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NOTE

PEOPLE V. DAVIS: CALIFORNIA'S MURDER STATUTE AND THE REQUIREMENT OF VIABILITY FOR FETAL MURDER

I. INTRODUCTION

In *People v. Davis,*[1] the California Supreme Court held that the viability[2] of a fetus is not required for a murder conviction under California Penal Code section 187(a).[3] The *Davis* court ruled that the third-party killing of a fetus with malice aforethought is murder under California's murder statute so long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.[4] This decision overturned eighteen years of California appellate court holdings.[5]

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1. People v. Davis, 872 P.2d 591 (Cal. 1994) (per Lucas, C.J., joined by Arabian, J.; Kennard, J., concurring, joined by Stone, J.; Baxter, J., concurring and dissenting, joined by George, J.; Mosk, J., dissenting).

2. "Viability is that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." BLACK'S LAW DICTIONARY 1565-66 (6th ed. 1990). *See infra* notes 15 and accompanying text for the United States Supreme Court's definition of viability.

3. *Davis*, 872 P.2d at 593. CAL. PENAL CODE § 187(a) (West 1988) reads: "Murder is the unlawful killing of a human being or fetus with malice aforethought." *Id.*

4. *Davis*, 872 P.2d at 602.

5. *Id.* at 601. Since People v. Smith, 129 Cal. Rptr. 498 (Ct. App. 1976), every California appellate court that addressed the issue of whether viability is required to constitute murder, required fetal viability. *See infra* notes 17-26 and accompanying text for a historical discussion of the judicial interpretation of § 187(a) prior to *Davis*.

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II. BACKGROUND

In 1970, California's murder statute, codified in Penal Code section 187, read: "Murder is the unlawful killing of a *human being* with malice aforethought."[6] The same year, in *Keeler v. Superior Court,*[7] the California Supreme Court held that a man who killed a fetus carried by his former wife could not be prosecuted for murder.[8] The *Keeler* court reasoned that the legislature probably intended the phrase "human being" to mean a person who had been born alive.[9]

Although the legislative session was more than halfway over, and the deadline for introducing new bills had passed, the majority floor leader of the Assembly took immediate action to permit the legislature to overrule *Keeler.*[10] Thus, the legislature amended Penal Code section 187(a) by adding within the proscription of the statute the killing of a fetus.[11] The amended statute now reads: "Murder is the unlawful killing of a human being, or a *fetus*, with malice aforethought."[12]

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6. CAL. PENAL CODE § 187(a) (West 1988) (emphasis added).

7. 470 P.2d 617 (Cal. 1970).

8. *Id.* at 618.

9. *Id.* at 622. In *Keeler,* Teresa and Robert Keeler were divorced. *Id.* at 618. At the time of the divorce, Teresa was already pregnant by Ernest Vogt. *Id.* Five months later, Robert came upon Teresa driving on a rural road. Robert said, "I hear you're pregnant." *Id.* When he looked at her stomach, he became outraged and said, "I'm going to stomp it out of you." *Id.* He then hit Teresa in the face and pushed his knee into her stomach. *Id.* Teresa survived, but the fetus was stillborn. *Id.* Doctors concluded that if the fetus was born at the time of the incident, it would have had a 75% to 96% chance of survival. *Id.* at 619.

10. *See* People v. Davis, 872 P.2d 591, 608 (Cal. 1994) (Mosk, J., dissenting) Justice Mosk states:

> [A] fellow legislator relinquished sponsorship of a pending bill on a wholly different subject—Assembly Bill No. 816—and on June 24 the majority leader "amended" that bill by deleting its original text in its entirety and replacing it with his new version of section 187. In quick succession the bill was then amended twice more in the Assembly (July 10 & 17), passed and sent to the Senate (July 27), amended in the Senate (Aug. 7), and passed and returned to the Assembly (Aug. 20), where the Senate amendments were concurred in the next day (Aug. 21).

Id. (quoting Comment, *Is the Intentional Killing of an Unborn Child Homicide?*, 2 PACIFIC L.J. 170, 174 (1970)).

11. *See* Stats. 1970, ch. 1311, § 1, p. 2440.

12. CAL. PENAL CODE § 187(a) (West 1988) (emphasis added). Despite the addition of the term "fetus," the amended statute states that it does not apply to abor-

In its 1973 opinion in *Roe v. Wade*,[13] the United States Supreme Court held that, in the context of a mother's decision to have an abortion, the state has no legitimate interest in protecting the fetus until it reaches the point of viability.[14] The Court explained that viability occurs when the fetus reaches the capability of meaningful life outside of the mother's womb.[15]

After *Roe*, a number of California appellate courts construed the term "fetus" in section 187(a), to mean a "viable fetus."[16] In *People v. Smith*,[17] the first of these cases, the court of appeal held that viability is an essential element of fetal murder under section 187(a).[18] The *Smith* court reasoned that "one cannot destroy independent human life prior to the time it has come into existence."[19] Thus, the court maintained, before viability, the state has no interest in protecting the fetus from abortion.[20]

The *Smith* court relied on *Roe v. Wade* in acknowledging a woman's constitutional right to abort her fetus before viabili-

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tions complying with the Therapeutic Abortion Act, performed by a doctor when the death of the mother was substantially certain in the absence of an abortion, or whenever the mother solicited, aided, and otherwise chose to abort the fetus. *See* CAL. PENAL CODE § 187(b) (West Supp. 1971).

13. 410 U.S. 113 (1973).

14. *Roe*, 410 U.S. at 163.

15. *Id.* The Court stated that "viability" generally occurs at approximately 28 weeks, but may occur as early as 24 weeks. *Id.* at 160. At the point of viability, the Court ruled, the state may restrict abortion. *Id.* at 163.

16. *See, e.g.*, People v. Hamilton, 774 P.2d 730 (Cal. 1989); People v. Henderson, 275 Cal. Rptr. 837 (Ct. App. 1990); People v. R.P. Smith, 234 Cal. Rptr. 142 (Ct. App. 1987); People v. Apodaca, 142 Cal. Rptr. 830 (Ct. App. 1978); People v. Smith, 129 Cal. Rptr. 498 (Ct. App. 1976).

17. 129 Cal. Rptr. 498 (Ct. App. 1976).

18. *Smith*, 129 Cal. Rptr. at 504. In *Smith*, the defendant beat his wife who was 12 to 15 weeks pregnant, saying he did not want the baby to live. *Id.* at 500. His wife miscarried her fetus as a direct result of the beating. *Id.* At trial, the parties stipulated that the fetus was not viable at the time of the miscarriage. *Id.* The trial court then dismissed the murder charge, holding that viability is an essential element. *Id.* The court of appeal affirmed a trial court's ruling dismissing the murder charge and held that viability is an essential element under § 187(a). *Id.* at 504.

19. *Id.* at 502

20. *Id.*

ty.[21] The court explained that:

> Implicit in *Wade* is the conclusion that as a matter of Constitutional law the destruction of a nonviable fetus is not a taking of a human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father . . . or a third person.[22]

Since *Smith*, subsequent cases have similarly interpreted California's feticide statute as requiring a viability limitation.[23] In 1990, the court of appeal in *People v. Henderson*[24] recognized that, even though the statute does not expressly reference viability, decisional law interpreting section 187(a), has limited "criminal liability for its violation to viable fetuses."[25] The *Henderson* court considered the definition of fetal viability to be well-established and concluded that fetal viability occurs when the fetus is capable of independent existence outside the mother's womb.[26]

Despite the appellate court decisions inferring a viability requirement to convict a defendant of fetal murder under section 187(a), the California Supreme Court had never addressed this issue before *People v. Davis.*[27]

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21. *Id.*

22. *Id.* at 502. The court defined viability as "having attained such form and development of organs as to be normally capable of living outside the uterus." *Id.* at 503 (quoting WEBSTER'S NEW INT'L DICT. 2548 (3d ed. 1966).

23. *See, e.g.*, People v. Apodaca, 142 Cal. Rptr. 830 (Ct. App. 1978) (rejecting the assertion that § 187(a) is unconstitutionally vague because it does not specify the stage of development of the fetus in the statute); People v. R.P. Smith, 234 Cal. Rptr. 142 (Ct. App. 1987) (holding that viability of a fetus is a constitutional prerequisite for murder of a fetus by extension of *Roe*).

24. 275 Cal. Rptr. 837 (Ct. App. 1990).

25. *See id.* at 854.

26. *See id.* at 853.

27. *See Davis*, 872 P.2d at 597. In People v. Hamilton, 774 P.2d 730 (Cal. 1989), the California Supreme Court did not consider whether §187(a) should impose criminal liability for only the killing of viable fetuses. *Hamilton*, 774 P.2d at 747. The defendant there was convicted of the murder of his wife and 7-month old fetus. *Id.* at 733. On appeal, the defendant asserted that the trial court's jury instruction was incorrect and that it misled the jury to believe they could convict him if the baby could be born alive. *Id.* at 747. The California Supreme Court determined that it did not need to address the defendant's contention because there was uncontradicted evidence that the fetus was viable under any definition of viability; thus, even if the instructional error had occurred, the defendant could not

III. FACTS AND PROCEDURAL HISTORY

On March 1, 1991, Maria Flores went to cash her welfare check at a check cashing store with her twenty-month-old son, Hector.[28] At the time, she was twenty-three to twenty-five weeks pregnant.[29] As Flores left the store, defendant Robert Davis pulled a gun and demanded the money from Flores' purse.[30] When Flores refused to give Davis her purse, Davis shot her in the chest and fled the scene.[31]

Flores underwent emergency surgery as a result of the shooting, but the next day, her fetus was stillborn as a direct result of her blood loss, low blood pressure, and state of shock.[32] The police subsequently apprehended Davis and charged him with assault and robbery of Flores and the murder of her fetus.[33] Moreover, the prosecution charged the special circumstance of robbery-murder.[34]

The trial court instructed the jury that it had to find Flores' fetus was viable before it could convict Davis of murder.[35] The jury then convicted Davis of murder of a fetus dur-

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have been prejudiced. *Id.*

28. People v. Davis, 872 P.2d 591, 593 (Cal. 1994).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* During Flores' surgery, although doctors sutured the existing holes in her uterine wall to prevent additional bleeding, no further obstetrical measures were taken due to the immaturity of her fetus. *Id.* At trial, the prosecution's medical experts testified that the fetus's statistical chances of survival outside the womb were between 7 and 47 percent. *Id.* The defense medical expert, however, stated the chances were only 2 or 3 percent. *Id.* None of the experts testified that the survival of the fetus was probable. *Id.*

33. *Davis*, 872 P.2d at 593.

