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The Killing Of A Viable Fetus Is Murder - Keeler v. Superior Court

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Keeler v. Superior Court[1]

Homicide is generally said to be the "killing of a human being by another human being"[2] under the assumption that the human being killed was in fact a human being — that is, alive prior to the event causing death. The question presented by this note is whether a fetus in the later stages of pregnancy is really alive for purposes of the law of homicide. In *Keeler v. Superior Court,*[3] the California Court of Appeal for the Third District held that when a fetus has developed to the stage of viability, it is a human being for the purpose of California's homicide statutes. The inclusion of a fetus that may never have been born alive as a possible victim of homicide is a marked departure from the common law doctrines involving the killing of fetuses and seems to be the first judicial attempt to so broaden the law of homicide.

WHEN IS A FETUS ALIVE?

The question of detemining when an embryo or fetus becomes a live human being has plagued religious and legal scholars for centuries. In medieval times, the governing concept was *mediate animation,* or the moment when the soul entered the fetus,[4] but there were different views as to when that precise event occurred. For example, while some theologians and canon lawyers envisioned animation at forty days after conception for a male fetus and ninety days after conception for a female fetus,[5] the jurists of the Roman Civil Law felt forty days was sufficient for fetuses of either sex, and the English common law fixed the time at some point between the sixteenth and eighteenth weeks of pregnancy.[6]

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1. 80 Cal. Rptr. 865 (Dist. Ct. App. 1969).
2. R. PERKINS, CRIMINAL LAW 28 (2d ed. 1969) [hereinafter cited as PERKINS].
3. 80 Cal. Rptr. 865 (Dist. Ct. App. 1969).
4. 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, 412 (1968). The general rule of *mediate animation* was expressed by the Council of Trent as: "[N]o human body, when the order of nature is followed can be informed by the soul of man except after the prescribed interval of time." *Id.* at 412.
5. This view was based on Aristotle's theory of ensoulment. These time periods may be related to the prescription in *Leviticus* that after the birth of a child, the mother must spend forty days in becoming purified if that child was a boy, and eighty days in becoming purified if that child was a girl. J. NOONAN, CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 90 (1966).
6. 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, 412 (1968). The Jews, on the other hand, have consistently adhered to the view that the soul is not infused into the fetus until the moment of birth. This emphasis on live childbirth curiously provides a better "metaphysique" of the general rules in property and tort law that a fetus has no rights if stillborn. The Christian theory of *mediate animation,* however, explains the placing of at least some human value on the fetus in the criminal law. *Id.* at 418. *See* Jakobovits, *Jewish Views on Abortion,* 17 W. RES. L. REV. 480, 483 (1965). In New York, for example, the fetus has no rights

By the seventeenth and eighteenth centuries, with the resultant medical advances, the view emerged that animation occurred close to or at the same time as conception. This theory of immediate animation was given little credence by the legal scholars, however, and thus it has had little significance in the development of criminal law.[7]

The English in the thirteenth century had adopted the Roman Canon Law view of *mediate animation.* This is evidenced by Henry de Bracton's summary of the common law concerning killing unborn children: "If there be anyone who strikes a pregnant woman or gives her a poison whereby he cause an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide."[8] Bracton made a distinction between a fetus being formed and one that becomes animated, initimating that formation and animation occurred at two different points in time. It was on this distinction that the common law developed.[9] Killing of the fetus before it was formed was no crime at all. Thus abortion in the early stages of pregnancy was not a crime at common law. As to killing the fetus after animation, this was reduced from murder to a "great misprision" or misdemeanor.[10] To constitute murder, the English courts held that the fetus must be born and have a separate existence outside the mother and then die.[11] Killing of the unborn child inside the womb was not murder.

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in the areas of tort and property law unless born, but the killing of a viable (twenty-four week) fetus by an intentional act on a pregnant female with intent to cause a miscarriage is a class D felony and the killing of a non-viable fetus is a class E felony. Comment, *Abortion Law Reform in New York: A Study of Religious, Moral, Medical and Legal Conflict,* 31 ALBANY L. REV. 290, 296–97 (1967).

