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The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice

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THE TORTIOUS LOSS OF A NONVIABLE FETUS: A MISCARRIAGE LEADS TO A MISCARRIAGE OF JUSTICE

I. INTRODUCTION

Kristie Crosby was twenty weeks pregnant when her car was hit by a truck owned and operated by the Glasscock Trucking Company.[1] Ms. Crosby delivered a stillborn fetus later that day.[2] The personal representative of the unborn fetus's estate filed a lawsuit on behalf of the miscarried fetus in South Carolina state court under the wrongful-death statute.[3] The statute provides, in relevant portion, the following:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .[4]

The trial court held that a nonviable fetus could not maintain an action for wrongful death, presumably because it is not a "person" within the meaning of the statute, and thus the court dismissed the case.[5] The South Carolina Supreme Court subsequently affirmed the trial court's ruling by a three-to-two margin.[6] Thus, Ms. Crosby not only found herself forced to suffer through a miscarriage caused by the negligent act of another, but she also was faced with a harsh, bright-line rule barring recovery for the loss of her nonviable fetus.

It is difficult to articulate an argument that expecting parents have lost nothing when a pregnancy results in a miscarriage. Psychological studies show that expecting parents whose pregnancies result in a miscarriage experience

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1. Crosby v. Glasscock Trucking Co., 340 S.C. 626, 627, 532 S.E.2d 856, 856 (2000).
2. *Id.*
3. *Id.*
4. S.C. CODE ANN. § 15-51-10 (2005). The common law did not provide a cause of action for wrongful death. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984). Thus, under common law, "[t]he result was 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 . . . without a remedy." *Id.* In response to this problem, states enacted wrongful-death statutes to provide compensation for the family's loss. *See id.* The first statute of this nature was enacted in England in 1846, the Fatal Accidents Act, which was widely known as Lord Campbell's Act. *Id.* (citing Fatal Accidents Act, 1846, 9 & 10 VICT., c. 93 (Eng.)). Today, every state in the United States has a similar statute. *Id.* South Carolina's statute is modeled after Lord Campbell's Act. *See In re* Estate of Mayo, 60 S.C. 401, 406–07, 38 S.E. 634, 635 (1901).
5. *See Crosby*, 340 S.C. at 627, 532 S.E.2d at 856.
6. *Id.*

emotional suffering from the loss of a fetus.[7] At least one study found that these emotional effects last many years after the date of the miscarriage and that even the subsequent birth of a healthy child may not alleviate the parents' bereavement, and in fact, it found that in some cases a subsequent birth may actually aggravate the emotional pain by stirring up old memories.[8] Regardless of the stage of fetal development, potential parents likely suffer a substantial loss anytime they have to go through the experience of a miscarriage.[9] The purpose of this Comment is to highlight the harsh results under the current rule of law and to present several options that would allow potential parents to recover for the loss of a nonviable fetus at the hands of a negligent or intentional wrongdoer.

In Part II, this Comment explains the common law development of liability for prenatal injury in South Carolina tort law, including the entrenchment of viability as a bright-line liability shield under the wrongful-death statute. Part III describes the parallel development of the law in this area in the rest of the United States, including the majority rule that nonviability is a bar to recovery, and discusses *Farley v. Sartin*,[10] a West Virginia decision that allowed the estate of a nonviable fetus to recover under the West Virginia wrongful-death statute.[11] Part IV critiques other states' approaches to compensating victims of similar circumstances as Ms. Crosby under the constraints of the majority rule. Part V then discusses the various ways in which *Roe v. Wade*[12] has affected decisions in the area of tortious prenatal death. Part VI discusses the analysis in the South Carolina Supreme Court's *Crosby v. Glasscock Trucking Co.*[13] decision, which reaffirmed the majority rule.[14] Part VII discusses three avenues that courts could utilize in order to allow the potential parents of a nonviable fetus to recover fully for their loss. Finally, this Comment concludes by advocating that South Carolina courts should begin to provide an adequate remedy to potential parents when a nonviable fetus dies in utero as a direct and proximate result of a wrongdoer's negligent, reckless, or intentional conduct.

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7. *See* Judith N. Lasker & Lori J. Toedter, *Acute Versus Chronic Grief: The Case of Pregnancy Loss*, 61 AM. J. ORTHOPSYCHIATRY 510, 512 (1991) (describing both normal, acute grief and "prolonged or chronic grief"); Kandi M. Stinson et al., *Parents' Grief Following Pregnancy Loss: A Comparison of Mothers and Fathers*, 41 FAM. REL. 218, 222 (1992) (contrasting the different types and intensity of grieving between the sexes but concluding that both grieve the death of a fetus); Susan K. Theut et al., *Perinatal Loss and Parental Bereavement*, 146 AM. J. PSYCHIATRY 635, 637 (1989) (showing that potential parents of miscarried fetuses were impacted regardless of the level of development of the fetus).

8. *See* Theut et al., *supra* note 7, at 637–38.

9. *See id.*

10. 466 S.E.2d 522 (W. Va. 1995).

11. *See id.* at 535.

12. 410 U.S. 113 (1973).

13. 340 S.C. 626, 532 S.E.2d 856 (2000).

14. *See id.* at 627, 532 S.E.2d at 857.

II. SOUTH CAROLINA AND PRENATAL INJURIES

The South Carolina Supreme Court has considered recovery for prenatal injuries on four notable occasions.[15] First, in *West v. McCoy*,[16] the court held that a nonviable, though "quick," fetus killed in utero had no cause of action under the statute even though the miscarriage was "proximately, directly and solely caused by the negligent, careless, willful, unlawful, reckless and wanton acts of [the d]efendant."[17] The court held that an unborn child has "no right of action . . . for its death prior to birth [because] the unborn child is a part of the mother at the time of injury and any damage to it which is not too remote to be recovered at all is recoverable by her."[18] The court noted, but was apparently unconvinced, the trend of allowing recovery where the child was born alive or was viable at the time of injury.[19] It was equally unconcerned with the paradoxical fact that it had held, in construing a criminal abortion statute ten years earlier, that life begins at quickening.[20] Later, in *Hall v. Murphy*,[21] the court allowed the estate of a viable fetus that was born alive, though premature, to recover under the wrongful-death statute where the fetus survived for merely four hours after its birth.[22] The court reasoned that "the law recognizes the separate existence of an unborn child for the purpose of protecting his property rights and to protect him against criminal conduct," and it rejected the traditional arguments against recovery, including lack of precedent, difficulty in showing causation, and the absence of a duty to the fetus because it had no separate existence from its mother.[23] Next, in *Fowler v. Woodward*,[24] the court declared that the estate of a viable fetus, where the fetus died along with its mother in an automobile accident, could maintain a cause of action under the wrongful-death statute.[25] Thus, *Fowler* eliminated the requirement that a viable fetus be subsequently born alive in order to recover under the wrongful-death statute.[26]

Finally, the question of nonviable fetus recovery was the precise issue raised in *Crosby*.[27] In that case, the court reasoned that a fetus is not a person for

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15. *See Crosby*, 340 S.C. 626, 532 S.E.2d 856; Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).

16. 233 S.C. 369, 105 S.E.2d 88 (1958).

17. *Id.* at 371, 375, 105 S.E.2d at 89, 91.

18. *Id.* at 372–73, 105 S.E.2d at 89 (collecting cases).

19. *See id.* at 373, 376, 105 S.E.2d at 90–91 (collecting cases).

20. *See id.* at 375, 105 S.E.2d at 91 (citing State v. Steadman, 214 S.C. 1, 7, 51 S.E.2d 91, 93 (1948)).

21. 236 S.C. 257, 113 S.E.2d 790 (1960).

22. *See id.* at 259, 263, 113 S.E.2d at 791, 793.