34. *Id.* When a murder occurs during the commission of a state listed felony, the defendant may be charged with murder with special circumstances. If the defendant is convicted, the result may be the death penalty. *See* CAL. PENAL CODE § 190.2(a) (West 1988).

35. *Davis*, 872 P.2d at 593. California Penal Code §187(a) does not expressly require viability as an element of fetal murder, but the trial court based its instructions on prior court of appeal jury instructions requiring the viability of a fetus for a fetal murder conviction. *See supra* notes 17-26 and accompanying text for a discussion of these prior cases.

ing the course of a robbery,[36] assault with a firearm,[37] and robbery.[38] Furthermore, the jury found true the special circumstance allegation.[39]

On appeal, Davis argued that the trial court prejudicially erred by not giving California's standard viability instruction.[40] Specifically, Davis argued, the trial court should have defined viability as "probability of survival" instead of the lower threshold "possibility of survival."[41]

Rather than simply examining Davis' alleged viability instructional error, however, the court of appeal proceeded to address the state's contention that viability is not necessary to convict a defendant of fetal murder.[42] The court then agreed with the state and, contrary to prior decisions, held that viability is not a required element of fetal murder under section 187(a).[43] Nevertheless, the court of appeal reversed Davis' murder conviction and set aside the special circumstance finding.[44] The court believed that application of its unprecedented interpretation of the parental consent statute to Davis would violate his due process rights.[45]

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36. *See* CAL. PENAL CODE § 187(a) (West 1988); *see also* CAL. PENAL CODE § 190.2(a)(2) (West 1988).

37. *See* CAL. PENAL CODE § 245(a)(2) (West Supp. 1990) (amended 1995).

38. *Davis*, 872 P.2d at 593. *See* CAL. PENAL CODE § 211 (West 1988).

39. *Id.* Although the jury found true the special circumstance allegation, the prosecutor did not seek the death penalty. Consequently, Davis was sentenced to life in prison without the possibility of parole, plus five years for the use of a firearm. *Id.*

40. *Id.* The standard jury instruction, CALJIC No. 8.10 (5th ed. 1988), provides: "A viable human fetus is one that has attained such form and development of organs as to be normally capable of living outside of the uterus." *Id.*

41. *Id.* CALJIC No. 8.10 prevents the jury from convicting a defendant of fetal murder unless there is a "probability" of the fetus' survival. Rather than giving the standard viability instruction, CALJIC No. 8.10, the trial court instead gave the jury an instruction that allowed it to convict the defendant if it found that the fetus had a *possibility* of survival. *Davis,* 872 P.2d at 593.

The trial court's jury instruction stated: "Within the meaning of Penal Code section 187, subdivision (a), as charged in Count One, a fetus is viable when it has achieved the capability for independent existence; that is, when it is *possible* for it to survive the trauma of birth, although with artificial medical aid." *Davis,* 872 P.2d at 593.

42. *Davis*, 872 P.2d at 594.

43. *Id.*

44. *Id.*

45. *Id.*

In a 6-1 decision on the viability issue and a 4-3 decision to remand because of due process considerations, the California Supreme Court affirmed the court of appeal judgment in its entirety.[46]

IV. THE COURT'S ANALYSIS

Initially, in *People v. Davis*,[47] the California Supreme Court discussed in depth the historical development of California's feticide statute.[48] The court then performed its own statutory interpretation and concluded that fetal viability is not a required element to convict a defendant of murder under the statute.[49] Finally, the Davis court discussed Robert Davis' due process challenge and analyzed whether the trial court's instructional error was prejudicial.[50]

A. STATUTORY INTERPRETATION OF THE CALIFORNIA MURDER STATUTE

After discussing prior appellate court decisions that had inferred a viability requirement as an element of fetal murder,[51] the California Supreme Court emphasized that it had never determined whether such an element is necessary.[52] The *Davis* court then embarked upon its own statutory interpretation of California's murder statute.[53] The *Davis* court began its analysis with a discussion of *Roe v. Wade*[54] principles.[55]

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46. *Id.*

47. 872 P.2d 591 (Cal. 1994).

48. *See id.* at 594-97. The Background section of this Note is an abbreviation of the *Davis* court's "Historical Background" section of its opinion. *See supra* notes 6-26 and accompanying text for the author's summary of the California Supreme Court's discussion.

49. *See Davis*, 872 P.2d at 599-600. *See infra* notes 51-96 and accompanying text for a discussion of the *Davis* court's statutory interpretation.

50. *See id.* at 600-02. *See infra* notes 97-108 and accompanying text for a discussion on the due process challenge and instructional error.

51. *See supra* notes 16-26 and accompanying text for a discussion of these decisions.

52. *See Davis*, 872 P.2d at 597.

53. *See id.* at 597-600.

54. 410 U.S. 113 (1973).

55. *See Davis*, 872 P.2d at 597.

1. Roe v. Wade *Principles Do Not Apply*

The *Davis* court commenced its *Roe v. Wade* analysis by announcing that *Roe* principles are inapplicable to a statute that criminalizes the killing of a fetus without the mother's consent.[56] The court explained that *Roe* did not rule that the state's interest becomes legitimate only after viability.[57] Rather, the *Roe* decision "forbids the state's protection of the unborn's interest only when these interests conflict with the constitutional rights of the prospective parent."[58] Thus, the *Davis* court maintained, despite *Roe v. Wade* and its progeny, a court may recognize an unborn fetus' interests in situations where these interests do not conflict with the mother's right to

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56. *See id.* Davis claimed that the fetus did not obtain the protection of Penal Code § 187(a) because the fetus could have been legally aborted at the time it was killed. *See id.* Davis relied on *Smith* and its progeny to assert that, if the fetus had not attained independent human life status under *Roe*, it had not achieved "viability" under *Smith*, and therefore, he could not be prosecuted under PENAL CODE § 187(a) for the fetus's murder. *See id. See supra* notes 17-26 for a discussion of *Smith* and its progeny.

57. *Id. See also* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life* 22 HARV. J. ON LEGIS. 97, 144 (1985). Professor Parness states: "By holding that the Fourteenth Amendment does not cover the unborn, the Supreme Court was left with only one constitutionally mandated right, that of the mother's privacy, to be considered along with the legitimate state interest in protecting an unborn's potential life." *Id.*

58. *Davis*, 872 P.2d at 597. Parness, *supra* note 57, at 144. Other scholars agree with Professor Parness. *See, e.g.*, King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn,* 77 MICH. L. REV. 1647 (1979). *See also* Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,* 21 VAL. U. L. REV. 563, 616 (1987). Professor Forsythe explains:

> "While the decision in *Roe* declares that the state may not protect the potential life of a fetus from the moment of conception, it does so in the narrow context of the mother's abortion decision." Under *Roe v. Wade*, therefore, the right to an abortion is encompassed within the woman's right to constitutional privacy. The fetus is not a 'person' for the purposes of the Fourteenth Amendment and has no Constitutional rights that would outweigh the exercise of the woman's Fourteenth Amendment rights. The fetus' rights and the state's interest, or lack of interest, in protecting maternal health and in protecting the life of the fetus, were distinctly balanced against the woman's right to privacy in the context of consensual abortion.

Id. (quoting Parness, *supra* note 57, at 97).

personal autonomy.[59] The court stated that, "when the state's interest in protecting the potential life of a fetus is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail."[60]

2. *Viability Is Not a Requirement in Other States*

Having determined that *Roe* principles do not require a fetal viability element to convict a defendant of fetal murder, the *Davis* court next examined other states' statutes which do not require viability to convict a defendant of feticide.[61] Specifically, the *Davis* court focused on Minnesota and Illinois, where constitutional challenges to fetal murder statutes have failed.[62] In those states, the challenges were based on the statutes' failure to distinguish between viable and nonviable fetuses.[63]

a. Minnesota: *State v. Merrill*

In 1990, the Minnesota Supreme Court addressed equal protection and due process challenges to the state's feticide statute[64] by a defendant who murdered a woman and her

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59. *Davis*, 872 P.2d at 597.

60. *Id.*

61. *See Davis*, 872 P.2d at 598-99. The court cited Minnesota, Arizona, Illinois, Louisiana, Indiana, North Dakota and Utah as states that do not require fetal viability to convict a defendant of murder. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (A)(5) (1989); ILL. REV. STAT. ch. 38, para. 9-1.2, 9-2.1, 9-3.2 (1991) (currently found at ILL. ANN. STAT. ch. 720 para. 5/9-1.2, -2.1. -3.2 (Smith-Hurd 1993); IND. CODE ANN. § 35-42-1-6 (Burns 1994); LA. REV. STAT. ANN. § 14:2(7), § 14:32.5-:32.8 (West 1986 & Supp. 1990); N.D. CENT. CODE § 12.1-17.1-01 to 12.1-17.1-04 (Supp. 1993); UTAH CODE ANN. § 76-5-201 (1990).

62. *See Davis*, 872 P.2d at 598-99. Minnesota and Illinois courts rejected constitutional challenges to their respective state statutes on the ground that "protection of a woman's privacy interest in the abortion context is not applicable to a nonconsensual murder of the unborn child." *Id.* at 598.