7. This idea of immediate animation is gaining some favor in the field of tort liability for pre-natal injuries. Provided the child is born alive, some jurisdictions have allowed recovery for injuries received before the fetus was either viable or quick. W. PROSSER, THE LAW OF TORTS § 56, at 356 (3d ed. 1964). The logical basis for this is the fact that the infant, no matter what stage of its development, is injured. Moreover, viability is an unsatisfactory criterion because the health of the mother and child, and other factors besides an arbitrary time sequence make viability a relative matter. *Id.* at 356–57. *See* Gordon, *The Unborn Plaintiff,* 63 MICH. L. REV. 579, 582–93 (1965).

8. 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, 419 (1968).

9. *Id.* at 420. *See* L. LADER, ABORTION 77–78 (1966).

10. This common law view was evident from Edward Coke's much quoted passage:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dyeth 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.

3 Coke, Institutes 50 (1648).

For a discussion of the law of feticide at the time of Coke, *see* Winfield, *The Unborn Child,* 8 CAMB. L.J. 76, 78–80 (1942).

11. *See, e.g.,* Rex v. Pritchard, 17 T.L.R. 310 (1901).

> The person killed must be one who is in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb; but if the child be born alive and afterwards die by reason of a felonious act done to it in the mother's womb or in the act of birth, the person who committed that act is guilty of murder.
>
> A child is not considered in law to be completely born, so as to be the subject of either murder or manslaughter, until the whole body of the child is brought alive into the world having an independent circulation and breathing,

WHAT CONSTITUTES BEING BORN ALIVE?

By Coke's definition,[12] to secure a murder conviction based on prenatal injuries, the fetus must be born alive and then die of the injuries inflicted before birth. This position has been adopted by the majority of American states.[13]

To determine when a fetus has been "born alive," two major tests have been developed. The majority of states use the "independent circulation" of blood test and the minority relies on the decision of whether or not the fetus showed signs of having breathed after birth.[14]

To have independent circulation, the infant must have an existence separate from its mother.[15] This usually means that the baby must be completely out of the womb[16] and have the umbilical cord severed.[17] However, some cases have held that a child was born alive even though the umbilical cord was not severed.[18] This raises the question of how an infant can be said to have a complete and separate existence of its own if its blood is still circulating through its mother's heart. This distinction also fails to recognize that medical evidence has shown that as soon as the fetus becomes viable it has its own circulatory system and thus could be said to have "independent circulation."[19]

Because of the difficulties of trying to establish independent circulation, some courts have resorted to the aforementioned "breathing test."[20] The breathing test consists of an autopsy being performed

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or capable of breathing, from its own lungs, so that it possesses, or is capable of, an existence independent of connection with its mother. But the child may be completely born although the umbilical cord be not severed.

9 THE LAWS OF ENGLAND 570–71 (Halsbury ed. 1909) (footnotes omitted).

12. *See* note 10 *supra.*

13. R. PERKINS, CRIMINAL LAW 29 (2d ed. 1969). It is interesting to note that in England the requirement of proving live birth became unpopular, resulting in the passage of legislation providing that the killing of a child under twelve months by the mother would only be manslaughter if at the time of the act the mother's mind was disturbed due to the effects of childbirth. This occurred for several reasons: popular sentiment was not in favor of capital punishment for this type of crime, the difficult legal question of determining life was avoided since the manslaughter charge was believed not to require proof of live childbirth, and there was not yet a proper balance between medical knowledge and judicial opinion. Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines,* 52 MARQ. L. REV. 105, 108 (1969).

14. For a discussion of the common law requirements of being born alive, *see* G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 5–7 (1957); Atkinson, *Life, Birth, and Live-Birth,* 20 L.Q. REV. 134 (1904); 17 WYO. L.J. 237, 242 (1963).

15. *E.g.,* Rex v. Enoch, 172 Eng. Rep. 1089 (1833).

16. For this reason, if the child was killed when it was only partially removed from the mother, it was not murder. Thus, in People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949), the defendant admitted pulling the top of the head off the baby and strangling it before it was completely out of the mother. The court reversed the conviction stating: "[T]he People were bound to establish . . . that the child was born alive in the legal sense, that is, had been wholly expelled from its mother's body. . . ." *Id.* at 24.

17. This principle was carried over from English law by Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923), which rejected the breathing test and stated that usually the umbilical cord must be severed to show independent circulation.

