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# Murder in Modesto: A Viable Argument

## Bioethics and Law Forum*

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Patricia Ireland, the former National Organization of Women (NOW) president, and the upcoming CEO of the YWCA, NOW, and other organizations have recently blanketed the media with the position that Scott Peterson, of Modesto, Calif, should be charged with only 1 count of murder for allegedly killing his pregnant wife, Laci Rocha Peterson, and causing the death of their unborn child. The state of California, however, has charged Scott Peterson with 2 counts of first-degree murder and is seeking the death penalty. Are Patricia Ireland and others trying to mire a murder case in the abortion debate to keep the government from sliding down the proverbial slippery slope to classifying a fetus as a person under the law with all the rights and privileges such affords? Can a charge of murder in the Peterson case be reconciled with the legal right to an abortion? Has the Modesto prosecutor made an emotionally appealing but legally inaccurate double-murder charge?

The US Constitution and Bill of Rights establish the rights and privileges of persons under the law.[1] The meaning of ''persons'' under the law has changed over the years, once referring only to land-owning white males and excluding women and blacks, among others. But, in the 21st century, does the definition of ''person'' now include fetuses and the unborn, specifically with respect to the right to life/not to be killed?

On one side of the debate are those who hold the position that life begins at conception and, as such, are consistent in their argument against abortion and for the applicability of murder charges for causing the death of a fetus. In juxtaposition, others proffer that a fetus is not a ''person'' under the law and, thus, not entitled to all the rights and privileges thereof. Such a position enables them to support the legality of abortion, but it also forces them, for consistency's sake, to advocate the presently unpopular position that Scott Peterson should not face murder charges for allegedly causing the death of his unborn son. So what position do the lawyers take? ''It depends,'' of course.

In this instance, in which a pregnant women and her fetus are killed, ''it depends'' is not legal legerdemain. What it depends on is the state in which the crime occurred or, in other words, which state's law governs. Some states' laws bestow fetuses with certain rights, enabling its prosecutors to charge a mother with delivering drugs to a minor or a third party with murder, while others do not. California is one such state in which a third party can be charged with murder without contradicting the holding in *Roe v Wade*,[2] which established the legality of abortion. Here's how.

### A. Is It Murder?

On February 23, 1969, Robert Harrison Keeler, after discovering that his ex-wife was pregnant by another man, confronted her, leered at her belly, and then beat her about the face and abdomen while exclaiming, ''I'm going to stomp it out of you.''[3] Mrs Keeler ''suffered substantial facial injuries, as well as, extensive bruising of the abdomen wall.''[4] A subsequent cesarian section resulted in the stillbirth of a 5-lb, 18-in fetus whose skull was severely fractured. A pathologist testified that the cause of death most likely resulted from the force applied to Mrs Keeler's abdomen by Mr Keeler. There was also medical testimony ''to a reasonable degree of medical certainty'' that the fetus was viable at the time of her death.

Mr Keeler was charged with murder, defined under Cal Pen Code §187 as ''the unlawful killing of a human

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[1] The words ''The right to life, liberty and the pursuit of happiness,'' often cited as some of our most basic rights, are not found in the US Constitution, but rather in the preamble to the US Constitution. As such, the right to life and liberty, while rights or privileges guaranteed under the law, are not guaranteed by these words from the preamble.

[2] *Roe v Wade*, 410 US 113, 35 LEd2d 147, 93 SCt 705 (1973).

[3] *Keeler v Superior Court*, 2 Cal 3d 619, 623 (1970).

[4] *Id.*

being, with malice aforethought.''[5] Mr Keeler challenged the charge, arguing that a fetus, even a viable one, was not a ''human being.'' Ultimately, the California Supreme Court looked to the intent of the legislators who enacted §187 of the Cal Pen Code in 1872 to determine whether a fetus was intended to be a human being under the law. They concluded that the intent of the legislators and earlier common law was that a fetus was not a human being for the purposes of §187 and that, as such, a charge of murder could not be levied for killing a fetus unless it is born alive, lives for a brief interval, and then dies as a result of the accused's conduct.[6] The court declared that it would exceed its judicial and constitutional limits if it were to declare an unborn fetus to be within the murder statute. Furthermore, assuming the court could adopt such a rule, it could only apply it prospectively.[7] Ultimately, Mr Keeler was only charged and convicted of battery.

### *B. Killing a Fetus Becomes a Crime in California*

The following year, in response and reaction to this perceived injustice, the California Legislature promptly amended §187 to include the killing of a fetus in the statute's definition of murder but not in its definition of human being. The relevant part of the amendment reads, ''Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.''[8]

Three years after the amendment of §187, the US Supreme Court held in the landmark case *Roe v Wade*[9] that the state has no legitimate interest in protecting a fetus until it reaches viability, at which time the state gains a ''compelling interest'' in protecting the fetus, absent any threat to the health or life of the mother. Reading between the lines, *Roe* in essence added ''viable fetus'' to the definition of ''person'' for purposes of murder statutes.[10]

### *C. Killing a Viable Fetus Becomes a Crime in California*

The seminal California case to embrace not only the amended explicit definition of murder, but an implicit one as well, was *People v Smith.*[11] Once again, a pregnant woman was physically attacked by her husband, which resulted in a miscarriage. In this case, however, the fetus was between 12 and 15 weeks old. The trial court embracing legislative history and the analysis in *Roe* held that the word ''fetus'' in the reenactment of §187 means not just any fetus, but ''viable'' fetus.

