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HUGHES v. STATE: THE “BORN ALIVE” RULE DIES A TIMELY DEATH

It must be true that whenever a sensational murder is committed there are people who—though they are, quite properly, of no interest to law enforcers, attorneys, or newspaper reporters—weep, lie sleepless, and realize at last that their lives have been changed by a crime in which they played no part.¹

I. INTRODUCTION

May a person be convicted of homicide² for inflicting injuries on an unborn child who died from the injuries before birth? After a recent decision by the Oklahoma Court of Criminal Appeals, the answer in Oklahoma is an unequivocal “YES.”³ The Oklahoma Court of Criminal Appeals is the third⁴ and most recent state court to expressly reject the “Born Alive” Rule and hold that a viable human fetus is a “human being” against whom a homicide may be committed.⁵ While still in the minority, Oklahoma has recognized that technological advances in medical science have abolished the need for the “Born Alive” Rule.⁶

Criminal liability for the death of a fetus remains a powerfully debated area, but existing protections for the unborn under the criminal law are very limited.⁷ The majority of jurisdictions does not recognize the unborn as persons entitled to the protection of the criminal

1. THE QUOTABLE LAWYER 225 (David Shrager & Elizabeth Frost eds., 1986) (quoting VINA DELMAR, THE BECKER SCANDAL (1968)).

2. Homicide is defined as the killing of one human being by the act, procurement, or omission of another. A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. Criminal homicide is murder, manslaughter or negligent homicide. BLACK'S LAW DICTIONARY 734 (6th ed. 1990).

3. Hughes v. State, 868 P.2d 730, 736 (Okla. Crim. App. 1994).

4. The other two states that have expressly rejected the born alive rule are South Carolina and Massachusetts. See State v. Horne, 319 S.E.2d 703 (S.C. 1984); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). Kansas also appears to have rejected the born alive rule without discussion. See State v. Burrell, 699 P.2d 499 (Kan. 1985).

5. Hughes, 868 P.2d at 734, 736.

6. *Id.* at 732; see also People v. Guthrie, 334 N.W.2d 616, 619 (Mich. 1983) (Ryan, J., dissenting) (“Since the reason for the existence of the born alive rule has vanished—the impossibility of proving the humanness of the viable unborn—the rule should likewise vanish.”).

7. Commonwealth v. Cass, 467 N.E.2d 1324, 1327 (Mass. 1984).

On the other hand, civil law has afforded protections to the unborn in a variety of ways. At common law the fetus was given certain property rights. See Keeler v. Superior Court, 470 P.2d

law.⁸ A few states, however, have enacted separate feticide statutes to protect the unborn from homicide,⁹ and the unborn are expressly included in the coverage of the general homicide statutes in a few other jurisdictions.¹⁰

In *Hughes v. State*,¹¹ the Oklahoma Court of Criminal Appeals, overturned the "Born Alive" Rule.¹² The court concluded that viability rather than live birth was a better standard for ascribing criminal liability for the death of a fetus.¹³ Consequently, after *Hughes* a homicide action for the death of a viable fetus will be proper in Oklahoma, even if there was no subsequent live birth.¹⁴

This Note discusses the history of the "Born Alive" Rule and modern advances in medical technology that affect the rationale behind the "Born Alive" Rule. In addition, the decisions of the other state courts that have rejected the "Born Alive" Rule are examined. Finally, this Note explores the *Hughes* decision and considers the impact it will have on society and criminal prosecutions in Oklahoma.

II. HISTORICAL BACKGROUND ON THE "BORN ALIVE" RULE

The "Born Alive" Rule is a rule of medical jurisprudence produced by the limitations on medical knowledge available to the common law from the 16th through 19th centuries.¹⁵ Given the primitive knowledge of life in the womb, live birth was an evidentiary standard

617, 629-30 (Cal. 1970). Modern tort law has recognized the right of a fetus to recover damages for prenatal injuries, if the fetus survives. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367-70 (5th ed. 1984). There is also a recent trend permitting recovery for wrongful death when the fetus dies as a result of prenatal injuries. See Barbara E. Lingle, Comment, *Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?*, 44 ARK. L. REV. 465, 466 n.6 (1991).

8. *Cass*, 467 N.E.2d at 1327.

9. See, e.g., IOWA CODE ANN. § 707.7 (West 1993) ("Feticide—any person who intentionally terminates a human pregnancy after the end of the second trimester of the pregnancy where death of the fetus results commits feticide."); GA. CODE ANN. § 16-5-80 (1992) (defining feticide as the willful killing of a quickened child by an act injuring the mother that would be murder if the mother died).

10. N.Y. PENAL LAW §§ 125.00, 125.05 (McKinney 1987) (stating that homicide includes certain abortifacient acts, all defined to include the intent to cause a miscarriage); CAL. PENAL CODE § 187 (West 1988) (defining murder as the unlawful killing of a human being, or fetus, with malice aforethought).

11. 868 P.2d 730 (Okla. Crim. App. 1994).

12. *Id.* at 736.

13. *Id.* at 732-33.

14. *Id.* at 736.

