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STATE V. ARD: STATUTORY AGGRAVATING CIRCUMSTANCES AND THE EMERGENCE OF FETAL PERSONHOOD IN SOUTH CAROLINA

I. INTRODUCTION

Medical science defines a fetus simply as "the product of conception from the end of the eighth week to the moment of birth."[1] South Carolina courts, however, take a broader view. In *State v. Ard*[2] the South Carolina Supreme Court recently held that a viable fetus is a person within the meaning of the state's capital murder aggravating circumstances statute.[3] The decision continues a trend in South Carolina law affording greater protection to the unborn.[4] Only two other states have used logic similar to the court in *Ard* when determining that the killing of a viable fetus can turn an otherwise non-capital crime into one punishable by death.[5] This Note argues that the South Carolina Supreme Court's decision in *Ard* was sound for the following reasons: (1) its logical consistency with South Carolina case law and long-recognized canons of statutory construction, (2) its respect for the criminal defendant's Fourteenth Amendment right to fair notice, and (3) its respect for a woman's Fourteenth Amendment right to privacy.

Part II of this Note reviews both the supreme court's decision in *Ard* and historical trends in fetal rights. Part III examines the leading arguments against adding fetal murder to the list of statutory aggravating circumstances and suggests deficiencies in both their purely legal and policy-based justifications.

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1. STEDMAN'S MEDICAL DICTIONARY 573 (25th ed. 1990).

2. 332 S.C. 370, 505 S.E.2d 328 (1998).

3. *Id.* at 377, 505 S.E.2d at 331.

4. *See, e.g.*, Whitner v. State, 328 S.C. 1, 8, 492 S.E.2d 777, 781 (1997) (holding that a viable fetus is a person for purposes of child abuse and endangerment statutes of the South Carolina Children's Code); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that a viable fetus is a person for the purposes of a homicide action); Fowler v. Woodward, 244 S.C. 608, 613, 138 S.E.2d 42, 44 (1964) (holding that a viable fetus is a person capable of maintaining a wrongful-death action); Hall v. Murphy, 236 S.C. 257, 263, 113 S.E.2d 790, 793 (1960) (holding that a viable fetus is a person who may recover damages for injuries received in utero).

5. Through legislative action the killing of a fetus in Arizona is a statutory aggravating circumstance for capital murder, and in Indiana the killing of a viable fetus is an aggravating circumstance for capital murder. *See* ARIZ. REV. STAT. ANN. § 13-702(D)(10) (West 1989); IND. CODE ANN. § 35-50-2-9(b)(16) (Lexis 1998).

II. BACKGROUND

A. State v. Ard

Joseph Ard, the boyfriend of Madalyn Coffey and father to her unborn son, was convicted for murdering both with a single bullet to Ms. Coffey's head.[6] Mr. Ard's son was viable[7] at the time of the shooting, but died in the womb soon thereafter from asphyxiation.[8] After Mr. Ard's conviction, the trial judge instructed the jury that it could consider the South Carolina aggravating circumstances statute for purposes of imposing the death penalty.[9] In pertinent part, the statute provides that the death penalty can be considered when "[t]wo or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct"[10] or the act results in "[t]he murder of a child eleven years of age or under."[11] The jury sentenced Mr. Ard to death, and he appealed the sentence on the theory that an unborn but viable fetus is not a "person" or a "child" within the meaning of the South Carolina aggravating circumstances statute.[12] The South Carolina Supreme Court disagreed.[13]

Writing for the majority, Justice Burnett noted that the legislature added subitem nine to the list of statutory aggravating circumstances only after the court's decision in *State v. Horne*,[14] which held that "an action for homicide may be maintained" if the fetus is viable.[15] Because courts presume the legislature knows of judicial decisions construing legislation when enacting statutes concerning related subjects,[16] the majority concluded that "it would be inconsistent to conclude that a viable fetus is a person for purposes of murder, but not . . . for purposes of a statutory aggravating circumstance to murder."[17]

Justice Moore concurred in the result only.[18] Arguing that statutory aggravating circumstances language must be strictly construed against the State

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6. *Ard*, 332 S.C. at 374, 505 S.E.2d. at 330.

