Washington and Lee Law Review

Volume 63 | Issue 2 Article 7

Spring 3-1-2006

Loss of Potential Parenthood as a Statutory Solution to the Conflict Between Wrongful Death Remedies and Roe v. Wade

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I. Introduction

Imagine this situation: A car runs a red light and strikes a woman six months pregnant with twins. The mother suffers no physical injury herself, but one of the fetuses miscarries within the womb. The other baby is delivered in the emergency room and survives for only five minutes.

Under state common law prior to 1946, the mother would be able to recover damages for the wrongful death of the baby that survived for five minutes, but she would have no remedy for the death of the other fetus.[1] This illogical result has led a majority of states to apply wrongful death statutes to unborn children.[2] However, Texas recently handed down the latest in a series of rulings refusing such an application.[3] In *Fort Worth Osteopathic Hospital, Inc. v. Reese*,[4] the Texas Supreme Court affirmed its interpretation of the Texas

1. *See, e.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884) (rejecting an action against defendant Town of Northampton, Massachusetts, for injuries the infant sustained while in the mother's womb when the mother slipped and fell); Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (permitting wrongful death action to be brought on behalf of a fetus for the first time).

2. *See* Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising From the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 53–71 (2004) (noting that twenty-nine states have permitted a wrongful death action to be brought on behalf of a viable fetus, and six others allow a wrongful death claim for the death of an embryo or pre-viable fetus).

3. *See* Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 95 (Tex. 2004) (holding that Texas wrongful death and survival statutes do not violate the Equal Protection Clause by prohibiting parents of a stillborn fetus from bringing claims under them).

4. *Id.* In *Fort Worth*, the Texas Supreme Court was presented with the question of whether a refusal to allow recovery for wrongful fetal death under existing wrongful death and survival statutes violated the Equal Protection Clause of the Texas State Constitution. *Id.* at 95. After experiencing a racing pulse and dizziness, the plaintiff, seven-months-pregnant Tara Reese, went to the Fort Worth Osteopathic Medical Center emergency room. *Id.* After monitoring her throughout the night, the doctors confirmed the following morning that the fetus would be stillborn. *Id.* Tara and her husband brought suit against the hospital and against the

wrongful death statute as prohibiting the recovery of civil damages for the death of a fetus.[5] And Texas is not alone—California, New York, Florida, and Virginia are among the fourteen states that still subscribe to some version of the "born-alive rule."[6] Parents who have lost unborn children to the negligence of third parties are clearly sympathetic figures. So why have these states refused to provide a legal remedy for wronged parents?

The answer is often rooted in the plain language of wrongful death statutes. These statutes necessarily require that recovery be conditioned on the wrongful death of a *person* or *individual*.[7] The *Fort Worth* court's decision was grounded on an unwillingness to define a fetus as a legal person who is eligible to maintain an action as a separate entity.[8] Although most state courts and legislatures have avoided addressing the issue directly, an important concern is voiced by courts, amicus parties, and states retaining the born-alive rule: Defining a fetus as a legal person for purposes of state statutes poses a threat to a woman's right to choose as guaranteed by the holding of *Roe v. Wade*.[9] States following the born-alive rule are leery of providing a remedy at the cost of interfering with women's rights.

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individual health care providers who gave her treatment for negligence, gross negligence, and vicarious liability, seeking damages under the wrongful death and survival statutes and for personal injuries to Tara Reese. *Id.* at 95–96. The trial court granted summary judgment in favor of all health care providers. *Id.* at 96. With the exception of the disposal of Mr. Reese's individual bystander claim, the court of appeals reversed the summary judgment. *Id.* In keeping with previous rulings, the Texas Supreme Court held that Texas wrongful death and survival statutes do not permit recovery for the wrongful death of a fetus. *Id.* at 95. The court based its refusal on a finding that the word "individual" in the statutes does not include the unborn within its definition. *Id.* at 97. The court reversed the court of appeals, dismissing the fetal wrongful death claim. *Id.* at 95.

5. *Id.*

6. *See* Marks, *supra* note 2, at 44 (noting that fourteen jurisdictions still apply the born-alive rule).

7. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 71.002(a) (West 1997) (defining the cause of action as one "for actual damages arising from an injury that causes an individual's death").

8. *See Fort Worth*, 148 S.W.3d at 96 (stating that "the Legislature did not intend the words 'individual' or 'person' to include an unborn fetus").

9. Roe v. Wade, 410 U.S. 113, 158 (1973) (holding that the word "person," as used in the Fourteenth Amendment, does not include the unborn). In *Roe*, a pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. *Id.* at 120. In *Roe*, the Court addressed the issue of whether abortion is within the scope of fundamental liberty protected by the Fourteenth Amendment of the Constitution. *Id.* at 129. The Court held that abortion was a part of the fundamental right of privacy, guaranteed by the Due Process Clause. *Id.* at 153. The Court decided that this right was not absolute, however, and that it was subject to regulation by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests. *Id.* at 153–54. Drawing on the social, medical, and legal history of abortion, the Court found two

Texas is, however, in a shrinking minority. A majority of states allow recovery on behalf of a fetus if the fetus was viable, and some even allow recovery for a pre-viable fetus.[10] For the reasons discussed below, the wrongful death statutes embroil courts in a quagmire of moral, ethical, and semantic considerations.

Moreover, in states where wrongful death statutes have been expanded to include fetuses, there is dissonance between the purpose of the statute and the problem it is being used to remedy. Wrongful death statutes are historically designed to compensate for pecuniary losses.[11] There is no remotely accurate way to calculate the pecuniary loss incurred by survivors for the death of someone who was never born.[12] Recovering pecuniary loss is not likely the motivation for aggrieved parents to bring a suit anyway. Furthermore, there is a problem in determining the point in time during gestation that the statute should become effective. States have responded to these concerns in a variety of ways, none of which are very effective.

This Note proposes an alternate remedy that side-steps the legal inconsistencies inherent in the application of wrongful death statutes to fetuses. This remedy—called Loss of Potential Parenthood[13]—simultaneously avoids

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compelling state interests that supported regulation: protection of the health of the mother and protection of the potentiality of human life. *Id.* at 156. The Court held that the former becomes compelling, and was thus grounds for regulation, after the first trimester of pregnancy, beyond which the state could regulate abortion procedures to preserve and protect maternal health. *Id.* at 163. The Court held that the latter became compelling at viability, after which a state could proscribe abortion except to preserve the life or health of the mother. *Id.*

10. *See* Marks, *supra* note 2, at 44 (noting that "most jurisdictions have adopted the viability rule in wrongful death actions" and some have allowed a wrongful death claim "even when the tortfeasor's action resulted in the death of an embryo or previable fetus").

11. *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES 405 (1999) (noting that "the consistent approach when interpreting wrongful death statutes has been to limit recoveries to pecuniary losses suffered by the survivors or the estate").

12. For an example of this calculation, see *infra* note 36 (discussing how to calculate lifetime income expectation for an unborn fetus).

13. The idea for this remedy came from a sentence in another law review Note: Joseph McReynolds, Note, *Childhood's End: Wrongful Death of a Fetus*, 42 LA. L. REV. 1411 (1982) (discussing a Louisiana case awarding damages for the wrongful death of a fetus, *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981)). That Note stated in passing:

> The determination, therefore, of whether a wrongful death action exists for the death of a fetus is an entirely separate question from the determination of whether a cause of action exists under the "fountainhead article" for the breach of an obligation not to cause parents to suffer the loss of their unborn child. In fact, a judicial recognition of a new cause of action . . . —such as the loss of prospective parenthood—actually would obviate the problem of wrongful death: The characterization of the fetus as a "person" would be unnecessary because the cause of action would not be for wrongful death. Likewise, the recovery by the parents

the need to categorize fetuses as persons under the law and provides would-be parents with an opportunity for redress. The remedy identifies who qualifies as a potential parent, describes the grounds upon which they may base their action, and sets out the kinds of damages they may recover. Recovery is based not on the injury suffered by the fetus, but on the injuries suffered by the would-be parents, particularly their loss of the expectation of parenthood. Conceptually, Loss of Potential Parenthood is more consistent with the true rationale underlying recovery in these situations, and it is also in keeping with the evolving legal viewpoints on parental rights and feminist-influenced ideas of the parent/child relationship.[14] In practice, it would act as a corollary of wrongful death actions—it fills a gap left by wrongful death statutes, but which wrongful death cannot appropriately fill.

To understand fully the implication of this proposed remedy, a brief exploration of the history of wrongful death as applied to fetuses is necessary. A survey of the purpose of wrongful death remedies generally and within the context of fetal deaths is also helpful. These issues are addressed in Part II of this Note. In Part III, the problems inherent in applying (or not applying) wrongful death statutes to fetuses will be described. Part IV proposes Loss of Potential Parenthood as a new remedy and describes the ways in which the remedy avoids the problems of wrongful death statutes while conforming with the modern view of parenthood.

II. History of Wrongful Death Statutes and Their Application to Fetuses

A. Common Law Basis of Wrongful Death Statutes

The leading common law case on civil recovery for prenatal injuries and fetal wrongful death is *Dietrich v. Inhabitants of Northampton*,[15] decided in

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would be for the damages they sustain, not from the death of a "person," but from the *loss of parenthood* caused by a "tortfeasor's fault."

Id. at 1420–21. (emphasis added)

14. *Infra* Part III.D.

15. Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884). In *Dietrich*, an expectant mother slipped and fell because of a defect in the town's road, and the infant was born after only four or five months' gestation. *Id.* at 14–15. The infant survived for a few minutes after being born. *Id.* at 15. The administrator brought an action for the benefit of the mother as next of kin. *Id.* The trial court ruled that the action could not be maintained, and the administrator excepted to the ruling. *Id.* The court rejected analogies to English law, which held that if a woman's unborn child had reached some degree of quasi-independent life, a criminal act upon the mother caused the child to be born alive, and the child subsequently died, such criminal act constituted murder. *Id.* at 15–16. The court concluded that such reasoning

1884 by the Supreme Judicial Court of Massachusetts.[16] The *Dietrich* court held that an unborn infant was a part of its mother rather than an independent entity.[17] As such, neither the fetus nor its mother acting on its behalf could maintain an action for injuries sustained in the womb.[18]

Courts following the *Dietrich* rationale justified denial of recovery in various ways. First, some courts reasoned that an unborn child is merely a part of its mother until birth, so that an injury to the unborn child is actually an injury to the mother.[19] This reasoning has been rejected by most modern jurisdictions as being contrary to current medical knowledge.[20] A second rationale cited by courts was the lack of precedent allowing recovery.[21] Although some courts have found that the born-alive rule is not harsh enough to justify violating the principle of stare decisis,[22] many courts are reconsidering this position.[23] Some courts have denied recovery on the grounds that the difficulties in proving causation would lead to many fraudulent claims.[24] Most courts agree, however, that the mere fact that such risks exist does not justify barring legitimate claims.[25] A final reason offered by some courts in denying recovery is that the issue should be decided by the legislatures, not the courts.[26]

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could not be extended to civil liability, that the statute under which the action had been brought did not contemplate an unborn child within its meaning, and that because the unborn child had been part of the mother at the time of the injury, any recoverable damage to the child was recoverable by the mother. *Id.* at 16–17.

16. *Id.* at 17 (rejecting an action against defendant Town of Northampton, Massachusetts, for injuries the infant sustained while in the mother's womb when the mother slipped and fell).

