CHAPTER ELEVEN
HOMICIDE

Perhaps no other law affects us as much as murder. Unfortunately, we find that all too often those who fall victim to murder are often either part of the victim's family or in their immediate circle of friends and relatives. Murders in criminal acts pale in comparison to murders by family members. Criminal homicides can stem from a wide variety of circumstances. In some, it's part of a criminal plan. In others, it is an unintended consequence. In many cases, it is unintentional but due to the circumstances, the offender is criminally liable. In other cases, it may be either justifiable or excusable. In addition, the law covering homicide cases can be quite extensive, ranging from first degree murder with special circumstances, which warrant the death penalty, to a lesser degree of manslaughter, which could merely lead to a probation sentence.

In law, homicide has essentially evolved into three major forms of homicide:

- ***Justifiable Homicide***
- ***Excusable Homicide***
- ***Criminal Homicide***
    - ***Murder***
    - ***Manslaughter***

Murder typically has the definition similar to "the killing of another (human being) with malice aforethought, or premeditation. This becomes an important distinction later in the discussion on first degree murder statutes. The term ***malice*** refers to the intentional killing without any justification, excuse or lawful reason. The absence of premeditation or malice, may be a case of "manslaughter," which still is an intentional killing, but often done in the sudden heat of passion or provocation by the victim.

TYPES OF CRIMINAL HOMICIDE

Today, the more general forms of homicide are divided into:

- First degree murder
- Second degree murder
- Voluntary manslaughter
- Involuntary manslaughter

MENS REA OF HOMICIDE

The criminal intent in the crime of homicide is a key factor in distinguishing between degrees of murder. The following factors must be considered, in that the death of the other person or fetus, must have been committed either:

- Purposely
- Knowingly
- Recklessly
- Negligently

Actus Reus and Criminal Homicide
In California, the crime of murder is defined in PC 187:
PC 187 Murder:
*(a) Murder is the **unlawful killing** of a **human being**, **or a fetus**, with **malice** aforethought.*
(b)This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:
(1)The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.
(2)The act was committed by a holder of a physician's and surgeon' s certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
(3)The act was solicited, aided, abetted, or consented to by the mother of the fetus.
(c)Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

Homicide of a Fetus

Interestingly, due to the time frame of when the MPC was developed, the definition of a "human being" was not clarified. The Model Penal Code, (MPC) Section 210.0, simply defined a human being as merely *"a person who has been born and is alive."* Obviously much has changed since this was drafted in 1962. Today, statutory laws do address the death of an unborn child, as demonstrated in the recent murder case involving the death of Lacy Peterson and her unborn son, Connor (the fetus). Her husband, Scott Peterson, was found guilty and sentenced to die for both murders.

Case law and legislatures have had to adapt to the medico-legal issue of just when the fetus is considered a human being. State statutes now generally include the death of a fetus in homicide law. For example the California statute of defining murder clearly includes the death of a fetus.

Note carefully the wording of PC 187 *Murder:*
(a) Murder is the unlawful killing of a human being, <u>or a fetus</u>, with malice aforethought.

Legal vs. Medical issues
When is a fetus "legally" a "human being?" Is this a legal or medical definition as we see in the dilemma with the insanity defense? The words "or a fetus" were added by the legislature in 1970. The California Supreme Court later interpreted "fetus" to apply "beyond the embryonic stage of seven to eight weeks." (*People v. Davis*, 1994)[1] In addition, Penal Code § 190.2(3) makes a defendant eligible for capital punishment if convicted of more than one murder, and the California Supreme Court ruled that fetal homicide ***is*** included under this provision as well (*People v. Dennis*, 1998).[2]

Clarifying how we get to even be a fetus, much less a fully developed human being, is a lesson in biology, chemistry and human development.

Initially we're all single cell Zygotes before we are a fully formed baby. Our development process includes the following stages: :

- Germinal – First Two weeks from conception
- Embryonic - 3-8 weeks.
- Fetal - 9th week until birth

[1] *People v. Davis* (1994) 7 Cal.4th 797, 814-815 [30 Cal. Rptr. 2d 50, 872 P.2d 591].
[2] People v. Dennis (1998) Cal.4th 468 [71 Cal. Rptr. 2d 680, 950 P.2d 1035]

- Age of viability – 22 weeks, there is a less than 50%, or rare, chance of survival.
- At 24 Wks., there is at least a 50-50 chance of survival.
- By 28 weeks, the fetus should be around 3lbs. and has a 95% chance of survival[3]

The medical issue of just when a fetus is a human being is complex. The court, in Roe v. Wade, defined viable to mean capable of prolonged life outside the mother's womb. It extended to included fetuses that doctors expected to be sustained by respirators. The court has generally accepted the conventional medical wisdom that a fetus becomes viable at the start of the last third of a pregnancy, the third trimester, sometime between the 24th and 28th week (a pregnancy usually lasts 38 weeks).

Because the point of viability varies, the court ruled it could only be determined case by case and by the woman's own doctor. Even if the fetus is viable, the court said, states could not outlaw an abortion if the woman's life or health was at stake.[4] The legal question arises then, in particular to the death of a fetus, at what point does life actually begin, and at what point can we hold another responsible for the death of the fetus?

Some may argue (and do!) that medically performed consensual abortions are in fact "murder," but the law, under "Roe v Wade (1972) is still the "law of the land," and as such, those are not legally murder. Although there are varying definitions from state to state as to what point in the development of the fetus would their death be a murder, under circumstances not included in legal abortions, we are bound by the Roe v Wade decision as to the definition of when the fetus is viable or not. The recent case of Laci Peterson's unborn child stands as a mute statement that the taking of his life, despite being yet unborn, still is a crime. Peterson's unborn son, "Connor," was 33 weeks old on the day she went missing.
In a California Supreme Court case, [5]*People v. Taylor (2004)*, [6] the court recently upheld a murder conviction of a man who shot a pregnant woman to death, and then argued that he had not known she was pregnant, thus he couldn't be convicted of two homicides. The case is also used as one of your Case Study assignments for the chapter.

Harold Taylor was convicted of two counts of murder in the 1999 shooting deaths of Patty Fensler and her 11-week to 13-week-old unborn child. A state appeals court reversed the fetal homicide conviction, saying the law did not apply to Taylor because he was not aware of the pregnancy. The California Supreme Court reinstated the conviction, ruling that it is not necessary for the state to prove that an attacker knew of the existence of a fetal victim, as long as the state proves criminal intent towards some victim.

Justice Janice Rogers Brown wrote for the six-justice majority: "Had one of Fansler's other children died during defendant's assault, there would be no inquiry into whether defendant knew the child was present for implied malice murder liability to attach. Similarly, there is no principled basis on which to require defendant to know Fansler was pregnant to justify an implied malice murder conviction as to her fetus. In battering and shooting Fansler, defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered."
NRLC Federal Legislative Director Douglas Johnson commented, "This ruling makes clear that under California law, as under the federal Unborn Victims of Violence Act, if criminal intent towards one victim is proved, a criminal will be held responsible for the harm he does to other victims as well,

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[3] The Developing Person through childhood and adolescence, 6th ed. , Berger, Kathleen Stassen, Worth Publishers, NY 2003 Page 105-107
[4] Fetal Viability: Franklin Foer. *http://www.slate.com/id/1060/*
[5] http://www.nrlc.org/Unborn_Victims/CASupremeCourtruling040504.html
[6] People v. Taylor, (2004) 32 Cal. 4th 863

including unborn children. This legal doctrine will serve to deter many attacks, including many attacks on women and girls who are not actually pregnant."

Failing to Count the Fetus as a Human Being: The Old California Rule
In 1970, the California courts faced the question whether a viable fetus would count as a "human being" for purposes of the state's murder law. The defendant in the case, *Keeler v. Superior Court*, [7]had assaulted his ex-wife after learning that she was carrying another man's child. Upon seeing her swollen belly, he pushed her, shoved his knee into her abdomen, and struck her until she fainted, declaring to her his intention to "stomp it out of you." He succeeded in his objective and the fetus -- whom doctors attempted to deliver by a Caesarean section, at five pounds -- died in utero of the trauma sustained during the assault.

Keeler brutally attacked his pregnant ex-wife and was subsequently charged with both the attack on her and the murder of her baby. On a special application to arrest the proceedings, Keeler argued that the word "human being" in the homicide statute should not be understood to include a fetus that had not yet been born at its time of death.

The Supreme Court of California agreed. It concluded that, in light of the statute's legislative history, prosecuting the defendant for murder in connection with killing a fetus that had not yet been born would violate the Due Process Clause of the Fourteenth Amendment.

In response to the ruling in *Keeler*, the California legislature amended its murder statute to add "fetus" to the class of victims whose malicious killing would qualify as murder, coupled with an exception for consensual abortions

Historical perspective: The Teresa Keeler case:
Teresa Keeler was eight months pregnant on the winter day in 1969 when her ex-husband attacked her. Robert Keeler, whom she had divorced the previous fall, blocked the path of her car on a narrow mountain road near Stockton, California, and asked her if she was expecting a child by her new lover, Ernest Vogt. When she ignored the question, he pulled her from the vehicle and seeing her swollen belly, said, "I'm going to stomp it out of you." He kneed her in the abdomen and then beat her unconscious. At the hospital, Keeler delivered a stillborn girl. Her head was severely fractured from the blow to Teresa Keeler's stomach. See Case Study: **Keeler v. Superior Court, 2 Cal. 3d 619 (1970)**

That assault three decades ago paved the way for a law against fetal homicide that was used in the Laci Peterson, to include two counts of murder when a pregnant woman is killed.

In a recent case in Pennsylvania, the court had to decide a fetal homicide case (where the fetus was 15 weeks old. [8]The state, under Pennsylvania law, had to prove only that the implanted embryo or fetus in the mother's womb was living, that it once had a life and that it has life no longer." This is very similar to the definition given by the Model Penal Code, Section 210.0, (1) in defining a human being as a “person who has been born and is alive.” Pennsylvania is one of 27 states that have fetal homicide laws, which have been widely promoted by abortion-rights opponents to bolster their arguments that fetuses should be recognized as living human beings. Last year, the Pennsylvania Supreme Court ruled that the law (Fetal homicide law) could be used to prosecute cases of murder, voluntary manslaughter and aggravated

[7] Keeler v. Superior Court, 2 Cal. 3d 619
[8] Commonwealth (of Penn.) v. Matthew Bullock (2004)
www.courts.state.pa.us/OpPosting/Superior/out/a46026_04.pdf

assault. Other states have upheld fetal homicide laws in similar cases. [9] The rationale of the decision was largely based on the fact that while an abortion can be conducted legally as a choice within time frames set by Roe v. Wade, a homicide is not a choice and the mother has no decision in the matter.

