A THEORY OF STABILITY: JOHN RAWLS, FETAL HOMICIDE, AND SUBSTANTIVE DUE PROCESS

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INTRODUCTION

If you take a hard look around, you might get the sense that our society is drifting toward a bifurcated narrative of the human fetus.[1] One line of the fetal narrative is epitomized by the restructuring of criminal codes in order to protect fetuses from acts of violence. Such legislation tends to define fetuses as "human beings" or "persons," and to meld, in terms of classification and punishment, acts that cause the death of either born persons or fetuses. It is worth emphasizing that these new laws are not merely conceptual extrapolations of the mother's reproductive rights – they apply, as it turns out, irrespective of whether the mother wants, or is aware of, her pregnancy. Yet despite this expanding legal recognition of fetuses, there is, of course, another line of the fetal narrative. This is the fetus's near-absolute subordination to maternal liberty; a clear hierarchy of legal status which manifests itself most pronouncedly in the constitutional right to abortion. Indeed, both lines of the fetal narrative are deeply entrenched in our societal institutions.

This bifurcated approach to fetal rights, as it currently exists in most jurisdictions, leads to some interesting, and perhaps awkward, results. Imagine, for instance, a pregnant woman who approaches an abortion clinic with the intention of terminating her pregnancy. In one scenario, she is mugged at the entrance, and, due to the ensuing trauma, has a miscarriage. The law holds that a "person" was "murdered," and it punishes the perpetrator with a life sentence in jail. In the second scenario, the woman evades the mugger, enters the clinic safely, and undergoes a successful abortion procedure. Here the law holds that no crime was committed.

The above hypothetical illustrates a potential flaw in our current approach to fetal rights. The woman intending to terminate her pregnancy, but assaulted on her way, was, as far as the law is concerned, carrying a person in her womb. Which prompts the question: What happened to the person in her womb when, in the second scenario, she evaded the mugger? Proponents of abortion rights are undoubtedly distressed by the terminological shift from "fetus" to "human being" or "person."[2] After all, our legal tradition, excluding a few discrete and well-defined exceptions, knows of no liberty to cause the death of another human being.[3] Due to the strong liberty interests lying in the balance, a

[1] For the sake of simplicity, the terms "fetus" and "fetal," unless otherwise noted, encompass all stages of gestation from fertilization to birth. In reality, the fetal period begins around the ninth week of pregnancy. *See* KEITH L. MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 3 (7th ed. 2003).

[2] *See infra* discussion Part I.D.

[3] *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (1962) ("The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."). The criminal law has occasionally permitted an actor to use deadly force in self-defense even if the one killed did not intentionally seek to inflict harm. A woman, for example, could claim self-defense in shooting a 3-year-old who pointed a loaded gun at

detailed theoretical examination of the interplay between fetal homicide and abortion rights seems warranted.

Juxtaposing fetal-homicide laws and abortion rights prompts two basic inquiries. First, do fetal-homicide laws in fact reflect a societal recognition of fetal "personhood"? Second, is fetal personhood compatible, in either a political or moral sense, with the "liberty" justification for abortion? Each question raises intriguing and complex issues. The first query has received scant treatment in the philosophical and legal literature.[4] Most scholars seem content to avoid the issue by challenging its very relevance, thereby seeking solace in the legalistic claim that any expansion of statutory personhood will not directly affect interpretations of the constitutional "person" central to abortion litigation.[5] But, as to the second question, there has been a longstanding and extensive debate between theorists. A few leading scholars, such as Judith Jarvis Thomson and Anita Allen, have famously argued that the "humanness" or "personhood" of fetuses would not necessarily render the abortion procedure contrary to our notions of justice.[6] This position has generated tremendous controversy within academic circles, with the majority of commentators, including liberal constitutionalists like Ronald Dworkin and

her, even if the child had been too young to form criminal intent. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 197 (2d ed. 1995) (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 876 (5th ed. 1989)).

[4] One notable exception is Professor Carolyn Ramsey, who takes the position that fetal-homicide statutes "do not provide clear evidence that the unborn are ubiquitously becoming 'persons' under law." Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 737 (2006).

[5] Jeffrey Rosen, *A Viable Solution*, LEGAL AFF., Sept.-Oct. 2003, *available at* http://www.legalaffairs.org/printerfriendly.msp?id=435 ("Far from threatening abortion rights, the fetal-homicide statutes provide a model for a pluralistic approach to reproductive rights."); *id.* (quoting Ronald Dworkin as stating that statutory assertions of fetal "personhood" are "a kind of shorthand for describing the complex network of rights and duties, and so long as states do not use the shorthand to curtail or diminish constitutional rights, there can be no constitutional objection").

[6] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-49 (1971) (analogizing a fetus to a violin player plugged into one's body for a period of nine months, and arguing that it would be morally permissible to unplug the violinist even if one knew the violinist would die as a result); *see also* Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 468 (1987) (arguing that the hypothetical connection to the violinist has no moral bearing on the woman's right to choose to remain connected); Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979) ("It is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance."); *cf.* Ramsey, *supra* note 4, at 738 ("The pro-choice camp would be better served by arguing that, although the fetus may be a human being (or even a person in some legal contexts), the choice to prevent it from being born still belongs to the woman, but not to her attacker.").

Jack Balkin, contending that a societal understanding of fetal personhood cannot be reconciled with a general right to abortion.[7]

When surveying the academic landscape relating to these two questions, one realizes a regrettable soft spot: the absence of a thorough analysis of John Rawls's philosophy.[8] Rawls is, after all, considered by many to have been the most important political philosopher of the twentieth century. It was Robert Nozick who, in paying what is surely the ultimate compliment, wrote that "[p]olitical philosophers now must either work within Rawls' theory or explain why not."[9] And, beyond academia, a large swath of the public, explicitly or otherwise, shares Rawls's fundamental view that "justice is fairness."[10]

Perhaps this quiet surrounding Rawls's work is best explained by the fact that his views on abortion were ambiguous and non-committal, and that he altogether ignored the emergence of fetal-homicide laws. He reiterated near the end of his life that he had not reached any firm moral conclusion on

[7] RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 111 (1993) ("But abortion normally requires a physical attack on a fetus, not just a failure to aid it, and, in any case, parents are invariably made an exception to the general doctrine because they have a legal duty to care for their children."); Jack Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 846 (forthcoming 2007), *available at* http://ssrn.com/abstract=964508 ("Why could states decriminalize murder simply because of who the victim's parents were or because the victim's conception was not consensual? These conclusions do not mesh well with how most people – even those with strong moral objections – feel about abortion."); *see also* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 5-6 (1984) (suggesting that the recognition of fetuses as persons would undermine abortion rights); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1000 (1999) ("If fetuses are recognized as full legal persons, then their right to life must, as a matter of constitutional law, be protected – and all abortions outlawed."); Jed Rubenfeld, *On the Legal Status of the Proposition That "Life Begins at Conception,"* 43 STAN. L. REV. 599, 627 (1991) ("I do not question the conclusion that a state could override a woman's privacy rights if it were able to determine in advance that the fetus was a person.").

[8] *But see, e.g.*, JEFFREY H. REIMAN, ABORTION AND THE WAYS WE VALUE HUMAN LIFE 113-14 (1999) (briefly discussing Rawls's views on public reasoning); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2476 (1997) (arguing that Rawlsian public reason is purposely designed to induce dissenters to accede to liberal hegemony); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 142 (2007) (briefly speculating on how Rawls might have viewed the recognition of fetuses as "human beings" but not "persons").

[9] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 183 (1974).

[10] *See, e.g.*, Martha Nussbaum, *The Enduring Significance of John Rawls*, CHRON. HIGHER EDUC. (Wash., D.C.), July 20, 2001, § 2 (Magazine), at B7 ("[Rawls's] ideas are central starting points in many nations for discussions of justice."); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) ("Professor Rawls, of Harvard . . . has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore.").

abortion, writing, "I don't say the most reasonable or decisive argument; I don't know what that would be, or even if it exists."[11] But while Rawls might have been agnostic on abortion, he nonetheless left behind a coherent theoretical model with which to analyze the justness of policy determinations. And what one finds, upon closer analysis, is that his philosophy is particularly well-suited to measure the sustainability of a legal scheme that punishes fetal homicide while permitting abortion.

The goal of this Article is to evaluate the bifurcated fetal-rights scheme in the light of Rawls's political philosophy. In particular, it seeks to discern whether the current set of fetal-homicide laws indicates a societal recognition of fetal personhood, and, if so, whether this renders the right to abortion inconsistent with our principles of justice. This Article proceeds in three Parts. The first Part outlines the contours of the fetal-rights scheme and demonstrates that it is an established societal judgment with robust institutional support.[12] The middle Part introduces Rawls's philosophy, and explains how it can, under certain circumstances, provide us with insight into the stability of public policies. The final Part, which constitutes the core of the Article, uses Rawls's philosophical model to gauge the stability of the bifurcated fetal-rights scheme. Specifically, it demonstrates that, in a Rawlsian society, the emergence of our current fetal-homicide laws necessarily reflects a public understanding that fetuses are represented at the "original position." This Part then goes on to evaluate the circumstances in which the current fetal-rights scheme – a blend of fetal-homicide laws and abortion rights – could be affirmed by a Rawlsian. The Article concludes by briefly speculating about how Rawls's philosophy might impact our views on fetal rights in the coming decades.

I. THE BIFURCATED FETAL-RIGHTS SCHEME

The law currently endorses a bifurcated characterization of human fetuses.[13] On the one hand, the legal status of the fetus has been greatly enhanced through the restructuring of criminal codes.[14] On the other hand, fetal interests

[11] *See* JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* JOHN RAWLS: COLLECTED PAPERS 573, 605 n.80 (Samuel Freeman ed., 1999) [hereinafter RAWLS, *Public Reason Revisited*].

[12] Rawls uses the terms "societal judgments" and "societal convictions of justice" interchangeably throughout his work. For a definition of "societal judgments," see *infra* note 135.

[13] *See, e.g.*, Note, *What We Talk About When We Talk About Persons: The Language of Legal Fiction*, 114 HARV. L. REV. 1745, 1766 (2001) ("[T]he doctrinal confusion regarding legal personhood evidences the two-mindedness of a society that finds fetal murder abhorrent even as it desires to protect the autonomy of pregnant women.").

[14] *See* Byrn v. N.Y. City Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972) ("The process [of granting personhood] is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on

are nearly wholly subordinated to the liberty interests of their mothers. This Section briefly describes the key components of the bifurcated fetal-rights scheme and documents how this hierarchy of rights has been strongly endorsed by our leading societal institutions.

A. *Fetal Rights*

One line of the fetal narrative is the fetus's burgeoning legal status. Although there are many examples, this phenomenon is most clearly evinced by penal codes that (1) delineate fetuses as crime victims separate from their mothers, (2) explicitly define fetuses as "persons" or "human beings," (3) classify offenses against fetuses with terminology suggestive of personhood, and (4) punish crimes against fetuses similarly to crimes against born persons.[15]

At common law a fetus was not considered a unique "victim" of a crime committed against its mother.[16] Yet it is clear that, over the past few decades, society has begun to shift its views on the subject.[17] Perhaps the most

the Legislature, subject again of course to the Constitution as it has been 'legally' rendered."); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19-20 (Erin Kelly ed., 2001) [hereinafter RAWLS, RESTATEMENT] ("[T]he conception of the person is worked up from the way citizens are regarded in the public political culture of a democratic society. . . . For these interpretations we look . . . to courts, political parties, and statesmen . . . ."); *cf.* Levy v. Louisiana, 391 U.S. 68, 70 (1968) ("[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being.").

[15] There are, of course, other, perhaps less persuasive, indicia of fetal personhood in the laws of tort, property, or equity. *See, e.g.*, Cowles v. Cowles, 13 A. 414, 417 (Conn. 1887) (holding that a child born six months after the testator's death was in existence, in contemplation of law, and therefore a beneficiary); Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964) (holding that an unborn child had a right to medical care despite the mother's refusal to consent to a blood transfusion on religious grounds); State v. Beale, 376 S.E.2d 1, 2 n.3 (N.C. 1989) (noting that the word "person" in the state's wrongful death statute had been extended to impose civil liability for the killing of a fetus).

[16] *See, e.g.*, Mamta K. Shah, Note, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 934 (2001) (citing Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 718 (1999)); *cf.* United States v. Spencer, 839 F.2d 1341, 1343 (9th Cir. 1988) ("In 1908 it was well-established in common law that murder was the killing of one human being by another, and that an infant born alive that later died as a result of fetal injuries was a human being.").

[17] *See* Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 95, 117 (2000) (observing that "[b]y separating fetal killing from the crime against the pregnant woman, these states implicitly or explicitly accord the fetus at least limited personhood status" and that "[o]ne possible escape from this conundrum is a return to the idea that the interests of the woman and fetus are unitary"); Note, *supra* note 13, at 1756 ("[T]he act of criminalizing feticide, regardless of the method, sends a message about the state's regard for fetal life and

pronounced example is the federal Unborn Victims of Violence Act of 2004 (UVVA).[18] The UVVA provides that if a child in utero is injured or killed during the commission of certain federal crimes of violence against its mother, then the assailant has committed an offense against two victims: the mother *and* the unborn child.[19] During the UVVA debate, opponents of the proposed legislation introduced a substitute bill that retained the traditional view that a fetus is not a separate victim.[20] The "single-victim" substitute would have, as a

thereby implicitly grants fetuses limited personhood status."); *see also* Shah, *supra* note 16, at 939 (mentioning how a majority of jurisdictions have extended the term "person" in their wrongful death statutes to include fetuses) (citing Mary Lynn Kime, Note, Hughes v. State*: The "Born Alive" Rule Dies a Timely Death*, 30 TULSA L.J. 539, 550 (1995)). *But see* State v. Merrill, 450 N.W.2d 318, 324 (Minn. 1990) ("People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires 'personhood.' These questions are entirely irrelevant to criminal liability under the statute.").

[18] Unborn Victims of Violence Act (Laci and Conner's Law) of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (Supp. IV 2004)). The House of Representatives approved the bill on February 26, 2004, with a vote of 254–163. 150 CONG. REC. H667–68 (daily ed. Feb. 26, 2004). For the entire debate on the UVVA in the House, see *id.* at H637–68. The Senate approved it on March 25, 2004, with a vote of 61–38. 150 CONG. REC. S3167 (daily ed. Mar. 25, 2004). For the entire debate on the UVVA in the Senate, see *id.* at S3124–67.

[19] 18 U.S.C. § 1841(a)(1) ("Whoever engages in conduct that violates any of the provisions of [various federal criminal provisions] and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense . . . ."). The elements of fetal murder under the UVVA are: (1) the defendant violated one of the federal laws dealing with crimes of violence; and (2) the defendant's criminal conduct caused the death of "a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.* Prior to the enactment of this law, an unborn child was *not* recognized as a victim with respect to violent crimes under federal law. *See* 150 CONG. REC. S3145 (daily ed. Mar. 25, 2004) (statement of Sen. Feinstein) (warning of the potentially serious "repercussion[s]" that will result from "giv[ing] a fertilized egg rights in the Federal law"). The UVVA applies this two-victim principle to sixty-eight existing federal laws dealing with acts of violence (as well as all laws governing federal geographical jurisdictions and the military justice system). *See* 18 U.S.C. § 1841(b) (listing the statutory provisions to which the UVVA applies).

[20] *Compare* 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004) (reporting Senator Feinstein's separate bill punishing a third party for terminating a woman's fetus as a separate offense against the third party), *with* 18 U.S.C. § 1841 (punishing a third party for terminating a woman's pregnancy as a separate offense against the third party while also finding that the fetus is a separate victim). Public sentiment seems to reflect the two-victim principle. *See* Dana Blanton, *Peterson Should Get Two Counts of Murder*, FOXNEWS.COM, April 25, 2003, http://www.foxnews.com/story/0,2933,85158,00.html (citing a Fox News/Opinion Dynamics poll from April 22–23, 2003, in which eighty-four percent of respondents believed that Scott Peterson should be charged with two counts of homicide for murdering his wife and unborn child); Debra Rosenberg, *The War over Fetal Rights*, NEWSWEEK, June 9, 2003, at 40, 42–43 (discussing how "abortion-rights supporters are

practical matter, implemented standards and punishments identical to the primary bill. Despite this functional parity, Congress rejected the substitute bill, thereby making unequivocally clear its view of fetuses as separate and distinct victims from their mothers.[21] In addition to the UVVA, thirty-six states have incorporated the double-victim approach into their penal codes.[22]

Perhaps not surprisingly, jurisdictions treating fetuses as unique victims reach different conclusions as to *when* such uniqueness vests. The minority position is to focus on a particular point in the gestation process[23] (such as

finding it increasingly difficult to claim credibly that a fetus just a few weeks, or even days, from delivery is not entitled to at least some protections under the law").

