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# KENTUCKY, FETAL HOMICIDE, AND THE SUPREME COURT'S PROBLEMATIC PERSONHOOD JURISPRUDENCE

Mark A. Pemberton<sup>†</sup>

## I. INTRODUCTION

On March 15, 2001, Christopher Charles Morris negligently caused an automobile accident which took the life of a pregnant woman and her unborn child as the woman and her husband were traveling to a hospital for the child's anticipated birth.<sup>1</sup> In the ensuing criminal prosecution, the Commonwealth of Kentucky convicted Morris of a single count of vehicular manslaughter.<sup>2</sup> Although the Commonwealth convicted Morris of vehicular manslaughter for the death of the woman, prior Kentucky case law and United States Supreme Court precedent prevented a conviction for the death of the unborn child.<sup>3</sup> The proceedings prompted the Commonwealth to adopt a new fetal homicide statute and raised serious questions about the consistency of the United States Supreme Court's personhood jurisprudence.<sup>4</sup>

*Commonwealth of Kentucky v. Morris* reached the Kentucky Supreme Court on the question of whether the Commonwealth's existing homicide statute was meant to address the killing of an unborn child.<sup>5</sup> Because the statute did not specifically mention fetal homicide, the primary issue was whether the statute's definition of "human being" should include a viable unborn child.<sup>6</sup> In its June 17, 2004, opinion, the court stated that homicide protection should apply to unborn children at the point of viability and therefore overruled a 1983 decision, in which it had held the statute inapplicable to unborn children who are not born alive.<sup>7</sup> However, the court declined to convict Morris of manslaughter for the death of the child because of the doctrine of *ex post facto*.<sup>8</sup>

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1. See *Commonwealth v. Morris*, 142 S.W.3d 654, 655 (Ky. 2004).

2. *Id.* at 663.

3. *Id.* at 654. Morris was also convicted of criminal assault for injuries to the husband. *Id.* at 655.

4. See discussion *infra* Part III.

5. *Morris*, 142 S.W.3d at 654.

6. See KY. REV. STAT. ANN. § 507.010 (1984); *Morris*, 142 S.W.3d at 654. Viability is the point in the second trimester at which the fetus could potentially survive outside of the womb. *Roe v. Wade*, 410 U.S. 113, 162–64 (1973).

7. *Morris*, 142 S.W.3d. at 660. See also *Roe*, 410 U.S. at 160 (defining "viability" as the point in the second trimester at which the fetus can survive outside of the womb).

8. *Morris*, 142 S.W.3d. at 661 (stating that a court cannot apply a new statute retrospectively).

After oral argument, but before the court released its opinion, the Kentucky General Assembly<sup>9</sup> enacted a new statute, which explicitly authorized criminal punishment for the killing of unborn children.<sup>10</sup>

These important legal developments have demonstrated that the people of Kentucky, through their representatives in the legislative and judicial branches of government, believe that the killing of an unborn child requires the same measure of punishment as the killing of an adult human being. However, in light of the United States Supreme Court's federal abortion jurisprudence, which clearly states that unborn children are not considered to be legal persons, the *Morris* case and Kentucky's new fetal homicide statute are part of a somewhat inconsistent scheme for the punishment of fetal homicide.<sup>11</sup>

This Note discusses the development of Kentucky's fetal homicide jurisprudence and how federal abortion law, as promulgated by the United States Supreme Court, has stunted that development. Specifically, this Note asserts that the Supreme Court's denial of personhood to unborn children in *Roe v. Wade* has thwarted the punishment of those who kill unborn children under existing homicide statutes and has slowed the creation of consistent and effective statutes for the punishment of fetal homicide.<sup>12</sup> Part II of this Note describes the history of Kentucky's fetal homicide jurisprudence. Part III analyzes the effects of the Supreme Court's abortion jurisprudence on both the *Morris* case and the drafting of Kentucky's fetal homicide statute. Finally, Part IV calls for a formal recognition of unborn personhood in order to bring consistency to the law of fetal homicide.

## II. THE DEVELOPMENT OF KENTUCKY'S FETAL HOMICIDE JURISPRUDENCE

### A. Kentucky's Pre-Morris Approach to Fetal Homicide

The common law did not differentiate between the rights of an unborn child and the rights of his mother.<sup>13</sup> Therefore, the common law did not consider the killing of an unborn child a homicide unless the child subsequently achieved at

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9. Hereinafter referred to as the "General Assembly" or the "legislature."

10. KY. REV. STAT. ANN. § 507A.040 (2004) ("A person is guilty of fetal homicide in the third degree when he wantonly causes the death of an unborn child, including but not limited to situations where the death results from the person's operation of a motor vehicle."). Had the statute been in place at the time of the accident, the Commonwealth could have charged Morris with third degree fetal homicide.

11. See discussion *infra* Part III.

12. See *Roe v. Wade*, 410 U.S. 113 (1973).

13. Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 934-35 (1995).

least a moment of individual existence, apart from his mother, before his death.<sup>14</sup> Some common law jurists, such as Sir Edward Coke, supported the born-alive standard because they believed that unborn children lacked the capacity for personhood.<sup>15</sup> However, the born-alive standard actually developed as an evidentiary rule, since historically the prosecution in a fetal homicide case could not establish the necessary element of causation unless a child was born alive.<sup>16</sup> Without the benefits of more recent medical technology, the prosecution could not prove that an unborn child had been alive at the time of an alleged injury nor establish that a specific event had caused the child's death.<sup>17</sup>

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14. *Id.*

15. SIR EDWARD COKE, *THIRD INSTITUTE* (1644) (“[I]f the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.”).

16. Clark D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 575 (1987) (“As a result of a primitive understanding of human life *in utero*, the health of the child *in utero* could not be established unless and until the child was observed outside the womb.”); Annissa R. Obasi, *Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas*, 4 TEX. WESLEYAN L. REV. 207, 211 (1998) (stating that a lack of medical knowledge necessitated the born-alive standard); Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 309-10 (2006) (stating that the born-alive standard was an evidentiary necessity). See also *Commonwealth v. Morris*, 142 S.W.3d 654, 655-57 (Ky. 2004) (explaining the origin of the common law born-alive standard). Before modern medical technology existed, doctors could not know the health of the child until it was born.