18. "[I]f a child is fully brought forth from the body of its mother, and is killed while still connected by the umbilical cord, it is murder." Jackson v. Commonwealth, 265 Ky. 295, 96 S.W.2d 1014 (1936).

19. For a discussion of fetal development, *see* Culiner, *Trauma to the Unborn Child,* 5 TRAUMA 1:5, 41 (1963).

20. *E.g.,* Bennett v. State, 377 P.2d 634 (Wyo. 1963).

on the dead infant and having the baby's lungs subjected to a hydrostatic test to detect the presence of air.[21]

If air is found in the lungs, the baby is presumed to have breathed and hence to have been alive. The use of this rather simplistic test has been hampered by the medical complexities of human childbirth, for a baby may breathe while in the womb or during delivery yet still be born dead.[22] Further, it has been shown that the hydrostatic test is not infallible since the lungs may be filled with gases other than air.[23]

The strict use of these two tests can very easily lead to absurd results. For example, if one were to have the baby in a bath full of water, the baby could never breathe, and under the breathing test it would not be born alive. Thus it could not be murdered. Under the independent circulation test the baby could be killed before it was completely out of the womb and had its umbilical cord severed. This also would not be murder. Clearly, these consequences cannot be sanctioned, but unthinking reliance on the common law born alive rule could lead to the hypothetical results.

The born alive principle itself suffers from one major defect which stems from the problem of proving that there was a live birth. Usually the only person present is the mother or the actual killer. If the death of the child was intentionally caused, neither is likely to testify truthfully as to the condition of the child at birth.[24] Because of this fact, heavy reliance must be placed on medical testimony as to the probable state of the child at birth, and courts are reluctant to convict only upon medical conjecture as to a key element necessary for conviction.[25]

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21. The hydrostatic test consists of placing the lung of the dead infant in water to determine if it floats. If it does, the presence of gaseous material (which may or may not be air) in the lung is confirmed. Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).

22. G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 5-7 (1957). A fetus making positive respiratory movements prior to birth may expand the lungs, creating a microscopy of the lung similar to that of a born child who actually breathed air. On the other hand, a definite requirement of breathing may deprive a child of protection due to the fact that infants sometimes do not breathe air until after the actual birth and only then by vigorous treatment. *Id. See also* Rex v. Sellis, 173 Eng. Rep. 370 (1837) where the court stated: "The fact of [the fetus] having breathed is not a decisive proof that it was born alive: it may have breathed and yet died before birth."

23. In Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923), the court found that there was no satisfactory proof the child was born alive. The lungs floated, not because the child breathed air, but because decomposition had set in and the resulting gas inflated the lungs.

24. Most of the cases which have arisen involve a situation where the mother has consented to the murder of her newborn child, or she has killed the child herself. Thus when the dead infant is discovered, the first to be questioned is the mother. When the mother learns she will not be guilty of any crime if the child was born dead, it is quite unlikely that she will testify that the child was born alive.

25. In People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949), the court summarized the problem posed by adhering to the born alive rule:

> The testimony of [the state's] medical experts was necessarily slight or merely conjectural significance. For here no one claiming to be an eye or ear witness came forth and, where that is the case evidence of live birth precedent to speedy death is of a nature practically impossible to medical science.

Id. at 25. The medical testimony is much more conjectural in a feticide case than in a case concerning abortion. To constitute murder the doctor must be able to state beyond a reasonable doubt that the baby was born and was alive when it was killed. This usually calls for a very extensive autopsy. As was indicated in *Hayner*, the dead

Despite its faults, the born alive criterion has been adopted in the Model Penal Code.[26] But the courts of California seem to have rejected the born alive rule for the reason that it creates a presumption that a healthy, viable unborn child would be born dead.[27] A more careful look at these court decisions is necessary to assess the state of homicide law in California.

