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Jonathan D. Stanley

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I. INTRODUCTION

Imagine a young couple in the not-too-distant-future who are eagerly awaiting the birth of their first child. During the eighteenth week of the pregnancy, the mother has an ultrasound performed to detect possible developmental problems with the child. To their dismay, the ultrasound reveals a malformation in the fetus. The defect will not be fatal, but if left untreated will cause the child severe breathing problems once born. The problem can be fixed with surgery after birth, but such a procedure will result in disfiguring facial scars.

After thoroughly considering their options, which range from an abortion to carrying the pregnancy to a natural delivery, the couple decides to have a surgeon attempt to correct the defect while the fetus remains in the womb. If successful, this fetal surgery will fix the breathing problem without significant scarring. The woman is anesthetized, and the surgeon makes a small incision in her uterus to expose the fetus and attempts to correct the problem. Unfortunately, the surgery does not have the results intended. While in the recovery room, the woman begins to experience labor pains and eventually delivers a stillborn fetus.

Distraught over their loss, the woman and her husband visit a lawyer with the intention of suing the hospital for the wrongful death of their unborn child. Whether their suit has any chance of success depends, in most states, on whether the fetus was of the age where it would have been able to survive outside of the womb.

This Note will argue that the viability limitation on wrongful death recovery, which has been previously criticized as arbitrary and unjust, is particularly inappropriate in the fetal surgery context. While conceding that the viability standard is generally the most prudent approach when a fetal death results from another's negligence, it argues that problems with allowing recovery for nonviable fetuses are not present when the cause of the death has been a negligent fetal surgery. This Note concludes that States should retain the viability standard as the general rule but should allow parents of non-viable fetuses to sue in wrongful death when the termination of the fetus has resulted from fetal surgery.

Part II of this Note discusses the brief history and rapidly developing future of fetal surgery. Part III predicts how the current medical malpractice law would apply to fetal surgery, explaining that the recognition of a legal duty of care from the surgeon to the fetus would not mean that the surgeon would be liable every time a fetal surgery results in a miscarriage or stillbirth.[1] Parts IV and V trace the evolution of the cause of action for wrongful death in Anglo-American law, both in general and as applied to the unborn. Part VI presents the reasons given by judges and scholars for adhering to the viability standard. Part VII offers a policy-based argument for a special standard in wrongful death cases involving fetal surgeries. Part VIII argues that the reasons presented in Part VI are either not applicable in the fetal surgery context or based on false premises altogether.

II. BACKGROUND ON FETAL SURGERY

Few possibilities are as terrifying to expectant parents as the prospect that their child will not be born healthy. Yet, despite great gains in the field of obstetric health, the risk that an American child will be born with a major birth defect remains significant.[2] Until recently, those parents whose prenatal care revealed that their unborn child suffered from a major birth defect were forced to choose between

1. Pregnancies that spontaneously terminate early in the pregnancy are called miscarriages or abortions. BERNARD S. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 331 (1942). To avoid confusion between spontaneous and physician induced abortions, I will avoid using the term abortion to describe the unintended termination of a pregnancy. Pregnancies that spontaneously terminate when the child is close to term are usually called stillbirths. *Id.* at 418.

2. A study conducted in one major American city revealed a major birth defect rate of 3.3%. Nat'l Ctr. on Birth Defects and Developmental Disabilities, Ctrs. for Disease Control, U.S. Dep't of Health and Human Servs., 2002 Report on the Metropolitan Atlanta Congenital Defect Program 6 (2002), http://www.cdc.gov/ncbddd/bd/documents/MACDP2002.pdf.

abortion and the prospect of waiting until after birth to treat the defect, knowing that in many cases it would worsen as the child continued to develop.[3] Medical science finally began to offer a third choice in 1981, when surgeons at the University of California, San Francisco performed the first successful intrauterine surgery on a fetus.[4] Instead of waiting until after birth, the doctors tried to correct the defect in the midst of the pregnancy.

Since 1981, pioneering surgeons at a few hospitals across the United States have used fetal surgery techniques to treat a variety of defects that would otherwise be fatal to the unborn child.[5] While these techniques are quite diverse, they fall into two major categories. The older and more intrusive category, commonly referred to as open fetal surgery, involves surgically opening the uterus, just as in a caesarian section, and performing the procedure directly on the fetus.[6] In this procedure, the fetus is actually partially out of the womb for a time and exposed to the open air.[7] The second category is the endoscopic procedure, in which the surgeon inserts a single needle into the uterus.[8] While endoscopic procedures are less traumatic than open surgeries, both procedures are fraught with significant dangers for both mother and child.[9]

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3. For instance, a common birth defect in male fetuses is an obstruction in the urinary tract. The Fetal Treatment Ctr., Univ. of Cal. San Francisco, Urinary Obstructions, http://www.fetalsurgery.ucsf.edu/irinary.htm (last visited Sept. 23, 2003). "When both kidneys are obstructed and unable to empty, the pressure builds up in the kidney and destroys the tissue. Cysts often form as a result of the pressure build up; the cysts replace normal functioning kidney tissue. Amniotic fluid (fetal urine) is crucial in the development of the fetal lungs. If there is not enough amniotic fluid, the lungs of the fetus do not grow. As a result, fetal urinary tract obstruction can produce pulmonary hypoplasia (small lungs) and renal dysplasia (destruction of the kidneys)." *Id.*

4. MONICA J. CASPER, THE MAKING OF THE UNBORN PATIENT: A SOCIAL ANATOMY OF FETAL SURGERY 5 (1998).

5. Among the fetal defects that are currently treated with some sort of fetal intervention are Congenital Cystic Adenomatoid Malformation of the Lung (CCAM), Spina Bifida, Sacrococcygeal Teratoma (SCT), Lower Urinary Tract Obstruction (LUTO), and Congenital Diaphragmatic Hernia (CDH). STEVEN G. GABBE ET AL., OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 297-305 (4th ed. 2002)

6. The Fetal Treatment Ctr., Univ. of Cal. San Francisco, Congenital Cystic Adenomatoid Malformation of the Lung (CCAM), How We Treat It, http://www.fetalsurgery.ucsf.edu/ccam.htm (last visited Sept. 23, 2003).

7. *Id.*

8. The Fetal Treatment Ctr., Univ. of Cal. San Francisco, Twin Diseases, How We Treat It, http://www.fetalsurgery.ucsf.edu/twindiseases.htm (last visited Sept. 23, 2003).

9. Susan Okie, *Over the Tiniest Patients, Big Ethical Questions: Fetal Surgery's Growing Reach Raises Issues of Need and Risks*, WASH. POST, Apr. 12, 2000, at A01 ("Women can experience bleeding, infection and sometimes life-threatening side effects from drugs to control premature labor. They must have all future children by caesarian section. And virtually all

Until the late 1990s the risks of fetal surgery were thought so severe that the procedure was only attempted when the defect was likely to cause the death of the fetus if left untreated.[10] But, in the past several years a few surgeons have begun performing fetal surgeries to ameliorate the effects of spina bifida, a disease which, though debilitating, is generally not fatal.[11] These new procedures have caused great controversy, since an operation on a fetus that would likely survive its defect without surgery raises, for the first time, the possibility that the surgery could cause more harm than good.[12]

III. MEDICAL MALPRACTICE DOCTRINE APPLIED TO FETAL SURGERY

Many of the ethical and legal issues that fetal surgery raises have been examined at length. Commentators have explored the ethical responsibilities of the doctor when the health interests of fetus and mother conflict,[13] the moral threat to abortion rights presented by surgeries that benefit nonviable fetuses,[14] the possibility that the government could compel a pregnant woman to undergo surgery to benefit her unborn child,[15] and whether pregnant women are being given adequate information on the risks to their own health that arise

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infants who have fetal surgery are born prematurely, increasing their chances of complications as newborns.").

10. CASPER, *supra* note 4, at 6; Okie, *supra* note 9.

11. Fetal-surgery.com, http://www.fetal-surgery.com (last visited Sept. 23, 2003). Four hospitals currently use fetal surgery to treat spina bifida: Vanderbilt University Medical Center (VUMC) in Nashville, Children's Hospital of Philadelphia (CHOP), the University of California in San Francisco (UCSF), and the University of North Carolina at Chapel Hill (UNC). *Id.* Of these hospitals, only UCSF uses the endoscopic method, rather than the more intrusive open surgery method. *Id.*

12. Okie, *supra* note 9 ("'This is a real jump for us, to go from a baby who's . . . guaranteed to die' without fetal surgery to one who doesn't need it to survive, said Lori Howell, coordinator of CHOP's fetal surgery program."); *see also* CASPER, *supra* note 4, at 6 (noting that "[t]he prevailing logic [behind earlier surgeries was] that these fetuses will die anyway and thus make perfect candidates for a new and uncertain treatment"); Tami Jackson, Surgery in Womb Fuels 'Start of Life' Debate–And Sparks Others ("The shift from lethal to non-lethal anomalies raises the moral presence of the fetus in a way that we need to think through more carefully." (quoting Mark Bliton) "One could argue that we are turning a malformation that doesn't cause death into one that might." (quoting Dr. Noel Tulipan)), *at* http://cronkite.pp.asu.edu/med/Pages/jack_womb.html (last visited Sept. 23, 2003).

