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# Is the Intentional Killing of an Unborn Child Homicide? California's Law to Punish the Willful Killing of a Fetus

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Is The Intentional Killing Of An Unborn  
Child Homicide? California's Law  
To Punish The Willful Killing  
Of A Fetus

*The California Supreme Court's decision in Keeler v. Superior Court precipitated a legislative battle to include a fetus as a human being within the homicide statutes. Penal Code section 187 had existed unchanged since 1872. No one anticipated that the court would hold that a man who kills a fetus would not be convictable under its provision. The legislature has now cured this defect, with a simple provision calling for the inclusion of a fetus, not as a human being, but separately, as subject to being murdered.*

On February 23, 1969, Teresa Keeler was delivered of a stillborn baby girl. The cause of the infant's death was said to be "skull fracture with consequent cerebral hemorrhaging."<sup>1</sup> Thus began a case in which a man whom many would have considered a murderer escaped trial for that crime. During its course the Supreme Court of California inquired into the minds of the state's first legislature and received guidance therefrom.<sup>2</sup> It also marked the beginning of a legislative battle to change a law which had existed in its pristine state for 98 years.<sup>3</sup>

*Keeler v. Superior Court*

Robert and Teresa Keeler were divorced in September of 1968. Unknown to Robert, Teresa was then pregnant with Ernest Vogt's

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<sup>1</sup> Keeler v. Superior Court, 2 Cal. 3d 619, 623 (1970), petition for rehearing denied September 10, 1970.

<sup>2</sup> *Id.* at 628.

<sup>3</sup> CAL. PEN. CODE § 187 1st Ed. (1872) [Hereinafter cited as CAL. PEN. CODE OF 1872].

child. Robert heard this news at some time subsequent to the divorce, and his suspicions were confirmed on the fatal date, when he saw Teresa's obvious condition for the first time. This discovery so incensed him that he exclaimed, "I'm going to stomp it out of you."<sup>4</sup> He then pushed Teresa, hit her in the face several times and shoved his knee into her midriff. Later that day Teresa's baby was delivered by Caesarian section. The pathologist's opinion was that the fractured skull causing death could have been inflicted by force applied to the abdomen.<sup>5</sup>

Keeler was arrested and an information was filed charging him with murder, willful infliction of traumatic injury and assault by means of force likely to produce great bodily injury.<sup>6</sup> The evidence was in conflict as to the age of the fetus at the time of death, but there was little question that the child could have lived had it been born without injury.<sup>7</sup>

Keeler moved to set aside the information for lack of probable cause.<sup>8</sup> Upon denial of his motion he sought, and was refused, a writ of prohibition from the Third District Court of Appeal.<sup>9</sup> He then brought his appeal to the State's highest court. In an interesting and scholarly opinion by Justice Mosk, the Court held by a five to two margin that a fetus was not a human being within the meaning of Penal Code section 187.<sup>10</sup> Keeler could not be charged with murder since the victim of the alleged crime was not capable of being its subject. To convict Keeler of this crime would be to deprive him of due process of law, since he could not have known, even presumptively, that his actions would constitute murder.<sup>11</sup>

For Robert Keeler the decision was a momentous one. He escaped trial for a capital crime. For students of the criminal law, it is perhaps surprising that what seems an elementary question should require resolution at this late date. For the California Legislature it was the beginning of a short but determined effort to eliminate what at least one legislator considered an anomaly in our criminal law.

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<sup>4</sup> 2 Cal. 3d 619, 623 (1970).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 624. Keeler was charged with violations of Penal Code §§ 273d and 245, as well as with violation of Penal Code § 187. As of Oct. 1 1970, he was awaiting trial on both lesser counts.

<sup>7</sup> *Id.* Chances for its survival were estimated at from 75 to 96 percent.

<sup>8</sup> *Id.*

<sup>9</sup> Keeler v. Superior Court, 276 A.C.A. 324, 80 Cal. Rptr. 865 (1969). The opinion by Judge Friedman concluded that a fetus was included within the murder statute on the basis of the decision in People v. Chavez, 77 Cal. App. 2d 621 (1947). See pp. 177, 178 *infra*.

<sup>10</sup> 2 Cal. 3d 619, 623 (1970).

<sup>11</sup> *Id.* at 639.

