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FURTHER COMMENT ON PEOPLE v. BELOUS*

RECENTLY, THE CATHOLIC LAWYER[1] published an amicus curiae brief which had been submitted to the Supreme Court of California in the case of *People v. Belous*.[2] That brief propounded various arguments as to why the abortion statute[3] under attack should be upheld. Subsequent to that publication, the court held the statute in question to be unconstitutionally vague. This note will briefly summarize the Supreme Court decision and introduce the reader to three recent developments: namely, an unsuccessful petition for reargument presented by the proponents of the abortion statute, an attack on the constitutionality of New York's abortion laws, and a recent district court decision which adopted the holding in *Belous*.

The *Belous* Case

The appellant in *Belous*, Dr. Leon Belous, had been convicted of conspiracy to commit abortion and abortion. His conviction was affirmed by the Court of Appeals for the Second District. On appeal to California's highest court, Dr. Belous challenged the constitutionality of the statutes proscribing abortion as criminal under certain circumstances. Focusing on the section which prohibited anyone from assisting a woman in the procurement of a miscarriage with intent to cause such,

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[1] *Abortion Legislation and the Establishment Clause*, 15 CATH. LAW. 108 (1969).

[2] 71 A.C. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (*en banc*).

[3] CAL. PEN. CODE § 274 (West 1955) states:

> 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 thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.

The statute now exists as amended in 1967, providing exceptions to the absolute prohibition of abortion as prescribed in *Cal. Health and Safety Code* §§ 25950-54 (West 1969).

the Supreme Court of California ruled that the exception contained in the phrase "unless the same is necessary to preserve her life" was not susceptible to a construction which satisfied due process requirements without infringing on fundamental constitutional rights.[4]

In reaching its decision, the court, in an effort to attain that degree of certainty and univocity required of criminal legislation,[5] considered the definitions of "necessary" and "preserve" as cognizable in ordinary usage, previous judicial decisions, and at common law. The court concluded, however, that such a definitional approach was futile inasmuch as the words are flexible and relative terms, incapable of singular import. Nor could a suitable definition be derived from the common law, since there, abortion before quickening was not a crime.[6]

The court next examined the respondent's contention that the phrase in question meant "unless performed the patient will die." Relying on lower court decisions[7] which included ill health and the possibility of suicide within the definition of "necessary to preserve life," the court reasoned that a demonstration of immediacy or certainty of death was not essential. Moreover, the court concluded that such a definition would abridge both a woman's constitutional right to life,[8] and her right to choose whether to bear children or not.[9] The existence of these rights, however, was not in issue; rather, the critical question before the court related to "whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state."[10] Conceding that the instant definition may have been feasible in the nineteenth century (when any operation was dangerous), the court, nevertheless, decided that in view of modern medical practice[11] such a construction could not be

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[4] 71 A.C. at —, 458 P.2d at 197, 80 Cal. Rptr. at 357.

[5] *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[6] *See* R. PERKINS, CRIMINAL LAW 101 (1957); Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L.F. 411 (1968).

[7] People v. Abarbanel, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (Ct. App. 2d Dist. 1965); People v. Ballard, 218 Cal. App. 2d 295, 32 Cal. Rptr. 233 (Ct. App. 2d Dist. 1963); People v. Ballard, 167 Cal. App. 2d 803, 335 P.2d 204 (Ct. App. 2d Dist. 1959).

[8] The court held that the woman's right to life was involved because childbirth involves risks of death. 71 A.C. at —, 458 P.2d at 199, 80 Cal. Rptr. at 359.

The court also indicated that Dr. Belous' standing to raise this right was unchallenged. *Id.* at —, 458 P.2d at 199 n.5, 80 Cal. Rptr. at 359 n.5. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965).

[9] "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 71 A.C. at —, 458 P.2d at 199, 80 Cal. Rptr. at 359 (1969) (*citing* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

[10] 71 A.C. at —, 458 P.2d at 200, 80 Cal. Rptr. at 360.