From 1976 through 1994, the term ''fetus'' in §187 was read by courts as ''viable fetus'' with its own amorphous definition and was deemed an essential element of the crime of murder in California.[12] However, in 1994, in *People v Davis*,[13] the implicit term ''viable'' was dropped as an element of the crime of murder under §187.

### *D. Killing Any Postembryonic Fetus Becomes a Crime in California*

Maria Flores, after having been shot in the chest by a robber (Davis) and undergoing life-saving surgery, delivered her 23- to 25-week-old fetus stillborn as a result of her blood loss, low blood pressure, and state of shock. The assailant was subsequently caught and charged with robbery, assault with a firearm, and murder of a fetus during a robbery (aka felony murder). Convicted of all charges, Davis appealed based on the definition of viability provided by the trial court during the charge.[14] The California Court of Appeals for the Fourth District, after an extensive review of the statue, its legislative history, and the treatment of the issue in other jurisdictions, as well as authoritative comments, held that not only does the term ''viable'' not appear in §187, but also that it is

[5] *Id;* Cal Pen Code §187 (West 1872). Definition adopted from English Common Law by the majority of the states in these United States of America.

[6] *Id* p. 624.

[7] *Id* p. 619.

[8] Cal Pen Code §187 (West 1970). The amendment was also meant as a deterrent against fetal homicide; however, given that domestic violence of both pregnant and nonpregnant women has become a national public health crisis and that recent studies suggest the leading cause of death among pregnant women is homicide, the intended impact of the amendment seems to be less than desired. (See, for example, Horon IL, Cheng D. Enhanced surveillance for pregnancy-associated mortality—Maryland, 1993–1998. *JAMA.* 2001;285;1455–1459.)

[9] *Supra,* note 2.

[10] Justice Blackmun, writing for the court in *Roe*, divided pregnancy into trimesters, each roughly equal to 3 months, and stated that viability is ''usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.''

[11] *People v Smith,* 59 Cal App3d 751, Cal App2d Dist (1976), overruled by *People v Davis,* 7 Cal 4th 797 (1994) construing the term ''fetus'' in §187(a) to mean viable fetus as defined by *Roe, supra,* note 2 pp. 162–164.

[12] *People v Smith,* 188 Cal App3d 1495, Cal App 5th Dist (1987) *cert denied, Smith v California,* 484 US 866 (1987), overruled by *People v Davis,* 7 Cal 4th 797 (1994). In *Smith,* a 28- to 30-week pregnant woman and her fetus were murdered. At the trial, the failure of the judge to charge the jury with a legal meaning of ''viable'' was found to be reversible error because the trial judge had a *sua sponte* duty to instruct the jury as to all the essential elements of the charged offence. (See also *People v Henderson,* 225 Cal App3d 1129, Cal App 1st Dist (1990), overruled by *People v Davis,* 7 Cal 4th 797 (1994) in which the court pointed out that although not specifically referenced, decisional law interpreting §187 as limiting criminal liability to causing the death of a viable fetus was well established ever since *Smith.* In *Henderson,* a 30-week-old fetus died as a result of its mother's murder.

[13] *People v Davis,* 15 Cal App 4th 690, Cal App 4th Dist (1993), reported in full at 7 Cal 4th 797 (1994).

[14] *Id.* In defining the term ''viable,'' the court used the term ''possible'' for it to survive, rather than the state's standard jury instructions, which employed the term ''capable.''

*not* a required element of the crime of fetal murder (emphasis added).

The California Supreme Court concurred with both the appellate court's interpretation of §187 and the reversal of the defendant's murder conviction, because to subject Davis to its unprecedented interpretation of §187 would violate the defendant's due process and the *ex post facto* clauses of the US Constitution. Thus, the law in California as of 1994 and *Davis* is that a person can be charged with fetal murder of a postembryonic fetus (approximately 7 to 8 weeks after fertilization according to the law), viability notwithstanding. The California Supreme Court in *Davis* also distinguished the principles and practices of *Roe* from the crime specified in Cal Pen Code §187(a) stating, ''Roe v. Wade principles are inapplicable to a statute (like section 187(a)) that criminalizes the killing of a fetus without the mother's consent.''[15]

*Roe* is irrelevant to the issue in *People v Peterson*, opponents of dual-murder charges against Scott Peterson are legally misinformed, and the Modesto prosecutor filed the emotionally and legally appropriate charges. The only debate now will be among the jurors. ''It depends'' on them.

[15] *Id* p. 807. Other state murder statutes such as those of Minnesota and Illinois do not have a viability bar and were examined by the California Supreme Court in reaching its conclusion.