

A LOW THRESHOLD OF GUILT: INTERPRETING CALIFORNIA'S FETAL MURDER STATUTE IN *PEOPLE V. TAYLOR*

I. INTRODUCTION

Imagine a pregnant woman murdered by her boyfriend in a jealous rage. As a result of the attack, her fetus dies as well. At the time of the attack, however, the boyfriend did not know of the woman's pregnancy. In *People v. Taylor*¹ the California Supreme Court held that regardless of whether a defendant knew of the woman's pregnancy when he attacked her, the defendant may be liable for the murder of the fetus.²

Although the California Supreme Court addressed different aspects of California's murder statute in previous cases, the court had yet to examine the issue concerning the defendant's state of mind with respect to the fetus. The defendant argued that the court must find that he acted with malice toward the fetus specifically in order to be charged with implied malice murder.³ Thus, the court had to determine whether it was sufficient for the defendant to have acted with malice toward life in general or toward the fetus specifically.⁴ The *Taylor* court adopted the latter interpretation.⁵

In so holding, the *Taylor* court apparently went against legislative intent. The legislature arguably intended to treat the murder of human beings and fetuses differently as evidenced by the fact that the statute mentions them separately.⁶ Additionally, the

1. *People v. Taylor*, 86 P.3d 881 (Cal. 2004).
2. *Id.* at 882.
3. *Id.* at 885.
4. *See id.* at 886.
5. *See id.*
6. This is evidenced by the fact that CAL. PENAL CODE § 187 (West Supp. 2006) deals with murder generally, but CAL. PENAL CODE § 187(a) (West Supp. 2006) deals specifically with fetal murder. *See infra* Part II.

legislature has yet to make fetal manslaughter a crime,⁷ thus indicating its desire to not have the murders of each victim parallel one another.

In addition to going against legislative intent, the *Taylor* court's holding may have an impact on the abortion debate. Because of its broad interpretation of section 187, the court's decision arguably supports the contention that the killing of a fetus, regardless of the method used, is murder. Pro-life advocates could use the holding in *Taylor* to advance the argument that if a fetus is treated as a person in the context of murder, then it also should be treated as a person in the realm of abortion.

This Comment contends that the *Taylor* court's holding ran afoul of legislative intent when it interpreted California's murder statute in such a broad manner. Part II outlines the two California Penal Code statutes that comprise a majority of the *Taylor* court's holding. Part III summarizes the facts in *Taylor* and provides the procedural background to the California Supreme Court opinion. Part IV discusses the reasoning of the court's decision in *Taylor* including the majority's holding as well as Justice Kennard's dissent. Part V argues that the court's holding goes against legislative intent and ignores the notion of fairness embedded within California criminal statutes. Part VI discusses the implications of the court's holding. Part VI examines how the court's holding potentially undermines a woman's right to an abortion. It then discusses the pressure felt within state legislatures to pass fetal murder laws or to broadly interpret their current laws as a result of the recent publicity surrounding the issue.

II. BACKGROUND: CALIFORNIA'S MURDER STATUTE AND THE REQUIREMENT OF MALICE

The California Supreme Court's decision in *Taylor* centered around two important California Penal Code sections. Understanding these statutes is imperative to understanding the court's analysis and why the court rendered an incorrect decision. As discussed below, *Taylor* required the court to determine whether under sections 187 and 188, a defendant, unaware of the victim's

7. See CAL. PENAL CODE § 192 (West Supp. 2006) (failing to add the same inclusive language of "fetus" as was added to section 187).

pregnancy, may nonetheless be convicted of second degree murder of the fetus.⁸

A. *Section 187: California's Murder Statute*

Determining whether a defendant was guilty of killing the fetus, required the court to first look at California's murder statute. Section 187, subsection (a) defines murder as "the unlawful killing of a human being, *or a fetus*, with malice aforethought."⁹ As one might expect, California's murder statute did not always contain the term "fetus." In fact, from 1872 until 1970, California's murder statute defined murder as "the unlawful killing of a human being, with malice aforethought."¹⁰ Because the statute did not specifically include fetal murder, California courts "held that only children who were born alive fell within the protection of section 187."¹¹

In 1970, however, the California legislature amended the statute to include the term "fetus" within the basic murder statute, thus making the killing of a fetus a crime.¹² This amendment came about after the California Supreme Court ruled in *Keeler v. Superior Court* that because an unborn fetus was not considered a human being within the meaning of section 187 at the time of the case, the defendant could not be found guilty of murdering the fetus.¹³

Although the 1970 amendment included fetuses within its definition of murder, it left the term "fetus" undefined. This left California courts to determine the meaning of the term through case law. Consequently, when the United States Supreme Court came

8. *People v. Taylor*, 86 P.3d 881, 882 (Cal. 2004).

9. CAL. PENAL CODE § 187(a) (West 2005) (emphasis added). Because a woman has a right to an abortion, the California legislature included an exception to section 187 so as to protect this right. *Id.* § 187(b). Specifically, section 187 does not "apply to any person who commits an act that results in the death of a fetus if . . . [t]he act was solicited, aided, abetted, or consented to by the mother of the fetus."

10. *Keeler v. Superior Court of Amador County*, 470 P.2d 617, 619 (Cal. 1970) (quoting CAL. PENAL CODE § 187 (West 1970)).

11. Katherine B. Folger, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in People v. Davis*, 29 U.S.F. L. REV. 237, 242 (1994) (citing *Keeler*, 470 P.2d at 624).

