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Criminal Law—Manslaughter—A Fetus is Not a Person as the Term Is Used in the Manslaughter Statute

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CRIMINAL LAW—MANSLAUGHTER—A FETUS IS NOT A "PERSON" AS THE TERM IS USED IN THE MANSLAUGHTER STATUTE. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Robert Keith Meadows drove his car while intoxicated. He was accompanied by Vanessa Weicht. Weicht was in her fortieth week of pregnancy, carrying a fetus two weeks "overdue." Meadows drove his car recklessly, crossed the center line of the highway, and struck an oncoming car head-on. Randy Waldrip, driver of the oncoming car, and Vanessa Weicht's fetus were killed as a result of the accident. Meadows andWeicht survived their serious injuries.

The state charged Meadows with two counts of manslaughter: one for the death of Randy Waldrip and the other for the death of Weicht's full-term fetus. The pertinent part of the manslaughter statute under which the state charged Meadows provides that one commits manslaughter if one "recklessly causes the death of another person."[1] The Benton County Circuit Court convicted Meadows on both counts, and he appealed the conviction to the Arkansas Supreme Court.

The central issue on appeal involved whether the term "person" as used in the manslaughter statute included fetuses. Meadows argued that the term "person" did not include fetuses[2] and, therefore, the reckless killing of fetuses did not come within the purview of the manslaughter statute. The Arkansas Supreme Court agreed. After noting that the statute failed to define "person," the court found that the common law did not include fetuses within the definition of the term "person." Refusing to create and retroactively apply a new common law crime of fetus homicide, the Arkansas Supreme Court reversed the manslaughter conviction for the death of the full-term, viable fetus. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Medical, ethical, and legal questions regarding the status of human fetuses have perplexed scholars for centuries.[3] The great philosophers of early Greece possessed only scant medical knowledge of fetal life, viability, and causes of fetal death. Their key writings on the killing of fetuses concerned abortion, not manslaughter, and they

1. ARK. STAT. ANN. § 41-1504(1)(c) (1977).

2. Meadows v. State, 291 Ark. 105, 107, 722 S.W.2d 584, 585 (1987).

3. *See generally* Roe v. Wade, 410 U.S. 113, 130 (1973) (detailed discussion of ancient philosophical and theological attitudes about fetuses).

based their thinking regarding protections due human fetuses upon the primary ethical consideration that once a human fetus became animate, that is, endowed with a soul,[4] destruction of the fetus was wrongful. Although this Greek opinion was rigid, philosophers conflicted on the timing of animation. Pythagoras (580-500 B.C.) thought that a human embryo was animate from conception,[5] and he rejected abortion without qualification.[6] Hippocrates (460-377 B.C.) incorporated this Pythagorean anti-abortion position[7] into his ethical guide for the medical profession, the Hippocratic Oath.[8] Plato (428-348 B.C.) thought that a body was inanimate until it moved,[9] but he commended aborting fetuses if the parents were beyond the lawful procreation age.[10] Plato's student, Aristotle, (384-322 B.C.) supported abortion "before sense and life have begun"[11] as a means of controlling population growth.[12] St Augustine of Hippo (A.D. 354-430) acknowledged the distinction between an embryo endowed with a soul and an inanimate embryo, but believed that humans could not determine when human fetuses become animate.[13] These theological and philosophical concepts contributed to early English thought regarding the homicide of human fetuses.[14]

In the middle of the thirteenth century, the English writer Bracton focused upon "quickening"—the first movement of the fetus felt *in utero*[15]—as the critical moment when a fetus attained the protection of the manslaughter laws. The fetus lived if it moved, and its subsequent death marked the death of a human being.[16] Although Bracton did not explicitly require a "born alive" fetus for the killing to amount to a homicide, the relatively primitive state of medical

4. PLATO, *Phaedrus*, in COLLECTED DIALOGUES 493 (Bollingen Series No. 71, 1961).

5. L. EDELSTEIN, *The Hippocratic Oath*, in ANCIENT MEDICINE 18-19 (1967).

6. *See id.* at 19.

7. *Id.* at 17-18, 20.

8. *Id.* at 6 (quoting the Hippocratic Oath: "I will not give to a woman an abortive remedy.").

