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# The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology

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# THE "BORN ALIVE" RULE: A PROPOSED CHANGE TO THE NEW YORK LAW BASED ON MODERN MEDICAL TECHNOLOGY

> [L]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of.[1]

## I. INTRODUCTION

In 1949, the New York Court of Appeals, in *People v. Hayner*,[2] enunciated the common-law born alive rule. The rule applies to homicides—in particular, the unconsensual killing of unborn fetuses. It requires proof that (1) a child lived outside the womb after birth; and (2) the child's life was sustained by independent circulation before the child died due to an external force that occurred while in the womb.[3] In 1965, the born alive rule was codified in the New York Penal Law,[4] which defines a person as a "human being who has been born and is alive."[5] The New York State Appellate Division first applied the born alive rule in June 1990, in *People v. Hall*.[6] This was the first time this court had to decide whether an individual could be convicted of the homicide of a child who was born alive but then died as a result of wounds inflicted on the child's mother during her pregnancy.[7] In *Hall*, the child died after an emergency Caesarean birth that was necessitated by a gunshot wound inflicted on the mother.[8] The court upheld Hall's conviction of involuntary manslaughter.[9] Although the fetus was twenty-eight- to thirty-two-weeks old and viable when the mother was shot,[10] the manslaughter conviction would not have been sustained if the child had died prior to birth.[11]

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1. *In re* Quinlan, 355 A.2d 647, 665 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

2. 90 N.E.2d 23 (N.Y. 1949).

3. *See id.* at 25.

4. *See* N.Y. PENAL LAW §§ 125.00-.05 (McKinney 1965), *amended by* N.Y. PENAL LAW § 125.05 (McKinney 1970).

5. *Id.* § 125.05(1) (in 1965, no provision existed for the 24-week pregnancy termination).

6. 557 N.Y.S.2d 879 (App. Div. 1990), *aff'g* 511 N.Y.S.2d 532 (Sup. Ct. 1987).

7. *Id.* at 880.

8. *Id.*

9. *Id.* at 880-81.

10. *Id.* at 880.

11. *Id.* at 883. A person cannot be convicted of homicide unless the victim was first

This note explains the history of the born alive rule and its adoption by various courts. While doing so, this note emphasizes New York law[12] and the *Hall* decision[13] and discusses the decisions of other state courts and legislatures.[14] Several states have enacted legislation overruling the born alive rule and have added fetal homicide as a statutory criminal offense.[15] South Carolina[16] and Massachusetts[17] courts have gone so far as to make fetal homicide a common-law crime.

When comparing the New York rule with fetal-homicide laws of other states, it becomes apparent that New York's born alive rule should be abolished. Instead, New York should enact legislation offering greater protection to the unborn fetus. A law that makes the killing of a fetus at a point as early as conception a homicide punishable by law, however, is as unattractive as the present law. Nonetheless, New York would be justified in following those states that have enacted fetal-homicide laws to punish, as well as to stigmatize, individuals for causing the cessation of a viable fetus. Viability is the point in fetal growth at which a fetus can survive outside the womb with or without the benefit of medical technology.[18]

Modern medical technology has had, and will continue to have, an impact on the existence of the born alive rule. With the use of ultrasonography and amniocentesis, medical experts can determine the point at which a fetus is viable.[19] Modern Supreme Court decisions discussing a right to life,[20] as well as those discussing a right to die,[21]

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born alive. The trial court never held that an unborn fetus could be considered a person under the homicide provisions. *Id.*

12. *See* discussion *infra* part III.A.

13. *See* discussion *infra* part III.B.

14. *See* discussion *infra* part III.C.

15. *See id.*

16. *See* State v. Horne, 319 S.E.2d 703 (S.C. 1984); *see also* discussion *infra* part III.D.2.

17. *See* Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); *see also* discussion *infra* part III.D.1.

18. *See* Roe v. Wade, 410 U.S. 113, 160 (1973) (discussing the existence of fetal viability based on trimesters in the pregnancy).

19. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 514-15, 530-31 (1989) (upholding a Missouri statute creating a presumption of viability that must be rebutted by medical tests before an abortion may be performed).

20. *See, e.g., Webster*, 492 U.S. at 502 (upholding the use of medical tests to determine gestational age, weight, and lung maturity).

21. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2854 (1990) (finding that the potential of medical advances allows for reversal of life-sustaining

illustrate the Court's acceptance of medical evidence to determine if life exists.

Recent abortion decisions must be discussed, however, in any attempt to bring the definition of person, for purposes of homicide law, up to date with modern achievements and values.[22] Although abortion involves the consensual termination of a fetus and the born alive rule concerns the non-consensual killing of a fetus, the issues have always been interrelated.

## II. THE HISTORY OF THE BORN ALIVE RULE: COMMON-LAW DISTINCTION BETWEEN FETAL LIFE BEFORE AND AFTER QUICKENING

In the thirteenth century, Henry de Bracton, Chancellor of Exeter Cathedral and Justice of the Court of King's Bench in England, was unique in distinguishing between formation and animation of the fetus in the womb.[23] Other medieval writers equated physical formation with rational animation, although Bracton suggested animation could follow formation.[24] Animation was agreed to be the moment at which a rational soul infused into the developing fetus—sometime between conception and birth.[25] The early English common law of abortional homicide was modeled after Bracton's view. The period of animation was labeled as the time of quickening—the time between the sixteenth and eighteenth week of pregnancy, when the fetus begins to stir.[26] By the seventeenth century, Sir Edward Coke had accepted the common-law view as evidenced by his famous statement:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great [misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.[27]

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treatment to rehabilitate the patient).

22. *See* discussion *infra* part IV.B.

23. *See* Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 419 (1968).

24. *Id.*

25. *See id.* at 411.

26. *See id.* at 420.

27. 3 SIR EDWARD COKE, INSTITUTES 50 (1648). "Misdemeanor" is the American courts' translation of Coke's term "misprision." Means, *supra* note 23, at 420.

Coke's words make it apparent that the common law did not view an abortional act before quickening as any type of offense. An abortional killing after quickening was a misdemeanor if the child died within the womb and was stillborn;[28] the killing was murder only if the fetus (1) was quickened; (2) was born alive; (3) lived for a brief interval; and (4) died.[29] This is the so-called born alive rule, in which killing a fetus is murder only if the fetus is born alive and subsequently dies as a result of acts committed on the mother while the fetus was in the womb. One century later, Blackstone reiterated and expanded Coke's born alive rule.[30]

By 1850, many states recognized the born alive rule to support murder indictments.[31] The only evidence of the New York common-law rule, however, appeared in *Evans v. People*,[32] decided 43 years after the Revised Statutes of 1829[33] replaced New York's common law. In *Evans*, the court noted that, at common law, to cause the death of an unborn fetus was not murder; rather, the willful destruction of an unborn infant quick in the womb was a high crime and was manslaughter only if rendered so by statute.[34] The New York Revised Statutes, however, included a feticide statute that deemed the killing of an unborn *quickened* fetus first-degree manslaughter.[35] Yet, the feticide statute was never actually used

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28. *See* Means, *supra* note 23, at 420.

29. *Id.*

30. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30. Blackstone stated that

> if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor.

*Id.*

31. *See, e.g.*, State v. Cooper, 22 N.J.L. 52, 54 (1849) (stating that it was not murder to kill a child before it was born, even if it was killed in the process of delivery); Pennsylvania v. McKee, 1 Add. 1 (Pa. 1791) (reiterating the common-law born alive rule by requiring proof that the child was born alive to support a murder indictment).

32. 49 N.Y. 86 (1872).

33. N.Y. REV. STAT. 1829, pt. IV, ch. 1, tit. 2, § 8, *amended by* N.Y. PENAL LAW § 125 (McKinney 1965).

34. *See Evans*, 49 N.Y. at 88 (finding that an unborn infant is not considered a person upon whom the crime of murder can be committed).

35. *See* N.Y. REV. STAT. 1829, pt. IV, ch. 1, tit. 2, § 8 (reading that "[t]he willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree").

to prosecute anyone for a homicide other than illegal abortion.[36] An abortion law was enacted as a companion section, which rendered an act intended to procure a miscarriage second-degree manslaughter.[37] This abortion law is similar to those in effect today.[38]

In 1850, California enacted a Crimes and Punishment Act,[39] modeled after the then existing New York Penal Law,[40] but declined to adopt a provision punishing a special crime of feticide. California also enacted an abortion statute, but unlike the New York provision, it was separate and apart from the homicide statute.[41] The California Court of Appeal continued to apply the born alive rule, but did so rather broadly in *People v. Chavez*.[42] The *Chavez* court proclaimed that "a viable child *in the process of being born* is a human being within the meaning of the [California] homicide statutes, whether or not the process has been fully completed."[43] The court reasoned that a viable child should be considered a human being when it is a living baby, or when, in the natural course of events, a birth that is already started would be successfully completed.[44] The court took the realities of life into consideration instead of merely relying on legal fictions.[45] This ruling, however, does not

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36. *See* People v. Joseph, 496 N.Y.S.2d 328, 329 (Sup. Ct. 1985).

