

# 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

*Philosophers and theologians may debate, but there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception.*<sup>1</sup>

## I. INTRODUCTION

In 1978, a healthy baby girl was born in northern England,<sup>2</sup> a child not of traditional *in vivo*<sup>3</sup> fertilization, but rather one born as a result of the groundbreaking technology of *in vitro*<sup>4</sup> fertilization. The birth of Louise Joy Brown, better known as the world's first "test-tube baby," sparked a heated worldwide debate as to the ethical and biological implications of creating human life outside the womb.<sup>5</sup> This debate continued as the United States implemented its own *in vitro* fertilization program at the Eastern Virginia Medical School,<sup>6</sup> and when in 1981, Elizabeth Jordan Carr, the first American *in vitro* success, was born in Norfolk, Virginia.<sup>7</sup>

To some, this technology was frighteningly reminiscent of Aldous Huxley's prophetic vision of genetically engineered children conceived in laboratories, while others hailed it as a medical miracle.<sup>8</sup> The media response initially focused on the ethical debate of "playing God"; however, the legal implications of *in vitro* fertilization quickly became

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<sup>1</sup> Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 6 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

<sup>2</sup> FIONA MACDONALD, THE FIRST "TEST-TUBE BABY" 4 (2004).

<sup>3</sup> *In vivo* is defined as "[i]n the living body, referring to a process or reaction occurring therein." STEDMAN'S CONCISE MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS 1060 (John H. Dirckx ed., 4th ed. 2001) [hereinafter STEDMAN'S MEDICAL DICTIONARY].

<sup>4</sup> *In vitro* is defined as "[i]n an artificial environment, referring to a process or reaction occurring therein, as in a test tube or culture media." *Id.*

<sup>5</sup> MACDONALD, *supra* note 2, at 32-34.

<sup>6</sup> GEOFFREY SHER, VIRGINIA MARRIAGE DAVIS & JEAN STOESS, IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES xvii (3d ed. 2005).

<sup>7</sup> MACDONALD, *supra* note 2, at 31.

<sup>8</sup> *The First Test Tube Baby*, TIME, July 31, 1978, at 58. Huxley's famous novel, first published in 1932, depicts a futuristic world where technicians orchestrate human conception, birth, and childhood development within a laboratory. This society shuns any barbaric woman who chooses to carry a child in her womb and give birth in the traditional way. ALDOUS HUXLEY, BRAVE NEW WORLD (First Perennial Classics 1998) (1932).

relevant. For example, a 1989 article in *Time* magazine discussed the complex legal dilemmas raised by *in vitro* technology, including such questions as “Who should exercise primary rights over the frozen embryo?” and “What rights, if any, does the embryo have?”<sup>9</sup> Today, more than twenty years after the inception of *in vitro* fertilization, the courts and state legislatures still struggle with these fundamental questions.

In February 2005, in a case of first impression, a Cook County district judge chose to review an interlocutory order to determine whether, under Illinois law, a couple could bring a wrongful death action for the destruction of their frozen preembryo.<sup>10</sup> The court, in *Miller v. American Infertility Group*, held that a preembryo is a human being and should be given the same legal status as an embryo developing in the womb.<sup>11</sup> That determination caused the media and legal community to probe further into the important issue of what rights should be given to all embryos, including those cryogenically preserved.

This note will focus on the legal status of the preivable embryo. It begins with an overview of the processes of *in vitro* fertilization and cryopreservation. Part III examines the historical framework of wrongful death statutes as well as the various state statutory approaches to the wrongful death of an embryo. Part IV focuses on the struggle to define human life in Illinois, and whether, under Illinois law, there is a wrongful death remedy for a pre-implanted embryo. Finally, Part V challenges the states to allow wrongful death suits for all preivable embryos and proposes a guide for change through model legislation.

This note will show why *Miller v. American Infertility Group* should be upheld, and why Illinois is on the cutting edge of establishing a definitive standard for embryonic legal rights.

## II. OVERVIEW OF *IN VITRO* FERTILIZATION AND CRYOPRESERVATION

Since the dawn of *in vitro* fertilization (IVF) in the late 1970s, there has been an explosion of reproductive technologies. While no precise figure exists, it is believed “that more than one million babies have been born worldwide since 1978” as a result of IVF.<sup>12</sup> In the United States, approximately 400 clinics offer IVF<sup>13</sup> and “[a]t least 60,000 IVF

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<sup>9</sup> John Elson, *The Rights of Frozen Embryos*, TIME, July 24, 1989, at 63.

<sup>10</sup> *Miller v. Am. Infertility Group*, No. 02-L-7394, slip op. at 1 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois’ Wrongful Death Act). Throughout this article and *Miller*, the term *preembryo* is primarily used to describe the embryo that is frozen and not yet implanted in the womb. This term is defined in the Illinois Gestational Surrogacy Act as “a fertilized egg prior to 14 days of development.” *Id.* at 2 n.2 (quoting 750 ILL. COMP. STAT. 47/10 (2002)).

<sup>11</sup> See *infra* note 136 and accompanying text.

<sup>12</sup> MACDONALD, *supra* note 2, at 32–34.

<sup>13</sup> SHER, DAVIS & STOESS, *supra* note 6.

procedures are performed . . . annually, with an average birthrate of 25%.<sup>14</sup>

To begin the *in vitro* process, a woman takes fertility drugs. These fertility drugs cause the ovaries to produce several mature eggs (as opposed to the single egg that is naturally released each normal monthly cycle).<sup>15</sup> After the eggs have matured, they are removed from the ovaries by an IVF surgeon using a needle guided by ultrasound technology.<sup>16</sup> The harvested eggs are then placed in a Petri dish and mixed with sperm and a special medium that assists in keeping them alive.<sup>17</sup> Around forty-six hours after the Petri dish conception, a growing “embryo is a translucent, amber-colored mass of two to six cells (blastomeres),”<sup>18</sup> and

[w]ithin 72 hours of insemination most healthy embryos will have divided into seven to nine blastomeres. . . . By 96 hours the healthy embryo will have more than 80 blastomeres and will look like a mulberry, or morula. By 120 to 144 hours after insemination, most viable embryos will comprise more than 100 cells and have a fluid-filled center or blastula, and are said to be at the blastocyst stage.<sup>19</sup>

When the embryos have reached the blastocyst stage, the IVF surgeon will use a catheter to place several embryos into the uterus where ideally they will implant and continue to grow.<sup>20</sup>

While a normal IVF cycle can result in “one dozen to nearly three dozen eggs for fertilization,” only “[a] few of the resulting embryos are implanted and . . . [typically] the remainder are cryopreserved.”<sup>21</sup> As of May 2003, “according to a report released by the Society for Assisted Reproductive Technology . . . , an estimated four hundred thousand embryos are suspended in cryotanks in IVF clinics across the [United States]—the largest population of frozen embryos in the world.”<sup>22</sup> The preembryo in *Miller* was similarly intended for cryopreservation.