63. *Id.*

64. MINN. STAT. ANN. § 609.2661(1) (West 1987). The statute includes in its definition of first degree murder the killing "of an unborn child with premeditation and with intent to effect the death of the unborn child or of another." *Id.*

four-week-old embryo.[65] In *State v. Merrill,*[66] the defendant argued that the Minnesota feticide statute violated constitutional principles due to its failure to distinguish between viable and nonviable fetuses.[67]

The defendant in *Merrill* asserted that the Minnesota statute violated equal protection principles because, by not requiring viability as an element for fetal murder, the statute exposed him to serious penal consequences.[68] To the contrary, the defendant pointed out, mothers and doctors who deliberately terminate nonviable fetuses are not subject to criminal sanctions.[69] In short, the defendant argued that similarly situated persons were treated disparately by the statute.[70]

In rejecting the defendant's equal protection challenge, the *Merrill* court found that a defendant who assaults a woman and destroys her fetus without her consent is not the same as a woman who elects to terminate her pregnancy legally.[71] The court explained that, "in the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy."[72] The court further stated: "*Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[73] Accordingly, the *Merrill* court concluded, the Minnesota feticide statute does not violate equal protection principles by failing to distinguish between viable and nonviable fetuses.[74]

65. *See* State v. Merrill, 450 N.W.2d 318 (Minn. 1990).

66. *Id.*

67. *Id.* at 321.

68. *Id.*

69. *Id.*

70. *Merrill*, 450 N.W.2d at 321.

71. *Id.* at 321-22.

72. *Id.* at 322. The *Merrill* court articulated that the right to privacy includes the woman's choice to terminate or continue the pregnancy without state interference unless the state's interest in protecting the potentiality of human life becomes compelling. *Id.*

73. *Id.*

74. *Id.* The defendant also asserted that feticide statute violated equal protection because an unborn is not a "person" under *Roe* and is not protected by the Fourteenth Amendment. *Id.* The *Merrill* court rejected this assertion and reasoned that the state's feticide statute protects the potentiality of human life without directly or indirectly impinging on the mother's privacy rights. *Id.* The court explained that *Roe* focused on protecting the woman from governmental interference

The defendant in *Merrill* also claimed that Minnesota's feticide statute[75] is so vague that it violates the Due Process Clause of the Fourteenth Amendment.[76] Specifically, the defendant asserted that the statute fails to give fair warning of the prohibited conduct.[77]

The *Merrill* court rejected the due process argument, explaining that the "fair warning" rule has never been interpreted to excuse criminal liability because the actual victim was not the one that a defendant originally intended to assault.[78] The court explained that there is always a possibility that a female victim of childbearing years might be pregnant.[79] Thus, the *Merrill* court concluded, Minnesota's feticide statute provides the requisite fair warning.[80]

b. Illinois: *People v. Ford*

Additionally, the *Davis* court examined an Illinois opinion which relied substantially on *Merrill*.[81] As in *Merrill,* the Illinois Court of Appeal in *People v. Ford*[82] addressed assertions that the state's feticide statute[83] violates equal protection and

and acknowledged that the state still has a legitimate interest in protecting the potentiality of human life. *Id.* Consequently, the state retains an interest in protecting an unborn child whether the embryo is viable or not. *Id.* The court concluded that even laws which directly impact abortion are constitutional so long as the statute itself does not unduly impinge on the woman's decision. *Id.*

75. *See* MINN. STAT. ANN. § 609.2661(1).

76. *Merrill*, 450 N.W.2d at 322.

77. *Id.* at 323. The *Merrill* court noted the defendant argued that it is unfair to impose on the murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy. *Id.*

78. *Id.* The court noted that just because a perpetrator did not intend to kill a specific victim does not mean he lacked a fair warning that he would be held similarly accountable as if the victim had been the one intended. *Id.*

79. *Id.*

80. *Merrill*, 450 N.W.2d at 323.

81. *See Davis*, 872 P.2d at 598-99.

82. 581 N.E.2d 1189, 1197 (Ill. App. Ct. 1991). In Ford, the defendant was convicted under the Illinois feticide statute for killing his 17-year-old stepdaughter's five and one half-month old fetus. *Id.* at 1190.

83. *See* ILL. REV. STAT. ch. 38, para. 9-1.1 (1985) (current version at ILL. REV. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993)). The statute states: "A person commits the offense of intentional homicide of an unborn child if . . . he [or she] . . . (1) either intended to cause the death of or to do great bodily harm to the preg-

due process principles for failing to distinguish between viable and nonviable fetuses.[84]

Upon determination that the Illinois feticide statute did not affect any protectable interest held by the defendant, the *Ford* court applied a rational basis standard of review to the defendant's equal protection challenge.[85] To pass constitutional muster, the state's feticide statute needed only a rational relation to a valid legislative purpose.[86] Because it found that the feticide statute bears a rational relationship to the valid legislative purpose of protecting the potentiality of human life, the *Ford* court concluded that the statute does not violate equal protection principles.[87] After dispensing of the

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nant woman or her unborn child . . . (2) he knew that his acts created a strong probability of death or great bodily harm to the pregnant woman or her unborn child: and (3) *he knew that she was pregnant* . . . . " *Id.* (emphasis added).

84. *See Ford*, 581 N.E.2d 1189. The defendant argued that Illinois' feticide statute violates equal protection principles because under *Roe*, a woman can terminate her nonviable fetus without incurring serious penalties. *Id.* To the contrary, the defendant pointed out, by destroying a nonviable fetus, the defendant faced capital penalties. *Id.* Consequently, the defendant argued that he and a pregnant woman are similarly situated, but treated differently by the statute. *Id.*

The defendant's argument in *Ford* was identical to the argument made by the defendant in *State v. Merrill*. *See supra* notes 64-80 and accompanying text for a discussion of *Merrill*.

85. *Ford*, 581 N.E.2d at 1200. The court stated:

> The court must first determine the proper level of scrutiny to be applied to the challenged classification. When the statute under consideration affects a fundamental right, or discriminates against a suspect class, courts will apply a strict scrutiny test and only uphold it if it serves a compelling State interest. If neither a fundamental right nor a suspect class is affected by this statute, a rational basis test is used. Under this analysis, a statutory classification must bear a rational relationship to a valid legislative purpose. The classification created by the statute will only be declared violative of the equal protection clause if based on reasons totally unrelated to the pursuit of a legitimate State goal.

Id. at 1199-1200.

86. *Id.* at 1200.

87. *Id.* The court noted:

> [A] pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated. A woman consents to the abortion and has an absolute right, at least during the first trimester of the pregnancy, to choose to terminate the pregnancy. A woman has a privacy interest in terminating her pregnancy; however,

defendant's equal protection argument, the *Ford* court then rejected the defendant's due process challenge as well.[88]

3. *Conclusion of the* Davis *Majority*

The *Davis* court utilized both *Ford* and *Merrill* to illustrate the constitutionality of criminalizing the killing of a nonviable fetus and the legislature's freedom to impose upon the killer of a fetus the same penalty as is prescribed for the murder of a human being.[89] The *Davis* court reasoned that, like Minnesota and Illinois, California is a "code state,"[90] thus the legislature "has the exclusive province to define by statute what acts constitute a crime."[91] The court concluded that nothing prevents the legislature from protecting the potentiality of human life; "when the mother's privacy interests are not involved, the legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."[92]

Consequently, the *Davis* court held that viability is not an element of fetal murder under section 187(a).[93] The court interpreted the legislative history as suggesting that the term "fetus" was deliberately left undefined in the face of divided legislative views about its meaning.[94] Nevertheless, the court

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> defendant has no such interest. The statute simply protects the mother and the unborn child from the intentional wrongdoing of a third party.

Id. at 1199.

88. *See id.* at 1200-01. As in State v. Merrill, 450 N.W.2d 318 (Minn. 1990), the defendant argued that the feticide statute violates due process principles because it is unconstitutionally vague. *See supra* notes 64-80 and accompanying text for the discussion of *Merrill*. The *Ford* court ruled that the defendant did not have standing to challenge the statute on vagueness grounds. *See Ford,* 581 N.E.2d at 1201. Nevertheless, the court added, even if the defendant had standing to challenge the statute, the fetal homicide statute is not unconstitutionally vague. *Id.* The Ford court reasoned that the statute only requires proof that the entity existing in the mother's womb was alive, but is now dead as a result of defendant's actions. *Id.*

89. *Davis*, 872 P.2d at 599.

90. The term "code state" refers to the legislature's exclusive province to define statutorily what acts constitute a crime. *See* CAL. PENAL CODE § 6 (West 1988).

91. *Davis*, 872 P.2d at 599.

92. *Id.*

93. *Id.*

94. *Id.* The court believed that the legislature purposely left the term "fetus" undefined after debate on the subject. *Id.* The court stated: "The Legislature was

explained, the term "fetus" is generally defined as "the unborn offspring in the postembryonic period, after major structures have been outlined."[95] Because this period occurs in humans seven to eight weeks after fertilization, the court concluded that the killing of a fetus with malice aforethought by a third party is murder so long as the state can show that the fetus has progressed beyond the seven to eight week embryonic stage.[96]

B. VIABILITY MAY NOT BE REQUIRED TO CONVICT A DEFENDANT OF FETAL MURDER, BUT THE CASE MUST STILL BE REVERSED AND REMANDED FOR A NEW TRIAL

Although the *Davis* majority held that fetal viability is not a required element to convict a defendant of fetal murder, it agreed with the court of appeal that this new statutory interpretation was a major change in the law that judicially enlarged the statute.[97] Prior to this case, appellate courts had always read a viability requirement into California's feticide statute.[98] Thus, the court could not apply this new interpretation to Robert Davis because it would violate his due process rights.[99] To hold a defendant criminally responsible for conduct that he could not reasonably anticipate would be proscribed would violate due process principles: "[T]he law must give sufficient warning that individuals 'may conduct themselves so as to avoid that which is forbidden.'"[100] Accordingly, the *Davis* court concluded that its new interpretation of

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clearly aware that it could have limited the term 'fetus' to 'viable fetus,' for it specifically rejected a proposed amendment that required the fetus be at least 20 weeks in gestation before the statute would apply." *Id.* at 594.