[21] *See* 150 CONG. REC. S3145 (daily ed. Mar. 25, 2004) (statement of Sen. Hatch) ("Where our bills are different – and this is important – is the definition of when life begins."). Sharon Rocha, the mother of Laci Peterson, wrote the following to U.S. Senators:

> I hope that every legislator will clearly understand that adoption of such a single-victim amendment . . . would be a painful blow to those, like me, who are left alive after a two-victim crime, because Congress would be saying that Conner and other innocent unborn victims like him are not really victims – indeed, that they never really existed at all.

H.R. REP. NO. 108-420, pt. 1, at 4 n.4 (2004) (quoting Letter from Sharon Rocha to United States Senators Mike DeWine, Lindsey Graham, Orrin Hatch and United States Congresswoman Melissa Hart (June 16, 2003) (on file with House Committee on the Judiciary)).

[22] *See infra* notes 23 & 25 and accompanying text. Interestingly, the Supreme Court has held that a policy shared by thirty states constitutes a "national consensus," at least for the purposes of an Eighth Amendment analysis. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) ("When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. . . . By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."). For a critique of this method of evaluating national consensus, see Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus* 2 (Nw. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 05-15, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=813124 ("*Atkins* and *Roper* confirmed and expanded an inherently defective practice, using state legislation as evidence of an evolving national consensus.").

[23] The minority view has been adopted by twelve jurisdictions. *See* ARK. CODE ANN. § 5-1-102(13)(B)(i)(b) (2006) (twelve weeks); CAL. PENAL CODE § 187(a) (West 1999) (post-embryonic stage, as construed in People v. Davis, 872 P.2d 591, 602 (Cal. 1994)); FLA. STAT. ANN. §§ 782.071, .09 (West 2007) (viability and quickening, respectively); IND. CODE ANN. §§ 35-42-1-1(4), -3(a)(2), -4(b) (West 2004 & Supp. 2006) (viability as defined in IND. CODE ANN. § 16-18-2-365 (West 2007)); IOWA CODE ANN. § 707.7 (West 2003) (end of second trimester); MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis Supp. 2006) (viability as defined in MD. CODE ANN., HEALTH-GEN. § 20-209 (LexisNexis 2005)); NEV. REV. STAT. § 200.210 (2005) (quickening); N.Y. PENAL LAW § 125.00 (McKinney 2004) (end of twenty-four weeks); R.I. GEN. LAWS § 11-23-5 (2002) (quickening); TENN. CODE ANN. § 39-

viability, quickening, or the post-embryonic stage).[24] The clear majority of jurisdictions, however, provide that unborn children become legally separate entities upon their conception.[25]

It is worth noting that the double-victim concept is not a mere legal fiction devised for the purpose of fortifying the mother's right to a violence-free pregnancy. Importantly, fetal-homicide laws require neither that the mother be aware of her pregnancy at the time of the fetus's death, nor that she endorse or acquiesce to the ensuing criminal prosecution.[26] The double-victim approach indeed seems to mean what it says: a fetus is a protected entity unique and separate from its mother.

In addition to double-victim laws, the legal status of the fetus can also be gleaned from legislative definitions.[27] Various jurisdictions have expressly

13-214 (2006) (viability); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 2000) (quickening); Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (viability).

[24] "Viability" occurs once a fetus has "a reasonable potential for subsequent survival if . . . removed from the uterus." Tara Kole & Laura Kadetsky, Recent Developments, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 217 n.28 (2002) (omission in original) (quoting Bicka A. Barlow, Comment, *Severe Penalties for the Destruction of "Potential Life" – Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 471 (1995)). "Viability generally occurs between twenty and twenty-four weeks gestation, at about the end of the second trimester of pregnancy." *Id.* By contrast, "[q]uickening is the point at which a fetus first moves within the womb or is capable of moving; this stage usually occurs between the sixteenth and twentieth week of pregnancy." *Id.* at 217 n.29 (citing Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword To Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 463 (1998)). Finally, "[t]he post-embryo stage, when an embryo nominally becomes a fetus, occurs approximately seven to eight weeks into gestation." *Id.* at 217 n.30 (citing *Davis*, 872 P.2d at 599).

[25] *See infra* App. A (describing the fetal-homicide laws of the twenty-four states that recognize unique victim-status upon conception). Conception is not synonymous with fertilization. *See, e.g.*, Rubenfeld, *supra* note 7, at 625 n.112 (stating that conception is complete only when the fertilized ovum implants itself in the woman's uterus).

[26] *See* Kole & Kadetsky, *supra* note 24, at 227 (observing that the UVVA's "protection of the fetus during pregnancy is entirely disconnected with the woman's 'choice' to continue her pregnancy"); *see also* People v. Taylor, 86 P.3d 881 (Cal. 2004) (upholding a murder conviction for causing the death of an eleven- to thirteen-week old fetus without addressing whether the mother had been aware of the pregnancy prior to her death). For a discussion of the various reasons why victims of domestic abuse can be reluctant to cooperate with law enforcement investigations, see Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 472-84 (2003).

[27] These statutory provisions are particularly relevant when one appreciates the expressive dimension of law. This concept holds that law does more than simply regulate behavior; it embodies and signals social values and aspirations. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997) (describing how social influences can shape a person's propensity to engage in crime); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025-29 (1996)

stated that fetuses are "persons," "human beings," or "members of the species homo sapiens."[28] The federal UVVA defines a "child in utero" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[29] Representative examples at the state level include Ohio's expansion of "person" to include "[a]n unborn human who is viable;"[30] Pennsylvania's characterization of an "unborn child" as "an individual organism of the species homo sapiens from fertilization until live birth;"[31] and Kentucky's proviso that an "unborn child" is "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."[32]

(defining the "expressive function of law" as referring to the law's attempt to influence social norms, though also noting that the phrase can be defined in other ways as well).

[28] There are differing views on how the terms "persons" and "human beings" differ from one another. In some jurisdictions, for example, there appears to be no meaningful distinction. *See* Note, *supra* note 13, at 1749 ("When courts held that slaves were legal persons, they emphasized the obvious fact that slaves were human beings and relied on this fact to settle the issue."); *Cass*, 467 N.E.2d at 1325 ("An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb."). For a contrary view, see Ramsey, *supra* note 4, at 738 (stating that the difference between the two "constitutes more than formalistic hairsplitting" and stating that "[m]ore than sixty percent of states with fetal homicide laws eschew designating the fetus as a 'person,' instead calling it a 'human being'").

[29] 18 U.S.C. § 1841(d) (Supp. IV 2004).

[30] OHIO REV. CODE ANN. § 2901.01(B)(1)(a)(ii), (c)(i) (LexisNexis 2006); *see also* ALA. CODE § 13A-6-1(a)(3) (LexisNexis Supp. 2006) (including "an unborn child in utero at any stage of development, regardless of viability" in the definitions of a "person" and "human being" for purposes of the state laws dealing with murder, manslaughter, criminally negligent homicide, and assault); ARK. CODE. ANN. § 5-1-102(13)(B)(i)(a), (b) (2006) (defining "person" to include a "living fetus of twelve (12) weeks or greater gestation," at any stage of development); LA. REV. STAT. ANN. § 14:2(7), (11) (2007) (stating that the definition of "person" includes "a human being from the moment of fertilization and implantation"); *Cass*, 467 N.E.2d at 1325-26 (ruling that a viable fetus is within the ambit of "person" in the state's homicide statute).

[31] 18 PA. CONS. STAT. ANN. § 3203 (West 2000).

[32] KY. REV. STAT. ANN. § 507A.010(1)(c) (LexisNexis Supp. 2006); *see also* ALASKA STAT. § 11.81.900(b)(62) (2006) ("'[U]nborn child' means a member of the species Homo sapiens, at any stage of development, who is carried in the womb."); GA. CODE ANN. §§ 16-5-20, -28, -80 (Supp. 2006) (defining "unborn child" as a member of the species homo sapiens); MISS. CODE ANN. § 97-3-37 (West 2005) ("'[U]nborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."); NEB. REV. STAT. § 28-389 (Supp. 2006) (defining "unborn child" as "an individual member of the species Homo sapiens, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth"); S.C. CODE ANN. § 16-3-1083(C) (Supp. 2006) (defining "unborn child" in essentially the same manner as the previously cited statutes). Moreover, the California Supreme Court recently

The expanding legal status of fetuses is further reflected by how jurisdictions choose to classify criminal offenses. The majority of jurisdictions, in characterizing the unlawful killing of a fetus, have replaced the neutral term "feticide"[33] with the far more suggestive language of "homicide," "murder," or "manslaughter."[34] This is significant in that these terms have been utilized exclusively in our legal tradition to classify acts causing the death of human beings: "homicide" is "[t]he killing of one person by another,"[35] "murder" is "[t]he killing of a human being [by another] with malice aforethought,"[36] and "manslaughter" is "[t]he unlawful killing of a human being [by another] without malice aforethought."[37]

Lastly, it should be noted that many jurisdictions punish crimes against fetuses as if they were crimes against born persons. The UVVA, for instance, draws almost no punitive distinctions between acts causing the death of the mother or fetus: "the punishment . . . is the same as the punishment provided under federal law for that conduct had that injury or death occurred to the unborn child's mother."[38] Utah provides that the killing of an "unborn child" at any stage of prenatal development is no different than any other homicide.[39] Arizona holds that a victim who is "an unborn child at any stage of development,"[40] shall, for the purposes of establishing the level of punishment, "be treated like a minor who is under twelve years of age."[41] And Texas

defined an eleven- to thirteen- week-old fetus as a "person" for the purposes of its implied malice doctrine. People v. Taylor, 86 P.3d 881, 884-85 (Cal. 2004).

[33] BLACK'S LAW DICTIONARY 654 (8th ed. 2004) (defining "feticide" as an "act or instance of killing a fetus").

[34] At least thirty states employ such language. *See infra* App. A (listing twenty-four states adopting the majority view, of which twenty define the crime as either murder, homicide, or manslaughter). Of the jurisdictions adopting the minority view of victim status, ten states define the crime as either murder, homicide, or manslaughter. *See supra* note 23 (listing the jurisdictions adopting the minority view of victim status, of which Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Nevada, Rhode Island, Tennessee, and Washington define the crime as either murder, homicide, or manslaughter).

[35] BLACK'S LAW DICTIONARY 751 (8th ed. 2004).

[36] *Id.* at 1043; *see also* Note, *supra* note 13, at 1747-48 (arguing that punishing the killing of a slave as "murder" constituted a "robust understanding of slaves' personhood").

[37] BLACK'S LAW DICTIONARY 983 (8th ed. 2004).

[38] 18 U.S.C § 1841(a)(2)(A). The UVVA, however, withholds the death penalty for an actor who kills only the fetus. *Id.* § 1841(a)(2)(D) ("Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.").

[39] UTAH CODE ANN. § 76-5-201(1)(a) (2003); *cf.* 18 PA. CONS. STAT. ANN. § 2605(c) (West 1998) ("The penalty for voluntary manslaughter of an unborn child shall be the same as the penalty for voluntary manslaughter.").

[40] ARIZ. REV. STAT. ANN. § 13-604(V) (Supp. 2006).

[41] *Id.* § 13-604.01(M); *see also id.* § 13-703 (treating unborn children and children under fifteen as being the same for the purpose of determining when someone sentenced to life can be released); *id.* § 13-1102 (applying the crime of negligent homicide to both born and

applies its entire criminal code to any offense against "an unborn child at every stage of gestation from fertilization until birth."[42]

In sum, a large development in federal and state penal legislation has been to recognize fetuses as unique victims, define fetuses as "persons" or "human beings," classify offenses against fetuses with terminology suggestive of personhood, and punish crimes against fetuses similarly to crimes against born persons. This restructuring of the criminal codes has, perhaps not surprisingly, led some to identify an emerging societal understanding that fetuses are individual persons with protectable human rights.[43]

B. *Subordinating Fetal Rights*

The growing legal recognition of the fetus aside, there is another line to the fetal narrative: the subordination of the fetus to the liberty interests of its mother.[44] This hierarchy of interests is most clearly reflected in (1) judicial holdings that a fetus is not a "person" under the Constitution, (2) judicial holdings that the Constitution ensures a right to abortion, and (3) legislation protecting a mother's liberty interests.

The Supreme Court, in its landmark 1973 opinions, *Roe v. Wade*[45] and *Doe v. Bolton*,[46] held that the Constitution provides no affirmative protection to fetuses. At issue in *Roe* was the constitutionality of a Texas statute

unborn victims, with a few narrow exceptions); *id.* § 13-1103 (applying the crime of manslaughter to both born and unborn victims alike, with a few narrow exceptions); *id.* § 13-1104 (applying the crime of second degree murder to both born and unborn victims, with a few exceptions); *id.* §13-1105 (applying the crime of first degree murder to both born and unborn victims alike, with exceptions).

[42] TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2006) (defining "individual"); *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (Vernon Supp. 2006) (providing an identical definition of an "individual" for the purposes of the civil code).

[43] See *infra* discussion Part I.D (inventorying the leading arguments against the UVVA). One leading critic of this view is Professor Carolyn Ramsey, who argues that fetal-homicide statutes "do not provide clear evidence that the unborn are ubiquitously becoming 'persons' under law." Ramsey, *supra* note 4, at 737. It seems, however, that Professor Ramsey fails to sufficiently address the close definitional nexus between "human beings" and "persons" in some jurisdictions, or the fact that many jurisdictions similarly punish acts against fetuses and born persons. While a legitimate debate can be had whether fetuses have the status of "persons" under the law, it is becoming increasingly unreasonable to deny that society views fetuses as individual "human beings."

[44] While this Section focuses on the embryo's status while it is *inside* the mother's womb, the absence of the embryo's personhood status vis-à-vis the mother seems to apply equally to embryos outside the womb. For example, third-party destruction of embryos created *in vitro* for scientific research is lawful because of their mothers' consent, be it explicit or implicit.

[45] 410 U.S. 113, 154 (1973) (finding that the mother's "right of personal privacy includes the abortion decision").

[46] 410 U.S. 179 (1973).

criminalizing the procurement of an abortion unless the procedure was necessary to save the mother's life.[47] The Court's threshold consideration was whether fetuses are entitled to protection under the Fourteenth Amendment, which provides that "persons" cannot be deprived of life without due process of law. Justice Blackmun, writing for a 7-2 majority, held that the term "persons" in the Fourteenth Amendment does not include the unborn.[48] He explained that "the unborn have never been recognized in the law as persons in the whole sense," and that, except for abortion regulations, "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth."[49] Because fetuses are not constitutional persons under the Fourteenth Amendment, the Court continued, states are not constitutionally obligated to protect fetuses.[50] Had the Court held that fetuses were constitutional persons, at least some of the abortion regulations struck down in *Roe* and *Doe* would have been upheld.[51]

The subordination of fetuses to maternal liberty is further reflected in the Supreme Court's recognition of a constitutional right to abortion. *Roe* and *Doe* hold that the Due Process Clause of the Fourteenth Amendment guarantees a woman's right to choose an abortion,[52] and this interpretation has been affirmed by the Court on numerous occasions over the past 35 years.[53] Two guiding principles have emerged from the Court's abortion jurisprudence. First, a woman has the right to choose to have an abortion before fetal viability

[47] *See Roe*, 410 U.S. at 117-18 (referencing the Texas State Penal Code that "make[s] it a crime to 'procure an abortion,' . . . except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother'").

[48] *Id.* at 158.

[49] *Id.* at 161-62.

[50] *But see id.* at 154 (providing that a government may, under narrow circumstances, regulate abortion in order to protect "potential [human] life" and safeguard medical standards); Gonzales v. Carhart, 127 S. Ct. 1610, 1632-35 (2007) (discussing the government's interest in fetal life and holding that it justifies a ban on the so-called "dilation and evacuation" method of abortion).

