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FETICIDE

The State claimed that Robert Lee Hollis went to the home of the parents of his estranged wife, Barbara, and declared that he did not want his wife to have the baby. It was later established that at that time she was in her 28th to 30th week of pregnancy. It is alleged that Robert Lee took Barbara out to the barn where he proceeded to put his hand up her vagina causing the womb of the child's mother to split and the child to be forced into the mother's abdomen. Surgery was necessary to remove the unborn fetus which was, of course, dead after this injury.

Mrs. Keeler was driving on a narrow mountain road in Amador County, California, after delivering the girls to their home. She met a man driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm and she rolled down the window to hear him. He said, "I hear you are pregnant. If you are, you better stay away from the girls and from here." She did not reply and he opened the door as she later testified, "He assisted me out of the car... [I]t wasn't roughly at this time." He then looked down at her abdomen and became extremely upset. He said, "You sure are. I'm going to stomp it out of you." He pushed her up against the car, shoved his knee into her abdomen and struck her in the face with several blows. The fetus was 28 to 35 weeks old, was delivered stillborn with a severely fractured skull.

INTRODUCTION

~~[A man brutally assaults his estranged wife, eight months pregnant, by kicking her repeatedly in the abdomen. During this assault, he declares that he is going to "stomp" the baby out of her. The unborn child would have had a ninety-nine percent chance of survival in the event of a premature birth at the time of the assault. Instead, the fetus is subsequently delivered stillborn with a fractured skull.]~~

Ignoring the legal ramifications of the assault on the woman, has the man committed murder as defined in the murder statute? Phrasing this question another way, ^{is} ~~is~~ an unborn viable fetus a "person" within the meaning of the murder statute?

The Supreme court of Kentucky, in Hollis v. Commonwealth, recently decided that an unborn viable fetus is not a "person" within the meaning of Kentucky's murder statute. Because this decision is consistent with all other American jurisdictions, it cannot be considered a landmark case. However, this ruling is in direct conflict with the view of Kentucky Court of Appeals and with the views of two members of the Kentucky Supreme Court, who have indicated their belief that a fetus is a "person" and therefore entitled to the protection of the murder statute.

This paper examines the current legal status of feticide in Kentucky. It discusses why the Supreme court was correct in denying a fetus protection under the current murder statute, as well as the perceived flaws in the court of appeals' attempt to define a fetus as a

"person" under the current statute. Finally, this paper proposes that the murder statute be revised to include feticide.

I. Historical Background

Throughout history, there has been confusion regarding the legal implications of killing an unborn child. Ancient law fluctuated between two extremes--from protecting a quickened fetus to allowing a mother to kill her child, even after birth. This ^{wide} ~~wife~~ divergence in the law was caused by factors such as convenience, the potential for a fetus to become a worker or a warrior, medical knowledge (or the lack thereof), and religious and moral beliefs.

Early English common law attached significance to fetal quickening when considering the legal implication of feticide. However, by the mid-nineteenth century, common law shifted to the "born alive" theory. Under this theory, a child must be born alive in order to be afforded protection under a homicide statute. The "born alive" doctrine prevailed in England until passage of the Infanticide Acts of 1922 and 1938.

American courts employed the "born alive" doctrine as early as 1797 in infanticide cases. By 1850, this rule of English common law had become accepted and "well settled" in American case law.

American jurisdictions have several variations of the "born alive" theory. Most states use the "independent circulation of blood" test, which requires the baby to be completely out of the mother's womb and, in some cases, to have the umbilical cord severed.

However, other states have concluded that respiration is determinative of independent existence. Kentucky courts require both respiration and the completed birth process to sustain a conviction for murder. In contrast, California common law required only that the child be in the process of birth to be protected under its homicide statute.

English and American courts adopted the "born alive" theory for several reasons. First, at the time the courts adopted the theory, medical science was relatively crude, resulting in high pre-natal mortality rates. Thus, the presumption was that the fetus would not be born alive. Second, it was believed that a mother did not act rationally during the process of birth. She was considered to be "capable of destroying the fetus through irrational conduct and would be excused by the criminal law. Finally, it was difficult to determine the cause of the infant's death, again due to lack of medical scientific knowledge.