95. *Id.* at 599 (quoting SLOANE-DORLAND ANN. MEDICAL-LEGAL DICT. 281 (1987)).

96. *Davis*, 872 P.2d at 599. The court's holding overruled *Smith* and its progeny. *See supra* notes 17-27 for a discussion those cases.

97. *Davis*, 872 P.2d at 600.

98. *Id. See supra* notes 17-27 and accompanying text for a historical discussion of these cases.

99. *Davis*, 872 P.2d at 600. The court explained that prior appellate court holdings demonstrated that a viability requirement had been consistently read into § 187(a). *Id.* Consequently, the elimination of this requirement created an unforeseeable enlargement of a criminal statute. *Id.* Thus, the new interpretation of the statute should apply prospectively only. *Id.* The *Davis* court also noted that in this case it was not faced with reevaluating its own precedent. *Id.*

100. *Id.* (quoting Rose v. Locke, 423 U.S. 48, 50 (1975)).

California's feticide statute should apply only prospectively.[101]

Because it could not administer its new interpretation of Penal Code section 187(a), to Robert Davis, the supreme court was forced to use the former interpretation of the statute;[102] yet, the trial court had given the jury a modified version of the former instruction.[103] Thus, the *Davis* court first had to consider whether the trial court erred in giving the modified jury instruction, and if so, whether the error prejudiced Robert Davis.[104]

Because the trial court's instruction permitted the jury to convict Robert Davis of fetal murder if the fetus merely had a "possibility" of survival, rather than the formerly proper standard requiring that the fetus have a "probability" of survival, the *Davis* court found that the trial court erred in instructing the jury.[105] Moreover, the court explained, the error prejudiced Robert Davis. By substantially lowering the viability threshold as commonly understood and accepted, the instruction allowed the jury to find viability at an incorrect stage of fetal development.[106] The court explained: "Had the jury been given [the proper instruction at the time], it is reasonably probable it would have found the fetus not viable."[107] Thus, the *Davis* court concluded, Robert Davis' conviction must be

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101. *Id.* at 600.

102. *See id.* at 601.

103. *See id.*

104. *See Davis*, 872 P.2d at 601.

105. *See id.* The court observed:

> [T]he wording of CALJIC No. 8.10, defining viability as "normally capable of living outside the uterus," while not a model of clarity, suggests a better than even chance—a probability—that a fetus will survive if born at that particular point in time. By contrast, the instruction given below suggests a "possibility" of survival, and essentially amounts to a finding that a fetus incapable of survival outside the womb for any discernible time would nonetheless be considered "viable" within the meaning of section 187, subdivision (a).

Id. at 602.

106. *Id.*

107. *Davis*, 872 P.2d at 602. Davis' medical expert stated that it was "possible" for the fetus to have survived, but that the chances were 2 or 3 percent. *Id.* None of the medical experts who testified at the trial believed the fetus had a probable chance of survival. *Id.*

reversed, and the case must be remanded for a new trial.[108]

V. CONCURRENCE

Justice Kennard agreed with the *Davis* majority[109] that the legislature did not intend to make viability an element of fetal murder.[110] Additionally, Justice Kennard agreed that the United States Constitution does not prohibit a state from criminalizing the unlawful killing of a nonviable fetus.[111] Nevertheless, she wrote separately to address the dissent and to expand on the majority's discussion of *Roe v. Wade*.[112]

A. LEGISLATIVE INACTION IN THE FACE OF A JUDICIALLY IMPOSED VIABILITY REQUIREMENT DOES NOT CONSTITUTE ACQUIESCENCE

Contrary to the dissent,[113] Justice Kennard believed that there was no significance to the legislature's failure to rewrite the fetal murder statute in response to the appellate court decisions interpreting a viability element in the statute.[114] Thus, she did not share the dissent's view that this legislative inaction implied an agreement with these decisions.[115]

Justice Kennard pointed out that legislative inaction would only be significant if the legislature could have nullified the rule adopted by the courts of appeal; here, however, the legislature was powerless to eliminate the requirement of fetal viability even had it so desired.[116] Justice Kennard reasoned that the legislature's restraint stemmed from previous appellate court decisions that interpreted the viability requirement for fetal murder as a matter of constitutional law.[117]

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108. *Id.*

109. People v. Davis, 872 P.2d 591 (Cal. 1994) (per Kennard, J., concurring, joined by Stone, J.).

110. *See id.* at 603

111. *See id.*

112. *See id.*

113. *See id.* at 607-24 (Mosk, J., dissenting). *See infra* notes 135-97 and accompanying text for the author's discussion of Justice Mosk's dissent.

114. *Davis*, 872 P.2d at 603.

115. *Id.*

116. *Id.*

117. *Id.* Justice Kennard explained: "Faced with that appellate authority, the

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B. THE STATE'S POWER TO CRIMINALIZE THE KILLING OF A FETUS DOES NOT DEPEND ON FETAL VIABILITY

Justice Kennard stated that prior appellate court decisions had erroneously relied on *Roe v. Wade*[118] when they read a viability requirement into the fetal murder statute.[119] She believed that these courts had confused the issue of state authority to interfere with a woman's right to choose an abortion, with the state's interest in punishing a third party whose conduct deprives a woman of her right to choose.[120] Justice Kennard explained: "[W]hen, as here, a violent assault on a pregnant woman results in the killing of the fetus she carries, the state's power to criminalize the act as murder does not depend on 'fetal viability.'"[121]

C. IN SOME INSTANCES THE NEW STATUTORY INTERPRETATION COULD RESULT IN CRUEL AND UNUSUAL PUNISHMENT

Although Justice Kennard joined the majority's conclusion that fetal viability is not necessary to convict a defendant of fetal murder, she believed the dissent raised a significant concern regarding the death penalty issue.[122] Justice Kennard

legislature's inaction proves nothing more than its recognition that, under California case law, enforcement of section 187, subdivision (a), against someone who had killed a nonviable fetus would be unconstitutional." *Id.*

118. 410 U.S. 113 (1973).

119. *Davis*, 872 P.2d at 603.

120. *Id.* Justice Kennard stated:

> Although in *Roe* the concept of "fetal viability" was critical to the first of the two issues, it has no application to California's fetal murder statute . . . Because, unlike the situation in *Roe v. Wade* . . . there is no competing constitutionally protected interest at stake, the state's decision to criminalize the conduct can be justified even if the state does not have a compelling interest in protecting potential human life.

Id. at 603-04.

121. *Id.* at 604. Justice Kennard added: "[W]hen a fetus dies as the result of a criminal assault on a pregnant woman, the state's interest extends beyond the protection of potential human life. The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice." *Id.*

122. *Id.* at 604. *See also id.* at 615-20 for dissent's discussion regarding the possibly unconstitutional circumstances. *See infra* notes 171-84 and accompanying text for the author's summary of Justice Mosk's discussion on this issue.

agreed with the dissent that the majority's new interpretation of California's murder statute could potentially result in violations of the constitutional proscriptions against cruel and unusual punishment.[123] She pointed out that under California's felony-murder rule,[124] this new interpretation could lead to the imposition of the death penalty even if a convicted defendant's conduct is inadvertent.[125]

In Robert Davis' situation, however, Justice Kennard felt that the trial court's sentence of life imprisonment without the possibility of parole was not wholly disproportionate to his criminal culpability.[126] Nevertheless, she agreed with the majority that reversal of Davis' conviction was necessary to preserve his due process rights.[127]

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123. *Davis*, 872 P.2d at 604. *See* U.S. CONST. amend. VIII stating: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

124. *See* CAL. PENAL CODE § 189 (a) (West Supp. 1995).

125. *Id.* at 604. Justice Kennard explained:

> Under [the felony-murder] rule, even an accidental killing committed during the perpetration of certain specifies felonies is first degree murder . . . . In some such cases a penalty of death, or even life imprisonment without the possibility of parole, may be wholly disproportionate to the particular defendant's criminal culpability, and thus may violate constitutional proscriptions against cruel and unusual punishment.

Id.

In his dissent, Justice Mosk explained:

> [A]n unarmed 18-year-old with no criminal record enters a store during business hours, intending to shoplift a can of spray paint; when a security guard accosts him, his nerve fails and he bolts for the door; in his haste he accidentally knocks a woman shopper to the floor; unknown to anyone the woman is 7 weeks' pregnant, and the trauma of the fall causes her to miscarry.

Id. at 619. *See infra* notes 171-84 and accompanying text for the discussion of Justice Mosk's dissent.

126. *Davis*, 872 P.2d at 604. Justice Kennard argued that life imprisonment without the possibility of parole was not disproportionate to Davis' criminal culpability because Davis had shot his victim in the chest at point blank range as he attempted to rob her. *Id.* This conduct was highly likely to result in a fatality. *Id.* It was only fortuitous that Davis' conduct did not result in the victim's death in addition to the death of her fetus. *Id.*

127. *Id.* at 603. *See supra* notes 97-102 and accompanying text for a summary of the *Davis* majority's discussion of due process principles.

VI. CONCURRENCE AND DISSENT

Justice Baxter wrote a concurring and dissenting opinion.[128] Although he agreed with the majority's construction of California's feticide statute, Justice Baxter believed Robert Davis' conviction should not have been reversed.[129] Specifically, Justice Baxter disagreed with the majority's conclusion that the jury instruction regarding fetal viability created an unforeseeable judicial enlargement of the feticide statute that would have violated Davis' due process rights.[130]

Justice Baxter asserted three principal reasons in support of his assertion that the trial court's instruction did not unforeseeably enlarge the fetal murder statute.[131] He believed these reasons demonstrated that the definition of viability before this case was an open question in California.[132] Thus, Justice Baxter urged, Robert Davis was put on adequate notice that the state would proscribe his conduct; he could not credibly claim that the trial court's jury instruction

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128. People v. Davis, 872 P.2d 591, 604-07 (Cal. 1994) (per Baxter, J., concurring and dissenting, joined by George, J.).

