The Court in *Roe* stated that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-64. However, the Court did not explain what it meant by "health."

Two years earlier, the Court faced this issue in United States v. Vuitch, 402 U.S. 62 (1971). In *Vuitch* the Court held that a District of Columbia statute prohibiting abortion

Section II examines the historical reliance on birth as the point at which legal protection vests in the developing human. I contend that that reliance was due to the perceived significance of birth as the moment at which a developing human became capable of independent existence, not to any special importance of physical separation. Since a fetus today becomes capable of independent existence — viable — before birth, I argue that the law should recognize fetal claims to legal protection.

Section III compares fetuses with newborn children, identifying relevant similarities and differences. Like children, fetuses may develop into rational adults. I contend that the ability to interact with humans other than the mother — possessed by children but not by fetuses — is not a relevant distinction. This contention is supported by an examination of society's treatment of the interests of the dead.

Section IV studies whether fetuses at all stages of development should have the same protection and concludes that they should not. Previable fetuses should remain legally distinguishable from viable fetuses. I argue that the viability criterion strikes a fair balance between the competing interests of developing and mature humans.

Section V examines the practical implications of choosing viability as a developmental stage of special significance for legal protection. It responds to some of the difficulties created by a standard that shifts with medical technology and shows them inadequate to overcome the logical and ethical arguments in favor of the viability criterion.

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except as "necessary for the preservation of the mother's life or health" was not unconstitutionally vague. 402 U.S. at 68, 72. Although the Court did not define health, it said, on the basis of dictionary definition, that the term included mental health. 402 U.S. at 72.

Justice Douglas, however, disagreed. He felt that the imprecision of the term "health" made the statute unconstitutionally vague. He illustrated the lurking ambiguities by posing the following questions:

> May [the doctor] perform abortions on unmarried women who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?
>
> Is any unwanted pregnancy a "health" factor because it is a source of anxiety?
>
> Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?
>
> Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?
>
> Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health"?

402 U.S. at 76 (Douglas, J., dissenting in part). These questions remain unanswered.

I. *Roe v. Wade* REEXAMINED

Jane Roe, unmarried and pregnant, wanted an abortion. Because her life was not threatened by continuing pregnancy, she could not get an abortion legally in her home state of Texas.[12] Moreover, she could not afford to travel to another jurisdiction for a legal abortion.[13] She therefore sued on behalf of herself and all similarly situated women. Roe contended that she had a constitutionally guaranteed right of privacy that included the right to terminate her pregnancy.[14] In defense of its statutes, Texas contended that it could protect fetal life constitutionally from the time of conception, and that Roe therefore had no right to an abortion.[15] A three-judge district court panel held that the Texas criminal abortion statutes were void on their faces, but they abstained from granting the plaintiff's request for an injunction.[16] Roe appealed to the Supreme Court,[17] Texas cross-appealed, and the Court had to determine the constitutionality of the Texas statutes.

The Court agreed with Roe that a woman has a constitutional right of privacy that "is broad enough to encompass [her] decision whether or not to terminate her pregnancy."[18] Yet the Court emphasized that the state might have "important" and "legitimate interests" that could limit that right. Mind you, not any interest would do — the interest had to be a " 'compelling state interest.' "[19] Nonetheless, the woman's right of privacy was definitely qualified.

The issue was thus whether the state had any "compelling" interests that could justify criminal abortion statutes. The Court

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12. 410 U.S. at 113, 120.

13. 410 U.S. at 120.

14. 410 U.S. at 129.

15. 410 U.S. at 156.

16. 410 U.S. at 122.

17. Plaintiff Doe and intervenor Hallford also appealed from a denial of the injunction. Plaintiff Doe alleged that she was married, suffered from a disorder, had been advised by her physician to avoid pregnancy, and on medical advice had discontinued use of birth control pills. She alleged that she would desire a legal abortion should she become pregnant. The district court dismissed her complaint because she did not have standing. This action was upheld by the Supreme Court. 410 U.S at 129. Hallford was a licensed physician who sought to intervene in Roe's action. He alleged that he had been arrested for violation of the statutes at issue and that two prosecutions were pending against him. The district court found that Hallford had standing to sue. The Supreme Court reversed, 410 U.S. at 126-27, relying on its decisions in Samuels v. Mackell, 401 U.S. 66 (1971), and Younger v. Harris, 401 U.S. 37 (1971).

18. 410 U.S. at 153.

19. 410 U.S. at 154, 155.

engaged in a lengthy examination of the historical bases for such statutes. It observed that three justifications could be offered — discouraging immoral conduct, safeguarding the health of pregnant women, and protecting fetal life[20] — but quickly dismissed the first justification because Texas had not proffered it, and because neither courts nor commentators had ever considered it seriously.[21]

The second justification, paternalistic concern for the safety of pregnant women, grew from the historical dangers of the abortion technique. The information available to the Court regarding the safety of contemporary abortion procedures was contradictory. Roe, relying on data about abortions in New York City, argued that mortality rates for childbirth are higher than mortality rates for induced abortions.[22] *Amici* supporting Texas laws challenged the reliability of the New York data and pointed to evidence showing higher abortion mortality rates when abortions are performed late in pregnancy.[23] In the face of these conflicting presentations, the Court concluded that abortions can be performed more safely today than when criminal abortion laws were first enacted,[24] and that, at least at some stages of pregnancy, modern abortions are as safe as childbirth.

The *Roe* Court held that the state's interest in protecting a woman's health becomes compelling — at the point where the risk of death from an abortion is not less than the risk of death from a normal childbirth, roughly the end of the first trimester of pregnancy.[25] After that point, "a State may regulate the abor-

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20. 410 U.S. at 147-52.

21. 410 U.S. at 148.

22. Brief for Appellants at 30-32, Roe v. Wade, 410 U.S. 113 (1973).

23. Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 32-40, Roe v. Wade, 410 U.S. 113 (1973). Amici pointed out that most abortions in Eastern Europe were performed in the first trimester of pregnancy and that fact might account for the very low mortality rates of those countries. They further contended that higher mortality rates in Western and Northern Europe might be the result of the performance of abortions after the first trimester. *Id.* at 39. Appellants also argued that abortion was without significant psychiatric sequellae. Brief for Appellant, *supra* note 9, at 33-34. This assertion was also contested. Motion and Brief Amicus Curiae of Certain Physicians, *supra,* at 55-58.

24. 410 U.S. at 149.

25. 410 U.S. at 163. The Court's reasoning indicates that the state's compelling interest in the woman's health is dependent upon mortality data. If the data changed, presumably the point at which the state's interest would attach would also change. Recent data suggest that mortality from abortions during the first 12 weeks of pregnancy is declining while mortality associated with childbirth is increasing. This suggests that some

tion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[26] Before that point, the state's interest in her health is insufficient to override the woman's decision in consultation with her physician.[27]

The third justification for criminal abortion statutes, the state's interest in protecting prenatal life,[28] was potentially the most complex. The medical and scientific data before the Court were inconclusive on all the details of fetal development, except for general consensus that a fetus has a separate genetic identity at or soon after conception.[29] On the other hand, the common law had traditionally been stingy in awarding rights to the unborn, and where it had grudgingly made such awards, it had, with few

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second trimester abortions may be safer than childbirth, and thus, a state's compelling interest in the mother's health would not justify legislation until later in pregnancy. Tietze, *New Estimates of Mortality Associated with Fertility Control,* 9 FAMILY PLAN. PERSPEC. 74 (1977).

26. 410 U.S. at 163. The Court had a somewhat narrow view of what constituted appropriate implementations of that compelling state interest in maternal health after the first trimester. As examples, the Court would have permitted

> requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

410 U.S. at 163.

The Court, however, did not convincingly explain why the state does not have a similar interest in maternal health during first trimester abortions. Presumably, the state is interested in licensure and quality of facilities whenever its citizens undergo surgery. The reliance on comparative mortality rates between normal childbirth and first trimester abortion does not justify the absence of all regulation in the first trimester, although it might justify a lesser degree of regulation.

27. 410 U.S. at 163. The consultation requirement constitutes a minimal regulation for first trimester abortions, ensuring only that abortions are performed under safe conditions. By precluding other regulation of first trimester abortions, the Court may have been trying to prevent state interference with a woman's interests during the first three months of pregnancy. That hope, however, was soon shattered. In the year after *Roe*, many state legislatures enacted restrictive legislation. *See* Moss, *Abortion Statutes After Danforth: An Examination,* 15 J. FAM. L. 537 (1976-1977).

The Court itself has subsequently conceded that states may otherwise restrict a woman's access to abortion. For example, Missouri's statute requiring the written consent of the woman as well as certain recordkeeping requirements for hospitals and physicians was held to be constitutional. Planned Parenthood v. Danforth, 428 U.S. 52, 65-69, 79-81 (1976). The decision of the Court in Maher v. Roe, 432 U.S. 465 (1977), holding that the failure of states to pay abortion expenses while paying costs related to childbirth was not a violation of the equal protection clause, also burdens a woman's decision to seek an abortion. *See* Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

28. 410 U.S. at 150.

29. For an overview of fetal development, see text at notes 123-29 *infra*.

exceptions, made them contingent upon the fetus's live birth.[30] The Court first held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[31] But the Court did not and could not stop there. Texas was arguing that, whether or not a fetus was a " 'person' as used in the Fourteenth Amendment," the state could take a legitimate, even compelling interest in its well-being. After noting that in other areas of the law, legal protection vests at the moment of birth, the Court equivocated on a central issue:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[32]

That statement was more than a little disingenuous. Only a few pages later, the Court did decide "when life begins," at least for the purpose of limiting the moment at which a state may bestow full legal protection. The Court held that a state acquires a compelling interest in the potential human life of the fetus at the moment the fetus becomes viable — "potentially able to live outside the mother's womb, albeit with artificial aid."[33] After that time, a state may prohibit all abortions that are not necessary to protect the life or health of the mother.[34]

Later in this Article, I will suggest that the *Roe* decision's indirect implications regarding legal protection of fetal interests — indirect because they express those interests as those of the state rather than of the fetus — are justifiable in history and in reason. Before doing so, it is useful to discuss some of the ambiguities and logical flaws that weakened the *Roe* opinion.

One ambiguity rests with the Court's definition of viability. The statement that a fetus is "potentially able to live" can be interpreted in at least two ways. It could be merely a contingent prediction: the fetus is now alive and will continue to live unless something alters its environment. Viability in this sense depends

30. 410 U.S. at 161-62. The Constitution of the United States does not discuss the time at which a developing entity acquires rights, and nothing indicates that the founders intended "person" to include the unborn. No court had so assumed. Furthermore, every state, including Texas, had statutorily endorsed some abortions through exceptions to its criminal abortion provisions. 410 U.S. at 157-58.

31. 410 U.S. at 158.

32. 410 U.S. at 159.

33. 410 U.S. at 160 (footnote omitted).

34. 410 U.S. at 162-63.

on a continuing, unaltered relationship between mother and child. But viability has a second meaning: the level of developmental maturity at which a fetus will continue to live and develop even if physically separated from its mother. Clearly the Court intended this latter sense, which includes the possibility that artificial aid might be needed. It referred to a specific stage of development (twenty-four to twenty-eight weeks)[35] and refused to recognize a compelling state interest in potential human life before then.[36] If the Court intended "viable" to be understood in the first sense, it would have had to recognize a compelling state interest at the moment of conception, since from that time on fetuses are "potentially able to live" *if* they are not separated from their mothers.