23. *Id.* at 261–62, 113 S.E.2d at 792–93 (quoting Amann v. Faidy, 114 N.E.2d 412, 415–16 (Ill. 1953)) (internal quotation marks omitted).

24. 244 S.C. 608, 138 S.E.2d 42 (1964).

25. *Id.* at 613, 138 S.E.2d at 44.

26. *Id.* at 614–15, 138 S.E.2d at 45.

27. *See* Crosby v. Glasscock Trucking Co., 340 S.C. 626, 627, 532 S.E.2d 856, 856 (2000).

purposes of the wrongful-death statute until it reaches viability, and it held that "a nonviable stillborn fetus may not maintain a wrongful death action under § 15-51-10."[28] Thus, in South Carolina, all tortious wrongdoers whose actions cause miscarriage or postbirth death of a fetus are subject to civil liability under the wrongful-death statute, except when they cause the miscarriage of a nonviable fetus.[29]

III. PRENATAL INJURY AT COMMON LAW

Beginning with *Dietrich v. Inhabitants of Northampton*,[30] American courts almost uniformly deny recovery for prenatal injuries, regardless of whether the fetus survived the injury.[31] Generally, these decisions heavily relied on the reasoning expounded by Justice Holmes in *Dietrich*[32]—that a fetus had no separate existence from its mother,[33] that no duty could be owed to it,[34] and that this connection to its mother made all injuries sustained by the fetus alone too

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28. *Id.* at 629, 532 S.E.2d at 857.

29. *See id.*

30. 138 Mass. 14 (1884), *abrogated by* Keyes v. Constr. Serv., Inc., 165 N.E.2d 912, 915 (Mass. 1960) (allowing recovery where the fetus was viable at the time of the injury and was born alive), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967) (rejecting the rule that a fetus must be viable at the time of injury).

31. *See, e.g.*, Allaire v. St. Luke's Hosp., 56 N.E. 638, 640 (Ill. 1900) ("That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed."), *overruled by* Amann v. Faidy, 114 N.E.2d 412, 417–18 (Ill. 1953) (allowing recovery where the fetus is viable and born alive); Newman v. City of Detroit, 274 N.W. 710, 711 (Mich. 1937) ("[A child who suffered prenatal injuries] has no cause of action under the common law or under any statute."), *overruled by* Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971) ("In light of the present state of science and the overwhelming weight of judicial authority, this Court now overrules *Newman*."); Buel v. United Rys. Co. of St. Louis, 154 S.W. 71, 73 (Mo. 1913) ("[T]he Legislature could not have intended . . . when it used the terms 'persons so dying' to include a person who died after birth from injuries received by its mother prior to its birth."), *overruled by* Steggall v. Morris, 258 S.W.2d 577, 582 (Mo. 1953) (allowing recovery by a viable fetus later born alive); Drobner v. Peters, 133 N.E. 567, 568 (N.Y. 1921) ("[D]efendant owed no duty of care to the unborn child . . . apart from the duty to avoid injuring the mother."), *overruled by* Woods v. Lancet, 102 N.E.2d 691, 694 (N.Y. 1951) ("We act in the finest common-law tradition when we adapt and alter decisional law to produce commonsense justice."); Gorman v. Budlong, 49 A. 704, 707 (R.I. 1901) ("[O]ne cannot maintain an action for injuries received by him while in his mother's womb; and consequently his next of kin . . . after his death, cannot maintain an action therefor . . . ."), *overruled by* Sylvia v. Gobeille, 220 A.2d 222, 223 (R.I. 1966) (holding that a fetus, born alive, can maintain a cause of action regardless of viability); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 945 (Tex. Comm'n App. 1935) ("We have found no decision . . . by an appellate court of final jurisdiction holding that damages for prenatal injury may be recovered either by the injured child if it is born and lives or by its beneficiaries in the event of its death from such injury."), *overruled by* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing a right of action for prenatal injuries).

32. *See, e.g.*, West v. McCoy, 233 S.C. 369, 372–73, 105 S.E.2d 88, 89 (1958) (relying on the reasoning in *Dietrich*).

33. *Dietrich*, 138 Mass. at 17.

34. *See id.* at 16–17.

remote for causation purposes.[35] The *Dietrich* court noted that even if the problems of remoteness could be overcome, the court would still have to answer in the affirmative the question of "whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having [standing] in court, or of being represented there by an administrator" before recovery could be allowed.[36]

A. Allowing Recovery—Development of the Majority Rule

Beginning in 1946, in what William Prosser regarded as "what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts,"[37] the United States District Court for the District of Columbia, in *Bonbrest v. Kotz*,[38] rejected these traditional arguments and held that a fetus subsequently born alive may recover for prenatal injuries.[39] The court distinguished the facts in the case from the facts in *Dietrich* by noting that the fetus in this case was viable and, therefore, capable of sustaining life outside its mother's womb.[40] The court also reasoned that it seemed illogical for the fetus to be considered a separate legal entity for the purposes of civil law and property law but part of the mother for the purposes of negligence.[41]

Using *Bonbrest* as a foundation, nearly every jurisdiction in the United States, many times by expressly overruling prior cases,[42] began to allow the estate of a fetus to recover for injuries the fetus sustained while viable in its mother's womb if it was subsequently born alive.[43] Many of these states discarded the viability requirement and only require that the fetus be born

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35. *Id.* at 17.

36. *Id.* at 16 (citing Harper v. Archer, 9 Miss. (4 S. & M.) 33 (1845); Marsellis v. Thalhimer, 2 Paige Ch. 34, 35 (N.Y. Ch. 1830); 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 249 n.b (New York, O. Halsted 1830)).

37. WILLIAM L. PROSSER, LAW OF TORTS § 55, at 336 (4th ed. 1971). This statement has been moderated in later revisions of Prosser's book on torts. *See* KEETON ET AL., *supra* note 4, § 55, at 368 (describing the reversal of the no-duty rule as "rather spectacular").

38. 65 F. Supp. 138 (D.D.C. 1946).

39. *Id.* at 140, 143. Most attribute the origins of this reversal to Mr. Justice Boggs and his famous dissent in *Allaire v. St. Luke's Hospital*, 56 N.E. 638, 640 (Ill. 1900) (Boggs, J., dissenting), *overruled by Amann v. Faidy*, 114 N.E.2d 412, 418 (Ill. 1953). *See, e.g.*, KEETON ET AL., *supra* note 4, § 55, at 368 n.13 (observing that the dissent was the "real start" of the movement); PROSSER, *supra* note 37, § 55, at 336 n.23 (same).

40. *See Bonbrest*, 65 F. Supp. at 140.

41. *Id.*

42. *See, e.g.*, *Allaire*, 56 N.E. at 640 ("That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed."), *overruled by Amann*, 114 N.E.2d at 418 (allowing recovery where the fetus is viable and born alive).

43. *See* RESTATEMENT (SECOND) OF TORTS § 869 & cmt. a (1979) (noting that the "all but universal . . . rule" is that "[o]ne who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive").

alive.[44] However, in wrongful-death cases where the fetus is not born alive, states differ as to the availability of a remedy. A few states require that the fetus be subsequently born alive to state a claim under the wrongful-death statute and have extended recovery no further.[45] However, the majority rule is that a wrongdoer is subject to liability for injuries suffered by a viable fetus that is stillborn.[46] The next logical extension of wrongful-death claims is also to allow recovery by a nonviable fetus that is stillborn, but only nine jurisdictions currently allow such a claim.[47]

Regardless of the distinctions among the jurisdictions, most have agreed that the traditional reasons for denying recovery are ill-conceived, antiquated, and no

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44. *See, e.g.*, Wolfe v. Isbell, 280 So. 2d 758, 763–64 (Ala. 1973) (allowing recovery for wrongful death where the fetus was born alive but died of injuries sustained while not yet viable).

45. *See, e.g.*, Shaw v. Jendzejec, 717 A.2d 367, 368 (Me. 1998) (affirming the strict construction of the wrongful-death statute).

