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Including Victims Without a Voice: Amending Indiana's Child Wrongful Death Statute

Justin Curtis

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INCLUDING VICTIMS WITHOUT A VOICE: AMENDING INDIANA'S CHILD WRONGFUL DEATH STATUTE

I. INTRODUCTION

Ashley and her husband, David, are driving home from the hospital after Ashley was taken there due to pains in her abdomen. The doctor conducted a few tests and reassured Ashley that the child growing inside her was perfectly fine. Ashley knows she is being overly cautious because this is her first pregnancy, but she has wanted this child for some time and does not want to take any risks nearly six months into the pregnancy. The new car smell of their recently purchased silver Tahoe is not helping her already irritated stomach. As David accelerates through the last intersection before their home, Ashley, to her horror, catches a glimpse of a blue sports car that is only feet away from slamming into her side of the Tahoe.

John is driving home to get some sleep before his long shift the following morning. He knows he should have left the bar earlier, but it is not often he gets the opportunity to have a few drinks with his old high-school friends now that he is working the long hours at his new job. Driving somewhat faster than usual in his blue Mustang, he approaches an intersection and races through the usually deserted crossing, believing that few vehicles will be out this late in the evening. The last thing John remembers seeing before waking up on the side of the road is the silver SUV that appeared seemingly out of thin air.

Ashley and her husband are rushed back to the hospital. The paramedic told the couple they were lucky it was a sports car that collided with their SUV and not something larger. Both Ashley and David have few injuries themselves, but the irritation in Ashley's stomach is no longer present, ironically troubling her even more than when the pain was unbearable. The doctor performs a few tests and debates how to tell the couple, whom he reassured just an hour before that their child was fine, that their child did not survive the collision.

Later on, John is charged with and convicted of reckless driving and involuntary manslaughter for the death of the child.¹ Ashley and David initiate a suit for wrongful death for the loss of their child, wishing to use

¹ See *Horn v. Hendrickson*, 824 N.E.2d 690, 700 (Ind. Ct. App. 2005). The Indiana Court of Appeals criticized the Indiana Supreme Court's interpretation of Indiana's child wrongful death statute. *Id.* "Under *Bolin's* interpretation of the statute, a person whose wrongful act results in the death of a viable fetus owes no civil duty to the parents and is not a tortfeasor, even if that same person is convicted of feticide based on the same facts." *Id.* at 701. See generally *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002).

1212 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

the money to start a new life in a different town closer to their parents.² This hypothetical will demonstrate, as this Note progresses that Ashley and David may or may not have a cause of action for the wrongful death of their unborn child, depending solely on the state where the tragic car accident occurred.³

The late nineteenth century marked the introduction of wrongful death claims in the United States.⁴ Prior to this time, dependents of an individual tortiously killed by another had no remedy at law to compensate them for their loss, even if the individual killed was the sole provider for the entire household.⁵ Although early wrongful death claims compensated survivors for only the lost economic benefits the tortiously killed individual would have provided but for his or her untimely death, wrongful death claims eventually evolved into a vehicle for compensating survivors for their emotional trauma as well.⁶ As wrongful death laws expanded to cover non-pecuniary losses, a new question emerged that has divided the states: can parents, under a

² The following hypothetical is completely fictional and entirely the creation of the author.

³ See *infra* Part II.C (explaining the three major approaches that states use to award damages for fetal wrongful death: states use the live birth, viability, and pre-viability approaches to determine if a survivor can bring a cause of action for the death of a fetus).

⁴ See *Mobile Life Insurance Co. v. Brame*, 95 U.S. 754, 759 (1877). At common law, a tortfeasor was not liable to any dependents of an individual he tortiously killed. *Id.* at 756-57. A cause of action for injuries simply died with the injured individual. *Id.* at 759. Yet, the Supreme Court nevertheless followed New York's lead in holding that the death of a human being does carry civil liability for the tortfeasor to those individuals dependant on the negligently killed individual. *Id.*

⁵ See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 127 (5th ed. 1984). The main purpose of the early wrongful death statutes was to compensate the survivors for the lost economic benefits they would have received if the deceased was still alive. *Id.* A trait that the early wrongful death statutes share with current wrongful death statutes is that there are only a limited number of individuals who can seek recovery, typically a husband, wife, child, or parent. *Id.* The first wrongful death statute included compensation to a parent seeking recovery for the death of a child even though the damages would be too speculative to calculate. *Id.*

⁶ See *Krouse v. Graham*, 562 P.2d 1022, 1025 (Cal. 1977). A wrongful death suit was initiated by a woman's husband after she was killed in a car accident. *Id.* at 1024. Though the woman provided little economic support to the family, the court allowed the husband recovery for the loss of his wife's love, companionship, comfort, affection, society, moral support, sexual relations, and physical assistance around the home. *Id.* at 1026. The court specifically held that wrongful death could be used to compensate survivors for their emotional trauma even though it is not a pecuniary loss and is at times very speculative. *Id.* at 1025-26. See *KEETON ET AL., supra* note 5, § 127. In line with generally expanding tort liability, many states allow substantial awards for loss of society and comfort under wrongful death statutes. *Id.* Currently, many states have expanded wrongful death claims to include recovery for loss of consortium, loss of love and affection, and loss of guidance and advice that the survivor would have received but for the death of the decedent. *Id.*

theory of wrongful death, be compensated for the loss of their expectant child not yet born?⁷

States are sharply divided on how to approach fetal wrongful death, due to drastically different ideas concerning the legal and moral identity of the unborn.⁸ Though the majority of states have recognized a cause of action for parents who lose a viable, unborn child through the negligent actions of a third party, Indiana recently chose to revert from the viability rule and follow the common law policy of allowing recovery for prenatal injuries only if a child survives until birth.⁹ Though compelling arguments can be advanced for following different approaches to fetal wrongful death, Indiana has chosen to follow a rule of law that produces inequitable and incongruous results by denying recovery to parents whose unborn child is tortiously killed unless that child survives until birth.¹⁰

This Note advocates that the current interpretation of Indiana's Wrongful Death or Injury of a Child Statute is flawed and produces inequitable results, and should be amended by the state legislature to advance a more just and logical approach.¹¹ Part II of this Note highlights the progression of both the rights of the unborn child and

⁷ See generally Jill D. Washburn Helbling, Note, *To Recover or not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363 (1996). Washburn's Note surveys different approaches states have taken when addressing the issue of fetal wrongful death claims. *Id.* at 366. Three prominent approaches are utilized by the states: the born alive rule, the viability rule, and the pre-viability rule; each takes drastically different views of compensating parents for the loss of their unborn child. *Id.* at 429-30. See *infra* Part II.C (discussing the application and use of the three approaches to fetal wrongful death).

⁸ See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 495 (1989) (reestablishing the proposition that states have a compelling interest in protecting the life of the unborn). *But see* *Justus v. Atchison*, 565 P.2d 122,133 (Cal. 1977) (advancing the proposition that damages resulting from the loss of a fetus are too speculative to quantify; therefore, states should deny recovery under a theory of fetal wrongful death).

⁹ See *infra* Part II.C.2 (identifying the states that allow fetal wrongful death recovery if a child is viable). See *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002). Indiana allowed fetal wrongful death recovery from 1972 to 2002. *Id.* at 207. In *Bolin*, the Indiana Supreme Court ruled that the legislature intended recovery for only children that received a prenatal injury and survived until a live birth, reversing thirty years of established law in the state. *Id.*

¹⁰ See *Bolin*, 764 N.E.2d at 207 (stating the current position of Indiana law regarding fetal wrongful death). See also Raina Weaver, Note, *Torts – Wrongful Death – The Birth of Fetal Rights under Arkansas's Wrongful Death Statute: The Arkansas Supreme Court Recognizes a Fetus as a "Person."* *Aka v. Jefferson Hospital Ass'n*, 344 Ark. 627, 42 S.W.3d 508 (2001), 24 U. ARK. LITTLE ROCK L. REV. 359 (2002). Weaver's Note contends that the overriding reason for overturning Arkansas's historical adherence to the born alive rule was the inconsistent treatment of fetuses in Arkansas law. *Id.* at 379. Arkansas realized the need for consistent protection of the unborn under its laws and amended several sections so as to protect viable fetuses in every portion of Arkansas law except abortion, due to federal constitutional constraints. *Id.* at 384.

¹¹ IND. CODE § 34-23-2-1 (2008).

1214 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

wrongful death statutes until they merge in fetal wrongful death statutes, focusing on Indiana law.¹² Part III analyzes the Indiana Supreme Court's interpretation of the state's current child wrongful death statute, criticizing the court's decision to revert from a viability approach to the common law born-alive approach.¹³ Part IV proposes that Indiana reestablish the viability approach it followed for thirty years and introduces a model amendment which could be added to the state's child wrongful death statute to achieve this goal.¹⁴

II. BACKGROUND OF FETAL PROTECTION AND CIVIL RESPONSES IN INDIANA

Modern moral understandings and technological advances have largely contributed to the recognition and growth of fetal rights in a majority of American states that were inconceivable throughout most of our history.¹⁵ Criminal law was the first to recognize the rights of the fetus in ancient times, and these rights have expanded today to protect the unborn in various areas of criminal and civil law, culminating with wrongful death causes of action.¹⁶ Though fetal rights are expanding to

¹² See generally *infra* Part II. Parts II.A-B begin by examining the historical development of fetal rights which have expanded exponentially in the latter part of the twentieth century. *Id.* Part II.C examines the introduction of wrongful death statutes into the United States and its development into a mechanism for compensating parents for the negligent death of their fetus. *Id.* Part II.D examines the development of wrongful death and fetal rights in Indiana leading to the state's current child wrongful death statute. *Id.*

¹³ See *infra* Part III (arguing that the Indiana Supreme Court's interpretation of the state's child wrongful death statute is incorrect and in violation of the state's Equal Privileges Clause).

¹⁴ See *infra* Part IV (proposing an amendment to Indiana's wrongful death statute to clarify the legislature's intent of utilizing a viability approach).

¹⁵ See *White v. Yup*, 458 P.2d 617, 623 (Nev. 1969). "An unborn child is a part of its mother until birth and thus has no juridical existence. This proposition has no scientific or medical basis in fact and has been expressly rejected by numerous authorities." *Id.* (citations omitted). See also *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394, 397 (D.C. 1984) (holding that because a cause of action arises for prenatal injuries if the child survives until live birth, there is no reason to cut off the right to be free from tortious injury simply because the injury is severe enough to cause death).

¹⁶ See generally Jennifer A. Brobst, Note, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127 (2006). Brobst's Note examines the progression of fetal rights in criminal and civil law. *Id.* at 130-32. The Note identifies that fetal rights are protected to some extent in homicide, civil, child endangerment, and abortion law. *Id.* at 127. See Ronen Perry, Note, *It's a Wonderful Life*, 93 CORNELL L. REV. 329 (2007-2008). This Article analyzes another emerging area of fetal rights—wrongful life. *Id.* at 329. Contrary to wrongful death claims, wrongful life claims ask the question of whether a severely disabled child has been harmed by the mere fact that it was born. *Id.* at 331. Wrongful life is a tort action against another person who negligently enabled the child's birth when there were reasons to believe the mother would have terminated if she had known all the facts. *Id.* For multiple reasons, few states recognize a cause of action for

unprecedented areas through legislative and judicial initiative, Indiana is among a small minority of states that has yet to advance fetal protection into the area of wrongful death consistent with contemporary standards.¹⁷ Part II.A begins with a classical examination of fetal rights leading to the expansion of fetal rights after the *Roe v. Wade* decision examined in Part II.B. Part II.C discusses the different approaches jurisdictions have taken when assessing whether wrongful death actions are permitted for the death of a fetus. Finally, Part II.D examines Indiana's contradictory and inconsistent approach to defining a person for the purposes of its wrongful death statutes, more specifically Indiana's current Wrongful Death or Injury of a Child Statute.¹⁸

wrongful life, but a primary reason is that a child is suing an individual that had nothing to do with the cause of the abnormality or sickness from which the child is suffering. *Id.*

¹⁷ See *infra* Part II.C.1 (listing the fourteen states which still follow the common law born-alive approach).

¹⁸ IND. CODE § 34-23-2-1 (2008). Indiana's Wrongful Death or Injury of a Child Statute reads:

Sec. 1. (a) As used in this section, "child" means an unmarried individual without dependents who is:

- (1) less than twenty (20) years of age; or
- (2) less than twenty-three (23) years of age and is enrolled in a postsecondary educational institution or a career and technical education school or program that is not a postsecondary educational program.

(b) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child.

The action may be maintained by:

- (1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;
- (2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and

(3) a guardian, for the injury or death of a protected person.

(c) In case of death of the person to whom custody of a child was awarded, a personal representative shall be appointed to maintain the action for the injury or death of the child.

(d) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

(e) In an action to recover for the death of a child, the plaintiff may recover damages:

- (1) for the loss of the child's services;
- (2) for the loss of the child's love and companionship; and
- (3) to pay the expenses of:
 - (A) health care and hospitalization necessitated by the wrongful act or omission that caused the child's death;
 - (B) the child's funeral and burial;
 - (C) the reasonable expense of psychiatric and psychological counseling incurred by a surviving parent or minor sibling of the child that is required because of the death of the child;

1216 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

A. *Classical Application of the Law to the Unborn*

Our historical concepts of protecting fetal rights are a far cry from modern understandings that extend protection of the unborn into tort claims such as wrongful death.¹⁹ The traditional line defining the difference between a legally recognized human being and a fetus, which had no legal identity outside its mother, was the quickening of a child within its mother's womb.²⁰ The rationale for this early definition was

(D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and

(E) the administration of the child's estate, including reasonable attorney's fees.

(f) Damages may be awarded under this section only with respect to the period of time from the death of the child until:

(1) the date that the child would have reached:

(A) twenty (20) years of age; or

(B) twenty-three (23) years of age, if the child was enrolled in a postsecondary educational institution or in a career and technical education school or program that is not a postsecondary educational program; or

(2) the date of the child's last surviving parent's death;

whichever first occurs.

(g) Damages may be awarded under subsection (e)(2) only with respect to the period of time from the death of the child until the date of the child's last surviving parent's death.

(h) Damages awarded under subsection (e)(1), (e)(2), (e)(3)(C), and (e)(3)(D) inure to the benefit of:

(1) the father and mother jointly if both parents had custody of the child;

(2) the custodial parent, or custodial grandparent, and the noncustodial parent of the deceased child as apportioned by the court according to their respective losses; or

(3) a custodial grandparent of the child if the child was not survived by a parent entitled to benefit under this section.

However, a parent or grandparent who abandoned a deceased child while the child was alive is not entitled to any recovery under this chapter.

Id.

¹⁹ Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 175-79 (1998). Under English common law, homicide was the killing of a human by another human. *Id.* at 175. Because a fetus was not considered a "person" or a "reasonable creature in being[.]" killing it was not regarded as homicide. *Id.* (quotations omitted). See also 1 WILLIAM BLACKSTONE, COMMENTARIES *129.

²⁰ *Britt v. Sears*, 277 N.E.2d 20, 25 (Ind. Ct. App. 1971) (citing BLACKSTONE, *supra* note 19, at *129) (noting that the killing of a "quick" fetus was not considered murder under ancient law, yet rose to the lesser crimes of homicide or manslaughter). The biblical passage from the Apostles' Creed, "From thence He shall come to judge the quick and the dead[.]" may have provided the rationale for ancient lawmakers to convey a legal identity upon a "quick" fetus. Brobst, *supra* note 16, at 131 (footnote omitted).

believed to stem more from an acceptance of the inability to medically determine when a fetus was alive, or if outside factors contributed to its death rather than moral and ethical beliefs concerning the beginning of life.²¹ This early formulation of a line defining legal identity did not carry over to the law developing in the American colonies.²² The accepted rule in American common law, which also had roots reaching back many centuries, was “that the destruction of a fetus in utero is not a homicide.”²³ Rather than recognize a legal identity at the time of quickening, American law accepted its own inability to medically determine the difficult questions of whether a fetus was alive, and whether a certain action resulted in the death of the fetus by denying recovery unless a child was born alive and perished after that point as a result of the injuries it sustained.²⁴ Indeed, at early common law, the fetus had no rights, either criminal or civil, in American jurisdictions.²⁵

²¹ See Philip A. Rafferty, *Roe v. Wade: A Scandal upon the Court, Part I: The Unsettling of Roe v. Wade*, 7 RUTGERS J.L. & RELIGION 1, 3 (2005) (noting that the competing rationale given for not bestowing a legal identity until a child had quickened was a religious belief that the body and soul did not infuse until the child was perfectly formed).

²² See *Michigan v. Guthrie*, 293 N.W.2d 775, 777 (Mich. Ct. App. 1980). In describing the early application of the born alive rule in the United States, the court stated,

[I]n the United States the ‘born alive’ requirement has come to mean that the fetus be fully brought forth and establish an ‘independent circulation’ before it can be considered a human being. Proof of live birth and death by criminal agency are required beyond a reasonable doubt to sustain a homicide conviction. ‘Independent circulation’ can be established by evidence of the fetus having breathed, but such proof usually is not conclusive in the absence of the evidence of life, such as crying.

Id. (quoting LAFAYETTE & SCOTT, CRIMINAL LAW, § 67, pp. 530–31). Though the court through dicta described the born alive rule as archaic and expressed a desire to change the rule, it was bound by precedent and upheld the current application of the law, which did not confer a legal identity on a fetus *Id.* at 780–81.

²³ *Massachusetts v. Cass*, 467 N.E.2d 1324, 1328 (Mass. 1984). *E.g.*, *New Mexico v. Willis*, 652 P.2d 1222, 1223 (N.M. Ct. App. 1982) (“The early common law did not attach human status to a fetus[.]”); *Michigan v. Guthrie*, 293 N.W.2d 775, 776 n.1 (Mich. Ct. App. 1980) (quotation omitted) (“No appellate court of the United States or England has ever, as a matter of common law definition, treated a fetus as a person for the purpose of criminal law.”); *Ohio v. Dickinson*, 275 N.E.2d 599, 601 (Ohio 1971) (“[Ohio laws do not] include an unborn child in the category of persons against whom the crime of homicide could be committed.”).