17. *Id.*

18. *Id.*

19. *But see* Farley v. Sartin, 466 S.E.2d 522, 529 (W. Va. 1995) (rejecting the "single entity" theory of *Dietrich* based on advancing medical knowledge and on the persuasive authority of other jurisdictions).

20. *Id.*

21. *See, e.g.*, Shaw v. Jendzejec, 717 A.2d 367, 371 (Me. 1998) (finding that the "harshness that results from the live-birth rule" was insufficient to justify overruling a prior decision supporting the rule).

22. *Id.*

23. *See, e.g.*, *Farley*, 466 S.E.2d at 529 (rejecting a lack of precedent as a logical basis for denying recovery and noting that "stare decisis does not require static doctrines but instead permits law to evolve and to adjust to changing conditions and notions of justice as well as to varied sets of facts").

24. *See, e.g.*, *id.* (rejecting this basis and finding that "courts generally have concluded that such risks do not justify a bar to legitimate claims").

25. *Id.*

26. *Id.* at 530. The *Farley* court disagreed with this reasoning, stating:

> In response, courts have concluded that it is incumbent upon them to give meaning to the term "person" as used in wrongful death statutes and, in the absence of

Increasingly, legislatures are heeding this call to action and modifying their statutes to include the unborn expressly within the protection of wrongful death statutes.[27]

B. Remedies Under Wrongful Death Statutes Compensate for Pecuniary Loss

States enact one of two types of wrongful death statutes—loss to estate statutes or loss to survivors statutes.[28] Loss to estate statutes focus on what the decedent would have earned but for his death.[29] Loss to survivors statutes focus on what the survivors would have received but for the decedent's death, so that the projected amount of money earned is reduced by the amount the decedent would have spent on himself during his lifetime.[30] Regardless of which kind of statute state legislatures favor, courts interpreting such statutes have consistently limited recovery to pecuniary damages suffered by the survivors of the estate.[31]

Depending on the specific language of the wrongful death statute in the jurisdiction, the following damages may be recoverable: loss of support, loss of services, loss of society, loss of inheritance, and punitive damages.[32] Loss of society allows recovery for loss of decedent's love, companionship, comfort, affection, society, solace or moral support, or any loss of assistance in the operation or maintenance of the home.[33] This appears to open the door for

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specific legislative language, that responsibility requires courts to supplement the law (i.e., fill in the statutory interstices) regardless of what conclusion is reached.

Id.

27. *See infra* notes 61, 64 (citing examples of permissive wrongful death statutes).

28. *See* FISCHER, *supra* note 11, at 405 (surveying wrongful death statutes).

29. *Id.*

30. *Id.*

31. *See id.* (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224 (1996); Krouse v. Graham, 562 P.2d 1022, 1025 (Cal. 1977)). Fischer posits that courts have found some room for interpretation within the framework of the statutes, describing a "modern willingness" in a handful of jurisdictions to permit awards for grief and sorrow experienced by the survivors of the decedent. *Id.* at 406. However, as discussed below, this appearance of willingness is more a product of courts' confusion regarding intentional infliction of emotional distress claims with wrongful death claims. *Infra* notes 41–43 and accompanying text.

32. FISCHER, *supra* note 11, at 406–13. Fischer also includes grief and sorrow in this list, but it is inaccurate to say that most courts award damages for grief and sorrow under wrongful death statutes. For examples of exceptions, see *infra* notes 38–40 and accompanying text describing explicit statutory provisions and court interpretations allowing recovery for mental anguish.

33. FISCHER, *supra* note 11, at 408.

nonpecuniary valuations; however, recovery under loss of society does not help in the situation of a deceased fetus for several reasons. First, most courts still manage to anchor loss of society and the related loss of support in the realm of pecuniary loss by placing a monetary value on the time and effort spent by the deceased in acting as a family member—tutoring children, helping do the dishes, and acting as an advisor, among other activities.[34] Second, significant valuation problems exist. How does a court measure the loss of something that the person never had?[35] In the case of an unborn child, such measurements are completely speculative.[36] Would-be parents do not in fact suffer a loss of society—it is better characterized as a loss of their expectation of society.

Professor Fischer argues that even within those jurisdictions that do not permit recovery for nonpecuniary damages, courts tend to introduce nonpecuniary elements into the evaluation.[37] He contends that courts in those jurisdictions still often find a way to grant compensation for nonpecuniary injury under the name of loss of society: "While loss of society claims must be reduced to a pecuniary value, there is a substantial non-pecuniary element to the claim. The more the decedent was loved, and the greater the loss over her death, the more likely the trier of fact will measure loss of society generously."[38]

At first glance, grief and sorrow also seems like a promising avenue of recovery for plaintiffs. In his hornbook, *The Law of Torts*, Professor Dobbs notes that some states have amended their statutes to permit recovery directly for the grief or anguish of survivors.[39] He further notes that "some courts have

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34. *Id.* at 407–08.

35. Of course, Loss of Potential Parenthood incurs this same problem. But as discussed in Part IV.D., by calling it by the appropriate name, the monetary awards are likely to be more reasonable since they directly address the motivation behind the suit.

36. For an example of just how speculative the process of determining damages can be, see Childs v. United States, 923 F. Supp. 1570, 1584–85 (S.D. Ga. 1996) (holding that the full value of a six-year-old's life was over $1.3 million and the full value of an unborn fetus's life was $1.083 million). The court considered such factors as whether the parents were single or married and what the average statistical income was for a given ethnic group and gender, making assumptions about where the decedent would have lived, what kind of profession he or she would have taken, and even whether the parents attended church regularly. *Id.* at 1575–78.

37. *See* FISCHER, *supra* note 11, at 411–12 (noting that most loss of society awards include recovery for grief and sorrow).

38. *Id.* at 412.

39. DAN B. DOBBS, THE LAW OF TORTS 812 (2000); *see, e.g.*, ARK. CODE ANN. § 16-62-102(f)(2) (1987) (stating that "[w]hen mental anguish is claimed as a measure of damages under this section, mental anguish will include grief normally associated with the loss of a loved one"); DEL. CODE ANN. tit. 10, § 3724(d) (1999) (stating that "[i]n determining the amount of the award the court or jury may consider . . . [m]ental anguish resulting from such death to the surviving spouse and next-of-kin of such deceased person"); OHIO REV. CODE ANN.

expanded liability to include mental anguish recovery under statutes that do not specifically authorize it."[40] However, in many cases it seems that these courts have actually mingled independent intentional or negligent infliction of emotional distress claims (IIED) with the wrongful death claim.[41] In those

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§ 2125.02(B) (West 2005) (stating that "[c]ompensatory damages may be awarded in a civil action for wrongful death and may include damages for . . . [t]he mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin"); NEV. REV. STAT. § 41.085 (2003) (providing heirs and personal representatives an action for wrongful death and stating that "the court or jury may award each person pecuniary damages for his grief or sorrow").

40. *Id.*; *see, e.g.*, Garner v. Houck, 435 S.E.2d 847, 850 (S.C. 1993) (noting that the South Carolina Supreme Court has interpreted that state's wrongful death statute, S.C. CODE ANN. §§ 15-51-10 *et seq.* (2005), to allow recovery for grief and sorrow).

41. *See, e.g.*, Krishnan v. Sepulveda, 916 S.W.2d 478, 480–81 (Tex. 1995) (noting that the overwhelming majority of states now permit some form of recovery for the loss of a fetus, including in some cases mental anguish). However, the court incorrectly cited the following cases to support its position, incorrectly because these cases do not permit recovery for wrongful death; instead they permitted IIED or similarly independent claims to proceed: Modaber v. Kelley, 348 S.E.2d 233, 237 (Va. 1986) (allowing recovery for physical injury and mental suffering associated with a stillbirth, but barring recovery for damages ordinarily recoverable in a wrongful death action including loss of society, companionship, comfort, or guidance, but following the old rule from *Dietrich* that an unborn child is part of its mother from birth); Giardina v. Bennett, 545 A.2d 139, 140–43 (N.J. 1988) (discussing the appropriateness of a tort remedy for the mental anguish and suffering of parents who lost their unborn child through a doctor's negligence, but adhering to the born-alive rule and prohibiting recovery on grounds of statutory interpretation); Johnson v. Ruark Obstetrics & Gynecology Assocs., 395 S.E.2d 85, 98–99 (N.C. 1990) (discussing suit for negligent infliction of emotional distress allowed to proceed where parents suffered a stillbirth as a result of negligence during delivery); Hilsman v. Winn Dixie Stores, Inc., 639 So. 2d 115, 117 (Fla. Dist. Ct. App. 1994) (stating that a mother may recover for the loss of a fetus as an injury sustained to her own body); McGeehan v. Parke-Davis, 573 So. 2d 376, 376–78 (Fla. Dist. Ct. App. 1991) (noting that where a mother suffered physical injury resulting in the loss of her fetus, her claim for damages would not be considered an attempt to circumvent the existing case law holding that Florida's wrongful death statute does not recognize the fetus as a separate person, so that the plaintiff could bring a suit in her own right for mental anguish); Prado v. Catholic Med. Ctr. of Brooklyn & Queens, Inc., 145 A.D.2d 614, 615 (N.Y. App. Div. 1988) ("It is well settled that absent independent physical injuries, a mother may not recover for emotional and psychic harm as a result of a stillbirth . . . ."); District of Columbia v. McNeill, 613 A.2d 940, 943 (D.C. 1992) (holding that a plaintiff cannot recover for grief suffered because of death of child in utero). In *McNeill*, there was evidence that supported a finding that the mother suffered serious emotional injury, other than grief as a result of negligent treatment she received, providing a cause of action under a theory of negligent infliction of emotional distress, *McNeill*, 613 A.2d at 943; Seef v. Sutkus, 562 N.E.2d 606, 610 (Ill. App. Ct. 1990) (stating that grief or mental anguish are not pecuniary damages and thus are barred as grounds for recovery under Illinois's wrongful death statute); Milton v. Cary Med. Ctr., 538 A.2d 252, 256 (Me. 1988) (holding that Maine follows the "born-alive" rule, thus precluding recovery under wrongful death statute for parents suing on behalf of their unborn child; the court further held that the parents were not without relief because their complaint alleged facts sufficient to claim infliction of emotional distress); Amadio v. Levin, 501 A.2d 1085, 1088–89 (Pa. 1985) (equating application of wrongful death for fetuses to that for born individuals, and stating "a parent's pain and suffering for the loss of its child is

cases, the fetus is often characterized as an inseparable element of the mother so that injury to the fetus is also actual injury to the mother.[42] Recovery is framed in terms of IIED, a remedy that requires some kind of injury inflicted upon the mother herself in order to claim mental distress.[43] Thus, an independent recovery for mental anguish under the wrongful death statute in these cases was quite possibly neither intended nor correct. Regardless, most jurisdictions do not allow recovery by survivors for their grief and sorrow resulting from the death of the decedent either expressly or impliedly.[44]

Fischer posits that legislators feared that triers of fact, particularly juries, would be swayed by sympathy for the parents' loss.[45] It was this fear that prompted states to prohibit wrongful death actions for fetuses, a recovery at least initially based solely on pecuniary measures.[46] Many of these restrictions have been lifted, but not because the pecuniary basis of the suit has changed.[47] Rather, states have removed these restrictions because courts are surreptitiously recognizing that grief may deserve a measure of compensation.