37. *See* N.Y. REV. STAT. 1829, pt. IV, ch. 1, tit. 2, § 9. The statute reads,

> [e]very person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree.

*Id.*

38. *See* discussion *infra* part III.; Means, *supra* note 23, at 449. Until 1965, the only significant abortion statutory change was a movement of the dividing line between simple abortion and manslaughter six weeks farther from quickening to the end of the 24th week. *See id.* at 442-43; *see also* N.Y. PENAL LAW §125.15 (McKinney 1989) (providing that second-degree manslaughter is the killing of a female by a non-consensual "abortional act").

39. 1850 Cal. Stat. ch. 99, §19, p. 231 (current version at CAL. PENAL CODE § 187 (West 1988)).

40. *See* N.Y. REV. STAT. 1829, pt. IV, ch. 1, tit. 2, § 9.

41. *See* CAL. HEALTH AND SAFETY CODE §§ 25950, 25951 (West 1984).

42. 176 P.2d 92 (Cal. Ct. App. 1947) (convicting the defendant of manslaughter for the murder of her newborn infant, which she delivered in a toilet bowl, wrapped in a newspaper, and left under a bathtub to be found dead the next day).

43. *Id.* at 94 (emphasis added).

44. *See id.*

45. *See id.*

stand for the proposition that a viable fetus who is not in the process of being born is also a human being under homicide law.[46]

In the controversial case of *Keeler v. Superior Court*,[47] the California Supreme Court, relying on the *Chavez* decision and legislative intent, upheld the same interpretation of the born alive rule.[48] In *Keeler*, the defendant, infuriated that his ex-wife was pregnant, threw her against a car and tried to "stomp the baby out of her" by shoving his knee into her abdomen.[49] The fetus was stillborn due to severe head fractures.[50] The defendant initially was charged with willful infliction of traumatic injury upon his wife, assault on his wife by means of force likely to cause great bodily injury, and murder of the baby.[51] The California Supreme Court, however, granted the defendant's writ of prohibition to prevent the superior court from prosecuting him on the murder charge.[52] The court reasoned that if the legislature had intended to include the unborn fetus in the homicide statute, it would have done so.[53] It was not the court's duty to broaden the statute; to do so would have been to deny the defendant due process of the law because he was not given advance notice of such broad statutory interpretation.[54] After *Keeler*, California revised its homicide statute to include the term fetus; it is now a feticide statute.[55]

## III. MODERN-DAY LAW DEALING WITH THE BORN ALIVE RULE

### A. *New York Law*

The New York Court of Appeals did not enunciate the born alive rule until the 1949 landmark decision of *People v. Hayner*.[56] The court did

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46. Keeler v. Superior Court, 470 P.2d 617, 629 (Cal. 1970).

47. *Id.* at 617.

48. *See id.* at 628-30.

49. *Id.* at 618.

50. *Id.*

51. *Id.* at 619.

52. *See id.*

53. *See id.* at 619-20.

54. *See id.* at 626; *see also* Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964) (proclaiming that "when an unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime").

55. *See* CAL. PENAL CODE § 187(a) (West 1989 & Supp. 1991) (providing that murder is the killing of a human being, or a fetus, with malice aforethought).

56. 90 N.E.2d 23, 24 (N.Y. 1949) (acquitting the defendant of manslaughter because

not apply the born alive rule as broadly as the California court did in *Chavez*,[57] but instead adhered strictly to the common-law rule. The court enunciated a two-pronged test that required proof that (1) a child lived outside the womb after birth; and (2) the child's life was sustained by independent circulation before the child died due to an external force that occurred while in the womb.[58] In *Hayner*, the defendant purposefully strangled his daughter's baby with its own umbilical cord while assisting its delivery.[59] Because evidence of livebirth was insufficient, he was not convicted of murder.[60]

The New York Penal Law of 1965 codified the born alive rule in its homicide statute.[61] Section 125 of the Penal Law provides, in part, that homicide includes abortion in the first degree and defines homicide as "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four (24) weeks."[62] It was necessary, for statutory purposes, to limit this definition of homicide to "unborn child[ren] . . . more than twenty-four (24) weeks old."[63] The reason for this limitation was that the statute also provides that the offense of abortion in the second degree, which prohibits abortion at an earlier point in the term, is not to be considered homicide.[64]

The various homicide offenses are defined in subsequent sections of the Penal Law.[65] With the exception of abortion, the statutes require that

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insufficient evidence existed to determine whether the dead baby had been born alive, fully expelled from the womb, and had sustained life independent of the mother).

57. *Compare Hayner*, 90 N.E.2d at 25 (emphasizing the need of the fetus's complete expulsion) *with* People v. Chavez, 176 P.2d 92, 94 (Cal. Ct. App. 1947) (stressing that the fetus need only be in the process of birth).

58. *See Hayner*, 90 N.E.2d at 25.

59. *See id.* at 23-24.

60. *See id.* Hayner was also the baby's father and was later indicted for second-degree rape, to which he plead guilty, and incest. *See* Leonard v. Barnes, 111 N.Y.S.2d 5 (App. Div.) (dismissing Hayner's appeal regarding error on the part of the sentencing court), *aff'd*, 303 N.Y. 989 (1952).

61. *See* N.Y. PENAL LAW § 125.00 (McKinney 1965).

62. *Id.*; *see also* People v. Joseph, 496 N.Y.S.2d 328, 329 (Sup. Ct. 1985) (distinguishing between abortion in the first degree, occurring after 24 weeks of pregnancy and considered homicide, and abortion in the second degree, occurring before 24 weeks of pregnancy and prohibited but not deemed homicide).

63. N.Y. PENAL LAW § 125.00 (McKinney 1989).

64. *See Joseph*, 496 N.Y.S.2d at 329; *see also* People v. Vercelletto, 514 N.Y.S.2d 177, 179 (Sup. Ct. 1987) (stating that in every case other than illegal abortion, proof was required that the baby was born and was alive).

65. *See* N.Y. PENAL LAW §§ 125.00-.60 (McKinney 1989).

the victim be a person.[66] Section 125.05(1) defines "person," in referring to the victim of a homicide, as "a human being who has been born and is alive."[67] Courts have interpreted this definition as insuring that the death of a person would not include the abortional killing of an unborn child.[68] In 1985, the court in *People v. Joseph*[69] found that the legislature did not intend to make the non-abortional, or the non-consensual, killing of an unborn child a homicide under section 125.05.[70] The court reasoned that if the legislature had intended to do so, it would have specifically included "fetus" in the definitions section. In the past, other state courts have always insisted on clear legislative guidance before they would abrogate adherence to the long-standing born alive rule, and the *Joseph* court agreed with this practice.[71]

### B. *The* People v. Hall *Decision*

In June 1990, in *People v. Hall*,[72] the New York Court of Appeals specifically dealt with the application of the born alive rule for the first time. *Hall* involved a baby actually born alive that subsequently died due to injuries inflicted upon its mother during her pregnancy.[73] The defendant, Leonard Hall, while intending to shoot a man he had had a fight with earlier that night, shot the mother, Ms. Brigette Garrett, in the abdomen.[74] The bullets disrupted the oxygen flow to Ms. Garrett's twenty-eight- to thirty-two-week-old fetus, and an emergency Caesarean section was performed.[75] Although premature babies born at her weight normally have a ninety percent chance of survival, baby Atallia lived for only thirty-six hours before she died from Hyaline Membrane Disease,[76]

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66. *See id.*

67. *Id.* § 125.05(1).

68. *See id.* § 125.05, *construed in* People v. Ebasco Servs., Inc. 354 N.Y.S.2d 807, 811 (Sup. Ct. 1974).

69. 496 N.Y.S.2d 328 (Sup. Ct. 1985).

70. *See id.* at 329-30.

71. *See id.* at 328-29 (citing State v. Dickinson, 275 N.E.2d 599 (Ohio 1971); People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980), *appeal denied*, 334 N.W.2d 616 (Mich. 1983); State *ex. rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984)).

72. 557 N.Y.S.2d 879 (App. Div. 1990) (*Hall II*), *aff'g* 511 N.Y.S.2d 532 (Sup. Ct. 1987) (*Hall I*).

73. *See Hall II*, 557 N.Y.S.2d at 880.

