RETHINKING THE ENGLISH "BORN ALIVE RULE": COMPARATIVE AND DOCTRINAL STUDY

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Abstract

Should a person be criminally responsible for the death of a newborn, if this death is the result of injuries inflicted, by this person, on the fetus in utero? If affirmative, which offense should this person be accountable for? This article deals with these questions, thus coping with the old-standing Common Law "Born Alive Rule" (BAR). Our assertion is that the European-Continental Law model should be adopted, thus defining a fetus as a human being from the beginning of the dilating pains. Accordingly, there is no place for the BAR and its complementary, nor for an independent offense of "Child Destruction," which aims to cover the period between inception and the fetus exiting his mother's womb. However, we also propose to adopt the Anglo-American Law approach in the sense that causing the death of a fully designed fetus is an aggravated abortion offense, thus mandating a severe punishment as close as possible to the punishment of a homicide offense imposed for causing the death of a human being. Consequently, it is our perception that there is no need to define the fetus, besides as a human being and as an object of the regular homicide offenses. Similarly, there is no need to define the assault of a pregnant woman, which causes the death of the fetus, as an independent offense or aggravated assault.

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I. INTRODUCTION

Should a person be criminally responsible for the death of a newborn if the death is the result of injuries inflicted on the fetus in utero? If affirmative, which offense should this person be accountable for? This article deals with these questions, thus coping with the old-standing Common Law "Born Alive Rule" (BAR).

Homicide offenses assume that the victim was alive prior to the killing. However, the question regarding the determination of the beginning of a human life has been widely disputed.[1] Similarly, this has been the case for the question regarding the proper legal protection for the fetus.[2] In principle, there are three models: first, the Common Law model, stipulates that a fetus is not a human being, and a human being is a fetus who exited the mother's

1. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.); 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 2–3 (London, MacMillan & Co. 1883); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 373 (2000); Rolf Dietrich Herzberg, *Der Anfang der Geburt als Ende der »Schwangerschaft« – das »Ungeborene« als Mensch und Person?* [*The Beginning of Birth as the End of "Pregnancy" – the "Unborn" as a Human and Person?*], *in* BOCHUMER BEITRÄGE ZU AKTUELLEN STRAFRECHTSTHEMEN, VOTRÄGE ANLÄSSLICH DES SYMPOSIONS ZUM 70. GEBURTSTAG VON GERD GEILEN AM 12./13.10 2001 [BOCHUMER CONTRIBUTIONS TO CURRENT CRIMINAL ISSUES, LECTURES ON THE OCCASION OF THE SYMPOSIUM ON THE 70TH BIRTHDAY OF GERD GEILEN ON OCTOBER 12/13, 2001] 39, 39 (2003) (Ger.); 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, 965–69 (2001); *Crimes against the Foetus* 33–35 (Law Reform Comm'n of Can., Working Paper 58, 1989), http://www.lareau-law.ca/LRCWP58.pdf (last visited Mar. 3, 2020).

2. Shah, *supra* note 1, at 965–69; *Crimes against the Foetus*, *supra* note 1, at 33–35.

womb.[3] The BAR, and its complementary, were developed within this jurisdiction (as well as the offense of child destruction) which thus grants the fetus a very wide range of protection.[4] Second, the European-Continental Law model extends the definition of human being to the stage of bearing down pains (*presswehen*), or even to the earlier stage of dilating pains (*eroeffnungswehen*), thus making it so that regular homicide offenses apply to the fetus.[5] Third, in the United States, the model used in several states abandons the BAR and instead applies regular homicide offenses to the fetus (even to the early stage while it is in his mother's womb), or establishes special offences that concern injuring a pregnant woman and causing the death of her fetus.[6] Underlying the competition between the above-mentioned models is the Greek legal philosophy.[7] With regard to the Greek legal philosophy, the designed embryo (a viable embryo) is a human being and its death can fall within the regular offenses of homicide, whereas an undersigned embryo is not a human being, and its death can be considered only as a termination of pregnancy.[8] This position was adopted by Canon Law, which in turn influenced the Common Law, but this position was later abandoned.[9]

Our assertion is that the European-Continental Law model should be adopted to define a fetus as a human being from the beginning of dilating pains.[10] Accordingly, there is no place for the BAR and its complementary, nor for an independent offense of "Child Destruction," which aims to cover the period between the inception and the existence of the fetus. However, we also propose to adopt the Anglo-American Law approach in the sense that causing the death of a fully formed fetus is an aggravated abortion offense, thus mandating a severe punishment as close as possible to the punishment of a homicide offense imposed for causing the death of a human being.

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3. Shah, *supra* note 1 at 934.

4. *Id.* at 934, 936–37.

5. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 1983, 32 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 194 (Ger.); Kai Ambos & Stefanie Bock, *Germany, in* HOMICIDE IN CRIMINAL LAW: A RESEARCH COMPANION 245, 246 (Alan Reed & Michael Bohlander et al. eds., 2019); SAMANTHA HALLIDAY, AUTONOMY AND PREGNANCY: A COMPARATIVE ANALYSIS OF COMPELLED OBSTETRIC INTERVENTION 108–09, 109 & n.82 (2016).

6. Shah, *supra* note 1, at 934–36, 939, 942, 949.

7. *See* PETER L. PHILLIPS SIMPSON, A PHILOSOPHICAL COMMENTARY ON THE POLITICS OF ARISTOTLE 246–47 (1998).

8. *See generally id.*

9. Daniel B. Sinclair, *The Interaction between Law and Morality in Jewish Law in the Areas of Feticide and Killing a Terminally Ill Individual*, 11 CRIM. JUST. ETHICS 76, 77 (1992) [hereinafter *Law and Morality in Jewish Law*]; *see also* Daniel B. Sinclair, *The Legal Basis for the Prohibition on Abortion in Jewish Law*, 15 ISR. L. REV. 109, 109–10 (1980) [hereinafter *Abortion in Jewish Law*].

10. *See generally* Agnès Guillaume & Clémentine Rossier, *L'avortement dans le monde. État des lieux des législations, mesures, tendances et consequences* [*Abortion Around the World. An Overview of Legislation, Measures, Trends, and Consequences*] 73 POPULATION 225(Paul Reeve trans., 2018).

Consequently, it is our perception that there is no need to define the fetus, besides as a human being, as an object of regular homicide offenses. Furthermore, there is no need to define an assault of a pregnant woman which causes the death of the fetus as an independent offense nor as aggravated assault.

II. THE FETUS' LIFE QUERY

The subject-matter of this paper involves thorny and complicated criminal and constitutional law questions that are relevant to both Anglo-American and Continental jurisprudences. While juggling theories of criminal and constitutional law of both the Anglo-American and Continental jurisprudences, we view that contrary to the case in criminal law, constitutional Anglo-American Law grants a very weak protection to the fetus as compared to the constitutional Continental Law's strong protection. Let us elaborate.

A. Criminal Law

1. Common Law and Modern Anglo-American Law

As mentioned above, the Canon Law has distinguished between formed and unformed fetuses, concluding that the termination of a "formed" fetus constitutes an act of homicide for which a perpetrator is criminally liable and thus subjecting them to the death penalty.[11] During the Middle Ages, England was a Catholic country under which Canon Law was the only existing law that addressed abortion and the fetus.[12] Due to a lack of medical knowledge regarding the development phases of the fetus during pregnancy, and a lack of technological means to determine the health condition of the fetus in the womb, the only possible way to determine if a fetus was alive (fully formed) was when, through observation after birth or exiting the

11. Paul D. Simmons, *Religious Approaches to Abortion, in* ABORTION, MEDICINE, AND THE LAW 712, 713 (John Douglas Butler & David F. Walbert eds., 4th ed. 1992). Jewish Law adopted another view, that

> if men strive together, and hurt a woman with child, so that her fruit depart, and yet no mischief follow, he shall be surely fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow, then thou shalt give life for life[.]

Exodus 21:22–23; *see Abortion in Jewish Law*, *supra* note 9, at 109–10; *see also Law and Morality in Jewish Law*, *supra* note 9, at 77.

12. MARGARET D. KAMITSUKA, ABORTION AND THE CHRISTIAN TRADITION: A PRO-CHOICE THEOLOGICAL ETHIC 34–35 (2019).

mother's womb, the fetus was determined to have been harmed.[13] Based on the medical knowledge of those days, the earliest stage in which it was possible to determine the vitality of the fetus, was when the mother felt the movements of the fetus in her womb ("quickening").[14] However, since it was difficult to provide conclusive evidence that the fetus was alive when harmed, even after it reached the quickening stage, Common Law stated that there is no sufficient evidence to convict for the killing of a "human being."[15] Therefore, because of the desire to avoid false accusations and false convictions, many safety measures were taken and a rule was established under which a fetus was considered a "human being" only after its birth.[16] Eventually, the term "Born Alive Rule" was developed, which involves two sub-principles: first, homicide offences apply only to a victim that is a "human being" (the victim is defined as such only after exiting the mother's womb alive); and second, homicide offenses apply to situations in which the fetus was harmed at any stage of its development—but only if the fetus was born alive ("human being") and subsequently died after its birth.[17]

The origins of the BAR, and the reasons leading to its adoption in Common Law, demonstrate that the rule had an evidential nature and developed as a constraint resulting from the lack of medical technology in those days.[18] Accordingly, it did not reflect the social or moral perception regarding the sanctity of a fetus' life nor the question of when to consider the fetus as a "human being"—and it certainly was not sufficient to reflect a perception that reduced the protection of the fetus in criminal law.[19]

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13. Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1847 & n.13 (2000); Clarke D. Forsythe, Note, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 575–76 (1987); *see* Shah, *supra* note 1, at 937–38.

14. Joanne Pedone, Note, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 81–82 (2009).

15. *Id.* at 80–82.

16. *Id.* at 82.

17. Forsythe, *supra* note 13, at 579–80. The BAR has become part of the Common Law since the late thirteenth century or the early fourteenth century. *Id.* at 580–81.

