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Criminal Law--Abortion--Man, Being Without a Legal Beginning

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Comments

CRIMINAL LAW—ABORTION—MAN, BEING WITHOUT A LEGAL BEGINNING. On May 10, 1966, a Mexican physician, unlicensed in California, performed an abortion on an unmarried woman in a Los Angeles apartment. The woman had been referred to him by Leon Phillip Belous, a physician licensed since 1931 and a Board-certified obstetrician and gynecologist practicing in Beverly Hills. Dr. Belous was convicted in the Superior Court of Los Angeles County of conspiring to commit abortion and of abortion. His conviction was sustained by the Court of Appeals for the Second District,[1] and Dr. Belous appealed to the Supreme Court of California. *Held*: Reversed. The pre-1967 California abortion statute[2] making a person who performs abortion punishable unless abortion is "necessary to preserve the woman's life" is not susceptible of a construction that is sufficiently certain to satisfy due process requirements without improperly infringing on the fundamental constitutional rights of the woman. *People v. Belous*, 17 Cal. App. 966, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 38 U.S.L.W. 3313 (U.S. 1970).

Belous has been hailed as the most significant opinion on abortion in Anglo-American jurisprudence since the inception in 1803[3] of the

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[1] 2d App. Dist., Div. 3, 2d Crim. No. 13618, filed Aug. 13, 1968.

[2] CAL. PENAL CODE § 274 (Stats. 1872, amended Stats. 1935):

> 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 for not less than two nor more than five years. (emphasis added).

In 1967, § 274 was amended and reads in part:

> 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, . . . *except as provided in the Therapeutic Abortion Act . . . of the Health and Safety Code*, is punishable by imprisonment in the state prison . . . Stats. 1967, ch. 327 § 3, at 1523. (emphasis added).

The Therapeutic Abortion Act, Health & S.C. §§ 2590-2594 (Stats. 1967), permits termination of pregnancy where its continuation would present substantial risk of danger to the physical or mental health of the woman, or where the pregnancy was conceived by sexual assault (rape or incest); requires abortion to be performed in an accredited hospital by licensed physician, purusant to approval of the hospital therapeutic abortion committee; provides time limits within which pregnancy may be terminated; provides for notification and/or approval of District Attorney or Superior Court where pregnancy resulted from sexual assault. Since this act was adopted after the abortion involved in the *Belous* case, the Court would not direct itself to the issues involving the later act's validity.

[3] Lord Ellenborough's Act, 43 GEO. III, ch. 58, § 2 at 758 (1803).

anti-abortion statutes.[4] It comes at a time when abortion has emerged as an issue of open national debate. It is generally estimated that one million illegal abortions are performed annually in the United States.[5] In 1969 alone, 350,000 women were hospitalized after injurious abortion attempts and more than 8,000 of them died.[6] While these facts alone do not support immediate repeal of our anti-abortion laws,[7] they do demand re-evaluation in light of contemporary social mores and medical science.

In *Belous*, the Supreme Court of California was reviewing the violation of a statute[8] which was substantially unchanged since its enactment in 1850.[9] Judicial notice was taken of the fact that surgery, and hospital procedures in general, in the nineteenth century were primitive and dangerous. Legislatures may therefore have been justified in restricting abortion to the preservation of the woman's life.[10] However, the Court determined that twentieth century advances in medical science and practice had rendered such a legislative purpose obsolete.[11] The Court found persuasive precedent in the 1959 California decision of *People v. Ballard*[12] which stated:

> Surely, the abortion statute (Pen. Code § 274) does not mean by the word 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition be potentially present, even though its full

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[4] Leavey, *Current Developments in the Law of Abortion: 1969—A Landmark Year*, 45 LAB. BULL. 11 (1969).

[5] *Abortion Legislation: The Need for Reform*, 20 VAN. L. REV. 1313 (1967). One source goes so far as to say, "It is probable that the majority of *therapeutic* abortions in the United States are illegal." Kutner, *Due Process of Abortion*, 53 MINN. L. REV. 1, 8 (1969) (emphasis added).

[6] *Abortion Comes Out of the Shadows*, LIFE, Feb. 27, 1970, Vol. 68, at 7.

[7] For example, the laws against theft were violated in 1966 by 762,352 cases of larceny of amounts over $50.00 known to the police, and 486,568 cases of auto theft known to the police. U. S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 149 (1967). Yet these figures are hardly arguments for the repeal of laws prohibiting theft.

[8] CAL. PENAL CODE § 274 (West 1957).