When life begins and ends are not merely legal, scientific or medical terms, and despite the Wade ruling, not everyone agrees. In homicide cases, where a fetus is also a victim, the emotional toll has to be considered as does the effect on the victim's families and the community itself. Should life end with the cessation of breathing, or brain waves? What about people in comas and who are on life support systems, without which they would surely die? In particular, those who have an absolute absence of brain waves yet are kept alive on artificial respirators? We saw this played out on the world stage with the recent death of Terry Schiavo. We've seen other cases where even loved ones have committed what are referred to as "mercy killings." In most cases, the person is in fact charged with homicide, despite their motives.

Mens Rea of Homicide

Remember that the criminal intent in the crime of homicide is a key factor in distinguishing between degrees of murder. The following factors must be considered, in that the death of the other person or fetus, must have been committed either:

- Purposely
- Knowingly
- Recklessly
- Negligently

PC 189. Murder - Degrees

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under (Sex Offenses) Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

The mens rea or criminal mind (intent) requires that the intent be premeditated and there is as deliberate intent to kill another person or the intent to commit another felony specified in the statute to be considered the ***"Felony Murder Rule."***

The Felony Murder Rule

The felony murder role is a way to attach liability to offenders, when, in the course of some criminal act, an "unintended" victim dies as a result. Unfortunately, these are essentially collateral deaths to a felony where the death is unintentional. If committed during certain felonies, specified in the first degree murder statute, the death penalty may be applied. While these may vary between states, the issue is the same; if during the commission of a specified felony, someone dies during that event, you are held liable for that death, as though you intended to cause it. This is clearly linked to the *"proximate cause"* rule.

[9] Judge Upholds Pennsylvania's Fetal Homicide Law in Fetal Murder Case , January 28, 2003, http://www.themediaproject.com/news/itn/012803.htm

The Non-Triggerman Rule

What about those offenders who are participants in a violent crime, but do not themselves pick up a weapon, and where another person does the actual killing? This means that while someone else may have actually committed the murder, any co-principal or accomplice may be liable for the death, as though they had actually done the killing. As such they may be just as liable also for the most severe sentence possible, the death penalty.

For example, in California law**,** PC 190.2 (b).." ***every person, <u>not the actual killer</u>, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony… which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance are found.***

Manslaughter
Manslaughter is a term for homicide, but the element of premeditation or specific intent is missing. There are two types of manslaughter; **Voluntary and Involuntary.**

Voluntary Manslaughter
Actus Reus of Voluntary Manslaughter
Voluntary Manslaughter still requires the killing of another person, but there are certain elements that are missing from murder cases.

The real difference is in the criminal intent. The term "Voluntary" manslaughter refers to a killing where the defendant did intend to kill the victim or cause them serious bodily harm, but it was due to specific circumstances. The most common are the sudden heat of passion and adequate provocation on the behalf of the victim, or an honest, but not reasonable belief, that the killing was necessary for self defense. Note the emphasis on the reaction was *not reasonable* under the circumstances. This is for the trier of fact to decide**.**

The degree of provocation usually includes:

- Mutual combat where a fight ensues and someone is killed
- Assault and battery
- Trespass or home invasion
- Adultery

Provocation
The type of provocation must be of such a degree that it is sudden, nearly uncontrollable, and enough to "inflame the passions" of a reasonable person. Remember the test of "reasonableness" is whether or not the jury would feel that they would do the same thing under the same set of circumstances. Words themselves are never enough in a legal sense, to warrant the killing of another. Racial slurs, obscene gestures or words, hateful, vile words, are all legally unable to warrant an emotional response strong enough to kill, regardless of the way in which the words were delivered.

Involuntary Manslaughter
There are three kinds of involuntary manslaughter:

- **Reckless manslaughter**
- **Negligent manslaughter**
- **Unlawful act manslaughter,** sometimes referred to as "misdemeanor manslaughter."

Criminal Recklessness requires the actual "conscious" creation of a substantial inherently dangerous act, with an unjustifiable risk.

Criminal Negligence, referred also as *gross criminal negligence* means one has created a substantial and unjustifiable risk, where the defendant should have been aware of the dangers and risks, but wasn't. As a result someone was killed. This is also seen in vicarious liability cases, where a supervisor is held liable for a work-related accident that should have been foreseen.

The ***Actus Reus of involuntary manslaughter*** includes the killing of another person.
The ***Mens Rea of involuntary manslaughter*** is where the act creates the risk of killing or seriously injuring someone either recklessly or negligently.

The circumstances require the death be committed during the commission of some unlawful act and those acts trigger a series of events that lead to someone's death.

California law defines manslaughter as:

PC 192. Manslaughter
Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
(a) Voluntary-upon a sudden quarrel or heat of passion.
(b) Involuntary-in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.
(c) Vehicular

Time of Death
Does the victim actually have to die within a certain time frame, for the offender to be charged with the murder? Yes, they do! While states may statutorily set the time frame, typically it is within one year. However, California changed the time and not only extended it to three years and a day, also included the caveat that there is a rebuttable presumption that the death was not criminal, which must be proven by the prosecution. The defense will argue that the death was not criminal, due to the extensive medical treatment, length of time before the victim actually died, etc. This gives the prosecution a change to "rebut" that presumption and present their facts to support that the victim actually did die as a direct result of the crime, and not merely due to medical circumstances, sometimes years later. Again, this relates directly back to the issue of the *"proximate cause"* rule.

PC 194.Death of Victim Within Three Years and a Day
To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause of death administered. If death occurs beyond the time of three years and a day, there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the burden of overcoming this presumption. In the computation of time, the whole of the day on which the act was done shall be reckoned the first.

What if the death or killing was truly an accident? Are you still liable? Or if, under the circumstances, you killed the person in self defense? What about cases where the police kill someone or in a legal execution? The following statutes answer most of these questions.

Accidental, Excusable and Justifiable Homicide

PC 195.Accidental and Excusable Homicide
Homicide is excusable in the following cases:
1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

PC 196. Justifiable Homicide by Public Officer
Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either -
1 .In obedience to any judgment of a competent Court; or,
2 .When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

PC 197. Killing in Defense of Self or Property, in Arresting Fugitive or Quelling Riot
Homicide is also justifiable when committed by any person in any of the following cases:
1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,
4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

PC 198. Limitation of Self Defense and Defense of Property Rule
A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

PC 198.5. Home Protection Bill of Rights
Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. As used in this section, great bodily injury means a significant or substantial physical injury.

PC 199. Justifiable or Excusable Homicide; Full Acquittal Required
In these cases, there actually is a finding that the killing was justifiable or excusable, the likelihood of them going to trial is remote. If they do, and the jury finds that they were in fact justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

We've seen the evolutionary process of homicide laws, to include most any form of the death of another under law, as punishable, excusable or justifiable. The criminal act and the criminal intent, particularly the latter, are the keys to the various degrees of homicide. The various rules of murder, such as the "felony" murder rule extend the liability or culpability of offenders or even those who are co-principals or accomplices to be liable for the death of virtually anyone killed as a result of the crime or attempted crime that is specifically mentioned in state statutes. The difference between murder and manslaughter should be clear; the lack of premeditation or "malice aforethought." Without it, you have manslaughter at best. The issues of recklessness or negligence also create a liability, even for those who may be removed from the scene itself, especially on the part of supervisors and others responsible for the welfare and safety of others. States may vary on statutory specifics, but the law remains constant; the message is as old as the Old Testament, "Thou shall not kill," and those who, at least in many cases, will be punished.

Review Questions:
1. What are the key differences between voluntary and involuntary manslaughter?
2. Define the term “Malice”
3. Describe the “Felony Murder Rule”
4. Just what does the time frame that a victim dies have to do with a successful prosecution for murder?
5. What is the key element missing in manslaughter from homicide?

Web Resources

National Right to Life Coalition: Article on Supreme Court Rulings:
http://www.nrlc.org/Unborn_Victims/CASupremeCourtruling040504.html

Article on Fetal Viability: Franklin Foer. http://www.slate.com/id/1060/

Commonwealth (of Penn.) v. Matthew Bullock (2004)
www.courts.state.pa.us/OpPosting/Superior/out/a46026_04.pdf

Article: Judge Upholds Pennsylvania's Fetal Homicide Law in Fetal Murder Case , January 28, 2003,
http://www.themediaproject.com/news/itn/012803.htm

Case Study #1: **2 Cal. 3d 619 People vs. Keeler (1970)**
This is a benchmark case for deciding the issue of whether or not a fetus is to be "counted" in homicide cases.

Discussion Question: Assuming your role would be that of a defense attorney, how would you argue the case that the fetus should not be considered as a "human being," and thus not to be considered in a homicide case?

Facts
Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for 16 years. Unknown to petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Petitioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, "I hear you're pregnant. If you are you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car. . . . [It] wasn't roughly at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are. I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed and the fetus was examined *in utero*. Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would have been immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact.

Upon delivery the fetus weighed five pounds and was 18 inches in length. Both Mrs. Keeler and her obstetrician testified that fetal movements had been observed prior to February 23, 1969. The evidence was in conflict as to the estimated age of the fetus; n1 the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival.

Mrs. Keeler testified, in effect, that she had no sexual intercourse with Vogt prior to August 1968, which would have made the fetus some 28 weeks old. She stated that the pregnancy had reached the end of the seventh month and the projected delivery date was April 25, 1969. The obstetrician, however, first estimated she was at least 31 1/2 weeks pregnant, then raised the figure to 35 weeks in the light of the autopsy report of the size and weight of the fetus. Finally, on similar evidence an attending pediatrician estimated the gestation period to have been between 34 1/2 and 36 weeks. The average full-term pregnancy is 40 weeks.

Issue
In this proceeding for writ of prohibition we are called upon to decide whether an unborn but viable fetus is a "human being" within the meaning of the California statute defining murder (Pen. Code, § 187). We

conclude that the Legislature did not intend such a meaning, and that for us to construe the statute to the contrary and apply it to this petitioner would exceed our judicial power and deny petitioner due process of law.