74. *See id.*

75. *See id.*

76. *See id.* at 881-82. Hyaline Membrane disease is also known as Respiratory Distress Syndrome. *Id.* at 881. Heavy airless and congested lungs are symptomatic of the

a condition common to premature babies.[77] This disease never occurs in fetuses who remain *in utero*, but develops only in babies who are born alive.[78] The question before the court was whether a twenty-eight-week-old fetus removed from its mother's womb by Caesarean section and immediately placed on a ventilator is a "person" within the meaning of section 125.05 of the New York Penal Law.[79]

The court followed the born alive rule as enunciated in *Hayner* because the legislature had since incorporated it into section 125.05(1).[80] The trial court found Atallia was born alive and was a person.[81] The court based its conclusion on the testimony of several physicians who witnessed Atallia's condition and on the fact that she was breathing for thirty-six hours.[82] Although Atallia used a ventilator for breathing, the court refused to presume that she was incapable of independent existence.[83]

Medical technology has made the use of cardiorespiratory machines possible, and courts have recognized that breathing and heartbeat alone are not indicia of life but are part of an integration of functions in which the brain is dominant.[84] Death occurs only when there is irreversible cessation of brain functions.[85] Thus, Atallia's death did not occur until thirty-six hours after her birth, when her brain died. The trial court reasoned that a finding that the infant was incapable of sustaining independent life would "further contradict the medical realities."[86] Hall was found guilty of both second-degree manslaughter for killing baby Atallia and of first-degree assault on her mother.[87]

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disease. *Id.* at 882. A doctor testified that the bullet wound to the baby's mother severed the placenta and disrupted the flow of oxygen to the fetus thus having an impact upon the development of the disease following birth. *Id.* at 881.

77. *Id.* at 881.

78. *See id.* The court considered expert testimony that a baby who dies *in utero* never develops this syndrome. *See id.*

79. *See id.* at 880. For a discussion of the term "person," see *supra* text accompanying notes 65-71.

80. *See Hall II*, 557 N.Y.S.2d at 883. The two-pronged test enunciated in *Hayner* was used to answer the question of whether or not Atallia was born alive. *See Hall I*, 511 N.Y.S.2d at 534; *see also supra* text accompanying notes 56-71.

81. *See Hall I*, 511 N.Y.S.2d at 534.

82. *See id.*; *Hall II*, 557 N.Y.S.2d at 882.

83. *See Hall I*, 511 N.Y.S.2d. at 534-35.

84. *See id.* at 534.

85. *Id.* at 535.

86. *Id.*

87. *Hall II*, 557 N.Y.S.2d at 881. A person is guilty of manslaughter in the second

Based on the trial court's reasoning and its application of the born alive rule, the appellate court affirmed.[88] The appellate court also noted that because Atallia's birth fit the criteria of a live birth under New York's Public Health Law, a birth certificate had been filed.[89] Thus, the definition of fetal death was not met[90]—Atallia was unquestionably a person within the meaning of the homicide statute.

Both the trial court and the appellate division relied heavily on medical technology to determine the status of baby Atallia. If it had been found that she had died before birth, Hall would not have been convicted of manslaughter, but rather of the lesser offense of first-degree criminal assault on the baby's mother.[91] If courts are willing to use medical technology to this extent, then they should use it to determine whether an unborn viable fetus may also be considered a person for the purpose of homicide law. Currently, someone who performs an abortion after the twenty-fourth week of pregnancy can be convicted of criminal abortion, whereas someone who kills the same fetus by a non-abortional act can only be convicted of criminal assault on the pregnant woman.[92] Although

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degree when "he recklessly causes the death of another person." N.Y. PENAL LAW § 125.15 (McKinney 1989).

88. *See Hall II*, 557 N.Y.S.2d at 879.

89. *See id.* at 882; *see also* N.Y. PUB. HEALTH LAW § 4130(1) (McKinney 1989). The statute reads,

> [l]ive birth is defined as the complete expulsion or extraction from its mother of product of conception, irrespective of the duration of pregnancy, which, after, such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such a birth is considered live born.

*Id.*

90. *See Hall II*, 557 N.Y.S.2d at 882; N.Y. PUB. HEALTH LAW § 4160(1) (McKinney 1989). The statute reads,

> [f]etal death is death prior to the complete expulsion or extraction from its mother of a product of conception; the death is indicated by the fact that after such separation, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

*Id.*

91. *See Hall II*, 557 N.Y.S.2d at 880, 882-83; *see also* N.Y. PENAL LAW § 120.10(i) (McKinney 1987 & Supp. 1992) (providing that a person is guilty of assault in the first degree when "with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon."). The original indictment charged Hall with attempted (intentional) murder in the second degree with "John Doe" as the intended victim. This count, however, was dismissed. *See id.*

92. *See generally* N.Y. PENAL LAW §§ 70.00-.02, 120.05-.10, 125.40-.45 (McKinney 1989). Abortion in the second degree, a class E felony, is punishable by a minimum of one

the intent of the abortion statute may be to punish and to deter the professional abortionist, the street criminal who kills a fetus should face a similar stigmatizing charge.

The author proposes that New York create a statute that imposes a greater stigma on defendants who are convicted of killing a fetus older than twenty-four weeks by non-abortional methods. Wayne R. LaFave has written that one reason for criminal sentences is "*denunciation*, or condemnation—as a symbol of distinctively criminal 'guilt,' as an affirmation and reenforcement of moral standards, and as reassurance to the law-abiding."[93] Certainly, an offense entitled fetal homicide, or feticide, would better serve this goal because society would logically view fetal homicide as a much more stigmatizing offense than the offense entitled criminal assault. At the very least, a fetal-homicide conviction would let others know that the individual committed a violent act on a pregnant woman and a fetus. In a criminal assault conviction, the individual's act is more anonymous without further inquiry. Moreover, it is conceivable that the criminal act is never known because either no further inquiry is made, or the actor provides a sanitized version of the act.

Perhaps voluntary and involuntary fetal homicide could be added to New York's Penal Law to punish an individual for an act, not consented to by a mother, that resulted in the death of a viable fetus. Voluntary fetal homicide could be classified as a Class C felony, the same level offense as second-degree manslaughter and first-degree assault.[94] Involuntary fetal homicide could be classified in the same way as second-degree assault and first-degree abortion.[95] By characterizing the new crimes in

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to one-and-a-third years and a maximum of three to four years imprisonment. *Id.* § 70.00-2(e), § 125.40. Abortion in the first degree, a class D felony, is punishable by a minimum of one to two-and-a-third years and a maximum of three to seven years imprisonment. *Id.* § 70.00-2(d), § 125.45. Assault in the first degree, a class C felony, is punishable by a minimum of one-third of the maximum 15 years imprisonment. *Id.* § 70.00-2(d), § 120.10. Assault in the second degree, a class D felony, is punishable by the same sentencing guidelines as abortion in the first degree. *Id.* § 70.02-2(c), § 120.05. The assault offenses overall are punishable by higher sentences. The abortion offenses, however, are more likely to carry a greater stigma as society views abortion because a more heinous crime.

Manslaughter in the first degree, a class B felony, is punishable by a minimum of one-third the maximum, which is six to 25 years imprisonment. *Id.* § 70.00-2(b), § 125.20. Manslaughter in the second degree, a class C felony, is punishable by the same sentences as assault in the first degree. *Id.* § 70.00-2(c), § 125.15.

93. WAYNE R. LAFAVE, MODERN CRIMINAL LAW CASES, COMMENTS AND QUESTIONS 24 (2d ed. 1988).

94. *See* N.Y. PENAL LAW §§ 120.10, 125.15 (McKinney 1989).

95. Both of these offenses are Class D felonies. *See* N.Y. PENAL LAW §§ 120.05, 125.45 (McKinney 1989).

the same classes as abortion, manslaughter, and assault, the Penal Law would remain consistent. These new offenses would carry more stigma with them and possibly would make the mother, as well as society, feel that justice was better served. New York should look to jurisdictions like California, Minnesota, and Illinois for guidance and for an understanding of why and how the common-law rule should be changed.[96]

### C. *Comparative Law of Other States*

#### 1. California

California law provides a good example of the shift from the born alive rule to the application of a homicide statute in situations in which a viable fetus has been killed. In *People v. Chavez*,[97] the court ruled that a viable fetus in the course of birth was a human being for purposes of the homicide statute.[98] In *People v. Belous*,[99] the court indicated that the ruling in *Chavez* did not, however, change the law to make an unborn fetus the legal equivalent of a born child.[100] The court found that "[t]he intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion."[101] In 1970, in *Keeler v. Superior Court*,[102] the California Supreme Court followed both *Chavez* and *Belous* in interpreting the California homicide statute. The court held that the killing of a fetus was a homicide only if the fetus was born alive, even though it may have been viable while in the womb when the injury was inflicted upon the mother.[103]

Immediately following *Keeler*, in 1970, the California Legislature amended its Penal Law to read that "[m]urder is the unlawful killing of a human being, or a *fetus*, with malice aforethought."[104] Acts that fall under the Therapeutic Abortion Act[105]—acts solicited, aided, abetted, or

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96. *See* discussion *infra* part III(C).

97. 176 P.2d 92 (Cal. Ct. App. 1947).

98. *See id.* at 94.

99. 458 P.2d 194 (Cal. 1969).

100. *See id.* at 203.

101. *Id.*

102. 470 P.2d 617 (Cal. 1970).

103. *See id.* at 628-29.

104. 1970 Cal. Stat. ch. 1311, § 1 (amending 1850 CAL. STAT. ch. 99, § 19) (emphasis added).

