UNBORN & UNPROTECTED: THE RIGHTS OF THE FETUS UNDER § 1983

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When the action of a state agent results in the deprivation of the federal rights of any "person" within the jurisdiction of the United States, that person may bring a civil action under 42 U.S.C. § 1983. In Roe v. Wade*, the Supreme Court held that a fetus is not a constitutional "person." As a result, an unborn child injured by a state agent may not raise a claim under § 1983. This result, however, has at times appeared unjust. The bar on fetal 1983 claims has obstructed access to state-funded prenatal care, denied fetuses the protection of the police, and insulated state agents from liability where their reckless or abusive actions have resulted in physical injuries to the unborn.*

Conceding that the language of Roe *presents a virtually insurmountable obstacle to fetal 1983 actions, this Comment argues that neither the facts nor the reasoning of* Roe *logically support a regime that refuses to compensate unborn children for injuries occasioned by state actors. This Comment proceeds to analyze how the prohibition on fetal 1983 claims generates legal inconsistencies and is unsound from a policy perspective. A principled examination of the unavailability of damages to compensate for in utero injuries reveals that the longstanding bar on fetal 1983 claims should be reconsidered.*

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INTRODUCTION

Chantrienes Barker went into labor while locked in a jail cell in Wayne County, Michigan.[1] After she notified the guard on duty that she was experiencing labor pains, Barker was left in her cell for over eighteen hours.[2] She was then taken to the hospital, examined, electronically monitored, given pain medication, and sent back to jail.[3] While confined to her cell for the next several hours, Barker's pains intensified and she experienced contractions. Barker's cellmate unsuccessfully attempted to notify the guards that Barker needed immediate medical attention.[4] Although there was a registered nurse on duty, Barker was not provided with medical care. "[A]t this point all of the inmates on Barker's cell block started screaming and banging on toilets and cell bars in an effort to alert the [guards and the nurse]."[5] Finally, Barker was taken in a wheelchair to the nurse's station where Emergency Medical Services (EMS) were contacted. "When EMS arrived, they realized that Barker's baby was 'crowning' or had already crowned. Within minutes, the baby Chelsie Barker . . . was delivered at the Wayne County Jail."[6] Chelsie, who was not breathing, was taken to the hospital where she was found to have "no respirations or heart rate."[7] Although she survived, she was left with "severe mental retardation and severe cerebral palsy."[8]

1. Havard v. Puntuer, 600 F. Supp. 2d 845, 849 (E.D. Mich. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

Despite the ordeal of her birth and the serious injuries she suffered as a result, when Chelsie Barker, through her guardian Lorraine Havard, brought suit against the prison guards and nurse under 42 U.S.C. § 1983, Chelsie's chances of success seemed slim. The defendant, Wayne County, moved for judgment on the pleadings, arguing that because Chelsie was a fetus[9] at the time of her injury, she was neither a "citizen" nor a "person" under § 1983, and therefore had no federally protected rights.[10] Judicial precedent was on the defendant's side.[11]

Courts deciding cases like Chelsie Barker's turn to one Supreme Court case for guidance: *Roe v. Wade*.[12] In *Roe*, the Court explicitly declared that "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."[13] This holding appears to have been quoted by every state and local government facing a fetus' 1983 claim since *Roe*.[14] Government defendants argue that because the Fourteenth Amendment does not apply to fetuses and because § 1983 is a derivative statute used to remedy violations of constitutional and federal statutory rights,[15] § 1983 does not apply to fetuses.[16] In Part I of this Comment, I point out that nearly all courts have been receptive to this defense, and, therefore, very few plaintiffs have recovered damages under § 1983 for injuries they suffered while in the womb.[17]

In Part II, I consider three cases where courts appear to have circumvented the bar to fetal recovery under § 1983. I also examine other paths courts might take, and I analyze scholarly claims that despite its holding, *Roe* does not facially limit recovery under § 1983 for unborn children. Nonetheless,

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9. In this Comment, I use the words "fetus" and "unborn child" interchangeably. I do not intend to take a position in the abortion terminology debate, where scholars and activists have devoted considerable energy to advocating the use of one term over the other. For an important discussion of the power of language in the abortion context, see Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47, 56–67 (1997).

10. Wayne County's Brief in Support of Motion for Judgment on the Pleadings, *Havard*, 600 F. Supp. 2d 845 (No. 2:06-cv-10449) [hereinafter Wayne County's Brief].

11. *But see infra* Part II.B (discussing outcome of the *Havard* case).

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

13. *Id.* at 158.

14. *See* discussion and cases cited *infra* Part I.A–I.C.

15. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) ("42 U.S.C. § 1983 . . . is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.").

16. *See, e.g.*, Reed v. Gardner, 986 F.2d 1122, 1128 (7th Cir. 1993) ("Claims may be brought under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment. This circuit has already concluded that fetuses are not persons within the scope of the fourteenth amendment."); Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974) ("It necessarily follows that if an unborn is not a person under the Fourteenth Amendment an unborn has no right of action under Section 1983 and this claim must fall.").

17. *See* cases cited *infra* Part II.A–II.B.

I conclude that *Roe* appears to pose an insurmountable barrier to unborn children seeking damages when their federal rights are infringed by state actors.

Despite these constraints, in Part III, I argue that with respect to the rights of fetuses, the current state of the law fails to realize and arguably frustrates the goals of *Roe*. Finally, in Part IV, I point to legal inconsistencies, articulate policy arguments, and respond to counterarguments to support my claim that the law should be changed to allow unborn children to recover under § 1983 for injuries they suffer while in the womb.

I. A FETUS IS NOT A CONSTITUTIONAL "PERSON"

When *Roe v. Wade* was decided, pro-life leaders described the decision as the "greatest slaughter of innocent life in the history of mankind," and called the authors of the opinion "fetal muggers."[18] Pro-choice activists celebrated their "staggering victory,"[19] calling the Supreme Court opinion a "thunderbolt."[20] Norma McCorvey, the woman formerly known only as "Roe," later said that when the decision came down, she felt as if she were "on top of Mt. Everest."[21] Restrictive abortion statutes in thirty-one states were immediately called into question, if not overturned.[22] Pregnant women could no longer categorically be mandated to carry unwanted children to term.[23] The decision was sweeping and powerful, and even proponents of abortion rights feared the potential consequences of the path the Court had taken.[24]

18. MARIAN FAUX, *ROE V. WADE*: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL 305 (1988).

19. *Id.* at 304.

20. N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 180 (2001).

21. FAUX, *supra* note 18, at 304. However, McCorvey, who never actually had an abortion, wrote in her autobiography that she had been lied to and manipulated into being the plaintiff in *Roe v. Wade*. *See* NORMA MCCORVEY, I AM ROE 126–27, 137 (1994); *see also* Alex Witchel, *At Home With Norma McCorvey: Of Roe, Dreams and Choices*, N.Y. TIMES, July 28, 1994, at C1. A year later, McCorvey underwent a dramatic and widely publicized transformation when she was baptized in a backyard Dallas swimming pool by a fundamentalist minister and then joined a militant anti-abortion group, becoming a spokesperson for the pro-life movement. *See 'Jane Roe' Joins Anti-Abortion Group*, N.Y. TIMES, Aug. 11, 1995, at A12.

22. FAUX, *supra* note 18, at 315.

23. Roe v. Wade, 410 U.S. 113, 164–65 (1973). As readers will no doubt recall, under *Roe*'s trimester framework, states may still proscribe abortions "subsequent to viability." *Id.*

24. *See* HULL & HOFFER, *supra* note 20, at 182. According to Hull & Hoffer, women's rights advocates like Ruth Bader Ginsburg were convinced that the decision "was too sweeping, and thereby made all women's rights vulnerable" in a nation that was "not ready for the opinion." *Id.* Some pro-choice activists might have been more comfortable with the continued legislative repeal of abortion laws; other activists might have preferred a ruling on equal protection grounds, acknowledging the gender discrimination inherent in abortion prohibitions. *Id.*; *see also* Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV.

Central to *Roe*'s holding that women could abort unwanted fetuses was the Court's conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[25] As Ronald Dworkin has framed the issue, the Court excluded fetuses from "the constitutional population."[26] According to Dworkin, the Supreme Court *had* to deny fetal personhood:

> Is a fetus a constitutional person? In *Roe v* [sic] *Wade*, the Supreme Court answered that question in the only way it could: in the negative. If a fetus is a constitutional person, then states not only *may* forbid abortion but, at least in some circumstances, *must* do so.[27]

The *Roe* Court raised a similar proposition in a footnote, pointing out that if a fetus is a person, then abortion is murder and state statutes permitting abortion to save the life of the mother would unjustifiably privilege one life over another.[28] If fetuses were constitutional persons, pregnant women would be unable to seek abortions irrespective of the costs of bearing unwanted children.[29]

But what of "wanted" children? As more than one pregnant woman came to realize in the wake of *Roe*, the rejection of fetal personhood signaled a denial of rights to both undesired and desired fetuses alike. Federal and state court decisions demonstrate a near consensus in accepting the notion that with a mother's[30] right to abort the fetus comes the state's right to deny the fetus benefits, and even injure it.