As late as the nineteenth century, prior to quickening, it was virtually impossible for either the woman, a midwife, or a physician to confidently know that the woman was pregnant, or . . . that the child in utero was alive. As a result, live birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts.

*Id.* at 657.

17. See Peter G. Guthrie, *Proof of Live Birth in Prosecution for Killing Newborn Children*, 65 A.L.R.3d 413 (1975). The logic behind the born-alive standard was thus consistent with the presumption of innocence absent proof of guilt beyond a reasonable doubt. If the acquittal of a guilty man is better than the conviction of an innocent one, then assuming that a miscarriage was caused by something other than a defendant's action is preferable to assuming that the defendant caused the death himself. The lower requirement of proof may also explain why tort law moved away from the born-alive standard sooner than the criminal law. See also Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41 (2004) (discussing the development of fetal wrongful death statutes in various states).

Many American states, including Kentucky, adopted the born-alive standard from the common law, and some have continued using it to this day.<sup>18</sup> In 1936, Kentucky affirmed its use of the common law born-alive standard by ruling that a *corpus delicti* for infanticide could not exist unless the victim had a “complete and separate existence of its own after birth.”<sup>19</sup> In the 1983 case of *Hollis v. Commonwealth of Kentucky*, the Kentucky Supreme Court integrated the born-alive standard with the Commonwealth’s criminal code by explicitly stating that a homicide conviction requires the birth of a live infant.<sup>20</sup> The court reasoned that an unborn child who never attained an existence independent from its mother was not a human being, and since the homicide statute referred only to the killing of human beings, it was inapplicable to unborn children.<sup>21</sup>

With the advent of modern medicine, the born-alive rule is no longer necessary as an evidentiary standard. The development of medical technologies, such as pregnancy testing and ultrasound imaging, has allowed doctors to confirm pregnancies soon after conception and to monitor the health of children in utero.<sup>22</sup> By 2004, these technologies had obviated the evidentiary necessity of the born-alive standard, and the Kentucky Supreme Court was prepared to reevaluate its fetal homicide jurisprudence.<sup>23</sup>

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18. See *infra* note 70.

19. *Jackson v. Commonwealth*, 96 S.W.2d 1014, 1014 (Ky. Ct. App. 1936).

20. *Hollis v. Commonwealth*, 652 S.W.2d 61, 62 (Ky. 1983), *overruled by* *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004).

21. *Hollis*, 652 S.W.2d at 62 (stating that a child must have a “complete and separate existence” apart from his mother before becoming a “person” for the purpose of the homicide statute (quoting *Jackson*, 96 S.W.2d at 1014)). See also KY. REV. STAT. ANN. § 507 (1974); Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (2005). Historically, the killing of an unborn child was not within the scope of a homicide statute unless the child was born alive, subsequent to the act that led to his eventual death.

At common law and in the absence of statute, it is the rule that if a child dies before birth, there is no crime, but if the child is born alive and thereafter dies from the defendant’s felonious act, the culpability is the same as that incurred in the killing of any other human being. The essential element is the independent existence of the infant.

*Id.*

22. See *Morris*, 142 S.W.3d at 660 (“Whether a fetus was viable when killed is just as provable by competent evidence as whether a child was born alive or stillborn.”).

23. *Id.* at 657; Klasing, *supra* note 13, at 956–57.

### B. *The Morris Case*

*Commonwealth v. Morris* marked a significant transition from the traditional born-alive standard of personhood to a viability standard, and the opinion illustrates the Kentucky Supreme Court's desire to authorize punishment for fetal homicides.<sup>24</sup> Although the *ex post facto* rule prevented the Kentucky Supreme Court from convicting Morris of manslaughter for the death of the unborn child, the court explicitly overruled its previous affirmation of the born-alive standard, as articulated in *Hollis v. Commonwealth*, and stated that Kentucky's homicide statute should apply to viable fetuses, even if they are not born alive.<sup>25</sup> A review of the *Morris* case is helpful in understanding the issues involved in Kentucky's fetal homicide jurisprudence as well as in understanding the greater debate over unborn personhood.

At trial, Morris filed a motion to dismiss the charge of vehicular manslaughter for the death of the unborn child.<sup>26</sup> He claimed that because the child was not born alive, it was not protected as a human being under the *Hollis* court's interpretation of Kentucky's homicide statute.<sup>27</sup> The trial court refused to dismiss the charge, and Morris entered a conditional guilty plea.<sup>28</sup>

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24. *Id.* Technology now allows doctors to know whether a child could have survived if it had been born before the injury. *See id.* These advances have allowed physicians to know the causes of many pre-natal injuries with reasonable medical certainty. However, the viability standard is necessarily flexible because the status of an unborn child's viability is left in a physician's judgment. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976). In the same way that technology obviated the born-alive standard, it may also render the viability standard insignificant. *Id.* As medical and technological advances continue to push back the average point of viability, the current state of technology will be more important in determining viability than an unborn child's level of physical development. *See id.* Assuming that no newborn could survive outside the womb without at least minimal care, even the most basic assumption of the viability test (that a definite point exists at which a newborn child could live independently) seems flawed. Such a standard could also lead to problems of equal protection. *See infra* discussion Part III. For example, a child treated at a state-of-the-art facility could reach viability and therefore secure the protection of a homicide statute at an earlier stage than a child treated at a hospital without access to the newest equipment and most highly trained physicians.

25. *Morris*, 142 S.W.3d at 660. *See also* KY. REV. STAT. ANN. § 507.010 (1984) ("A person is guilty of criminal homicide when he causes the death of another human being under circumstances which constitute murder, manslaughter in the first degree, manslaughter in the second degree, or reckless homicide.").

26. *Morris*, 142 S.W.3d at 655.