129. *Id.* at 604-05 (Baxter, J., concurring and dissenting). Baxter noted:

> Had the trial court in this case given an instruction that a fetus need not be viable under Penal Code section 187, subdivision (a), or had the law in California been settled that, for purposes of section 187(a), a viable fetus meant a fetus with a "probability" or "reasonable likelihood" of survival outside the womb, then I would not hesitate in joining the lead opinion to reverse defendant's conviction.

Id. at 604.

130. *Id.* at 605. Justice Baxter noted: "In finding that this definitional instruction was in error, the lead opinion is purporting to decide an issue that was unsettled both at the time defendant acted and at the time of his trial . . . . In effect, the lead opinion wanders into a wonderland to decide what the law might be had it not been for today's holding rejecting the viability limitation." *Id.*

131. *See id.* First, at the time of defendant's actions, no court had directly addressed whether a viable fetus means a fetus with a possible or probable chance of survival outside the womb. *Id.* Second, two courts had already expressed the view that a viable fetus means one with a *possibility* of survival outside the womb. *Id.* (emphasis added). Third, the California Supreme Court indicated it would consider the suitability of an instruction implying a fetus is deemed viable when it had a possibility of survival if and when it was faced with a case involving the viability of a fetus with less than a 50% chance of survival. *Id.* Thus, Justice Baxter concluded, the definition of viability was an open ended question at the time Robert Davis acted. *Id.*

132. *Id.*

unforeseeably enlarged the fetal murder statute.[133] Accordingly, Justice Baxter concluded, application of the jury instruction to Robert Davis would not have abridged his due process rights.[134]

VII. DISSENT

Justice Mosk was the sole dissenter from the majority's holding that fetal viability is not required to convict a defendant of fetal murder. Justice Mosk wrote a lengthy dissent basing his position on five separate grounds.[135]

A. THE PURPOSE OF STATUTORY CONSTRUCTION IS TO ASCERTAIN LEGISLATIVE INTENT

Justice Mosk began his dissent by stating that both a statute's legislative history and the wider circumstances of its enactment demonstrate relevant evidence of a legislature's actual intent.[136] He explained that the legislative intent behind the amendment of section 187(a) could be ascertained only by understanding the defendant's actions in *Keeler v. Superior Court*[137] and the supreme court's response to them.[138] Justice Mosk added: "It is black letter law that the holding of a case is determined 'by taking into account . . . the facts treated by the judge as material, and . . . his decision based on them.'"[139] Justice Mosk then pointed out that he had authored the *Keeler* opinion for the court.[140]

In *Keeler*, the defendant had intentionally killed his estranged wife's viable fetus, yet, he was acquitted of murder

133. *Id.* at 607.

134. *Davis*, 872 P.2d at 607.

135. People v. Davis, 872 P.2d 591, 607-24 (Cal. 1994) (Mosk, J., dissenting).

136. *Id.* at 607.

137. 470 P.2d 617 (Cal. 1970).

138. *Davis*, 872 P.2d at 608. Section 187(a) was amended immediately following the *Keeler* decision in response to the legislature's outrage at that opinion. *Id.* Thus, the *Keeler* holding sheds light on the legislature's intent behind the amendment. *See supra* notes 7-12 and accompanying text for a discussion of *Keeler*.

139. *Davis*, 872 P.2d at 608 (citing Achen v. Pepsi-Cola Bottling Co., 233 P.2d 74 (Cal. Ct. App. 1951)).

140. *Id.*

because California's murder statute did not refer to fetuses.[141] In affirming the trial court, the supreme court explained that the common law had always required a live birth to support a charge of murder.[142]

The issue before the *Keeler* court, Justice Mosk asserted, was "whether an unborn but *viable* fetus is a 'human being' within the meaning of section 187."[143] Justice Mosk placed great importance on the fact that the fetus in *Keeler* was viable because the majority in that case repeatedly incorporated that fact into its legal analysis and conclusions.[144] Although the *Keeler* court did not deny that a fetus capable of independent existence was viable, the court still held that the defendant could not be prosecuted for the murder of an unborn, but viable fetus.[145] The court did not want to expand the murder statute to an additional class of victims, reasoning that the task was solely reserved to the legislature.[146] Furthermore, the *Keeler* court noted, such an interpretation of the statute would result in a judicial enlargement that would violate the defendant's due process rights for lack of notice.[147]

Justice Mosk additionally stressed that the dissent in *Keeler* "likewise tied its analysis and conclusions closely to the fact of viability."[148] Because the dissent argued that "[t]here is no

141. *See Keeler*, 470 P.2d 617 (Cal. 1970).

142. *Davis*, 872 P.2d at 609 (citing *Keeler*, 470 P.2d at 620).

143. *Id.* (citing *Keeler*, 470 P.2d at 618) (emphasis added). The *Keeler* court stressed that, at the time of the stillborn delivery, the fetus was approximately 34 1/2 to 36 weeks old, and the medical expert concluded with reasonable certainty that the fetus was viable. *Keeler*, 470 P.2d at 619.

144. *Davis*, 872 P.2d at 608.

145. *Id.* at 618.

146. *Id.* The *Keeler* court reasoned: "For a court simply to declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it." *Id.* at 625-26.

147. *Davis*, 872 P.2d at 609 (citing *Keeler*, 470 P.2d at 630). The *Keeler* court noted that it did not find any existing California case which would have given defendant notice that the killing of an unborn, viable fetus was covered by § 187(a). *Keeler*, 470 P.2d at 630.

148. *Davis*, 872 P.2d at 609. In his dissenting opinion in *Keeler*, Acting Chief Justice Burke continuously argued that a *viable* fetus should be considered a human being, and therefore, included within California's murder statute. *Keeler*, 470 P.2d at 630. He asserted that there is common law precedent to support the view that a *viable* fetus is a human being under § 187. *Id.* To illustrate this point, Justice Burke explained that the common law severely punished abortion

good reason why a fully viable fetus should not be considered a 'human being' under [section 187]."[149] Justice Mosk believed it was "obvious" that the *Keeler* decision held that the legislature did not intend the killing of an "unborn, but viable" fetus to constitute murder under section 187(a).[150] According to Justice Mosk, in rushing to amend section 187(a), "the Legislature extended the crime of murder, as the *Keeler* court refused to do, to the malicious killing of a *viable* fetus."[151] He opined: "[T]o read that amendment as further extending murder to include the killing of even a nonviable fetus, as the lead opinion does now, is to ignore the facts and holding of *Keeler* and the direct legislative response they so plainly triggered."[152]

B. EIGHTEEN YEARS OF LEGISLATIVE SILENCE SIGNAL PASSIVE APPROVAL OF THE FETAL VIABILITY REQUIREMENT

As a second ground for his dissent, Justice Mosk explained that *People v. Smith*,[153] the first case to construe the 1970 amendment to section 187, and all subsequent cases involving fetal murder in California, have "held or assumed that viability is an element of the crime."[154]

Moreover, Justice Mosk pointed out, since *Smith*, the legislature had met eighteen times without taking any steps to overrule the holding of that case.[155] According to Justice

after "quickening" and reasoned that, "we cannot assume that the legislature intended a person such as defendant, charged with the malicious slaying of a *fully viable* child, to suffer only the mild penalties imposed upon common abortionists who, ordinarily, procure only the miscarriage of a *nonviable* fetus or embryo." *Id.* at 631 (emphasis added). Justice Burke further argued that his view "would not judicially create a new offense because the Legislature intended that the term 'human being' in section 187 be constituted as an evolving concept defined by the courts according to contemporary conditions." *Id.* at 632.

149. 872 P.2d at 610 (quoting *Keeler*, 470 P.2d at 634 (Cal. 1970)).

150. *Id.*

151. *Id.*

152. *Id.*

153. 129 Cal. Rptr. 498 (Ct. App. 1976).

154. *Davis*, 872 P.2d at 610-11. Justice Mosk referred to People v. Hamilton, 774 P.2d 730 (Cal. 1989); People v. Henderson, 275 Cal. Rptr. 837 (Ct. App. 1990); People v. R.P. Smith, 234 Cal. Rptr. 142 (Ct. App. 1987); and People v. Apodaca, 142 Cal. Rptr. 830 (Ct. App. 1978).

155. *Davis*, 872 P.2d at 611. Justice Mosk recognized that Legislative silence

Mosk, if the California Legislature had disagreed with later judicial opinions limiting criminal liability for the killing of a fetus to a viable fetus, it would have responded as vigorously as it had after the *Keeler v. Superior Court* decision in 1970 by once again amending the statute.[156] However, rather than taking remedial action, the legislature has remained silent.[157] Thus, Justice Mosk concluded: "In these circumstances [the legislature's] acquiescence is persuasive evidence of its intent."[158]

C. THE MAJORITY EXAGGERATES THE LEGISLATIVE HISTORY BY ASSERTING THAT THE TERM "FETUS" WAS DELIBERATELY LEFT UNDEFINED

Justice Mosk next noted that the majority opinion devoted barely any of its discussion to the task of determining the legislature's intent when it amended California's homicide statute to include fetal murder.[159] He asserted that the majority opinion made a "gross exaggeration" of the legislative history by concluding that the legislature deliberately declined to adopt a provision that limited the section 187(a) amendment

after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval and that the presumption of such acquiescence is not conclusive in determining legislative intent. *Id.* at 612 (citing Harris v. Capital Growth Investors, 805 P.2d 873 (Cal. 1991)). Nevertheless, Mosk argued that, because the viability element of fetal murder had been recognized in a number of published opinions, approved jury instructions, and the legislature has acquiesced in that construction for 18 years, the inference of passive legislative approval was quite strong. *Id.*

156. *Davis*, 872 P.2d at 612. Mosk noted that the legislature is aware of its power to delete added statutory elements by judicial construction. *Id.* at 611. To demonstrate his point, Justice Mosk stated that in People v. Conley, 411 P.2d 911 (Cal. 1966), the California Supreme Court declared that, "[a]n awareness of the obligation to act within a general body of laws regulating society . . . is included in the statutory definition of . . . malice." *Id.* (citing *Conley*, 411 P.2d 911 (Cal. 1966)). In 1981, however, the legislature expressly repudiated the *Conley* construction by adding a sentence to the applicable section 188 declaring: "An awareness of the obligation to act within the general body of laws regulating society is *not* included within the definition of malice." *Davis*, 872 P.2d at 612 (quoting Stats. 1981, ch. 404, § 6, p.1593).