12. Robert A. Pugsley, *State Can Work to Protect Fetuses From Their Parents*, L.A. DAILY J., Apr. 16, 2004, at G1.

13. *Keeler*, 470 P.2d at 622.

down with its decision in *Roe v. Wade*,¹⁴ California courts believed this decision gave them some guidance with respect to the meaning of “fetus” within section 187. In fact, after the Court’s holding, California courts placed a viability limitation on the fetal provision within section 187.¹⁵

In *Roe*, the Supreme Court defined viability as the point at which the “fetus presumably has the capability of meaningful life outside the mother’s womb,”¹⁶ which usually occurs at about seven months.¹⁷ In accordance with this definition, the Supreme Court held that until viability, the State has no legitimate interest in protecting potential human life.¹⁸ At the point of viability, however, the State may restrict abortion.¹⁹

In accordance with the Supreme Court’s holding in *Roe*, California state courts held that the term “fetus” within section 187 only referred to viable fetuses.²⁰ In applying the Court’s holding in *Roe* to its current case, the California Court of Appeal in *People v. Smith*, reasoned that “one cannot destroy independent human life prior to the time it has come into existence.”²¹

In 1994, however, the California Supreme Court in *People v. Davis*²² finally clarified the meaning of “fetus” within section 187. The court in *Davis* held that viability is *not* a required element of fetal murder under section 187;²³ however, the prosecution must prove that the fetus progressed beyond the embryonic stage of seven to eight weeks.²⁴

In so holding, the *Davis* court broke away from the California courts’ long tradition of following the Supreme Court’s holding in

14. 410 U.S. 113 (1973).

15. Folger, *supra* note 11, at 247.

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

17. *Id.* at 160.

18. *See id.* at 163.

19. *See id.*

20. *See, e.g.,* *People v. Smith*, 129 Cal. Rptr. 498, 504 (Ct. App. 1976) (following the holding in *Roe v. Wade* and construing the term “fetus” to refer to a “viable unborn child” within the meaning of section 187), *overruled by* *People v. Davis*, 872 P.2d 591 (Cal. 1994).

21. *Id.* at 502.

22. 872 P.2d 591 (Cal. 1994).

23. *Id.* at 593.

24. *Id.* at 602.

Roe with respect to the viability requirement.²⁵ In explaining its departure, the court held that *Roe* principles were simply inconsistent with a statute such as section 187.²⁶ The *Davis* court viewed the decision in *Roe* as very narrow and only applicable when a state's interest in protecting potential life is weighed against a mother's right to privacy.²⁷ Therefore, the court held that "when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."²⁸ The *Davis* court found no such threat to a mother's right to privacy and thus eliminated the viability requirement that had been read into the statute.²⁹ In accordance with this decision, the current precedent regarding fetal murder does not require viability under section 187.

B. Section 188: The Requirement of Malice

For a conviction of murder, California law requires more than simply an "unlawful killing"; the defendant needs to have acted with malice.³⁰ Section 188 states that malice can be either express or implied.³¹ Malice is "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."³² Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."³³

California courts have noted that the definition of implied malice within section 188 provides little direction when determining whether the defendant has the required mental state for a murder conviction.³⁴ Additionally, section 188 along with section 187, provides no guidance as to how the requirement of malice should be

25. See *People v. Davis*, 872 P.2d 591, 594-95 (Cal. 1994) (discussing the departure from *Roe* by the California Supreme Court).

26. See *id.* at 597.

27. *Id.*

28. *Id.* at 599.

29. See *id.*

30. CAL. PENAL CODE § 188 (West 2005) (defining murder as "the unlawful killing of a human being, or a fetus, with malice aforethought").

31. *Id.* § 188 (defining malice)

32. *Id.*

33. *Id.*

34. *People v. Dellinger*, 783 P.2d 200, 203 (Cal. 1989).

applied to fetuses.³⁵ As a result of this lack of clarity, courts clarified the statute by holding 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.”³⁶

When determining what constitutes malice, it is important as well as helpful to note that malice contains both a physical and a mental component.³⁷ “The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component is the requirement that the defendant knows that his conduct endangers the life of another and acts with a conscious disregard for life.”³⁸

III. STATEMENT OF THE CASE

The defendant, Harold Wayne Taylor, met the victim, Patty Fansler in the spring of 1997.³⁹ The two dated and then subsequently moved in together.⁴⁰ In July 1998, Fansler and Taylor separated.⁴¹ One of Fansler’s friends heard Taylor threaten to kill Fansler and anyone close to her if she left him.⁴² Following the dissolution of their relationship, Taylor told one of Fansler’s friends that he was having great difficulty dealing with the break up and if he was unable to have her, then no one else could either.⁴³

On January 1, 1999, a police officer responded to a call where he found Fansler “upset and crying” and she alleged that Taylor raped her.⁴⁴ Consequently, the police officer arrested Taylor and Fansler obtained a restraining order against him.⁴⁵

35. CAL. PENAL CODE §§ 187, 188 (West Supp. 2006).

36. *See, e.g., Dellinger*, 783 P.2d at 201.

37. *People v. Patterson*, 778 P.2d 549, 557 (Cal. 1989).

38. *Id.* (quoting *People v. Watson*, 637 P.2d 279, 285 (Cal. 1981) (internal quotes omitted)).

39. *People v. Taylor*, 127 Cal. Rptr. 2d 443, 445 (Ct. App. 2002).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *People v. Taylor*, 86 P.3d 881, 882 (Cal. 2004).