*Assembly Bill 816*

The *Keeler* decision was filed on June 12, 1970.<sup>12</sup> Shortly thereafter, Craig Biddle (R-Riverside), the California Assembly's Majority Floor Leader, issued a press release indicating his disagreement with the decision.<sup>13</sup> The release stated that Biddle felt the legislature had already determined the question which the court refused to answer by attaching the 20-week criterion to the Therapeutic Abortion Act, and that further definition was not necessary.<sup>14</sup> "To now suggest that the killing of unborn children well beyond that stage of development is not to be regarded as murder would be inconsistent, irrational and immoral. . . ."<sup>15</sup> On June 24th Biddle acted. Assemblyman Don MacGillivray (R-Santa Barbara) relinquished sponsorship of Assembly Bill 816 to Biddle, who promptly offered amendments to the bill. The amendments as passed at this initial stage provided that the bill would amend sections 187 (murder) and 192 (manslaughter) of the Penal Code to reflect that a fetus into or beyond the 20th week of uterogestation is a human being within the meaning of the statute.<sup>16</sup>

At this same time Biddle issued another press release explaining his actions in the assembly.<sup>17</sup> He stated that he wanted to clarify the legislative intent with regard to murder of a fetus, as suggested by the court in the *Keeler* decision, and that this was the way to do it.<sup>18</sup>

Biddle's original intent with his bill was simply to include a fetus in or beyond the 20th week of uterogestation as a human being for purposes of murder and manslaughter.<sup>19</sup> During the process of the bill through committee hearings and floor sessions of the assembly and senate, however, several changes had to be made. The first was to add exceptions to the bill to insure that it did not conflict with the abortion statutes.<sup>20</sup> This led to further difficulty, since the language Biddle included was taken from the pre-1967 abortion statute,<sup>21</sup> and had been specifically declared unconstitutional in *People v. Belous*.<sup>22</sup> At an Assembly Criminal Procedure Committee meeting on July 15th, the discussion led to Biddle's decision to find better language for this

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<sup>12</sup> *Id.* at 619.

<sup>13</sup> Press Release from the office of Assembly Majority Floor Leader W. Craig Biddle, Room 2128, State Capitol, Sacramento, California 95814, June 15, 1970.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> A.B. 816, 1970 Regular Session, as amended June 24, 1970.

<sup>17</sup> Press Release from the office of Assembly Majority Floor Leader W. Craig Biddle, Room 2128, State Capitol, Sacramento, California 95814, June 24, 1970.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> A.B. 816, 1970 Regular Session, as amended June 24, 1970.

<sup>20</sup> A.B. 816, 1970 Regular Session, as amended July 10, 1970.

<sup>21</sup> CAL. PEN. CODE OF 1872, § 274, as amended by CAL. STATS. 1935, c. 528, § 1.

<sup>22</sup> 71 A.C. 996, 1002, 80 Cal. Rptr. 354, 357 (1969).

section, and to include an exception for the Therapeutic Abortion Act, the criminal abortion law and the consented-to abortion law.<sup>23</sup> The language was not changed at this time, however. It is also interesting to note that at this same hearing, Committee Chairman Frank Murphy, Jr. (R-Santa Cruz), expressed his opinion that the bill should be changed to include any fetus, not only those in or beyond the 20th week. Biddle also felt he should make this suggested change.

The bill was amended in the assembly on July 17, 1970, and returned to committee.<sup>24</sup> It was accepted without further amendment, and sent back to the floor with a "do pass" recommendation.<sup>25</sup>

Biddle's bill met unexpected opposition on the assembly floor. One of the sections of the bill concerned an exception to the fetus murder section, so that it would not conflict with Penal Code Section 275, which covered abortion with the consent of the mother.<sup>26</sup> Some legislators thought this exception should not be made. They felt an expectant woman should not have this power over the life of her incipient child, and argued against the bill on this basis. Assemblyman Leo J. Ryan (D. South San Francisco) questioned the wisdom of widening the definition of "human being" to include a fetus, even for this limited purpose. He suggested that the legislature should not attempt this defining piecemeal, but should instead appoint a select committee to study the problem and devise a legislative definition of human life. Opposition from all quarters was overcome with typical legislative dexterity, and the bill was passed by a bare majority and sent to the senate.<sup>27</sup>

The next crisis for the bill was in the Senate Committee on the Judiciary. Senator George Moscone (D-San Francisco) objected to inclusion of the exception for abortions performed under the Therapeutic Abortion Act.<sup>28</sup> He felt that since the definition of murder includes only "unlawful" killings, and an abortion performed under the Therapeutic Abortion Act is not unlawful, the courts might construe the law proposed by Biddle as creating some new exception to its terms. Why should the legislature make an exception for something already excepted? He opposed the bill as then constituted on this ground. Senator Anthony Beilenson (D-Los Angeles) accused Biddle of overreacting to a situation needing careful consideration. He pro-

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<sup>23</sup> Hearings on A.B. 816 before the California Assembly Criminal Procedure Committee, July 15, 1970.