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<sup>14</sup> Laura Bradford, *Three Ways to Give Nature a Helping Hand*, TIME, Apr. 15, 2002, at 52.

<sup>15</sup> SHER, DAVIS & STOESS, *supra* note 6.

<sup>16</sup> *Id.* at 38.

<sup>17</sup> *Id.* at 86.

<sup>18</sup> *Id.* at 87.

<sup>19</sup> *Id.* at 87–88.

<sup>20</sup> *Id.* at 95.

<sup>21</sup> KIM K. ZACH, REPRODUCTIVE TECHNOLOGY 81 (2004). *Cryopreservation* is the freezing of the embryos for use at a later date. STEDMAN'S MEDICAL DICTIONARY, *supra* note 3, at 235.

<sup>22</sup> *Id.* at 82–83.

## III. WRONGFUL DEATH STATUTES

*A. Historical Development of Wrongful Death Statutes*

Under the English common law, no cause of action existed for wrongful death<sup>23</sup> because when either the tortfeasor or the victim died prior to litigation of the claim, the claim died as well.<sup>24</sup> The tortfeasor paid no monetary price to the deceased victim's dependents or heirs, making it "cheaper for the defendant to kill the plaintiff than to injure him."<sup>25</sup> This inconsistency in the common law meant that "the greatest injury that one person can inflict upon another, the taking of another's life, was without civil redress."<sup>26</sup> The British Parliament rectified this injustice by passing the Fatal Accident's Act of 1846,<sup>27</sup> commonly referred to as Lord Campbell's Act, which allowed for civil suit by any "person answering the description of the widow, parent or child who, under the circumstances, suffers pecuniary loss."<sup>28</sup>

In 1847, following England's lead, New York enacted a wrongful death statute patterned after Lord Campbell's Act.<sup>29</sup> Currently, every state has a statutory remedy for wrongful death that provides compensation to the victim's beneficiaries, and also provides deterrence for negligent behavior.<sup>30</sup>

*B. History of Recovery for Injuries to the Unborn Child*

During the first part of the twentieth century, a tortfeasor in the United States owed no duty to the child within a woman's womb—only a duty to the pregnant mother.<sup>31</sup> Early court cases such as *Dietrich v. Inhabitants of Northhampton* failed to recognize any personhood for the unborn.<sup>32</sup> *Dietrich* addressed whether a pregnant woman could bring a civil suit for the death of her child due to a miscarriage induced by her

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<sup>23</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127A, at 945–50 (5th ed. 1984).

<sup>24</sup> DAN B. DOBBS, THE LAW OF TORTS 803 (2000); see also 12 AM. JUR. TRIALS *Wrongful Death Actions* § 2, at 317 (2005) (clarifying that this principle "was embodied in the maxim, 'actio personalis moritur cum persona' [which] [l]iterally . . . means that a personal action dies with the person").

<sup>25</sup> KEETON ET AL., *supra* note 23, at 945.

<sup>26</sup> 12 AM. JUR. TRIALS, *supra* note 24, § 2, at 323.

<sup>27</sup> *Id.* § 4, at 327.

<sup>28</sup> *Id.* § 4, at 328.

<sup>29</sup> KEETON ET AL., *supra* note 23, at 945.

<sup>30</sup> DOBBS, *supra* note 24, at 804.

<sup>31</sup> *Id.* at 781.

<sup>32</sup> 138 Mass. 14, 14 (1884), *overruled by* *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967). The Supreme Court of Massachusetts decided the first recorded American case of liability for prenatal injuries. *Id.*

fall on a defective sidewalk.<sup>33</sup> The court held that because the “unborn child was a part of the mother at the time of injury,”<sup>34</sup> the child had no separate cause of action for “injuries received by it while in its mother’s womb.”<sup>35</sup> For over fifty years, the common law reflected this “single entity” view that the unborn child had no legal existence apart from the mother.

However, in 1946, the court in *Bonbrest v. Kotz* rejected the notion that an unborn child is merely an extension of the mother.<sup>36</sup> There, a baby sustained nonfatal injuries due to professional malpractice during delivery. The District Court for the District of Columbia denied the defendant physician’s motion for summary judgment agreeing with a Canadian court’s assertion that “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.”<sup>37</sup> The court explained that a “viable child being ‘part’ of its mother [is] a contradiction in terms” when “[m]odern medicine is replete with cases of living children being taken from dead mothers.”<sup>38</sup> Moreover, the court also recognized the *previable embryo* within the womb as human life, noting that “[b]y the eighth week the embryo . . . is an unmistakable human being, even though it is still only three-fourths of an inch long.”<sup>39</sup>

This case led the way for courts to recognize a separate action for the wrongful death of an unborn child. Today, although fourteen states still deny recovery for the wrongful death of a child that is not born alive,<sup>40</sup> the majority of states allow wrongful death actions for the death of a “viable” unborn child.<sup>41</sup> Six states give ultimate value in protecting

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 17.

<sup>35</sup> *Id.* at 15.

<sup>36</sup> 65 F. Supp. 138 (D.D.C. 1946).

<sup>37</sup> *Id.* at 142 (quoting *Montreal Tramways v. Leveille*, [1933] S.C.R. 456, ¶ 28).

<sup>38</sup> *Id.* at 140.

<sup>39</sup> *Id.* at 140 n.11 (citing GEORGE WASHINGTON CORNER, OURSELVES UNBORN: AN EMBRYOLOGIST’S ESSAY ON MAN 69 (1944)).

<sup>40</sup> Fourteen states continue to hold to the live birth requirement: Alaska, California, Florida, Indiana, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, Virginia, and Wyoming. *See infra* Part III.C.1.

<sup>41</sup> There are currently thirty states that uphold viability as the standard for wrongful death recovery: 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, South Carolina, Vermont, Washington, and Wisconsin. *See infra* Part III.C.2; *see also* Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan’s Struggle to Settle the Question*, 37 AKRON L. REV. 41, 53–71, 77–80 (2004).

human life by recognizing a claim for the death of a “preivable” embryo.<sup>42</sup>

*C. Three Jurisdictional Approaches to the Wrongful Death of a Fetus or an Embryo*

1. Live Birth

Fourteen jurisdictions apply the most stringent test for liability, which denies all recovery for the wrongful death of a child that is not born alive.<sup>43</sup> Thus, a child wrongfully injured during birth will have no cause of action when a stillbirth results. On the other hand, the “live birth” requirement is satisfied even if the child dies within a few minutes of birth.<sup>44</sup> This rule effectuates the standard “that if the defendant does enough damage to terminate the life of the fetus before birth, he simply is not liable.”<sup>45</sup> While this harsh position does create a bright line standard, it has been criticized for lacking an “understanding about fetal development,” since “[t]he rule assumes that a fetus cannot be considered a person . . . at any point prior to birth.”<sup>46</sup>

