State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform

Gary V. Perko

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol68/iss6/9
State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform

Medical knowledge of fetal development has increased at a startling pace in recent years.\(^1\) The growth of medical technology has forced courts to reexamine the legal status of the fetus. As recently as 1987, the North Carolina Supreme Court construed the term “person” to include a viable fetus under the North Carolina Wrongful Death Act.\(^2\) Only two years later, however, the same court refused to extend the protection of the criminal law of homicide to the unborn. In State v. Beale\(^3\) the North Carolina Supreme Court chose instead to adopt an ancient common-law rule requiring proof of live birth for a murder conviction based on the death of a child resulting from injuries sustained in the womb.\(^4\)

This Note analyzes the court’s decision in Beale and traces the development of the “born alive rule”\(^5\) from its creation in the middle ages to its reaffirmation in the twentieth century. The Note concludes that the Beale court reached the correct result, but criticize the court’s incomplete statutory analysis. The Note also examines legislative attempts in other jurisdictions to ameliorate the common-law rule and suggests a statutory approach to punish violence against the unborn.

On the night of December 17, 1986, Donald Ray Beale, Jr. fired a shotgun at the head of his pregnant wife, Donna Faye Beale, as she started to enter her home.\(^6\) At the time, Mrs. Beale was twelve days past her due date, and had been having contractions earlier in the day.\(^7\) After the shooting, Donna Beale was taken to a local hospital where she and her unborn child were pronounced dead on arrival.\(^8\)

On August 31, 1987, the Grand Jury of Cumberland County indicted Beale for the murders of his estranged wife and of “Baby Girl Beale, a human being, a viable but unborn child.”\(^9\) Beale moved to dismiss the second count of the indictment on the ground that the term “person” as used in the North Carolina Wrongful Death Act did not include a child who has not survived childbirth.\(^10\)

4. \(\text{Id.}\) at 92-93, 376 S.E.2d at 3-4.
5. Courts and commentators generally refer to the common-law rule excluding unborn children from the class of potential victims of murder as “the born alive rule.” See, e.g., \(\text{Id.}\) at 90, 376 S.E.2d at 2; Forsythe, supra note 1, at 563.
7. Brief for the State at 3, Beale (No. 64PA88). According to an obstetrician who examined her on the morning of the shooting, Mrs. Beale had been having contractions at 10- to 15-minute intervals. \(\text{Id.}\) at 2-3. The doctor also testified that the unborn child was alive at the time of the examination. \(\text{Id.}\) at 3.
8. \(\text{Id.}\) An autopsy attributed the death of the fetus to the mother’s loss of circulation. \(\text{Id.}\) The pathologist also testified that the unborn child was a normal, nine-pound, four-ounce baby girl. \(\text{Id.}\) In the pathologist’s opinion, the unborn child was a viable fetus at the time of the shooting. \(\text{Id.}\)
9. Beale, 324 N.C. at 88, 376 S.E.2d at 1. The indictment of August 31 superseded a previous
dictment, claiming that the killing of a fetus does not constitute murder under North Carolina law. Following a hearing, the trial court denied Beale's motion. Beale sought interlocutory review of the trial court's ruling by petitioning for a writ of certiorari. The North Carolina Supreme Court granted certiorari to decide "whether the unlawful, willful and felonious killing of a viable but unborn child is murder within the meaning of [North Carolina General Statutes section] 14-17." Refusing to extend the common-law definition of murder to encompass the killing of a viable fetus, the supreme court reversed the denial of Beale's motion to dismiss. The court rejected the State's argument that North Carolina should abandon the common-law born alive rule in light of "advances in medical technology which enable the State to show with certainty the viability and cause of death of the unborn child."

With Beale the North Carolina Supreme Court became the latest court to address an issue that has plagued judges and commentators for centuries. Although modern courts take the born alive rule for granted, the criminal law's recognition of crimes against the unborn has been debated since the middle ages. Writing during the reign of King Henry III, but reflecting the Roman canon law of the thirteenth century, common-law scholar Henry de Bracton viewed the killing of a "quickened" fetus as homicide. In contrast, Bracton's contemporary, Andrew Horne, distinguished between infants "slain en ventre sa mere" and those killed "after birth." Horne's concerns are no longer relevant in light of current medical technology, which enables physicians to establish conclusively the existence of a live fetus within the womb.

indictment, which charged that Beale murdered Donna Faye West Beale in violation of North Carolina General Statutes section 14-17; and "unlawfully, willfully and feloniously did employ an instrument, a 410 shotgun, on Donna Faye West Beale, a pregnant woman, by firing... with intent to destroy the unborn child, in violation of North Carolina General Statutes section 14-44." For a discussion of the relationship between the murder and abortion statutes, see infra text accompanying notes 106-12.