An information was filed charging petitioner, in count I, with committing the crime of murder (Pen. Code, § 187) in that he did "unlawfully kill a human being, to wit Baby Girl Vogt, with malice aforethought." In count II petitioner was charged with wilful infliction of traumatic injury upon his wife (Pen. Code, § 273d), and in count III, with assault on Mrs. Keeler by means of force likely to produce great bodily injury (Pen. Code, § 245). His motion to set aside the information for lack of probable cause (Pen. Code, § 995) was denied, and he now seeks a writ of prohibition; as will appear, only the murder count is actually in issue. Pending our disposition of the matter, petitioner is free on bail.

I

Penal Code section 187 provides: "Murder is the unlawful killing of a human being, with malice aforethought." The dispositive question is whether the fetus which petitioner is accused of killing was, on February 23, 1969, a "human being" within the meaning of the statute. If it was not, petitioner cannot be charged with its "murder" and prohibition will lie.

Section 187 was enacted as part of the Penal Code of 1872. **(1)** Inasmuch as the provision has not been amended since that date, we must determine the intent of the Legislature at the time of its enactment. But section 187 was, in turn, taken verbatim from the first California statute defining murder, part of the Crimes and Punishments Act of 1850. (Stats. 1850, ch. 99, § 19, p. 231.) n2 Penal Code section 5 (also enacted in 1872) declares: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." We begin, accordingly, by inquiring into the intent of the Legislature in 1850 when it first defined murder as the unlawful and malicious killing of a "human being."

(2) It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form. (*Baker* v. *Baker* (1859) 13 Cal. 87, 95-96; *Morris* v. *Oney* (1963) 217 Cal.App.2d 864, 870 [32 Cal.Rptr. 88].) This is particularly appropriate in considering the work of the first session of our Legislature: its precedents were necessarily drawn from the common law, as modified in certain respects by the Constitution and by legislation of our sister states. n3

We therefore undertake a brief review of the origins and development of the common law of abortional homicide. (For a more detailed treatment, see Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (1968) 14 N.Y.L.F. 411 [hereinafter cited as Means]; Stern, *Abortion: Reform and the Law* (1968) 59 J.Crim.L., C. & P.S. 84; Quay, *Justifiable Abortion -- Medical and Legal Foundations II* (1961) 49 Geo.L.J. 395.) **(3)** From that inquiry it appears that by the year 1850 -- the date with which we are concerned -- an infant could not be the subject of homicide at common law *unless it had been born alive*. n4 Perhaps the most influential statement of the "born alive" rule is that of Coke, in mid-17th century: "If a woman be quick with childe, n5 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 [i.e., misdemeanor], 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).) In short, "By Coke's time, the common law regarded abortion as murder only if the foetus is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies." (Means, at p. 420.) Whatever intrinsic defects there may have been in Coke's work (see 3 Stephen, A History of the Criminal Law of England (1883) pp. 52-60), the common law accepted his views as authoritative. In the 18th century, for example, Coke's requirement that an infant be born alive in order to be the subject of

homicide was reiterated and expanded by both Blackstone n6 and Hale. n7

Against this background, a series of infanticide prosecutions were brought in the English courts in mid-19th century. In each, a woman or her accomplice was charged with murdering a newborn child, and it was uniformly declared to be the law that a verdict of murder could not be returned unless it was proved the infant had been born alive. Thus in *Rex* v. *Brain* (1834) 6 Car. & P. 349, 350, 172 Eng.Reprint 1272, the court instructed the jury that "A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after their birth. But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder." (Accord, *Rex* v. *Poulton* (1832) 5 Car. & P. 329, 172 Eng.Reprint 997; *Rex* v. *Enoch* (1833) 5 Car. & P. 539, 172 Eng.Reprint 1089; *Rex* v. *Crutchley* (1836) 7 Car. & P. 814, 173 Eng.Reprint 355; *Rex* v. *Sellis* (1836) 7 Car. & P. 850, 173 Eng.Reprint 370; *Reg.* v. *Reeves* (1839) 9 Car. & P. 25, 173 Eng.Reprint 724; *Reg.* v. *Wright* (1841) 9 Car. & P. 754, 173 Eng.Reprint 1039; *Reg.* v. *Trilloe* (1842) Car. & M. 650, 174 Eng.Reprint 674; see also cases collected in Atkinson, *Life, Birth, and Livebirth* (1904) 20 L.Q.Rev. 134, 139-145.)

Of these decisions, some pointed out that evidence of breathing is not conclusive because that function may begin before the infant is fully born (*Poulton, Enoch, Sellis*), while others observed that the infant can possess an "independent circulation" -- one of the tests used to determine live birth -- even though the umbilical cord may not yet be severed (*Reeves, Trilloe*). But all were in agreement that however live birth was to be proved, unless that event had occurred before the alleged criminal act there could be no conviction of homicide.

By the year 1850 this rule of the common law had long been accepted in the United States. As early as 1797 it was held that proof the child was born alive is necessary to support an indictment for murder (*State* v. *McKee* (Pa.) Addison 1), and the same rule was reiterated on the eve of the first session of our Legislature (*State* v. *Cooper* (1849) 22 N.J.L. 52). Although the precise issue in *Cooper* was whether an attempted abortion on a woman whose fetus had not yet "quickened" was a common law crime, the opinion begins by a recital of the common law rules on abortional homicide. In its argument the State took the position that attempted abortion was an offense against the person of the child, and the court replied that "the very point of inquiry is, whether that be at all an offense or not, and whether the child be *in esse*, so that any crime can be committed against its person. In regard to offences against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery." (*Id*. at p. 54.) In support of this proposition, the court then set out in full each of the passages of Coke, Blackstone, and Hale quoted hereinabove. (*Id*. at pp. 54-55.)

While it was thus "well settled" in American case law that the killing of an unborn child was not homicide, a number of state legislatures in the first half of the 19th century undertook to modify the common law in this respect. n8 The movement began when New York abandoned the common law of abortion in 1830. The revisers' notes on that legislation recognized the existing rule, n9 but nevertheless proposed a special feticide statute which, as enacted, provided that "The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." (N.Y. Rev. Stat. 1829, pt. IV, ch. 1, tit. 2, § 8, quoted in Means, at p. 443.) At the same time the New York Legislature enacted a companion section (§ 9) which, although punishing a violation thereof as second degree manslaughter, was in essence an "abortion law" similar to those in force in most states today. n10

In the years between 1830 and 1850 at least five other states followed New York and enacted, as companion provisions, (1) a statute declaring feticide to be a crime, punishable as manslaughter, and (2) a

statute prohibiting abortion. n11 In California, however, the pattern was not repeated. Much of the Crimes and Punishments Act of 1850 was based on existing New York statute law; but although a section proscribing abortion was included in the new Act (§ 45), the Legislature declined to adopt any provision defining and punishing a special crime of feticide.
(**4a)** We conclude that in declaring murder to be the unlawful and malicious killing of a "human being" the Legislature of 1850 intended that term to have the settled common law meaning of a person who had been born alive, and *did not intend the act of feticide* -- as distinguished from abortion -- to be an offense under the laws of California. (My emphasis)

Nothing occurred between the years 1850 and 1872 to suggest that in adopting the new Penal Code on the latter date the Legislature entertained any different intent. The case law of our sister states, for example, remained consonant with the common law. In *Abrams* v. *Foshee* (Cole ed. 1856) 3 Iowa 274, 278, the court noted that Iowa's feticide statute (Iowa Rev. Stat. 1843, § 10) had been repealed by the Iowa Code of 1851; it was contended that an unborn child is nevertheless "a *human being*, within the meaning of [Iowa Code] section 2508, which provides that whoever kills any human being, with malice aforethought, either express or implied, is guilty of murder." The court observed that "notwithstanding the infant in *ventre sa mere*, is treated by the law for some purposes, as born, or as a human being, yet we are not aware that it has been so treated, so far as to make the act of its miscarriage *murder*, unless so declared by statute. . . . When the child is born, however, it becomes a human being, within the meaning of the law; and if it shall then die, by reason of any potions or bruises it received in the womb, it would be murder in those who administered or gave them, with a view of causing the miscarriage." (*Ibid*.) Citing Blackstone, Coke, and other authorities, the court concluded that "an infant in *ventre sa mere*, is not a human being within the meaning of" the statute defining murder. (*Id*. at p. 279.) n12

Any lingering doubt on this subject must be laid to rest by a consideration of the legislative history of the Penal Code of 1872. The Act establishing the California Code Commission (Stats. 1870, ch. 516, § 2, p. 774) required the commissioners to revise all statutes then in force, correct errors and omissions, and "recommend all such enactments as shall, in the judgment of the Commission, be necessary to supply the defects of and give completeness to the existing legislation of the State. . . ." In discharging this duty the statutory schemes of our sister states were carefully examined, n13 and we must assume the commissioners had knowledge of the feticide laws noted hereinabove. n14 Yet the commissioners proposed no such law for California, and none has been adopted to this day.

That such an omission was not an oversight clearly appears, moreover, from the commissioners' explanatory notes to Penal Code section 187. After quoting the definitions of murder given by Coke, Blackstone, and Hawkins, the commissioners conclude: "A child within its mother's womb is not a 'human being' within the meaning of that term as used in defining murder. The rule is that it must be born. -- *Rex* vs *Brain*, 6 Car. & P., p. 349. That every part of it must have come from the mother before the killing of it will constitute a felonious homicide. -- *Rex* vs *Brain*, 6 Car. & P., p. 349; *Rex* vs *Crutchley*, 7 Car. & P., p. 814; *Rex* vs *Sellis*, 7 Car. & P., p. 850; *Rex* vs *Poulton*, 5 Car. & P., p. 329; 2 Bishop's Cr. Law, Secs. 541, 542." (Code Commissioners' Note, Pen. Code of Cal. (1st ed. 1872), p. 81.) The cited cases, of course, are among those we have discussed earlier as representing the settled common law rule that live birth is a prerequisite to a conviction of homicide.