9. PLATO, *supra* note 4.

10. PLATO, *Republic*, in COLLECTED DIALOGUES 700 (Bollingen Series No. 71, 1961).

11. ARISTOTLE, *Politics*, in THE BASIC WORKS OF ARISTOTLE 1302 (R. McKeon ed. 1941).

12. *Id.*

13. Roe v. Wade, 410 U.S. 113, 133 n.22 (1973).

14. This history is reviewed exhaustively in Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and other Legal Anachronisms*, 21 VAL. U.L. REV. 563 (1987).

15. TABER'S CYCLOPEDIC MEDICAL DICTIONARY I-45 (13th ed. 1977).

16. "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide." 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (S. Thorne trans., G. Woodbine ed. 1968).

technology would have made difficult the task of proving that a fetus lived at the time of the trauma to the mother.[17] Near the end of the thirteenth century, an unknown author prepared a commentary on Bracton called *Fleta*.[18] *Fleta* also expressed the theory that killing a "formed and quickened"[19] fetus constituted homicide. *Fleta* did not require that *in utero* injuries to the fetus be followed by live birth and subsequent death for homicide conviction, but it faced the same evidentiary problem that plagued Bracton. Unless the child was born alive, proving that the quickened fetus was alive at the time of the trauma to the mother was virtually impossible because of the limited understanding of fetal development, periods of fetal life, and causes of fetal death.[20]

This evidentiary obstacle led to the development of the "born alive rule." A modern statement of the rule provides that, absent a statute providing otherwise, one cannot be convicted of homicide for the death of a fetus, regardless of the stage of development, because a fetus is not a person.[21] To be the victim of a homicide, a fetus must be born alive and subsequently die of injuries sustained as a fetus.[22]

Andrew Horn was apparently the first English writer to have explicitly adopted the "born alive" requirement for homicide of a fetus.[23] His treatise, which appeared near the end of the thirteenth century, distinguishes the killing of fetuses in the uterus and the killing of children after birth. Under this view, the killing of a fetus is not murder.[24] Lambard, writing in the sixteenth century, also adopted

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17. Forsythe, *supra* note 14, at 580 n.84.

18. SELDEN SOCIETY, FLETA (H. Richardson & G. Sayles trans. 1953).

19. *Id.* at 60-61.

> He, too, in strictness is a homicide who has pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion or to prevent conception, if the foetus was already formed and quickened, and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by a potion or the like, she destroys a quickened child in her womb.

Id.

20. Forsythe, *supra* note 14, at 580.

21. 40 AM. JUR. 2D *Homicide* § 9 (1968).

22. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 67 at 530-31 (1972).

> In the United States the "born alive" requirement has come to mean that the fetus be fully brought forth and establish an "independent circulation" before it can be considered a human being. Proof of live birth and death by criminal agency are required beyond a reasonable doubt to sustain a homicide conviction.

Id. at 531 (footnotes omitted).

23. Forsythe, *supra* note 14, at 581.

24. As to the infant who is slain we must distinguish whether he is slain *en ventre sa mere* [in its mother's womb] or after birth, for in the former case there is no homi-

the "born alive" requirement because of the difficulty in determining if the fetus died *in utero* of natural causes or because of a trauma inflicted on the pregnant woman by a defendant.[25]

Sir Edward Coke's writing greatly influenced American law. He considered quickening and live birth when writing of the killing of a fetus.[26] Coke did not write of any criminality for causing the death of a fetus before quickening,[27] but he opined that defendants committed great misprisons[28] when they caused the death of a quick fetus.[29] Defendants committed murder if, by injuring a pregnant woman, they caused her fetus to die after being born alive, because a living child existed as a reasonable creature.[30] The writings of Sir William Blackstone equally influenced American law. In considering the "born alive" requirement, Blackstone also concluded that when a defendant killed a fetus, the defendant committed "a great misprison," but not murder.[31] However, if a child born alive later died because of injuries the defendant inflicted on the pregnant woman, the defendant committed murder.[32] By the 1830s, the "born alive rule" transcended the

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cide, for no one can be adjudged an infant until he has been seen in the world so that it may be known whether he is a monster or no . . . .

A. HORN, THE MIRROR OF JUSTICES 139 (Selden Society 1893).

25. If the mother destroy hir childe newely borne, this is Felonie of the death of a man, though the child have no name, nor be baptized. And the Justice of Peace may deale accordingly. But if a childe be destroyed in the mothers belly, is no manslayer nor Felone to be imprisoned upon this statute.