18. Most scholars accept the viewpoint that the justification for the BAR is evidential rather than essential, today. Mary Lynn Kime, Note, *Hughes v. State: The Born Alive Rule Dies a Timely Death*, 30 TULSA L.J. 539, 540–42 (1995).

19. Kristin Savell, *Is the 'Born Alive' Rule Outdated and Indefensible?* 28 SYDNEY L. REV. 625, 630–31 (2006); *Crimes against the Foetus*, *supra* note 1, at 33–35; *see* Forsythe, *supra* note 13, at 564; *see also* Alison L. Tsao, Note, *Fetal Homicide Laws: Shield against Domestic Violence or Sword to Pierce Abortion Rights?* 25 HASTINGS CONST. L.Q. 457, 460–61 (1998).

Although the BAR has become an integral part of the Common Law[20]—except for the United States[21]—due to the approach that sought to protect a human being at every stage of its development on the one hand, and because of the described evidentiary problems on the other hand, it was determined independently from the BAR that there must be a penalty for killing a fetus that was not born alive.[22] As a result, a distinction was made between two different offenses:[23] first, an offender who harmed a fetus that was later born alive and died after birth can be prosecuted for the death of a human being; and second, an offender who caused the death of a fetus that was later born dead, it was decided that it is possible to be satisfied, in terms of evidence, that the fetus has human life by proving it reached the quickening phase, and subsequently to prosecute the offender for putting a fetus to death, which was a less severe offense than the killing of a human being.[24]

In Common Law countries where the BAR prevails, there is a complementary principle which is relevant in the event of an early injury occurring before the entire fetus has emerged from its mother's womb, causing the infant's death after becoming a "person;" that is, it gives its effect or continues to make its mark after the birth of a living person.[25] The

20. Forsythe, *supra* note 13, at 580 (explaining a detailed history of the common law authorities and application of the Born Alive Rule); *see, e.g.,* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1797); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198 (1769); Pedone, *supra* note 14, at 82; 1 JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS) 188 (London, MacMillan & Co. 1877); JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982, at 4 (1988); AG's Reference No. 3 of 1994 [1997] UKHL 31, [1998] AC 245 (HL) (appeal taken from Eng.); Ian R. Kerr, *Pregnant Women and the 'Born Alive' Rule in Canada*, 8 TORT L. REV. 713, 713 (2000).

21. Michael S. Robbins, Comment, *The Fetal Protection Act: Redefining "Person" for the Purposes of Arkansas' Criminal Homicide Statutes*, 54 ARK. L. REV. 75, 80–82 (2001); Cari L. Leventhal, Comment, *The Crimes against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 176 (1998); Pedone, *supra* note 14, at 83, 87–88 (discussing the adoption of the Born Alive Rule by the MODEL PENAL CODE § 210.01(1) (AM. LAW INST. 1962)); Tara Kole & Laura Kadetsky, Recent Developments*, The Unborn Victims of Violence Ac*t, 39 HARV. J. ON LEGIS. 215, 216–18 (2002). The murder of a fetus at different stages of pregnancy is classified as a murder offence in about one half of the states in the United States of America, and many states retain a modified version of the rule, but there are considerable variations between the legal arrangements among the states. *Id.* at 217 nn. 27, 28.

22. Kole & Kadetsky, *supra* note 21, at 216–18.

23. Pedone, *supra* note 14, at 382 (citing COKE, *supra* note 20, at 50).

24. Shah, *supra* note 1, at 936–37. This offense exists in English law until today and is called "child destruction." However, this offense is not currently based on the quickening distinction. *See* Emma Milne, Suspicious Perinatal Death and the Law: Criminalising Mothers Who do not Conform 107, 206–08 (2017) (unpublished Ph.D thesis, University of Essex).

25. Shah, *supra* note 1, at 939.

complementary principle dictates that perpetrators who cause the injury may be liable for a homicide offense (such as murder).[26] This principle includes not only cases in which the injury directly affected the fetus, but also cases in which the offender caused the baby's premature birth, affecting the infant's ability to cope with the normal dangers of infancy.[27]

In the English legal system, and other affected countries, the severe consequences arising from the late determination of human life, have been mitigated by the specific offense of child destruction, which is found in most common law countries that have determined human life begins at a later point in time.[28]

2. Continental Law

The position of German law on the question at stake has influenced and shaped the position of many continental legal systems. As such, in this Section we will mainly review the German law with a brief reference to other continental systems.

Under German law, the issue relating to the term "person" varies between different legal branches, as well as with regard to the different purposes of the legal arrangement.[29] In light of the purpose of recognizing legal competence, civil law determines that a fetus is a "person" at the end of the birthing process,[30] while the common approach under criminal law determines that a fetus is a "person"—and thus an object of the homicide offense—at the beginning of the birthing process.[31]

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26. *Id.* at 954.

27. AG's Reference No. 3 of 1994 [1997] UKHL 31, [1998] AC 245 (HL); J. W. CECIL TURNER, KENNY`S OUTLINES OF CRIMINAL LAW 129 (18th ed. 1962).

28. *See* Sara Fovargue & José Miola *Policing Pregnancy: Implications of The Attorney-General's Reference (No. 3 Of 1994)*, 6 MED. L. REV. 265, 268–69 (1998). Examination of the prohibition in these countries raises three differences between the other various countries: in relation to the stage in the development of the fetus that the prohibition protects; the mental element required; and punishment. Cameron Murphy et al., Submission of N.S.W. Council for Civil Liberties & The Univ. of N.S.W. Council for Civil Liberties, Review of the Law of Manslaughter in New South Wales 19–21 (2003); *see, e.g., Criminal Law Consolidation Act 1935* (SA) s 81 (Austl.); *Criminal Code Act 1899* (Qld) s 313 (Austl.); *Criminal Code 1913* (WA) s 290 (Austl.); *Criminal Code Act 1983* (NT) s 170 (Austl.); *Criminal Code Act 1924* (Tas) s 165 (Austl.).

29. *See, e.g.,* STRAFGESETZBUCH [STGB] [PENAL CODE] (Ger.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (Ger.).

30. *See* BGB § 1 (Ger.).

31. Ambos & Bock, *supra* note 5, at 246. Note that the old German law adopted the position according to which homicide offences are possible even before pregnancy is complete. *See* 39 BVERFGE 1 (7) (Ger.) (citing STRAFGESETZBUCH FÜR DIE PREUBISCHEN STAATEN 1851 [PRUSSIAN PENAL CODE 1851] §§ 181–182).

The determination under criminal law serves the purpose of legal order by extending the protection of human life, physical integrity, and health to the stage of birth itself (which has an increased risk to life), and thus provides protection from injury caused by negligence during this stage.[32] Today, the birthing process begins at the beginning of dilating pains (*eröffnungswehen*) whether they occur naturally, or due to medical intervention.[33] This approach, which reflects the progress achieved in the field of medical science, replaced the previously accepted approach that the birthing process began at the beginning of the bearing down pains (*presswehen*) which cause the fetus to exit from the uterus.[34] The position is that the bearing down pains occur at an advanced stage of labor.[35] With regard to cesarean section, the crucial point in time is the opening of the uterus through medical intervention which is intended to replace the natural birthing process.[36] Putting the threshold of the beginning of human life into an earlier medical intervention (such as the incision of a pregnant woman's abdomen), might have provided a broader protection for the baby to be born but, since such a cut itself may serve other purposes than birth, it is deemed to not yet mark the beginning of

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32. Albin Eser, Commentary, *in* SCHÖNKE-SCHRÖDER, STRAFGESETZBUCH KOMMENTAR [COMMENTARY TO THE PENAL CODE] Vorbem §§ 211ff, at 1773 (27th ed. 2006) (Ger.); REINHART MAURACH ET AL., STRAFRECHT BESONDERER TEIL: TEILDANF 1 STRAFTATEN GEGEN PERSÖNLICHKEITS- UND VERMÖGENSWERTE [SPECIAL PART OF CRIMINAL LAW: PART I OFFENSES AGAINST PERSONALITY AND ASSETS] § 10, at 14 (8th ed. 1995) (Ger.).

33. 32 BGHST 194 (Ger.); Ambos & Bock, *supra* note 5, at 246; HALLIDAY, *supra* note 5, at 108–09.

34. Reichsgericht [RG][Imperial Court of Justice] Sept. 29, 1883, 9 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [RGST] 131, 132 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 1956, 10 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 5 (Ger.); FRANZ VON LISZT & EBERHARD SCHMIDT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS [TEXTBOOK OF GERMAN CRIMINAL LAW] 458–59 (1927) (Ger.); Hans Joachim Hirsch, *Die Grenze zwischen Schwangerschaftsabbruch und allgemeinen Tötungsdelikten nach der Streichung des Privilegierungstatbestands der Kindestötung* (*§ 217 StGB a. F.*) [*The Boundary Between Abortion and General Homicide After the Privilege of Child Killing Has Been Removed* (*§217 Penal Code*)], *in* MENSCHENGERECHTES STRAFRECHT: FESTSCHRIFT FÜR ALBIN ESER ZUM 70. GEBURTSTAG [HUMAN RIGHTS CRIMINAL LAW. COMMEMORATIVE FOR ALBIN ESER'S 70TH BIRTHDAY] 309, 316–17 (2005) (Ger.); Enrico Mario Ambrosetti, *Il Delitto Di Infanticidio* [*The Crime of Infanticide*]*, in* 4 TRATTATO DI DIRITTO DI FAMIGLIA: DIRITTO PENALE DELLA FAMIGLIA [TREATED OF FAMILY LAW: CRIMINAL FAMILY LAW] 840, 869 & n. 165 (directed by Paolo Zatti, Silvio Riondato ed., Giuffrè 2011) (It.).

35. 10 BGHST 5 (Ger.); HALLIDAY, *supra* note 5, at 108 n. 82.