375, 385–86 (1985) ("*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." (citation omitted)).

25. *Roe*, 410 U.S. at 158. Several federal and state courts reached this same conclusion in the months leading up to *Roe*. *See, e.g.*, McGarvey v. Magee-Womens Hosp., 340 F. Supp. 751, 754 (W.D. Pa. 1972) (refusing to "afford fetal life constitutional protection"); Byrn v. N.Y. City Health & Hosps. Corp. 329 N.Y.S.2d 722, 734–35 (N.Y. App. Div. 1972) (finding that a fetus does not necessarily have an independent "legal personality").

26. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 398 (1992).

27. *Id.* at 398–99.

28. *Roe*, 410 U.S. at 157–58 n.54.

29. *See id.* at 153 ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

30. A pregnant woman who does not wish to have a child should not necessarily be referred to as a "mother" when the fetus is not recognized as a person. However courts and commentators consistently use this language in discussing the abortion rights of the "pregnant mother." *See, e.g.*, *id. passim*.

A. Quality Medical Care

One of the first cases to reach this conclusion was *Poole v. Endsley*,[31] a § 1983 class action seeking to compel the state of Florida to grant benefits to unmarried pregnant women under the federal Aid to Families with Dependent Children (AFDC) program.[32] A welfare program administered under the Social Security Act, AFDC provided federal money to states for the purpose of aiding "needy families with children."[33] The plaintiff class in *Poole* consisted of pregnant women who under Florida policy were denied AFDC aid.[34] Advocating on behalf of themselves and their unborn children, the *Poole* plaintiffs raised an equal protection challenge to Florida's aid-distribution policy.[35] The federal court rejected their claims in a four-page opinion that cited *Roe* three times for the same proposition: namely, "an unborn child is not a person."[36] Because the unborn children were not constitutional children, it necessarily followed that the pregnant women were not in fact mothers. The result? No equal protection claim, no 1983 cause of action, and no AFDC dollars to low-income women in need of prenatal care.[37]

Similar claims have been met with similar resistance. Although many state statutes now recognize wrongful death claims brought by the parents of stillborn children,[38] such claims cannot arise under the federal Constitution. As a Texas court of appeals explained to a mother who claimed that negligent hospital staff caused her baby to be delivered stillborn, "[f]ollowing *Roe* . . . the protections of the federal . . . constitution[ ] do not extend to an unborn child."[39]

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31. 371 F. Supp. 1379 (N.D. Fla. 1974).

32. 42 U.S.C. §§ 601–610 (1994) (repealed by Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112 (1996)). Enacted under the New Deal in 1935, AFDC was substantially discontinued in 1996 as part of President Clinton's welfare reform efforts. *See* U.S. Dep't of Health & Hum. Serv., *A Brief History of the AFDC Program*, *in* AID TO FAMILIES WITH DEPENDENT CHILDREN: THE BASELINE 1, *available at* http://aspe.hhs.gov/hsp/AFDC/baseline/1history.pdf (last visited Oct. 17, 2009).

33. 42 U.S.C. § 601.

34. *Poole*, 371 F. Supp. at 1380.

35. *Id.*

36. *Id.* at 1382–83.

37. *Accord* Green v. Stanton, 451 F. Supp. 567, 570–71 (N.D. Ind. 1978) (holding that unborn children as nonpersons could not be part of plaintiff class and that denial of AFDC benefits to pregnant women did not run afoul of the equal protection clause); *see also infra* note 76.

38. *See infra* Part IV.A.

39. Sosebee v. Hillcrest Baptist Med. Ctr., 8 S.W.3d 427, 433 (Tex. App. 1999). Four years after *Sosebee*, the Texas legislature amended the state's wrongful death statute to permit claims for the wrongful death of unborn children. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (Vernon 2008) (defining "individual" to include "an unborn child at every stage of gestation from fertilization until birth"). Nonetheless, the Texas Supreme Court reiterated that an unborn child's

The Third Circuit reached the same result in a case where a child was delivered stillborn even though "[t]he vital signs of [the] baby were taken only fourteen minutes prior to delivery by cesarean section, and the fetus appeared normal and healthy."[40] The plaintiff's complaint alleged that the New Jersey Wrongful Death Act[41] violated the Fourteenth Amendment by "deny[ing] recovery on behalf of stillborn fetuses."[42] Affirming the dismissal of the complaint, the Third Circuit reasoned that neither a due process nor an equal protection claim could be brought on behalf of a nonperson.[43] According to the court, the question was whether the plaintiff's "child" was a Fourteenth Amendment "person." The answer was clear: "The Supreme Court has already decided that difficult question for us in *Roe v. Wade*."[44] Had the plaintiff's baby survived another fourteen minutes and been born alive prior to its death, the plaintiff might have recovered substantial damages under New Jersey's wrongful death statute. As it was, she recovered nothing.

B. Police Protection

Quality medical care is not the only benefit denied to wanted unborn children. They are also not constitutionally guaranteed the police protection to which born children and adults are entitled. In a Seventh Circuit case, the police arrested a driver and left behind the drunk passenger, who proceeded to take the wheel, cross the center line on the highway, and cause a head-on collision resulting in the death of a pregnant woman and her eight-month-old fetus and in substantial injuries to other passengers in the car.[45] Given the actions of the police, the court reasoned that the passengers could maintain a 1983 claim based on "state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that [sic] they otherwise would have been."[46] The claim of the fetus, on the other

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wrongful death protection was statutory, not constitutional. *See* Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 96–98 (Tex. 2004).

40. Alexander v. Whitman, 114 F.3d 1392, 1396 (3d Cir. 1997).

41. N.J. STAT. ANN. § 2A:31-1 (West 2009).

42. *Alexander*, 114 F.3d at 1397.

43. *Id.* at 1400.

44. *Id.*

45. Reed v. Gardner, 986 F.2d 1122, 1123–24 (7th Cir. 1993).

46. *Id.* at 1126. However, the court went on to say that the defendants would be entitled to summary judgment on remand upon showing that the driver whom they arrested had also been drunk. *Id.* at 1127 ("[R]emoving one drunk driver and failing to prevent replacement by another drunk will not subject officers to section 1983 liability . . . .").

hand, was summarily dismissed with a citation to *Roe* and the holding that "a fetus cannot state a claim under section 1983."[47]

C. Police Brutality

The most seemingly unjust cases arise not when fetuses are denied the protection *of* the police, but when they are denied protection *from* the police. Take, for example, the case of Linda Harman, who was arrested by the police while she was pregnant.[48] Harman alleged that the arresting officer struck her in the stomach and then failed to provide medical assistance.[49] She further alleged that as a result of the officer's assault, her baby Sarah was born with "severe complications . . . which required substantial medical treatment and which will require continued medical care."[50] Citing *Roe*, the court dismissed Sarah's 1983 claim.[51] Five years later, a district judge in Puerto Rico recited the reasoning and holding of *Harman* to dismiss a very similar case where a woman alleged that her unborn child was injured after she was beaten by police officers while nine months pregnant.[52]

II. DOES *ROE* BAR CLAIMS BY FETUSES UNDER § 1983?

A. Ignoring *Roe*?

Evidently, the notion that *Roe* categorically bars unborn children from bringing 1983 claims has been accepted by judges. Only one federal judge, T. Emmet Clarie, has bucked the trend, in one short but controversial opinion.[53] In *Douglas v. Town of Hartford*, Rosalee Douglas was five-and-a-half months pregnant when she heard a commotion outside her house, stepped out into her yard, and found a police officer beating her sister with a nightstick while another officer watched.[54] When Douglas attempted to protect her sister, the officer hit Douglas "across the top of the head" with the nightstick.[55]

47. *Id.* at 1127–28.
48. Harman v. Daniels, 525 F. Supp. 798, 799 (W.D. Va. 1981).
49. *Id.*
50. *Id.*
51. *Id.* at 800–02.
52. Ruiz Romero v. Gonzalez Caraballo, 681 F. Supp. 123, 125–26 (D.P.R. 1988).
53. Douglas v. Town of Hartford, 542 F. Supp. 1267 (D. Conn. 1982).
54. *Id.* at 1269–70. These facts were asserted by Douglas and accepted as true for purposes of the defendants' motion to dismiss. *See id.*
55. *Id.* at 1269.