The comment that viability "is usually placed at about seven months (28 weeks) but may occur earlier,"[37] created a second ambiguity. Undoubtedly the Court wished to reflect present knowledge of premature survival rates. Although most fetuses are capable of surviving at twenty-eight weeks, some fetuses are not able to survive independently until some later point, and a few fetuses survive as early as twenty-four weeks after conception.[38] The moment when a particular fetus can survive is affected by such factors as race, medical care, nutritional health of the mother and fetus, genetic composition, and availability of neonatal facilities.[39] General predictions about fetal survival do not consider these personal traits; at best, they describe only the typical case, and suggest a range of probability rather than a specific developmental point. But although the Court's range of weeks may have been an accurate generalization about available

35. 410 U.S. at 160.

36. 410 U.S. at 163.

37. 410 U.S. at 160.

38. 410 U.S. at 160. Some commentators have suggested that viability should be linked to weight as well as gestational age. *See* Behrman & Rosen, *Report on Viability and Nonviability of the Fetus,* in RESEARCH ON THE FETUS: APPENDIX 12-1, 12-6, 12-9 (Natl. Commn. for the Protection of Human Subjects of Biomedical and Behavioral Research ed. 1975) (HEW Publication No. (OS) 76-128). *See also* Gordon, *Neonatal and "Perinatal" Mortality Rates by Birth Weight,* 2 BRIT. MED. J. 1202 (1977); Stewart, Turcan, Rawlings, & Reynolds, *Prognosis for infants weighing 1000 g or less at birth,* 52 ARCHIVES OF DISEASE IN CHILDHOOD 97 (1977) [hereinafter cited as Stewart].

39. *See* Noonan, *An Almost Absolute Value in History,* in MORALITY OF ABORTION, *supra* note 1, at 52; North & McDonald, *Why Are Neonatal Mortality Rates Lower in Small Black Infants Than in White Infants of Similar Birth Weight?,* 90 J. PEDIATRICS 809 (1977) (suggests black babies are genetically endowed with greater capacity to survive than whites, and females are more likely to survive than males).

medical information, it left unsettled whether a state's compelling interest attaches at twenty-four weeks — when it is possible, but not likely, that the individual fetus can survive — or at whatever point the fetus can in fact survive, but in no event later than twenty-eight weeks.[40]

The Court's *Roe* discussion contains further ambiguities. It includes a statement that the state's compelling interest in potential life attaches at viability "because the fetus then presumably has the capability of meaningful life outside the mother's

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40. The Supreme Court has reexamined the definition of viability in two subsequent cases. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court sustained the constitutionality of a Missouri statute's definition of viability: "Viability [is] that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." MO. ANN. STAT. § 188.015(3) (Vernon Supp. 1975). The Supreme Court held that the Missouri definition was compatible with the definition of viability in *Roe*. 428 U.S. at 63. In fact, said the Court,

> one might argue . . . that the presence of the statute's words "continued indefinitely" favor, rather than disfavor, the [challengers], for, arguably, the point when life can be "continued indefinitely outside the womb" may well occur later in pregnancy than the point where the fetus is "potentially able to live outside the mother's womb."

428 U.S. at 64. The Court apparently believed that the Missouri abortion statute did not cover the entire area of permissible regulation (24-28 weeks), but apparently regulated only abortions of fetuses with an estimated gestational age of 28 weeks or longer.

The Court has recently made another effort to clarify its concept of viability. In Colautti v. Franklin, 439 U.S. 379 (1979), the Court held unconstitutional on grounds of vagueness a Pennsylvania statute that subjected a physician to criminal penalties for failure to conform to a statutorily prescribed standard of care following a determination that the fetus "is viable" or "may be viable." 439 U.S. at 381. The Court found two problems with the statute. First, it did not clarify whether the physician's determination would be judged by a subjective or objective standard, or a mixture of the two. Second, the Court was not sure whether the phrase "may be viable" incorporated *Roe's* viability standard or whether the phrase referred to a period prior to viability. 439 U.S. at 391.

To the first concern, the Court stated that the determination of viability was a subjective assessment to be made by the attending physician. However, the Court appears to have changed the *Roe* definition of viability in stating: "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus's sustained survival outside the womb, with or without artificial support." 439 U.S. at 388. The apparent departure from *Roe* was noted in the dissenting opinion of Justice White. He argues that *Roe* used the term "potentially able" and for that reason the *Roe* definition of viability "reaches an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb." 439 U.S. at 402 (emphasis in original).

Second, the Court considered whether the phrases "may be viable" and "viable" had different meanings. Pennsylvania argued that the two phrases meant the same thing. 99 S. Ct. at 684. The Court rejected that contention, finding two possible interpretations for the distinction. Under either interpretation, the Court found the statute ambiguous and therefore unconstitutionally vague. 439 U.S. at 393-94.

womb."[41] What did the Court mean by the word "meaningful"? Did it mean that human life must have some special, unarticulated quality before it is entitled to protection by the state? Did it mean that fetuses with genetic diseases are excluded from the domain of legitimate state interests? This seems unlikely. Even at the time of *Roe,* it was usually possible to diagnose genetic disease before the twenty-four to twenty-eight week period used by the Court,[42] and there was nothing special about the twenty-four to twenty-eight period for purposes of diagnosis. Moreover, the greatest strides in development of prenatal diagnostic techniques have been made since the *Roe* decision.[43] It is far more likely that the Court meant the word "meaningful" to exclude only the class of fetuses that lack the minimal integrative physiological equipment and therefore could not survive for a significant period of time — more than a few minutes — if separated from their mothers by existing medical techniques.[44]

Although the *Roe* Court took a reasonable position on fetal status, its holding stood upon notably weak reasoning. The Court chose viability as the critical point in fetal development "because presumably the fetus has the capability of meaningful life outside the mother's womb."[45] As Professor Ely eloquently observed, "the Court's defense seems to mistake a definition for a syllogism"[46]: the definition of viability for a syllogism demonstrating that a compelling interest arises at viability. The Court found that, until a fetus is viable, neither it nor the state has a compelling interest that can override the constitutionally protected rights of the mother to obtain an abortion. After viability, except where the life and health of the mother are at issue, the state can vindicate its interests in fetal life and deny a woman an abortion. The Court offered no justification for this conclusion, perhaps because any justification would have exposed the thinness of its claim that it was taking no position on when life begins.

The remainder of this Article examines the suitability of the *Roe* framework for resolving legal and public policy issues involv-

41. 410 U.S. at 163.

42. Omenn, *Prenatal Diagnosis of Genetic Disorders,* 200 SCIENCE 952 (1978).

43. *Id.*

44. Humans with severe malformations of the central nervous system, such as those without brains (anencephaly), severe and grotesque multiple system malformations (cyclops), and severe fetal asphyxia or anoxia would not be considered biologically viable. Behrman & Rosen, *supra* note 38, at 12-26.

45. 410 U.S. at 163.

46. Ely, *supra* note 9, at 924.

ing the unborn. I believe that although the opinion was inadequately reasoned, its framework is broadly acceptable if properly modified and rooted in the reasons developed below.

II. The Reasons for the Traditional Live Birth Requirement for Granting Legal Protection

A. *The Historical Perspective*

At the time *Roe* was decided, the case law typically bestowed legal protection at birth, a determination that suggests at least two possible explanations: only then was the fetus physically separate from the mother, and only then was the fetus traditionally capable of surviving independently of the mother.[47] The cases are unclear about which of those explanations was more central, largely because there was no reason to decide. Live birth was an adequate and uncomplicated standard, and courts rarely needed to discuss its significance.

Yet two types of cases provide clues to the value underlying the live birth standard. The first type involves a premature infant who exhibits some signs of life, but who expires shortly after birth. The second type involves an infant born after a normal gestation period, but who expires before all physical connections to the mother have been severed.

Although few early American cases concerned premature births, the first case to consider whether one may inherit through a stillborn child, *Marsellis v. Thalhimer,*[48] discussed the problem of prematures in dictum. The question presented was whether a widow, pregnant at the time of her husband's death, could inherit the share of her husband's estate allocable to her unborn child, when that child was subsequently stillborn. The law was clear that, had the fetus been born alive, it would have taken the share.[49] A child born alive qualifies for an inheritance even if it

47. This Article stresses capability rather than actual independence. Even a newborn is not actually independent; it would die without the care of others. Actual ability to feed and clothe oneself only occurs well after birth.

48. 2 Paige Ch. 24 (N.Y. 1830).

49. The historical use of live birth is traced from Roman law to the present in 4 R. Pound, Jurisprudence § 127, at 384-94 (1959). The civil law principle, later adopted by the common law, was that fetal existence was a legal fiction used to protect fetal interests in property until live birth occurred. *Id.* at 387-90. Louisell takes a different view. He asserts that all of these cases accidentally involve live-born children. He argues: "Under such circumstances it is understandable, but really gratuitous and superfluous, for the court to observe that the child must have been born alive. The observation is only dictum; it does not necessarily require a different result in those cases where the observation is

was only a fetus *in utero* at the testator's death. What was unclear was whether another person could benefit from the existence of a fetus *in utero* that was not subsequently born alive. After examining the civil law, the source of the rule permitting inheritance by a child who was *in utero* at the death of the testator,[50] the *Marsellis* court concluded that "children born dead, or in such an *early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth,* are considered as if they had never been born or conceived."[51] Thus, a third party could not inherit through a stillborn child; a live birth of a mature baby was necessary to secure property interests. The dictum also suggests that a person claiming through a premature child had to prove that the child was capable of continued existence.[52] Since *Marsellis,* other cases[53] have reinforced its implications that the live birth criterion was important not as a sign of physical separation, which could occur at any time during the gestational period, but as verification of a capacity for continued life.

Cases involving fetuses born after a full gestation period, but who died before they were completely separated from their mothers, offer other clues. In *State v. Winthrop,*[54] the issue was whether the killing of such a fetus was homicide — the killing of a person. The trial court instructed the jury as follows:

> If the child is fully delivered from the body of the mother, while the after birth is not, and the two are connected by the umbilical cord, and the child had independent life, *no matter whether it has*

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inappropriate." Louisell, *Abortion, The Practice of Medicine and the Due Process of Law,* 16 UCLA L. Rev. 233, 237 (1969).

50. 2 Paige Ch. at 40.

51. 2 Paige Ch. at 41 (emphasis added).

52. In civil law, a child born within the first six months after conception was presumed incapable of living. This presumption had to be rebutted before these newborns could inherit and transmit property to others. 2 Paige Ch. at 41.

53. *E.g.,* Tomlin v. Laws, 301 Ill. 616, 618, 134 N.E. 24, 25 (1922); Swain v. Bowers, 91 Ind. App. 307, 316-17, 158 N.E. 598, 601-02 (1927); Harper v. Archer, 12 Miss. (4 S. & M.) 99, 109 (1845); *In re* Will of Wells, 129 Misc. 447, 457, 221 N.Y.S. 714, 725 (Sur. Ct. 1927); Kimbro v. Harper, 113 Okla. 46, 49, 238 P. 840, 842 (1925). Whether a living but previable fetus *ex utero* can be the subject of homicide remains undecided. An early case illustrates the difficulty in determining whether death was caused by the previability itself or by the criminal assault. "Want of hair, nails, &c. or other circumstances of premature birth, must be evidence in favor of the prisoner [indicted for the murder of her child]. Circumstances of maturity, marks of violence, &c. are evidence against her." Pennsylvania v. McKee, 1 Addison 1 (Allegheny County Ct. Pa. 1791). *But see* Morgan v. State, 148 Tenn. 417, 421, 256 S.W. 433, 434 (1923) (if the fetus is criminally injured while previable and dies of its injuries after birth, the offense constitutes homicide).