27. *Commonwealth v. Morris*, No. 01-CR-00114, slip op. at 3 (Ky. Ct. App. Sept. 13, 2002). *See also* KY. REV. STAT. ANN. § 507.020(1)(b) (1984) (defining murder as "the operation of a motor vehicle under circumstances manifesting extreme indifference to human life" that "thereby causes the death of another person."). For the purposes of this Note, the term "human being" has the same meaning as the term "person," and the two are used interchangeably. The

On appeal, Morris renewed his argument that the homicide statute did not apply to unborn children.<sup>29</sup> In response, the prosecution asserted that a Kentucky abortion statute enacted after *Hollis* had rendered the born-alive standard obsolete by explicitly defining a “human being” as “any member of the species homo sapiens from fertilization until death.”<sup>30</sup> The prosecution claimed that according to this definition of “human being,” the statute included the killing of the unborn child, and that Morris was therefore guilty of homicide.<sup>31</sup> However, the Kentucky Court of Appeals reversed, ruling, *inter alia*, that the 1984 federal district court case of *Eubanks v. Brown* had invalidated the same abortion statute.<sup>32</sup> In *Eubanks*, the district court ruled that the statute unconstitutionally infringed upon the right to abortion by attempting to promote a “definition of life as beginning at fertilization, a theory which the Supreme Court has not adopted.”<sup>33</sup>

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Kentucky Penal Code states that the word “person” “means a human being.” KY. REV. STAT. ANN. § 500.080 (2001). Kentucky’s criminal homicide statute implies the same conclusion by stating that “[a] person is guilty of criminal homicide when he causes the death of another human being.” KY. REV. STAT. ANN. § 507.010 (2004) (emphasis added).

28. *Morris*, No. 01-CR-00114, slip op. at 2.

29. *Id.* at 3.

30. *Id.* at 3; KY. REV. STAT. ANN. § 311.720(6) (1982), declared unconstitutional by *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984).

31. KY. REV. STAT. ANN. § 507.010 (2004) (“A person is guilty of criminal homicide when he causes the death of another *human being* under circumstances which constitute murder, manslaughter in the first degree, manslaughter in the second degree, or reckless homicide.”) (emphasis added).

32. *Commonwealth v. Morris*, 142 S.W.3d 654, 661 n.7 (Ky. 2004); *Eubanks*, 604 F. Supp. at 144.

33. *Id.* at 144. Upon invalidating the Kentucky abortion statute the district court stated that:

Subsection 5 of Section 2 defines “fetus” as “a human being from fertilization until birth,” and Section 6 defines “human being” as “any member of the species homo sapiens from fertilization until death.” These two subsections are unconstitutional because they incorporate into the law a definition of life as beginning at fertilization, a theory which the Supreme Court has not adopted, and which the Supreme Court has held may not be used by a state in a statute to justify its regulation of abortion.

*Id.* See also KY. REV. STAT. ANN. § 311.720(5) & (6) (1982); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444 (1983); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 866 (6th ed. 2000) (“In *Roe v. Wade* the Supreme Court found that a woman’s right to choose to have an abortion was a part of the fundamental constitutional right to privacy.”).

The Kentucky Supreme Court then granted discretionary review to hear the Commonwealth's argument that the "'born alive' rule [was] an anachronism that should not be applied when the victim is a viable fetus."<sup>34</sup> The Commonwealth also reasserted its claim that the General Assembly had explicitly intended to extend attachment of the rights of personhood to the point of conception through the broad definition of "human being" in the abortion statute.<sup>35</sup>

The court began its analysis by noting that the born-alive standard was not an evidentiary necessity in *Morris* because at the time of the accident, the victim could have survived outside of the womb.<sup>36</sup> The court then stated that technological advancements had rendered the born-alive rule generally inapplicable in that it would be unjust to retain a rule which was based on outdated technology and limited knowledge.<sup>37</sup> The court agreed that the born-alive standard should be overruled in favor of the viability standard.<sup>38</sup> However, the majority concluded that the "fair warning" requirement of the Due Process Clause prohibited *Morris*'s conviction under a standard that was not in place at the time of his act.<sup>39</sup>

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34. *Morris*, 142 S.W.3d at 655.

35. *Id.* See also §§ 311.720(5)–(6).

36. *Morris*, 142 S.W.3d at 655. The medical examiner stated that "the child was a viable fetus who would have been born a healthy baby girl had she not sustained a fatal brain injury in the collision." *Id.* The parties stipulated that the victim could have survived outside the womb at the time of the accident. *Id.* at 655 n.1.

37. *See id.* at 659.

38. *Id.* at 660. Although the Kentucky Supreme Court was generally receptive to the idea that the born-alive standard should be discarded, it gave two reasons why the abortion statute's definition of "human being" could not be used to interpret the homicide statute. First, the Kentucky Constitution states that statutes may not apply to more than one subject. *Id.* at 661; KY. CONST. § 51. Therefore, the definition of "human being" in the abortion statute could not apply *ipso facto* to the Kentucky homicide statute. *Morris*, 142 S.W.3d at 660. Second, the abortion statute was invalid on its face because it "violat[e]d the directive in *Roe v. Wade* . . . that a state may not adopt a particular theory of life for the purpose of overriding the rights of the pregnant woman." *Id.* at 661 n.7 (quoting *Eubanks*, 604 F. Supp. at 144).