<sup>24</sup> Debate on A.B. 816 in the California Assembly, July 17, 1970.

<sup>25</sup> Hearings on A.B. 816 before the California Assembly Criminal Procedure Committee, July 22, 1970.

<sup>26</sup> A.B. 816, 1970 Regular Session, as amended July 17, 1970.

<sup>27</sup> Debate on A.B. 816 in the California Assembly, July 27, 1970.

<sup>28</sup> A.B. 816, 1970 Regular Session, as amended July 17, 1970.

posed that a study of the problem be undertaken, citing Biddle to the abortion laws, and arguing that if we consider a fetus expendable by abortion, we cannot properly consider it a life for purposes of murder. He also argued that the bill should not include a fetus at the moment of conception, but at the moment of viability, defined as that point in time where the fetus could live separate from its mother.

Neither Moscone nor Beilenson was successful in opposition to the bill, but Senator Clark Bradley (R-San Jose) and Senator George Deukmejian (R-Los Angeles) prevailed upon Biddle to make what they considered important changes. Bradley, showing his considerable influence on the committee, insisted that the bill not change the law regarding manslaughter.<sup>29</sup> Along with Senator Nicholas C. Petris (D-Alameda) the acting committee chairman, Bradley felt that the key reason for making a fetus the subject of murder was the defendant's extreme culpability, and since that same level of purpose was not involved with manslaughter, the change should not apply to it. Deukmejian suggested that if the bill were amended to read only that a fetus could be the subject of murder, not that a fetus was a human being for purposes of the statute, those who objected to the bill on its definitional basis would be mollified.

Assemblyman Biddle, anxious to have his bill approved, prepared the suggested amendments and submitted them for adoption on the senate floor. He also amended the bill to delete the language which provided that the new statute would not apply to any abortion which was "necessary to preserve the life of the mother." This language which had been held to be so vague as to be unconstitutional was replaced with Biddle's version of the language approved by the supreme court in the *Belous* case.<sup>30</sup> Biddle had left the original language in the bill thinking that as long as it was in an exception to application of the statute, its constitutionality was not an issue, but further reflection had convinced him the new language was better.

When the bill was returned to committee, it was in its final form and was sent back to the senate floor with a "do pass" recommendation.<sup>31</sup> With some last minute legislative finagling, Assembly Bill 816 was passed by both houses of the legislature and signed by the Governor on September 17, 1970.

Though it had been altered considerably, the bill was still satis-

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<sup>29</sup> A.B. 816, as amended July 17, 1970, applied to both murder and manslaughter.

<sup>30</sup> 71 A.C. 996, 1013, 80 Cal. Rptr. 354, 357-58 (1969). A.B. 816, as amended August 7, 1970, paraphrases the language used by the *Belous* court.

<sup>31</sup> Hearings on A.B. 816 before the California Senate Committee on the Judiciary, August 12, 1970.

factory to its author. Biddle was convinced that it would accomplish his original intent, that is, to make Robert Keeler's actions susceptible to a charge of murder.<sup>32</sup> As amended, Penal Code section 187, the only section finally affected by the bill, reads as follows:

187. (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus, or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted or consented to by the mother of the fetus. (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.<sup>33</sup>

### *Background*

Before assessing the effect of the new law, we should look to its background to determine the need for such legislation. Penal Code section 187 was enacted in 1872 as part of a general revision of the California statutes.<sup>34</sup> It was adopted, with little change, from the Penal Code of 1850 which was enacted by the state's first legislature.<sup>35</sup> Murder was the "unlawful killing of a human being, with malice aforethought." The provisions as to express and implied malice were simply placed in a subsequent code section in 1872.<sup>36</sup>

Also enacted in 1872 was Penal Code section 5, which declared that the revisions of statutes should not be considered new laws, but as continuations of old laws, at least to the extent no change had been made.<sup>37</sup> This was the last revision of Penal Code section 187.

The California Supreme Court in the *Keeler* case specifically found

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<sup>32</sup> Press Release from the Office of Assembly Majority Leader W. Craig Biddle, June 15, 1970.

<sup>33</sup> A.B. 816, 1970 Regular Session.

<sup>34</sup> CAL. PEN. CODE OF 1872.

<sup>35</sup> CAL. STATS. 1850, c. 99, § 19, p. 231.

<sup>36</sup> CAL. PEN. CODE OF 1872, § 188. See also CAL. STATS. 1850, c. 99, §§ 20, 21, p. 231.