A related topic, wrongful death actions brought on behalf of young children, helps to elucidate some of the issues surrounding the application of

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recoverable only as an element of the damages suffered because of [a physical] injury sustained to the person of the parent"); Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 425 A.2d 92, 95 (Vt. 1980) (holding that the father of a baby stillborn due to negligence was barred from bringing a claim for negligently inflicted emotional distress, but the mother could bring a claim because she in fact suffered direct personal injury to herself and was thus within the "zone of danger"); Johnson v. Superior Court of L. A. County, 177 Cal. Rptr. 63, 65 (Cal. App. Ct. 1981) (noting that recovery for mental anguish and distress is allowable under the framework of intentional/negligent infliction of emotional distress, not wrongful death statutes).

42. *See* Krishnan v. Sepulveda, 916 S.W.2d 478, 480–82 (Tex. 1995) (refusing to recognize the fetus as a separate person but allowing the mother to recover for mental anguish from her injury, which included the loss of the fetus).

43. *See* DOBBS, *supra* note 39, at 826 (noting that under an emotional distress claim, the plaintiff must prove that the defendant acted in such a way as to harm the actual plaintiff as a result of intentional or reckless action).

44. *See* Krouse v. Graham, 562 P.2d 1022, 1026 (Cal. 1977) (citing with support other cases which held that "[j]uries should be insistently cautioned not to allow compensation for the sorrow and distress which always ensues from such a death"); Kogul v. Sonheim, 372 P.2d 731, 732 (Colo. 1962) (stating that the court must "adhere to the rule that parental grief is not an element of damages in wrongful death actions under the statute"). *But see* STUART SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH § 4:25 (3d ed. 1992) (noting that "the death of one's own child is the greatest loss a parent may suffer" and as a result, "many courts have permitted and do permit recovery for a parent's grief and anguish").

45. FISCHER, *supra* note 11, at 414.

46. *Id.*

47. Note, however, that such changes only occur in jurisdictions that employ the loss to survivor form of statutes, since there is no way to account for grief in a loss to estate framework. *Id.*

the statutes to fetuses. Dobbs notes that "the traditional measure for a child-death was the value of the child's services minus the cost of rearing the child."[48] As in the case of adult decedents, this focus can exclude recovery for the value of the child's society or companionship, on the theory that loss of a child's companionship has no pecuniary value.[49] A court could simultaneously refuse compensation for loss of a child's companionship and insist on allowing recovery only for such earnings as he might be expected to contribute to his parents during his minority.[50] In that kind of jurisdiction, "death might actually represent an economic gain to survivors because the expense of maintenance could readily exceed any financial contributions."[51] Dobbs notes that a number of states have avoided this problem by allowing a recovery for the survivor's loss of companionship, society, advice and guidance—sometimes on the theory that such elements have a pecuniary value.[52] Additionally, some courts permit a recovery for expected post-majority contributions of the child so as to increase slightly the chances of a substantial recovery in child-death cases.[53] These calculations are in large part fictional, however. They require broad speculation about the future career of the decedent, a problem that worsens with decedents of very young ages.[54]

The problems that make pecuniary damages an inappropriate measure for the loss suffered by parents of young children are magnified in the case of a fetus. Not only did the parents receive no pecuniary value from the fetus (in the form of wages, household chores performed, or the like), but the calculation of potential lost pecuniary damages becomes even more speculative. Parents have also not yet received the benefit of companionship, barring the solution allowed by some courts in the death of a child.

As suggested by both Fischer and Dobbs, courts and legislatures may increasingly be recognizing that nonpecuniary damages are also accounted

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48. DOBBS, *supra* note 39, at 812 (citing Mo. Pac. R.R. v. Maxwell, 109 S.W.2d 1254 (Ark. 1937)).

49. *Id.* at 811–12.

50. *Id.*

51. *Id.* at 812 (citing Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983)). The court in *Sanchez* noted that "[i]f the rule were literally followed, the average child would have a negative worth." *Id.*

52. *Id.*

53. *See* FISCHER, *supra* note 11, at 407 (describing parents' reasonable expectation of future financial support).

54. *Supra* note 36.

for in the valuation process.[55] The expansion of nonpecuniary damages is essentially recognition that would-be parents are just as deserving of compensation for their loss, even though that loss is not pecuniary at all, and a dollar-value for that loss is not easily calculable. But that process is bound to be arbitrary, and thus inaccurate, if it is based on the presence or "worth" of a person who was never born.

C. Modern Statutes and the Jurisdictional Split

An American court first departed from *Dietrich* in *Bonbrest v. Kotz*.[56] *Bonbrest* rejected the *Dietrich* theory that a viable fetus is part of its mother and instead held that, once born, a child could maintain an action for injuries it sustained while viable in the womb.[57] Today, every jurisdiction in the country permits recovery for prenatal injuries of the child if the child is born alive.[58]

Regarding wrongful death actions, states generally take one of three approaches that are based on varying degrees of a fetus's viability at the time of its death. Legal analysts suggest that an expansive interpretation of wrongful death statutes is a rapidly growing trend.[59] However, at this point, only six (or possibly eight) states provide a cause of action for the

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55. FISCHER, *supra* note 11, at 411–12; DOBBS, *supra* note 39, at 812.

56. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). In *Bonbrest*, a child suffered prenatal injuries as a result of the delivering doctor's malpractice and filed a lawsuit against the defendant for those injuries. *Id.* at 139. The defendant filed a motion for summary judgment, contending no basis for a tort action existed because the child had not been born when the injury occurred. *Id.* The court refused to grant summary judgment to defendant, holding that where the child was viable at the time of the injury, common law that held that an unborn child had no juridical existence with regard to tort actions did not apply. *Id.* at 142–43. The issue whether an unborn child had a right to pursue a tort action for prenatal injuries was a question of first impression for the court. *Id.* at 139. The court questioned the rationale behind distinguishing between tort law, which considered an unborn child part of its mother and not a separate person, and property law, which considered an unborn child a human being from the moment of conception. *Id.* at 139–40. The court found that where the child was viable, it was not part of its mother and therefore it should have its own right of action for prenatal injuries. *Id.* at 142. If the child were not allowed to pursue such an action, the child would have no remedy for the injury it suffered. *Id.*

57. *Id.* at 140, 142.

58. Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 869(1) app. at 79 (1977)).

59. *See, e.g.*, Timothy Stoltzfus Jost, *Rights of Embryo and Fetus in Private Law*, 50 AM. J. COMP. L. 633, 642–46 (2002) (noting that "courts have been increasingly open to permitting civil recoveries for the death of unborn fetuses").

wrongful death of an embryo or fetus: Georgia,[60] Illinois,[61] Louisiana,[62] Missouri,[63] South Dakota,[64] and West Virginia.[65] Georgia allows recovery once the fetus has "quickened," which falls somewhere between the majority's viability approach and the permissive approach of Louisiana and its counterparts that allows an action to be brought any time after conception.[66] Michigan and Texas have both amended their wrongful death statutes so that the language now explicitly permits recovery for the death of a fetus, but as of yet, there is no existing case law to support this position.[67]

The second approach to wrongful death permits recovery only if the fetus was viable at the time of death. Twenty-nine states follow this approach.[68] This approach represents a search for a middle ground, but poses its own problems. The exact moment of viability can be difficult to pinpoint. Additionally, as medicine advances, the point of viability gets pushed back further and further, thus creating instability and uncertainty in the law.[69]

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60. *See* Porter v. Lassiter, 87 S.E.2d 100, 102 (Ga. Ct. App. 1955) (allowing an action for recovery for the death of unborn fetus who is "quick").

61. *See* Seef v. Sutkus, 583 N.E.2d 510, 511 (Ill. 1991) (allowing recovery for a stillborn fetus under the wrongful death act); 740 ILL. COMP. STAT. ANN. 180/2.2 (West 2002) (stating that "[t]he state of gestation or development of a human being . . . at death, shall not foreclose maintenance of any cause of action . . . arising from the death of a human being caused by wrongful act, neglect or default").

62. *See* Danos v. St. Pierre, 402 So. 2d 633, 639 (La. 1981) (upholding the lower court's decision that there is a cause of action for the death of a fetus under the Louisiana wrongful death statute).

63. *See* Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) (en banc) (holding that the Missouri state constitution requires courts to interpret "person" within the wrongful death statute to allow a parent to state a claim for the wrongful death of his or her unborn child, even prior to viability).

64. *See* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790–91 (S.D. 1996) (allowing a wrongful death claim for a pre-viable fetus based on the language of S.D. CODIFIED LAWS § 21-5-1 (1987) which states that there is a cause of action "[w]henever the death or injury of a person, including an unborn child, shall be caused by a wrongful act").

65. Farley v. Sartin, 466 S.E.2d 522, 523 (W. Va. 1995) (holding that the term "person" as used in the wrongful death act encompasses a pre-viable embryo or fetus).

66. *See* Porter v. Lassiter, 87 S.E.2d 100, 102 (Ga. Ct. App. 1955) (allowing recovery for the death of unborn fetus who is "quick").

67. *See infra* note 84 and accompanying text (quoting Texas's amended wrongful death statute); Marks, *supra* note 2, at 79 (noting that although Michigan's newly amended wrongful death statute has not been interpreted in an opinion, "the legislature's apparent intent was to provide recovery for the death of an embryo or fetus, without regard to viability").

68. Marks, *supra* note 2, at 53–71.

69. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (describing how advances in neonatal care have "overtaken some of *Roe*'s factual assumptions").

The third approach—the one of Texas in *Fort Worth*—is sometimes referred to as the "born-alive" rule. States following this approach require that a fetus be born alive in order to recover damages, thus prohibiting recovery for fetal wrongful death.[70] Although Texas has recently amended its statute to allow recovery for the death of a fetus under wrongful death, thirteen other states still follow some version of the born-alive rule: Alaska,[71] California,[72] Florida,[73] Indiana,[74] Iowa,[75] Maine,[76] Nebraska,[77] New Jersey,[78] New York,[79] Tennessee,[80] Utah,[81] Virginia,[82] and Wyoming.[83]

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70. Marks, *supra* note 2, at 43–44.

71. *See* Mace v. Jung, 210 F. Supp. 706, 707–08 (D. Alaska 1962) (holding that a pre-viable fetus is not a person under Alaska's wrongful death act, and leaving intact the prevailing rule that a child must be born alive before a wrongful death claim could be maintained).

72. *See* Justus v. Atchison, 565 P.2d 122, 133–34 (Cal. 1977) (holding that the California legislature did not intend the word "person" in the wrongful death act to include an unborn fetus), *overruled, in part, by* Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985).

73. *See* Stern v. Miller, 348 So. 2d 303, 307 (Fla. 1977) (holding that Florida's wrongful death act does not create a cause of action for a stillborn fetus).

74. *See* Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002) (holding that Indiana's wrongful death statute does not create a cause of action for an unborn child).

75. *See* Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981) (plurality) (holding that the stillbirth of a viable fetus does not create a cause of action under Iowa's survival statute because it is not the death of a person), *overruled, in part, by* Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf R.R. Co., 335 N.W.2d 148 (Iowa 1983).

76. *See* Shaw v. Jendzejec, 717 A.2d 367, 368 (Me. 1998) (upholding prior decisions requiring a live birth before a wrongful death action could be maintained).

77. *See* Egbert v. Wenzl, 260 N.W.2d 480, 481 (Neb. 1977) (confirming that there must be a live birth before there is a cause of action under Nebraska's wrongful death act for a stillborn fetus).

78. *See* Giardina v. Bennett, 545 A.2d 139, 146 (N.J. 1988) (holding that the death of a viable fetus does not create a cause of action under New Jersey's wrongful death act).