54. 43 Iowa 519 (1876).

breathed or not, or an independent circulation has been established or not, it is a human being . . . .[55]

Because that instruction looked solely to the fact of physical expulsion in defining personhood, the Supreme Court of Iowa reversed.[56] According to the court, the instruction "would tell the jury . . . that they might find independence of life in utter disregard of the conditions in which alone, it could exist."[57] The high court held that potential independence was not enough; the state needed to show actual independence in order to sustain a conviction for homicide.[58] Thus, the state had to prove that the victim had an independent circulation, that the umbilical cord had been severed, and that the newborn had breathed on its own[59] before the killing. To be a "person," the infant needed to be capable of survival; mere physical separateness was not determinative.

Other cases agree with *Winthrop's* view of when a fetus becomes a person and reject mere physical separation in favor of other factors, factors suggesting a capacity for continued independent life. The indices of live birth that courts have used include independent circulation,[60] severance of the umbilical cord,[61] and physical expulsion from the uterus.[62] Secondary signs have also been offered, such as vocal cries[63] and heartbeat.[64] The most widely used criterion, however, has been independent respiration.[65]

B. *The Effect of Recent Medical Advances on the Case Law*

Two developments in medicine have eroded the adequacy of

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55. 43 Iowa at 520 (emphasis in original).

56. 43 Iowa at 521.

57. 43 Iowa at 521.

58. 43 Iowa at 521-22.

59. 43 Iowa at 521-22.

60. Shedd v. State, 178 Ga. 653, 654-55, 173 S.E. 847, 847 (1934); State v. O'Neall, 79 S.C. 571, 573, 60 S.E. 1121, 1122 (1908); Morgan v. State, 148 Tenn. 417, 420-21, 256 S.W. 433, 434 (1923).

61. Shedd v. State, 178 Ga. 653, 655, 173 S.E. 847, 848 (1934); Morgan v. State, 148 Tenn. 417, 420-21, 256 S.W. 433, 434 (1923).

62. *See* Wallace v. State, 7 Tex. Crim. 570, 573 (1880) (total expulsion required).

63. Allen v. State, 128 Ga. 53, 57 S.E. 224 (1907). The transcript of the trial record is discussed in Shedd v. State, 178 Ga. 653, 656, 173 S.E. 847, 848-49 (1934). *But see* State v. Osmus, 73 Wyo. 183, 194, 276 P.2d 469, 472 (1954) ("Not every baby cries when born").

64. People v. Chavez, 77 Cal. App. 2d 621, 623, 176 P.2d 92, 94 (1947).

65. Jackson v. Commonwealth, 265 Ky. 295, 296, 96 S.W.2d 1014, 1014 (1936); State v. O'Neall, 79 S.C. 571, 572, 60 S.E. 1121, 1122 (1908); Morgan v. State, 148 Tenn. 417, 419, 256 S.W. 433, 433 (1928); Harris v. State, 28 Tex. Crim. 308, 309, 12 S.W. 1102, 1103 (1889).

the live birth criterion. First, as the *Roe* Court acknowledged, modern biological studies have verified that the fetus is *genetically* a separate entity from a point at or near conception.[66] Second, advances in medicine have made it possible for a fetus that is too young for normal birth to survive apart from its mother.[67] These developments directly called into question the selection of live birth as *the only* relevant moment for distributing legal protection.

The verification and acceptance of the fetus's genetic separation from the mother at or near conception significantly influenced tort law. As early as 1946, the court in *Bonbrest v. Kotz*[68] awarded damages to a child for injuries suffered *en ventre sa mere*.[69] The court specifically rejected the contention that a fetus is only a "part" of its mother and therefore not entitled to an independent claim, calling such notion "a contradiction of terms." By 1967, every state had followed *Bonbrest*'s lead and permitted recovery for fetal injury if the fetus was subsequently born alive.[70]

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66. *See* notes 123-29 *infra* and accompanying text.

67. *See* note 133 *infra*.

68. 65 F. Supp. 138 (D.D.C. 1946).

69. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), was the first American case to consider whether a fetus injured *in utero* and born alive could recover from a negligent defendant. This case involved a woman who miscarried after falling on a negligently maintained highway. The infant was previable and lived for a few minutes before dying. The court, in an opinion by then-Judge Holmes, stated that a child subsequently born alive would have no cause of action for injuries sustained while *in utero*, because the child did not have independent existence apart from the mother. 138 Mass. at 16. This was the law until *Bonbrest v. Kotz* was decided. However, the *Dietrich* position was challenged as early as 1900 in a dissenting opinion in Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900). This case involved the negligent operation of an elevator in which the pregnant mother was a passenger. The fetus was injured while viable. The majority followed *Dietrich*, but a dissent by Judge Boggs argued persuasively that fetuses injured while viable and subsequently born alive should be able to recover. 184 Ill. at 368-74, 56 N.E. at 640-42.

70. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55 (4th ed. 1971). Courts also quickly established that live birth followed closely by death would not preclude a cause of action under a wrongful death statute. *Id.*

Courts disagree whether a fetus must be viable at the time of injury to recover. In Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), the fetus was viable and some courts retained that requirement. However, where the injured fetus is born alive there seems to be little point in drawing an arbitrary line about when injury must occur. If the objective of recovery is to compensate a living person who bears injuries caused by another's negligence, the timing of the injury is irrelevant. For a listing of states still adhering to viability and those who have abandoned it, see Comment, *Negligence and the Unborn Child: A Time for Change*, 18 S.D. L. Rev. 204, 204 n.7, 213 n.74 (1973). Since the date of that publication, Florida has abandoned the viability requirement. Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560 (Fla. Dist. Ct. App. 1976).

The second modern medical development — a fetus's ability to exist independently of its mother at about twenty-eight weeks — helped some courts even before *Roe* to award fetuses full legal protection at the moment of viability.[71] *Verkennes v. Corniea,*[72] decided in 1949, initiated this trend: it was the first case to allow recovery for injuries to a viable fetus that resulted in stillbirth. The Supreme Court of Minnesota reasoned, "There is no question here about the viability of the unborn child, or its capacity for a separate and independent existence . . . . [W]here independent existence is possible and the life is destroyed through a wrongful act a cause of action arises."[73] By relying on a capacity criterion — a finding that the fetus was capable of continued independent existence — the court endorsed the view that I discussed above: capacity was the key reason for the traditional reliance on birth. Because the fetus was sufficiently mature to grow and develop even if separated from its mother, the court saw no reason to treat it differently from a newborn infant. The view first expressed in

71. The recognition of the fetus as a separate entity has led some commentators to argue that it should be entitled to legal protection from a point at or near conception. *See e.g.,* Noonan, *supra* note 39; Ramsey, *Reference Points in Deciding About Abortion* in MORALITY OF ABORTION, *supra* note 1, at 60. This was the point selected by the West German Constitutional Court in holding a permissive abortion statute unconstitutional. Judgment of Feb. 25, 1975, Bundesverfassungsgericht, 39 BVerfGE 1. (An English translation appears in Gorby & Jonas, *West Germany Abortion Decision: A Contrast to Roe v. Wade,* 9 J. MAR. J. PRAC. & PRO. 551, 605 (1976)).

The special reliance in tort law on the fact that the fetus is genetically separate from the mother from conception is causing current difficulty. In suits seeking recovery for preconception injuries where the fetus is born alive, it is argued that no duty is owed to one not yet in being. These suits involve negligent conduct which occurs prior to the conception of the child. The injury occurs to the parent(s), but they are not harmed. The harm attaches to the fetus at conception. These injured children will be unable to recover if it is required that the fetus be a separate entity at the time of the negligent conduct. Such a result seems unjust. The traditional elements of the tort of negligence can be applied to allow recovery. "If there is a human life, proved by subsequent birth, then that human life has the same rights at the time of conception as it has at any time thereafter. There cannot be absolutes in the minute to minute progress of life from sperm and ovum to cell, to embryo to foetus, to child." Zepeda v. Zepeda, 41 Ill. App. 2d 240, 249-50, 190 N.E.2d 849, 853 (1963), *cert. denied,* 379 U.S. 945 (1964).

In at least one case a cause of action for a preconception injury has been permitted. In Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976), the plaintiff's mother had been given two blood transfusions when she was thirteen. These transfusions were the wrong blood type and caused sensitization of her blood. This was discovered eight years later through routine testing of her blood while she was pregnant with the plaintiff. Since the plaintiff's life was in danger, labor was induced. The plaintiff was born, but suffered injuries including permanent damage to the brain and nervous system.

72. 229 Minn. 365, 38 N.W.2d 838 (1949).

73. 229 Minn. at 370-71, 38 N.W.2d at 841.

Verkennes has now been adopted in a substantial number of states.[74]

The criminal law of at least one state has developed similarly.[75] In *Keeler v. Superior Court,*[76] the Supreme Court of Cali-

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74. Alabama: Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Connecticut: Gorke v. LeClerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Delaware: Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); District of Columbia: Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971) (mem.); Georgia: Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Illinois: Chrisafogeorgis v. Brandenburg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Indiana: Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Kansas: Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Kentucky: Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970); Maryland: State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Massachusetts: Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Michigan: O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Minnesota: Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Mississippi: Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Nevada: White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); New Hampshire: Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Ohio: Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Oklahoma: Evans v. Olson, 550 P.2d 924 (Okla. 1976); Oregon: Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974); Rhode Island: Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976); South Carolina: Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964) (South Carolina law); Washington: Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975) (en banc); West Virginia: Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Wisconsin: Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

The following states expressly deny recovery under wrongful death statutes for injury to the fetus *in utero* that results in stillbirth: Arizona: Kilmer v. Hicks, 22 Ariz. App. 522, 529 P.2d 706 (1974); California: Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Florida: Stern v. Miller, 348 So. 2d 303 (Fla. 1977); Iowa: McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Louisiana: Wascom v. American Indem. Corp., 348 So. 2d 128 (La. App. 1977); Missouri: State *ex rel.* v. Sanders, 538 S.W.2d 336 (Mo. 1976) (en banc); Nebraska: Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); New Jersey: Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); New York: Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); North Carolina: Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied,* 287 N.C. 464 (1975); Pennsylvania: Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); Tennessee: Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Virginia: Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

Two states, however, have indicated that they would allow recovery for injuries resulting in stillbirth even without proof that the fetus was viable when the injury occurred. *See* Presley v. Newport Hosp., 117 R.I. 177, 188-89, 365 A.2d 748, 753 (1976) (dictum stating that recovery would be allowed for previable injury resulting in subsequent stillbirth); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (allowing recovery for injury to a woman one and one-half months pregnant which resulted, after quickening, in a stillborn infant at four and one-half months).

75. Most states required live birth to convict an offender of homicide for the infliction of fatal prenatal injuries. *See, e.g.,* Keeler v. Superior Ct., 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); State v. Cooper, 22 N.J.L. 52, 54 (1849); State v. Dickinson, 23 Ohio App. 2d 259, 263 N.E.2d 253 (1970), *affd.,* 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); Morgan v. State, 248 Tenn. 417, 256 S.W. 433 (1928).

In People v. Chavez, 77 Cal. App. 2d 621, 626, 176 P.2d 92, 94 (1947), the court said

fornia held that a viable fetus was not a human being within the meaning of the state homicide statute. The California legislature responded by revising the general homicide statute to read: "Murder is the unlawful killing of a human being, *or a fetus,* with malice aforethought."[77] In 1976, a court of appeals in California construed the revised statute in a case involving the death of a fetus twelve to fifteen weeks in development.[78] Such a fetus was "previable": it had not reached the stage where it was capable of living independently of its mother. In construing the statute the court concluded that its protection was coextensive with the capability for independent human life, and thus existed only from the point of viability.[79]

Thus, birth was traditionally the point at which the fetus was entitled to full legal protection of its interests *because birth was once synonymous with viability.* Now that the concepts are distinct, courts have begun to abandon birth as the central criterion in both tort and criminal law. The next Sections of this Article analyze the arguments for retaining birth as the event that heralds legal protection and the related question of whether the law

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that a child killed while being born could be the subject of homicide. The court's statement, however, was dictum since it affirmed the defendant's conviction on the ground that there was sufficient evidence to support jury findings that the child was born alive and removed from the mother.

