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Feticide: Murder in Kentucky?

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 this man committed murder as defined in the murder statute? Phrasing this question another way, 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 rul-

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1 The fact situation described is based on Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970). See note 54 infra for a detailed account of the facts in Keeler.
2 See People v. Guthrie, 293 N.W.2d 775, 778 (Mich. Ct. App. 1980). The court stated: [B]irth itself is no longer a violent, perilous adventure. Current statistics indicate that the fetal survival rate after twenty weeks of gestation is ninety-nine percent (99%). . . . This compares with an infant survival rate of 98.5%. Thus, after five months of pregnancy, survival is virtually certain, or at least as certain as survival through the first postnatal year.
   (1) A person is guilty of murder when:
      (a) With intent to cause the death of another person, he causes the death of such a person or of a third person . . . or
      (b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.
6 Id. (emphasis added).
ing is in direct conflict with the view of the Kentucky Court of Appeals\(^5\) and with the views of two members of the Kentucky Supreme Court,\(^6\) who have indicated their belief that a fetus is a "person" and therefore entitled to the protection of the murder statute.

This Comment examines the current legal status of feticide\(^7\) 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 Comment proposes that the murder statute be revised to include feticide.

I. \textbf{HISTORICAL BACKGROUND}

Throughout history, there has been confusion regarding the legal implications of killing an unborn child.\(^8\) Ancient law fluctuated between two extremes—from protecting a quickened fetus\(^9\) to allowing a mother to kill her child, even after birth.\(^10\) This wide 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.\(^11\)

Early English common law attached significance to fetal quickening when considering the legal implication of feticide.\(^12\) However, by the mid-nineteenth century, common law shifted

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\(^6\) Hollis v. Commonwealth, 30 KLS 4, at 7 (Wintersheimer, J., dissenting) (Chief Justice Stevens joined in the dissent).

\(^7\) Feticide must be distinguished from infanticide. Feticide is the destruction of the fetus in the womb, while infanticide is the murder or killing of an infant soon after its birth. BLACK'S LAW DICTIONARY 559, 699 (5th ed. 1979).


\(^9\) "Quickening" is defined as "the first motion of the fetus in the womb felt by the mother, occurring usually about the middle of . . . pregnancy." BLACK'S LAW DICTIONARY 1122 (5th ed. 1979).

\(^10\) See Comment, supra note 8, at 536.

\(^11\) See id. at 535-36.

\(^12\) Id. at 536.
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

13 Id. The court in Keeler stated:
Perhaps the most influential statement of the "born alive" rule is that of Coke, in mid-17th century: "If a woman be quick with childe, and . . . if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of . . . battery, or other cause, this is murder; for in the law it is accounted a reasonable creature, in rerum natura, when it is born alive."
470 P.2d at 620 (citation omitted).

14 Comment, supra note 8, at 536.

15 Meldman, Legal Concepts of Human Life: The Infanticide Doctrines, 52 MARQ. L. REV. 105, 107 (1968). Under these Acts, a mother who killed her child under the age of 12 months would be guilty of only manslaughter if, at the time of the killing, the mother was mentally unbalanced because she had not fully recovered from the effect of giving birth. These laws were more in keeping with popular sentiment, as they provided a way to find a mother guilty of infanticide without inflicting capital punishment, which was generally thought to be too severe. See id. at 108.

16 Keeler v. Superior Court, 470 p.2d at 621.

17 Id.


19 Id.

20 Id. The post-mortem examination usually included a "hydrostatic test," in which the infant's lungs were placed in water. If they floated, then respiration was assumed to have transpired. Unfortunately, decomposition also produces gases which would cause the lung to float. Thus, the "hydrostatic test" (and correspondingly, the "respiration test") was, at best, a rough test of live birth. See Meldman, supra note 15, at 109.

21 Jackson v. Commonwealth, 96 S.W.2d 1014 (Ky. 1936).
required only that the child be in the process of birth to be protected under its homicide statute.22

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.23 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."24 Finally, it was difficult to determine the cause of the infant's death, again due to lack of medical and scientific knowledge.25

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.26 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.27

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*,28 in which a mother was convicted of murder for the strangulation death of her newborn infant.29 However, whether an *unborn* viable fetus

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23 Comment, supra note 8, at 536.
24 Id. at 537.
25 Id.
26 See note 2 supra.
27 See note 35 infra and accompanying text for a discussion of medical and scientific advances since the *Jackson* decision in 1936.
28 96 S.W.2d at 1014.
29 The Court held:

It is true that, "in order to establish the corpus delicti, in a case of infanticide, it must be established that the child was born alive. In the absence
is a "person" within the meaning of Kentucky's murder statute is a question which had not been directly addressed by Kentucky courts prior to the Hollis decision.