After the first of the year, Fansler requested that her manager change her shifts at work because she did not want Taylor to know when she was working.⁴⁶ Shortly thereafter, on January 20, Taylor tailgated Fansler on two separate occasions and Fansler reported the incidents to the police department, indicating that Taylor was “swearing behind her” and that she “was scared of him.”⁴⁷

Early in the evening of March 9, 1999, Fansler and her three children spent time at the apartment of her boyfriend, John Benback.⁴⁸ John lived with his son, John, Jr. (J.J.), within the same complex as Fansler.⁴⁹ After spending some time with her boyfriend, Fansler returned to her apartment alone.⁵⁰ Sometime after doing so, Taylor arrived at Fansler’s apartment.⁵¹

At around 8:30 p.m., J.J. and Fansler’s son, Robert, went back to Fansler’s apartment.⁵² After knocking on the front door, Robert heard muffled screams, but was unable to get in because the door was locked.⁵³ After obtaining a key to the apartment, they opened the door and spotted Taylor leaving, but failed to catch him.⁵⁴ In the apartment, Robert, J.J., and John found Fansler lying on the bed, bleeding.⁵⁵ The apartment was trashed and there was blood everywhere.⁵⁶

Fansler died of a single gunshot wound.⁵⁷ She had a laceration on the back of her head as well as bruising on her neck, legs, and elbows.⁵⁸ The laceration on her head spanned her entire scalp, penetrating her skull and chipping the bone.⁵⁹ Fansler’s autopsy revealed that she was pregnant and the fetus was between eleven and

46. *Id.*

47. *Taylor*, 127 Cal. Rptr. 2d at 445.

48. *Id.* at 446–47.

49. *Id.* at 447.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

thirteen weeks old. The fetus died as a result of its mother's death.⁶⁰ The examining pathologist noted that he could not tell whether Fansler, who weighed approximately 200 pounds, was pregnant by simply looking at her.⁶¹

The night of the murder, Taylor called a friend, Jeremy Luggier, and asked him to provide his alibi.⁶² The following morning, Taylor called another friend, James Gravlee, and asked him to recover a handgun in some bushes near Fansler's apartment.⁶³ Because he feared getting involved, Gravlee led the police to the handgun with Taylor's fingerprints on it as well as the sweatshirt that Taylor wore at the time of the murder.⁶⁴ Gravlee also revealed to the police that Taylor admitted to shooting Fansler. The police subsequently arrested Taylor on March 10, 1999.⁶⁵

At the jury trial, the prosecution attempted to convict Taylor on a theory of second degree implied malice murder as to the fetus.⁶⁶ The jury found Taylor guilty of two counts of second degree murder and sentenced him to sixty-five years to life in prison.⁶⁷ Taylor appealed and urged the court to reverse the second degree murder conviction of the fetus.⁶⁸

The Court of Appeal reversed Taylor's second degree murder conviction as to the fetus.⁶⁹ The court held that while the physical component was satisfied, there was "not an iota of evidence that [Taylor] knew his conduct endangered fetal life and acted with disregard of that fetal life."⁷⁰ The court further noted that when charged with second degree murder of a fetus, it is necessary to prove the malice aforethought as to the fetus separately.⁷¹ The court explained that implied malice involves a "subjective assessment of

60. *People v. Taylor*, 86 P.3d 881, 883 (Cal. 2004).

61. *Id.*

62. *Taylor*, 127 Cal. Rptr. 2d at 447.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Taylor*, 86 P.3d at 883.

67. *Id.*

68. *Taylor*, 127 Cal. Rptr. 2d at 449.

69. *Id.* at 444.

70. *Id.* at 452.

71. *Id.* at 450.

whether the defendant *actually appreciated* the risk involved.⁷² The court feared that if it found the implied malice component satisfied with respect to the fetus, it would eliminate the subjective mental component of implied malice.⁷³ In applying the separate requirement of malice aforethought for the fetus, the court concluded that “[t]he undetectable early pregnancy was too latent and remote a risk factor to bear on [Taylor’s] liability or the gravity of his offense.”⁷⁴

Following this decision, the Attorney General petitioned the California Supreme Court for review, which the supreme court granted.⁷⁵

IV. REASONING OF THE COURT

A. *The Majority’s Holding in Taylor*

The California Supreme Court reversed the Court of Appeal.⁷⁶ The court found that a defendant may be held liable for second degree murder of a fetus even if he did not know of the woman’s pregnancy.⁷⁷ The court accordingly found Taylor guilty of second degree murder of the fetus that died as a result of Taylor shooting Fansler.⁷⁸

The central issue within *Taylor* rested on whether Taylor met the requirements for implied malice with respect to the killing of the fetus. According to the court,

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 that the defendant specifically know of the existence of each victim.⁷⁹

To illustrate the court’s view of implied malice, it cited to

72. *Id.* at 451.

73. *Id.* at 453.

74. *Id.* at 452.

75. *People v. Taylor*, 86 P.3d 881, 883 (Cal. 2004).

76. *Id.* at 882.

77. *Id.*

78. *Id.* at 886.

79. *Id.* at 884.