Louisiana by statute makes criminal "killing a child during delivery" by the "intentional destruction, during parturition of the mother, of the vitality of life of a child in a state of being born and before actual birth, which child would otherwise have been born alive." LA. REV. STAT. ANN. § 14.87.1 (West 1974).

In a few states killing a fetus before it was quick constituted a lesser crime than manslaughter. *See* Evans v. People, 49 N.Y. 86 (1872); Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923). Other cases that outlawed abortion from conception forward did not equate abortion with murder. *See, e.g.,* State v. Reed, 45 Ark. 333 (1885); Smith v. State, 33 Me. 48 (1851); State v. Elliott, 206 Or. 82, 289 P.2d 1075 (1955). However, some states did make illegal abortion a felony. *See* State v. Reed, 45 Ark. 333, 334 (1885) (prequickening attempted abortion a felony; postquickening attempt a misdemeanor); Smith v. State, 33 Me. 48, 57 (1851) (felony if intent to destroy fetus, otherwise a misdemeanor).

76. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

77. CAL. PENAL CODE § 187 (West Supp. 1979) (emphasis added).

78. People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

79. 59 Cal. App. 3d at 757, 129 Cal. Rptr. at 502. A California court recently affirmed a conviction for the murder of a viable fetus between 22-24 weeks in development. People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978). The defendant was convicted of murder in the second degree against the fetus, and rape and assault against the mother. The court held that multiple punishment was warranted because each conviction "was [for] a crime of violence against a different victim: the murder was a crime against the fetus, while the rape was a crime against [the mother]." 76 Cal. App. 3d at 493, 142 Cal. Rptr. at 840.

should provide the same protection to fetuses at different stages of development.

III. The Case for Recognizing Legal Protection for the Unborn: The Analogies to Children and to the Dead

To determine whether the unborn should be able to claim legal protection, we must ascertain what qualities determine who is entitled to such protection. The United States Constitution only protects "persons."[80] At least since the passage of the post-Civil War Amendments, all born of human parents have been regarded as persons.[81] The Constitution protects persons by granting them rights that the state must respect. But not all persons have the same rights.[82] For example, public officials, soldiers, and prisoners have constitutional rights, but they may have fewer rights than citizens at large. Moreover, although two persons may have similar rights, the law does not always permit them to assert those rights in identical ways.[83] The differences between the legal rights of adults to make reproductive decisions and those of children illustrate that fact of American life.

Competent adults may, subject to compelling state interests, determine whether and under what circumstances they will reproduce.[84] The Supreme Court has stated: "If the right of privacy

80. U.S. Const. amends. V, XIV § 1. *Cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451-52 (1856) (denying rights to blacks after holding that blacks are mere property).

81. *See generally* U.S. Const. amends. XIII-XV. These amendments, ratified between 1865 and 1870, were designed primarily to protect fundamental rights of blacks who had recently been emancipated from years of slavery and treatment as something less than human. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Today, however, these amendments protect all humans of any race. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-95 (1978) (opinion of Powell, J.).

Apart from the questions of who is a human, or of how we determine who is a member of the species, there is the more interesting question of what, if anything, distinguishes humans from some of the more intelligent animals. One of the characteristics thought to distinguish humans from animals has been the ability to communicate through language. This distinction may become blurred, however, since there is evidence that some animals can be taught language skills. *See* Hayes, *The Pursuit of Reason,* N.Y. Times, June 12, 1977, § 6 (Magazine) at 21. This in turn raises the issue of whether some animals ought to have rights. *See* Feinberg, *The Rights of Animals and Unborn Generations,* in Philosophy and Environmental Crisis 43, 45-51, 55-57 (W. Blackstone ed. 1974).

82. Children, for example, do not have the right to trial by jury in juvenile delinquency hearings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

83. *See* text at notes 92-104 *infra.*

84. Carey v. Population Servs. Intl., 431 U.S. 678, 687-89 (1977) (plurality opinion); Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold* the Court invalidated a Connecticut statute prohibiting distribution of contraceptives to married couples. The Court stated that a zone of privacy, emanating from the Bill of Rights, encompasses the marital

means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[85] This recognition of rights pertaining to childbearing began with *Griswold v. Connecticut,*[86] a case addressing married persons' use of contraceptives. The recognition continued with *Eisenstadt v. Baird*[87] (contraception), *Roe v. Wade*[88] (abortion) and *Planned Parenthood v. Danforth*[89] (abortion), and it culminated recently in *Carey v. Population Services International.*[90] In *Carey,* the Court invalidated a statute that permitted only licensed pharmacists to distribute nonprescription contraceptives:

> *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.[91]

Children, too, have constitutional rights entitling them to make reproductive decisions.[92] However, the cases hold that the state may regulate the child's right to make decisions about re-

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relation. 381 U.S. at 484-86. That zone of privacy can be regulated only upon a showing of compelling state interest. Despite the Court's denial, *Griswold* extends the substantive due process approach adopted by the Court in Lochner v. New York, 198 U.S. 45 (1905). For a discussion of the right to privacy and substantive due process, see Tribe, *supra* note 6; Ely, *supra* note 6.

85. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

86. 381 U.S. 479 (1965) (the Court struck down a Connecticut statute banning the use of contraceptives by married people).

87. 405 U.S. 438 (1972) (right of access to contraceptives the same for single and married individuals).

88. 410 U.S. 113 (1973).

89. 428 U.S. 52 (1976).

90. 431 U.S. 678 (1977) (plurality opinion).

91. 431 U.S. at 687. The Court distinguished the right to privacy from a more expansive notion of a right to autonomy that might, for example, protect homosexual relations between consenting adults. As Justice Goldberg stated in his *Griswold* concurrence, "[T]he Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." 381 U.S. at 498-99. *See also* Carey v. Population Servs. Intl., 431 U.S. at 694 n.17; 431 U.S. at 702-03 (White, J., concurring in part and concurring in the judgment). It has been argued persuasively, however, that the right of privacy as used in *Roe* embraces the notion of autonomy rather than traditional notions of privacy. *See, e.g.,* Friendly, *The Courts and Social Policy: Substance and Procedure,* 33 U. MIAMI L. REV. 21, 35-36 (1978); Note, *Roe and Paris: Does Privacy Have a Principle?,* 26 STAN. L. REV. 1161 (1974).

92. *See* Carey v. Population Servs. Intl., 431 U.S. 678, 693 (1977) (minors have a right to privacy that protects procreation).

productive matters more extensively than it may an adult's right.[93] The issue is not whether children are capable of having rights in all respects equivalent to those of adults,[94] but rather whether the state's interest in regulating the activites of children may permit it to limit those rights more than it limits those of adults. The issue "is a vexing one, perhaps not susceptible to precise answer."[95] Although the Supreme Court has overturned statutes prohibiting persons from distributing contraceptives to minors under the age of sixteen[96] and statutes requiring parental consent to abortion for unmarried women under eighteen,[97] those decisions also suggest that the state may regulate a child's right to make reproductive decisions more extensively than an adult's right. *Carey,* which invalidated New York's blanket prohibition of contraceptive sales to minors,[98] did not foreclose less burdensome restrictions on such sales and did not give minors a full constitutional right to have sexual relations.[99] In *Bellotti v.*

93. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (the state may subject minors' constitutional rights to greater regulation than that permissible for adults).

94. The Supreme Court has often held that specific constitutional guarantees extend to minors as well as adults. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required in delinquency hearing); *In re* Gault, 387 U.S. 1 (1967) (extending the due process clause to juvenile delinquency hearings and specifically requiring notice of charges, right to counsel, and a right to cross examination); Haley v. Ohio, 332 U.S. 596 (1948) (plurality opinion) (due process requires suppression of minor's involuntary confession). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (refusing to extend right of trial by jury to juvenile delinquency hearings).

95. Carey v. Population Servs. Intl., 431 U.S. at 692 (plurality opinion).

96. Carey v. Population Servs. Intl., 431 U.S. 678 (1977).

97. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

98. 431 U.S. at 91-96 (plurality opinion). The decision in *Carey* is a majority opinion except upon the issue of prohibiting the distribution of contraceptives to minors under the age of 16. That portion of the opinion, referred to in the text, is a plurality opinion written by Justice Brennan and joined by Justices Stewart, Marshall, and Blackmun. Justice White concurred in the judgment on this issue because he found that the state had not demonstrated that the prohibition against distribution of contraceptives to minors had a deterrent effect on premarital intercourse. 431 U.S. at 702. Justices Powell and Stevens based their concurrences in part on the statute's unconstitutional prohibition of distribution of contraceptives to married females between the ages of 14 and 16. 431 U.S. at 707-08 (Powell, J., concurring in part and concurring in the judgment); 431 U.S. at 713 (Stevens, J., concurring in part and concurring in the judgment).

99. The concurring opinions to that part of the opinion in *Carey* declaring the statute unconstitutional emphatically make that point. Justice Stevens, in a statement with which Justice White explicitly concurred, 431 U.S. at 702-03, wrote: "Indeed, I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." 431 U.S. at 713. Justice Powell stated that the New York statute was unconstitutional because "this provision prohibits parents from distributing contra-

Baird,[100] the Court held unconstitutional a Massachusetts statute that did not permit a mature minor to make an independent decision about abortion and required parental consultation and notification for all minors. However, four Justices suggested that a court could determine that an abortion was not in the best interests of an immature minor.[101]

Both adults and children, then, may claim constitutional protections. On what basis do we distinguish the scope of their respective rights? Why, in the area of reproductive decisions, do we treat children differently from adults?[102] Traditionally there has been concern for a minor's ability to evaluate risks. Some states protect children from the risks associated with medical procedures by declaring that children are incapable of consenting to those procedures.[103] States have also limited a child's right to engage in other activities, such as driving, making contracts, and purchasing alcoholic beverages. These restrictions all manifest the state's concern for a child's ability to make mature judgments.[104]

While protecting the child from the consequences of immature decisions, the state has played an active role in rearing children, especially in matters that might contribute to a child's future ability to make judgments. State laws on compulsory education and on rehabilitation of juvenile delinquents are two ex-

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ceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children." 431 U.S. at 708.

100. 99 S. Ct. 3035 (1979). In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), all of the Justices indicated that a requirement of parental consultation might well be constitutional. Justice Stewart believed the Missouri statute to be unconstitutional primarily because of the absolute limitation that it created to a minor's access to abortion. However, citing *Bellotti,* he held open the possibility that a requirement only of parental consultation, as opposed to parental consent, would be constitutional. 428 U.S. at 90-91 (Stewart, J., concurring). The remaining Justices would have upheld the Missouri requirement of parental consent and would have undoubtedly have held the less restrictive requirement of parental consultation constitutional as well. 428 U.S. at 95 (White, J., with Burger, C.J., & Rehnquist, J., concurring in part and dissenting in part) (parental consent furthers valid state interest in ensuring that unmarried minor makes abortion decision in her own best interests); 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part) (parental consent maximizes probability that abortion decisions will be made with full understanding of consequences).

101. 99 S. Ct. at 3050.

102. In *Bellotti* Justice Powell offered three reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." 99 S. Ct. at 3043.