[51] *See Roe*, 410 U.S. at 157 n.54 (suggesting that the Texas abortion ban would have been upheld if "the fetus . . . [were] a person who . . . [was] not to be deprived of life without due process of law"); *Doe*, 410 U.S. at 189 ("What is said [in *Roe*] is applicable here, and need not be repeated."); Balkin, *supra* note 7, at 843.

[52] *Roe*, 410 U.S. at 153; *Doe*, 410 U.S. at 189.

[53] *See, e.g.*, *Carhart*, 127 S. Ct. at 1626; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (musing that the right to liberty, which includes the right to terminate one's pregnancy, includes the freedom "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). It is notable that this is not the right to define *another's* existence. In short, the mother's right is not one to grant or deny "personhood" status to the fetus in her womb, but rather to determine whether to terminate her pregnancy. *Id.* at 853 (framing the issue as "[t]he extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy").

and to obtain it without undue interference from the government.[54] Second, the government has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health.[55] The Court has explained that the term "health" should be interpreted broadly to encompass a mother's physical, mental, and emotional well-being.[56] And so it is clear that a hierarchy of rights has been formed by the Supreme Court: The mother's right to an abortion trumps the rights of *pre-viable* fetuses under all circumstances, and the rights of *viable* fetuses whenever the mother's health, liberally construed, is in jeopardy.[57] While government is deemed to have a legitimate interest in protecting fetal life,[58] this interest, as a practical matter, is regularly outweighed by the mother's constitutional right to choose an abortion.[59]

Peering beyond constitutional doctrine, one finds that statutory law also subordinates the rights of fetuses. This is evinced most clearly by the maternal safe harbors written into the various laws protecting fetal life. Many states, for example, explicitly exempt the fetus's mother from the prosecution of laws banning certain types of late-term abortions.[60] Along these same lines, the

[54] *Casey*, 505 U.S. at 876-77 (adopting the "undue burden" standard and defining "undue burden" as a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"); *id.* at 846 (finding that the state's interest in protecting fetal life is insufficiently strong before viability).

[55] *Roe*, 410 U.S. at 164-65 (finding that after viability, the state may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"). This Article will refer to abortions that are necessary to preserve a woman's health as "therapeutic" abortions.

[56] *See* Doe v. Bolton, 410 U.S. 179, 191-92 (1973) (finding that a physician may consider not only physical factors but also emotional and psychological factors when determining if the preservation of the woman's health justifies an abortion).

[57] Professor Balkin contends that the constitutional right to abortion is composed of two distinct rights: the right to not be forced by the State to bear children at risk to her life or health and the right to not be forced by the state to become a mother and thus take on the responsibilities of motherhood. Jack Balkin, *Abortion and Original Meaning* 5 (Yale Law Sch., Research Paper No. 128), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925558#PaperDownload.

[58] *See Carhart*, 127 S. Ct. at 1633 ("Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."); *Casey*, 505 U.S. at 846 (discussing Pennsylvania's right to protect "the life of the fetus that may become a child").

[59] The traditional example concerns the woman who is pregnant with a viable fetus yet who lacks a health justification to override the state's interest in protecting fetal life. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (quoting *Roe*, 410 U.S. at 164-65) (observing that states may regulate or proscribe post-viability abortions except where abortion is medically necessary to preserve the mother's life or health).

[60] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3603 (2001) (punishing the person that procures the miscarriage of the woman); ME. REV. STAT. ANN. tit. 22, § 1598 (2004) (penalizing the person who performs an illegal abortion but not the mother); TENN. CODE ANN. § 39-15-201

large majority of fetal-homicide laws include safe harbor provisions for acts committed by the fetus's mother.[61] These provisions, it seems, would encompass acts outside of the abortion context such as the ingestion of illicit drugs.[62]

After juxtaposing the growing legal recognition of fetuses with the mother's right to an abortion, the contours of the current fetal-rights scheme can be summarized as follows: (1) fetuses at all stages of gestation are unique human beings;[63] (2) the unlawful killing of fetuses is classified and punished similarly

(2003) (criminalizing the conduct of those performing illegal abortions or procuring miscarriages); 1 AM. JUR. 2D *Abortion and Birth Control* § 118 (2005) ("Statutes defining abortion usually are directed only against the person or persons who commit or attempt to commit the act rather than against the woman upon whom the act is committed, notwithstanding it may be done with her knowledge and consent. As a general rule, she incurs no criminal liability.").

[61] *See* ARIZ. REV. STAT. ANN. § 13-1103(B) (Supp. 2006) (exempting the mother from prosecution for illegal abortions); ARK. CODE ANN. § 5-1-102(13)(B)(iii) (2006) (same); FLA. STAT. ANN. § 782.09(1) (West 2007) (same); GA. CODE ANN. § 16-5-80(f) (Supp. 2006) (same); IDAHO CODE ANN. § 18-4016(2) (2004) (same); 720 ILL. COMP. STAT. ANN. 5/9-3.2(c) (West 2002) (same); IOWA CODE ANN. § 707.8(12) (West 2003) (same); KY. REV. STAT. ANN. § 507A.010(3) (LexisNexis Supp. 2006) (same); LA. REV. STAT. ANN. § 14:32.5(A) (2007) (same); MD. CODE ANN., CRIM. LAW § 2-103(f) (LexisNexis Supp. 2006) (same); MINN. STAT. ANN. § 609.266(b) (West 2003) (same); NEB. REV. STAT. § 28-390 (Supp. 2006) (same); N.D. CENT. CODE § 12.1-17.1-01(2) (1997) (same); OHIO REV. CODE ANN. § 2903.09(C) (LexisNexis 2006) (same); OKLA. STAT. ANN. tit. 21, § 652(E) (West Supp. 2007) (same); 18 PA. CONS. STAT. ANN. § 2608(a) (West 1998) (same); TEX. PENAL CODE ANN. §§ 19.06, 22.12, 49.12 (Vernon Supp. 2006) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(c) (Vernon Supp. 2006) (same); W. VA. CODE ANN. § 61-2-30(d)(5) (LexisNexis 2005) (same); WIS. STAT. ANN. § 939.75(2)(b)(3) (West 2005) (same).

[62] *See, e.g.*, 18 U.S.C. § 1841(c) (Supp. IV 2004) (stating that the UVVA shall not "be construed to permit the prosecution . . . of any woman with respect to her unborn child"); KY. REV. STAT. ANN. § 507A.010(3) (LexisNexis Supp. 2006) ("Nothing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child."); TEX. PENAL CODE ANN. §§ 19.06, 22.12, 49.12 (Vernon Supp. 2006) (exempting from its wrongful death statute "conduct committed by the mother of the unborn child"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(c) (Vernon Supp. 2006) (same). While all jurisdictions prohibit certain types of drug use, and these laws apply with equal force to pregnant women, the safe harbor provisions in fetal-homicide laws ensure that a pregnant woman will not be punished for the harm her illicit drug use caused to the fetus in her womb. *See, e.g.*, State v. Deborah J. Z., 596 N.W.2d 490, 494 n.5 (Wis. Ct. App. 1999) (indicating that only one state court of last appeal has held that maternal drug use during pregnancy can result in criminal prosecution and conviction for the harm caused to her fetus).

[63] This Article proceeds under the assumption that society identifies the uniqueness of the unborn upon conception. Of the thirty-six states that apply homicide laws to the unborn, a substantial majority (twenty-four) apply this conception-based framework. Other vesting points include nine weeks (1 jurisdiction), twelve weeks (1), quickening (3), viability (5), and twenty-four weeks (2). It is also notable that Congress follows the majority position and recognizes uniqueness at conception. Lastly, the conception framework seems to have

to the unlawful killing of born humans; (3) mothers can procure nontherapeutic abortions prior to fetal viability; (4) mothers can procure therapeutic abortions at any stage of fetal gestation; and (5) mothers cannot be prosecuted for harming fetuses in their wombs. The following Sections examine this bifurcated scheme, taken in its whole, and describe how it has been endorsed by our societal institutions.

C. *Institutional Support for the Bifurcated Fetal-Rights Scheme*

The bifurcated fetal-rights scheme enjoys broad support within our societal institutions. This institutional support is best demonstrated by examining judicial accommodation of fetal statutory rights and, conversely, legislative respect for maternal constitutional liberty.

In the wake of *Roe*, courts have been willing to tailor the constitutional right to abortion to permit governments to make certain value judgments on the personhood status of fetuses. The signature case in this regard is *Webster v. Reproductive Health Services*.[64] In *Webster*, the Supreme Court reviewed the constitutionality of a Missouri statute that declared in its preamble "that '[t]he life of each human being begins at conception,' and that 'unborn children have protectable interests in life, health, and well-being.'"[65] The Supreme Court upheld the law on the grounds that "the preamble does not by its terms regulate abortion" and that the underlying statute offered no more protections to unborn children than otherwise afforded by tort and probate law, which is permissible under *Roe*.[66] The Court explained that *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion."[67] *Webster* makes clear that a woman's constitutional right to abortion does not encompass a right to preclude the government from defining the fetus in her womb as a "person."

significant momentum within the states, as it was adopted by four states in last year alone (Alabama, Alaska, Nebraska, and South Carolina). If the contour were alternatively placed at some later point of gestation (such as quickening), the bifurcated rights-scheme, as discussed *infra* in Part III, would of course still exist. In such a case, however, it would only extend to fetuses that had developed beyond the chosen gestation point.

[64] 492 U.S. 490 (1989).

[65] *Id.* at 501 (alteration in original) (quoting MO. REV. STAT. § 1.205.1(1)-(2) (1986)). The preamble of the statute also stated that, to the extent permissible by the Constitution, "the unborn child at every stage of development [is entitled to] all the rights, privileges, and immunities available to other persons, citizens, and residents of this state." *Id.* at 504 n.4 (quoting MO. REV. STAT. § 1.205.2 (1986)).

[66] *Id.* at 506. The Eighth Circuit had declared the law unconstitutional, reasoning that the preamble constituted "'an impermissible state adoption of a theory of when life begins.'" *Id.* at 570 (Stevens, J., dissenting) (quoting Reprod. Health Servs. v. Webster, 851 F.2d 1071, 1076 (8th Cir. 1988)).

[67] *Id.* at 506 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

Since *Webster*, criminal defendants and advocacy groups have mounted various constitutional challenges to fetal-homicide laws. Each one of them has failed. In one such case, the Supreme Court of California held that "when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."[68] The Missouri Court of Appeals similarly stated that "[t]he fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother."[69] And the Minnesota Supreme Court, in dismissing a defendant's equal protection claim, wrote that "*Roe v. Wade* . . . does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[70] Following the example of *Webster*, courts have uniformly permitted legislatures to make value judgments on the personhood status of fetuses so long as the mother's right to exercise abortion rights is not obstructed.

The institutional legitimacy of the fetal-rights scheme is further demonstrated by legislative respect for maternal liberty. As described above, many fetal-homicide laws include a maternal safe harbor provision which explicitly prohibits prosecution of the mother for any acts that harm her fetus. Professor Carolyn Ramsey recently observed that, as a result of these safe harbors, fetal-homicide laws "do not provide an effective launching pad for an assault on *Roe*."[71] And even leading proponents of the right-to-life position have conceded that, as a result of this exemption, fetal-homicide laws do not infringe on abortion rights. During the UVVA debate, Senator Rick Santorum stated unequivocally that the right to an abortion was not at stake.[72] And the National Right to Life Committee explained, "[u]nborn victims laws do not affect legal abortion, but they do allow justice to be done for unborn babies whose lives are snuffed out by the actions of violent criminals, and for the parents and grandparents of such victims."[73]

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[68] People v. Davis, 872 P.2d 591, 599 (Cal. 1994).

[69] State v. Holcomb, 956 S.W.2d 286, 291 (Mo. Ct. App. 1997).

[70] State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990); State v. Alfieri, 724 N.E.2d 477, 483 (Ohio Ct. App. 1998) (explaining that, even under *Roe*, "there has never been any notion that a third party . . . has a fundamental liberty interest in terminating another's pregnancy" (quoting State v. Coleman, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997))); Commonwealth v. Wilcott, 86 ERIE COUNTY LEGAL J. 1, 14-16 (Pa. Ct. Com. Pl. Jan. 24, 2003) (rejecting a challenge that the Pennsylvania Crimes Against Unborn Children Act violates *Roe* and its progeny because it criminalizes the killing of a fetus from the point of conception, since *Roe* also protects the right of a mother "to carry her child to term").

[71] Ramsey, *supra* note 4, at 725; *see also supra* note 61 and accompanying text.

[72] 150 CONG. REC. S3136 (daily ed. Mar. 25, 2004) (statement of Sen. Santorum) (stating that the UVVA "has nothing to do with abortion").

[73] Letter from Douglas Johnson, Legis. Dir., Nat'l Right to Life Comm., to the U.S. Senate (Feb. 1, 2004), *available at* http://www.nrlc.org/Unborn_Victims/Senateletter020104.pdf.

Judicial accommodation of fetal rights and legislative respect for maternal liberty suggest widespread institutional endorsement of the bifurcated fetal-rights scheme. Moreover, public opinion polls show that Americans indeed support this balance struck by their judicial and legislative institutions.[74] While structural and popular endorsements are certainly suggestive of a societal consensus, they do not, of course, ensure the stability of that consensus over time. To get a better sense of the scheme's potential chasms, the next Section briefly surveys the leading attacks against the bifurcated fetal-rights scheme.

D. *Criticism of the Bifurcated Fetal-Rights Scheme*

Despite a coalition of institutional support for the bifurcated fetal-rights scheme, there are outspoken critics on both sides of the abortion issue who view the scheme as flawed and ultimately unsustainable. For example, in 1999, five years before the UVVA was signed into law, the National Abortion and Reproductive Rights Action League warned that a federal fetal-homicide law would "'forge new legal ground that would eventually undermine' the *Roe vs. Wade* decision."[75] And the ACLU argued that the UVVA would "separate the woman from her fetus in the eyes of the law. Such separation is merely the first step toward eroding a woman's right to determine the fate of her own pregnancy and to direct the course of her own health care."[76] During the UVVA floor debate, pro-choice members of Congress issued ominous warnings. Senator Russ Feingold stated that "by recognizing the fetus as an entity against which a separate crime can be committed, the Unborn Victims of Violence Act may undermine women's reproductive rights as set forth by the Supreme Court in *Roe v. Wade*."[77] And Senator Dianne Feinstein predicted

[74] *See* Ramsey, *supra* note 4, at 734 (stating that fetal-homicide laws tend to "track the middle ground of public opinion"); Roper Ctr. for Pub. Opinion Research, ABC News Poll, Question ID: USABC.090605 R29 (Sept. 6, 2005), *available at* LexisNexis, Public Opinion Online, Acc-No. 1633001 (sixty percent of those polled want the Roberts Court to uphold *Roe*); Roper Ctr. for Pub. Opinion Research, CBS News Poll, Question ID: USCBS.080405 R56 (Aug. 4, 2005), *available at* LexisNexis, Public Opinion Online, Acc-No. 1631372 (noting that sixty percent of those polled described the *Roe* decision as a "good thing"); *see also* H.R. REP. NO. 108-420, pt. 1, at 5 (2004) (observing that "84% of Americans believe that prosecutors should be able to bring a homicide charge on behalf of an unborn child killed in the womb" by someone other than the pregnant woman or an abortion provider).

[75] *House Votes To Make Hurting Fetus a Crime*, DESERET MORNING NEWS (Salt Lake City), Oct. 1, 1999, at A2 (quoting Kate Michelman, President of the National Abortion and Reproductive Rights Action League).

[76] Memorandum from the ACLU Wash., D.C., Nat'l Office to Interested Persons on Attempts to Create Fetal Rights: The Unborn Victims of Violence Act of 2003 (S. 1019/S. 146, H.R. 1997) (June 17, 2003), http://www.aclu.org/reproductiverights/fetalrights/12535leg20030617.html.