36. Ambos & Bock, *supra* note 5, at 246; Hans Lüttger, *Geburtshilfe und Menschwerdung in strafrechtlicher Sicht* [*Obstetrics and Becoming a Person from a Criminal Point of View*], *in* FESTSCHRIFT FÜR ERNST HEINITZ ZUM 70. GEBURTSTAG [COMMEMORATIVE FOR ERNST HEINITZ'S 70TH BIRTHDAY] 359, 365–66 (1972) (Ger.).

the birthing process nor the beginning of human life.[37] Opening the uterus at the beginning of dilating pains in the cesarean section is seen as the beginning of the birth, and with it, begins the protection of the newborn's human life.[38] An important condition for establishing the elements necessary for an act of murder is that at the moment of birth the newborn was alive without depending on the mother's life.[39] The newborn's ability to survive is irrelevant.[40] Therefore, a newborn who is unable to survive after birth can still be an object for the purpose of establishing a murder offense.[41] Other legal systems such as Austria,[42] Switzerland,[43] Greece,[44] Luxembourg, Romania, and Argentina, have adopted the common position of German law.[45]

Similar to the complementary principle of the BAR, transgression of harm to a newborn's life can also occur through a harmful act, performed prior to the point in time perceived as the beginning of human life, if its effect is apparent after the beginning of birth.[46] The point at which the harmful effects begin (as opposed to the date of the occurrence of the adverse result) prevents the harmful act from falling within the scope of the criminal prohibition of killing a person (homicide offense) from the act of terminating pregnancy with an abortion (harm to the fetus).[47] When effects of the harmful

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37. Lüttger, *supra* note 36, at 365–66.

38. 32 BGHST 194 (196) (Ger.); Ambos & Bock, *supra* note 5, at 246; Eser, *supra* note 32, §§ 211ff, at 1772–73.

39. 32 BGHST 194 (196) (Ger.); Ambos & Bock, *supra* note 5, at 246; Eser, *supra* note 32, §§ 211ff, at 1773.

40. 32 BGHST 194 (197) (Ger.); Ambos & Bock, *supra* note 5, at 246; Eser, *supra* note 32, §§ 211ff, at 1773.

41. 32 BGHST 194 (197) (Ger.); Ambos & Bock, *supra* note 5, at 246; Eser, *supra* note 32, §§ 211ff, at 1773.

42. STRAFGESETZBUCH [STGB] [Penal Code] § 79 (Austria).

43. Bundesgericht [BGer] [Federal Supreme Court] Sept. 21, 1993, 119 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] IV 207, 209 (Switz.); GÜNTER STRATENWERTH, SCHWEIZERISCHES STRAFRECHT, BESONDERER TEIL I: STRAFTATEN GEGEN INDIVIDUALINTERESSEN [SWISS CRIMINAL LAW, SPECIAL PART I: CRIMES AGAINST INDIVIDUAL INTERESTS] § 1, at 23 (5th rev. ed. 1995) (Ger.).

44. Hirsch, *supra* note 34, 316–17; PENELOPE AGALLOPOULOU, BASIC CONCEPTS OF GREEK CIVIL LAW 39 & n.2 (Youlika Kotsovolou Masry trans., 2005); *see also* Theresa Papademetriou, *Greece*, *in* CHILDREN'S RIGHTS 96, 97 (Law Library of Cong., 2007), http://www.loc.gov/law/help/child-rights/pdfs/childrens-rights.pdf (last visited May 8, 2020).

45. Hirsch, *supra* note 34, 316–17.

46. 39 BVERFGE 1 (Ger.); Ambos & Bock, *supra* note 5, at 246; *see* Eser, *supra* note 32, §§ 211ff, at 1773.

47. *See infra* note 48. *But cf. infra* note 49.

act begin before the birth, the act falls within the offense of abortion.[48] When effects of the harmful act begin only after the beginning of birth, the act does not fall within the prohibition of terminating a pregnancy, but rather, within homicide offenses, such as murder.[49] For example, an instance in which a bacterium was introduced into a woman's body which caused an infection within her body—but did not spread to the fetus.[50] Assuming, *arguendo*, that after woman gave birth, only during breastfeeding the bacterium entered the baby's body, ultimately causing the baby's death.[51] This example illustrates an act which occurred before birth, while the baby was still a fetus, but which began affecting the baby after birth—meaning the act affected a person and therefore would be considered as a killing of a person (homicide offense).[52] In light of this criterion, a 2007 case in which an act injured the fetus, resulting in the fetus' premature birth and death after several hours (even though the effects began before birth and lasted thereafter), was considered a case of abortion (termination of pregnancy) and not the killing of a person (homicide offense).[53]

The importance of this distinction lies in the fact that German law does not establish a criminal prohibition against negligently harming the life of a fetus prior to the beginning of life, nor does it establish criminal prohibitions against causing harm to the fetus' body and health (offenses of assault).[54] In other words, termination of pregnancy requires *mens rea* and cannot be accompanied by negligence, because such a prohibition would result in significant restrictions on actions of pregnant women that could endanger the fetus' life.[55] In contrast to the limited protection afforded to the fetus at the stage prior to birth, the German law provides newborns with a broad protection—even for negligent acts—at the stage of birth itself by defining

48. STGB § 218 (Ger.); Ambos & Bock, *supra* note 5, at 246.

49. Michael G. Mattern, Comment, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INT'L & COMP. L.J. 643, 684–85 (1991).

50. *See, e.g.,* Eser, *supra* note 32, §§ 211ff, at 1774.

51. *Id*.

52. *Id.*

53. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 02, 2007, NEUE Z EITSCHRIFT FUR STRAFRECHT [NSTZ] 393 (2008) (Ger.).

54. *Compare* 39 BVerfGE 1 (6) (Ger.), *with* Burkhard Jähnke, *Straftaten gegen das leben: Vorbemerkungen zu den Tötungsdelikten* [*Crimes Against Life: Preliminary Remarks on Homicides*]*, in* 5 STRAFGESETZBUCH, LEIPZIGER KOMMENTAR [PENAL CODE, LEIPZIGER COMMENTARY] vor § 211, at 13–14 (Burkhard Jähnke et al. eds., 11th ed. 2005) (Ger.).

55. *Compare* Mattern, *supra* note 49, at 684–85, *with* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, E.T.S. No. 005, *and* V.O. v. France, App. No. 53924/00, 2004-VIII Eur. Ct. H.R. 67, 106–07, ¶ 80 (2004), *and* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

the beginning of human life at the beginning of birth (negligent malpractice and causing death by negligence).[56]

B. Constitutional Law

1. Common Law and Modern Anglo-American Law

In the infamous 1973 case, *Roe v. Wade*, the United States Supreme Court ruled that in balancing the constitutional right to privacy of the mother and the state's interest in protecting the life of the fetus, the state must not restrict the mother's right to terminate pregnancy until the fetus reaches the stage of viability, which is generally the twenty-eighth week of pregnancy, but may also be during the twenty-fourth week.[57] It was held that the term "person" as stated in the Fourteenth Amendment of the Constitution does not include a fetus.[58] The Court refused to decide the issue of when human life begins, but determined that when the fetus reaches the viability stage, the state's interest in protecting potential human life increases.[59]

It should be noted that when it comes to termination of pregnancy performed by a "third party" (i.e., a person other than the mother who does not act according to her will), before the state's interest to protect the fetus' life, the counter-interest of the mother is not taken into account.[60] It is possible, therefore, that with respect to homicide offenses, the result of the balancing test would be different, and the time for which protection of the fetus's life begins, will be earlier than the stage of the viability.[61] Thus, courts in jurisdictions where homicide offenses apply to embryos prior to the viability stage have determined that these laws do not contradict the Fourteenth Amendment of the United States Constitution and the decision in *Roe v. Wade*.[62] Accordingly, the United States Supreme Court later ruled in the case of *Casey v. Planned Parenthood* that states have an interest in protecting the life of the fetus, and that termination of pregnancy can be arranged even before the stage of viability, as long as it does not constitute an inappropriate burden on the woman.[63]

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56. StGB §§ 222, 229 (Ger.).

57. Roe v. Wade, 410 U.S. 113, 160 (1973) (holding modified by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

58. *Id.* at 158.

59. *Id.* at 159, 164–65.

60. Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671, § 12 (1988); *cf. Roe*, 410 U.S. at 162–64.

61. State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) (citing to *Roe*, 410 U.S. at 161–62).

62. *See, e.g., id.*; People v. Davis, 872 P.2d 591, 599 (Cal. 1994).

63. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

The case has been different in Ireland, where its Constitution before 2018 provided for the "right to life of the unborn . . . ."[64] Accordingly, legal literature provides that it would be implausible for Irish case law to adopt the Common Law approach on the subject matter.[65] However, we shall highlight the Thirteenth Amendment of the Constitutional Act 1992 of the Constitution of Ireland, approved by referendum in the same year, which particularly specifies that the right to life of the unborn does not limit freedom of travel in and out of the state.[66] Later on in 2018, an additional referendum was held and Article 40.3.3, which previously stated: "[t]he State acknowledges the right to life of the unborn, with due regard to the equal right to life of the mother, guarantee in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the right" and providing for the right to travel and information, was repealed and replaced the right to life of the unborn with a clause permitting legislation regarding termination of pregnancy.[67]

The *Attorney General v. X* case established the background for this amendment, in which the Attorney General issued and secured an injunction in the High Court that prevented a fourteen-year-old woman, who was raped and later became pregnant, from obtaining an abortion.[68] The Supreme Court held that there was a right to the young woman's life from suicide and reversed the injunction; otherwise, it would have been lawful.[69] In this context, it should be noted that the 1992 referendum included a proposal, which was ultimately rejected, whereby the possibility to commit suicide would not establish a sufficient threat to justify an abortion.[70]

As for England, although it has no formal written constitution, the Human Rights Act provides that the European Convention on Human Rights (ECHR) applies to England and binds its state authorities.[71] The European Convention provides a wide range of protection to the life of a human being and, according to case-law of the European Court on Human Rights, such

64. M.R. *v.* T.R. [2006] IEHC 359 [2010] 2 IR 321 (Ir.) (quoting Constitution of Ireland 1937 art. 40.3.3).

65. SEÁN E. QUINN, CRIMINAL LAW IN IRELAND 624–26 (4th ed. 2009) (quoting Attorney Gen. v. X [1992] IESC 1 [1992] IR 1 (Ir.)).