103. Pilpel, *Minors' Rights to Medical Care,* 36 ALB. L. REV. 462, 463-64 (1972).

104. *See* Planned Parenthood v. Danforth, 428 U.S. at 102-93 (Stevens, J., concurring in part and dissenting in part).

amples of state efforts toward that end. Such efforts presume that a child must be carefully instructed and educated in order to assume adult responsibilities, and that during the education period it must be protected from the adverse consequences of its own behavior and from the harmful actions of others. Competent adults are not afforded similar nurture and protection. It is thought that they possess a level of maturity and capability for rational action that children lack. They are presumed capable of making responsible, mature, and reasoned decisions, fully appreciating the possible consequences.

If children cannot make rational decisions, why do we give them any rights at all? We do so to increase the likelihood that they will be regarded as persons rather than property.[105] Giving children rights also makes it easier for the state to protect them from the harmful acts of parents or third parties. Long ago, the Supreme Court said, "It is in the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[106] Ultimately, it may be this last trait that truly motivates courts and legislatures to give children rights — the potential to grow into mature, competent, well-developed adults.[107] Although we realize that they are "not possessed of that full capacity for individual choice" that is essential to exercise of the broadest rights,[108] we know that children are

105. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975). Areen traces the history of child abuse and neglect and points out, for example, that children were forced to be indentured servants both in England and the United States. *Id.* at 894-903. That suggests that children were treated like property.

106. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

107. Feinberg argues that beings must have interests if they are logically to be subjects of rights. He suggests that interests are composed of conations ("conscious wishes, desires, and hopes; or urges and impulses; . . . or latent tendencies, direction of growth, and natural fulfillments"). Feinberg, *supra* note 81, at 49. Interests are necessary because a right-holder must be capable of being represented (a being cannot be represented if it has no interest), and because a right-holder must be capable of being a beneficiary in its own person. In the usual case a right-holder is a normal adult human being. Feinberg contends that children are also right-holders because they have interests, or in the case of newborns because they have a capacity to acquire interests. Emerging interests are sometimes in need of protection, otherwise they might never come into existence. These interests may be protected by representatives. He further argues that the same principle can be extended to the unborn. The unborn a day prior to birth are "not strikingly different" from the newborn in the first hour after birth. *Id.* at 62. In a later article, he argues that the unborn have no right to be born. Feinberg, *Is There a Right to Be Born?*, in MORAL PHILOSOPHY: PROBLEMS OF THEORY AND PRACTICE 346 (J. Rachels ed. 1976).

108. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the result).

potentially capable, and we nurture that potentiality.

The unborn are like children in their potentiality to become rational adults. Notwithstanding the *Roe* holding that the unborn are not persons within the meaning of the fourteenth amendment, that critical similarity between fetuses and children is convincing evidence for giving fetuses and children at least some legal protection. Neither fetuses nor newborn infants are capable of making rational judgments; both can develop that capacity. Professor Feinberg has remarked that a newborn infant "lacks the traits necessary for the possession of interests, but he has the capacity to acquire those traits, and his inherited potentialities are moving quickly toward actualization even as we watch him."[109] The identical statement could be made of the unborn.[110]

What differences there are between a fetus and a newborn are not of the sorts that the law has found material in awarding legal protection. Although it is true that the newborn infant is conscious and the fetus is not, comatose adults do not forfeit their constitutional rights. Not even the most arguably relevant difference between the newborn and the unborn — the ability to interact with other humans — is persuasive. Birth is certainly the point at which other humans see, touch, and communicate with the developing infant. But is there something unique about the characteristic of human interaction that should prevent recognition of legal protection at some earlier point in human development? I would argue not. Both the dead and the unborn lack that capacity to interact, yet the law respects the interests of the deceased; the incapacity to interact should be no greater barrier to legal protection for the unborn.

A brief digression to probe the forms and purposes of legal deference to the dead will prove enlightening. At first, the idea that the dead deserve legal protection seems strange. Physically, after all, they are mere decaying matter. They are incapable of

109. Feinberg, *supra* note 81, at 62. The argument that beings have rights because they have the potential to be competent adults raises disturbing questions, however, with respect to the severely mentally retarded and the mentally disabled. We can argue that to the extent that they are potentially curable they should have rights. However, it might be extremely difficult to regard some humans as potentially curable — those in irreversible comas, for example. Should these beings have rights? I am inclined to think not. I hasten to add that the fact that perhaps they should not have rights does not imply that they are to be treated cavalierly. There may be many reasons we should treat them as though they had rights. For Feinberg's discussion of this issue, see *id.* at 60-61.

110. The legal rights of children must often be asserted by representatives, because that is the only practical means of assuring that those rights will be protected. The same principle could extend to the unborn.

making promises or of fulfilling responsibilities.[111] Yet, in a significant sense, they may be said to rule from the grave. This is especially true in property law; where testamentary dispositions change the lives of the living according to the whims of those no longer with us.[112] And it is true elsewhere in the law as well. For the most part, the wishes of the deceased concerning disposition of his corpse prevail, even though at English common law the corpse was not property[113] and was therefore not subject to testamentary direction.[114] In the United States, the strict English rule has been relaxed to the extent that, although there is no commercial property right in a dead body and it is not part of a decedent's estate,[115] a "quasi property" right exists.[116] In some states a person's right to ordain the manner of disposition of his own body has been specifically conferred by statute.[117] The general Ameri-

111. For example, at common law death ended the contract. RESTATEMENT OF CONTRACTS §§ 35 (1)(d), 48 (1932).

112. Blackstone argues that the ability to pass title to property is not a natural right. He writes: "[T]here is no foundation in nature or in natural law why a set of words upon parchment should convey the dominion of land . . . ." 2 W. BLACKSTONE, COMMENTARIES* 2. However, Blackstone concedes that humans have always been permitted to devise property.

> [T]he universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possession by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor . . . .

Id. at * 10-11. In the United States, the Supreme Court has stated that although validly created wills will be enforced, enforcement is not necessarily a matter of constitutional rights. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). *Contra,* Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906).

113. *In re* Estate of Johnson, 169 Misc. 215, 217-20, 7 N.Y.S.2d 81, 83-86 (Sur. Ct. 1938).

114. The prevailing concept of the human body was a temple for the Holy Spirit, from which a person's soul was temporarily separated at death. It would have been repugnant to common law society to attach to such a holy vessel the commercial values that attend legal property rights. *In re* Estate of Johnson, 169 Misc. 215, 218, 7 N.Y.S.2d 81, 84 (Sur. Ct. 1938). Therefore, until the time of Henry VIII, the place and manner of burial were controlled by the ecclesiastical courts. *See* Groll & Kerwin, *The Uniform Anatomical Gift Act: is the Right to a Decent Burial Obsolete?,* 2 LOY. CHI. L.J. 275, 275 (1971). Bodies, according to law and custom, were buried intact in the community churchyard. Any attempt by the decedent to control the manner of his burial by testamentary direction failed because the body was not "property." *Id.* at 275-76.

115. Fidelity Union Trust Co. v. Heller, 16 N.J. Super. 285, 290, 84 A.2d 485, 487 (1951).

116. Diebler v. American Radiator & Standard Sanitary Corp., 196 Misc. 618, 620, 92 N.Y.S.2d 356, 358 (1949).

117. The New York statute, which made it a crime to interfere with the decedent's wishes for his own burial, was repealed upon enactment of the Uniform Anatomical Gift Act, 1970 N.Y. Laws ch. 466, § 2.

can rule is that, while the decedent's wishes or directives concerning his interment are not technically testamentary and legal compulsion may not necessarily attach to them, they are entitled to respectful consideration and have been allowed great weight.[118]

The terms of the Uniform Anatomical Gift Act[119] also respect the wishes of the deceased. That Act provides that any individual of sound mind and eighteen years or more of age may donate all or part of his body for transplant or for medical research by testamentary directive or by execution of a properly attested nontestamentary document,[120] even over opposition by his family.[121]

Why have we so frequently respected the deceased's desires concerning their remains, enforced their promises, and permitted their desired disposition of property? As living, existing persons we have many interests, most of which we can assert while we remain alive. But some interests cannot be asserted and fulfilled during our lifetimes; they must survive death if they are to be recognized and enforced. Yet, our legal system protects them. Does that protection imply that the dead have rights? Are we protecting those interests for the exclusive benefit of the dead? Probably not. Do we do it for the good of us all? Probably so. Most of us desire assurance that our wishes about the world we shall leave behind are recognized. We wish to take care of our families. We wish to leave nothing to certain people. It is a continuation of the responsibilities we assumed while living. By recognizing the

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118. In disputes between executors or administrators attempting to carry out the decedent's directions and decedent's next-of-kin having other plans for interment, courts have held that the wishes of the deceased for the disposition of the remains are paramount to all other considerations. *E.g., In re* Estate of Henderson, 13 Cal. App. 2d 449, 57 P.2d 212 (1936); *In re* Harlam, 57 N.Y.S.2d 103 (1945); *In re* Herskovits, 183 Misc. 411, 48 N.Y.S.2d 906 (1944); *In re* Estate of Eichner, 173 Misc. 644, 18 N.Y.S.2d 573 (1940). Even when the decedent's testamentary directives contravene the religious beliefs of his family (*e.g.*, where a Jewish decedent leaves instruction that he should be cremated), courts still have often upheld the wishes of the deceased. *See generally In re* Herskovits, 183 Misc. 411, 412, 48 N.Y.S.2d 906, 907 (1944); *In re* Estate of Johnson, 169 Misc. 215, 7 N.Y.S. 81 (1938).

A majority of courts, however, refuse to allow a body, once buried, to be exhumed. *E.g.*, Yome v. Gorman, 242 N.Y. 395, 403, 152 N.E. 126, 128 (1926). Moreover, since a decision in disputes between a decedent's executor and surviving relations is an exercise of equitable powers, the courts have not hesitated to violate the decedent's directions where the directives offend the court's conception of family responsibility or community interest. *See* Herold v. Herold, 16 Ohio Dec. 303, 3 Ohio N.P. (n.s.) 405 (C.P. Butler Co. 1905).

119. Codifications for all participating jurisdictions are collected in Groll & Kerwin, *supra* note 114, at 290 n.49.

120. UNIFORM ANATOMICAL GIFT ACT §§ 2(10), 4(a).

121. *See* UNIFORM ANATOMICAL GIFT ACT §§ 2(a), 4(a).

claims of all dead people, we hope that our own desires will be accorded similar respect and deference. Giving legal protection to the dead thus serves two purposes. It gratifies people who are now alive by encouraging their present hopes that their own preferences will be satisfied after they are gone. Moreover, it affirms the importance to our society of human life generally: continued respect for the wishes of those who were once persons bolsters respect for the wishes of those who are still persons.

What relevance does consideration of the interests of the deceased have to the interests of the unborn? First, it makes clear that ability to interact with other humans is not a prerequisite for recognizing legal protection in our society. Second, the reasons that motivate our society to protect the dead have analogies in the realm of the unborn. Corresponding with the gratification felt by mature adults at the thought that their own wishes will be significant after they die is a gratification at the thought that their wishes were significant even before they were born. They can thereby escape whatever insecurity may be aroused by the notion that at one time in their prenatal existences they were deemed wholly undeserving of legal respect. Similarly, it can bolster societal appreciation of human life generally, by assuring that at no time during the development of any person alive today was that person wholly beyond legal concern.

To say that a fetus should have legal protection is not to delineate the contours of that protection.[122] It does not imply that the protection must be coextensive with that given children, any more than newborns must have rights equivalent to those of teenagers. I assert only that the unborn fetus, the newborn child, and the mature adult are all at different stages of development, and the fact that a fetus is not conscious or socially responsive should not preclude all legal protection.