105. CAL. HEALTH & SAFETY CODE §§ 25950-25957 (West 1989 & Supp. 1991).

consented to by the mother that are performed by physicians and surgeons when childbirth would more likely than not result in the death of the mother or the fetus—are exempt from the Penal Law.[106] The purpose of the amended statute was to punish acts, by third persons, that in the past were protected by the born alive rule.[107]

Because the legislature did not define "fetus," however, courts were reluctant to enforce the newly amended statute when a question arose about a fetus's viability.[108] In the 1976 decision of *People v. Smith*,[109] the California Court of Appeal applied the viability principle, set forth by the Supreme Court in *Roe v. Wade*,[110] to determine whether the defendant's killing of his wife's baby constituted murder under California's amended Penal Law.[111] The *Roe* Court had found that, until viability, only the potential and expectancy for human life exists and, until the beginning of the third trimester, the fetus is not yet viable and is therefore not a human life.[112] Accordingly, the *Smith* court reasoned that because the Penal Law[113] defines the malice required for murder as "a deliberate intention unlawfully to take away the life of a fellow creature," there can be no murder if there was no human life.[114] Although the defendant had acted with malice aforethought in killing the twelve-

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106. *See* CAL. PENAL CODE § 187(b)(3) (West 1988).

107. *See id.* § 187(b), (c) (amended 1970).

108. *See, e.g.*, People v. Smith, 129 Cal. Rptr. 498, 501-02 (Ct. App. 1976).

109. *Id.*

110. 410 U.S. 113, 160 (1973).

111. *See Smith*, 129 Cal. Rptr. at 501-04; CAL. PENAL CODE § 187 (West 1989 & Supp. 1991).

112. *See Roe*, 410 U.S. at 162-65 (stating that no compelling state interest exists in the fetus until viability); *see also* Webster v. Reproductive Health Servs., 492 U.S. 490, 513-22 (1989) (holding that the state may require tests on a woman carrying an unborn child of 20 or more weeks to determine viability before an abortion may be performed); Planned Parenthood v. Danforth, 428 U.S. 52, 63 (1976) (holding that a definition of a "viable fetus" that requires the possibility of the fetus being able to survive the trauma of birth with or wiyhout artificial medical aid, is acceptable); *Smith*, 129 Cal. Rptr. at 502-03 (following *Danforth*, 428 U.S. at 53).

113. CAL. PENAL CODE § 187 (West 1989).

114. *Smith*, 129 Cal. Rptr. at 501-02 (quoting CAL PENAL CODE § 188 (West 1990). The court was not at all persuaded by the rationale that because "viability" was not included in the statute, the legislature did not intend to have a viability requirement for fetal murder. *Id.* at 501-04.

to fifteen-week-old fetus, he was convicted of the lesser offense of criminal abortion[115] instead of murder because the fetus was not viable.[116]

Two years later in *People v. Apodaca*,[117] based upon uncontradicted medical testimony as to the viability of the fetus at the time of slaying, the court of appeal upheld the defendant's conviction for murdering a twenty-two- to twenty-four-week-old fetus.[118] The court held that the question of when the fetus becomes viable should rest on the circumstances of each particular case.[119] Although the *Roe* Court observed that viability generally occurs between twenty-four and twenty-eight weeks, the Court did not limit viability to this specific period, nor did it foreclose medical evidence to the contrary.[120] Recently, a California court had the opportunity to reevaluate California's fetal-homicide statute in *People v. Hamilton*.[121] The court reaffirmed the use of the viability standard used to convict the defendant of murdering a fetus that was twenty-six- to twenty-eight-weeks old.[122]

2. Minnesota

In 1985, a Minnesota state court reinforced the born alive rule in the absence of a homicide statute that explicitly included a fetus or an unborn. In *State v. Soto*,[123] the Minnesota Supreme Court affirmed a trial court's decision to dismiss a murder indictment for the death of an eight-and-a half-month-old viable fetus resulting from a car accident the defendant caused while driving under the influence of alcohol.[124] A medical examiner determined that the stillbirth was directly caused by the car accident.[125] Minnesota's vehicular-homicide statute provides that a

115. CAL. PENAL CODE § 274 (West 1989) ("Every person who . . . employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, . . . is punishable by imprisonment in the state prison.").

116. *See Smith*, 129 Cal. Rptr. at 503-04.

117. 142 Cal. Rptr. 830 (Ct. App. 1978).

118. *See id.* at 836.

119. *See id.* at 837-38.

120. *See id.*; Roe v. Wade, 410 U.S. 113, 160 (1973).

121. 774 P.2d 730 (Cal. 1989).

122. *See id.* at 747-48. The jury had been instructed that the defendant could not be convicted of murdering the unborn fetus unless they found beyond a reasonable doubt that the fetus was viable. *Id.*

123. 378 N.W.2d 625 (Minn. 1985).

124. *See id.* at 626.

125. *Id.* at 626-27. The medical examiner said the fetus suffered an "intercranial

person is guilty of criminal vehicular operation resulting in death when the person causes the death of a "human being," as a result of operating a vehicle.[126] Because Minnesota is not a common-law state, the court relied on its strict interpretation of the penal code in making its decision.[127] The court used the born alive rule in interpreting the provisions of its statute.[128] It assumed that the born alive rule was a substantive rule of criminal law that defined the criminality of the killing of an unborn child.[129] This assumption is evident in the court's reluctance to reject the born alive rule, fearing that the rejection would violate the doctrine of strict construction by creating a new crime.[130]

As a result of the *Soto* decision, the legislature responded to the outcry of anti-abortion groups, as well as others, to protect the unborn fetus in circumstances other than abortion.[131] In 1986, the Minnesota legislature passed comprehensive legislation protecting unborn children.[132] The Minnesota Penal Code,[133] in a section entitled "Crimes Against Unborn Children," defines an unborn child as "the unborn offspring of a human being conceived, but not yet born."[134] The statute does not include any type of viability requirement and, given its plain meaning, can include a fetus only days or weeks old.[135]

Although the statute specifically excludes from its coverage medical abortions permissible under state law,[136] anti-abortion groups supported its passage because of its strong implications on abortion. It defines a fetus as a person from the point of conception onward—a definition abortion opponents have long been seeking.[137] On the other hand, this definition is troublesome to abortion-rights advocates.[138] They believe that fetal-

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hemorrhage associated with closed head trauma." *Id.* at 627.

126. MINN. STAT. ANN. § 609.21 (West 1987 & Supp. 1990).

127. *See Soto*, 378 N.W.2d at 627-28.

128. *See id.* at 629.

129. *See id.*

130. *See id.* at 630.

131. *See generally* William E. Schmidt, *Murder Trial Adds Facet to the Abortion Debate*, N.Y. TIMES, June 15, 1990, at B5 (discussing the trend among states in adopting homicide laws that allow child-abuse or criminal-neglect charges to be brought against women who use drugs or alcohol during their pregnancy).

132. *See* MINN. STAT. ANN. §§ 609.266-.2691.

133. *Id.* § 609.266.

134. *Id.* § 609.266(a).

135. *See* Schmidt, *supra* note 131, at B5.

136. *See* MINN. STAT. ANN. § 609.269.

137. Schmidt, *supra* note 131, at B5.

138. *Id.*

homicide statutes sensitize people to the belief that an unborn fetus, at any stage, is a person with rights.[139] The key distinction between abortion and fetal homicide, however, is that abortion is an act carried out with the consent of the mother, whereas fetal homicide is not.[140]

The Minnesota statute proves to be the most sweeping legislation of its kind. It ignores the viability issue and, to convict a defendant of first-degree murder, the State is not required to prove that the defendant had actual knowledge that the woman was pregnant at the time of the act.[141] This distinguishes the Minnesota law from the revised Illinois statute[142] because, to convict a defendant of first-degree murder in Illinois, the State is required to prove that the defendant had knowledge that the woman was pregnant.[143] Furthermore, Minnesota imposes onerous penalties for those convicted of this crime. A defendant who is convicted of the premeditated murder of an unborn child must be sentenced to life imprisonment.[144] The maximum sentence for a defendant convicted of non-premeditated murder of an unborn child is forty years.[145] In contrast, both Arizona and Indiana, the two other states that impose criminal liability for causing the death of a fetus at any stage, provide a far less severe penalty upon conviction. Arizona imposes a five-year sentence,[146] and Indiana imposes a two-year sentence.[147]

In *State v. Merrill*,[148] the court was faced with applying this new statute. In this case, a Minnesota man murdered his girlfriend and her twenty-seven- or twenty-eight-day-old embryo.[149] It was unclear whether the defendant or his girlfriend knew that she was pregnant at the time of the murder.[150] The Minnesota Supreme Court upheld the constitutionality of the law and ruled that the defendant could be charged with both first-

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139. *Id.*

140. *See* State v. Merrill, 450 N.W.2d 318, 321 (Minn.) (en banc), *cert. denied*, 496 U.S. 931 (1990).

141. *See id.*; MINN. STAT. ANN. §§ 609.266-.2691.