13. CASPER, *supra* note 4, at 170-73.

14. *See* Bill Snyder, *The Picture that Went 'Round the World*, THE TENNESSEAN, Jan. 9, 2000, at 11A (discussing how the abortion controversy has been enflamed by the publication of photos taken during open uterus fetal surgeries that show the human features of a nonviable fetus).

15. *E.g.*, Krista L. Newkirk, *State-Compelled Fetal Surgery: The Viability Test Is Not Viable*, 4 WM. & MARY J. WOMEN & L. 467 (1998).; Katherine A. Knopoff, Note, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL.. L. REV. 499 (1991).

in a fetal surgery.[16] One issue left unexplored, however, is whether the fetal surgeon owes any special legal duty to the only patient whom he endeavors to benefit: the fetus.

This Note is primarily concerned with the extent to which fetal surgeons owe a duty of care to the fetuses upon which they operate. However, even if fetal surgeons owed the same duty to an unborn patient as they do to a newborn child, a fetal surgeon would not be automatically liable if the fetus were lost after a fetal surgery. Surgeons can only be held liable for negligence when (1) they have a duty of care to a particular individual, (2) they breach that duty of care, and (3) there is a causal relationship between the breach and an injury to that individual.[17]

Generally, a breach of the duty of care is established when a person fails to exercise the amount of care that would be exercised by a reasonable person under similar circumstances.[18] Medical malpractice cases differ from normal tort cases in that the standard of care is established not by what a reasonable person would do, but by the level of care that would customarily be provided by a doctor in the same general line of practice and geographic area.[19] With newly developed procedures such as fetal surgery, establishing breach becomes difficult, if not impossible, because there is essentially no standard of care to which a particular procedure can be compared.[20] Even if the plaintiff in a fetal surgery case could prove a breach by the surgeon, the plaintiff would still have difficulty proving the necessary element of causation. When new surgical techniques are applied to patients who already have serious health problems, courts are reluctant to find that the surgery caused the patient's death.[21]

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16. CASPER, *supra* note 4, at 154-57.

17. *See* CLARK C. HAVIGHURST ET AL., HEALTH CARE LAW AND POLICY: READINGS, NOTES, AND QUESTIONS 992 (2d ed. 1998) (listing the propositions a plaintiff must prove to win a medical malpractice lawsuit).

18. Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 558 (1959).

19. *Id.* at 558-59.

20. *See* James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382, 1391 (1994) (discussing the difficulty of establishing a customary standard of care when new technologies are constantly adjusting the standard). Of course, this protection only applies to the new aspects of a new procedure. A surgeon that failed to count his sponges during a fetal surgery might still be liable if a sponge was left inside the patient, because sponges must be counted in every surgery.

21. *E.g.*, Karp v. Cooley, 493 F.2d 408, 422 (5th Cir. 1974) (holding that relatives of a man with a critical heart condition who died during an experimental heart surgery did not meet the burden of proving causation when "expert testimony at best links the mechanical heart as only one of the 'possible' but less likely causes of . . . death").

Given that the plaintiff in a fetal surgery wrongful death case could only rarely establish breach and causation, today's fetal surgeons would most likely avoid any liability even if courts recognized that surgeons owe a duty to fetuses. Nonetheless, the risk of liability, and the attendant large jury award, would likely convince fetal surgeons and their insurance companies to settle such cases.[22] To avoid this result, legislatures should fix the amount of damages allowed in fetal surgery wrongful death cases. Since every parent whose fetus dies after a fetal surgery has experienced approximately the same loss,[23] the legislature should be able to establish a monetary value for that loss.[24] While this amount should not be nominal, it also should not be so large that plaintiffs can use it to extract *in terrorem* settlements.[25]

As a policy matter, it seems appropriate that plaintiffs should have a difficult time holding surgeons liable for any injury that results from surgery on a fetus. The few surgeons who are currently performing these procedures provide a ray of hope to parents who would otherwise have little. To overburden these pioneering surgeons with the prospect of defending innumerable and potentially frivolous lawsuits at this early stage would discourage further innovation and punish those who seek to move the practice of medicine forward.[26]

Since the difficulty of proving breach and causation should be adequate to keep innovating fetal surgeons out of the courthouse for now, concluding that the surgeon owes a duty to a fetus will not

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22. Conversely, a rule of law stating that no duty is owed to a fetus means that a defendant can win his case without appealing to a jury. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 236 (5th ed. 1984) ("A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant.").

23. Each parent that brings this suit has lost a potential child. Some plaintiffs will feel the loss of their fetus more strongly than others. However, in the fetal surgery context, we know that each plaintiff valued its fetus enough to undergo a painful and risky surgery on behalf of the fetus, but probably did not value its fetus as much as if the fetus had been born. Even if the set amount is not the perfect compensation in every case, the similarities in circumstances of each plaintiff ensures that a set amount that is fair for the average plaintiff will be substantially fair for the rest.

24. It is, of course, quite difficult to put a monetary value on any life or potential life. But, to disallow recovery altogether because the estimation of damages is difficult brings the same result as deciding that the life or potential life has no value.

25. There is some precedent for a system like this. Florida and Virginia have both created no-fault compensation schemes for babies that are delivered alive but with serious injuries. Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53, 82-83 (1998). While the amount of compensation in the scheme varies from case to case, the compensation is determined by an administrative agency according to specific factors. *Id.* at 85-87. Florida's system provides for non-pecuniary losses up to $100,000. *Id.* at 91.

26. *See* Robert D. Mulford, Note, *Experimentation on Human Beings*, 20 STAN. L. REV. 99 (1967) (discussing the need to balance innovation in medicine with the rights of patients).

immediately lead to an undesirable increase in medical malpractice cases. Therefore, recognizing this duty is presently a solution without a problem. The question of the fetal surgeon's duty to the fetus is not merely academic, however, because the tendency of medical technology is to advance, and that means that fetal surgery will not remain an extraordinary remedy forever. At some point the in utero correction of birth defects will become a standard procedure.[27] Further, just as fetal surgeons have recently moved from treating only lethal defects to treating those which are debilitating but not lethal, fetal surgery will likely move toward treating even less traumatic defects in the future.[28] For instance, since fetal tissue has not yet developed the ability to scar, some have speculated that facial deformities will eventually be treated through fetal surgery.[29]

As fetal surgeries become more routine, they will no longer be performed exclusively by the best surgeons in the most advanced facilities. At the same time, parents will increasingly expect success.[30] By that time, the protections of breach and causation will begin to erode[31] along with the policy reasons for protecting fetal surgeons from malpractice liability. To be prepared, negligence law must now begin to determine the extent of the surgeon's duty to her fetal patient.

IV. DEVELOPMENT OF THE CAUSE OF ACTION FOR WRONGFUL DEATH

At common law, courts did not allow recovery when a person injured by another's carelessness or intentional act died of his injuries before bringing suit.[32] It was, therefore, cheaper for a tortfeasor to kill his victim than to injure him.[33] The application of the doctrine also

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27. Bonnie Steinbock, *Maternal-Fetal Conflict and In Utero Therapy*, 57 ALA. L. REV. 781, 788 (1994).

28. Okie, *supra* note 9.

29. CASPER, *supra* note 4, at 99-102 (describing the extraordinary discovery of the ability of fetal tissue to heal without scarring).

30. *See* Jeffrey L. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1, 17 (1983) (noting that "[w]hen innovative fetal surgery procedures become beneficial and safe, the parents will likely consent to–indeed expect–treatment that will save the life of the future child or prevent a life of unnecessary deformity").

31. Breach will be easier to prove because as the surgery becomes more standard, a standard of care will develop against which a physician's performance can be measured. Causation will be easier to prove for two reasons. First, when fetal surgeries increasingly involve patients who do not have life threatening birth defects, courts will be less likely to assume that the cause of death was a preexisting problem with the pregnancy. Second, as fetal surgery becomes more common, the medical community should begin to have a better sense of the problems that fetal surgery is likely to cause.

32. Keeton et al., *supra* note 22, at 942.

33. *Id.*

created an entire class of destitute families who, having lost their sole breadwinner to the wrongful acts of another and being unable to bring any suit for recovery, pulled on both the heartstrings and purse strings of society.[34]

In Great Britain, dissatisfaction with the strictness of the common law culminated with Parliament's passage of Lord Campbell's Act in 1846.[35] This first wrongful death statute provided that

> [W]henever the death of any person is caused by the wrongful act, neglect or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action may be maintained if brought within twelve months after his death in the name of his executor or administrator for the benefit of certain relatives.[36]

The principles embodied in Lord Campbell's Act were eventually adopted in every American jurisdiction, always in the form of statute.[37]

While the American versions of Lord Campbell's Act agreed on the principle that the dependents of a deceased should not be left without any claim against the tortfeasor, the statutes parted company on the legal theory that courts should pursue in vindicating this principle.[38] Some statutes based liability on the losses suffered by the dependents of the deceased; others simply maintained that the dependents could maintain the action for injuries that the deceased could have brought had he survived.[39] Though the majority of States compensate for a dependent's loss, these differences in statutory schemes remain today.[40]

Jurisdictions adopting the former theory of liability have had trouble deciding what type of compensation a decedent's dependents should receive.[41] Wrongful death statutes were traditionally interpreted to allow dependents to recover only the income that the deceased would have earned.[42] Fear of speculative estimates caused many jurisdictions to bar recovery for emotional damages suffered by

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34. *See* T.A. Smedley, *Some Order Out of Chaos in Wrongful Death Law*, 37 VAND. L. REV. 273, 275 (1984).