Today, however, the rationale supporting the "born alive" doctrine is no longer valid in feticide cases, especially when the fetus is killed as a result of an assault on the fetus' mother. Medical science has progressed to the point that the presumption must be that a viable fetus will be born alive. Also, the mother's mental condition is irrelevant when the fetus is killed as a result of a non-consensual assault upon her. Finally, medical and scientific advances have minimized evidentiary problems in determining the fetus' cause of death.

II. HOLLIS V. COMMONWEALTH

The requirement that a murder victim be "born alive" in order to sustain a prosecution for infanticide was enunciated in Kentucky in the case of Jackson v. Commonwealth (1936), in which a mother was convicted of murder for the strangulation death of her newborn infant. However, whether an unborn viable fetus is a "person" within the meaning of Kentucky's murder statute is a question which has not been directly addressed by Kentucky courts prior to the Hollis decision.

The trial court held that an unborn viable fetus was not a "person" under the murder statute and dismissed the indictment. On appeal by the Commonwealth, the Kentucky Court of Appeals reversed the decision and remanded the case to the trial court. The appellate court believed that "Jackson was based upon outmoded principles and should not be controlling" in Hollis. The court of appeals based its decision on several factors: 1) the progress of medical science since Jackson; 2) the tort law allowing recovery of damages for wrongful death of a viable fetus; and 3) the belief that the judiciary can interpret the meaning of the word "person" in the murder statute, absent specific legislative definition.

On appeal by Hollis, the Supreme Court of Kentucky reversed the court of appeals. The Supreme court based its decision on three factors: 1) the common law definition of murder; 2) the impact of the United States Supreme Court's decision in Roe v. Wade on Hollis; and 3) the use of recognized rules of statutory construction.

The Kentucky Supreme Court rejected the argument of the Commonwealth that a fetus should be accorded the status of a "person"

for purposes of the law of criminal homicide. Although this argument appealed to the Supreme Court the justices felt constrained by prior case law. The Court noted that nineteen other states had specifically upheld the "born alive" doctrine and that no jurisdiction had invalidated this doctrine.

The Court then looked to the impact of the United States Supreme Court's decision in Roe v. Wade on the Hollis case. The Court held that Roe v. Wade is not authority for the proposition that a viable fetus is a "person" within the meaning of the murder statute. Rather, the meaning of Roe v. Wade is just the opposite--"that no state can prohibit terminating the life of a fetus"...until the final trimester of pregnancy, and not even then when necessary to protect maternal life or health."

Finally, the Kentucky Supreme Court looked to rules of statutory construction to aid in its interpretation of the murder statute. The Court rejected the use of tort law to aid in the interpretation of a criminal statute. Instead, the Court relied on the Model Penal Code and decided that the murder statute only applied when the victim was "born alive." Further, the Court seemed concerned that an interpretation that would include a fetus as a person would be void for vagueness due to the uncertainty inherent in the determination of viability. Also, "a finding that a viable fetus should be considered a 'person' [under the murder statute], runs afoul of the well-recognized rule of statutory construction that 'the specific statute controls a more general statute.'" Thus, the specific statute of abortion controls the more general murder statute.

III. The Supreme Court's Rationale is Correct

The brutal killing of a near-term fetus under circumstances like those in Hollis is a horrible event. The facts of Hollis clearly demand that the killer be tried for murder, but such a trial is not proper under Kentucky's current murder statute because the statute does not define an unborn viable fetus as a "person,": and Kentucky's courts are not free to infer such a definition from the law. For these reasons, the rationale supporting the Supreme Court's decision in Hollis is correct.

A. Due Process Considerations

The Supreme Court's decision in Hollis is consistent with the due process clause of the fourteenth amendment to the United States Constitution. An essential element of due process is a state's criminal law must give fair warning that certain actions are punishable as a crime. In the famous case of Keeler v. Superior Court, a man was tried in California for the murder of an unborn child. Keeler's facts are similar to those in Hollis. The Court in Keeler, although acknowledging medical science's advances in obstetrics and pediatrics since the adoption of the "born alive" rule, refused to find an unborn viable fetus a "human being" within the meaning of the murder statute. The court found the constitutional requirements of due process to be an insurmountable obstacle to sustaining an indictment for murder.