THE KEELER EXTENSION OF THE BORN ALIVE REQUIREMENT

The born alive requirement for homicide, which has been applied by courts since the seventeenth century, was drastically modified by the Court of Appeals of California in *Keeler v. Superior Court.*[28] In *Keeler* the petitioner was charged with aggravated *assault* upon his divorced wife, with willfully *inflicting* corporal injury upon her and with the *murder* of the unborn child she was carrying at the time. Under the California Penal Code, murder is defined as "the unlawful killing of a human being, with malice aforethought."[29] Manslaughter is also defined as the killing of a human being.[30] The petitioner, in seeking a writ of prohibition[31] to stay prosecution on the homicide charge, contended that a fetus is not a human being, as required by the state homicide statutes, and therefore homicide is not committed by one who destroys it.

Petitioner's wife had secured an interlocutory decree of divorce from him about six months prior to the incident. She thereupon entered into a non-marital relationship with another man and was soon pregnant by him. Petitioner, after learning of his ex-wife's pregnancy, forced her car to the side of a narrow mountain road. Upon confronting his ex-wife and observing her obvious pregnancy, petitioner stated: "You sure are. I'm going to stomp it out of you." He kicked her abdomen, struck her in the face several times and left her unconscious along the side of the road.

Upon examination at the hospital, doctors observed "two or three crescent shaped marks, which appeared to be heel imprints," on her abdomen. A Cæsarian section was performed, and the head of

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infant may have been exposed for days, or it may be badly mutilated. Thus an accurate autopsy may be almost impossible. For a discussion of the sufficiency of the evidence in feticide cases, *see* State v. Osmus, 73 WYO. 183, 276 P.2d 469 (1954). In proving an abortion took place, the prosecutor's task is greatly simplified, in that many state abortion statutes do not even require proof of an actual miscarriage. All that need be shown is an unlawful act with the requisite intent. R. PERKINS, CRIMINAL LAW 140–44 (2d ed. 1969).

26. This standard has been carried forth in the proposed Model Penal Code. The article on criminal homicide provides:

> § 210.0(1) "human being" means a person who has been born and is alive;
> § 210.1(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another *human being.*

MODEL PENAL CODE § 210 (Proposed Official Draft 1962) (emphasis added).

27. *See* People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947); Note, *The Unborn Child: Consistency in the Law?* 2 SUFFOLK U.L. REV. 228, 234 (1968).

28. 80 Cal. Rptr. 865 (Dist. Ct. App. 1969).

29. CAL. PENAL CODE § 187 (West 1955).

30. CAL. PENAL CODE § 192 (West 1955).

31. CAL. PENAL CODE § 999(a) (West 1956).

the fetus was found extensively and severely fractured. Doctors stated the death of the fetus was immediate. There was sufficient evidence that the pregnancy had been progressing normally for its entire thirty-one to thirty-six week duration and that the fetus had definitely become viable.[32] Additional evidence showed the baby had been alive eight hours before the attack.[33]

After discussing the "born alive" theory as stated by Coke,[34] the court concluded: "The question is one of law, not of morality, medicine or popular belief."[35] Therefore, stated the court, inquiry into the rule's present status should be considered in light of modern life, not in that of past centuries which witnessed its formation. The Court reasoned that the "born alive" rule of common law never really crystallized as acknowledged California law.[36] The court then pointed out that in actuality, in California, the law had developed in a different manner. In support of this theory the court cited *People v. Chavez*[37] for the proposition that evidence of life after complete separation from the mother's body was not needed to sustain a manslaughter conviction.[38]

The court recognized the twentieth century advances in obstetrics and pediatrics which show that premature infants' lives can be preserved by the use of modern hospital techniques and equipment. "It is contrary to the spirit of the common law itself to apply a rule

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32. Viability is defined as "the ability to survive outside of the uterus, depending on the state of development or age." 2 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE 870 (1968).

As to the issue of viability in California, the California Senate Judiciary Committee, when considering the California Therapeutic Abortion Act, adopted the time limit of twenty weeks on abortions, stating that viability occurs around twenty weeks into pregnancy and any time after that the fetus is considered viable. Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure,* 15 U.C.L.A.L. REV. 1, 11 (1967).

33. Petitioner's wife testified that the baby had moved earlier that day, but not after she left the scene of the attack.

34. *See* note 10 *supra.*

35. 80 Cal. Rptr. at 867.

36. *See* People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App. 1939).

37. 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947).

38. To support this statement of the holding in *Chavez,* the *Keeler* court referred thusly to *Chavez:*

> It observed that neither birth nor removal by Caesarean section created a human being, rather, that the baby "has started an indepenedent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being."