(5) When there is persuasive evidence of a legislative intent contrary to the views expressed in code commissioners' notes, those views will not be followed in construing the statute. (See, e.g., *People* v. *Valentine* (1946) 28 Cal.2d 121, 138, 142-144 [169 P.2d 1] [contrary to commissioners' note, Legislature omitted important limitation of prior statute in codifying manslaughter provision of Penal Code].) Here, however, the views of the commissioners are in full accord with the history of section 187; and as we have seen, the Legislature made no significant change in that statute when it was codified into the Penal Code. **(6)** The rule is therefore applicable that "Reports of commissions which have proposed statutes that

are subsequently adopted are entitled to substantial weight in construing the statutes. [Citations.] This is particularly true where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill." (*Van Arsdale* v. *Hollinger* (1968) 68 Cal.2d 245, 249-250 [66 Cal.Rptr. 20, 437 P.2d 508].) n15

(7) It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute. (*Walsh* v. *Department of Alcoholic Bev. Control* (1963) 59 Cal.2d 757, 764-765 [31 Cal.Rptr. 297, 382 P.2d 337], and cases cited.) **(4b)** We hold that in adopting the definition of murder in Penal Code section 187 the Legislature intended to exclude from its reach the act of killing an unborn fetus.

II

(8a) The People urge, however, that the sciences of obstetrics and pediatrics have greatly progressed since 1872, to the point where with proper medical care a normally developed fetus prematurely born at 28 weeks or more has an excellent chance of survival, i.e., is "viable"; that the common law requirement of live birth to prove the fetus had become a "human being" who may be the victim of murder is no longer in accord with scientific fact, since an unborn but viable fetus is now fully capable of independent life; and that one who unlawfully and maliciously terminates such a life should therefore be liable to prosecution for murder under section 187. We may grant the premises of this argument; indeed, we neither deny nor denigrate the vast progress of medicine in the century since the enactment of the Penal Code. But we cannot join in the conclusion sought to be deduced: we cannot hold this petitioner to answer for murder by reason of his alleged act of killing an unborn -- even though viable -- fetus. To such a charge there are two insuperable obstacles, one "jurisdictional" and the other constitutional.

Penal Code section 6 declares in relevant part that "No act or omission" accomplished after the code has taken effect "is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation. . . ." **(9)** This section embodies a fundamental principle of our tripartite form of government, i.e., that subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch. (*People* v. *Knowles* (1950) 35 Cal.2d 175, 181 [217 P.2d 1]; *Harbor Comrs.* v. *Excelsior Redwood Co.* (1891) 88 Cal. 491, 493 [26 P. 375]; *People* v. *Hess* (1951) 104 Cal.App.2d 642, 685 [234 P.2d 65]; *In re Finley* (1905) 1 Cal.App. 198, 201 [81 P. 1041].) **(10)** Stated differently, there are no common law crimes in California. (*People* v. *Redmond* (1966) 246 Cal.App.2d 852, 862 [55 Cal.Rptr. 195]; *People* v. *Harris* (1961) 191 Cal.App.2d 754, 758 [12 Cal.Rptr. 916]; *In re Harder* (1935) 9 Cal.App.2d 153, 155 [49 P.2d 304].) "In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. [Citations.] **(11)** In order that a public offense be committed, some statute, ordinance or regulation prior in time to the commission of the act, must denounce it; likewise with excuses or justifications -- if no statutory excuse or justification apply as to the commission of the particular offense, neither the common law nor the so-called 'unwritten law' may legally supply it." (*People* v. *Whipple* (1929) 100 Cal.App. 261, 262 [279 P. 1008].)

Settled rules of construction implement this principle. **(12)** Although the Penal Code commands us to construe its provisions "according to the fair import of their terms, with a view to effect its objects and to promote justice" (Pen. Code, § 4), it is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings.

(*People* v. *Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675].) Penal statutes will not be made to reach beyond their plain intent; they include only those offenses coming clearly within the import of their language. (*De Mille* v. *American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 156 [187 P.2d 769, 175 A.L.R. 382].) Indeed, "Constructive crimes -- crimes built up by courts with the aid of inference, implication, and strained interpretation -- are repugnant to the spirit and letter of English and American criminal law." (*Ex parte McNulty* (1888) 77 Cal. 164, 168 [19 P. 237].)

(8b) Applying these rules to the case at bar, we would undoubtedly act in excess of the judicial power if we were to adopt the People's proposed construction of section 187. As we have shown, the Legislature has defined the crime of murder in California to apply only to the unlawful and malicious killing of one who has been born alive. We recognize that the killing of an unborn but viable fetus may be deemed by some to be an offense of similar nature and gravity; but as Chief Justice Marshall warned long ago, "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." (*United States* v. *Wiltberger* (1820) 18 U.S. (5 Wheat.) 76, 96 [5 L.Ed. 37, 42].) Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature. n16 For a court to simply 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. Nor does a need to fill an asserted "gap" in the law between abortion and homicide -- as will appear, no such gap in fact exists -- justify judicial legislation of this nature: to make it "a judicial function 'to explore such new fields of crime as they may appear from time to time' is wholly foreign to the American concept of criminal justice" and "raises very serious questions concerning the principle of separation of powers." (*In re Davis* (1966) 242 Cal.App.2d 645, 655-656 & fn. 12 [51 Cal.Rptr. 702].)

The second obstacle to the proposed judicial enlargement of section 187 is the guarantee of due process of law. Assuming *arguendo* that we have the power to adopt the new construction of this statute as the law of California, such a ruling, by constitutional command, could operate only prospectively, and thus could not in any event reach the conduct of petitioner on February 23, 1969.

(13) The first essential of due process is fair warning of the act which is made punishable as a crime. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." (*Connally* v. *General Constr. Co*. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126].) "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (*Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453 [83 L.Ed. 888, 890, 59 S.Ct. 618].) The law of California is in full accord. (*In re Newbern*, *supra*, 53 Cal.2d 786, 792; *In re Davis*, *supra*, 242 Cal.App.2d 645, 650-651.)

(14) This requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws (U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 16). When a new penal statute is applied retrospectively to make punishable an act which was not criminal at the time it was performed, the defendant has been given no advance notice consistent with due process. And precisely the same effect occurs when such an act is made punishable under a preexisting statute but by means of an unforeseeable *judicial* enlargement thereof. (*Bouie* v. *City of Columbia* (1964) 378 U.S. 347 [12 L.Ed.2d 894, 84 S.Ct. 1697].)

In *Bouie* two Negroes took seats in the restaurant section of a South Carolina drugstore; no notices were posted restricting the area to whites only. When the defendants refused to leave upon demand, they were arrested and convicted of violating a criminal trespass statute which prohibited entry on the property of

another "after notice" forbidding such conduct. Prior South Carolina decisions had emphasized the necessity of proving such notice to support a conviction under the statute. The South Carolina Supreme Court nevertheless affirmed the convictions, construing the statute to prohibit not only the act of entering after notice not to do so but also the wholly different act of remaining on the property after receiving notice to leave.

The United States Supreme Court reversed the convictions, holding that the South Carolina court's ruling was "unforeseeable" and when an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (378 U.S. at pp. 354-355 [12 L.Ed.2d at p. 900].) Analogizing to the prohibition against retrospective penal legislation, the high court reasoned "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates* a *crime*, or makes it *greater* than it was, when committed.' *Calder* v. *Bull*, 3 Dall. 386, 390, 1 L.Ed. 648, 650. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith* v. *Cahoon*, 283 U.S. 553, 565, 75 L.Ed. 1264, 1273, 51 S.Ct. 582. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. *Id*., at 61." (Fn. omitted.) (*Id*. at pp. 353-354 [12 L.Ed.2d at pp. 899-900].)

The court remarked in conclusion that "Application of this rule is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral." (*Id*. at p. 362 [12 L.Ed.2d at p. 905].) In the case at bar the conduct with which petitioner is charged is certainly "improper" and "immoral," and it is not contended he was exercising a constitutionally favored right. **(15)** But the matter is simply one of degree, and it cannot be denied that the guarantee of due process extends to violent as well as peaceful men. The issue remains, would the judicial enlargement of section 187 now proposed have been foreseeable to this petitioner?

It is true that section 187, on its face, is not as "narrow and precise" as the South Carolina statute involved in *Bouie*; on the other hand, neither is it as vague as the statutes struck down in *Connally* and *Lanzetta*. n17 Rather, section 187 bears a plain, common sense meaning, well settled in the common law and fortified by its legislative history in California. In *Bouie*, moreover, the court stressed that a breach of the peace statute was also in force in South Carolina at the time of the events, and that the defendants were in fact arrested on that ground and prosecuted (but not convicted) for that offense. **(16a)** Here, too, there was another statute on the books which petitioner could well have believed he was violating: Penal Code section 274 defines the crime of abortion, in relevant part, as the act of "Every person who . . . uses or employs any instrument *or any other means whatever*, with intent thereby to procure the miscarriage" of any woman, and does not come within the exceptions provided by law. **(17)** The gist of the crime is the performance, with the requisite intent, of any of the acts enumerated in the statute. (*People* v. *Root* (1966) 246 Cal.App.2d 600, 604 [55 Cal.Rptr. 89]; *People* v. *Moore* (1963) 213 Cal.App.2d 160, 167 [23 Cal.Rptr. 502].) It is therefore no defense to a charge of violating section 274 that the act was committed unusually late in the woman's pregnancy or by a method not commonly employed for that purpose. The prohibition is against "any means which might be used to effect a miscarriage" (*People* v. *Clapp* (1944) 67 Cal.App.2d 197, 202 [153 P.2d 758]), and has been applied to instances of beating or other physical violence inflicted upon the person of the woman for this purpose. n18 **(16b)** In the present case, it will be

remembered, petitioner's avowed goal was not primarily to kill the fetus while it was inside his wife's body, but rather to "stomp it out of" her; although one presumably cannot be done without the other, petitioner's choice of words is significant and strongly implies an "intent thereby to procure the miscarriage" of his wife in violation of section 274.

Turning to the case law, we find no reported decision of the California courts which should have given petitioner notice that the killing of an unborn but viable fetus was prohibited by section 187. Indeed, the contrary clearly appears from *People* v. *Eldridge* (1906) 3 Cal.App. 648, 649 [86 P. 832], in which the defendant challenged as uncertain an information which charged him with the murder of "a human being," to wit, the infant child "born to the said Glover H. Eldridge and said Mabel Eldridge on or about said twentieth day of February, 1905." It was urged that "such charge might include the killing before birth, and therefore it cannot be determined from the information whether murder or abortion was intended to be charged." The Court of Appeal rejected the contention, observing that "The only reasonable construction which can be given to the language employed in the information is to say that it charges that a child born to the defendant was by him unlawfully killed and murdered. That it was born is clearly stated; that it could be killed after birth of necessity implies that *it was born alive*, and we think the charge of murder was set forth with the degree of certainty required." (Italics added.)