<sup>37</sup> CAL. PEN. CODE OF 1872, § 5.

that the California Legislature, in enacting the 1850 and 1872 versions of the statute, did not intend that a fetus should be included within the definition of a human being.<sup>38</sup> To reach this conclusion, the court first reviewed the common law authority from which the legislature is presumed to have drawn its intent in enacting the original laws.<sup>39</sup> Their holding that, "by the year 1850 . . . an infant could not be the subject of homicide at common law *unless it had been born alive*" (emphasis is the court's) is amply supported in both English and American case law, and need not be the subject of extensive discussion here.<sup>40</sup> Coke, Blackstone and others stated the early English law and a collection of cases, both English and American, support the position in each country after the systems diverged.<sup>41</sup> The rule was based on the common law presumption that a child was born dead. The presumption seems to have arisen from the high natal death rate before modern antisepsis became prevalent, and the state of early delivery procedures in general.<sup>42</sup> Thus in each case where murder or manslaughter was charged and the victim was a fetus or an infant, proof of birth alive had to be adduced to sustain a conviction.<sup>43</sup>

Once the court determined that this was the law in 1850, they then had to examine the intent with which California legislators enacted their first penal law. The sources from which they could draw their conclusions were limited. They determined that the early legislature had indeed looked to the existing common law, and related the support for that conclusion in their opinion.<sup>44</sup>

Other sources support this conclusion also. Hubert Howe Bancroft, a noted California historian, observed that in 1847 the area was rapidly becoming Americanized. There was much discontent with the Alcalde system, where appointed governors administered the jumble of laws under which the populace was expected to live.<sup>45</sup> Two San Francisco weekly newspapers were clamoring for a constitutional convention,<sup>46</sup> and when that convention was finally held in 1850, the often-absent legislators engaged in a "good deal of 'slavish copying' of the Constitutions of New York and Iowa."<sup>47</sup>

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<sup>38</sup> 2 Cal. 3d 619, 628 (1970).

<sup>39</sup> *Id.* at 625.

<sup>40</sup> *Id.* at 625.

<sup>41</sup> 2 Cal. 3d 619, 625-630 (1970).

<sup>42</sup> See discussion of this presumption in an article by Stanley D. Atkinson, *Life, Birth, and Live-Birth*, 20 LAW QUARTERLY REVIEW 134 (1904). It is also raised by the Court in *People v. Belous*, 71 A.C. 996, 1007, 80 Cal. Rptr. 354, 360 (1969).

<sup>43</sup> 2 Cal. 3d 619, 626 (1970).

<sup>44</sup> 2 Cal. 3d 619, 629-630 (1970).

<sup>45</sup> 6 H. BANCROFT, HISTORY OF CALIFORNIA 261 (1888).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 296.

The State was thus born in the spirit of the common law. Most of the legislators were from the East, and while some concessions were made to the Spanish law under which the area had existed, the familiar common law was emphasized.<sup>48</sup>

One of the first acts adopted by the legislature was one providing that the common law of England was the "rule of decision" in the California courts.<sup>49</sup> The murder statute adopted was not the only one relating to homicide. An abortion statute comprehensive for its day was enacted also.<sup>50</sup> And in keeping with the English tradition, the legislature enacted a statute punishing concealment of a bastard child.<sup>51</sup>

There is little doubt then that the early legislature did not intend to include a fetus within the definition of a human being for purposes of murder. And the 1872 revisers of the Penal Code gave no indication that their intent had changed in this regard.<sup>52</sup> Since that time little has occurred which could have been of help to the court in interpreting Penal Code section 187. It was established early that any information brought pursuant to section 187 had to state that a "human being" had been murdered,<sup>53</sup> and that "human being" may be inferred from the wording of the document.<sup>54</sup> But the first case which approached the problem was *People v. Eldridge*.<sup>55</sup> This case again involved an allegedly insufficient information. The defendant claimed that alleging only that the child was born and that defendant killed it does not mean the child was born alive. The court rejected this contention by saying the fact that it could be killed indicated it was born alive.<sup>56</sup> The court did not reach the question of whether or not the child actually needed to be born alive in order to be the subject of murder, but by implication this could be considered the holding of the case.

Forty years later the court finally discussed this problem in the case of *People v. Chavez*.<sup>57</sup> Josephine Chavez had expelled her baby into the family toilet in the dead of night. The baby lay there unattended

<sup>48</sup> CALIFORNIA'S LEGISLATURE, prepared by the Office of the Chief Clerk of the California Assembly in 1969, indicates at p. 46 that all but two of the original 52 were non-natives. They enacted one section stating their desire to adhere to the common law (CAL. STATS. 1850, c. 95, p. 219), but also enacted a section creating the office of State Translator, whose job was to translate laws and documents into Spanish. CAL. STATS. 1850, c. 8, p. 51.