46. *See* Espadero v. Feld, 649 F. Supp. 1480, 1484 (D. Colo. 1986) (applying Colorado law); Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985); Greater Se. Cmty. Hosp. v. Williams, 482 A.2d 394, 398 (D.C. 1984); Volk v. Baldazo, 651 P.2d 11, 14 (Idaho 1982); Shelton v. DeWitte, 26 P.3d 650, 654 (Kan. 2001); Kandel v. White, 663 A.2d 1264, 1266–67 (Md. 1995); Remy v. MacDonald, 801 N.E.2d 260, 265 (Mass. 2004) (citing MASS. GEN. LAWS ANN. ch. 229, § 2 (West 2000)); O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983); Poliquin v. MacDonald, 135 A.2d 249, 251 (N.H. 1957) (citing Rainey v. Horn, 72 So. 2d 434 (1954)); Salazar v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. Ct. App. 1980); DiDonato v. Wortman, 358 S.E.2d 489, 493 (N.C. 1987); Werling v. Sandy, 476 N.E.2d 1053, 1054 (Ohio 1985); Evans v. Olson, 550 P.2d 924, 928 (Okla. 1976); Amadio v. Levin, 501 A.2d 1085, 1089 (Pa. 1985); Crosby v. Glasscock Trucking Co., 340 S.C. 626, 629, 532 S.E.2d 856, 857 (2000); Farley v. Mount Marty Hosp. Ass'n., 387 N.W.2d 42, 43 (S.D. 1986); Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 425 A.2d 92, 94 (Vt. 1980); Cavazos v. Franklin, 867 P.2d 674, 677 (Wash. Ct. App. 1994).

47. In two states, West Virginia and Oklahoma, courts have allowed the estate of a nonviable fetus to recover under a wrongful-death statute. *See* Pino v. United States, 183 P.3d 1001, 1006 (Okla. 2008); Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995). Four states began allowing recovery by statutory enactment. *See* 740 ILL. COMP. STAT. ANN. 180/2.2 (West 2002) ("The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State . . . ."); LA. CIV. CODE ANN. art. 26 (1999) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death."); MO. ANN. STAT. § 1.205 (West 2000) ("(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."); S.D. CODIFIED LAWS § 21-5-1 (2004) (providing for a wrongful-death action for "the death or injury of a person, including an unborn child"). One state allows recovery under a statutorily created wrongful prenatal injury cause of action. *See* MICH. COMP. LAWS ANN. § 600.2922a (West 2000) ("(1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to the embryo or fetus."). Two states allow recovery so long as the fetus was "quick" in the womb prior to death. *See* Citron v. Ghaffari, 542 S.E.2d 555, 557 (Ga. Ct. App. 2000) (dismissing a claim under the wrongful-death statute because the fetus was not yet quick); 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 114 (Miss. 2003) (holding that a fetus that was quick in its mother's womb could maintain an action for wrongful death).

longer justified by the advancements in medical knowledge.[48] These traditional reasons include "the lack of precedent," the "'single entity'" theory, the threat of fraudulent claims, and the difficulty in proving causation.[49] On the other hand, strong reasons exist to allow recovery (although in most cases limited to viable fetuses): the fundamental goal of tort law to allow recovery for tortious conduct causing death, the immunity that would be granted to a tortfeasor for inflicting severe enough harm to cause death while compensating lesser harms, and the protections afforded to fetuses in other areas of law.[50]

B. Allowing Recovery—Nonviable Fetuses

Two judicial decisions have allowed,[51] and several state legislatures have enacted statutes to allow,[52] a wrongful-death claim by the estate of a nonviable fetus. In *Farley*, the West Virginia Supreme Court of Appeals opined that "[t]he societal and parental loss is egregious regardless of the state of fetal development"[53] and that allowing recovery by the estate of a nonviable fetus "reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away."[54] As with the cases that began the common law movement towards compensation for prenatal injuries, the *Farley* court focused on the apparent paradox that denying recovery in this situation would grant immunity to the most egregious tortfeasors, who caused harm so severe that the fetus miscarried instantly, while less severe injuries, where the fetus is subsequently born alive then dies, would be actionable.[55] Indeed, the court noted that "justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death."[56]

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48. *See* KEETON ET AL., *supra* note 4, § 55, at 369; David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 647 (1980).

49. *Farley*, 466 S.E.2d at 529.

50. *See id.* at 531.

51. *See Pino*, 183 P.3d at 1006 (answering in the affirmative the certified question of whether Oklahoma's wrongful-death statute affords a cause of action for the wrongful death of a nonviable, stillborn fetus); *Farley*, 466 S.E.2d at 535 (allowing the estate of a nonviable fetus to recover in a wrongful-death claim). The Oklahoma wrongful-death statute does not refer to the death of a person; rather, it creates a cause of action "[w]hen the death of one is caused by the wrongful act or omission of another." OKLA. STAT. ANN. tit. 12, § 1053 (West 2000). The Oklahoma Supreme Court determined that by using the word "one" instead of "person" the legislature left the reach of the statute up to the development of the common law. *See Pino*, 183 P.3d at 1005 (citing Nealis v. Baird, 996 P.2d 438, 454 (Okla. 1999)).

52. *See* 740 ILL. COMP. STAT. ANN. 180/2.2 (West 2002); LA. CIV. CODE ANN. art. 26 (1999); MO. ANN. STAT. § 1.205 (West 2000); S.D. CODIFIED LAWS § 21-5-1 (2004); *cf.* MICH. COMP. LAWS ANN. § 600.2922a (West 2000) (allowing recovery under a statutorily created wrongful prenatal injury cause of action).

53. *Farley*, 466 S.E.2d at 533.

54. *See id.*

55. *See id.*

56. *Id.*

In reaching its decision, the court pointed to the generally accepted rule of statutory interpretation that remedial statutes should be construed liberally to effectuate the intent of the legislature.[57] Next, the court noted that it had previously dismissed the traditional arguments for denying recovery by the estate of a viable fetus on the grounds that they lacked merit[58] and found these arguments equally without merit with regard to nonviable fetuses.[59] Additionally, the court noted that "the overriding importance of the interest that we have identified merits judicial recognition and protection by imposing the most liberal means of recovery that our law permits."[60] The court also quoted Alabama Supreme Court Justice Hugh Maddox's dissent in *Gentry v. Gilmore*[61] in support of its position.[62] In *Gentry*, Justice Maddox chastised the majority because he felt that "in distinguishing between viability and nonviability of the fetus as a condition for the application of Alabama's Wrongful Death Act, [his colleagues] necessarily resurrect[ed] the same distinctions that led to the adoption of wrongful death statutes in the first place."[63] He specifically argued that the majority improperly focused on viablity rather than the tortfeasor's wrongdoing:

> To deny a cause of action rewards tortfeasors who inflict fatal injuries upon nonviable fetuses, by allowing them to escape liability based upon what I think is an artificial distinction that focuses more on the status of the life that has been wrongfully terminated than upon the wrongful conduct that caused the death.[64]

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57. *See id.* at 531 (citing City of Wheeling *ex rel.* Carter v. Am. Cas. Co., 48 S.E.2d 404, 408 (W. Va. 1948); Wilder v. Charleston Transit Co., 197 S.E. 814, 816 (W. Va. 1938), *superseded by statute*, W. VA. CODE ANN. § 55-7-6 (LexisNexis 2008)). South Carolina follows the same rule of statutory interpretation. *See* S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978); *In re* Estate of Mayo, 60 S.C. 401, 415, 38 S.E. 634, 638 (1901).