*People v. Watson*⁸⁰ where a defendant killed a mother and her daughter while driving under the influence of alcohol.⁸¹ The court found that the evidence supported a conclusion that the defendant answer on two counts of implied malice second degree murder.⁸² The *Taylor* court emphasized that nowhere in its decision in *Watson* did it indicate a requirement that the defendant possess a “subjective awareness of his particular victims—that is, the mother and daughter killed—for an implied malice murder charge to proceed.”⁸³ The court concluded its case comparison by stating that nothing in the language of section 187, subdivision (a) indicated that a different analysis should be applied when the killing of a fetus is involved.⁸⁴

The majority in *Taylor* noted that the defendant knowingly put human life at risk when he fired into an occupied apartment building.⁸⁵ If Taylor fired down the hall of an apartment complex through closed doors, he would be liable for all those killed by his bullets.⁸⁶ In fact, the defendant would be guilty of second degree murder if one of his bullets struck an infant hiding under the bed covers.⁸⁷ The majority equated the above situation with the killing of a fetus by reasoning that there is no basis on which to require Taylor to know Fansler was pregnant in order to justify his guilt as to the second degree murder of the fetus.⁸⁸ In applying its holding to the present case, the court stated that “[i]n battering and shooting Fansler, [Taylor] 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.”⁸⁹

The court further bolstered its view of implied malice by

80. *People v. Watson*, 637 P.2d 279 (Cal. 1981).

81. *Id.* at 281.

82. *See id.*

83. *People v. Taylor*, 86 P.3d 881, 884 (Cal. 2004).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 884–85.

comparing section 187 with section 12022.9.⁹⁰ Section 12022.9 provides a sentence enhancement for a defendant who “knows or reasonably should know the victim is pregnant” and who “personally inflicts injury upon a pregnant woman that results in the termination of the pregnancy.”⁹¹ The court reasoned that the fact that the legislature specifically included a knowledge requirement within section 12022.9, but not in section 187, indicated the legislature did not intend to impose such a knowledge requirement for implied malice murder.⁹²

The court quickly disposed of the defendant’s argument that the legislature’s separate inclusion of the term “fetus” in section 187 as opposed to including fetuses under the definition of human beings indicated the legislature’s desire to modify the existing law of murder.⁹³ The court noted that the legislative history of section 187 contained no indication of intent to alter the established definition of implied malice for purposes of the new crime of fetal murder.⁹⁴ The court ultimately concluded that “by engaging in the conduct he did, [Taylor] demonstrated a conscious disregard for *all life*, fetal or otherwise, and hence is liable for *all deaths* caused by his conduct.”⁹⁵

Finally, the defendant asserted that California’s failure to make either voluntary or involuntary manslaughter of a fetus a crime indicated that the legislature intended to restrict the crime of fetal murder to those who specifically intended to kill the fetus or at least to those who knew their attack on the mother would be harmful to the fetus.⁹⁶ The defendant reasoned that it did not follow logically that the legislature would exclude both types of manslaughter, yet still label the defendant’s less cognizant conduct as fetal murder.⁹⁷ In response to this argument, the court simply stated that the fact the legislature chose to amend section 187 to include the murder of a fetus, but also refused to amend the manslaughter statute had no

90. *Id.* at 885; CAL. PENAL CODE § 12022.9 (West 2000).

91. CAL. PENAL CODE § 12022.9 (West 2005).

92. *Taylor*, 86 P.3d at 885.

93. *Id.* at 886.

94. *Id.*

95. *Id.* (emphasis added).

96. *Id.*

97. *Id.*

bearing on the proper interpretation of California's murder statute.⁹⁸

B. Justice Kennard's Dissent

As the only dissenting justice within *Taylor*, Justice Kennard disagreed with the majority's interpretation of section 187. Accordingly, Justice Kennard argued that "a defendant is guilty of murdering a fetus on an implied malice theory *only if* the fetus's death resulted from the defendant's *intentional* act, the natural consequences of which are dangerous to *fetal life*, with knowledge of that particular danger."⁹⁹

Justice Kennard emphasized that the legislature defined murder with respect to two different types of victims—human beings and fetuses.¹⁰⁰ In doing so, she contended that it is possible that the legislature intended to treat the murder of these two types of victims differently.¹⁰¹ Otherwise, the legislature would have included the term "fetus" under the definition of a human being for purposes of section 187.¹⁰² Consequently, Justice Kennard disagreed with the majority's assertion that "for a conviction of implied malice murder of a *fetus*, it is sufficient that the person acted with conscious disregard 'for *life in general*.'"¹⁰³ Justice Kennard argued that the majority's view eliminates the legislature's intended distinction between human beings and fetuses.¹⁰⁴

Justice Kennard agreed with the defendant's argument that the fact that the legislature did not make fetal manslaughter a crime indicated that the legislature did not intend for the crime of fetal murder to parallel the murder of a human being.¹⁰⁵ To further her argument, she gave an example of where the effect of omitting the crime of fetal manslaughter is evident. Her scenario was as follows: Finding his wife in bed with another man, the defendant shoots his

98. *Id.*

99. *Id.* at 887 (Kennard, J., dissenting) (first and second emphasis added) (emphasis omitted).

100. *Id.* at 886.

101. *See id.* at 890.

102. *See id.*

103. *Id.* at 886.