In addition to Douglas' own injuries, "her unborn baby, the plaintiff Paul Douglas, also suffered serious physical injuries" as a result of the incident.[56] The following year, moving to dismiss the claims brought on behalf of baby Paul, the police argued that "since a fetus is not a 'person' or 'citizen' within the meaning of 42 U.S.C. § 1983, he cannot recover damages under this provision."[57] Undoubtedly well aware of the holding in *Roe*,[58] and citing three federal cases that "have ruled that a fetus is not entitled to civil rights and constitutional protections under § 1983," Judge Clarie nonetheless refused to dismiss Paul's claims. Instead, he noted that state courts had shown an increased willingness to grant legal rights to a viable fetus,[59] and he concluded that "a viable fetus is a 'person' within the meaning of 42 U.S.C. § 1983."[60]

Judge Clarie's decision is most logically explained on social/political grounds, as he was a longtime abortion opponent.[61] Over twenty-five years after *Douglas*, Clarie remains the only member of the federal judiciary to explicitly hold that, irrespective of *Roe*, fetuses can be "persons" for purposes of § 1983. However, perhaps sensitive to the injustice of denying fetuses recovery for serious harms, other judges have engaged in judicial acrobatics to work around *Roe*'s holding. There are two prime examples of courts circumventing *Roe*'s seemingly insurmountable bar to § 1983 claims brought by unborn children: *Crumpton v. Gates*[62] and the case with which I began this Comment, *Havard v. Puntuer*.[63] In both of these cases, the judges reached unexpected outcomes through what could either be described as judicial ingenuity or judicial sophistry.

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56. *Id.*
57. *Id.* at 1270.
58. *See infra* note 61.
59. *Douglas*, 542 F. Supp. at 1270.
60. *Id.* at 1269. Judge Clarie did, however, dismiss all claims against the city of Hartford, finding that the alleged constitutional violations were not committed pursuant to "official policy." *Id.* at 1270–71 (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978)).
61. Ten years before *Douglas* and one year before *Roe*, Judge Clarie sat on a three-judge district court panel to determine the constitutionality of Connecticut's anti-abortion statutes. *See* Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded by* Markle v. Abele, 410 U.S. 951 (1973). While the other two judges declared the statutes unconstitutional, Judge Clarie vehemently dissented, arguing that "the Connecticut anti-abortion statutes do protect fetal life as a 'compelling subordinating state interest.'" *Id.* at 814 (Clarie, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)). Judge Clarie concluded that the majority decision "invites unlimited foeticide (the murder of unborn human beings)." *Id.* at 816.
62. 947 F.2d 1418 (9th Cir. 1991).
63. 600 F. Supp. 2d 845 (E.D. Mich. 2009).

B. Circumventing *Roe*?

When John Crumpton, IV, was a two-month-old fetus, his father was killed by the Los Angeles Police Department.[64] Allegedly, at the time of the killing, an LAPD "death squad" systematically tracked and killed criminals who the police thought were not being convicted for their crimes or were receiving sentences that were too lenient.[65] On or about September 15, 1982, Crumpton's father was allegedly followed by the LAPD until he robbed a bank. Officers then fatally shot him in the back as he fled.[66] Crumpton was born seven months later, and six years after that, a guardian filed suit on his behalf under § 1983.[67]

The theory behind Crumpton's substantive due process claim, "based on the violation of [his] right to familial companionship and society," had previously been recognized by the Ninth Circuit.[68] However, the Ninth Circuit had never before recognized such a claim where the violation of the plaintiff's rights occurred when the plaintiff was a fetus.[69] Unsurprisingly, the district court granted the defendants' motion for summary judgment, reasoning that Crumpton was not a "person" when his father was killed.[70]

On appeal, however, the Ninth Circuit reversed the district court's decision.[71] According to the Ninth Circuit, Crumpton's case was distinguishable from cases where the fetus suffered physical injury due to an attack on the pregnant mother. In such cases, "the plaintiff's injury was complete at the moment the wrongful act, a physical attack, injured the fetus."[72] By contrast, in Crumpton's case, "although the wrongful act occurred while Crumpton was *in utero*, the injury or suffering which flowed from that wrongful act occurred postnatally."[73] Crumpton's loss of familial companionship and society did not occur when his father was shot but when Crumpton was born fatherless. The Ninth Circuit reasoned that "[b]ecause a child has familial relationships only after birth, it follows that the child's right to familial relationships exists

64. *Crumpton*, 947 F.2d at 1419.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1420–21 (citing Smith v. City of Fontana, 818 F.2d 1411, 1418–20 (9th Cir. 1987)).
69. *Id.* at 1420 ("This case poses a novel, purely legal question. Indeed, our research has uncovered no federal case on all fours. Specifically, we must decide whether a child may bring a section 1983 action based upon the unconstitutional killing of his father prior to the child's birth.").
70. *Id.* at 1419.
71. *Id.*
72. *Id.* at 1422.
73. *Id.*

only after birth."[74] If we accept this strained analysis, Crumpton's right was violated the moment it arose, and the incident precipitating the constitutional injury occurred seven months before the right existed.[75] Arguably, Crumpton's right was violated before Crumpton had a right. Certainly a perplexing conundrum, but because the Ninth Circuit held that "Crumpton's injury and cause of action did not arise until his birth," the defendants' summary judgment motion was denied.[76]

In *Havard v. Puntuer*,[77] the case described in the introduction of this Comment, *Crumpton v. Gates* was not cited by either party. Nonetheless, Judge Stephen J. Murphy found *Crumpton* to be "highly persuasive"[78] and relied on the case to reach his holding. Recall that in *Havard*, Chantrienes Barker was left in her jail cell for hours after going into labor, and that minutes after EMS technicians arrived at the jail, Barker's baby, Chelsie, was born not breathing.[79] The defendants, citing *Roe*, argued that a fetus who is not a "person" for Fourteenth Amendment purposes could not bring a claim for the denial of proper medical care.[80] To circumvent *Roe*'s formidable obstacle to recovery, Judge Murphy reasoned that "the complaint alleges facts that show that the injury to Chelsie Barker occurred during the process of and in the time period following her birth."[81] In other words, Chelsie's brain damage occurred after she was born, and after she was born, Chelsie was a "person"

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74. *Id.*

75. *Cf.* Unborn Child v. Evans, 245 N.W.2d 600, 604–05 (Minn. 1976) (denying defendant's summary judgment motion where illegitimate child born six months after his father's death alleged equal protection violation based on distribution of father's life insurance policy to legitimate children while plaintiff was still a fetus); State Farm Mut. Auto Ins. Co. v. Luebbers, 119 P.3d 169, 190 (N.M. Ct. App. 2005), *writ quashed*, 146 P.3d 810 (N.M. 2006) (holding that a child was not legally barred from seeking loss of parental society and consortium damages for his father's death even though the child had been a four-week-old fetus when his father died).

76. *Crumpton*, 947 F.2d at 1423. *Contra* Lewis v. Thompson, 252 F.3d 567, 585–86 (2d Cir. 2001). In *Lewis*, a class of illegal immigrant mothers contested their denial of Medicaid-sponsored prenatal care arguing that "the born child, who indisputably is a citizen entitled to equal protection of the laws, can challenge the constitutionality of the denial of prenatal care." *Id.* at 586. The Second Circuit disagreed:

> In our view, recognition of a newborn child's constitutional challenge to the prior denial of care *in utero* is foreclosed by *Roe v. Wade* just as clearly as would be a constitutional claim asserted on behalf of a fetus. If, as *Roe v. Wade* instructs, a fetus lacks constitutional protection to assure it an opportunity to be born, we see no basis for according it constitutional protection to assure it enhanced prospects of good health after birth.

Id. See *infra* Part IV.E.3, for a discussion of the reasons why the availability of § 1983 damages should not turn on a judicial assessment of when the injury to the unborn child occurs.

77. 600 F. Supp. 2d 845, 854 (E.D. Mich. 2009).

78. *Id.* at 854.

79. *Id.* at 849.

80. *Id.* at 850.

81. *Id.* at 855.

under the Fourteenth Amendment. This analysis raises sophisticated medical (and perhaps philosophical) questions. At exactly what moment did Chelsie's injury occur? At exactly what moment is a child born? Perhaps more to the point, at exactly what moment is a constitutional person born?[82]

C. Alternate Routes Around *Roe*

Based on the foregoing, it appears that several judges have circumvented *Roe* by way of temporal manipulation, such that injuries to fetuses are characterized as having occurred after birth. However, *Roe* might not actually pose a categorical bar to 1983 claims brought by those injured while in the womb. When Judge Clarie's *Douglas* decision broke with *Harman* and every other case that had addressed the right of a fetus to bring a 1983 claim post-*Roe*, four law student notes questioned Judge Clarie's inscrutable reasoning but attempted to offer doctrinal support for his holding.[83] These student notes offered a number of possible rationales to explain how fetuses might be considered "persons" for purposes of § 1983. However, because most of these ideas come across as maneuvers of legal desperation—and the authors all seem aware of this—I will outline them only briefly.

To reconcile *Roe* and *Douglas*, one student suggested that perhaps "the word 'person' as used in section 1983 has a different meaning than it does as used in the fourteenth amendment."[84] It is true that a fetus could be recognized as a statutory person despite not being a constitutional person.[85] However, neither the text nor the legislative history of § 1983 evinces an intent to recognize unborn children as "persons."[86] Moreover, because § 1983 is a derivative statute enacted not to create but to enforce substantive federal rights,[87] it would seem impossible for a fetus with no cognizable Fourteenth Amendment right to have an enforceable 1983 claim for a Fourteenth Amendment violation.