122. The problem of choosing where on the continuum of human potentiality we wish to acknowledge significant legal protection is analogous to the issue of how far into the future we want to permit the wishes of the dead to control disposition of property. From the earliest times, the common law sought to balance the power to bind land indefintitely against the desire for free alienability of property. The Rule Against Perpetuities, first announced in The Duke of Norfolk's Case, 22 Eng. Rep. 931 (Ch. 1682), attempted to strike a balance between these competing concerns. The Rule is, without doubt, somewhat arbitrary and is certainly difficult to understand and apply, but it does attempt a balance between competing, equally valid concerns. For an interesting account of the Rule and its origins, see Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19 (1977).

IV. What Legal Protection for the Unborn? The Case for Distinguishing Between the Previable and the Viable Fetus

Even if, as has been argued above, there is no justification for denying the unborn all legal protection, we must still confront another problem: Should we give the same degree of legal protection to all humans at every stage of development, or should we recognize some specific point on the continuum of potentiality at which the legal protection becomes substantially greater than it was before? This problem is particularly acute when the interests of a fully matured individual conflict directly with those of a human at an earlier stage of biological development. In such a situation, it is impossible to resolve the conflict satisfactorily without subordinating the interests of one of the parties. For example, should the interests of a fertilized ovum be accorded the same, lesser, or greater legal protection than those of an infertile woman who desires to have a child through a procedure that involves fertilization outside of the womb? In such a procedure, physicians may destroy unused fertilized ova in an effort to impregnate the mother. In my view, the fetus should not be entitled to the same degree of protection at every stage of development. We should distinguish between the legal protection afforded the viable and the previable fetus just as we once distinguished between legal protection furnished before and after birth.

In exploring the contours of a revised view of legally cognizable fetal interests, we should consider the available medical and biological data concerning human development. Current medical understanding indicates that the meeting of sperm and ova results in the creation of a zygote possessing a totally independent genetic package of twenty-three chromosome pairs.[123] Within a week of fertilization, the zygote implants itself in the uterine wall[124] — a significant event, because only after implantation can we diagnose pregnancy.[125] "Twinning," and occasionally recombi-

123. *See* Hellegers, *Fetal Development*, 31 Theo. Stud. 3, 3-4 (1970). This article is a particularly vivid and nontechnical description of fetal development which highlights stages of development and the importance that has been attached to them historically.

124. *Id.* at 6. Normally, implantation occurs in the endometrium, the lining of the uterine cavity. However, extrauterine implantation sometimes occurs, most commonly in the fallopian tubes, resulting in an ectopic pregnancy.

125. *Id.* at 7. Pregnancy can be diagnosed at this stage by chemical tests that measure hormones secreted to stop the menstrual cycle. However, these chemicals tests indicate only that pregnancy has probably occurred. The positive signs of pregnancy are: "(1) identification of the fetal heartbeat separately and distinctly from that of the mother; (2) perception of active fetal movements by the examiner; and (3) recognition of the fetus

nation, takes place[126] during the first fourteen days after fertilization. This suggests that although fertilization creates a new genetic grid, conception occurs over an extended time period. Moreover, fertilization does not necessarily indicate that genetic individuality has been accomplished. Thus, it may be impractical to recognize legal protection on the entire continuum of fetal existence if for no other reason than that we are not sure when "existence" begins.

Early fetal development continues through the eighth week of pregnancy, after which all organs of the fetus exist in rudimentary form and we can detect readable but not understandable brain activity. Subsequent development consists of growth and maturation of structures formed during the embryonic period.[127] Somewhere between the twelfth and sixteenth weeks, "quickening" — fetal movement perceptible to the mother — occurs.[128] Given current medical knowledge and technology, the fetus is viable[129] somewhere between the twentieth and twenty-eighth weeks.

In addition to better information about the stages of fetal development, modern science has acquired knowledge that is useful to prevent, ameliorate, or cure some fetal disabilities. We should also consider that information carefully in evaluating fetal interests. It suggests that some fetal interests deserve some legal protection at all stages of development. We have developed new and better methods of caring for neonates (infants four weeks old or younger).[130] Greater numbers of prematures are surviving, and

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radiologically or sonographically." J. PRITCHARD & P. MACDONALD, WILLIAMS' OBSTETRICS 204 (15th ed. 1976). Menstrual extraction, the morning-after pill, and the intrauterine device, commonly used as contraceptives, might technically be considered "abortifacients" since they interrupt pregnancy before it can be diagnosed.

126. Hellegers, *supra* note 123, at 4.

127. *See* J. PRITCHARD & P. MACDONALD, *supra* note 125, at 89.

128. *Id.* at 212. In the early criminal law, this was a significant point before which abortion was sometimes permitted. Later criminal abortion statutes prohibited abortion from conception. Since quickening is a matter of maternal perception rather than fetal development, it has no modern legal significance.

129. Hellegers, *supra* note 123, at 8-9. Hellegers asserts that the fetus between the 20th and 28th weeks may have approximately a 10% chance of survival. This view is not universally accepted. Behrman and Rosen report that a worldwide survey revealed that no infant weighing less than 601 grams and less than 24 weeks in gestational age has survived. Behrman & Rosen, *supra* note 38, at 12-9.

130. *See* Brans, *Advances in Perinatal Care: 1970-1980,* 19 J. REPRODUCTIVE MED. 111 (1977). Brans discusses the significant advances in selected areas — hemolytic disease, hyperbilirubinemia, maternal diabetes, hyaline membrane disease, nutrition of the tiny premature neonate, infections, and monitoring mother-child interaction.

they are surviving at earlier periods of development.[131] We have also developed a variety of techniques for observing individual fetuses. It is possible, for example, to detect and accurately diagnose *in utero* some disabilities and anomalies resulting from genetic conditions.[132] We can determine the sex of the fetus, hear fetal heartbeats, diagnose multiple fetuses, and obtain an outline of fetal structure.[133] Indeed, recent research has garnered so much knowledge about the fetus and its environment that we can view the fetus as a "second patient."[134]

We are only beginning to develop the capacity to administer therapy to fetuses *in utero*. One noteworthy achievement treats Rh incompatibility between mother and fetus: we can now give transfusions to the fetus *in utero*.[135] Current research suggests that administering certain drugs to mothers can prevent or minimize respiratory distress in newborns.[136] Moreover, contemporary

131. *See* Manniello & Farrell, *Analysis of United States neonatal mortality statistics from 1968 to 1974,* 129 AM. J. OBSTETRICS & GYNECOLOGY 667 (1977). That article analyzes neonatal statistics with specific reference to changing trends in major casualties. The authors conclude that the data show a fall in the annual newborn mortality rate from 16.1 to 12.3 per 1000 births. *Id.* at 669. They attribute this decline to advances in perinatology. *Id.* at 673. *See also* Stewart, *supra* note 38. That article concludes that provided intensive care methods are available, the prognosis for infants weighing less than 1000 grams is better than in the past. *Id.* at 103. However, the costs of providing for perinatal intensive care are high. One investigator reports a $40,000 figure per infant less than 1000 grams. Pomerance, Ukrainski, & Ukra, *The Cost of Living for Infants ≤ 1000 Gms. at Birth, abstracted in* 11 PEDIATRIC RESEARCH 381 (1977). These high costs suggest that guidelines should be developed concerning problems such as when to withdraw intensive perinatal care.

132. *See* Omenn, *supra* note 42. The most common technique employed is amniocentesis. Amniocentesis involves the insertion of a needle through the abdominal wall into the amniotic sac to withdraw amniotic fluid. The fluid and fetal cells found in the fluid are analyzed to detect the presence of genetic diseases. Currently most chromosomal anomalies and more than 60 inborn errors of metabolism can be identified through that technique. Littlefield, Milunsky, & Atkins, *An Overview of Prenatal Genetic Diagnosis,* in BIRTH DEFECTS 221 (1974). Other techniques are visualization of the fetus by a fetoscope, radiography and ultrasound, and sampling of fetal and maternal blood. For an explanation of these techniques and their current level of development see Omenn, *supra* note 42.

133. *See* J. PRITCHARD & P. MACDONALD, *supra* note 125, at 204-05, 537-40, 274-77.

134. This is a relatively new concept for medicine. Until about 25 years ago the mother was regarded as the patient. The fetus was regarded as another maternal organ. The physician, therefore, always acted in the best interests of the mother, believing that doing so was in the best interest of the unborn. *See* J. PRITCHARD & P. MACDONALD, *supra* note 125, at 265.

135. *See id.* at 809-11.

136. *See* Liggins & Howie, *The Prevention of RDS by Maternal Steroid Therapy,* in MODERN PERINATAL MEDICINE 415 (L. Gluck ed. 1974); Liggins & Howie, *A Controlled Trial of Antepartum Glucocorticoid Treatment for Prevention of the Respiratory Distress Syndrome in Premature Infants,* 50 PEDIATRICS 515 (1972).

animal research is expected to develop additional therapeutic techniques.[137]

This review of the medical data suggests a number of points in fetal development at which one might recognize a strong claim for significantly increasing the legal protection given a developing human. I would argue that, absent powerful countervailing considerations, the point selected should reflect the fundamental principles underlying the present legal system — principles that warrant revised rules to keep pace with recent medical advances.

As I noted earlier, the law has traditionally considered the acquisition of a capacity for independent existence to be the significant point in human development. Traditionally, birth was the point at which the capacity criterion was satisfied. Today viability precedes birth, and therefore birth is no longer the event most appropriately satisfying the capacity criterion.[138] Viability is preferable to birth, because, as we saw earlier, there is no relevant difference between a viable fetus and a newborn.[139] Explicit substitution of viability for birth as the point at which important legal protections vest would not establish a new principle. It would adhere to the traditional principle, invoking a more precise formulation of the standard in response to modern medical information and capabilities.

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137. Investigators are removing primate fetuses from the womb, performing complicated neurosurgery, replacing the fetuses, and delivering them at term. It is hoped that such research will increase knowledge about nervous system damage in humans. *Primate Neurobiology: Neurosurgery with Fetuses,* 199 SCIENCE 960 (1978).

138. An analogous change is occurring in the determination of when a person is legally dead. The traditional criterion for determining whether death has occurred was cessation of the heartbeat. Modern medicine has made it possible, however, artificially to sustain the heart even while the patient is in an irreversible coma. *See* Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal,* 121 U. PA. L. REV. 87, 89 (1972). In light of this achievement, our reliance on cessation of the heartbeat to indicate death has been seriously challenged. As a consequence, new criteria for determining death have been proposed. *See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma,* 205 J.A.M.A. 337 (1968); Task Force on Death and Dying, Institute of Society, Ethics and the Life Science, *Refinements in Criteria for the Determination of Death: An Appraisal,* 221 J.A.M.A. 48 (1972). Adoption of new criteria has not meant that our concept of dying has changed. It means only that we must consider new medical data and new technological innovations in determining when death occurs.

139. One court permitting recovery for injury to a viable stillborn infant stated:

> Suppose . . . viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither.

Stidham v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959).

But we should not content ourselves with the law's traditional application of a capacity criterion. Before applying that criterion in the light of new developments, we must ask why it is an appropriate standard. Why should it be preferred to another principle, such as genetic individuality? Traditional acceptance alone is inadequate justification. I would argue that we should continue to use the capacity criterion because it represents a careful balance among powerful, complex, and perplexing societal concerns.

Society is naturally prone to protect most securely the interests of its most mature and responsible members. This instinct reveals itself whenever the interests of those members conflict with the interests of less mature or less responsible citizens. Preferring the interests of a "remote" potentiality in cases of conflict would be perceived as an intolerable incursion on the interests of the fully matured. Accordingly, we tend to favor the interests of parents over the interests of children when those interests collide.