²⁴ *Nebraska v. Doyle*, 287 N.W.2d 59, 62 (Neb. 1980) (holding that technology at the time was unable to distinguish between stillborn children that perished due to natural causes and those that perished due to injuries inflicted upon the pregnant woman during gestation, and, therefore, finding that any conclusion on this matter was based on circumstantial evidence and mere speculation).

²⁵ See *Indiana v. Soale*, 74 N.E. 1111, 1112 (Ind. Ct. App. 1905) (“Personal rights of an infant do not occur until birth. Up to that time personal rights of an infant are not distinguishable from those of the mother.”); *Canfield v. State*, 56 Ind. 168, 170 (Ind. 1877)

1218 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

Indiana was no different from the rest of the country by denying a legal identity to the unborn.²⁶ In *Canfield v. State*, the Indiana Court of Appeals attempted to advocate a progressive position by awarding a woman damages when the father was ruled to have killed the child by abandoning the unwed mother during pregnancy.²⁷ Indiana's Supreme Court overruled the judgment, stating that "the *foetus in utero* never became a child within the meaning of the law authorizing proceedings for the maintenance of the bastard children after their birth."²⁸ Therefore, to support an indictment for feticide in Indiana, the child had to be born alive and subsequently die from its wounds sustained during gestation.²⁹ It would be many years until Indiana and the rest of the states would abandon the common law notion that criminal or civil liability for harming a fetus could occur only if that fetus was subsequently born alive.³⁰

B. *Roe v. Wade and the Expansion of Fetal Rights*

The traditional rules gradually gave way and were replaced by more contemporary theories of how to define a person for purposes of legal identity.³¹ The first areas of law to begin protecting the unborn focused

("[U]ntil a child is wholly born, and has attained an independent circulation and existence, it is but a *foetus in utero*, and not a human being within the meaning of the law defining the several grades of homicide.").

²⁶ See *infra* Part II.D (identifying Indiana's early trends of denying a legal identity to the unborn).

²⁷ 56 Ind. at 168. Though the case illustrates an antiquated law against premarital sex and abandoning a child, legally termed "bastardy," the case identifies what Indiana required for legal identity. *Id.* A child's lungs had to fill with air before the child could be considered a legal person for purposes of Indiana law. *Id.* at 170.

²⁸ *Id.* at 171. Although the court did not hold the father responsible for the child's death because the child was never a legally identified person, the court attempted to compensate the woman by holding the father liable for the costs associated with her pregnancy. *Id.*

²⁹ *Id.* at 170. The court held that the term "life" was synonymous with the term "respiration." *Id.* Therefore, the father was not held responsible for the child's death because the child's lungs were never inflated with air. *Id.* at 171.

³⁰ See *Britt v. Sears*, 277 N.E.2d 20, 20 (Ind. Ct. App 1971). Although Indiana had consistently followed the born alive approach to conferring a legal identity on individuals, the court, as a matter of first impression, was asked to interpret the term "person" in the wrongful death statute as including viable, unborn children. *Id.* at 21. Because the legislative record was silent on the matter, the court determined it had the duty to decide the rule and concluded that in equity a father should be allowed to recover for the wrongful death of his viable, unborn child. *Id.*

³¹ See *infra* Part II.C (identifying the three most common approaches states use to recognize legal identity for purposes of wrongful death). See, e.g., *Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002) (providing an example of a state following the born-alive approach); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 790 (S.D. 1996) (providing an

not on the potential life of the unborn child, but centered on protecting the mother or other living individuals.³² Prior to the general spread of antibiotics in the 1940s, criminal abortion statutes were passed because of the high mortality rate associated with such procedures, not to protect the potential life of the fetus.³³ Property law recognized fetuses for the purpose of keeping wealth with the living members of a family, not to protect the fetus's interests.³⁴ Though states were willing to protect living individuals when passing laws which centered on the unborn, states were not as willing to pass laws specifically intended to protect the potential life of an unborn child.³⁵

At first glance, the holding in *Roe v. Wade* appears to be a setback for proponents of granting the unborn full protection under the law, yet this historical case supplied the justification for the expansion of laws protecting the unborn.³⁶ Although *Roe* recognized that the fundamental

example of a state following the pre-viability approach); *O'Neill v. Morse*, 188 N.W.2d 785, 787 (Mich. 1971) (providing an example of a state following the viability approach).

³² See *Mississippi State Bd. of Health v. Johnson*, 19 So.2d 445, 447 (Miss. 1944) (revoking defendant's license to practice medicine after he performed an abortion which could have jeopardized the patient's life; the doctor was not disciplined or even criticized for terminating the pregnancy).

³³ *Roe v. Wade*, 410 U.S. 113, 149 (1973). It has been argued that Texas's real concern in enacting a criminal abortion law was to protect the pregnant woman from submitting to a procedure that placed her life in serious jeopardy. *Id.* at 148-49. "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure [sic] maximum safety for the patient." *Id.* at 150. See Steven G. Calabresi, *How to Reverse Government Imposition of Immorality: A Strategy for Eroding Roe v. Wade*, 31 HARV. J.L. & PUB. POL'Y 85 (2008). *Roe* was a controversial holding when it was decided in 1973. *Id.* at 85. One author, Steven Calabresi believes the holding in *Roe* goes against the general trends in American law. *Id.* Specifically, Calabresi contends that American law is based on positive law, and the holding of *Roe* goes against this general trend by supporting an immoral law. *Id.*

³⁴ See Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THER. INQ. L. 367, 385 (2007). During medieval times, access to wealth and political participation was controlled by one's status as a citizen. *Id.* The legal concept of fee tails, or the automatic passage of an estate and citizenship to the heirs of one's body, was created during this time to ensure that ordinary people did not have access to the political system or wealth. *Id.* Therefore, rather than creating these inheritance laws to protect any unborn progeny a person might have, laws were passed to continue to restrict wealth among a small class of individuals who had no desire to share their power. *Id.*

³⁵ See generally Rafferty, *supra* note 21, at 2 (recognizing that historically, medical technology was incapable of determining many difficult questions regarding the potential life of a fetus, and theological viewpoints differed dramatically on this issue; as a result, laws were not passed to protect fetuses).

³⁶ 410 U.S. at 113. *Roe* involved a challenge to a Texas statute which criminalized abortions. *Id.* at 117-18. Petitioners argued that the United States Constitution guaranteed their right to personal privacy which includes the right to terminate an unwanted pregnancy. *Id.* at 120. The state argued that its criminal abortion statute was passed to protect both the life of the mother and the potential life of the unborn child, both of which

1220 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

right of privacy limited a state's right to ban or criminalize abortions, it also clarified that states had a compelling interest to protect the potential for human life at the point of viability, taking recent decisions into account.³⁷ Following the guidelines adopted by *Roe* and its progeny, many states expanded their protection of the unborn into areas of the law which historically offered little or no protection to the fetus.³⁸

Classically, homicide law offered no protection to a fetus that was not subsequently born alive.³⁹ Today, thirty-four of the fifty states have enacted statutes that to some extent criminalize killing of an unborn child.⁴⁰ On May 5, 1995, Indiana passed its own feticide statute, which

were compelling interests sufficient to overcome strict scrutiny. *Id.* at 122. The Supreme Court ruled for the petitioners up until the third trimester of pregnancy where the Court held the state's compelling interest in protecting the potential life of the unborn child outweighed the pregnant woman's right of privacy in most situations. *Id.* at 164.

³⁷ *Id.* at 162-63. The court placed no limitations upon states as to when their interest in protecting prenatal life began, thereby allowing the states to protect the unborn from the point of conception in other areas of the law. *Id.* The Supreme Court found a compelling interest in protecting prenatal life, yet the holding of the case also acknowledged that women have a fundamental right to private autonomy that outweighs the state's interest to a certain degree. *Id.*

³⁸ See, e.g., FLA. STAT. ANN. § 782.09 (West 2007) (Florida's feticide statute allows a charge of murder for the killing of a quick fetus); GA. CODE ANN. § 16-5-80 (2003 & Supp. 2006) (Georgia's statute provides that the killing of any prenatal child, regardless of its stage of development, is murder); 720 ILL. COMP. STAT. 5/9-1.2 (2006) (Illinois's feticide statute allows recovery for killing any prenatal child, regardless of its stage of development).

³⁹ See *Canfield v. Indiana*, 56 Ind. 168, 168 (Ind. 1877) (according to the court, a fetus did not become a living person until its lungs were filled with air).

⁴⁰ Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767, 770 (2007). See, e.g., ALASKA STAT. § 11.41.150 (2006) (homicide statute includes pre-viable fetuses); ARIZ. REV. STAT. ANN. § 13-1102 (2001 & Supp. 2006) (homicide statute includes pre-viable fetuses); ARK. CODE ANN. § 5-1-102(13)(B)(i)(a) (2006) (homicide statute includes fetuses twelve weeks or greater); CAL. PENAL CODE § 187 (West 1999) (homicide statute includes pre-viable fetuses); FLA. STAT. ANN. § 782.09 (West 2007) (homicide statute includes quick fetuses); GA. CODE ANN. § 16-5-28 (2003 & Supp. 2006) (homicide statute includes pre-viable fetus); IDAHO CODE ANN. § 18-4001 (2004) (homicide statute includes pre-viable fetuses); 720 ILL. COMP. STAT. 5/9-1.2 (2006) (homicide statute includes pre-viable fetuses); IND. CODE § 35-42-1-6 (2008) (homicide statute includes viable fetuses); KY. REV. STAT. ANN. § 507.020 (LexisNexis 1999); LA. REV. STAT. ANN. § 14:32.5 (1997 & Supp. 2007) (homicide statute includes pre-viable fetuses); MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis Supp. 2006) (homicide statute includes viable fetuses); MICH. COMP. LAWS § 750.322 (2004) (interpreted to include viable fetuses); MINN. STAT. § 609.266-2691 (2006) (homicide statute includes pre-viable fetuses); MISS. CODE ANN. § 97-3-19(1)(d) (2006) (homicide statute includes pre-viable fetuses); MO. ANN. STAT. § 1.205 (West 2000) (stating that an unborn child is a "person," construed to apply to manslaughter and murder statutes in *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992) and *State v. Holcomb*, 956 S.W.2d 286 (Mo. App. 1997)); NEB. REV. STAT. ANN. § 28-391 (LexisNexis 2003 & Supp. 2006) (homicide statute includes pre-viable fetuses); NEV. REV. STAT. ANN. § 200.210 (West 2006) (homicide statute includes quick fetuses); N.D. CENT. CODE § § 12.1-17.1-01 to 12.1-17.1-06 (1997) (homicide statute includes pre-viable fetuses); OHIO REV. CODE ANN.

criminalized the intentional killing of a viable fetus.⁴¹ Following the evolving trend taking place in the states, the federal government enacted its Protection of the Unborn Child Statute, more commonly referred to as "Laci and Conner's Law[.]"⁴²

After fetal rights found their place in criminal law, protection for the unborn began emerging in different areas of the civil law.⁴³ Property law has long recognized the rights of the unborn, yet states now began expanding the protections offered under this area of the law.⁴⁴ Apart

§ § 2903.01-06 (West 2007) (homicide statute includes viable fetuses); OKLA. STAT. ANN. tit. 21, § 691 (West Supp. 2007) (homicide statute includes pre-viable fetuses); 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 2006) (homicide statute includes pre-viable fetuses); R.I. GEN. LAWS § 11-23-5 (2002) (homicide statute includes quick fetuses); S.C. CODE ANN. § 16-3-1083 (Supp. 2006) (homicide statute includes pre-viable fetuses); S.D. CODIFIED LAWS § 22-16-1.1 (2006) (homicide statute includes pre-viable fetuses); TENN. CODE ANN. § 39-13-107 (2006) (homicide statute includes viable fetuses); TEX. PENAL CODE ANN. § § 1.07, 19.01 (Vernon 2003 & Supp. 2006) (homicide statute includes pre-viable fetuses); UTAH CODE ANN. § 76-5-201 (2003) (homicide statute includes pre-viable fetuses); VA. CODE ANN. § 18.2-32.2 (2004) (homicide statute includes pre-viable fetuses); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 2000) (homicide statute includes quick fetuses); W. VA. CODE ANN. § 61-2-30 (LexisNexis 2005) (homicide statute includes pre-viable fetuses); WIS. STAT. ANN. § § 940.01-02, 940.04-06 (West 2005) (homicide statute includes quick fetuses); Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004) (ruling that a viable fetus is a "person" for purposes of Kentucky's homicide statute); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (holding that the killing of a viable unborn child is "murder" under the common-law definition of the term).

⁴¹ IND. CODE § 35-42-1-6 (2008). This section states, "A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide This section does not apply to an abortion[.]" *Id.*

⁴² 18 U.S.C. § 1841 (2006). Although unsuccessful attempts had been made to adopt a federal feticide statute as recently as 1999 and 2001, the murder of the pregnant Laci Peterson by her husband Scott Peterson pressured Congress to pass the Federal Unborn Victim's Act, enacted two years after Laci's death. Amy Lotierzo, Comment, *The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 281-83 (2006). The House had passed the Unborn Victim's of Violence Act in 1999 and again in 2001, yet members of the Senate stopped the legislation because they believed its passage would erode women's rights. *Id.* at 282. The disappearance of Laci Peterson in 2001 sparked a media frenzy, and her husband Scott was convicted of murder in 2003 after Laci's body was finally discovered. *Id.* With this pressure on Congress, both houses passed the bill, with President Bush stating, "The suffering of two victims can never equal only one offense." *Id.* (footnote omitted). See generally Jason Dearen, *Prosecutor Presents Closing Arguments*, SAN MATEO COUNTY TIMES, Dec. 9, 2004, at A1 (discussing the outcome of the Peterson murder trial and the effect on the jury of Laci Peterson being pregnant with her child, Conner, when she was murdered).

⁴³ Brobst, *supra* note 16, at 144-47 (examining the expansion of fetal rights in wrongful death actions).

⁴⁴ Parvin v. Dean, 7 S.W.3d 264, 275 (Tex. Ct. App. 1999). In determining whether a wrongful death action should be allowed for parents of an unborn child, the Texas court examined other areas of its law which protected the unborn. *Id.* The court found that an unborn child's property rights have been recognized in the state for more than 200 years.

1222 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

from simply inheriting land, states have expanded property rights to allow fetuses to be represented in probate court to contest claims against their inheritance, inherit property from a deceased parent, and even disclaim the legal right to inherit property.⁴⁵

As with property law, rights for the unborn have emerged in family law. In the case of *Whitner v. State*, a mother ingested crack cocaine during her pregnancy and her child was subsequently born with a dependency on the drug.⁴⁶ South Carolina's Supreme Court interpreted its child abuse and endangerment statute to include a viable fetus under the term "person" and sentenced the mother to eight years imprisonment.⁴⁷ Jurisdictions differ dramatically on the issue of criminally prosecuting a mother for decisions she makes upon her own body—some allow criminal prosecution; some proscribe drug treatment for the mother; and other jurisdictions hold a pregnant woman's autonomy as deserving more protection than the unborn child.⁴⁸ Indiana follows those states which do not allow a criminal prosecution for a

Id. "Even without the sophistication of modern technology, courts over 200 years ago recognized that a viable unborn child in the womb is the same as a child in the flesh." *Id.* at 275 n.12. (quoting *Nelson v. Galveston*, 14 S.W. 1021, 1021-23 (Tex. 1890)).

⁴⁵ TEX. PROB. CODE ANN. § 34A (Vernon 2001). See *Parvin*, 7 S.W.3d at 275 (interpreting the Texas probate statute to allow an unborn child to receive an appointed attorney ad litem to protect his interest even if the child may never be born). See also TEX. PROP. CODE ANN. § 112.010 (Vernon 2007) (allows an unborn child, through an appointed representative, to make decisions regarding trusts in which he or she is the beneficiary); *James v. James*, 164 S.W. 47, 47 (Tex. Civ. App. 1914) (allowing three children who were born many years after their grandfather had passed to inherit their grandfather's property, even though the grandfather never knew they existed).

⁴⁶ 492 S.E.2d 777, 778-79 (S.C. 1997) (expanding South Carolina's child neglect statute to include a viable fetus).

⁴⁷ *Id.* The court examined how different jurisdictions have approached the difficult question of whether a mother can be held responsible for damaging a fetus through acts she takes upon her own body. *Id.* at 782. The court compared Massachusetts law, which allows recovery in certain circumstances, to other states, such as Florida, which does not allow recovery for acts the mother inflicts upon her own body. *Id.* at 783. The court also addressed the "slippery slope" argument which addressed whether a mother can be prosecuted for using controlled substances while pregnant, posing the question of what is next. *Id.* at 782-84. The defendant's argument was whether criminalizing the use of crack cocaine would lead to criminal prosecutions for pregnant women drinking or smoking. *Id.* at 781-82. See *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000) (holding that a child born with controlled substance in its blood was an abused person for purposes of its child abuse statute). But see *Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (court did not allow prosecution when mother damaged her fetus through passing cocaine through the umbilical cord). See generally Moses Cook, Note, *From Conception Until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307 (2002) (advocating drug treatment rather than imprisonment for pregnant women who use controlled substances).

⁴⁸ See *supra* note 47 (providing examples of different methodologies for handling pregnant women who harm their child for illegal acts taken on their own bodies).

mother's ingestion of a controlled substance that subsequently injures or even terminates a pregnancy.⁴⁹

With the expansion of statutes protecting prenatal life in homicide, property, and family law, the unborn are legally defended to a greater extent now than at any point in history.⁵⁰ The most recent trend taking hold in the majority of the states is expanding wrongful death statutes to include the parents of a fetus that was wrongfully killed in the class of individuals who can recover for their loss.⁵¹

C. *Fetal Wrongful Death Actions*

Just as laws which protected the unborn were unknown to the common law, wrongful death also was not a historically recognized cause of action.⁵² A wrongful death action is "[a] lawsuit brought on behalf of a decedent's survivors for their damages resulting from a tortious injury that caused the decedent's death."⁵³ Under English common law, no cause of action existed for wrongful death because the claim was considered to have died with the victim.⁵⁴ "The result was

⁴⁹ *Herron v. State*, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000). The court interpreted IND. CODE section 35-46-1-1 (2008) as not including an unborn child within the meaning of the word "dependent" for purposes of a child abuse or neglect statute. *Id.* Although the court expressed a desire to criminalize the reprehensible conduct of the mother, who ingested crack cocaine which killed her unborn child, the court acknowledged that all crimes are statutory and indicated that it was powerless to punish the mother until the legislature acted. *Id.* Unfortunately, because the mother did sufficient damage to kill the fetus before it was born, the mother avoided criminal liability for her act which would have followed had the child been born alive. *Id.*

⁵⁰ See *supra* notes 42, 45, 47 and accompanying text (identifying cases and articles explaining the expansion of fetal rights in homicide, property, and family law).