Properly understood, the often cited case of *People* v. *Chavez* (1947) 77 Cal.App.2d 621 [176 P.2d 92], does not derogate from this rule. There the defendant was charged with the murder of her newborn child, and convicted of manslaughter. She testified that the baby dropped from her womb into the toilet bowl; that she picked it up two or three minutes later, and cut but did not tie the umbilical cord; that the baby was limp and made no cry; and that after 15 minutes she wrapped it in a newspaper and concealed it, where it was found dead the next day. The autopsy surgeon testified that the baby was a full-term, nine-month child, weighing six and one-half pounds and appearing normal in every respect; that the body had very little blood in it, indicating the child had bled to death through the untied umbilical cord; that such a process would have taken about an hour; and that in his opinion "the child was born alive, based on conditions he found and the fact that the lungs contained air and the blood was extravasated or pushed back into the tissues, indicating heart action." (*Id*. at p. 623.)

On appeal, the defendant emphasized that a doctor called by the defense had suggested other tests which the autopsy surgeon could have performed to determine the matter of live birth; on this basis, it was contended that the question of whether the infant was born alive "rests entirely on pure speculation." (*Id*. at p. 624.) The Court of Appeal found only an insignificant conflict in that regard (*id*. at p. 627), and focussed its attention instead on testimony of the autopsy surgeon admitting the possibility that the evidence of heart and lung action could have resulted from the child's breathing "after presentation of the head but before the birth was completed" (*id*. at p. 624).

The court cited the mid-19th century English infanticide cases mentioned hereinabove, and noted that the decisions had not reached uniformity on whether breathing, heart action, severance of the umbilical cord, or some combination of these or other factors established the status of "human being" for the purposes of the law of homicide. (*Id*. at pp. 624-625.) The court then adverted to the state of modern medical knowledge, discussed the phenomenon of viability, and held that "a viable child *in the process of being born* is a human being within the meeting of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events *a birth which is already started* would naturally be successfully completed." (Italics added.) (*Id*. at p. 626.) Since the testimony of the autopsy surgeon left no doubt in that case that a live birth had at least begun, the court found "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*." (Italics added.) (*Id*. at p. 627.) n19

(18) *Chavez* thus stands for the proposition -- to which we adhere -- that a viable fetus "in the process of being born" is a human being within the meaning of the homicide statutes. But it stands for no more; in particular it does not hold that a fetus, however viable, which is *not* "in the process of being born" is nevertheless a "human being" in the law of homicide. On the contrary, the opinion is replete with references to the common law requirement that the child be "born alive," however that term as defined, and must accordingly be deemed to reaffirm that requirement as part of the law of California. n20

The *Chavez* court relied in part on *Scott* v. *McPheeters* (1939) 33 Cal.App.2d 629 [92 P.2d 678, 93 P.2d 562], a decision holding that an unborn child is an "existing person," within the meaning of Civil Code section 29, for the purpose of bringing a postnatal action for prenatal injuries. In *People* v. *Belous, supra*, 71 Cal.2d 954, however, a majority of this court distinguished such civil law rules on the ground they either "require a live birth or reflect the interest of the parents." (*Id*. at p. 968 & fn. 12.) We need not repeat that analysis here; but two further bases of distinction deserve mention. First, *Scott* emphasized that the child's right of action for prenatal injuries was unknown to the common law and would not exist in California but for statutory authorization. n21 By the same token, as we have seen, the fetus' status as a "human being" within the definition of murder was unknown to the common law and exists only where special feticide statutes have been enacted. Secondly, the law's protection of the *property* interests of an unborn child dates not from *Scott* but from a far earlier time: for example, in Blackstone's day it was already well settled that "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." (1 Blackstone, Commentaries *130 (1765).) Inasmuch as such rules coexisted for centuries with the common law requirement of live birth to support a conviction of homicide, they cannot reasonably be deemed to have given petitioner notice that the killing of an unborn but viable fetus would now be murder.

Finally, although a defendant is not bound to know the decisional law of other states, the United States Supreme Court in *Bouie* (378 U.S. at pp. 360-361 [12 L.Ed.2d at pp. 903-904]) referred to reported cases of jurisdictions other than South Carolina in concluding that the South Carolina Supreme Court's construction of the statute "is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself." Here, too, the cases decided in our sister states from *Chavez* to the present are unanimous in requiring proof that the child was born alive before a charge of homicide can be sustained. (*Bennett* v. *State* (Wyo. 1963) 377 P.2d 634, 635-637; *People* v. *Ryan* (1956) 91 Ill.2d 467 [138 N.E.2d 516, 518-520]; *People* v. *Hayner* (1949) 300 N.Y. 171 [90 N.E.2d 23, 24]; *Singleton* v. *State* (1948) 33 Ala.App. 536 [35 So.2d 375, 378]; *Montgomery* v. *State* (1947) 202 Ga. 678 [44 S.E.2d 242, 243-244]; cf. *Watson* v. *State* (1955) 208 Md. 210 [117 A.2d 549, 552].) And the text writers of the same period are no less unanimous on the point. (Perkins on Criminal Law, *supra*, pp. 29-30; Clark & Marshall, Crimes (6th ed. 1958) § 10.00, pp. 534-536; 1 Wharton, Criminal Law and Procedure (Anderson ed. 1957) § 189; 2 Burdick, Law of Crime (1946) § 445; 40 Am.Jur.2d, Homicide, §§ 9, 434; 40 C.J.S., Homicide, § 2b.)

Decision

(8c) We conclude that the judicial enlargement of section 187 now urged upon us by the People would not have been foreseeable to this petitioner, and hence that its adoption at this time would deny him due process of law.

Let a peremptory writ of prohibition issue restraining respondent court from taking any further proceedings on Count I of the information, charging petitioner with the crime of murder.

Case Study #2: People v. Taylor (2004) , 32 Cal. 4th 863.

Discussion question: If someone shoots a pregnant woman, and she and the fetus die, are there two counts of homicide?

Facts
The following facts are taken largely from the Court of Appeal opinion. Defendant Harold Wayne Taylor and the victim, Ms. Patty Fansler, met in the spring of 1997. They dated and then lived together along with Fansler's three children. In July 1998 Fansler moved out. Defendant was heard threatening to kill Fansler and anyone close to her if she left him. Defendant wanted to "get back" with Fansler, and told one of her friends he could not handle the breakup, and if he could not have her, "nobody else could."

Defendant and Fansler spent New Year's Eve 1998 together. On January 1, 1999, a police officer responded to a call regarding a woman screaming in a motel room. In the room he found defendant and Fansler. Fansler was "upset and crying," and said defendant had raped her. Defendant was arrested, and shortly thereafter Fansler obtained a restraining order against him.

After the first of the year, Fansler asked her employer to alter her shifts so defendant would not know when she was working. In January 1999, defendant followed Fansler and her ex-husband in a car at high speeds for a mile or so, and on two other occasions tailgated her.

On March 9, 1999, defendant entered Fansler's apartment through a ruse, and after an apparent struggle, shot and killed Fansler. Fansler's son Robert, who heard his mother's muffled screams, but was unable to enter the apartment, pounded on Fansler's window outside the bedroom in which she was being attacked, and yelled "Goddamn it, you better not hurt her." Defendant was seen leaving the apartment, and Robert and a friend, John Benback, Jr., chased but did not catch him.

Back in the apartment Fansler was found by her boyfriend John Benback, his son, John, Jr., and Robert. John Benback, Sr., testified, "She was lying on her back on the bed. The room had been pretty well trashed. There was blood everywhere."

Fansler died of a single gunshot wound to the head. (A subsequent search of the room revealed a second bullet had penetrated and exited the nightstand, and a fragment of this bullet was found near the nightstand.) Fansler also suffered a laceration on the back of her head that penetrated to her skull and chipped the bone, and bruising on her neck, legs, and elbows.

The autopsy revealed that Fansler was pregnant. The fetus was a male between 11 and 13 weeks old who died as a result of his mother's death. The examining pathologist could not discern that Fansler, who weighed approximately 200 pounds, was pregnant just by observing her on the examination table.

The prosecution proceeded on a theory of second degree implied malice murder as to the fetus. n1 The jury convicted defendant of two counts of second degree murder, and found true attendant firearm enhancements. (Pen. Code, § 187, subd. (a).) n2 He was sentenced to 65-years-to-life in prison.

The Court of Appeal reversed defendant's second degree murder conviction based on the fetus's death. The court concluded there was evidence to support the physical, but not the mental, component of implied malice murder. "There is not an iota of evidence that [defendant] knew his conduct endangered fetal life and acted with disregard of that fetal life. It is undisputed that the fetus was [11] to 13 weeks old; the pregnancy was not yet visible and [defendant] did not know Ms. Fansler was pregnant." In contrast to "the classic example of indiscriminate shooting/implied malice" of a person firing a bullet through a window not knowing or caring if anyone is behind it, "[t]he undetectable early pregnancy [here] was too

latent and remote a risk factor to bear on [defendant's] liability or the gravity of his offense." "[T]he risk to unknown fetal life is latent and indeterminate, something the average person would not be aware of or consciously disregard." "[W]ere we to adopt the People's position, we would dispense with the subjective mental component of implied malice. Where is the evidence that [defendant] acted with knowledge of the danger to, and conscious disregard for, fetal life? There is none. This is dispositive."

We granted the Attorney General's petition for review.

Discussion

II. "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (*People v. Hansen* (1994) 9 Cal.4th 300, 307 [36 Cal. Rptr. 2d 609, 885 P.2d 1022] (*Hansen*); § 187, subd. (a).) "[V]iability is not an element of fetal homicide under section 187, subdivision (a)," but the state must demonstrate "that the fetus has progressed beyond the embryonic stage of seven to eight weeks." (*People v. Davis* (1994) 7 Cal.4th 797, 814-815 [30 Cal. Rptr. 2d 50, 872 P.2d 591].)