58. *Farley*, 466 S.E.2d at 532 (citing Baldwin v. Butcher, 184 S.E.2d 428, 434 (W. Va. 1971) (allowing the estate of a viable fetus to recover under the state's wrongful-death statute)). The court in *Farley* acknowledged the following four traditional arguments for denying recovery: "(1) . . . lack of precedent, (2) an unborn viable child had no jurisdictional existence apart from the mother, (3) it would lead to fraud and difficulties in proof, and (4) it is in derogation of legislative intent and should be left to the legislature to decide." *Id.*

59. *Id.* at 533.

60. *Id.*

61. 613 So. 2d 1241, 1245 (Ala. 1993) (Maddox, J., dissenting).

62. *See Farley*, 466 S.E.2d at 533–34 (citing *Gentry*, 613 So. 2d at 1245–46 (Maddox, J., dissenting)).

63. *Gentry*, 613 So. 2d at 1246 (Maddox, J., dissenting).

64. *Id.*

In conclusion, the *Farley* court held that the estate of a nonviable fetus could maintain a cause of action under the state's wrongful-death statute, except where a woman has exercised her constitutional right to an abortion.[65]

IV. COURTS SEARCH FOR A REMEDY UNDER THE MAJORITY RULE

Some other jurisdictions—perhaps concerned with the inequity of an all-out denial of recovery yet feeling bound by precedent—have sought to provide a remedy for the loss of a nonviable fetus without allowing recovery under their wrongful-death statute. These decisions have posited several theories to allow the mother, in her own personal injury suit (and in one case, the father as well), to recover for the mental anguish suffered as a result of the miscarriage.

One theory—emanating rather ironically from the reasons for denial of recovery in *Dietrich*—has become known as the "body part" theory.[66] Accepting that a fetus is not a separate legal entity, this theory posits that a fetus must necessarily remain a part of the mother, and thus, any injuries sustained by a fetus are recoverable by her, just as she would be able to recover for the loss of an arm or leg.[67] Courts allowing recovery under this theory note—and thus highlight the theory's shortcomings—that the damages available to the mother cannot duplicate those damages traditionally reserved for a wrongful-death action, notably, the loss of filial consortium.[68] In another case, the Louisiana Court of Appeal, also noting that no recovery is allowed for filial consortium, developed a theory that equated the loss of a fetus to an injury resulting in sterility.[69] Both of these theories allow recovery only for emotional-distress damages and medical expenses sustained by the mother due to the miscarriage.[70] In practice, this damage duplication concern limits the recovery available for the loss of a fetus to the mother's emotional distress during the miscarriage itself and perhaps during the time between the injury and the confirmation of the miscarriage.[71]

Of course, allowing recovery only by the mother for her injuries unfairly denies the father any compensation for the loss of his future son or daughter.[72]

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65. *See Farley*, 466 S.E.2d at 535.

66. *See* Smith v. Borello, 804 A.2d 1151, 1158 (Md. 2002) (citing Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884), *abrogated by* Keyes v. Constr. Serv., Inc., 165 N.E.2d 912, 915 (Mass. 1960), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967)).

67. *See id.*

68. *See id.* at 1159.

69. *See* Valence v. La. Power & Light Co., 50 So. 2d 847, 849–50 (La. Ct. App. 1951).

70. *See Valence*, 50 So. 2d at 849–50; *Smith*, 804 A.2d at 1163.

71. *Smith*, 804 A.2d at 1163; *see also* Simons v. Beard, 72 P.3d 96, 101 (Or. Ct. App. 2003) (allowing emotional-distress claim by the mother so long as the damages were "distinct from a wrongful death-based recovery of emotional distress damages").

72. *Cf.* Stinson et al., *supra* note 7, at 222 (noting that most men grieve but that due to societal norms, they are less expressive of their grieving and have a tendency not to seek support

Presumably, if the mother dies with the fetus, the father's potential recovery would be limited to the loss of his wife. This unfortunate circumstance is a result of the common law rules regarding the recovery for emotional distress absent a physical injury. Generally, emotional-distress damages are not recoverable absent physical impact on the person of the plaintiff.[73] However, emotional-distress damages are allowed, in South Carolina and other jurisdictions, when the plaintiff witnesses, from a close proximity, the injury of a close relative or other person with whom the plaintiff has a close personal relationship.[74] Yet, suppose an unmarried, but recently engaged, woman who is one month pregnant is killed (and the fetus is thus lost) after being struck by a negligent driver as she crosses the street. Due to this bystander limitation, the father's[75] loss of the fetus would not be legally recognized, and he would not be a beneficiary of his fiancé's wrongful-death suit;[76] thus the father would receive no compensation from the negligent driver. Though one can imagine a circumstance where the father will be unaffected by this loss, some (if not most) expectant fathers will be devastated by a miscarriage.[77]

Perhaps realizing the inequity of the father's situation described above, the Florida Supreme Court has held that the impact rule is inapplicable to "negligent stillbirth" cases.[78] In that case, the court allowed the parents of a stillborn fetus to recover despite the impact rule, in part, because "it is difficult to justify the outright denial of a claim for the mental pain and anguish which is so likely to be experienced by parents as a result of the birth of a stillborn child caused by the negligence of another."[79] The court felt that the body part theory was merely "a 'clever mechanism to satisfy the impact rule.'"[80] However, like the cases mentioned above, the court decreed that damages would be "limited to mental pain and anguish and medical expenses incurred incident to the pregnancy."[81] Thus, regardless of the way in which courts have chosen to mitigate the harsh results of the majority rule, the resulting recovery is limited.

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from others); David Hlavsa, *My First Son, a Pure Memory*, N.Y. TIMES, Sept. 21, 2008, at ST6 (describing his personal grieving experience after a miscarriage).

73. *See* RESTATEMENT (SECOND) OF TORTS § 426A (1965).

74. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (disregarding the "zone of danger" test in favor of a three-prong test for negligent infliction of emotional distress absent a physical injury); Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 582–83, 336 S.E.2d 465, 467 (1985) (adopting the *Dillon* approach).

75. For the purposes of this hypothetical, assume the father is also the fiancé of the decedent.

76. *See* S.C. CODE ANN. § 15–51–20 (2005) (providing that the beneficiaries of a wrongful-death suit are first the spouse and children, if none then the parents, and if still none, then the heirs of the decedent).

77. *See* Stinson et al., *supra* note 7, at 222 (noting that most men grieve but due to societal norms, they are less expressive of their grieving and have a tendency not to seek support from others); Hlavsa, *supra* note 72 (describing his personal grieving experience after a miscarriage).

78. *See* Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997).

79. *Id.*

80. *Id.* at 707 (quoting Tanner v. Hartog, 678 So. 2d 1317, 1321 (Fla. Dist. Ct. App. 1996)).

81. *Id.* at 709.

V. CONSTITUTIONAL IMPLICATIONS

A mother's constitutional right to abortion is another area of the law, subject to considerably more public controversy, that is inevitably discussed or at least mentioned whenever courts are presented with an issue concerning the remedies available for the loss of a fetus. In *Roe v. Wade*, the United States Supreme Court held that a woman's right to obtain a legal abortion is protected by the Due Process Clause of the Fourteenth Amendment.[82] The Court, in so holding, noted that a woman's right to an abortion is within the fundamental right to privacy, and such a right cannot be overridden absent a compelling state interest.[83] The Court noted that the State had important and legitimate interests in both the health of the mother and in the potential life of the fetus from the moment of conception; however, those interests did not become "compelling" (and thus did not outweigh the mother's right to privacy) until the end of the first trimester or at the point of viability respectively.[84] This case, though it certainly does not compel the states to deny or allow recovery for prenatal loss,[85] has been cited for support of three distinct propositions in cases concerning prenatal loss.[86] The first two have cited *Roe* as a justification for denying recovery, and the third is typically noted by courts allowing recovery.[87]