⁵¹ See *infra* Part II.C (explaining the history and application of fetal wrongful death statutes); Helbling, *supra* note 7. Helbling's Note identifies the current application and justification that every state gives for its fetal wrongful death statute. Helbling, *supra* note 7, at 367-429. The Note highlights the current trend toward allowing wrongful death recovery at the point of viability in a large majority of jurisdictions. *Id.*

⁵² KEETON ET AL., *supra* note 5, § 127. See, e.g., Lotierzo, *supra* note 42, at 288. The Note shows that until 1949, the law did not recognize a duty owed to the fetus. *Id.* The law did not recognize a fetus as a living being, and therefore, if a prenatal injury occurred and the child was born and subsequently died of that injury, there could be no cause of action because the child was not a person when the injury was received. *Id.*

⁵³ BLACK'S LAW DICTIONARY 1644 (8th ed. 2004).

⁵⁴ KEETON ET AL., *supra* note 5, at 940-42. There were three harsh results that stemmed from the common law's denial of wrongful death statutes. *Id.* Specifically,

The common law of England enforced three restrictive rules concerning the death of a person in personal injury cases:

1. If the tortfeasor died before the victim recovered for the tort, the victim's right of action died with him.
2. If the victim of a tort himself died (from whatever cause) before he recovered in tort, the victim's right of action also died.

1224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

that it was cheaper for the defendant to kill the plaintiff than to injure him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."⁵⁵ This injustice was finally remedied in 1846 when England enacted its wrongful death statute, more commonly referred to as Lord Campbell's Act.⁵⁶ The purpose behind creating an action for wrongful death was to compensate those individuals who were dependent on the person negligently killed with financial support and also to compensate them for their loss.⁵⁷

It was not until well after the enactment of Lord Campbell's Act that New York became the first American jurisdiction to enact a wrongful death statute.⁵⁸ The first American wrongful death statutes were nearly identical to Lord Campbell's Act in that they provided damages to compensate for only the economic benefit the decedent would have provided for the family; they did not offer damages for any emotional harm the survivors may have suffered.⁵⁹ It was not long until wrongful

3. If the tortfeasor caused a victim's death, relatives and dependants of the victim who were deprived of financial support or who suffered emotional loss, had no cause of action of their own.

Id. at 940 (footnotes omitted). As a result, there was no civil cause of action for the death of a human being at common law. *Id.* at 940. It really was true that killing an individual was less costly, in terms of civil liability, than not killing that same individual. *Id.* at 942.

⁵⁵ KEETON ET AL., *supra* note 5, at 945. The old rationale that it was cheaper to kill another human than to scratch him led to the creation of the myth about old railroad cars. *Id.* at 942 n.24. It was said that the reason passengers slept with their heads facing the aisles in old Pullman cars was that in the event of an accident, the conductor could grab one of the fire axes provided in each car and efficiently deal with those who were merely injured. *Id.*

⁵⁶ 22A AM. JUR. 2D *Death* § 4 (West 2007). Until the passage of Lord Campbell's Act in England, there were no wrongful death statutes in the United States. *Id.* After its passage, wrongful death liability quickly expanded, with every state in the United States having enacted some sort of wrongful death statute. *Id.*

⁵⁷ *Cummins v. Kansas City Pub. Serv. Co.*, 66 S.W.2d 920, 924 (Mo. 1933). A competing rationale for wrongful death actions at the time was to "preserve life from the perils of our modern mechanical age by providing a penalty for negligently killing a human being[.]" *Id.* (citation omitted). Nonetheless, every wrongful death statute limited the individuals who could recover under its provisions, showing that these statutes were passed out of need to compensate survivors rather than to punish newly forming industries. *Id.*

⁵⁸ *See Mobile Life Ins. Co. v. Brame*, 95 U.S.754 (1877). Early authorities adopted the position that the killing of a human being resulted in no civil damages. *Id.* at 756. Yet, the court in *Brame* followed decisions in Connecticut and New York which followed Lord Campbell's Act in allowing recovery for the damages resulting from the death of a human being. *Id.* at 757.

⁵⁹ KEETON ET AL., *supra* note 5, at 949-54. *See, e.g.*, *Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind. 1987) (determining that although the parents were successful in their wrongful death action for the death of their child, the court awarded the couple no damages because it was impossible to speculate the potential economic benefit that the child would have provided the parents—their emotional harm was not a compensable damage).

death claims evolved into a vehicle to compensate survivors for non-economic losses such as loss of companionship, guidance, and conjugal relations.⁶⁰ *Krouse v. Graham*, a California Supreme Court case, was one of the first decisions that quantified a survivor's emotional pain and suffering into damages recoverable in a wrongful death action.⁶¹ The court awarded reasonable compensation in this case for a husband's loss of love, companionship, comfort, affection, society, moral support, sexual relations, and maintenance of everyday activities which were all non-pecuniary losses on top of the pecuniary losses he suffered.⁶²

With wrongful death claims evolving to a point where non-pecuniary losses were being compensated, the next question that emerged was whether wrongful death claims could be utilized to offer some compensation for the harm suffered by parents whose unborn child is killed by the negligent acts of another.⁶³ The first American case addressing this issue was *Dietrich v. Inhabitants of Northhampton*, in which a woman who was four to five months pregnant tripped on a negligently maintained sidewalk that was unreasonably dangerous.⁶⁴ The child she was carrying was injured in the fall, but survived until birth, and then died from the injuries it suffered in the fall.⁶⁵ Since the child was still

⁶⁰ *Elliott v. Willis*, 442 N.E.2d 163, 168 (Ill. 1982). The trial court stated the law at the time when it found that pain and suffering, loss of society, and grief and sorrow were not compensable damages. *Id.* at 164. Yet, the Illinois Supreme Court acknowledged that loss of consortium was a unique damage suffered by a husband or a wife and found that equity required that his loss of guidance, comfort, and sexual relations should be compensated. *Id.* at 166. The court went even further in expanding compensable damages resulting from special relationship such as father-son, husband-wife, or parent-child. *Id.* at 166-68.

⁶¹ 562 P.2d 1022, 1024 (Cal. 1977). Plaintiff, his wife, and their five children were unloading groceries from the trunk of their vehicle when the defendant drove his vehicle at such a speed to propel the plaintiff's parked vehicle seventy feet forward. *Id.* The plaintiff's wife was killed in the collision that was witnessed by the plaintiff, his children, and their neighbor. *Id.* The plaintiff asked the court for compensation for his children's and his own emotional damages. *Id.* The court found that the damages recoverable under wrongful death needed to be expanded to cover non-pecuniary injuries such as those suffered by the plaintiff and his children. *Id.* at 1027.

⁶² *Id.* at 1025 (reasonable compensation in this case was determined to be \$442,000 rather than the nominal amount the family would have been awarded if only punitive damages had been available).

⁶³ See generally Washburn, *supra* note 7 (examining the history and progression of fetal wrongful death actions).

⁶⁴ 138 Mass. 14, 14 (Mass. 1884), *overruled by* *Torigian v. Watertown News Co.* 225 N.E.2d 926 (Mass. 1967). The court made analogies to the criminal law, which did not allow the prosecution of an individual for killing a fetus. *Id.* at 15. Applying the concept that the mother and the child were one at the time she fell, the court denied the mother recovery for the wrongful death of her child even though the child was born and survived for a few minutes outside of her body. *Id.* at 16.

⁶⁵ *Id.* at 15. See also *Herron v. State*, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000) (finding that a child was killed by its mother's use of controlled substances, yet the court was

1226 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

inside his mother when the injury occurred, the court determined that the child and its mother were one entity and therefore only the mother was injured in the fall, not the child, and denied recovery.⁶⁶

The notion that a child and its mother were one entity precluded any fetal wrongful death suits until the District Court of District of Columbia in *Bonbrest v. Kotz* explicitly rejected the idea that a child could not be legally injured until birth.⁶⁷ The court recognized that a fetus could be injured during gestation, yet the law at the time offered no relief for injuries inflicted upon a child before birth, an injury which the law afforded no compensation.⁶⁸ The court reasoned that if the fetus survives until birth and suffers from injuries it sustained before birth, the law should abandon the notion that a child is an extension of its mother

unable to award damages because, for purposes of Indiana's child endangerment statute, a child and its mother are one until the child is born).

⁶⁶ *Dietrich*, 138 Mass. at 17. The plaintiff prayed for recovery, following the common law of England as stated by Lord Coke: "If a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder." *Id.* at 15. The court denied her request, however, because it found similar authorities that treated the mother and the child as one entity because it was impossible at the time to medically determine independent life before birth. *Id.* at 16.

⁶⁷ 65 F. Supp. 138, 140 (D.D.C. 1946). Although the common law in the jurisdiction stated that prenatal injuries were afforded no basis for an action in tort, the court found the reasoning for this rule dispositive. *Id.* at 139. The court allowed a mother to recover damages because her child was injured while he was viable and survived until birth. *Id.* at 141. In justifying its reasoning, the court explained,

The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.

Id. (quotation omitted).

⁶⁸ *Id.* at 139. The court, recognizing the inequity created by the common law, reasoned,

If a child *after birth* [] has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and *viable* [] should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.

Id. at 141-42. (quotation omitted) (footnotes omitted). Therefore, the court determined that the common law perception that a child and its mother were one entity until birth was not based in logic if a child could survive at the point of viability even if the mother perished. *Id.* at 140.

and offer a remedy to either the child or its survivors for the prenatal injuries.⁶⁹ Since *Bonbrest's* holding that a fetus has a legal identity before birth, states have taken three different approaches to awarding damages to parents when their unborn child is killed by tortiously inflicted prenatal injuries.⁷⁰ The three approaches are the born-alive rule, the viability rule, and the pre-viability rule.⁷¹

For demonstration, the hypothetical in Part I about Ashley losing her unborn child in the car accident will be used to differentiate the three approaches.⁷² Recall that John was the driver of the Mustang that hit Ashley and her husband's vehicle, resulting in the death of the couple's nearly six-month-old fetus. John was convicted of involuntary manslaughter for his actions, and drawing upon this hypothetical, the following three sections will show that civil liability depends on the approach the state utilizes to recognize a fetal wrongful death cause of action.⁷³

1. The Born-Alive Rule

If John struck Ashley's SUV in California, he would not be civilly liable for their unborn child's death because the fetus has no legal rights until she draws her first breath. California is among fourteen jurisdictions that still adhere to the common law born-alive rule.⁷⁴

⁶⁹ *Id.* The court justified its reasoning for changing hundreds of years of adherence to the common law rule by quoting Justice Holmes,

"[T]he life of the law has been not logic: it has been experience" and here we find a willingness to face the facts of life rather than a myopic and specious resort to precedent to avoid attachment of responsibility where it ought to attach and to permit idiocy, imbecility, paralysis, loss of function, and like residuals of another's negligence to be locked in the limbo of uncompensable wrong, because of a legal fiction, long outmoded.

Id. at 142 (citations omitted) (alteration in original) (emphasis omitted).

⁷⁰ See *infra* Parts II.C.1-3 (discussing the born-alive, viability, and pre-viability approaches to fetal wrongful death).

⁷¹ See *infra* Parts II.C.1-3 (identifying these three approaches to fetal wrongful death and setting forth which states adhere to each test).

⁷² See *supra* Part I (introducing the hypothetical at the beginning of the Note).

⁷³ See *infra* Parts II.C.1-3. See *Horn v. Hendrickson*, 824 N.E.2d 690, 701 (Ind. Ct. App. 2005) (criticizing Indiana's law for holding individuals criminally liable for killing an unborn child while simultaneously finding that the same individual owes no civil duty to the parents for the same reckless act).

⁷⁴ Amber N. Dina, Note, *Wrongful Death and the Legal Status of the Previable Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights*, 19 REGENT U. L. REV. 251, 255 n.40 (2007) (Alaska, California, Florida, Indiana, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, Virginia, and Wyoming are the fourteen jurisdictions that still require a live birth for a wrongful death claim).

1228 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

Under this rule, “an unborn child is a part of the mother until birth and . . . injury to an unborn child constitutes injury to the mother and . . . she may recover for such physical injury and mental suffering associated with a stillbirth.”⁷⁵ The mother may recover for the injuries she sustained in the act that terminated her pregnancy, but if the child dies before birth, no legal remedy is available to compensate the parents for the resulting emotional harm.⁷⁶ Furthermore, because a cause of action for wrongful death becomes feasible only when the child takes its first breath, the father is precluded from any compensation for his pain and suffering associated with losing his progeny if the child dies before birth.⁷⁷ Under the born-alive rule, even though John inflicted a sufficient amount of damage to kill Ashley’s unborn child, Ashley is nonetheless precluded from recovering for the lost compassion, love, and companionship her child would have provided her but for John’s reckless actions.⁷⁸

The born-alive rule is justified by states because it avoids bringing complicated medical issues into court, issues that in reality delve deeper into perplexing moral and religious determinations about the status of the unborn.⁷⁹ By a wrongful death statute drawing a line for liability at

⁷⁵ *Kalafut v. Gruver*, 389 S.E.2d 681, 683 (Va. 1990) (internal quotation marks omitted) (citation omitted). Plaintiff, a twenty-one-week-pregnant woman, was struck from behind while operating a motor vehicle. *Id.* at 681. Circumstances led the doctors to believe that the child’s life was in jeopardy, so they attempted to induce premature labor in an effort to save the child. *Id.* The child was subsequently born alive, yet died a little over an hour after delivery. *Id.* at 682. The court found the plaintiff, as the administrator of her child’s estate, had a cause of action for wrongful death because the child was born alive, even if the birth was induced through medical means before viability. *Id.* at 684.

⁷⁶ *Id.* at 683. See *Bonbrest v. Kotz*, 65 F. Supp. 138, 139 (D.D.C. 1946) (criticizing the fact that children should have to survive until birth in order to recover for an injury sustained while they were physically capable of surviving outside of their mother’s womb).

⁷⁷ *Kalafut*, 389 S.E.2d at 684. Virginia courts decided to allow wrongful death actions if the child was born alive, regardless of when the child received the injuries that eventually caused its demise. *Id.* Other jurisdictions, however, declare that the fatal injury must occur after the point of viability or quickening for a wrongful death action to be maintained. *Id.* See *Horn*, 824 N.E.2d at 703 (discussing how the born-alive rule may violate equal protection clauses because fathers (males) are not compensated for harms they endure but mothers (females) may be compensated for harms they endure).

⁷⁸ See *supra* note 55 and accompanying text (explaining that the application of the common law wrongful death law resulted in the situation where it was cheaper for the tortfeasor to kill the victim than to inflict a nonfatal injury).

⁷⁹ *Kuhnke v. Fisher*, 683 P.2d 916, 918–19 (Mont. 1984) (requiring the state legislature to define when wrongful death is allowed because the cause of action is entirely a creature of statute). See *Nebraska v. Doyle*, 287 N.W.2d 59, 62 (Neb. 1980). In *Doyle*, a mother was convicted by the lower court of killing her child, yet this holding was overturned when it was established that the evidence was incapable of proving the mother was responsible for the child’s death. *Id.* Although it was obvious that the child died through the acts of the mother, medical testimony was unable to provide a concrete answer as to the cause of the

birth, it gives courts and citizens clear notice of when recovery is available and when compensation will be denied.⁸⁰ Furthermore, liability is more easily assessed because medical testimony is not needed to prove a child was viable when it died; the testimony is necessary only to show the prenatal injury lead to the child's death.⁸¹

Yet, the born alive rule has been criticized by scholars for advocating the common law ideology that a prenatal child is simply a part of its mother and possesses no intrinsic human value of its own.⁸² If John would have injured the unborn child less severely and the child survived until birth, dying shortly thereafter, Ashley and David would have a

child's death. *Id.* Because medical technology at the time was not advanced enough to concretely determine the cause of death of a fetus while still in the womb, the court determined the born alive rule was the most logical test to produce fair and consistent results in fetal wrongful death cases. *Id.* at 63.

⁸⁰ See *Kuhnke*, 683 P.2d at 919 (the Montana Supreme Court limited its holding to civil wrongful death actions, taking note that under criminal law a fetus was considered a person and had legally defined rights); *Stern v. Miller*, 348 So.2d 303, 307 (Fla. 1977) (the Florida Supreme Court concluded that the harsh application of not recognizing a fetus as a person under Florida civil law promoted the state legislature's goal of uniform application of Florida law to wrongful death cases involving fetuses).

⁸¹ *Kalafut*, 389 S.E.2d at 684. Addressing the evidentiary standards in fetal wrongful death cases, the court acknowledged,

[A]n action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established. Given the present state of medical technology, however, the proof of causation obviously becomes increasingly more difficult as the focus moves to the beginning of pregnancy. But the difficulty of proving the facts should not cause the denial of a right to bring the action. With the complex litigation of today, trial courts are accustomed to applying evidentiary rules and to adjudicating difficult sufficiency of the evidence questions dealing with causation.

Id. (citation omitted). See *Horn*, 824 N.E.2d at 703. Indiana courts have justified treating fetuses differently from children born alive because of the different evidentiary standards used to prove the causation of their injury or death. *Id.* Yet, the *Horn* court found this reasoning illogical when Indiana's murder statute requires the court to prove this same causation that was being denied in tort law. *Id.* The court found that proving the proximate cause of the death of a fetus is a routine activity that takes place daily in Indiana courts along with other complicated medical issues. *Id.*

⁸² 19 AM. JUR. 3D PROOF OF FACTS *Wrongful Death of Fetus* § 107 (1993). See *Eich v. Town of Gulf Shores*, 300 So.2d 354, 355 (Ala. 1974). In criticizing the born-alive rule, the court in *Eich* noted the inherent unfairness of allowing tortfeasors to escape liability by killing a fetus rather than simply harming it. *Id.*

To deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting injury.

Id. (footnote omitted).