Robert Hollis was charged with murdering the unborn child of his estranged wife. The Commonwealth alleged that Hollis:

came to the home of the parents of his estranged wife and told his wife that he did not want her to have the baby, then took her out into the barn and put his hand up into her vagina, causing the womb of the child's mother to split and the child to be forced into the mother's abdomen.

The child died as a result of this trauma and had to be surgically removed.

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 this 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 of proof that the child had ever breathed or was alive at birth a conviction can not [sic] be sustained. It is necessary for the Commonwealth to prove affirmatively, not only that the child had breathed, because that might occur during birth, but that it had had a complete and separate existence of its own after birth. Being born means that the whole body is brought into the world, and it is not sufficient that the child breathes in the progress of the birth. But if a child is fully brought forth from the body of its mother, and is killed while still connected by the umbilical cord, it is murder. When the evidence that the child was born alive is susceptible of doubt, a conviction can not [sic] be sustained."

Id. at 563 (quoting J. Roberson, Roberson's New Kentucky Criminal Law and Procedure § 425 (2d ed. 1927)).

30 Hollis v. Commonwealth, 29 KLS 6, at 7.
31 Id.
32 Id.
33 Id.
34 Id. at 8.
35 The court of appeals believed that in light of the progress in medical science since Jackson, the jury should decide from the scientific evidence presented whether the unborn Hollis child was a "person." 29 KLS 6, at 7. The court stated:
law allowing recovery of damages for the wrongful death of a viable fetus;\textsuperscript{36} and 3) the belief that the judiciary can interpret

We believe that medical science has progressed tremendously since \textit{Jackson} was decided in 1936. Many diseases, genetic and otherwise, and injuries to a fetus, can be diagnosed while the fetus is in the womb. Doctors can make a prognosis and prescribe \textit{[sic]} treatment for sick and injured unborn infants with the aid of modern medical science. For these medical reasons . . . we conclude that . . . \textit{Jackson} . . . should not be controlling in the case at bar.

\textit{Id.} at 8.

Most American courts which have considered this issue have acknowledged the progress of science since the creation of the "born alive" doctrine and have found the "born alive" rule to be an archaic legal fiction which no longer serves a legitimate objective. \textit{See, e.g.}, Keeeler v. Superior Court, 470 P.2d at 624; People v. Guthrie, 293 N.W.2d at 778; State v. Dickinson, 275 N.E.2d 599, 602 (Ohio 1971). The rule originated because of the common law's presumption that a fetus would not be born alive. \textit{See Comment, supra} note 8, for a discussion of the common law presumption that a fetus would not be born alive. Now that medical science provides a high probability that a viable fetus will be born alive (see 293 N.W.2d at 778 for a court's use of statistical support for a presumption of survival) the "born alive" rule is no longer needed.

\textsuperscript{36} 29 KLS 6, at 8. The court of appeals in \textit{Hollis} noted:

\textit{In the Commonwealth of Kentucky, it has long been recognized that an unborn fetus has certain rights because the courts of Kentucky . . . have generally recognized the unborn infant's right of action for the loss or injury of one or both of its parents under the death statute, and workers compensation act. Kentucky addressed this issue in permitting recovery in damages for the wrongful death of a viable fetus.} \textit{Id.} (citing Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955)).

\textit{In Mitchell, Kentucky's highest court held that an unborn fetus was a person within the meaning of the wrongful death statute and allowed recovery in damages for the fetus' death. The Court in Mitchell stated:}

\begin{quote}

The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word "person" is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being. . . . [W]e conclude that when a pregnant woman is injured through negligence and the child, if it be a viable infant . . . , suffers death as a consequence, a right of recovery exists. . . .
\end{quote}

\textit{Id.} at 905-06. Most jurisdictions now permit the recovery of damages for the wrongful death of an unborn child. \textit{See W. PROSSER, HANDBOOK OF THE LAW OF TORTS} \textsection{55} (4th ed. 1971). However, the court of appeals decision in \textit{Hollis} is unique in that the court extended the tort law concept that a fetus is a person into the criminal law. \textit{See e.g.}, People v. Greer, 402 N.E.2d 203, 207-08 (Ill. 1980) (acknowledging the merit of the tort argument, but not concurring in the extension); People v. Guthrie, 293 N.W.2d at 778 (acknowledging recovery for the wrongful death of a viable fetus, but rejecting such an extension into the criminal law). The court of appeals in \textit{Hollis} stated: "If an unborn viable fetus is a person for the purposes . . . [of tort law], we cannot perceive any sound reason why it should have any less status when it has become an alleged murder victim." 29 KLS 6, at 8.
the meaning of the word "person" in the murder statute, absent specific legislative definition.37