A. A Fetus Is Not a Person

The first proposition is that because under *Roe* a fetus is not a person for purposes of the Fourteenth Amendment, a fetus should not, or cannot, be considered a person within the meaning of a wrongful-death statute.[88] This argument proceeds from the Court's language in *Roe* that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"[89] and that "the unborn have never been recognized in the law as persons in the whole sense."[90] However, the irony of this argument is that this language regarding legal recognition concludes a discussion by the Court of cases denying recovery for the wrongful death of nonviable fetuses.[91] Thus, the cases that deny recovery for wrongful death and cite *Roe* for support are merely pointing to their own line of

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82. *See* Roe v. Wade, 410 U.S. 113, 164 (1973).
83. *Id.* at 154–55.
84. *See id.* at 163–64. The trimester framework was later rejected by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992) (plurality opinion).
85. *See* Kader, *supra* note 48, at 657 ("*Roe v. Wade* neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes.").
86. *See id.* at 656, 658, 660.
87. *See id.*
88. *See id.* at 656.
89. *Roe*, 410 U.S. at 158.
90. *Id.* at 162.
91. *See id.* at 161–62.

precedent—not a unique principle expounded by the Supreme Court in *Roe*. In light of this fact, a citation to *Roe* in this manner only supports the majority rule to the extent that the Court acknowledged the existence of the rule when *Roe* was decided. Citing to *Roe* for this proposition is not only circular, but it also implies the presence of constitutional issues where there are none. A rule of law should not be justified by its mere existence, even—as in this situation—where the attempted justification is effectuated by the use of a proxy.

B. Conflict with the Mother's Right to an Abortion

The second proposition attributed to *Roe* is that to allow recovery for the death of a nonviable fetus would interfere with the mother's constitutional right to an abortion.[92] Courts claim that the State is prohibited from allowing recovery for the negligent termination of a nonviable fetus because the State cannot punish the intentional termination of that same fetus.[93] Specifically, courts note the possibility that the estate of the fetus might be able to bring an action against the mother for her decision to have an abortion.[94] However, this inconsistency between *Roe* and allowing recovery for the wrongful death of a nonviable fetus is marginalized by an examination of the holding in *Roe* and its relationship to a wrongful-death suit.[95] *Roe* is most appropriately viewed as a weighing of competing interests. The Supreme Court declared that viability is the point at which the State's legitimate interest in the potential life of a fetus becomes compelling, and only then may the State lawfully intrude upon the mother's privacy rights for the sake of maintaining that interest.[96] The distinction between a compelling interest and a legitimate interest is determinative in the balancing analysis of whether the State may abrogate a citizen's fundamental right.[97] However, there is no legitimate, much less compelling, state interest in protecting a wrongdoer from liability where a fetus has died as a result of those wrongful acts.[98] Therefore, without a conflicting privacy interest, the bright-line rule of viability is not required in the context of wrongful-death cases. When the State's interest in the potentiality of human life is the sole consideration, the State may choose to protect that interest as it sees fit. Additionally, one

92. *See* Kader, *supra* note 48, at 658 (citing Toth v. Goree, 237 N.W.2d 297, 301 (Mich. Ct. App. 1975); Presley v. Newport Hosp., 365 A.2d 748, 754–55 (R.I. 1976) (Bevilacqua, C.J., concurring in part and dissenting in part)).

93. *See id.* (citing *Toth*, 237 N.W.2d at 301).

94. *See, e.g.*, Crosby v. Glasscock Trucking Co., 340 S.C. 626, 629, 532 S.E.2d 856, 857 (2000) (noting that if the estate of a fetus that was negligently killed could bring an action against the tortfeasor, it could also bring an action against the mother where she "has exercised her right to a legal abortion").

95. *See* Kader, *supra* note 48, at 659–60.

96. *See Roe*, 410 U.S. at 163–64.

97. *See id.* at 155.

98. *See* Kader, *supra* note 48, at 659–60.

commentator has addressed any inconsistency created by allowing both an abortion of and wrongful-death recovery by a nonviable fetus:

> If the woman's right to abortion and the fetus['s] right to be free from tortious injury are both accepted as socially desirable, then it may be necessary to accept some inconsistency and conclude that prenatal life will be protected against intentional or negligent interference, *absent* some compelling countervailing interest on the part of another. . . . [T]he courts should get on with the business of compensating survivors, and "should be concerned more with the dominant purpose of the statute than with the broad philosophical, theological, and moral questions with which the Supreme Court dealt with in *Roe v. Wade*."[99]

Thus, *Roe* does not limit the State's ability to impose liability for the miscarriage of a nonviable fetus except where it would interfere with the mother's privacy interests.[100] In the context of wrongful-death cases—and tort liability generally—the State is free to protect the potentiality of human life by allowing recovery by the estate of a nonviable fetus except where the fetus was legally aborted.[101]

C. *The Potentiality of Human Life*

The third proposition attributed to *Roe* in prenatal injury cases is used to support recovery under wrongful-death statutes.[102] The *Roe* Court noted that the State has an "important and legitimate interest in protecting the potentiality of human life."[103] The Supreme Court has relied upon and subsequently reaffirmed this proposition.[104] Both before and after *Roe*, various courts have pointed to the potentiality of human life to justify state action, and courts remain free to allow claims for the wrongful death of a nonviable fetus if the State is sufficiently concerned with this issue.[105] One court that allowed limited recovery posited that the State's legitimate interest justifies civil recovery whenever such recovery does not unnecessarily intrude upon the woman's right to privacy.[106]

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99. *Id.* at 660 (quoting Timothy P. Reilly, Recent Case, Presley v. Newport Hospital, *365 A.2d 748 (R.I. 1976)*, 46 U. CIN. L. REV. 266, 273 (1977)).

100. *See id.* at 664.

101. *See id.*

102. *See id.* at 660.

103. Roe v. Wade, 410 U.S. 113, 162 (1973).

104. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871–72 (1992) (relying on the State's interest in protecting potential human life when upholding various requirements that the State of Pennsylvania had imposed upon a woman before she could receive an abortion).

105. *See* Kader, *supra* note 48, at 662.

106. *See id.* at 661 (citing Eich v. Town of Gulf Shores, 300 So. 2d 354, 357–58 (Ala. 1974)).

Thus, the *Roe* decision can be construed as giving weight to both sides of the argument but is not determinative on whether recovery can be allowed by the estate of a nonviable fetus under a wrongful-death statute.

VI. THE *CROSBY* OPINION

In order for a South Carolina court to allow a nonviable fetus to recover under the state's wrongful-death statute, the South Carolina Supreme Court would have to overturn both *West*, which first established the rule denying recovery,[107] and *Crosby*, which reaffirmed the rule with respect to nonviable fetuses.[108] In *Crosby*, Justice Moore, writing for the 3–2 majority, relied on familiar justifications—the potential conflict with the mother's right to an abortion, strict statutory interpretation (fetuses are not "persons"), deferrence to the legislature, and consistency with a majority of other courts—to deny recovery.[109] In the opening paragraph of the discussion, the majority cited *In re Estate of Mayo*[110] for the proposition that the wrongful-death statute is a "derogation of the common law."[111] The *Mayo* opinion states that "[t]he [wrongful-death] statute is remedial and should be liberally construed so as to accomplish its object."[112] Yet, oddly, the *Crosby* majority ignored this prior statement of the court and concluded that such statutes (in derogation of common law) are statutes of creation,[113] and as such, the "statute must be strictly construed and its application must not be extended beyond the clear intent of the legislature."[114] Admittedly, this rule of statutory interpretation is reasonable and logical in areas of the law where a statute has carved out an exception to a common law right of action. The logic clearly favors limiting the scope of a statute to its precise language when its purpose is to displace no more of the common law doctrine than what was intended by the legislature. However, the wrongful-death statute was enacted to displace completely the common law rule that decedents' causes of action die with them and to create an entirely new cause of action, not merely to partially change one area of the law.[115]

Regardless, the *Crosby* majority's reading of the statute allows a wrongdoer to escape liability for tortiously ending a potential life, and this strict reading was

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107. *See* West v. McCoy, 233 S.C. 369, 375–76, 105 S.E.2d 88, 91 (1958).