1230 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

wrongful death claim.⁸³ But because John inflicted sufficient damage to kill the child, the cause of action also perished.⁸⁴ Thus, John's civil liability is less severe because he killed the child, exemplifying the proposition that it is less costly to kill the victim than to scratch it.⁸⁵ Because of this paradoxical result, "[a]ll writers who have discussed the problem have joined in condemning the old rule, and maintaining that an unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof."⁸⁶

2. Viability

If Ashley's tragic accident occurred in Massachusetts, she would have to prove that her child was viable at the time the accident occurred in order to maintain a fetal wrongful death action.⁸⁷ The majority of jurisdictions, Massachusetts being among thirty states that adhere to this rule, permit wrongful death actions for prenatal deaths if the child is viable at the time the fatal injury occurs.⁸⁸ Minnesota was the first state

⁸³ See *supra* note 54 and accompanying text (discussing the common law belief that no action in tort arose from the killing of a human being because the claim died with the person). *But see* *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394, 397 (D.C. 1984) (stating that liability to the victim should not be extinguished through the fortuitous event of the victim's death).

⁸⁴ See *supra* note 54 and accompanying text (discussing the common law belief that no action in tort arose from the killing of a human being because the claim died with the person). See *Greater Se. Cmty. Hosp.*, 482 A.2d at 396. At common law, the victim's cause of action for tortious injury was extinguished with his death. *Id.* Wrongful death and survival statutes were enacted to avoid the harsh results stemming from the application of the common law rule. *Id.*

⁸⁵ See *supra* note 55 and accompanying text (addressing the criticism of the common law that it was cheaper to kill an individual than to simply injure them).

⁸⁶ *Stern v. Miller*, 348 So.2d 303, 306 (Fla. 1977) (citation omitted). See *O'Grady v. Brown* 654 S.W.2d 904, 908 (Mo. 1983). In overturning the born-alive rule followed by Missouri at the time, the court in *O'Grady* noted that the loss suffered by parents of an unborn child is as genuine and substantial as the loss suffered by parents of children who die shortly after birth. *Id.* Furthermore, wrongful death statutes are present to place the cost of unsafe activities on the tortfeasor and thereby create a deterrent to engaging in such activity. *Id.* The timing of the defendant's conduct does not change the injury suffered by the child or the desirability of the conduct; it is equally wrong at any point. *Id.*

⁸⁷ See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992) (defining viability as the ability of a child to sustain independent life separate from its mother, and indicating that this usually takes place between twenty-three or twenty-four weeks into a pregnancy).

⁸⁸ *Dina*, *supra* note 74, at 255 n.41 (noting that Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island,

to recognize a cause of action in wrongful death and compensate parents for their emotional suffering resulting from the death of their unborn child.⁸⁹ In *Verkennes v. Corniea*, the wrongful death statute of Minnesota was determined to allow for recovery for any person who was wrongfully killed by the negligent acts of another, despite the defendant's argument that the plaintiff could not maintain a cause of action because the fetus was never actually a person in being.⁹⁰ The Minnesota court rejected the defendant's argument and overturned the born-alive rule by declaring, "It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises[]." ⁹¹

Since this holding, a majority of jurisdictions have legislatively amended their wrongful death statutes, or courts have interpreted them, to include viable fetuses.⁹² The viability standard corrects many of the inherent flaws of the born-alive rule. For example, the viability standard disregards the notion that a mother and her unborn child are one for the

South Carolina, Vermont, Washington, and Wisconsin allow recovery for the wrongful death of a child if the child was viable when the fatal injury was sustained).

⁸⁹ *Verkennes v. Corniea*, 38 N.W.2d 838, 838 (Minn. 1949). In advancing this at-the-time-radical approach, the court reasoned,

Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life[. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

Id. at 840 (quoting *Allaire v. St. Luke's Hospital*, 56 N.E. 638, 641 (Ill. 1900)). The Minnesota Supreme Court reasoned that if the child could maintain a separate existence from its mother, there was no reason to treat tortious injury inflicted upon it while still in gestation as anything but an injury to the child. *Id.*

⁹⁰ *Id.* at 839. Yet the court reversed this holding when viewing other aspects of Minnesota law which conferred a legal identity upon a fetus. *Id.* at 840. The court specifically held that the contrary treatment of the fetus in criminal and civil law in the state was illogical and could not be maintained. *Id.*

⁹¹ *Id.* at 841. The court in *Verkennes* noted that for purposes of Minnesota criminal and property law, a fetus was a person from the point of conception. *Id.* With this in mind, the court had no problem holding a defendant liable, absent any precedent giving authority to do so in negligence actions, because Minnesota law recognized a fetus as a person and no individual should be able to escape invading the rights of another individual. *Id.*

⁹² *Supra* note 88 and accompanying text (identifying the thirty states that allow a fetal wrongful death cause of action if the fetus is viable at the time the fatal injury occurs).

1232 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

purposes of the law until birth.⁹³ The proposition that an unborn child is part of its mother until birth has no scientific or medical basis.⁹⁴ Furthermore, by allowing fetal wrongful death actions after the point of viability, civil liability is not precluded by the death of a fetus like it would be under the born-alive approach.⁹⁵

Whereas the live-birth rule is criticized for drawing an arbitrary line at birth, the viability approach is criticized for precluding recovery one day before viability.⁹⁶ Is it not true that parents are equally emotionally harmed by the death of their unborn child one day before viability as they are one day after viability?⁹⁷ The viability standard also suffers a

⁹³ See *O'Neill v. Morse*, 188 N.W.2d 785, 787 (Mich. 1971). The Michigan Supreme Court, disregarding the shattered reasoning for adhering to the born-alive rule, stated,

If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life?

If the tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?

The phenomenon of birth is not the beginning of life; it is merely a change in the form of life.

Id. In advancing its reasoning further, the court spoke of a car accident in which a pregnant mother was killed and her child was torn from her body and found to be alive several feet away. *Id.* The court asked the rhetorical question of how many deaths would have taken place if the child was found dead. *Id.* Finding that the application of the born alive rule to this case would cause obvious problems, the court determined that medical advances have now made the born alive rule obsolete. *Id.* See *Rainey v. Horn*, 72 So. 2d 434, 439–40 (Miss. 1954), in which the Mississippi Supreme Court reasoned as follows:

[A]n unborn child, after it reaches the prenatal age of viability when the destruction of the life of its mother does not necessarily mean the end of its life also, and when, if separated from its mother would be so far a matured human being that it would live and grow mentally and physically, is a person; and if such child dies before birth as a result of the negligent act of another, an action may be maintained for its death under the wrongful death statute.

Id.

⁹⁴ *White v. Yup*, 458 P.2d 617, 623 (Nev. 1969) (noting that although the proposition that a mother and child are one entity until birth is advanced by jurisdictions who deny fetal wrongful death causes of action, by 1969 multiple authorities had rejected this proposition on medical and technological grounds).

⁹⁵ *Id.* at 623–24. For justification, the court noted, “The death of a minor child is a deep emotional wounding, and it may be admitted that there is a decided tendency for the law to compensate for the grievous injury to family feelings involved in the death of such children[.]” *Id.* at 623.

⁹⁶ See *O’Grady v. Brown*, 654 S.W.2d 904, 907 (Mo. 1983) (after the court criticized the legislature for not keeping pace with modern understandings regarding fetal wrongful death, the Missouri legislature went a step further and expanded the state’s wrongful death statute to include parents of pre-viable fetuses).

⁹⁷ *Id.* at 908; see *Horn v. Hendrickson*, 824 N.E.2d 690, 702 (Ind. Ct. App. 2005) (indicating that both parents of children born alive and parents of viable children have the same interest at stake in fetal wrongful death actions, mainly the death of their child in which they suffer the same loss).

severe disadvantage vis-à-vis the burden of proof when compared to the born-alive rule. The viability approach requires medical testimony to prove that the child was viable and also that the prenatal injury lead to the child's death, whereas the born-alive rule requires only the latter.⁹⁸

In the hypothetical in Part I, Ashley would have to prove first when her child was conceived, and then use medical testimony to show her child was viable and also that the accident was the proximate cause of the unborn child's death. Unfortunately, Ashley and David would most likely be unsuccessful in a wrongful death action because their child was approximately one week shy of the typical point of recognizing viability.⁹⁹

3. Pre-Viability

If John struck Ashley's SUV in Illinois, Ashley would have a cause of action for the injuries she sustained, and additionally, the child would have a cause of action through his or her estate for wrongful death. Illinois is one of five states that allow parents to recover for the wrongful death of their fetus at any stage of gestation.¹⁰⁰ Under a pre-viability approach to wrongful death, the estate of the wrongfully killed child has a cause of action at any point past conception.¹⁰¹

⁹⁸ *Supra* note 77 (noting that jurisdictions which follow the live birth rule differ on the evidentiary standards required, and that some require the same medical proof as viability jurisdictions). *But see Horn*, 824 N.E.2d at 703 (stating that the same evidence—a clinical autopsy—used to prove the wrongful death of a child that survives until birth is capable of proving the cause of death of a fetus).

⁹⁹ *Supra* note 87 (noting that viability occurs usually between twenty-three to twenty-four weeks into pregnancy).

¹⁰⁰ *Dina*, *supra* note 74, at 259 (noting that currently, Illinois, Louisiana, Missouri, South Dakota, and West Virginia extend wrongful death causes of action at any point during gestation, whereas Georgia adheres to the ancient idea of legally recognizing a child at quickening). See *Tucker v. Howard L. Carmichael & Sons*, 65 S.E.2d 909 (Ga. 1951), for a discussion of the rationalization behind Georgia's rule. The *Tucker* court concluded,

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. An infant en ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

Id. at 910 (quotation omitted).

¹⁰¹ See *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996) (interpreting, for the first time, South Dakota's wrongful death statute that was specifically amended to include a pre-viable fetus).

1234 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

Missouri law has utilized all three approaches to fetal wrongful death at some point in the state's history and has identified the advantages and weaknesses of each approach.¹⁰² In 1913, Missouri strictly applied the ideology that a mother and her child were one person for purposes of the law, therefore not allowing any claim for an injury to a fetus even if the fetus was subsequently born alive.¹⁰³ The only cause of action that existed for prenatal injuries was the injury to the mother, which may or may not have existed.¹⁰⁴ Forty years later, the Missouri Supreme Court asked the question, "Why, then, may not a viable child *en ventre sa mere*, injured through the negligence of another, maintain an action in tort after birth, against the tort-feasor?"¹⁰⁵ Acknowledging the inequality caused by the denying recovery to expectant mothers, Missouri reversed its earlier stance and allowed a viable child that was injured *in utero* to maintain a wrongful death action if it was born alive.¹⁰⁶

Only thirty years later Missouri was again faced with the inadequacies created by utilizing the born-alive approach, and as a result, expanded the class of individuals protected under its wrongful

¹⁰² See MO. REV. STAT. § 1.205 (West 2000) (pre-viability cause of action); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983) (viability cause of action); *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953) (live birth cause of action); *Buel v. United Railway Co.*, 154 S.W. 71 (Mo. 1913) (no fetal wrongful death cause of action)(viability cause of action).

¹⁰³ See *Buel*, 154 S.W. at 73. In *Buel*, a fetus was gravely injured as a result of a railcar opening its doors and throwing a pregnant woman to the ground. *Id.* at 72. Though badly injured, the child survived and was born. *Id.* Six months later, the child died as a proximate cause of the injury it sustained when his mother was thrown from the railway car, yet the court concluded that any liability was precluded because the mother was the only entity that could suffer an injury when it occurred. *Id.* at 73.

¹⁰⁴ *Id.* at 72-73. The court found that, legally, the child was regarded as property of the mother until it was born. *Id.* Therefore, having no legal identity, neither the child nor his parents could maintain a cause of action for wrongful death because the child was mere property until it was born. *Id.*

¹⁰⁵ *Steggall*, 258 S.W.2d at 579 (emphasis added). The court in *Steggall* acknowledged that the common law precluded any cause of action for prenatal injuries, even if the child was born deformed due to those injuries. *Id.* Yet, after reviewing all of the reasons not to allow recovery for fetal wrongful death and the lack of precedent, the court explained, "When these ghosts of the past stand in the path of justice clanking their mediaeval chain[,] the proper course for the judge is to pass through them undeterred." *Id.* at 581 (quotation omitted). Reasoning so, the court ignored the antiquated law and reasoning for denying a child born alive any compensation for injuries she suffered before birth, and adopted the born-alive rule. *Id.*

¹⁰⁶ *Id.* at 582. In overturning the common law position Missouri had followed for many years, the court determined, "It is no answer to say that there is no remedy because a cause of action is not written down in the common law in precise formula. . . . Rather is it implicit in the common law—else we admit that the law has no remedy for a grievous wrong." *Id.* at 579 (quoting *Stemmer v. Kline*, 26 A.2d 684, 686 (N.J. 1942)).

death statute.¹⁰⁷ In *O'Grady v. Brown*, the Missouri Supreme Court sympathized with the parents' argument that "the loss suffered by parents of an unborn child is in every respect a substantial and genuine loss, which is not distinguishable from the loss suffered when the child dies shortly after birth. . . . To deny recovery based on the arbitrary requirement of live birth would work an injustice[.]"¹⁰⁸ The Missouri legislature took up the cause to expand the scope of the state's wrongful death law shortly after the *O'Grady* decision.¹⁰⁹ And in 1988, Missouri's new wrongful death statute was enacted which extended the cause of action to all life after the point of conception.¹¹⁰

Examining Missouri's law is a useful example for states desiring to expand the class of individuals protected under fetal wrongful death

¹⁰⁷ 654 S.W.2d 904, 906 (Mo. 1983) (grappling with the issue of an expectant mother whose child may have been killed due to the negligence of her obstetrician during an emergency delivery).

¹⁰⁸ 654 S.W.2d at 908; see *Horn v. Hendrickson*, 824 N.E.2d 690, 702 (Ind. 2005) (stating that parents whose viable child is negligently killed and parents whose child survives until birth and dies from his injuries suffer the same emotional loss).

¹⁰⁹ 654 S.W.2d at 904. The defendant in the case argued that the legislature was content with the existing law and it was not the court's place to alter the legislature's clear intent. *Id.* at 911. The court expanded the statute to include pre-viable fetuses. *Id.* Although the statute had not changed since the court's last cases applying the viability rule, the court in *O'Grady* found that when the legislature amended its wrongful death statute to include emotional damages along with economic damages, the legislature intended to expand the scope of individuals covered under the statute's provisions. *Id.*

¹¹⁰ MO. REV. STAT. § 1.205 (West 2000). The Missouri Statute reads, 1. The general assembly of this state finds that:

- (1) The life of each human being begins at conception;
 - (2) Unborn children have protectable interests in life, health, and well-being;
 - (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Id. (emphasis omitted).

1236 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

statutes because it exemplifies the advantages and weaknesses of each approach while also showing how the law can be changed either through legislative or judicial initiative.¹¹¹ Yet, Missouri case law also highlights many of the main criticisms of including pre-viable children in a wrongful death statute.¹¹² First, there is speculation, especially during the early stages of pregnancy, regarding whether a fetus will survive and eventually be born alive.¹¹³ Furthermore, some argue that parents who lose a child during the very early stages of pregnancy may not suffer the same emotional harm as parents whose fetus is viable and statistically has a greater chance of surviving until birth.¹¹⁴ Yet the pre-viability rule avoids arbitrarily cutting off liability at birth or viability because it is unknown whether the emotional harm suffered by parents is any greater during the latter stages of a pregnancy.¹¹⁵ The pre-viability rule acknowledges that an expectant mother does in fact suffer a loss when her fetus is wrongfully killed at any point during gestation and leaves the jury with the duty of quantifying the damage suffered.¹¹⁶

4. Summary of the Three Approaches to Fetal Wrongful Death Actions

Although all three tests have their inherent advantages and weaknesses, it is a state's duty to determine which rule most adequately reflects its citizens' values. Most states have continued the trend of

¹¹¹ Compare *O'Grady*, 654 S.W.2d at 904 (providing an example of judicially expanding the class of individuals included in Missouri's wrongful death statute), with MO. REV. STAT. §1.205 (West 2000) (providing an example of legislatively expanding the class of individuals).

¹¹² *Rambo v. Lawson*, 799 S.W.2d 62, 63 (Mo. 1990). The court in *Rambo* identified four reasons for not extending the state's wrongful death law to nonviable fetuses. *Id.* First, there is always uncertainty whether a pregnancy will culminate in a live birth, especially during the early stages. *Id.* Second, the mother can be compensated for her injuries without extending the reach of the wrongful death statute. *Id.* Third, the father has an action for the loss of the mother's services. *Id.* Finally, fertile parents may conceive another child. *Id.*

¹¹³ *Id.* The court in *Rambo* refused to extend liability to nonviable fetuses for multiple reasons. *Id.* Foremost among its reasons was the fact that it is uncertain whether a pregnancy will culminate in a live birth, and this speculation is greater during the early portion of the term than the later portion. *Id.*

¹¹⁴ *Id.*; see also *Horn v. Hendrickson*, 824 N.E.2d 690, 702 (Ind. Ct. App. 2005) (arguing that both sets of parents suffer the same harm when their child is negligently killed).

¹¹⁵ *O'Grady*, 654 S.W.2d at 908 (finding that parents of unborn children suffer the same emotional harm as parents of children who die shortly after death).

¹¹⁶ *Horn*, 824 N.E.2d at 703. Though it is difficult to prove damages for the loss of an unborn child, parents still suffer emotional harm. *Id.* If a child is born alive and the parents get to touch and see a child prior to its death, it is a valid consideration for the jury in awarding damages. *Id.* However, simply because parents of unborn children do not get to see their child does not mean they are not injured. *Id.*

increasing the rights of the unborn in civil law, realizing the inherent flaws created by the born-alive rule.¹¹⁷ The question, which has been answered three different ways, is where the line should be drawn on denying recovery in wrongful death; Justice Holmes guides us when stating, “[We are not] troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law.”¹¹⁸

D. Indiana's Inclusion of the Unborn in Wrongful Death

The question of whether the parents of an unborn could be compensated in wrongful death under Indiana law was seemingly a rhetorical question throughout the state's early legal history.¹¹⁹ Indiana's criminal and civil statutes in the early twentieth century did not confer a legal identity to the unborn in most areas of the law.¹²⁰ The Federal District Court of Northern Indiana was the first court confronted with the issue of whether Indiana would allow any tort recovery for negligent killing of a fetus.¹²¹ The court answered a rhetorical no, determining that Indiana law would not allow the parents of a stillborn child to recover for wrongful death without citing any Indiana authority to back up its

¹¹⁷ See *supra* note 88 and accompanying text (identifying the thirty jurisdictions which utilize a viability approach to fetal wrongful death).