79. *See* Endresz v. Friedberg, 248 N.E.2d 901, 902–03 (N.Y. 1969) (holding that there is no wrongful death cause of action for a stillborn fetus under New York law).

80. *See* Hamby v. McDaniel, 559 S.W.2d 774, 776–77 (Tenn. 1977) (affirming that there is no wrongful death cause of action for a viable, stillborn fetus under Tennessee law).

81. The Supreme Court of Utah has never directly decided whether a viable fetus is a person under the state's wrongful death act, Marks, *supra* note 2, at 51, but it has never allowed recovery in a wrongful death claim for the death of a viable or pre-viable embryo or fetus. *See, e.g.*, Webb v. Snow, 132 P.2d 114, 118–19 (Utah 1942) (holding that no damages could be awarded for the loss of an unborn child, but not discussing the gestational age of the fetus or embryo because there was a dispute about whether the plaintiff was pregnant at all).

82. *See* Lawrence v. Craven Tire Co., 169 S.E.2d 440, 442 (Va. 1969) (holding that there is no wrongful death action for the death of a stillborn child under Virginia law).

83. As of yet, no published cases address whether a viable or a pre-viable fetus is a person under Wyoming's wrongful death act. It has, however, made no statement that it would abandon the born-alive rule. Marks, *supra* note 2, at 52.

As mentioned, in 2003, the Texas legislature amended their statutes to explicitly grant the parents of a stillborn child a cause of action under the Wrongful Death Act.[84] Therefore, Texas no longer statutorily follows the born-alive rule, although no cases have yet been decided under the new law. However, as noted by the *Fort Worth* court, the statute operates prospectively only, so that it was not applicable to the facts of the *Fort Worth* case.[85] Moreover, the amended statute provides several limitations on when parents may bring an action on behalf of a stillborn fetus.[86] The statute expressly excludes claims for the death of an unborn child brought against "a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider."[87] Thus, the parents in *Fort Worth* would not have obtained relief under this rule regardless of the date.[88] In light of the amended statute, however, Texas should probably now be included in the group allowing recovery for pre-viable fetuses, even though it has no case law on the issue yet.[89]

III. Problems Inherent in Wrongful Death Statutes as They Are Applied (Or Not) to Fetuses

A. Problems with the (Old) Texas Approach

Many reasons weigh in favor of providing a remedy to parents who have lost a fetus through the negligence of a third party. These reasons are stated succinctly in Justice Steven Smith's dissent in *Fort Worth*.[90] First, Justice Smith argued that the Texas legislature never intended to exclude a viable

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84. *See* TEX. CIV. PRAC. & REM. CODE § 71.001(4) (Vernon 2005) (defining "individual" under the wrongful death act to include "an unborn child at every stage of gestation from fertilization until birth").

85. Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 97 (Tex. 2004) (noting that amended Wrongful Death Act was intended to operate prospectively only, pursuant to Act of June 2, 2003, ch. 822, 2003 Tex. Gen. Laws 2607, 2608).

86. TEX. CIV. PRAC. & REM. CODE § 71.003(c) (Vernon 2005).

87. *Id.* § 71.003(c)(4).

88. *See Fort Worth*, 148 S.W.3d at 97 (noting that "[t]he parties do not contend that this case involved anything other than a lawful medical procedure, so this case would not be covered even if the new statute were applicable").

89. *Supra* note 67.

90. *Fort Worth*, 148 S.W.3d at 101–09 (Smith, J., dissenting).

human fetus that dies before birth from the Texas wrongful death and survival acts.[91] Of course, this argument is a matter of statutory interpretation and is left to the discretion of the state courts. Second, Justice Smith disagreed with the court's reliance on the power of stare decisis, stating that the question is too important to be decided solely on that basis.[92] Justice Smith argued that the case on which *Forth Worth* relied, *Witty v. American General Capital Distributors, Inc.*,[93] was wrongly decided and should be overruled.[94] Perhaps most persuasive is Justice Smith's observation that the rule announced in *Witty* creates unjust results.[95] That is, the *Witty* rule produces the counterintuitive consequence that "it is more profitable for the defendant to kill than to injure," because infants who are injured in the womb and survive the pregnancy may maintain causes of action against tortfeasors responsible for their injuries.[96] Furthermore, a pregnant mother may sue for any injury she suffers independently, but a parent cannot bring a cause of action for wrongful death when a pregnancy terminates in miscarriage or stillbirth.[97]

An additional hypothetical that demonstrates the counterintuitive effects of the born-alive rule is that of prenatally injured twins, one of whom survives for a few moments outside the womb.[98] As noted in Part I, under the born-alive rule, even if the injuries sustained were essentially identical, only the twin who

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91. *Id.* at 102 (Smith, J., dissenting).

92. *Id.* at 103–04 (Smith, J., dissenting).

93. Witty v. Am. Gen. Capital Distribs., Inc., 727 S.W.2d 503, 506 (Tex. 1987) (holding that controlling statues did not provide a cause of action for the death of an unborn fetus). A surviving expectant mother brought an action against her employer under the Texas Wrongful Death Act and the Survival Statute, alleging damages for the death of her fetus, mental anguish, and alternatively alleging property damage as a result of the destruction of her chattel, the fetus. *Id.* at 504. The trial court granted respondent employer's motion for summary judgment. *Id.* The appellate court affirmed except as to petitioner's wrongful death action and her common law mental anguish claim. *Id.* On further appeal, the Texas Supreme Court found in favor of respondent on all claims, holding that the Wrongful Death Act did not provide a cause of action for the death of an unborn fetus. *Id.* The court also held that because there was no live birth, the Survival Statute did not provide a cause of action. *Id.* at 506. The court held that petitioner had no common law claim for mental anguish because it was barred under the Worker's Compensation Act. *Id.* The court further held that, as a matter of law, the unborn fetus was not chattel. *Id.*

94. *Fort Worth*, 148 S.W.3d at 104 (Smith, J., dissenting) (arguing that the *Witty* court misinterpreted the Texas wrongful death statute).

95. *Id.* at 107 (Smith, J., dissenting).

96. *Id.* (Smith, J., dissenting) (citing *Witty*, 727 S.W.2d at 506–07 (Kilgarlin, J., dissenting)).

97. *Id.* at 108 (Smith, J., dissenting).

98. *See* McReynolds, *supra* note 13, at 1417–18 (praising the Louisiana Supreme Court's decision allowing parents to recover for the wrongful death of a six-month old fetus).

survived would have a cause of action, on the basis of a seemingly unjustifiable distinction.[99]

A Texas appellate court discussed another notable inconsistency with the law as applied in Texas in *Parvin v. Dean*:[100]

> Strangely, Texas law denies the mother and father of a viable human fetus capable of living outside the womb at the time of the negligent tort, the redress of a statutory wrongful death suit or survival claim for loss of the viable fetus, while at the same time Texas law classifies unborn *animals* as 'goods,' so humans who own pregnant animals will have redress for the negligently inflicted death of their unborn animals.[101]

This result certainly seems absurd. In defending the born-alive rule, an Indiana court stated that "[t]he exclusion of unborn children from Indiana's Child Wrongful Death Statute does not mean that negligently injured expectant mothers have no recourse."[102] The Indiana Supreme Court, quoting the Missouri Supreme Court, noted that "the mother has her own action for negligently inflicted injury, in which the circumstances of her pregnancy and miscarriage may be brought out and considered as part of the intangible damages."[103] This remedy is insufficient, however, to address two particular circumstances.

First, in cases where the mother herself suffers no physical injury outside of the miscarriage, recovery may not be possible. Recovery for mental anguish or infliction of emotional distress is often conditioned on the plaintiff having also suffered some physical injury.[104] Second, even if the mother has suffered injury and brings a successful claim, the loss of the would-be father remains

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99. *Supra* note 1 and accompanying text.

100. Parvin v. Dean, 7 S.W.3d 264, 275–76 (Tex. Ct. App. 1999) (holding that wrongful death statutes were applicable to fetuses), *rev'd*, 148 S.W.3d 94, 97 (Tex. 2004). In *Parvin*, a viable fetus suffered prenatal injuries and was stillborn due to the negligence of the driver of a vehicle that crashed into the car being driven by the mother. *Id.* at 268. The parents brought wrongful death, survival, and mental anguish actions against the driver, and the district court entered summary judgment for the parents. *Id.* at 268–69. The appellate court affirmed, holding that denial of action under wrongful death statutes to fetuses violated principles of equal protection and that the denial of the father's cause of action for mental anguish from the negligently caused loss of his viable fetus violated the Equal Rights Amendment of the state constitution. *Id.* at 267–68.

101. *Id.* at 275–76.

102. Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002).

103. *Id.* (quoting Rambo v. Lawson, 799 S.W.2d 62, 63 (Mo. 1990), *superseded by statute as stated in* Connor v. Monkem Co., 898 S.W.2d 89, 92–93 (Mo. 1995).

104. *See* DOBBS, *supra* note 39, at 826 (noting that under an emotional distress claim, the plaintiff must prove that the defendant acted in such a way as to harm the actual plaintiff by intentional or reckless action).

uncompensated. These problems argue strongly for providing a remedy for would-be parents. States that have broadened the scope of their wrongful death statutes have recognized the need for a legal remedy in these cases. However, the application of wrongful death statutes to fetuses poses its own inconsistencies.

B. Applying Wrongful Death to Fetuses Conflicts with Roe v. Wade

Wrongful death actions can necessarily be brought only upon the death of a person.[105] Therefore, to bring an action for the wrongful death of a fetus requires classifying that fetus as a legal person.[106] This language will probably set off alarm bells for anyone acquainted with the holding of *Roe v. Wade*, in which the United States Supreme Court declared that a fetus is not a person for purposes of the Fourteenth Amendment, thus giving rise to the fetal rights debate.[107] The personhood status of the fetus raises particularly difficult questions, often directly concerning individual religious and moral beliefs. Debate continues to rage about when—if at all—a fetus becomes a human being.[108] Some scholars doubt that fetal personhood in the context of wrongful death will have any serious effect on *Roe*.[109] Even the Texas legislature addressed this matter when deciding whether to amend their Wrongful Death Statute:

> [The amendment] would not infringe in any way on a woman's constitutional right to abortion or the right to any other legal medical procedure to which the mother had consented. Concerns that the bill is designed to limit abortions or lay the groundwork to limit abortions are unfounded. The bill would make clear, specific exceptions to the applications of the law for any action to which a pregnant woman

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105. *See* SPEISER ET AL., *supra* note 44, § 4:36 (describing how the existence and subsequent death of a "person" to whom a duty of care is owed is a requirement for the existence of a wrongful death claim).

106. *See supra* note 7 and accompanying text (giving an example of how statutory construction that permits recovery for the wrongful death of a "person" or "individual" requires that the decedent be categorized as a legal person).

107. Roe v. Wade, 410 U.S. 113, 158 (1973).

108. *See generally* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745 (2001) (considering the legal metaphor "person" from a transsubstantive point of view, focusing directly on the problems and meaning of legal personality).

109. Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 225–27 (2002). *But see id.* at 227–28 (discussing how the definition of a fetus as a "person" under California fetal homicide law potentially places the holding of *Roe* in jeopardy).