80 Cal. Rptr. at 867 (citations omitted). It is important to note that the court in *Chavez* was not saying that this "independent existence" (viability) totally obviated the born-alive rule and that a manslaughter conviction could be obtained where prenatal injuries caused the death of a viable but unborn fetus. In fact, the court was merely rejecting the harsh fictions surrounding the born-alive rule — for example, that there had to be complete separation and independence. Moreover, the court was saying that when a fetus is *born or removed,* if it has reached a stage of development where it is capable of independent life or would live under ordinary circumstances, then it is "born-alive." The importance of the fact of birth is evident "It should equally be held that a viable child in the *process of being born* is a human being within the meaning of the homicide statutes, whether or not the process has been *fully completed.*" 176 P.2d at 94. (Emphasis added).

founded on a particular reason to a case where that reason utterly fails."[39] Therefore, the court refused to employ the "born alive" rule and held that a viable fetus is a human being for the purpose of California's homicide statutes.[40]

The *Keeler* court based its decision primarily on the rationale given in *Chavez* where the defendant was accused of manslaughter for killing her newborn child. The evidence indicated that the child had been removed from the defendant's body by the defendant alone and placed headfirst into a nearby toilet. The defendant claimed that the baby had been born dead. To rebut this testimony, the state offered medical evidence to show that the child was probably born alive.[41]

The *Keeler* court interpreted this case as doing away with the common law requirements of live birth.[42] This interpretation is somewhat questionable. In *Chavez* the baby had been completely born and separated from the mother. The question which was faced by the court was whether there was sufficient medical testimony to show that the child had been alive after birth. The court expressed the problem this way:

> This baby was completely removed from its mother and even the placenta was removed. A factual question was presented and the opinion of the autopsy physician was evidence which could be considered by the jury. His opinion was that the baby was born alive and that it breathed and had heart actions.[43]

Thus it is submitted that the expression of anything pertaining to an unborn child in the *Chavez* opinion was purely dictum. The *Chavez* court was faced with a fully grown fetus, separated from its mother, which had been treated in a heinous fashion. Even with this factual situation, the court still required proof of the child being born alive to sustain the conviction.[44]

A year later *Chavez* was interpreted by the Court of Appeals of Alabama in the case of *Singleton v. State*.[45] In *Singleton* an abandoned dead baby was found in a cemetery. Circumstantial evidence

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39. 80 Cal. Rptr. at 868 (citations omitted).

40. 80 Cal. Rptr. at 869.

41. The problem presented the *Chavez* court was that the defendant claimed the baby was dead at birth. Thus under the born alive rule the state had the burden of proving live birth. The state's medical officer could not state with certainty whether hemorrhaging or suffocation had caused the death. To these facts the court replied, "The fact that he was unable to attribute the death to one of these causes alone does not make this evidence mere speculation or conjecture, and does not affect the question as to whether death resulted from a criminal act." 176 P.2d at 96.

42. 80 Cal. Rptr. at 867.

43. 176 P.2d at 95.

44. The court made this clear by stating: "Without drawing a line of distinction applicable to all cases, we have no hesitation in holding that the evidence is sufficient here 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." 176 P.2d at 95. Thus it can be seen that the *Chavez* court still required a child to be born alive before it could become a human being under the homicide statutes.

45. 33 Ala. 536, 35 So. 2d 375 (Ct. App. 1948).

linked it to the defendant, who argued that even if the child did belong to her there was no evidence that the child had been born alive. As to the born alive requirements, the court referred favorably to *Chavez:* "Adopting such view it is our conclusion that the State met the burden of proof cast upon it to establish that the infant in the present case was born alive."[46] It can be clearly seen that even after *Chavez* the fact of being born alive must still be established. Both *Chavez* and *Singleton* dealt with children that had been completely expelled and separated from their mother. It is submitted that all these cases show is that the defendant's denial of live birth and the state's affirmation of live birth are questions of fact which must be weighed by the jury. To convict, the jury must find that the child had been born alive under the common law requirements.