W. LAMBARD, EIRENARCHA, OR OF THE OFFICE OF THE JUSTICES OF THE PEACE 217-18 (1581 & photo. reprint 1970).

26. If a woman be quick with childe and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder: but if the childe be borne alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in rerum natura [in existence] when it is born alive.

E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *50.

27. *Id.*

28. "In Coke's time . . . it was a vague offence . . . . High misdemeanors." 2 BOUVIER'S LAW DICTIONARY 2225-26 (Rawle's 3d rev. 1914).

29. E. COKE, *supra* note 26.

30. *Id.*

31. To kill a child in it's mother's womb, is now no murder, but a great misprison: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *198. Blackstone further wrote that there must be "some sort of presumptive evidence that the child was born alive" before a mother could be convicted of murdering her bastard child, despite a statute declaring that concealment of the corpse was conclusive evidence of murder. *Id.*

32. *Id.*

realm of legal treatise material; British courts applied the rule, and it became ensconced in English common law.[33]

Early American courts applied the "born alive rule."[34] Even though the original evidentiary reasons for applying the common law "born alive rule" have been removed by medical technological advances, including fetal heart monitoring, ultrasound examinations, and fetal autopsies, the rule continues to dominate American law regarding the homicide of fetuses, regardless of their gestational development.[35] During the 1980s, 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.[36] However, Kansas, South Carolina, and Massachusetts have judicially rejected the "born alive rule" without

33. Rex v. Sellis, 7 Carr. & P. 850, 173 Eng. Rep. 370 (1837) (A newborn child was decapitated and dumped in a privy. The first question the court faced was whether the entire child was born alive.); Rex v. Crutchley, 7 Carr. & P. 814, 173 Eng. Rep. 355 (1836) (A mother strangled her child after only its head protruded during birth. There could be no murder conviction because the child was not wholly born and alive.); Rex v. Brain, 6 Carr. & P. 349, 172 Eng. Rep. 1272 (1834) (Child must be wholly born and be alive to be a homicide subject.); Rex v. Enoch, 5 Carr. & P. 539, 172 Eng. Rep. 1089 (1833) (Newborn child was stabbed in the head with a fork, but the child must have had independent circulation to be considered born alive. The court made references to writings of Coke, Bracton, and Fleta.); Rex v. Poulton, 5 Carr. & P. 329, 172 Eng. Rep. 997 (1832) (The material question for the jury was whether the child was born alive. If the child was not born alive, the prisoner could not be convicted of murder.).

34. Illustrative of these early American cases are Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917); and Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889). Other cases and materials describing the application of the born alive rule in many jurisdictions are collected at *Meadows*, 291 Ark. at 108, 722 S.W.2d at 585 (1987). *See generally*, Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R. 3D 444 (1971).

35. Forsythe, *supra* note 14, at 595-96.

36. The Illinois Supreme Court ruled that although the beating death of a woman eight and one-half months pregnant was murder of the mother, the deceased viable fetus was not murdered. The Court required not only that the injuries inflicted upon the mother be the cause of the death of the fetus, but that the baby be born alive and later succumb to those injuries. This was a case of first impression in Illinois. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980). In Kentucky, a defendant forced his hand up the vagina of his estranged pregnant wife and manually aborted her 30-week old, viable fetus. He could not be convicted of murder because the statute penalized intentionally causing "the death of another person." The Kentucky Supreme Court, applying a substantive "born alive rule," determined that a fetus was not a person. Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983). In New Jersey, reckless driving caused the death of a fetus three days before its expected full-term delivery. The reckless driver was not convicted of death by auto because the fetus was not born alive. This was also a case of first impression. State *ex rel* A.W.S., 182 N.J. Super. 334, 440 A.2d 1174 (1980). In New Mexico, reckless drunk driving resulted in the death of a viable fetus. The appellate court dismissed vehicular homicide prosecution because the unborn fetus was not a human being within the meaning of the statute. State v. Willis, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982).

waiting for their state legislatures to act.[37]