These minority “live birth” jurisdictions advance seemingly contradictory reasoning to “support their failure to permit a cause of action for the wrongful death of a viable unborn child.”<sup>47</sup> For example, in *Justus v. Atchison*, parents urged the California Supreme Court to recognize a cause of action for the wrongful death of two full-term children who were delivered stillborn due to medical negligence during the course of delivery.<sup>48</sup> The parents argued that “[b]ecause California recognizes an action for prenatal injuries if a child is born alive, it is illogical to deny a cause of action to a different child who suffers identical prenatal injuries but dies shortly before birth instead of shortly thereafter.”<sup>49</sup> Nevertheless, the court’s analysis centered on “whether a stillborn fetus is a ‘person’ within the meaning of the [California] wrongful death statute.”<sup>50</sup> The court concluded that, based on the legislative intent behind the California statute, a full-term stillborn child is not a person. The court defended its upholding of the live birth view, stating:

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<sup>42</sup> Six states have extended liability to the preivable embryo: Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia. *See infra* Part III.C.3.

<sup>43</sup> *See supra* note 40.

<sup>44</sup> *Kalafut v. Gruver*, 389 S.E.2d 681, 684–85 (Va. 1990).

<sup>45</sup> *DOBBS, supra* note 24, at 782.

<sup>46</sup> Robin C. Hewitt, *Farley v. Sartin: Viability of a Fetus No Longer Required for Wrongful Death Liability*, 98 W. VA. L. REV. 955, 964 (1996).

<sup>47</sup> 19 AM. JUR. 3D PROOF OF FACTS *Wrongful Death of Fetus* § 8, at 125 (1993).

<sup>48</sup> 565 P.2d 122 (Cal. 1977).

<sup>49</sup> 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

<sup>50</sup> *Justus*, 565 P.2d at 124 (citing CAL. CIV. PROC. CODE § 377 cmt. (West 2004)).

In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life . . . . In short, the unborn have never been recognized in the law as persons in the whole sense.<sup>51</sup>

While commentators may have initially opposed those states that allow a wrongful death recovery for the viable fetus, this was a weak argument for the California Supreme Court since at the time of the 1977 *Justus* decision, "twenty-five states had [already] recognized the cause of action."<sup>52</sup> Also, because wrongful death acts compensate or even vindicate the parents for the death of their unborn child, it does not necessarily follow that the unborn child has no intrinsic human value. Other live birth jurisdictions give similar illogical arguments and echo the poor conclusion of *Justus* "that a viable unborn child is not a person within the meaning" of their state's statute.<sup>53</sup>

In *Stern v. Miller*, the Florida Supreme Court held that a viable unborn child is not a "person" for purposes of [the Florida wrongful death statute] despite admitting that the great weight of authority supported allowing recovery.<sup>54</sup> The court noted the following arguments in support of the majority viability position:

The courts are split where, as a result of the injuries he received, the child is subsequently stillborn . . . . The reasons for recovery are compelling: A viable fetus is a human being, capable of independent existence outside the womb; a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death; such a situation favors the wrongdoer who causes death over the one who merely causes injuries, and so enables the tortfeasor to foreclose his own liability.<sup>55</sup>

However, the Florida Supreme Court dismissed these compelling grounds for recognizing the viable unborn child as human life, and instead focused on the intent of the legislature to limit recovery to a "minor child," concluding "that a stillborn fetus is not within the statutory classification."<sup>56</sup>

Similarly, in the leading minority case of *Witty v. American General Capital Distributors, Inc.*, the Texas Supreme Court recognized that an

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<sup>51</sup> *Id.* at 131 (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

<sup>52</sup> 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> 348 So. 2d 303, 303 (Fla. 1977).

<sup>55</sup> *Id.* at 305-06.

<sup>56</sup> *Id.* at 307.

unborn child has “an existence separate from its mother” and that the live birth jurisdictions are substantially outnumbered by those states adopting the majority rule.<sup>57</sup> Yet, the court still refused to allow a mother to collect wrongful death damages for her child’s death resulting from prenatal injuries.<sup>58</sup>

While many of the early live birth cases have been “subsequently overruled by judicial or legislative action,”<sup>59</sup> California, Florida, and Texas, as well as eleven other jurisdictions, still continue to hold to their minority position of no recovery for the wrongful death of an unborn child.

## 2. Viability

The majority of jurisdictions do permit fetal wrongful death actions on the condition that the child is “viable” at the time of death.<sup>60</sup> A viable child is one that is capable of living outside the womb.<sup>61</sup> The concept of legal viability “was first suggested by Justice Boggs of the Illinois Supreme Court in his dissent to *Allaire v. St. Luke’s Hospital*.”<sup>62</sup> The majority opinion in *Allaire* held that an infant could not maintain a cause of action for nonfatal injuries received within the womb. However, in dissent, Justice Boggs argued that if the child had received an injury *in utero*, which later after birth caused the child’s death, the common law would treat this as a punishable injury to a human being. Thus, it follows that one who inflicts nonfatal injuries on a child in the womb should also be punished:<sup>63</sup>

The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should by parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.<sup>64</sup>

In 1949, the Minnesota Supreme Court, in *Verkennes v. Corniea*, first rejected the live birth requirement in favor of the viability rule.<sup>65</sup>

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<sup>57</sup> 727 S.W.2d 503, 505 (Tex. 1987) (citing *Leal v. C.C. Pitts Sand & Gravel Co.*, 419 S.W.2d 820 (Tex. 1967)).

<sup>58</sup> *Id.* at 506.

<sup>59</sup> 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

<sup>60</sup> *See supra* note 41.

<sup>61</sup> BLACK’S LAW DICTIONARY 1559 (7th ed. 1999).

<sup>62</sup> *Hewitt, supra* note 46 (citing *Allaire v. St. Luke’s Hosp.*, 56 N.E. 638 (Ill. 1900) (Boggs, J., dissenting)).

<sup>63</sup> *Allaire*, 56 N.E. at 641 (Boggs, J., dissenting).

<sup>64</sup> *Id.* at 642.

<sup>65</sup> 38 N.W.2d 838, 841 (Minn. 1949); *see also* *Marks, supra* note 41, at 44.



The court held that a cause of action would lie when a stillbirth results from prenatal injuries to a viable unborn child.<sup>66</sup> In refuting the common law belief that the child *in utero* is merely an extension of the woman's anatomy, *Verkennes* cited several cases including *Bonbrest v. Kotz*<sup>67</sup> and Judge Boggs's dissent in *Allaire*.<sup>68</sup> *Verkennes* led the way for other jurisdictions to expand liability for the wrongful death of a viable child within the womb.