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82. See *infra* Part IV.E.3 for a more detailed discussion of the temporal dimensions of birth and the challenge of determining when a child is born.

83. Paul T. Czepiga, Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 SYRACUSE L. REV. 1029, 1058–64 (1983); Nancy Jo Linck, Note, *The "Aborted" Evolution of Fetal Rights After* Roe v. Wade—Douglas v. Town of Hartford, *542 F. Supp. 1267 (D. Conn. 1982)*, 6 W. NEW ENG. L. REV. 535, 547–52 (1983); Julie Elizabeth Rice, Note, *Fetal Rights: Defining "Person" Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347; Case Note, Douglas v. Town of Hartford: *The Fetus as Plaintiff Under Section 1983*, 35 ALA. L. REV. 397 (1984) [hereinafter *Fetus as Plaintiff*].

84. *Fetus as Plaintiff*, *supra* note 83, at 399.

85. *See supra* note 39; *infra* Part IV.A.

86. Czepiga, *supra* note 83, at 1047–52.

87. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything."); *supra* note 15.

Perhaps then, as another student reasoned, "a fetus has no fourteenth amendment rights but may have rights under other constitutional provisions."[88] Not only would this be incongruous, but it would also require a good deal of creativity to conceptualize other constitutional rights that a fetus might claim.[89] "A fetus, for example, could not be deprived of its free speech or freedom of religion under the first amendment, nor be denied a speedy and impartial trial under the sixth amendment."[90] And even if there were other constitutional protections that a fetus might claim, on the facts of *Douglas*, it is hard to imagine what constitutional provision, other than the Fourteenth Amendment, could have given rise to the unborn child's claim.[91] Similarly, although § 1983 also offers a remedy for deprivations of federal *statutory* rights,[92] Congress has yet to enact a statute that would grant rights to an unborn child injured by a state actor.

From a somewhat different perspective, a third student argued that fetuses might be able to recover under § 1983 if we read *Roe* very narrowly or treat its bar on fetal personhood as dicta.[93] This student proposed that because *Roe* involved a Texas statute and *Douglas* arose in Connecticut, perhaps *Roe* could be read exceedingly narrowly to only bar constitutional claims of the unborn in Texas.[94] In addition to straining credulity, this argument is defeated by the fact that the Court did not limit its holding in *Roe* to the Texas statute at issue.[95]

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88. Rice, *supra* note 83, at 356.

89. In the context of *Havard*, one might imagine Chelsie Barker claiming an Eighth Amendment right to be free from cruel and unusual punishment. However, the Supreme Court has repeatedly held that the Eighth Amendment only protects convicted criminals. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment does not apply to corporal punishment in schools). Because Chelsie, unlike her mother, was not a convicted criminal, she would not be able to raise a successful Eighth Amendment claim for the injuries she suffered as a fetus. *See also* Defendant's Motion for Judgment on the Pleadings at 3, Havard v. Puntuer, 600 F. Supp. 2d 845 (E.D. Mich. 2009) (No. 06-10449) ("The Eighth Amendment applies to incarcerated persons, after there is a formal finding of guilt . . . . Ergo, the instant citation to the Eighth Amendment is misplaced. . . ." (citations omitted)).

90. Rice, *supra* note 83, at 356.

91. Judge Clarie's opinion in *Douglas* is especially impenetrable when it comes to defining the right at stake or the constitutional provision at issue. *See* Douglas v. Town of Hartford, 542 F. Supp. 1267, 1268 (D. Conn. 1982) (making no reference to any constitutional amendment when describing the case as "a civil rights action commenced pursuant to 42 U.S.C. §§ 1981, 1983").

92. Rice, *supra* note 83, at 360 ("Section 1983 provides redress for deprivation of any 'rights, privileges, or immunities secured by the Constitution *and laws*.'" (citing Maine v. Thiboutot, 448 U.S. 1 (1980))).

93. Linck, *supra* note 83, at 551–52.

94. *Id.*

95. Roe v. Wade, 410 U.S. 113, 164 (1973) ("A state criminal abortion statute of the current Texas type . . . is violative of the Due Process Clause of the Fourteenth Amendment.").

The claim that *Roe*'s bar on fetal personhood should be treated as dicta can also be summarily dismissed. As Justice Burger explained, a Court decision "favorable to abortion" would be improper "if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."[96] Thus, the conclusion that the fetus is not a constitutional person under the Fourteenth Amendment is necessary to the judicial sanctioning of abortion as exemplified by *Roe*. But even if the student is correct that "the premise that 'person . . . does not include the unborn' was unnecessary for the Court's decision in *Roe*,"[97] most judges and commentators agree that even the Supreme Court's dicta is given deference by lower courts.[98] In sum, efforts to reconcile Judge Clarie's holding in *Douglas* with the Supreme Court's language in *Roe* have not been convincing. Following *Roe*'s explicit refusal to recognize fetuses as Fourteenth Amendment persons, the arguments that unborn children are entitled to § 1983 recovery are far fetched at best.

III. OBSTACLES TO § 1983 RECOVERY BY FETUSES ARE NOT JUSTIFIED

As the law stands, it appears relatively undeniable that unborn children injured by the state cannot recover for their injuries under § 1983. But the fact that this *is* the state of the law does not necessarily mean that this *should* be the state of the law. In this section, I will argue that *Roe*'s bar on 1983 claims of fetuses is not supported by the facts or logic of *Roe*. I will then argue that denying recovery for the injuries and deaths of unborn children actually frustrates the underlying goals of *Roe*.

A. The Goals of *Roe*

In the debate over abortion, pro-choice advocates claim that the mother's rights must prevail over those of the fetus, while pro-life activists argue that the rights of the fetus are at least equal to, if not predominate over, those of the mother.[99] But of course, in the vast majority of pregnancies, the interests of

96. *Id.* at 159.

97. Linck, *supra* note 83, at 551 (quoting *Roe*, 410 U.S. at 158).

98. *See, e.g.*, United States v. Baird, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference . . . ."); Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 104–06 (2008).

99. *Compare* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986) ("Any legal recognition of the fetus should be scrutinized to ensure that it does not infringe on women's constitutionally protected interests in liberty and equality during pregnancy."), *with* Warren Murray, *The Nature and*

the mother and the fetus are aligned, not in conflict. Therefore, outcomes in abortion cases should not be determinative of outcomes in cases where the fetus has been injured by the state contrary to the wishes of the mother.

As I noted in Part I, the distinction between wanted and unwanted fetuses is important. It was, evidently, important to the *Roe* Court. In identifying abortion as a privacy right, Justice Burger articulated "factors"[100] or "elements"[101] supporting that right:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.[102]

Properly understood from this list of factors, the *Roe* decision was intended to allow a mother to choose whether she wants to incur the possible burdens attendant to pregnancy and child rearing. The Court recognized the adverse consequences of requiring women to carry unwanted children to term. Notably, Justice Burger's list emphasizes psychological harms.[103] Of course, the potential psychological harms suffered by mothers required to raise children against their wishes are not properly factored into the analysis where mothers are looking forward to the birth of their children. In fact, the psychological harms a mother may experience in the § 1983 context are not those associated with raising an unwanted child but rather those associated with raising an injured child despite the desire to have a healthy baby. Therefore, whereas a mother's potential psychological harms cut in favor of permitting fetal abortion, a mother's potential psychological harms cut against denying fetal 1983 actions. Thus, the *Roe* Court's justifications for abortion rights do not justify the denial of fetal claims under § 1983. The mother's right to abort the fetus does not give the state a right to injure it.

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the Rights of the Foetus, 35 AM. J. JURIS. 149, 166 (1990) ("[I]f there is a question of one being subordinate to the other, it is the mother who is biologically subordinated to the foetus, as is evident during pregnancy in the processes which protect the foetus, even to the detriment of the mother.").

100. *Roe*, 410 U.S. at 153.

101. *Id.*

102. *Id.*

103. Even those harms that at first appear economic are framed in terms of the mother's well-being: "Mental and physical health may be taxed by child care." *Id.*

B. Frustrating the Goals of *Roe*

Not only does *Roe*'s logic fail to support denying recovery for unborn children injured by the state, but *Roe*'s holding actually appears to bolster the case for fetal 1983 claims. *Roe*, after all, placed a premium on the health of the fetus.[104] According to the Court, the state has interests in protecting the health of the mother and the fetus.[105] Under *Roe*'s framework, as a pregnancy progresses, the state's interests grow and eventually become compelling, at which point they outweigh the mother's privacy right such that restrictions on abortion become permissible.[106] Thus, the state's interests in the health of the fetus and the mother are taken seriously.