If it is accepted that the common law requirements are still necessary, whether they be independent circulation or breathing, then *Keeler* clearly represents a marked change in the law. Moreover, there is some inconsistency between *Keeler* and a recent California Supreme Court decision that invalidated the California abortion statute[47] as unconstitutional. In *People v. Belous,*[48] the court had to answer the question of whether there was a compelling state interest to protect an unborn fetus. The court answered in the negative, stating that whenever a fetus was treated as equivalent to a born child the rules which were being considered required a live birth or that the statute only reflected the interests of the parents.[49] The *Belous* court went on to say that there were "major and decisive" areas where the fetus was not treated as equivalent to a born child:

> Probably the most important is reflected by the statute before us. The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is *never* treated as murder, and only rarely as manslaughter, but rather as the lesser offense of abortion.[50]

The *Keeler* court in discussing *Belous* points out that the statement pertaining to the intentional killing of the fetus is only dictum.[51] *Keeler* points out, if feticide can be manslaughter as indicated in *Belous,* then surely it can be murder. However, this interpretation overlooks the fact that *Belous* was only referring to those states which have feticide

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46. 35 So. 2d at 379.

47. CAL. PENAL CODE § 274 (West 1955).

48. 458 P.2d 194, 80 Cal. Rptr 354 (1969), *noted in* 46 N. D. L. REV. 249 (1970).

49. 458 P.2d at 202–03, 80 Cal. Rptr at 362–63. For example, CAL. CIV. CODE § 29 (West 1954), gives an unborn child most of the rights attributed to a born child. Unborn children are also allowed to sue for prenatal injuries, but *only* if born alive. *E.g.,* Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App. 1939); W. PROSSER, THE LAW OF TORTS § 56, at 356 (3d ed. 1964).

50. 458 P.2d at 203, 80 Cal. Rptr at 363 (emphasis added).

51. "[W]e interpret it as a description of the state of current law in most American jurisdictions. . . . That interpretation is fortified by the reference to manslaughter. If, as a matter of California law, feticide can amount to manslaughter, it can also constitute murder." 80 Cal. Rptr at 869.

statutes.[52] In those states, before the statute, the situation presented by *Keeler* would have at most constituted the crime of abortion. By enacting a feticide statute, those states have made a *Keeler* situation manslaughter or murder. Thus the common law rule was changed by legislative action rather than by judicial decision.

It would seem more likely that the *Keeler* holding can be rationalized by looking at the status of the California law after the decision in *Belous*. The result of *Belous* was that section 274 of the California Penal Code, the section which gave the punishment for unlawful abortions, was ruled unconstitutional.[53] Section 274 was the penal section for not complying with California's Therapeutic Abortion Act, which became law in November 1967.[54] Thus if *Keeler* had come before *Belous*, Keeler could have been held for performing an illegal abortion and been imprisoned for anywhere from two to five years. However, *Belous* came first and at the time of *Keeler* California had no penal statute covering abortions. Therefore, if the petitioner is not guilty of murder, he can be charged with no crime in reference to the unborn child.

The result reached in *Keeler* raises several interesting questions. The first is the situation which will be presented by the application of the "felony-murder" doctrine.[55] Under this doctrine, if someone is killed while defendant is attempting a dangerous felony, then the defendant may be guilty of murder. The intent to kill the victim is not necessary. Thus if petitioner had assaulted his wife without knowing of her pregnancy and the fetus subsequently died, he would be guilty of murder since the fetus is a human being under the *Keeler* rationale. The desirability of this result is open to question. Under the common law born-alive rule the child must have been born alive and subsequently die of the injuries inflicted. Following the rule proposed by *Keeler*, there is a question as to whether the child would have ever lived at all. Medical testimony must be presented to show

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52. *See, e.g.*, ARK. STAT. ANN. § 41-2223 (1947); FLA. STAT. ANN. § 782.09 (1943); KAN. STAT. ANN. § 21-409 (1964); MICH. COMP. ANN. LAWS § 750.322 (1967); MISS. CODE ANN. § 2222 (1942); N.D. CENTURY CODE § 12-25-03 (1960); OKLA. STAT. ANN. tit. 21, § 713 (1958).

53. *Belous* was decided in September of 1969 and thus the 1967 Therapeutic Abortion Act was enacted without its drafter's having any knowledge of the latent defect in CAL. PENAL CODE § 274 (West 1955).