### 3. Previability

Currently, Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia have extended wrongful death liability to those injuries causing the death of a previable child. Of these six, "five permit the cause of action at any point during gestation. Georgia alone uses 'quickening' as the point when a wrongful death action is recognized."<sup>69</sup>

In Georgia, *Tucker v. Carmichael & Sons* first broached the issue of whether an infant could recover damages for prenatal injuries. The state's highest court held in the affirmative for the child, emphasizing that life begins "when the child is able to stir in the mother's womb."<sup>70</sup> Four years later, a Georgia appellate court, in *Porter v. Lassiter*, ruled that an action may be maintained for the death of an unborn child who was "quick" or "able to move in the mother's womb" at the time of death.<sup>71</sup> In this case, the mother was approximately six weeks pregnant at the time of the accident and was four and a half months pregnant when a miscarriage occurred.<sup>72</sup> The court determined that the Georgia Code, which allows suit for the wrongful death of a "child," included that of a "quickened" fetus because it also declares that "the wilful killing of an unborn child so far developed as to be ordinarily called 'quick', [sic] is considered as murder."<sup>73</sup> Therefore, "[a]s a result of the *Porter* decision, Georgia became the first state to allow wrongful death recovery for the death of an unborn fetus that may not be viable at the time of the tortious act."<sup>74</sup>

In 1981, the Louisiana Supreme Court in *Danos v. St. Pierre* initially denied recovery for a six-month-old fetus that suffered prenatal

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<sup>66</sup> *Verkennes*, 38 N.W.2d at 841.

<sup>67</sup> 65 F. Supp. 138, 138 (D.D.C. 1946).

<sup>68</sup> *Allaire*, 56 N.E. at 641-42 (Boggs, J., dissenting).

<sup>69</sup> Marks, *supra* note 41, at 71.

<sup>70</sup> 65 S.E.2d 909, 910 (Ga. 1951).

<sup>71</sup> 87 S.E.2d 100, 102 (Ga. App. 1955).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 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, 423 (1996).

injury and was subsequently stillborn.<sup>75</sup> However, upon rehearing, the court reversed and allowed the parents of the deceased child to recover for the wrongful death.<sup>76</sup> To support its ruling, the court reasoned, “The loss to parents of a child who otherwise would have been born normally is substantially the same, whether the tortfeasor’s fault causes the child to be born dead or to die shortly after being born alive . . . .”<sup>77</sup> Also, recent Louisiana legislation had pronounced “that a human being exists from the moment of fertilization and implantation.”<sup>78</sup> *Danos* also rejected the argument that an unborn child is a part of the mother’s anatomy, stating:

We believe the infant is a child from the moment of its conception although life may be in a state of suspended animation the subject of love, affection, and hope and that the injury or killing of it, in its mother’s womb . . . gives the bereaved parents a right of action against the guilty parties for their grief, and mental anguish.<sup>79</sup>

Missouri courts held to the position that a viable fetus is not a “person” within Missouri’s wrongful death statute until the 1983 case of *O’Grady v. Brown*.<sup>80</sup> In *Rambo v. Lawson*, the Supreme Court of Missouri declined to extend liability to a pre-viable fetus that died *in utero* as a result of an automobile accident.<sup>81</sup> However, the court reversed itself in 1995 and allowed recovery for the wrongful death of a pre-viable child at four months gestation.<sup>82</sup> In examining the statutory intent behind state abortion regulation, which in part says that “[t]he life of each human being begins at conception” and that “[u]nborn children have protectable interests in life, health, and well-being,” the court found that the general assembly had directed “that the time of conception and not viability is the determinative point at which the legally protected rights, privileges, and immunities should be deemed to arise.”<sup>83</sup>

In 1984, South Dakota specifically amended its statute to include the wrongful death of an unborn child.<sup>84</sup> In 1986, the Supreme Court of South Dakota held that even under the pre-amendment statute, because of the “clear, overwhelming and growing majority of jurisdictions’ permitting actions in such cases, a cause of action for the death of a

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<sup>75</sup> 402 So. 2d 633, 639 (La. 1981).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 638.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 639.

<sup>80</sup> 654 S.W.2d 904 (Mo. 1983).

<sup>81</sup> 799 S.W.2d 62, 64 (Mo. 1990).

<sup>82</sup> *Connor v. Monkem Co.*, 898 S.W.2d 89, 90–93 (Mo. 1995).

<sup>83</sup> *Id.* at 91 n.6.

<sup>84</sup> Helbling, *supra* note 74, at 426 (citing S.D. CODIFIED LAWS § 21-5-1 (1987)).

viable, unborn fetus did exist under the [former] wrongful death statute.”<sup>85</sup>

The court further held in *Wiersma v. Maple Leaf Farms* that South Dakota’s amended wrongful death statute provides a cause of action for the loss of the previable unborn child.<sup>86</sup> In this case, parents had brought a wrongful death action against a frozen food company claiming that the company’s salmonella-contaminated chicken had caused the mother to miscarry. At the time of the miscarriage, the unborn child was clearly previable at only seven weeks gestation.<sup>87</sup> The court focused its analysis on the construction of the statute, and found that by amending the statute to include an “unborn child” and not a “fetus or embryo,” the legislature meant to “include any child still within a mother’s womb.”<sup>88</sup> Furthermore, the intent of the legislature is seen where an “unborn child” in criminal statutes is defined as “an individual organism of the species homo sapiens from fertilization until live birth.”<sup>89</sup> The court also noted that apart from balancing “the privacy rights of the mother against her unborn child,” the term “viability is purely an arbitrary milestone from which to reckon a child’s legal existence,” since this is a relative matter that may vary depending on the mother’s health and other factors apart from the state of development.<sup>90</sup>

In West Virginia, the landmark case of *Farley v. Sartin* declared that a previable fetus is a “person” within the meaning of West Virginia’s wrongful death statute.<sup>91</sup> In *Farley*, the plaintiff’s pregnant wife was killed in an auto accident along with their child who had developed to approximately eighteen weeks gestation. The court held that

justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child ha[s] not yet reached viability at the time of death. . . . Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.<sup>92</sup>

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<sup>85</sup> *Id.* at 427 (quoting *Farley v. Mount Marty Hosp. Ass’n*, 387 N.W.2d 42, 44 (S.D. 1986)).

<sup>86</sup> 543 N.W.2d 787, 789 (S.D. 1996).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 790.

<sup>89</sup> *Id.* (citing S.D. CODIFIED LAWS § 22-1-2(50A) (1996)).

<sup>90</sup> *Id.* at 792.

<sup>91</sup> 466 S.E.2d 522, 532 (W. Va. 1995).

<sup>92</sup> *Id.* at 533.