15. Clarke D. Forsythe, *Homicide of the Unborn Child: The BORN ALIVE RULE and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 571 (1987).

required to prove that the unborn child was alive.¹⁶ The resulting evidentiary limitations led to the quickening doctrine and the "Born Alive" Rule.¹⁷

Quickening is the first physical movement that is felt by the mother of the fetus in the womb.¹⁸ It was at this point that it could be proved that the mother was pregnant.¹⁹ It also could be established that the child was alive in utero.²⁰ Before quickening, therefore, it was virtually impossible for anyone, including the woman, a midwife, or a physician, to confidently know of a pregnancy or a live child.²¹ As a result, the common law adopted the quickening doctrine as a presumption that the child was first "endowed with life" at quickening.²²

This primitive knowledge of human life in the womb explained the rationale for the "Born Alive" Rule. Even after quickening, it was exceptionally difficult to determine whether the child died prior to or during labor and subsequent expulsion from the womb.²³ As a result, live birth²⁴ was required to prove that the unborn child was alive and that the tortious acts ultimately caused death.²⁵ Without live birth, it could not be established that the child was alive in the womb at the time of the defendant's acts.²⁶

By the seventeenth century, the English common law fully embraced the "Born Alive" Rule, and the Rule was reported and advocated by Sir Edward Coke and Sir William Blackstone.²⁷ Considering the tremendous influence of Coke and Blackstone on early American common law, it is not surprising that American courts uniformly

16. *Id.*

17. *Id.*

18. *Id.* at 567.

19. *Id.* at 568.

20. *Id.*

21. *Id.* at 573.

22. *Id.*

23. *Id.*

24. Any expulsion of the fetus from the womb showing evidence of life is called a live birth. *Id.* at 568. A child is considered alive if the child has an independent life of its own for some period, even momentarily, after birth, as evidenced by respiration or other indications of life, such as beating of heart and pulsation of arteries or heart tones in response to artificial respiration, or pulsation of umbilical cord after being severed. BLACK'S LAW DICTIONARY 74 (6th ed. 1990).

Oklahoma has enacted a "live birth" definition virtually identical to this definition. See OKLA. STAT. tit. 63, § 1-301(e) (1991).

25. Forsythe, *supra* note 15, at 575.

26. Forsythe, *supra* note 15, at 575.

27. See SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1648); 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198 (1765 ed.) (U. of Chi. Press Facsimile 1979).

adopted the "Born Alive" Rule during the nineteenth century.²⁸ In fact, by 1850 the English common-law rule "had long been accepted in the United States."²⁹

III. MODERN-DAY ADVANCES IN MEDICAL TECHNOLOGY

Medical knowledge of fetal development has increased at a startling pace in recent years.³⁰ The growth of medical technology has forced courts to reexamine the legal status of the fetus. Although American courts invariably adopted the "Born Alive" Rule without examining its purpose, scholars generally attribute the rule to the technological inability to prove the *corpus delicti* of the homicide of an unborn child.³¹ The courts are using a rule that is "generally understood to derive from the impossibility of determining whether and when a fetus was living and when and how it died."³² As a result, American courts are using an antiquated law that is over 300 years old.

Although medical science was unable to establish conclusively the existence of a live fetus or the cause of an unborn child's death until the middle of the twentieth century, recent advances in medical technology make these determinations routine.³³ With recent advances in embryology and medical technology, physicians can establish the existence and gestational age of a live fetus by fetal heart

28. Several American courts cited Coke and Blackstone in support of the Born Alive Rule. *Clarke v. State*, 23 So. 671, 674 (Ala. 1898); *State v. Cooper*, 22 N.J.L. 52, 54 (1849).

29. *Keeler v. Superior Court*, 470 P.2d 617, 621 (Cal. 1970).

30. Forsythe, *supra* note 15, at 576.

31. Forsythe, *supra* note 15, at 576.

32. *People v. Guthrie*, 334 N.W.2d 616, 617 (Mich. 1983).

33. F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 267 (18th ed. 1989). "Birth 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." *People v. Guthrie*, 293 N.W.2d 775, 778 (Mich. Ct. App. 1980), *pet. for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983).

monitoring, sonography, amniocentesis, and other techniques.³⁴ Medical experts can now also establish the point at which a fetus is viable,³⁵ as well as the proximate cause of a fetal death.³⁶

Despite these medical advances, the "Born Alive" Rule continues to dominate American law regarding the homicide of fetuses, regardless of their gestational development.³⁷ During the 1980's, many state courts applied the rule to prohibit homicide convictions for the deaths of viable fetuses in the face of occasionally gruesome facts and despite the high degree of culpability of some defendants.³⁸

IV. APPLICATION OF THE "BORN ALIVE" RULE BY AMERICAN COURTS

Today, despite the significant advances in our understanding of the human unborn, twenty-four states still adhere to the "Born Alive" Rule by court decision.³⁹ In at least eleven cases involving the "Born

34. CUNNINGHAM ET AL., *supra* note 33, at 19-20.

35. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 514-15, 530-31 (1989) (upholding a Missouri statute creating a presumption of viability that must be rebutted by medical tests before an abortion may be performed).

Viability is an arbitrary standard, which varies from case to case. David A. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 588-97 (1965). Whether a fetus is capable of living will depend upon any number of factors, including the health of its mother and the general state of medical science. *Green v. Smith*, 377 N.E.2d 37 (Ill. 1978) (finding that court was unable to hold as a matter of law that a fourteen-week-old fetus which weighed less than 120 grams was non-viable); *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1252 (Ill. 1977) (stating that "in addition to the length of pregnancy, viability depends on other facts which include the weight. . . of the child and the available life-sustaining techniques."). However, viability has no medical reality because of these factors. The legal reality of viability developed out of historical need to explain that a fetus exists as a being separate from its mother. See *Smith v. Brennan*, 157 A.2d 497, 502-03 (N.J. 1960).

36. This can be done with the aid of fetal autopsies. See *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984); *State v. Beale*, 376 S.E.2d 1, 2 (N.C. 1989); *State v. Trudell*, 755 P.2d 511, 512 (Kan. 1988).