7. A fetus is viable when its life may be sustained "indefinitely outside the womb by natural or artificial life-supportive systems." BLACK'S LAW DICTIONARY 1565 (6th ed. 1990). In South Carolina it is presumed that a fetus is not viable until the 24th week of pregnancy. S.C. CODE ANN. § 44-41-10(l) (Law. Co-op. 1976).

8. *Ard*, 332 S.C. at 374-75, 505 S.E.2d at 330.

9. *Id.* at 376, 505 S.E.2d at 330-31. Of the 37 states that allow the death penalty, all agree that the death sentence cannot be imposed unless the sentencer finds "certain facts relating to the crime or to the defendant that elevate the offense above the norm of other first degree murders." Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 941 (1986).

10. S.C. CODE ANN. § 16-3-20(C)(a)(9) (Law. Co-op. Supp. 1998).

11. *Id.* § 16-3-20(C)(a)(10).

12. *Ard*, 332 S.C. at 376, 505 S.E.2d at 331.

13. *Id.*

14. 282 S.C. 444, 319 S.E.2d 703 (1984).

15. *Id.* at 447, 319 S.E.2d at 704.

16. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).

17. *Ard*, 332 S.C. at 377, 505 S.E.2d at 331.

18. *Id.* at 387, 505 S.E.2d at 337 (Moore, J., concurring).

and in favor of the defendant, he observed that the age-defined class of child should not be expanded to include the unborn.[19] Moreover, Justice Moore averred that absent "full legislative debate and deliberation" the court should not render a decision that could potentially lead prosecutors to pursue the death penalty against mothers who aborted viable fetuses.[20] By discussing the potential conflict between the interests of the mother and the fetus, Justice Moore demonstrated how far notions of fetal rights have evolved from the common-law view.

B. Historical Currents in Fetal Rights

Before the development of the common law, "[i]t was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder."[21] Likewise, a woman who procured an abortion at any stage of pregnancy was guilty of murder.[22] However, during the thirteenth century, the law began to distinguish between children born alive and fetuses killed in utero. Only those born alive could be victims of murder insofar as "none can judge whether it be a child before it be seen, and known whether it be a monster or not."[23]

The "born-alive" rule took root in the English common law, but its rationale was modified to address modern causal concerns about a child's death when the mother suffered a battery.[24] Sir William Blackstone canonized the born-alive rule in his *Commentaries on the Laws of England*: "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and dieth by reason of the portion or bruises it received in the womb, it seems, by the better opinion, to be murder . . . ."[25] In America the rule outlasted British control of the colonies and was widely recognized in

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19. *Id.* at 388, 505 S.E.2d at 337.

20. *Id.*

21. State v. Cooper, 22 N.J.L. 52, 54 (1849). However, penalties for harming the fetus could vary. "If men strive, and hurt a woman with child, so that her fruit depart *from her*, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges *determine*." *Exodus* 21:22

22. Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671, 686 (1998).

23. ANDREW HORNE, THE MIRROUR OF JUSTICES 209 (Augustus M. Kelley 1968) (1903).

24. *See, e.g.*, Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L. F. 335, 336-40 (1971). "Historically, the inadequacy of medical technology to determine the cause of death justified this distinction [between infants born alive and fetuses]." Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 952 (1995).

25. 4 WILLIAM BLACKSTONE, COMMENTARIES *198.

American jurisprudence by the end of the nineteenth century.[26]

The rationale for the born-alive rule began to show its age as American law entered the modern era. Minnesota became the first state to disregard the common-law rule by recognizing a wrongful-death claim on behalf of an unborn but viable fetus.[27] Other states followed in rapid succession, prompting what has been termed "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[28] Today a majority of states reject the born-alive rule for wrongful-death claims.[29]

Commentators chronicling this shift have noted that recent advances in embryology and medical technology have made medical proof of causation in these cases increasingly reliable.[30] With the wrongful-death-causation hurdle cleared, courts in some jurisdictions have flatly declared that "[a] viable fetus ... is undeniably alive and undeniably human."[31] However, despite widespread recognition of the fetus as a person in tort law, courts have been less willing to award protection to the viable fetus in the criminal context.