39. *Morris*, 142 S.W.3d at 663 (stating that new laws and new interpretations of existing laws cannot be applied retrospectively). The Kentucky Supreme Court ruled that *Morris* could not be found guilty of an action that was not illegal at the time he committed it, and thus acquitted him for the death of the unborn child. *Id.* Although the court was obliged by the *ex post facto* rule to uphold the born-alive standard in *Morris*, it stated that a more inclusive standard was necessary. *Id.* at 661. The court then prospectively interpreted the Kentucky homicide statute's definition of "person" to include unborn children after the point of viability. *Id.* The court indicated that in *Morris*, because the victim was viable at the time of its death, it did not need to address the merits of the conception standard and stated that "[p]resumably, future homicides of nonviable fetuses will be prosecuted under [the fetal homicide statute]." *Id.*



In one of two concurring opinions, Justice Keller agreed with the majority's decision not to convict Morris for the death of the unborn child but took exception to the majority's finding that medical advances had made the born-alive standard obsolete.<sup>40</sup> He stated that the General Assembly's failure to overrule the *Hollis* decision was evidence of legislative approval of the court's interpretation of the homicide statute.<sup>41</sup> Thus, he claimed that the court should have followed the rule laid out in *Hollis* apart from any discussion of due process.<sup>42</sup> Justice Keller then asserted that because of a presumption against redundant legislation, the adoption of the new fetal homicide statute proved that the legislature had not intended the original homicide statute to include unborn children within the term "human beings."<sup>43</sup>

In a separate concurrence, Justice Wintersheimer agreed with the majority's decision to overrule *Hollis*, stating that "it was long past due to remove that holding from the jurisprudence of Kentucky."<sup>44</sup> He stated that medical advances would continue to blur conceptions about fetal personhood and that no legitimate difference exists between a viable unborn child and a slightly younger unborn child, with less developed organs, who would not typically be considered viable.<sup>45</sup>

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Therefore, although the court made no comment on how the standard homicide statute should treat the homicide of pre-viable unborn children, it appeared to approve of the fetal homicide statute's use of the conception standard. *Id.* See also U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

40. *Morris*, 142 S.W.3d at 664 (Keller, J., concurring).

41. *Id.* at 664–65 (Keller, J., concurring). The reenactment doctrine, "a well-settled rule of statutory construction," states that "when a statute or clause, or provision thereof, has been construed by the court of last resort of a state, and the statute has been substantially re-enacted, the Legislature will be deemed to have adopted such construction." *Id.* at 664 n.9 (quoting *Falender v. Hankins*, 177 S.W.2d 382, 383 (Ky. 1944)) (Keller, J., concurring). Justice Keller based his rationale on a disagreement "with the majority's prospective broadening of . . . criminal homicide liability through its conclusion (a/k/a 'judicial fiat') that medical advancements have changed the meaning of the word 'person' . . ." *Id.* at 663.

42. See *id.* at 664–65.

43. *Morris*, 142 S.W.3d at 665; KY. REV. STAT. ANN. § 507A (2004); KY. REV. STAT. ANN. § 507 (1984). See also *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003).

44. *Morris*, 142 S.W.3d at 666 (Wintersheimer, J., concurring).

45. *Id.* at 666–67. ("Different technological improvements will move *backward* the point of viability." (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 US 416, 456 (1983)). See also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 457 (1983) ("It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future."). In *City of Akron*, Justice O'Connor went on to state that the reduction of the pre-viable period is evidence that "[t]he *Roe* framework . . . is clearly on a collision course with itself." *Id.* at 458. In *Morris*, Justice Wintersheimer noted the same problem with the viability standard. *Morris*, 142 S.W.3d at 667 (Wintersheimer, J., concurring).

### C. *The Fetal Homicide Statute*

On February 20, 2004, nine days after oral argument in the *Morris* case, the Kentucky General Assembly enacted a fetal homicide statute which parallels the standard homicide statute and authorizes punishment for the killing of unborn children at any time after conception.<sup>46</sup> Because it applies even to the earliest stages of pregnancy, the statute comes closer to establishing a comprehensive framework for the punishment of fetal homicide than that provided by either the live-birth or viability-based interpretations of the standard homicide statute.<sup>47</sup> If the General Assembly had been allowed to refer to unborn children as persons, it would not have needed to establish the fetal homicide statute—the standard homicide statute would have been sufficient.

The definitions section of the fetal homicide statute states that the term “[u]nborn child” means a member of the species *homo sapiens* in utero from conception onward, without regard to age, health, or condition of dependency.<sup>48</sup> This provision is analogous to the portion of the Kentucky abortion statute (invalidated by *Eubanks*) that defined a “human being” as “any member of the species *homo sapiens* from fertilization until death.”<sup>49</sup> Although both statutes implicitly acknowledge that personhood begins at conception, only the latter explicitly contradicts the Supreme Court’s personhood dictates by referring to an unborn child before viability as a “human being.”<sup>50</sup>

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46. See KY. REV. STAT. ANN. § 507A (2004). Because the statute was enacted subsequent to the *Morris* cause of action, it was inapplicable to that case. As the Kentucky Supreme Court explained, “The Ex Post Facto Clauses of both the United States and Kentucky Constitutions preclude retrospective application of this statute to Appellee’s conduct with respect to the unborn child in this case.” *Morris*, 142 S.W.3d at 661. However, in dicta, the court approved of the increase in protection and took the opportunity to use *Morris* “as a vehicle to prospectively adopt that definition via common law.” *Id.* Because *Morris* broadened the scope of the standard homicide statute to include protection for viable unborn children, the fetal homicide statute essentially fills the gap between conception and viability, at which point the homicide statute, as interpreted by *Morris*, takes effect.

47. See KY. REV. STAT. ANN. § 507A.010 (2004); *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

48. KY. REV. STAT. ANN. § 507A.010 (2004).

49. Compare KY. REV. STAT. ANN. § 311.720 (6) (1982), with KY. REV. STAT. ANN. § 507A.010(1)(c) (2004). The abortion statute’s definition is broader in that it includes post-natal human life while the fetal homicide statute refers only to human life in utero. However, this distinction is not important to the discussion of unborn personhood.

50. *Eubanks v. Brown*, 604 F. Supp. 141, 144 (W.D. Ky. 1984) (stating that the abortion statute’s definition of “human being” was unconstitutional). All evidence indicates that the legislature was attempting to duplicate the effect of abortion statute’s invalidated definition “human being” while avoiding unconstitutionality itself. The Commonwealth’s assertion that the definition of “human being” in the abortion statute should guide the interpretation of the

According to *Planned Parenthood v. Casey*, a state may not impose any “undue burden” on a woman who wishes to terminate her pregnancy before her unborn child has reached viability.<sup>51</sup> Because the imposition of criminal liability would constitute a burden, the General Assembly could not draft a statute imposing punishment on mothers who kill their pre-viable unborn children. In an effort to retain an overall conception-based scheme of fetal homicide, the legislature chose to exclude abortion from the statute’s scope rather than face inevitable invalidation by the Supreme Court.<sup>52</sup>

The General Assembly avoided direct conflict with federal abortion jurisprudence by drafting two important exceptions into the statute.<sup>53</sup> This decision assured the statute’s constitutionality and helped to avoid potentially

homicide statute therefore gains considerable support. See generally KY. REV. STAT. ANN. § 507A.010(c) (2004); KY. REV. STAT. ANN. § 311.720(6) (1982); *Morris*, 142 S.W.3d at 655.

51. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming the right to abortion and *Roe*’s denial of unborn personhood). The “‘right’ to abortion ‘protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.’” *Id.* at 874 (quoting *Maher v. Roe*, 432 US 464, 473–74 (1977)). “[The] undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” *Casey*, 505 U.S. at 876. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877.

52. KY. REV. STAT. ANN. § 507A.010(3) (2004).

53. *Id.* at § 507A.010(2) (2004). The fetal homicide statute excludes physicians from liability for the death of unborn children so long as the mother consents to the procedure and the physician acts with reasonable skill. It states that:

(2) In a prosecution for the death of an unborn child, nothing in this chapter shall apply to acts performed by or at the direction of a health care provider that cause the death of an unborn child if those acts were committed:

(a) During any abortion for which the consent of the pregnant woman has been obtained or for which the consent is implied by law in a medical emergency; or

(b) As part of or incident to diagnostic testing or therapeutic medical or fertility treatment, provided that the acts were performed with that degree of care and skill which an ordinarily careful, skilled, and prudent health care provider or a person acting under the provider’s direction would exercise under the same or similar circumstances.

*Id.* Because the fetal homicide statute recognizes unborn personhood from conception onward, the second provision was necessary to prevent physicians from being liable for the destruction of embryos during fertilization procedures.

crippling opposition from pro-abortion groups.<sup>54</sup> The first exception prevents prosecution of physicians for the homicides of unborn children during abortions and fertility treatments.<sup>55</sup> This exception is particularly important because under a strict conception-based framework, a doctor would be guilty of a homicide each time he negligently or intentionally destroyed an embryo or fertilized egg during a fertility procedure.<sup>56</sup>

The second exception was designed to prevent the prosecution of mothers who obtain abortions and stated that none of the penalties relating to fetal homicide “apply to any acts of a pregnant woman that cause the death of her unborn child.”<sup>57</sup> However, because it implicitly allows a woman to terminate her pregnancy at any time and by any means, the exception is actually much

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54. See Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1876–77 (2000). In an attempt to prevent a weakening of *Roe*, the ACLU has actively pressured states attempting to enact fetal homicide statute.

The ACLU has been active in scrutinizing proposed fetal protection legislation. This scrutinization has been to ensure that the proposals (1) do not infringe on a woman’s right to choose, (2) discourage the “policing” of pregnancy, and (3) do not violate due process rights. To that end, they devised a list of six factors for legislators and pro-choice activists to consider when drafting and evaluating such legislation. First, the bill should define the woman alone as the victim, as opposed to the fetus alone, or both the woman and the fetus. If the state does not include such exceptions, then the proposal will probably be stiffly opposed by pro-choice activists who might view it as a threat to abortion rights, as well as by groups opposed to laws criminalizing maternal behavior during pregnancy. Second, in order to diffuse pro-choice opposition, the bill should have an exemption for abortions and the woman’s conduct. Statutes that characterize the pregnant woman as victim do not share the same problems because they penalize actions of others against pregnant women, rather than the fetus and do not focus on the potential actions of the pregnant woman. Third, the language used to describe the fetus should not include anti-choice terms such as “pre-born” or “unborn child.” Fourth, to comport with due process, the bill should require adequate knowledge or intent to commit the crime. Fifth, the terms and prohibited conduct should be defined precisely to avoid vagueness concerns. Sixth, the penalties for causing fetal death should not be as severe as for killing a live person. Aligning proposed legislation with these factors can help avoid conflicts with pro-choice advocates.

*Id.* Such efforts to constrict potential fetal homicide statutes by those who hope to protect the right to abortion is clear evidence of the tension between the Supreme Court’s abortion jurisprudence and a reasonable treatment of fetal homicide. See discussion *infra* Part III.

55. KY. REV. STAT. ANN. § 507A.010 (2)(a)-(b) (2004).

56. *Id.*

57. § 507A.010(3).

broader than necessary to comply with the Supreme Court's abortion jurisprudence.<sup>58</sup> In fact, the exception appears to compromise the government's interests in potential life and maternal health as set out in *Roe* and *Casey*.<sup>59</sup> Under Kentucky's new statutory framework, mothers are immune from punishment for killing pre-viable unborn children through self-abuse, drug use, or recklessness, so long as the child never reaches viability.<sup>60</sup> To the extent that

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58. See *Roe v. Wade*, 410 U.S. 113 (1973) (stating that women have a constitutionally protected right to terminate pregnancy only up to the point of viability). The cause of action for most fetal homicides is a criminal assault on, or negligent injury of, a pregnant woman that causes a miscarriage. The exception for the mothers' behavior essentially allows the mother to induce an abortion by inflicting upon herself the same type of injury that is prohibited when inflicted by a third party. Because there are no other (currently valid) statutes that punish the killing of unborn children before viability, this exception appears to encourage a step backward to the days of the proverbial back-alley abortion. See generally KY. REV. STAT. ANN. § 507A (2004) (providing punishment for third parties who kill unborn children during any stage of development); *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004) (stating that the killing of a viable unborn child is homicide irrespective of who commits the act).