37. Forsythe, *supra* note 15, at 595-96.

38. See, e.g., *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) (involving a defendant that shoved his knee into his pregnant ex-wife's abdomen while stating, "I'm going to stomp it out of you"); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) (involving a defendant that forced his hand up his wife's vagina killing the child and substantially damaging the mother's uterus and vagina); *In re A.W.S.*, 440 A.2d 1174 (N.J. 1980) (involving the death of a fetus three days before its expected full-term delivery by a reckless driver).

39. *Singleton v. State*, 35 So. 2d 375 (Ala. 1948); *Meadows v. State*, 722 S.W.2d 584 (Ark. 1987); *State v. Anonymous*, 516 A.2d 156 (Conn. 1986); *State v. McCall*, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); *White v. State*, 232 S.E.2d 57 (Ga. 1977); *State v. Winthrop*, 43 Iowa 519 (1876); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983); *People v. Guthrie*, 293 N.W.2d 775 (Mich. Ct. App. 1980), *pet. for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983); *Taylor v. State*, 66 So. 321 (Miss. 1914); *State v. Doyle*, 287 N.W.2d 59 (Neb. 1980); *In re A.W.S.*, 440 A.2d 1144 (N.J. 1981); *State v. Willis*, 652 P.2d 1222 (N.M. 1982); *People v. Hayner*, 90 N.E.2d 23 (N.Y. 1949); *State v. Sogge*, 161 N.W. 1022 (N.D. 1917); *State v. Dickinson*, 275 N.E.2d 599 (Ohio 1971); *State v. McKee*, 1 Add. 1 (Pa. 1791); *State v. Amaro*, 448 A.2d 1257 (R.I. 1982); *Morgan v. State*, 256 S.W. 433 (Tenn. 1923); *Harris v. State*, 12 S.W. 1102 (Tex. 1889); *State v.*

Alive" Rule, courts applied the Rule despite medical evidence indicating the cause of fetal death.⁴⁰ Furthermore, even in those jurisdictions that have abandoned the live-birth requirement in the tort context, courts continue to apply the "Born Alive" Rule in homicide cases. These courts typically note this inconsistency, but dismiss it with little hesitation, often pointing out that remedial statutes are to be construed liberally, whereas criminal statutes are governed by a rule of strict construction.⁴¹ Nevertheless, courts in two states⁴² have abandoned the rule, while others have abandoned the rule to some extent by statute.⁴³

A reason often cited by the courts for retaining the "Born Alive" Rule is that a retroactive application of a homicide statute to encompass the particular child before the court would violate the constitutional guarantee against undue surprise afforded criminal defendants by the due process clause.⁴⁴ The first essential of due process is fair warning of the act which is made punishable as a crime.⁴⁵ These courts maintain that the application of a homicide statute to the killing

Larsen, 578 P.2d 1280 (Utah 1978); Lane v. Commonwealth, 248 S.E.2d 781 (Va. 1978); State ex rel. Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984); Huebner v. State 111 N.W. 63 (Wis. 1907); Bennett v. State, 377 P.2d 634 (Wyo. 1963).

40. See Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970); State v. Anonymous, 516 A.2d 156, 157 (Conn. 1986); People v. Greer, 402 N.E.2d 203, 206 (Ill. 1980); State v. Trudell, 755 P.2d 511, 512 (Kan. 1988); Hollis v. Commonwealth, 652 S.W.2d 61, 61-62 (Ky. 1983); People v. Guthrie, 293 N.W.2d 775, 776 (Mich. Ct. App. 1980), *pet. for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983); State v. Soto, 378 N.W.2d 625, 627 (Minn. 1985); State v. Beale, 376 S.E.2d 1 (N.C. 1989); State v. Dickinson, 275 N.E.2d 599, 600 (Ohio 1971); State v. Evans, 745 S.W.2d 880, 881 (Tenn. Crim. App. 1987); State v. Larsen, 578 P.2d 1280, 1281 (Utah 1978).

41. See State v. Beale, 376 S.E.2d 1, 2 n.3, 4 (N.C. 1989); see also People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) ("Differing objectives and considerations in tort and criminal law foster . . . different principles governing the same factual situation."); State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985) ("This court may . . . fashion a remedy for civil wrong . . . but is forbidden to use its common law power to fashion crimes for public wrong."); State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982) (holding wrongful death statute was "properly subject to a liberal application," but homicide statute must "be narrowly construed").

42. See Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (including viable fetus as "person" for purpose of common-law crime of murder); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (construing vehicular homicide statute to encompass killing of viable fetus); State v. Horne, 319 S.E.2d 703 (S.C. 1984) (extending common-law definition of murder to include viable fetus).

43. See CAL. PENAL CODE § 187(a) (West 1988) (defining murder as "the unlawful killing of a human being or a fetus, with malice aforethought"); ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1994) (creating the crime of "Intentional homicide of an unborn child"); MINN. STAT. ANN. §§ 609.266-268 (West 1987 and Supp. 1995) (establishing separate, comprehensive homicide statutes encompassing unborn children).

44. Keeler v. Superior Ct., 470 P.2d 617, 625-26 (Cal. 1970); State v. Anonymous, 516 A.2d 156, 159 (Conn. 1986); State v. Trudell, 755 P.2d 511, 516 (Kan. 1988); State v. Willis, 652 P.2d 1222, 1223 (N.M. Ct. App. 1982).