[11] The court placed heavy reliance on reports of European countries, which maintain that a hospital therapeutic abortion during the first trimester is safer for a woman than to bear a child. *See* Kolblova, *Legal Abortion in Czechoslovakia*,

justified when it would result in a direct infringement upon such rights. In response to the contention that the state has a compelling interest in the protection of the unborn child[12] which would warrant the limitation of a woman's rights,[13] the court held: first, that statutes recognizing the rights of an unborn child require a live birth,[14] or reflect the interest of the parents,[15] and hence, are distinguishable; second, that the penal code acknowledges a distinction between a living child and an unborn child by its classification of murder as the destruction of the former, and the lesser crime of abortion as the destruction of the latter;[16] finally, that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn child.[17]

Continuing its analysis, the court found that the addition of the words "substantially" or "reasonably" necessary to preserve life actually led to more confusion since these words were relative and subjective when used in this context. That is, an application of these words to particular circumstances demonstrates that given individuals might consider an abortion necessary when the risk of death is merely increased, or when the risk of death is doubled, or not until the risk of death becomes an absolute certainty. The only construction which the court considered feasible was that the legislature may have intended a relative safety test whereby an abortion would be permissible if the risk of death due to abortion was less than the risk of death in childbirth. However, the court found that neither the statute nor any decisions interpreting the statute suggested such a test. In further support of its conclusion the court focused upon the difficulties confronting the doctor who is called upon to decide whether an abortion is permissible. In view of the severe penalties attending such a decision, a doctor might be reluctant to approve of a justifiable abortion and, ultimately, a woman's rights would bear the loss.[18]

In summary, the decision has two identifiable facets. First, that the meanings drawn from ordinary usage, previous judicial interpretations, and the common law do not provide the degree of certainty re-

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196 J.A.M.A. 371 (1966); Mehland, *Combating Illegal Abortion in the Socialist Countries of Europe*, 13 WORLD MED. J. 84 (1966); Tietze & Lehfeldt, *Legal Abortion in Eastern Europe*, 175 J.A.M.A. 1149, 1152 (1961).

[12] *Cf.* Noonan, *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATH. LAW. 124 (1969).

[13] *See* Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964), wherein the court placed this right to life above the mother's right to free exercise of religion. *See also In re* President of Georgetown Univ. Hosp., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 337 U.S. 978 (1964).

[14] *See, e.g.*, CAL. CIV. CODE § 29 (West 1954); CAL. PROB. CODE § 250 (West 1956).

[15] 71 A.C. at —, 458 P.2d at 202, 80 Cal. Rptr. at 362 (1969) (*citing* Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (Ct. App. 1st Dist. 1940); People v. Sianes, 134 Cal. App. 355, 25 P.2d 487 (Ct. App. 4th Dist. 1933).

[16] *See* R. PERKINS, CRIMINAL LAW 103 (1957).

[17] 71 A.C. at —, 458 P.2d at 202-03, 80 Cal. Rptr. at 362-63 (1969).

[18] The court held that the delegation of decision-making power to a directly involved individual violates the fourteenth amendment. *Id.* at —, 458 P.2d at 206, 80 Cal. Rptr. at 366. *Cf.* Tumey v. Ohio, 273 U.S. 510 (1927).

quired when criminal sanctions are involved; nor do the words "substantially" or "reasonably," which are often employed to clarify a statute, provide any assistance. Secondly, the state's definition cannot be adopted because its interest in regulating abortion is subordinate to the woman's constitutional right to life and to choose whether to bear children or not.

The dissenting opinions of Justices Burke and Sullivan questioned the majority's holding, contending that the phrase under consideration had been accorded its commonsense meaning by doctors, judges, lawyers and juries for over one hundred years. Furthermore, the dissenters reasoned that the construction previously given the statute was in accord with the legislature's intent that the rights of the unborn child to life should be sacrificed only if there were a danger to the life of the mother.