## IV. ILLINOIS' STRUGGLE TO DEFINE HUMAN LIFE

A. *Illinois Wrongful Death Act*<sup>93</sup>

The Illinois Wrongful Death Act, “enacted by the General Assembly in 1853, created for the first time in Illinois a cause of action for death.”<sup>94</sup> The Act patterns the 1847 New York statute, which substantially copied Lord Campbell’s Act.<sup>95</sup>

In 1973, Justice Ryan in his dissent to *Chrisafogeorgis v. Brandenburg* asked: “[W]hy set the line of demarcation at viability? Why should not a cause of action exist for the death of a fetus in its pre-viable state?”<sup>96</sup> In 1980, the Illinois Legislature enacted section 2.2 of the Illinois Wrongful Death Act which states:

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 arising from the death of a human being caused by wrongful act, neglect or default.<sup>97</sup>

Senator Rhoads introduced this bill by explaining that while at the time case law permitted “the representative of the unborn child at viability [to] bring a cause of action for wrongful death[,]” there was no case law clarifying the gap between conception and viability, a gap that section 2.2 would now fill.<sup>98</sup>

B. *Illinois Case History*1. Case History Prior to *Miller v. American Infertility Group*

In 1973, the Supreme Court of Illinois in *Chrisafogeorgis v. Brandenburg* first addressed whether under the Illinois Wrongful Death Act parents could recover for the wrongful death of a child who dies in

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<sup>93</sup> The text of section 1 of the act reads as follows:

Whenever the death of a person shall be caused by wrongful act, neglect or default, 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, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . .

740 ILL. COMP. STAT. 180/1 (2002).

<sup>94</sup> 740 ILL. COMP. STAT. ANN. 180/0.01 hist. n. (West 2002).

<sup>95</sup> *Id.*

<sup>96</sup> John C. Wunsch, *Parental Recovery for Loss of Society of the Unborn: The Plaintiff’s Perspective*, 77 ILL. B.J. 538, 539 (1989) (quoting *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88, 92 (Ill. 1973) (Ryan, J., dissenting)).

<sup>97</sup> 740 ILL. COMP. STAT. 180/2.2 (2002).

<sup>98</sup> Wunsch, *supra* note 96 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 165 (statement of Sen. Rhoads)).

the womb.<sup>99</sup> During her thirty-sixth week of pregnancy, an automobile negligently struck Mrs. Chrisafogeorgis, later causing her baby boy to be stillborn. The Court had previously held in *Amman v. Faidy*<sup>100</sup> that “there is a right of action for injuries wrongfully sustained by a viable child . . . when the child survives the injuries and is born alive.”<sup>101</sup> In *Chrisafogeorgis*, the court chose to extend this liability to a viable fetus that dies *in utero*.<sup>102</sup> The court cited cases from other jurisdictions which described the bizarre results of only allowing recovery for a child who is born alive. “For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby’s death would be legally immune from a lawsuit. However if they badly injured the child they would be exposed to liability.”<sup>103</sup> Justice Ryan further argued in his dissent that the distinction between viability and nonviability is relative and thus causes similarly incongruous results as the distinction made between a child who dies shortly before birth and one who dies shortly thereafter.<sup>104</sup>

In *Renslow v. Mennonite Hospital*, the court held that an infant could maintain an action against the hospital for injuries sustained from a negligent blood transfusion given to the mother *prior* to the child’s conception.<sup>105</sup> The court noted that viability is a relative matter and that “denial of claims for injuries to the previable fetus may indeed cut off some of the most meritorious claims, for there is substantial medical authority that congenital structural defects caused by factors in the prenatal environment can be sustained only early in the previable stages.”<sup>106</sup> While *Renslow* did not address wrongful death, it did cast doubt on upholding viability as the standard for recovery.

One year after *Renslow*, the court in *Green v. Smith* addressed whether a father could recover for the wrongful death of a child who died *in utero* at fourteen weeks gestation.<sup>107</sup> The court held that unless the fetus was viable, there would be no recovery, and that viability was a question of fact to be determined by the jury.<sup>108</sup> The court distinguished this from *Renslow* by stating:

In our opinion there is a clear distinction between a common law cause of action on behalf of a live-born infant for injuries suffered prior to its

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<sup>99</sup> *Chrisafogeorgis*, 304 N.E.2d at 88–89.

<sup>100</sup> 114 N.E.2d 412 (Ill. 1953).

<sup>101</sup> *Chrisafogeorgis*, 304 N.E.2d at 89 (citing *Amman*, 114 N.E.2d at 417–18).

<sup>102</sup> *Id.* at 91.

<sup>103</sup> *Id.* at 92.

<sup>104</sup> *Id.* at 92–93 (Ryan, J., dissenting).

<sup>105</sup> 367 N.E.2d 1250, 1255 (Ill. 1977).

<sup>106</sup> *Id.* at 1252–53 (citing Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563 (1962)).

<sup>107</sup> 377 N.E.2d 37, 38 (Ill. 1978).

<sup>108</sup> *Id.* at 39.

having become viable, and a statutory cause of action for the destruction of a fetus not yet viable. The extent of the loss incurred by a living child burdened with mental or physical defects resulting from a prenatal occurrence is not affected by whether the injuries were suffered prior to or after he became viable. On the other hand, the Wrongful Death Act provides for recovery for the “death of a person,” and we find no basis upon which to hold that one can cause the death of a fetus not yet viable.<sup>109</sup>

However, in 1980, the Illinois legislature amended the Wrongful Death Act to clarify that age of gestation will not bar recovery for the wrongful death of a developing child.<sup>110</sup> *Seef v. Sutkus* is the primary case addressing the wrongful death of a fetus following the amended legislation.<sup>111</sup> In *Seef*, a child was stillborn at thirty-eight weeks after a physician and hospital negligently failed to monitor the child and to perform a timely c-section.<sup>112</sup> The parents sought pecuniary damages for loss of the child’s society.<sup>113</sup> The court explained that because section 2.2 of the Wrongful Death Act prohibits limitation of a wrongful death claim based on the state of gestation or development, “an unborn fetus is recognized as a ‘person’ and parents may recover damages for ‘pecuniary injuries’ resulting from the death of the unborn fetus.”<sup>114</sup> The concurring opinion clarifies that the 1980 legislation eliminates the viability requirement of *Chrisafogeorgis*; however, the amount of pecuniary damages that the parents may recover is a separate issue.<sup>115</sup>

Illinois has led the way in enacting legislation that provides recovery for the wrongful death of a previable fetus. Recently, *Miller v. American Infertility Group* raised the important issue of whether the right of recovery given under the Illinois Wrongful Death Act to any “state of gestation or development of a human being” includes not only an embryo developing in the womb, but also an embryo artificially created and preserved *in vitro*, outside the womb.<sup>116</sup>

## 2. *Miller v. American Infertility Group*

Allison Miller and her husband, Todd Parish, sought treatment for

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<sup>109</sup> *Id.* at 38–39.

<sup>110</sup> 740 ILL. COMP. STAT. 180/2.2 (2002).

<sup>111</sup> 583 N.E.2d 510 (Ill. 1991).