45. Keeler, 470 P.2d at 626.

of an unborn child could not be foreseen by the offender and would violate the criminal defendant's right to due process.⁴⁶

The due process rationale as applied to a homicide statute for the killing of an unborn child is incorrect and should be criticized. The application of a homicide statute to the death of an unborn viable fetus does not violate a criminal defendant's fair warning and certainly does not justify retaining the "Born Alive" Rule under such circumstances.⁴⁷ The proper inquiry at stake in the "fair warning" rationale is the general, not specific knowledge of the offender.⁴⁸ The issue is not whether the offender knew that his conduct was prohibited but whether he knew that his conduct was wrong.⁴⁹

In *Hollis v. Commonwealth*,⁵⁰ the defendant took his estranged pregnant wife from her parent's home out to the barn and told her he did not want the baby. He then forced his hand up her vagina killing the child and substantially damaging the mother's uterus and vagina.⁵¹ The court found that he could not be charged with murder under a statute penalizing "the death of another person."⁵² How could Robert Hollis not know that his conduct was wrong? As applied to the intentional killing of an unborn child, the inquiry is whether the offender had fair warning that he was killing a human being.⁵³

It will be immediately contended that the "Born Alive" Rule indicates that the offender could not have known that he was killing a human being.⁵⁴ However, this argument is flawed for a two reasons.⁵⁵ First, the definition of human being includes all human beings.⁵⁶ The Hollis baby was a viable, thirty-week old fetus which was proven by the available evidence under the medical technology of this time.⁵⁷ A viable fetus in a human mother is a human being. Second, the issue is not whether Robert Hollis knew of the common law "Born Alive" Rule that limited the scope of a homicide statute, but whether he knew in ordinary everyday terms that he was killing a human being,

46. Forsythe, *supra* note 15, at 607-08.

47. Forsythe, *supra* note 15, at 611.

48. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 34 (1972).

49. Forsythe, *supra* note 15, at 611.

50. 652 S.W.2d 61 (Ky. 1983).

51. *Id.*

52. *Id.*

53. Forsythe, *supra* note 15, at 611.

54. Forsythe, *supra* note 15, at 611.

55. Forsythe, *supra* note 15, at 611.

56. Forsythe, *supra* note 15, at 611.

57. *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

his baby.⁵⁸ In common knowledge, it is recognized that an unborn child is a human being.⁵⁹ Robert Hollis had fair knowledge that he was killing a human being and the death of the unborn child should not go unpunished due to the use of an antiquated law.

Another reason often cited by the courts for retaining the "Born Alive" Rule is that the legislature has the primary right to define crimes and their punishments, subject only to certain constitutional limitations.⁶⁰ Even when courts concede the inappropriateness of the "born alive" requirement, they refuse to abandon it without express legislative action.⁶¹

In *People v. Guthrie*,⁶² the defendant drove his pickup truck across four lanes of traffic striking an automobile being driven by Brenda Tucker in the northbound curb lane.⁶³ The collision caused Mrs. Tucker's abdomen to impact with her vehicle's steering wheel.⁶⁴ At the time of the accident, Brenda Tucker was nine months pregnant and was scheduled to enter the hospital the next day in preparation for a caesarean delivery.⁶⁵ Shortly after the accident, an emergency caesarean section was performed and a stillborn infant was delivered.⁶⁶ Both the pathologist and the obstetrician who performed the caesarean stated that the infant had bled to death.⁶⁷ Charges were dismissed against the defendant on grounds that a fetus was not a "person" within the meaning of the negligent homicide statute.⁶⁸ In *Guthrie*, the court termed the rule as "outmoded, archaic and no longer serving a useful purpose," but refused to abandon the rule because the court would in effect be usurping the legislature's traditional power of defining what acts should be criminal.⁶⁹ Unfortunately, many state legislatures have not utilized their police powers to protect the potentiality of human life by deterring the conduct of those who are acting intentionally against the unborn.

58. Forsythe, *supra* note 15, at 611.

59. Forsythe, *supra* note 15, at 611.

60. See, e.g., *People v. Greer*, 402 N.E.2d 203 (Ill. 1980); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

61. Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 131 (1985).

62. 293 N.W.2d 775 (Mich. Ct. App. 1980), *pet. for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983).

63. *Id.* at 776.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 778-81.

The case of *People v. Greer*⁷⁰ illustrates the failure of state legislatures to extend adequate protection to the unborn fetus. In *Greer*, the criminal defendant allegedly beat his pregnant girlfriend with his fists, kicked her with his feet, struck her repeatedly with a broomstick which broke during the course of the beating, and thereby caused the death of an approximately eight-month-old fetus.⁷¹ Yet, that defendant was found to be immune from prosecution under the state homicide law.⁷² In this case, had the fetus been born alive and survived independent of the mother for only a very short while, the prosecution for homicide would have been permitted.⁷³ The court's reliance on the common-law rule would not have occurred had the legislature protected potential human life by expressly including the fetus within its murder statute.⁷⁴

To avoid results such as that in *Greer*, some state legislatures have announced statutory schemes that offer explicit measures of protection to the unborn from the nonconsensual killing of third parties causing the termination of potential life.⁷⁵ Some of these measures

70. 402 N.E.2d 203 (Ill. 1980).

71. *Id.* at 206.

72. *Id.* at 209, 213.

73. *Id.* at 207; *see also* Parness, *supra* note 61, at 128.

74. *Greer*, 402 N.E.2d at 209; *see also* Parness, *supra* note 61, at 128.