142. *See* ILL. ANN. STAT. ch. 38, para. 9-1.2 (Smith-Hurd Supp. 1992).

143. *See id.*

144. MINN. STAT. ANN. § 609.2661.

145. *Id.* § 609.2662.

146. ARIZ. REV. STAT. ANN. § 13-1103-A-5 (1989).

147. IND. CODE ANN. § 35-42-1-6 (Burns 1985).

148. 450 N.W.2d 318, 320 (Minn.) (en banc), *cert. denied*, 496 U.S. 931 (1990).

149. *Id.*

150. *Id.* at 323.

degree and second-degree murder for the resultant death of the twenty-eight-day-old fetus.[151]

In challenging the constitutionality of the statute, the defendant first contended that the statute violates the Equal Protection Clause of the Fourteenth Amendment[152] because it does not distinguish between viable and nonviable fetuses.[153] He argued that although the statute exposed him to a conviction of murder for destroying an unborn nonviable fetus during the first trimester of pregnancy, under *Roe v. Wade*,[154] a woman can do the same thing without facing criminal penalties and has an absolute right to an abortion within the first trimester.[155] Thus, the defendant claimed that he and a pregnant woman who chooses to have an abortion are similarly situated people being treated dissimilarly, in violation of the Equal Protection Clause of the Fourteenth Amendment.[156]

The court disagreed, however, and held that a pregnant woman who chooses to have an abortion, and a defendant who assaults a pregnant woman causing the death of her fetus, are not similarly situated.[157] The assailant of a pregnant woman causing the death of her fetus does so without the consent of the woman.[158] This is not the same as the woman who elects to have her pregnancy terminated by a legal abortion.[159] The woman's right to choose an abortion is based on her right to privacy. *Roe* protects her choice[160]—it does not, however, protect a third-party's unilateral right to destroy the fetus.[161] The fetal-homicide statute protects the mother and her unborn child from the intentional wrongdoing of a third party.[162] It also protects the potentiality of life without impinging on a pregnant woman's privacy rights.[163]

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151. *See id.* at 318.

152. U.S. CONST. amend. XIV, § 1.

153. *Merrill*, 450 N.W.2d at 321-22.

154. 410 U.S. 113 (1973).

155. *See Merrill*, 450 N.W.2d at 321.

156. *See id.*

157. *See id.* at 321-22.

158. *Id.* at 321.

159. *Id.* at 321-22.

160. *See Roe*, 410 U.S. at 153 (1973).

161. *Merrill*, 450 N.W.2d at 322.

162. *Id.*

163. *Id.*

The *Merrill* court noted that the state "'has *another* important and legitimate interest in protecting the potentiality of human life.'"[164] The Minnesota Supreme Court found that this interest includes protecting the unborn child, whether or not viable, and also protecting the woman's interest in her unborn child.[165] In conclusion, the court ruled that "[t]he interest of a criminal assailant in terminating a woman's pregnancy does not outweigh the woman's right to continue the pregnancy. In this context, the viability of the fetus is simply immaterial to an equal protection challenge to the feticide statute."[166] Therefore, the court held that although the statute fails to distinguish between a viable and nonviable fetus, it did not violate the Fourteenth Amendment.[167]

In her dissent, however, Justice Wahl strongly disagreed with the majority's opinion.[168] She stated that the majority opinion properly addressed the defendant's equal-protection concerns but found that the defendant's challenge raised a question of substantive due process.[169] The requirements of due process limit "the manner and extent to which conduct may be defined as cruel in the substantive criminal law."[170] She stated that the statute violated the defendant's right to substantive due process because it fails to distinguish between viable and nonviable fetuses.[171]

Justice Wahl noted that the defendant was charged with murder and murder is defined as the "unlawful killing of a human being by another."[172] She continued, stating that a nonviable fetus is not a human being,[173] and, under *Roe*, a State's interest in potential human life does not become compelling until viability.[174] Implicit in *Roe* is the conclusion that the destruction of a nonviable fetus is not the taking of a human life and cannot constitute murder.[175] Therefore, she concluded, unless the words unborn child are construed to read unborn viable child,

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164. *Id.* (quoting *Roe*, 410 U.S. at 162).

165. *See id.*

166. *Id.*

167. *See id.*

168. *See id.* at 326-27 (Wahl, J., dissenting).

169. *Id.* at 326.

170. *Id.* (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 20, at 136 (1972)).

171. *Id.*

172. *Id.* at 326 (quoting BLACK'S LAW DICTIONARY 918 (5th ed. 1979)).

173. *Id.* at 327.

174. *Id.* (citing Roe v. Wade, 410 U.S. 113, 162-63 (1973)).

175. *Id.* (citing People v. Smith, 129 Cal. Rptr. 498, 502 (Ct. App. 1976)).

the reach of the statute is unconstitutionally broad.[176] In her opinion, the state violated the defendant's due process.[177]

The defendant also argued that the statute violates the Due Process Clause of the Fourteenth Amendment[178] because it fails to give fair warning of the prohibited conduct and encourages arbitrary and discriminatory enforcement.[179] A state criminal statute is void for vagueness if it fails to define a "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[180] The *Merrill* defendant contended that it was unfair to impose a criminal penalty on the murderer of a pregnant woman for the death of her unborn child, when neither the assailant nor the woman may have been aware of the pregnancy.[181]

The majority concluded that the statute provides the necessary fair warning required by the Due Process Clause.[182] The doctrine of transferred intent applies when the intent being transferred is for the same type of harm.[183] Here, because the court found that the harm to the fetus and the harm to the mother are substantially the same, it therefore concluded that the intent to kill the mother is transferable to the fetus.[184] Thus, an assailant may not safely exclude the possibility that a female homicide victim of childbearing age is pregnant.[185]

Next, the defendant claimed that the statutory phrase "causes the death of an unborn child" is incapable of objective measurement in dealing with a nonviable fetus at an early stage.[186] The defendant contended that the point in time when life begins and death occurs was left uncertain by the statute and, therefore, would result in arbitrary and discriminatory enforcement of the statute.[187]

The defendant additionally argued that to cause death, there must first be life. The court found difficulty this argument because it raised profound

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176. *Id.*

177. *Id.*

178. U.S. CONST. amend. XIV, § 1.

179. *Merrill*, 450 N.W.2d at 323.

180. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

181. *Merrill*, 450 N.W.2d at 323.

182. *See id.*

183. *Id.*; LAFAVE & SCOTT, *supra* note 170, at 243.

184. *See Merrill*, 450 N.W.2d at 323.

185. *Id.*

186. *Id.*

187. *Id.*

moral and philosophical questions.[188] The court concluded, however, that the statute does not require the State to prove that there was human life—it only requires proof that the embryo within the mother's womb had life and that, because of the defendant's acts, the embryo no longer does.[189] Therefore, the court ruled that the statute was not applied in a discriminatory or arbitrary manner and did not violate the Due Process Clause.[190]

The United States Supreme Court declined to review *Merrill* without comment.[191] The case was brought to trial, and the defendant became the first person ever to be convicted of second-degree intentional fetal homicide.[192] He was sentenced to twenty-nine-and-a-half years in prison.[193]

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188. *See id.* at 324.

189. *See id.*

190. *See id.* In his dissent, Justice Glenn E. Kelley said that absent a definition of when life and death occur, the statutory phrase "causes the death of an unborn child" is "burdened with ambiguity" and "invites arbitrary and discriminatory enforcement." *Id.* at 324-25. (Kelley, J. concurring in part, dissenting in part). He continued, "[w]ithout adequate definitional standards for guidance, it is not only possible, but probable, in my opinion, that different judges might resolve the issue differently." *Id.*

191. *See* State v. Merrill, 496 U.S. 931 (1990).

192. *See* State v. Merrill, No. C6-91-290, 1991 Minn. Ct. App. LEXIS 790, at *1 (Aug. 13, 1991); Schmidt, *supra* note 131, at B5.

193. *See Merrill*, No. C6-91-290, at *2. Merrill was also convicted for the intentional murder of his girlfriend. *Id.*

In another Minnesota case, a defendant was charged with assisting a suicide and charged with felony fetal homicide because the suicide victim was pregnant. State v. Bauer, 471 N.W.2d 363 (Minn. Ct. App. 1991). The defendant conceded that a number of constitutional challenges to the statute had been rejected in *Merrill* but argued that the statute was nevertheless unconstitutional because it violated the Establishment Clause of the First Amendment, an argument not made in *Merrill*. *See id.* at 365. In order to withstand an Establishment Clause challenge, a statute must (1) have a secular legislative purpose; (2) have a principal or primary effect which neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion. *Id.* The defendant claimed that the statute lacked a secular legislative purpose. The Minnesota Court of Appeals disagreed, noting that the state has the ability to criminalize behavior affecting unborn children and that the imposition of criminal liability is generally a secular matter. *See id.* at 365-66. Prohibiting the termination of a pregnancy was not necessarily done to serve a religious purpose. *See id.* The defendant was given a 24-month sentence for aiding a suicide and a concurrent 60-month sentence for felony fetal homicide. *See id.* at 365.