On appeal by Hollis, the Supreme Court of Kentucky reversed the court of appeals.38 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. Wade39 on Hollis; and 3) the use of recognized rules of statutory construction.40

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.41 Although this argument appealed to the Supreme Court the justices felt constrained by prior case law.42 The Court noted that nineteen other states had specifically upheld the "born alive" doctrine and that no jurisdiction had invalidated this doctrine.43

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."44

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37 29 KLS 6, at 8. The court of appeals in Hollis stated: "We do not believe . . . we are in a position of legislating or usurping the function of the Legislature. We are interpreting the meaning of the word "person" and we feel free to utilize existing case law and other matters pertinent thereto in arriving at this decision." Id. (relying on McCord v. Pineway Farms, 569 S.W.2d 690 (Ky. Ct. App. 1978)). See note 79 infra for the text of McCord as cited in the court of appeals' decision.

38 Hollis v. Commonwealth, 30 KLS 4, at 7.


40 30 KLS 4, at 7.

41 Id. at 8. This argument had been accepted by the court of appeals. 29 KLS 6, at 8.

42 Id.

43 Id. at 8.

44 Id. The Supreme Court further stated:

[Under Roe, Kentucky has the right to regulate the manner in which abortions shall be performed in the second trimester of pregnancy. To declare that it has done so by the murder statute, KRS 507.020, is totally inconsistent with any rational interpretation of that statute. The statute makes no effort to define the word "person," leading to only one conclusion, that it
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 should be interpreted in conformity with the law regarding criminal homicide as it existed at the time when the statute was passed. We have already discussed what that law is Jackson v. Commonwealth.

Id. "In this state, where criminal sanctions are supposed to flow from the Kentucky Penal Code rather than evolving out of court decisions, it would be fundamental error to create a crime in the absence of a statute based on destroying the life of a viable fetus." Id.

Id. The court relied on the commentary to the Model Penal Code which states: The effect of this language is to continue the common-law rule limiting criminal homicide to the killing of one who has been born alive. Several modern statutes follow the Model Code in making this limitation explicit. Others are silent on the point, but absent express statement to the contrary, they too may be expected to carry forward the common-law approach.

Id. See also MODEL PENAL CODE § 210.1(1) at 11 (Official Draft and Revised Comments 1980) [hereinafter cited as MPC].

Id. Hollis v. Commonwealth, 30 KLS 4, at 9. The Court stated: In the present situation, if we were to declare that a viable fetus should be considered a "person" for purposes of the criminal homicide statutes, our decision would be unconstitutionally vague unless we set some objective legal standard for deciding if the accused knew he was terminating the life of a viable fetus.

Id. (citing Heady v. Commonwealth, 597 S.W.2d 613 (Ky. 1980)).

Id.
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 that 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 be-

51 See U. S. CONSTR. amend. XIV, § 1.
52 See Keeler v. Superior Court, 470 P.2d at 626, where the court refused to allow a trial for murder because the statute failed to give fair warning. This "fair warning" requirement of due process also ensures that a court cannot arbitrarily convict a person for violating a law that is not on the books. See notes 75-84 infra and accompanying text for a discussion of the inadvisability of judicial legislation.
53 470 P.2d at 617.
54 In Keeler, the court found the facts to be as follows: Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner 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 her window to hear him. He said, "I hear you're pregnant. If you are you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car...[I]t wasn't roughly at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are, I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. Id. at 618. The fetus, which was 28 to 35 weeks old, was delivered stillborn with a severely fractured skull. Id.
ing" 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-recognized 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 a "person" within the meaning of the murder statute.

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55 Id. at 624.
56 Id. at 626. The court first quoted from Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (a statute which imposed severe penalties on contractors for paying less than minimum wage was held void for vagueness) and then from Lanzetta v. New Jersy, 306 U.S. 451, 453 (1939) (a statute which imposed severe penalties for being a "gangster" was held void for vagueness).
57 KRS § 311.780 (1977) prohibits the abortion of an unborn child after the child "may reasonably be expected to have reached viability except when necessary to preserve the health or life of the woman."
58 For example, even if Robert Hollis had thoroughly researched his alleged assault prior to its commission, he would not have discovered a jurisdiction that had found a fetus to be a "person" within the meaning of its murder statute absent a specific feticide provision. See, e.g., People v. Greer, 402 N.E.2d at 207 (citing 470 P.2d at 617); State v. Brown, 378 So.2d 916 (La. 1979); State v. Dickinson, 275 N.E.2d at 599. See also notes 94-95 infra for examples of homicide statutes which include feticide. If Hollis could not ascertain from previous case law or from the statute itself that his contemplated act would be murder, then he did not have requisite notice that he would be liable for that crime.
statute when it enacted the statute in 1974. Although the murder statute itself does not reveal legislative intent, and Kentucky 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 the 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