75. *See, e.g.*, CAL. PENAL CODE § 187 (West 1988) (defining homicide as "the unlawful killing of a human being, or a fetus"); ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993) (establishing the crime of "intentional homicide of an unborn child"); LA. REV. STAT. Ann. § 14:2(7) (West 1986) (defining person in criminal code to include human being from moment of fertilization).

are criminal abortion,⁷⁶ feticide,⁷⁷ and homicide⁷⁸ statutes. In California, the "fetus" is protected within the murder statute.⁷⁹ This protection came in response to *Keeler v. Superior Court*,⁸⁰ in which the court applied the "Born Alive" Rule. However, even if *Keeler* had been tried in a state that protects fetuses through the criminal abortion laws, he would not have been prosecuted for criminal abortion.⁸¹ Such laws differ from the California statute in that they only apply where there are acts constituting an attempt at an "abortion."⁸² Such acts may not include all conduct directed at or causing a pregnancy termination.⁸³ In *Keeler*, the defendant was infuriated that his ex-wife was pregnant.⁸⁴ However, Keeler could not be prosecuted for criminal abortion because he only threw her against a car and shoved his knee into her abdomen while stating, "I'm going to stomp it out of you."⁸⁵ His act could not be classified as an attempted abortion.⁸⁶

Although beneficial, criminal abortion, feticide, and homicide statutes leave gaps in criminal law regarding the unintentional conduct of third parties.⁸⁷ Statutes expressly protective of potential life often

76. See, e.g., MO. ANN. STAT. § 188.030(1) (Vernon 1983) (defining an abortion as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child"); ILL. ANN. STAT. ch. 720, para. 510/2(4) (Smith-Hurd 1993) (defining an abortion as "the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death"). Both the Missouri and Illinois criminal abortion statutes require an intent to terminate potential human life.

77. See, e.g., IOWA CODE ANN. § 707.7 (West 1993) ("Feticide—any person who intentionally terminates a human pregnancy after the end of the second trimester of the pregnancy where death of the fetus results commits feticide."); GA. CODE ANN. § 16-5-80 (1992) (defining feticide as the willful killing of a quickened child by an act injuring the mother that would be murder if the mother died).

78. N.Y. PENAL LAW §§ 125.00, 125.05 (McKinney 1987) (defining homicide to include certain abortifacient acts undertaken with the intent to cause a miscarriage); CAL. PENAL CODE § 187 (West 1988) (defining homicide as the unlawful killing of a human being, or fetus, with malice aforethought).

79. CAL. PENAL CODE § 187 (West 1988).

80. 470 P.2d 617 (Cal. 1970).

81. Parness, *supra* note 61, at 135.

82. Parness, *supra* note 61, at 134.

83. Parness, *supra* note 61, at 134.

84. *Keeler*, 470 P.2d at 623.

85. *Id.* at 618; see also Parness *supra* note 61, at 135.

86. See Parness, *supra* note 61, at 135.

87. Parness, *supra* note 61, at 136.

encompass only conduct undertaken with the intent to cause the termination of potential life or death.⁸⁸ However, a wide range of culpable, but somewhat unintentional, third party conduct remains unaddressed.⁸⁹ Because intent is a prerequisite in producing fetal death for these statutes, what happens in the case of an intoxicated motorist who operates a car, causing a collision and causes the death of an unborn child?⁹⁰ Though the fetus is killed, the driver cannot be prosecuted for the fetus's death because there was no intentional killing of the fetus.⁹¹ Similarly, although a mugger or rapist intentionally inflicts injury upon a pregnant woman, he usually cannot be prosecuted for the ensuing death of the fetus if he is unaware of the pregnancy; he has not "willfully" killed the unborn child as is often required.⁹² So, criminal laws especially protective of the unborn are certainly lacking. Even when states act expressly to protect fetuses through their criminal laws, perhaps in response to judicial criticism of the "Born Alive" Rule, their legislative protection is often incomplete.⁹³

Despite retaining the "Born Alive" Rule, many states have recognized that an unborn child is in existence from the moment of conception and its existence is recognized by the law for purposes in equity, property law, and tort law.⁹⁴ Until the middle of the twentieth century, civil common law denied recovery for wrongful death actions based on the stillbirth of a child due to injuries to the mother.⁹⁵ In *Verkennes v. Corniea*,⁹⁶ the Supreme Court of Minnesota became the first court to assail this policy when it allowed the plaintiff-father's

88. See, e.g., MO. ANN. STAT. §188.030(1) (Vernon 1983) (defining an abortion as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child."); IOWA CODE ANN. § 707.7 (West 1993) ("Feticide—any person who intentionally terminates a human pregnancy after the end of the second trimester of the pregnancy where death of the fetus results commits feticide."); N.Y. PENAL LAW §§ 125.00, 125.05 (McKinney 1987) (including in the definition of homicide certain abortifacient acts undertaken with the intent to cause a miscarriage).

89. Parness, *supra* note 61, at 136.

90. Parness, *supra* note 61, at 137.

91. Parness, *supra* note 61, at 137.

92. See, e.g., GA. CODE ANN. § 16-5-80 (1992) (defining feticide as the willful killing of a quickened child by an act injuring the mother that would be murder if the mother died).

93. Parness, *supra* note 61, at 137 n.177.

94. KEETON ET AL., *supra* note 7, at 367-68.

95. See, e.g., *Newman v. City of Detroit*, 274 N.W. 710 (Mich. 1937); *Buel v. United Railways Co.*, 154 S.W. 71 (Mo. 1913); *Magnolia Coca-Cola Bottling Co. v. Jordan*, 78 S.W.2d 944 (Tex. Civ. App. 1935).