Yet society has never wholly disregarded the interests of those less mature. It has always sought to strike a fair balance and has typically done so at that point in development where the entity shows a significant likelihood of becoming a mature, contributing member. That point has, logically, been the moment at which the entity is capable of independent existence — the capacity criterion. The criterion is thus a rational one — it represents a societal commitment to bestowing rights on those likely to contribute to its advancement. It naturally follows the societal instinct for self-perpetuation. It explains the early common law property rule that one had to be alive at the time of a testator's death to inherit; otherwise no one would fulfill the feudal responsibilities.[140] Similarly, modern law gives rights to artificial entities such as corporations only when they are capable of bearing responsibilities.[141]

Thus, the capacity criterion is a rational principle, and the viability standard is a rational application of that principle to the

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140. *In re* Peabody, 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959). The court stated:

> Because of the necessity in medieval England always to have available a living person who could be charged with the performance of feudal duties, the common law developed the rule that a remainder estate was destroyed if the heir or devisee was not alive when the prior estate came to an end.

5 N.Y.2d at 546, 158 N.E.2d at 844, 186 N.Y.S.2d at 269.

141. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

modern world. Yet that should not obscure the arguments in Section IV above: Although principal rights should be bestowed at viability, the previable fetus should still receive some protection. Where the protectable interests of fully mature members do not conflict with those of less mature members, there is no justification for ignoring the latter's claims. The *Roe* opinion was correct in recognizing a state's legitimate interest in protecting the previable fetus. In tort, property, and criminal law, when that interest does not oppose a protected interest of the mature mother, the state should not hesitate to vindicate it.

V. Some Implications of the Viability Criterion

I have argued that medical data and common law theory strongly support a viability criterion as one of central significance. There is today no inherent legal obstacle to giving viable fetuses legal protection fully equivalent to that given the newborn. But is it practical? Will it help to resolve disputes between fetuses and mothers? Or between fetuses and third parties?

The first difficulty with the viability criterion is the extraordinary complexity of determining a particular fetus's viability.[142] Estimates of gestational age have a two-week margin of error. Moreover, even if we could always determine precisely the gestational age of a fetus, that datum would not be sufficient to tell us whether the fetus was in fact viable.[143] To apply the viability

142. The Supreme Court acknowledged that complexity in *Colautti v. Franklin:*

> As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty.

439 U.S. 379, 395-96 (1979) (footnote omitted).

143. Indeed, between the 20th and 28th weeks there is no reliable technique to make the determination of viability. *See* Kass, *Determining Death and Viability in Fetuses and Abortuses, in* Research on the Fetus: Appendix, *supra* note 38, at 11-1, 11-15. A competent examiner using a stethoscope can detect a heartbeat that suggests fetal life and age at approximately 20 weeks of pregnancy. Even *ex utero,* determining viability is not entirely free of difficulty. One author suggests that a fetus *ex utero* is to be considered viable if it shows all five of the following signs: (1) spontaneous muscular movement, (2) response to external stimuli, (3) elicitable reflexes, (4) spontaneous respiration, and (5) spontaneous heart function. *Id.* Behrman suggests that a fetus is viable *ex utero* if it has a minimum number of basic intergrative physiologic functions. In 1975 he listed the following: (1) perfusion of tissues with adequate oxygen and the prevention of the increasing accumulation of carbon dioxide and/or lactic and other organic acids, and (2) neuro-

criterion in today's world we must resort to estimates of the probability of viability drawn from statistics on premature births. Using those estimates, we must then create a rebuttable legal presumption of viability or nonviability associable with each gestational age. The presumption chosen is vitally important, for in many cases it will not be feasible to marshal the evidence necessary to rebut it.

In *Roe,* the Court said that viability usually occurs at twenty-eight weeks, adopting what it believed to be the consensus of the medical profession that at least 40-50% of fetuses born at twenty-eight weeks of gestation survive.[144] But the Court did not stop there. It acknowledged that some fetuses beat the odds and survive at fewer than twenty-eight weeks of gestational age, possibly as early as twenty-four weeks. As I mentioned above, this left interpreters of the *Roe* opinion with a difficult ambiguity — when did the Court intend the presumption of viability to arise? At twenty-eight weeks, when most fetuses survive, or at twenty-four weeks, when some fetuses survive?

I would contend that states should be permitted to assert a compelling interest in potential life at the earliest point at which there has been verified fetal survival — at twenty-four weeks under *Roe.*[145] Such an assertion would certainly be within the

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logic regulation of the components of the cardiorespiratory perfusion function, of the capacity to ingest nutrients, and of spontaneous and reflex muscle movements. Behrman & Rosen, *supra* note 38, at 12-26. He suggests, however, that these functions cannot be reliably assessed in all cases. He argues that there is a correlation of these functions with gestational age and weight. Delivered infants weighing less than 601 grams and/or less than 24 weeks gestational age should be considered nonviable. At this stage signs of life, such as a beating heart, pulsation of the umbilical cord, etc., are not adequate in and of themselves to indicate the presence of the basic minimum functions. *See id.*

144. *See* Behrman & Rosen, *supra* note 38, app. A at 12-51. Their study has comprehensive data on premature survival rates by gestational age. Although this study does not represent a statistical sampling of total world, U.S., or Canadian births, it represents the best available data at the time the study was done. The study shows the percent of survivors among those born at 28 weeks is 46.2%.

145. "Verified" means substantiated in the manner that new medical information is substantiated by acceptance and publication in an established medical journal. Earliest verified survival refers to survival in the United States. Historically, American physicians have been held to a standard of practice in a particular locality. *See* W. PROSSER, *supra* note 70, § 32 at 164. However, accreditation of medical schools, better methods of communication and transportation, and availability of medical literature, and consultation have contributed to a breakdown of the locality rules. In some jurisdictions the locality rule has been entirely discarded. *Id.* There of course will be babies who will not live although born well after the earliest verified survival because viability is in part a function of available medical resources, and these babies will not be born in or near hospitals with the resources to keep them alive. *See* text at note 39 *supra.* In the future, earliest verified survival will ideally be determined by some national body, applicable in the entire United States, and

language of *Roe*. Moreover, it would be consistent with the reasons for giving fetuses legal protection in the first place. If we want to ensure that no human being is denied fair consideration by entitling every fetus to legal protection as soon as it is viable, then we should err on the safe side by protecting all who might have such an entitlement. In fact, given the margin of error in estimating gestational age, one could at least argue for a compelling state interest in any potential human estimated to be within two weeks of the age of the youngest fetus known to have survived. Especially when we know that the concerned mature persons have had a chance to protect their interests earlier in pregnancy, we should draw the line to maximize protection for those who may be viable.[146]

Despite the logic of such an approach, the Supreme Court's post-*Roe* opinions strongly suggest that statutes adopting a presumption at twenty-four weeks would be unconstitutional.[147] In *Planned Parenthood v. Danforth*[148] the Court stated, "[I]t is not the proper function of the legislature or the courts to place viability at a specific point in the gestation period. [T]he determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physi-

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subject to periodic review. *See* text at notes 163-64 *infra*. This national body might decide to take into account survival data from other countries in arriving at a national standard of viability for the United States. Information from foreign countries was taken into account by the National Commission when making its recommendations concerning fetal research. *See* Behrman & Rosen, *supra* note 38, at 12-2, 12-4.

146. Because our ability to sustain life earlier in gestation will probably move faster than common acceptance of this information by physicians, legislatures, and courts, perhaps a state should be able to create a zone in which we have no verified fetal survival but in which abortion is prohibited. Kass argues that we should treat every fetus with an audible heartbeat (which occurs at about twenty weeks) as if it were viable, although some will not be. *See* Kass, *supra* note 143, at 11-14. The National Commission adopted this approach in its report. It recommended that the "possibly viable infant," who is likely to be between 20 and 24 weeks and between 500 and 600 grams, could be involved in research only under stringent conditions. NATL. COMMN. FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, RESEARCH ON THE FETUS: REPORT AND RECOMMENDATIONS 75 (1975) (HEW Publication No. (OS) 76-127).

147. The Court has never considered a carefully drafted statute or a statute that incorporated the *Roe* definition of viability. At least one state legislature attempted to prohibit abortion on demand 24 weeks after conception. This statute was declared unconstitutional in Floyd v. Anders, 440 F. Supp. 535 (D.S.C. 1977) (three judge panel), *vacated and remanded per curiam*, 440 U.S. 445 (1979). "Because the District Court may have reached this conclusion on the basis of an erroneous concept of 'viability' which refers to potential, rather than actual, survival of the fetus outside the womb," the Court remanded in light of Colautti v. Franklin, 439 U.S. 379 (1979). The Court also suggested that the district court give further consideration to abstention.

148. 428 U.S. 52 (1976).

cian."[149] The Court expressly affirmed this view in *Colautti v. Franklin*.[150] Thus, a reading of *Roe, Danforth* and *Colautti* might suggest that the states' compelling interest in potential life arises clearly at twenty-eight weeks, and earlier only if an individual physician so determines.[151]

If that is how the Court intends to resolve the problem of determining individual viability, its approach is not convincing. The medical profession is not of one mind concerning the conclusion that the fetus does not have a reasonable likelihood of survival until twenty-eight weeks. Some would argue that the point of reasonable likelihood of survival occurs earlier. In the Court's own words,

> [E]ven if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.[152]

The Court's extraordinary deference to the medical profession regarding what constitutes a reasonable likelihood of survival seems unwarranted. Physicians do have some competence to tell us the probabilities of survival at each stage of development. They do not, however, have peculiar competence to decree that a specific probability of survival is the critical one for determining when a state's interest in potential life becomes compelling. That decision is important to all of society.

Moreover, the Court's apparent refusal to permit states to assert a compelling interest at the earliest moment of known fetal survival sacrifices the objectivity and ease of administration which that system offers. Under the Court's system, a physician could reasonably abort a fetus that other physicians consider viable. All physicians called upon to estimate the odds will do so subjectively under circumstances that make it impossible to ignore the powerful motives of the parties. One must question the justice of imposing such a difficult question of values on a profes-

149. 428 U.S. at 64.

150. 439 U.S. 379 (1979).

151. Under the Court's position presumably the physician could determine that a fetus older than 28 weeks was not viable. The physician might however have a difficult time sustaining that position if the finding were contested.

152. 439 U.S. at 396 (footnote omitted).

sion that neither wants to answer it nor is especially competent to do so.

Although I have stressed the importance of the presumption of viability or nonviability, the manner of rebutting it should not be ignored. The question of a fetus's viability often arises when it is delivered stillborn after a traumatic event that occurred near the time of viability. For example, a fetus might be injured through another's negligence during the twenty-sixth week of pregnancy. After stillbirth, the question might arise of whether a wrongful death suit on its behalf could be brought in those states that require that the fetus be viable when injured. Under my approach, it would be presumed viable from the twenty-fourth week onward. To rebut the presumption, a doctor would have to examine the fetus after birth to find peculiar characteristics known to affect the time of viability. The difficult factual issue need not be any tougher than those already presented by efforts to separate the birth process from the moment of birth.

A second problem with giving full legal protection at viability stems from the fetus's physicial attachment to the mother. Given this fact, how should we resolve conflicts between the interests of mothers and of viable, attached fetuses? The Court in *Roe* suggests that the mother's interest predominates, at least when her life and health are at stake.[153] It offered no justification for this value preference and did not attempt to reconcile it with the fact that a state's compelling interest in potential life otherwise attaches at viability. Moreover, it offered no guidance for other conflicts of interests, such as where a mother's treatment of her own body might hurt her unborn child. If it could be demonstrated that the intake of alcohol or drugs during pregnancy is likely to harm the fetus, could we prohibit a pregnant mother from drinking or taking drugs?[154] These are difficult issues, which should perhaps be distinguished according to whether the fetus is viable or previable.