Over thirty American jurisdictions decline to protect an unborn but viable fetus under state homicide or criminal manslaughter statutes.[32] Many of these jurisdictions refuse to abandon the born-alive rule in criminal law despite their recognition of fetal personhood for wrongful-death claims.[33] A standard

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26. *See, e.g.*, *Cooper*, 22 N.J.L. at 54-55 (rejecting the ancient rule of fetal murder in favor of the born-alive standard); Klasing, *supra* note 24, at 952 (observing that American courts "uniformly adopt[ed] the 'born-alive' rule during the nineteenth century").

27. Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949).

28. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 336 (4th ed. 1971).

29. Klasing, *supra* note 24, at 952; Christopher P. Edwards, Note, DiDonato v. Wortman *and Wrongful Death of a Viable Fetus in North Carolina: The Case Against Unreasonably Restricting Damages*, 66 N.C. L. REV. 1291, 1299 (1988); *see, e.g.*, Summerfield v. Superior Court, 698 P.2d 712, 722 (Ariz. 1985) (rejecting the notion "that if the viable infant dies immediately before birth it is not a 'person' but that if it dies immediately after birth it is a 'person'"); DiDonato v. Wortman, 358 S.E.2d 489, 493 (N.C. 1987) (concluding that a viable fetus, killed in utero, has the same right to maintain a wrongful-death action as a child born alive).

30. "[I]t is undisputed that [today] medicine is generally able to prove the *corpus delicti* of the homicide of the unborn child." Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 VAL. U. L. REV. 563, 579 (1987).

31. *See, e.g.*, *DiDonato*, 358 S.E.2d at 491.

32. *See, e.g.*, State v. McCall, 458 So. 2d 875, 877 (Fla. Dist. Ct. App. 1984) (holding that "there are no such crimes as vehicular homicide and DWI manslaughter of a viable but unborn child"); White v. State, 232 S.E.2d 57, 57 (Ga. 1977) (holding that evidence could not establish crime of murder unless child was born alive); State v. Beale, 376 S.E.2d 1, 4 (N.C. 1989) (refusing to abandon the born-alive rule in favor of a viability standard); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807, 812 (W. Va. 1984) (declining to alter common-law born-alive principle by judicial fiat).

33. *See, e.g.*, People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) ("Differing objectives and considerations in tort and criminal law foster the development of different principles governing the same factual situation."); State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982) (observing that the state wrongful-death statute was "properly subject to a liberal application," but the homicide statute "must be ... narrowly construed") (citing State v. Simmons, 327 A.2d 843 (R.I. 1974)).

reason given for the distinction is the judiciary's duty to construe criminal laws strictly.[34] In *State v. McCall*[35] the Florida District Court of Appeal typified the contradictory logic of jurisprudence in this area. Claiming that "[w]e do not hold that a viable fetus is not alive nor . . . that a person should not be punished for causing its death,"[36] the court nevertheless declined to employ the state homicide statute to punish a drunk driver for killing a nine-month old fetus.[37] Justice McGraw of the West Virgina Supreme Court once responded to this dichotomy by observing that "[i]n simple terms, you can, under our law, collect but not convict."[38] The gulf between the civil and criminal law seems especially odd to some, given the complimentary objectives of wrongful-death and homicide statutes.[39] Some state legislatures have responded to this inconsistency by abolishing the born-alive rule through "feticide" statutes that protect viable fetuses from harm suffered in the womb.[40] However, the statutes of South Carolina, Massachusetts, and Oklahoma contain no such provision, although the judiciaries of those states have created a feticide law by interpreting the word "person" in their prospective homicide statutes to include an unborn but viable fetus.[41] South Carolina's decision to reject the born-alive rule in fetal homicide cases was the first step towards the *Ard* decision. The decision also highlighted the supreme court's desire to fashion a consistent jurisprudence of fetal rights within the state.