35. 9 & 10 Vict., c. 93. (Eng.), *cited in* KEETON ET AL., *supra* note 22, at 945.

36. *Id.*, *quoted* in Tony Hartsoe, *Person or Thing–In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 170-71 (1995).

37. KEETON ET AL., *supra* note 22, at 945.

38. Smedley, *supra* note 34, at 275-76.

39. *Id.* These two theories are often differentiated by calling the former wrongful death and the latter survival. *Id.*

40. KEETON ET AL., *supra* note 22, at 946.

41. Smedley, *supra* note 34, at 277-79.

42. KEETON ET AL., *supra* note 22, at 949.

the deceased's family.[43] Courts in a few states softened the effect of this rule by holding that, while the family members of the deceased could not be allowed to recover for their "grief and anguish," it was appropriate to consider "not only [the deceased's] earning capacity, but also the care and attention which such a man would give to his wife and children, and also the loss of his advice and training as a husband and father . . . ."[44] These noneconomic damages, which are generally categorized under the description "loss of consortium," are now allowed in the majority of jurisdictions.[45]

Determining wrongful death damages has been even more problematic when the plaintiffs are parents seeking recovery for the death of their child. In virtually all such cases there will be no pure economic damages since children do not bring more money into the household than it costs to raise them. Courts in many jurisdictions have responded to this problem by declaring that the relevant standard is not the wages that the child might have earned had she worked, but the value of her companionship.[46] While a few jurisdictions require that the unrealized expenses of child rearing be deducted from the loss of companionship award,[47] they are currently a distinct minority.[48] While both controversial and unpredictable, jury awards to the parents of deceased children can be quite high.[49]

V. AVAILABILITY OF WRONGFUL DEATH ACTIONS FOR UNBORN CHILDREN

Throughout history, courts have inconsistently allowed compensation for injuries to fetuses. The wrongful death statutes enacted by the States have traditionally given little guidance as to whether unborn children should be included within the State's realm of protection.[50] State courts have attempted to fill this void with a

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43. Lanni P. Tama, Note, *Recovery for Loss of Consortium in a Wrongful Death Action*, 49 BROOK. L. REV. 605, 608 (1983).

44. Walker v. McNeill, 50 P. 518, 520 (Wash. 1897).

45. Tama, *supra* note 43, at 609.

46. Wycko v. Gnodtke, 105 N.W.2d 118, 122-23 (Mich. 1960) (distinguishing the lost value of the child's companionship, which was recoverable, from the grief suffered by the parents, which was not).

47. *E.g.*, Haumersen v. Ford Motor Co., 257 N.W.2d 7, 17 (Iowa 1977).

48. KEETON ET AL., *supra* note 22, at 953.

49. *See, e.g.*, Turner v. Parish of Jefferson Through Dep't of Recreation, 721 So. 2d 64, 77 (La. Ct. App. 1998) (declaring that a judgment for $225,000 to the mother of a twelve-year-old girl who drowned in a hotel swimming pool was appropriate when mother and daughter had a close and loving relationship).

50. *See, e.g.*, N.M. STAT. ANN. § 41-2-1 (Michie 2003) ("Whenever the death of a *person* shall be caused by the wrongful act, neglect or default of another, although such death shall have been

series of bright-line rules delineating the point at which State protection should begin. As will be seen, each rule led to some sort of injustice when applied in unusual situations. Courts have vacillated throughout the twentieth century, and the States currently remain at odds with one another as to the extent to which tort law should treat a fetus differently from a born child.

A. The Strict Common Law Standard

At common law, injuries sustained by a fetus while encased in the womb, even if the fetus survived the injury and was born alive, were not compensable; there was no recovery. This principle was most famously enunciated by Justice Oliver Wendell Holmes during his tenure on the Massachusetts Supreme Court.[51] Justice Holmes reasoned that, since the fetus was "not yet in being," it could not be owed a legal duty by a third party.[52] He also asserted that any significant injury suffered by a fetus would necessarily be suffered by the mother first, and her ability to recover would ensure adequate justice.[53]

For sixty years, Justice Holmes's statement of the law survived. His assertions about the fetus's lack of legal personhood were bolstered in subsequent years by a variety of policy arguments put forth by courts concerned with the prospect of ever-expanding tort liability.[54] Determining pecuniary damages for the death of a child became all the more problematic when the child had not yet been born

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caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." (emphasis added)); N.C. GEN. STAT. § 28A-18-2(a) (2003) ("When the death of a *person* is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent." (emphasis added) ("Person" is not defined by the statute.)). *But see* S.D. Codified Laws § 21-5-1 (2003) ("Whenever the death or injury of a person, *including an unborn child*, shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if death had not ensued, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, or the personal representative of the estate of such person as such personal representative, shall be liable, to an action for damages." (emphasis added)).

51. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

52. *Id.* at 16.

53. *Id.*

54. Lenow, *supra* note 30, at 6.

because the fact finder could not have any indication of an unborn child's future earning capacity.[55] Further, in a time when a lack of modern medical care meant that pregnancies frequently did not result in healthy children, courts recognized that proof of causation between an injury to the mother and injury to the fetus could rarely be identified.[56]

The strict rule barring recovery for any fetal injury was increasingly called into question during the first half of the twentieth century.[57] The most compelling case for change was presented whenever a pregnant woman suffered a fatal injury, but her child, albeit injured, could be delivered alive.[58] Because the fetus survived its injuries, the damage caused by the injury was just as easy to evaluate as if the child had been injured shortly after birth. With the mother dead, courts could not satisfy their sense of justice with the consolation that the damages recoverable by the mother would adequately compensate the child.[59] Following precedent, however, courts continued to hold that the fetus had no separate existence under the law, thereby barring recovery for any injury sustained.

B. The Born Alive Rule

Despite the criticism lodged against it, the strict common law rule survived until 1946, when a federal district court decided *Bonbrest v. Kotz*.[60] In *Bonbrest*, a fetus was injured within the womb through professional malpractice, but was born alive despite its injuries.[61] Refuting the precedent set by Justice Holmes, the court declared that the child could recover for these injuries.[62]

The court attacked the prior rule on two grounds. First, it asserted that a viable fetus and its mother were not one and the same,

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55. *Id*; *see also supra* Part IV.

56. *See* Lenow, *supra* note 30, at 6.

57. *E.g.*, Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) ("Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the fetus is capahle of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?").

58. *See* Lenow, *supra* note 30, at 8-9.

59. *See id.*

60. 65 F. Supp. 138 (D.D.C. 1946).

61. *Id.* at 139.

62. *Id.* at 142.

pointing out that the viable fetus could, by definition, live independently of its mother even when it was removed from the womb after the mother died.[63] Second, the court said that even after the mother recovered for her personal injuries, there remained "a residuum of injury for which compensation cannot be had save at the suit of the child."[64]

Bonbrest was the beginning of a revolution in tort law as applied to unborn children. Following that decision, every American jurisdiction switched from the strict rule articulated by Justice Holmes to the born alive rule, which declared that a child born alive could recover for any injury received while in the womb provided that the injury continued to affect the child after birth.[65] A child who was born alive but who subsequently died as a result of prenatal injuries, could recover to the extent allowed by the State's wrongful death statute.

The creation of the born alive rule was a bold step intended to adjust the common law that led to an injustice: if a child experienced an injury only minutes before her birth, the law provided her no recovery, but if she experienced the same injury only minutes after she emerged from the womb, the law supported her claim. Nonetheless, the born alive rule carried its own inequitable inconsistencies. If a fetus was mortally injured while still in the womb, delivered barely alive, and died a few moments after birth, her parents were entitled to recover.[66] But, if the same fetus, after experiencing the same injury, died only a few moments before emerging from the birth canal, her parents had no recourse for the loss of their child.[67]

C. The Viability Standard

Only thirteen years after *Bonbrest* was decided, the restrictions of the born alive rule were challenged by the Minnesota Supreme Court in *Verkennes v. Corniea*.[68] In *Verkennes*, an expectant mother near the end of her term and her child both died because of the

63. *Id.* at 140.

64. *Id.* at 141.

65. Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 935 (1995); Daniel S. Meade, *Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause of Action?*, 14 J. CONTEMP. HEALTH L. & POL'Y 421, 430-31 (1998).

66. Meade, *supra* note 65, at 431.

67. *Id.*

68. 38 N.W.2d 838 (Minn. 1949).

negligence of hospital personnel.[69] The child could have survived independent of her mother had the doctors taken the proper steps to deliver it.[70] For the same reasons that the *Bonbrest* court allowed a child born alive to recover for its prenatal injuries, the court refused to deny recover solely because the viable fetus had not survived its injuries.[71]

The *Verkennes* court defined "viability" by reference to a definition provided by the dissenting opinion in a case that rejected the concept of recovery for prenatal injury:

> [The unborn child] reaches that pre-natal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally.[72]

This definition of viability largely squares with the concept of fetal viability in other areas of the law, most notably in the abortion rights context.[73] In both areas, the fetus is recognized when it can survive outside of the mother's womb.