[9] It is important to note that approximately thirty states have anti-abortion laws similar to California's pre-1967 statute. *See* Ziff, *Recent Abortion Law Reforms*, 60 J. CRIM. L.C. & P.S. 3 (1969).

[10] *Abortion and the Changing Law*, NEWSWEEK, April 13, 1970:

> In early nineteenth century New York, for example, the mortality from major surgery averaged 38 per cent, but only 2 per cent of women died during childbirth. Now the situation is different; there are twenty deaths for every 100,000 live births in the U.S., but only three for every 100,000 in-hospital abortions performed under the best of circumstances. *Id.* at 55.

[11] Brief for Medical School Deans as Amicus Curiae in Support of Appellant, People v. Belous, 71 Cal. App. 966, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). This brief was signed by 178 deans of medical schools throughout the United States, including the deans of all California medical schools, and argued that anti-abortion laws have created a greater health problem than they were ever designed to cure. The brief estimated 30,000 to 100,000 criminal abortions annually in California—this being the greatest single cause of maternal mortality.

[12] 167 Cal. App. 2d 803, 335 P.2d 204, —Cal. Rptr.— (1959).

> development might be delayed to a greater or lesser extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief.[13]

But the importance and impact of the *Belous* case goes beyond the considerations of medical advances in surgical safety. It goes beyond considerations of the woman's health. In denying the validity of requiring great danger to the expectant mother as a precondition to lawful abortion, the California Supreme Court recognized as a fundamental constitutional right the prerogative of a woman to choose whether to bear children[14] and—for the first time—extended that right to include the first three months of pregnancy:

> In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of consideration of the woman's health where, as here, abortion is sought during the first trimester.[15]

In the Roman Empire, the basic concept of the law was that a fetus is part of the woman. Abortion with the consent of the father was legal.[16] At English common law, human life did not have its

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[13] *Id.* at 814, 335 P.2d at 212, — Cal. Rptr. at —. The reasonableness of such a holding is persuasive:

> Few pregnancies carry an imminent risk to life, but a number of them threaten life by a substantial impairment of health; therefore, to balance a mother's interest in being free from a life-shortening disease against the fetus' interest in life may not overstep the constitutional line. Analogy is afforded by the usual rule treating as justifiable homicide killing done to repel a threat of substantial bodily injury. A rule of self-preservation where life is balanced against life does not offend the respect which the constitution demands for the life of every person. Noonan, *Constitutionality of the Regulation of Abortion,* 21 HASTINGS L. J. 51, 61 (1969).

[14] The *Belous* Court reasoned:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. (See, e.g., Griswold v. Connecticut, *supra,* 381 U.S. 479, 485, 486, 500, 85 S.Ct. 1678, 14 L.Ed.2d 510; Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535, 536, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [sterilization laws; marriage and procreation involve a "basic liberty"]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 199-400, 43 S.Ct. 625, 67 L.Ed. 1042 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal. App.2d 711, 715, 198 P.2d 17; see also Custodio v. Bauer, 251 Cal. App.2d 303, 317-318, 59 Cal. Rptr. 463.). 71 Cal. App. at —, 458 P.2d at 199-200, 80 Cal. Rptr. at 359-60.

[15] *Id.* at —, 458 P.2d at 202, 80 Cal. Rptr. at 362.

[16] JUSTINIAN, DIGEST Ch. 25 § 4, 1 (1).

legal beginning until the time of "quickening"[17] i.e., the first time the fetus was felt to stir in the womb.[18] And while the American states outlawed all abortion in the nineteenth century,[19] in 1884 Justice Holmes enunciated in *Dietrich v. Inhabitants of Northhampton*[20] a rule which was followed by the courts for some time—that a child has no cause of action against a third person to recover for damages wrongfully inflicted on it in the womb, on the theory that when the injury was inflicted, the fetus was a vegetating part of the mother and not a separate individual to whom legal duties were owed. Such reasoning is implicit in the *Belous* decision. Incidental to her constitutional right to life and to choose whether to bear children, and not unlike her right to use contraceptives, the *Belous* court said that a woman has the fundamental right to terminate pregnancy in the first trimester.[21]

But what of the fetus? Herein lies the crucial question for consider-

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[17] The American Law Institute implicitly readopted the common law theory of "quickening" as a basis for the liberalized Model Penal Code provision on abortion:

> As the fetus develops to the point where it is recognizable in human form (4-6 weeks) or manifests life by movements perceptible to the mother at "quickening" (14-20 weeks) or becomes "viable", or capable of surviving though born prematurely (24-28 weeks) it increasingly evokes in the greater portion of mankind a feeling of sympathy as with a fellow human being so the destruction comes to be regarded by many as equivalent to murder. . . . [But] most abortions occur prior to the fourth month of pregnancy, before the fetus becomes firmly implanted in the womb, before it develops many of the characteristics and recognizable features of humanity, and well before it is capable of those movements, which when felt by the mother are called "quickening." . . . [T]here seems to be an obvious difference between terminating the development of such an inchoate being whose chance of maturing is still somewhat problematical, and on the other hand, destroying a fully formed viable fetus of eight months, where the offense may well become murder. . . . MODEL PENAL CODE § 207.11, Comment (1959).