108. *See* Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628–29, 532 S.E.2d 856, 857 (2000).

109. *See id.*

110. 60 S.C. 401, 38 S.E. 634 (1901).

111. *Crosby*, 340 S.C. at 628, 532 S.E.2d at 856 (citing *In re Estate of Mayo*, 60 S.C. 401, 38 S.E. 634).

112. *In re Estate of Mayo*, 60 S.C. at 415, 38 S.E. at 638.

113. *Crosby*, 340 S.C. at 628, 532 S.E.2d at 856–57 (citing Simpson v. Sanders, 314 S.C. 413, 415, 445 S.E.2d 93, 94 (1994); Hyder v. Jones, 271 S.C. 85, 89, 245 S.E.2d 123, 125 (1978)).

114. *Id.* at 628, 532 S.E.2d at 857 (citing Davenport v. Summer, 273 S.C. 771, 773, 259 S.E.2d 815, 816 (1979)).

115. *See* KEETON ET AL., *supra* note 4, § 127, at 945.

not required. Notably, this strict reading of the wrongful-death statute could be viewed as failing to account for the statute's remedial purpose.[116] The United States Supreme Court has decreed that "'[t]he rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose.'"[117] Secondly, "[t]he rule that remedial statutes are construed liberally is one of the most common exceptions to the rule that statutes in derogation of the common law are construed strictly."[118] The remedial purpose of wrongful-death statutes is to provide a cause of action to the decedent's estate for fatal injuries whenever the decedent would have had a cause of action but for his death.[119] Thus, regardless of the classification of the statute as a derogation of common law, a strict reading of the statute denying recovery by the estate of a nonviable fetus contradicts the remedial purpose of the statute, because, but for its death, the fetus would have been able to recover for its injuries once born alive.[120] Additionally, in the legal context, the term *person* is rarely limited to a living human being.[121] In fact, the term is often used as a legal fiction.[122] Moreover, the word's meaning is not limited to living human beings as written in the Fourteenth Amendment because it includes corporations.[123]

Next, Justice Moore reasons that the viability distinction should preclude recovery in this situation, regardless of the fact that the fetus could have recovered had it survived, because being "born alive . . . is indisputable evidence [of viability]."[124] While this assertion is undoubtedly true, it is a distinction of limited legal significance, because the cause of action for wrongful death arises at the time of the injury.[125]

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116. *See Crosby*, 340 S.C. at 640, 532 S.E.2d at 863 (Toal, J., dissenting).

117. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (citing Jamison v. Encarnacion, 281 U.S. 635, 640 (1930); Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907)).

118. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61:3 (7th ed. 2008). Justice Toal cited this source in her dissent in *Crosby*. *See Crosby*, 340 S.C. at 640, 532 S.E.2d at 863 (Toal, J., dissenting).

119. *See* KEETON ET AL., *supra* note 4, § 127, at 945.

120. *See Crosby*, 340 S.C. at 638, 532 S.E.2d at 862 (Toal, J., dissenting). Both the majority and the dissent seem to agree that recovery would have been allowed had the nonviable fetus been subsequently born alive. *Compare id.* at 628, 532 S.E.2d at 857 (majority opinion) (noting that a nonviable fetus that is later born has indisputably become viable, thus implying that recovery would then be allowed), *with id.* at 638, 532 S.E.2d at 862 (Toal, J., dissenting) ("I believe that a cause of action would lie for an injury suffered by a nonviable fetus that is later born alive.").

121. *See* Kader, *supra* note 48, at 656–57.

122. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1745 (2001).

123. *See* Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does.").

124. *Crosby*, 340 S.C. at 628, 532 S.E.2d at 857.

125. *See* Fowler v. Woodward, 244 S.C. 608, 613, 138 S.E.2d 42, 44 (1964).

The majority opinion also mentions that to allow a cause of action in this situation would create the possibility of an action against a mother for exercising her right to a legal abortion.[126] Presumably, *Roe* prohibits states from allowing the estate of a nonviable fetus to recover under a wrongful-death statute where the mother chooses to have an abortion.[127] As discussed above, the holding in *Roe* does not prohibit the State from protecting its interest in potential life in any way that does not interfere with the woman's right to an abortion.[128] Furthermore, this potential problem can be avoided by including a caveat that a wrongful-death action is not available against the mother for her decision to have an abortion.[129] In *Farley*, the West Virginia Supreme Court of Appeals stated that "[b]y definition, if a woman has a constitutional right to [an abortion], then the act of aborting is not tortious."[130] Once appropriately limited to cases that do not involve the mother's choice to have an abortion, recovery under a wrongful-death statute by the estate of a nonviable fetus is constitutionally permissible.[131]

Justice Moore also notes in *Crosby* that "[a] mother who is negligently injured by the same act that results in the stillbirth of her fetus may, of course, seek recovery for her own personal injuries."[132] Although unclear, this statement seems to suggest that the court would allow the mother to recover emotional distress damages resulting from the miscarriage. Assuming the mother's personal injury recovery can include emotional distress damages for her miscarriage, that recovery likely would be limited to avoid duplication of those damages reserved for wrongful death.[133] A contrary rule would allow the same recovery as allowed under the statute and thus abrogate the effect of *Crosby*. Also, allowing only the mother to recover would result in injustice where the mother and the fetus are killed in the same accident and the father is left without a remedy for the loss of his potential child.[134]

Finally, Justice Moore notes that the decision is consistent with the majority of courts and that the decision to change the rule should be left up to the

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126. *See Crosby*, 340 S.C. at 629, 532 S.E.2d at 857.

127. *See* Kader, *supra* note 48, at 664; *cf.* Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 979 (D.S.D. 2009) (holding that the recognition of a wrongful-death action for the loss of a nonviable fetus does not create a legal relationship between the fetus and the mother).

128. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871–72 (1992) (relying on the State's interest in protecting potential human life when upholding various requirements that the State of Pennsylvania had imposed upon women before they could receive abortions).

129. *See* Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995) ("Our decision is a limited one and is in no way intended to be contrary to the constitutional right of a woman to have an abortion.").

130. *Id.*

131. *See supra* Part V.B. Another related issue, beyond the scope of this Comment, is whether the mother's intention to have a legal abortion may be presented as an affirmative defense to a wrongful-death action.

132. Crosby v. Glasscock Trucking Co., 340 S.C. 626, 629, 532 S.E.2d 856, 857 (2000).

133. *See supra* Part IV.

134. *See supra* Part IV.

legislature.[135] However, a change in this rule need not be sought through legislative means. Indeed, it would be well within the province of the judiciary to continue to expand recovery in this area of law, just as it did over sixty years ago when *Bonbrest* allowed the first claim for prenatal injuries to proceed and began the nationwide reversal of the no-duty rule.[136] Furthermore, the principles of stare decisis—stability and predictability—should always be considered in connection with countervailing principles of change, particularly where the justifications of a rule are no longer consistent with the prevailing realities of society, medicine, and technology.[137] Thus, when "the public policy basis underlying the precedent is no longer viable . . . the doctrine or rule hangs like an ornament without a Christmas tree. When the Christmas tree is removed, the ornament falls."[138] Advancements in technology as well as obstetrics have lessened the prior difficulties of determining causation,[139] and the remaining difficulties are now no more difficult than the questions of causation that arise in all negligence actions.[140] Also, as discussed above,[141] "[t]he abortion question simply is not relevant to wrongful death."[142] Finally, the court should not hesitate to make a controversial decision where justice is served by a change. Indeed, as noted by the West Virginia Supreme Court of Appeals in *Farley*, "landmark decisions become landmark because they establish new, groundbreaking precedent."[143]

VII. VIABLE OPTIONS TO COMPENSATE THE TORTIOUS LOSS OF A NONVIABLE FETUS

A. Allow Recovery Under the Wrongful-Death Statute

Perhaps the most straightforward way for the court to address this wrong is to disregard viability as a criterion for recovery under the wrongful-death statute. In order to do so, it may be necessary for the court to refocus upon the issue raised when a nonviable fetus has been miscarried due to the negligent act of the wrongdoer. That issue, interestingly, was recognized more than a century ago by Justice Holmes in *Dietrich*, who noted that the issue that remained unaddressed in the decision was "whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as

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135. *Crosby*, 340 S.C. at 629, 532 S.E.2d at 857.