Revealingly, the health of the fetus and the mother are the exact same interests plaintiffs emphasize when they raise 1983 claims on behalf of children injured while in utero. Surely, the health of the fetus and the mother are at stake when pregnant women are denied prenatal care.[107] Surely, the health of the fetus and the mother are at stake when they are killed in a car crash.[108] And surely the health of the fetus and the mother are at stake when they are injured by abusive police officers and callous prison guards.[109] Yet somehow the state has a compelling interest in protecting the mother and fetus in the abortion context but seems to have no interest in protecting the mother and fetus when agents of the state act to compromise the fetus' health. Put differently, the government has an interest in protecting the life of the fetus, but government actors who threaten or harm the fetus' life, thereby compromising the government's interest, are not held liable for damages. If we take seriously the state's claimed interest in fetal health, *Roe* appears to support the notion that unborn children should be able to recover damages under § 1983. At the very least, where the mother wants to carry the fetus to term, *Roe* should not stand as a barrier to the recovery of damages when the fetus is injured by a state actor.

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104. *Id.* at 155 (reasoning that the "protection of health, medical standards, and prenatal life" become dominant at some point during the pregnancy).

105. *Id.* at 164–65. The state's interest in protecting fetal life was reaffirmed and arguably strengthened by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where the Court stated: "[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Id.* at 871 (quoting *Roe*, 410 U.S. at 163) (internal citation omitted).

106. *Roe*, 410 U.S. at 154, 164–65.

107. *See supra* Part I.A.

108. *See supra* Part I.B.

109. *See supra* Part I.C.

IV. POLICY ARGUMENTS SUPPORT PERMITTING FETUSES TO RECOVER UNDER § 1983

Given that neither the facts nor the reasoning of *Roe* counsels against recovery for fetal injuries caused by state actors, it appears that the language of *Roe* forecloses 1983 claims of unborn children without reason. This leaves the question as to whether there *is* a reason to foreclose such claims. In this section, I will argue that, from a policy standpoint, the law should permit fetuses to recover for injuries occasioned by the state. As I detail herein, the bar on fetal 1983 claims is inconsistent with both state and federal law. Furthermore, denying compensatory damages to those injured in utero punishes some of the least-culpable, most-vulnerable members of society and fails to carry out the purpose of § 1983, a statute designed to protect the otherwise unprotected.[110] Finally, prohibiting fetal 1983 claims appears unsound from an economic perspective and unjust from a temporal perspective. Although I consider important counterarguments to the propositions I set forth, I conclude that the benefits of recognizing fetal 1983 claims outweigh the harms.

A. Inconsistency with State Law

While Judge Clarie offered little legal justification for his opinion in *Douglas*, he did offer one rationale for his decision to break with other federal courts: "[T]he Court finds that recent and well-established trends in the state courts . . . have expanded the legal rights of the viable fetus in a wide variety of contexts."[111] This is true. Through the twentieth century, state courts, as well as state legislatures, demonstrated an increasing willingness to protect the rights of the fetus. As a result, the bar on fetal 1983 claims appears increasingly inconsistent with state law.

The history of fetal rights has been recounted by others,[112] so I will only outline it briefly here. Scholars trace fetal rights to the earliest period of American history.[113] The common law recognized a fetal right to inheritance

110. *See* Mitchum v. Forster, 407 U.S. 225, 238–42 (1972).

111. Douglas v. Town of Hartford, 542 F. Supp. 1267, 1270 (D. Conn. 1982).

112. *See, e.g.*, Deirdre Moira Condit, *Fetal Personhood: Political Identity Under Construction*, *in* EXPECTING TROUBLE: SURROGACY, FETAL ABUSE, AND NEW REPRODUCTIVE TECHNOLOGIES 25, 33–38 (Patricia Boling ed., 1995); Johnsen, *supra* note 99, at 600–13; Beth Driscoll Osowski, Note, *The Need for Logic and Consistency in Fetal Rights*, 68 N.D. L. REV. 171, 172–206 (1992).

113. *See* A.B. Frey, *Injuries to Infants En Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85 (1927). Professor Condit traces fetal rights back to biblical times, noting that "the Book of Exodus prescribes the appropriate punishment for injuring a pregnant woman or causing a miscarriage." Condit, *supra* note 112, at 34.

such that a child who was conceived but not yet born at the time of a testator's death could inherit if subsequently born alive.[114] Tort law was initially more resistant. Numerous courts followed the seminal case of *Dietrich v. Northampton* where then-Judge Oliver Wendell Holmes held that a fetus could not recover tort damages for prenatal injuries.[115] Similarly, the criminal common law refused to recognize fetal homicide as a crime.[116]

However, midway through the twentieth century, state after state opened the door to tort claims based on injuries suffered in utero,[117] and state after state criminalized fetal homicide.[118] By the end of the twentieth century, "all courts allow[ed] causes of action by a child who was prenatally injured past viability and later born alive."[119] The criminal law has moved in a similar direction, and "as of 2009, thirty-six states punish killing a fetus as a form of homicide."[120] In sum, most states now punish the killing of an unborn child,

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114. Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) ("A child in ventre sa mere was regarded at the common law as in esse from the time of conception for the purpose of taking any estate, whether by descent or devise, or under the statute of distribution, if the infant was born alive after such a period of foetal existence that its continuance in life was or might be reasonably expected."); Gorman v. Budlong, 49 A. 704 (R.I. 1901) ("[T]he civil law . . . regards an unborn child as born for some (not for all) purposes connected with the acquisition and preservation of real or personal property.").

115. Dietrich v. Northampton, 138 Mass. 14, 15 (1884). In *Dietrich*, a woman who was between four and five months pregnant "slipped upon a defect in a highway," causing her baby to be born prematurely. *Id.* at 14. Although the baby "did live for ten or fifteen minutes," Judge Holmes held that even though the mother could recover for her injuries, the baby had no cause of action against the town responsible for maintaining the road. *Id.* at 15.

116. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("Since at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide . . . . The rule has been accepted as the established common law in every American jurisdiction that has considered the question." (citations omitted)).

117. *See, e.g.*, Keyes v. Construction Serv., Inc., 165 N.E.2d 912, 915 (Mass. 1960) (effectively overturning *Dietrich*).

118. *See, e.g.*, Act of Sept. 17, 1970, ch. 1311, 1970 Cal. Stat. 2440 ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."). The California murder statute was amended immediately after the California Supreme Court refused to recognize "feticide" as a crime in a much-publicized case where the defendant, finding that his ex-wife was pregnant with another man's child, looked at her stomach and said, "I'm going to stomp it out of you." Keeler v. Super. Ct., 470 P.2d 617, 618 (Cal. 1970). The defendant then "pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows." When the woman was taken to the hospital, "[a] Caesarian section was performed and the fetus was examined *in utero*. Its head was found to be severely fractured, and it was delivered stillborn." *Id.*

119. Osowski, *supra* note 112, at 174. States are split over whether to permit tort claims prior to viability. *Id.* Although important, this question, as well as the related question of whether § 1983 claims should only be recognized for viable fetuses, is beyond the scope of this paper.

120. Douglas S. Curran, Note, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1109 (2009). For a listing of those state statutes, see National Conference of State Legislatures, Fetal Homicide State Laws (Sept. 2009), http://www.ncsl.org/programs/health/fethom.htm. Another recent count claims that as many as "forty states . . . currently have established criminal penalties for fetal homicide." Marka B. Fleming, *Feticide*

and all states sanction certain tort claims against third parties who injure fetuses. In light of this consensus, recognizing 1983 claims brought by fetuses would better align federal and state law.

B. Inconsistency Within Federal Law

Along with the interlegal inconsistency between state and federal law in the fetal rights domain, Congress also created intralegal inconsistency within federal law when it passed the Unborn Victims of Violence Act (UVVA)[121] in 2004. The UVVA, a criminal statute that was met with much resistance in Congress,[122] provides that a criminal who injures or kills a "child in utero"[123] while committing one of sixty-eight specified federal crimes of violence may be charged with a separate offense for harming the fetus. The prescribed punishment is the equivalent of the punishment the criminal would receive had the injury or death been inflicted upon the mother.[124] Importantly, the UVVA treats the fetus as an independent entity; injury to the unborn child is punished separately from injury to the mother.[125]

While passage of the UVVA moved federal criminal law more in line with state criminal law, which has largely come to recognize the crime of feticide,[126] it also served to further isolate § 1983. Section 1983's bar on fetal rights is now inconsistent not only with most state civil and criminal laws but also with federal criminal law. While many individuals may now be prosecuted for injuring unborn children, state officials continue to avoid liability.[127] The time has come to resolve this inconsistency by permitting fetal 1983 claims.

Laws: Contemporary Legal Applications and Constitutional Inquiries, 29 PACE L. REV. 43, 51 (2008). Fleming's forty-state tally may be more accurate, as she has cited statutes that other authors appear to have overlooked. *See id.* at 51 n.44.

121. 18 U.S.C. § 1841 (2006).

122. *See* Carl Hulse, *Senate Outlaws Injury to Fetus During a Crime*, N.Y. TIMES, Mar. 26, 2004, at A1.