Adopting the language of the Supreme Court of the United States, the California Supreme Court stated:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-organized requirement...No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Under Kentucky law, a person who kills an unborn viable fetus, in a situation such as Hollis, does not have sufficient notice that he or she has committed the crime of murder. Although the Penal Code gives the killer notice that a lesser crime, such as illegal abortion, has been committed, the killer cannot fairly be expected to know that he had murdered a "person".

B. Legislative Intent

Kentucky's General Assembly apparently did not intend an unborn fetus to be "person" within the meaning of the murder statute when it enacted the statute in 1974. Although the murder statute itself does not maintain an official record of legislative proceedings, the General Assembly's intent can be inferred from other sources.

First, the Kentucky Penal Code's murder statute is based largely on the Model Penal Code (MPC). Consequently, the MPC's murder provision and Kentucky's murder statute have substantially the same effect. The drafters of the MPC defined a "human

being" as a "person who has been born and is alive." Thus, a fetus is not a human being' for the purposes of MPC's murder provision. The Kentucky statute, however, circularly defines a "person" as a "human being" without addressing whether a fetus is a "person." Since Kentucky's murder statute is based on the MPC, it is reasonable to assume that the Legislature intended to rely on the MPC's concept of a "person" as one who has been "born alive."

Further, Kentucky's abortion statutes, also enacted in 1974, suggest that the General Assembly did not intend the murder statutes to encompass an unborn fetus. Kentucky Revised Statutes (KRS) section 311.710 presents the General Assembly's "official" intent behind enacting the abortion statutes. The statute provides that "every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution to be taken to provide life-supportive procedures to insure an unborn child its continued life after its abortion. A close reading of this statute suggests that the General Assembly only desired to protect an aborted fetus after it is actually "born alive."

KRS section 311.710 further states "there is inadequate legislation to protect the life, health, and welfare of...unborn human life." This language implies that the legislature gave careful consideration to the degree of legal protection it desired for an unborn child. Presumably, the legislature provided this desired level of legal protection by enacting the 1974 abortion statutes. Consequently, the legislature's omission of a feticide provision in the murder statute can be considered intentional.

Finally, the legislative intent to exclude an unborn child from the murder statute's protection is shown by contrasting the murder penalty with the illegal abortion penalty. In Kentucky, a murder conviction carries a minimum penalty of twenty years imprisonment and a maximum penalty of death. In contrast, the penalty for an illegal abortion is as little as two years imprisonment and the maximum sentence is twenty-one years. Such a contrast implies that the General Assembly attached more significance to the killing of a "person" who was "born alive" than to the unborn fetus.

Practically speaking, murder and illegal abortion are indistinguishable in their effect upon an unlawfully killed fetus. In either crime, the killer has intentionally destroyed an unborn child. Nevertheless, the Legislature demonstrated its intent to distinguish murder from illegal abortion by assigning a greater penalty for murder. Therefore, until revised, Kentucky's murder statute must exclude unborn children.

C. Judicial Legislation

Despite the lack of legislative intent to include fetuses within the meaning of "person" for purposes of the murder statute, the court of appeals in Hollis decided that it was free to interpret the murder statute and adopt the opposite position. The court relied on McCord v. Pineway Farms, a civil action involving the application and interpretation of agricultural zoning statutes, as authority giving the

court license to interpret the meaning of the term "person" in the murder statute.

The Court's reliance on McCord was misplaced. In McCord, the Court was concerned with the narrow issue of interpreting KRS section 100.111(22). Cautious of judicial legislation, the McCord Court examined the legislature's intent in enacting KRS section 100.111(22) and interpreted the statute accordingly. In contrast, the court of appeals in Hollis ignored legislative intent. The Court carefully selected that part of the McCord decision which would enable it to interpret the murder statute. Under Kentucky law, all statutes are to be liberally construed with a view to carry out the intent of the legislature. But the court's interpretation of the murder statute without looking to legislative intent was more than mere liberal construction; in reality, it was judicial legislation.

Judicial legislation, particularly in a case like Hollis, is unwise, as many jurisdictions have previously noted. In Keeler, the Supreme Court of California held:

Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature. For a court to simply declare, by judicial fiat, that the time has now come to prosecute under [the murder statute] one who kills an unborn but viable fetus would indeed to rewrite the statute under the guise of construing it.