C. *Judicial Protection of the Fetus in South Carolina*

The first South Carolina decision to afford protection to the unborn fetus was *Hall v. Murphy*.[42] In *Hall* a pregnant woman and her viable fetus were injured in an automobile collision.[43] The child was delivered alive after

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34. *See, e.g., Beale*, 376 S.E.2d at 4 (finding that a fetus is not a person under criminal law because criminal statutes must be strictly construed); State v. Oliver, 563 A.2d 1002, 1003-04 & n.5 (Vt. 1989) (holding that the legislature's omission of the term "fetus" in the penal code indicated its desire to omit the unborn); *Atkinson*, 332 S.E.2d at 812 (holding that the homicide statute does not apply to an unborn but viable fetus).

35. 458 So. 2d 875 (Fla. Dist. Ct. App. 1984).

36. *Id.* at 877.

37. *Id.*

38. *Atkinson*, 332 S.E.2d at 812 (McGraw, J., dissenting).

39. Wrongful-death statutes have been described as aiming "to protect human life . . . and to stimulate diligence in the protection of the natural right to live." Breed v. Atlanta, B. & C.R. Co., 4 So. 2d 315, 316 (Ala. 1941). Homicide statutes are likewise aimed at the protection of human life by providing deterrents to dangerous criminal behavior. Forsythe, *supra* note 30, at 610.

40. *See, e.g.*, CAL. PENAL CODE § 187(a) (West 1988) (creating criminal penalty for murder of a fetus); N.Y. PENAL LAW § 125.00 (McKinney 1998) (establishing crime of feticide).

41. Commonwealth v. Cass, 467 N.E.2d 1324, 1326 (Mass. 1984); Hughes v. State, 868 P.2d 730, 734 (Okla. Crim. App. 1994); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984).

42. 236 S.C. 257, 113 S.E.2d 790 (1960).

43. *Id.* at 259, 113 S.E.2d at 791.

the accident, but died only four hours later.[44] Subsequently, the mother brought a wrongful-death action against the driver of the other vehicle.[45] The court then faced the question of whether injuries suffered before birth could support a cause of action on behalf of the fetus.[46] Many jurisdictions denied such claims after the famous case of *Dietrich v. Inhabitants of Northampton*,[47] in which Justice (then judge) Oliver Wendell Holmes opined that no recovery could be had for injuries sustained by a fetus because it was simply a part of the mother.[48] Justice Oxner, however, concluded on behalf of a unanimous South Carolina Supreme Court that to reject the wrongful-death claim because injuries were suffered before birth would be "unsound, illogical and unjust."[49] Although the court relied on the fact that the child was born, it set a precedent in South Carolina law by resting its decision firmly on the independent status of the fetus.[50]

The court next addressed the personhood of the fetus in *Fowler v. Woodward*.[51] Like *Hall*, *Fowler* involved a wrongful-death claim stemming from an automobile accident in which a viable fetus was injured.[52] However, the fetus in *Fowler* died in utero,[53] thus squarely presenting the court with the validity of the born-alive rule. The court dismissed the notion that live birth was a prerequisite to a cause of action.[54] Instead, the unanimous decision affirmed *Hall*'s broader notion of the viable fetus as an independent person with rights separate from the mother.[55]

Twenty years after *Fowler*, the supreme court again unanimously expanded fetal protection in *State v. Horne*.[56] *Horne* involved whether the word "person" in the state homicide statute applied to an unborn but viable fetus.[57] The appellant was convicted under the statute for killing his unborn son while attacking his pregnant wife with a kitchen knife.[58] Writing for the majority, Justice Shaw held that in light of *Fowler*, "[i]t would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."[59] The decision rested on the court's desire to develop the common

44. *Id.*
45. *Id.*
46. *Id.*
47. 137 Mass. 14 (1884).
48. *Id.* at 17.
49. *Hall*, 236 S.C. at 262, 113 S.E.2d at 793.
50. *Id.*
51. 244 S.C. 608, 138 S.E.2d 42 (1964).
52. *Id.* at 611, 138 S.E.2d at 43.
53. *Id.*
54. *Id.* at 613, 138 S.E.2d at 44.
55. *Id.* at 615, 138 S.E.2d at 45.
56. 282 S.C. 444, 319 S.E.2d 703 (1984).
57. *Id.* at 446, 319 S.E.2d at 704.
58. *Id.*
59. *Id.* at 447, 319 S.E.2d at 704.