¹¹⁸ *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (citation omitted). See *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88, 92 (Ill. 1973), *superseded by statute as stated in Miller v. American Infertility Group of Ill.*, 2008 WL 4210537 (Ill.App. 1 Dist. Sep 12, 2008) (NO. 1-05-3202). In debating whether liability should follow the death of an unborn child, the defendant argued that lines have to be drawn in tort liability, and birth was the logical point to start liability in fetal wrongful death causes of action. *Id.* Yet the court disagreed, and found the more realistic and reasonable line to determine liability was at the point of viability, when a child could independently survive without her mother. *Id.* Further, the court found that when drawing dividing lines in the law, indefensible positions should be avoided, such as denying recovery where independent life is medically proven to be capable. *Id.*

¹¹⁹ *Britt v. Sears*, 277 N.E.2d 20, 21 n.3 (Ind. 1971) (noting that the first cases which challenged Indiana's exclusion of the unborn from wrongful death were dismissed by the federal court without citing any authority whatsoever). See *Schulty v. Stecy*, 11 Ind.Dec. 198 (N.D. Ind. 1967).

¹²⁰ See cases cited *supra* note 23 (identifying jurisdictions which denied a legal identity to an unborn child).

¹²¹ *Britt*, 277 N.E.2d at 21 (citing *Schulty v. Stecy*, 11 Ind.Dec. 198, 198 (N.D. Ind. 1967)). In *Schulty*, the court denied a father recovery under Indiana's wrongful death statute for the loss of his unborn child. *Id.* The federal court did mention, however, that the mother might be able to recover for her mental distress, raising interesting equal protection arguments. *Id.*

1238 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

position.¹²² Indiana residents also did not find the challenge worth pursuing until the first major case confronted the issue in 1972.¹²³

By that time, twenty-four states were petitioned to expand their wrongful death statutes to include the unborn; *Britt v. Sears* brought the issue to the forefront in Indiana.¹²⁴ Relying on Indiana's adherence to the common law born-alive rule, the lower court dismissed a father's action for the wrongful death of his viable unborn child.¹²⁵ The sole question presented on appeal was whether an action may be maintained by a father for the wrongful death of a fetus alleged to be a full-term healthy male capable of independent life.¹²⁶ The Indiana wrongful death statute at the time allowed recovery by a parent for the wrongful death of a child caused by another's negligence, yet was silent as to whether the unborn was included in the term "child[.]"¹²⁷ Acknowledging that this was a question of first impression in Indiana, the Court of Appeals looked to different jurisdictions and other sections of Indiana law for guidance, ultimately concluding that a viable child would be included in the term child for purposes of wrongful death recovery.¹²⁸ Following the majority of states who had confronted the question, Indiana disregarded

¹²² *Id.* at 21 (citing *Schulty*, 11 Ind.Dec. at 198) (*the Schulty* court was the first court to determine the issue of fetal wrongful death in Indiana, yet the Indiana Appellate Court disregarded this case when it ruled on the issue for the first time in 1972).

¹²³ *Id.* at 20. The wrongful act of the defendant in *Schulty* resulted in the death of a man's wife and unborn child. *Id.* at 21. The trial court allowed the father to maintain his wrongful death claim for the loss of his wife, yet dismissed his wrongful death claim for his nine month and one-week-developed unborn child because the common law believed the child was part of the mother until birth. *Id.*

¹²⁴ *Id.* at 22 (out of the twenty-four states that had confronted the question of allowing wrongful death recovery for unborn children, sixteen of those states and the District of Columbia allowed recovery).

¹²⁵ *Id.* There is surprisingly little literature on the issue of whether a father can maintain a wrongful death claim for the loss of a child that is not yet born. *Id.* at 21-23. The damages suffered by the father are believed to be less substantial than those suffered by the mother. *Id.* at 28. "The action of the father for the wrongful death of a child is based solely on the loss of the father's *property right* in the fruits of the child's services." *Id.* at 28 (citation omitted).

¹²⁶ *Id.* at 21. The court was confronted with a difficult question, whether a father could maintain a cause of action for the wrongful death of his unborn child. *Id.* The *Schulty* court stated that a father could not maintain a cause of action while the mother might be able to do so. *Id.* This court found that at least superficially, denying a father the right to maintain a cause of action would violate the United States Supreme Court decisions under the Equal Protection Clause with respect to illegitimate children. *Id.* at 24.

¹²⁷ IND. CODE § 34-1-1-8 (1986) (amended 1987) (repealed 1998) (in pertinent part the 1986 version of the wrongful death statute stated that a father may bring a claim for the death of a child).

¹²⁸ *Britt*, 277 N.E.2d at 25-26 (stating that Indiana law has allowed unborn children to maintain claims in property law and inheritance rights and has specifically recognized the unborn infant as a child in abortion and burial statutes).

the antiquated born-alive rule in favor of compensating parents of viable fetuses for their loss.¹²⁹

Out of equity, the Indiana appellate court held that a viable fetus is to be considered a child within the meaning of the previous version of our wrongful death statute.¹³⁰ The court concluded that the legislature had not considered the concept of including the unborn under the wrongful death statute when it created the statute in 1881, yet after reviewing the history behind the statute, the court also concluded that the legislature would have intended for the unborn to be included in the wrongful death statute had the issue been presented.¹³¹ Although Indiana adopted the viability rule in compensating survivors in wrongful death, the law was still inadequate to fully compensate parents for their lost child.¹³² In 1987, *Miller v. Mayberry* highlighted the weaknesses in Indiana's wrongful death statute, primarily insofar as the statute had no bite when dealing with unborn or young children because the statute allowed recovery for only pecuniary losses, which did not include any compensation for emotional harm.¹³³ Shortly after the *Miller*

¹²⁹ Jill D. Washburn Helbling, *To Recover or not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363, 393 (1996) (identifying Indiana among the states that allow parents of a viable fetus to maintain a fetal wrongful death cause of action); see *Britt*, 277 N.E.2d at 27 (stating that a full-term, healthy male is a person for purposes of Indiana's wrongful death statute).

¹³⁰ *Britt*, 277 N.E.2d at 27. The court weighed the pros and cons of including an unborn child in the wrongful death statute and determined that it was just and logical to treat a viable fetus as a person for purposes of the wrongful death statute. *Id.* at 26. Though the court professed that it did not know the answer of whether the child would survive outside of its mother's body in this particular case, the court found that most children who reach the late stages of gestation are usually born and that was sufficient evidence to warrant finding the fetus a person. *Id.*

¹³¹ *Id.* at 24–25 (because the legislature had probably not considered the issue, the court applied its own meaning to the term child rather than attempting to figure out what definition the legislature would have given the term when the statute was originally passed).

¹³² *Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind. 1987). The plaintiff's seventeen-month-old son was struck by a car and quickly rushed to a hospital. *Id.* at 8. The doctor released the child after taking an X-ray, but the child died the next morning because the doctor failed to recognize major internal injuries. *Id.* The court awarded the plaintiff a substantial sum, yet this was reversed on appeal because the parents were not allowed to recover for emotional damages. *Id.* Although the court expressed its desire to compensate the plaintiff, it was bound to uphold the law and not interfere with the duties of the legislature to make the law. *Id.* at 11.

¹³³ *Id.* at 11. In accepting its inability to change the law, the court explained,

[This Court is bound to enforce the intention of the Legislature. It is a fundamental rule of statutory construction that the failure of the Legislature to change a statute after a line of decisions of a court of last resort giving the statute a certain construction, amounts to an acquiescence by the Legislature in the construction given by the court,

1240 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

court denied parents full recovery for their loss, the Indiana legislature amended the wrongful death statute for the first time, fifteen years after Indiana began applying the viability rule.¹³⁴ These amendments were important for the following two reasons: (1) the legislature added language to define the term “child” in the amended statute, and (2) the legislature alleviated the deficiencies exemplified in *Miller* by specifically allowing recovery for lost love and affection.¹³⁵ After these amendments, Indiana continued to follow the viability approach to fetal wrongful death, although parents could be compensated only for the emotional trauma they suffered from losing a child before birth.¹³⁶

For thirty years, parents in Indiana were compensated for the death of their viable, unborn child; however, this changed in 2002 when the Indiana Supreme Court decided *Bolin v. Wingert*.¹³⁷ Before the *Bolin* decision, the Indiana legislature had passed a new wrongful death statute pertaining solely to children with language that is nearly

and that such construction should not then be disregarded or lightly treated.

Id. (citations omitted). The court wanted to change the interpretation of the statute to include emotional damages, but at the same time, it recognized that separation of powers prohibited the court from exercising its desires. *Id.* Justice Shepard’s dissent raises an interesting question: if a court is responsible for interpreting a statute or phrase a certain way, is it the court’s duty or the legislature’s duty to change that interpretation when it becomes necessary to do so? *Id.* at 12.

¹³⁴ 1987 Ind. Acts 306. The amendments added the following language to IND. CODE section 34-1-1-8(a), (e) (1986) (amended 1987) (repealed 1998) to describe the term child:

(a) As used in this section, “child” means an unmarried individual without dependents who is:

- (1) Less than twenty (20) years of age; or
- (2) Less than twenty-three (23) years of age and is enrolled in an institution of higher education or in a vocational school or program.

...

(e) In an action to recover for the death of a child, the plaintiff may recover damages:

- (1) for the loss of the child’s services;
- (2) for the loss of the child’s love and companionship;

Id.

¹³⁵ *Id.*; see *O’Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983) (finding that because the legislature had expanded compensation to cover emotional damages, the legislature intended to expand the group of individuals covered by the wrongful death statute).

¹³⁶ *Miller*, 506 N.E.2d at 11. See generally *Horn v. Hendrickson*, 824 N.E.2d 690 (Ind. Ct. App. 2005) (identifying that after the wrongful death statute was amended, the viability rule was still used for fifteen years until the Indiana Supreme Court overturned the holding of *Bolin v. Wingert*).

¹³⁷ 764 N.E.2d 201 (Ind. 2001); see *Horn*, 824 N.E.2d at 696 (stating that until 2002, tortfeasors had no legitimate expectation of immunity from a wrongful death of a viable fetus cause of action, therefore overruling the born-alive rule would do no harm).

verbatim with the 1987 version of the statute.¹³⁸ The new statute contained the same four concepts to define the term “child”: (1) an unmarried, (2) individual, (3) without dependents, (4) who is less than twenty years of age.¹³⁹ The version of the wrongful death statute the court applied in *Britt* did not contain the language defining the term “child” added by the 1987 amendment, which was the deciding factor for the court in *Bolin*.¹⁴⁰

In *Bolin*, an automobile accident resulted in the death of the plaintiff's eight- to ten-week old fetus, and the parents believed the Indiana Supreme Court might follow its neighboring states in expanding wrongful death to the pre-viable stages of pregnancy.¹⁴¹ Noting that an action for wrongful death is entirely a creature of statute, the Indiana Supreme Court for the first time was confronted with the new version of the statute—albeit nearly identical to the previous version.¹⁴² Even though the viability approach was applied for fifteen years after the language defining the term “child” was added to the statute, the Indiana Supreme Court concluded that the language was added to deny parents of children not yet born any compensation in wrongful death actions.¹⁴³ Accordingly, the Indiana Supreme Court determined that the state

¹³⁸ See *supra* note 18 (providing the text of the Indiana Wrongful Death or Injury of a Child statute).

¹³⁹ *Bolin*, 764 N.E.2d at 206. But see *Horn*, 824 N.E.2d at 697-98. The *Horn* court gave a completely different interpretation to the defining language than the court did in *Bolin*. *Id.* While *Bolin* found the defining language was created to limit the scope of recovery, *Horn* found the language was meant to expand the scope of recovery. *Id.* at 698.

¹⁴⁰ *Bolin*, 764 N.E.2d at 201, 205–06. The court in *Bolin* found that the first three defining concepts tended to indicate that only living children would be covered by the statute. *Id.* at 206. Being married or having dependents are activities engaged in by living individuals—not fetuses. *Id.* Therefore, the court found it would be an illogical interpretation of the language to find the legislature intended to include unborn children in the statute. *Id.*

¹⁴¹ *Id.* at 203. The parents in this case realized that Indiana had long followed the viability approach, yet hoped Indiana would expand fetal wrongful death causes of action to parents of pre-viable children. *Id.* *Bolin* was eight to ten weeks pregnant at the time the accident happened. *Id.*

¹⁴² *Id.* at 206. The key language added by the 1987 amendment had not changed in any material way since the new statute was enacted. *Id.* The new statute passed in 1998 contained the same language defining the term “child” and also contained the clause allowing recovery for lost love, affection, and companionship when calculating damages. *Id.* See *Horn*, 824 N.E.2d at 697 (considering the same language, yet reaching a different result).

¹⁴³ *Bolin*, 764 N.E.2d at 206. The Indiana Supreme Court found that the wrongful death statute was susceptible to multiple meanings and therefore was forced to “try to ascertain the legislature’s intent and interpret the statute so as to effectuate that intent.” *Id.* at 204 (citation omitted). The Supreme Court concluded that the intent of adding the language defining “child” was that the legislature did not contemplate an unborn child within the meaning of the statute. *Id.* at 207.

1242 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

legislature intended to reverse three decades of case law utilizing the viability rule in favor of the more restrictive born-alive rule.¹⁴⁴

Since 2002, the *Bolin* decision has categorically precluded parents from bringing a wrongful death claim for the death of their unborn child.¹⁴⁵ In 2005, the Indiana Court of Appeals in *Horn v. Henderson* directly confronted the Indiana Supreme Court's holding in *Bolin*.¹⁴⁶ First, the case questioned the interpretation that the Indiana Supreme Court had given to the term "child."¹⁴⁷ Second, the appellate court indicated that denying parents of viable unborn children compensation, while allowing parents of children born alive to recover for their losses, violates Indiana's Equal Privileges Clause.¹⁴⁸ Finally, the case raises multiple other concerns regarding *Bolin's* effects on Indiana law as a whole.¹⁴⁹ The appellate court was compelled to point out the flaws created by *Bolin*, yet could offer no remedy to the parents because the

¹⁴⁴ See *id.* at 201. The result of the ruling was that the mother was allowed to be compensated for her injuries, which were negligible, because her vehicle was rear-ended. *Id.* at 208. The father was completely denied any form of compensation because he suffered no physical injury from the car accident. *Id.* Therefore, emotional harm occasioned from the loss of an unborn child was no longer remedied under Indiana law. *Id.* See also *McVey v. Sargent*, 855 N.E.2d 324 (Ind. Ct. App. 2006). But see *Horn*, 834 N.E.2d at 690 (allowing recovery in wrongful death for the negligent killing of an unborn child).

¹⁴⁵ *Horn*, 824 N.E.2d at 694. The court in *Horn* wrote to attempt to persuade the Indiana Supreme Court to overrule its holding in *Bolin* which denied recovery to parents when viable fetuses are negligently killed. *Id.* at 695. The court concluded, "[F]or more than thirty years, from 1971 until *Bolin* was decided in 2002, tortfeasors had no legitimate expectation of immunity from a wrongful death cause of action for the prenatal death of a viable fetus." *Id.*

¹⁴⁶ *Id.* at 693.

¹⁴⁷ *Id.* at 697-701 (challenging the *Bolin* opinion, stating that the 1987 amendment should convey a different message than the one given by the Supreme Court—that the term "child" is defined incorrectly because the Supreme Court did not apply canons of construction—and that the term "child" is given a different meaning if read in relation to Indiana's two other wrongful death statutes).

¹⁴⁸ *Id.* at 701-03. A two-part test has been applied to challenges of Indiana's Equal Privileges and Immunities clause. *Id.* at 701-02. "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.* (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)). The *Horn* court rejected the notion that parents who give birth to a child are inherently different from parents who do not give birth to a child for purposes of the wrongful death statute because they could not "discern [any] legitimate explanation for such disparate treatment[.]" *Id.* at 703.

¹⁴⁹ *Id.* at 690 (questioning the court's opinion in *Bolin* because it doubts that the legislature intended to impose criminal sanctions for the same wrongful act that that now carries no civil responsibilities; doubts that the legislature intended to overturn thirty years of case law without specifically mentioning it; and finally doubts that the legislature intended to leave parents of unborn children without an adequate remedy when these unborn children are wrongfully killed); see *Bolin*, 764 N.E.2d at 201.

appellate court lacked the authority to overturn Indiana Supreme Court decisions.¹⁵⁰

McVey v. Sargent is the most recent case challenging the Indiana Supreme Court's interpretation of the child wrongful death statute.¹⁵¹ The appellant challenged the validity of the born-alive rule under Indiana's Equal Privileges Clause and also under the Equal Protection Clause of the United States Constitution.¹⁵² The court concluded that there were inherent differences between children born alive and children that die before birth, and therefore dismissed the appellant's claim because her child was not born alive.¹⁵³

In sum, although Indiana abandoned the born-alive rule for thirty years, as have thirty-five other states, the Indiana Supreme Court has nevertheless determined that the current approach to fetal wrongful death should be the born-alive rule.¹⁵⁴ Though the holding in *Bolin* has been challenged by the Indiana Court of Appeals and legal scholars, the Indiana Supreme Court and the Indiana legislature have been unwilling to address the inadequacies inherent in the born-alive rule.¹⁵⁵

¹⁵⁰ *Horn*, 824 N.E.2d at 704 (highlighting the injustice, the court told the plaintiff that her only hope of obtaining a remedy for the death of her child was for the Supreme Court to accept transfer and overrule its earlier interpretation of the child wrongful death statute or for the legislature to repudiate *Bolin*).

¹⁵¹ 855 N.E.2d 324, 324 (Ind. Ct. App. 2007) (in which a father of an unborn child challenged the *Bolin* holding when his pregnant wife and unborn child were killed in an automobile accident).