Likewise, in People v. Greer, the Supreme Court of Illinois stated: "[T]he General Assembly declined to specifically include the unborn within the potential victims of homicide or to create a separate offense of feticide. We cannot alter that decision or create a new

offense." The language of Keeler and Greer illustrate that the court in Hollis went beyond interpretation of a murder statute and judicially created a feticide statute.

D. Tort Recognition of the Unborn Child

Kentucky civil law has recognized the unborn infant's right of action for loss of or injury to its parents under the wrongful death statute and under the Workers Compensation Act. Yet the civil law's recognition of an unborn viable fetus as a "person" cannot be transferred to the murder statute solely by judicial interpolation.

Tort law and criminal law are different because each employs different means to obtain different objectives. In tort law, the injured party prosecutes the action and seeks compensation for the injury, regardless of the offending party's actual intent. In the criminal law, however, the state prosecutes a person on the basis of the person's mens rea in order to protect the public and punish the guilty party. Tort law, afforded the luxury of hindsight, may compensate an injured party even if that party's cause of action had not previously been recognized. In contrast, criminal law requires the defendant to know, in advance, that certain actions are prohibited. Ultimately, the most important distinction between the two types of law lies in the remedy. In tort law, the losing party usually pays monetary damages. In criminal law, the losing party pays with his or her liberty, or even his or her life.

Other jurisdictions have found that recognition of an unborn child for tort purposes does not translate into similar recognition under a murder statute. The Court in Greer stated: "American courts which have extended the benefits of tort law to fetuses have also, in the absence of specifically inclusive statutory language, uniformly refused to change the born-alive rule in criminal cases..." In People v. Guthrie, the court noted:

It is one thing to mold, change and even reverse established principles of common law in civil matters. It is quite another thing to do so in regard to criminal statutes. "...Criminal statutes, in contrast with the common law, may not be expanded to meet new problems beyond the contemplation of the Legislature when the statute was enacted.

IV. The Solution to the Hollis Dilemma

In Hollis, the Kentucky judiciary was "on the horns of dilemma." The judiciary saw the result needed to promote justice in the case but at the same time was confronted with a murder statute that did not encompass feticide. In an effort to reach the just result, the court of appeals ignored the limitations of current murder statute and held the killing of an unborn child to be murder. However, as the Supreme Court correctly recognized in reversing the court of appeals decision, obstacles of due process, legislative intent, and the "born alive" rule preclude the court of appeals approach from being a long-term solution to the question of whether feticide is murder in Kentucky. The solution to the problem lies not in judicial interpretation, but in

legislative enactment of a revised murder statute which specifically includes feticide.

Other states, notably California and New York, have responded to the injustice of a murder statute which does not encompass the killing of an unborn viable fetus by enacting homicide statutes specifically addressing the issue of feticide. Kentucky should do the same.

A revision of Kentucky's current murder statute which would encompass feticide might read:

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, or a viable fetus, he or she causes the death of such a person, or viable fetus, or of a third person...

(b) Under circumstances manifesting extreme indifference to human life, he or she wantonly engages in conduct which creates a grave risk of death to another person, or to a viable fetus, and thereby causes the death of another person or viable fetus.

(2) This section shall not apply to any person who commits an act which results in the death of a fetus if the act complies with KRS sections 311.710-.830 (the abortion statutes) or the act was solicited, aided, or consented to by the mother of the fetus.

The legislative enactment of a feticide statute would remove all of the obstacles previously discussed in this paper. Any person contemplating feticide would have sufficient notice that the killing was murder. This would satisfy the due process requirements of the fourteenth amendment. Legislative intent would be clear and would preclude any need for courts to act as a "super-legislature." Consequently, Kentucky would fall into line with the other jurisdictions which have enacted specific legislation in order to consider feticide to be murder.

CONCLUSION

An unborn viable fetus is not a "person" under Kentucky's current murder statute. The court of appeals in Hollis, acting to promote justice in a situation where the current law is unjust, incorrectly tried to judicially legislate through a contrary interpretation of the murder statute. The Supreme Court of Kentucky, while recognizing the inadequacies of the current murder statute, correctly decided that feticide is not murder in Kentucky. The only solution to the feticide dilemma lies in the General Assembly's enactment of a murder statute which encompasses feticide.