123. 18 U.S.C. § 1841(d). "Child in utero" is defined to mean "a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.* This goes beyond a number of state statutes that criminalize feticide beginning at viability, not conception. *See* Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1229–30 (2007) (noting that 24 of the 36 states criminalizing feticide "recognize victim capacity upon conception").

124. 18 U.S.C. § 1841(a)(2)(A).

125. Milligan, *supra* note 123, at 1183–84.

126. *Supra* note 120.

127. Although § 1983 claims can be brought against state actors not only for deprivations of constitutional rights but also for violations of federal law, the UVVA is unlikely to provide fetuses with a § 1983 cause of action because a violation of the UVVA only occurs during the commission of specified federal crimes of violence. Such crimes include "terrorist attacks, threats against a witness in a federal proceeding, violence at an international airport, drug-related killings, attacks involving

C. Possible Adverse Consequences

Pro-choice advocates are often the strongest opponents of fetal rights. They correctly point out that the leaders of the "fetal rights movement" tend to be conservative, pro-life activists.[128] Thus, some proponents of abortion rights argue that efforts to extend rights to fetuses are a thinly veiled component of the strategy to overturn *Roe*.[129] In vigorously opposing the UVVA, Senator Dianne Feinstein stated that "the language in the bill will clearly place into federal law a definition of life that will chip away at the right to choose as outlined in *Roe v. Wade*."[130] Following this line of reasoning, my proposal to extend 1983 claims to fetuses is susceptible to the criticism that permitting such claims would further erode *Roe*'s foundation.

The strength of this criticism would largely depend on the mechanism used to extend 1983 protection to fetuses.[131] If the Constitution were amended to make the fetus a "person" under the Fourteenth Amendment,[132] the underpinnings of *Roe* might indeed be called into question.[133] On the other hand,

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interstate stalkings, and domestic violence on military bases." Megan Fitzpatrick, Note, *Fetal Personhood After the Unborn Victims of Violence Act*, 58 RUTGERS L. REV. 553, 554 (2006).

128. For example, one of the leading sponsors of the UVVA was former Republican Senator Rick Santorum. *See* Unborn Victims of Violence Act, S. 1019, 108th Cong. (2003), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.1019.

129. In 1999, when the UVVA first passed in the House of Representatives, NARAL Pro-Choice America claimed, "this legislation is not meant to provide greater protections for pregnant women, nor to fight crimes against them, but rather to forge new legal ground that would eventually undermine *Roe v. Wade*." Michael Holzapfel, Comment, *The Right to Live, The Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 439 (2002); *see also* Rebecca Farmer, *"Fetal Rights" Initiatives Concern Abortion Rights Supporters*, NAT'L ORG. FOR WOMEN (2001), http://www.now.org/nnt/fall-2001/fetalrights.html; Linda C. Fentiman, *The New "Fetal Protection:" The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 540 (2006) ("[M]any 'fetal protection' initiatives seek to redefine the fetus as a person, with rights fully equal to those of a born human being, in a thinly disguised effort to limit abortion access."); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 41 (1987) ("[T]here simply is no stopping point—no 'bright line'—to the fetal rightists' demands.").

130. 150 CONG. REC. S3126 (daily ed. Mar. 25, 2004) (statement of Sen. Feinstein).

131. My primary purpose in this paper is not to examine how the law could be changed but to argue that change is appropriate. For a broader discussion of possible legislative and judicial actions that could be taken to recognize claims of fetuses under § 1983, see Rice, *supra* note 83, at 355–61.

132. Precisely such an amendment was introduced in Congress by Maryland Representative Lawrence Hogan eight days after the *Roe* decision was rendered. HULL & HOFFER, *supra* note 20, at 186.

133. *See Fetus as Plaintiff*, *supra* note 83, at 405 ("[I]f the fetus is viewed as an autonomous living 'person,' no credible argument could be made that the woman's privacy interest would outweigh the full panoply of the fetus' fourteenth amendment rights involving life, liberty, and property."). *But see* FAUX, *supra* note 18, at 325 ("Antiabortionists seem oblivious to the fact that conferring personhood on fetuses would not resolve the issue. Society would still be required to balance the fetus's rights against those of the woman . . . .").

if § 1983 itself were revised to extend its protections to the unborn or if another federal statute were enacted, Congress could specify that fetuses would be able to recover damages for in utero injuries caused by state actors, whether or not unborn children are constitutional "persons."[134]

Any statute granting legal recognition to fetuses under § 1983 could make clear that it is confined to the § 1983 context in which unborn children are bringing claims against the state. To assuage fears that it was intended to undermine *Roe*, the UVVA contains a subsection explicitly stating that the statute is not to be "construed to permit the prosecution of any person for conduct relating to an abortion . . . or of any woman with respect to her unborn child."[135] Similar qualifying language could be used to protect abortion rights when extending 1983 rights to fetuses.

Fears of *Roe*'s erosion due to the UVVA have proved to be largely unfounded. In fact, five years since its passage, the UVVA appears to have had zero impact on any law or case. Including all federal, state, published, and unpublished cases, the UVVA has been mentioned in only seven cases and not a single one of those cases even included a charge, let alone a conviction, under the UVVA.[136] No court has referenced the UVVA in the abortion rights context. Moreover, to assume that any advance in fetal rights presents a challenge to abortion rights is to ignore history. Fetal rights do not unstoppably march along at the expense of a woman's right to choose. To the contrary, *Roe* was decided long after many other fetal rights had been recognized.[137] Although the progress of fetal rights has continued since *Roe*,[138] a woman's basic right to choose remains intact.[139]

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134. The fact that fetuses are not constitutional persons does not foreclose the possibility of a fetal cause of action against state actors. As Professor John Hart Ely famously pointed out, "[d]ogs are not 'persons in the whole sense' nor have they constitutional rights, but that does not mean the state cannot prohibit killing them . . . ." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973).

135. 18 U.S.C. § 1841(c)(1), (3) (2006). Likewise, according to Professor Carolyn Ramsey, 70 percent of fetal homicide statutes "explicitly contain an abortion exception." Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734 (2006).

136. To reach this conclusion, I first ran a Westlaw search of all federal and state cases for "Unborn Victims of Violence Act." Although eight results were found, *Kilmon v. State* mentions only a failed Maryland statute of the same name. *See* 905 A.2d 306, 313 (Md. 2006). I then searched all federal and state cases for "18 U.S.C. s 1841" and found no other relevant case law. Finally, I searched LexisNexis for any criminal jury verdicts mentioning "18 U.S.C. s 1841." No results were located.

137. *See supra* Part IV.A.

138. *Id.*

139. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (upholding *Roe*'s "central principle"). Concededly, in recent years, both legislation and case law have chipped away at abortion rights. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban Act of 2003). But the fact that fetal rights have been extended while abortion rights have been limited does not indicate a causal relationship, and the fact that pro-life politicians, activists,

All that said, the notion that a fetus could be a legal person for one purpose but not for another may be condemned as a legal fiction not grounded in principle. If we are willing to recognize a fetus' rights against the state, is there any reason those rights disappear in the abortion context? This counterargument, while raising concerns that are central to my proposal, fails for two reasons: first, the law consistently and unapologetically permits such legal fictions; second, there are indeed principled reasons to draw the distinction that I propose.

That recognizing fetal personhood in one context while denying it another may be termed a legal fiction is not adequate grounds to refuse the distinction. The common law sanctions just such a legal fiction by treating unborn children as persons for the limited purpose of inheritance. As the New York Court of Appeals explained in the early twentieth century, "[b]y a legal fiction or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after his birth, but not for purposes working to his detriment."[140] Similarly, modern law has embraced the "corporation as 'person'" construct for limited legal purposes, including the right to sue under § 1983.[141] However, this notion of corporate personhood does not appear to have facilitated claims that a corporation should have a right to vote or to bear arms.

More properly understood, then, the question of whether to recognize fetal personhood for 1983 claims while denying fetal personhood in the abortion context is a question not of whether the distinction is permissible but whether the distinction is appropriate. Such a distinction is appropriate because it better realizes the goals of *Roe* by appreciating the mother's rights in the abortion context while holding the state accountable for violating its own interest in protecting the health of the fetus.[142] Indeed, while it is possible to debate the

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and judges may often support fetal-rights initiatives does not mean that fetal rights are inherently incompatible with abortion rights.

140. Drobner v. Peters, 133 N.E. 567, 567 (N.Y. 1921) (internal citations omitted); *see also* Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 948 (Tex. Comm'n App. 1935) ("In civil rights life begins with birth. . . . In the law of inheritance life begins with conception." (quoting 37 C.J. 347 *Liens* § 78 (1925)).

141. *See, e.g.*, Primera Iglesia Bautista Hispana v. Broward County, 450 F.3d 1295, 1305 (11th Cir. 2006) ("We have clearly and repeatedly held that corporations are 'persons' within the meaning of section 1983."); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700–01 (1978) (reasoning that municipalities can be sued as "persons" under § 1983).