11. Id.
12. Id.
13. Id. (citing N.C. GEN. STAT. § 14-17 (1988)). For the text of § 14-17, see infra note 75.
15. Id. at 90, 376 S.E.2d at 2.
17. Modern courts define "quickening" as "the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy." Roe v. Wade, 410 U.S. 113, 132 (1973); see also State v. Forte, 222 N.C. 537, 539, 23 S.E.2d 842, 844 (1943) (describing quickening as "the first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy").
18. Bracton wrote: "If one strikes a pregnant women or gives her poison in order to procure an abortion, if the fetus is already formed or quickened, especially if it is quickened, he commits homicide." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 341 (G. Woodbine ed. 1968).
20. 3 A. HORNE, THE MIRROR OF JUSTICES 139 (Selden Society ed. 1895).
21. Id. Horne's concerns are no longer relevant in light of current medical technology, which enables physicians to establish conclusively the existence of a live fetus within the womb. See infra text accompanying notes 34-37.
a related evidentiary concern, sixteenth-century scholar William Stanford accepted the born alive rule "because it is difficult to judge . . . whether the child died of this battery of its mother or through another cause." 22

By the seventeenth century, the common law of homicide fully embraced the born alive rule. 23 Sir Edward Coke maintained that the killing of a quick, but unborn, child "is a great misprision, and no murder; but if the childe be born alive and dieth . . . this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive." 24 In his Commentaries, Sir Edward Blackstone reiterated the born alive rule, closely following Coke's language. 25 Considering the tremendous influence of Coke and Blackstone on early American common law, it is not surprising that American courts uniformly adopted the born alive rule during the nineteenth century. 26 By 1850 the English common-law rule "had long been accepted in the United States." 27

Although American courts invariably adopted the born alive rule without examining its purpose, 28 scholars generally attribute the rule to the technological inability to prove the corpus delicti 29 of the homicide of an unborn child. 30 In other words, "[t]he 'rule' is generally understood to derive from the impossibility, 300 years ago, of determining whether and when a fetus was living and when and how it died." 31 High infant mortality rates also led the courts to adopt a presumption that an unborn child would not be born alive. 32

Although medical science was unable to establish conclusively the existence

---

24. 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND *50. The term in rerum natura means "in the nature of things; in the realm of actuality; in existence." BLACK'S LAW DICTIONARY 714 (5th ed. 1979).
25. "To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder." 4 W. BLACKSTONE, COMMENTARIES *198.
26. Several American courts cited Coke and Blackstone in support of the born alive rule. See, e.g., Clarke v. State, 117 Ala. 1, 7, 23 So. 671, 674 (1898); State v. Cooper, 22 N.J.L. 52, 54 (1849).
28. See Forsythe, supra note 1, at 597-98.
29. "The 'corpus delicti' of a crime is the body or substance of the crime, which ordinarily includes two elements: the act and the criminal agency of the act." BLACK'S LAW DICTIONARY 310 (5th ed. 1979); see also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 4 (1972) (discussing components of the corpus delicti requirement).
30. See Forsythe, supra note 1, at 590. To establish the corpus delicti of homicide, "there must be a showing of death and that the death resulted from the criminal act or agency of another." Lane v. Commonwealth, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978).
32. One early nineteenth-century commentator observed that "an average, one child in sixteen, or between that number and twenty, is usually dead before delivery." J. CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE 416 (1st Am. ed. 1835).
33. See A. DEAN, PRINCIPLES OF MEDICAL JURISPRUDENCE 168 (1854); see also People v. Greer, 79 Ill. 2d 103, 112, 402 N.E.2d 203, 207 (1980) (early judges rationalized the born alive rule "by creating a presumption that the fetus would die in childbirth").
of a live fetus or the cause of an unborn child's death until the middle of the twentieth century, recent advances in medical technology make these determinations routine. "Today it is undisputed that medicine is generally able to prove the corpus delicti of the homicide of the unborn child." Physicians can establish the existence and gestational age of a live fetus by fetal heart monitoring, sonography, and other techniques. As was the case in Beale, today's medical science can determine the proximate cause of a fetal death. Moreover, birth itself is no longer a violent perilous adventure. Current statistics indicate that the fetal survival rate after twenty weeks of gestation is ninety-nine percent."

These advancements in obstetrics and forensics have forced courts to reexamine the protection afforded unborn children under the law. In what Professor Prosser called "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts," a majority of jurisdictions now recognize a wrongful death action based on the death of an unborn child. In doing so, courts construe the terms "person" or "human being" in the various wrongful death statutes to include a viable fetus, thereby entitling the unborn to the same protection afforded the born. For example, when the North Carolina Supreme Court first recognized the tort of wrongful death of a viable fetus, the court explained: "A viable fetus . . . is undeniably alive and undeniably human. It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human life forms." Despite the recognition of viable fetuses as persons in the tort context, courts have not been as willing to extend the protection of the criminal law to the unborn.