[77] 150 CONG. REC. S3149 (daily ed. Mar. 25, 2004) (statement of Sen. Feingold). R. Alta Charo, Warren P. Knowles Professor of Law and Bioethics at the University of Wisconsin,

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*."[78] Similarly, in the House debate, Representative Zoe Lofgren observed that the "underlying intent" of the UVVA was to make "American women . . . give up their [reproductive] freedom in order to get protection from violence."[79]

On the pro-life side of the issue, Senator Orrin Hatch responded to pro-choice criticism of the UVVA by observing: "'They say it undermines abortion rights. It does undermine it. . . . But that's irrelevant.'"[80] Representative Ron Paul, a strident proponent of fetal rights,[81] complained during a House of Representatives debate in 2001 that fetal-homicide legislation employs

> the odd legal philosophy that an abortionist with full knowledge of his terminal act is not subject to prosecution while an aggressor acting without knowledge of the child's existence is subject to nearly the full penalty of the law. . . . It is becoming more and more difficult for congress [sic] and the courts to pass the smell test as government simultaneously treats the unborn as a person in some instances and as a non-person in others.[82]

The fervent concerns of certain legislators, advocacy groups, and commentators – on both sides of the abortion issue – raise a genuine issue as to whether the bifurcated fetal-rights scheme can be sustained over the coming decades. Due to the substantial liberties at stake, their warnings cannot simply be ignored out of hand. The remainder of this Article therefore seeks to address the following questions: First, do fetal-homicide laws reflect a societal understanding that a fetus is a "person"? And, second, is fetal "personhood" incompatible with the right to abortion? To better inform the debate on these issues, this Article turns to the work of John Rawls, whose ideas are often regarded as the central starting point for discussions of justice.

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submitted the following statement to the Senate: "If you can get enough of these bricks in place, draw enough examples from different parts of life and law where embryos are treated as babies, then how can the Supreme Court say they're not?" *Id.* at 3127 (statement of Sen. Feinstein) (internal quotation marks omitted).

[78] *Id.* at 3126 (statement of Sen. Feinstein). Senator Feinstein further warned that the UVVA's definition of homo sapiens "will be the first step in removing a woman's right to choice." *Id.* She explained: "[O]nce declared legally, that law becomes the stepping-stone to refuse embryonic stem cell research and to ban abortion. Once the law defines human life as beginning at conception, stem cell research could become murder, abortion becomes murder, even in the first days of a pregnancy." *Id.* at 3127.

[79] 150 CONG. REC. H665 (daily ed. Feb. 26, 2004) (statement of Rep. Lofgren).

[80] Kate Snow, *Laci Peterson Family Endorses "Unborn Victims" Bill*, CNN.COM, May 8, 2003, http://www.cnn.com/2003/ALLPOLITICS/05/07/laci.bill (quoting Sen. Hatch).

[81] *See, e.g.*, Ron Paul, *Pro-Life Action Must Originate from Principle*, LEWROCKWELL.COM, June 4, 2003, http://www.lewrockwell.com/paul/paul100.html ("I have long been concerned with the rights of unborn people.").

[82] 147 CONG. REC. 6326 (2001) (statement of Rep. Paul).

II. RAWLS'S POLITICAL PHILOSOPHY

John Rawls is widely regarded as the most distinguished moral and political philosopher of our past century.[83] His seminal work, *A Theory of Justice*, published in 1971, introduced to the world his unique methodology for framing issues of distributive justice.[84] Rawls's conception of justice, which he named "justice as fairness,"[85] revived interest in many of the substantive questions of political philosophy, and has had a lasting impact in modern scholarship as a whole.[86] Later in his career, Rawls turned his attention to issues of political stability. His work in this area culminated with the publication of *Political Liberalism* in 1993.[87] In the last years of his life, Rawls strived to integrate the ideas from *A Theory of Justice* and *Political Liberalism* into a unified philosophical framework of justice and stability.[88]

Taking Rawls's writings in their entirety, it is virtually impossible to know how he understood the morality or political implications of juxtaposing fetal-homicide laws with abortion. His work, for instance, never references the potential implications of a societal recognition of fetal personhood. And in the two brief passages in which he does discuss the right to abortion, one quickly realizes that he was agnostic regarding the inherent fairness of the procedure. On the one hand, Rawls wrote the following in a note to *Political Liberalism*:

> Now I believe any reasonable balance of [the values of due respect for human life, ordered reproduction of political society over time, and the equality of women as equal citizens] will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the

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[83] Nussbaum, *supra* note 10; *accord* Ben Rogers, *The Good Life*, NEW STATESMAN, Sept. 20, 1999, at 55 (reviewing JOHN RAWLS, JOHN RAWLS: COLLECTED PAPERS, *supra* note 11) ("[Rawls] is now often said to be the most important political philosopher of the century in any language.").

[84] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) [hereinafter RAWLS, THEORY OF JUSTICE].

[85] *Id.* at 3. Despite having made "a number of important revisions" to the 1971 edition, Rawls contends that he "still accept[s] its main outlines and defend[s] its central doctrines." *Id.* at xi.

[86] *See* Nussbaum, *supra* note 10 ("The ideas took hold through their own power, decisively shifting the climate of debate not only in philosophy but also in such fields as economics, law, and public policy. . . . Thirty years after publication of *A Theory of Justice*, with all the discussion of rights and pluralism that has ensued, it is easy to forget that a whole generation of our political and moral philosophers had virtually stopped talking about that idea . . . .").

[87] *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993).

[88] *See* RAWLS, RESTATEMENT, *supra* note 14, at xv ("The other aim [of this book] is to connect into one unified statement the conception of justice presented in *Theory* [*of Justice*] and the main ideas found in my essays beginning with 1974.").

> political value of the equality of women is overriding, and this right is required to give it substance and force.[89]

And on the other hand, Rawls later wrote in response to comments on that note:

> Some have quite naturally read the footnote in *Political Liberalism* . . . as an argument for the right to abortion in the first trimester. I do not intend it to be one. . . . I don't say the most reasonable or decisive argument; I don't know what that would be, or even if it exists.[90]

The mere fact that Rawls did not stake out a clear position on the issue of abortion does not, of course, mean that his philosophical model is unhelpful to the matter before us. For the legacy of Rawls is, to be sure, not a laundry list of "just" policies, but rather it is a unique theoretical approach to describe and evaluate the justness of policy determinations as they shift over time. The following paragraphs set forth Rawls's views on justice and explain how they can assist us in our efforts to measure the stability of the bifurcated fetal-rights scheme.

A. *Rawls's Philosophy*

Rawls's political philosophy evolved over the course of his career,[91] and, in its final form, claimed that pluralistic societies are well-ordered when their societal judgments accord with those principles of justice implicated by a shared political conception of justice.[92] Rawls argued that a particular political

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[89] JOHN RAWLS, *The Idea of Public Reason (Feb.–Mar. 1990)*, *in* POLITICAL LIBERALISM, *supra* note 87, 212, 243 n.32 [hereinafter RAWLS, *Public Reason*].

[90] RAWLS, *Public Reason Revisited*, *supra* note 11, at 605 n.80; *see also* Jeremy Waldron, *The Plight of the Poor in the Midst of Plenty*, LONDON REV. BOOKS, July 15, 1999, at 6 (reviewing JOHN RAWLS, JOHN RAWLS: COLLECTED PAPERS, *supra* note 11) (discussing Rawls's ambiguous public statements regarding the justness of abortion). In contrast, one commentator has observed:

> It is sobering to observe that even in the hands of a careful and high-minded thinker such as Rawls, the appeal to public reason can serve to highhandedly deny the reality of competing goods and tragic choices and intractable questions – to disguise, in other words, reason's limits. The master's lapse dramatizes how readily partisan intellectuals might arrogate public reason and, thus armed, use it in the heat of public debate to dispense with reason, cut off discussion, shut down questioning, and stop the inquiring mind dead in its tracks. . . . [I]n the end it is less that Rawls is confused than that his conscientious philosophical investigations lead him to keep bumping up against fundamental tensions in the liberal spirit.

Peter Berkowitz, *John Rawls and the Liberal Faith*, WILSON Q., Spring 2002, at 60, 66-68.

[91] *See* RAWLS, RESTATEMENT, *supra* note 14, at xv-xvi.

[92] *See* JOHN RAWLS, *The Idea of an Overlapping Consensus (1987)*, *in* POLITICAL LIBERALISM, *supra* note 87, at 133, 134 [hereinafter RAWLS, *Overlapping Consensus*]. Rawls's "pluralism" should be distinguished from that of Isaiah Berlin. As Charles Lamore put it:

conception – his own ideal of "justice as fairness" – was in fact best suited to generate a public consensus in pluralistic societies. The following Sections outline the core components of his writings, namely: the original position, principles of justice, the public domain, and reflective equilibrium.

1. The Original Position

Building on a rich tradition of political philosophy (most notably the writings of Locke, Rousseau, and Kant), Rawls's model of justice is founded on a contractarian theory.[93] His starting point is the "original position," a hypothetical place where parties choose together, in one joint act, a system of justice to govern society's basic institutions.[94] The original position is analogous to the "state of nature" in traditional theories of social contract.[95] The parties at the original position constitute rational agents acting on behalf of all "those who could take part in the initial agreement, were it not for fortuitous circumstances."[96] This constituency includes those with (1) the capacity for a sense of justice and (2) the capacity for a conception of the good.[97]

A central tenet of the original position is that agents select their system of justice from behind a "veil of ignorance."[98] The objective of the veil is to

> Berlin's pluralism is a positive doctrine according to which there are many ultimate, irreducible, and sometimes incompatible ends of life. The pluralism Rawls has in mind might be better described as the existence of reasonable disagreement about the nature of the human good (Berlin's value-pluralism being one of the views in dispute).

Charles Lamore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 368, 392 n.8 (Samuel Freeman ed., 2003).

[93] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 10; *see also* RAWLS, *Public Reason*, *supra* note 89, at 217 (explaining that government coercion is only legitimate when "exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational").

[94] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 10-11.

[95] *Id.* at 11; *cf.* Berkowitz, *supra* note 90, at 64 ("Rawls himself sometimes notes . . . that the original position is not a point of departure for discovering morality's premises so much as a formulation of them and a means for sketching out some of their most basic practical implications.").

[96] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 446.

[97] RAWLS, RESTATEMENT, *supra* note 14, at 19-20.

[98] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 11 ("Among the essential features of this situation is that no one knows his place in society, his class position or social status . . . . The principles of justice are chosen behind a veil of ignorance."). The concept of the "veil of ignorance" was first devised by John Harsanyi in 1953. *See* John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 434-35 ("Now, a value judgment on the distribution of income would show the required impersonality to the highest degree if the person who made this judgment had to choose a particular income distribution in complete ignorance of what his own relative position . . . would be within the system chosen."). Rawls and Harsanyi, however, came to very different conclusions about how humans behave behind the veil. *Compare* RAWLS, THEORY

counter each party's potential for bias during the selection process,[99] thereby creating the fundamental fairness of conditions necessary for a just and pluralistic society to emerge through the mechanism of a social contract.[100] It thereby conceals what Rawls referred to as politically irrelevant information, which includes one's race, gender, intelligence, family, social position, and – importantly – one's own notions of a moral, religious, or philosophical good.[101] "By situating the parties symmetrically, the original position respects the basic precept of formal equality, or Sidgwick's principle of equity: those similar in all relevant respects are to be treated similarly."[102]

OF JUSTICE, *supra* note 84, at 278 (arguing that "one of the chief aims of justice as fairness is to construct an alternative to the classical utilitarian doctrine"), *with* JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 5 (1996) ("Harsanyi purported to show that utilitarianism would emerge from the contemplation of souls behind a veil of ignorance.").

[99] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 118 (explaining that the veil of ignorance seeks to "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage").

[100] *See* RAWLS, RESTATEMENT, *supra* note 14, at 18 (discussing the fairness of bargaining conditions in the original position); JOHN RAWLS, *The Law of Peoples*, *in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 11, at 529, 538 (stating the essential condition that "the original position represents the parties (or citizens) fairly, or reasonably"). Notably, when placed behind a veil, agents will rarely disagree on the governing conception; thus, conceptions are *chosen*, rather than bargained for, at the original position. *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 119.

[101] JOHN RAWLS, *The Powers of Citizens and Their Representation (April 1980)*, *in* POLITICAL LIBERALISM, *supra* note 87, at 47, 79 (1993) [hereinafter RAWLS, *Powers of Citizens*] ("Features relating to social position, native endowment, and historical accident, as well as the content of persons' determinate conceptions of the good, are irrelevant, politically speaking, and hence placed behind the veil of ignorance."); RAWLS, RESTATEMENT, *supra* note 14, at 15 ("In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent."). In addition to concealing the ultimate personal characteristics and beliefs of the agents, the veil ensures that agents lack information to assess the probabilities as to who they might be beyond the veil. *See id*. at 98 ("[P]arties have no reliable basis for estimating the probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent.").

[102] RAWLS, RESTATEMENT, *supra* note 14, at 87; *accord* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 118 ("[Parties] do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations."). This conception of equality borrows from economic theories about human behavior where "role-reversibility" exists. *See, e.g.*, Francesco Parisi, *The Formation of Customary Law* 10 (George Mason Univ. Sch. of Law: Law and Econ. Research Paper Series, Paper No. 01-06, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262032 ("Similar to a Rawlsian veil of ignorance, role reversibility and stochastic symmetry induce each member to agree to a set of rules that benefits the entire group, thus maximizing her expected share of the wealth.").

Although personal and political information is placed behind the veil, Rawls was unequivocal that agents at the original position have access "to the same body of general facts . . . and to the same information about the general circumstances of society."[103] They know, for example, that they will invariably possess certain traits and hold certain beliefs within a diverse and pluralistic society.[104] Rawls instructed that from this general knowledge the agents will identify a uniform set of "primary goods," which are what free and equal persons need as citizens.[105] These primary goods constitute those "social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their two moral powers, and to pursue their determinate conceptions of the good."[106] In Rawls's contractarian model, a common interest in preserving primary goods allows the parties to reach an agreement on a single political "conception of justice."[107] The chosen conception is the one which, from a menu of all plausible conceptions, appears to offer the best protection of the primary goods.[108]

[103] RAWLS, RESTATEMENT, *supra* note 14, at 87.

[104] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 119 ("It is taken for granted, however, that [parties in the original position] know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed the parties are presumed to know whatever general facts affect the choice of the principles of justice.").

[105] *See* RAWLS, RESTATEMENT, *supra* note 14, at 58. Prominent among these goods are freedom of movement, freedom of thought and liberty of conscience, freedom of the person and political liberty. *See id.* at 58-59.

[106] *Id.* at 57.

[107] *Id.* at 60 ("Primary goods, then, are what free and equal persons . . . need as citizens. . . . [S]ome conceptions of the good are indispensable for any account of justice, political or other."); *see* JOHN RAWLS, *Fundamental Ideas (April 1980)*, *in* POLITICAL LIBERALISM, *supra* note 87, at 3, 10 [hereinafter RAWLS, *Fundamental Ideas*] (explaining that a political conception of justice seeks support from these doctrines and how, despite differences within the doctrines, citizens "can still maintain a just and stable democratic society"); RAWLS, *Overlapping Consensus*, *supra* note 92, at 134 ("Social unity is based on a consensus on the political conception; and stability is possible when the doctrines making up the consensus are affirmed by society's politically active citizens and the requirements of justice are not too much in conflict with citizens' essential interests as formed and encouraged by their social arrangements."); *accord* Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1771-72 (1994) (book review) ("This means that different people can be persuaded to endorse liberal political arrangements, such as equal basic liberties, for different reasons, reflecting the various comprehensive moral and religious conceptions they espouse.").