law of South Carolina, rather than an investigation into the statute's intended scope.[60] The opinion gave little heed to the fact that no South Carolina case had declared a viable fetus a person within the particular context of criminal homicide: "The fact this particular issue has not been raised or ruled on before does not mean we are prevented from declaring the common law as it should be."[61] Nonetheless, the court reversed the appellant's conviction on the grounds that judicial recognition of the crime of feticide should not be applied retroactively.[62]

The controversial case of *Whitner v. State*[63] continued the court's efforts to define consistently the viable fetus as a "person" under state law. *Whitner* involved the conviction of a mother who ingested crack cocaine during the third trimester of her pregnancy, causing her unborn child to become addicted to the drug.[64] She was charged under the South Carolina Children's Code, which imposes criminal penalties on those who have legal custody of a child or helpless person, but who fail to provide the necessary care or attention.[65] Ms. Whitner pled guilty to the offense and was sentenced to eight years in prison.[66] Afterwards, Ms. Whitner filed a petition for post conviction relief, arguing that the circuit court convicted her of a non-existent offense[67] because the term "child" or "helpless person" under the Children's Code did not encompass a viable fetus.[68] In a tersely written opinion, the supreme court affirmed Whitner's conviction.[69]

Justice Toal, writing for the majority, focused the court's opinion on the "plain and ordinary meaning" of the term "person" in South Carolina law.[70] An analysis of the decisions in *Hall*, Fowler, and *Horne* led Justice Toal to

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60. "This Court has the right and the duty to develop the common law of South Carolina to better serve an ever-changing society as a whole." *Id.*

61. *Id.*

62. *Id.*

63. 328 S.C. 1, 492 S.E.2d 777 (1997).

64. *Id.* at 4, 492 S.E.2d at 778-79.

65. S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1976). The statute provides:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

Id.

66. *Whitner*, 328 S.C. at 4, 492 S.E.2d at 778-79.

67. If Ms. Whitner's argument was valid, the circuit court's acceptance of her guilty plea would have been void: "[A] circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense." *Id.* at 5, 492 S.E.2d at 779.

68. *Id.* at 4-5, 492 S.E.2d at 779.

69. *Id.* at 19, 492 S.E.2d at 786.

70. *Id.* at 8, 492 S.E.2d at 780.

observe that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges."[71] In particular, Justice Toal explained that the court's jurisprudence in *Hall*, *Fowler*, and *Horne* was not based on a desire to protect the relationship between mother and child, but rather the "protection of the viable fetus."[72] Accordingly, the court concluded that there was no rational basis for holding that a viable fetus was not a person under the Children's Code and characterized arguments to the contrary as "absurd."[73] *Whitner* marked the court's clearest expression of South Carolina's policy to treat unborn children with the same solicitude afforded the born. *State v. Ard* followed *Whitner* as a natural step in the supreme court's continuing expansion of fetal protection across doctrinal lines. However, the *Ard* court's decision to add fetal murder to the list of statutory aggravating circumstances raises potential objections based on statutory construction, the criminal defendant's right to fair notice, and a woman's fundamental right of privacy.

III. ANALYSIS

A. Objection One: Strict Statutory Construction

The statutory aggravating circumstances statute at issue in *Ard* permits the jury to consider the death penalty for a defendant who pleads guilty to or is convicted of murder.[74] The law is a criminal penal statute and must be strictly construed under universally accepted norms of statutory construction.[75] This rule suggests that absent specific language in the statute defining a viable fetus as a "person," a strict construction demands excluding that class from the statute. As Justice Moore expressed in his dissent in *Ard*, "[a]ll murders involve the killing of a person but, under our statutory scheme, not all murders are capital offenses."[76] For the court to imply a term in the statute that the legislature could easily have made explicit would serve, in effect, to seize the stylus from the legislator's hand so as to draft a law of the court's own design.