<sup>112</sup> *Id.* at 511.

<sup>113</sup> *Id.* In the sense used here, “society” means “[t]he general love, affection, and companionship that family members share with one another.” BLACK’S LAW DICTIONARY 1396 (7th ed. 1999).

<sup>114</sup> *Seef*, 583 N.E.2d at 511.

<sup>115</sup> *Id.* at 512–13 (Miller, J., concurring).

<sup>116</sup> *Miller v. Am. Infertility Group*, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (quoting 740 ILL. COMP. STAT. 180/2.2 (2002)) (order denying motion to dismiss claims brought under Illinois’ Wrongful Death Act).

infertility from the Center for Human Reproduction in Illinois (Center).<sup>117</sup> In the typical preparation for *in vitro* fertilization,<sup>118</sup> the Center harvested Allison's eggs and then fertilized them with Todd's sperm. As a result, nine viable embryos were created and then frozen so that they could later be implanted in Allison's uterus. The couple believed "that at least one of these embryos developed into a healthy blastocyst"; however, it was wrongfully destroyed by the Center on or around January 13, 2000.<sup>119</sup> Allison and Todd first learned of their loss in June 2000 when they wished to transfer the embryo to another facility. The Center notified them by letter stating: "Based on our records, one of our junior embryologists informed you that we would freeze one embryo at the blastocyst stage . . . . A [senior embryologist] then decided not to cryopreserve this embryo."<sup>120</sup>

Miller and Parish filed suit against the Center and their complaint consisted of three counts including claims for negligence, willful and wanton misconduct, breach of contract, and wrongful death. On May 4, 2004, Judge David Lichtenstein dismissed with prejudice the claims based on negligence, willful and wanton misconduct, and breach of contract "with leave to plead, provided that the references to the Wrongful Death Act were removed."<sup>121</sup> Upon dismissal, Miller and Parish moved to reconsider. The court (with a new judge, as the previous trial judge had retired) denied the motion, refusing to reconsider the original order. The plaintiffs again moved for reconsideration, and Judge Jeffery Lawrence chose to review Lichtenstein's dismissal order and the order denying reconsiderations.<sup>122</sup>

A trial judge has the authority to revisit interlocutory orders—those orders that do not dispose of "all [the] counts or issues in the case."<sup>123</sup> Lawrence chose to review these orders since the case "involves an issue of public importance which is apparently one of first impression in Illinois."<sup>124</sup>

Not only is this an issue of first impression for Illinois, but one for almost all jurisdictions, with the exception being Rhode Island. In *Frisina v. Women & Infants Hospital of Rhode Island*, the Superior Court of Rhode Island held that three couples could not maintain an action for negligent infliction of emotional distress against a fertility

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<sup>117</sup> *Id.* at 1.

<sup>118</sup> *See supra* Part II.

<sup>119</sup> *Miller*, No. 02-L-7394, at 1–2.

<sup>120</sup> Dee McAree, *Wrongful Death Suit Allowed over Embryo*, NAT'L L.J., Feb. 14, 2005, at 4 (alteration in original).

<sup>121</sup> *Miller*, No. 02-L-7394, at 2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

clinic following the loss and destruction of several frozen embryos.<sup>125</sup> In analyzing whether the destroyed preembryos were victims, the court cited various cases from other jurisdictions where frozen embryos were “[not] recognized as ‘persons’ for constitutional purposes.”<sup>126</sup> Also, the court deferred to *Miccolis v. Amica Mutual Insurance Co.*,<sup>127</sup> in which it had held “that a [pre]viable fetus is not a ‘person’ within the meaning of the wrongful death statute.”<sup>128</sup> The *Frisina* court held that this “would [also] preclude pre-embryos from being considered victims.”<sup>129</sup> Because Rhode Island holds to the viability approach for the wrongful death of the unborn, *Frisina*’s failure to extend legal rights to the frozen embryo is not surprising.

In *Miller*, Judge Lawrence presented two key issues: “(1) is a pre-embryo a ‘human being’ within the meaning of Sec. 2.2 of the Wrongful Death Act, and (2) must it be implanted in its mother’s uterus to give rise to a claim under the Act for its destruction?”<sup>130</sup>

In analyzing whether section 2.2 of the Illinois Wrongful Death Act includes legal standing for the preembryo, as it does for the previable embryo, *Miller* emphasizes that the “words in a statute must be given their plain and ordinary meaning.”<sup>131</sup> In 1980, section 2.2 was added to the Wrongful Death Act. It states: “The state of gestation or development of a human being when an injury is caused . . . shall not foreclose maintenance of any cause of action . . . arising from the death of a *human being* caused by wrongful act . . . .”<sup>132</sup> This amendment was sponsored by Senator Rhoads, who believed the bill would “close a gap in the current law, both case and statutory law, covering that period . . . from the time of conception to the time of viability.”<sup>133</sup>

However, neither Rhoads nor any of the other legislators attempted to define “human being.” When necessary, the court may use “legislative history and the language of other statutes concerning related subject matter” to discern statutory construction.<sup>134</sup> While the Wrongful Death Act fails to define “human being,” the Illinois Abortion Law of 1975 does

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<sup>125</sup> CIV. A. 95-5827, 2002 WL 1288784, at \*1–2 (R.I. Super. Ct. May 30, 2002).

<sup>126</sup> *Id.* at \*4–5 (quoting *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998)).

<sup>127</sup> 587 A.2d 67 (R.I. 1991).

<sup>128</sup> *Frisina*, 2002 WL 1288784, at \*8 (citing *Miccolis*, 587 A.2d at 71).

<sup>129</sup> *Id.* at \*8.

<sup>130</sup> *Miller v. Am. Infertility Group*, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois’ Wrongful Death Act).

<sup>131</sup> *Id.* at 4 (citing *Lulay v. Lulay*, 739 N.E.2d 521, 527 (Ill. 2000)).

<sup>132</sup> 740 ILL. COMP. STAT. 180/2.2 (2002) (emphasis added).

<sup>133</sup> *Miller*, No. 02-L-7394, at 4–5 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 168 (statement of Sen. Rhoads)).

<sup>134</sup> *Id.* at 4 (citing *People v. Hickman*, 644 N.E.2d 1147, 1152 (Ill. 1994)).



define the term.<sup>135</sup> According to *Miller*, the Abortion Law makes it clear that while “[p]hilosophers and theologians may debate . . . there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception.”<sup>136</sup> Section 1 of the Abortion Law declares:

The General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child’s right to life and is entitled to the right to life from conception under the laws and Constitution of this State.<sup>137</sup>

Section 2 of the Illinois Abortion Law states that:

(5) “Fertilization” and “conception” each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.