66. Thirteenth Amendment of the Constitution Act 1992 (Amendment No. 13/1992) (Ir.).

67. Thirty-sixth Amendment of the Constitution Act 2018 (Amendment No. 36/2018) (Ir.); Constitution of Ireland 1937 art. 40.3.3.

68. Attorney Gen. v. X [1992] IESC 1 [1992] IR 1 (Ir.).

69. *Id.*

70. David Kenny, *Aborto, a Constituição irlandesa e mudança constitucional* [*Abortion, the Irish Constitution, and Constitutional Change*], 5 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. RES.] 257, 262 (2018) (Braz.).

71. *See* Human Rights Act of 1998, c. 42, pmbl. (UK).

protection extends to a born human being—i.e., the fetus is not constitutionally protected.[72]

The Canadian constitutional law does not extend the protection of life to the fetus.[73] An inquiry into Canadian constitutional law makes clear that for various purposes, the fetus is "accorded various rights . . . [on the] condition [] a legal personality be [] acquired [which is possible] when the fetus is subsequently born alive."[74]

2. Continental Law

Article 2(2) of the German Basic Law provides the constitutional protection of life; some believe this protection is not limited to an existing physical-mental entity, but instead, that the protection also includes human life at the prenatal stage.[75] The point in time from which to extend the constitutional protection of life is a controversial question to which there is no precise scientific answer.[76] The various approaches for answering this question attempt to strike a balance between the rights of pregnant women and the rights of unborn fetuses.[77] The German Federal Constitutional Court's interpretation of Article 2(2) of the German Basic Law is that "life which is developing in the mother's womb is itself an independent legal value which enjoys the protection of the constitution."[78] However, according to another view in German literature, the constitutional protection of life begins earlier—at the stage of the connection between the sperm cell and the egg cell.[79]

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72. Cristian Claudiu Teodorescu, *The Right to Life Guaranteed by the European Convention on Human Rights and It's Exceptions*, 2010 DAYS L. 2756, 2762–64.

73. Tremblay v. Daigle, [1989] 2 S.C.R. 530, 532 (Can.).

74. Karen M. Weiler & Katherine Catton, *The Unborn Child in Canadian Law*, 14 OSGOODE HALL L.J. 643, 655 (1976).

75. GRUNDGESETZ [GG] [BASIC LAW] art. 2(2) (Ger.); 39 BVERFGE 1 (37) (Ger.).

76. 39 BVERFGE 1 (29–30) (Ger.).

77. Teodorescu, *supra* note 72, at 2761, 2763.

78. 39 BVERFGE 1 (1) (Ger.), *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605, 605 (1976); RALPH INGELFINGER, GRUNDLAGEN UND GRENZBEREICHE DES TÖTUNGSVERBOTS: DAS MENSCHENLEBEN ALS SCHUTZOBJEKT DES STRAFRECHTS [FOUNDATIONS AND BASICS OF THE KILLING BAN: HUMAN LIFE AS A PROTECTIVE OBJECT OF CRIMINAL LAW] 103 (2004) (Ger.).

79. Sheila Jasanoff & Ingrid Metzler, *Borderlands of Life: IVF Embryos and the Law in the United States, United Kingdom, and Germany*, SCI. TECH. & HUM. VALUES, Jan. 2018, at 10–11, https://journals.sagepub.com/doi/pdf/10.1177/0162243917753990 (last visited Mar. 21, 2020).

The constitutional right to human life is not only of a defensive nature (*abwehrrecht*), although this is arguably its primary and main function.[80] The state's duty to recognize this right "forbids . . . direct state attacks against developing life itself."[81] Nevertheless, this duty also "requires the state to [take active measures] to protect and foster . . . life"—in the constitutional sense—even against unlawful infringement by a third party.[82] The question then becomes whether the appropriate means of protection is necessarily always criminal law. When it is not a question of the relations between the individual and the authority, but rather the relationship between two individuals, or the relationship between the rights of those individuals, the right to life does not always prevail.[83] For example, the right to life may retreat against the pregnant woman's right to human dignity that may be harmed, at least in certain circumstances, if she is required to continue her pregnancy against her will.[84] In this context, it should be noted that when criminal law is applied, the state must act in accordance to principles of proportionality, which require measures taken by the state to protect a right (and in our case, to protect life in the expanded sense through criminal law) to be the least injurious (*erforderlich*).[85]

The question of what the proper expression of the state's duty should be to protect life, in light of the view that the right to life applies to a fetus in its mother's womb, has been discussed in several Constitutional Court judgments dealing with the question of the existence of a criminal prohibition against abortion.[86] Until the 1970s, the criminal law included a complete ban on the termination of pregnancies.[87] The need for legal reform was realized in the wake of a reality in which women and doctors risked themselves when

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80. 60 YEARS GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT, LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS 81, 85, 87 (Jürgen Bröhmer et al. eds., 2d ed. 2012) [hereinafter 60 YEARS GERMAN BASIC LAW].

81. 39 BVERFGE 1 (1, 20) (Ger.), *translated in* Jonas & Gorby, *supra* note 75, at 605, 642; *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 87.

82. 39 BVERFGE 1 (24–25) (Ger.), *translated in* Jonas & Gorby, *supra* note 75, at 605, 642; *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 86–87, 181.

83. *See* 39 BVERFGE 1 (20–21) (Ger.).

84. 39 BVERFGE 1 (24–25) (Ger.); 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 181.

85. 39 BVERFGE 1 (45–47) (Ger.); 88 BVERFGE 203 (254, 258) (Ger.).

86. *See, e.g.,* 39 BVERFGE 1 (Ger.); 88 BVERFGE 203 (Ger.); *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 180–81.

87. Mattern, *supra* note 49, at 656–60; Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 4 (1994) [hereinafter *Constitutional Law of Abortion in Germany*]; Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 260 (1977) [*Abortion and Constitution*].

performing pregnancy termination procedures.[88] The first reform was in 1974.[89] At that time, the Fifth Law on the Reform of Criminal Law of June 18, 1974 (5th StrRG), stipulated that anyone who ends a pregnancy after the thirteenth day of conception is generally punished; however, punishment is inapplicable if the abortion is performed by a doctor no more than twelve weeks from the date of conception.[90] A petition challenging this law was subsequently filed with the German Federal Constitutional Court, wherein it was argued that Article 2 (2) prohibited the death of an unborn fetus except under exceptional circumstances.[91] In a 1975 ruling, the Federal Constitutional Court accepted this position and rejected the legal arrangement because it is unconstitutional and contrary to the obligation of the state to realize the fetus's right to life or to realize the objective value of human dignity, which also applies to the life of the fetus, according to Articles 1(1) and 2(2) of the Basic Law (the right to life and the right to dignity).[92] The Constitutional Court held that "the fundamental norm of the constitution, protects unborn life as the preliminary stage of human life", and therefore protection of life of human being also requires protection of the life of the fetus.[93] In the same ruling, the court also held that "[i]f the legislature wants to dispense . . . with penal law punishment, this would be compatible with . . . Article 2, Paragraph 2 . . . of the Basic Law . . . ."[94] After the disqualification of the existing arrangement by the Constitutional Court, an arrangement was made that did not define the legality of terminating a pregnancy in terms of the point in time at which it was performed (*fristenmodell*), but rather upon an examination of the reasons underlying a woman's request for termination of pregnancy (*indikationsmodell*) in exceptional cases only.[95]

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88. *See* Albin Eser, Comment, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 371–72 (1986).

89. Fünftes Gesetz zur Reform des Strafrechts [5. StrRG] [Fifth Criminal Law Reform Act], June 18, 1974, BUNDESGESETZBLATT, Teil I [BGB_L I] at 1297 (Ger.) (Section 218a of the Act was declared unconstitutional by the Federal Constitutional Court in 39 BVERFGE 1 (Ger.)); *Abortion and Constitution, supra* note 87, at 263–64, 267.

90. Fünftes Gesetz zur Reform des Strafrechts [5. StrRG] [Fifth Criminal Law Reform Act], June 18, 1974, BGB_L I at 1297, § 218 (Ger.).

91. *Constitutional Law of Abortion in Germany*, *supra* note 87, at 5–6; *Abortion and Constitution, supra* note 87, at 264.

92. *Compare* 39 BVERFGE 1 (42–44) (Ger.), *with* Eser, *supra* note 32, Vorbem §§ 218ff, at 1831–33.

93. 39 BVERFGE 1 (30) (Ger.), *translated in* Jonas & Gorby, *supra* note 75, at 632.

94. 39 BVERFGE 1 (30) (Ger.), *translated in* Jonas & Gorby, *supra* note 75, at 649.

95. 39 BVERFGE 1 (2–3) (Ger.); Mattern *supra* note 49, at 658–60, 666–67, 671; *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 181; *see* Eser, *supra* note 88, at 372–78.