Several states have enacted feticide statutes, abandoning to some degree the "born alive rule."[38] California includes fetuses directly within the homicide statute[39] as a result of *Keeler v. Superior Court of Amador County*,[40] a decision of the California Supreme Court. In *Keeler*, an estranged husband blocked a mountain road with his car and didn't allow his former wife to pass. Seeing that she was pregnant, he said "I'm going to stomp it out of you."[41] He beat the woman unconscious, and she later delivered a stillborn fetus of up to thirty-six weeks gestation. Doctors concluded, with reasonable medical certainty, that the fetus was viable and would have had a seventy-five to ninety-six percent chance of surviving had it been born just before the injuries to the mother. The California Supreme Court ruled that to include fetuses as subjects of murder would be rewriting the murder statute[42] in the guise of construing it. The court further held that extending criminal liability is the responsibility of the legislature, and that the court could not create a new common law crime of murder of a fetus and apply it to the case on appeal without violating the due process rights of the defendant.[43]

The California legislature reacted to *Keeler* by passing a statute making it murder to unlawfully kill a fetus with malice aforethought.[44] California courts have interpreted the statute as applying

37. State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) (An estranged husband stabbed his former wife, who was pregnant with a full-term, viable fetus. The South Carolina Supreme Court prospectively applied the state homicide statute to fetuses that could be proved viable at the time of the injury to the mother. The court declared it had a right and duty to develop common law to better serve a changing society, and that it would be grossly inconsistent to classify a fetus as a human being for the purpose of imposing civil liability, but as nonhuman for imposition of criminal liability.); State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985) (When a woman eight months pregnant was thrown from a car and killed, the Kansas Supreme Court applied the homicide statute to the viable fetus without discussion.); Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (A fetus killed in a car accident was later delivered stillborn. Physicians conducted an autopsy on the fetus and determined that the fetus was viable at the time of the injury to the mother and that the trauma to the mother was the cause of fetal mortality. With no evidentiary reason to apply the "born alive rule," the Supreme Judicial Court of Massachusetts rejected it.).

38. *See* GA. CODE ANN. § 26-1105 (1983); IOWA CODE ANN. § 707.7 (West 1979); MICH. COMP. LAWS ANN. § 750.322 (West 1968).

39. CAL. PENAL CODE § 187(a) (West Supp. 1987).

40. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

41. *Id.* at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482 (1970).

42. CAL. PENAL CODE § 187 (West 1970) ("Murder is the unlawful killing of a human being, with malice aforethought.")

43. 2 Cal. 3d 619, 633-34, 470 P.2d 617, 625-26, 87 Cal. Rptr. 481, 489-90 (1970).

44. CAL. PENAL CODE § 187(a) (West Supp. 1987).

only to the murder[45] of viable[46] fetuses.

To date, the highest courts of twenty-four states have held, under facts similar to those in *Meadows*, that they would not create a new common law crime of fetus homicide.[47] South Carolina, Kansas, and Massachusetts are exceptions; the high courts of those states created the new common law crime.[48]

For many years, an Arkansas feticide statute[49] protected the interest of fetal life. This statute made quickened fetuses subjects of manslaughter if the injury to the mother would be murder should her death result.[50] The state employed the statute in 1965 to convict a defendant of manslaughter. The defendant had intentionally driven his car so that it struck a pregnant woman, killing her seven and one-half month old fetus.[51] The feticide statute also appears to have been used in 1977 to convict a defendant of manslaughter.[52] The defendant had intentionally drowned a pregnant woman.[53]

The Arkansas General Assembly expressly repealed the feticide statute when it enacted the Criminal Code.[54] Since the enactment of

45. People v. Carlson, 37 Cal. App. 3d 349, 358, 112 Cal. Rptr. 321, 327 (1974) ("[T]here is no crime constituting manslaughter of a fetus.").

46. People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (construing the word "fetus" to refer to a viable unborn child).

47. 291 Ark. at 109-10, 722 S.W.2d at 585. *See, e.g.*, Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); White v. State, 238 Ga. 224, 232 S.E.2d 57 (1977); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); State v. Gyles, 313 So. 2d 799 (La. 1975); Smith v. State, 33 Me. 48 (1851); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980); State v. Soto, 378 N.W.2d 625 (Minn. 1985); State v. Doyle, 205 Neb. 234, 287 N.W.2d 59 (1980); State *ex rel* A.W.S., 182 N.J. Super. 278, 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (N.M. Ct. App. 1982); People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917); State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); State v. McKee, 1 Add. 1 (Pa. 1791); State v. Amaro, 448 A.2d 1257 (R.I. 1982); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889); State v. Larson, 578 P.2d 1280 (Utah 1978); Lane v. Commonwealth, 219 Va. 509, 248 S.E.2d 781 (1978); Huebner v. State, 131 Wis. 162, 111 N.W. 63 (1907); Bennett v. State, 377 P.2d 634 (Wyo. 1963).