(6) “Fetus” and “unborn child” each mean an individual organism of the species homo sapiens from fertilization until live birth.<sup>138</sup>

Because of the legislative intent behind section 2.2 of the Wrongful Death Act, as well as the Abortion Law’s clear definition of “human being” including the unborn child “from the time of conception,” the *Miller* order concludes that under Illinois statutory law an embryo not yet implanted in the womb is just as much a human being as an embryo developing *in utero*.<sup>139</sup>

The second issue addressed by *Miller* is whether a preembryo must be implanted in its mother’s uterus to give rise to a claim under the Wrongful Death Act. Judge Lawrence again turns to the construction of the amendment. Although Rhoads’s discussion of the bill focuses on the term “gestation,” the final version of amendment section 2.2 reads “gestation or development of a human being.”<sup>140</sup> Because section 2.2 also includes the term development, and not merely the term gestation, “it is a reasonable inference that [the legislature] must have contemplated nongestational development or development outside the womb.”<sup>141</sup> In conclusion, *Miller* finds that it would be illogical to “allow a claim for the death of a human being after implantation in its mother’s womb but deny it for one before implantation.”<sup>142</sup>

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<sup>135</sup> 720 ILL. COMP. STAT. 510/1-15 (2002).

<sup>136</sup> *Miller*, No. 02-L-7394, at 6.

<sup>137</sup> 720 ILL. COMP. STAT. 510/1 (2002).

<sup>138</sup> *Id.* at 510/2; *see also id.* at 5/9-1.2 (defining “unborn child” under the Illinois intentional homicide statute to “mean any individual of the human species from fertilization until birth”).

<sup>139</sup> *Miller*, No. 02-L-7394, at 6.

<sup>140</sup> 740 ILL. COMP. STAT. 180/2.2 (2002).

<sup>141</sup> *Miller*, No. 02-L-7394, at 8.

<sup>142</sup> *Id.*

## V. PROPOSAL

A. *Why All States Should Permit Recovery for the Wrongful Death of Both Previable Embryos and Preembryos*

## 1. Natural Law Tradition of Valuing Life

*If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished . . . and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life . . .*<sup>143</sup>

Many jurisdictions, struggling with the determination of when life truly begins, have cited Blackstone to support a position of valuing early human life. For example, Justice Boggs, in his dissent in *Allaire v. St. Luke's Hospital*, cited Blackstone in support of the then innovative concept of legal viability.<sup>144</sup> Blackstone, reflecting the principle of justice for the unborn in *Exodus 21:22*, states:

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

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

An infant *in 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 . . . 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.<sup>145</sup>

*Verkennes v. Corniea*, the first case to reject the live birth requirement and adopt the viability standard, cited Blackstone in support of its expansion of legal rights for the unborn.<sup>146</sup> Both Boggs's dissent in *Allaire* and the majority in *Verkennes* found inconsistency between the current property and criminal law which treated the unborn as human "from the moment of conception," and the law of negligence

<sup>143</sup> *Exodus 21:22–23* (King James).

<sup>144</sup> *Allaire v. St. Luke's Hosp.*, 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting).

<sup>145</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*129–30.

<sup>146</sup> 38 N.W.2d 838, 840 (Minn. 1949).

which continued to treat the child as part of the mother.<sup>147</sup> Blackstone first emphasized this contradiction and declared that life begins “as soon as an infant is able to stir in the mother’s womb.”<sup>148</sup>

In the Illinois Supreme Court case of *Amman v. Faidy*, the court similarly cited Blackstone in support of its decision to allow an infant to maintain an action for prenatal injuries when it stated, “It would therefore seem to us to be an unwarranted reflection upon the common law itself to attribute to it a greater concern for the protection of property than for the protection of the person.”<sup>149</sup>

The natural law, as reflected by Blackstone, gives foundational support for valuing human life and not treating the death of the unborn as a mere misdemeanor, but rather as an offense equal to that of the wrongful death of any other human being.

## 2. Scientific Evidence that the Preivable Embryo is Human Life

In *Davis v. Davis*, a mother sought custody of seven cryogenically frozen embryos following a divorce.<sup>150</sup> Her ex-husband desired custody in order to have the embryos destroyed. At the trial in Maryville, Tennessee, world renowned French geneticist Jérôme Lejeune, M.D., Ph.D., testified to the humanity of the frozen embryos.<sup>151</sup> Lejeune passionately articulated that life begins at conception:

[E]ach of us has a unique beginning, the moment of conception . . . . As soon as the twenty-three chromosomes carried by the sperm encounter the twenty-three chromosomes carried by the ovum, the whole information necessary and sufficient to spell out all the characteristics of the new being is gathered.<sup>152</sup>

Lejeune went on to speak of the unnecessary and potentially misleading terminology of labeling a frozen embryo a preembryo since

[b]efore an embryo there is a sperm and an egg, and that’s it. And the sperm and the egg cannot be a pre-embryo because you cannot tell what embryo it will be, because you don’t know what sperm will go into what egg, but once it is made, you have got a zygote and when it divides it’s an embryo and that’s it.

<sup>147</sup> *Id.* (citing *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946)).

<sup>148</sup> 1 BLACKSTONE, *supra* note 145, at \*129.

<sup>149</sup> 114 N.E.2d 412, 429 (Ill. 1953).

<sup>150</sup> No. E-14496, 1989 WL 140495, at \*1 (Tenn. Cir. Ct. Sept. 21, 1989), *overruled by* 842 S.W.2d 588 (Tenn. 1992).

<sup>151</sup> JÉRÔME LEJEUNE, *THE CONCENTRATION CAN: WHEN DOES HUMAN LIFE BEGIN? AN EMINENT GENETICIST TESTIFIES* 22–23 (Ignatius Press 1992) (1990). In 1959, Jérôme Lejeune’s genetic research identified the human chromosomal abnormality that accounts for Down syndrome, or Trisomy 21, the first chromosomal disorder to be positively identified. For his research on Down syndrome, he received the Kennedy Award and the William Allen Memorial Award, the highest honor in the world for genetics. *Id.*

<sup>152</sup> *Id.* at 30.