The State's Petition for Rehearing

The petition challenging the decision in the *Belous* case reiterated the conflict of rights and interests of the mother and an unborn child. Indeed, the petition questioned the court's assumption that a woman has the right to decide whether or not to bear children. Although the woman's decision as to whether to conceive may be constitutionally protected, the petitioner denied the existence of any right to choose once conception occurs.[19] Thus, it was argued that the state's interest in protecting the unborn child is paramount except where the mother's life is endangered. The petitioner contended that abortion was originally proscribed, absent the most compelling circumstances, not because of the dangers involved in the operative process (which petitioner maintained still exist), but in recognition of the human life which must be protected from the moment of conception. This position is supported by the contention that if the dangers surrounding an operation were the sole consideration, the legislature would not have also proscribed the administration of any medicine, drug, or substance to procure a miscarriage.[20]

The petition also challenged the propriety of permitting three lower court decisions to obscure, rather than clarify, a statute and ultimately lead to its invalidation.[21] In reply to the court's position that a physician will seek to avoid the risk of prosecution by being reluctant to authorize an abortion, the petitioner asserted that the risk of civil or criminal liability is inherent in every decision to perform surgery, and, therefore, should not be given extraordinary weight.

Other States Follow the Lead

In *Doe v. Lefkowitz*,[22] a suit recently initiated in the United States District Court for the Southern District of New York, the

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[19] Statement in support of Petition for Rehearing at 2, People v. Belous, 71 A.C. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

[20] *Id.* at 2-3.

[21] Cases cited note 7 *supra*.

[22] 69 Civil No. 4423 (S.D.N.Y., filed Sept. 30, 1969). As of this writing the plaintiffs had successfully obtained a three-judge consideration of the case, and had withstood challenges based on lack of standing. 6 CR. L. 2132 (S.D.N.Y. Nov. 4, 1969).

parties sought a declaratory judgment and permanent injunction against the enforcement of New York's abortion laws. The organizations initiating the action were admittedly influenced by the *Belous* decisions and have announced that suits are also planned in 38 other states with abortion laws similar to those of New York and California.[23]

The complaint in *Doe* alleged that the law under attack was unconstitutional because it violated:

(1) the right of a physician and patient to privacy in their associations,
(2) the right of the physician to care for his patients according to the highest standards of modern medical practice,
(3) the right of a pregnant woman to decide whether to risk the dangers of childbirth,
(4) the right of a woman not to be compelled to bear a child each time she conceives,
(5) the right of women to safe and adequate medical advice and treatment pertaining to the decision of whether to carry a given pregnancy to term, and
(6) the right of couples not to be forced to become parents following each and every conception.[24]

Further Developments

Agreeing with the due process objections expressed in *Belous*, the District Court of the District of Columbia recently reached a similar conclusion in *United States v. Vuitch*.[25] As in *Belous*, the lack of certainty, *i.e.*, the failure of the statute[26] to proscribe specific standards of conduct, and the presence of constitutionally protected individual rights which could conceivably be infringed under the statute, was the motivation for the decision that the statute was unconstitutional as applied to physicians. However, that portion of the statute which prohibited abortions by nonphysicians was declared to be constitutional as a legitimate exercise of Congress' police power. It should be noted that an immediate distinction between *Belous* and *Vuitch* is that the decision in the latter removed all obstacles to abortion by a physician, whereas *Belous* did not affect the recent amendments to the California Code.

Conclusion

Prior to the *Vuitch* decision, it was conceivable that a reevaluation by the California Supreme Court of its decision in *Belous* would discourage many of the suits presently planned in other states. Notwithstanding the refusal of the California court to reverse its decision, it is feasible that the *Belous* case can be limited because of its peculiar facts. That is, since the court was aware of a changing legislative attitude towards abortion as manifested by amendments to the law, and the concomitant factor that the invalidation of the older statute would not create havoc in the long run in view of those amendments, the court may have adopted an attitude more liberal than the situation demanded. However, the exis-

[23] 162 N.Y.L.J. 65, Oct. 1, 1969, at 1, col. 6.
[24] *Id.* at 4, col. 6.
[25] 38 L.W. 1074 (D.D.C. Nov. 10, 1969).
[26] D.C. CODE ANN. § 22-201 (1967).

tence of factors completely contrary in *Vuitch* did not preclude the court from finding as it did; consequently, there is no law governing abortion by a physician in Washington, D.C. As a result, it is difficult to estimate the impact that *Belous* will eventually have on the abortion laws of other states in view of the momentum gained by pro-abortionists from the *Vuitch* decision. Further developments will be treated in future editions of THE CATHOLIC LAWYER.

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