<sup>49</sup> CAL. STATS. 1850, c. 95, p. 219.

<sup>50</sup> CAL. STATS. 1850, c. 99, § 45, p. 233.

<sup>51</sup> CAL. STATS. 1850, c. 99, § 38, p. 233.

<sup>52</sup> Code Commissioners' Notes, CAL. PENAL CODE OF 1872.

<sup>53</sup> *People v. Lee Look*, 137 Cal. 590, 591 (1902).

<sup>54</sup> *People v. Smith*, 215 Cal. 749, 751 (1932).

<sup>55</sup> 3 Cal. App. 648 (1906).

<sup>56</sup> *Id.* at 649.

<sup>57</sup> 77 Cal. App. 2d 621 (1947).

until she removed it and placed it under the tub, where it was found dead by Josephine's mother the following day.<sup>58</sup> Josephine was charged with manslaughter. Her attorney alleged on appeal that the evidence did not show live birth, and that this was necessary to sustain the conviction.<sup>59</sup> The court affirmed the lower court's decision largely on its findings of fact, saying that the evidence was sufficient to "support the implied finding of the jury that this child was born alive and became a human being within the meaning of the homicide statutes."<sup>60</sup> Appellant had testified that the baby was "limp and made no cry,"<sup>61</sup> and the autopsy surgeon was convinced that evidence of heart action and inflation of the lungs indicated live birth.<sup>62</sup> While the defense offered an expert who brought the autopsy surgeon's tests for live birth into question, it merely presented a question for the jury, which was resolved against the defendant.<sup>63</sup>

In his opinion in *Chavez*, however, the appellate judge considered the question of whether or not a complete separation of infant from mother need be proven to sustain the idea of live birth. This was necessary because respondent contended that the heart action and lung inflation relied on by the doctor could have occurred while the head of the infant was out of its mother, but before the rest of him was expelled.<sup>64</sup> The court said in rejecting the contention that, "it should at least be held that it is a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed."<sup>65</sup> *Chavez*, then, is not definitive authority on the live birth issue. The holding obliquely pre-saged the *Keeler* finding, but left the later supreme court free to decide the issue without benefit of precedent in California.

The *Keeler* court adopted the early version of legislative intent though they were by no means mandated to do so. California authority on legislative intent is sparse and less than persuasive.<sup>66</sup> As suggested in Justice Burke's dissenting opinion in *Keeler*, a different version may well have been appropriate.<sup>67</sup> But it is well to note with regard to changing intent that where the legislative intent did in fact

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<sup>58</sup> *Id.* at 623.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 627.

<sup>61</sup> *Id.* at 623.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 627.

<sup>64</sup> *Id.* at 624.

<sup>65</sup> *Id.* at 626.

<sup>66</sup> *Hearings on Legislative Intent before the California Assembly Subcommittee on Legislative Intent of the Assembly Interim Committee on Rules*, Nov. 29 and Dec. 6, 1962, p. 3.

<sup>67</sup> 2 Cal. 3d 619, 641 (1970).

change, so did the law. We have new abortion laws now, showing a clear intent on the part of the legislature to change the prior law.<sup>68</sup>

Intent need not be inflexible through the years. It may change with changing social conditions, as those who have had to interpret the United States Constitution have found. When the reason for the rule ceases to exist, then the rule itself may be inapplicable. At any rate, regardless of the legislature's or the court's feelings on the subject, Assemblyman Biddle had to deal with reality. The law had been interpreted so as to cover the situation inadequately, and Biddle sought change.

### *Other Statutes*

The most obvious sources for direction as to how to frame a new statute are the California statutes and case law on related subjects. The abortion laws, for instance, provided a good basis for Biddle to look for the ways in which the law treated a fetus, especially since Biddle was the author of the Therapeutic Abortion Act,<sup>69</sup> California's most recent abortion law. It allows abortion of a fetus at or prior to 20 weeks in development.<sup>70</sup> Though the act itself contains no reference to the stage at which a fetus becomes a human life, Assemblyman Biddle maintains that this was one of his intentions in prescribing the 20-weeks requirement, and was disappointed when forced to remove it from his bill.<sup>71</sup>

Another possible source of evidence is the Civil Code. Section 29 provides that an unborn child is to be deemed an existing person for purposes of protecting his interests in the event of subsequent birth.<sup>72</sup> As interpreted in *Scott v. MacPheeters*,<sup>73</sup> this section allows a suit on behalf of a minor child for injuries suffered before birth. The right of action is of course dependent upon live birth of the infant, so neither the code section nor the case provides definitive guidance.