136. *See* PROSSER, *supra* note 37, § 55, at 336 (citing Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946)); *supra* Part III.A.

137. *See* Victor E. Schwartz et al., *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. 317, 327–29 (2006).

138. *Id.* at 329.

139. *See* Kader, *supra* note 48, at 647.

140. *Crosby*, 340 S.C. at 631, 532 S.E.2d at 858 (Toal, J., dissenting).

141. *See supra* Part V.

142. Farley v. Sartin, 466 S.E.2d 522, 534 (W. Va. 1995).

143. *Id.* at 533 n.23.

capable of having [standing] in court, or of being represented there by an administrator."[144] More specifically, whether a nonviable fetus is a person under a wrongful-death statute depends not on the philosophical question of when life begins but on whether such a fetus is a legal entity entitled to receipt of legal protection.[145] In other areas of South Carolina law, a nonviable fetus is a legal entity. For example, for over one hundred years, the rule in South Carolina has been that "a posthumous child inherits in the same manner as if he had been born in the lifetime of his father and had survived him."[146] Also, in South Carolina a person may be subject to criminal liability—including prosecution for murder or attempted murder—for any violent crime causing the death of or bodily injury to a fetus "at any state of development."[147] Additionally, as recognized by the South Carolina Supreme Court, "[t]he [wrongful-death] statute is remedial and should be liberally construed so as to accomplish its object."[148] Justice Toal noted in her dissent in *Crosby* that her "refusal to recognize a distinction between viability and nonviability is based on the same logical reasoning [the South Carolina Supreme Court] used in refusing to recognize a distinction between viable fetuses which are born alive then die and viable fetuses killed in the womb."[149] Finally, as explained above,[150] the State has an important and legitimate interest in protecting the potentiality of human life.[151]

Understandably, because of concerns over the implications of the Supreme Court's decision in *Roe v. Wade*, courts have been reluctant to take an affirmative stance on this issue and have thus been inclined to leave the question up to the legislature.[152] Admittedly, because allowing recovery under the wrongful-death statute in South Carolina (and in most states) would necessarily require a determination that a nonviable fetus is a person for the particular purpose of that statute, one could interpret a decision to allow recovery to imply an underlying motive of the judiciary to express its disfavor with *Roe v. Wade*

144. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 16 (1884) (citing Harper v. Archer, 9 Miss. (4 S. & M.) 33 (1845); Marsellis v. Thalhimer, 2 Paige Ch. 34, 35 (N.Y. Ch. 1830); KENT, *supra* note 36, at 249 n.b), *abrogated by* Keyes v. Constr. Serv., Inc., 165 N.E.2d 912, 915 (Mass. 1960), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967).

145. *See* Kader, *supra* note 48, at 657.

146. Pearson v. Carlton, 18 S.C. 47, 59 (1882).

147. S.C. CODE ANN. § 16-3-1083 (Supp. 2009).

148. *In re* Estate of Mayo, 60 S.C. 401, 415, 38 S.E. 634, 638 (1901).

149. Crosby v. Glasscock Trucking Co., 340 S.C. 626, 642, 532 S.E.2d 856, 864 (2000) (Toal, J., dissenting).

150. *See supra* Part V.C.

151. *See* Roe v. Wade, 410 U.S. 113, 162 (1973) (noting the State's legitimate interest in the potentiality of human life); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (reaffirming the legitimacy of the interest).

152. *See, e.g.*, *Crosby*, 340 S.C. at 629, 532 S.E.2d at 857 ("Because a wrongful death action is a legislatively created one, we find deference to the legislature especially appropriate in this matter.").

instead of its recognition of the potential parents' loss.[153] However, the judiciary may be better suited to make this controversial decision because, due to its separation from the political spectrum, it need not participate in that ideological debate.[154] A decision to allow some form of recovery may be based on only the concern that the potential parents have suffered an egregious wrong and that they ought to be compensated. The judiciary may need to offer stability in this area due to the political firestorm, and the potential for frequent repeal and reenactment at the whims of the dominating party of the time, that likely will occur if the decision to include a nonviable fetus within the definition of person for the purposes of the wrongful-death statute is addressed by the legislature,[155] and thus the judiciary may need to offer stability in this area. Indeed, as John Adams noted in his summation in *Rex v. Wemms*, "[t]he law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men."[156] Additionally, as noted above,[157] nearly every currently actionable prenatal injury is a result of judicial decision, not enactments of the legislature. The bright-line rule of viability as a bar to a wrongful-death action "is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development."[158]

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153. *See* Note, *supra* note 122, at 1764 ("The legal personality of fetuses remains tied so deeply to the social debate over fetal humanity that courts cannot manipulate the legal category 'person' without expressing certain values, whether they want to or not."). Unfortunately, at least one commentator has openly advocated such a subversive assault on the sublime holding of *Roe v. Wade*. *See* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 978–79 (1995) (suggesting that the use of the "emotional power of parents pleading for legal recognition of their unborn children may sway societal views and incite political action," which could persuade the Supreme Court to overturn *Roe*).

154. However, some members of the judiciary sometimes do participate. *See* Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 34–35.

155. In at least one state where this decision was left up the legislature, the resulting statute seems to reflect that group of legislators' stance on the abortion issue rather than the concerns for the potential parents' loss. *See* MO. ANN. STAT. § 1.205 (West 2000) ("The life of each human being begins at conception."). Michigan's statute more closely reflects the appropriate consideration for allowing a cause of action. *See* MICH. COMP. LAWS ANN. § 600.2922a (West 2000).

156. John Adams, Rex v. Wemms, *in* 3 LEGAL PAPERS OF JOHN ADAMS 98, 269–70 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). In the *Wemms* case, Adams defended the British soldiers involved in a confrontation with civilians on the streets of Boston—now known as the "Boston Massacre." *Id.* at 100–01. The jury returned a verdict acquitting six of the soldiers, and the other two were convicted of manslaughter instead of murder. *Id.* at 312–14.

157. *See supra* Part III.

158. KEETON ET AL., *supra* note 4, § 55, at 369 (citing J.P. GREENHILL, PRINCIPLES AND PRACTICE OF OBSTETRICS 391, 794 (10th ed. 1951)).

B. *Expand Damages for Emotional Distress for the Mother and Loss of Consortium for the Father*[159]

Another option to compensate for the loss of a nonviable fetus would be to allow a less limited emotional distress claim by the mother and to allow a derivative consortium claim by the father of the fetus. As discussed more fully above, courts that have allowed such claims by the mother have typically limited recovery to the emotional trauma and medical expenses of the miscarriage and have not allowed recovery for any nonpecuniary damages for the lost chance of having a child.[160] Courts' chief concern seems to be with allowing recovery for wrongful-death damages where no wrongful-death action lies.[161] In South Carolina, wrongful-death damages may include: "'(1) [p]ecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the [decedent's] society.'"[162] Additionally, when a child is the decedent, parents are entitled to a presumption of nonpecuniary damages.[163] The damages for the loss of a fetus are generally the same as those recoverable by the parents for the loss of a child.[164] These nonpecuniary damages are focused on the damages sustained by the parents as a result of the miscarriage.[165]

Unlike typical wrongful-death claims for the loss of a spouse or a parent, where a bulk of the damages awarded represent the financial support lost by the beneficiaries, awards for the loss of a child are largely emotional distress damages, such grief, sorrow, and mental shock and suffering.[166] Thus, the enactment of the wrongful-death statute was not likely in response to, or even in contemplation of, a need to compensate the parents for emotional damages suffered as a result of the loss of a nonviable fetus, and perhaps not even for the loss of any child. In most situations, the wrongful-death statute is a convenient

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159. This part assumes that the parents of the fetus are married and that the father could thus maintain a loss of consortium claim. Of course, this will not always be the case and could result in the father being left without a remedy, but it is nevertheless an option for adequate recovery when the parents are married.

