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## COMMENTS

ABORTION STATUTES: ARE THEY UNCONSTITUTIONAL PER SE? *People v. Belous*, \_\_\_\_\_ Cal.2d \_\_\_\_\_, 458 P.2d 194, 80 Cal. Rptr. 354 (1969)

Defendant doctor referred a woman in her first trimester of pregnancy to an abortionist, not licensed to practice medicine in California, who performed an abortion. The defendant argued that the woman's pregnant condition had endangered her life, but a jury found otherwise, and convicted him of abortion in violation of California's *unamended* criminal abortion statute<sup>1</sup> and of conspiracy to commit abortion.<sup>2</sup> Defendant appealed to the California Supreme Court arguing that the unamended abortion statute was unconstitutional. *Held*: Conviction reversed. California's *unamended* criminal abortion statute violates the Constitution because the standard "necessary to preserve [the mother's] life" is so vague and uncertain as to deprive the defendant *doctor* of due process of law. Alternatively, the court held that the standard, however interpreted, produced an unjustifiable

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<sup>1</sup> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable . . . .

CAL. PENAL CODE § 274 (Deering Supp. 1961-69) (emphasis added).

Over the last three years, six states, including California, have extensively amended their old abortion statutes. CAL. PENAL CODE § 274 (Deering Supp. 1969); CAL. HEALTH & SAFETY CODE §§ 25950-54 (Deering Supp. 1969); COLO. REV. STAT. ANN. § 40-2-50 (Supp. 1967); GA. CODE ANN. §§ 26-1101 to -1106 (Supp. 1968); MD. ANN. CODE art. 43, § 149E (Supp. 1968); N.M. STAT. ANN. § 40A-5-1(C) (Supp. 1969); N.C. GEN. STAT. § 14-45-45.1 (Supp. 1967). These statutes were fashioned essentially after the Model Penal Code, but differ in that they all require that the abortion be performed in a licensed hospital after approval by a special hospital board. California is the only state among the six that does not allow an abortion if there is substantial risk that the child will be born with a grave mental or physical defect. Under the Model Penal Code:

A licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for the purpose of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. . . .

No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or to the police. . . .

MODEL PENAL CODE § 230.3(2), (3) (Proposed Official Draft 1962).

<sup>2</sup> CAL. PENAL CODE § 182 (Deering Supp. 1961-69).

infringement upon a pregnant woman's constitutional rights to life and to choose to bear children.<sup>3</sup>

The court reasoned that the standard "necessary to preserve [the mother's] life" had no clear meaning so that a doctor must speculate when an abortion is authorized. And, because the doctor may be convicted of criminal abortion if a jury finds the abortion not authorized, he is denied his liberty without due process of law.<sup>4</sup> Further, the standard's vagueness produces an unconstitutional delegation of decision-making powers to the doctor which, because the doctor must determine the legality of an abortion at his own peril, denies the pregnant woman her right to have an abortion.<sup>5</sup>

Moreover, under any interpretation of the standard, the pregnant woman's Constitutional rights are invaded without justification. While emphasizing it did not interpret the standard to require the threat of imminent or certain death,<sup>6</sup> the court nevertheless held that such an interpretation would represent an invasion of both the woman's right to life and to privacy in matters relating to marriage, family and sex, as recognized in *Griswold v. Connecticut*,<sup>7</sup> not justified by a countervailing interest of the state, particularly in the fetus.<sup>8</sup> Furthermore, no meaning other than imminent or certain death will convey to the medical profession any ascertainable limits to legal abortions.<sup>9</sup>

Although the narrow holding of *Belous* is only that the abortion statute, because of vagueness, violates the doctor's right to due process of law, the alternative holding places in question the validity of similar legislation in 42 states<sup>10</sup> and strongly implies that prohibitive abortion laws are *per se* an impermissible exercise of the state's police power.<sup>11</sup>

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3. *People v. Belous*, \_\_\_ Cal. 2d \_\_\_, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

4. *Id.* at \_\_\_, 458 P.2d at 199, 80 Cal. Rptr. at 357-58.