142. *See supra* Part IV.A–IV.B.

importance of the mother's interest in the abortion context, few even claim that the state has any interest in denying § 1983 relief to unborn children.[143]

The public appears to strongly support the notion that fetal personhood should be recognized only for limited purposes. A significant majority of Americans believe that fetal rights as against third parties can coexist with a woman's right to an abortion. Just before the enactment of the UVVA, surveys reported that "more than 90 percent of Americans say they would support a federal law that increases punishment for perpetrators who harm an unborn child, while more than two thirds oppose laws that restrict first-trimester abortions."[144] Neither pro-choice advocates nor legislators should see this position as untenable. In fact, Professor Jeffrey Rosen has described "the notion that states must protect fetal life in all circumstances or not at all" as "overly crude and legalistic."[145] Perhaps the legal fiction is the position that granting § 1983 protections to fetuses must inexorably lead to the denial of abortion rights.

D. Is it Necessary to Compensate the Fetus?

Even if, as a theoretical matter, Congress and the public are willing to distinguish between fetal rights as against the state and fetal rights as against the pregnant mother, one might nonetheless argue that the distinction is unnecessary from a practical standpoint. Why not just permit the mother to recover for injuries to the fetus? Allowing the mother to claim damages would compensate the family for harm to the wanted fetus while avoiding the troubling issues associated with the recognition of fetal rights.

Although it has surface appeal, this proposal is problematic. Under § 1983, for the mother to claim physical damages based on an injury to her fetus, the law would have to treat the fetus as an extension of the mother.[146] Historically, the law did in fact take this position,[147] which Kayhan Parsi has termed the

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143. As I argue in Part IV.E, *infra*, to the extent that the state may have a financial interest in categorically barring fetuses from recovering damages under § 1983, such an interest would seem to be limited.

144. Jeffrey Rosen, *A Viable Solution*, LEGAL AFF., Sept.–Oct. 2003, at 20, 20.

145. *Id.* at 22.

146. So long as an unborn child lacks standing to bring a § 1983 claim, the mother cannot bring such a claim on her unborn child's behalf. Therefore, she would have to bring the § 1983 claim on her own behalf, characterizing the injury to her fetus as an injury to herself.

147. *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, 418 (Ill. 1953); Dietrich v. Northampton, 138 Mass. 14, 17 (Mass. 1884) (describing the unborn child as "a part of the mother"),

"appendage metaphor."[148] As Parsi points out, early-twentieth-century judges invoked the appendage metaphor in order to reject the claims of live infants suing for prenatal damages.[149] Even where a child was born "greatly and sadly crippled for life,"[150] the child could not recover damages for injuries suffered prior to his entry into the world of legal personhood.[151] The fact that the unborn child was considered part of the mother meant that the born child lacked standing to sue for injuries suffered in the womb.

Nonetheless, where the appendage metaphor was embraced, the question remained whether the mother could claim her own damages based on the injuries to her child. This question became particularly troubling where the prenatally injured child was born alive. In *Prescott v. Robinson*,[152] the New Hampshire Supreme Court was somewhat confounded when the mother of "a misshapen and sickly child" attempted to characterize her son's injuries as her own.[153] Although the court reasoned that "[i]f a foetus is deemed to constitute a part of the mother's person, an injury to it is plainly an injury to her,"[154] the court rejected the plaintiff's attempt to claim her own damages when her son was born with physical disabilities.

> Upon the birth of the child the physical consequences of the injury to it become effective. From the time of the injury to the time of the birth the mother suffers no physical damage merely because the child's limbs are distorted, or because its health is impaired. It, therefore, follows that the child alone suffers damage on that account . . . . If the child cannot recover therefor, it does not follow that [the mother] can.[155]

Although the reasoning in *Prescott* may come across as somewhat convoluted, no other court applying the appendage metaphor appears to have considered the personal, physical claim of a mother whose child was born injured.[156] However, unless a court were willing to treat an infant's impairment stemming

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abrogated by Keyes v. Constr. Serv., Inc., 165 N.E.2d 912, 915 (Mass. 1960), *and* Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967).

148. Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 719 (1999).

149. *Id.* at 719–27.

150. *Allaire*, 56 N.E. at 639.

151. *Id.* at 640.

152. 69 A. 522 (N.H. 1908).

153. *Id.* at 524.

154. *Id.* at 523.

155. *Id.* at 524.

156. In dicta, a New York court suggested it would reach the same result as in *Prescott*. *See* Nugent v. Brooklyn Heights R. Co., 139 N.Y.S. 367, 368 (N.Y.A.D. 1913) ("[T]here is no remedy unless in an action by the mother for damages to her by reason of injuries to her son, and that would be inadequate.").

from prenatal harm as a physical injury to the infant's mother, a return to the appendage metaphor would not further the goal of extending § 1983 damages to unborn children.[157]

Rejecting the appendage metaphor, a court might still allow compensation for the emotional and psychological harms suffered by the mother of a child prenatally injured by a state actor.[158] However, such compensation would be inadequate. In seeking redress for her emotional suffering due to her unborn child's physical injuries, a plaintiff mother will likely face a more challenging burden of proof and will almost certainly recover less than a child would be able to recover if permitted to bring a claim for its own prenatal injuries.[159]

The Supreme Court has held that in § 1983 actions, compensatory damages for emotional distress must "be supported by competent evidence concerning the injury."[160] Federal circuits, perhaps skeptical of emotional distress claims, have drawn on this language to impose more stringent evidentiary standards for claims based on mental anguish. The Fifth Circuit has held that a § 1983 plaintiff alleging psychological injuries must show "a specific discernable injury to the claimant's emotional state, proven with evidence regarding the nature and extent of the harm."[161] Costly expert testimony may be necessary given that a plaintiff's testimony alone will not suffice unless it is "particularized and extensive, such that it speaks to the nature, extent, and duration of the claimed emotional harm in a manner that portrays a specific and discernible injury."[162]

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157. A return to the appendage metaphor would also conflict with fetal homicide and wrongful death laws that recognize the unborn child as an independent entity. *See supra* Parts IV.A–IV.B.

158. It would be inconsistent with prevailing tort concepts to permit a woman to recover physical injury damages for physical injuries she did not suffer. *See* RESTATEMENT (SECOND) OF TORTS § 430 (1965). Although courts have held that a pregnant woman is a "direct victim" when her physician injures her fetus, this direct-victim theory stems from the preexisting patient-physician relationship. Burgess v. Superior Court, 831 P.2d 1197, 1201–03 (Cal. 1992). Generally, there is no such preexisting relationship between a pregnant woman and the state actor who injures her fetus.

159. On these facts, it is not entirely clear that a mother could even make out a § 1983 cause of action. Does a woman have a constitutional right to an uninjured fetus? Even if there is such a right, state actors would likely have a strong qualified immunity defense on the grounds that such a right has not been clearly established.

160. Carey v. Piphus, 435 U.S. 247, 264 n.20 (1978).

161. Brady v. Fort Bend County, 145 F.3d 691, 718 (5th Cir. 1998) (internal citations omitted); *see also* Price v. City of Charlotte, 93 F.3d 1241, 1250 (4th Cir. 1996) ("*Carey*, therefore, requires evidence of emotional distress sufficient to convince the trier of fact that such distress did in fact occur and that its cause was the constitutional deprivation itself and cannot be attributable to other causes. A verdict supported by competent evidence, therefore, is a prerequisite to recover compensatory damages for a constitutional violation.").

162. *Brady*, 145 F.3d at 720; *see also Price*, 93 F.3d at 1254 ("[W]e express the same trepidation as our sister circuits regarding conclusory testimony with respect to the sufficiency of the evidence supporting an award of compensatory damages based on emotional distress for a constitutional violation.").

While a mother whose fetus suffers injury might have a strong emotional distress claim, she will have to incur the costs of proving that claim.

Even if she is able to succeed in proving her emotional distress, a mother would be unlikely to recover damages comparable to those an infant would recover if permitted to bring a 1983 claim based on its own prenatal injuries. A baby born with injuries stemming from prenatal mistreatment would be able to claim postnatal medical expenses. The baby might also be able to claim lost wages in addition to possible pain and suffering damages of its own. Meanwhile, an infant bringing suit on its own behalf would not preclude the infant's mother from also seeking damages for her emotional distress. In sum, unless courts recognize fetal 1983 claims, a newborn child injured by the state postnatally will be able to recover significantly more than the amount potentially recoverable by the family of a fetus injured by the state prenatally. This inequity is problematic for the same reasons it is problematic to allow 1983 claims brought by infants injured immediately after birth while barring 1983 claims brought by infants injured immediately before birth.[163]

E. Additional Policy Considerations

Other intuitive factors also militate toward extending the 1983 cause of action to unborn children. Three such factors that I sketch out briefly are: (1) the vulnerability and nonculpability of the fetus, (2) the state support and government services necessary to care for children born with disabilities, and (3) the temporal difficulty of determining when a child is "born."[164]

1. Fetal Vulnerability and Non-Culpability

Fetuses, it would seem, are the least culpable and most vulnerable victims of abusive state actions. While judges might plausibly—albeit generally unconvincingly—believe that those who are mistreated by state actors are in some way responsible for the mistreatment, such a claim could not be made of fetuses. Recall the *Havard* case in which Chantrienes Barker, a pregnant prisoner, was denied proper medical care after going into labor.[165] In its motion

163. *Cf.* Werling v. Sandy, 476 N.E.2d 1053, 1055 (Ohio 1985) ("It is logically indefensible as well as unjust to deny an action where the child is stillborn, and yet permit the action where the child survives birth but only for a short period of time.").