157. *Id.*

158. *Id. See supra* notes 113-17 for Justice Kennard's response to this argument.

159. *Davis*, 872 P.2d at 612. Justice Mosk asserted that the majority essentially gave up on the task of determining legislature's intent. *Id.*

to viable fetuses.[160]

Justice Mosk further argued that the majority had completely misread the legislative history when it asserted that the legislature was "clearly aware that it could have limited the term 'fetus' to 'viable fetus,' for it specifically rejected a proposed amendment that required the fetus to be at least twenty weeks in gestation before the statute would apply."[161] Contrary to the majority's assertion, according to Justice Mosk, the proposed amendment that would protect a twenty-week-old fetus as a human being was deleted to avoid conflict with the Therapeutic Abortion Act,[162] not because of the viability issue.[163]

Furthermore, Justice Mosk stated that the majority opinion erred by defining fetal murder liability at "seven or eight weeks after fertilization."[164] Justice Mosk believed the majority was legislating on the subject and that such an imprecise interpretation was highly unlikely the legislature's intent.[165]

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160. *Davis*, 872 P.2d at 613. Justice Mosk quoted the majority as concluding: "The legislative history of the amendment suggests the term 'fetus' was deliberately left undefined after Legislature debated whether to limit the scope of statutory application to viable fetus." *Id.* (quoting *Davis*, 872 P.2d at 594).

Justice Mosk believed this statement wrongfully implied that the legislature conducted a full debate on whether the section 187 amendment should be limited to viable fetuses. *Id.* In addition, Justice Mosk pointed out, the majority's support for this conclusion consisted of only one committee member who argued that the amendment should be expressly limited to viable fetuses. *Id.* Justice Mosk argued that this single objection was merely the personal position of one person and was a far cry from a full scale legislative debate. *Id.* He concluded that it was not a proper subject for determining the legislature's intent because it did not represent the views of other legislative members who favored the bill. *Id.*

161. *Id.*

162. *See* CAL HEALTH & SAFETY CODE §§ 25950-25957 (West 1984 & Supp. 1995).

163. *Davis*, 872 P.2d at 613. Justice Mosk stated that the language in the original version of the 1970 amendment, which states: "As used in this section, 'human being' includes a fetus which has advanced to or beyond the 20th week of uterogestation," had nothing to do with viability, but referred to abortion and "quickening." *Id.* Justice Mosk based his opinion on the undisputed medical fact that fetuses are not viable at 20 weeks. *Id.*

164. *Id.* at 614. Specifically, the majority opinion concluded that the malicious killing of a fetus under California Penal Code § 187 is murder so long as the state can show that the fetus has progressed beyond the seven or eight week embryonic stage. *Id.* (citing *Davis*, 872 P.2d at 602).

165. *Davis*, 872 P.2d at 614. Justice Mosk explained that the legislature would never draw a line at seven or eight weeks. *Id.* He analogized this Legislative im-

He explained that a seven-week-old fetus is the size of a peanut and argued that the contrast between it and a viable fetus is too obvious to be ignored.[166] Justice Mosk could believe that the legislature intended the killing of a fully viable fetus to constitute murder, yet, he could not believe the legislature intended the definition of murder to include the killing of "an object the size of a peanut."[167]

D. WHEN THERE IS UNCERTAINTY ABOUT STATUTORY CONSTRUCTION, IT MUST BE ASSUMED THAT THE LEGISLATURE INTENDED REASONABLE RESULTS, NOT ABSURD CONSEQUENCES

Justice Mosk argued that it was even more improbable that the legislature intended many of the consequences resulting from the majority's new definition of "fetus" in Penal Code section 187(a).[168] One consequence, Justice Mosk explained, is that a defendant can be convicted of capital murder for causing the death of an object that no person had any reason to know even existed.[169] Even in the present case, Justice Mosk emphasized, existing evidence suggested that Robert Davis did not know his victim was pregnant when he robbed and shot her.[170]

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preciseness to scenario of the legislature prescribing that the death penalty shall not be imposed on any individual under the age of 17 or 18. *Id.*

166. *Id.* at 615.

167. *Id.* Justice Mosk described a seven week embryo as having a bulbous head that comprises roughly half of its body, widely spread eye sockets and puglike nostrils. *Id.* at 614-15. Additionally, the embryo's hands and feet are still webbed and it retains a vestigial tail. *Id.* at 615. Justice Mosk noted that if viewed at eight weeks, an uninformed observer would have difficulty even recognizing it as human. *Id.*

168. *Id.*

169. *Id.* Mosk stated:

> A woman whose reproductive system contains an immature fetus a fraction of an inch long and weighing a fraction of an ounce does not, of course, appear pregnant. In fact, if she is one of many women with some irregularity in her menstrual cycle, she herself may not know she is pregnant . . . . Unless such a woman knows she is pregnant and has disclosed that fact to the defendant, the defendant has no way of knowing she is carrying a fetus.

Id.

170. *Davis*, 872 P.2d at 615. Robert Davis testified that, on the day of the shooting, his victim, Maria Flores, did not "show" her pregnancy. *Id.* She was

Justice Mosk further charged that the majority's new interpretation of the state's murder statute creates absurd consequences due to its interaction with California's felony-murder statute.[171] In the present case, lacking proof of both malice and premeditation, the prosecutor sought a murder conviction on the theory of felony-murder.[172] Justice Mosk pointed out that the felony-murder theory had been invoked in only one previous fetal murder case that did not involve the intentional killing of a fetus.[173] Nevertheless, Justice Mosk explained, even that case was distinguishable from the present scenario.[174]

In *People v. Henderson*,[175] the prosecutor likewise invoked the theory of felony-murder in an attempt to convict the defendant of murder.[176] However, contrary to the *Davis* scenario, at the time of fetal death in *Henderson*, the victim's fetus was viable, for the mother was approximately thirty weeks pregnant.[177] Moreover, the jury in *Henderson* avoided the severe results of the felony-murder rule by exercising its "power of nullification"[178] to convict the defendant of second degree murder rather than the requisite first degree murder.[179]

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approximately five feet and weighed 191 pounds on the last day of her visit to her obstetrician. *Id.* Furthermore, a doctor at Davis' trial testified that it was not likely that, given Flores' height and weight, she would have showed her pregnancy while clothed and standing up. *Id.*

171. *Id.* at 616.

172. *Davis*, 872 P.2d at 617.

173. *Id.* In People v. Henderson, 275 Cal. Rptr. 837 (Ct. App. 1990), the felony murder rule was invoked by the prosecutor, but the facts differ. *See infra* notes 175-79 and accompanying text.

174. *Davis*, 872 P.2d at 617.

175. 275 Cal. Rptr. 837 (Ct. App. 1990). In *Henderson*, the defendant robbed and killed a married couple. *Id.* at 839. At the time of the murder, the wife was pregnant with a viable fetus. *Id.* at 841.

176. *Id.* at 839.

177. *Id.* at 841. Furthermore, the defendant in *Henderson* was well acquainted with the pregnant woman because he lived with her prior to murdering her and her fetus. *Id.* at 842.

178. *See generally* People v. Dillon, 668 P.2d 697, 728 (Cal. 1983) (Kaus, J., concurring), for an explanation of jury nullification. Jury nullification occurs when the jury ignores a rule or result that it considers unjust. *Id.*

179. *See Davis* 872 P. 2d. at 617 (Mosk, J., dissenting) (saying that the jury apparently exercised their "power of nullification" by finding defendant Philip Henderson guilty of only second degree murder of the victim's fetus). *But see Henderson,* 275 Cal. Rptr. at 839, where the jury found the defendant Velma Henderson guilty of murder in the first degree of the same fetus. *See also* CAL. PENAL CODE § 189 (West Supp. 1995). Under the felony-murder rule, a murder

Justice Mosk asserted that the majority's new definition of "fetus" in section 187 will create even harsher results than in *Henderson*.[180] He explained that the felony-murder rule "will be extended to include any death, in the commission of a listed felony, of a nonviable and invisible fetus that the actor neither knew nor had reason to know existed."[181] Justice Mosk believed it unlikely that the legislature intended the 1970 amendment to section 187(a), to accomplish "so absurd a result."[182] Furthermore, he added, these unsound results could provoke either juries to nullify convictions,[183] or courts to hold that a first degree murder conviction violates the Eighth

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committed during an enumerated felony is murder in the first degree as a matter of law.

In *Henderson*, the defendant, Philip Henderson, was convicted of robbery and two counts of first degree murder for the deaths of the married couple, but the jury only convicted him of second degree murder for the death of the fetus. *Henderson*, 275 Cal. Rptr. at 839. In Justice Mosk's opinion, the *Henderson* jury was doubtlessly instructed that under the felony-murder rule, the killing of the fetus was first degree murder because it occurred during a robbery. *Davis*, 872 P.2d at 617 (Mosk, J., dissenting). Nonetheless, Justice Mosk stated that the jury declined to follow the law given to them by the court and instead, returned a verdict of second degree murder, thus, exercising their power of nullification. *Id.*

180. *Davis*, 872 P.2d at 617.