5. *Id.* at \_\_\_, 458 P.2d at 206, 80 Cal. Rptr. at 366.

6. *Id.* at \_\_\_, 458 P.2d at 198, 80 Cal. Rptr. at 358.

7. 381 U.S. 479 (1965).

8. *People v. Belous*, \_\_\_ Cal.2d \_\_\_, \_\_\_, 458 P.2d 194, 199-203, 80 Cal. Rptr. 354, 359-63 (1969).

9. *Id.* at \_\_\_, 458 P.2d at 204-05, 80 Cal. Rptr. 364-65.

10. See Appendix, *infra*. The District of Columbia statute has already been declared unconstitutional on reasoning similar to the *Belous* alternative holding. See note 46, *infra*, and accompanying text.

11. The court noted that, "The woman's right to life is involved because childbirth involves risks of death," and then added, ". . . there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death." *People v. Belous*, \_\_\_ Cal.2d \_\_\_, \_\_\_, 458 P.2d 194, 199, 203, 80 Cal. Rptr. 353, 359, 363 (1969). Since all childbirths involve some risk of death, no abortion statute could be constitutional under this rationale.

The critical elements in the decision are that (1) the rights of marital privacy recognized in *Griswold* include a pregnant woman's right to obtain an abortion, and (2) the state has no interest in a non-viable fetus which justifies state infringement upon a pregnant woman's right to obtain an abortion.<sup>12</sup>

As part of a couple's right to marital privacy *Griswold* recognized their right to use contraceptives without state interference.<sup>13</sup> This right is premised on the right of a married couple to control the size of their family.<sup>14</sup> Similarly, abortion is an exercise of a couple's right to control family size because, like contraception, it is employed to prevent the birth of a child. This is an important allegation (which *Belous* fails to discuss) because approximately 90% of all abortions are performed on married women.<sup>15</sup> Clearly a prohibitive abortion statute infringes upon a woman's right *not* to bear children. Unless the state has a recognizable interest in *protecting the fetus*, which it did not have in the egg and spermatozoa prior to conception, upon which the state can base its interference with marital privacy, the statute is unconstitutional.<sup>16</sup>

State protection of a fetus is premised on the classical theory that the right of a fetus to be born takes precedence over all rights of the

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12 The only interest the state might have in the fetus is protecting its right to life. See notes 15-38, *infra*, and accompanying text. And, any other interest the state might profess to have in the question of whether a woman should be able to obtain an abortion, such as protecting the mother's health or inhibiting immoral conduct, would not be sufficient basis to invade an individual's constitutional right. See L. LADER, ABORTION 89-93 (1966); Lucas, *Federal Constitutional Limitations On the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 750 (1968).

13 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

14 *Griswold* may be interpreted in a more narrow fashion, namely, that the state is merely prohibited from interfering with a married couple's conjugal relations. However, the broader interpretation appears to be the better interpretation. See DIXON, *The Griswold Penumbra, Constitutional Charter for Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 212-13 (1965); Leavy & Kummer, *Abortion and the Law, Some New Approaches*, 27 OHIO ST. L.J. 647, 674 (1966).

15 L. LADER, ABORTION 159 (1966).

16 If, under an extension of *Griswold*, married couples are completely free to regulate the size of their families, before the fetus becomes viable, should the state, nevertheless, be allowed to regulate the choice of the unmarried pregnant woman regarding abortion because *Griswold* only applies to marital privacy? To distinguish between a married and an unmarried pregnant woman would be invidious discrimination violative of the equal protection clause of the fourteenth amendment. If the state has no interest in the non-viable fetus, there is no reason to make an exception simply because the woman is unmarried. In fact, the unmarried pregnant woman would be under a greater burden if she had to bear an unwanted child. Many sectors of society would consider her an outcast, and she would find it difficult to support a child without the aid and comfort of a husband.

pregnant woman except her right to life.<sup>17</sup> However, while some hold the right to life exists from the time of conception,<sup>18</sup> others argue the fetus has no rights at all until it becomes *viable* (i.e., is able to exist outside the mother's womb).<sup>19</sup> Therefore, since the vast majority of abortions occur in the first trimester of pregnancy before the fetus is viable,<sup>20</sup> a determination of when the fetus attains the right to life becomes crucial.