With the court's decision in Beale, North Carolina became the thirtieth state to adopt the born alive rule by judicial decision in a criminal case. In at

34. Forsythe, supra note 1, at 579.
36. See supra note 8.
37. See, e.g., Brief for the State at 3, Beale (No. 64PA88) (autopsy establishing loss of mother's circulation as cause of fetal death); see also State v. Trudell, 243 Kan. 29, 30, 755 P.2d 511, 512 (1988) ("abnormal trauma . . . had torn the placenta, blocking the blood supply to the fetus and resulting in its death"); People v. Guthrie, 97 Mich. App. 226, 228, 293 N.W.2d 775, 776 (1980) (the "infant bled to death" after placental abruption resulting from trauma received in automobile accident), appeal denied, 417 Mich. 1006, 334 N.W.2d. 616 (1983).
41. See, e.g., DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987); Verkennes v. Cornelia, 229 Minn. 365, 38 N.W.2d 838 (1949). For a complete list of cases construing wrongful death statutes to include viable fetuses, see Note, supra note 40, at 1291-92 n.6.
42. DiDonato, 320 N.C. at 427, 358 S.E.2d at 491. The Beale court did not acknowledge this statement. Instead, the court attempted to distinguish DiDonato in a footnote, stating that the DiDonato court reached its conclusion "after considering the language of the Wrongful Death Act, its legislative history, and the statute's broadly remedial objectives." Beale, 324 N.C. at 90 n.3, 376 S.E.2d at 2 n.3; cf. infra note 48 and accompanying text (discussing different rules of construction for remedial and penal statutes).
43. See Clarke v. State, 117 Ala. 1, 23 So. 67 (1898); Meadows v. State, 291 Ark. 105, 722
least eleven of these cases, the courts adopted the rule despite medical evidence indicating the cause of fetal death. 44 Although some states have overturned the rule to some degree by statute, 45 only two states have done so by judicial fiat. 46 Even in those jurisdictions that have abandoned the live-birth requirement in the tort context, courts continue to apply the born alive rule in homicide cases. 47 These courts typically note this inconsistency, but dismiss it with little hesitation, often pointing out that remedial statutes are to be construed liberally, whereas criminal statutes are governed by a rule of strict construction. 48


45. See, e.g., CAL. PENAL CODE § 187(a) (West 1988) (defining murder as “the unlawful killing of a human being or a fetus, with malice aforethought” (emphasis added)); ILL. REV. STAT. ch. 38, para. 9-1-2 (Supp. 1989) (creating the crime of “intentional homicide of an unborn child”); MINN. STAT. ANN. §§ 609.266-268 (West 1987) (establishing separate, comprehensive homicide statutes encompassing unborn children). For a discussion of legislative attempts to abolish the born alive rule, see infra text accompanying notes 116-135.


47. See infra note 48.

48. For example, the Beale court noted the wrongful death statute’s “broadly remedial objectives.” Beale, 324 N.C. at 90 n.3, 376 S.E.2d at 2 n.3. In contrast, the court emphasized that “[c]riminal statutes must be strictly construed.” Id. at 93, 376 S.E.2d at 4 (citations omitted); see also People v. Greer, 79 Ill. 2d 103, 115, 402 N.E.2d 203, 209 (1980) (“‘Differing objectives and considerations in tort and criminal law foster . . . different principles governing the same factual situation.’”); State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985) (“This court may . . . fashion a remedy for a civil wrong . . . [but] . . . is forbidden to use its common law power to fashion criminal crimes for public wrongs.”); State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982) (Wrongful death statute was “properly subject to a liberal application,” whereas homicide statute must “be narrowly construed.”). But see State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (“It would be grossly inconsistent for
The rule requiring strict construction of penal statutes "is perhaps not much less old than construction itself."49 The rule rests "on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature."50 Plainly stated, the rule requires courts to construe criminal laws in favor of the accused. Merely stating the rule, however, does not end the inquiry. The rule does not relieve a court from its duty to construe the statute in question, nor does it "mean that a criminal statute should be construed stintingly or narrowly."51 As the North Carolina Supreme Court once stated, "[w]hile a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress."52

A related proposition often cited in support of retaining the born alive rule is the constitutional guarantee against undue surprise afforded criminal defendants by the due process clause.53 As one court noted, "[t]he first essential of due process is fair warning of the act which is made punishable as a crime."54 This notion of fair warning stems from the federal constitution's prohibition of ex post facto laws,55 which protects individuals against punishment for an act that was not criminal when performed. Although the ex post facto prohibition "applies only to legislative acts and not to judicial decisions,"56 the United States Supreme Court in Bouie v. City of Columbia57 proclaimed that "[i]f 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 the same result by judicial construction."58