D. Problems with the Viability Standard

Like the born alive rule, the viability standard has not been the panacea that its creators hoped.[74] First, determining when the fetus has become physically capable of a separate existence is not an exact science.[75] In cases involving State restrictions on abortion, the United States Supreme Court has declared that the time during a pregnancy at which a fetus becomes viable cannot be determined by statute but

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69. *Id.* at 839.

70. *Id.*

71. *Id.* at 841. The *Verkennes* court cited *Bonbrest* heavily and did not appear to believe it was disagreeing with its precedent, despite the clear language in *Bonbrest* indicating that its holding was limited to children born alive. *Id.*

72. Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting).

73. *See* Roe v. Wade, 410 U.S. 113, 160 (1973) (noting that a fetus becomes viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid").

74. *E.g.*, Cardwell v. Welch, 213 S.E.2d 382, 393 (N.C. Ct. App. 1975) (rejecting the viability standard in favor of adherence to the born alive rule, noting that "[t]o say, however, as some courts have, that an action lies for the death if the child was viable at the time of its injury and death but that no action lies if the child was not yet capable of existing apart from its mother's womb does not solve but merely relocates the problem"), *overruled by* Di Donato v. Wortman, 358 S.E.2d 489 (N.C. 1987).

75. *See* GABBE ET AL., *supra* note 5, at 755-61 (discussing varying fetal survival rates "at the margins of viability").

must be determined by a physician in each individual case.[76] State courts have imported this vagueness into their wrongful death jurisprudence, where it becomes more consequential.[77] If the fetus is fatally injured by the negligence of its treating physician at a gestational age when viability is in doubt (between 20 and 26 weeks), the Supreme Court's rule would seem to hinge the legal determination of the fetus's viability on the medical opinion of the defendant physician. This would hardly be an optimal source for objective expert testimony.[78]

Second, if a fetus attains viability after it is injured by defendant's negligence, but before it dies, a court would then be forced to decide whether a "person" that dies of injuries it received before becoming a "person" has any cause of action.[79] Third, if a court decides that the hypothetical fetus described above has become a "person" for the purposes of wrongful death recovery, recognizing the cause of action depends on the occurrence of a condition subsequent. In no other area of tort law are a plaintiff's rights so conditional.[80]

E. The Current State of the Law

The fifty States and the District of Columbia are currently divided into three basic camps on the issue of whether a person can be held liable for the wrongful death of the fetus. Twelve States retain the born alive rule,[81] thirty-three States and the District of Columbia

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76. Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52, 64-65 (1976) (noting that "[t]he time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician").

77. *E.g.*, Johnson v. Ruark Obstetrics & Gynecology Assocs., 365 S.E.2d 909, 913-14 (N.C. 1988).

78. *See id.* While seeming to recognize this problem, the *Johnson* court was able to avoid it because the alleged injuries to the fetus continued into the period where its viability was beyond dispute. *Id.*

79. *See id.* ("[S]ome portion of defendants' alleged negligence necessarily occurred after fetal viability was purportedly achieved. . . . [P]laintiffs have therefore sufficiently alleged defendants breached a duty owed their fetus *after* it had become viable. Accordingly, we need not determine whether defendants owed a duty to this fetus *prior* to its achieving viability or whether its achieving 'viability' is merely a condition precedent to suit.").

80. Amadio v. Levin, 501 A.2d 1085, 1096 (Pa. 1985). The condition subsequent criticized in *Amadio* was the live birth requirement, but the same logic applies to a requirement of viability.

81. Jill D. Washburn Helbling, *A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363, 367-71 (1996) (listing Arkansas, California, Florida, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, and Virginia as retaining the born alive rule).

use the viability standard,[82] and four States allow recovery for the death of any fetus regardless of whether it was viable or born alive.[83] Wyoming has no case law on the issue.[84]

VI. THE REASONS BEHIND THE VIABILITY STANDARD

Judges and commentators opposing recovery for wrongful death of fetuses that were nonviable at the time of injury have given a variety of reasons for such a limitation. These reasons range from considerations of judicial efficiency and fear of fraud[85] to concerns about upsetting the delicate and politically charged balance of fetal and women's rights.[86] The diversity of these reasons makes for an unlikely coalition of interests, pairing businesses opposed to increased tort liability[87] with abortion rights activists.[88]

To complement their substantive arguments, courts tend to cite a variety of technical reasons for refusing to extend wrongful death liability to cover nonviable fetuses. First, in states where wrongful death statutes indicate only that the representative of any deceased "person" is eligible for recovery,[89] courts assert that the definition of "person" can be derived through statutory interpretation.[90] They then construe viability as the threshold of personhood, noting that viability is by definition the point at which the fetus is capable of a separate

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82. *Id.* at 381-421 (listing Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin as using the viability standard).

83. *Id.* at 422-29 (listing Georgia, Missouri, South Dakota, and West Virginia as allowing recovery for the death of any fetus regardless of whether it was viable or born alive).

84. *Id.* at 429.

85. *See infra* Parts VI.C-VI.E.

86. *See infra* Parts VI.A-VI.B.

87. *See* Wiersma v. Maple Leaf Farms, 543 N.W. 2d 787, 789 (S.D. 1996) (fetal wrongful death case where defendant was a corporation that manufactured allegedly adulterated frozen foods).

88. *See* NATIONAL ABORTION RIGHTS LEAGUE, THE "UNBORN VICTIMS OF VIOLENCE ACT": A MISGUIDED BILL THAT THREATENS WOMEN'S RIGHTS 2 (2002) (arguing that "[i]n states that have enacted 'fetal protection' legislation by affording legal rights to fetuses, women's rights and health have been infringed upon significantly").

89. *See* statutes cited *supra* note 50.

90. Di Donato v. Wortman, 358 S.E.2d 489, 491 (N.C. 1987); Amadio v. Levin, 501 A.2d 1085, 1098-1101 (Pa. 1985) (holding that a viable fetus not born alive may recover in wrongful death, but not deciding the applicability of the rule to a nonviable fetus).

existence.[91] At least one court has added that only a viable fetus is "genetically complete" and "can be taxonomically distinguished from non-human life forms."[92]

Courts also frequently add that wrongful death, a creature of statute, can only be expanded through legislative means.[93] In fact, two of the four States that have approved a wrongful death award on behalf of a nonviable fetus have done so because of express statutory direction.[94] Notably, courts rarely required the same explicit statutory command when rejecting the born alive rule in favor of the viability standard.[95]

The other technical reason often cited by courts that have decided to adopt the viability standard is their desire to conform their state law with the majority of other American jurisdictions, which are now heavily weighted towards recovery for only viable fetuses.[96]

A. Conflict with Abortion Jurisprudence

Allowing recovery only for injuries to a viable fetus is logically consistent with the constitutional protection of the right to abortion. In *Roe v. Wade*, the United States Supreme Court established that prior to the point of viability, a State cannot proscribe abortion because the Court did not consider protecting a nonviable fetus to be a compelling State interest.[97] In *Planned Parenthood v. Casey*, the Court reiterated that viability is the point "that the independent existence of the second life can in reason and all fairness be the object of State protection that . . . overrides the rights of the woman."[98]

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91. Humes v. Clinton, 792 P.2d 1032, 1037 (Kan. 1990); Kandel v. White, 663 A.2d 1264, 1268 (Md. 1995); Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995); Wallace v. Wallace, 421 A.2d 134, 136 (N.H. 1980); *Di Donato*, 358 S.E.2d at 491.

92. *Di Donato*, 358 S.E.2d at 491.

93. *E.g.*, *Humes*, 792 P.2d at 1037; *Kandel*, 663 A.2d at 1267.

94. Connor v. Monkem Co., 898 S.W.2d 89, 93 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W. 2d 787, 790 (S.D. 1996).

95. *See, e.g.*, O'Grady v. Brown, 654 S.W.2d 904, 907-09 (Mo. 1983) ("Respondents assert that this statute must be 'strictly construed' because it is 'in derogation of the common law.' We do not agree. The wrongful death statute is not, strictly speaking, in 'derogation' of the common law. . . . We note that the term 'person' is used in many disparate senses in common speech, in philosophy, psychology, and in the law; it has no 'plain and ordinary meaning' which we can apply. The term must therefore be construed in light of the purpose for which this statute was passed.").

96. *Kandel*, 663 A.2d at 1267; *Di Donato*, 358 S.E. 2d at 491 ("Courts construing wrongful death statutes similar to [North Carolina's statute] generally have concluded that a viable fetus is among the class of persons contemplated by the statute's authors.").

97. 410 U.S. 113, 163-64 (1973).

98. 505 U.S. 833, 870 (1992).

