2 Cal.3d 619
Supreme Court of California,
In Bank.

Robert Harrison KEELER, Petitioner,
v.
The SUPERIOR COURT OF AMADOR COUNTY,
Respondent,
The PEOPLE, Real Party in Interest.

Sac. 7853. | June 12, 1970. | Rehearing Denied Sept. 10, 1970.

***

MOSK, Justice.

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, s 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.

The evidence received at the preliminary examination may be summarized as follows: 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. ***

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road ***. 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 here.' She did not reply, and he opened the car door; as she later testified, 'He assisted me out of the car. * * * (I)t 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; 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.

An information was filed charging petitioner, in Count I, with committing the crime of murder (Pen.Code, s 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, and in Count III, with assault on Mrs. Keeler by means of force likely to produce great bodily injury. *** [O]nly the murder count is actually in issue. ***

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 this statute. If it was not, petitioner cannot be charged with its 'murder' ***.

Section 187 was enacted as part of the Penal Code of 1872. 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. 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.'

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. ***

We therefore undertake a brief review of the origins and development of the common law of abortional homicide. 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*. 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,[5] 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* 58 (1648).) *** In the 18th century *** Coke's requirement that an infant be born alive in order to be the subject of homicide was reiterated *** by both Blackstone and Hale. ***

5 'Quickening' is said to occur when movements of the fetus are first sensed or observed, and ordinarily takes place between the 16th and 18th week of pregnancy. ***

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 and the same rule was reiterated on the eve of the first session of our Legislature. ***

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.

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. ***

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. 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

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 thought 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 * * *.' 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. Stated differently, there are no common law crimes in California. ***

Settled rules of construction implement this principle. 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, s 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. 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. ***

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. *** 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.) Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature. 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 *** 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.'

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.

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, 46 S.Ct. 126, 127, 70 L.Ed. 322.) '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, 59 S.Ct. 618, 619, 83 L.Ed. 888.) ***

This requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws (U.S.Const., art. I, ss 9, 10; Cal.Const., art. I, s 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, 84 S.Ct. 1697, 12 L.Ed.2d 894.)

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.' 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, s 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. 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. *** 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.

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.' 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. 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? ***

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. ***

Finally, although a defendant is not bound to know the decisions law of other states, *** the cases decided in our sister states *** are unanimous in requiring proof that the child was born alive before a charge of homicide can be sustained. And the text writers of the same period are no less unanimous on the point.

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. ***

BURKE, Acting Chief Justice (dissenting).

The majority hold that 'Baby Girl' Vogt, who, according to medical testimony, had reached the 35th week of development, had a 96 percent chance of survival, and was 'definitely' alive and viable at the time of her death, nevertheless was not a 'human being' under California's homicide statutes. In my view, in so holding, the majority ignore significant common law precedents, frustrate the express intent of the Legislature, and defy reason, logic and common sense.

Penal Code section 187 defines murder as 'the unlawful killing of a human being, with malice aforethought.' *** The majority pursue the meaning of the term 'human being' down the ancient hallways of the common law, citing Coke, Blackstone and Hale to the effect that the slaying of a 'quickened' *** child constituted 'a great misprision,' but not murder. ***

The majority cast a passing glance at the common law concept of quickening, but fail to explain the significance of that concept: At common law, the quickened fetus *was* considered to be a human being, a second life separate and apart from its mother. As stated by Blackstone, *** 'Life is the immediate gift of God, a right inherent by nature in every individual; *and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.*' ***

This reasoning explains why the killing of a quickened child was considered 'a great misprision,' although the killing of an unquickened child was no crime at all at common law. Moreover, although the common law did not apply the labels of 'murder' or 'manslaughter' to the killing of a quickened fetus, it appears that at common law this 'great misprision' was severely punished. ***

Thus, at common law, the killing of a quickened child was severely punished, since that child was considered to be a human being. The majority would have us assume that the Legislature in 1850 and 1872 simply overlooked this 'great misprision' in codifying and classifying criminal offenses in California, or reduced that offense to the lesser offense of illegal abortion with its relatively lenient penalties. ***

Of course, I do not suggest that we should interpret the term 'human being' in our homicide statutes in terms of the common law concept of quickening. At one time, that concept had a value in differentiating, as accurately as was then scientifically possible, between life and nonlife. The analogous concept of viability is clearly more satisfactory, for it has a well defined and medically determinable meaning denoting the ability of the fetus to live or survive apart from its mother.