Several state courts interpret this language in Bouie as prohibiting retroac-
tive rejection of the born alive rule absent legislative direction to the contrary.\textsuperscript{59} In Keeler \textit{v. Superior Court},\textsuperscript{60} for example, the California Supreme Court examined the common law of California and other states and concluded that judicial construction of the state murder statute to include the killing of an unborn child "would not have been foreseeable."\textsuperscript{61} Relying on \textit{Bouie}, the court held that rejection of the born alive rule would deny Keeler due process of law.\textsuperscript{62}

At least one commentator has criticized this concept of "lawyer's notice," stating that "[i]n the great run of cases, the picture of a citizen relying to his or her detriment on highly technical legal sources is simply not credible."\textsuperscript{63} Nevertheless, the \textit{Bouie} court alluded to an objective "lawyer's notice" standard when it stated that "[t]he determination whether a criminal statute provides fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an \textit{ad hoc} appraisal of the subjective expectations of particular defendants."\textsuperscript{64}

Yet another rationale relied upon by courts that have retained the born alive rule is legislative intent. Several courts have concluded that because the common-law rule predated the enactment of the homicide statute in question, the legislature intended to retain the rule when it enacted the statute.\textsuperscript{65} When construing a vehicular homicide statute in \textit{State v. Amaro},\textsuperscript{66} for example, the Rhode Island Supreme Court recognized that "[t]he born-alive rule was well established at common law . . . by the time [the statute] was enacted in 1950."\textsuperscript{67} The court reasoned "that the Legislature would have expressly deviated from the common-law born-alive meaning of 'person' had it meant to do so."\textsuperscript{68}

Other courts look to the statutory scheme of the state's penal code to deter-


\textsuperscript{60} 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). The state charged Keeler with the murder of an eight-month-old fetus after he allegedly assaulted his estranged wife by repeatedly kicking her in the abdomen while proclaiming: "I'm going to stomp it out of you." \textit{Id.} at 623-24, 470 P.2d at 618-19, 87 Cal. Rptr. at 482-83.

\textsuperscript{61} \textit{Id.} at 639, 470 P.2d at 630, 87 Cal. Rptr. at 494. Although no previous California case had adopted the born alive rule explicitly, one case had suggested it when holding that the killing of an unborn child in the process of being born was murder. \textit{See id.} at 636-38, 470 P.2d at 628-29, 87 Cal. Rptr. at 492-93, (discussing People \textit{v. Chavez}, 77 Cal. App. 2d 621, 176 P.2d 92 (1947)).

\textsuperscript{62} \textit{Id.} at 639, 470 P.2d at 630, 87 Cal. Rptr. at 494. The court recognized that the defendant's conduct was "certainly 'improper' and 'immoral,'" but stressed that "the guarantee of due process extends to violent as well as peaceful men." \textit{Id.} at 635, 470 P.2d at 627, 87 Cal. Rptr at 491; \textit{cf. supra} note 58 (noting \textit{Bouie} Court's observation that the rule prohibiting unforeseeable construction of penal statutes is particularly compelling when defendant's conduct cannot be deemed improper or immoral).

\textsuperscript{63} Jeffries, supra note 49, at 230.

\textsuperscript{64} \textit{Bouie v. City of Columbia}, 378 U.S. 347, 355-56 n.5 (1964).


\textsuperscript{66} 448 A.2d 1257 (R.I. 1982).

\textsuperscript{67} \textit{Id.} at 1259.

\textsuperscript{68} \textit{Id.}
mine legislative intent. In *Hollis v. Commonwealth*\(^9\) the Kentucky Supreme Court concluded that rejection of the born alive rule would run "afoul of the well-recognized rule of statutory construction that 'the specific statute controls a more general statute.'"\(^{70}\) Accordingly, the defendant's violent conduct resulting in the miscarriage of his estranged wife's unborn child was punishable by the abortion statute, not the murder statute.\(^{71}\) The *Hollis* court noted that a criminal abortion covered "any 'act . . . producing the premature expulsion of the fetus.'"\(^{72}\) The court emphasized that the gravamen of the Kentucky abortion statute "is the *act* causing the delivery of the fetus, not the method of delivery."\(^{73}\) Because the murder and abortion statutes were enacted contemporaneously, the court reasoned that "the legislature intended conduct directed to cause the unlawful abortion of a fetus . . . to be punished under the abortion statute."\(^{74}\)