> consented, including abortion. Physicians performing legal abortions would fall under the exceptions of the bill. Courts in other states consistently have upheld similar laws, ruling that a woman's right to an abortion does not protect a third party who would harm or kill her unborn child against her wishes. Laws allowing civil and criminal penalties for the wrongful death of unborn children in other states have not limited a woman's right to abortion.[110]

Some supporters even argue that in the context of fetal rights, legislation that prohibits or punishes individuals who kill a fetus (either inadvertently or intentionally) protects a woman's right to choose whether to have a child, and thus should be categorized under the broad heading of "women's rights."[111] However, pro-life and pro-choice supporters alike have recognized the probability that "if *Roe v. Wade* is going to fall, it will be through the recognition of fetal personhood and the inconsistencies that have come from treating a fetus differently under the law depending on the circumstances."[112] There is increasing evidence that "[i]nconsistencies between state statutes and recently proposed federal legislation appear to threaten the fragile holding of *Roe v. Wade*."[113]

For example, in 2004, Scott Peterson was convicted of the murder of both his wife, Laci Peterson, and their unborn son.[114] California, like many other states, has a state fetal homicide law, which makes the killing of an unborn child a separate offense from killing or injuring the mother.[115] That law defines murder as "the unlawful killing of a human being, *or* a fetus, with malice aforethought."[116] Meanwhile, a federal law, the Unborn Victims of Violence Act,[117] was renamed

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110. Texas Bill Analysis, S.B. 319, 78th Leg., Reg. Sess., at 4 (Tex. 2003), *available at* http://www.capitol.state.tx.us/hrofr/hrofr.htm.

111. Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 309 (2004) (contending that fetal rights legislation is, in effect, a misnomer for legislation which actually reinforces a woman's autonomy by deterring and punishing individuals who take away the choice to have a child by killing a fetus).

112. *See* Aaron Wagner, Comment, *Texas Two-Step: Serving Up Fetal Rights By Side-Stepping* Roe v. Wade *Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1086 (2001); *id.* at 1087 (noting that "what may prove ultimately more effective is an indirect undercutting of *Roe* through the establishment of fetal personhood in every other area of the law").

113. Mans, *supra* note 111, at 309.

114. *See* Eric Bailey & Eric Slater, *In Modesto, a Feeling of Closure*, L.A. TIMES, Nov. 13, 2004, Metro Desk, at B1 (reporting the guilty verdict returned against Peterson on November 12, 2004).

115. CAL. PENAL CODE § 187(a) (West 1999).

116. *Id.* (emphasis added).

117. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (Supp. 2004)).

after the Peterson victims.[118] That law provides a criminal cause of action against someone who intentionally causes the death of "a child, who is in utero"[119] and defines a "child in utero" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[120] Careful reading of the California statute shows that its drafters were very careful not to call a fetus a human being. An examination of the federal statute is less clear however—an unborn child is a homo sapien—but is it a human being with those rights that accrue to a legal person? It is this sort of inconsistency that has reproductive rights supporters nervous about the ramifications such confusion may have for other areas of the law.[121]

Effects have already been seen where states have defined a fetus as a person for purposes of fetal homicide statutes and statutes criminalizing drug use during pregnancy.[122] For example, Professor Paltrow argues that "anti-choice activists have had some of their greatest successes with strategies that linked anti-abortion sentiment with another unpopular cause or politically disempowered group."[123] Paltrow points to instances of prosecutors routinely citing wrongful death cases and fetal homicide cases as bases for treating fetuses as persons and for treating the women who risk harm to them as criminals—essentially asserting that fetuses are legal persons with constitutionally protected rights.[124] Additionally, the Attorney General of South Carolina made clear that, following a recent state supreme court ruling declaring a viable fetus as a person under the Children's Code, he intended to use the decision as a basis for limiting abortion.[125] As one commentator noted, "some of these provisions were not intended to provide a legal basis for recognizing full fetal personhood or for undermining women's rights."[126] Some of the provisions, however, were actively supported by pro-life lobbyists who

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118. *Id.* § 1 (providing, "This Act may be cited as . . . 'Laci and Conner's Law'").

119. 18 U.S.C. § 1841(a)(1) (Supp. 2004).

120. *Id.* § 1841(d).

121. One law professor I spoke with speculated that the enormous press attention garnered by the Peterson case is attributable in part to efforts of pro-life supporters eager to see a fetus characterized as a person in the popular media.

122. *See generally* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999 (1999) (arguing that anti-abortion activists are using fetal personhood as defined in criminal statutes for pregnant drug users as a backdoor to weaken *Roe v. Wade*).

123. *Id.* at 1001.

124. *Id.* at 1014.

125. *Id.* at 1035.

126. *Id.* at 1014.

understood their potential as a tool for ultimately overturning *Roe v. Wade*.[127] And, regardless of intent, "these decisions create an environment in which prosecutions of pregnant women seem reasonable and the right to abortion does not."[128] Arthur Caplan, a noted expert in biomedical ethics, observed:

> It is foolish to think these suits aren't related to the abortion issue . . . . They spring from the same concern that drives the antiabortion position—that is to say, assigning a more elevated moral and legal status to the fetus, granting it personhood separate from the woman carrying it.[129]

The connection of anti-abortion arguments with fetal wrongful death is the opposite side of the coin from the strategy described by Paltrow. In the context of criminalization, the fetal rights issue is given leverage by connecting it with unpopular issues and groups, such as low-income women, minority women, and drug addicts.[130] The same method can be employed by connecting fetal rights with the incredibly sympathetic parents who have lost unborn children through the negligence of third parties.

One example of an extreme application of wrongful death statutes occurred in a recent ruling by Judge Jeffrey Lawrence in a case out of Chicago, Illinois.[131] Judge Lawrence ruled that an Illinois couple whose frozen embryo was accidentally destroyed at a fertility clinic has the right to file a wrongful death lawsuit.[132] Victor Rosenblum, an anti-abortion activist and professor at the Northwestern University School of Law, stated that he was pleased to see the judge's initiative, but noted that "as a lawyer, I can't say that he is on solid ground in his reasoning."[133] Other legal commentators expect that the ruling will be overturned, noting that "[n]o appellate court has ever declared a fertilized egg a human being in a wrongful-death suit."[134] John Mayoue, a specialist on in-vitro law, believes the ruling is likely too narrow to affect abortion law, but explains that it exemplifies the contradictory treatment of court rulings on embryos, which are considered property for certain purposes

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127. *Id.*

128. *Id.* at 1014.

129. *Id.* at 1015.

130. *Id.* at 1001–02.

131. Miller v. Am. Infertility Group, No. 2002-L-007394 (Cook County, Ill., Cir. Ct. 2005).

132. Patrick Rucker, *Judge Says Lost Embryo a Human; Ruling Clears Way for Couple's Suit*, CHI. TRIB., Feb. 6, 2005, Metro, at 1.

133. *Id.*

134. Associated Press, *Judge OKs Discarded Embryo Lawsuit*, CNN Feb. 5, 2005, http://www.cnn.com/2005/LAW/02/05/frozen.embryo.lawsuit.ap/index.html (last visited Feb. 23, 2005) (on file with the Washington and Lee Law Review).

and life for others.[135] Although this ruling is certainly on the legal fringe, it is exactly the sort of precedent that supporters of *Roe v. Wade* fear.

C. *The Viability Approach to Wrongful Death Gives Rise to Arbitrary and Inconsistent Results*

The majority of states use viability as the marker for determining when a wrongful death action may be brought, a marker that closely mirrors the actual holding of *Roe v. Wade*.[136] Viability provides a compromise between factions that disagree when a fetus becomes human and, thus, entitled to the protection of the law. However, this middle-ground approach in no way avoids the problems associated with more extreme applications of wrongful death statutes. As noted by the Prosser and Keeton treatise:

> Viability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[137]

Prosser and Keeton argue in favor of eliminating the viability requirement because pinpointing the moment of viability leads to results no less arbitrary than the born-alive rule.[138] As a result, states seem to have taken an all-or-none approach with regard to recovery. This seems tantamount to choosing between a rock and a hard place—neither solution is ideal, and as discussed above, both are fraught with problems.[139] The key concern is the tension between the right of recovery of aggrieved parents and the resulting implications for other areas of the law, particularly reproductive rights, and coherence of legal theory.

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135. *Id.*

136. Roe v. Wade, 410 U.S. 113, 163 (1973) (holding that the state's interest in the life of the fetus becomes compelling at viability, after which a state could proscribe abortion except to preserve the life or health of the mother).

137. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 369 (5th ed. 1984) (defending recovery for injury to a pre-viable fetus born alive by emphasizing that viability is a relative matter contingent on many circumstances and that the child remains injured regardless of when the injury occurred).

138. *Id.*

139. *Supra* Parts III.A–B.

D. Conflict with Modern Views of Parenthood and Parental Rights

1. Parenting Is a Valuable Enterprise

Until well into the twentieth century, the law recognized children as chattels, not people.[140] Children worked on farms in a predominantly agrarian society.[141] Under common law, parents were allowed to indenture their children—most often for the purpose of an apprenticeship—and the wages that were earned by the child belonged to the parent.[142] That viewpoint has changed, and courts have recognized that as people children are entitled to constitutional rights.[143] Now we "look with amazement at the late twenties and early thirties and the abuse of child labor in the sweatshops of the industrialized East of this country where, for pennies, children were made to work eight, ten and twelve hours a day."[144] Today, children are encouraged to remain children as long as possible.

This modern thinking has two major implications: First, parenthood has assumed a preeminent role as a tool for raising individuals able to make lasting contributions to society. The school of hard-knocks is gone, replaced by a supportive and caring family. Second, this new perspective on parenthood means that the rights of parents in deciding how to raise their children are nearly sacrosanct, protected from interference by the state except in extreme circumstances.[145] Some would argue that this favoring of parental rights is actually at odds with the view that children are not chattel.[146] However, the modern preeminence of parental rights is utilized to protect the family from the intrusion of the state more than to subvert the rights of children.

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140. Christian Reichel VanDeusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417, 418 (1991).

141. Ted R. Youmans, *Adoption: An Answer to Children in Crisis*, 4 WHITTIER J. CHILD & FAM. ADVOC. 71, 72–73 (2004).

142. VanDeusen, *supra* note 140, at 417.

143. *See id.* at 418 (noting, however, that "[c]hildren are precluded from some constitutional privileges because of age and the traditional assessment that maturity is required for decision making").

144. *Id.*

145. *Infra* notes 159–60 and accompanying text.

146. *See* VanDeusen, *supra* note 140, at 420 (proposing that "[t]he law, still treating children as chattel, tipped the scales drastically in favor of parental rights and, all too often, the child would suffer the consequences").

The jurisprudence of this country placing a high value on parenthood and parental rights is well established. For example, in *Skinner v. Oklahoma*,[147] the United States Supreme Court emphasized the importance of procreation, stating that, "[w]e are dealing here with legislation which involves one of the basic civil rights of man," and that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[148] The Court also discussed the value of parenthood in *Meyer v. Nebraska*,[149] stating, "[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children . . . ."[150]

147. Skinner v. Oklahoma, 316 U.S. 535 (1942). Defendant was convicted of more than two felonies and, under the Habitual Criminal Sterilization Act, was ordered to be rendered sterile. *Id.* at 537. The Oklahoma Supreme Court affirmed the order that the operation be performed. *Id.* Upon being granted certiorari, defendant claimed that the act violated the Fourteenth Amendment. *Id.* at 538. The Court held that the Act failed to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Court found that defendant was convicted of larceny and that the act treated larceny and embezzlement as the same crime and punishable in the same manner, except for the sterilization provision. *Id.* at 538–39. The Court noted that where legislation laid an unequal hand on those who had committed the same quality of offense, the Equal Protection Clause would be impotent if such conspicuously artificial lines could be drawn. *Id.* at 541. The crimes of larceny and embezzlement rated the same terms of fines and imprisonment, but when it came to sterilization, the pains and penalties of the law were different, which made for invidious discrimination against groups of individuals and thereby violated the constitutional guaranty of just and equal laws. *Id.* at 542. The judgment of the state supreme court affirming the order for sterilization was reversed. *Id.* at 543.