[108] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 581. Rawls is clear, however, that this menu is limited to "those political conceptions that are reasonable for a constitutional democratic regime." *Id.* at 585. The general rationale is that human beings are risk-averse, and when faced with poor information regarding their eventual position in society, they will never place their basic rights in jeopardy for the benefit of the greater good. Agents, for example, would not select a conception which tolerated slaves and

Leading conceptions include utilitarianism, classical natural rights models, and Rawls's own model of "justice as fairness."[109] Rawls intimated that it was likely agents would ultimately settle on justice as fairness as the preferred conception of justice.[110]

2. Principles of Justice

An important component of Rawls's model is how a political conception of justice, which is chosen at the original position, leads to the particular principles of justice which govern society.[111] A political conception can implicate principles in two ways. First, some principles are *given by* the conception.[112] Rawls instructed that a conception thus "fixes, once and for all, the content of basic rights and liberties, takes those guarantees off the political agenda, and puts them beyond the calculus of social interests."[113] These are

masters because they would be unwilling to risk being a slave when the veil lifted. To ensure equality, agents select a conception that compensates citizens saddled with unfavorable, but irrelevant, traits or circumstances. *Cf.* RAWLS, RESTATEMENT, *supra* note 14, at 64 (discussing the "difference principle" which requires that any existing inequalities in society "must contribute effectively to the benefit of the least advantaged"). *But see* Cass R. Sunstein, *Hazardous Heuristics* 21 (Univ. Chi. Law Sch. John M. Olin Law & Econ. (2d Series), Working Paper No. 165, 2002), *available at* http://www.law.uchicago.edu/academics/publiclaw/resources/33.crs.hazardous.pdf (discussing the optimistic bias inherent in human behavior).

[109] RAWLS, RESTATEMENT, *supra* note 14, at 9 (listing potential political conceptions of justice as including "a particular natural rights doctrine, or a form of utilitarianism, or justice as fairness"); RAWLS, *Public Reason Revisited*, *supra* note 11, at 581 ("There are . . . many forms of public reason specified by a family of reasonable political conceptions. Of these, justice as fairness, whatever its merits, is but one."); *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 153 (1980) (discussing the concept of shared group norms and their relation to the "common good"); JOHN STUART MILL, UTILITARIANISM (George Sher ed., Hackett Publ'g Co. 1979) (1861).

[110] *See* RAWLS, RESTATEMENT, *supra* note 14, at 61.

[111] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 11-12. The principles of social justice are applied to "choos[e] among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares." *Id.* at 4.

[112] For instance, see RAWLS, *Public Reason Revisited*, *supra* note 11, at 608-09, stating:

> [A]ll reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion. On the other hand, comprehensive doctrines that cannot support such a democratic society are not reasonable. Their principles and ideals do not satisfy the criterion of reciprocity, and in various ways they fail to establish the equal basic liberties. As examples, consider the many fundamentalist religious doctrines, the doctrine of the divine right of monarchs and the various forms of aristocracy, and, not to be overlooked, the many instances of autocracy and dictatorship.

[113] RAWLS, RESTATEMENT, *supra* note 14, at 194; *see* Joshua Cohen, *For a Democratic Society*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 92, at 86, 113 ("So justice as

the principles that all parties at the original position can agree are necessary for political justice;[114] they tend to include, among others, freedom of religion and the protection of one's physical integrity.[115] Rawls points out that the principles embedded in the political conception of "justice as fairness" would include "the values of equal protection and civil liberty; fair equality and opportunity; social equality and reciprocity."[116]

The second way a political conception implicates principles of justice is through the process of public reason. Parties at the original position are uncertain of their ultimate position in a pluralistic society.[117] As such, no agreement can be expected regarding certain principles (e.g., those that will be simultaneously valuable and offensive to differing segments of the population).[118] Rawls suggests that principles enjoying no such consensus can nonetheless be legitimized, once the veil of ignorance lifts, through the process of public reason.[119] The idea is that a principle will at least be *tolerable* to those who find it offensive if it can be defended by political values which

fairness conceives of democratic political life as ideally guided by substantive principles of justice set out in advance – principles that are said to articulate the (democratic) idea of society as a scheme of fair cooperation among free and equal persons."). For criticism that this fixture of substantive principles does not facilitate actual political autonomy but rather promotes the nonviolent preservation of political stability, see Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 128 (1995).

[114] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 581.

[115] *See* RAWLS, RESTATEMENT, *supra* note 14, at 189-90.

[116] *Id.* at 90.

[117] *See supra* notes 98-101 and accompanying text.

[118] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 182 ("An individual recognizing religious or moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests.").

[119] RAWLS, *Public Reason Revisited*, *supra* note 11, at 578 ("Thus when, on a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law."); RAWLS, RESTATEMENT, *supra* note 14, at 194 ("[A]s citizens come to appreciate what a liberal conception achieves, they acquire an allegiance to it, an allegiance that becomes stronger over time. They come to think it both reasonable and wise to affirm its principles of justice as expressing political values that, under the reasonably favorable conditions that make democracy possible, normally outweigh whatever values may oppose them. With this we have an overlapping consensus.").

could be agreed upon by all parties at an original position.[120] Rawls referred to this reliance on common values as "reciprocity,"[121] and explained that:

> A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.[122]

The political values selected at the original position thereby set the parameters of the political discourse regarding society's governing principles.[123] "They include not only appropriate use of the fundamental concepts of judgment, inference, and evidence, but also the virtues of reasonableness and fair-mindedness."[124] In sum, Rawls's model provides that principles of justice can be implicated by a conception of justice in one of two ways. They are either (1) inherent to the conception, or (2) they are the product of public reason founded on the values endorsed by the conception.[125]

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[120] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 578 (discussing how citizens will come to "the most reasonable conception of political justice . . . even at the cost of their own interests").

[121] *See id.* ("The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.").

[122] *Id.* at 581. Rawls goes on to state that:

> Some may, of course, reject a legitimate decision, as Roman Catholics may reject a decision to grant a right to abortion. They may present an argument in public reason for denying it and fail to win a majority. . . . [However,] [t]hey can recognize the right as belonging to legitimate law enacted in accordance with legitimate political institutions and public reason, and therefore not resist it with force.

Id. at 606 (footnote omitted). Although Rawls uses the abortion debate as an example of public reason, I explain in the next Section why the resolution of the abortion issue is not left to public reasoning when agents settle on justice as fairness as their political conception of justice.

[123] *Id.* at 584 ("Examples of political values include those mentioned in the preamble to the United States Constitution: a more perfect union, justice, domestic tranquillity, the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity. These include under them other values: so, for example, under justice we also have equal basic liberties, equality of opportunity, ideals concerning the distribution of income and taxation, and much else.") Importantly, Rawls introduced the concept of the "proviso." This idea allows for individuals holding policy views based on unreasonable political values to participate in public reason so long as they use acceptable values in their effort to persuade others. *See id.* ("This requirement still allows us to introduce into political discussion . . . our comprehensive [moral] doctrine . . . provided that . . . we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.").

[124] RAWLS, RESTATEMENT, *supra* note 14, at 91-92.

[125] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 581-82 (discussing the content of public reason).

3. Public Domain

Principles of justice have a limited applicability in that they are confined to the "public domain." Rawls's public domain encompasses society's "basic structure,"[126] or, in other words, our political, social, and economic institutions.[127] These institutions, writes Rawls, are highly determinative of the individual's prospects in life – they "define men's rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do."[128] Examples of such institutions include "the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family."[129]

The family – an institution central to the subject of this Article – falls only partly within Rawls's public domain.[130] While the public domain does not encompass the family's role as a locus of affection, relaxation, personal conflict, and support,[131] it does extend to the family when it serves as a place for institutionalized abuse or leads to unjust desires in its members.[132] Rawls explained that there are times when "the individual members of families [need protection] from other family members."[133] Accordingly, principles of justice can thereby require parents to respect the rights of their children, and not, for

[126] RAWLS, *Public Reason*, *supra* note 89, at 223 (writing that the principles govern "the basic structure of . . . political, social, and economic institutions as a unified scheme of social cooperation").

[127] *Id*.

[128] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 6-7.

[129] *Id*. at 6.

[130] *See, e.g.*, RAWLS, *Public Reason Revisited*, *supra* note 11, at 597 ("[P]olitical principles do not apply directly to its internal life, but they do impose essential constraints on the family as an institution and so guarantee the basic rights and liberties, and the freedom and opportunities, of all its members.").

[131] *See id.* at 598 ("[A]t some point society has to rely on the natural affection and goodwill of the mature family members."); *cf.* Nussbaum, *supra* note 10 ("[Rawls] gives parents a very large measure of unqualified control over the upbringing of their children, even when they deny girls equal opportunity by teaching them the unequal worth of females.").

[132] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 598 (stating that "the principles of justice impose constraints on the family on behalf of children who as society's future citizens have basic rights as such," and arguing that children who witness injustices within the family face difficulty in "acquir[ing] the political virtues required of future citizens in a viable democratic society"); *see also* Martha C. Nussbaum, *Rawls and Feminism*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 92, at 488, 504 ("[C]hildren are simply hostages to the family in which they grow up, and their participation in its gendered structure is by no means voluntary.").

[133] RAWLS, *Public Reason*, *supra* note 89, at 221 n.8. For criticism of Rawls's treatment of the family, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193-94 (1989); Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23, 25-28 (1994).

example, subject them to certain forms of physical abuse or deprive them of essentials such as medical care.[134]

4. Reflective Equilibrium

An important component of Rawls's philosophical model is that the conception of justice selected at the original position is only *justified* when it is consistent with society's "considered judgments" about justice.[135] Rawls instructed that the alignment of our conception of justice (and its implicated principles) with our judgments is called "reflective equilibrium."[136] "It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation."[137] The model provides that society naturally brings the two into accord by working from both ends: it will either "modify the account of the initial situation or . . . revise [its] existing judgments."[138] By going back and forth, adjusting our considered judgments and principles of justice, we deliberately bring ourselves into reflective equilibrium.[139] At this point, society is well-ordered according to Rawls.[140]

B. *Gauging the Sustainability of Societal Judgments*

Rawls's political philosophy undoubtedly provides insight into the sustainability of certain societal judgments. We know that a society out of

[134] RAWLS, RESTATEMENT, *supra* note 14, at 11.

[135] *See id.* (discussing the definition of a "narrow reflective equilibrium"). Considered judgments demand that a person: (1) Is aware of relevant facts about the issue in question; (2) Is able to concentrate on this question; and (3) Does not stand to gain or lose on the basis of the answer given. T.M. Scanlon, *Rawls on Justification*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 92, at 139, 143.

[136] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18. Rawls notes that this is an adaptation of Nelson Goodman's model. *Id.* at 18 n.7 (citing NELSON GOODMAN, FACT, FICTION, AND FORECAST 65-68 (1955)). The idea is that we should correct or revise our views about particular inferences we initially might think are acceptable if we come to see them as incompatible with rules that we generally accept and refuse to reject because they, in turn, best account for a broad range of other acceptable inferences. *See* GOODMAN, *supra*, at 63-64.

[137] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18.

[138] *Id.*; *see also* Scanlon, *supra* note 135, at 149 ("But the process of seeking reflective equilibrium is something we each must carry out for ourselves, and it is a process of deciding what to think, not merely one of describing what we do think. . . . Moreover, it seems to me that this method, properly understood, is in fact the best way of making up one's mind about moral matters and about many other subjects.").

[139] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18-19.

[140] *Id.* at 18. Rawls described this as "a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles." *Id.* at 4.

reflective equilibrium will naturally seek equilibrium.[141] This search for equilibrium often causes "rogue" societal judgments to shift toward the principles implicated by the governing conception of justice.[142] Rawls observed that: "When a person is presented with an intuitively appealing account of his sense of justice (one, say, which embodies various reasonable and natural presumptions), he may well revise his [societal] judgments to conform to its principles even though the theory does not fit his existing judgments exactly."[143] Rawls further emphasized that "even the judgments we take provisionally as fixed points are liable to revision,"[144] and that "laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[145] But it is important to recall that principles (and, if need be, conceptions) of justice can adjust to our societal judgments. After all, Rawls went to pains to describe the search for reflective equilibrium as "alternating" and "work[ing] from *both* ends."[146]

Because Rawls allowed for the possibility that principles and conceptions of justice will adjust to considered judgments,[147] a Rawlsian analysis of the

[141] *See id*. at 18 (describing how society will match its judgments with the principles of justice); Scanlon, *supra* note 135, at 149; Waldron, *supra* note 90, at 3.

[142] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18.

[143] *Id.* at 42-43; *see also* RAWLS, RESTATEMENT, *supra* note 14, at 30 ("When the person in question adopts [a] conception and brings other judgments in line with it we say this person is in narrow reflective equilibrium.").

[144] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18.

[145] *Id.* at 3. Rawls cites the example of the United States in the years leading up to the Civil War. *See* RAWLS, *Public Reason*, *supra* note 89, at 249-50. He suggested that American society was in reflective disequilibrium due to the emerging gulf between its societal judgment tolerating slavery and its principle of justice that all members of society are free and equal. *See id*. Ultimately, with the emancipation of slaves, the judgment shifted, thereby becoming more aligned with its underlying principle of justice. *See id.* at 250 (mentioning how the "political force leading to the Civil War" could be seen as an effort to "bring about a well-ordered and just society").

[146] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 18 (emphasis added).

[147] It is important to emphasize the distinction between judgments and *considered* judgments, which are:

> [Judgments] that seem clearly to be correct under conditions conducive to making good judgments of the relevant kind; that is, when one is fully informed about the matter in question, thinking carefully and clearly about it, and not subject to conflicts of interest or other factors that are likely to distort one's judgment.

Scanlon, *supra* note 135, at 140. While reflective equilibrium does work from two ends, principles (and conceptions) will only conform to *considered* judgments. *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 42 ("[T]he principles which would be chosen in the original position are identical with those that match our considered judgments . . . ."). Regular societal judgments, on the other hand, will always conform to our principles in reflective equilibrium. If the fetal-rights scheme were not deemed a considered judgment, there would be no need to account for the possibility that our principles might theoretically adjust to it. While it is possible that, due to the strong emotions involved in the debate of

stability of a particular judgment must ask whether there are *any* principles implicated by a reasonable conception of justice which could correspond with that judgment. If there are not, then the judgment is a rogue and must, according to Rawls's political model, be reformed to some degree.

But how do we discover the principles that could be implicated by reasonable political conceptions of justice? It should be remembered that principles of justice can be derived from a conception of justice in one of two ways. First, principles can be dictated by the conception. Second, principles can manifest through public reason informed by the values of the conception. Accordingly, a two-part "sustainability" test can be distilled: a societal judgment is inherently unstable under Rawlsian theory if it fails to match either (1) principles inherent to a reasonable conception or (2) principles which emerge through the process of public reasoning. The following Part applies this analysis to evaluate the stability of the bifurcated fetal-rights scheme.

III. THE STABILITY OF THE BIFURCATED FETAL-RIGHTS SCHEME

John Rawls's model of justice provides us with useful information about the bifurcated fetal-rights scheme. The scheme, as discussed in Part I, constitutes a blend of strong fetal protections and abortion rights. And we know from Part II that it is unstable in a Rawlsian sense if it does not correlate with a principle manifesting from a conception of justice that could be agreed upon at the original position. The entirety of this Article considers the application of this sustainability test. Section A deduces all those principles of justice that plausibly match the scheme. Section B examines these "matching principles" and seeks to identify those original positions where parties could choose a conception of justice implicating such principles. It concludes that, in a Rawlsian society, fetal-homicide laws necessarily reflect the "personhood" status of fetuses. Section C then analyzes the reasonableness of each "presumed original position" in light of Rawls's writings, and concludes that, from a Rawlsian perspective, our current fetal-homicide laws cannot be reconciled with abortion rights.[148]

fetal rights, the judgment fails to rise to the level of "considered," this Article nonetheless plays it safe and presumes, *arguendo*, that it does.

[148] As a theoretical matter, one could also analyze a judgment's stability through inductive reasoning. This would entail: (1) devising a reasonable original position; (2) deriving its implicated principles of justice; and (3) comparing these principles to society's judgments. This inductive approach, however, is not practical. By starting with a *devised* original position, the outcome of the entire stability analysis would turn on the subject's arbitrary impression of whether certain personal characteristics were irrelevant. Such a methodology also fails to appreciate that a societal judgment could match principles implicated at more than one reasonable original position. Thus, the deductive approach followed in this Article is preferable as it starts from a more reliable position (current societal judgments) and accounts for the possibility that several reasonable original positions could implicate principles matching these judgments.