Courts have listed the preservation of this consistency as a primary reason for denying wrongful death damages for unborn children.[99]

Some courts seek consistency between recognizing fetal rights and recognizing a right to recover for fetal injuries solely to enhance simplicity and fairness. Feminist scholars fear that inconsistencies, once established, could be used to erode existing abortion rights.[100] They argue that inclusion of fetuses within the protection of wrongful death law begins to establish fetal constitutional rights, which could become powerful enough to outweigh a woman's right to privacy.[101]

B. Unintended Consequences for Other Liberties of Pregnant Women

Feminist activists also fear that laws providing additional legal protection to fetuses could have the effect of curbing the freedoms of pregnant women outside of the abortion context. For example, protection of nonviable fetuses could "encourage civil claims against [mothers] for negligent in utero care" that leads to a miscarriage.[102] Similarly, businesses, if exposed to liability for injured fetuses, will limit this risk by restricting their interactions with pregnant women.[103]

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99. Toth v. Goree, 237 N.W.2d 297, 303-04 (Mich. Ct. App. 1975) ("If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage."); *see also* Kandel v. White, 663 A.2d 1264, 1268 (Md. 1995); Wallace v. Wallace, 421 A.2d 134, 137 (N.H. 1980).

100. *See, e.g.*, Wendy C. Shapero, Comment, *Does a Non-viable Fetus's Right To Bring a Wrongful Death Action Endanger a Woman's Right to Choose?*, 27 SW. U. L. REV. 325, 342-46 (1997).

101. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALA. L. REV. 999, 1014 (1999) ("[Provisions allowing] fetuses to be covered as 'persons' for purposes of civil wrongful death statutes . . . [were] actively supported by anti-choice lobbyists who understood their potential as a tool for ultimately overturning *Roe v. Wade* . . . [and] create an environment in which prosecutions of pregnant women seem reasonable and the right to abortion does not."); *see also* Shapero, *supra* note 100, at 337 ("The concept of fetal rights is a development by attorneys working for anti-abortion organizations. . . . The danger in recognizing fetal rights prior to viability is that a fetus, which cannot survive independently from its mother, obtains judicial support to demand that the mother make all decisions regarding her body for the benefit of the fetus.").

102. Shapero, *supra* note 100, at 350; *see also* V. Dion Haynes, *Homicide Laws and the Unborn*, THE TENNESSEAN, May 11, 2003, at 19A (" 'If we allow batterers to be charged with homicide against a fetus, [law enforcement may] charge a battered woman with negligence for having been in that relationship in the first place' said Juley Fulcher, public policy director of the National Coalition Against Domestic Violence.").

103. NAT'L ABORTION RIGHTS LEAGUE, supra note 88, at 2 (noting that "[f]or example . . . gyms might refuse to allow pregnant women to work out, fearing that any miscarriage would be attributable to them. Very quickly, pregnant women could become 'protected' in a cage of restrictive rules fashioned in response to so-called 'fetal protection' laws").

C. Desire to Curb the Expansion of Tort

Courts have also expressed reluctance to allow recovery for the death of nonviable fetuses because of a perceived need to check "the never-ending effort to widen more and more the circle of liability which surrounds us."[104] Adherence to the viability standard provides a convenient bright line marking the point at which a fetus becomes an entity with legal rights.[105] The viability line appears particularly bright both because it has precedent in another area of law,[106] and because it seems very reasonable to assign *legal* existence independent of the mother to the fetus at the time when it becomes a theoretical possibility for the fetus to have an *actual* existence independent from the mother.[107]

The relatively rapid adoption and discard of both the strict standard and the born alive rule, with each new rule bringing an additional class of cases into court, gives legitimate cause to fear a slippery slope. Left totally unrestrained, the circle of liability could ultimately expand to the point where even the bright line of conception would be breached.[108] Though this may seem far fetched, consider that courts have already held that liability can arise from damage done to a preconception sperm or egg which results in injury to a child that is born alive.[109] Particularly at a time when medical malpractice judgments and ensuing malpractice insurance premiums threaten to bankrupt physicians who practice in the area of prenatal care,[110] it is understandable that judges would wish to halt any further expansion of legal duty.

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104. *Wallace*, 421 A.2d at 136; *see also* Amadio v. Levin, 501 A.2d 1085, 1101 (Pa. 1985) (Nix, C.J., dissenting) (arguing against extending wrongful death coverage to any fetus).

105. *See, e.g.*, Miller v. Kirk, 905 P.2d 194, 196 (N.M. 1995).

106. *See supra* Part VI.A (describing use of viability standard in abortion law).

107. *Miller*, 905 P.2d at 196 ("Only a viable fetus is capable of an independent existence, and therefore it should be regarded as a separate entity capable of maintaining an action in its own right."). *But see* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) (calling viability "purely an arbitrary milestone from which to reckon a child's legal existence").

108. *See* Lenow, *supra* note 30, at 8. One can, albeit with difficulty, imagine a situation where this might occur. For instance, Jack and Jill attempt to conceive a child but fail because Jill has been rendered temporarily infertile by a chemical to which she was negligently exposed by Company X. Before the chemical wears off, Jack is killed in an unrelated event. The woman then might attempt to sue Company X for the wrongful "death" of the potential fetus that Jack and Jill would otherwise have created.

109. A. Edward Doudera, *Fetal Rights? It Depends*, TRIAL, Apr. 1982, at 38, 43 (citing Jorgensen v. Meade-Johnson Labs., 483 F.2d 237 (10th Cir. 1973)).

110. Press Release, American College of Obstetricians and Gynecologists, Nation's Obstetrical Care Endangered by Growing Liability Insurance Crisis (May. 6, 2002) http://www.acog.org/from_home/publications/press_releases/nr05-06-02-1.cfm

D. The Problem of Proving Causation

Yet another problem cited by courts that have been reluctant to expand wrongful death liability for fetuses is the difficulty of proving causation.[111] As a general matter, the actual physical cause of death is not often in doubt when a born person is killed. If the cause is not immediately obvious from viewing the body, an autopsy can be performed. A fetus, to the contrary, is often miscarried for reasons not ascertainable.[112] At least one court has recognized that, prior to viability, determining the cause of death is particularly difficult.[113] Before viability it is more likely both that there will be a miscarriage[114] and that the miscarriage will be unexplainable.[115]

Further, even when it can be proven that a fetal death was caused by the negligence of a third party, there is no way of proving that the pregnancy would not have terminated for another reason regardless of the third party's actions.[116] This uncertainty is compounded if wrongful death protection is extended to nonviable fetuses. Since nonviable fetuses are more susceptible to spontaneous termination[117] and have a longer period before birth than viable fetuses, it is more likely that a nonviable fetus would not have survived to birth if the third party had not acted.

E. The Problem of Proving Injury

Courts must also be concerned that an expansion of wrongful death coverage to nonviable fetuses could increase the risk of juries compensating a nonexistent harm.[118] In almost every American

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111. *See* Marko v. Philadelphia Transp. Co., 216 A.2d 502, 503 (Pa. 1965) (requiring live birth), *overruled by* Amadio v. Levin, 501 A.2d 1085 (Pa. 1985).

112. *See* 5B LAWYER'S MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 37.6c (Richard M. Patterson, ed., 4th ed. 1998).

113. Rambo v. Lawson, 799 S.W.2d 62, 62 (Mo. 1990) (superseded hy statute).

114. GABBE ET AL., *supra* note 5, at 748.

115. 5B LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 112, § 37.6c.

116. This is different from when an adult is killed by someone else's negligence. Even if the adult died a year later of natural causes, the negligence would still have deprived the adult of a year of life. The fetus, which otherwise would have miscarried three months later in the pregnancy, is deprived of nothing more than two months in a non-aware, almost vegetative state. The parents of the fetus are deprived of three months of pregnancy, but if the ultimate result is still miscarriage, this is probably not much of an injury either. Given the choice between miscarrying at four months or miscarrying at seven months, most parents would probably find the earlier miscarriage easier to deal with emotionally.

117. *See supra* note 114 and accompanying text.

118. *See* Coveleski v. Bubnis, 571 A.2d 433, 435 (Pa. Super. Ct. 1989) ("Before viability, any determination of damages for death of the fetus would be entirely speculative. Whether the child

family, children constitute a net financial loss for their parents. The real injury that demands compensation is the emotional loss suffered by the parents. For some expectant parents, the emotional or psychological loss suffered through a miscarriage or stillbirth can approach that suffered by parents who lose a born child.[119]

When the terminated fetus is viable, the pregnancy has progressed to the point where society generally finds it believable that the parents have experienced a significant emotional loss.[120] For a nonviable fetus, this belief becomes harder to sustain. The frequency of early term miscarriages has conditioned prospective parents to be emotionally cautious in the early weeks of the pregnancy.[121] When a pregnancy is involuntarily terminated in the early, nonviable stage, it is less likely that the prospective parents have become attached to their fetus in a way that will cause psychological pain if the pregnancy does not come to fruition.[122]

Further, during the nonviable stage of a pregnancy, a woman may not even be aware that she is pregnant. If a pregnancy is lost at this stage, courts might rightly be concerned about a woman opportunistically suing on behalf of an unborn child that she did not know she had until after it was gone. Most troubling of all, one can envision a situation where a woman intending to procure an abortion experienced some trauma beforehand that spontaneously terminated her pregnancy. If this woman were to sue on behalf of her lost fetus,

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would be born healthy and talented would be incapable of prediction with reasonable certainty."); Miccolis v. Amica Mut. Ins. Co., 587 A.2d 67, 71 (R.I. 1991) ("Adoption of the rule advocated by plaintiff would give rise to actions based upon speculation and conditions wherein predictability would be virtually nonexistent.").