148. *Id.* at 541.

149. Meyer v. Nebraska, 262 U.S. 390 (1923). In *Meyer*, a teacher sought review of a judgment from the Nebraska Supreme Court which affirmed a conviction for violating a statute that prohibited teaching of languages other than English to children who had not passed the eighth grade. *Id.* at 396–97. The teacher, while working in a parochial school, was convicted for teaching the German language to a 10-year old child who had not successfully passed the eighth grade. *Id.* The state supreme court held that the statute was a valid exercise of the state's police power. *Id.* at 397. The United States Supreme Court held, on the other hand, that the liberty guaranteed by the Fourteenth Amendment protected the teacher's right to teach and the right of parents to engage the teacher in educating their children. *Id.* at 399–400. The state could not, under the guise of exercising its police power, interfere with such guaranteed liberty interests. *Id.* at 400. The Court reversed the state supreme court's judgment, holding that the Nebraska statute was arbitrary and infringed on the liberty guaranteed under the Fourteenth Amendment to the United States Constitution. *Id.* at 403.

150. *Id.* at 399.

Two years after *Meyer*, in *Pierce v. Society of Sisters*,[151] the Court stated, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[152] Professor Quince Hopkins notes that "*Meyer* and *Pierce* thus arguably stand for the proposition that (biological) parents' control over their (biological) children, in many, if not most, circumstances, is superior to states' interest in those same children."[153] States recognize that the "job" of parenting is one most effectively done by motivated individuals, and they are happy to leave the vast majority of decisions regarding offspring to their parents.

Furthermore, courts have increasingly recognized that parenthood is not simply a biological function required for propagation of the species. Quoting Justice Stewart's dissent in another case, the United States Supreme Court in *Lehr v. Robertson*[154] confirmed that "[p]arental rights do not spring full blown

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151. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). Private primary schools filed actions against public officials, challenging the constitutionality of the Compulsory Education Act (the Act) under the Fourteenth Amendment and seeking to enjoin its enforcement. *Id.* at 533. The Act mandated that all normal children aged eight to sixteen years old attend public school. *Id.* at 530–31. Appellees asserted that their enrollments were declining as a result of the Act. *Id.* at 532. The district court entered an order enjoining appellants from enforcing the Act and appellants sought review in consolidated appeals. *Id.* at 534. The Court held that the inevitable practical result of enforcing the Act was the destruction of appellees' primary schools and perhaps all other private primary schools for normal children within the state and that the Act unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children. *Id.* at 534–35. The Court affirmed the order enjoining appellant public officials from enforcing the Act. *Id.* at 536.

152. *Id.* at 535.

153. C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 455 (2004).

154. Lehr v. Robertson, 463 U.S. 248, 250 (1982) (holding that where a putative father had not established a substantial relationship with his child, failure to give him notice of the pending adoption of that child did not violate either his due process or equal protection rights). The putative father, Lehr, lived with the mother before the birth of a daughter, who was born out of wedlock. *Id.* at 252. Lehr failed to enter his name in the State of New York's "putative father registry," which would have triggered notice to him of pending adoption proceedings. *Id.* at 250–51. The Supreme Court found that he never had any significant custodial, personal, or financial relationship with the child and that he waited two years to establish a legal tie. *Id.* at 262. The Court held that the State of New York adequately protected Lehr's inchoate interest in establishing a relationship with his daughter through the provision of laws authorizing formal marriage, through its statutory adoption scheme, and through the putative father registry. *Id.* at 263–65. Further, it concluded that the Equal Protection Clause did not prevent a state from according two parents different legal rights where one had a continuous custodial responsibility for the child, while the other never established a relationship. *Id.* at 267–68. The Court affirmed the judgment of the New York Court of Appeals. *Id.*

from the biological connection between parent and child. They require relationships more enduring."[155]

Professor Hopkins describes this stance as "actively delineating who is and who is not a parent to a child, defined by what that 'potential' or theoretical parent does or does not *do* and whether that behavior is in accord with the Court's definition of what a 'true' parent is and does."[156] Thus, there is recognition on the part of the Court that being a parent is more than being a biological mother or father, and that parenting is a desirable and laudable social goal. Parents who have made the commitment to carry out those worthwhile duties should have some avenue of recourse when their opportunity to be a parent is wrongly taken away. However, by refusing to grant a remedy in that situation, states are undermining the very process they are trying to encourage. If parenting is a valuable enterprise, it should be protected under the law.

2. *Parental Rights Receive Precedence over the Rights of Minors*

A further consideration is that in cases involving tension between the rights of a child and the rights of a parent, the Court has come down squarely on the side of the parents.[157] For example, in *DeBoer by Darrow v. DeBoer*,[158] the Supreme Court noted that "[n]either [state] law, nor federal law, authorizes unrelated persons to retain custody of a child whose natural parents have not

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155. *Id.* at 260.

156. Hopkins, *supra* note 153, at 458.

157. *See* Bruker v. City of New York, 92 F. Supp. 2d 257, 267 (S.D.N.Y. 2000) (noting that parents have a right to determine their children's religious upbringing, which remains even after the children are taken into state custody); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that the right to study the German language in a private school was a protected liberty interest falling within the right of parents to control the upbringing of their children). *But see* Whalen v. Allers, 302 F. Supp. 2d 194, 203–04 (S.D.N.Y. 2003) (holding that mature fourteen-year-old child, who was in temporary custody of county department of social services, had a First Amendment right to make her own religious commitment, without regard to her mother's wishes); Prince v. Mass., 321 U.S. 158, 169–71 (1944) (determining that a child in the custody of her aunt distributing religious periodicals on the street was not permitted to do so because it violated a state statute, even though the child did it voluntarily, and even enthusiastically).

158. DeBoer by Darrow v. DeBoer, 509 U.S. 1301 (1993) (denying an application for a stay of enforcement directing prospective adoptive parents to deliver a child to its natural parents). The applicants took custody of a baby pending adoption proceedings. *Id.* at 1302. An Iowa court determined that the parental rights of the child's biological father had not been terminated in accordance with state law, and therefore the applicants were not entitled to adopt the child. *Id.* The Court held that a Michigan court's determination that the child's best interests would be served by allowing her to remain with the applicants was irrelevant. *Id.* Justice Stevens declined to stay the enforcement of an Iowa court order requiring that the child be returned to her biological father. *Id.* at 1303.

been found to be unfit simply because they may be better able to provide for her future and her education."[159] Justice Stevens essentially agreed that the best interests of a child pale in comparison to the right of an individual to be a parent. The fundamental right of a parent to raise their children can only be removed in light of a state's compelling interest in ensuring the children's safety.[160]

This respect for parental rights as opposed to the rights of minors indicates that a remedy that focuses on the loss suffered by would-be parents is more in keeping with judicial precedent. Courts view the rights of minors quite narrowly. If the true purpose of a remedy is to compensate the parents, then it makes more sense to base it on the loss suffered by the parents rather than on the loss their unborn child has suffered.

3. Children Are Not Chattel—But Their Death Deserves Compensation, Too

Finally, awarding damages for losses that are plainly nonpecuniary recognizes the modern trend to view parenthood less as custody of chattel and more as a rewarding and culturally necessary experience. The "value" of being a parent and raising a family is not the pecuniary benefit obtained from having a helping hand around the house. Even in earlier times (or other currently existing cultures for that matter), where many families engaged in subsistence farming or similar activities in which having more children meant a reduced workload for everyone, it is doubtful that parents viewed having children as primarily an economic investment. "Family issues are at the heart of religious, political, and philosophical ideologies,"[161] because families are where these values are created and inculcated in individual members of society. As noted above, the court in *Parvin v. Dean* recognized the absurdity of providing

159. *Id.* at 1302.

160. *See, e.g.*, United States v. Loy, 237 F.3d 251, 269–70 (3d Cir. 2001) (holding that convicted pedophiles may lose custody of their children or have restrictions placed upon their parental rights if there is sufficient evidence to support a finding that the children are potentially in danger from their parents); Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997) (noting that the liberty interest in familial integrity does not include a right to remain free from child abuse investigations).

161. *See* Maxine Baca Zinn, *Feminism and Family Studies for a New Century*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 52 (2000) (discussing the differing feminist approaches to families).

compensation for the loss of unborn chattel in the form of livestock, but not for the loss of an unborn child.[162] This strange result demands a solution.

IV. Loss of Potential Parenthood as a Possible Solution

A father I spoke to who had lost a baby to a doctor's negligence did not have suit as an option because he lived in New York, a state that adheres to the "born-alive" rule.[163] But he said that if he had been allowed to sue, he would have donated any money recovered to a charity for handicapped children.[164] He agreed that parents in his position need and deserve a remedy.[165] But he was in the best position to acknowledge that the remedy is not about money, it is about reconciliation and forgiveness.

Rather than trying to force wrongful death statutes to resolve a problem they were never designed to address, legislators could more effectively deal with the problem of would-be parents lacking a remedy by creating one that is tailor-made. Because our understanding of life and parenthood has changed dramatically since wrongful death statutes were developed, it is simply more efficient to start from scratch than to systematically eliminate all the old rationales that common law brings with it—for example, *Dietrich*'s idea that a fetus is a part of the mother, indistinguishable and inseparable until birth.[166] A new legal remedy can take advantage of new medical knowledge rather than be hampered by it.

A remedy drafted from scratch also has the potential to be logically coherent with respect to other areas of the law already in place, such as family law and reproductive rights. As discussed above, modern views of parenthood have moved away from conceptualizing it as a property right and have emphasized the necessary socialization function that parenting provides.[167] If drafted correctly, a fresh statute can minimize and perhaps even resolve conflicts with other areas of the law, thus increasing the coherence of legal theory and terminology.

To that end, I propose Loss of Potential Parenthood as a remedy, which would give aggrieved parents a right of action, separate and distinct from either

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162. Parvin v. Dean, 7 S.W.3d 264, 275–76 (Tex. Ct. App. 1999); *supra* note 100 and accompanying text.

163. Interview with Ira Schacter, in New York City, N.Y. (Oct. 28, 2004).

164. *Id.*

165. *Id.*

166. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884).

167. *Supra* Part III.D.

wrongful death claims or infliction of emotional distress claims. Identification of the concrete requirements of the statute is a prerequisite to a discussion of the benefits of this remedy. At a minimum, the statute must identify who is eligible to bring an action, on what grounds recovery is based, and any possible limits to recovery.

A. Model Statute for Potential Parenthood

ACTIONS FOR LOSS OF POTENTIAL PARENTHOOD[168]

§ 1. For the purposes of this subsection, potential parents of a deceased fetus may maintain an action under this section.

1. "Potential parent" means a person who, under the laws of this state, would have been entitled to raise the deceased child and intended to do so. Adoptive parents may satisfy this requirement if they can sufficiently establish that the adoption would have been completed. The term does not include a biological parent who intended to give the child up for adoption at birth or to otherwise not have actively participated in a parental role. Nor does the term apply to a biological parent of a fetus who was legally aborted.