160. *See supra* Part IV.

161. *See, e.g.*, Smith v. Borello, 804 A.2d 1151, 1159 (Md. 2002) (noting that wrongful-death damages cannot be duplicated in the mother's suit).

162. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (quoting F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 610 (2d ed. 1997)).

163. *Id.* (citing Mock v. Atl. Coast Line R.R. Co., 227 S.C. 245, 259, 87 S.E.2d 830, 836 (1955); Self v. Goodrich, 300 S.C. 349, 351–52, 387 S.E.2d 713, 714–15 (Ct. App. 1989)).

164. *See* Todd v. Sandidge Constr. Co., 341 F.2d 75, 77–78 (4th Cir. 1964) (citing S.C. CODE ANN. § 10-1954 (Michie 1962); Johnson v. Charleston & W. Carolina Ry. Co., 234 S.C. 448, 108 S.E.2d 777 (1959); Mishoe v. Atl. Coast Line R. Co., 186 S.C. 402, 197 S.E. 97 (1938)) (applying South Carolina law and discussing damages for the loss of a viable fetus).

165. *See* Welch v. Epstein, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct. App. 2000) (citing Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969); *Self*, 300 S.C. 349, 387 S.E.2d 713).

166. *See, e.g.*, *Scott*, 340 S.C. at 169–70, 530 S.E.2d at 394–95 (determining that a $1.5 million award for the loss of a child was not grossly excessive).

enough way to compensate for these filial losses. However, in the case of a nonviable fetus, it seems reasonable to allow the mother to recover, in her own emotional distress claim, not only damages associated with her emotional distress during the stillbirth procedure, but also the loss of companionship with the fetus based on the bond she felt as it grew within her womb. Though allowing the mother of a nonviable fetus to recover a broader range of damages than the mother of a viable fetus may seem unfair, such a recovery would actually be logical and fair. Because the estate of a viable fetus already has a claim under the wrongful-death statute for nonpecuniary damages, allowing the mother to recover such damages in her own right as well could result in an impermissible duplication of damages. Conversely, in the situation of a nonviable fetus, where no wrongful-death action lies, there is no possibility for a duplication of damages.[167]

Secondly, to compensate fairly the father for his loss, a loss that for biological reasons may be less severe than that of the mother, courts could allow him to recover on a claim of loss of his wife's consortium. The father would seek damages under the theory that the loss of the nonviable fetus so affected his wife that the wrongdoer violated his "right to the companionship, aid, society and services of his . . . spouse."[168] Essentially, his claim would be that because of his wife's extensive grieving process over the loss of their potential son or daughter (which may last for quite some time),[169] she is no longer the happy, loving, and charming woman that he once knew. By allowing the potential parents to assert these claims, courts could avoid the uncomfortable implications of allowing a wrongful-death claim while also fully compensating them for their loss.

C. *Disregard the* Dillon *Test for the Father*

A third option to recognize and compensate those harmed by the loss of a nonviable fetus would be first to allow the mother to recover under the expanded emotional distress remedy discussed above, for which presumably the mother will always satisfy the impact requirement[170] or the three-prong *Dillion* test.[171] Secondly, with regard to the father, courts would disregard the *Dillon* test to allow for a claim for negligent infliction of emotional distress. As mentioned above,[172] bystander recovery for negligent infliction of emotional distress is limited to those who observe, in person and within a close proximity, the injury

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167. *Cf.* Smith v. Borello, 804 A.2d 1151, 1163 (Md. 2002) (noting that damages reserved for wrongful-death claims cannot be duplicated in the mother's personal injury suit).

168. *See* S.C. CODE ANN. § 15–75–20 (2005).

169. *See* Theut et al., *supra* note 7, at 637.

170. *Cf.* Simons v. Beard, 72 P.3d 96, 100 (Or. Ct. App. 2003) (allowing a claim for emotional distress by the mother to survive summary judgment because the "complaint allege[d] facts, with attendant reasonable inferences, that [fell] well within [the] scope [of the impact rule]").

171. *See supra* note 74 and accompanying text.

172. *See supra* notes 73–74 and accompanying text.

of a person with whom they share a close personal relationship.[173] The father clearly satisfies the close relationship requirement, but he often may not satisfy the proximity and present observation prongs. Courts could abandon this test for fathers only in situations involving the loss of a nonviable fetus. Removing the requirements of this test will allow the jury to decide, based on a factual determination regarding the particular relationship, the amount of damages the father should receive for his loss.

The first option has the advantage of simplicity because it does not require a special rule for nonviable fetuses. Of course, it presents courts with the conceptually difficult prospect of including a nonviable fetus in the definition of the word *person* for the purposes of the wrongful-death statute. The other two options avoid that problem altogether and allow a court to focus exclusively on the potential parents' loss but could create concerns regarding whether "wrongful-death damages" should remain distinct remedies only available under the wrongful-death statute, meaning such damages would be available only when a wrongful-death action could be sustained. Of course, the risk of duplicating damages is nonexistent as long as the estate of a nonviable fetus cannot recover under the wrongful-death statute. Despite these various issues, if the courts decide that compensating for the tortious loss of a nonviable fetus is socially desirable and worthy of judicial recognition, recovery could be allowed under any one of these theories.

VIII. CONCLUSION

The loss of a fetus, no matter the stage of development, and the subsequent grieving process is a traumatic event for anyone to have to endure.[174] Under the current law in South Carolina, and in most states, when the fetus dies at the hands of a wrongdoer before reaching the point of viability, this loss is not compensated. By enacting the wrongful-death statute long ago, the legislature recognized the impropriety of a rule that made "it . . . cheaper for the defendant to kill the plaintiff than to injure him" and "left the bereaved family of the victim . . . without a remedy."[175] Using this principle as a guide—though not necessarily under that statute—South Carolina courts should compensate and recognize the potential parents' loss. Indeed, it is a fundamental goal of tort law that a wrongdoer should not be immune from suit absent some important justification,[176] and perhaps the greatest strength of a common law system is the

173. *See* Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968); Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 582–83, 336 S.E.2d 465, 467 (1985).

174. *See supra* notes 7–9 and accompanying text.

175. KEETON ET AL., *supra* note 4, § 127, at 945.

176. *See* Crosby v. Glasscock Trucking Co., 340 S.C. 626, 641, 532 S.E.2d 856, 864 (2000) (Toal, J., dissenting) ("[I]t is antithetical to our fault-based tort system to allow a negligent party to escape liability based solely on the blurred line of fetal viability."); Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944) ("The purpose of the law of torts is to adjust

power to overturn a rule that no longer has justification.[177] Additionally, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since."[178] A miscarriage, caused by another's wrongdoing, should not continue to result in the miscarriage of justice, and South Carolina courts should allow the grieving potential parents to recover for the tragic, tortious loss of a nonviable fetus.

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. . . losses and to afford compensation for injuries sustained by one person as the result of the conduct of another.").

177. *See* Woods v. Lancet, 102 N.E.2d 691, 694 (N.Y. 1951) ("We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice."); Schwartz et al., *supra* note 137, at 328–29 (arguing that the doctrine of stare decisis should consist of a counterbalance of principles of stability and principles of change).

178. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).