However, the strict construction of a statute does not force the judiciary to interpret its words narrowly.[77] Instead, "[w]ords and phrases which

71. *Id.* at 6, 492 S.E.2d at 779.
72. *Id.* at 13, 492 S.E.2d at 783.
73. *Id.* at 8, 492 S.E.2d at 780.
74. S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1998).
75. The requirement that a penal statute be strictly construed "is perhaps not much less old than construction itself." United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). The rule rests "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Id.*
76. State v. Ard, 332 S.C. 370, 388, 505 S.E.2d 328, 337 (1998) (Moore, J., dissenting).
77. Perhaps the most venerated canon of strict constructionism is the notion that "[a] statute cannot go beyond its text." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 522 (1960).

have received judicial construction before enactment are to be understood according to that construction."[78] In the *Ard* case a substantial body of case law defined the word person to include viable fetuses well before the legislature added the killing of two or more persons as a statutory aggravating circumstance to murder.[79] The inclusory definitions were never limited to the specific facts or doctrinal setting of each case, such as wrongful-death claims or prosecutions under the homicide statute. To the contrary, the holdings "rested primarily on the *plain meaning* of the word 'person' in light of existing medical knowledge concerning fetal development."[80] Because South Carolina case law infused the legislative term "person" with a particular meaning, only an interpretation that ventures beyond the terms of the statute could exclude viable fetuses from the judicially defined class.

Furthermore, statutes of whatever stripe must be read "in the light of the common law."[81] In developing the common law, the supreme court implicitly found that the definition of "person" found in the wrongful-death statute[82] was compatible with the strict constructionist requirements of the state homicide statute.[83] Only a startling break with the common-law tradition could allow strict construction now to demand the *exclusion* of viable fetuses within the criminal law context. Moreover, it would be alarming to find that strict statutory construction would allow the definition of "person" to be compatible between civil and criminal contexts, but not necessarily consistent within criminal contexts. Absent an express command from the legislature, the court rightly refrained from such interpretive innovation.

B. Objection Two: The Fair Warning Doctrine

The Fourteenth Amendment gives criminal defendants the right to "fair warning of the act which is made punishable as a crime."[84] After *Ard* the jury may consider the death penalty for the defendant when he has murdered a viable fetus in connection with another homicide. Under the Fair Warning Doctrine, the defendant might claim that the vague nature of viability made it impossible for him to know that the fetus was a person under the law:

> Viability is not an absolute concept and its limits will keep changing as medical technology advances. Moreover, even when similar medical care is available, the viability of individual fetuses at the same

78. *Id.* at 524 (footnote omitted).
79. S.C. CODE ANN. § 16-3-20(C)(9) (Law. Co-op. Supp. 1998).
80. Whitner v. State, 328 S.C. 1, 8, 492 S.E.2d 777, 780 (1997) (emphasis added).
81. LLEWELLYN, *supra* note 77, at 522.
82. Hall v. Murphy, 236 S.C. 257, 263, 113 S.E.2d 790, 793 (1960).
83. State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1994).
84. *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617, 626 (Cal. 1970).

> gestational age may be different. It seems that viability is not a bright line test upon which courts and physicians can easily rely.[85]

Because of the shifting standard, the defendant could claim that the aggravating circumstances statute unfairly subjects him to the death penalty for what he believed to be a non-capital crime.[86] One might initially respond to such a claim by doubting whether any criminal refers to the state statutes before committing a crime in order to get fair warning of the possible consequences. However, the United States Supreme Court has determined that the concept of fair notice hinges only on whether the criminal defendant could objectively receive adequate notice from the wording of the statute.[87]

Nonetheless, the Fair Warning Doctrine does not mandate that notice of criminal liability be rendered with surgical precision. Instead, the proper standard requires only that the statute afford the world at large general knowledge of wrongful conduct.[88] The Code of Laws of South Carolina ("Code") provides that viability is the "stage of human development when the fetus is *potentially* able to live outside of the mother's womb with or without the aid of artificial life support systems."[89] A person of average intelligence could reasonably expect that a pregnant woman may at least *potentially* harbor a fetus capable of living outside of the womb on life support. Even though viability may vary from case to case, this variance is immaterial because factual determinations are routinely necessary to establish the elements of statutory offenses.[90]

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85. Agota Peterfy, *Fetal Viability as a Threshold to Personhood: A Legal Analysis*, 16 J. LEGAL MED. 607, 632 (1995).