3. Illinois

In 1980, the Supreme Court of Illinois adhered to the common-law born alive rule in deciding *People v. Greer*.[194] The court applied the same rationale as the California court applied in *Keeler*, which was that in the absence of an express inclusion of fetus in a homicide statute, a court cannot rule that the killing of an unborn fetus is murder.[195] The Illinois Criminal Code of 1961 did not expressly apply to fetuses but stated that "[a] person who kills an *individual* without lawful justification commits murder."[196] The word "individual" was not defined. In *Greer*, the defendant killed a viable eight-and-a-half-month-old fetus.[197] Although the court agreed in part with the State's position that the fetus should have been considered a human being,[198] the defendant was acquitted of the murder of the fetus. The court rationalized that if the General Assembly had intended to make the destruction of a viable fetus murder, it would have included fetus in the homicide law.[199]

Five years after *Greer*, the Illinois legislature enacted a separate feticide statute.[200] For a feticide conviction to be obtained, the statute required proof that the fetus was capable of sustained life at the time of death and that the defendant knew that the mother was pregnant at the time of the act.[201] Under this law, the state supreme court sustained the murder conviction of a man who shot a woman whom he knew was nine-months pregnant.[202] In 1986, the legislature repealed the feticide statute and passed a statute entitled "Intentional Homicide of an Unborn

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194. 402 N.E.2d 203 (Ill. 1980).

195. *See id.* at 209.

196. ILL. ANN. STAT. ch. 38, para. 9-1(a) (Smith-Hurd 1989) (emphasis added).

197. *Greer*, 402 N.E.2d at 205.

198. *See id.* at 208-09. The State contended that the born alive rule is inadequate in the modern day because of major advances in medical knowledge and technology. *Id.* at 207. A viable fetus now has a high probability of surviving outside the womb and is regarded as a distinct individual with its own circulatory system. *Id.* The State also pointed out that the court has extended tort remedies to encompass prenatal injuries. *Id.* at 207-09. *Cf.* Green v. Smith, 377 N.E.2d 37 (Ill. 1978) (allowing wrongful death action for the death of a fetus due to injuries sustained while it was viable); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977) (allowing a child to sue for prenatal injuries).

199. *See Greer*, 402 N.E.2d at 209, 213.

200. *See* ILL. ANN. STAT. ch. 38, para. 9-1.1 (Smith-Hurd Supp. 1992) (repealed 1986).

201. *See id.*

202. *See* People v. Shum, 512 N.E.2d 1183, 1187 (Ill. 1987), *cert. denied*, 484 U.S. 1079 (1987). Although the statute was repealed in 1986, the shooting occurred in 1982 while it was in effect. *See id.*

Child."[203] This statute, still in effect today, provides that to be convicted of the offense, the defendant must have intended to cause the death of either the fetus or the mother, have intended to cause great bodily harm, or have known that the act would cause death or great bodily harm.[204] The defendant must also have been aware that the woman was pregnant at the time of the assault.[205] Furthermore, the statute provides that the phrase "'unborn child' shall mean any individual of the human species from fertilization until birth."[206] This definition seems overbroad because of the difficulty in positively determining whether life begins at fertilization.

In 1991, however, the Illinois Appellate Court affirmed the conviction of a man under the new Illinois statute and upheld the statute's constitutionality.[207] The defendant was convicted and sentenced to twenty years in prison for the intentional homicide of an unborn child that was twenty-two weeks old.[208] In his appeal, the defendant challenged the constitutionality of the fetal-homicide statute, contending that it violated both the Equal Protection and the Due Process Clauses of the Constitution.[209]

The court relied on the Minnesota court opinion[210] and held that a pregnant woman who chooses abortion and a defendant who kills a fetus by assaulting a pregnant woman are not similarly situated.[211] The court found that the distinction between these two classes of people bears a rational relationship to the purpose of the statute, which is to protect the potentiality of human life.[212] Therefore, the court held that the statute does not violate the Equal Protection Clause.[213]

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203. ILL. ANN. STAT. ch. 38, para. 9-1.2 (Smith-Hurd Supp. 1992).

204. *See id.* para. 9-1.2(1).

205. *See id.* para. 9-1.2(3).

206. *Id.* para. 9-1.2(3)(b); *see also id.* para. 9-1.2(3)(d) ("Penalty. The sentence for intentional homicide of an unborn child shall be the same as for first degree murder, except that the death penalty may not be imposed."); *id.* para. 9-2.1 (entitled "Voluntary Manslaughter of an Unborn Child"); *id.* para. 9-3.2 (entitled "Involuntary Manslaughter and Reckless Homicide of an Unborn Child").

207. *See* People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1019 (1992).

208. *See id.* at 1190.

209. *See id.* The Minnesota statute had been challenged on the same grounds. *See supra* text accompanying notes 148-93.

210. *See Ford*, 581 N.E. 2d at 1199.

211. *See id.* at 1199.

212. *See id.* at 1200.

213. *See id.*

Next, as in *State v. Merrill*,[214] the defendant argued that the fetal homicide statute was unconstitutionally vague because the phrase "caused the death" is "fraught with uncertainty and ambiguity and in many instances would be incapable of objective measurement in dealing with nonviable embryos at an early stage."[215] The defendant contended that absent a definition of when life and death occur, the trier of fact will apply "subjective religious, philosophical, and political views to define those terms, thereby leading to arbitrary and discriminatory enforcement of the statute."[216] Again, the court adopted the rationale of *Merrill*.[217] The court held that it is unnecessary to prove that the unborn child is a human being—the trier of fact need only determine whether the entity once had life.[218] Therefore, the statute will not be applied in an arbitrary or discriminatory manner and does not violate the Due Process Clause.[219] The defendant's conviction and sentence were affirmed.[220]

### D. *Fetal Homicide as a Common-Law Crime*

As previously discussed, New York, California, Minnesota, and Illinois courts would not convict anyone for fetal homicide in the absence of a homicide statute expressly including an unborn fetus as a victim.[221] To date, however, courts in two states have taken it upon themselves to make fetal homicide a common-law crime.[222]

#### 1. Massachusetts

In *Commonwealth v. Cass*,[223] the defendant, Daniel I. Cass, was charged with vehicular homicide.[224] While operating a motor vehicle,

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214. 450 N.W.2d 318, 323 (Minn.) (en banc), *cert. denied*, 496 U.S. 931 (1990).

215. *Ford*, 581 N.E.2d at 1200.

216. *Id.*

217. *See id.* at 1201; *see also Merrill*, 450 N.W.2d at 324 (holding that unborn child homicide statutes are not fatally vague for failure to define the phrase "causes the death of an unborn child" because they do not require that fetuses be considered human beings).

218. *See Ford*, 581 N.E.2d at 1202.

219. *See id.*

220. *See id.*

221. *See* discussion *supra* part III.A-C.

222. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328-29 (Mass. 1984); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

223. 467 N.E.2d at 1324.

224. MASS. GEN. LAWS ANN. ch. 90, § 24G (West 1989). The statute reads,

Cass hit a female pedestrian who was eight-and-a-half-months pregnant.[225] The fetus was delivered stillborn and its death was caused by injuries sustained when the mother was struck.[226] An autopsy revealed that the baby had been viable at the time of the accident.[227]

A person is guilty of violating the Massachusetts vehicular homicide statute if the person causes the death of another person while operating a motor vehicle under the influence of alcohol or drugs.[228] The statute makes no mention of a fetus.[229] The question before the court was whether the legislature intended a viable fetus to be considered a "person" as that term is used in the statute.[230]

Massachusetts criminal law is derived largely from the common law, and the court, therefore, exercises its authority to develop new common-law rules when necessary.[231] Common law is applied to define statutory terms within the limits permitted by the statutory language.[232] In a past civil case, Massachusetts's highest court held that an eight-and-a-half-month-old viable fetus is considered a person for purposes of the wrongful-death statute.[233] The *Cass* court saw no reason not to extend this definition to the vehicular homicide statute.[234] The court rejected the preexisting common-law born alive definition used in *Keeler* because that definition froze the meaning of "person" and made a "shibboleth of a rule of construction."[235] The born alive rule was also rejected in light of the

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> [w]hoever . . . operates a motor vehicle while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants, or stimulant substances . . . or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes the death of another person, shall be guilty of homicide by a motor vehicle . . . .

*Id.*

225. *See Cass*, 467 N.E.2d at 1325.

226. *See id.*

227. *See id.*

228. *See* MASS. GEN. LAWS ANN. ch. 90, § 24G (West 1989).

229. *See Cass*, 467 N.E.2d at 1325.

230. *See id.* at 1327.

231. *See id.*

232. *Id.*

233. *See* Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 920 (Mass. 1975) (finding that a policy of "conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well").

234. *See Cass*, 467 N.E.2d at 1325-26 (holding that because the legislature enacted the statute shortly after the *Mone* decision, the legislature knew that the term "person" would be construed to include a viable fetus).