In *Beale* the North Carolina Supreme Court touched upon the various rationales supporting maintenance of the born alive rule, but did not rest its decision on any one proposition. The court began by noting that section 14-17 of the North Carolina General Statutes\(^{75}\) codified the common-law definition of murder, which did not include the killing of a viable but unborn child.\(^{76}\) The court then examined the decisions of the minority of jurisdictions that have rejected the born alive rule, emphasizing that the holdings in each case were prospective only.\(^{77}\) With little discussion, the court chose to join "the overwhelming majority of courts which have considered the issue and concluded that the killing of a viable but unborn child is not murder under the common law."\(^{78}\)

In the *Beale* court's view, the legislature determined the punishment for the

---

69. 652 S.W.2d 61 (Ky. 1983). In *Hollis* defendant was charged with the murder of a fetus carried by his estranged wife. *Id.* at 61. The State alleged that Hollis told his wife that "he did not want a baby" and then forcefully aborted the fetus. *Id.*

70. *Id.* at 64.

71. *Id.*

72. *Id.* (quoting KY. REV. STAT. ANN. § 311.720 (Michie 1983)).

73. *Id.*

74. *Id.* at 64-65; see also State v. Anonymous, 40 Conn. Supp. 498, 502, 516 A.2d 156, 158 (1986) ("The fact that the legislature would refer to an 'unborn child' in [the criminal abortion statute] and not in the [murder statute] is strongly persuasive that the legislature did not intend an 'unborn child' to be a 'person' in the murder statute."); cf. State v. Wickstrom, 405 N.W.2d 1 (Minn. Ct. App. 1987) (affirming criminal abortion conviction of defendant whose battery of pregnant woman caused death of fetus).

75. In pertinent part, § 14-17 provides:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment . . . for life as the court shall determine . . . All other kinds of murder . . . shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon.

N.C. GEN. STAT. § 14-17 (Supp. 1989).


78. *Id.* at 92, 376 S.E.2d at 3 (citations omitted).
destruction of a fetus when it created the crime of abortion.\textsuperscript{79} The court noted that the legislature previously had amended both the abortion and murder statutes, but observed that "[n]othing in any of the statutes or amendments shows a clear legislative intent to change the common law rule that the killing of a viable but unborn child is not murder."\textsuperscript{80} To buttress its conclusion, the court stressed that "[c]riminal statutes must be strictly construed."\textsuperscript{81} Writing for the court, Justice Frye summarized by stating that "[i]n view of the action previously taken by the legislature and considering the weight of authority in other jurisdictions on this question, we believe that any extension of the crime of murder . . . is best left to the discretion and wisdom of the legislature."\textsuperscript{82}

When carefully scrutinized, it appears that the \textit{Beale} court failed to apply a complete analysis. The court began by noting that North Carolina’s murder statute, section 14-17, neither defines the term "murder," nor identifies potential victims of the crime.\textsuperscript{83} The court then observed that the common-law definition of murder did not include the killing of a viable fetus.\textsuperscript{84} At this point, however, the court ended its examination of section 14-17. The court never discussed the purpose of the statute, a necessary inquiry even under the rule of strict construction.\textsuperscript{85}

If the court had examined the purpose of section 14-17, which is to punish the unlawful killing of human beings, it might have reached a different result. As one commentator stated, "[a] homicide statute protects all human beings. To construe a homicide statute in such a manner as to exclude an entire class of human beings is to defeat the intention of the legislature."\textsuperscript{86}
In *DiDonato v. Wortman*\(^{87}\) the court defined the term "person" to include a viable but unborn child under North Carolina's wrongful death statute.\(^{88}\) In *Beale*, however, the court disregarded the language of its prior decision, choosing instead to invoke summarily the rule of strict construction even though rejection of the born alive rule would advance the purpose of the murder statute.\(^{89}\) The court ignored the irony that Mrs. Beale, had she survived, could have recovered monetary damages for the baby's death, but could not have obtained criminal punishment against her husband.

Although it is true that the common-law born alive rule was well established when the North Carolina General Assembly first enacted the predecessor to section 14-17,\(^{90}\) the rule was based on the inability of existing medical science to prove the *corpus delicti* of murder.\(^{91}\) Because recent advancements in medical technology have eradicated the evidentiary basis of the rule,\(^{92}\) and the court has construed the term "person" to include a viable fetus, the court reasonably could have construed section 14-17 to encompass the killing of a viable fetus. Such a construction would not violate the rule of strict construction, as rejection of the born alive rule would have advanced the purpose of the murder statute.