For purposes of inheritance or succession, a posthumous child is deemed existing at the time of the parent's death. Again, however, this requires live birth of the child.<sup>74</sup>

The Penal Code also provides for protection of an unborn infant.

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<sup>68</sup> The Therapeutic Abortion Act, CAL. HEALTH AND SAFETY CODE, commencing with § 25950, was enacted in 1967. It is the modern expression of legislative intent in that field.

<sup>69</sup> CAL. HEALTH AND SAFETY CODE, commencing with § 25950.

<sup>70</sup> CAL. HEALTH AND SAFETY CODE, § 25953.

<sup>71</sup> Press Release from the office of Assembly Majority Floor Leader W. Craig Biddle, Room 2128, State Capitol, Sacramento, California, June 15, 1970.

<sup>72</sup> CAL. CIV. CODE § 29.

<sup>73</sup> 33 Cal. App. 2d 629 (1939).

<sup>74</sup> CAL. PROB. CODE § 250.

The code provides for postponing until birth the execution of a pregnant female sentenced to death.<sup>75</sup> These sections, perhaps, most closely parallel the case of murder of a fetus. The existence of the child is specifically recognized, and what is more important, he is considered a life worth saving. But in such a case, the state is simply postponing an execution of a previously convicted murderer. The criminal is not made to suffer, and is not in danger of having a protectible interest threatened. In the case of convicting a man of murder of a fetus, the relative interests are considerably different. Holding that the unborn infant's life is subject to the crime of murder means that a man may be convicted of that murder.

We thus find little of value in other California code sections. The statutes for the most part require live birth of the infant before his interests are protected, and where birth is not necessary, the interest which may be weighed against that of holding the infant's life protectible is not sufficient to require the most complete protection possible.

#### *Other Jurisdictions*

The law of other jurisdictions is also of some interest when attempting to formulate a penal statute. Although the murder and abortion statutes in many states have existed as long as California's, and provide substantially the same, some have been recently updated. New York, for instance, thoroughly revised and updated its entire Penal Law in 1967, attempting at the time to bring it securely into the modern world.<sup>76</sup> Although the New York code revisers recognized that their law was outmoded and irrelevant to the problems of modern society, they were reluctant to change the common law to the extent Assembly Bill 816 proposed. They preferred to protect only the fetus of 24 weeks development or more, deriving the 24 weeks from the modern version of the common law concept of quickening.<sup>77</sup> Fortunately, however, they saw the need for such a law to be consistent in application, and made the limit apply to each of the crimes of murder, manslaughter of all degrees, criminally negligent homicide, abortion of first degree and self-abortion of the first degree.<sup>78</sup> The reason for retaining the 24 weeks limit is somewhat obscure, but it is stated at one point in a practice commentary to the code that it is because beyond this point, any kind of abortion is much more dangerous to the life of the mother.<sup>79</sup>

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<sup>75</sup> CAL. PEN. CODE §§ 3705, 3706.

<sup>76</sup> N.Y. PENAL LAW commencing with § 125.00 (McKinney 1967).

<sup>77</sup> *Id.*, § 125.00 and Practice Commentary thereto.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, § 125.20, and Practice Commentary thereto.

The Wisconsin scheme is to define a human being as one who has been born alive, and make this definition apply to murder and manslaughter.<sup>80</sup> This code revision was accomplished in 1955, and indicates that not all modern legislatures desire to make a fetus the subject of murder.<sup>81</sup> The abortion statute, also revised in 1955, provides for various punishments for both a mother who aborts her child and the aborter himself.<sup>82</sup>

Thus, the statutes extant in the United States do not lend much support to the idea that a fetus should be considered a human being for purposes of murder. Where modern statutes have been adopted, the support would seem to be for a compromise between Assembly Bill 816 and the present status of the law. It seems easier for men to believe that a child which is "quick" or "viable" is protectible, than to believe that an embryonic fetus is.

### *A.B. 816 Reviewed*

California's new law is somewhat of an anomaly. It appears to adopt the doctrinaire position of the Catholic Church on human life, *i.e.*, that it begins at conception.<sup>83</sup> But of course it deals only with murder, and practically speaking, in such a case as Robert Keeler's, the mitigation of murder to manslaughter may well operate to reduce such a charge to the level of assault, rendering the murder statute inapplicable, since the accused would not be triable for manslaughter.<sup>84</sup>

The new statute's lack of application to the crime of manslaughter is an interesting bent in the law. New York's law applies to all crimes involving killing of a fetus.<sup>85</sup> But the California Legislature saw fit in Assembly Bill 816 to exclude the lesser crimes, presumably because in those cases defendant's culpability is less.<sup>86</sup> This may have been due to lack of understanding of the homicide law's operation, or a deliberate attempt to limit the effect of the law. But regardless of the reason, the exception appears to have removed whatever teeth A.B. 816 may have had in its original form.