96. 38 N.W.2d 838 (Minn. 1949).

wrongful death action against a physician for allegedly negligent conduct which caused a stillbirth.⁹⁷

A majority of jurisdictions now recognize a wrongful death action based on the death of an unborn child.⁹⁸ In doing so, courts construe the terms "person" or "human being" in the various wrongful death statutes to include a viable fetus, thereby entitling the unborn to the same protection afforded the born.⁹⁹ If a viable unborn child is killed, the estate may sue for monetary damages from the wrong-doer.¹⁰⁰ However, if the same child is killed under circumstances which would constitute murder or manslaughter, but for the fact that the child is still in his mother's womb, the wrong-doer is immune from criminal prosecution for the intentional killing.¹⁰¹ It is inconsistent to declare that "an action may be maintained by the personal representative of a viable unborn child for the wrongful death of such child" and yet, not recognize the death of such child in the context of criminal prosecution.¹⁰²

V. COMPARATIVE LAW OF OTHER STATES

As indicated in the introduction, two courts besides Oklahoma have found it within their powers of judicial interpretation to recognize feticide by expressly altering the common law "Born Alive" Rule. The Massachusetts Supreme Court in *Commonwealth v. Cass*¹⁰³ concluded that the term "person" as used in the vehicular homicide statute included viable fetuses.¹⁰⁴ A similar opinion was issued the next day¹⁰⁵ by the Supreme Court of South Carolina in *State v. Horne*,¹⁰⁶ where the court found that an action for homicide based on the killing of an unborn child could be maintained.¹⁰⁷ The only basis given for this decision was the court's right and duty to develop the common law of South Carolina.¹⁰⁸

97. *Id.* at 841.

98. *See* Lingle, *supra* note 7, at 466 n.6.

99. *See, e.g.,* DiDonato v. Wortman, 358 S.E.2d 489, 493 (N.C. 1987); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949). For a complete list of cases construing wrongful death statutes to include viable fetuses, *see* Lingle, *supra* note 7, at 466 n.6.

100. KEETON ET AL., *supra* note 7, at 367-68.

101. Baldwin v. Butcher, 184 S.E.2d 428, 429-30 (W. Va. 1971).

102. *Id.* at 436.

103. 467 N.E.2d 1324 (Mass. 1984).

104. *Id.* at 1330.

105. The Massachusetts decision was issued on August 16, 1984 and the South Carolina opinion on August 17, 1984.

106. 319 S.E.2d 703 (S.C. 1984).

107. *Id.* at 704.

108. *Id.*

A. *Massachusetts*

In *Commonwealth v. Cass*, the Supreme Judicial Court of Massachusetts had before it a statute which provided that whoever operates a motor vehicle while under the influence of intoxicating liquor or marihuana, etc., and causes the death of another "person," shall be guilty of "homicide by a motor vehicle."¹⁰⁹ The defendant, while driving a motor vehicle, struck a pregnant female pedestrian and caused the death of the pedestrian's viable fetus.¹¹⁰

The court in *Cass* held that a viable fetus is a "person" under the statute in question.¹¹¹ In so holding, the court rejected the assertion that it was unable to develop common law rules of criminal law where the legislature had promulgated criminal law statutes.¹¹² The court also rejected the assertion that, by using the term "person" in the vehicular homicide statute, the legislature intended to crystallize the preexisting, limited definition of "person" at common law.¹¹³ Finally, the court concluded that the rule of strict construction of criminal statutes did not prevent the court from construing the word "person" to include viable fetuses.¹¹⁴ The court stated:

We think that the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide. If a person were to commit violence against a pregnant woman and destroy the fetus within her, we would not want the death of the fetus to go unpunished. We believe that our criminal law should extend its protection to viable fetuses.¹¹⁵

B. *South Carolina*

The decision of the court in *Cass*, however, does not stand alone. The South Carolina Supreme Court in *State v. Horne* held that an action for criminal homicide could be maintained for the death of a viable unborn child.¹¹⁶ The court applied the state homicide statute to a stillborn child, implicitly acknowledging the "Born Alive" Rule to be evidentiary in nature.¹¹⁷ The court in *Horne* stated, "[t]he fact this particular issue has not been raised or ruled on before does not mean

109. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984).

110. *Id.*

111. *Id.* at 1330.

112. *Id.* at 1327.

113. *Id.*

114. *Id.*

115. *Id.* at 1329.

116. *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984).

117. *Id.* at 703.

we are prevented from declaring the common law as it should be."¹¹⁸ The *Horne* court, like the *Cass* court, rejected the "Born Alive" Rule but ruled that application of the homicide statute to the killing of an unborn child would be prospective.¹¹⁹

VI. *HUGHES V. STATE*

A. *Facts and Procedural Background*

In August of 1990, the defendant, Treva LaNan Hughes, while driving under the influence of alcohol, collided with another automobile driven by Reesa Poole who was nine months pregnant and expected to deliver in four days.¹²⁰ Due to the collision, the steering wheel in Poole's car broke because Poole's stomach hit the steering wheel with such force.¹²¹ After the accident, the baby was born by an emergency caesarean section and the only sign of life was an extremely slow heartbeat.¹²² It was, however, brain dead and had no blood pressure, no respiration and did not respond to any resuscitative efforts.¹²³ Medical evidence determined that the fetus was viable at the time of the accident, and that it had died as a result of the placental obreption which occurred when Poole's stomach hit and broke the steering wheel of her car.¹²⁴

Hughes was charged with manslaughter of the unborn fetus.¹²⁵ Since the only matter for decision in the case was the legal issue of whether the conviction should be reversed on the basis of the common law "Born Alive" Rule, the Oklahoma Court of Criminal Appeals ordered a direct review.¹²⁶ Applying its decision prospectively, the court held that a viable fetus is a "human being" which may be the subject of a homicide under title 21, section 691 of the Oklahoma Statutes¹²⁷ and the common law "Born Alive" Rule is abandoned.¹²⁸

118. *Id.* at 704.

119. *Id.*

120. *Hughes v. State*, 868 P.2d 730, 731 (Okla. Crim. App. 1994).