86. The defendant's challenge would not be without merit simply because the aggravating circumstances statute is only a *sentencing* statute. Commentators recognize that the doctrine of vagueness "can and should be applied to evaluate aggravating circumstances in capital sentencing proceedings." Rosen, *supra* note 9, at 956.

87. According to the Supreme Court:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931).

88. *See, e.g.*, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) (noting that only a reasonable degree of certainty is required in criminal statutes).

89. S.C. CODE ANN. § 44-41-10(l) (Law. Co-op. 1976) (emphasis added).

90. For example, the Code of Laws of South Carolina also provides that the death penalty can be considered for a murderer when "[t]he offender . . . knowingly created a great risk of death to more than one person in a public place." *Id.* § 16-3-20(C)(a)(3) (Law. Co-op. Supp. 1998). "Great risk of death" is not defined in the Code, but is a question of fact for the jury. *Id.*

Furthermore, fair notice challenges are certain to fail after the twenty-fourth week of pregnancy because the Code expressly creates a presumption of fetal viability after that period.[91] In the *Ard* case, Mr. Ard murdered his wife while she was eight and a half months pregnant.[92] The Fair Warning Doctrine does not provide a safe haven for defendants like Mr. Ard who are certainly aware that a viable fetus will suffer because of their felonious conduct.

C. The Abortion Right Under the Fourteenth Amendment

Justice Moore sounds a cautionary note in his dissent in *Ard*. Observing that on appeal the State argued that the majority's opinion might subject a woman to the death penalty for aborting a viable fetus, Justice Moore called for "extreme caution" to guide the court's determination of the issue.[93] The philosophical grounds for Justice Moore's objection to such a penalty are unclear. His concerns possibly resonate from an opinion about the mother's rights in relation to the viable fetus. If the viable fetus is a child protected from murder under state law, then a mother can be excluded only from suffering the same penalty as others for the act of murder if she possesses countervailing rights which trump those of the viable fetus. Some commentators contend that penalizing a mother for aborting a viable fetus subornes the woman's fundamental right to sovereignty over her own body:

> Women's right to self-sovereignty also remains contingent upon the state's interest in the fetus. . . . If the fetus is granted rights as a person, then the self-sovereignty of women may be undermined by the dual sovereignty housed within the pregnant body. The assumption that two sets of rights may exist within one body makes women uniquely vulnerable to state intrusion, as the state may be aligned with the fetus against

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(establishing the authority of the jury to determine the existence of statutory aggravating circumstances); *see also* People v. Henderson, 225 Cal. App. 3d 1129, 1158 (1990) (noting that the law is "resplendent with elements containing factual questions dependent upon the particular facts of the case").

91. S.C. CODE ANN. § 44-41-10(l) (Law. Co-op. 1976).

92. State v. Ard, 332 S.C. 370, 375, 505 S.E.2d 328, 330 (1998).

93. *Id.* at 388, 505 S.E.2d at 337 (Moore, J., dissenting). The "personhood" of the viable fetus was not decided for South Carolina or any other state by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). The *Roe* Court merely concluded that "the word 'person,' as used in the *Fourteenth Amendment*, does not include the unborn." *Id.* at 158 (emphasis added). The states, through their own constitutions or statutes, are still free to define person as they see fit. *Roe* simply requires that a mother's aborting of her viable fetus be decriminalized in the limited context of consensual abortions necessary to preserve the mother's life or health. *See infra* note 95.

the woman.[94]

However, the law does not assume that the state's interest in protecting a viable fetus is per se subordinate to the mother's interests.[95] However, the suggestion that a viable fetus is a child for purposes of murder could conceivably implicate a mother's right to terminate her pregnancy under these circumstances. Neither the South Carolina homicide statute nor the aggravating circumstances statute makes an exception for the killing of a viable fetus to preserve the life or health of the mother.