(Edited for content)

(1) "It is plain that *implied* malice aforethought does not exist in the perpetrator only in relation to an intended victim. Recklessness need not be cognizant of the identity of a victim or even of his existence." (*People v. Scott* (1996) 14 Cal.4th 544, 555 [59 Cal. Rptr. 2d 178, 927 P.2d 288] (conc. opn. of Mosk, J.); see *Bland, supra*, 28 Cal.4th at p. 323 [quoting *Scott* (conc. opn. of Mosk, J.) with approval]; *People v. Albright* (1985) 173 Cal. App. 3d 883, 887 [219 Cal. Rptr. 334] [implied malice does not require awareness of life-threatening risk to a particular person]; *People v. Stein* (1913) 23 Cal.App. 108, 115 [137 P. 271] ["malice will be implied, although the perpetrator of the act had no malice against any particular person of the multitude into which he so fired"].) When a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no requirement the defendant specifically know of the existence of each victim.

(2) To illustrate, in *People v. Watson* (1981) 30 Cal.3d 290, 293-294 [179 Cal. Rptr. 43, 637 P.2d 279], the defendant killed a mother and her six-year-old daughter while driving under the influence of alcohol. We found the evidence supported a conclusion that the "defendant's conduct was sufficiently wanton" (*id.* at p. 300) to hold him to answer on two charges of second degree murder (*id*. at pp. 294, 301). Nowhere in our discussion did we indicate the defendant was required to have a subjective awareness of his particular victims, i.e., the mother and daughter killed, for an implied malice murder charge to proceed. Nothing in the language of section 187, subdivision (a), allows for a different analysis for a fetus. Indeed, had the mother in *Watson* been pregnant, it is difficult to see any logical basis on which to argue the defendant could not have been held to answer for three charges of second degree murder.

Here, as the Attorney General notes, defendant "knowingly put human life at grave risk when he fired his gun twice in an occupied apartment building." As the Attorney General observed during oral argument, if a gunman simply walked down the hall of an apartment building and fired through the closed doors, he would be liable for the murder of all the victims struck by his bullets--including a fetus of one of his anonymous victims who happened to be pregnant. Likewise, defense counsel conceded at oral argument that defendant would be guilty of implied malice murder if one of his bullets had struck an infant concealed by the bedcovers. On this point, both counsel are right. Had one of Fansler's other children died during defendant's assault, there would be no inquiry into whether defendant knew the child was present for implied malice murder liability to attach. Similarly, there is no principled basis on which to require defendant to know Fansler was pregnant to justify an implied malice murder conviction as to her fetus.

(3) In battering and shooting Fansler, defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered.

Moreover, section 12022.9 provides for a sentence enhancement under certain circumstances for a defendant's personal infliction of injury on a pregnant woman resulting in the termination of the pregnancy. It applies only when the defendant "knows or reasonably should know that the victim is pregnant." (§ 12022.9.) As the Attorney General notes, the "fact that the Legislature explicitly imposed a knowledge requirement in section 12022.9, but not in section 187," further confirms no such knowledge requirement was intended for implied malice murder.

Relying on *People v. Dennis* (1998) 17 Cal.4th 468 [71 Cal. Rptr. 2d 680, 950 P.2d 1035], defendant asserts that this court has held or assumed that implied malice must be shown separately with respect to the **fetus.** In *Dennis*, the defendant killed his ex-wife, who was eight months pregnant, and her fetus with a machete-like weapon. As a result of cuts to the mother's abdomen, the fetus was expelled and suffered severe chopping wounds. (*Id*. at pp. 489, 495-496 [71 Cal.Rptr.2d 680, 950 P.2d 1035].) The jury convicted defendant of the first degree murder of the mother and second degree murder of the fetus. (*Id*. at p. 489.) In connection with defendant's claim that his penalty was disproportionate, we stated, "Defendant notes the jury made no express finding of his premeditation, deliberation, or intent to kill the fetus, and he suggests the jury's verdict may even imply a finding he was unaware of the fetus's existence. We disagree. The jury's verdict of second degree murder necessarily found that at the very least, defendant bore implied malice toward the fetus. [Citation.] The jury was so instructed." (*Id*. at p. 512.) In connection with defendant's claim of instructional error, we stated, "[t]he instructions made plain that malice was a separate element that had to be proved for each of the two murders charged. The trial court instructed the jury that a verdict of guilt of the alleged fetal murder required a finding that defendant killed the fetus with malice aforethought. ... It is not reasonably likely the instructions misled the jury into thinking it could convict defendant of two murders while finding malice aforethought only as to one victim's death." (*Id*. at pp. 514-515.

In *Dennis*, we simply noted the jury was required to find malice as to the fetus in order to convict the defendant of his murder; we did not say how such malice was demonstrated. To the extent *Dennis* assumed that a defendant must have a requisite mental state as to a *specific* victim, that assumption was unexamined and unnecessary to rejecting the defendant's claim of disproportionate penalty or instructional error. Defendant also asserts that the legislative history of section 187 demonstrates that the Legislature did not intend to hold a defendant liable for the murder of a fetus unless he had knowledge the woman was pregnant. Prior to 1970, the killing of a fetus was not murder. In *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 623 [87 Cal. Rptr. 481, 470 P.2d 617], a fetus was deliberately " 'stomp[ed] out of' " the mother, but this court held a fetus was not a "human being" within the meaning of former section 187, subdivision (a). Following *Keeler*, the Legislature amended section 187, subdivision (a) to provide that murder was the unlawful killing of either a human being or a fetus. (Stats. 1970, ch. 1311, § 1, p. 2440.) Relying on a law review article interpreting the legislative history of this amendment, defendant contends, "the stated purpose of the bill's author was 'to make Robert Keeler's actions susceptible to a charge of murder.' "

The language of section 187, subdivision (a), that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought," is clear, making resort to its legislative history unnecessary. Moreover, we find no such stated purpose in the legislative history. In any event, given *Keeler* was the motivating force behind the 1970 amendment to section 187, subdivision (a), any references in the legislative history as to how the amendment would punish "Keeler's actions," which involved an intentional attack on a fetus, are to be expected and do not preclude our interpretation here.

Nor is the fact that the Legislature chose to simply include fetuses in the statute, and not separately define them as human beings, indicative of any intent to modify the existing law of murder which, as a result of the amendment, would now also apply to a fetus. As defendant himself notes, "[t]here is no suggestion in the legislative history of any intent to alter the established common-law definition of implied malice for purposes of the new crime of fetal murder." Nor, contrary to defendant's contention, are we concluding the Legislature in 1970 "imput[ed] malice to fetal life based upon malice directed to human life." Rather, by engaging in the conduct he did, defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct. Defendant further asserts that the fact that there is no crime of voluntary or involuntary manslaughter of a fetus demonstrates that the Legislature intended to "restrict the feticide provision to defendants who specifically intend to kill a fetus itself ... or, at most, to defendants who know full well their attack on the mother will likely have this result." He also asserts, "The [L]egislature would not exclude from feticide a large class of criminal conduct posing a more palpable risk to fetal life, yet punish [defendant's] less cognizant conduct as fetal murder." Of course, a defendant who commits murder is, contrary to defendant's implicit suggestion, more culpable than one who commits voluntary or involuntary manslaughter. Moreover, the Legislature's decision to amend section 187, subdivision (a) and punish the malicious killing of a fetus, but not also amend the manslaughter statute, says nothing about the proper interpretation of the murder statute. Finally defendant asserts that to the extent section 187 is ambiguous, it should be construed in his favor. It is not ambiguous. Nor is our conclusion today "an overruling of controlling authority or a sudden, unforeseeable enlargement of a statute" in violation of ex post facto or due process principles. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal. Rptr. 3d 425, 79 P.3d 542].) Rather, unlike the situation in *Davis*, on which defendant relies, "there was no uniform appellate rule interpreting the pertinent statutory language contrary to our holding here when defendant" killed Fansler and her fetus. (*People v. Loeun* (1997) 17 Cal.4th 1, 12 [69 Cal. Rptr. 2d 776, 947 P.2d 1313].)

Disposition

A defendant shoots a woman, killing her. As a result, her fetus also dies. In the absence of evidence the defendant knew the woman was pregnant, may the defendant be held liable for the second degree implied malice murder of the fetus? *We conclude he may,* and therefore reverse the judgment of the Court of Appeal.

The judgment of the Court of Appeal is reversed, and the case remanded for proceedings consistent with this opinion.

Case Study #3: **People v. Lasko (2000) , 23 Cal. 4th 101**

Discussion Question: Does conduct that endangers the life of another, that *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion, voluntary or involuntary manslaughter?

Under California law, murder is the unlawful killing of a human being or a fetus, with malice aforethought. Malice is *express* when the killer harbors a deliberate intent to unlawfully take away a human life. Malice is *implied* when the killer lacks an intent to kill but acts with conscious disregard for life, knowing such conduct endangers the life of another.

When a killer *intentionally* but unlawfully kills in a sudden quarrel or heat of passion, the killer lacks malice and is guilty only of voluntary manslaughter. We hold here that this is also true of a killer who, acting with conscious disregard for life and knowing that the conduct endangers the life of another, *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion.

Facts

Michael Medina and the victim, Don Fitzpatrick, owned a newspaper distribution business. Defendant Louis Lasko, Jr., one of their employees, lived in Fitzpatrick's home in San Jose. Fitzpatrick paid the employees in cash and customarily carried large sums of cash on his person. On September 15, 1994, Medina gave Fitzpatrick $ 2,820, and an additional $ 1,200 on September 21, 1994.

On the afternoon of September 27, 1994, five teenage boys--Michael Clark, Art Flores, David Gonzales, Nathan Gonzales, and Jason Reyes--were playing next door to Fitzpatrick's house when they heard someone moaning or screaming inside the house. The boys grabbed makeshift weapons (a tire iron, a bottle, a pool cue, and a board) and went to the door of the house. David Gonzales, the oldest boy and a neighbor of Fitzpatrick's, kicked the door and asked for Fitzpatrick. Defendant yelled through the door that Fitzpatrick was not home. Hearing moaning, Gonzales told defendant to leave Fitzpatrick alone. Defendant repeated that Fitzpatrick was not home and said he was killing a cat. Gonzales accused defendant of lying and told defendant that Gonzales's mother (who lived next door to Fitzpatrick) was calling the police.

When defendant opened the door briefly, Gonzales and Clark saw blood on the carpet behind defendant, and Reyes saw blood on defendant's shirt. Defendant closed the door. When he opened it again, he had a wad of money in his hand and he invited Gonzales in. Gonzales peered briefly into the house, which was very dark, and saw nothing.