59. Compare *Roe*, 410 U.S. at 163 (holding that the state has an "important and legitimate interest in potential life" after the point of viability), with *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (modifying *Roe* by holding that the state has an interest in potential life even before viability and that the state has an additional interest in the health of the mother during all stages of pregnancy). Before viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* After viability, the state may regulate abortion if it provides "exceptions for pregnancies which endanger the woman's life or health." *Id.* In addition, "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.*

60. See generally Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393 (1993). Prenatal drug use is a serious problem. "[B]etween 350,000 and 739,200 infants are born each year exposed to drugs in utero." McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 107 (1995). Scientists have shown that prenatal exposure to drugs and alcohol can cause various injuries to the unborn child, including an increased chance of fetal stroke and spontaneous abortion, increased infant mortality, lower birth weights, and fetal alcohol syndrome. *Id.* at 107-08. However, attempts to protect unborn children often face opposition by those hoping to preserve the Supreme Court's denial of fetal personhood. Lynn M. Paltrow, *Pregnant Drug Users, Feta Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999). For a discussion of tort issues involved with maternal drug use, see Thomas M. Fleming, *Right of Child to Action Against Mother For Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082 (2005) (stating that some jurisdictions allow tort recovery to children for injuries caused by maternal drug use during pregnancy). Opposition to policies of tort liability for mothers is similar to the opposition to fetal homicide statutes and is another indicator of the tension between federal abortion law and the public's desire to protect unborn children.

The imposition of tort liability on mothers for causing their children prenatal

the exception allows a mother to engage in behavior that is dangerous to her own health or that damages the State's interest in potential life, a court could find the exception unconstitutional under *Casey*.<sup>61</sup>

The next four sections of the statute set out the elements for the various degrees of fetal homicide.<sup>62</sup> The requirements for first through third degree fetal homicide are analogous to the requirements for murder and first and second degree manslaughter under the standard homicide statute.<sup>63</sup> The fetal homicide statute also provides for fourth degree fetal homicide, with mere recklessness as the only required mental element.<sup>64</sup> In addition, although first degree fetal homicide carries a capital status similar to first degree murder, the statute includes a prohibition on the death sentence.<sup>65</sup>

Although the statute is inconsistent in its application of personhood principles and inconsistent in its treatment of fetal homicides (depending on who does the killing), it does succeed in providing a general increase in protection for unborn children.<sup>66</sup> In addition, despite the United States Supreme Court's denial of personhood to unborn children and the statute's own failure to define unborn children as persons, the statute does show practical support for the idea of fetal personhood.<sup>67</sup> The legislature may have avoided

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injury has been endorsed by some commentators as a means of promoting fetal health by discouraging maternal conduct detrimental thereto. Other commentators, however, have criticized such measures as impractical and unacceptable intrusions into a woman's rights to privacy, autonomy, and bodily integrity in procreational matters, as recognized in *Roe v Wade* and other cases.

Thomas M. Fleming, *Right of Child to Action Against Mother For Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082 (2005). See also Smith, *supra* note 54.

61. The broad exception for maternal behavior effectively prohibits regulation of self-induced abortion—the proverbial back-alley abortion. See Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327, 377 (1993) (describing the dangers of “self-help” abortions). The state's interest in potential life may be protected by limitations on abortion only after viability. Although *Casey* recognized the state's interest in potential life during all stages of pregnancy, the mother's right to abortion cannot be unduly burdened before viability. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

62. KY. REV. STAT. ANN. §§ 507A.020–507A.050 (2004).

63. Compare KY. REV. STAT. ANN. § 507A (2004), with KY. REV. STAT. ANN. § 507 (1984).

64. KY. REV. STAT. ANN. § 507A.050 (2004).

65. KY. REV. STAT. ANN. § 507A.020(2) (2004); KY. REV. STAT. ANN. § 507A.060 (2004) (prohibiting the death penalty for first degree fetal homicide).

66. See discussion *infra* Part III.

67. On its face, the statute appears to protect maternal choices about procreation more than unborn life. For example, under the fetal homicide statute, if Morris had killed a pregnant woman on her way to an abortion clinic rather than the hospital, he could have been charged with fetal homicide for the death of her unborn child even though the woman had planned to

constitutional conflict by explicitly refusing to punish acts of the mother, but the law's designation as a "homicide statute" implicitly acknowledges the personhood of the unborn child.<sup>68</sup> Although the Supreme Court has denied the existence of such personhood, the enactment of Kentucky's fetal homicide statute demonstrates that a state government can still acknowledge the inherent value of unborn life.<sup>69</sup> Because the law does have a large normative impact on society, the establishment of sanctions for the killing of unborn children will help to promote a recognition of the inherent value of the fetus even if the statute is not explicitly based on a constitutional right to life.

### III. THE EFFECTS OF *ROE V. WADE* ON KENTUCKY'S FETAL HOMICIDE JURISPRUDENCE

The combination of the Kentucky Supreme Court's decision in *Morris* and the General Assembly's adoption of the new fetal homicide statute illustrate the tension between federal abortion jurisprudence and the desire of some states to provide consistent and effective punishment for the homicide of unborn children. A survey of other jurisdictions confirms that Kentucky's actions are consistent with a nationwide trend toward punishment for fetal homicide.<sup>70</sup>

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terminate the pregnancy. For an explanation of the personhood implications of fetal homicide statutes see Smith, *supra* note 54, at 1879–80 ("State legislatures that have focused on the pregnant woman as victim generally have met with less opposition from pro-choice activists, and also have met with support from groups concerned about domestic violence.").

68. See *infra* note 80.

69. *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992). By holding that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions," the Court failed to acknowledge a life-interest on the part of the unborn child. *Id.*

70. For a state by state overview of fetal homicide protection, see National Right to Life Committee, *State Unborn Victim Laws*, Oct. 5, 2005, [http://www.nrlc.org/Unborn\\_Victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html) (last visited Dec. 18, 2006) [hereinafter *NRLC*]. Thirty two states have some kind of fetal homicide protection for unborn children. Of those states, twenty recognize unborn victims at any point after conception. *Id.* Twelve states provide partial protection, beginning at some point after conception. *Id.* Of those twelve states, five recognize unborn victims after viability. *Id.* Another five states recognize unborn victims after "quickening." *Id.* "Quickening" is "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." *Roe v. Wade*, 410 U.S. 113, 132 (1973). Finally, two states recognize unborn victims only if the injury occurs after a certain time in pregnancy, seven weeks in one state and twelve weeks in another state. *NRLC*. For additional information on the states' differing approaches to fetal homicide, see Smith, *supra* note 54; Hilary A. Converse, Note, *The Fetal Homicide Fallacy: A Comparison of California's Inconsistent Statutes to Other States*, 25 T. JEFFERSON L. REV. 451 (2003); Michael Holzapfel, Comment, *The Right to Live, the Right to Choose, and the Unborn*

However, the Supreme Court's abortion jurisprudence has hindered these efforts.