104. *Id.*

105. *Id.* at 888–89.

wife, unaware of the fact that she is nine weeks pregnant.¹⁰⁶ He is charged with the death of both the mother and the fetus.¹⁰⁷ At the trial, however, the jury finds that he acted in the heat of passion and accordingly finds him guilty of manslaughter with respect to the killing of his wife.¹⁰⁸ Because manslaughter does not contain the requirement of malice,¹⁰⁹ the jury cannot convict the defendant of murdering the fetus, nor can it convict the defendant of the lesser offense of manslaughter because California does not make fetal manslaughter a crime.¹¹⁰ Therefore, the defendant is only liable for the death of his wife and not the fetus.¹¹¹ In response to the outcome within this scenario, Justice Kennard concluded that the fact that the “same murderous conduct is punished differently depending upon the type of victim, either a human being or a fetus, implies that the Legislature intended to treat fetal murders differently.”¹¹²

Justice Kennard ended her dissent by urging the legislature to amend section 187 to clarify whether it intended to retain the same mental state for both human beings and fetuses.¹¹³ Justice Kennard argued that the language of section 187 is unclear and because of this lack of clarity, any ambiguity should be construed in favor of the defendant, under California’s rule of lenity.¹¹⁴ Therefore, she would hold that without a clear indication of what mental state the legislature intended to apply for a fetus, a defendant unaware of the mother’s pregnancy should not be liable for the implied malice murder of a fetus that dies as a result of an attack on the mother.¹¹⁵

106. *Id.* at 888.

107. *Id.*

108. *Id.*

109. CAL. PENAL CODE § 192 (West 2005) (defining manslaughter as the “unlawful killing of a human being without malice”).

110. *Taylor*, 86 P.3d at 889 (Kennard, J., dissenting).

111. *Id.*

112. *Id.*

113. *Id.* at 890.

114. *Id.*; see generally *People v. Avery*, 38 P.3d 1, 5 (Cal. 2002) (explaining the rule of “lenity,” which states that “when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant”).

115. *Taylor*, 86 P.3d at 890 (Kennard, J., dissenting).

V. ANALYSIS OF THE CALIFORNIA
SUPREME COURT'S DECISION IN *TAYLOR*

Since its amendment in 1970, statutory interpretation of section 187 has proven difficult because the statute does not specifically state whether fetuses and human beings should receive similar treatment with respect to the charge of implied malice murder.¹¹⁶ Despite this lack of clarity, the majority in *Taylor* held that it was sufficient for an implied malice murder conviction of a fetus that the defendant acted with “a conscious disregard for *all life*, fetal or otherwise.”¹¹⁷ In so holding, the court destroyed the distinction that the legislature specifically embedded within the statute between human beings and fetuses.

Up until its amendment in 1970, section 187 remained unchanged since its enactment in 1872.¹¹⁸ Assembly member, Craig Biddle, introduced the amendment.¹¹⁹ Biddle originally intended to include a fetus beyond the twenty weeks of uterogestation as a human being under both the murder and manslaughter statutes.¹²⁰ In opposition to the bill, Senator Clark Bradley and Senator George Deukmejian urged Biddle to make certain changes to the bill.¹²¹ Senator Bradley insisted that the bill not change the law with regard to manslaughter.¹²² Senator Bradley contended that the purpose of including a fetus within the definition of murder “was the defendant’s extreme culpability, and since the same level of purpose was not involved with manslaughter, [Biddle’s] change should not apply. . . .”¹²³ Additionally, Senator Deukmejian suggested that if the term “fetus” was only included in the murder statute and not placed under the definition of a human being, those who objected to

116. CAL. PENAL CODE § 187 (West Supp. 2006).

117. *Taylor*, 86 P.3d at 886 (emphasis added).

118. Borden D. Webb, *Is the Intentional Killing of an Unborn Child Homicide—California’s Law to Punish the Willful Killing of a Fetus*, 2 PAC. L.J. 170, 170 (1971).

119. Assemb. B. 816, 1970 Leg., Reg. Sess. (Cal. 1970) (as amended June 24, 1970).

120. *Id.*

121. Webb, *supra* note 118, at 174.

122. *See id.*

123. *Id.*

the bill on its definitional basis would be appeased.¹²⁴

In the end, both Senator Deukmejian's and Senator Bradley's suggestions prevailed. Although this bill added fetuses to the realm of murder under California law as the underlying motive behind the bill intended, Biddle's original intent was lost in the bill's final version. The assembly bill did not change California's manslaughter statute to include the term "fetus," nor did the murder statute include fetuses within its definition of a human being.¹²⁵ Rather, only the murder statute included the term "fetus" and it was separate from the phrase "human beings" within that statute.¹²⁶

Excluding both of Biddle's original suggestions indicated that the legislature ultimately decided to treat the murder of human beings and fetuses differently with respect to the required mental state of malice; they were not intended to parallel one another. Specifically, the current version of section 187 includes both fetuses and human beings as separate terms under the statute,¹²⁷ implying the legislature's intent to analyze them separately when determining a defendant's guilt. Additionally, by not criminalizing fetal manslaughter, the legislature implied that it required some form of malice specifically directed at the fetus in order for a defendant to be convicted of murdering the fetus. Thus, the court's holding that it is sufficient for a defendant to have a conscious disregard for *life in general* runs afoul of legislative intent. Instead, the courts should be looking at the defendant's mental state with respect to the fetus specifically, not toward life in general.

Much of California's criminal law centers around a defendant's state of mind when he committed the crime.¹²⁸ And, when he

124. *See id.*

125. Assemb. B. 816, 1970 Leg., Reg. Sess. (Cal. 1970) (as amended by the Senate, Aug. 7, 1970) (indicating that the suggested amendment to California's manslaughter statute had been stricken as well as the portion of the bill that included fetuses under the statute's definition of a human being).