Additional legal reforms with respect to the termination of pregnancy were made subsequent to the reunification of Germany due to the many differences in the worldview between the more liberal East Germans, where abortions were allowed at a woman's discretion during the first three months of pregnancy, as compared to the more conservative West Germans, where a doctor would have to interview a woman and attest to the presence of an "indication" before she could obtain an abortion.[96] In the agreement of unification between West Germany and East Germany, according to which the West German law would be applied, a provision was issued requiring a reform of the halting of pregnancy laws for a united Germany.[97] According to the legal arrangement adopted in 1992, termination of pregnancy would generally constitute a criminal act, but termination of pregnancy that was performed up until the twelfth week of pregnancy after receiving professional counseling would constitute an exception to the criminal prohibition.[98] The Constitutional Court of Germany, which dealt with the constitutionality of the arrangement, emphasized, as in its judgment in 1975, that the starting point in the examination of the legal arrangement is, *inter alia*, the obligation of the state to actively protect the right of the fetus to life and human dignity.[99] The court rejected the arrangement in the law because it contravened Articles 1(1) and 2(2) of the Basic Law, and because it did not provide adequate protection for the life and dignity of the fetus.[100] The arrangement in the law was unconstitutional because it determined that, under certain conditions (obtaining professional counseling and being at the appropriate stage for pregnancy), the termination of pregnancy is lawful (*rechtmäßig*).[101] Although, the Constitutional Court has technically accepted that punishment should not be imposed upon women for termination of pregnancy under certain circumstances (*straffrei*), it cannot be said that such an act is in fact "lawful."[102] In other words, the termination of pregnancy

96. Mattern *supra* note 49, at 651; 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 180.

97. Mattern *supra* note 49, at 652, 673; *Constitutional Law of Abortion in Germany*, *supra* note 87, at 11, 13–14.

98. *Constitutional Law of Abortion in Germany*, *supra* note 87, at 13–14.

99. 88 BVERFGE 203 (203–04) (Ger.); *Constitutional Law of Abortion in Germany*, *supra* note 87, at 18–20; *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 180–81.

100. GG arts. 1(1), 2(2); 88 BVERFGE 203 (208) (Ger.); *Constitutional Law of Abortion in Germany*, *supra* note 87, at 17–19; *see* 60 YEARS GERMAN BASIC LAW, *supra* note 80, at 180.

101. 88 BVERFGE 203 (203–04) (Ger.); *see Constitutional Law of Abortion in Germany*, *supra* note 87, at 17–20.

102. *See Constitutional Law of Abortion in Germany*, *supra* note 87, at 17–18.; *cf.* 88 BVERFGE 203 (270, 273–74) (Ger.).

should not be regarded as justified, but only as an act for which no punishment can be given.[103]

The legal arrangement currently existing in Section 218 was accepted into the Criminal Law—the "Consulting Arrangement" (*Beratungsmodell*).[104] The law states that an action to terminate pregnancy during the first stage of pregnancy—until the fertilized egg is absorbed into the womb—does not fall within the scope of the criminal prohibition.[105] Therefore, measures to prevent the development of pregnancy, such as the "day after" pill, are not prohibited by criminal law.[106]

Also, the period between the absorption of the fertilized ovum in the womb and the end of the twelfth week of pregnancy, it is forbidden to carry out pregnancy termination.[107] Thus, a pregnancy termination performed after receiving professional medical advice, at least three days before the termination of pregnancy, does not fall within the scope of the prohibition.[108] Outside of this condition, nothing additional is required of the pregnant woman; she is not required to explain or justify the reasons for which she wishes to terminate her pregnancy.[109] In fact, the law establishes a period of time, after receiving a medical consultation, wherein the termination of a pregnancy would not fall within the criminal prohibition.[110] Professor Horst Dreier opined that the determination to exempt abortions from criminal liability at the end of the twelfth week of pregnancy is not well reasoned and seems rather arbitrary.[111]

According to the Constitutional Court's 1993 ruling on the subject, the law does not stipulate that execution of a pregnancy termination is "permitted" or "lawful," but rather under Section 218a of the law act of terminating the pregnancy does not fall within the scope of criminal prohibition in certain circumstances including: "when the woman has obtained counseling at least three days before the operation, when termination of the pregnancy was performed by a doctor, and not more than

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103. *See Constitutional Law of Abortion in Germany*, *supra* note 87, at 17–18.

104. STGB §§ 218 (Ger.); *see* 88 BVERFGE 203 (203–05) (Ger.).

105. STGB § 218a(1)3 (Ger.); 88 BVERFGE 203 (251) (Ger.).

106. *See* 88 BVERFGE 203 (303–04) (Ger.).

107. STGB § 218 (Ger.); 88 BVERFGE 203 (251) (Ger).

108. STGB § 218a(1)1 (Ger.).

109. *See id.*; *see also* 88 BVERFGE 203 (349–50) (Ger.) (Mahrenholz & Sommer, JJ., dissenting).

110. STGB § 218a(2) (Ger.).

111. Horst Dreier, *Grenze des Tötungsverbotes—Teil 1* [*Limit of the Killing Ban—Part 1*], 6 JURISTEN ZEITUNG 261, 269 (2007) (Ger.)

twelve weeks have elapsed since conception."[112] The fulfillment of the conditions in Section 218a(1) made the act of abortion in accordance with Section 218 non-punishable.[113] Moreover, the court's 1993 ruling was intended to send a message that this is indeed an act of impunity; i.e., to negate its disqualification and wrongdoing, which may be expressed in other legal areas, such as by not requiring state funds to bear the cost of terminating pregnancies.[114]

Beginning at the thirteenth week of pregnancy, termination is not exempt from the criminal prohibition, and a medical reason is required for a woman seeking an abortion in order to avoid criminal prosecution.[115] As of now, termination of a pregnancy performed by a doctor, with the woman's consent, does not contravene the law; in other words, termination of a pregnancy is justified only when continuation of the pregnancy creates an immediate or future danger to the woman's life, or a serious and immediate danger of future physical or mental harm to the woman, and there is no other reasonable possibility of preventing the dangers mentioned above.[116]

This legal arrangement attempts to give protection to the development of human life prior to its commencement (i.e., prior to birth); this protection increases as the stages of pregnancy and proximity to the due date progress.[117] However, this protection does not amount to that provided by the Criminal Code for a newborn after the beginning of the birth, and marks the beginning of human life in terms of criminal law protected by various types of murder offenses which result in severe punishment, including death, in addition to offenses relating to negligence, as well as assault and injury.[118]

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112. Jenny Gesley, *Germany: Proposed Amendment to the Criminal Code Concerning Advertising Services for Abortion*, LIBR. CONGRESS GLOBAL LEGAL MONITOR (Mar. 19, 2018) https://www.loc.gov/law/foreign-news/article/germany-proposed-amendment-to-the-criminal-code-concerning-advertising-services-for-abortion/ (last visited Mar. 5, 2020). *Compare* 88 BVERFGE 203 (299–301) (Ger.), *with* STGB § 218a (Ger.).

113. STGB § 218a(1) (Ger.); 88 BVERFGE 203 (300) (Ger.).

114. 88 BVERFGE 203 (313) (Ger.) (cannot use public funds to finance "illegal" abortions); *Constitutional Law of Abortion in Germany, supra* note 87, at 22. *But see* 88 BVERFGE 203 (320–21) (Ger.) (exception for women receiving public assistance (i.e., welfare assistance) if they fulfil the counselling requirements).

115. STGB § 218a(2) (Ger.).

116. *Id.*

117. *See id.* § 218a.

118. Mattern, *supra* note 49, at 683; MAURACH ET AL., *supra* note 32, at 13–14.

III. CONCEPTUAL UNDERSTANDING OF THE LEGAL JURISPRUDENCE

C. Constitutional Law versus Criminal Law

We have seen that Continental constitutional law, such as German law, provides a wide range of protection to the fetus when compared to Anglo-American Law.[119]

The case of *Roe v. Wade* considered the subject of abortion (and more specifically—injury to a fetus life) in which it was established that the constitutional protection provided for living persons under the Fourteenth Amendment does not apply to the fetus.[120] It is worthwhile emphasizing that the fetus does not enjoy any independent protection, but rather, it is the state's interest which is being protected here.[121]

The House of Lords rejected the United States Supreme Court's above-mentioned decision, holding that the fetus was not a part of his mother and was instead a human creature worthy of protection; however, such protection is not anchored in the English constitutional law.[122] The Human Rights Act of England provides that the ECHR applies to England and binds its state authorities.[123] However, the ECHR provides extensive protection to the life of a human being and according to case-law of the European Court on Human Rights, such protection extends to a born human being—i.e., the fetus is not constitutionally protected.[124]

Unlike English law, in Germany, the fetus is perceived as enjoying an independent and strong protection.[125] In two precedents, the Federal Constitutional Court of Germany decided that the broad protection provided by Article 2(2) of the German Basic Law to human life, and by Article 1 to human dignity, extends to the fetus as well.[126] The court's perception is that the broad protection afforded to the life and dignity of a born human being mandates extending such protection to the fetus' life; which is considered an earlier and preliminary stage of human life.[127] Without protecting the fetus'

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119. *Compare* GG arts. 1(1), 2(1) (Ger.), *with* U.S. CONST. amend. XIV, *and* Roe v. Wade, 410 U.S. 113 (1973).

120. *Roe*, 410 U.S. at 158.

121. *See id.* at 157–58.

122. AG's Reference No. 3 of 1994 [1997] UKHL 31, [1998] AC 245 (HL) (appeal taken from Eng.).

123. Human Rights Act 1998, c. 42, pmbl. (UK).

124. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 55, art. 2; *see, e.g.,* Asiye Genç v. Turkey, App. No. 24109/07, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng/?i=001-151025 (last visited May 3, 2020).

125. GG arts. 1(1), 2(1) (Ger.).

126. GG art. 2(2); 39 BVERFGE 1 (Ger.); 88 BVERFGE 203 (Ger.).

127. 39 BVERFGE 1 (30, 36–41) (Ger.); 88 BVERFGE 203 (251–52) (Ger.).

life, the protection of the human being's life is impossible.[128] Moreover, unlike the United States Supreme Court, the German Federal Constitutional Court has established that a woman may perform an abortion until the end of the first trimester of the pregnancy only upon completion of advisory proceedings before an authorized committee.[129] In such instances, the only requirement is that the final decision be that of the woman herself, even without reasoning to support her decision.[130] However, beginning with the second trimester of pregnancy, the fetus' rights to life and dignity prevail over the woman's rights to privacy and bodily integrity.[131] Accordingly, in the latter case, a woman may have an abortion performed only under justifying circumstances, such as when the pregnancy will endanger her life.[132]

That being said, criminal law is completely different, as Anglo-American Law grants the fetus a wider protection in comparison with Continental Law.[133]

For the purposes of homicide offences, Common law and Anglo-American criminal law define a human being as a fetus who exited his mother's womb.[134] In the same context, for Continental law, it is the beginning of the bearing down pains or even earlier, in that the beginning of dilating pains marks the beginning of the life of a human being.[135]

In principle, the protection of the life of human being is stronger than that of a fetus.[136] This position is represented by both Anglo-American law and Continental law, which both distinguish between the human being and fetus.[137] Even when a particular offense defines the crime's object as a human being and a fetus, the punishment for causing the death of a fetus is less harsh than that of causing the death of a human being.[138] For instance, in certain states the death of a fetus will not be deemed punishable through the use of the death penalty, unless the state grants the necessary protections

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128. 39 BVERFGE 1 (43) (Ger.).