48. *See* cases cited *supra*, note 37.

49. ARK. STAT. ANN. § 41-2223 (1964) (repealed 1975).

50. "The willful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter." Tiner v. State, 239 Ark. 819, 826, 394 S.W.2d 608, 612 (1965).

51. *Id.* at 819, 394 S.W.2d 608.

52. Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977) (The crime was committed on July 27, 1975, and the Arkansas feticide statute remained effective until January 1, 1976.).

53. *Id.* at 590, 550 S.W.2d at 434.

54. Act of April 8, 1975, No. 928, § 3, 1975 Ark. Acts 2463, 2466 (repealing ARK. STAT. ANN. § 41-2223 (1964)).

the Code, no reported Arkansas cases have applied the manslaughter statute to the death of a fetus.[55]

It was against this historic background of the "born alive rule" that the Arkansas Supreme Court considered *Meadows v. State*.[56] The court faced two issues: whether the term "person," undefined in the manslaughter statute, could be construed to include a full-term, viable fetus; and, if not, whether the court could properly create a new common law crime applicable to the killing of such a fetus.[57]

As to the first issue, the Arkansas Supreme Court determined that the common law effective when the manslaughter statute was passed (originally in 1839,[58] later as part of the 1975 Criminal Code[59]) governed the construction of the meaning of "person."[60] In ascertaining the common law, the Arkansas Supreme Court looked to early English cases, as well as cases from Arkansas[61] and other states. The court also considered the early writings on common law.[62] Fetuses were not included within the common law definition of "person" in 1839 and 1975[63] and, therefore, the killing of an unborn viable fetus was not murder.[64] In its argument, the state acknowledged that a fetus was not a person at common law,[65] and accepted the substantive explanation of the "born alive rule."[66] Nevertheless, the state urged the Arkansas Supreme Court to alter the common law by creating a new criminal law offense for manslaughter of a viable fetus.[67]

The Arkansas Supreme Court declined to create a new common law crime by judicial fiat.[68] It deferred to the Arkansas General Assembly,[69] recognizing the duty of the legislature to determine the type of conduct which constitutes a crime and the applicable punish-

55. *See also* Forsythe, *supra* note 14, at 596 n.161, indicating that Arkansas "adopted" the "born alive rule" with the *Meadows* decision.

56. 291 Ark. 105, 722 S.W.2d 584 (1987).

57. *Id.* at 107-08, 722 S.W.2d at 585.

58. ARK. STAT. ANN. § 41-2201, -2209 (1964) (repealed 1975).

59. ARK. STAT. ANN. § 41-1504 (1977).

60. 291 Ark. at 107, 722 S.W.2d at 585 (citing State v. Pierson, 44 Ark. 265 (1884)).

61. 291 Ark. at 107, 722 S.W.2d at 585 (but the Arkansas Supreme Court cited no Arkansas cases in ascertaining the common law).

62. *Id.*

63. *Id.* at 107-08, 722 S.W.2d at 585.

64. *Id.*

65. *Id.*

66. Since the "born alive rule" was created to serve an evidentiary purpose, not one of substantive law, other prosecutors might argue that a court may abandon the "born alive rule" without creating a new common law crime.

67. 291 Ark. at 108, 722 S.W.2d at 585.

68. *Id.* at 109, 722 S.W.2d at 586.