¹⁵² *Id.* at 327 (the appellant got the idea to challenge the child wrongful death statute from the *Horn* court's opinion, in which the court expressed its desire to overturn the Indiana Supreme Court's interpretation but also acknowledged that it lacked the authority to do so).

¹⁵³ *Id.* at 328. "[T]he 'law is replete with examples of how children and viable fetuses are dealt with differently,' and . . . 'Indiana law predominantly utilizes the date of birth, not the date of viability, to establish a determination of eligibility' for various rights, activities, and occupations." *Id.* at n.4 (citation omitted). The appellate court concluded,

The state has an interest in determining that there is a specific point at which parents may bring an action to recover for the death of a child caused by another's negligence. As *Bolin* acknowledged, the lack thereof is 'otherwise open-ended liability.' The fact that the legislature set that point at the time of a live birth is rationally related to its legitimate interest in having such a time defined for its citizenry so that they might then pursue the action authorized by the statute.

Id. at 329 (citation omitted).

¹⁵⁴ See *supra* notes 74, 88 (identifying the states that follow the born-alive and viability approaches).

¹⁵⁵ See *Horn*, 824 N.E.2d at 693 (declaring, "[O]ur supreme court's words and opinions are not carved in stone, and it is not inappropriate for the parties or the judges of this court to ask the court to reconsider earlier opinions[']"); *Bolin*, 764 N.E.2d at 206 (stating that the Indiana Supreme Court is bound to follow the legislature's intent).

III. ANALYSIS

For three decades, Indiana has provided parents of viable unborn children compensation for their losses under the theory of wrongful death, yet it took but one court decision to reverse the state's practice.¹⁵⁶ With that holding, the Indiana Supreme Court determined that the term "child" in the wrongful death statute did not include unborn children, regardless of the fact that the same statute had provided compensation to parents for the wrongful death of their viable, unborn child for fifteen years.¹⁵⁷ The question arising from this controversial holding is whether the Indiana Supreme Court correctly interpreted the legislature's intent when it found that the emotional trauma parents suffer from the wrongful death of a viable, unborn child was not intended to be a compensable injury.¹⁵⁸

Part III.A analyzes the *Bolin* court's interpretation of Indiana's Wrongful Death or Injury of a Child Statute, focusing on how the Indiana Supreme Court misconstrued the legislature's intent when interpreting the meaning of the term "child" within the statute.¹⁵⁹ Next, Part III.B proposes that the Indiana Supreme Court's interpretation of the child wrongful death statute violates Indiana's Equal Privileges Clause found in the state's constitution.¹⁶⁰ Finally, Part III.C identifies reasons why following the common law born-alive rule is unjust and inequitable in contemporary society.¹⁶¹

¹⁵⁶ *Bolin*, 764 N.E.2d at 207 (after following the viability approach to fetal wrongful death since 1972, the Indiana Supreme Court concluded "that the legislature intended that only children born alive fall under Indiana's Child Wrongful Death Statute[']").

¹⁵⁷ *Supra* notes 142-43 and accompanying text (though the child wrongful death statute remained the same after the 1987 amendments, the Indiana Supreme Court interpreted the statute in a more restrictive manner than previous courts had done).

¹⁵⁸ *Supra* notes 147-48 and accompanying text (listing the discrepancies between the Indiana Court of Appeals' and the Indiana Supreme Court's interpretation of the child wrongful death statute).

¹⁵⁹ *See infra* Part III.A (discussing the multiple reasons why the legislature believed it was including unborn viable children within the term "child" under the child wrongful death statute).

¹⁶⁰ *See infra* Part III.B (explaining why there are no inherent differences between parents of children that die shortly before birth and parents of children that die shortly after birth, or at least no differences that justify different treatment under the Indiana Constitution).

¹⁶¹ *See infra* Part III.C (addressing the multiple reasons why the born-alive rule creates injustices for parents of unborn children that die due to the wrongful acts of another and how other methods of determining what constitutes a person or child for wrongful death statutes corrects this problem).

A. *The Indiana Supreme Court Incorrectly Interpreted the Indiana Wrongful Death or Injury of a Child Statute*

From 1972 until the *Bolin* decision in 2002, Indiana law dictated that parents of unborn, viable children could maintain a cause of action for wrongful death if their child was negligently killed.¹⁶² In 1987, the Indiana legislature significantly amended the child wrongful death statute to include the current definition of the term “child.”¹⁶³ Although the Indiana Supreme Court determined that the legislature intended not to include unborn children under the statute’s provisions, from 1987 until 2002, this same statute, or nearly identical versions of it, did offer relief to parents of viable, unborn children.¹⁶⁴ When the legislature amended the wrongful death statute in 1987 and in 1998, it is assumed that it was aware of the current state of the law and took this into consideration when placing the term “child” into the statute.¹⁶⁵

This Note contends that the Indiana Supreme Court interpreted the Indiana Wrongful Death or Injury to a Child Statute incorrectly when it overturned well-established law in the state of Indiana, allowing recovery for viable fetuses under wrongful death.¹⁶⁶ First, when the child wrongful death statute is read in relation with Indiana’s other wrongful death statutes, it shows that the language defining the term “child” was meant as an upper limit to recover under the statute—not a lower limit.¹⁶⁷ Next, once it is established that the legislature intended

¹⁶² See *supra* note 144 and accompanying text. See also *Horn*, 824 N.E.2d at 695 (“[F]or more than thirty years, from 1971 until *Bolin* was decided in 2002, tortfeasors had no legitimate expectation of immunity from a wrongful death cause of action for the prenatal death of a viable fetus.”).

¹⁶³ See *supra* note 134 (supplying the text of the 1987 amendments to the Wrongful Death or Injury of a Child statute).

¹⁶⁴ See *supra* notes 142–43 and accompanying text (discussing the Indiana Supreme Court’s decision to overturn thirty years of law based on amendments which were passed to expand the reach of the Wrongful Death or Injury to a Child statute); see *O’Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983) (the Missouri Supreme Court was faced with similar language which expanded the damages recoverable under its state’s child wrongful death statute, and the court determined the legislature would do this only if it intended to expand the class of individuals protected under the statute).

¹⁶⁵ *Horn*, 824 N.E.2d at 698. “[W]e must assume that legislature is mindful of both court decisions and existing law.” *Id.* (citing *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1092 (Ind. Ct. App. 2002)).

¹⁶⁶ See *supra* notes 146–49 and accompanying text (explaining the Indiana Court of Appeals’ disagreement with the Supreme Court’s ruling in *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002)).

¹⁶⁷ See *infra* notes 170–75 (explaining that the language defining the term “child” in the child wrongful death statute is meant to create an upper limit to recovery). See also *Bolin*, 764 N.E.2d at 205. Even the court in *Bolin* acknowledged the possibility that the legislature was simply attempting to differentiate the child and adult wrongful death statutes by

1246 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

the language defining the term “child” to set an upper limit on claims, further evidence will show that the legislature intended to continue applying the viability rule.¹⁶⁸ Specifically, the Indiana Supreme Court interpreted “child” incorrectly when it misconstrued the legislature’s intent in passing the 1987 amendments, mistakenly read requirements into the child wrongful death statute that are not found in the language of the statute, and created inconsistencies in Indiana law where the unborn are protected in some instances but not others.¹⁶⁹

1. The Indiana Supreme Court Incorrectly Interpreted the Wrongful Death Statute

To begin, when the Indiana Wrongful Death or Injury of a Child Statute is read in connection with Indiana’s other two wrongful death statutes, it becomes clear that the enumeration of factors describing the term “child” is used to create an upper limit to avoid redundant statutes or multiple causes of action.¹⁷⁰ A well-established rule of statutory construction provides that when construing the meaning of a particular statute, related statutes are *in pari materia* and should be considered when interpreting the meaning of a particular statute and to effectuate the legislative intent.¹⁷¹ When statutes address the same subject, the court should attempt to harmonize the statutes if possible.¹⁷² When the Indiana Supreme Court viewed the four factors defining the term “child” in the wrongful death statute as an unmarried individual without

placing defining language in the child wrongful death statute when stating, “While the legislature has clearly set upper limits on the definition of ‘child,’ it is not as plain that it has placed a ‘lower’ limit on the definition of ‘child.’” *Id.* at 205.

¹⁶⁸ See *infra* notes 179–91 and accompanying text (discussing how the Indiana Supreme Court misconstrued the meaning of the 1984 amendments to the child wrongful death statute).

¹⁶⁹ See *supra* note 41 (showing that killing a viable fetus is punishable as feticide in Indiana); see also *Britt v. Sears*, 277 N.E.2d 20, 25 (Ind. App. 1971) (noting that the unborn are protected under Indiana’s abortion, homicide, property and inheritance laws).

¹⁷⁰ *Horn*, 824 N.E.2d at 699 (holding that the purpose of adding the defining language to the child wrongful death statute was to distinguish child wrongful death claims from claims under the general wrongful death statute).

¹⁷¹ See *supra* note 147 and accompanying text (explaining the differences between the Indiana Court of Appeals’ interpretation of the child wrongful death statute in *Horn v. Hendrickson* and the Indiana Supreme Court’s interpretation of the same statute); see also *Horn*, 824 N.E.2d at 698 (defining *in pari materia* as “a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject[.]”); BLACK’S LAW DICTIONARY, *supra* note 53, at 807.

¹⁷² See *supra* note 147 and accompanying text (explaining the Indiana Court of Appeals’ interpretation of the child wrongful death statute in *Horn v. Hendrickson*); see also *Horn*, 824 N.E.2d at 698.

dependants who is under the age of twenty, it concluded that the legislature contemplated that only living children fall within the definition of the term.¹⁷³

When the four factors added to define the term "child" ((1) unmarried, (2) individual, (3) without dependants, and (4) who is less than twenty years of age) are viewed in relation with the three factors that define the term "adult person" in the adult wrongful death statute ((1) an unmarried individual, (2) who does not have dependants, and (3) is not a child under IND. CODE section 34-32-2-1), it starts to become clear that the statutes were written to correlate with one another.¹⁷⁴ The current child wrongful death statute was codified in 1998, while the adult wrongful death statute was codified in 1999, adopting the language of the child wrongful death statute for the purpose of avoiding the redundancy of having statutes that create duplicate causes of action for the same death.¹⁷⁵

The purpose of wrongful death statutes is to compensate the survivors for not only lost pecuniary value of the individual, but also for emotional losses such as love and affection.¹⁷⁶ The logical reason the legislature would create an upper limit for the term "child" in the statute is to preclude parents whose connection with an older child may be too tenuous to support a claim for lost love and affection.¹⁷⁷ To this end, the legislature placed the language defining the term "child" in the statute to preclude parents of a child who is over the age of twenty-three, married, or has dependents of their own from collecting for emotional damages

¹⁷³ See *supra* notes 137–44 and accompanying text (explaining the approach the Supreme Court followed when overturning the state of Indiana's viability approach). See also *Bolin*, 764 N.E.2d at 206 (overturning the use of the viability rule in child wrongful death cases in favor of the born-alive rule).

¹⁷⁴ See *supra* note 18 (providing the text of Indiana's Wrongful Death or Injury of a Child statute). See IND. CODE § 34-23-1-2 (2008) (defining an adult as an unmarried individual who: (1) does not have any dependents and (2) who is not a child under the child wrongful death statute).

¹⁷⁵ IND. Code § 34-23-1-2 (2008) (since the general wrongful death statute was passed only one year after the child wrongful death statute was amended, it is reasonable to infer that the statutes were constructed using similar language to differentiate the statutes).

¹⁷⁶ See *supra* notes 60–62, 134 and accompanying text (in 1987, the legislature specifically amended the child wrongful death statute to compensate parents of unborn or young children for lost love, companionship, and affection because it was too speculative to prove the child's future earnings potential); see also *O'Grady v. Brown*, 654 S.W.2d 904, 911 (Mo. 1983) (showing that the Missouri Supreme Court inferred that the state legislature intended to expand the reach of its wrongful death statute when it expanded damages to include emotional harm).

¹⁷⁷ See *supra* notes 60, 112, 115–16 (providing examples where the court has denied wrongful death compensation where the harm was too speculative to quantify). See also *Horn*, 824 N.E.2d at 699 (finding that the language added to the wrongful death statute created an upper limit for recovery, not a lower limit).

1248 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

that may either not exist or are too speculative to quantify, rather than to preclude parents of viable children from recovering in wrongful death.¹⁷⁸

Next, along with failing to read the child wrongful death statute in correlation with the adult wrongful death statute, the Indiana Supreme Court misconstrued the legislature's intent when it amended the child wrongful death statute in 1987.¹⁷⁹ To begin, *Bolin* was the first case in which the Indiana Supreme Court was asked to interpret the Wrongful Death or Injury of a Child Statute.¹⁸⁰ When *Britt* was decided in 1972, the Indiana Court of Appeals was confronted with an older version of the statute which simply allowed recovery for the death of a child.¹⁸¹ The appellate court defined "child" in the statute to include "a full term healthy male capable of independent life," therefore extending wrongful death recovery to viable, unborn children.¹⁸² Fifteen years after the *Britt* decision, the Indiana legislature amended the wrongful death statute in two key ways in 1987.¹⁸³ First, in response to the *Miller* decision which reaffirmed Indiana's tradition of awarding only pecuniary losses, the legislature made emergency amendments to the child wrongful death statute to allow recovery for not only pecuniary losses but also emotional damages including the loss of a child's love and affection.¹⁸⁴ Second, the

¹⁷⁸ *Horn*, 824 N.E.2d at 699. The purpose of placing the defining language in the child wrongful death statute was to ensure that a parent had a substantial and ongoing relationship with an older child before he or she could recover in wrongful death. *Id.* Apparently, the legislature determined that when a child marries, has a child of his or her own, or graduates from college, the parents' emotional attachment is too speculative to justify an award under wrongful death. *Id.*

¹⁷⁹ See *supra* text accompanying notes 136–37 (showing that Indiana followed the viability approach for fifteen years after the wrongful death statute was amended until the Supreme Court rejected this approach).

¹⁸⁰ *Bolin v. Wingert*, 764 N.E.2d 201, 205–06 (Ind. 2002). The earlier rulings on the statute were made by the Court of Appeals; therefore, the Indiana Supreme Court approached it as a case of first impression. *Id.* at 203. Though the Supreme Court acknowledged that there was an absence of clear legislative guidance, it concluded that the Indiana legislature intended to exclude unborn children from the statute. *Id.* at 207.

¹⁸¹ See *supra* note 127 (discussing that the older version of the statute did not contain the descriptive language defining the term "child," making it possible for the *Bolin* court to answer the question of first impression by looking to other decisions and judicial opinions in similar jurisdictions to settle the controversy).

¹⁸² See *supra* note 129 and accompanying text (identifying Indiana's former position of following the viability rule for purposes of fetal wrongful death recovery); see also *Britt v. Sears*, 277 N.E.2d 20, 21 (Ind. App. 1971) (defining a child for purposes of the statute as a "full term healthy male capable of independent life").

¹⁸³ See *supra* note 129 and accompanying text (identifying Indiana's former position of following the viability rule for purposes of fetal wrongful death recovery); see also *Britt*, 277 N.E.2d at 21.

¹⁸⁴ See *supra* note 133 (in response to *Miller*, the legislature found it necessary to allow recovery for emotional damages suffered by parents and "declared an emergency" which provided that the amendments take immediate effect). See also IND. CODE ANN. § 34-1-1-8

amendment added the current definition of "child" found in the state's child wrongful death statute.¹⁸⁵

By expanding the scope of allowable compensable damages under wrongful death actions, it seems that the legislature was not only stamping their approval on the viability rule practiced at the time, but was also expanding the reach of the law beyond where Indiana law had reached in the past.¹⁸⁶ When the wrongful death statute was amended in 1987, the legislature was aware of both existing law and court decisions interpreting those laws.¹⁸⁷ Given that *Britt* and its viability rule were established law in 1987 when the statute was amended, if the legislature had intended to exclude viable children from the definition of the term "child," it would have clearly expressed its intention to nullify *Britt* when it amended the statute.¹⁸⁸ Instead, the legislature expanded the damages recoverable under the statute without placing any specific language about excluding expectant parents in the amendment, or even attempting to correct the courts, as they continued to apply the viability rule for another fifteen years.¹⁸⁹ Indeed, "[i]t is a fundamental rule of statutory construction that the failure of the Legislature to change a statute after a line of decisions of a court of last resort giving the statute a certain construction, amounts to an acquiescence by the legislature in the construction given by the court, and that such construction should not

note (West 1987) (repealed 1998) (after *Miller*, the wrongful death statute was amended to encompass a wide array of damages).

¹⁸⁵ See *supra* note 134 (giving the language of the amendments to Indiana's Wrongful Death or Injury of the Child statute).

¹⁸⁶ See *supra* text accompanying notes 132-36 (identifying the reasons for the legislature's amendment of the child wrongful death statute in 1984).

¹⁸⁷ *Horn v. Hendrickson*, 824 N.E.2d 690, 698 (Ind. Ct. App. 2005); see *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. 1983) (interpreting the meaning of the terms "person[.]" "minor child[.]" and "child" to include viable fetuses because that is in line with the remedial purpose of a wrongful death statute and in accord with a large number of jurisdictions which have held similarly).