The first of the three exceptions to the new statute's operation is for

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<sup>80</sup> WISC. CRIMINAL CODE § 939.22(16).

<sup>81</sup> WISC. LAWS 1955, c. 696, § 1.

<sup>82</sup> WISC. CRIMINAL CODE § 940.04.

<sup>83</sup> See the discussion of this concept in Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 413-415 (1968) [hereinafter cited as *Means*].

<sup>84</sup> California's present murder statute contains the common law concept of "malice aforethought." This malice can be mitigated by the murder having been committed in a "heat of passion." Manslaughter would then be the proper charge.

<sup>85</sup> N.Y. PENAL LAW § 125.00 (McKinney 1967).

<sup>86</sup> See p. 174 *supra*.

the Therapeutic Abortion Act.<sup>87</sup> Though this exception probably was not necessary, since killings performed under its aegis are not "unlawful," it does have the effect of balancing the new section by including all exceptions thereto. The Act becomes important when an abortion is performed which does not meet its conditions.<sup>88</sup> Then the prosecutor could go to section 274 of the Penal Code for his conviction.<sup>89</sup> The specific abortion statute would be applied rather than the murder statute.

The second exception to the statute's operation is derived from language in *People v. Belous*.<sup>90</sup> In that case, the supreme court invalidated a conviction under Penal Code section 274, as worded in 1967. The court declared that the words "necessary to preserve the life of the mother" did not give a physician sufficient guidance to insure that he would have due process of law in following the statute.<sup>91</sup> Biddle's original version of Assembly Bill 816 contained this precise language, and while it was momentarily thought that its being in an exception to the rule would render the constitutional question insignificant, a change was recommended.<sup>92</sup> The language in the bill as passed was prepared by the Legislative Counsel, and comes directly from the *Belous* opinion.<sup>93</sup> The language appears to give a physician some guidance for purposes of, for instance, inducing abortion in a woman more than 20 weeks pregnant where her life is in danger. It has the added advantage of having been uttered by the state's highest court in seeming approval.

The third exception simply allows for operation of Penal Code section 276, providing for punishment of a pregnant woman who solicits an abortion outside the terms of the Therapeutic Abortion Act.<sup>94</sup> Although this section was the butt of considerable opposition from solicitous legislators,<sup>95</sup> it appears reasonable to assume that where a situation is specifically provided for in one statute carrying a lesser penalty, the same acts should not be made punishable under a harsher statute without changing the former.

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<sup>87</sup> CAL. HEALTH AND SAFETY CODE, commencing with § 25950.

<sup>88</sup> CAL. HEALTH AND SAFETY CODE § 25951 provides that abortions may be committed under the Act if (1) there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or (2) the pregnancy resulted from rape or incest. Section 25953 provides that the abortion may not be committed if the pregnancy is beyond 20 weeks.

<sup>89</sup> CAL. PEN. CODE § 274. It provides that "Every person who . . . uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman . . . is punishable by imprisonment in the state prison. . . ."

<sup>90</sup> 71 A.C. 996, 80 Cal. Rptr. 354 (1969).

<sup>91</sup> *Id.* at 1002.

<sup>92</sup> A.B. 816, 1970 Regular Session, as amended June 24, 1970.

<sup>93</sup> Section (b)(2) of the new CAL. PEN. CODE, § 187.

<sup>94</sup> CAL. PEN. CODE § 276.

<sup>95</sup> See p. 173 *supra*.

The new law will obviously be limited in its application. The dearth of California case law on the subject is a good indication of this. It appears to be another one of those areas where more comprehensive legislation is needed, but the exigencies of the situation demand at least a beginning of consideration of the subject.

*What is Life?*

The California Legislature neatly avoided having to define human life for purposes of the new murder statute, though such a course was suggested.<sup>96</sup> Perhaps it would have been presumptuous of them to undertake definition of a concept so evanescent as to have eluded the grasp of metaphysicians for centuries.