69. *Id.*

ment.[70] Judges created common law crimes during medieval times because legislatures sat infrequently[71] and legislation was scanty.[72] These original reasons for creating common law crimes have disappeared.[73] The court further reasoned that members of the General Assembly are more frequently elected, more closely attuned to the public, and better suited to represent the people of the State than are members of the Arkansas Supreme Court.[74] Finally, General Assembly committees would be able to conduct hearings in a nonadversarial manner and would be able to distinguish degrees of culpability and to graduate penalties.[75] The court, however, would be limited to making rulings solely on the adversarily developed facts before it.[76]

The Arkansas Supreme Court considered and declined to follow the Massachusetts and South Carolina decisions that judicially abrogated the "born alive rule."[77] The Arkansas Supreme Court noted that the Massachusetts courts, in abrogating the "born alive rule," relied on and extended an earlier holding in a civil case that held that a viable fetus was a "person" within the state's wrongful death statute.[78] The Arkansas Supreme Court reasoned that Arkansas has no such holding in a civil case, and that the holding of a comparable Arkansas case, *Carpenter v. Logan*,[79] was just the opposite.[80] An even more compelling reason why the court could not infer legislative intent for the term "person" to include viable fetuses was that the legislature had expressly repealed[81] a manslaughter statute specifically relating to fetuses.[82] Even if the "born alive rule" were judicially abrogated, the court noted that the *Meadows* conviction could not be upheld. A new common law rule applying the manslaughter statute to full-term, viable fetuses would have to be applied prospectively to

70. *Id.* (citing Sparrow v. State, 284 Ark. 396, 397, 683 S.W.2d 218, 219 (1985)).

71. 291 Ark. at 108-09, 722 S.W.2d at 585-86 (citing W. LAFAVE, *supra* note 22, at 57-69).

72. *Id.*

73. *Id.*

74. *Id.* at 109, 722 S.W.2d at 586.

75. *Id.*

76. *Id.*

77. *Id.* at 110, 722 S.W.2d at 586 (Hays, J., dissenting).

78. *Id.* at 110, 722 S.W.2d at 586-87 (citing Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975)).

79. 281 Ark. 184, 662 S.W.2d 808 (1984) (the court reasoned that a fetus born dead is not a "deceased person" under the Probate Code).

80. 291 Ark. at 110, 722 S.W.2d at 587.

81. Act of April 8, 1975, No. 928, § 3, 1975 Ark. Acts 2463, 2466 (repealing ARK. STAT. ANN. § 41-2223 (1964)).

82. ARK. STAT. ANN. § 41-2223 (1964) (repealed 1975).

provide due process.[83]

Associate Justice Hays filed a lone dissenting opinion. He argued that affirming the trial court would not be creating new law, but simply giving effect to the legislative intent for the 1975 manslaughter statute.[84] Justice Hays opined that the "born alive rule" was discredited and should be rejected, as it was in Massachusetts and South Carolina.[85] Justice Hays stated that the evidentiary rule had no function in *Meadows*, as the viability and cause of death of the fetus were fully supported by the proof produced at trial.[86] Justice Hays also argued that the facts of *Meadows* warranted no extended discussion of due process problems,[87] and that Meadows had adequate "fair warning" that his conduct was unlawful.[88] Meadows knew that his drunken driving was unlawful, even if he failed to foresee the final circumstances.

As a result of *Meadows*, the "born alive rule" was adopted as Arkansas law. By its holding, a full-term, viable fetus cannot be the subject of homicide because it is not within the purview of the homicide statute. *Meadows* proscribes homicide convictions regardless of the culpability of the defendant, and as a result, Arkansas courts cannot successfully convict defendants of homicide when they intentionally destroy full-term fetuses.

One of the Directors of Arkansas Right To Life, an organization "devoted to the legal protection of innocent human life,"[89] filed an amicus curiae brief[90] with the Arkansas Supreme Court. Arkansas Right to Life reacted immediately to *Meadows* by seeking legislation making viable fetuses "persons" within the purview of the manslaughter statute.[91] A state legislator was prepared to sponsor the legislation.[92] Planned Parenthood of Greater Arkansas, a family planning organization, submitted an alternate proposal to the Attorney Gen-

83. Bouie v. City of Columbia, 378 U.S. 347 (1964) (retroactive application of a new law would lead to *ex post facto* convictions).

84. 291 Ark. at 113, 722 S.W.2d at 588 (Hays, J., dissenting).

85. *Id.* at 115, 722 S.W.2d at 589.

86. *Id.* at 114, 722 S.W.2d at 589.

87. *Id.* at 115, 722 S.W.2d at 589.

88. *Id.* (the defendant's behavior in Bouie v. City of Columbia, 378 U.S. 347 (1964) could reasonably have been thought lawful).