¹⁸⁸ *Id.* at 698 (assessing the legislature's intent for making the 1987 amendments to the child wrongful death statute, it stated, "[R]ecovery under the statute beyond the pecuniary loss rule and [by the legislature] defin[ing] 'child,' the statute unmistakably superseded *Miller*, but did not likewise repudiate our holding in *Britt* that an unborn child capable of life outside the womb is a 'child.'"). *Id.*

¹⁸⁹ *Horn*, 824 N.E.2d at 697. See *O'Grady*, 654 S.W.2d at 909. The court identified three purposes of a wrongful death statute: to provide compensation to plaintiffs for the loss of the loved ones; to ensure that tortfeasors are held responsible for their actions; and to generally deter conduct that could result in death. *Id.* The court found that these general reasons for enacting a wrongful death statute apply equally whether the deceased is born or unborn. *Id.* Parents have a general right to be protected against, and compensated for, the loss of the child they wished to have. *Id.*

1250 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

then be disregarded or lightly treated.”¹⁹⁰ It would surely be a strange interpretation of the legislature’s intent if the amended statute was read to significantly expand the scope of damages being awarded to expectant parents who lost their child, while at the same time drastically limiting the class of individuals who could bring a claim.¹⁹¹

Furthermore, when interpreting statutes, courts should interpret words in their plain, or ordinary and usual sense.¹⁹² The American Heritage dictionary’s definition of “child” includes an unborn infant or fetus.¹⁹³ The appellate court in *Britt* determined the term “child” found in the wrongful death statute included viable, unborn children.¹⁹⁴ The Indiana Supreme Court in *Bolin*, however, reached an opposite conclusion when it viewed the language defining child and concluded that the legislature intended for only living individuals to be included under the statute’s provisions.¹⁹⁵ Yet, if the Indiana Supreme Court viewed the language defining “child” as solely an upper limit on recovery and acknowledged the fact that the term “child” has included viable fetuses since 1972 without the legislature challenging this interpretation, a different conclusion might have been reached in *Bolin*.¹⁹⁶

¹⁹⁰ *Miller v. Maybury*, 506 N.E.2d 7, 11 (Ind. 1987) (citations omitted); see *Steggall v. Morris*, 258 S.W.2d 577, 582 (Mo. 1953) (finding that since the legislature had not acted to stop different areas of the state’s law from conferring a legal identity to the unborn, the legislature had accepted that a “person” for purposes of Missouri law included a viable fetus).

¹⁹¹ *Horn*, 824 N.E. at 701. The appellate court found the Indiana Supreme Court missed the legislature’s intent:

The holding in *Bolin* that parents in Indiana cannot recover for the wrongful death of a viable fetus is a return to the 19th century when, in tort law, a fetus and its mother were considered one and the same. We do not believe that the Indiana legislature intended to turn the clock back a century when it modified the child wrongful death statute in 1987.

Id.

¹⁹² IND. CODE § 1-1-4-1(1) (2004); see *supra* note 197 (noting the Indiana Court of Appeals’ criticism of the Indiana Supreme Court’s interpretation of the child wrongful death statute).

¹⁹³ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 332 (3d ed. 1992).

¹⁹⁴ See *supra* note 128 and accompanying text (acknowledging that Indiana law recognizes a fetus for purposes of its criminal and probate laws).

¹⁹⁵ See *supra* note 143 and accompanying text (explaining the Indiana Supreme Court’s interpretation of the 1984 amendment to Indiana’s Wrongful Death or Injury of a Child statute).

¹⁹⁶ See *supra* text accompanying note 154 (stating how the Indiana Supreme Court changed Indiana’s approach to fetal wrongful death, even though Indiana and multiple other states utilized the viability approach for many years); see also *Horn*, 824 N.E.2d at 701 (the court recommended that the appellant seek transfer to the Indiana Supreme Court, and encouraged the Indiana Supreme Court to reconsider its interpretation of the child wrongful death statute).

2. The Indiana Supreme Court Wrongfully Added the Born-Alive Requirement

Along with changing the definition of the term “child,” the Indiana Supreme Court also replaced the rule of wrongful death recovery at viability with the born-alive rule.¹⁹⁷ The Indiana Supreme Court has stated that nothing may be read into a statute that is not the manifest intent of the legislature as ascertained from the plain language of the statute.¹⁹⁸ It is difficult to assume that the Indiana legislature intended to significantly expand damages recoverable under the child wrongful death statute while simultaneously denying recovery to the class of individuals to which the damages would most apply.¹⁹⁹ Furthermore, if the Indiana legislature intended to exclude unborn children from the statute when it made the amendments in 1987, it would have precluded the courts from continuing to utilize the viability approach after 1998 when it amended the statute once again.²⁰⁰ Instead, the legislature was silent as to the courts’ continued adherence to the viability rule, therefore accepting this approach rather than, as the Indiana Supreme Court held, proposing a new rule, which is not found in the text of the statute or in court opinions during this time period.²⁰¹

3. The Interpretation of the Wrongful Death Statute Contradicts Other Laws

Finally, by failing to include unborn children under Indiana’s child wrongful death statute, the Indiana Supreme Court is contradicting other state laws that specifically protect unborn children.²⁰² Under Indiana

¹⁹⁷ See *supra* text accompanying note 144 (showing the effects of the born alive approach on fetal wrongful death cases); see also *Bolin*, 764 N.E.2d at 207 (explaining why the Indiana Supreme Court found the born-alive rule was the legislature’s intended test for wrongful death claims).

¹⁹⁸ *Indiana Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 946 (Ind. 1999); see also *Horn*, 824 N.E.2d at 699 (stating that requirements, such as a rule of law, are not usually read into statutes).

¹⁹⁹ See *supra* notes 135–36 and accompanying text (noting what the amendments were and how they subsequently affected Indiana law); see also *Horn*, 824 N.E.2d at 698 (bringing attention to the fact that for fifteen years after the wrongful death statute was amended, the viability rule was still the accepted approach in the state).

²⁰⁰ See *supra* note 142 (stating that the legislature amended the wrongful death statute fifteen years after the viability rule was judicially enforced, and the legislature did not alter this holding in any way).

²⁰¹ See *supra* note 174 (stating the language of child and adult wrongful death statutes).

²⁰² See *supra* note 149 and accompanying text (identifying the Indiana Court of Appeals’ problems with the Indiana Supreme Court’s interpretation of the child wrongful death statute).

1252 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

law, knowingly or intentionally killing a viable fetus is murder and punishable by the death sentence.²⁰³ Similarly, an individual who unintentionally kills a viable fetus when acting in a reckless manner can be charged with feticide.²⁰⁴ Yet, this same individual who could be charged with feticide for his reckless actions owes no civil duty to the same woman under the current interpretation of Indiana's child wrongful death statute.²⁰⁵ This outcome is an anomaly under Indiana law and creates incongruous results.²⁰⁶ Assuming the legislature is aware of the implications and impact a proposed statute will have on the state's law, it is doubtful the legislature meant for an individual who unintentionally kills an unborn child, in a car accident for example, to be punished criminally yet owe no civil duty to the parents who suffer the injury for their loss.²⁰⁷

B. The Indiana Supreme Court's Interpretation of Indiana's Child Wrongful Death Statute Violates Indiana's Equal Privileges Clause

The Equal Privileges Clause of the Indiana Constitution provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."²⁰⁸ This provision of Indiana's Constitution has been interpreted to impose two requirements on statutes that grant unequal privileges or immunities to differing classes

²⁰³ See *supra* note 41 (explaining Indiana's feticide statute).

²⁰⁴ *Horn*, 824 N.E.2d at 701. The appellate court reasoned that the legislature intended courts to apply the logical application of the language within statutes and doubted that the legislature intended the results created by the Supreme Court. *Id.* Specifically, the court stated,

Under *Bolin's* interpretation of the statute, a person whose wrongful act results in the death of a viable fetus owes no civil duty to the parents and is not a tortfeasor, even if the same person is convicted of feticide based on the same facts. The outcome is not only incongruous, but it is also an anomaly in Indiana law.

Id.

²⁰⁵ *Id.* See *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. 1983) (determining that since criminal law recognized that a fetus was a person for purposes of its murder statute, it would be illogical to deny a legal identity to a fetus in tort law).

²⁰⁶ *Horn*, 824 N.E.2d at 701.

²⁰⁷ See *Horn*, 824 N.E.2d at 696 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970)), in which the court noted the differences in criminal and civil laws that the *Bolin* decision had created by quoting the Supreme Court: "[A] judicious consideration [sic] of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy."

²⁰⁸ IND. CONST. art. 1, § 23.

of people.²⁰⁹ Though courts typically should refrain from scrutinizing legislative classifications, they are justified to do so if the classification seems arbitrary or manifestly unreasonable.²¹⁰ When the Indiana Supreme Court decided *Bolin* in 2002, it interpreted Indiana's Wrongful Death or Injury to a Child Statute in a manner that unjustifiably excludes parents of unborn children in violation of its Equal Privileges Clause.²¹¹

When the Indiana Supreme Court decided *Bolin*, it interpreted the meaning of "child" in the Indiana Wrongful Death or Injury of a Child Statute.²¹² When the court in *Bolin* concluded that the statute encompassed only living children, the court drew a line, and in doing so, it placed parents of children born alive on one side and parents of children not born alive on the other side.²¹³ This distinction creates a difference in which there is no legitimate purpose for such disparate treatment; instead, the privilege of maintaining a wrongful death cause of action should apply to both parents of children born alive and parents of viable, unborn children.²¹⁴

To begin, when applying the first part of the *Collins* test to the Indiana Supreme Court's interpretation of Indiana's child wrongful death statute, it becomes clear that there are no inherent differences

²⁰⁹ See *supra* note 148 (listing the requirements needed to pass Indiana constitutional scrutiny).

²¹⁰ *Id.* See *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984). In overturning its state's use of the born-alive rule for fetal wrongful death, the Supreme Court of North Dakota noted the manifest flaws of that position. *Id.* The court stated that "[w]e believe that it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death." *Id.* Therefore, the court refused to uphold a position which produced unreasonable and indefensible results taken with contemporary understandings. *Id.*

²¹¹ *Horn*, 824 N.E.2d at 701-03. The court found that there were no inherent differences between the parents of a child born alive and the parents of a viable fetus. *Id.* at 701. Specifically, the appellate court rejected that the harm suffered, evidentiary standards, or the simple fact that a child is born were sufficient to justify the unequal treatment of parents of unborn children. *Id.* at 702-03. See, e.g., *O'Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. 1983) (holding that parents of children born alive and parents of viable fetuses suffer the same emotional harm when the child is negligently killed).

²¹² See *supra* text accompanying notes 139-40 (explaining the 1984 amendments which provided the current definition of the term "child" in the wrongful death statute); see also *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002).

²¹³ See *supra* text accompanying note 145 (stating how *Bolin* has precluded the parents of a viable child negligently killed from recovery in wrongful death); see also *Bolin*, 764 N.E.2d at 203 (stating that a viable fetus is not included in the class of individuals protected by the wrongful death statute); *Horn*, 824 N.E.2d at 694 (stating that Indiana's current law does not protect viable fetuses in wrongful death cases). But see *McVey v. Sargent*, 855 N.E.2d 324 (Ind. Ct. App. 2006).

²¹⁴ *Horn*, 824 N.E.2d at 703; see also *O'Grady*, 654 S.W.2d at 908 (stating that parents whose child is killed before birth and parents whose child is killed shortly after birth both suffer nearly identical emotional harm).

1254 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

between parents of a child born alive and parents of a viable, unborn fetus.²¹⁵ It is important to distinguish that recovery for wrongful death focuses on the survivors, in this case the parents, and not the children that are born alive or die before this point.²¹⁶ Although the court did not address this specific issue in *Bolin*, the equal privileges and immunities argument has been presented in the lower courts.²¹⁷ Justifications for distinguishing parents of children born alive from parents of viable children who do not survive until birth are numerous.²¹⁸ Some commentators argue that the two classes of parents differ because of the different evidentiary standards that apply to proving that a child is viable or that a child is born alive.²¹⁹ Others argue that parents of a child who is born alive have a more concrete emotional attachment to the child than parents who never actually saw their child.²²⁰ Incorrectly, the *McVey* court applied the test to the children rather than the parents and concluded that the inherent difference, sufficient to satisfy constitutional scrutiny, was that children born alive have an independent existence

²¹⁵ *Horn*, 824 N.E.2d at 702. See *supra* text accompanying note 108 (stating that the pain suffered by parents whose child dies before birth and the pain suffered by parents whose child dies after birth is the same).

²¹⁶ See *supra* text accompanying note 53 (stating that wrongful death actions are meant to compensate survivors or living people, not the decedent). See *Bolin*, 764 N.E.2d at 204 (noting that courts have come to different conclusions about whether the inherent differences referred to in the *Collins* test refers to the parents of the child wrongfully killed or the child itself); *Horn*, 824 N.E.2d at 702 (discussing why the parents should be the focus of the argument). *But c.f. McVey*, 855 N.E.2d at 328 (discussing why the child should be the focus of the constitutional scrutiny).

²¹⁷ See *supra* notes 148, 152–53 and accompanying text (examining two different perspectives on the current interpretation of the child wrongful death statute in relation to Indiana’s Equal Privileges Clause).

²¹⁸ See *supra* notes 92–96 and accompanying text (giving multiple examples of why viable children should be protected under a wrongful death statute).

²¹⁹ See *Horn*, 824 N.E.2d at 704 (Mathias, J. concurring). Judge Mathias argues that the word “individual” is given a contextual meaning if a viability standard is used. *Id.* A fetus will be considered an “individual” if she can be proven viable, yet a fetus a day older who is not medically capable of surviving independently will not be considered an “individual” for purposes of the statute. *Id.* Indeed, viability could depend on whether the expectant mother is able to reach a modern metropolitan hospital where her child might survive rather than having access only to a rural hospital without the same advanced prenatal care facilities. *Id.*

²²⁰ See *supra* notes 116 and accompanying text (describing the Missouri Supreme Court’s determination that the harm suffered by parents who lose a viable fetus and parents who lose a child shortly after birth suffer the same pain); see also *Horn*, 824 N.E.2d at 703 (stating that both groups of parents are emotionally injured and it should be up to a jury to quantify this damage for purposes of the wrongful death statute rather than simply excluding parents of unborn children because the emotional damage is difficult to quantify).

outside the mother's body, whereas unborn fetuses do not have such an independent existence.²²¹

The differences used to justify the distinctions above are not inherent differences in situations related to the subject-matter of the legislation that necessitate different or exclusive legislation with respect to members of the class.²²² First, there are no inherent differences that necessitate compensating parents whose child dies shortly after birth, while denying recovery to parents whose child dies shortly before birth.²²³ Both groups of parents suffer the loss of their child through the wrongful act of another person.²²⁴ Though it is argued that the different evidentiary standards justify the distinction between the parents, the difference in litigation costs is not an inherent difference between the parents.²²⁵ Furthermore, under the born-alive rule, two elements must be proven: first, that the injury sustained by the unborn child is the proximate cause of his death; and second, that the injury that resulted in the unborn child's death occurred when the fetus was viable.²²⁶ Under a viability rule, parents have to prove the same two elements with slightly more difficulty merely because the child dies inside the mother rather than outside the mother.²²⁷ The different means of proving these two

²²¹ See *McVey*, 855 N.E.2d at 328. The *McVey* court also addressed the fact that the *Bolin* decision created classifications between mothers and fathers. *Id.* Under the current law, expectant mothers will be able to recover, but the unborn child's father will have no cause of action. *Id.* The Court found the mother's privilege was reasonably related to the inherent distinctions between the two, exemplified by the fact that the mother suffers the miscarriage while the father does not. *Id.*

²²² *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994); see also *Horn*, 824 N.E.2d at 702-03 n.13 (explaining that an equal protection argument should center on the parents of the negligently killed child and that there are no differences sufficient to treat parents of viable children and parents of children that survive until birth differently under the appropriately applied constitutional scrutiny).

²²³ *Horn*, 824 N.E.2d at 702; see *supra* notes 108, 116 and accompanying text (stating how damages suffered by parents of unborn children and parents of children that die shortly after birth are relatively the same).

²²⁴ *Horn*, 824 N.E.2d at 702. The *Horn* court stated that both groups of parents have the same interests at stake, mainly the death of their child from the tortious conduct of another person. *Id.* The court continued to explain that although there are minor differences between the two groups of parents, every distinction does not amount to a constitutional difference. *Id.*

²²⁵ See *supra* note 81 (discussing how complex medical issues are resolved daily in courts around the country); see also *Horn*, 824 N.E.2d at 703 ("Whether the viable fetus would have been born alive is an issue subject to proof at trial and not unlike[,] or more difficult to prove than[,] any other medical issue tried in Indiana courts on a daily basis.").

²²⁶ See *supra* text accompanying note 81 (noting that even under a born alive test, a child must sustain the injury that causes its death after the point of viability).

²²⁷ See *supra* note 98 and accompanying text (addressing the different evidentiary standards used to determine liability under a viability approach and a born-alive approach).

1256 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

elements are simply “subject to proof at trial and not unlike or more difficult to prove than any other medical issue tried in Indiana courts on a daily basis.”²²⁸

It is also an unreasonable subjective judgment to determine that parents of a child who is born alive have a more concrete emotional attachment to their child than parents of a child that dies before birth.²²⁹ The difficulty with all wrongful death statutes which allow recovery for emotional loss is proving actual damages for lost love and affection.²³⁰ Though it might be a valid consideration for a jury in awarding damages that parents of a child born alive get to touch and see their child, this does not negate the fact that parents who lose their child one day before birth can be just as emotionally damaged by the loss of their progeny whose love and affection they would have enjoyed, but for the intervening wrongful act.²³¹

Finally, there is no inherent difference between a viable child and one that is born alive.²³² The *McVey* court found the inherent difference which justified the unequal treatment between unborn children and children that have been born is that “the child who has been born has an independent existence outside the mother’s body[.]”²³³ The definition of viability is a fetus reaching such a stage in development to exist independently of the mother.²³⁴ Therefore, the only difference between

²²⁸ *Horn*, 824 N.E.2d at 703. The court highlights that the same medical evidence used to prove a viability rule under wrongful death statutes is used to prove that a defendant has murdered a fetus under section 35-42-1-1(4) (2004) of the Indiana Code. *Id.* This proof may be shown through a fetal autopsy which will most likely be performed whether the child dies before or after birth. *Id.*

²²⁹ See *supra* notes 108, 116 and accompanying text (explaining that both parents of viable fetuses and parents of children who die shortly after birth suffer the same emotional trauma).

²³⁰ See *supra* notes 60–62 (explaining which emotional harms are legally recoverable damages); see also *Horn*, 824 N.E.2d at 703.

²³¹ *Horn*, 824 N.E.2d at 703. Although assessing emotional damages such as loss of love and affection is highly difficult in cases dealing with unborn or young children, the argument that parents of a child born alive have a more direct emotional attachment to the child, and therefore a more quantifiable loss, does not carry much weight. *Id.* Both mothers must carry their child during gestation which creates an emotional bond whether the child is born alive or not. *Id.* Further, it is not uncommon for parents of a stillborn fetus to hold their child after birth. *Id.*

²³² *Id.* at 702. The only difference between the two groups of children is that one survives until birth while the other dies shortly before birth. *Id.* This amounts to nothing more than parents of viable fetuses expending more resources and effort in litigating their wrongful death claim than parents of a child that dies after birth. *Id.* at 703.