129. *Compare* Roe v. Wade, 410 U.S. 113, 163–64 (1973), *with* 88 BVERFGE 203 (210–13) (Ger.).

130. STGB § 218a (Ger.); 88 BVERFGE 203 (270) (Ger.).

131. *See* Tsao, *supra* note 19, at 467. *Compare Roe,* 410 U.S. at 163, *with* 39 BVERFGE 1 (4, 39) (Ger.).

132. Tsao, *supra* note 19, at 462. *Compare Roe,* 410 U.S. at 164–65, *with* 39 BVERFGE 1 (4, 49) (Ger.).

133. *See* Mattern, *supra* note 49, at 683. *See generally* Tsao, *supra* note 19.

134. Forsythe, *supra* note 13, at 583–85; *see, e.g.,* Tsao, *supra* note 19, at 462, 466–67.

135. *See supra* note 5 and accompanying text.

136. *See* Forsythe, *supra* note 13, at 616–17; *see also* Tsao, *supra* note 19, at 459.

137. *See* Mattern, *supra* note 5, at 683; *see* Forsythe, *supra* note 13, at 616; *see also* Tsao, *supra* note 19, at 459.

138. *See, e.g.,* Forsythe, *supra* note 13, at 565–67, 611; Smith, *supra* note 13, at 1878-79.

to a fetus within its laws; which pertain to the causing of the death of the death of a fetus.[139] Moreover, it is remarkable that the rights and interest of life, health and bodily integrity of a human being are protected against *mens rea* and negligent violations. However, as for the protection of these rights and interest concerning the fetus, it is possible only against *mens rea* violations of human life; negligent violation of the fetus's life and *mens rea* violation of the fetus's health and bodily integrity are not even offenses.[140]

Accordingly, widening the definition of a human being under Continental law leads to widening the legal protection. However, Continental Law and Common Law jurisdictions have developed the BAR, its complementary principle and the offense of child destruction.[141] This way, offenses against human life have been extended over the fetus at its various stages of development, thus, many instances of violating the fetus life establish severe homicide offenses.[142] In addition, the American law of various states which has adopted the definition of human being as accepted in the Common Law, yet rejected the BAR, provides that in regard to homicide offenses that the object of these offenses is both a human being and a fetus, or alternatively establishes an independent offense of fetal homicide which is punishable to the same degree, or as close as possible to homicide offenses of a human being, or establishes independent offenses such as assaulting a pregnant woman which caused the death of the fetus, where the fixed punishment is severe than or close to that of homicide offenses.[143] Moreover, both Common Law and Anglo-American Law grant the fetus very wide legal protection, when compared to the Continental Law.[144]

The wider picture is that Continental constitutional law grants the fetus wider protection, compared with Anglo-American constitutional law, while Continental criminal law particularly entails the fetus very weak legal protection when compared with the Anglo-American criminal law.[145]

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139. *See, e.g.,* Tsao, *supra* note 19, at 465–66 (citing MINN. STAT. ANN. § 609.2661 (West 1996)). *But see* Smith, *supra* note 13, at 1855 (citing State v. Ard*,* 505 S.E.2d 328 (S.C. 1998)).

140. *See* Tsao, *supra* note 19, at 468; *see* Kime, *supra* note 18, at 548–49.

141. *See* Kime, *supra* note 18, at 543–50.

142. *See id.* at 549–58.

143. *See* Smith, *supra* note 13, at 1851–69 (detailing the states that criminalize actions against the fetus including the culpability that attaches), 1848 & n.177, 178 (providing examples of states that modified statutes to include crimes against a fetus and states that created new statutes to include a separate offense to a fetus).

144. *See* Kime, *supra* note 18, at 557–58.

145. *Compare* 39 BVerfGE 1 (1) (Ger.), *and* 88 BVerfGE 203 (203) (Ger.), *with* Roe v. Wade, 410 U.S. 113, 163–64 (1973).

D. Dogma versus Pragmatism

The question then becomes not whether Continental Law or Anglo-American Law is the most proper, but rather whether the development of a new law is necessary in both jurisdictions. As Mohammed Saif-Alden Wattad stated

> [a] sophisticated inquiry into comparative law allows for the distinction between the Anglo-American and the Continental jurisprudences, based on a methodological characteristic: Dogma versus Skepticism. In the context of legal theory, dogmatic systems are driven by a set of beliefs . . . . Obviously, these are not arbitrary beliefs, but rather are based on reason, methodology and doctrine; they are not about fiction. However, dogma suggests paying no attention to evidence or other opinions . . . . At the extreme opposite end, skepticism is a prominent feature of the Anglo-American legal system. 'But how will I find such a belief?' René Descartes once asked; and he answered: 'by the method of doubt.'[146]

The Common Law pragmatism is characterized by skepticism, thus "suggest[ing] a very cautious methodology."[147] Pragmatism and skepticism demand "not only reasoning but substantial evidence."[148] Common law adopts "questioning approach" and is being described as "skeptical jurisprudence".[149]

The Common Law and Continental Law systems are fundamentally different how they approach regulation and resolve issues in the legal process.[150] Among the leading features of Continental Law is that the law codified in codes and statutes, thus, case law constitutes only a secondary source of law.[151] Continental Law is dogmatic, and thus contains a great number of "logically connected concepts and rules" with defined hierarchy between "general principles" and "specific rules."[152] Accordingly, the way Continental Law functions is deductive, namely, it goes through the process of analyzing the codified rules to application of the rule in particular case "by

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146. MOHAMMED SAIF-ALDEN WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 202–03 (2007).

147. *Id.* at 203.

148. *Id*. "René Descartes is the father and originator of modern philosophy and France's greatest philosopher." *Id.* at 203 n.608.

149. *Id.* at 203.

150. Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICT. U. WELLINGTON L. REV. 817, 820 (2001).

151. *Id.*

152. *Id.*

means of deduction."[153] This is not the case for Common Law legal systems, where courts are given the task of creating, and at times applying and interpreting, the law.[154] Common Law evolves cautiously case by case, not necessarily led by general rules and principles, but rather by the paradigm of pragmatism and evidence.[155] The way Common Law functions is inductive, i.e., it "starts with the actual case and compares it with . . . similar legal issues that have been dealt with by courts," thus determining the binding legal rule "by means of induction."[156] This is why Continental Law is perceived as more conceptual, while Common Law is more pragmatic.[157]

Bearing this in mind, we shall now step forward to examine the reasons for the different criminal law and constitutional law approaches of both the Continental Law and the Common Law jurisprudences in relation to the question at issue.

In the English Common Law—which is correctly deemed as the origin of the other Anglo-American legal systems—there is no room for the legality principle.[158] There, the principal rule is that of judge made law.[159] In the past, the Roman law and the Canonical Law were perceived as the legal sources for both Common Law and Continental Law.[160] Then, the view was that causing the death of a fully formed embryo was congruent to that of causing the death of a human being.[161] Due to evidentiary problems, the ultimate distinction between a fully formed embryo and a not fully formed embryo was rejected.[162] Accordingly, Common Law systems searched for a tangible point in time by which it would be easy to distinguish between a human being and a fetus.[163] It was only then that Common Law developed the rule whereby a human being is only a fetus who fully exited his mother's womb.[164] The outcome was that the distinction between a human being and a fetus was very clear, and thus no further principal difficulties remained at stake in this regard.[165]

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153. *Id.*
154. *Id.*
155. *See* Pejovic, *supra* note 150, at 819–21.
156. *Id.* at 820.
157. *Id*.
158. *See id* at 819.
159. *See id*. at 820.
160. Pejovic, *supra* note 150*,* at 818*; see Abortion in Jewish Law*, *supra* note 9, at 110.
161. *Law and Morality in Jewish Law*, *supra* note 9, at 77.
162. *See Abortion in Jewish Law*, *supra* note 9, at 109–10.
163. *See id.* at 110.
164. Forsythe, *supra* note 13, at 581.
165. *See id.* at 575.

However, this development of the Common Law did not provide sufficient protection to the fetus, mainly because the death of a fetus took place at various stages of the pregnancy.[166] Consequently, there was a need for stronger protection to the fetus, particularly at earlier stages, before exiting the mother's womb, when the fetus, during the labor stages, was perceived as a tangible creature; therefore, an expectation to bring a human being to the world exists.[167] Moreover, where the pregnancy comes to its end and the fetus is about to exit the mother's womb, it is from a legal perspective and social point of view, that it is quite difficult to treat the case of causing the death of the fetus at the late stages of pregnancy as a case of child destruction. Remarkably, the latter offense is entitled "child destruction" and not "fetus destruction."[168] Given that Common Law granted the judiciary the power to establish new offenses—we are unbid by the legality principle—there was no principal problem in developing a new offense.[169] Originally, the offense of child destruction aimed to encompass the labor stage; however, late case law applied this offense over earlier stages of the pregnancy.[170] Thus, it was for the sake of stronger protection to the fetus that the Common Law developed the BAR as well as its complementary principles.[171] This was the case when the Common Law perceived itself as free of restraints from basic principles, thus allowing for independent judicial development of protection to the fetus.[172]

Likewise, by the United States abandoning the Common Law definition of a "human being," the BAR and the offense of child destruction stepped forward and provided very strong protection to the fetus in the context of criminal law by defining the object of homicide offenses as involving death to a human being or fetus, or by establishing an independent offense of

166. *Id.* at 575–76.