When defendant could not get past Gonzales at the front door, he ran into the backyard and tried to climb a fence, but he stopped when Reyes and Flores started hitting him with a board and a pool cue. The boys allowed defendant to get some water from a nearby faucet, and Reyes saw him surreptitiously hide something on a shelf next to the faucet. Defendant remained in the yard, surrounded by the boys, until San Jose police officers arrived and arrested him. The officers found $ 1,791 in cash on the shelf.

Inside the house, the officers saw Fitzpatrick lying on the bathroom floor. His face was covered with blood, and he was unresponsive to questions. (He died 30 minutes later in a San Jose hospital.) A baseball bat was in the kitchen, partly covered by a canvas bag, and water was on the kitchen floor. Inside a trash can on a stairway was Fitzpatrick's bloodstained wallet, which contained no money. The wallet was hidden beneath crumpled papers that were wet with water and stained with blood.

Dr. Angelo Ozoa, Chief Medical Examiner for Santa Clara County, examined Fitzpatrick's body. He testified that there were scalded areas on Fitzpatrick's face and the front of his body, and that he died from

multiple skull fractures caused by one or several blows from a blunt object.

Defendant testified in his own defense. He said that a week before the killing, Fitzpatrick had accused him of stealing his watch and fired him, but Fitzpatrick permitted him to remain in the house until the end of the year because Fitzpatrick owed him $ 300. Defendant claimed that on the afternoon of the killing, he was heating a pan of water on the stove when he and Fitzpatrick got into an argument about the money Fitzpatrick owed defendant. When Fitzpatrick hit defendant in the side with a baseball bat, defendant grabbed the pan of water he was heating and threw it at Fitzpatrick, scalding him. The hot water also scalded defendant's arm. Fitzpatrick again hit defendant with the bat, which defendant then took and used to hit Fitzpatrick in the head. Defendant did not intend to kill Fitzpatrick; he was only trying to protect himself. After Fitzpatrick collapsed on the floor, defendant dragged him to the bathroom. He picked up the telephone to call for help, but there was no dial tone. When he heard kicking on the front door, he went outside, where the boys surrounded him.

Defendant denied telling Gonzales he was killing a cat; what he said was that his cat had jumped in the window while carrying a dead mouse. He also denied telling Gonzales that Fitzpatrick was not home, denied trying to escape by climbing the back fence, denied taking money from Fitzpatrick and placing it on the shelf next to the faucet outside, and denied putting Fitzpatrick's wallet in the trash can on the stairway.

Photographs taken at the time of defendant's arrest showed a cut and bruises on his back, a bruise on his right abdomen, two bruises on his right arm, and a scrape or burn on his right forearm.

In rebuttal, Paul Von Tersh who, like defendant, had been staying at Fitzpatrick's house, testified that defendant had threatened to kill Fitzpatrick about a month and a half before Fitzpatrick's death. A neighbor, Daniel Alarcon, testified that on several occasions before the killing defendant had expressed his hatred of Fitzpatrick, and one of Fitzpatrick's friends testified that twice in the month before Fitzpatrick's death he had heard defendant say he was going to "mess [Fitzpatrick] up." Two witnesses confirmed that Fitzpatrick's telephone was working on the day of the killing.

The trial court instructed the jury on the charged crime of murder. It also instructed the jury on the lesser included offense of voluntary manslaughter, both on the theory that the killing occurred intentionally during a sudden quarrel or in the heat of passion and on the theory that the killing occurred in an honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. The court also instructed the jury on the lesser included offense of involuntary manslaughter. The jury convicted defendant of second degree murder.

Issue

On appeal, defendant argued the trial court had erroneously instructed the jury that intent to kill was an essential element of the lesser included offense of voluntary manslaughter. This error, he contended, required the jury to convict him of murder if it found that he had killed Fitzpatrick in a sudden quarrel or heat of passion but without the intent to kill. The Court of Appeal noted that the rule that intent to kill is a necessary element of voluntary manslaughter had become " 'deeply seated in the case law without thoughtful examination,' " as a result of " 'the offhand misreading of *People v. Freel* (1874) 48 Cal. 436, which only holds, correctly, that even if there were an intent to kill the offense could be manslaughter under the heat of passion doctrine.' " Nevertheless, the Court of Appeal concluded, it lacked the power to redefine the elements of voluntary manslaughter, because it was bound by decisions of this court that voluntary manslaughter requires an intent to kill. (See, e.g., *People v. Hawkins* (1995) 10 Cal. 4th 920, 958-959 [42 Cal. Rptr. 2d 636, 897 P.2d 574].)

II **(1a)** As relevant here, the trial court gave the jury the standard instruction on the elements of voluntary manslaughter (CALJIC No. 8.40): "1. A human being was killed, [P] 2. The killing was unlawful, and [P] 3. *The killing was done with the intent to kill.*" (Italics added.) n1 Defendant argues that the instruction was improper because intent to kill is not a necessary element of voluntary manslaughter. We agree.

We begin our analysis by exploring the differences between murder and the lesser offense of manslaughter.

(2) Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) n2 Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) We have noted in the past that this definition of implied malice "has never proved of much assistance in defining the concept in concrete terms" (*People v. Dellinger* (1989) 49 Cal. 3d 1212, 1217 [264 Cal. Rptr. 841, 783 P.2d 200]), and that juries instead should be instructed that malice is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life" (*id.* at p. 1215). For convenience, we shall refer to this mental state as "conscious disregard for life."

(3a) Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in "limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense (see *In re Christian S.* (1994) 7 Cal. 4th 768 [30 Cal. Rptr. 2d 33, 872 P.2d 574]; *People v. Flannel* [(1979)] 25 Cal. 3d 668 [160 Cal. Rptr. 84, 603 P.2d 1])." (*People v. Barton* (1995) 12 Cal. 4th 186, 199 [47 Cal. Rptr. 2d 569, 906 P.2d 531].) (1b) The form of voluntary manslaughter we address here is when a defendant kills during a sudden quarrel or in the heat of passion. (We consider the other form of voluntary manslaughter--when a defendant kills in unreasonable self-defense--in the companion case of *People v. Blakeley* (2000) 23 Cal. 4th 82 [96 Cal. Rptr. 2d 451, 999 P.2d 675].)

(3b) In a recent decision, we discussed what facts will reduce an *intentional* killing from murder to manslaughter, when based on heat of passion: "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment." ' " (*People v. Breverman* (1998) 19 Cal. 4th 142, 163 [77 Cal. Rptr. 2d 870, 960 P.2d 1094].) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citations] other than revenge [citation]." (*Ibid.*) Thus, a person who *intentionally* kills as a result of provocation, that is, "upon a sudden quarrel or heat of passion," lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter**.**

(1c) But what offense is committed when a person, acting with a conscious disregard for life, *unintentionally* kills a human being, but the killing occurs during a sudden quarrel or in the heat of passion? Is it murder, voluntary manslaughter, or involuntary manslaughter? The Attorney General insists it is murder. We disagree. The statutory provision defining voluntary manslaughter contains no requirement of intent to kill. Section 192 describes manslaughter as "the unlawful killing of a human being without malice" and states that there are three types of manslaughter. Subdivision (a) of this section defines voluntary manslaughter as occurring "upon a sudden quarrel or heat of passion." Nothing is said about an intent to kill.

Under the Attorney General's approach, one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder. This cannot be, and is not, the law.

(4) We drew a similar comparison in *In re Christian S., supra*, 7 Cal. 4th 768. There, we held that a defendant who unintentionally kills in the actual but unreasonable belief in the necessity of self defense ("imperfect self-defense") is not guilty of murder. "A contrary conclusion," we reasoned, "namely, that imperfect self-defense applies only in cases of express, but not implied, malice would lead to a totally anomalous and absurd result, in which a defendant, who unreasonably believes that his life is in imminent danger, would be guilty only *of manslaughter* if he acts *with the intent to kill* his perceived assailant, but would be guilty *of murder* if he does *not* intend to kill, but only to seriously injure, the assailant." (*Id.* at p. 780, fn. 4.)

(1d) Also on point here are early decisions of this court establishing that one who kills upon a sudden quarrel or in the heat of passion lacks malice regardless of whether there was an intent to kill. An example is *People v. Freel, supra*, 48 Cal. 436. There the trial court instructed the jury that manslaughter was " 'the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection.' " (*Id.* at p. 437.) We found this instruction erroneous and reversed the defendant's conviction for second degree murder. We explained: "Whether the homicide amounts to murder or to manslaughter merely, *does not depend upon the presence or absence of the intent to kill*. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." (*Ibid.*, italics added.) Similarly, in *People v. Doyell* (1874) 48 Cal. 85, 96, this court said, "the law, in some cases of voluntary manslaughter, disregards the actual intent to kill, when the killing is done in a sudden passion, caused by sufficient provocation." (See also *People v. Elmore* (1914) 167 Cal. 205, 210 [138 P. 989] [quoting extensively from *Freel* and *Doyell* and citing both cases with approval].)

Thus, a killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.