235. *Id.* at 1327.

technology of modern medicine, which can now provide proof that the fetus was alive at the time of defendant's act and died as a result of that act.[236] The court used this reasoning, as well as its finding that society would not want such a crime to go unpunished, to conclude that a viable fetus could be a victim of vehicular homicide.[237] The new common-law rule was not applied to defendant Cass, however, because it had not been the law at the time he committed the act.[238] The decision was to be applied prospectively only, so as to afford Cass due process of law.[239]

2. South Carolina

The day after *Cass* was decided, the Supreme Court of South Carolina decided *State v. Horne*,[240] and, like the Massachusetts court, deemed the killing of an unborn viable fetus a homicide.[241] In *Horne*, the defendant stabbed his wife, who was nine-months pregnant, causing her baby to be stillborn.[242] An autopsy determined that the fetus had been viable at the time of the stabbing.[243] But, as in *Cass*, because this feticide rule had not been in existence at the time that the defendant committed the act, he was not convicted of manslaughter.[244] The court noted that the new feticide law was to be applied prospectively only in South Carolina.[245]

3. States Rejecting Common-Law Feticide

Three years later, when the same question came before the Supreme Court of Arkansas, in *Meadows v. Arkansas*,[246] the court declined to follow the decisions of *Cass* and *Horne*. The defendant in *Meadows*, like the defendant in *Cass*, was charged with the manslaughter of a viable fetus, caused by drunk driving.[247] But the homicide statute did not define

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236. *See id.* at 1328-29.

237. *See id.*

238. *See id.* at 1329-30; *see also* Bouie v. City of Columbia, 378 U.S. 347 (1964) (holding that petitioners were denied due process because the state failed to afford fair notice that the conduct for which they were convicted had been made a crime).

239. *See Cass*, 467 N.E.2d at 1329-30.

240. 319 S.E.2d 703 (S.C. 1984).

241. *See id.* at 704.

242. *See id.* at 703-04.

243. *See id.* at 704.

244. *See id.*

245. *See id.* at 704.

246. 722 S.W.2d 584 (Ark. 1987).

247. *See id.* at 585; *see also* ARK. CODE ANN. § 5-10-104(a)(3) (Michie 1989)

the term "person." While the court agreed that common law should be taken into account when construing a statute's undefined words, it did not agree that a new common-law crime of feticide should be developed.[248] Historically, courts created common-law crimes because the legislature met infrequently and enacted little legislation.[249] The court recognized that this is no longer the case and declared it the duty of the legislature to define the scope of crimes, along with the punishment to be imposed for them.[250]

Two months after the *Meadows* decision, in *People v. Vercelletto*,[251] a New York court faced with the same question also declined to follow *Cass* and *Horne*. In *Vercelletto*, the defendant was accused of manslaughter for the death of a viable seven-month-old fetus, caused by the defendant's drunk driving.[252] The court relied on its strict interpretation of the homicide statute, which defined the term "person" as a "human being who has been born and is alive."[253] Because the court applied the born alive rule, the defendant was not convicted of manslaughter.[254] This is consistent with New York's past and continued application of the born alive rule in other homicide cases.[255]

The court noted the confusion generated by New York's homicide statutes and urged the legislature to determine whether the present statutes adequately protect the fetus or require changes related to feticide.[256] It planned to forward copies of the decision to New York's Law Revision Commission and the chairpersons of the Senate and Assembly Judicial Committees.[257] Thus far, nothing has been done by New York's legislature in response to the court's request.

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(providing that a person commits manslaughter if "[h]e recklessly causes the death of another person").

248. *See Meadows*, 722 S.W.2d at 585-87.

249. *See id.* at 586. In medieval England, judges created crimes from general principles because the legislature met infrequently and, therefore, legislation was sparse. Today, because legislatures meet frequently, the original rationale for developing common-law crimes has disappeared. *Id.*

250. *Id.* (noting that past legislation indicated the intent not to include a viable fetus as a victim of manslaughter).

251. 514 N.Y.S.2d 177 (Sup. Ct. 1987).

252. *Id.* at 177-78.

253. N.Y. PENAL LAW § 125.00 (McKinney 1989).

254. *See Vercelletto*, 514 N.Y.S.2d at 180.

255. *See* discussion *supra* part III.A-B.

256. *See Vercelletto*, 514 N.Y.S.2d at 180.

257. *See id.*

## IV. THE BORN ALIVE RULE AND ITS FUTURE

### A. *The Definition of Life and Death*

Although the born alive rule is obsolete from a medical standpoint, courts deem it a substantive part of homicide law and adhere to the rule requiring strict interpretation of penal statutes.[258] At the time the common-law born alive rule was established, medical technology was unsophisticated. It could not be determined whether the fetus had been alive or when it may have died.[259] The rule was merely evidentiary in nature; it served as proof to distinguish between life and death.[260] The rule was not created to limit the class of human beings; it was created to reflect the status of the fetus at common law.[261] Because strict interpretation of penal statutes requires that only substantive rules be retained, the evidentiary born alive rule is not an obstacle in applying a homicide statute to human beings, including fetuses.[262] New York, however, has not agreed with this interpretation of the rule.

The New York Court of Appeals has accepted that the definition of "life" or "death" may be affected by modern medical technology.[263] This was indicated when the court ruled that a person may be declared dead when an irreversible cessation of brain function occurs, even though heartbeat and breathing are being continued by artificial means and the person could technically be considered alive.[264] The New York legislature, however, has refused to stray from the born alive rule and to use modern medical technology to redefine the term "person" as used in the homicide statute.[265] If expert medical testimony is evaluated when the question of death arises,[266] then it should also be used in evaluating when life arises.

The United States Supreme Court relied on medical technology to decide when death occurs in *Cruzan v. Director, Missouri Department of*

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258. Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 607 (1987). Today 22 states retain the born alive rule as part of their homicide law by state court decision. *Id.* at 596 n.161.

259. *Id.* at 613 n.284.

260. *Id.* at 613.

261. *Id.*

262. *Id.*

263. *See* People v. Eulo, 472 N.E.2d 286, 289 (N.Y. 1984).

264. *See id.* at 286 (holding that the defendant was not relieved of criminal liability in a case in which the victim was declared dead according to brain-based criteria).

265. *See* discussion *supra* part III.A-B.

266. *See Eulo*, 472 N.E.2d at 294-95.

*Health.*[267] The Court agreed that before a hospital may be permitted to withdraw life-sustaining equipment, the state may require clear and convincing evidence of a coma victim's prior wish to have the equipment withdrawn.[268] Nancy Cruzan was in a persistent vegetative state and possessed no cognitive functions.[269] In the majority opinion, Chief Justice Rehnquist pointed out that an erroneous decision not to terminate Cruzan's life-sustaining treatment has a chance of being corrected, or at least mitigated, by the "possibility of subsequent developments such as advancements in medical science," whereas an erroneous decision to terminate life support can never be corrected.[270] Justice Brennan's dissenting opinion, however, urged the Court to rely on present-day medical technology and not to dwell on possibilities of future miracles.[271] Justice Brennan recognized that medical technology has developed tremendously in the past twenty years and utilized statistical data to show how many Americans are kept alive solely by artificial means—a practice with which he disagreed.[272] Both the majority and the dissenters recognized the role modern medical technology plays in effectuating present-day legal aims. Indeed, as far back as 1966, in *Schmerber v. California,*[273] the Supreme Court has looked to medical evidence to assist it in its decisions.

New York has made abortion after twenty-four weeks of pregnancy a crime—an approach consistent with the Court's teachings in *Roe v. Wade.*[274] Given the continued controversies in New York and other jurisdictions, it is imprudent for New York's legislature to refuse to impose liability on a third party who causes the death of a viable fetus. The medical evidence available today regarding fetal viability should be considered when answering the question when life begins, if not as a general standard, then at least on a case-by-case basis.

Scientists have determined that a human being begins its existence as early as conception.[275] A zygote is a "cell [that] results from [the] fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and [is] *the beginning of a human being.*"[276] Although significant fetal

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267. 110 S. Ct. 2841 (1990).

268. *See id.* at 2852-55.

269. *Id.* at 2845.

270. *Id.* at 2854.

271. *Id.* at 2873-74 (Brennan, J., dissenting).

272. *See id.* at 2877-78.

273. 384 U.S. 757 (1966) (holding that the extraction of blood for blood-alcohol level is an accurate method of determining whether a person is under the influence of alcohol).

274. 410 U.S. 113 (1973); *see* N.Y. PENAL LAW § 125.00 (McKinney 1965).

275. *See* Forsythe, *supra* note 258, at 608-09.