121. *Id.*

122. *Id.*

123. *Id.* at 732.

124. *Id.*

125. *Id.* at 731. Oklahoma's first degree manslaughter statute, provides that "[h]omicide is manslaughter in the first degree . . . [w]hen perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor." OKLA. STAT. tit. 21, § 711(1) (1991).

126. *Hughes*, 868 P.2d at 731.

127. *Id.* Oklahoma's homicide statute provides that "[h]omicide is the killing of one human being by another." OKLA. STAT. tit. 21, § 691 (1991).

128. *Hughes*, 868 P.2d at 731.

B. *The Majority Opinion*

The issue in *Hughes* was one of first impression in Oklahoma.¹²⁹ Certain of the undesirability of allowing the commission of violence against a pregnant woman resulting in the death of her unborn child to go unpunished, or to be punished as less than homicide, the court extended the protection of the criminal law to viable fetuses, subject to the constitutional limits imposed by the Supreme Court in *Roe v. Wade*.¹³⁰

The court set forth several reasons for its holding. The first reason was based upon the origins, history, and purpose of the "Born Alive" Rule.¹³¹ The court rejected the Rule as no longer relevant in the twentieth century in view of modern medical advances.¹³² The court reasoned that concerns about whether the fetus was alive at the time of the defendant's act are no longer valid.¹³³ The court concluded that speculation as to causation can be removed through competent medical testimony.¹³⁴

In addition, the court analogized to the decisions of *Cass* and *Horne*.¹³⁵ In those two cases, both courts felt that they had the right and the duty to develop the common law to better serve an ever-changing society as a whole.¹³⁶ The Oklahoma Court of Criminal Appeals stated that they also had the right and duty to develop the common law of Oklahoma to serve the evolving needs of its citizens.¹³⁷

Another reason was based on the plain language and purpose in using the words "human being" in the homicide statute.¹³⁸ The court stated that the purpose of the Oklahoma Statutes title 21, section 691 is to protect human life.¹³⁹ A viable human fetus is nothing less than

129. *Id.* at 731.

130. *Id.* at 734. The court stated:

We wish to make it absolutely clear that our holding shall not affect a woman's constitutional right to choose a lawful abortion based upon her constitutional right to privacy or a physician's right to perform one Accordingly, today's decision to bestow upon viable human fetuses the legal status of "human being" under Oklahoma law, cannot and shall not be used as the basis for bringing homicide charges against either a woman who chooses a lawful abortion or a physician who performs a lawful abortion.

Id. at 734-35 (citations omitted).

131. *Id.* at 732.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 732-33.

136. *Id.*

137. *Id.* at 733.

138. *Id.*

139. *Id.*

human life.¹⁴⁰ Thus, the term "human being" in section 691, according to its plain and ordinary meaning, includes a viable human fetus.¹⁴¹ The court went on further to overrule *State v. Harbert*,¹⁴² in which the same court held that a viable fetus is not a "person" within the meaning of the Oklahoma Statutes title 21, section 652, an assault and battery statute.¹⁴³

The court also looked at Oklahoma's bifurcated appellate system; the Oklahoma Supreme Court has final jurisdiction over civil appeals, and the Oklahoma Court of Criminal Appeals has final jurisdiction over criminal appeals.¹⁴⁴ The court stated that while neither Oklahoma court is obligated to adopt the reasoning of the other, consistency is certainly desirable.¹⁴⁵ The court looked to the Oklahoma Supreme Court's holding in *Evans v. Olson*,¹⁴⁶ in which it had decided that a statutory cause of action for the wrongful death of an unborn viable child exists under title 12, section 1053 of the Oklahoma Statutes.¹⁴⁷ The court reasoned that the decision of *Evans* further supported its rationale for including a viable human fetus in the term "human being."¹⁴⁸

The *Hughes* court went on to state that the legislative intent is not changed by this decision.¹⁴⁹ The change comes in the common law as applied in this jurisdiction so as to more fully adapt to present day life.¹⁵⁰ The homicide statute was enacted to protect human life.¹⁵¹ The court concluded, therefore, that the legislature intended to include a viable fetus as a person protected under the homicide statute and is clearly in accord with legislative intent.¹⁵² Finally, the court

140. *Id.*

141. *Id.*

142. 758 P.2d 826 (Okla. Crim. App. 1988)

143. *Hughes*, 868 P.2d at 733 (citing *State v. Harbert*, 758 P.2d 826 (Okla. Crim. App. 1988)).

144. *Id.*

145. *Id.*

146. 550 P.2d 924, 927-28 (Okla. 1976).

147. *Hughes*, 868 P.2d at 733 (citing *Evans v. Olson*, 550 P.2d 924, 927-28 (Okla. 1976)). The statute provides in part:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission.

OKLA. STAT. tit. 12, §1053(A) (1991).

148. *Hughes*, 868 P.2d at 733.

149. *Id.* at 734.