A. *Deducing Matching Principles of Justice*

The first step of the Rawlsian sustainability analysis is to inventory all of the principles of justice that could plausibly correspond to the bifurcated fetal-rights scheme. The contours of the scheme, which were set forth in Part I, are illustrated in Table 1:

Table 1: The Fetal-Rights Scheme

ELEMENT OF SCHEME	SOURCE
1. Fetuses at all stages of gestation are unique human beings	Criminal codes
2. The unlawful killing of fetuses is characterized and punished similarly to that of the unlawful killing of born humans	Criminal codes
3. Pregnant women can procure nontherapeutic abortions until viability	*Roe* and progeny
4. Pregnant women can procure therapeutic abortions until birth	*Roe* and progeny
5. Women cannot be prosecuted for committing acts harmful to fetuses in their wombs	Criminal codes

A quick review of this scheme suggests that the two most determinative factors impacting when a fetus enjoys basic human rights are the "party acting on the fetus" and the fetus's "stage of development." This Article assumes that there are two possible types of parties acting on the fetus: either a "mother" or a "third party."[149] It also assumes that rights can be triggered at one of three

[149] "Third parties," as used below, refers to actors that are neither the fetus's mother nor persons acting at the direction of its mother. *See, e.g.*, Commonwealth v. Bullock, 913 A.2d 207, 215 (Pa. 2006) (stating that "the challenged distinction consists of the mother versus everyone else").

stages: "all," "some," or "none." Working under these assumptions, nine plausible principles of justice emerge. These are set forth in Table 2.[150]

Table 2: Potential Principles of Justice

		HUMAN RIGHTS VS. MOTHER		
		All stages	Some stages	No stage
HUMAN RIGHTS VS. THIRD PARTIES	All stages	Principle A	Principle B	Principle C
	Some stages	~~Principle D~~	Principle E	Principle F
	No stage	~~Principle G~~	~~Principle H~~	Principle I

Principles D, G, and H can be dismissed out of hand. It is, after all, inarguable that fetal rights do not emerge vis-à-vis one's mother before they do against third parties. This leaves us with the following six potential principles to explain the current fetal-rights scheme:

(A) Human rights vest against both their mothers and third parties at all stages of gestation.

(B) Human rights vest against third parties at all stages of gestation and against their mothers at a particular stage of gestation.

(C) Human rights vest against third parties at all stages of gestation, and never against their mothers.

(E) Human rights vest against mothers and third parties at a particular stage of gestation.

(F) Human rights vest against third parties at a particular stage of gestation, and never against their mothers.

(I) Human rights do not vest against either their mothers or third parties at any stage of gestation.

Principle A, which holds that fetuses have human rights against all parties at all times, makes a bad match because it conflicts with Elements 3 through 5 of the fetal-rights scheme. This principle most directly contravenes the Supreme

[150] One could debate whether, taking into account the right to abortion, the fetus (1) lacks human rights vis-à-vis its mother, or (2) has human rights which are simply outweighed by its mother's right to privacy or liberty. Human rights are "core" rights (e.g., the right to life) which can be overridden only under discrete and well-defined circumstances (e.g., just war and certain types of self-defense). This Article works on the premise that a fetus lacks human rights in any relationship in which its right to life can be lawfully overridden for a reason falling outside the traditional list of justifications.

Court's declaration in *Casey*[151] that a state may not place an undue burden on a pregnant woman's ability to obtain nontherapeutic abortions prior to fetal viability.[152] The mother's right to abort a pre-viable fetus at her unfettered discretion indicates that pre-viable fetuses lack human rights in their relationships with their mothers. It seems Principle A could only match the fetal-rights scheme if society were to adopt unreasonably expansive theories of implicit consent or self-defense. The idea would be that the pre-viable fetus has human rights but implicitly consents to all acts of its mother – including her decision to terminate it. But theories of implied consent are applied under narrow and rare circumstances. And it is simply unreasonable to suggest that an American court would impute an implied consent to be killed from the silence of a party in a temporary state of physical dependence.[153] Similarly, it would be improper to expand the doctrine of self-defense in this circumstance. The principle of self-defense permits one to use deadly force against another person when faced with imminent threat of death or great bodily harm[154] – threats that are by definition absent in the context of non-therapeutic abortions. And so it seems clear that Principle A is a poor match for the current bifurcated fetal-rights scheme.

Also off the mark are Principles E, F, and I, each of which provides, among other things, that pre-viable fetuses lack human rights against third parties. As outlined in Elements 1 and 2, the majority of fetal-homicide laws expressly define pre-viable fetuses as human beings (or persons), recognize such fetuses as victims separate from their mothers, and similarly characterize and punish the unlawful killing of born persons and fetuses.[155] Principles E, F, and I could only match the scheme if fetal-homicide laws were nothing more than a legal fiction enacted for the sole purpose of protecting the mother's reproductive rights. But as discussed in Part I, fetal-homicide laws draw no exception for those instances where the mother (or other family members) are opposed to the prosecution of the third-party perpetrator. Put simply, fetal-homicide laws

[151] 505 U.S. 833 (1992).

[152] *Id.* at 877 ("[W]e answer the question . . . whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. The answer is no." (citation omitted)).

[153] *See* Collins v. Heaster, 619 S.E.2d 165, 169-70 (W. Va. 2005) (finding no precedent to support the appellant's "expansive view of implied consent," and observing "[i]t is noteworthy that these limited examples of 'implied' consent from other jurisdictions involve circumstances where immediate action was necessary to avoid serious harm or risk of harm [to the consenting party]"); R v. Dudley & Stevens, (1884) 14 Q.B.D. 273, 286-87 (rejecting the theory that a cabin boy killed on the high seas would have hypothetically agreed that the defendants' lives were more important than his, and would have been willing to die so that the defendants could carry on as breadwinners for their families).

[154] *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (1962).

[155] *See supra* notes 23 & 25 (listing state fetal-homicide laws).

seek, at least in part, to protect and vindicate the rights of *fetuses* against third parties.

The two closest matches – Principles B and C – each recognize that fetuses have human rights against third parties, and that *pre-viable* fetuses have no rights against their mothers. So it is clear, no matter which principle governs, that we are working within a human-rights dichotomy.[156] But the two principles split on the murkier issue of whether the dichotomy extends to *viable* fetuses: Principle B holds that fetuses have rights against third parties at all stages and none against their mothers at certain stages of gestation (i.e., pre-viability); Principle C holds that fetuses at all stages have rights against third parties and none vis-à-vis their mothers. At quick glance, neither theory appears to be a particularly good match: Principle B because it fails to account for the maternal safe harbor in fetal-homicide laws (Element 5); and Principle C because the Constitution does not guarantee a mother's right to nontherapeutic, post-viability abortions (the corollary to Element 3).

The apparent flaw in Principle B becomes more pronounced under scrutiny. The maternal safe harbor provisions (which are included in all fetal-homicide laws) are expansive. They bar prosecutions of mothers, not only for fetal deaths resulting from constitutionally-protected activity, but also for those deaths caused by unprotected acts (such as late-term, nontherapeutic abortions or the use of illicit drugs).[157] Moreover, safe harbor provisions generally apply to acts committed by the mother at *any* point during her pregnancy. Because the law generally exempts a mother from all criminal liability for causing the death of her late-term fetus, it seems unreasonable to conclude that fetal rights ever exist vis-à-vis their mother. Thus, Principle B, which holds that rights of fetuses vest at a particular stage of gestation, does not sufficiently match the fetal-rights scheme.

On the contrary, our initial concerns with Principle C actually diminish upon closer examination. Societal prohibitions on nontherapeutic, post-viability abortions do not necessarily indicate that viable fetuses have human rights relative to their mothers. Rather, the ban is more likely grounded in society's generalized discomfort with a procedure widely perceived to be unnecessary. First, society finds late-term abortions unattractive in large part because viable fetuses tend to resemble newborn babies in both a physical and behavioral sense.[158] Second, late-term abortions are only banned, despite their perceived

[156] In both scenarios, the fetus, during at least some stages of its gestation, faces the dichotomy of having rights against third parties and no rights against its mother.

[157] *See* Commonwealth v. Bullock, 913 A.2d 207, 216 (Pa. 2006) (holding that the legislature had a rational basis for exempting mothers from criminal prosecutions under such circumstances).

[158] *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201, 1206 (codified as amended at 18 U.S.C. § 1531) (stating Congress's conclusion that "[t]he gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing

unattractiveness, when they are *unnecessary*. Regarding a non-therapeutic abortion, the thinking is that the mother has already had several months to evaluate the implications of her pregnancy and deliberate on the issue of abortion.[159] Necessity, however, reemerges when the pregnancy appears to threaten the mother's physical or emotional well-being.[160] Because the maintenance of one's emotional health does not, in our legal tradition, override another person's basic human rights, it seems that the current prohibitions on elective, late-term abortions are grounded in society's general distaste for a seemingly unnecessary procedure rather than the proposition that a fetus possesses human rights vis-à-vis its mother.[161] It thus seems clear that the principle underlying the current fetal-rights scheme is as follows: Fetuses at all stages of gestation possess human rights against third parties and lack human rights against their mothers.[162] The following Sections analyze this matching principle.

similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure").

[159] *See, e.g.*, Greg M. Shaw, *The Polls – Trends: Abortion*, 67 PUB. OPINION Q. 407, 413 (2003) (observing that there is far stronger support for abortions for women whose life or health are threatened by the pregnancy than for those who are motivated by fetal defects, financial hardship, or no desire for children); Public Agenda, Abortion: Overview, http://www.publicagenda.org/issues/overview.cfm?issue_type=abortion (last visited Oct. 9, 2007) (stating that "two-thirds of Americans say abortion should be legal during the first trimester, but . . . drops to 8 percent in the third trimester").

[160] *See* Public Agenda, *supra* note 159 (explaining that more than three-quarters of Americans believe that abortions should be legal when the health of the mother is at risk).

[161] But society's belief that a certain act is unnecessary and a blight (or even that "fetal life" has protectable interests) does not necessarily establish that human rights are at stake. For example, our laws have long prohibited acts of cruelty to many types of animal life. *See generally* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DETROIT C.L. REV. 1 (tracing the origins of anti-cruelty law in the United States from a pure property protection – e.g., prohibition on the stealing of horses – to the ensuing development of anti-cruelty law). Rawls commented:

> Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.

RAWLS, THEORY OF JUSTICE, *supra* note 84, at 448.

[162] It is important to see that the choice between Principles B and C has little effect on the analysis in subsequent Sections. The difference between the two merely relates to how far the dichotomy extends. Under Principle C, we see a rights-dichotomy for all fetuses, but with Principle B it is confined to only pre-viable fetuses. Rawlsians, I argue, should reject both principles for the reasons set forth in Part III.C.

B. *Obviating Public Reason*

The general Rawlsian sustainability test, set forth in Part II, provides that a societal judgment is stable if it matches either (1) a principle inherent in a political conception or (2) a principle that could emerge through the process of public reasoning. Rawls was clear that, at the original position, agents can select from a menu of potential political conceptions of justice. If, theoretically, the agents choose a classical utilitarian or a classical natural-rights conception, it seems that both stability prongs are potentially relevant: the principle could be inherent in the chosen political conception *or* through the process of public reason. This renders the sustainability analysis extremely spongy in that the second prong, public reason, creates a myriad of policy possibilities, leaving us with virtually no opportunity to evaluate the stability of a particular issue. Fortunately, Rawls did not think that agents at the original position would adopt a utilitarian or classical natural-rights conception of justice. He instead believed that the agents would inevitably choose his own ideal of "justice as fairness."[163] Rawls's presumption, it turns out, has a significant impact on our analysis.

Fixing the political conception at justice as fairness simplifies our sustainability analysis of the bifurcated fetal-rights scheme. When agents settle on justice as fairness, the two components of the sustainability test can, for issues which touch on *status or fundamental rights*, be truncated into one. Under such circumstances, the sole issue becomes whether the judgment's matching principle is inherent to the political conception (which is, of course, presumed to be justice as fairness). If not, the societal judgment is unstable.

The justification for dropping the public reason component is straightforward enough: justice as fairness seeks to ensure equality and consistency on issues affecting status or personhood issues.[164] Rawls suggested that the alternative process of public reason is unsuited to determine issues such as "those deriving from differences in status, class position, or occupation, or from differences in ethnicity, gender, or race."[165] He went on to state that "the idea of the person, when specified into a conception of the

[163] *See* RAWLS, RESTATEMENT, *supra* note 14, at 61 ("The hope is that [justice as fairness] with its account of primary goods can win the support of an overlapping consensus.").

[164] This is supported by the fact that Rawls "distinguishes human rights from the liberal democratic rights required by political liberalism." Samuel Freeman, *Introduction* to THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 92, at 47. "To deny people the right to vote or freedom of artistic expression seriously infringes liberal justice, but it is not as egregious as denying them the right to life, torturing or enslaving them, or persecuting them for their religion." *Id.* In such cases, people are "not seen as independent agents with a good that is worthy of respect or consideration." *Id.* (citing JOHN RAWLS, THE LAW OF PEOPLES 68 (1999)).

[165] RAWLS, *Public Reason Revisited*, *supra* note 11, at 612.

person, belongs to a political conception."[166] These types of questions should not be left to the unpredictability of public reason, but should instead be discerned by reference to the principles dictated by the conception of justice chosen at the original position.[167] "For what reasons," Rawls rhetorically asked, "can both satisfy the criterion of reciprocity and justify denying to some persons religious liberty, holding others as slaves, imposing a property qualification on the right to vote, or denying the right of suffrage to women?"[168]

Our designated matching principle, as set forth in Section A, indicates that fetuses have been granted protections approximating human rights versus third parties.[169] Rawls's writings suggest that, when working within the justice as fairness conception, principles granting human rights cannot be the product of public reason but must instead be *given by* the conception. Or, in other words, the principle must actually be agreed upon by agents at Rawls's original position. Moving forward, our sustainability analysis therefore turns on whether the matching principle could be chosen at an original position that is reasonable in a Rawlsian sense.

C. *Identifying Presumed Original Positions*

Because the matching principle intimates that fetuses possess some human rights, and because we are operating under Rawls's presumption that agents

[166] RAWLS, RESTATEMENT, *supra* note 14, at 19.

[167] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 612. Professor Frank Michelman's work on the value of *context* is also instructive here. *See* Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 92, at 394. He argues that the necessity of public reason lies in the distinction between inalienable rights and "situation-specific" rights. The latter type of rights need a "relatively fine adjustment of the reciprocal extents of the liberties in the scheme of basic liberties that is likely to call for more contextual knowledge and finer-grained, more contestable social-causal calculation than Rawls . . . believes constitutional lawmaking can effectively and legitimately bear." *Id.* at 418. Michelman argues that public reason, due to its superior elasticity, is well-equipped to define situation-specific rights. *See id.* (discussing how questions of basic liberties can be "too complexly situation-specific to be aptly resolvable at the level of constitutional law").

[168] RAWLS, *Public Reason Revisited*, *supra* note 11, at 579. For example, Rawls explains that the prohibition on slavery is not left to public reason, but rather it is dictated by our conception of justice: "Since the rejection of slavery is a clear case of securing the constitutional essential of the equal basic liberties, surely Lincoln's view was reasonable . . . while Douglas's was not. Therefore, Lincoln's view is supported by any reasonable comprehensive doctrine." *Id.* at 610.

[169] Rawls stated that if, for some reason justice as fairness is not selected, abortion rights could be left to public reason. Rawls, *Public Reason*, *supra* note 89, at 243 n.32. Because this Article fixes the political conception at justice as fairness, principles relevant to the abortion issue, which involves fundamental status issues, are not left to public reason but are rather given by the conception itself.

will settle on justice as fairness as the operative political conception, we can ignore the process of public reason. Instead, we need only analyze whether the matching principle could be chosen at a "reasonable" original position. A reasonable original position, as discussed in Part II, is one where representative agents operate behind a veil of ignorance which conceals personal characteristics and beliefs.[170] The two critical components of any original position are: (1) the scope of the parties' representation, and (2) the information set behind the veil. The scope of agency is particularly relevant to the question, set forth in the Introduction, whether fetal-homicide laws reflect societal notions of fetal "personhood." For if fetuses are represented by agents at the original position, they are deemed to be "persons" in a Rawlsian sense.[171] The following paragraphs seek to discern the components of all original positions that would yield the matching principle developed in the previous Section (i.e., that fetuses at all stages of gestation have human rights against third parties but no human rights against their mothers).