Although the Supreme Court created its abortion jurisprudence while addressing the maternal right to privacy, its doctrines have had far-reaching effects on other areas involving the status of the unborn, such as the ability of states to apply homicide statutes to the killing of unborn children.<sup>71</sup> By stating that personhood does not attach until birth, *Roe* significantly reduced the protection available to unborn children through conventional state homicide statutes.<sup>72</sup> For example, in *Morris* the Kentucky Supreme Court indicated that it might have considered extending homicide protection from conception onward if the Supreme Court's abortion jurisprudence had not prevented it from doing so.<sup>73</sup> Unfortunately, the Supreme Court's rejection of unborn personhood in *Roe* and its progeny has also stifled state efforts to provide logical and effective punishment for the homicide of unborn children through alternative methods such as Kentucky's fetal homicide statute.<sup>74</sup> For example, the prohibition on undue burdens to abortion access before viability has foreclosed official state recognition of unborn personhood and has crippled attempts to develop a coherent system of fetal homicide jurisprudence.<sup>75</sup>

Although recognition of the importance of fetal life appears to have motivated the drafters of Kentucky's fetal homicide statute, the Supreme

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*Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431 (2002). The number of states that punish fetal homicide before viability is evidence of a general recognition of unborn personhood that exceeds what the Supreme Court has allowed. Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 327–28 (1957). Decision-making about Due Process issues such as the maternal right to privacy are informed from two sources, judgments of state courts and acts of state legislatures. *Id.* The Supreme Court should not be so much “creating its own policy determinations as it is interpreting and reading determinations that have already been made . . . [t]he most significant kind of such objective data has consisted of the moral judgments already made on the point at issue . . .” *Id.* When such a large portion of the nation disagrees with the Supreme Court's precedent, the time has come for it to reevaluate its jurisprudence. For a discussion of the federal government's response to fetal homicide, the Unborn Victims of Violence Act of 1999, see W. Derek Malcom, *The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose*, 1 TENN. J. L. & POL'Y 277, 290 (2005); Colleen Jolicoeur-Wonnacott, *The Unborn Victims of Violence Act: Friend or Foe to the Unborn*, 17 T.M. COOLEY L. REV. 563 (2000).

71. See *Roe v. Wade*, 410 U.S. 113 (1973).

72. See *id.* at 158.

73. *Commonwealth v. Morris*, 142 S.W.3d 654, 661 (Ky. 2004).

74. See *supra* Part III.

75. See *supra* note 62; *Jackson v. Commonwealth*, 96 S.W.2d 1014 (Ky. Ct. App. 1936); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).



Court's denial of fetal personhood forced the General Assembly to adopt at least four limitations. First, *Roe*'s denial of unborn personhood prevented the statute from accurately representing its designation as a homicide statute.<sup>76</sup> The word "homicide" is universally known to mean "the killing of one person by another."<sup>77</sup> Therefore, the heading of the fetal homicide statute implies that unborn children are persons. However, at least one federal court has already used *Roe*'s denial of unborn personhood to strike down a Kentucky statute which attempted to acknowledge the personhood of unborn children.<sup>78</sup> The General Assembly avoided direct conflict with *Roe* by drafting the fetal homicide statute to address a newly-created class of "unborn children" rather than "human beings."<sup>79</sup> In a federal abortion scheme that prohibits unborn personhood, the implication of a "homicide statute" for unborn children is oxymoronic.<sup>80</sup> However, the legislature's intentional combination of the supposedly contradicting concepts of homicide and unborn children indicates that it was trying to provide as much protection for unborn children as possible despite the limitations imposed by the Supreme Court.<sup>81</sup>

Second, when the fetal homicide statute established that unborn children had a life-interest in relation to third parties but not in relation to their mothers, the statute created a new kind of legal entity, the status of which is not completely clear. An unborn child, as described by the statute, is essentially a quasi-person and is simultaneously both a person and not a person.<sup>82</sup> Relative to third

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76. See KY. REV. STAT. ANN. § 507A (2004).

77. See BLACK'S LAW DICTIONARY 751 (8th ed. 2004) (defining "homicide" as "[t]he killing of one person by another.").

78. See *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984).

79. KY. REV. STAT. ANN. § 507A.010(1)(c) (2004).

80. Homicide is the unlawful killing of a person, and according to the Supreme Court, a fetus is not a person. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

81. See *Eubanks*, 604 F. Supp. at 144; *Roe*, 410 U.S. at 158 (prohibiting the recognition of unborn children as "person[s]"). The legislature's recognition of unborn personhood is also evident in its requirement of intent for fetal homicide in the first degree. KY. REV. STAT. ANN. § 507A.020(1)(a) (2004). The statute states that a defendant has the requisite mental state for fetal homicide when *inter alia*, he operates a motor vehicle "under circumstances manifesting an extreme indifference to human life." *Id.* According to traditional theories of criminal law, different kinds of malice can be transferred. Laura Dietz, et al., 21 AM. JUR. 2D CRIMINAL LAW §135 (2006). Therefore, an "extreme indifference to human life" would not provide the requisite intent for a conviction of fetal homicide unless fetal homicide involved the loss of "human life."