It is true that some of our decisions appear to hold to the contrary. For instance, in *Drown v. New Amsterdam Casualty Co.* (1917) 175 Cal. 21, 24 [165 P. 5], this court observed in passing that "to constitute voluntary manslaughter there must be an intent to kill . . . ." Thereafter, this court repeated that fleeting observation in a number of cases. (*People v. Hawkins, supra,* 10 Cal. 4th 920, 958; *People v. Ray* (1975) 14 Cal. 3d 20, 28 [120 Cal. Rptr. 377, 533 P.2d 1017]; *People v. Forbs* (1965) 62 Cal. 2d 847, 852 [44 Cal. Rptr. 753, 402 P.2d 825]; *People v. Brubaker* (1959) 53 Cal. 2d 37, 44 [346 P.2d 8]; *People v. Gorshen* (1959) 51 Cal. 2d 716, 732-733 [336 P.2d 492]; *People v. Bridgehouse* (1956) 47 Cal. 2d 406, 413 [303 P.2d 1018]; *People v. Bender* (1945) 27 Cal. 2d 164, 181 [163 P.2d 8]; see also *People v. Miller* (1931) 114 Cal. App.. 293, 300 [299 P. 742].) In each of these cases, that observation was mere dictum. None of them said that a defendant who kills in a sudden quarrel or heat of passion, with conscious disregard for life but without intent to kill, is guilty of *murder*. n3
Our conclusion that voluntary manslaughter does not require an intent to kill is consistent with the

common law as well as the statutory law in most states. A prominent criminal law treatise explains: "[A]t common law and by statute in most states, since the homicide must be committed under circumstances which would otherwise be murder, defendant may act with the intent to kill or with any mental state which amounts to 'malice'; the malice is negated by the provocation and the offense is mitigated from murder to voluntary manslaughter." (2 Wharton's Criminal Law (15th ed. 1994) § 155, pp. 347-348.) Other criminal law scholars share that view: "It is not necessary that there should be a specific intent to kill to constitute voluntary manslaughter. Where the killing is done with a deadly weapon, if its use is intentional, and if the defendant knew or had reason to know that to use it as he did would endanger the life of [the] deceased or another, and acted recklessly of such safety, an intent to injure him may be inferred. Where one purposely assaults another with a dangerous weapon, in a way naturally to cause death, and death results, the killing is voluntary." (1 Warren on Homicide (1938) Elements of Voluntary Manslaughter, § 85, pp. 418-419.) "Most killings which constitute voluntary manslaughter are of the intent-to-kill sort . . . . But if [the killer] in the [heat of] passion . . . should intend instead to do his tormentor serious bodily injury short of death, or if he should, without intending to kill him, endanger his life by very reckless (depraved heart) conduct, the resulting death ought equally to be voluntary manslaughter . . . . [T]he great majority of modern statutes . . . take this broad view." (2 LaFave, Substantive Criminal Law (1986) § 7.10, p. 253.)

That view, which we adopt today, has also been embraced by the United States Court of Appeals for the Ninth Circuit. In discussing the federal voluntary manslaughter statute, whose language is identical to California's voluntary manslaughter statute, the court noted: "While most voluntary manslaughter cases involve intent to kill, it is possible that a defendant who killed unintentionally but recklessly with extreme disregard for human life may have acted in the heat of passion with adequate provocation. [Citations.] In such a case, the defendant would be guilty of voluntary manslaughter, not murder." (*U.S. v. Paul* (9th Cir. 1994) 37 F.3d 496, 499, fn. 1; see also *U.S. v. Browner* (5th Cir. 1989) 889 F.2d 549, 553 ["Voluntary manslaughter . . . requires proof . . . of a mental state that *would* constitute malice, but for the fact that the killing was committed in adequately provoked heat of passion or provocation."].)

III As we have explained, intent to kill is not a necessary element of the crime of voluntary manslaughter, which is a lesser offense included in the crime of murder. Thus, the trial court here erred when it told the jury that voluntary manslaughter requires a finding that "[t]he killing was done with the intent to kill." The error, however, did not prejudice defendant.

(5) A majority of this court recently held that when a trial court violates state law by failing to properly instruct the jury on a lesser included offense, this test applies: "[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal. 2d 818, 836 [299 P.2d 243]]. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson*, *supra*, 46 Cal. 2d 818, 836)." (*People v. Breverman*, *supra*, 19 Cal. 4th 142, 178.)

(1e) Here, in addition to its erroneous instruction to the jury that voluntary manslaughter requires an intent to kill, the court gave CALJIC No. 8.50, a standard instruction explaining the difference between murder and manslaughter. This instruction stated in part: "When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel such as it amounts to provocation . . . the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [P] To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder *and that the act which caused the death was not done in the heat of passion or upon a sudden*

quarrel . . . ." (Italics added.) Thus, the jury was told that regardless of whether the killing of Fitzpatrick was intentional or unintentional, defendant could not be convicted of murder unless the prosecution proved that, at the time of the killing, defendant was *not* acting in the heat of passion. Had the jury believed that defendant unintentionally killed Fitzpatrick in the heat of passion, it would have concluded that it could not convict defendant of murder (because he killed in the heat of passion) and could not convict defendant of voluntary manslaughter (because he lacked the intent to kill). The jury most likely would have convicted defendant of involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. Instead, the jury convicted defendant of second degree murder, showing that it did not believe the killing was committed in the heat of passion.

In closing argument, neither the prosecution nor the defense suggested that defendant was guilty of murder if he unintentionally killed Fitzpatrick in a sudden quarrel or the heat of passion. Indeed, the subject of voluntary manslaughter did not figure prominently in either party's argument. Defense counsel devoted much of his argument to rebutting the prosecutor's contention that defendant premeditatedly killed Fitzpatrick in the course of robbery, and that the jury should therefore convict defendant of first degree murder with a robbery-murder special circumstance.

Moreover, the evidence strongly suggested an intent to kill. Defendant hit Fitzpatrick in the head with a baseball bat with extreme force. The blow (or blows) caused extensive and multiple fractures at the base and on the outside of Fitzpatrick's skull. Numerous fragments of bone, the largest of which was about three inches in length, were broken off the top of the skull. There was also evidence that defendant had threatened to kill Fitzpatrick a month and a half before the killing. Furthermore, defendant's actions *after* striking the fatal blow were not those of an unintentional killer: he did not call an ambulance, he tried to obscure evidence of the killing by dragging Fitzpatrick's body to the bathroom and by trying to wipe up the blood on the floor, and he tried to leave the house with $ 1,800 of Fitzpatrick's money. Given the strength of the evidence indicating that the killing was not only intentional but premeditated, defendant could have been, but was not, convicted of first degree murder. Instead, the jury found him guilty of second degree murder. Under the circumstances, it is not reasonably probable that a properly instructed jury would have convicted defendant of the lesser offense of voluntary manslaughter. (*People v. Watson, supra*, 46 Cal. 2d at p. 836.)

Defendant also argues that the trial court's instructional error violated the federal Constitution, relying on a dissenting opinion in *People v. Breverman, supra*, 19 Cal. 4th 142. At the murder trial in that case the court erred in not instructing the jury on the lesser included offense of voluntary manslaughter. A majority of the court declined to consider whether this error violated the federal Constitution by giving the jury an incomplete definition of malice, an element of murder; the majority held that the defendant had not preserved the issue because he had not raised it before this court or before the Court of Appeal. (*Id.* at p. 170, fn. 19.) The dissenting view, however, was that the defendant had preserved the issue: The dissent concluded the error violated the defendant's federal constitutional rights to a jury trial and to due process of law, because the trial court had inadequately instructed the jury on the elements of murder by failing to explain that the element of malice is not present when the defendant kills in the heat of passion. (*Id.* at pp. 187-195 (dis. opn. of Kennard, J.).) Here, defendant has raised the issue both in this court and in the Court of Appeal.

In contrast to *People v. Breverman*, *supra*, 19 Cal. 4th 142, the trial court here instructed the jury on voluntary manslaughter, correctly explaining to the jury that a killing in the heat of passion is not murder. The court erred only in telling the jury that to convict defendant of voluntary manslaughter, the jury had to find that defendant intended to kill the victim. Defendant insists this instruction could have led the jury to conclude that if he lacked an intent to kill, it had to find him guilty of the more serious crime of murder. But, as previously explained, the trial court's instructions taken as a whole do not support this assertion. Thus, the court's instructional error did not violate defendant's federal constitutional rights to

trial by jury or to due process of law.

IV

(6) The trial court also instructed the jury on an alternate theory of voluntary manslaughter: that defendant killed Fitzpatrick in "unreasonable self-defense." THE COURT INSTRUCTED THE JURY: "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter . . . [P] There is no malice aforethought if the killing occurred . . . in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [P] In order to prove such crime, each of the following elements must be proved: [P] 1. A human being was killed, [P] 2. The killing was unlawful, and [P] 3. The killing was done with the intent to kill." (Brackets omitted.) Defendant contends this instruction was faulty because it did not tell the jury that unreasonable self-defense negates implied malice, and that an act resulting in death, performed with knowledge that the act endangers the life of another and with conscious disregard for life, but motivated by an unreasonable belief in the necessity of self-defense, is not murder.

In addition to the instruction quoted above, however, the trial court told the jury: "A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder." This instruction clearly explained that unreasonable self-defense negates *all* malice, both express and implied, and that a person who kills in unreasonable self-defense is not guilty of murder.

Although the trial court's instructions properly told the jury that an unintentional killing in unreasonable self-defense is not murder, in the companion case of *People v. Blakeley, supra*, 23 Cal. 4th 82, we conclude that instructions similar to those given here do not clearly explain to the jury whether an unintentional killing in unreasonable self-defense is voluntary or involuntary manslaughter. Here, this lack of clarity could not have prejudiced defendant, because, in finding defendant guilty of second degree murder rather than voluntary or involuntary manslaughter, the jury must have necessarily concluded he did not act in unreasonable self-defense. (See *People v. Sedeno* (1974) 10 Cal. 3d 703, 721 [112 Cal. Rptr. 1, 518 P.2d 913].)

Decision
The judgment of the Court of Appeal is affirmed.

Answers to Review Questions
Chapter 11

1. What are the key differences between voluntary and involuntary manslaughter?
A. The term "Voluntary" manslaughter refers to a killing where the defendant did intend to kill the victim or cause them serious bodily harm, but it was due to specific circumstances. In involuntary manslaughter, there was no intent to kill.

2. Define the term "Malice"
*A. The term **malice** refers to the intentional killing without any justification, excuse or lawful reason. Malice is considered either "expressed or implied." It is expressed, when one intended to commit the crime, for example in a gang fight with the intent to kill. It is implied, for example, in a case where a police officer is killed line of duty, or death occurs as a result of an unlawful or criminal act.*

3. Describe the "Felony Murder Rule"
A. The felony murder role is a way to attach liability to offenders, when, in the course of some criminal act, an "unintended" victim dies as a result. Unfortunately, these are essentially collateral deaths to a

felony where the death is unintentional. If committed during certain felonies, specified in the first degree murder statute, the death penalty may be applied. While these may vary between states, the issue is the same; if during the commission of a specified felony, someone dies during that event, you are held liable for that death, as though you intended to cause it. This is clearly linked to the "proximate cause" rule.

4. Just what does the time frame that a victim dies have to do with a successful prosecution for murder?
A. While states may statutorily set the time frame, typically it is within one year. However, California changed the time and not only extended it to three years and a day, also included the caveat that there is a rebuttable presumption that the death was not criminal, which must be proven by the prosecution.

5. What the key element missing in manslaughter from homicide?
A. The key element is premeditation. Also, while intent may be present in voluntary manslaughter, it is absent from involuntary manslaughter.