150. *Id.*

151. *Id.*

152. *Id.*

also found that the holding satisfied the constitutional requirement of notice and fairness to the defendant by making the decision prospective.¹⁵³

C. *The Dissent*

Presiding Judge Lumpkin concurred in part and dissented in part. He concurred with the court's determination that the term "human being" includes a viable human fetus pursuant to title 21, section 691 of the Oklahoma Statutes.¹⁵⁴ His dissent was based on the court's decision that the judgment and sentence for first degree manslaughter must be reversed and remanded with instructions to dismiss.¹⁵⁵ He stated two reasons for his dissenting opinion.¹⁵⁶ The first reason is that the court, in effect, recognizes the "Born Alive" Rule to be evidentiary, not substantive, in nature.¹⁵⁷ The court cites title 12, section 2 of the Oklahoma Statutes for the legal principle that the common law is applicable in Oklahoma.¹⁵⁸ The title of this section actually refers to the code of civil procedure and section 9 provides for the code of criminal procedure.¹⁵⁹ Judge Lumpkin states that there are no common law crimes in this state as is made clear by title 12, section 2 of the Oklahoma Statutes.¹⁶⁰ Therefore, the application of the homicide statute is an application of a substantive criminal statute which was originally codified in 1910.¹⁶¹ In conclusion, the discussion regarding retroactivity and foreseeability are therefore inappropriate and inapplicable.¹⁶²

Presiding Judge Lumpkin's second reason for dissenting was based on the determination that the child was dead upon delivery.¹⁶³ He states that in the light most favorable to the prosecution, that a baby who had a heartbeat before and after delivery, and who was not pronounced dead until over an hour after delivery, was alive.¹⁶⁴ His reasoning is based on the legislature's definition of "live birth" as it is

153. *Id.* at 735.

154. *Hughes v. State*, 868 P.2d 730, 736 (Okla. Crim. App. 1994).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 737.

164. *Id.*

used in connection with vital statistics governing birth and death.¹⁶⁵ Based on this "live birth," the defendant should be convicted of manslaughter.¹⁶⁶ The majority, however, held that being brain dead is the fact which determines whether there has been a "live birth" or not and in this case, the child was brain dead, therefore never being born alive.¹⁶⁷

VII. THE IMPLICATIONS OF *HUGHES*

The *Hughes* decision is momentous because the court viewed its role not only as interpreting but also as developing the criminal law.¹⁶⁸ Assured of its authority to decide the issue at bar, the *Hughes* court deliberated whether it should follow the common law definition of homicide.¹⁶⁹ The rationale offered for retaining the "Born Alive" Rule was discarded by the court as unpersuasive because advances in medical technology can provide competent proof of fetal viability at the time of the defendant's conduct, and can prove whether the defendant's conduct caused the death.¹⁷⁰ Recognizing the constitutional limitations with respect to an individual's right to privacy, the *Hughes* court extended the criminal law to protect viable fetuses, and thus held that a viable fetus, before or after birth, is a "person" under the Oklahoma homicide statute.¹⁷¹

The *Hughes* court boldly rejected firmly rooted precedent and justified its approach to the judicial construction of the homicide statute and its rejection of the principle that the court is bound by the pre-existing common law definition of human being.¹⁷² While the rule of strictly construing criminal statutes is crucial in assuring fairness to the defendant, the courts must nevertheless construe them with regard to the evil which they are intended to suppress.¹⁷³ Society would not want such a crime to go unpunished. The *Hughes* court also satisfied the due process requirement of providing adequate notice of potential

165. *Id.*

166. *Id.*

167. *Id.* at 732.

168. *Hughes v. State*, 868 P.2d 730, 733 (Okla. Crim. App. 1994).

169. *Id.* at 731-33.

170. *Id.* at 732.

171. *Id.*

172. *Id.* at 731-33.

173. *See Keeler v. Superior Court*, 470 P.2d 617, 632 (Cal. 1970).

criminal behavior and avoided unfairness to Treva Hughes by applying its decision prospectively.¹⁷⁴ Thus, the *Hughes* court rejected concerns of the judiciary overstepping its power, and stated precedent and the elasticity of common law as support.¹⁷⁵

The personhood of the fetus was the major obstacle confronting the *Hughes* court.¹⁷⁶ The court persuasively dispelled the reasoning behind the "Born Alive" Rule, emphasizing that current scientific understanding has eliminated the problem of proving that the fetus was alive and that the defendant's conduct had caused its death.¹⁷⁷ Additionally, the court noted the trend toward allowing recovery for an unborn fetus under civil wrongful death statutes and effectively analogized the decision in *Evans* to the instant case.¹⁷⁸ Thus, the court logically concluded that the time had come to dispense with the "Born Alive" Rule in construing whether a fetus is a "person" under criminal homicide statutes.¹⁷⁹

Notwithstanding its positive impact on the legal status of a viable fetus with regard to homicide statutes, the *Hughes* decision may have overtones in the area of a woman's right to privacy and freedom of choice.¹⁸⁰ The court carefully warned, however, that its decision should not infringe on a woman's constitutional right to privacy.¹⁸¹ The *Hughes* decision defines who is entitled to legal protection under the Oklahoma homicide statute.¹⁸² To ensure that a woman's constitutional right to privacy is preserved, the *Hughes* holding should be limited to this narrow area.

VIII. CONCLUSION

The *Hughes* decision represents a divergence from strong precedent. The court reexamined the rationales behind the stringent common law standard of refusing to include viable fetuses within the meaning of the word "person" for purposes of homicide statutes, and logically concluded that the "Born Alive" Rule was outmoded. A defendant can now be charged with and convicted of the murder of a viable fetus. The *Hughes* decision effectively paves the way for other

174. *Hughes*, 868 P.2d at 735.

175. *Id.* at 732-35.

176. *Id.* at 731.

177. *Id.* at 732.

178. *Id.* at 733.

179. *Id.* at 731.

180. *Id.* at 734.

181. *Id.*

182. *Id.*

courts to afford legal protection for the destruction of viable fetuses. Justice is now adequately served when an unborn viable baby can be killed by a non-consensual act with the offender being seriously punished and stigmatized for committing the crime. If kept within the narrow context of defining who is entitled to legal protection under homicide statutes, the *Hughes* decision does not infringe on the Supreme Court's determination that a woman has the constitutional right to decide whether to terminate her pregnancy.

Mary Lynn Kime