119. *See* Hazelanne Lewis, *Effects and Implications of a Stillbirth or Other Perinatal Death, in* PSYCHOLOGICAL ASPECTS OF PREGNANCY, BIRTHING, AND BONDING 321 (Barbara L. Blum ed., 1980) ("[F]or some parents the stillbirth can remain the most important event of their life."). In addition to the grief and disappointment that would be expected, parents of children that die in utero often experience damage to their self-esteem. *Id.* at 315 ("A stillbirth is frequently experienced as having failed in a basic human function, that of reproduction, and leads to feelings of inadequacy as a person."). Also, they must often go through the immensely saddening experience of temporarily carrying and then delivering a dead baby. *Id.* at 310-11.

120. *See Recent Development*, O'Neill v. Morse, *Torts-Wrongful Death-Unborn Child*, 70 MICH. L. REV. 729, 746 (1972) [hereinafter *Recent Development*] ("[T]he companionship of an unborn child is felt by the family, psychologically as well as physically. This is particularly true after quickening, and to this extent it seems probable that recovery would be higher for fetal loss later in pregnancy than earlier.").

121. *See supra* note 114 and accompanying text; *cf.* ARTHUR D. COLMAN & LIBBY LEE COLMAN, PREGNANCY: THE PSYCHOLOGICAL EXPERIENCE 43 (1971) ("The second trimester, months four through six, is [sic] called the quiet months. The threat of abortion (miscarriage) is generally over.")

122 *See* Kristen R.C. Goldbach et al., *The Effects of Gestational Age and Gender on Grief After Pregnancy Loss*, 61 AM. J. ORTHOPSYCHIATRY 461, 465 (1991).

justice would be offended by providing her with a financial award, yet the defendant would have a difficult time offering proof as to her intentions.

F. Ability to Compensate the Wrong Through Other Routes of Liability

Finally, judges have justified denying recovery for nonviable fetuses by claiming that the wrong done to the fetus can be compensated by damages awarded to the mother for injuries she suffered personally during the same incident that injured the fetus. Because the fetus is encased inside the body of the mother, it is almost impossible to injure the fetus without also injuring the mother personally.[123] For instance, if a fetus is killed because of a car accident involving the mother, or because the mother ingests an adulterated food product, the mother will most likely be able to complain of a physical injury in her own right. Additionally, most States allow a mother who has been injured in a way that terminates her pregnancy to recover for the mental anguish that the miscarriage causes her.[124]

Personal recovery for the mother helps to ensure that a negligent defendant will not escape having to pay for his actions, and that the mother will not have to endure the loss of her unborn child without receiving any compensation. Moreover, since the amount of damages for elements like pain and suffering is necessarily unscientific, we might expect that a jury award for personal injuries to a woman who has lost a pregnancy because of an accident will be higher than the award for a similarly injured woman who has not lost a pregnancy.

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123. *Wallace*, 421 A.2d at 136 (noting that "[recovery for death of a fetus] would be in addition to the cause of action the prospective mother has for her injuries"); Amadio v. Levin, 501 A.2d 1085, 1102 (Pa. 1985) (Nix, C.J., dissenting) (arguing that only fetuses born alive should be allowed to recover because "[a]ny trauma to the child *en ventre sa mere* is a trauma to the body of the mother carrying that child, which can be claimed in an action by that mother in her own rigbt"); Wiersma v. Maple Leaf Farms, 543 N.W. 2d 787, 795 (S.D. 1996) (Amundson, J., dissenting) ("It is important to note that Mother still may have numerous causes of action for the loss she personally sustained from this orderal.")

124. Sheldon R. Shapiro, Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411, 460-72 (1978).

VII. MEDICAL PERSONNEL SHOULD HAVE A DUTY TO UNBORN CHILDREN WHEN THEY PIERCE THE WOMB WITH THE SOLE INTENT OF BENEFITING THE CHILD, REGARDLESS OF VIABILITY

The best reasons for prohibiting wrongful death recovery for nonviable unborn children are not applicable in the fetal surgery context. A separate standard should be created.

A. Policy Reasons for the Expansion of Duty

The policy reasons for creating a duty from fetal surgeons to the unborn children they treat are not difficult to discern. First, surgeons always have an elevated duty to their patients.[125] While we all have a duty to avoid negligently causing harm to others, surgeons have an affirmative duty to use their skills to help those patients whom they undertake to treat.[126] When a surgeon treats a pregnant woman, the law does not necessarily impose a duty on him to care for her fetus.[127] To the contrary, in many situations the surgeon must sacrifice the fetus to save the life of the mother. But, when the mother is not in need of medical care and the surgeon agrees to perform surgery for the sole benefit of the mother's unborn child, it simply makes sense that the surgeon should have the same duty to his unborn patient as she would to any other patient.

If surgeons had no such legal duty to the fetus, some surgeons might be encouraged to act carelessly toward fetuses. For the vast majority of physicians, professionalism and compassion alone will ensure that all patients, born and unborn alike, receive careful treatment. For the small minority of physicians that would fall short of the standards established by professionalism and compassion, the imposition of a legal duty would reduce the risk that fetal patients would be injured due to unnecessarily risky experimentation, incompetence, or even malice. [128]

The fact that surgeons are aware of the existence of the fetus provides further support for the fetal surgery standard. This is often not true in fetal tort cases. The negligent driver who runs into a

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125. Donna H. Smith, *Note, Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U.L. REV. 275, 297-98 (1985).

126. Restatement (Second) of Torts § 323 (1965).

127. *See supra* Part V.E.

128. One of the battles currently raging in the fetal surgery debate is whether adequate attention is being paid to the significant health consequences of fetal surgery for mothers. *See* CASPER, *supra* note 4, at 201-03. To the extent that a legal responsibility for the life of the fetus discourages overambitious or unscrupulous fetal surgeries, the life and health of mothers will be protected as well.

pregnant woman and the negligent food producer who poisons her will likely have no idea that they stand to injure an unborn child. Even the emergency physician who is suddenly called upon to treat a pregnant woman may be unaware that a fetus exists within her. Since the fetal surgeon will always have notice that his negligent actions could harm the fetus as well as the mother, he will be better able to guard against negligence, and to refuse to perform surgery if the risk of liability seems too great.

Finally, to borrow a phrase from another area of law, the imposition of a duty from fetal surgeons to every fetus they treat vindicates the "investment-backed expectations"[129] of the mothers that agree to undergo fetal surgery. This investment is not only monetary, but also comes in the form of the pain and personal risk that a mother incurs when a procedure is attempted. A mother can reasonably expect neither success, nor even that her unborn child will not be worse off for having undergone the surgery. These mothers should reasonably expect, however, that fetal surgeries will be performed with the level of care exercised by reputable physicians practicing under similar conditions. Once fetal surgery becomes a more established practice, mothers who choose it should reasonably expect that it will be performed with the diligence and skill that has become the norm for fetal surgery. The imposition of a duty from fetal surgeons to fetuses guards these reasonable expectations, albeit only with monetary compensation.

B. Practical Limits on Expansion

If there is to be a special standard for fetal deaths resulting from fetal surgery, there must be a precise definition of what constitutes fetal surgery. Without such a clear delineation, the special standard could become just one more step along a slippery slope toward unlimited liability.

For the purpose of assigning liability in wrongful death law, "person" should include a fetus at any stage of development if the surgeon defendant has intentionally pierced the uterus surrounding the fetus with the intention of improving the health or saving the life of the fetus, and without the intention of improving the health or saving the life of the mother.

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129. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978) (using the phrase "investment-backed expectations" to describe the predicament of landowners who become unable to use their property as they had intended when the government imposes additional land use regulations).

This definition clearly excludes abortion providers, as well as any doctor who might compromise a pregnancy in order to preserve the health of the mother. It includes endoscopic as well as open surgeries. It also includes the more conventional procedure of amniocentisis.[130]

Despite the good policy reasons that support it, State courts are still likely to be uncomfortable with instituting the fetal surgery standard without some legislative direction. Therefore, State legislatures should incorporate the definition given above into their wrongful death statutes.

VIII. WRONGFUL DEATH IN THE FETAL SURGERY CONTEXT: A SPECIAL CASE

The reasons presented in Part VI for prohibiting wrongful death recovery for nonviable fetuses vary significantly in validity. Several are simply misguided. Others are legitimate, and make the viability standard seem a superior alternative to unrestricted fetal death liability. However, even the legitimate reasons are not applicable when a wrongful death action is brought because of alleged negligence that takes place during fetal surgery.