164. Other scholars and policymakers may wish to further explore these factors and other possible policy considerations at stake. My purpose is merely to highlight the fact that the bar on fetal 1983 claims is not only illogical from a theoretical standpoint but also appears inappropriate from a policy perspective.

165. *See supra* Introduction.

for judgment on the pleadings, the defendant, Wayne County, offered a brief but irrelevant history of Barker's criminal past.[166] Of course, the purpose of such details was to reduce the sympathy one might have felt after hearing Barker's tale of mistreatment. However, even those who believe that convicted criminals are less deserving of proper medical care cannot argue that Barker's daughter Chelsie was in any way culpable or in any way less deserving of the prenatal services required to be born healthy. If anything, the fact that a criminal convicted of murder is able to bring a claim under § 1983, while a fetus convicted of nothing is unable to bring such a claim, points to a systemic injustice.

In this light, it is also important to recall that § 1983 began as a Reconstruction-era statute, enacted to protect African Americans who were vulnerable victims of racist violence when Southern state governments refused to punish the perpetrators.[167] As Kansas Representative David Perley Lowe testified during congressional debate on the statute, "while murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."[168] Understood from this standpoint, § 1983 was enacted to protect those who were otherwise unprotected. As unborn children have no means by which to defend themselves or avoid government mistreatment, perhaps they have an even stronger claim for § 1983 redress.

2. State Support for Disabled Children

From an economic perspective, it is important to consider the consequences of denying § 1983 relief to fetuses. Children like Chelsie Barker who are born with serious disabilities will almost certainly require greater state services to support them. Thus, even in the absence of § 1983 liability, injuries to fetuses will likely be costly to state and municipal governments. If § 1983 liability were imposed on state actors who injure unborn children, theoretically, state agencies would make efforts to deter behavior likely to harm fetuses. Such efforts might be economically efficient insofar as a decrease in

166. Wayne County's Brief, *supra* note 10, at 1 n.1 ("In 1999, Ms. Barker was convicted of kidnapping, felony murder and drug charges. Currently, she is serving one life sentence for felony-murder, one life sentence for kidnapping, one 1–20 year sentenced [sic] for drug possession, and one 20–24 year sentence for drug possession.").

167. Section 1983's predecessor was known as the Ku Klux Klan Act and was enacted in 1871 to secure the Fourteenth Amendment rights of Blacks in the South. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961).

168. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (statement of Rep. Lowe).

fetal injuries would likely reduce later dependence on state services. Absent a more comprehensive analysis, it can at least be stated with some certainty that the bar on fetal 1983 claims does not necessarily result in significant financial savings to governments and, by extension, taxpayers. Therefore, while there are strong reasons to allow unborn children to bring 1983 claims, there may be no strong reasons not to allow unborn children to bring 1983 claims.

3. Temporal Dimensions of Birth

A final lesson that emerges from the *Havard* case is that allowing newborn, but not unborn, babies to recover damages under § 1983 raises difficult questions about when a child is born, when an injury occurs, and when a claim accrues. Chelsie Barker's case survived a motion to dismiss because the judge concluded that even though Chantrienes Barker was denied proper medical care "for almost 24 hours" prior to Chelsie's birth,[169] Chelsie's injuries were "sustained during the time period following her birth."[170] But when was Chelsie "born"? More to the point, is the distinction between unborn and newborn workable? From a medical standpoint, is it even possible to pinpoint the moment at which the injury occurred? From a legal standpoint, is it not possible for judges to stretch temporal dimensions to meet the outcomes of their choosing?[171]

It might reasonably be pointed out that courts are consistently charged with making difficult determinations regarding life and death. Abortion law turns on fetal viability,[172] as do many state feticide and wrongful death statutes.[173] Inheritance rights have been profoundly affected by very short periods of time.[174] Courts have rejected 1983 claims where the injured individual was already deceased at the time of the alleged wrongful act.[175] Therefore, it may seem proper to base eligibility for § 1983 damages on a

169. Havard v. Puntuer, 600 F. Supp. 2d 845, 859 (E.D. Mich. 2009).

170. *Id.* at 855.

171. Although *Havard* may seem to be a unique case, *Crumpton v. Gates* raises similar questions. *See* discussion *supra* Part II.B.

172. *See* Roe v. Wade, 410 U.S. 113, 163–66 (1973).

173. *See, e.g.*, IND. CODE ANN. § 35-42-1-1(4) (LexisNexis 2004) (criminalizing the knowing or intentional killing of "a fetus that has attained viability"); Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 307 (2004) ("Most jurisdictions consider viability to be a controlling factor in determining whether an action for the wrongful death of a fetus is sustainable.").

174. *See, e.g.*, Janus v. Tarasewicz, 482 N.E.2d 418, 418, 424 (Ill. App. Ct. 1985) (holding that husband's $100,000 life insurance proceeds were properly paid to wife's estate where wife was found to have survived husband by two days).

175. *See, e.g.*, Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979).

judicial determination of whether the § 1983 plaintiff was "born" at the time the injury was suffered.

One problem with this proposition is that while there are established medical standards to determine viability,[176] the medical profession does not appear to have defined when an individual is "born."[177] While biological evidence can be marshaled to support claims of vitality, it is difficult to imagine such evidence being used to establish the point at which a baby has been born. Where the *Havard* court attempts this task, discussing the fact that baby Chelsie was "crowning" when EMS arrived, the opinion comes across as unclear and inadequate.[178]

Even if one could medically determine whether an injury occurred before or after birth, the temporal deconstruction evident in a case like *Havard* should be avoided, not embraced by the law. Absent a compelling purpose, a system that premises economic recovery for identical injuries on the passage of mere minutes or even seconds would seem to be unjust. In other contexts, judges and legislators have criticized rules that allow legal rights to shift over brief periods of time. Although the central premise of *Roe* remains in force, the Court long ago rejected *Roe*'s rigid trimester framework as "unsound in principle and unworkable in practice."[179] In the inheritance context, to prevent rights from turning on insignificant periods of time, nearly all states have enacted simultaneous death statutes.[180] The law has sought to move away from, not towards, regimes where legal remedies and recoveries are granted or denied based on the momentary passage of time. It therefore appears improper to base

176. *See, e.g.*, STEDMAN'S MEDICAL DICTIONARY 1960 (Maureen Barlow Pugh et al. eds., 27th ed. Lippincott Williams & Wilkins 2000) (1911) (defining "viability" as the "[c]apability of living; the state of being viable; usually connotes a fetus that has reached 500 g in weight and 20 gestational weeks").

177. Major medical dictionaries and biological reference guides do not define words such as "born" or "birth." *See, e.g.*, BLACK'S MEDICAL DICTIONARY (Harvey Marcovitch ed., 41st ed. 2006); HENDERSON'S DICTIONARY OF BIOLOGICAL TERMS (Eleanor Lawrence ed., 10th ed. 1989).

178. Harvard v. Puntuer, 600 F. Supp. 2d 845, 855 (E.D. Mich. 2009) ("The complaint alleges that when the mother was brought to the jail's nurses [sic] station at approximately 1:30 a.m., the mother had already passed her mucous plug, her water had broken, and she had bloody show. When EMS arrived at approximately 1:57 a.m., the defendants realized the baby was crowning or had already crowned and, within minutes, the baby was delivered at the Wayne County Jail.").

179. Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (citation omitted); *accord* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 454 (1983) (O'Connor, J., dissenting) (describing *Roe*'s trimester framework as "unworkable").

180. 25A C.J.S. *Death* § 15 (2009). Such statutes, modeled on the Uniform Simultaneous Death Act, generally stipulate that if a person does not survive another by 120 hours, the first person is deemed to have predeceased the second for purposes of property distribution. 23 AM. JUR. 2D *Descent and Distribution* § 56 (2009).

a newborn infant's right to § 1983 damages on the question of whether she was "born" at the moment she suffered injury.

CONCLUSION

Roe v. Wade was a milestone for advocates of abortion rights and remains the most controversial Supreme Court case in American history.[181] It also remains an insurmountable obstacle to the recovery of damages for unborn children who are harmed by state actors. However, that should not and need not be the case. The continued bar on fetal claims under § 1983 is inconsistent with the goals of *Roe*, inconsistent with state law, inconsistent with federal law, and inappropriate as a policy matter. Thus, the federal government should revisit this issue to ensure that the injuries of fetuses caused by state actors do not continue to go uncompensated.

181. *See* FAUX, *supra* note 18, at 327 (noting that the Supreme Court has received more letters about *Roe* than about any other case in American history).