1. The Identification Process

Before we begin, the process of identifying plausible original positions warrants some discussion. Some principles of justice, so long as it is known that they were chosen at *an* original position rather than through the process of public reason, reveal dispositive information about their implicating original position. This can be illustrated by a few hypothetical scenarios. Take, for example, the principle that society should reasonably accommodate disabled persons. If information about who would be disabled were not placed behind the veil, the parties (a majority of whom would need no such accommodations) would likely reject an accommodation principle. From the perspective of one from the majority, the marginal costs incurred by such protections would surely exceed their marginal benefits. But notice how a starkly different result arises once information about who will be disabled is concealed from the parties. Because each party would be uncertain of their status, and thus fearful of being in the disabled minority, a Rawlsian would argue that the parties would agree on the principle of accommodation.[172] This example shows that at

[170] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 11-12.

[171] As Rawls explained:

> Moral persons are distinguished by two features: first they are capable of having . . . a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice . . . . Thus equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation.

See id. at 442

[172] *See id.* at 11-12, 144 (explaining how risk and uncertainty will cause agents at the original position "to weigh[] more heavily the advantages of those whose situation is less fortunate").

least some principles provide good information about the content of the veil of ignorance at their implicating original position.

A principle can also provide dispositive information about whom the agents represent at the original position. Consider the principle that one should not arbitrarily harm certain animal species.[173] Despite the fact that the protected species *benefit* from this principle, we know that their interests are not represented at the original position because the protections are weak and the standards of liability are riddled with safe harbor provisions.[174] When the scope of agency is confined to humans, there is no incentive for the parties to similarly protect non-humans and humans, and so the agents would not readily endorse a principle subjecting humans to overwhelming damages for harming non-humans. If, on the other hand, the protected species were represented at the original position, we could expect their protections to be comparable to those for humans. This demonstrates that one can, under certain circumstances, deduce from a particular principle essential information about the agents' scope of representation at the implicating original position.

2. Limits to the Identification Process

There are, however, two primary limits to identifying components of the original position from a given principle of justice. First, a principle may provide no insight regarding a given component of the original position if that component has no dispositive effect on the agents' consideration of that principle. Second, a principle may not provide good information about its components because its application is confined to the public domain.

a. *Principles Reveal Only Necessary Components*

A principle of justice selected at a given original position will only provide information about those components that have a dispositive effect on the agents' consideration of that principle. Take, for example, the principle that the death penalty is a just form of punishment. If agents at the original position knew they would lack a strong propensity for violence, they would plausibly support the notion of capital punishment on the ground that the sanction would not harm them and the threat of execution might deter dangerous citizens from committing murder. A similar result is reached, however, if information regarding the agents' propensity for violence is concealed behind the veil of ignorance. At this original position, agents might

[173] *See, e.g.*, 1 BRIAN BARRY, A TREATISE ON SOCIAL JUSTICE: THEORIES OF JUSTICE 207 (1989) ("[S]ympathy for animals varies a great deal from one time and place to another and is at best concentrated mainly on pets and petlike animals rather than on those defined as food, game, or pests.").

[174] *Compare* 16 U.S.C. §§ 1538(a)(2)(B), 1540(b)(1) (2000) (stating that people who "damage or destroy" endangered species face maximum punishments of a fifty thousand dollar fine or up to one year in jail or both), *with* 18 U.S.C. § 1111(b) (2000) (describing the punishments for murder as either a term of years, life imprisonment, or death).

still support capital punishment because, even if the agents ultimately possessed a propensity for violence, the death penalty's potential deterrent effect might keep the agents safe from other murderers and might discourage the agents from acting on their own dangerous impulses. In this scenario, where the variable component might have no dispositive effect on the consideration of a given principle, the existence of that principle provides no definitive information about the components at the implicating original position.[175] Thus, this deductive process only reveals those components of the original position that have a dispositive impact on the selection of the matching principle of justice.

b. *Principles Govern Only Matters in the Public Domain*

There is a second potential limitation on the process of identifying original positions from principles of justice. Importantly, principles only regulate the "public domain." One must therefore allow for the possibility that a given principle of justice is not the result of rational selection by agents under certain conditions at the original position, but rather the *remaining portion* of a broader principle that has been truncated by the public domain limitation. For example, a principle that children have no right to a healthy diet is not so much a result of the particular components at the original position. Instead, it reflects the inherent structure of Rawls's model, by which the application of principles are limited to the public domain.

For the purposes of this Article, however, there is no need for concern since the matching principle concerns matters wholly within Rawls's public domain. Rawls was explicit that the public domain extends to the household when it serves as a place for institutionalized abuse or forms unjust desires in its members.[176] The matching principle, as outlined in Part III.A, parses fetal rights in relation to (1) its mother and (2) third parties. The second component, which concerns third parties, is of course unaffected by the public domain limitation. Relying exclusively on this component, this Article concludes

[175] One reaches a similarly inconclusive result by analyzing the principle that humans enjoy the right to die. If information were not available at the original position about which agents would become terminally ill and incapacitated, agents would likely recognize a right to die because they would not take the risk of being terminally ill without such a right. But even if agents had perfect information at the original position, and knew they would never become terminally ill, risk-averse agents could still plausibly support a right to die on the ground that it provides a benefit (e.g., lowers society's health-care costs) and imposes no risk of harm to others. One need not agree with these actual conclusions to appreciate the point that many principles do not necessarily indicate the components of their implicating original positions.

[176] *See* RAWLS, *Public Reason Revisited*, *supra* note 11, at 598 (stating that "the principles of justice impose constraints on the family on behalf of children who as society's future citizens have basic rights as such," and arguing that children who witness injustices within the family face difficulty in "acquir[ing] the political virtues required of future citizens in a viable democratic society").

(*infra* in Section C) that fetuses are persons represented by agents at the original position. And because Rawls is clear that the public domain extends to protect persons from their families, there is no external limitation preventing agents from selecting principles protecting the core rights of fetal persons against familial intrusion. So we see that both the first and second components of the principle constitute a reflection of the agent's rational selection process rather than a byproduct of an external limitation regarding the reach of principles. Accordingly, the public domain limitation does not inhibit the identification of plausible original positions from the matching principle.

3. Applying the Process

After setting forth the identification process and its limitations, we are now ready to analyze the matching principle for information about its implicating original position. Remember that the matching principle, distilled in Section A, holds that fetuses at all stages of gestation have human rights against third parties but no human rights against their mothers. The Table below illustrates this principle.

Table 3: The Matching Principle

		HUMAN RIGHTS VESTING	
		vs. Mother	vs. Third Party
STAGE OF GESTATION	First Month	No human rights	Human rights
	Second Month	No human rights	Human rights
	Third Month	No human rights	Human rights
	Fourth Month	No human rights	Human rights
	Fifth Month	No human rights	Human rights
	Sixth Month	No human rights	Human rights
	Seventh Month	No human rights	Human rights
	Eighth Month	No human rights	Human rights
	Ninth Month	No human rights	Human rights

Our objective is to now decipher whether this principle is inherent in a conception of justice that could be selected at a reasonable original position. We begin by trying to deduce the implicating original position's "scope of agency," and then turn to evaluate the "content behind its veil."

a. *Scope of Agency*

Upon closer examination, the matching principle provides dispositive information about which parties are represented at the implicating original

position. The principle, as can be seen in Table 3, grants at least some fetuses full human rights. This principle could certainly be chosen at an original position where agents represented both fetuses and born humans. With this scope of agency, the primary benefits of granting human rights to fetuses, from the agents' perspective, would be threefold: (1) the fetus's gain from the protection of bodily integrity and potential moral agency; (2) the parental gain from increased protection of reproductive rights; and (3) the societal gain from decreased general violence. The expected cost of extending human rights to fetuses against third parties would be simply that a person might be classified and punished, rightly or wrongly, as a murderer for committing a crime against a pregnant woman that causes a miscarriage. Here, the benefits of granting fetuses human rights would quite clearly outweigh its costs, and the agents would in turn opt to extend human rights to fetuses.

But fetal representation is not merely a sufficient condition for the selection of the matching principle – it is also a necessary condition. If the agents only represented born human beings, and did not represent the interests of fetuses, it seems doubtful that fetuses would be granted human rights against third parties. This is because the benefit of such a grant would have, from the agents' perspective, dramatically shifted. Gone is the sense that the destruction of "one's bodily integrity and potential for moral agency" lies in the balance. The primary benefit for these agents is simply the parent's increased protection of reproductive rights, and society's interest in deterring general violence. It is highly unlikely that these potential benefits would outweigh the potential costs that one might be classified and punished as a murderer for committing a crime against a pregnant woman that causes a miscarriage.[177] In other words, it seems doubtful that such agents would treat the killing of a fetus as a "murder," a term which has, after all, been reserved in our legal tradition for the most severe and heinous acts against society. This is not to say that such agents would have no interest in protecting fetal life or the mother's right to a violence-free pregnancy. But it is to say that agents would turn to less extreme sanctions.[178]

It being established that fetuses are represented at the original position, we need to briefly consider *when* this representation begins. The matching principle does not distinguish between fetuses based on their stage of

[177] The fetus's rights vest against third-parties even if the mother is, for whatever reason, opposed to having the third party charged with murder. *See* discussion *supra* Part I.A. In such a case, the principle that the fetus has personhood rights against third parties will, at least in theory, not benefit all future mothers.

[178] For example, agents might agree to prohibit "feticide," which has historically focused on protecting the parent's interest in the fetus, and, as such, carried a lighter social stigma and penal sanction than murder. The agents could alternatively define fetuses as "nonpersons" and classify acts causing their death as a crime more akin to trespass to chattel. Lastly, they might treat "pregnancy" as an aggravating factor in any underlying crime against a woman.

development. For instance, a one-month-old fetus and a nine-month-old fetus each have human rights against third parties and no rights against their mothers. Put another way, a fetus enjoys relatively no comparative advantage based on its advanced stage of development. As such, we can definitively conclude that the matching principle would only be implicated at an original position where agents represented fetuses at *all* stages of gestation.

This analysis of agency representation provides us with an answer to the first question set forth in the Introduction: whether the current scheme of fetal-homicide laws indicates a societal recognition of fetal "personhood." Because such laws could only be chosen in accord with a Rawlsian original position if fetuses were duly represented by agents, Rawlsians who support these laws must, at least implicitly, recognize that fetuses are persons.

b. *Content of Veil*

The matching principle, in addition to suggesting the scope of agency, speaks volumes about the information necessarily withheld from agents and placed behind the veil of ignorance. As shown by Table 3, the matching principle holds that a fetus's human rights vest against third parties but not against mothers. Upon accounting for the fact that the agents represent both born persons and fetuses, it seems obvious that this matching principle could be chosen if the agents had reliable information regarding their *mother's likelihood to harm her fetus*.[179] By making such information available at the original position, the expected benefits of the matching principle would, for a substantial majority of agents, outweigh its expected costs. The expected benefits are significant, coming in the form of broad reproductive freedoms. As recognized by the Supreme Court in *Roe*:

> 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. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[180]

Conversely, the expected costs are, for the clear majority of agents, zero. After all, once armed with good information about their mothers, most agents

[179] This information would include the mother's willingness to procure an abortion or ingest substances harmful to her fetus during pregnancy.

[180] Roe v. Wade, 410 U.S. 113, 153 (1973). *But see* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 56 (1988) ("The women's movement, education, access to affordable birth control, liberalized divorce laws, and the larger role for women in politics, government, and the economy have expanded women's opinions and contributed to the erosion of oppressively nonegalitarian styles of home life.").

would realize no risk in subordinating fetal rights to maternal rights. Accordingly, the matching principle could clearly be selected at an original position where agents possessed information about their mothers' likelihood to cause them harm.

The availability of information about one's mother is not only sufficient, but it is indeed necessary, for the matching principle to be selected. For, without such information, all the agents, who represent both born persons and fetuses, would perceive the subordination of fetal rights to maternal liberty as highly threatening. Abortion rights, from the agents' view, present the possibility of arbitrary termination of biological identity and capacity to pursue moral agency.[181] The benefit of the principle is that agents will have the autonomy to terminate any unwanted pregnancy. From the agents' perspective, this is an easy decision: The matching principle's expected benefits, while crucial to ensuring fuller autonomy over their individual lives once born, do not justify the substantial risk of not making it to a live birth.[182] Accordingly, it seems clear that the agents' consideration of the matching principle, which wholly subordinates the fetuses' lives to the liberty of their mothers, turns directly on whether the agents possessed good, reliable information whether they would be injured by their mothers during their fetal development. It can therefore be deduced that information about one's mother is not concealed behind the veil of ignorance at the presumed original position.

So if society adopts Rawls's justice as fairness as its political conception, the matching principle could only be chosen at an original position where (1) agents represent the interests of born humans and fetuses of all stages of

[181] And while Rawls was clear that agents behind the veil do not know their actual chances of being situated in a socially inferior position, it is worth noting that the odds that an agent would incur such losses are not negligible as roughly twenty percent of fetuses in the United States are aborted. *See* Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 9 (2003), *available at* http://www.guttmacher.org/pubs/psrh/full/3500603.pdf.

[182] The right to abortion is deemed to be fundamental by many in our society. Yet there is a wide consensus that this right is not more fundamental than the right to life. No matter how physically and psychologically damaging it might be to carry an unwanted fetus to full term, even the most strident of pro-choice advocates would acknowledge that the mother is better off than if her life were taken. The point is simply to say that the right to life (once you've decided an entity is entitled to it) is more fundamental than the right to abortion. This point is further supported by Rawls's model of justice, in which basic liberties "have a central range of application," yet "can be limited and adjusted [when] they clash with other basic liberties." JOHN RAWLS, *Reply to Alexander and Musgrave*, *in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 11, at 232, 239. The right to life, which is regularly perceived to be the most fundamental of all rights, can only be overridden in our legal tradition in discrete and well-defined circumstances such as self-defense. And so it seems unlikely that agents without information about their mothers would ever agree on a principle that allowed for abortions that could not be justified by the self-defense doctrine (e.g., nontherapeutic abortions).

gestation and (2) the veil of ignorance does not conceal information regarding whether agents will be harmed by their mothers. The next Section analyzes the reasonability of this presumed original position and thus offers us information on the political sustainability of the bifurcated fetal-rights scheme.

D. *Reasonableness of the Presumed Original Position*

To evaluate the lasting stability of the bifurcated fetal-rights judgment from a Rawlsian perspective, one must examine whether that judgment matches a principle of justice that could be chosen at an original position that Rawls would have deemed "reasonable." At this point we have reconstructed the *only* plausible original position where agents could choose a principle of justice matching the fetal-rights scheme. This "presumed" original position, as shown in Section B, extends representation to fetuses at all stages of gestation and provides agents with information about whether the agents will be harmed by their mothers. The following paragraphs consider the reasonableness of this presumed original position.

1. Reasonableness of Expanding Scope of Agency to Fetuses

Agents at the presumed original position represent fetuses at all stages of gestation. An original position, as explained in Part II, is reasonable when, among other things, agents extend their representation to all "those who could take part in the initial agreement, *were it not for fortuitous circumstances*."[183] The following paragraphs evaluate the fortuity of fetal gestation, placing particular emphasis on Rawls's discussions of "temporary incompetence" and "generation."

a. *Fortuitousness of Temporary Incompetence*

Temporary incompetence is regarded as a fortuitous condition in a Rawlsian society. Individuals are entitled to equality, wrote Rawls, if they possess the "capacity to acquire" a sense of justice and a judgment of personal good as expressed by a rational life plan.[184] This view constitutes a break from the traditional rights theorists, such as Locke, Rousseau, and Kant, who believed *actual* competence was a necessary condition of full human liberty.[185] Rawls

[183] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 446 (emphasis added); *see* 1 BARRY, *supra* note 173, at 210 (explaining "fortuitous" to mean "everything about people that should not play any role in determining the way in which they should be treated").

[184] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 442 ("Moral persons are distinguished by two features: first they are capable of having . . . a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice . . . .").