I submit that the Court in *Roe* was not justified in assuming that the mother's interest in her life or health predominates over

153. *See* Roe v. Wade, 410 U.S. 113, 163-64 (1973).

154. Current research suggests that there is a relationship between maternal use of alcohol and fetal abnormality. *See* Ouellette, Rosett, Rosman, & Weiner, *Adverse Effects of Maternal Alcohol Abuse During Pregnancy,* 297 NEW ENG. J. MED. 528 (1977). At least one female has been indicted for child abuse for giving birth to a child addicted to heroin. *In re* Baby X, No. 77-1557 (6th Jud. Cir. Oakland Cty., Mich.). However, another case has held that a mother cannot be punished in such circumstances. Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

the identical interests of the viable fetus. The interests of mother and viable fetus should be weighed equally in resolving conflicts between them. We should strike a fair balance between their competing interests[155] on an issue-by-issue basis, considering the gestational age of the fetus, the severity of possible harm to the fetus, and the severity of possible harm to the mother's interests. If continued pregnancy threatens a mother's life[156] or health[157] at a time when her unborn child is viable, we should first consider separating them by a procedure designed to minimize the risks to both. Such a step is often difficult and is sometimes impossible, but in situations of clear danger to the mother, it may prove the fairest reconciliation of their competing interests. In other circumstances, that reconciliation might go more directly against the interests of the mother. It may require her to submit to activities she finds objectionable, such as blood transfusions, where they are necessary to save the life of the unborn fetus.[158] In such a case, that seems an appropriate balance between the mother's nonabsolute right to free exercise of religion and the fetus's life-or-death concern.

Where the mother's personal activities — smoking, drinking, using medication, or working, to give a few examples — endanger the fetus, resolution of conflicts should consider how much control the mother actually has over her actions, the severity of possible damage to the fetus, the nature of the conduct engaged in,

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155. Some will argue that this approach places too great a constraint on a woman's right to terminate her pregnancy. This is true only if termination of pregnancy means that a woman is entitled to a method of termination that will result in a dead fetus. There seems to be no justification for permitting termination of pregnancy after viability by a method likely to kill the fetus. We do not permit infanticide. There seems to be no logic in permitting the death of an entity that, like the newborn, is capable of living independently of its mother, on the ground that it has not been physically detached from the mother. We are simply extending the rationale behind proscriptions against infanticide to viable but unborn entities. Since viability will probably continue to occur earlier in pregnancy, at some future point some fetuses may be viable very early in the gestational period. If that event comes to pass, it may also become possible to separate mothers and fetuses upon request at minimal risk to both.

156. It appears that there are relatively few instances where continued pregnancy implies certain death for the mother. The threat to her life is relative and may depend on whether she has the financial resources to permit her to be hospitalized, to hire domestic help, etc. *See* Ryan, *Humane Abortion Laws and the Health Need of Society,* 17 W. RES. L. REV. 422, 430 (1965).

157. Health is a difficult concept to define. *See* note 11 *supra.*

158. *See* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964). In this case, the court ordered that a blood transfusion should be administered contrary to a woman's religious beliefs as a Jehovah's Witness, if needed to save the life of her unborn 32-week-old fetus.

and the invasion of the mother's interests. For example, if the mother were a heroin addict, the newborn could be born addicted — a serious injury. Her conduct would be involuntary, but her use of heroin illegal. It would certainly be justifiable to compel her to undergo treatment; we might even consider more severe sanctions.[159] If society may punish an addict for giving drugs to her children, it may consistently punish her for causing her unborn child to become addicted.[160] The more difficult cases involve smoking, drinking, or working in environments hazardous to fetuses. Perhaps resolution of those conflicts ought to turn on the risk of harm to the fetus. We should consider how likely it is that the risk will come about and the severity of damage if it occurs. Such conflicts may be difficult. But certainly the difficulty is not sufficient to force a retreat from the viability criterion or to warrant disregarding the fetus whenever a mother asserts some interest in her own lifestyle or health.

Viability poses another dilemma. It is not biologically fixed at some permanent time.[161] It will arrive earlier in gestation as

159. *But see* Colautti v. Franklin, 439 U.S. 379, 386 n.7 (1979) (prior to viability, state may not impose criminal sanctions to protect fetal life).

160. I do not suggest here that the mother should be punished rather than treated in such circumstances. However, persons have often been punished for involuntary behavior and a similar result here would be consistent with that legal tradition.

161. Viability has been criticized as a criterion for that reason. *See* Krimmel & Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. CIN. L. REV. 725, 741-42 (1977). Some commentators have emphasized biological properties. Some argue for conception as the most relevant point in fetal development, because it dates the creation of a unique genetic makeup. *See* Noonan, *supra* note 39, at 57. Others select a period up to fourteen days after conception or when we are assured that individualization has occurred. This point was selected by the Constitutional Court of West Germany. *See* note 71 *supra*. Still others select viability. *See* Engelhardt, *The Ontology of Abortion*, 84 ETHICS 217, 228-30 (1974). Another view suggests that, rather than looking to a point in fetal development such as viability in defining when full legal protection is appropriate, we should look to the presence or absence of certain unique human characteristics, though there is little consensus as to what those characteristics should be. Some examine the degree of social and personal concern invested in an entity in defining when life begins. *See id.* at 230-32. Others emphasize the entity's intellectual and cognitive functions. *See* Lederberg, *A Geneticist Looks at Contraception and Abortion*, 67 ANNALS INTERNAL MED., SUPP. 7, at 26 (1976). Still others emphasize the possession of self-consciousness or a capacity for self-consciousness. *See* Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, HASTINGS CENTER REPORT, Nov., 1972, at 1. These approaches share the same defect. Since they are all the product of philosophical views and social influences prevalent in different sectors of society at any given time, they are subject to prejudicial and subjective applications. In the past, such approaches have justified unjust treatment of persons based upon color, racial, sexual, religious, or cultural difference. By excluding blacks from the slave owners' definition of human (based upon "scientific" data of biological inferiority that often was falsified), the slave owners were able to rationalize slavery. *See* A. ROSE, THE

new and better techniques are developed for sustaining existence outside the womb. The Supreme Court noted this possibility in *Danforth* when it stated: "[W]e recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term."[162] It is precisely the fact that viability is not forever fixed in time that gives rise to the strongest criticism of its use as a criterion. Some would object to granting legal protection at different moments in the gestational period for different generations; such critics would prefer to choose an unvarying point in fetal development. But since viability strikes a balance of competing interests with a standard that applies fairly to all humans, striking that balance at different times for different people is not morally offensive. And viability is not subject to the type of arbitrariness that lurks in vague formulations of "personhood." It is a biological concept that would minimize the possibility of discriminatory treatment of different human lives.

The shifting moment of viability would not create an undue problem under the standard for establishing the viability presumption that I espoused above. It is relatively easy to keep track of the age of the youngest known successful birth and to advance it with each new "miraculous" premature survival. Nonetheless, it would create difficulties in assessing the appropriate way to rebut that presumption in an individual case. Surely the standards for that assessment will have to be revised periodically in light of new medical knowledge and advances. Who should make that revision and who should have the responsibility for verifying the earliest known survival? The National Commission for the

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NEGRO IN AMERICA 31-36 (1956). Such justifications even permeated the Supreme Court in the *Dred Scott* decision, where it stated:

> [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandize and property, was guarantied [*sic*] to the citizens of the United States . . . . And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451-52 (1856). Blacks in America are not the only persons discriminated against because of supposed biological inferiority. The Chinese in America and the Jews in Europe as well as others have suffered similar fates. *See* People v. Hall, 4 Cal. 339, 404-05 (1854) (Chinese, as well as blacks, excluded from testifying in action where any party is white because marked by nature as inferior and incapable of progress of intellectual development beyond a certain point); International Military Tribunal: Nuremberg 14 Nov. 1945 - 1 Oct. 1946 Trial of the Major War Criminals.

162. Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

Protection of Human Subjects of Biomedical Behavioral Research has recommended giving a federal agency responsibility for monitoring new developments.[163] Legislatures and courts could then be guided by that agency's reports. Another possibility would be to give some organized arm of the medical profession responsibility for issuing guidelines that summarize the most recent knowledge about the specific factors affecting viability. This would be a less satisfying resolution, however, for such guidelines would operate without the imprimatur of government approval. If the responsibility were lodged in a government agency, all interested concerns, including the medical profession, could participate in the formulation of the guidelines.[164]

The shifting moment of viability suggests another possible concern. Physicians currently can diagnose certain genetic conditions and complications *in utero* in time to perform an abortion under *Roe* standards.[165] If viability were to move to an earlier point in gestation, abortion of a defective fetus might not be allowed. Yet the problem is really not new. Whether one may kill a human, either because it will enjoy a quality of life below some minimal level or because its parents do not wish a severely handicapped child, is not a question peculiar to the use of viability as a standard.[166] We should treat viable, defective fetuses in the same way we treat defective newborns. The problem, in short, should be viewed as one of euthanasia and not one uniquely affecting legal protection of fetuses.

A final potentially troublesome aspect of viability is that it is a moment in development whose achievement is not readily apparent to lay persons, or even to physicians. This problem also afflicts the current debate over shifting the traditional legal definition of death, which looks to heartbeat cessation, to a definition that looks to brain activity. Neither brain death nor viability is

163. NATL. COMMN. FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *supra* note 146, at 5, 75.

164. Note, however, that suggestions for new criteria for determining death originated with nongovernmental groups. *See* note 156 *supra*.

165. *See* note 132 *supra*.

166. Some commentators who look to the possession of certain unique characteristics in defining when life begins have been forced to consider the legality of infanticide as well as that of abortion. Some would allow infanticide in some circumstances. *See, e.g.*, J. FLETCHER, THE ETHICS OF GENETIC CONTROL 152-54; 185-87; Tooley, *Abortion and Infanticide*, 2 PHIL. PUB. AFF. 37 (1972). Other commentators reach different conclusions. Paul Ramsey, for example, advises against the abortion of defective fetuses but supports a withdrawal of medical treatment that would lead to the fetus's death. Ramsey, *supra* note 71, at 97-100.

readily understood. Moreover, there is often lay resistance to the use of criteria that are technologically determined and can be used only by professionals. This is more a political problem than a legal or ethical one. We are therefore fortunate that, as a practical matter, the need to determine the point of viability, just as the need to use brain death definitions, is infrequent. In most abortion cases, we will have a termination of the pregnancy long before viability. In most other cases there will be a live birth. Achievement of live birth will adequately prove a separate and independent existence, to the satisfaction of professional and lay persons alike.

VI. Conclusion

Most legal and philosophical literature about the fetus concerns abortion, and in recent years moral philosophers have thought the critical preliminary issue in resolving the morality of abortion to be whether the fetus is a person. In *Roe v. Wade,* the Supreme Court also approached the abortion issue through the question of personhood. The Court held that the fetus is not a person, a holding that has been criticized for inadequate analysis.

I submit that whether the fetus is a "person" is irrelevant to whether it should have legal protection. The personhood debate has only obscured the decisive issues. The juridical status of developing humans has historically depended upon their capacity for a separate and independent existence. It is not necessary to abandon that traditional understanding; we must only revise its application in the context of greater scientific knowledge. Today, capacity to have independent existence points to viability instead of birth as the determinative moment in development. There are no serious legal problems to recognizing legal protection of viable fetuses equal to that already afforded newborns. The standard presents some problems that birth does not, but none that is sufficiently serious to challenge the thesis that all fetuses merit some protection and that viable fetuses merit all protection currently given the newborn infant.