If, however, the *Beale* court had rejected the born alive rule through judicial construction, the decision would have raised the due process concerns addressed in *Keeler v. Superior Court*.\(^{93}\) On its face, the *Keeler* ex post facto rationale comports with the due process language of *Bouie v. City of Columbia*.\(^{94}\) The facts of both *Keeler* and *Beale*, however, render unrealistic any assertion that the defendants failed to receive fair warning that their actions were criminal. To reach such a conclusion on the facts in *Beale*, one would have to assume that the defendant had studied Coke and Blackstone, as well as the common law of at least twenty-five states, and had concluded that his conduct in shooting his pregnant wife in the head would result in only one murder conviction rather than two.\(^{95}\)

Although the criticisms of "lawyer's notice" aimed at *Keeler*\(^{96}\) apply as well to *Beale*, the Constitution guarantees every criminal defendant fair warning that her conduct is criminal.\(^{97}\) Nevertheless, when applied to *Beale*, the *Bouie* standard is inconclusive. At the time of Beale's conduct, the statute itself did

---

\(^{87}\) 320 N.C. 423, 358 S.E.2d 489 (1987).

\(^{88}\) Id. at 426-28, 358 S.E.2d at 491-92 (construing N.C. GEN. STAT. § 28A-18-2 (1984)); see *supra* text accompanying note 42.

\(^{89}\) See *Beale*, 324 N.C. at 93, 376 S.E.2d at 4.

\(^{90}\) Act of Feb. 11, 1893, ch. 85, 1893 N.C. Session Laws 76.

\(^{91}\) See *supra* notes 28-33 and accompanying text.

\(^{92}\) See *supra* notes 34-38 and accompanying text.

\(^{93}\) 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), superseded by statute, CAL. PENAL CODE § 187 (1988); see *supra* notes 59-62 and accompanying text (discussing *Keeler*).

\(^{94}\) 378 U.S. 347 (1964); see *supra* text accompanying notes 56-58 (discussing *Bouie*).

\(^{95}\) Cf. Jeffries, *supra* note 49, at 229 (making a similar observation about defendant in *Keeler*).

\(^{96}\) See *supra* text accompanying note 63.

\(^{97}\) See *supra* text accompanying note 64.
not define the crime of murder,98 and no North Carolina case had adopted the born alive rule explicitly. Although a look at the "other pertinent law"99 would have revealed that most states still accepted the common-law rule, at least two states had rejected the rule by judicial construction.100 Beale, however, was a case of first impression in North Carolina. Because Bouie at least implicitly contemplates settled law,101 it is unclear whether construing the murder statute to include the killing of a viable fetus would have violated Beale's due process rights. In any event, the Beale court could have done so without violating Beale's due process rights by applying the decision prospectively.102

Viewed in isolation, section 14-17 could have been construed to encompass the killing of a viable but unborn child. The court must not take such an isolated view, however; it must construe a statute with respect to other relevant statutes. The Beale court failed to mention a rule of statutory construction supporting its decision: "It is . . . well settled that statutes dealing with the same subject matter must be construed in pari materia103 and harmonized to give effect to each other."104 This harmonization requires that "[w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms . . . the particular statute will be construed as controlling in the particular situation."105

Although not mentioned by the Beale court, the principle of construing statutes in pari materia supports the ultimate result, which "avoided injecting the law of homicide into the criminal regulation of abortion."106 Although the murder statute punishes the unlawful killing of "human beings," which could be construed to include a viable fetus, the Beale court recognized that "[t]he legislature has considered the question of intentionally destroying a fetus and determined the punishment therefor."107 Section 14-44 addresses the specific

98. See supra note 75; cf. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice . . . that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct.").
99. See supra text accompanying note 64.
100. See supra note 46 and accompanying text.
101. Cf. Bouie, 378 U.S. at 354 ("If a judicial construction . . . 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.") (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1960)).
102. In that regard, the Bouie court stated that "while [an ex post facto] construction is of course valid for the future, it may not be applied retroactively." Id. at 362; see also Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (prospectively applying judicial construction of vehicular homicide statute to encompass viable fetuses); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) (prospective application of decision to include viable fetus as victim of murder).
103. "Upon the same matter or subject." BLACK'S LAW DICTIONARY 711 (5th ed. 1979).
106. Jeffries, supra note 49, at 232. In Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983), the Kentucky Supreme Court suggested that the criminal abortion statute was intended to punish any destruction of a viable unborn child, with or without the mother's consent. Id. at 65; see supra notes 69-74 and accompanying text. In contrast, Professor Jeffries argues that the California legislature, when it enacted the abortion statute, intended to punish consensual abortions less severely than murder. See Jeffries, supra note 49, at 232.
situation in which a fetus is destroyed intentionally, whereas section 14-17 addresses the killing of human beings in general terms. Construing sections 14-17 and 14-44 in pari materia, section 14-44 must control in the more specific situation when a viable fetus is killed.\(^{108}\) Construction of the murder statute to encompass the killing of an unborn child would transform the crime of intentional destruction of a fetus, punishable by a prison term of up to ten years,\(^ {109}\) into a capital offense.\(^ {110}\) As the Beale court stated, "[t]he creation and expansion of criminal offenses is the prerogative of the legislative branch of government."\(^ {111}\) Because the General Assembly treated intentional destruction of a fetus less severely than murder when it enacted the abortion statute, "interpretation of the murder statute to reach abortion of a viable fetus would have been not only unwise, but also invasive of legislative choice."\(^ {112}\)