Arguably, the non-viable fetus' right to be born follows from certain rights it has under the law, such as (1) the right to inherit property from the moment of its conception,<sup>21</sup> (2) the right to sue a tortfeasor for negligently causing pre-natal injuries,<sup>22</sup> and (3) the right of the fetus' executor to bring a wrongful death action for its tortious destruction.<sup>23</sup> Yet, these rights can be qualified. The fetus can inherit property *only* if it is born alive;<sup>24</sup> the same is true of its right to sue in tort for pre-natal injuries;<sup>25</sup> and its executors can sue for wrongful death only if it was viable at the time it was negligently killed.<sup>26</sup> Furthermore, the fetus' rights in tort are actually for the benefit of its parents who sue the tortfeasor as guardian of the viable fetus and are entitled to all damages recovered.<sup>27</sup> The *Belous* decision indicates that

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17. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). This is the position taken by 80% of the states which permit an abortion only when it is necessary to preserve or save the mother's life. See Appendix, *infra*.

18. The Catholic Church takes this view. L. LADER, ABORTION 111-16 (1966); Note, *Abortion Legislation: The Need for Reform*, 20 VAND. L. REV. 1313, 1315-16 (1967).

19. See, e.g., L. LADER, ABORTION (1966); Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968).

20. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962).

21. See, e.g., *In re Meyer's Estate*, 119 N.Y.S.2d 737 (Surrogate Ct. 1953); *In re Lee's Will*, 203 Misc. 165, 116 N.Y.S.2d 282 (Surrogate Ct. 1952); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (Reprint of 1st ed. 1966).

22. See, e.g., *Benbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

23. See *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966).

24. See, e.g., *In re Scanelli*, 208 Misc. 804, 142 N.Y.S.2d 411 (Surrogate Ct. 1955); Note, *In Defense of the Right to Life: The Constitutionality of Therapeutic Abortion*, 1 GA. L. REV. 693, 700 (1967); Supplemental Brief for Appellant at 10-12, *People v. Belous* \_\_\_\_ Cal.2d \_\_\_\_, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

25. See *Carroll v. Skloff*, 414 Pa. 625, 202 A.2d 9 (1964).

26. See, e.g., *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D.W. Va. 1969); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1965); *Peterson v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 551, 197 N.E.2d 194 (1964); *cert. denied*, 379 U.S. 853 (1965). "A child is regarded as viable from somewhere between the twenty-fourth and twenty-eighth week of pregnancy." Note, *In Defense of the Right to Life: The Constitutionality of Therapeutic Abortion*, 1 GA. L. REV. 693, 701 (1967).

27. *People v. Belous*, \_\_\_\_ Cal. 2d \_\_\_\_, \_\_\_\_ n. 12, 458 P.2d 194, 202-03 n. 12, 80 Cal. Rptr. 354, 362-63 n. 12 (1969).

these fetal "rights" are non-existent or, in any event, insufficient to justify the state in limiting the woman's constitutional rights in order to protect the fetus.<sup>28</sup>

Even the cases which specifically state that the non-viable fetus has the right to be born except when the mother's life is endangered<sup>29</sup> are insufficient support because the facts in these cases are not concerned with a non-viable fetus. Rather, the child was either alive or viable at the time of the suit,<sup>30</sup> or the purpose of the questioned medical treatment was to save the life of the mother<sup>31</sup> or of the child when it was born alive.<sup>32</sup>

Although *Belous* distinguishes most of these cases,<sup>33</sup> they can all be distinguished simply because none of them are concerned with the constitutionality of abortion statutes. In these cases, the mothers wanted the fetus to be born while the issue in an abortion controversy is whether the fetus should be born against the mother's wishes.<sup>34</sup>

Significantly, *Belous* stresses that it would be inconsistent to judicially recognize the right of a non-viable fetus to be born when the legislature has never classified the intentional and unjustifiable destruction of the non-viable fetus as murder.<sup>35</sup> Only when the fetus has

28 *Id.* at \_\_\_\_, 458 P.2d at 202, 80 Cal. Rptr. at 362.

29. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Raleigh Fitkin-Paul Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).

30. *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Raleigh Fitkin-Paul Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

31. *Raleigh Fitkin-Paul Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

32. *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).

33. *People v. Belous*, \_\_\_\_, Cal. 2d \_\_\_\_, \_\_\_\_, n. 12, 458 P.2d 194, 202-03 n. 12, 80 Cal. Rptr. 354, 362-63 n. 12 (1969).

34. Leavy & Kummer, *Abortion and the Population Crises: Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 660 (1966).

35. *People v. Belous*, \_\_\_\_, Cal. 2d \_\_\_\_, \_\_\_\_, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969). Only a few states consider a successful non-viable fetal abortion to be as serious a crime as manslaughter, and even some of these statutes require the fetus to be "quick." ALASKA STAT. § 11 15.060 (1962) (manslaughter); FLA. STAT. ANN. § 782.10 (1959) (manslaughter); MISS. CODE ANN. § 2222 (1956) (homicide if a quick child); MO. REV. STAT. § 559.100 (1959) (manslaughter if a quick child); N.Y. PENAL LAW §§ 125.40, 45 (McKinney 1967). "Quickening is that stage of gestation, usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement." Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 84 n 1 (1968). Only Georgia considers the willful destruction of a quick child, in certain instances, to be a capital offense.

The willful killing of an unborn child so far developed as to be ordinarily called "quick," by any injury to the mother of such child, which would be murder if it resulted

become viable will the law regard its intentional destruction as murder.<sup>36</sup>

A medical approach to the problem reveals a significant difference between the viable and non-viable fetus. Ancient jurists recognized this fact; under the common law, prior to 1803, it was not a crime to abort a fetus before "quickening."<sup>37</sup> During the first trimester of pregnancy, the life in the mother's womb is an embryo and it is not until after three months that this life starts to develop human form (the fetal stage).<sup>38</sup> After six weeks of pregnancy, it is almost impossible to distinguish a human embryo from that of any other mammal whether it be a mouse or an elephant.<sup>39</sup> Thus, "[i]t is simply blinking at reality to call the embryo a human being, just as it is to call the outline of a brief, a brief, or that blueprint of a house, a house."<sup>40</sup> To say that an embryo is equivalent to a viable fetus, in the eyes of the law, is to fly in the face of medical science. Medical science gives scant support to the proposition that a non-viable fetus is a human being.

Thus, just as the state cannot prohibit an attempt to prevent the joining of an egg and a spermatozoa, so it cannot sanctify the two cells immediately after they join and accord them, over the woman's objection, the rights of a human being.<sup>41</sup> Such a sanctification would be a subjective belief of religious character which only a minority of Americans hold,<sup>42</sup> and there is no valid state interest in the implementation of a minority religious belief sufficient to serve as a basis for interference with substantial individual rights.<sup>43</sup> If the state has no interest in preventing an abortion immediately after conception,

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in the death of such mother, shall be punished by death or imprisonment for life, as the jury may recommend.

GA. CODE ANN. § 26-9921A (Supp. 1969).

36. *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947).

37. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 84 (1968). "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."

I.W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (Reprint of 1st ed. 1966).

38. Supplemental Brief for Appellant at 10 n. 17, *People v. Belous*, \_\_\_ Cal.2d \_\_\_, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

39. *Id.* at 23 n. 26.

40. *Id.* at 23-24.

41. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 760 (1968).

42. For example, the Catholic belief that the soul enters the living tissue at the moment of conception. See L. LADER, ABORTION 111-16 (1966).

43. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 760 (1968).

when, if ever, does it acquire such an interest? Certainly no one can precisely pinpoint when a fetus is sufficiently human to be accorded all the rights of a post-birth human, but present case law and medical science apparently recognize *viability* as the crucial stage after which a fetus should be accorded some rights.<sup>44</sup>

Because California had amended its abortion statute prior to *Belous*,<sup>45</sup> the decision did not create a legal vacuum. However, in other states, a declaration that its abortion statute is unconstitutional would leave that state without any abortion statute. Thus, *all* abortions would be legal if performed by a licensed physician, which is certainly a strong argument against striking down the statute. Nonetheless, two months after *Belous*, the court in *United States v. Boyd*<sup>46</sup> declared the District of Columbia abortion statute unconstitutional under the rationale of the *Belous* alternative holding. Most significantly, the *Boyd* court asked the Supreme Court of the United States to allow an appeal.<sup>47</sup> Perhaps at that level, a thorough consideration of the opposing rights of the pregnant woman and her fetus will be made, and a nationwide rule on abortion thus established.

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<sup>44</sup> See note 15-38, *supra*, and accompanying text.

<sup>45</sup> See note 1, *supra*.

<sup>46</sup> *United States v. Boyd*, Criminal No. 1587-69 (D.D.C., filed Nov. 2, 1969). The District of Columbia statute permitted an abortion only if ". . . necessary for the preservation of the mother's life or health. . . ." D.C. CODE ANN. § 22-201 (1961).

<sup>47</sup> *United States v. Boyd*, Criminal No. 1587-69 at 6 (D.D.C., filed Nov. 12, 1969).

## APPENDIX

*States Which Permit Abortions Only When They Are Necessary to Preserve or Save the Woman's Life.*

ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CONN. GEN. STAT. REV. § 53-29 (1968); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. § 782.10 (1965); HAWAII REV. STAT. § 768-7 (1968); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1964); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. STAT. ANN. §§ 21-410, 21-437 (1964); KY. REV. STAT. ANN. § 436.020 (1969); ME. REV. STAT. ANN. tit. 17, § 51 (1965); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); MISS. CODE ANN. § 2223 (Supp. 1968) (now includes rape); MO. REV. STAT. § 559.100 (1959); MONT. REV. CODE ANN. § 94-401 (1949); NEB. REV. STAT. §§ 28-404, 28-405 (1965); NEV. REV. STAT. §§ 200.220, 201.120 (1967); N.H. REV. STAT. ANN. §§ 585:12, 585:13 (1955); N.Y. PENAL LAW § 125.05 (McKinney 1967); N.D. REV. CODE §§ 12-25-01, -02 (1960); OHIO REV. CODE ANN. § 2901.16 (Page 1954); OKLA. STAT. ANN. tit. 21, § 861 (Supp. 1969-70); ORE. REV. STAT. § 163.060 (1968); R.I. GEN. LAWS ANN. § 11-3-1 (1957); S.C. CODE ANN. § 16-82,-83 (1962); S.D. COM. LAW ANN. § 22-17-1 (1969); S.C. COM. LAW ANN. § 22-17-1 (1969); TENN. CODE ANN. §§ 39-301, 39-302 (1956); TEX. PEN. CODE ANN. arts. 1191-1196 (1961); UTAH CODE ANN. § 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1958) VA. CODE ANN. § 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1961); W. VA. CODE ANN. 61-2-8 (1966); WIS. STAT. ANN. § 940.04 (1958); WYO. STAT ANN. § 6-77 (1957).

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A. Louisiana prohibits all abortions without exception. LA. REV. STAT. § 14:87 (Supp. 1969).

B. Three states prohibit "illegal abortions." MASS. ANN. LAWS. ch. 272 § 19 (1968); N.J. STAT. ANN. § 2A:87-1 (1953); PA. STAT. tit. 18, § 4718 (1963).

C. Hawaii recently passed a new abortion statute at the time this edition went to press. The new statute allows greater latitude for the performance of abortions.