2. Potential parents bringing a claim under this section must be able to establish by a preponderance of the evidence that the fetus would likely have been born alive had it not been for the wrongful act or neglect of another.

3. When the death of a fetus is caused by the wrongful act or neglect of another, the potential parents may each maintain an action for damages against the person who caused the death, or if the wrongdoer is deceased, against his personal representatives, whether the wrongdoer died before or after the death of the fetus he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is deceased against his personal representatives. Loss is measured from the time the initial injury is sustained.

4. The potential parents may prove their respective damages in the action brought pursuant to subsection 3, and the court or jury may award each person pecuniary damages for his grief or sorrow; mental anguish; loss of expectation of companionship and comfort; any special damages, such as medical expenses which the potential parent incurred or sustained before

168. To be included in personal injury provisions of civil law code.

the death of the fetus, and funeral expenses. The damages recoverable by the potential parent do not include damages for pain, suffering, or disfigurement of the decedent.

5. The court or jury may reduce the amount of pecuniary damages for which the person responsible for a wrongful or neglectful act resulting in loss of potential parenthood is liable if, with the consent of the potential parents, the wrongdoer undertakes to perform some acceptable form of apology, including but not limited to a formal statement, or a service performed, on behalf of, or for the benefit of, the potential parent.

B. Discussion of Provisions in the Model Statute

Of necessity, the statute requires a definition of the term "potential parents." A potential parent should be a person who expected to be a true parent in the sense that he or she intended to raise the child. Therefore, parents who were planning to give the baby up for adoption should not be allowed to recover. Such individuals are outside the intended scope of the statute, which seeks to compensate parents who are grieving for the loss of the expected companionship and rewards of raising a child. Individuals not intending to raise the child essentially would be receiving a windfall if they were allowed to recover for damages they never actually suffered. Under a similar rationale, individuals who intended to adopt the child at birth should be compensated because their expectations are the same as biological potential parents.

The process of identification would do well to borrow from the "pre-conception intent test" used by California courts to determine which parents will receive legal recognition in surrogacy disputes.[169] In those cases, courts look to "the preconception intention of the parties, as manifested in the surrogacy contract, to determine which woman's parental status [will] receive recognition."[170] In the case of a planned adoption, there likely will be a clear writing establishing the intent of the parties. This inquiry will be more difficult in cases where the intent of one of the biological parents is in dispute because no writing is necessary to establish parental rights in that case. In those instances, the court will have to look to the specific underlying facts to

169. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (involving a custody dispute between the gestational surrogate mother and the genetic mother and father, and holding that the pre-conception intentions of the parties determine parental rights).

170. *See* Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U.J. GENDER SOC. POL'Y & L. 207, 219 (2001) (discussing the construction and application of one of various tests for determining which parents will receive legal recognition in surrogacy disputes).

determine whether the claimants evidenced intent to be active parents, but there is likely to be a presumption of such intent when the parents are biological.

Subsection 1 also prohibits fathers from suing mothers who have legally procured an abortion, either with or without their consent, or the physicians of such women. This provision is common in state fetal homicide statutes and it is designed to prevent abuse of the statute by using it to punish legal and constitutionally protected actions.[171] If the state is concerned that a father's rights are infringed when a mother obtains an abortion, then abortion disclosure requirements are a more appropriate remedy than a civil suit.[172]

Subsection 2 of the statute limits recovery to those cases where parenthood becomes relatively certain. This limitation is essentially a proxy for the causation requirement and serves two purposes. First, it will help eliminate frivolous claims by preventing recovery in cases in which the probability of a successful completion of pregnancy is very low, so that the tortfeasor is not unfairly held responsible for ending a pregnancy that was uncertain anyway. Specifically, if the pregnancy was already particularly new or risky, or if the mother had a history of spontaneous miscarriage, it does not make sense to hold the tortfeasor liable since the lost expectation the statute seeks to compensate will be difficult to establish. Additionally, this requirement will increase the likelihood that the potential parents had truly developed an expectation of parenthood so that compensation for a subsequent loss is more accurate. Arguably, a parent who is only three weeks pregnant has lower expectations

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171. *See, e.g.*, MINN. STAT. ANN. § 609.266(b) (West 2003) (excluding prosecution of "the pregnant woman"); CAL. PENAL CODE § 187(b)(3) (West 2005) (providing that the statute should not apply if "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus"); VA. CODE ANN. § 18.2-32.2 (2004) (providing that killing a fetus is only homicide when committed by "[a]ny person who unlawfully, willfully, deliberately and maliciously kills the fetus of another").

172. An example of this type of legislation was the subject of litigation in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The contested provision in *Casey* was the Pennsylvania Abortion Control Act of 1982, § 3209, codified at 18 PA. CONS. STAT. ANN. § 3201 (West 2000). It provided that:

> [E]xcept in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

Casey, 505 U.S. at 887–88.

than a parent who is eight months pregnant. Upon wrongful termination of the pregnancy, the loss suffered by the eight-month-expectant parent is correspondingly greater.

The statute does not specify how the probability of a successful completion of pregnancy is to be analyzed. Although viability of the fetus is an obvious guideline, it poses the same problems with arbitrariness as occur when it is used to determine when wrongful death statutes may be applied.[173] But determining when someone is a potential parent is a very different question from determining when a fetus becomes a person. Medical data could be used to predict when a "potential parent" statistically becomes a likely parent. Viability should certainly be a consideration, but need not be the only factor in determining when a pregnancy is likely to be successful. The determination is best left up to courts that are in a position to develop a test designed to reflect the fact-specific nature of the inquiry.

A more difficult question concerns what the standard of care should be for establishing liability under loss of potential parenthood. There is no specific mens rea requirement because intentional killing of a fetus already has a remedy in most states under fetal homicide statutes.[174]

Strict liability, which imposes liability without fault, is clearly too high.[175] Applying strict liability is only appropriate if we presume that compensation of the injured parents is desirable, regardless of the deterrent effect of liability.[176] However, the purpose of this Note is not to argue for a change in the underlying policy of tort law, but to propose a solution that works within the existing framework. Our tort law system is one of corrective justice and social utility, with very few exceptions.[177] Under these policies, it would only make sense to impose strict liability if any conduct which resulted in the death of a fetus was inherently and inappropriately risky (ultrahazardous activity), or if that conduct could be deterred in a way that did not result in an unreasonable burden to the acting party or to society at large (cost-benefit analysis).[178] To a certain extent,

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173. *See* KEETON ET AL., *supra* note 137, at 369.

174. *Supra* notes 115–16 and accompanying text.

175. *See* DOBBS, *supra* note 39, at 15 (noting that strict liability may go beyond the principle of corrective justice by imposing liability for conduct that was not wrong but still resulted in harm).

176. *See id.* at 15 n.8 (noting the argument "that if anyone, wrongdoer or not, compensates the plaintiff, corrective justice has been done").

177. *See id.* at 18 (noting that "judges feel heavily committed to a system of corrective justice"); *see also id.* at 3 (noting that the two best known instances of common law strict liability are "cases in which the defendant engages in some abnormally dangerous activity and those in which the defendant manufactures a defective product").

178. *Id.* at 17.

the reduction of risk will already be incorporated in whatever legal consequences accompany the act which injures or affects the mother. That is to say, if vehicular manslaughter carries a negligence standard, a driver is not likely to be any more careful if the person he hits with his car is pregnant. Our tort system has already determined that a negligence standard is appropriate for regulating everyday activities.[179]

Therefore, one potential solution is that because the injury must be a result of some prohibited activity, the same standard of care should apply to loss of potential parenthood as to the underlying act. For example, if a doctor commits professional negligence while delivering a baby, an act resulting in a miscarriage, the standard of care required to avoid a loss of potential parenthood claim is the same as that required to avoid a malpractice claim. In practice, however, this solution may lead to inconsistent outcomes. There is potential confusion for a variety of circumstances under this standard: (1) where the underlying wrongful act occurs in a different jurisdiction than the time of loss of potential parenthood (death of the fetus); (2) where more than one underlying prohibited act is involved, with varying standards of care; and (3) the potential that differently situated defendants may be subject to similar standards of care in a way that violates common sense. A hypothetical example of this varying standard of care possibility might involve a doctor who is aware that he is dealing with a pregnant individual, and is thus on notice regarding a potential loss of parenthood situation. He could nevertheless be subject to a higher standard of care—for example, a standard of gross negligence in the case of malpractice—than the average person driving down the street who is subject to a plain negligence standard and is on no particular notice. This result seems unfair and illogical.

The first two concerns are easily resolved. The specification in subsection 3 that loss of potential parenthood is measured from the time the injury is sustained eliminates the jurisdictional problem. Similarly, a rule that the lower standard of care is to be applied in an incident involving multiple wrongful acts would resolve the second problem. However, the concern that individuals might be subject to liability for a standard of care that does not fit the circumstances is not so easily resolved.

Alternatively, requiring a criminal negligence standard would set the bar too high for most claimants to meet.[180] The goal is to facilitate recovery for

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179. *See id.* at 30 (arguing that "traditional tort rules governing conduct to a large extent reflect social values and norms already in existence in the culture"); *see also id.* at 52 (noting that conduct that imposes only a moderate risk of harm to others, for example, everyday activities like driving a car, "is clearly at most only negligent conduct").

180. *Id.* at 5 (noting that "the most fundamental basis for criminal liability is intent, often

wronged individuals in these instances, not to make it more difficult. Therefore, a better solution is perhaps to retain negligence, the standard used for wrongful death. Speiser describes that standard as follows: "[I]f one sought to be held liable for wrongful death is not personally guilty of negligence or other actionable wrongdoing, and is not vicariously liable for the asserted negligence of another, there is no liability for wrongful death."[181] This provides a relatively clear-cut rule, ensuring consistency in application. Therefore, subsection 3 implements an ordinary negligence standard.

Subsection 3 also includes a provision for vicarious liability. Vicarious liability is standard in wrongful death actions as well. It is designed to identify all legally responsible parties and also makes it more likely that the victim can obtain relief, as vicariously liable employers are probably "deep pockets," covered by insurance.

Subsection 4 addresses the grounds upon which a loss of potential parenthood claim may be brought. Because it is not a derivative action, there is no need to provide compensation for any suffering or loss to the fetus. Rather, the focus is upon the loss suffered by the potential parents. The challenge is to accurately describe what injury the compensation is remedying. The emotional anguish is presumably the motivating factor behind the suit, and is proper. The loss suffered by the parents could also be described as the loss of the expectation they had concerning the rewards and benefits of becoming parents. Additionally, medical expenses incurred during or as a result of the death of the fetus, and resulting funeral costs, are one of the clear pecuniary losses suffered by potential parents and should be compensated. Finally, punitive damages allow for adjustment in the case of particularly egregious behavior. Such damages should only be granted in extraordinary circumstances because as soon as wrongful conduct crosses the line to intentional conduct, the wrongdoer will likely be subject to state fetal homicide statutes.[182]

Finally, subsection 5 proposes an alternative or supplement to monetary damages, which are the obvious form of remedy that should be available under this type of action. Certainly, under an economic tort theory, monetary damages are necessary as a deterrent.[183] However, one premise of the proposal

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very specific intent"). Proving intent to cause harm is a substantial burden upon the plaintiffs. Additionally, neither wrongful death actions nor the proposed loss of potential parenthood claim are designed to deal with intentional harm which is already dealt with in criminal actions like homicide and fetal homicide.