Although an emotional reaction to the facts of Beale dictates rejection of the born alive rule in favor of severe punishment, the court is not free to ignore well-established rules of statutory construction. Admittedly, it stretches credulity to compare Beale's violent behavior with a mother's choice to abort her viable fetus,\(^ {113}\) particularly in light of the mother's constitutional right to abort prior to viability.\(^ {114}\) Nevertheless, the born alive rule cannot be eradicated by judicial construction because redefining murder to include the killing of a viable fetus would conflict with the legislative prerogative to punish unlawful abortions less severely than murder. Thus, until the General Assembly responds with appropriate legislation, violence against the unborn will be punished inadequately, if punished at all.\(^ {115}\) Accordingly, the legislature should enact such legislation as quickly as politically possible.

In drafting a statute to create crimes against the unborn, the General Assembly will have to confront several issues from the outset. The existing statutes of several states may serve as models to address these difficult issues. An examination of this existing legislation reveals a variety of approaches and attendant problems.\(^ {116}\)

---

108. Beale originally was indicted for the killing of the fetus under § 14-44. See supra note 9; cf. State v. Wickstrom, 405 N.W.2d 1 (Minn. App. 1987) (construing statute making it "unlawful to willfully perform an abortion" to encompass destruction of fetus resulting from battery to mother).

109. See supra note 79 (discussing North Carolina's criminal abortion statute).

110. See N.C. GEN. STAT. § 14-17 (1988). As Professor Jeffries noted when analyzing the decision in Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), "absent wholesale judicial construction of the statutory text, induced abortion by the mother of a viable but unborn 'human being' or by someone acting with her consent would have been punishable as murder." Jeffries, supra note 49, at 232. Moreover, interpretation of the statute to "depend on the consent of the mother . . . would have been to attribute to the statute a meaning that its text would not bear." Id. at 233.

111. Beale, 324 N.C. at 92, 376 S.E.2d at 4 (emphasis added).


113. Cf. Hollis v. Commonwealth, 652 S.W.2d 61, 67 (Ky. 1983) (Wintersheimer, J., dissenting) ("The only similarity between abortion and the [intentional destruction of the fetus by the father] is that an unborn child was involved.").

114. See infra note 129 (quoting Roe v. Wade, 410 U.S. 113 (1973)).

115. Cf. People v. Guthrie, 97 Mich. App. 226, 237-38, 293 N.W.2d 775, 780-81 (1980) ("Although we find that the 'born alive' rule is archaic and should be abolished . . . the abolition of the rule is a matter for action by the Legislature.").

116. For a detailed examination of legislative repeals of the born alive rule, see Parness, Crimes
The drafter must first determine the scope of protection to be afforded the unborn under the criminal law. In that regard, some states take a narrow approach, choosing only to punish the intentional or willful killing of a fetus. The California legislature, for example, amended its murder statute to define the crime as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Other states have achieved the same result by creating a distinct crime, often labelled “feticide,” which outlaws the killing of an unborn child resulting from injury to the mother.

By focusing only on intentional or willful acts, however, the narrow approach fails to protect the unborn from less culpable conduct. For example, although the California Penal Code includes a fetus as a potential victim of murder, it does not include a fetus within the narrow class of potential victims of lesser offenses such as manslaughter. Recognizing this deficiency, other states have enacted comprehensive statutes detailing specific crimes against the unborn. Minnesota, for example, has enacted a statute entitled: “Crimes Against Unborn Children,” which includes murder, manslaughter, and assault, in varying degrees.

The drafter of a statute addressing violence against the unborn also must determine the class of victims to be protected. The new law might encompass injury to unborn children from the point of conception, the point of viability, or some point in between. For example, the definitional section accompanying

---

**Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 HARV. J. ON LEGIS. 97 (1985).**


Representative Frank W. Ballance, Jr., unsuccessfully introduced a bill of this type into the North Carolina House of Representatives during the 1985 session of the North Carolina General Assembly. If enacted, the proposed bill would have created the following new section:

§ 14-17.2. Feticide.

(a) Offense. A person is guilty of feticide if, other than in the course of a lawful abortion pursuant to G.S. 14-45.1, he intentionally, knowingly, recklessly, or under circumstances set forth in G.S. 20-141.4 causes the death of a fetus that, at the time of its death, would have been capable of sustained life outside the mother's womb. A fetus is presumed to be capable of sustained life outside the mother's womb six months or more after the date of its conception.

(b) Punishment. Feticide is punishable to the same extent as if the defendant's conduct had caused the death of the mother.