[185] *See* Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1320-21 (1995) (arguing that Rawls expanded the theories set forth by the traditional rights theorists, who believed that children were not entitled to "the full panoply of rights accorded to adults because of their incapacity to obligate others").

explained that "[i]t is sometimes thought that basic rights and liberties should vary with capacity, but justice as fairness denies this: provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice."[186] Rawls continued that "[a] being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice."[187] Children and disabled persons are cited as examples.[188] Agents at the original position will tend to protect those with undeveloped powers,[189] and this is to be accomplished by empowering members of society to act on their behalf in a manner most likely to secure their future conception of good.[190] When society has little or no knowledge about the particular interests of a person with temporary incompetence, it presumes that the person has the interests of a rational person.[191] Notably, Rawls was careful to distinguish between temporary and permanent incompetence,[192] and wrote that "those more or less permanently deprived of moral personality may present a difficulty."[193] With regard to nonhuman animals, for instance, Rawls observed

[186] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 443.

[187] *Id.* at 445-46. Rawls explained, "[s]ince infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our considered judgments." *Id.* at 446.

[188] *Id.* at 218-19.

[189] *See* 1 BARRY, *supra* note 173, at 163 ("To say that this killing or taking is rendered just by the inability of the victims to organize an effective resistance would surely be a hollow mockery of the idea of justice – adding insult to injury. Justice is normally thought of not as ceasing to be relevant in conditions of extreme inequality in power but, rather, as being especially relevant to such conditions.").

[190] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 219 ("Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good."). Rawls treated children as moral primitives who must be protected from "the weakness and infirmities of their reason and will in society." *Id.*

[191] *See id.* ("As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position . . . .").

[192] Rawls's distinction likely stems from the inevitability of temporary incompetence. As Eva Feder Kittay has put it:

> [T]here are identifiable states of our life history in which dependency is unavoidable, either for survival or for flourishing. The immaturity of infancy and early childhood, illness and disability that renders one nonfunctional even in the most accommodating surroundings, and the fragility of advanced old age, each serve as examples of such inescapable dependency. . . . These are unassailable facts about human existence. While conditioned in fundamentally significant ways by cultural considerations, dependency for humans is as unavoidable as birth and death are for all living organisms.

EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 29 (1999).

[193] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 446.

that "it does seem that we are not required to give strict justice anyway to creatures lacking this capacity."[194]

Status as a human fetus can easily be framed as one more form of temporary incompetence. The fetus, after all, has unique DNA, its program of biological and cognitive development is ongoing, and, if unobstructed, this program will naturally and likely result in its birth.[195] Such *temporariness* of human incompetence is significantly analogous to that of the child, and easily distinguishable from the permanent human incompetence of gametes, animals, and plants.

b. *Fortuitousness of Generation*

Rawls's ideas on "generations" are also relevant to the reasonableness of the presumed original position. The Rawlsian model requires the maintenance of "justice between persons at different moments of time."[196] This manifests as an affirmative duty to future generations, and thereby obligates agents "to be impartial, even between persons who are not contemporaries but who belong to many generations."[197] Considering the lives of future citizens, writes Rawls, assures "[a]n ideally democratic decision" that is "fairly adjusted to the claims of each generation."[198] Rawls's view that later generations are "virtually"

[194] *Id.* at 448. Rawls's distinction between temporary and permanent incompetence should preempt any argument that status as a nonhuman animal species, or, for that matter, one's status as an unfertilized human egg, is a fortuitous condition.

[195] *See* George, *supra* note 8, at 2493 ("The significance of genetic completeness . . . is that no outside genetic material is required to enable the zygote to mature into an embryo, the embryo into a fetus, the fetus into an infant, the infant into a child, the child into an adolescent, the adolescent into an adult.").

[196] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 258 (clarifying that "[t]he present generation cannot do as it pleases but is bound by the principles that would be chosen in the original position to define justice between persons at different moments of time"). "Each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation." *Id.* at 252.

[197] *Id.* at 514. Rawls concluded *A Theory of Justice* as follows:

> Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis:* it is to regard the human situation not only from all social but also from all temporal points of view. The perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world. And having done so, they can, whatever their generation, bring together into one scheme all individual perspectives and arrive together at regulative principles that can be affirmed by everyone as he lives by them, each from his own standpoint. Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view.

Id.

[198] *Id.* at 256 (explaining that future "generations are virtually represented in the original position").

represented at the original position has significant implications for our sustainability analysis. It means agents are forced to consider the interests of the next generation, which, of course, includes those born, those conceived but not yet born, and those not yet conceived.

Taking into account Rawls's writings on temporary incompetence and generations, it seems that one's stage of fetal gestation can be viewed as a mere fortuitous circumstance. Accordingly, extending the scope of agency to include fetuses does not render an original position unreasonable in a Rawlsian sense.

2. Reasonableness of Providing Information About Agents' Mothers

Agents at the presumed original position necessarily possess good information about whether their mothers are likely to injure or terminate their fetuses. An original position is only reasonable, according to Rawls, if agents are unaware of their morally irrelevant traits.[199]

Rawls made it abundantly clear that information about the family is morally irrelevant,[200] arguing that one's placement in a particular family constitutes a "natural lottery"[201] resulting in arbitrary distinctions in "class position," "social status," and "fortune in the distribution of natural assets and abilities."[202] He also wrote that "the family may be a barrier to equal chances between individuals,"[203] individual families perpetuate "arbitrary" effects,[204] and "the principle of fair opportunity can be only imperfectly carried out, at least as long as some form of the family exists."[205]

So it is apparent that agents should not have access to information about the families that individuals are *born into*. But should this prohibition be extended

[199] *See id.* at 11; *see also* RAWLS, *Powers of Citizens*, *supra* note 101, at 79 ("Features relating to social position, native endowment, and historical accident, as well as to the content of persons' determinate conceptions of the good, are irrelevant, politically speaking, and hence placed behind the veil of ignorance.").

[200] *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 85-86. It should be clarified that the "moral irrelevance" of familial advantages does not suggest that principles of justice govern all familial relations. Rawls is, after all, unequivocal in his discussion of the "public domain" that principles cannot regulate those types of household activities that are not abusive to individual members. Instead, Rawls advances the narrower claim that information about one's ultimate family should be *concealed* from agents when they choose the principles of justice to govern society.

[201] RAWLS, THEORY OF JUSTICE, *supra* note 84, at 64 ("[D]istributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective.").

[202] *Id.* at 11.

[203] *Id.* at 265.

[204] *Id.* at 448.

[205] *Id.* at 64. It is worth noting that Rawls often uses the word "born" as synonymous with "starting point." *See id.* at 81-86. This usage is simply metaphorical, and surely does not indicate that information about pre-birth status cannot be placed behind the veil.

to information about the families that individuals are *conceived by*? It sure seems that way. The Rawlsian "relevance" analysis, after all, turns on arbitrariness, and there seems no reason to distinguish the born from the unborn based on the *arbitrariness* of their families. Because the fetus quite clearly has no more control over its starting point than does the born human, it seems similarly unable to take credit for membership in its family.[206] The presumed original position, which demands that agents have access to information about their mother's likelihood to harm her fetus, is therefore unreasonable.

This unreasonableness has significant consequences. It shows that a Rawlsian cannot in good faith endorse the current legal blend of fetal-homicide laws and abortion rights. As demonstrated by Section C, the selection process at the presumed original position is the only plausible way agents adopting justice as fairness as the political conception of justice could conceivably implicate principles of justice matching our current fetal-rights scheme. This presumed original position, however, is not reasonable in a Rawlsian sense because it fails to place irrelevant personal information behind the veil of ignorance. We can necessarily conclude that, for societies endorsing Rawls's justice as fairness as a political conception, the contemporary approach to fetal personhood is inherently "matchless" and thus in a permanent state of reflective *dis*equilibrium.[207] And remember that societal judgments in such disequilibrium will ultimately seek equilibrium by conforming to a Rawlsian principle of justice. To put it plainly, the current bifurcated fetal-rights scheme is fundamentally unsustainable from a Rawlsian perspective.

[206] Some fetuses are conceived by women who use illicit drugs or suffer from illness, while others are conceived by women who are conscientious about pre-natal care. This is, of course, an arbitrary distribution of assets from the fetus's perspective.

[207] A projection of instability prompts the question: In which direction will our judgments shift? Rawls might suggest we begin by examining the principles that would be implicated at a "reformed" version of the presumed original position. *See* RAWLS, THEORY OF JUSTICE, *supra* note 84, at 19 ("[T]he conditions embodied in the description of the original position are ones that we do in fact accept. *Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection*." (emphasis added)). An original position is reformed when all morally irrelevant information is isolated and placed behind the veil of ignorance. As stated in Part III, information about whether mothers are likely to harm their fetuses is morally irrelevant. Agents at the reformed original position, which of course includes representatives of fetuses at all stages of gestation, would likely choose a conception with given principles that entitle fetuses to human rights against both third parties and their mothers. A contrary conception, whereby the rights of the fetus are subordinated to those of its mother, even if confined to early stages of gestation, would present an intolerable degree of risk to the agents. Similarly, leaving the decision to public reasoning would not sufficiently mitigate this risk.

CONCLUSION

The right to abortion, when juxtaposed with the current set of legal protections afforded fetuses, is politically and morally unsustainable from a Rawlsian perspective. On a political level, a reformation of the bifurcated fetal-rights scheme can be expected *if* society has endorsed, or will endorse at some later point, Rawls's justice as fairness as its political conception of justice. The Article takes no position, of course, on the political stability of the scheme if society never settles on justice as fairness. But even if our society is indefinitely governed by an alternative political conception, the theoretical study here promises to have direct implications on how particular individuals view the morality of the fetal-rights scheme. The scheme, after all, cannot be supported in public reason by that sector of our population which adheres to justice as fairness as a moral conception.[208] These persons will need to either (1) decrease their support of the current brand of fetal-homicide legislation,[209] or (2) decrease their support of maternal liberty.[210] Importantly, this Article does not suggest that the bifurcated rights-scheme poses moral problems for *all* persons. For instance, a utilitarian or a classical natural-rights adherent might have far less trouble reconciling the bifurcated scheme – it is, of course, not unheard of for these conceptions to legitimize dual notions of personhood.[211] In sum, the bifurcated fetal-rights scheme is *politically* unstable if we are in, or moving toward, a Rawlsian political conception of justice, and it is, and always will be, a *morally* untenable judgment for those persons who remain committed to Rawls's vision of a just society.

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[208] Rawls was clear in his later writings that justice as fairness was a political conception as well as a moral conception. *See* JOHN RAWLS, *Justice as Fairness: Political Not Metaphysical*, *in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 11, at 388, 411 ("Some may even affirm justice as fairness as a natural moral conception that can stand on its own feet.").

[209] This would likely be achieved by treating fetuses as non-persons vis-à-vis all parties. Presumably this could be accomplished by returning to the traditional "feticide" laws, which tend to focus on protecting and vindicating the rights of the mother rather than the harmed fetus.

[210] We might see the mother's liberty curtailed to the point where the only lawful abortions are those consistent with theories of self-defense.

[211] *See, e.g.*, JOHN RAWLS, *The Independence of Moral Theory*, *in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 11, at 286, 298 (stating that utilitarian thought focuses "on valuable experiences themselves, and the only thing that counts is the net total held by all container-persons together"); STEVEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002) (discussing the religious, natural law-oriented ideology which helped maintain the institution of slavery in the antebellum American South).

APPENDIX A

The following twenty-four states currently recognize victim capacity upon conception:[212]

Alabama: The term "victim" is defined to include "an unborn child in utero at any stage of development."

Alaska: The crime of "murder" encompasses acts causing the death of an unborn child at any stage of development.

Arizona: The killing of an "unborn child" at any stage of prenatal development is either negligent homicide, manslaughter, second-degree murder, or first-degree murder.

Georgia: A person is guilty of feticide, feticide by vehicle, or voluntary manslaughter if they cause the killing of an unborn child "at any state of development who is carried in the womb."

Idaho: The term "murder" includes the killing of "a human embryo or fetus" under certain conditions.

Illinois: The killing of an "unborn child" at any stage of prenatal development is intentional homicide, voluntary manslaughter, involuntary manslaughter, or reckless homicide.

Kentucky: The offense of "fetal homicide" protects "member[s] of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."

Louisiana: The killing of "any individual of the human species from fertilization and implantation until birth" is first degree feticide, second degree feticide, or third degree feticide.

Michigan: Actions that intentionally, or in wanton or willful disregard for consequences, cause a "miscarriage or stillbirth" or cause "aggravated physical injury to an embryo or fetus," are classified as felonies.

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[212] ALA. CODE § 13A-6-1(a)(3) (LexisNexis 2006); ALASKA STAT. § 11.41.150 (2006); ARIZ. REV. STAT. ANN. § 13-1102 to -1105 (Supp. 2006); GA. CODE ANN. §§ 16-5-80, 40-6-393.1 (Supp. 2006); IDAHO CODE ANN. § 18-4001 (2004); 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2 (West 2002); KY. REV. STAT. ANN. §§ 507A.010-060 (LexisNexis Supp. 2006); LA. REV. STAT. ANN. §§ 14:2(11), 14:32.5-14:32.8 (2007); MICH. COMP. LAWS ANN. § 750.14 (West 2004); MINN. STAT. ANN. §§ 609.21, .266(a), .2661-.2665 (West 2003); MISS. CODE ANN. § 97-3-37(1) (2005); NEB. REV. STAT. §§ 28-389(2), -391 to -394 (Supp. 2006); N.D. CENT. CODE §§ 12.1-17.1-01 to -04 (1997); OHIO REV. CODE ANN. §§ 2903.01 to .06, 2903.09(A) (LexisNexis 2006); OKLA. STAT. ANN. tit. 21 §§ 652, 691, 713 (West Supp. 2007); OKLA. STAT. ANN. tit. 63 § 1-730 (West 2004); 18 PA. CONS. STAT. ANN. §§ 2603-2605, 3203 (West 1998); S.C. CODE ANN. § 16-3-1083 (2006); S.D. CODIFIED LAWS §§ 22-1-2(50A), 22-16-1.1, -15, -20, -41 (2006 & Supp. 2007); TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2006); UTAH CODE ANN. §§ 76-5-201 to -209 (2003 & Supp. 2007); VA. CODE ANN. § 18.2-32.2(A) (2004); W. VA. CODE ANN. § 61-2-30 (LexisNexis 2005); WIS. STAT. ANN. §§ 939.75, 940.01, .02, .05-.10 (West 2005); State v. Knapp, 843 S.W.2d 345, 347-48 (Mo. 1992) (en banc); State v. Holcomb, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997).

Minnesota: The killing of an "unborn child" at any stage of prenatal development is characterized as murder, manslaughter, or criminal vehicular homicide.

Mississippi: The term "human being" includes "an unborn child at every stage of gestation from conception until live birth and the term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

Missouri: The term "human being" includes an "unborn child" at any stage of prenatal development, at least under the involuntary manslaughter and first-degree murder statutes.

Nebraska: The killing of an "unborn child" at any stage of prenatal development is murder in the first or second degree, manslaughter, or motor vehicle homicide.

North Dakota: The killing of an "unborn child" at any stage of prenatal development is murder, felony murder, manslaughter, or negligent homicide.

Ohio: The killing "of an unborn member of the species homo sapiens, who is or was carried in the womb of another," is aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, negligent homicide, aggravated vehicular homicide, vehicular homicide, or vehicular manslaughter.

Oklahoma: "[U]nborn offspring of human beings from the moment of conception" are considered unique victims of criminal activity.

Pennsylvania: The killing of an "an individual organism of the species homo sapiens from fertilization until live birth" is criminal homicide classified as murder in the first, second, or third degree, or voluntary manslaughter.

South Carolina: A "child in utero" at any stage of development injured during an act of criminal violence is a separate victim of a separate offense.

South Dakota: The killing of an "unborn child" at any stage of prenatal development is fetal homicide, manslaughter, or vehicular homicide.

Texas: "[A]n unborn child at every stage of gestation from fertilization until birth" is to be protected by the entire criminal code.

Utah: The killing of an "unborn child" at any stage of prenatal development is treated as any other homicide if the rest of the elements of that homicide are met.

Virginia: "Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another" is guilty of "homicide."

West Virginia: "[A] pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims" for purposes of laws prohibiting crimes of violence.

Wisconsin: "[W]hoever causes the death of an unborn child with intent to kill that unborn child [or] kill the woman who is pregnant with that unborn child" is guilty of homicide.