54. This act, embodied in CAL. HEALTH & SAFETY CODE §§ 25950-25954 (West 1967), ruled illegal any abortion not meeting its proscribed standards, and also an abortion, regardless of reason, if it occurred after twenty weeks of pregnancy. For a discussion of the Therapeutic Abortion Act and its provisions, *see* Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A.L. REV. 1 (1967). For a comprehensive discussion of the problems with therapeutic abortions, *see* Quay, *Justifiable Abortion-Medical and Legal Foundations*, 49 GEO. L.J. 173 & 395 (1960-61); *Symposium: Abortion and the Law*, 17 W. RES. L. REV. 366 (1965).

55. The felony-murder rule has been defined as: "Homicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony." R. PERKINS, CRIMINAL LAW 44 (2d ed. 1969).

The felony-murder rule is in effect in California. *E.g.*, People v. De La Roi, 36 Cal. App. 2d 287, 97 P.2d 836 (Dist. Ct. App. 1939).

that the fetus was viable and that the defendant's actions killed it. However, this is still no assurance that the fetus would have survived the rigors of childbirth and thus become a living person. Unfortunately, this will be of little avail to the defendant, who may be guilty of the murder of a fetus that would never have lived.[56]

A second problem posed by the *Keeler* rule is its possible conflict with the present abortion laws. The conflict may arise if an abortion is necessary to save the life of the mother.[57] If complications in the pregnancy should arise after the fetus becomes viable, there can be no abortion as this would be murder.[58] It would seem then that the mother would have to sacrifice her life for that of the unborn child, but this result would be in direct conflict with several recent cases which have held that a woman has a constitutional right *not* to bear children.[59]

CONCLUSION

Keeler has taken a bold step in changing the heretofore settled law concerning prenatal homicide. The liberalization was based more on a sense of need for justice than on any trend in existing case law. If the *Keeler* rationale is viewed in the same perspective as is used in determining tort liability for prenatal injuries, it is a patently reasonable result. If the court does not supply the justice no one else will. However, the result that *Keeler* has accomplished has already been achieved by several other states through the enaction of feticide statutes. In light of the effects the *Keeler* rule may have in extending the felony-murder doctrine and in reconciling the homicide statutes with the abortion statutes, perhaps the legislature could best achieve the desired results, rather than a judicial decision based on questionable authority.

Just before this edition went to press the California Supreme Court overruled the Superior Court's decision in *Keeler*.[60] In its holding the court stated there were "two insuperable obstacles" which prevented the *Keeler* result. The first was California's Penal Code, Section 6, which requires that all actions which are to be considered crimes must be codified in the Penal Code. Thus, since there was no feticide statute in California, what Mr. Keeler had done could not be

56. One commentator has suggested that only by proving complete independence from the mother can due process be satisfied, as it is mere conjecture to say the baby might have been born alive. 17 WYO. L.J. 237, 242 (1963).

57. All states allow an abortion where it is absolutely necessary to save the life of the mother. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 84, 86 n.25–30 (1968).

58. There are many diseases which are not immediately apparent in early pregnancy which may lead to complications if the pregnancy is carried to the term. Quay, *Justifiable Abortion-Medical and Legal Foundations*, 49 GEO. L.J. 173 (1960).

59. While this may seem justifiable to some on the basis that the mother assumed the risk by getting pregnant, there is a trend in recent cases that abortion laws may be an infringement on the mother's constitutional right to bear or not to bear children. *See, e.g.*, United States v. Vuitch, 6 Crim. L. Rptr 2131 (D.D.C. Nov. 10, 1969); People v. Belous, 458 P.2d 194, 80 Cal. Rptr 354 (1969).

60. 38 U.S.L.W. 2696 (Cal. Sup. Ct. June 12, 1970).

called murder. The second obstacle found by the court was that posed by the constitutional requirement of due process. The first step in providing due process for a defendant is to give him fair warning that the action he is taking constitutes a crime. The court stated that this "unforeseeable judicial enlargement" of the existing homicide laws taken by the Superior Court denied defendant Keeler a fair warning and thus violated his right to due process. Thus it would appear from this latest decision that the only constitutionally permissible method of designating this type of behavior as criminal is through the legislature's enactment of a feticide statute.