A. Justice Does Not Require That Wrongful Death and Abortion Rights Be Consistent in Their Treatment of the Fetus

The use of the abortion analogy has received criticism from both judges and commentators who allege that it is an illogical comparison.[131] First, these critics note that Justice Blackmun's opinion in *Roe v. Wade* specifically mentioned State laws that permitted parents of a stillborn child to recover in wrongful death, and did not find these laws to be inconsistent with the *Roe* holding.[132] Second, the critics point out that the *Roe* decision was intended to balance a woman's right to privacy with the State's interest in protecting potential life.[133] Wrongful death suits focus on third party defendants and in no way infringe on a pregnant woman's privacy.[134]

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130. This is an unintended consequence, but not an undesirable one. *See* Tebbutt v. Virostek, 483 N.E.2d 1142, 1143 (N.Y. 1985) (holding that a mother could not recover following the death of her unborn child after a negligently performed amniocentesis).

131. *See* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790 (S.D. 1996); Meade, *supra* note 65, at 444-45. *But see* Klasing, *supra* note 65, at 977-79 (arguing that the definition of person must be consistent between wrongful death law and abortion law).

132. Meade, *supra* note 65, at 444-45.

133. *Id.* at 445.

134. *Wiersma*, 543 N.W.2d at 791.

In addition, it is relevant that wrongful death suits technically do not bear on the *State's* interest in potential life that was at issue in *Roe*. The State vindicates its interests through the criminal law and certain civil cases where the State acts as the plaintiff. The interests vindicated in a wrongful death suit are the *parents'* interests in the potential life of the fetus, and arguably the interest of the fetus itself in being protected from fatal injuries.[135] Therefore, since one side of the *Roe* balancing test is not implicated, the precedent is simply not relevant.[136]

The supposed need for verbal consistency of treatment between different bodies of law is belied by the way our legal system treats corporations. Like a nonviable fetus, a corporation can be terminated by its owners and managers without any legal repercussion.[137] This does not mean, however, that a corporation must be utterly without legal rights. On the contrary, a corporation can sue for damages if a third party breaks a contract with it or otherwise treats it unfairly. Analytically, this inconsistency is little different than allowing a nonviable fetus to be terminated by its mother while protecting it from torts perpetrated by the outside world.

Kayhan Parsi has explained the inconsistent treatment of fetuses between different bodies of law with what she calls the "cipher metaphor."[138] Under the cipher metaphor, "the fetus has no inherent status, but only what is conferred on it."[139] Under this theory, society can easily recognize the fetus as a legal entity in the wrongful death context solely to vindicate the value that the parents have attached to it.

The related concerns of those abortion rights activists who fear that wrongful death tort law is an "end-run" around the holdings of *Roe* and *Casey*[140] are also misplaced. First, it is notable that wrongful death liability for the fetus and criminalization of abortion have rarely

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135. *Recent Development*, *supra* note 120, at 746; *see also* O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983) ("Parents clearly have an interest in being protected against or compensated for the loss of the child they wish to have. The fetus itself has an interest in being protected from injury before birth. It follows logically that it should be protected against fatal injuries as well.") (citation omitted).

136. *See Recent Development*, *supra* note 120, at 746-47 ("The abortion issue involves the resolution of the mother's rights as against the child's when the two are in conflict. Whatever may be the determination of the rights in that contest, this special relation gives a third-party tortfeasor no comparable rights."), *quoted in O'Grady*, 654 S.W.2d at 910; *Wiersma*, 543 N.W.2d at 791.

137. MODEL BUS. CORP. ACT § 14.02 (2002).

138. Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Statutes of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 725-26 (1999).

139. *Id.* at 725.

140. *See supra* notes 97-101 and accompanying text.

traveled together. In fact, an attempted abortion was a crime at the same time Justice Holmes was reiterating that the fetus had no right to recover for injuries caused by third parties.[141]

Second, the abortion rights movement is ultimately concerned with allowing women to make their own choices about whether to continue a pregnancy. To be sure, this goal is infringed by State laws that proscribe or unduly burden the choice to have an abortion. But reproductive autonomy is also infringed by private third party negligence that forces an involuntary termination. To the extent that aggressive application of tort law deters such third party negligence, it can serve to promote rather than deter reproductive freedom.

Expanded fetal coverage in wrongful death law is supported by members of the pro-life movement who hope that it will encourage Americans to think of fetuses as people thereby engendering opposition to abortion.[142] But, a wrongful death jurisprudence that values the fetus only as a cipher, only to the extent that it was valued by its carrier, is unlikely to transfer any societal value to the fetus as an entity. As a society, we already differentiate between the emotion we attach to the spontaneously lost fetus that is missed by its parents and the aborted fetus that is not. There is no reason that the law cannot be sophisticated enough to reflect this distinction.[143]

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141. *Compare* Commonwealth v. Tibbetts, 32 N.E. 910 (Mass. 1893) (affirming conviction for attempting to procure the miscarriage of a woman), *with* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) (holding that there is no cause of action for fetal injuries caused by negligence).

142. *See* Klasing, *supra* note 65, at 978-79 ("It is . . . unlikely that a frontal attack on the right to abortion will succeed. . . . How then may we seek protection for the unborn? Those who seek a uniform definition of "person" that places proper value on an unborn child should begin to focus more on wrongful death law. . . . Only when the public is changed, will tbe United States Supreme Court change.").

143. Several scholars have stressed that judges and lawyers should make this distinction more clear. *See* Elizabeth S. Brown, Note, *Constitutional Considerations Underlie Missouri's Expansion of Fetal Rights Within its Wrongful Death Statute:* Connor v. Monk, 61 MO. L. REV. 473, 485 (1996) ("Lawmakers need not view their options as either labeling the fetus a person or denying its existence. By identifying the survivors as the focus of the statutorily created wrongful death action rather than the fetus, lawmakers could achieve the purposes of the statute while avoiding a threat to women's autonomy. The effect of a wrongful death action emanating from the survivors would continue to compensate parents for the loss of their expected child and protect the interest of a woman who has chosen to carry her pregnancy to term."); *accord* Shapero, *supra* note 100, at 350-51. While clarity of purpose in this area would be desireable, to state explicitly that the action focuses on the survivors to some degree merely states the obvious. In any wrongful death action, it is the survivors and not the deceased who appear in court, and the survivors and not the deceased who stand to benefit from any judgment.

B. Expanding Wrongful Death Liability in Fetal Surgery Cases Would Not Undermine Pregnant Women's Liberties

The contention that the imposition of a general duty of care for nonviable fetuses would result in private businesses closing their doors to pregnant women is not compelling when applied to fetal surgery. In this context, the argument would have to be that the additional liability risk imposed by creating a duty to the nonviable fetus would discourage surgeons from performing fetal surgeries, and therefore decrease women's access to these types of procedures. This is not compelling for several reasons. First, a woman's right to have fetal surgery is not an issue at the forefront of the women's rights movement. On the contrary, modern feminists tend to be much more concerned with a woman's right to avoid having fetal surgery forced upon her by the State.[144] Feminists might also worry that social and family pressure could induce a woman to undergo surgery with which she was not comfortable in order to benefit her fetus. For these reasons, a change in the tort law that made fetal surgery slightly less common might not be a bad thing from a feminist perspective.

Second, today's fetal surgeons are already protected from liability by the necessary negligence elements of breach and causation.[145] These doctors are unlikely to be dissuaded from performing procedures that put them at the forefront of medical science by a small increase in potential liability.[146] If, in spite of these protections, the threat of additional damages for a lost fetus is enough to discourage a doctor from performing a fetal surgery, perhaps that is a good indication that he or she should not perform the procedure all. In this manner, the tort system would help to ensure that fetal surgeries are channeled to those surgeons most capable of success, and that overly ambitious procedures will not be performed.

C. Expanding Liability in Fetal Surgery Would Retain Clear Limits on the Expansion of Tort

Recovery could be allowed for nonviable fetuses lost during fetal surgeries without sliding down the slippery slope of pervasive liability. In fact, determining whether a fetal death resulted from a surgery solely intended to benefit the fetus is both more sensible and

144. Newkirk, *supra* note 15. Even voluntary fetal surgery makes some pro-choice feminists nervous because of its tendency to personify the fetus. *See* CASPER, *supra* note 4, at 13.

145. *See supra* Part III.

146. These surgeons already operate despite enormous potential liability for harm that might befall the mother during the procedure.

easier to ascertain than deciding whether the fetus was viable when it was lost.

Courts have commended viability as a sensible standard in wrongful death law because of the supposed legal significance of the point where the fetus is able to exist separately outside of the womb.[147] This standard has several weaknesses. The practical difficulty with determining the actual point that an individual fetus has become viable has already been described.[148] Leaving aside the difficulties of application, a viable fetus in truth has no more capability for a separate existence than a nonviable fetus. Both are completely encased by the body of another person. Out of the womb, both would certainly die if actually left alone to fend for themselves. The fact that some level of intense medical attention would keep the heart of the viable fetus beating seems an odd distinction on which to base legal recovery.[149]

The fetal surgery standard is more sensible because it considers factors important to the law's motivation for providing a wrongful death remedy. The major consequence of a judgment that a defendant is liable for the wrongful death of a fetus will be the payment of compensation to the parents. Therefore, it makes sense to use a standard that helps to indicate whether the parents have suffered a compensable loss. When a mother has decided to undergo a dangerous and painful surgery in an effort to benefit her unborn child, she likely has a strong emotional attachment to the fetus. The existence of a strong emotional attachment shows that the loss of this particular fetus, viable or not, is a loss of no small significance that tort law should justly recognize.