126. *Id.*

127. CAL. PENAL CODE § 187(a) (West Supp. 2006).

128. *E.g.*, CAL. PENAL CODE § 242 (West Supp. 2006) (defining battery as "any *willful* and unlawful use of force or violence upon the person of another") (emphasis added); CAL. PENAL CODE § 302 (West 2005) ("Every person who *intentionally* disturbs or disquiets any assemblage of people met for religious worship. . . is guilty of a misdemeanor") (emphasis added); CAL. PENAL CODE § 350(a) (West 2005) ("Any person who *willfully* manufactures, *intentionally*

possesses no knowledge of the woman's pregnancy, then he is given no warning of the potential for criminal liability for killing the unborn, invisible fetus. In fact, generally "a law must give sufficient warning of prohibited behavior so that individuals may conduct themselves accordingly."¹²⁹ Therefore, to punish a defendant for killing a fetus that he neither knew nor should have known existed, seems to go against our notions of fundamental fairness embedded within the California Penal Code.

In accordance with the California Penal Code's implicit concerns with notions of fundamental fairness, it seems unlikely that the legislature intended to pass such a broad sweeping piece of legislation. In addition to the fact that a defendant can be found guilty of implied malice murder of a fetus, the California Supreme Court held prior to *Taylor* that viability is not an element of fetal murder under section 187.¹³⁰ The lack of a viability requirement, combined with the court's application of implied malice in *Taylor*, demonstrates that a defendant is subjected to an extended risk of liability under the statute before even knowing the woman is pregnant.¹³¹ Therefore, under the court's current interpretation of section 187, a defendant may be found guilty of implied malice murder of a fetus only after a mere seven to eight weeks after conception without any knowledge of the pregnancy.

Furthermore, under section 190.2 a defendant "convicted of more than one offense of murder in the first or second degree" within the same proceeding, is eligible for either capital punishment or the lesser alternative of life imprisonment without the possibility of parole.¹³² The California Supreme Court has held that fetal murder is applicable under this statute.¹³³ In looking at criminal liability as

sells, or knowingly possesses for sale any counterfeit of a mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office, shall, upon conviction, be punishable") (emphasis added).

129. Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 472 (1998).

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

131. *Id.* at 616 (Mosk, J., dissenting).

132. CAL. PENAL CODE § 190.2(a)(3) (West Supp. 2006).

133. *People v. Dennis*, 950 P.2d 1035, 1059 (Cal. 1998).

applied to fetuses under section 187, in conjunction with the multiple-murder special circumstances under section 190.2, a defendant's punishment for committing such a crime seems not only likely, but severe. Clearly, the legislature intended to punish such heinous crimes, but it seems unlikely that the legislature intended such a seemingly unfair and unyielding result.

In addition to section 190.2, section 12022.9 provides a sentence enhancement in certain circumstances when harm to a pregnant woman results in the death of the fetus.¹³⁴ The enhancement requires that the defendant knew or reasonably should have known the woman was pregnant.¹³⁵ As previously mentioned, the *Taylor* court used the specific knowledge requirement embedded within section 12022.9 to support its holding.¹³⁶ The court found that the *absence* of such a requirement within section 187 indicated the legislature did not intend to impose such a knowledge requirement for implied malice murder.¹³⁷ In comparing section 187 with section 12022.9, it seems odd that knowledge of the woman's pregnancy would be required for a sentence enhancement, but not for a charge of murder. One would assume that a charge of murder, arguably the most severe crime, would carry a higher knowledge requirement than a simple sentence enhancement. But under the *Taylor* court's interpretation, a defendant can be convicted of second degree murder of a fetus and be subject to the multiple-murder special circumstance under 190.2, yet not receive a sentence enhancement under 12022.9, which is clearly the lesser of the three punishments. The legislature could not have intended this paradoxical result.

VI. IMPLICATIONS

Because of the severe interpretation of section 187, the court's decision in *Taylor* has broad implications. This decision sets a dangerous precedent which could conceivably be used to impact the abortion debate. Specifically, the court's decision has the potential to bolster the argument that the killing of a fetus, regardless of the method, is murder. Additionally, the broad interpretation and

134. CAL. PENAL CODE § 12022.9 (West 2005).

135. *Id.*

136. *People v. Taylor*, 86 P.3d 881, 885 (Cal. 2004).

137. *Id.*

concern surrounding the issue will likely prompt other states to follow suit and punish these violent acts as severely as California currently does.

A. *The Effect of Taylor on Abortion*

Many abortion-rights advocates fear the *Taylor* court's decision as possible support along with other feticide laws for the movement to outlaw abortion and overturn *Roe v. Wade*.¹³⁸ There is grave concern among these advocates that decisions such as *Taylor* combined with fetal murder laws will be used by judges and anti-choice propagandists to undermine a woman's right to choose.¹³⁹ Recognizing a fetus as a person in the criminal context leaves the door open to allow the same interpretation in the abortion context.¹⁴⁰ By equating the killing of a human being with the killing of a fetus, the fetus is provided with a legal status. Additionally, this indicates that women and their unborn fetuses are of equal worth and the taking of their lives should be similarly punished.

The recognition and equating of life worth in the criminal context has the potential to seep into the abortion context and infringe upon a woman's right to an abortion. Such a problem was envisioned with the Unborn Victims of Violence Act ("UVVA"), a federal act similar to state fetal murder laws.¹⁴¹ Shortly before the court's decision in *Taylor*, Congress passed the UVVA.¹⁴² The UVVA makes it a crime to kill a fetus during the commission of a federal offense.¹⁴³ The defendant does not have to have prior knowledge of the pregnancy in order to be found guilty.¹⁴⁴ Further, the UVVA refers to a fetus as a "child in utero" and defines a fetus as any "member of the species homo sapiens, at any stage of

138. Peter Blumberg, *High Court Keeps Pro-Life, Pro-Choice Camps Guessing*, S.F. DAILY J., Apr. 13, 2004, at 1.

139. *Id.*

140. Tsao, *supra* note 129, at 470.

141. 10 U.S.C. § 919a(a)(1) (Supp. 2004); Kate Snow, *Laci's Family Endorses "Unborn Victims" Bill*, CNN, May 8, 2003, <http://www.cnn.com/2003/ALLPOLITICS/05/07/laci.bill/>.