82. See Amanda K. Bruchs, Note, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-Exist Peacefully?*, 55 SYRACUSE L. REV. 133, 155 (2004) (asserting that "[s]tates should be free to define fetuses as legal persons from conception, as long as they are not considered constitutional persons in a way that would infringe on women's rights." (quoting Jeffrey Rosen, *A Viable Solution*, Legal Aff.,

parties, the fetal homicide statute regards unborn children as possessing the same right to life as traditional persons.<sup>83</sup> However, relative to their mothers, the quasi-persons have no life-interest whatsoever.<sup>84</sup>

Third, although the statute forbids imposition of the death sentence for fetal homicide, it nevertheless defines “fetal homicide in the first degree” as a capital offense. Capital crimes, such as first degree murder, are generally those for which the State could impose the death penalty. According to the fetal homicide statute, the State may not punish a mother who kills her unborn child but may punish a third party who commits the same offense. Because the fetal homicide statute does not punish the killing of an unborn child by the child’s mother, the statute does not actually protect the child’s life. Rather, it merely protects the mother’s choice as to whether she wants to carry the child to term.<sup>85</sup>

If this is true, then the crime defined by the fetal homicide statute cannot constitute a capital offense.<sup>86</sup> The General Assembly’s use of the capital designation in spite of these inconsistencies is yet more proof of a desire to

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Sept./Oct. 2003, at 21–22)). Some might point out that not all “legal persons” are fully-protected “constitutional persons.” *Id.* To do so would be a mischaracterization of the fetal homicide situation. Entities such as corporations cannot claim the full bundle of rights possessed by a true “person.” Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577, 643–45 (1990).

83. *See supra* note 78. The legislature’s recognition of a life-interest is evinced by the use of the term “homicide.”

84. KY. REV. STAT. ANN. § 507A.010(3) (2004).

85. Smith, *supra* note 54, at 1870. Lawmakers can choose whether to design a fetal homicide statute to protect the mother or the child. “Either the fetus or the pregnant woman can be considered the victim of a crime that results in fetal death or injury.” *Id.* *See also* W. Derek Malcom, *The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose*, 1 TENN. J. L. & POL’Y 277, 290 (2004).

86. *See* KY. REV. STAT. ANN. § 507A.060 (2004). Fetal homicide in the first degree is a capital offense. However, “[t]he death of an unborn child shall not result in the imposition of a sentence of death, either as a result of the violation of [the fetal homicide statute] or as a result of the aggravation of another capital offense . . .” *Id.* Although the statute prohibits the death penalty for fetal homicides, the legislature’s use of the term “capital offense” indicates that the punishment for a conviction should nonetheless be severe. Although “capital” crimes are usually those punishable by death, there can be other consequences that attach to a “capital” conviction. *See* Laura Dietz, et. al., 21 AM. JUR. 2d CRIMINAL LAW § 25 (2004). In general, capital offenses are the type of crime for which the death penalty is appropriate. *Id.* Because the Kentucky fetal homicide statute does not operate as a true homicide statute, it does not address the type of crime for which courts often authorize the use of the penalty. *See* Bicka A. Barlow, Comment, *Severe Penalties for the Destruction of “Potential Life”—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463–64 (1995) (claiming that punishment for the killing of an early term unborn child is cruel and unusual punishment because the child had a large chance of dying anyway).

recognize the value of unborn life and of the difficulty of doing so in light of the Supreme Court's denial of fetal personhood.

Finally, the statute suffers from two significant equal protection problems. First, the statute does not provide equal consequences for different killers of unborn children.<sup>87</sup> The Supreme Court has stated that “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and [punishes] one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”<sup>88</sup> Therefore, equal protection is offended when a third party who commits fetal homicide is treated more harshly than a mother who kills her unborn child herself.<sup>89</sup> Additionally, if one views the fetal homicide statute as a source of protection for unborn children, a second equal protection problem becomes evident. A fundamental, though unstated assumption of Kentucky's fetal homicide jurisprudence is that an unborn child must have some form of life-interest.<sup>90</sup> The law is inconsistent when it grants differing levels of protection to different unborn children based solely upon the identity of the person who takes their life. Thus, when a statute treats two similarly-situated unborn children differently based on factors outside of their control, it has again offended equal protection.<sup>91</sup>

#### IV. CONCLUSION

The recent developments in the Commonwealth of Kentucky demonstrate the inconsistencies that are an inevitable result of the Supreme Court's personhood jurisprudence. In general, the Supreme Court's overbroad rejection of unborn personhood in *Roe v. Wade* has prevented courts from interpreting existing homicide statutes to include protection for unborn children and has had a stifling effect on legislatures that wish to protect unborn children through meaningful and consistent fetal homicide statutes.<sup>92</sup>

Both the *Morris* case and the enactment of Kentucky's fetal homicide statute illustrate important issues about the nature and value of unborn life in relation

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87. See KY. REV. STAT. ANN. §§ 507A.010(2)–(3) (2004). This argument assumes that the legislature intended the statute to punish the destruction of unborn life rather than the mother's right to order her procreation.

88. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

89. See *supra* note 60. Most people would agree that mothers have a higher duty to protect their unborn children than third parties have.

90. See discussion *supra* Part III.

91. KY. REV. STAT. ANN. § 507A.010 (2004).

92. See discussion *supra* Part III.

to the nation's current abortion policies. The recent actions of the Kentucky courts and legislature indicate a belief that the law should give unborn children an amount of homicide protection similar to that possessed by other human beings and that this protection should attach from the earliest stages of development.<sup>93</sup>

In the Supreme Court's current framework of fetal non-personhood, states wishing to protect unborn children face significant but needless obstacles. However, the growing body of state and federal law addressing the issue of fetal homicide and the inconsistencies caused therein by the denial of unborn personhood, have substantially challenged the rationale of the Supreme Court's abortion jurisprudence.<sup>94</sup> The tension between federal abortion law and the desire for effective fetal homicide protection will not be resolved until the Supreme Court acknowledges that unborn children have an inherent value apart from any interest of their mothers or of the state. Only with the opportunity to work from that presupposition can judges and lawmakers develop consistent and effective fetal homicide jurisprudence.

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93. KY. REV. STAT. ANN. § 311.710(5) (2005). The legislature stated its desire to reinstate its pre-*Roe* abortion regulations.

It is the present intention of the [legislature] to protect the valid and compelling interests of the Commonwealth and its inhabitants without unduly burdening a woman's constitutional privacy rights as delineated by the courts. If, however, the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

*Id.*

94. *See supra* note 70.