60 The term "legislative intent" may imply a more considered motivation than actually existed. Certainly there was no single intent behind the enactment of Kentucky's Penal Code. Legislators typically have a variety of personal and political reasons for casting their votes. Perhaps "legislative intent" is best viewed as the judicial attempt to fill the interstices of statutory language by viewing the actions of the legislators as a whole.
62 The Model Penal Code defines murder as follows: "Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." MPC § 210.2(1) (Proposed Official Draft 1962). "A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." Id. § 210.1(1) (1962) (emphasis added).
63 MPC § 210.0(1) (1962).
64 The MPC would treat the killing of an unborn viable fetus, under the circumstances of Hollis, as an unjustified abortion, a felony of the second degree. See MPC § 230.9(1) (1962).
65 KRS § 500.080(12) (Cum. Supp. 1982). Interestingly, Kentucky amended its abortion law in 1982 to define a "human being" as "any member of the species homo sapiens from fertilization until death." KRS § 311.720(6) (Interim Supp. 1982). This may indicate that the legislature is receptive to the inclusion of unborn viable fetuses within the protection of the murder statute. However, absent specific legislative action to that effect, any argument that the abortion statute's definition of a "human being" should be applied to the murder statute is, at best, tenuous. Cf. State v. Brown, 378 So.2d at 917, where the
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 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 imprison-
ment and a maximum penalty of death.\textsuperscript{71} In contrast, the penalty for an illegal abortion is as little as two years imprisonment and the maximum sentence is twenty-one years.\textsuperscript{72} Such a contrast implies that the General Assembly attached more significance to the killing of a "person" who was "born alive" than to an unborn fetus.

Practically speaking, murder\textsuperscript{73} and illegal abortion\textsuperscript{74} 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. \textit{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 \textit{Hollis} decided that it was free to interpret the murder statute and adopt the opposite position.\textsuperscript{75} The court relied on \textit{McCord v. Pineway Farms},\textsuperscript{76} 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.\textsuperscript{77}

The court's reliance on \textit{McCord} was misplaced. In \textit{McCord}, the Court was concerned with the narrow issue of interpreting KRS section 100.111(22).\textsuperscript{78} Cautious of judicial legislation, the \textit{McCord} Court examined the legislature's intent in enacting KRS

\begin{itemize}
\item \textsuperscript{71} KRS § 532.035 (Cum. Supp. 1982); KRS § 532.060(2)(a)(1975).
\item \textsuperscript{72} KRS § 311.990(17) (1983).
\item \textsuperscript{73} Murder is defined in KRS § 507.020 (Cum. Supp. 1982).
\item \textsuperscript{74} Illegal abortion is defined in KRS § 311.780 (1977).
\item \textsuperscript{75} See notes 34-37 supra and accompanying text for a discussion of why the court of appeals in \textit{Hollis} decided to consider a fetus a "person" within the meaning of the murder statute.
\item \textsuperscript{76} 569 S.W.2d 690 (Ky. 1978).
\item \textsuperscript{77} See note 37 supra and accompanying text for a discussion of how the appeals court in \textit{Hollis}, relying on \textit{McCord}, justified giving an expansive interpretation to the term "person."
\item \textsuperscript{78} See 569 S.W.2d at 692.
\end{itemize}
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 that 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 be 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

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79 The court held: Certainly, any such judicial activity must be consistent with the reasonably clear meaning of the statutes, as measured by the constitutional limitations which may be involved, however, the interpretation of KRS 100.111(22) is a proper judicial function. Clearly, the courts should not legislate, but the courts must interpret. It is necessary for the courts to provide reasonable interpretation of the language used by the legislature, where a legitimate controversy arises as to the meaning of the language used, until the legislature can expand its own definition, it if [sic] so desires. 

Id. (emphasis added). The court in Hollis cited only the last sentence of this passage. 29 KLS 6, at 8.

80 See 29 KLS 6, at 8, quoted at note 79 supra.

81 KRS § 446.080(1) (1975). See also Katzman v. Commonwealth, 130 S.W. 990, 992 (Ky. 1910) (holding that Kentucky courts must look to the legislative intent when interpreting a criminal statute).

82 See, e.g., Keeler v. Superior Court, 470 P.2d at 625-26; People v. Greer, 402 N.E.2d at 209; People v. Guthrie, 293 N.W.2d at 779-80; State v. Larsen, 578 P.2d 1280, 1281 (Utah 1978).