181. SPEISER ET AL., *supra* note 44, § 2:1.

182. *See, e.g., supra* note 115 and accompanying text (discussing California's fetal homicide statute and noting that many states have enacted similar laws).

183. *See* DOBBS, *supra* note 39, at 20 (describing a line of economic and public policy thinking which defines economics broadly to include a consideration of all human wants and

that alternative remedies may be more effective is that the motivation of aggrieved parents is not monetary. A great deal of modern research indicates that, in fact, people seeking legal redress are actually seeking apologies and acknowledgement of wrongdoing.[184] Parties who receive acknowledgement that they have been wronged are equally or more satisfied than ones receiving a monetary award but receive no such acknowledgement.[185] Increasing use of apologies in the legal context, including the adoption by several states of statutes which prevent them from being admissible in court as evidence of liability, supports this idea.[186] Under this theory, subsection 5 allows for a reduction of monetary damages with the consent of the parents, if the tortfeasor agrees to carry out some other form of restitution. That restitution might take the form of community service, including work with a particular charity, or something more straightforward, like a public apology and a letter acknowledging wrongdoing and remorse. In addition to higher satisfaction with the legal process, a benefit of this approach may be to lower the overall cost of the suit to all parties.

C. Provisions Omitted from the Model Statute

This model statute makes no exemptions for certain classes of tortfeasors. This is in contrast to the exemption in the Texas amended statute for physicians, discussed in Part II.C.[187] The Texas amendment is notable because it bars health providers from liability, even though that class of individuals is

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desires, and arguing that risky actions should be deterred by not permitting such actors to externalize their costs).

184. *See, e.g.*, Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 463–65 (2003) (describing survey research suggesting that "claimants desire apologies and that some would not have filed suit had an apology been proffered").

185. *See id.* at 464 (documenting anecdotal evidence of the value of an apology). Robbennolt notes:

> [Anecdotal evidence includes] settlement negotiations coming to a standstill over the issue of apology even after agreement on an appropriate damage amount has been reached, of plaintiffs who would have preferred an apology as part of a settlement, and of occasions on which a failure to apologize promoted litigation by adding insult to injury.

Id.

186. *See id.* at 470 (citing as examples CAL. EVID. CODE § 1160 (West Supp. 1995), COLO. REV. STAT. § 13-25-135 (2003), FLA. STAT. ch. 90.4026 (2003), MASS. GEN. LAWS ch. 233, § 23D (2002), TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004), and WASH. REV. CODE § 5.66.010(1) (2002)).

187. *Supra* notes 86–87 and accompanying text.

the most likely to be on notice that their actions could have consequences for a fetus, and is also most likely to be in a position to avoid being held liable for negligent actions. Supporters of the bill argue that it "would close a gap in current law by allowing criminal and civil penalties for a third party who wrongfully injured or killed an unborn child against the wishes of the mother through actions such as murder, assault, or drunk driving."[188] The history explains the exception for healthcare providers saying: "The bill's specific, clear exceptions for lawful medical procedures performed with a woman's consent would protect healthcare providers from frivolous lawsuits." However, it doesn't distinguish lawful medical procedures performed with a woman's consent from the same procedures performed negligently. The Fort Worth court failed to note any possible argument that a patient cannot consent to a negligently performed procedure, and thus might still have an action against a physician for a procedure to which she agreed. The exception for healthcare providers states: "The bill's specific, clear exceptions for lawful medical procedures performed with a woman's consent would protect healthcare providers from frivolous lawsuits."[189] However, the bill fails to distinguish lawful medical procedures performed with a woman's consent from the same procedures performed negligently. In upholding *Witty* until the 2003 amendment took effect, the Fort Worth court did not discuss any possible argument that a patient cannot consent to a negligently performed procedure, and thus might still have an action against a physician for a procedure to which she agreed. It seems unlikely that frivolous lawsuits would in fact abound without such an exception. Additionally, the grief suffered by would-be parents who lose a fetus through the negligence of a doctor is no different from that occurring as a result of the actions of a stranger. Therefore, the model statute does not include an exception for medical providers.

Wrongful death statutes generally include provisions that prohibit proceeds of a judgment for damages awarded from being applied to the debts of the deceased party.[190] The reasoning behind these provisions is that the statute creates a new cause of action and vests it in the survivors.[191] The wrongful death recovery does not go to the deceased's estate and therefore is not subject

188. Texas Bill Analysis, S.B. 319, 78th Leg., Reg. Sess., at 3 (Tex. 2003), *available at* http://www.capitol.state.tx.ushrofr/hrofr.htm.

189. *Id.* at 5.

190. *See, e.g.*, NEV. REV. STAT. ANN. § 41.085(4) (West 2003) (providing, "[t]he proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent").

191. DOBBS, *supra* note 39, at 804.

to the deceased's creditors.[192] That reasoning simply does not apply to Loss of Potential Parenthood where parents are being compensated for their own losses, and the deceased will not have any creditors.

D. Loss of Potential Parenthood Avoids the Problems of Wrongful Death

A key question is whether the proposed remedy provides results valuable enough to justify creating yet another legal form of action. This remedy certainly goes beyond the scope of traditional tort claims whose goal is simply to make the plaintiff whole again.[193] Loss of Potential Parenthood makes no such claim; it eliminates entirely the pretense that money can mend a parent's heart. Rather, it aims to serve various goals like reconciliation and forgiveness.

The primary benefit of Loss of Potential Parenthood is that it avoids all mention of the status of the decedent, so no conflict with the definition of legal personhood in other areas of the law occurs. Additionally, Loss of Potential Parenthood is more consistent with the modern view of parenthood and parental rights, particularly with respect to the rights of minors. As the case law surveyed in Part III.D makes clear, parental rights reign supreme.[194] By recognizing and protecting those rights, the logical dissonance between what the law is doing (compensating parents for their loss) and the method it is using (allowing recovery by a deceased fetus) is reduced. However, implementing this new remedy may have additional benefits.

First, it would provide a measure of deterrence, although this might be negligible in cases except for those where the mother was noticeably pregnant. Second, it would actively reconcile the purpose of the suit with the stated aim of the remedy. Conceptually, it is a much prettier solution than the semantics dance where:

> what is denied under the name of mental anguish or sentiment may, as a practical matter, be permitted under the name of lost services or lost companionship, and, as elsewhere in the law of damages, the denial of damages for emotional injuries really appears only to mean that such damages may be recovered, as long as they are not awarded in exorbitant sums.[195]

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192. *Id.*

193. *Id.* at 17 (noting that "[c]ompensation of injured persons is one of the generally accepted aims of tort law").

194. *Supra* notes 140–62 and accompanying text.

195. DOBBS, *supra* note 39, at 561.

To a certain degree, parents who bring suit are seeking punishment of the wrongdoer, a purpose best left to criminal law, not tort law. However, the suit also provides a certain degree of psychological comfort, regardless of the monetary recovery—in the form of legal recognition that the parents have suffered a terrible loss. And that leads to a final possible benefit: reducing the overall amount of tort claims.

There is consistent uproar over the state of tort law in this country due to exorbitant recoveries by plaintiffs.[196] Even though some commentators argue that such claims are overblown, a reduction in the size of civil awards would likely please the majority of the public.[197] By severing the emotional damages from the monetary, perhaps it will be clearer what is being asked of courts. Although it is difficult to put a monetary value on someone's grief, statutory guidelines can more reasonably impose recovery caps when a proposed pecuniary evaluation based on purely speculative future income is unhooked from the analysis. When it is clear that only emotional distress is being compensated, a limitation on the monetary award seems more reasonable. The effectiveness of recognition of loss is a tool of jurisprudence that is being increasingly recognized.[198] Perhaps the best way to reform the tort system is to make it work for a legitimate purpose other than monetary compensation. Making an individual whole does not always lie solely in economics. Loss of Potential Parenthood and its provisions for alternative compensation is an application of that truism.

E. Possible Drawbacks and Their Rebuttals

Of course, no solution is perfect. There are several possible drawbacks to the proposed remedy. Likely arguments against implementation of Loss of Potential Parenthood closely mirror those that argue against applying wrongful death statutes to fetuses. Concerns that this tort would expose people to criminal prosecutions even if they did not know that a woman was pregnant are red herrings. If a drunk driver hits a car and kills the driver along with two

196. *See, e.g.*, Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y L. & ETHICS 357, 357–61 (2005) (noting that tort reform lobbyists promote a view that "the civil justice system is 'out of control' and needs to be scaled back").

197. *See, e.g.*, Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates Our Fundamental Form of Government*, 46 BOSTON B. J. 26, 27 (2002) (noting that many states have passed tort reform laws over the last twenty years with the support of the public).

198. *Supra* notes 184–86 and accompanying text.

children in the back seat, the driver can be held criminally liable for the death of all the passengers, including the children, whether or not the driver knew the children were in the car.[199] Under Loss of Potential Parenthood, the death of an unborn child would not subject a tortfeasor to liability any more unfair or unexpected than that imposed for the death of born children in the back seat. Prosecutions under the law would have to meet all current requirements for culpable states.

An additional argument that might be applied against the proposal is that it would make the already serious tort-reform crisis worse by exposing doctors to increased liability for medical malpractice suits. It could result in higher malpractice insurance rates for doctors and in doctors restricting or limiting the medical procedures they were willing to perform on pregnant women. For example, a doctor could refuse to operate on a pregnant woman in a coma if the fetus would have to be lost to save the woman's life. This could increase the costs of an already overburdened health care system and could result in less access for women to obstetricians and gynecologists. However, physicians would not be required to implement any higher standard of care than they currently do. Rather, their actions simply would not be exempt because they involved an unborn child. The costs to physicians might be higher, but it is unlikely to impact the overall health system significantly.

Some opponents might argue that loss of parenthood would unwisely create a new cause of action for civil lawsuits and could lead to increases in frivolous litigation and to criminal penalties in inappropriate situations. For example, a pregnant woman walking on a sidewalk who tripped, fell, and later miscarried could sue because of the uneven sidewalk, or a woman who miscarried after being struck from behind in an automobile collision could bring a lawsuit. The bill also would raise questions about whether people who destroyed frozen embryos would face criminal or civil penalties. However, these issues could be addressed through legislation by providing baseline requirements for establishing causation and successful completion of pregnancy.

Additional potential pitfalls that might be encountered in implementing the new remedy are common to all new legislation, including a lack of jurisprudence resulting in some uncertainty in the law in the near future.

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199. *See* MODEL PENAL CODE §§ 2.02(2)(c), 210.1, 210.2(1)(b) (1985) (dividing the mens rea for reckless murder into four parts: that the offender have (1) consciously disregarded, (2) a substantial, and (3) unjustifiable risk to human life, (4) under circumstances manifesting an extreme indifference to human life). Under this standard, an offender must have consciously disregarded the risk that their actions posed to human life generally, but they need not have had knowledge that their actions would affect any specific party.

Concerns about the potential for frivolous or abusive suits always exist when a new cause of action arises. However, the flexible common law system followed by our courts is ideally suited to dealing with these concerns. These concerns are simply not serious enough to justify denying deserving parties a legal remedy for wrongs they have suffered.

V. Conclusion

Parents who have suffered the loss of a fetus clearly deserve a remedy. But wrongful death is not it. Loss of Potential Parenthood provides a remedy, as well as a solution to the problems associated with wrongful death statutes as applied to fetuses. A completely coherent legal system is perhaps unattainable, but consistency should still be an aspiration of lawmakers and Loss of Potential Parenthood is a step in that direction.