276. *Id.* at 609 (quoting KEITH L. MOORE, THE DEVELOPING HUMAN: CLINICALLY

characteristics develop in the early stages of gestation,[277] it is not until approximately twenty-four weeks that the fetus is developed enough to be capable of surviving if delivered, i.e., viable.[278] Fetal development can now be monitored with the use of ultrasonography[279] and amniocentesis.[280]

Ultrasonography is useful in determining the age of the fetus and in detecting abnormalities and diseases.[281] After only the sixth to ninth week of gestation, the ultrasonogram can pick up fetal cardiac activity and fetal motion.[282] It may not be able, however, accurately to predict fetal lung maturity, which influences the survival of the infant.[283] In fact, lungs are not fully developed until twenty weeks, and medical scientists admit there cannot be viability without proper lung development.[284] This evidence is invaluable in determining fetal viability, and it provides a firm foundation and guide for legislators redrafting New York's feticide laws.

At a 1990 international conference in Iowa City, Iowa, legislation was proposed that would protect the fetus at about seventy days after

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ORIENTED EMBRYOLOGY 13 (3d ed. 1982)) (emphasis in original).

277. *See* LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 37.2b, at 11 (Charles J. Frankel et al. eds., 3d ed. 1986) [hereinafter LAWYERS' MEDICAL].

278. *See id.* § 37.2b, at 11-12. When the fetus is between 500 to 999 grams, which is usually during the first 24 weeks of gestation, it is "immature" and has little chance of surviving if born. When it is between 1000 and 2500 grams, usually between the 28th and 36th week of gestation, the infant is "premature" and chances of survival vary directly with its weight and the adequacy of newborn care. Infants between 2500 and 4000 grams are within normal limits of maturity. *Id.* at 10-12 (according to standards accepted by the World Health Organization, pregnancy terminated at 20 weeks is an abortion but pregnancy terminated after 20 weeks must be recorded as a birth); *See also* MAX BORTEN & EMANUEL A. FRIEDMAN, LEGAL PRINCIPLES AND PRACTICE IN OBSTETRICS AND GYNECOLOGY 137 (1989) (stating that an infant delivered after 25 weeks gestation has a 25% chance of survival, a significant advance from the 1960s and 1970s).

279. Ultrasonography is the visualization of deep structures of the body by recording the reflection of ultrasonic waves directed into the tissues. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1671 (25th ed. 1974).

280. *See* LAWYERS' MEDICAL, *supra* note 277, § 37.5j-k, at 27-34. Amniocentesis is the process in which a needle is used to puncture the pregnant uterus through the abdominal wall and a small sample of amniotic fluid is removed. Tests of the fetal cells contained in the fluid can show chromosomal abnormalities, especially Down's syndrome. *Id.* § 37.5j, at 27.

281. *Id.* § 37.5k, at 30.

282. *Id.* § 37.5k, at 33.

283. *Id.* § 37.5k, at 30.

284. Jeanette R. Pleasure et al., *What is the Lower Limit of Viability?*, 138 AM. J. DISEASES CHILDREN 73 (1984).

conception—the point when integrated brain functioning begins.[285] Hans-Martin Sass, a professor at the Kennedy Institute of Ethics at Georgetown University, said that this definition of the beginning of life, which he calls "brain birth," parallels the definition of death, which is the irreversible cessation of brain function, or "brain death."[286] He believes this proposal focuses on what is specifically human: "reason and communication, cognition and consciousness."[287] This concept has been criticized, however, as not really paralleling brain death. The critics reason that with brain birth, unlike brain death, the potential for life exists.[288] Furthermore, this theory implies that cognition and consciousness occur ten weeks before full lung development, which has been equated with viability.[289] Whether this proposal will ever be accepted, either as is or modified, will be interesting to see. The adoption of this theory may bear heavily on abortion issues as well as on fetal homicide issues.

### B. *Abortion Decisions and Their Relevance to the Born Alive Rule*

State courts have often misconstrued the *Roe* decision as applying limitations on extension of homicide statutes to the unborn child. It is not until recently that states began to use the rationale in *Roe* to uphold fetal homicide statutes.[290] In *Roe*, Justice Blackmun wrote that "[w]e need not resolve the difficult question of when life begins."[291] This quotation has often been used to support the argument that the State can never define the unborn child as a person.[292] What is ignored, however, is that the Supreme Court was dealing with the definition of "person" in the context of constitutional rights and a mother's right to privacy.[293] If the *Roe* Court had included an unborn child in the definition of "person," the mother would have been denied her constitutional right to abortion under the Fourteenth Amendment.[294]

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285. Peter Steinfels, *Scholar Proposes Brain Birth Law*, N.Y. TIMES, Nov. 8, 1990, at A28.

286. *Id.*

287. *Id.*

288. *See id.*

289. *See supra* text accompanying notes 278, 284.

290. *See supra* text accompanying notes 148-93, 207-20.

291. Roe v. Wade, 410 U.S. 113, 159 (1973).

292. *See, e.g.*, People v. Smith, 129 Cal. Rptr. 498, 501-02 (Ct. App. 1976).

293. *See* Forsythe, *supra* note 258, at 616.

294. *See id.*

The *Roe* Court affirmed the State's compelling interest in protecting fetal life after viability.[295] This decision was based on medical evidence that placed the period of viability at generally twenty-four to twenty-eight weeks—when the fetus presumably has the capability to live outside the womb.[296] During the first trimester, before viability, the compelling state interest is only in the health of the mother.[297] Throughout the second trimester, the State can only regulate the safety of the procedure used and cannot restrict abortions.[298] During the third trimester, after viability, the State has a compelling interest in both the mother's health and the fetus's life; thus, states may generally prohibit abortions, except when necessary for the preservation of the mother's life.[299] This exception, however, is becoming the rule because many lower federal courts have interpreted the health restriction broadly.[300]

Although the *Roe* Court decided that a mother's right to privacy outweighed the fetus's rights, the fetus may still have common law or statutory rights against the criminal acts of a third party.[301] In the 1979 Louisiana case of *State v. Brown*,[302] Justice Blanche summarized the context of Roe:

> While *Roe* absolutely prohibits state regulation of a mother's voluntary abortion during the first trimester, nothing in the decision prohibits the state's regulation of other forms of feticide. *Roe* does not prevent a state from adopting a particular theory as to when life begins, but rather prohibits the state from using this theory to override the rights of the pregnant woman.[303]

Therefore, *Roe* should not apply to non-consensual acts by third parties and should not be used as a bar to judicial or statutory sanctions for criminal acts of third parties.

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295. *See Roe*, 410 U.S. at 163-64.

296. *See id.* at 163.

297. *Id.* at 149, 164.

298. *Id.* at 164.

299. *Id.* at 163-65.

300. *See, e.g.*, American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986) (holding that states may regulate abortions after viability in the interest of the unborn child and may even prohibit abortions, except those to preserve the life or health of the mother).

301. *See* Forsythe, *supra* note 258, at 618.

302. 378 So. 2d 916 (La. 1979).

303. *Id.* at 919 (Blanche, J., dissenting).

On July 3, 1989, the Supreme Court narrowed its decision in *Roe* when it decided *Webster v. Reproductive Health Services*.[304] In *Webster*, the Court upheld a Missouri statute creating a presumption of viability at twenty weeks, which must be rebutted before the physician may perform an abortion.[305] The stringent guidelines pertaining to trimesters enunciated in *Roe* were said to be uncharacteristic of our Constitution, which is cast in general terms.[306] The Court further criticized *Roe*, finding that *Roe*'s

> framework sought to deal with areas of medical practice traditionally subject to state regulation, and it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.[307]

The Court decided that Missouri's testing requirement was constitutional and was better fit than *Roe* to ensure that an abortion would not be performed after viability.[308]

*Webster*, along with other cases, shows the acceptance of medical technology and its use to achieve legal aims. Like *Roe*, *Webster* should not be construed to limit the States' definitions of a person in the context of non-consensual acts of third parties. In fact, the recent Minnesota and Illinois decisions[309] can be used as models to do just the opposite—to justify the definition of a viable fetus as a person under the homicide statutes.

## V. CONCLUSION

The born alive rule is still applied in many states despite today's medical evidence of the early stages of fetal life. Exactly when life begins will remain a difficult question, but medical technology can help us come

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304. 492 U.S. 490 (1989).

305. *See id.* at 513-21.

306. *See id.* at 518.

307. *Id.* at 520.

308. *See id.* Recently, although affirming the *Roe* Court's holding recognizing a woman's right to choose an abortion before viability, the Supreme Court continued to narrow *Roe's* application in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). The Court found that state regulations that are designed to foster the health of a woman seeking an abortion before viability are valid if they do not constitute an "undue burden" on a woman's right to choose. *See id.* at 2821.

309. *See supra* notes 148-93, 207-20 and accompanying text.

closer to the answer for legal purposes. Justice is not adequately served when an unborn viable baby can be killed by a non-consensual act without the offender being seriously punished and stigmatized for committing the crime. The laws that have been enacted for fetal homicide may not be the perfect solution, but laws seldom are perfect. They are, however, certainly closer to perfection than the born alive rule. The New York legislature should use the fetal-homicide laws, together with medical research, to develop a statute that better effectuates justice and punishes an offender for a violent act committed on an unborn viable fetus.

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