89. Letter from Arkansas Right to Life President Leon Holmes to John Shannon (August 5, 1987) (discussing the Arkansas Right to Life reaction to *Meadows*).

90. Amicus Curiae Brief for the Ad Hoc Committee of Arkansas Physicians in Support of Appellee, State of Arkansas, Meadows v. State, 291 Ark. 105, 722 S.W.2d 584 (1987) (No. 86-166).

91. Letter, *supra* note 89.

92. *Id.* (identifying Representative Frank Willems).

eral.[93] This alternate proposal was based on a New Mexico statute[94] which "allowed women legal and financial remedy for accidents caused by negligence which caused them to miscarry."[95] The Attorney General proposed similar legislation,[96] which was enacted by the General Assembly as an amendment to the battery statute.[97] Now, the battery statute includes pregnant women in the class against whom intentionally or recklessly causing physical injury is battery in the first degree.[98] This recent amendment would not have changed the outcome of the *Meadows* fetus homicide conviction, as a fetus still can not be the subject of a homicide.

The evidentiary obstacles that led to the creation of the "born alive rule" have been alleviated by advances in medical technology. Today, the "born alive rule" is anachronistic, intellectually dishonest, and unnecessary. It should be abandoned as the rationale for Arkansas' fetus homicide policy. The General Assembly should amend the manslaughter statute to make criminal the intentional murder or reckless killing of viable fetuses if the current policy is justified solely by the "born alive rule." Viability should be defined as it is in the abortion statute,[99] and the definition should be adjusted as necessary to remain consistent with that statute and any United States Supreme Court cases that modify the fetus viability standard.

If the Arkansas General Assembly decides to enact legislation to make fetuses "persons" within the purview of the manslaughter statute, the following issues must be considered. Should the homicide statute include all fetuses, regardless of gestation age, or only viable fetuses? Anomalous results may occur if all fetuses are included. For example, a pregnant woman with a pre-viable fetus may walk into an abortion clinic and have the pregnancy terminated without violating Arkansas' abortion statute.[100] But if the car of a drunk driver strikes that same woman and kills her fetus, then that drunk driver will be subject to homicide prosecution. Distinguishing the facts on the grounds that the second instance was a nonconsensual termination of

93. Letter from Planned Parenthood of Greater Little Rock Director Chris Charbonneau to John Shannon (August 21, 1987) (discussing the Planned Parenthood of Greater Arkansas reaction to *Meadows*).

94. N.M. STAT. ANN. § 30-3-7 (1987).

95. Letter, *supra* note 93.

96. *Id.*

97. Act of March 31, 1987, No. 482, 1987 Ark. Acts 1365 (Adv. Leg. Serv.) amending ARK. STAT. ANN. § 41-1601 (1977).

98. *Id.*

99. ARK. STAT. ANN. § 41-2562 (1977).

100. *Id.*

pregnancy is a weak argument if the statute is designed to give the fetus "person" status under the manslaughter statute rather than to protect the rights of the mother. The recent revision to the battery statute offers that increased protection to the mother.

If only viable fetuses will be included, how will "viable" be defined? The ability of the fetus to exist independent of its mother functions as a standard guide for fetus viability. In applying this test, viability is a question of fact determined on a case by case basis. An application of this guide will also lead to anomalous results. For example, a pregnant woman may abort her twenty-four week old fetus, although found viable under these guidelines, without violating the Arkansas abortion statute,[101] while a nonconsensual termination of the same pregnancy can lead to a homicide conviction.

What degree of culpability should be required to support a homicide conviction? The California statute makes criminal only intentional murder with malice aforethought. An application of that standard alone would not have changed the outcome of *Meadows*. Criminal homicide penalties for merely negligent acts would appear unduly harsh and bad public policy. If a pregnant woman slips and falls in a store, killing her fetus, should the shopkeeper face homicide charges? Should a physician be convicted of manslaughter if a fetus dies because the doctor misdiagnosed the mother's illness?

Sound public policy reasons may exist for excluding viable fetuses from the purview of the homicide statute. If so, the Arkansas General Assembly should enunciate the current public policy reasoning and abandon—carefully—the "born alive rule."

John T. Shannon

101. *Id.* (Although the fetus would be viable as defined on the case-by-case basis, it would not be third trimester viable under Roe v. Wade, 410 U.S. 113 (1973)).