142. Mike McKee, *Killing of Fetus, Intentional or Not, Still Murder*, THE RECORDER, Apr. 6, 2004, at 1.

143. 10 U.S.C. § 919a(b) (2000).

144. *Id.*

development, who is carried in the womb.”¹⁴⁵ Conversely, California law requires that the fetus be at least seven to eight weeks old at the time of the murder in order to charge a defendant with the crime.¹⁴⁶ Significantly, the passage of the UVVA marked the first time a federal statute recognized and granted rights to a fetus.¹⁴⁷

In response to whether the UVVA would impact abortion rights, Senator Orrin Hatch responded, “They say it undermines abortion rights. It does undermine it [but the] partisan arguments over abortion should not stop a bill that protects women and children.”¹⁴⁸ Similarly, with respect to the UVVA, Senator Dianne Feinstein expressed concern that “[t]hese federal laws, along with more than 350 anti-choice measures enacted by States, are setting legal precedents that abortion opponents will use to challenge *Roe v. Wade*, which is perilously close to being overturned . . . It is entirely possible that abortion will once again be illegal in this country.”¹⁴⁹

Senator Hatch’s and Senator Feinstein’s responses to the possible impact of the UVVA on abortion rights undoubtedly sparked concern among abortion rights advocates. Additionally, the passage of feticide laws in both the states and Congress, highly suggests that a woman’s right to choose is potentially at risk of being eliminated or at least diminished by legislation that broadly defines the requirements of fetal murder.¹⁵⁰ Although both California’s

145. 10 U.S.C. § 919a(d) (Supp. 2004); *see also* Memorandum from ACLU Washington National Office to Interested Persons (June 17, 2003), <http://www.aclu.org/reproductiverights/fetalrights/1535leg20030617.html> [hereinafter ACLU Memo] (stating that by applying to any stage of prenatal development, the UVVA will be the “first federal law to recognize a zygote (fertilized egg), a blastocyst (pre-implantation embryo), an embryo (through week eight of a pregnancy), or a fetus as an independent ‘victim’ of a crime, with legal rights distinct from the woman who has been harmed by criminal conduct”).

146. *People v. Davis*, 872 P.2d 591, 602 (Cal. 1994).

147. Megan Fitzpatrick, *Fetal Personhood After the Unborn Victims of Violence Act*, 58 RUTGERS L. REV. 553, 554 (2006).

148. Snow, *supra* note 141.

149. 150 CONG. REG. S4371 (daily ed. Apr. 26, 2004) (statement of Sen. Feinstein).

150. *See* ACLU Memo, *supra* note 145 (stating that UVVA undermines a woman’s right to make decisions about her pregnancy and health by “separate[ing] the woman from her fetus in the eyes of the law”).

murder statute and the UVVA contain exceptions for legal abortion procedures,¹⁵¹ there is no solid guarantee that the continued validity of *Roe* will require such exceptions in the future.¹⁵² In fact, the UVVA's congressional supporters refused an amendment to the UVVA that expressly stated that the bill should not be construed in a manner that would limit a woman's right to an abortion.¹⁵³ This further demonstrates that at the federal level, there is a growing trend that criminal laws affecting fetal life are being viewed as coextensive with the laws governing the right to life under abortion. Exclusion of the amendment further provides support for the erosion of women's abortion rights.

The implementation of fetal murder laws combined with the UVVA and the potential for other states to follow suit, may play some role in an overturning of *Roe* should the court revisit the issue in the near future. Arguably, the court's decision in *Taylor* and the UVVA's lack of a viability requirement seem to indicate that the distinction between fetal murder and abortion is already beginning to disappear.¹⁵⁴ Although the state clearly has some interest in protecting fetal life and punishing those who harm pregnant women and their unborn fetuses, the *Taylor* court's broad interpretation of section 187 seems to indicate that the state's interest in the issue is growing. And not only is the state's interest in fetal life growing, but the protection afforded to fetuses is also increasing. Now, a defendant can be convicted of murdering a fetus when he did not even know that the woman he harmed was pregnant.¹⁵⁵

151. See 18 U.S.C. § 1841 (c)(1)–(3) (Supp. 2004); CAL. PENAL CODE § 187(b)(1)–(3) (West Supp. 2006).

152. A lengthy discussion of *Roe* would be outside the scope of this Comment. Revisiting *Roe* would encompass the constitutional issue of a woman's right to privacy, which would be a much larger issue than simply defining a fetus as a person in the criminal context and prosecuting a defendant responsible for its murder.

153. H.R. REP. NO. 108-420, at 56 (2004) (illustrating that Representative Tammy Baldwin (D-WI) offered an amendment to the UVVA that stated “[n]othing in [the UVVA] shall be construed as undermining a woman's right to choose an abortion as guaranteed by the United States Constitution or limiting in any way the rights and freedoms of pregnant women”).

154. Under the UVVA, an “unborn child” is defined as a child in utero “at any stage of development.” 18 U.S.C.A. § 1841 (West Supp. 2006).

155. *People v. Taylor*, 86 P.3d 881, 882 (Cal. 2004).