I think it's important because people would believe that a pre-embryo does not have the same significance as an embryo. And in fact, on the contrary, a first cell knows more and is more specialized . . . than any cell which is later in our organism.<sup>153</sup>

Lejeune's testimony is filled with detailed explanation of scientific advancements concerning the genetic code and the beginning of life. He describes the process of freezing embryos as placing them in a "concentration can."<sup>154</sup> This "can" does not stop life, to be later started anew after thawing. Rather, the low temperatures greatly slow down cells' microscopic movements and arrest "the flux of time" for the embryo, which if thawed "will again begin to flourish and to divide."<sup>155</sup> Lejeune clarifies that

[a]n early human being in this suspended time inside the can, cannot be the property of anybody because he is the only one in the world to have the property of building himself. And I would say that science has a very simple conception of man; as soon as he has been conceived, a man is a man.<sup>156</sup>

The trial court heard from a total of seven experts in the fields of genetics, embryology, and *in vitro* fertilization, four of which agreed "that the seven cryopreserved embryos are human; that is, 'belonging or relating to man.'"<sup>157</sup> Based on their determination that the embryos were human beings, the trial court awarded the mother custody so that she would have the opportunity to bring the children to term through implantation. However, the court of appeals reversed, holding that "the parties share an interest in the seven fertilized ova" and remanded the case to the trial court to give them "joint control . . . and equal voice over their disposition."<sup>158</sup> The Supreme Court of Tennessee held that the husband's interests outweighed the wife's, and thus the husband was entitled to custody of the embryos and had the ability to determine whether the embryos should be destroyed. The final outcome of *Davis* resulted in Tennessee adopting the standard that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."<sup>159</sup>

Although Tennessee chose to treat frozen embryos as quasi-property, the testimony of Jérôme Lejeune, as well as his research and that of others within the scientific community, gives strong evidence for

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<sup>153</sup> *Id.* at 37–38.

<sup>154</sup> *Id.* at 47.

<sup>155</sup> *Id.* at 36.

<sup>156</sup> *Id.* at 47–48.

<sup>157</sup> *Davis v. Davis*, No. E-14496, 1989 WL 140495, at \*4 (Tenn. Cir. Ct. Sept. 21, 1989), *overruled by* No. 180, 1990 WL 130807, at \*3 (Tenn. Ct. App. Sept. 13, 1990).

<sup>158</sup> *Davis v. Davis*, 842 S.W.2d 588, 589 (quoting *Davis*, 1990 WL 130807, at \*3).

<sup>159</sup> *Id.* at 597.

supporting the standard that human life begins from the moment the sperm fertilizes the ovum.

The law has long given deference to scientific advancement in the shaping of legal rights given to the unborn. For example, in 1900 Justice Boggs argued that

[m]edical science and skill . . . 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, when separated from the dead body of the mother. . . . [I]s it not *sacrificing truth* to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?<sup>160</sup>

In *Bonbrest v. Kotz*, the landmark case which rejected the notion that an unborn child is merely an extension of the mother, the court used current science to correct an error in the law.<sup>161</sup> The court held that because “modern medicine is replete with cases of living children being taken from dead mothers,” a fetus can no longer be treated as legally one with the mother.<sup>162</sup>

Like *Bonbrest* and other cases which have used the understanding of modern medicine and human development to correct a scientifically outdated law, states should specifically amend their wrongful death statutes to reflect the current scientific evidence that life begins at conception. Not only must the law give rights to embryos *in utero*, but also to those embryos which are fully human but not yet implanted within the womb. “[Once] conceived, a man is a man.”<sup>163</sup>

### 3. Inconsistency in Distinguishing *In Vivo* and *In Vitro* Previabile Embryos

Those jurisdictions which reject the viability standard in favor of allowing wrongful death recovery for a previable embryo have justly done so in part due to the relativity and inconsistency of the viability standard. Likewise, Justice Ryan’s concurrence in *Green v. Smith* argues for abandoning the viability standard in favor of a more definite standard.<sup>164</sup> Ryan argues that

viability is . . . dependent upon the weight and race of the child and the techniques which are presently available to sustain the life of the fetus outside the womb. . . . For this court to base its determination

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<sup>160</sup> *Allaire v. St. Luke’s Hosp.*, 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) (emphasis added).

<sup>161</sup> 65 F. Supp. 138, 139–40 (D.D.C. 1946).

<sup>162</sup> *Id.* at 140.

<sup>163</sup> LEJEUNE, *supra* note 151, at 48.

<sup>164</sup> 377 N.E.2d 37, 40–41 (Ill. 1978) (Ryan, J., concurring). This case was prior to the 1980 amendment to the Illinois Wrongful Death Act that established a previability standard for wrongful death recovery for the unborn.

that an unborn child becomes a 'person' only at the point of viability is to premise the right to maintain an action for wrongful death on an uncertain and continually changing standard.<sup>165</sup>

However, it is similarly inconsistent for those jurisdictions that have extended legal rights to the preivable embryo in the womb to deny the same rights to the frozen preivable embryo. The only difference between those embryos is that an *in vivo* embryo has implanted within the lining of the uterus.<sup>166</sup> Implantation, however, is not a definite standard for determining human legal status, since it can occur anywhere from six to twelve days after fertilization of the ovum.<sup>167</sup>

The best standard supported by scientific evidence is that of conception. From a legal standpoint, the actual date of conception may be less significant for naturally conceived children; however, it is crucial for those children conceived through *in vitro* fertilization, since in those cases one can pinpoint the precise timing of conception. The moment that the sperm fertilizes the egg—whether inside or outside of a woman's body—human life begins. Wrongful death law, as in *Miller v. American Infertility Group*, should reflect this definite standard.

#### B. Model Legislation

Below is suggested legislation which states may use as a model to amend their Wrongful Death Acts to reflect modern scientific understanding of human development and give equal legal rights to *in vivo* and *in vitro* human life.

The state of gestation of a human being or the location of a developing human being when an injury is caused, when an injury takes effect, or at death, shall not bar any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.

A "human being" is an individual organism of the species *homo sapiens* beginning with the moment of conception, meaning the fertilization of a human ovum with a human sperm. Any form of preservation of a fertilized human ovum does not change its status as a human being.<sup>168</sup>

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<sup>165</sup> *Id.* at 40.

<sup>166</sup> Implantation is defined as "attachment of the fertilized ovum (blastocyst) to the endometrium, and its subsequent embedding in the compact layer." STEDMAN'S MEDICAL DICTIONARY, *supra* note 3, at 490.

<sup>167</sup> Allen J. Wilcox, Donna Day Baird & Clarice R. Weinberg, *Time of Implantation of the Conceptus and Loss of Pregnancy*, 340 NEW ENG. J. MED. 1796, 1797 (1999).

<sup>168</sup> This model legislation is a modification of section 2.2 of the Illinois Wrongful Death Act. See 740 ILL. COMP. STAT. 180/2.2 (2002).

## VI. CONCLUSION

All jurisdictions have struggled to define when human life reaches the stage of development that will warrant recovery for wrongful death. The answer to this struggle is modeled both by Illinois' statutory and case law. The legislation protects the previable embryo, as does *Miller v. American Infertility Group*, which affirms that human life exists from conception until death. According to *Miller*, even previable frozen embryos should be recognized under wrongful death law as persons with legal status equal to that of a living child. Other previability jurisdictions should make the logical step to include rights not only for previable embryos in the womb, but also for those created and preserved through *in vitro* procedures. Those jurisdictions which still hold to the scientifically outdated standard of "live birth," as well as those which hold to the inconsistent standard of "viability" for wrongful death recovery, should follow Illinois' lead and amend their legislation to adopt "conception" as the definitive standard for embryonic legal rights.

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