It is unlikely that the *Ard* decision forces the state homicide and aggravating circumstance statutes to include a woman's right to abortion under *Roe*. Section 44-41-10(a) of the Code defines an abortion as

> the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.[96]

Section 44-41-20(c) of the Code criminalizes abortion in the third trimester unless necessary "to preserve the life or health of the woman."[97] If a woman *voluntarily* undergoes an abortion during the third trimester, or herself "employs any device or instrument or other means with intent to produce an abortion, unless it is necessary to preserve her life," she is guilty only of a misdemeanor under the Code, punishable "by imprisonment for a term of not more than two years or [a] fine [of] not more than one thousand dollars, or both."[98]

Because the Code currently punishes the voluntary termination of a

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94. CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 136 (1993) (footnote omitted).

95. *Roe*, 410 U.S. at 163-64. *Roe* held that a woman has a fundamental right to an abortion until the point of fetal viability. *Id.* at 164-65. However, when viability is reached the state develops a compelling interest in the life of the fetus and may proscribe abortions altogether, except when risk to the life or health of the mother is involved. *Id.* at 163-64. Additionally, *Roe* established a rigid trimester framework that prohibited the states from interfering with the procurement of an abortion during the first trimester and allowed the state to regulate the procedure during the second trimester in "ways that are reasonably related to maternal health." *Id.* at 164. The subsequent case of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), jettisoned the trimester scheme. *Id.* at 873. *Casey* held that the states can regulate the abortion decision throughout pregnancy in order to promote "the State's profound interest in potential life," unless the regulation is an "undue burden" and places a "substantial obstacle in the path of a woman seeking an abortion." *Id.* at 878.

96. S.C. CODE ANN. § 44-41-10(a) (Law. Co-op. 1976 & Supp. 1998).

97. *Id.* § 44-41-20(c) (Law. Co-op. 1976).

98. *Id.* § 44-41-80(b).

pregnancy during fetal viability by short prison sentences and fines, it is rather doubtful that the aggravating circumstances statute expresses the notion that such conduct is punishable by death. The statutory construction rule of *in pari materia*[99] supports this conclusion: "[S]tatutes dealing with the same subject matter must be construed . . . and harmonized to give effect to each other."[100] Thus, "[w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms . . . the particular statute will be construed as controlling in the particular situation."[101]

In the present case, the abortion statute deals specifically with a woman's intentional termination of a pregnancy. On the other hand, the homicide and aggravating circumstance statutes consider the killing of a child without specific reference to either pregnancy or a woman's intent. These facts suggest that the abortion statute alone governs a woman's unlawful but voluntary termination of her pregnancy, leaving the constitutional right to abortion for health or safety reasons undisturbed.

IV. CONCLUSION

In *Hall v. Murphy* the South Carolina Supreme Court sparked a revolution in the way that the state's common law viewed the viable fetus. Since its decision in *Hall*, the court has established a consistent jurisprudence of fetal personhood that recognizes viability as the point beyond which citizens may be liable for injuries inflicted upon the fetus. This notion of personhood has relied upon the status of the fetus as an individual possessed of "certain legal rights and privileges,"[102] which must in turn be reckoned against the opposing interests of the born. *State v. Ard* strikes the appropriate balance. By allowing the murder of the viable fetus to have the same weight as the murder of any other child for purposes of statutory aggravating circumstances, the law preserves consistency in its protection of the interests of the unborn. And by recognizing fetal personhood under the aggravating circumstances statute, the law keeps faith with the interests of women and the criminally accused, neither of whom suffers a usurpation of constitutional interests under *Ard*. Instead, under *Ard* both the fetus and the members of the community into which it will emerge are compelled to stand in respectful relation to one another under the law.

James Clark

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99. BLACK'S LAW DICTIONARY 791 (6th ed. 1990) ("Upon the same matter or subject.").

100. State v. Williams, 230 S.E.2d 515, 517 (N.C. 1976).

101. State v. Leeper, 296 S.E.2d 7, 9 (N.C. Ct. App. 1982).

102. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).