Taylor's broad interpretation of section 187 may be used as support for undermining a woman's right to an abortion. A holding such as the one in *Taylor* is viewed by pro-life advocates as a victory.¹⁵⁶ Opponents characterize the UVVA as simply another instance in which a fetus is being treated as a person and thus afforded a great deal of protection.¹⁵⁷ Instances such as this "set[] the stage for a jurist to acknowledge that human beings at any stage of development deserve protection—even protection that would trump a woman's interest in terminating a pregnancy."¹⁵⁸ In addition to California's broad interpretation, and Federal legislation, the growing trend in other states bolsters the anti-abortion position.

*B. Fetal Murder Laws Are a Growing
Trend within the United States*

Because of the states' desire to punish violent assaults and discourage domestic violence as well as drunk driving, fetal murder laws are a growing trend among state legislatures.¹⁵⁹ Additionally, with headline-grabbing cases like the infamous Scott Peterson murder trial, states feel compelled to take action against violent offenders who harm a pregnant woman and her unborn child.¹⁶⁰ This pressure is also felt at the federal level as evidenced by the passage of the UVVA. Despite these similar pressures, the states are not united in how they punish such offensive crimes.

Although fetal murder laws vary among the states, thirty-two states today recognize the unlawful killing of an unborn child in at least some circumstances.¹⁶¹ While some states impose a viability

156. For example, Samuel Casey, executive director and CEO of the Christian Legal Society, stated "[i]n as many areas as we can, we want to put on the books that the embryo is a person." Aaron Zitner, *Abortion Foes Attack Roe on New Research*, L.A. TIMES, Jan. 19, 2003 at A1.

157. See 151 CONG. REG. S3128 (daily ed. March 25, 2004) (statement of Sen. Feinstein). In expressing her opposition to the UVVA, Senator Feinstein referred to Samuel Casey's comments as indicative of how the bill can be used to attack *Roe. Id.*

158. Zitner, *supra* note 156.

159. Tsao, *supra* note 129, at 480.

160. See Snow, *supra* note 141 (noting that twenty-six states have laws allowing a violent crime against a pregnant woman to be treated as crimes against two separate people).

161. Nat'l Right to Life Comm., *State Homicide Laws the Recognize Unborn*

requirement,¹⁶² other states criminalize the killing of an unborn child at any stage of its development.¹⁶³ Additionally, while some states recognize fetal manslaughter,¹⁶⁴ others only find liability where the defendant acted with malice.¹⁶⁵

The fact that Congress signed the UVVA into law just five days prior to the court's decision in *Taylor* reflects the pressure felt within the state legislature.¹⁶⁶ The UVVA is commonly known as Laci and Conor's Law,¹⁶⁷ which came into existence after Scott Peterson was accused of killing his pregnant wife, Laci and their unborn child, Conor.¹⁶⁸ Because of the timing of the court's decision in *Taylor* and the publicity surrounding the Peterson case, one must wonder whether the court felt the pressure of such a publicized case when it interpreted California's murder statute so broadly. Although the Peterson case did not involve the issue within *Taylor* since Laci was much further along in her pregnancy at the time of her murder,¹⁶⁹ the court in *Taylor* likely responded to the Peterson case in order to make a statement regarding how similar conduct would be punished.

The Peterson case undoubtedly opened the public's eyes to the issue of fetal murder and public concern is a powerful political motivator. It is possible that the recent publicity surrounding the issue will prompt those states without such statutes to take action and

Victims, Oct. 5, 2005, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html.

162. *E.g.*, IND. CODE § 35-42-1-1(4) (2005) (stating that a "person who knowingly or intentionally kills a fetus that has attained viability (as defined in IC 16-18-2-365) commits murder, a felony").

163. *E.g.*, UTAH CODE ANN. § 76-5-201(1)(a) (West 2005) ("A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, . . . causes the death of another human being, including an unborn child at any stage of its development").

164. *E.g.*, IDAHO CODE ANN. § 18-4006 (2005) ("Manslaughter is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, without malice.").

165. *E.g.*, CAL. PENAL CODE § 192 (West 2005) (excluding the term "fetus" from its definition of manslaughter).

166. McKee, *supra* note 142.

167. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (2004) (codified as amended in 18 U.S.C.A. § 1841 and 10 U.S.C.A. § 919a).

168. *See* Snow, *supra* note 141.

169. *See id.*

criminalize fetal murder. Additionally, the *Taylor* court's holding will likely encourage states to interpret their statutes more expansively so as to criminalize the conduct on a broader scale. And, it might also incite state legislatures to amend their statutes and eliminate the viability requirement or make fetal manslaughter a crime.

VII. CONCLUSION

While many would label fetal murder as a clearly heinous crime, distaste for such a crime does not justify construing the law in such a manner so as to make a person liable for harming something he had no reason to believe existed. In amending section 187, the California legislature purposefully did not include the term "fetus" within the definition of human beings, thus indicating that the legislature intended to treat the murder of each type of victim differently. Furthermore, the legislature did not make fetal manslaughter a crime, which implied that the legislature intended the defendant to have acted with malice toward the fetus specifically in order to convict him of the crime.

Although the *Taylor* court undoubtedly appeased the public's desire to punish such an atrocious crime, the court's actions were not without consequences. As a result of its broad interpretation of section 187, the court's decision began to affect criminal laws as they apply to abortion. Pro-life advocates will likely use this decision to bolster their view that fetal life should be protected and those who harm fetuses regardless of the method used, should be punished.

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