²³³ See *supra* note 153 and accompanying text (giving examples of how fetuses and live children are different). See also *McVey v. Sargent*, 855 N.E.2d 324, 328 (Ind. Ct. App. 2006).

²³⁴ BLACK’S LAW DICTIONARY, *supra* note 53, at 1597 (defining viable as “[c]apable of living, esp[ecially] outside the womb”).

the two children—birth—will not suffice to create a proper distinction under Indiana's constitutional scrutiny.²³⁵

Because the first part of the *Collins* test fails, specifically that there are no inherent characteristics that distinguish the unequally treated classes, there is no need to address the second part of the test.²³⁶ The privilege given to parents whose child is born of maintaining a wrongful death suit for injuries inflicted on a child *in utero* is not reasonably related to inherent distinctions between them and parents of viable, unborn child.²³⁷ Therefore, the Indiana Supreme Court's holding in *Bolin* creates situations where the child wrongful death statute will violate Article I, Section 23 of the Indiana Constitution as applied.²³⁸

C. *Indiana Should Allow Parents of Viable, Unborn Children to Maintain Wrongful Death Claims as a Matter of Public Policy*

The Indiana Supreme Court effectively turned back the clock when it traded in the state's viability approach for the outdated born-alive rule.²³⁹ Advances in obstetrics and neonatology have compelled every state to abandon the common law notion that the mother and her unborn child were one entity, and this same reasoning has compelled a majority of the states to abandon the born-alive rule.²⁴⁰ Indeed, the *Bolin* holding

²³⁵ *Horn*, 855 N.E.2d at 703. In concluding, the court found that parents of viable fetuses and parents of children that die shortly after birth have no differences that permit different constitutional treatment. *Id.* The court went further in finding that the current interpretation of the wrongful death statute completely prohibits fathers of unborn children from any remedy at law when that child is tortiously killed. *Id.* The court could not contemplate any legitimate reason for treating fathers differently than mothers, therefore finding that the current interpretation of Indiana's Wrongful Death or Injury of a Child statute violates the Indiana Constitution in multiple ways. *Id.*

²³⁶ *Id.* at 702 (since the court found that the treatment of the two groups of parents was not reasonably related to inherent characteristics which distinguish the unequally treated groups, the court did not address whether the unequal treatment was uniformly applicable and available to all people similarly situated).

²³⁷ *Id.*

²³⁸ *Id.* See also *Britt v. Sears*, 277 N.E.2d 20, 24 n.20 (Ind. App. 1971). Earlier court decisions have questioned whether distinctions between viable fetuses and children who die shortly after birth could meet federal constitutional scrutiny. *Id.* "Superficially, at least, the United States Supreme Court's decisions under the Equal Protection Clause with respect to illegitimate children cast some doubt on the constitutionality of excluding unborn and stillborn children." *Id.* (citations omitted).

²³⁹ See *supra* text accompanying note 154 (explaining the effect of the Indiana Supreme Court's holding in *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002)); see also *Horn*, 824 N.E.2d at 701 (noting that the court determined that the Indiana Supreme Court turned the clock back a century when it overturned *Britt* and returned to following the common law born alive rule).

²⁴⁰ See *supra* note 74 (noting that only fourteen states still require that a child be born alive to recover for injuries sustained before birth).

1258 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

should be overturned because it does not follow contemporary and equitable understandings of wrongful death recovery.

To begin, the Indiana Supreme Court's holding in *Bolin* is inconsistent with modern understandings and trends in wrongful death recovery.²⁴¹ Thirty states recognize a cause of action when a viable child is wrongfully killed along with the five states that allow recovery for pre-viable children that are wrongfully killed.²⁴² The Indiana Supreme Court justified its position by claiming the legislature was simply creating a clear line—birth—which would enable parents to recover for the wrongful death of their child.²⁴³ The court reasoned that the legislature was attempting to avoid the confusion and difficulty that results from attempting to prove a child was viable at the time of its death.²⁴⁴ The fact that the legislature set the point at birth is rationally related to its interest in having a clear time defined for its citizens so that they might then pursue the action authorized by the statute.²⁴⁵

However, although Indiana may have an interest in giving a clear definition to its citizens when they might pursue a wrongful death claim, drawing the line at birth is inequitable and unjust for many reasons. As the majority of the states in the country have identified, if a child can recover for prenatal injuries if it survives until live birth, there is no adequate reason to cut off the right to be free from tortious injury simply because the injury is severe enough to cause death.²⁴⁶ Lines of demarcation, such as birth, should be disregarded if they create unjustifiable and incongruous results.²⁴⁷ Most states have recognized the fact that the loss suffered by parents is substantially the same whether the child dies immediately before birth or immediately after birth.²⁴⁸ By

²⁴¹ See *supra* notes 88, 100 and accompanying text (identifying the large majority of states which follow either the viability or pre-viability approaches to fetal wrongful death).

²⁴² See *supra* notes 88, 100 and accompanying text (identifying the large majority of states which follow either the viability or pre-viability approaches to fetal wrongful death).

²⁴³ See *supra* note 153 (justifying the exclusion of parents whose child does not survive until birth from wrongful death recovery).

²⁴⁴ See *supra* text accompanying note 98 (stating how the viability approach carries more difficult evidentiary standards than the born alive rule).

²⁴⁵ See *supra* note 153 (justifying the exclusion of parents whose child does not survive until birth from wrongful death recovery); see also *McVey v. Sargent*, 855 N.E.2d 324, 329 (Ind. Ct. App. 2006).

²⁴⁶ See *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394, 397 (D.C. 1984) (stating that liability should not be extinguished by the event of death); see also *supra* notes 54–55 and accompanying text (discussing the criticism of the common law idea that it was cheaper to kill the victim than to injure him).

²⁴⁷ *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88, 92 (Ill. 1973), *superseded by statute* 2008 WL 4210537 (Ill.App. 1 Dist. Sep 12, 2008) (NO. 1-05-3202).

²⁴⁸ See *supra* note 108 and accompanying text (discussing that the harm suffered by parents is the same no matter when their child perishes).

denying recovery for viable children killed before birth, Indiana is perpetuating the criticism of the common law rule that it is cheaper to kill the victim than to scratch it.²⁴⁹

Thus, for the aforementioned reasons, Indiana should adopt a new statute clearly reflecting the legislature's intent to offer relief to prospective parents.²⁵⁰ In order to fairly and uniformly offer relief to expectant parents, Indiana should follow the viability approach that the state followed for over thirty years prior to 2002.²⁵¹

IV. PROPOSED LEGISLATION

In *Bolin*, the Indiana Supreme Court effectively precluded expectant parents from maintaining a cause of action for the wrongful death of their unborn child unless that child suffers a prenatal injury and survives until birth; fortunately, this inequitable result can be avoided.²⁵² With its holding in *Bolin*, the Indiana Supreme Court reversed thirty years of established case law providing parents a remedy for the pain and suffering associated with the death of their soon-to-be-child.²⁵³ In order to clearly convey that the Indiana Supreme Court incorrectly identified the legislature's intent when reestablishing the common law born-alive rule, the Indiana legislature should amend the current wrongful death statute to unequivocally advance a viability approach that would offer a remedy to parents of viable, unborn children.²⁵⁴ Part IV.A explains why the current interpretation of Indiana's child wrongful death statute is flawed and unacceptable in modern society.²⁵⁵ Part IV.B then proposes an amendment that would clearly indicate that Indiana includes parents of viable, unborn children in the class of individuals capable of maintaining a claim under the child wrongful death statute.²⁵⁶ Finally,

²⁴⁹ See *supra* notes 54–55 and accompanying text (discussing the criticism of the common law idea that it was cheaper to kill the victim than injure him).

²⁵⁰ See *infra* Part IV (proposing an amendment to Indiana's Wrongful Death or Injury of a Child Statute).

²⁵¹ See *supra* text accompanying notes 136–37 (noting that Indiana followed the viability rule from 1972 to 2002).

²⁵² See *supra* Part II.D (explaining the court's holding in *Bolin* which found the Indiana legislature intended to exclude parents of viable unborn children from recovery, even though the state had allowed recovery for the previous thirty years).

²⁵³ See *supra* Part II.D (discussing Indiana's fetal wrongful death statute and its application).

²⁵⁴ See *supra* Part III (challenging the Indiana Supreme Court's interpretation of the Wrongful Death or Injury of a Child Statute as violating the Indiana Constitution and not expressing the legislature's intent).

²⁵⁵ See *infra* Part IV.A (identifying the problems created by the current interpretation of the child wrongful death statute).

²⁵⁶ See *infra* Part IV.B (proposing a model amendment).

1260 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

Part IV.C highlights the advantages this rule will have on Indiana as a whole.²⁵⁷

A. *The Born-Alive Rule Is Incompatible With Indiana Law and Produces Unjust Results*

Currently, Indiana law protects the unborn in criminal law and portions of civil law, yet not in civil wrongful death actions.²⁵⁸ It makes little sense that Indiana lawmakers intended to punish an individual criminally for his reckless acts which resulted in the death of a viable unborn child while simultaneously determining that the same individual owes no civil duty to the child's parents for the same act.²⁵⁹ Furthermore, Indiana offers civil remedies for unborn children in areas such as property law.²⁶⁰ It is therefore difficult to reconcile that individuals are held accountable for harming the well-being of a viable fetus in Indiana's homicide, property, and various others areas of law while the parents of a viable fetus are not offered a cause of action under the current wrongful death statute.²⁶¹

Additionally, a large majority of states have found it necessary that a remedy be available to parents whose viable, unborn child is killed by another individual.²⁶² Regardless of the state's moral and ethical beliefs about the identity of the unborn, expectant parents who lose their child before birth suffer an injury and should have a remedy at law.²⁶³ The Indiana Supreme Court unjustifiably has upheld the lack of a remedy for parents of unborn children as promoting judicial efficiency and providing lower courts with clear guidelines regarding fetal wrongful death.²⁶⁴ For these reasons, Indiana's wrongful death law needs to be

²⁵⁷ See *infra* Part IV.C (identifying the advantages that adopting the proposed amendment would have on the state).

²⁵⁸ See *supra* notes 41, 144, 204 and accompanying text (giving examples of criminal liability stemming from the killing of a viable fetus).

²⁵⁹ See *supra* note 204 (noting that Indiana prosecutes individuals for murder if they intentionally or recklessly kill an unborn, viable child).

²⁶⁰ See *Britt v. Sears*, 277 N.E.2d 20, 25 (Ind. App. 1971) (noting that Indiana protects the property interests of unborn children).

²⁶¹ See *supra* note 204 (criticizing the fact that the death of a fetus can result in criminal liability but not civil liability).

²⁶² See *supra* notes 74, 100 (listing the thirty states which allow wrongful death recovery for viable, unborn children and the six states which offer recovery for children negligently killed at any point past conception).

²⁶³ See *supra* notes 95-96 (giving justifications for allowing parents of a viable fetus to maintain a cause of action in wrongful death).

²⁶⁴ See *supra* note 153 (declaring that the state legislature wants to provide concrete definitions to establish who can utilize a statute and who cannot).

2009] *Indiana's Child Wrongful Death Statute* 1261

amended to provide full recovery to parents whose unborn child is negligently killed.²⁶⁵

B. Indiana's Child Wrongful Death Statute Should Be Amended to Include Parents of Viable Fetuses

A simple addition to Indiana's Wrongful Death or Injury of a Child Statute will solidify the legislature's intent to include parents of viable, unborn children under that statute's provisions. The Indiana General Assembly should amend Indiana Code section 34-23-2-1 as follows:

Sec. 1. (a) As used in this section, "child" means an unmarried individual without dependents who is:

- (1) less than twenty (20) years of age; or
- (2) less than twenty-three (23) years of age and is enrolled in a postsecondary educational institution or a career and technical education school or program that is not a postsecondary educational program; or
- (3) *a fetus that has attained viability (as defined in IND. CODE § 16-18-2-365) . . .*²⁶⁶

This simple addition to the child wrongful death statute will clarify many of the ambiguities and weaknesses of the current version of the statute.²⁶⁷ First, the Indiana Supreme Court in *Bolin* found that the legislature was not clear in whether they were creating an upper limit to recovery, or as the court interpreted the statute, both an upper and lower limit to recovery.²⁶⁸ With the addition of this Note's proposed amendment, it will become clear that the language used to describe the term "child" in subsections (1) and (2) of the statute was included to place an upper limit on recovery.²⁶⁹ The upper limit to recovery is necessary to limit a parent's ability to collect damages under wrongful death for an older child whose emotional connection to the child is tenuous and further to differentiate between the child and adult

²⁶⁵ See *supra* note 18 (providing the text of the Wrongful Death or Injury of a Child statute).

²⁶⁶ IND. CODE § 16-18-2-365 (2007) (defining viability as "the ability of a fetus to live outside the mother's womb[']"). The italicized text is the contribution of the author.

²⁶⁷ See *supra* note 18 (Indiana already compensates for non-pecuniary losses under its wrongful death statute, specifically for the loss of the child's services and the child's love and compassion).

²⁶⁸ See *supra* note 167 and accompanying text.

²⁶⁹ See *supra* Part III.A (advocating that the legislature's intent in adding the factors to describe the term "child" in the wrongful death statute were originally meant to create an upper limit to recovery).

1262 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

wrongful death statutes.²⁷⁰ The amendment, subsection (3) of the statute, will identify the lower limit for which parents could seek recovery—viability—which provides clear guidelines to the court and parents that recovery is only possible at this point. Viability is a logical placement of a lower limit for wrongful death purposes because it precludes parents from seeking recovery during the early stages of pregnancy when the child's birth is less certain than after the point of viability.²⁷¹ Furthermore, it limits recovery for emotional damages to parents who have a reasonable expectation that their child will be born in the later stages of pregnancy and who possibly develop a stronger emotional connection with their future offspring.²⁷²

Finally, the addition of the amendment to Indiana's Wrongful Death or Injury of a Child Statute will actually provide courts with a clearer definition of the class of individuals covered by the statute.²⁷³ The *Bolin* court worried that without setting a specific point at which parents may recover for the death of a child caused by another's negligence would result in "open-ended liability."²⁷⁴ The above proposed amendment will provide Indiana Courts and its citizenry with clear notice of when a cause of action is permitted.²⁷⁵ Though determining viability is more difficult than determining if a child is born alive, Indiana courts determine whether a fetus is viable in abortion and homicide laws, making it a routine matter regularly resolved by the state's courts.²⁷⁶

C. *As Amended, Indiana's Wrongful Death Statute Will Offer Acceptable Relief and Work in Conjunction With Indiana's Other Laws*

If the proposed changes are made to Indiana's Wrongful Death or Injury of a Child Statute, Indiana's wrongful death law will finally be

²⁷⁰ See *supra* text accompanying note 114 (discussing the criticism of the pre-viability rule, that is, that it awards damages that are too speculative given the circumstances).

²⁷¹ See *supra* text accompanying note 114 (discussing the criticism of the pre-viability rule—that it awards damages that are too speculative given the circumstances).

²⁷² See *supra* note 112 (explaining that one of the main weaknesses of the pre-viability rule is that whether a pregnancy will culminate in a live birth during the early stages of pregnancy is speculative).

²⁷³ See *supra* notes 18, 153 (providing justifications and explanations of where to draw the line for recovery in fetal wrongful death cases).

²⁷⁴ *McVey v. Sargent*, 855 N.E.2d 324, 329 (Ind. Ct. App. 2006).

²⁷⁵ See *supra* note 153 (explaining the Indiana Supreme Court's desire to have a clear point defined for its citizens regarding when a cause of action would be permitted in fetal wrongful death).

²⁷⁶ See *supra* note 228 (stating that Indiana's feticide law requires the same evidence to prove liability as a viability rule requires to prove liability for wrongful death).

compatible with other aspects of Indiana law.²⁷⁷ Just as Indiana's abortion, homicide, and property laws all recognize a viable unborn fetus, Indiana's wrongful death law will do the same and offer the same results.²⁷⁸ No longer will the state of Indiana hold an individual criminally responsible for actions that resulted in the death of a fetus and at the same time find that the guilty party owes no civil duty to the parents who continue to suffer from their loss.²⁷⁹

Furthermore, if Indiana adopts the proposed legislation, it will once again join the thirty-six states that hold that parents whose unborn, viable child is negligently killed will have a remedy at law for their suffering.²⁸⁰ Instead of Indiana being criticized for drawing an arbitrary line precluding parents from recovery if their child dies before birth, the state will identify a clear class of individuals who will have a cause of action, and more fully address the harm suffered by expectant parents if the amendment is adopted.

V. CONCLUSION

If Indiana adopts the amendment proposed in Part IV, the state will once again be in line with the majority of states in recognizing and compensating for the injury expectant parents suffer when their unborn child is taken from them due to the negligent and reckless acts of other individuals. This Note does not call for any moral, philosophical, or theological determinations of what constitutes life; rather, it simply proposes that parents of an unborn child suffer a great emotional harm when that child is tortiously killed and should not be denied recovery. If the amendment is adopted, Indiana law will justly compensate this great harm—as the state had done for thirty years prior to 2002.

Under the current law, John, the reckless and inebriated driver from Part I, will not owe any duty to Ashley and David for killing their first child, even though the state will hold him criminally liable. However, if Indiana adopts the amendment proposed in this Note, John will be held accountable to those most injured—the parents of the child he killed through his reckless acts. As this hypothetical demonstrates, Indiana

²⁷⁷ See *supra* Part III.A (discussing how the current application of the child wrongful death statute is not in accord with the state's other laws).

²⁷⁸ See *supra* notes 41, 144, 204 and accompanying text (providing examples of other Indiana laws which protect a viable fetus).

²⁷⁹ See *supra* note 204 and accompanying text (giving an example of when an individual could be criminally charged but escape civil liability).

²⁸⁰ See *supra* note 88 (listing the thirty states which follow the viability approach for fetal wrongful death).

1264 *VALPARAISO UNIVERSITY LAW REVIEW* [Vol. 43

should adopt the amendments proposed in this Note, so as not to leave expectant parents with an injury for which there is no civil remedy.

Justin Curtis*

* J.D. Candidate, Valparaiso University School of Law (2009).