83 470 P.2d at 625-26.
separate offense of feticide. We cannot alter that decision or create a new offense.”84 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.85 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.86

Other jurisdictions have found that recognition of an unborn child for tort purposes does not translate into similar recognition under a murder statute.87 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,

84 402 N.E.2d at 209.
85 Commonwealth v. Hollis, 29 KLS 6, at 8.
86 See generally W. LaFave & A. Scott, Jr., Handbook on Criminal Law § 3 (1972) (presenting a detailed discussion of the differences between tort law and criminal law).
87 See, e.g., Keeler v. Superior Court, 470 P.2d at 629-30; People v. Greer, 402 N.E.2d at 208-09; People v. Guthrie 293 N.W.2d at 778; State v. Dickinson 275 N.E.2d at 602.
uniformly refused to change the born-alive rule in criminal cases. . ." 88 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." 89

Similarly, in State v. Dickinson, 90 the Ohio Supreme Court found "that the definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute. The result may be desirable, but criminal statutes, unlike civil statutes, must be construed strictly against the state." 91 Thus, the court of appeals in Hollis mistakenly relied on Kentucky's tort law. The definition of "person" in a civil action should not translate into a criminal law definition.

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 the current murder statute and held the killing of an unborn child to be murder. 92 However, as the Supreme Court correctly recognized in revers-

88 402 N.E.2d at 208.
90 275 N.E.2d 599.
91 Id. at 602.
92 See notes 34-37 supra and accompanying text for a discussion of the rationale supporting the court of appeals decision in Hollis. See also Keeler v. Superior Court, 470 P.2d at 630-34 (Burke, C.J., dissenting) (the dissent believed that justice required the murder statute to encompass an unborn viable fetus); Hollis v. Commonwealth, No. 82-SC-634-DG (Wintersheimer, J., dissenting) (the dissent adopted a position consistent with the court of appeals decision in Hollis).
ing 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.

93 See notes 50-91 supra and accompanying text for a discussion of the flaws in the appeals court's rationale.

94 The California legislature revised its murder statutes after the Keeler decision. The revised statute now provides:

§ 187. Murder defined; death of a fetus
(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.
(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:
(1) The act complied with the [abortion statutes].
(2) The act was committed by a holder of a physician's and surgeon's certificate . . . in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.
(4) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.
California does not distinguish the murder of a "fetus" from the murder of a "person" when sentencing a defendant found guilty of feticide. See Cal. Penal Code §§ 189-190.6 (West Supp. 1981).

95 The New York Penal Law, like the MPC, classifies the unlawful killing of an unborn viable fetus as an unjustified abortion. See note 64 supra for an explanation of the MPC provision. The following sections of the New York Penal Law are pertinent:

§ 125.00 Homicide defined
Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting . . . abortion in the first degree or self-abortion in the first degree.

§ 125.05 Homicide, abortion and related offenses; definition of terms

(2) "Abortional act" means an act committed upon or with respect to a female, whether by another person or by the female herself, whether she is pregnant or not, . . . with intent to cause a miscarriage of such female.
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. 96

(3) “Justifiable abortional act.” An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. . . .

§ 125.45 Abortion in the first degree
A person is guilty of abortion in the first degree when he commits upon a female pregnant for more than twenty-four weeks an abortional act which causes the miscarriage of such a female, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Abortion in the first degree is a class D felony.

§ 125.55 Self-abortion in the first degree
A female is guilty of self-abortion in the first degree when, being pregnant for more than twenty-four weeks, she commits or submits to an abortional act upon herself which causes her miscarriage, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Self-abortion in the first degree is a class A misdemeanor.

N.Y. PENAL LAW §§ 125.00, .05, .45, .55 (McKinney 1975). New York does not equate unjustifiable abortion with murder. The sentence upon conviction for murder in the first degree ranges from 15 years to life imprisonment. See N.Y. PENAL LAW §§ 70.00(2)(a), (3)(a)(i) (McKinney 1975). In contrast, the penalty for abortion in the first degree is at most seven years imprisonment. See N.Y. PENAL LAW § 70.00(2)(d) (McKinney 1975).

96 The author modeled the proposed murder statute after the California murder statutes. See note 94 supra for the text of the California statutes. The author chose the California statutes rather than the New York statutes (see note 95 supra for the text of the New York statutes) because the California approach subjects the intentional killing of an unborn child to the consequences of murder instead of illegal abortion.
The legislative enactment of a feticide statute would remove all of the obstacles previously discussed in this Comment. 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.

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