167. *See id.* at 592, 611.

168. Fovargue & Miola, *supra* note 28, at 268 n.15 (quoting Infant Life Preservation Act 1929, 19 & 20 Geo. c. 34, § 1 (Eng., Wales)).

169. *See* Pejovic, *supra* note 150, at 820. *But cf.* Shah, *supra* note 1, at 953 (providing examples of "code states" that abolished Common Law crimes, which precludes courts from establishing new offenses by expanding the Common Law through judiciary decision).

170. Mark J. Rankin, *The Offence of Child Destruction: Issues for Medical Abortion*, 35 SYDNEY L. REV. 1, 2, 13 (2013) (citing Rance v. Mid-Downs Health Authority [1991] 1 QB 587 (Eng.); C v. S [1988] 1 QB 135 (Eng.)).

171. *See id.*; *see, e.g.,* Murphy S. Klasing *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 935–37 (1995).

172. *Cf.* Pejovic, *supra* note 150, at 820; Shah, *supra* note 1, at 940–42 (providing examples of court decisions in the United States in cases of a viable, unborn fetus, where the courts' decision depended on legislative intent of the applicable statute).

unwanted abortion, or a crime of causing an unwanted abortion by assaulting a pregnant woman, both of which are severely punished.[173]

Unlike Common Law, Continental Law remained faithful to the distinction between human being and fetus, thus granting this distinction a practical consequence.[174] Accordingly, causing the death of a human being is perceived as a more serious offense than causing the death of a fetus.[175] This has been particularly true in light of the special status that the legality principle enjoys in Continental Law.[176] The judiciary has no power to establish new offenses or to widen the scope of an existing offense.[177] At best, the sole judiciary power is to interpret an existing offense, whereby the Continental criminal law has stuck to the distinction between a human being and a fetus, granting the former a stronger protection.[178] It was then that Continental criminal law defined a human being not only as a fetus that fully or partly exited the mother's womb, but also from the beginning of the mother bearing labor pains.[179] Later on, in light of medical and technological developments, Continental Law widened the definition of a human being even further to include the beginning of dilating pains, as marking the beginning of life of human being.[180] Thus, it can be concluded that the main concern of Continental Law was the establishment of a clear distinctive line between strong protection of a human being and weak protection of a fetus.[181]

Our view is that we should draw lessons from the Common Law and other modern legal systems that rely on it in entitling the fetus stronger protection in comparison with Continental Law. The reasons for providing wide protection to the fetus are substantive. This position is reflected by defining a fetus in the advanced stages of pregnancy as a creature that should enjoy stronger protection.

The question now becomes how it is possible to explain the exact opposite conclusions in the context of constitutional law. As for the American constitutional law, it is worthwhile mentioning that it is based on an individualistic perception that sanctifies human liberty.[182] When the

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173. *See supra* note 143 and accompanying text. *See generally* Kole & Kadetsky, *supra* note 21 (providing examples of various state criminal statutes in the United States).

174. *See supra* Sections II.A.2, II.B.2.

175. *See supra* note 118 and accompanying text.

176. Pejovic, *supra* note 150, at 820.

177. *Id.* at 820–21.

178. *Id.* at 820; *see, e.g., Constitutional Law of Abortion in Germany*, *supra* note 87, at 4–6.

179. *See supra* Section II.A.2.

180. *See supra* Section II.A.2.

181. *Abortion and Constitution*, *supra* note 87, at 267–69.

182. Leventhal, *supra* note 21, at 194; *see The Bill of Rights*, US HIST.ORG, https://www.ushistory.org/us/18a.asp (last visited Mar. 19, 2020); *see also First Amendment Rights*, US HIST.ORG, https://www.ushistory.org/gov/10b.asp (last visited Mar. 19, 2020).

American Constitution was drafted, a human being was defined as a fetus that fully exited the mother's womb.[183] Accordingly, the American constitutional law was solely concerned with the protection of the rights of the human being, but not of the fetus.[184] Likewise, American constitutional law has paid exclusive attention to the rights of the pregnant woman, but not to the rights of the fetus.[185]

Indeed, England has no formal constitution, however, the Human Rights Act mandates that the ECHR applies to England and binds its state authorities.[186] The ECHR binds not only England but also all other European states which are parties to it.[187] Accordingly, the ECHR provides only the basic constitutional protection to the essential rights in a democratic regime.[188] Namely, parties to the ECHR may—and so most of them do—provide wider protection to the ECHR's right, but not the contrary.[189]

This explanation has nothing to do with the Common constitutional law but is rather an explanation of an existing reality. This position is reflected in Austrian and German criminal law, which provides legal protection to the fetus.[190] However, Austrian constitutional law is different, as it provides for weaker constitutional protection to the fetus, particularly because Austria's constitution is non-existent; like England, it is bound by the ECHR.[191]

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183. Smith, *supra* note 13, at 1851; Kole & Kadetsky, *supra* note 21, at 221–23; *see* Roe v. Wade, 410 U.S. 113, 155–60 (1973).

184. *Roe*, 410 U.S. at 163–64; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Kole & Kadetsky, *supra* note 21, at 233.

185. *Roe*, 410 U.S. at 163–64; *Planned Parenthood*, 505 U.S. at 846; Kole & Kadetsky, *supra* note 21, at 233.

186. Human Rights Act 1998, c. 42, pmbl. (UK).

187. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 55; Maja Nastić, *ECHR and National Constitutional Courts*, 71 COLLECTION PAPERS FAC. L. NIŠ 203, 205–06 (2015); *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR. (Apr. 6, 2020), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures (last visited Mar. 19, 2020).

188. *See* EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2014); *see What is the European Convention on Human Rights?*, EQUALITY & HUM. RTS. COMMISSION (Apr. 19, 2017), https://www.equalityhumanrights.com/en/what-european-convention-human-rights (last visited Mar. 19, 2020).

189. Maja Nastić, *supra* note 187, at 205–06.

190. STGB §§ 96–98 (Austria); STGB § 218 (Ger.); *see* Wendy Zeldin, *Germany*, *in* ABORTION LEGISLATION IN EUROPE 14, 14 (Law Library of Cong., 2015), https://www.loc.gov/law/help/abortion-legislation/abortion-legislation.pdf (last visited May 9, 2020).

191. John D. Gorby, *Introduction to the Translation of the Abortion Decision of the Federal Constitutional Court of the Federal Republic of Germany*, 9 J. MARSHALL J. PRAC. & PROC. 557, 559–60; *cf.* Maja Nastić, *supra* note 187, at 206–07.

However, English law has no problem adopting the American constitutional position, which does not provide the fetus with independent constitutional rights but perceives the fetus as an independent creature, which deserves protection.[192] This is why existing English constitutional law does not characterize the English law. Essentially, it is hard to learn from the Anglo-American law.

IV. DISCUSSION AND CONCLUSIONS

A. The Definition of Human Being

The first crucial question is when does human life begins, namely, when does the fetus become a human being?

The Common Law and the laws of states belong to the Anglo-American System which marks the beginning of a human being as the entire fetus' exit from the mother's body when he is alive.[193] Therefore, an act that causes death directed at a child, which is mostly or partially removed from his mother's womb, is not considered killing a person.[194] The definition may have been set in this way at a time when a fetus had a reasonable chance of coming out of the womb dead, so a later point of time was established so that it could be seen that it was a living infant. The advantage of this definition lays in the fact that a point is made that is clear, tangible, and easy to identify, and that is based on an unequivocal end of pregnancy, expressed in the emergence of the entire fetus from the body of the mother.

However, it is highly doubtful that the result of the death of a fetus that was partially released from its mother's womb does not constitute killing a person, when it could be considered a living person. Is there really a difference between the death of a baby that was completely released from the mother's womb and the death of a baby who has partially emerged?

This position is reflected in the rejection of some Common Law jurisdictions of the Common Law rule, such as India, thus determining that it is sufficient that part of the fetus' body exited the mother's womb.[195]

Late determination of the beginning of life even necessitates an extension of pregnancy termination to that point; otherwise, there would be a gap in which there is no protection of life. This extension, which is necessary to prevent an absurd result, produces an artificial and difficult linguistic result. It is difficult to see the death of a baby that has already

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192. *Cf.* Kevin X. Cao et al., *The Legal Frameworks that Govern Fetal Surgery in the United Kingdom, European Union, and the United States*, 38 PRENATAL DIAGNOSIS 475, 476–77 (2018).

193. Forsythe, *supra* note 13, at 563, 568, 588.

194. *See id.* at 588–89.

195. Indian Penal Code, No. 45 of 1860, PEN. CODE §§ 312–316 (India).

emerged mostly from his mother, but not entirely, as termination of pregnancy. It should be added that the maximum penalty for termination of pregnancy is significantly lower than the maximum penalty for homicide offences.[196] Moreover, it seems that the meaning of the phrase "who knowingly stops the pregnancy of a woman" in the abortion offense even after the beginning of the birth, contravenes the principle of legality, which states that a criminal prohibition must be interpreted according to the natural and customary meaning of its words. The natural meaning of these words is that a woman's pregnancy ceases at the moment of birth, rather than "when he is born, he is alive from his mother's womb."[197]

Even assuming that we are prepared to extend the prohibition of termination of pregnancy until the moment the baby is born, there is still a serious problem in that the scope of the protection of the fetus is limited compared with the protection of a living person. This is mainly due to its dependence on the mother's right to her body and her freedom.[198] The limited scope of the protection of persons whose birth had begun but had not ended is expressed, *inter alia*, in that it is not adequately protected from causing death by negligence (termination of pregnancy requires a mental element of criminal intent), although the stage of birth involves a special risk to the life of the fetus; from bodily harm with criminal intent or negligence.[199]

In the English legal system and in other affected countries, these severe consequences arising from this late determination of the beginning of human life have been mitigated by applying the homicide offences due to the BAR and the specific offense of child destruction, discussed above.[200]

In most Continental legal systems, the problem was solved by stating that the criminal protection of the life of human being extends from the beginning of birth, or the beginning of dilating pains, and most states within the United States solved this problem by defining the fetus as a "person" for the purposes of ordinary offenses of murder, or for the determination of a special offense of death, or by defining assault on a woman which caused the death of the fetus as a serious offense.[201] According to George Fletcher, when

196. U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.1., 2A1.2, 2A1.3, 2A1.4 (U.S. SENTENCING COMM'N 2018); *Federal and State Bans and Restrictions on Abortion*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/federal-and-state-bans-and-restrictions-abortion (last visited Mar. 19, 2020); *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. ST. LEGISLATURES (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (last visited Mar. 22, 2020).