181. *Id.* at 619. Justice Mosk charged that excluding the viability element in section 187(a) will provide draconian results in felony-murder situations. *Id.* at 618. In his opinion, the *Davis* decision would apply to the scenario where:

> [A]n unarmed 18-year-old with no criminal record enters a store during business hours, intending to shoplift a can of spray paint; when a security guard accosts him, his nerve fails and he bolts for the door; in his haste he accidentally knocks a woman shopper to the floor; unknown to anyone the woman is 7 weeks' pregnant, and the trauma of the fall causes her to miscarry.

Id. at 619. Justice Mosk explained, that prior to the majority's new interpretation, such a youth would be guilty at most of second degree burglary, punishable by a prison term up to three years. *Id.* Now, this teenager could be found guilty of first degree murder of a fetus on a burglary felony-murder theory. *Id.* In that event, his punishment would be at least 25 years to life in prison, and he could be sentenced to death. *Id.*

182. *Id.* Justice Mosk stated that, to apply felony murder to the unintentional death of a nonviable and invisible fetus that an individual did not know existed extends the rule beyond the purpose it was intended to serve. *Id.* He cited former California Justice Traynor, in People v. Washington, 402 P.2d 130 (Cal. 1965), as stating: "The felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability. Although it is the law in this state, *it should not be extended beyond any rational function that it is designed to serve*." *Id.* (quoting *Washington*, 402 P.2d at 134) (citations omitted).

183. *Id.* at 620. *See supra* note 178 for a discussion of jury nullification.

Amendment.[184]

E. THE MAJORITY'S CONSTRUCTION OF THE 1970 AMENDMENT TO PENAL CODE SECTION 187(A) WILL MAKE CALIFORNIA'S MURDER STATUTE THE MOST SEVERE IN THE UNITED STATES

Lastly, Justice Mosk declared, in most states, the killing of a fetus is not homicide.[185] In fact, Mosk asserted, "it appears that in no other state is it a capital offense to cause the death of a nonviable and invisible fetus that the actor neither knew nor had reason to know existed."[186]

Justice Mosk's personal research discovered various jurisdictions that have enacted statutes criminalizing the killing of a fetus, and he grouped these jurisdictions into three distinct categories. First, in at least thirteen jurisdictions, the killing of a fetus is not criminal unless the fetus is viable or is far beyond the gestational age of seven or eight weeks, the period prescribed by the majority opinion.[187] Second, in at least six

184. *Id. See* People v. Dillon, 668 P.2d 697 (Cal. 1983) (holding, on the facts of that case, that a sentence of life imprisonment for a seventeen year old youth, who was convicted of first degree felony murder, for killing a marijuana farmer, was cruel and unusual punishment).

185. *Davis*, 872 P.2d at 620.

186. *Id.*

187. *Id.* at 621. *See, e.g.,* IOWA CODE ANN. §707.7 (West 1993) (fetal killing after the second trimester is called "feticide"); N.Y. PENAL §125.00 (McKinney 1987) (homicide exists when the fetus is older than 24 weeks). In South Carolina fetal murder exists when the fetus is viable. *See* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that fetal murder exists when the fetus is viable); *See* Commonwealth v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989) (holding that a defendant can be convicted for the common law crime of murder where the fetus was viable, but has not addressed the issue of whether such viability is a prerequisite to culpability). In England, a statute provides that any person who intentionally causes a fetal death commits the crime of "child destruction" provided that the fetus was capable of being born alive. Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, ch. 34 § 1.

In eight of these thirteen states the relevant statutes criminalize the killing of an "unborn quick child." *See* FLA. STAT. ANN. § 782.09 (West 1992); GA. CODE ANN. § 16-5-80 (1992); MICH. COMP. LAWS ANN. § 750.322 (West 1991); MISS. CODE ANN. § 97-3-37 (1994); NEV. REV. STAT. § 200.210 (1991); OKLA. STAT. ANN. TIT. 21, § 713 (WEST 1983); R.I. GEN LAWS ANN. § 11-23-5 (1994); WASH. REV. CODE ANN. § 9A.32.060 (West 1988). Justice Mosk noted that in all but one of these eight states, fetal homicide is punished as "manslaughter"; in Georgia, he explained, it is deemed "feticide." *Davis*, 872 P.2d at 621.

jurisdictions, the legislature has expressly declared that the killing of a product of conception is criminal regardless of its gestational age.[188] Finally, in at least six jurisdictions, the statute is facially silent on the matter of minimum gestational age for a conviction of fetal murder.[189]

Justice Mosk pointed out that California is one of these six states within the third category. In the other five states, however, the punishment for the offense is far less harsh than California.[190] Even in Utah, where the state murder statute

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188. *Id.* at 621-22. *See* ARIZ. REV. STAT ANN. § 13-1103 (1989); ARK. CODE ANN. § 5-13-201 (Michie 1993); N.M. STAT. ANN. § 30-3-7 (Michie 1994).

Contrary to the three states where the killing of a product of conception is not murder, Justice Mosk stated that in Illinois, the offense is called "intentional homicide of an unborn child." *See* ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993). "But the statute further provides that the act is not homicide unless the actor actually 'knew that the woman was pregnant.'" *Id.* at subd. (a)(3). "And the punishment for this crime 'shall be the same as for first degree murder, *except that the death penalty may not be imposed.*'" *Id.* at subd. (d) (emphasis added). Minnesota and North Dakota label the offense as the "murder of an unborn child." *See* MINN. STAT. ANN. §§ 609.266, 609.2661 (West 1987); N.D. CENT. CODE § 12.1-17.1-01, 12.1-17.1-02 (Supp. 1993). In Minnesota the offense is first degree murder if the actor kills the unborn child either with premeditation and "with intent to effect the death of the unborn child or another," or while committing a listed felony; however, the maximum punishment is life imprisonment. MINN. STAT. ANN. § 609.2661. In North Dakota the maximum penalty is life imprisonment. *See* N.D. CENT. CODE § 12.1-32-01 (1985).

189. *Davis,* 872 P.2d at 623. *See, e.g.,* CAL. PENAL CODE 187(a) (West 1988); IND. CODE ANN. § 35-42-1-6 (Burns 1994); LA. REV. STAT. ANN. § 14:32.6 (West Supp. 1990); N.H. REV. STAT. ANN. § 631:1 (Supp. 1994); S.D. CODIFIED LAWS ANN. § 22-17-6 (1988); UTAH CODE ANN. § 76-5-201(1) (1990).

190. *Davis,* 872 P.2d at 623. Justice Mosk explained that in four of these five states, the killing of a fetus is given special treatment and not punished as severely as in California. He stated:

> Thus, in Indiana one who "knowingly or intentionally" terminates a pregnancy commits feticide, punishable by imprisonment for four years with a possible fine of not more than $10,000. In Louisiana one who kills an unborn child intentionally or in the commission of a listed felony commits first degree feticide punishable by imprisonment for not more than 15 years. In South Dakota one who "intentionally kills a human fetus by causing an injury to its mother" commits a felony punishable by imprisonment for 10 years with a possible fine of $10,000. And in New Hampshire one who "Purposely or knowingly causes injury to another resulting in miscarriage or stillbirth" commits first degree assault punishable by imprisonment for not more than 15 years with a possible fine not to exceed $4,000.

Id. (citations omitted). *See* IND. CODE ANN. §§ 35-42-1-6, 35-50-2-6 (Burns 1994);

most closely resembles California's, the murder of a fetus is considered a capital offense "only if the actor caused the death of the unborn child '*intentionally or knowingly*,' even in a felony-murder case."[191] Justice Mosk maintained that it was highly unlikely that the legislature intended to make California's murder statute the most severe in the United States.[192]

F. REMAND FOR A NEW TRIAL WOULD BE FUTILE

Justice Mosk concluded his dissent by arguing that a retrial on the murder count would be a "total waste of court time, prosecutorial resources and taxpayers' money."[193] He explained that, if a retrial occurred, the prosecution would be required to prove beyond a reasonable doubt that Flores' fetus was viable and that survival was probable rather than possible.[194] Justice Mosk believed that this task would be futile because "none of the medical experts who testified at [Robert Davis'] trial believed that the fetus had a 'probable' chance of survival."[195] He asserted that the prosecution had taken "its

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LA. REV. STAT. ANN. § 14:32.6 (West Supp. 1990); N.H. REV. STAT. ANN. §§ 631:1, subd. I(c), 651:2 (Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-17-6, 22-6-1 (1988).

191. *Id.* (emphasis added). *See* UTAH CODE ANN. § 76-5-201(1) (1990). The statute reads:

> (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child.
> (b) There shall be no cause of action for criminal homicide against a mother or a physician for the death of an unborn child caused by an abortion.

Id.

192. *Davis*, 872 P.2d at 623. Justice Mosk stated:

> I cannot believe that in amending section 187 to make that act a crime the Legislature also intended to make California the only state in the Union in which it is a capital offense to cause the death of a nonviable and invisible fetus that the actor neither knew nor had reason to know existed. Yet this, again, is where the lead opinion's construction of the 1970 amendment inexorably takes us. I dissent from that construction.

Id.

193. *Id.* at 624.