Further, in contrast to the viability standard, the fetal surgery standard is easy to apply in a particular case. The court need only ask two questions to determine if the fetal surgery standard is met, neither prone to much ambiguity. First, did the surgeon pierce the uterus of the woman while she was pregnant? Second, was the sole purpose of the operation to benefit the fetus? If the answer to both of these questions is yes, the fetal surgery standard is met, and the defendant had a duty to the fetus.

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147. Kandel v. White, 663 A.2d 1264, 1268 (Md. 1995); Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995); Wallace v. Wallace, 421 A.2d 134, 136 (N.H. 1980).

148. *See supra* text accompanying notes 74-80.

149. Even in the abortion context, where the viability standard originated, the Supreme Court has conceded that viability is a somewhat arbitrary point of reference. Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992). The court maintained that it was necessary to pick such a point in order to balance the competing interest of the woman and the State. *Id.* at 871. There is nothing inherently fair about the point of viability that justifies its exportation to other bodies of law where there is not the same need for compromise.

Because the fetal surgery standard is both sensible and easily ascertainable, it is not likely to lead to the limitless expansion of tort that courts have feared when adhering to the viability standard. To the contrary, the fetal surgery standard covers so few cases that it cannot alone replace the viability standard. But as a complement to the viability standard, the fetal surgery standard would be a measured expansion of liability with a clear line of limitation.

D. The Problem of Proving Causation is Less Severe in the Fetal Surgery Context

As in any fetal wrongful death case, a court in a fetal surgery wrongful death suit must struggle with the problem of whether the allegedly negligent actions of the defendant actually caused the death of the fetus. However, the monitoring that takes place both before and during fetal surgery makes this problem easier to address. Candidates for fetal surgery must be screened prior to the procedure, and during the procedure the actions of the surgeon are closely watched.[150]

While this information may not be dispositive of causation in all cases, it should often be helpful in determining whether the defendant's breach directly led to the death of the fetus.

More difficult, however, is determining whether, even if a botched fetal surgery had been successful, the pregnancy would have terminated later in term for unrelated reasons. Scholars who generally oppose the viability standard assert that this consideration should be irrelevant, as "'it is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created.'"[151] This argument has some merit, but the frequency of miscarriages while the fetus is not viable cannot be ignored. If it were ignored, a significant number of plaintiffs would receive a windfall and fetal surgeries would be overdeterred.

Here again, the preoperative scrutiny to which fetal surgery candidates are subject will help to identify those cases that are most likely to be windfalls.[152] If the scrutiny reveals that a fetus suffers from some ailment that tends to cause miscarriages, one in addition to

150. *See* CASPER, *supra* note 4, at 81-89 (detailing use of ultrasound before and during fetal surgery).

151. Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 113 (1992) (quoting Wycko v. Gnodtke, 105 N.W.2d 118, 123 (Mich. 1960)).

152. *See* CASPER, *supra* note 4, at 81-89 (detailing use of ultrasound before and during fetal surgery).

the problem that the surgery is intended to treat, it seems unlikely that a fetal surgeon would attempt an operation at all. If a surgeon did conduct the procedure, there would be solid evidence that a spontaneous termination in the months ahead was more likely than in the average case. Courts could use this evidence either to reduce the parents' recovery in proportion to the likelihood of spontaneous termination, or to prohibit recovery entirely when the other ailment causes miscarriages more often than not.[153]

Admittedly, the fetal surgery standard does not resolve the latter causation problem. In each case where the preoperative scrutiny reveals no evidence of problems likely to cause stillbirth or miscarriage, the defendant surgeon may still argue that the fetus was as likely to experience a spontaneous termination as any other healthy fetus. But, the viability standard is not a perfect solution in this regard either, since even a viable fetus faces some risk of spontaneous termination. Only the increasingly disfavored born alive rule can guarantee that no plaintiff will recover unless the fetus was destined to come to term. Like the viability standard, the fetal surgery standard would simply forge a compromise, allowing a few windfall recoveries in order to protect the recovery of the greater number that genuinely deserve compensation.

E. The Problem of Proving Injury Is Solved in the Fetal Surgery Context

Perhaps the best advantage provided by the fetal surgery standard is its inherent ability to solve the problem of proving injury. As noted above, judges in a conventional fetal wrongful death case may worry that the mother seeking compensation is an opportunistic plaintiff who either had no idea she was pregnant before the miscarriage occurred, or was planning to have an abortion. In such a case, recovery would compensate for a harm that never occurred.

The fetal surgery standard avoids this problem. As long as the election of fetal surgery remains a free choice, courts can be almost sure that any pregnant woman who chooses the surgery has formed enough of a bond with her unborn child to be affected by losing her child. It simply defies reason to assert that a mother who volunteers

153. Courts use each of these approaches when faced with born persons who have lost a chance to survive an ailment because of physician negligence. *Compare* Roberts v. Ohio Permanente Med. Group, 668 N.E.2d 480, 484-85 (Ohio 1996) (allowing for damages in proportion to the lost chance for survival), *with* Dykes v. William Beaumont Hosp., 633 N.W.2d 440, 443 (Mich. Ct. App. 2001) (prohibiting any damages when the plaintiff did not have a chance of survival exceeding fifty percent).

to put her own health at risk, as well as tolerate at least a modicum of pain and suffering,[154] solely to benefit the fetus, has not formed significant emotional attachment.[155]

F. The Unique Nature of Fetal Surgery Makes it Unlikely that Injuries to the Fetus Will Be Compensated By Damages Awarded to the Mother for Her Own Injuries

Finally, the consolation offered by some courts–that the mother who is denied an award for the loss of her nonviable fetus will be compensated by the judgment she receives for her own injuries–does not carry the same weight when fetal surgery is involved. The botched fetal surgery, unlike the more traditional car accident or incident of food poisoning, can easily leave the mother unscathed but the fetus terminated. In fact, fetal surgery is virtually the only context in which the tortfeasor could negligently injure the fetus without negligently injuring the mother. While it is true that some jurisdictions allow a mother to recover for mental anguish when her pregnancy is terminated because of another's negligence, tort law's traditional hostility to emotional distress claims has made this cause of action rather unreliable.[156] Courts often require that the mother have personally sustained some accompanying physical injury, or at least have been aware of the injury to the fetus at the time it occurred.[157] Even when a cause of action for mental anguish is allowed, courts have limited recovery to damages incurred in the immediacy of the incident, therefore excluding compensation for long term loss of society and companionship.[158]

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154. Knopoff, *supra* note 15, at 527 (detailing risks and drawbacks to woman with regard to fetal surgery).

155. It does not necessarily follow from this argument that a woman's election of fetal surgery should create a duty on the part of everyone to her nonviable fetus. Her election only guarantees an emotional bond at the time of the surgery. Afterwards, she may begin to feel differently about the fetus, particularly if the surgery is unsuccessful in repairing a serious defect. If she changes her mind while the fetus is still not viable, she may decide to have an abortion. In this situation, courts must again worry that conventional negligence causing miscarriage may inflict no emotional injury worthy of compensation.

156. *E.g.*, Styles v. Y.D. Taxi Corp., 426 So. 2d 1144, 1144-45 (Fla. 1983) (requiring objective signs of personal injury); Big Sandy & C.R. Co. v. Blankenship, 118 S.W. 316, 318-19 (Ky. 1909) (requiring personal injury); Tebbutt v. Virostek, 483 N.E.2d 1142, 1143 (N.Y. 1985) (requiring either personal injury or contemporaneous observation).

157. *E.g.*, *Styles*, 426 So. 2d at 1144-45 (requiring objective signs of personal injury); *Big Sandy & C.R. Co.*, 118 S.W. at 318-19 (requiring personal injury); *Tebbutt*, 483 N.E.2d at 1143 (requiring either personal injury or contemporaneous observation).

158. *E.g.*, *Big Sandy*, 118 S.W. at 317-18 ("Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of

IX. CONCLUSION

The bitter controversy that exists in America over the moral existence of a fetus inevitably means that there will be no easy answers when courts attempt to define the legal status of the fetus. Wrongful death law has repeatedly stumbled in trying to address this problem. This Note offers no innovative solution to the problem as a whole. Instead, it merely identifies a small sliver of cases that can be separated from the rest and dealt with separately. By isolating the category of fetal surgery within wrongful death law, States can allow recovery for nonviable fetuses without worrying about problems of proof or windfall judgments for nonexistent injuries.

While the number of litigants affected by the absence of the fetal surgery standard may at present be small, recognizing a duty as proposed in this Note will ensure that the protection it affords will exist when fetal surgery becomes both more feasible and more popular. If States wait until the courts are encountering fetal surgery negligence cases more regularly, judges will be forced to choose between continuing to deny recovery or applying the new rules retroactively to medical personnel who had no prior notice of their liability. State legislatures should promptly amend their wrongful death statutes to allow recovery when, during a nonexperimental fetal surgery, the surgeon's negligence causes the death of the fetus.

Jonathan Dyer Stanley[*]

sentiment to be left to the conjecture and caprice of a jury."); Tunnicliffe v. Bay Cities Consol. Ry. Co., 61 N.W. 11, 12 (Mich. 1894).

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