119. See CAL. PENAL CODE § 187(a) (West 1988); supra text accompanying note 117.

120. See CAL. PENAL CODE § 192 (defining manslaughter as “the unlawful killing of a human being without malice”). For a discussion of the “manslaughter gap” in California, see Comment, Feticide in California: A Proposed Statutory Scheme, 12 U.C. DAVIS L. REV. 723, 725-29 (1979).


Minnesota's crimes against unborn children defines an "unborn child" as "the unborn offspring of a human being conceived, but not yet born." 123

In contrast to Minnesota's specificity, California's murder statute merely prohibits the unlawful killing of "a fetus" without further explanation. 124 In *People v. Smith* 125 the California Court of Appeals narrowed the class of protected victims by construing the statutory term "fetus" "to refer to a viable unborn child." 126 The *Smith* court thus rejected a murder charge based on an assault on the mother that resulted in the death of a previable fetus. 127 The court interpreted *Roe v. Wade* 128 as a constitutional prohibition against including a previable fetus as a victim of murder. 129 Although scholars uniformly reject the *Smith* court's reliance on *Roe*, 130 legislators drafting statutes in this area should be cognizant of its potential precedential value. To avoid the *Smith* result, legislation designed to protect previable fetuses should specify its intended scope clearly. Similarly, legislation intended to protect only viable fetuses should define viability. 131

To avoid infringing upon a mother's constitutional right to abort a pregnancy prior to viability, 132 the new legislation also should exclude explicitly con-

---


126. *Id.* at 759, 129 Cal. Rptr. at 504.

127. *Id.* at 754-55, 129 Cal. Rptr. at 501.


129. *Smith*, 59 Cal. App. 3d at 756-57, 129 Cal. Rptr. at 502-03; see also *Hollis v. Commonwealth*, 652 S.W.2d 61, 63 (Ky. 1983) (Relying on *Roe*, the Kentucky Supreme Court held that the state's interest in the life of a fetus is not sufficiently compelling to support criminal sanctions until the fetus is viable.). The United States Supreme Court summarized its holding in *Roe v. Wade* as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.

*Roe*, 410 U.S. at 164-65.

130. Scholars generally agree that *Roe* merely proscribes certain restrictions on a woman's constitutional right to abort a pregnancy prior to viability. See Forsythe, *supra* note 1, at 616-17; Parness, *supra* note 116, at 97; Comment, *Feticide in Illinois: Legislative Amelioration of a Common Law Rule*, 4 N. Ill. U.L. Rev. 91, 100-02 (1983). Therefore, the *Roe* rationale does not govern nonconsensual conduct of third parties that results in the death of a fetus. Because the assaults in *Smith* and *Hollis* did not involve a woman's fundamental right to privacy, these cases should not implicate *Roe*. Forsythe, *supra* note 1, at 616-18.

131. The United States Supreme Court has stated that "[v]iability is reached when, in the judgment of the attending physician on the particular facts before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

132. *Cf. Roe*, 410 U.S. at 164-65 (1973) (summarizing the state's ability to regulate abortions); see *supra* note 129.
duct resulting in the destruction of a fetus when the pregnant mother consents. The California murder statute, for example, prohibits prosecution if "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus."\textsuperscript{133} Similarly, the legislature must be wary of potential conflict with the abortion statute.\textsuperscript{134} One commentator suggests that to prevent "the word 'abortion' from being artfully used to include any termination of a pregnancy which might result from violent acts of third parties," the legislature should amend the abortion statute to define "abortion" as any termination of pregnancy to which the mother consented.\textsuperscript{135}

In light of the above discussion, this Note proposes that the North Carolina General Assembly adopt comprehensive legislation, patterned after the Minnesota scheme,\textsuperscript{136} covering crimes against the unborn. The new crimes should include murder as well as a range of lesser included offenses. The statute also should define expressly the class of protected victims, and should indicate specifically that a previable fetus is to be included. Such legislation would prevent the \textit{Beale} result and enable North Carolina to punish those who commit crimes against the unborn.

\textbf{Gary V. Perko}

\textsuperscript{133} \textit{Cal. Penal Code} § 187(b)(3) (West 1988); see also \textit{Minn. Stat. Ann.} § 609.266(b) (West 1987) (excluding prosecution of "the pregnant woman"). In California, however, the consent exception to the murder statute does not preclude prosecution "under any other provision of law." See \textit{Cal. Penal Code} § 187(c) (West 1988).

\textsuperscript{134} See supra text accompanying notes 69-74.

\textsuperscript{135} See Forsythe, supra note 1, at 622.

\textsuperscript{136} See supra notes 121-22 and accompanying text. The General Assembly considered a feticide bill in 1985, but failed to enact it. See supra note 118. This bill, however, would have punished only the intentional killing of a fetus.