194. *Davis*, 872 P.2d at 624. The prosecution would have to prove that the fetus had greater than a 50% chance of survival outside the mother's womb. *Id.*

195. *Id.* (quoting *Davis*, 872 P.2d at 602). The prosecution called three physi-

best shot" at proving viability beyond a reasonable doubt, but could not successfully do so.[196] Thus, Justice Mosk opined, it would be highly improbable that the prosecution could establish a better case for viability in a retrial, "let alone prove that element beyond a reasonable doubt."[197]

VIII. CRITIQUE

A. THE LEGISLATURE ONLY INTENDED VIABLE FETUSES TO BE COVERED BY ITS 1970 AMENDMENT

The author agrees with the dissent that the legislature did not deliberately intend to exclude the term "viable" from the 1970 amendment of California Penal Code section 187(a).[198] The *Davis* majority failed to offer any substantial evidence demonstrating the legislature's intent to purposely omit the term "viable" from the statute. Justice Mosk, to the contrary, correctly pointed out that the 1970 amendment to section 187 was enacted in direct and emphatic response to the California Supreme Court's holding in *Keeler v. Superior Court*.[199] The legislature hastily amended the statute to express its outrage at a judicial opinion that permitted a man who intentionally killed the viable fetus of his former wife to escape criminal culpability.[200]

B. LEGISLATIVE SILENCE DOES NOTE SIGNAL ACQUIESCENCE

In his dissent, Justice Mosk demonstrated that the legislature's initial intention was to include only viable fetuses within California's murder statute.[201] Nevertheless, the au-

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cians who were all experts in fetal viability and not a single physician believed that Flores' fetus "probably" would have survived outside its mother's womb. *Id.*

196. *Id.*

197. *Id.* Justice Mosk explained that the facts and medical testimony would not change in a retrial. *Id.* Thus, there would be no reason to compel the physicians to repeat their tedious testimony or to put the victim and her family through this tragic event once again. *Id.*

198. *See* People v. Davis, 872 P.2d 591, 607-15, (Cal. 1994) (Mosk, J., dissenting).

199. *See id.* at 607-10. *See Keeler,* 470 P.2d 617 (Cal. 1970).

200. *See Davis*, 872 P.2d at 610. *See supra* notes 137-52 and accompanying text for a summary of Justice Mosk's discussion regarding *Keeler*.

201. *See Davis*, 872 P.2d at 607-10.

thor believes that Justice Mosk was mistaken in his assertion that the legislature acquiesced in eighteen years of appellate court holdings requiring viability for fetal murder because the legislature agreed with the interpretation of those courts.[202] Justice Kennard, in her concurrence, was correct in pointing out that the legislature was powerless to delete the judicially imposed viability requirement of section 187 due to the constitutional mandate set by prior appellate court decisions.[203] Thus, the fact that the legislature had not responded to these subsequent appellate court rulings by once again amending the statute did not demonstrate its agreement with these courts' interpretations.[204] Because the courts' relied on *Roe v. Wade* in imposing the viability requirement, whether or not the legislature agreed with their holdings, its silence signaled nothing more that its acquiescence in those courts' interpretation of the United States Constitution.[205]

Regardless of the correct statutory interpretation, now that the California Supreme Court has drawn its own conclusion regarding the legislature's intent and ruled that viability is no longer a requirement for fetal murder, the court has provided the legislature the perfect opportunity to clarify its actual intent.

C. RECOMMENDATIONS

1. *California Should Enact a Separate Feticide Statute*

The California Legislature should enact a separate statute to punish the killing of a fetus. Separating feticide from homicide would eliminate the turmoil that is caused by the categorization of both offenses within California's general murder statute.[206] Most states do not criminalize the killing of a fetus in the same statute that criminalizes "homicide."[207] Instead,

202. *See Davis*, 872 P.2d at 603 (Kennard, J., concurring).
203. *See id.*
204. *See id.*
205. *See id.*
206. *See* Maura Dolan, *Assault Causing Miscarriage Can Be Murder*, L.A. TIMES, May 17, 1994, at A1.
207. *See Davis*, 872 P.2d at 620 (Mosk, J., dissenting) (citing State v. Trudell,

these states statutorily distinguish between the two offenses.[208] For example, in Indiana one who knowingly or intentionally terminates a pregnancy commits "feticide."[209] One who knowingly or intentionally kills another human being, by contrast, commits "murder."[210]

By criminalizing the killing of a fetus under a feticide statute rather than under a more general murder statute, the legislature would help diffuse the controversy that abortion activists have breathed into this issue.[211] A separate feticide statute would recognize the perpetual state interest in protecting the "potentiality of life" by permitting punishment of an actor who intentionally terminates a fetus.[212]

2. *Punishment Should Result Only Where Knowledge and Intent Are Present, Regardless of Fetal Viability*

Furthermore, the separate feticide statute should punish the intentional killing of a fetus regardless of viability. Criminals who knowingly and intentionally terminate a woman's fetus at any gestational age would be deemed to have committed feticide. They could face up to life imprisonment due to the state's interests in protecting the potentiality of life and punishing violent conduct that deprives a woman of her choice to have a child.[213] In this same situation, however, the death penalty would be too harsh because the termination of a fetus is not the taking of a "human life."[214]

3. *The Felony-Murder Rule Should Not Apply*

Lastly, California's felony-murder rule[215] would not apply

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755 P.2d 511, 515 (Kan. 1988)).

208. *See* IND. CODE ANN. § 35-42-1-6 (Burns 1994); LA. REV. STAT. ANN. § 14:32.6 (West Supp. 1995).

209. IND. CODE ANN. § 35-42-1-6.

210. *See* IND. CODE ANN. § 35-42-1-1 (Burns 1994).

211. *See* Dolan, *supra* note 206 (stating that anti-abortion advocates hail this decision as giving new rights to an unborn child).

212. *See Davis*, 872 P.2d at 599.

213. *See id.* at 604 (Kennard, J., concurring).

214. *See* People v. Smith, 129 Cal. Rptr. 498, 502 (Ct. App. 1976).

215. *See* CAL. PENAL CODE § 189 (West Supp. 1995). Under the felony-murder

to the recommended feticide statute when the killing of a fetus is unintentional and without the person's knowledge that a fetus exists.[216] Chief Justice Traynor's opinion in *People v. Washington*,[217] echoed by Justice Mosk in his *Davis* dissent, correctly pointed out that the application of the felony-murder doctrine erodes the relation between criminal liability and moral culpability.[218] Thus, the doctrine should not be "extended beyond any rational function it was designed to serve."[219]

Clearly, where a perpetrator acts with knowledge and intent, it is rational to punish the actor for his or her purposefully violent conduct. However, where one kills a fetus unintentionally and without knowledge of its existence, the application of the felony-murder rule to punish a defendant extends the rule beyond any rational function it was designed to serve.[220] The California Legislature adopted the felony-murder rule in 1872,[221] whereas the killing of a fetus was not criminally proscribed until 1970.[222] Thus, when it chose to criminalize unintentional killings that occur during the commission of certain enumerated felonies, the California Legislature could not have envisioned that this statute would one day apply to fetuses. The application of the felony-murder rule in this instance would not only create unjust decisions, but would create irrational and undeserving punishments as well.[223]

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rule, a murder committed during a listed felony is murder in the first degree as a matter of law. *Id.*

216. *See* IND. CODE ANN. § 35-42-1-6 (Burns 1994).

217. 402 P.2d 130 (Cal. 1965).

218. *See Davis*, 872 P.2d at 619 (citing People v. Washington, 402 P.2d 130 (Cal. 1965).

219. *See Davis*, 872 P.2d at 619 (Mosk, J., dissenting) (quoting *Washington*, 402 P.2d 130).

220. *See id.* (citing People v. Washington, 402 P.2d 130 (Cal. 1965)).

221. CAL. PENAL CODE § 189 (West 1988).

222. *See* Stats. 1970, ch. 1311, § 1, p. 2440.

223. *See Davis*, 872 P.2d at 619 (Mosk, J., dissenting). Under the recommended statute, the defendant in *Davis*, would not be convicted for either feticide or felony murder.

Qureshi: California's Fetal Murder Statute

IX. CONCLUSION

In *People v. Davis*,[224] the California Supreme Court held that the viability of a fetus is not a required element of fetal murder under California Penal Code section 187(a).[225] The court first explained why *Roe v. Wade* principles do not apply to the non-consensual third-party killing of a woman's fetus.[226] Next, the *Davis* court analogized California to other states where viability is not a requirement for fetal murder and used this analogy to illustrate why such a statute is not unconstitutional.[227]

Although the supreme court held that viability is unnecessary to convict a defendant of fetal murder, it determined that its new statutory interpretation judicially enlarged the statute and would violate Robert Davis' due process rights if applied to him.[228] Consequently, the court applied the former interpretation of the statute. Since Davis had been prejudiced by the trial court's incorrect jury instruction pertaining to the former interpretation, the court reversed and remanded the *Davis* case for a new trial.[229]

The *Davis* court's new interpretation of section 187(a) threatens to have a bearing on abortion rights because the opinion has been interpreted by abortion activists as implicitly determining "when life begins" as well as giving the fetus rights independent of the mother.[230] Consequently, many "pro-life" advocates have interpreted the *Davis* decision as precedent for asserting that human life begins at conception and deserves separate, individual rights. These pro-life advocates consider *Davis* a victory for their cause, for they believe that

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224. 872 P.2d 591 (Cal. 1994).

225. *Id.* at 593.

226. *Id.* at 597. The *Davis* court explained that the state has an interest in protecting the "potentiality of life," and a court may recognize an unborn fetus' interests in situations where these interests do not conflict with a mother's right to personal autonomy. *Id.*

227. *See id.* at 598-600.

228. *Davis*, 872 P.2d at 600.

229. *Id.* at 600.

230. *See* Maura Dolan, *Assault Causing Miscarriage Can Be Murder*, L.A. TIMES, May 17, 1994, at A1.

the *Davis* decision is an official recognition that a fetus is a human life at any stage of development.[231] Some "pro-choice" advocates, to the contrary, have expressed disagreement with a law that treats the fetus as a victim independent of the mother.[232] They fear that this ruling could pave the way for other legislation regulating the behavior of pregnant women.[233] These pro-choice advocates argue that lawmakers may eventually attempt to punish pregnant women for behavior, such as smoking and drinking, which is injurious to their fetuses.[234] Whether or not these divergent viewpoints are warranted, the *People v. Davis* holding has set a controversial precedent that adds fuel to the fire of an already heated and passionate abortion debate.

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231. *Id.*

232. *See id.*

233. *Id.*

234. *Id.*

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