197. *See generally* Mordechai Kremnitzer, *Interpretation in Criminal Law*, 21 ISR. L. REV. 358 (1986) (discussing the interpretation of criminal prohibition).

198. FLETCHER, *supra* note 1, at 376.

199. *See* Kole & Kadetsky, *supra* note 21, at 226–29.

200. *See supra* note 28 and accompanying text.

201. FLETCHER, *supra* note 1, at 375–76; *see supra* note 29 and accompanying text; *see supra* note 173 and accompanying text.

defining the beginning of life, it is important to maintain coherence of the moral imperative against death.[202] If the prohibition is added to an arbitrary event, the moral validity of the command in the border cases is violated.[203] It seems that "[o]ur perception of the fetus change[s] when the process of birth begins," therefore, we believe that the moment of birth is a little less arbitrary than when the newborn is completely out of the mother's body—who, as noted, was chosen primarily because of the difficulty in the past in ascertaining that the newborn was indeed born alive—in reality in which most newborns survive birth safely, the social perception sees the newborn as a person at the very beginning of the birth.[204] This contrasts with the impact that reality has had on the social outlook in the past. In addition, it can be said that "production"—passes at the time of birth is independent, whole and can survive without a woman's body. Moreover, especially, the act of birth involves special dangers, and therefore special caution is required, which justifies treating the "newborn" as a person, who receives increased protection both from negligent acts of death and from harm to health, as opposed to harm to the fetus.[205]

Therefore, our opinion is that the criminal protection of the life of a human being must be preceded also by the stage of the beginning of dilating pains, so that the person for the purpose of the offence is a "fetus" at the beginning of the birth process, i.e., the stage of the dilating pains.

We are of the view that the Continental Law definition of human being is more proper than that of the Common Law definition, including other definitions as proposed by Common Law jurisdictions.

B. Rejecting the BAR

Common Law, which defines human being as a fetus that exited his mother's womb and expands such definition by adopting the Born Alive Rule, including its complementary principles and the offense of child destruction, does not represent *de lege ferenda*, and should be criticized.[206]

Critics attacked the artificiality of distinguishing between an injury to the fetus that caused his death before birth and an identical injury that caused the death of the fetus shortly after birth.[207] Only the last injury would be

202. FLETCHER, *supra* note 1, at 375.

203. *Id.*

204. *Id.*

205. *See id*. at 373, 377.

206. Shah, *supra* note 1, at 934; *see* Jessica Ellis, *What Does "De Lege Ferenda" Mean?,* WISEGEEK (Feb. 10, 2020), https://www.wisegeek.com/what-does-de-lege-ferenda-mean.htm (last visited Mar. 2, 2020).

207. Shah, *supra* note 1, at 938.

considered a death of person and so the offences of homicide are applicable, whereas the first was not perceived as such and should be dealt as termination of pregnancy.[208] Moreover, the complementary principle leads to anomaly: When the offender hits a pregnant woman in her abdomen and causes a fatal injury to the fetus, it leads to the death of a person if the fetus is emerged from the womb alive, and dies because of the injury shortly after birth.[209] However, if the same attack by the offender was more effective, in that it caused the immediate death of the fetus while in the womb, then it would not be considered an offence of murder.[210] Accordingly, criminal liability should not depend on a random time factor, but should be derived from the nature of the criminal behavior itself.

The anomaly can be defined as follows: Criminal law often determines the level of responsibility in accordance with the outcome that has occurred, leaving room for luck and chance.[211] On the other hand, it can be argued that in our case, the problem is more acute because it is an anomaly built into the legal rule. The level of responsibility is determined by the outcome, but the result is inversely proportional to the anti-social act.[212] This is because that beyond luck and chance, the more severe and intense the offender's attack is, the more likely the fetus will die immediately in the mother's womb, and the more likely it is that the perpetrator will be convicted of a lesser offense.

On the other hand, it can be said that this anomaly is a necessary result of the requirement that the object of the manslaughter be a living person, as opposed to a fetus in his mother's womb.[213] The question is whether the existence of the circumstance must be demanded at the time of the act of the doer, in which case he will not be convicted of murder in any case; or that the circumstance exists even after the act, provided that it exists with the result, which then, the offender will be convicted of murder if the newborn dies after birth. Although the circumstances of the transgression usually exist at the time of the act, the accepted view is that the circumstance does not have to exist at the time of the act.[214] Damage to property occurs later, when the act generates results, laying a bomb, for example—the property that was damaged was not in yet place or did not even exist. Therefore, it seems that

208. *Id.* at 937.

209. *Id.* at 935–36.

210. *Id.* at 936–37.

211. Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA L. REV. 2183, 2183–84 (1994).

212. Mohammed Saif-Alden Wattad, *The Meaning of Wrongdoing—A Crime of Disrespecting the Flag: Grounds for Preserving "National Unity"?,* 10 SAN DIEGO INT'L L.J. 5, 36 (2008); *see* Kessler, *supra* note 211, at 2186–87; *cf.* FLETCHER, *supra* note 1, at 377.

213. Shah, *supra* note 1, at 934–35.

214. *Id.* at 941.

this is the conclusion that stems from the combination between defining the object in the crimes of murder as a human being, and determining the moment—in relation to the outcome—in which the fetus becomes a human being.[215] In this context, it is possible to bring the *Khoury* case, in which the defendant drove his car and by his negligence caused an accident that injured a pregnant woman and as a result, the woman was forced to undergo a cesarean section to save the fetus's life.[216] The fetus came out dead, but due to the cardiopulmonary resuscitation (CPR), he could breathe for a few hours, but then died because of the injury.[217] If resuscitation was not carried out, it would have been considered a fetus killing offence, but because of the resuscitation procedures that brought liveliness to the newborn for a few hours, the conviction would be that of killing a person.[218] Resuscitation actions, which are not under the control of the defendant, distinguish between criminal responsibility for the death of a person by way of negligence which is a criminal offence (culpable homicide), and a fetus killing by negligence which is not considered a criminal offense at all.[219]

Another criticism is that it can be argued that the BAR was adopted for evidentiary reasons and developed in a period of technological retardation in which it was impossible to prove that the fetus was fully formed when injured.[220] In the modern age, it is usually possible to prove whether the fetus could live and survive on its own at the time of the injury, and therefore there was no need at all.[221] An expression of this position can be found in the remarks of the Oklahoma Court of Appeals in *Hughes v. State*, according to which "advances in medical and scientific knowledge and technology have abolished the need for the born alive rule."[222]

C. The Offence of Abortion and in Severe Circumstances

There is no doubt that the fetus should be protected by criminal law. The fetus is a human creature, even though it is in the early stages of human life; thus, protecting human life requires protection over the life of the fetus. Without protection over the fetus' life, it is impossible to protect human life in the first place. One shall support the position taken by English law and German law according to which the fetus is an independent creature and that

215. *Id.*

216. *See* CrimA 7036/11 State of Israel v. Khoury 3(3) PD 783 (2014) (Isr.).

217. *Id.*

218. *Cf.* Shah, *supra* note 1, at 954 (citing to People v. Greer, 402 N.E.2d 203 (Ill. 1980)).

219. *See id.*

220. *Id.* at 968.

221. *Id.*

222. Pedone, *supra* note 14, at 83 (quoting Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994)).

it is entitled for an independent protection, and thus shall not be perceived simply as part of the woman's body. Violating the fetus' life – abortion – is a crime. One shall distinguish between a fully developed fetus, namely after the end of the second trimester of the pregnancy, and the fetus which is not fully developed, i.e., during the first and the second semester of the pregnancy.

As for the legal treatment of a viable fetus – in our opinion, it should not be considered a human being and subject to the laws of homicide. Indeed, a fetus that is viable can theoretically exist and survive on its own, if it were outside the womb. However, this is an independent theoretical and hypothetical existence, since there is no social expectation that the mother will release the fetus from her uterus at this stage. On the contrary—she is expected to keep it inside her womb. Even according to the prevailing social perception, it is considered a fetus and not the person. Therefore, the offence of causing death to a person should not be applied until the beginning of the birth process begins. The solution of a special transgression of child destruction as it is designed to deal with the death of the newborn after the beginning of the birth is not necessary, according to our system. Considering that the transformation of the fetus into a viable one is a significant stage in the development of the fetus, on the path to independent and external existence outside the mother's body, it is necessary to consider an illegal pregnancy termination at this stage—a severe circumstance of termination of pregnancy and a severe sentence.

To conclude, we are of the view that the Continental Law model should be adopted, thus defining a fetus as a human being from the beginning of dilating pains. Accordingly, there is no need to establish an independent offence of Child Destruction, which aims to cover this period between the inception and the fetus existing his mother's womb. However, we also propose to adopt the Anglo-American Law approach in the sense that causing the death of a fully designed fetus is an aggravated homicide offense against a fetus, thus mandating a severe punishment, as close as possible to the punishment imposed for causing the death of a human being.

Consequently, it is our view that there is no need to define assaulting a pregnant woman, which causes the death of the fetus as an independent offense. This would be insulting to the value of the fetus' life, and the criminalization of such, makes the impression, that what is at stake is an offense that concerns the woman's health and bodily integrity, and that causing the fetus' death does not constitute an independent violation of the fetus' life. We perceive the fetus to be entitled to independent protection.