Different societies have adopted vastly different views of the nature of human life and the point at which it begins and is legally protectible. The ancient Greeks formulated a theory that the soul entered the male fetus at 40 days of uterogestation, and the female fetus at 80 days, though there was little basis for the time period or the distinction between male and female.<sup>97</sup> But this early investiture of the fetus with a soul did not operate to protect the child after birth. The Greeks disposed of deformed or deficient children.<sup>98</sup>

The Catholic Church theorizes that the soul enters the fetus at conception, and derives its legal concepts of protection of the fetus from this philosophy. Where there is a soul, there is a life, and where there is a life, it can be taken only by God.<sup>99</sup> If man presumes to take that life he must be punished, and since qualitatively, at least from the standpoint of presence of a soul, there is no difference between an adult human, a newborn infant and a fetus at any stage of gestation, the crime the man commits in each case is murder. There is little point in decrying such a concept with statements to the effect that medically a fetus doesn't become differentiated until a certain point in gestation is reached, or that it is not considered a proper fetus until such a point is reached.<sup>100</sup> This is within the ken of all people, and presumably has been considered and rejected by Catholics as not dispositive. The presence of soul to them denotes human life.

Other authorities have found life to be present at quickening, or at

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<sup>96</sup> See pp. 173, 174 *supra*.

<sup>97</sup> NORMAN ST. JOHN-STEVAS, *THE RIGHT TO LIFE*, c. 2 (1964) [hereinafter cited as ST. JOHN-STEVAS].

<sup>98</sup> PLATO, *REPUBLIC*, c, V, § IX. Plato, while not normally used as a source material, reflects the Greece of his day.

<sup>99</sup> ST. JOHN-STEVAS, at 61.

<sup>100</sup> 5 *LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES* 37.1, 37.2.

the time when the first movements of the infant are felt by the mother.<sup>101</sup> Thus, at this point in gestation, usually around 20-24 weeks, the infant is said to be capable of being the subject of murder. Perhaps such a theory has more value when one considers that those advocating the doctrine are looking at a point somewhere in between what they consider too early (conception) and one they feel is too late (birth). They have compromised at a recognizable point, and one which was easily discernible to the physician of old. Though this concept is somewhat downgraded today because our knowledge has taught us that the infant may be no more likely to survive at this point than at some earlier point, the concept may be of some value.

The Jewish concept of life has been that it begins at birth.<sup>102</sup> The Jews traditionally have placed much more emphasis on the business of living, not celebrating the afterlife as do other religions. The infant is not endowed with life until birth, and so could not be murdered until that time. This view of life is consistent with the Wisconsin statute relating to murder.<sup>103</sup>

The concept implied by California's new murder statute is that for purposes of murder, human life begins at conception. Apart from the practical difficulties of determining when conception takes place, there is the question of whether the statute should take this position. It is argued that if we can take the "life" of a fetus up to 20 weeks old under the abortion statute, this same fetus cannot be considered a protectible human life for purposes of murder. We do not allow euthanasia, even though the prospective victim makes the choice and even the request himself.<sup>104</sup> If his life is taken it is murder. Shall we put a human fetus in this same special class for one purpose, when we exclude it for purposes of abortion? We have recognized a separate category for the fetus by allowing a pregnant woman to solicit abortion of her infant without punishment for murder.<sup>105</sup> Shall we allow another man's life to be taken for taking that same life?

Another argument against a concept which holds that life begins at conception is that medically a fetus is not considered more than an embryo until 20 weeks of development have taken place.<sup>106</sup> Prior to this point, the fetus is for the most part not x-rayable,<sup>107</sup> nor does it

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<sup>101</sup> ST. JOHN-STEVAS at c. 2. See also Jeffrey A. Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines*, 52 MARQ. L. REV. 105 (1968).

<sup>102</sup> Means at 412.

<sup>103</sup> See p. 181 *supra*.

<sup>104</sup> People v. Dessauer, 38 C.2d 547 (1952). See also Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).

<sup>105</sup> CAL. PEN. CODE § 276.

<sup>106</sup> 5 LAWYERS' MED. CYC. 37.2.

<sup>107</sup> *Id.*

have much chance of survival.<sup>108</sup> Moreover, not until 6-10 days after fertilization does the ovum become distinguishable as an embryo.<sup>109</sup> As did Robert Keeler, men are more inclined to consider a fetus as "it", rather than "he" or "she". A being so alien to what we know to be human beings seems hardly worth being made the subject of murder, regardless of the religious conception of life.

#### CONCLUSION

The California Legislature has enacted a bill the purpose of which was to define their intent on this very issue. Ostensibly, that intent is so defined. However, as noted earlier, the bill never received whole-hearted support. Its inapplicability to manslaughter leaves the law bare in an area where cases would appear to be much more likely to arise, indicating that their intent was not so clear as purported to be. Perhaps the answer is to form a committee to study the matter with regard to all situations where it could possibly make a difference, as has been suggested by members of the legislature.

*Borden D. Webb*

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*