The majority opinion suggests that we are confined to common law concepts, and to the common law definition of murder or manslaughter. However, the Legislature, in Penal Code sections 187 and 192, has defined those offenses for us: homicide is the unlawful killing of a 'human being.' Those words need not be frozen in place as of any particular time, but must be fairly and reasonably interpreted by this court to promote justice and to carry out the evident purposes of the Legislature in adopting a homicide statute. ***

We commonly conceive of human existence as a spectrum stretching from birth to death. However, if this court properly might expand the definition of 'human being' at one end of that spectrum, we may do so at the other end. Consider the following example: All would agree that 'Shooting or otherwise damaging a corpse is not homicide. * * *' (Perkins, Criminal Law (2d ed. 1969) ch. 2, s 1, p. 31.) In other words, a corpse is not considered to be a 'human being' and thus cannot be the subject of a 'killing' as those terms are used in homicide statutes. However, it is readily apparent that our concepts of what constitutes a 'corpse' have been and are being continually modified by advances in the field of medicine, including new techniques for life revival, restoration and resuscitation ***. Would this court ignore these

developments and exonerate the killer of an apparently 'drowned' child merely because that child would have been pronounced dead in 1648 or 1850? Obviously not. Whether a homicide occurred in that case would be determined by medical testimony regarding the capability of the child to have survived prior to the defendant's act. And that is precisely the test which this court should adopt in the instant case.

The common law reluctance to characterize the killing of a quickened fetus as a homicide was based solely upon a presumption that the fetus would have been born dead. *** Based upon the state of the medical art in the 17th, 18th and 19th centuries, that presumption may have been well-founded. However, as we approach the 21st century, it has become apparent that 'This presumption is not only contrary to common experience and the ordinary course of nature, but it is contrary to the usual rule with respect to presumptions followed in this state.' (People v. Chavez, Supra, 77 Cal.App.2d at p. 626, 176 P.2d at p. 95)

*** If, as I have contended, the term 'human being' in our homicide statutes is a fluid concept to be defined in accordance with present conditions, then there can be no question that the term should include the fully viable fetus.

The majority suggest that to do so would improperly create some new offense. However, the offense of murder is no new offense. Contrary to the majority opinion, the Legislature has not 'defined the crime of murder in California to apply only to the unlawful and malicious killing one who has been born alive.' Instead, the Legislature simply used the broad term 'human being' and directed the courts to construe that term according to its 'fair import' with a view to effect the objects of the homicide statutes and promote justice. What justice will be promoted, what objects effectuated, by construing 'human being' as excluding Baby Girl Vogt and her unfortunate successors? Was defendant's brutal act of stomping her to death any less an act of homicide than the murder of a newly born baby? No one doubts that the term 'human being' would include the elderly or dying persons whose potential for life has nearly lapsed; their proximity to death is deemed immaterial. There is no sound reason for denying the viable fetus, with its unbounded potential for life, the same status.

The majority also suggest that such an interpretation of our homicide statutes would deny defendant 'fair warning' that his act was punishable as a crime. Aside from the absurdity of the underlying premise that defendant consulted Coke, Blackstone or Hale before kicking Baby Girl Vogt to death, it is clear that defendant had adequate notice that his act could constitute homicide. ***

Our homicide statutes have been in effect in this state since 1850. The fact that the California courts have not been called upon to determine the precise question before us does not render 'unforeseeable' a decision which determines that a viable fetus is a 'human being' under those statutes. Can defendant really claim surprise that a 5-pound, 18-inch, 34-week-old, living, viable child is considered to be a human being? ***