[18] Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 419-22 (1968).

[19] *See* J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 746 (2d ed. 1883).

[20] 138 Mass. 14, 17 (1884). As recently as 1921, Justice Pound subscribed to this view: "In the mother's womb he [the infant] had no separate existence of his own. He carried the injuries out into the world with him. His full rights as a human being spring into existence with his birth." Drobner v. Peters, 232 N.Y. 220, 223, 133 N.E. 567, 568 (1921).

[21] A recent treatise would support such reasoning:

> . . . [T]he early fetus, similar in shape and functioning to the constituents which came together to form it, bears scarcely any developed characteristics at the time abortion normally takes place. If life transmission is recognized as a continuous process in which conception plays only the part of increasing and re-directing growth, contraception and abortion differ only in degree. Both are employed to prevent a birth several months in the future. Lucas, *Federal Constitutional Limitations On The Enforcement And Administration Of State Abortion Statutes*, 46 N.C. L. REV. 730, 764 (1968).

ation in determining the worth and validity of the *Belous* decision: When does the marital right to plan children end, and the right of the fetus to life begin? While there has been a discernable trend toward increased freedom for women and privacy for the family, has there been no change in our medical and legal concept of the nature of prenatal existence? As the Court in *Belous* itself asserted, "Constitutional concepts are not static."[22]

As early as 1946 in the case of *Bonbrest v. Kotz*,[23] a federal district court rejected the *Dietrich* rule[24] of Justice Holmes and permitted a recovery for a prenatal injury. The court reasoned:

> The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884 . . . . From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as a human being, but as such from the moment of conception—which it is in fact.[25]

In 1964, a pregnant woman's right to freely practice her religion came into conflict with the asserted right of the fetus to life. The court held for the fetus in *Raleigh-Fitkin-Paul Memorial Hospital* v. *Anderson*:[26]

> In State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses. And in Smith v. Brenan, 31 N.J. 353, 157 A.2d 497 (1960), we held that a child could sue for injuries negligently inflicted upon it prior to birth. We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order could be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.[27]

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[22] 71 Cal. App. at —, 458 P.2d at 202, 80 Cal. Rptr. at 362.

[23] 65 F. Supp. 138 (D.D.C. 1946).

[24] The fetus is part of the mother and therefore not deserving of legal protection. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

[25] Bonbrest v. Kotz, 65 F. Supp. 138, 143 (D.D.C. 1946). Herein lay the beginning of what has been called "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." W. PROSSER, LAW OF TORTS § 56 (3d ed. 1964). *See e.g.*, Torrigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1927) (recovery for 3½ month old fetus under wrongful death statute); Sinkler v. Kneale, 401 Pa. 26, 164 A.2d 93 (1960) (recovery for 1 month old fetus).

This development in tort law is cited as a prime example of scientific progress affecting the law in E. PATTERSON, LAW IN A SCIENTIFIC AGE (1963): ". . . [T]he meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts." *Id.* at 35.

[26] 42 N.J. 421, 201 A.2d 537 (1964).

[27] *Id.* at 423, 201 A.2d at 538.

Subsequently the New Jersey Supreme Court was called upon to apply this holding in a case involving the fetus' right not to be aborted. *Gleitman v. Cosgrove*[28] was an action for money damages brought by a husband and wife on behalf of themselves and their child against two doctors on the allegation that their child had been born with physical defects after the defendants had negligently failed to warn them that an attack of German measles, or rubella, which Mrs. Gleitman had suffered during pregnancy, might result in such defects. The failure to give the warning allegedly deprived the parties of an opportunity to terminate the pregnancy by abortion. In its 1967 decision, the court emphasized the unborn child's right to life:

> The right to life is inalienable in our society . . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit . . . It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life . . . . The right of their child to live is greater than and precludes their right not to endure emotional and financial injury . . . . A claim for them would be precluded by the countervailing public policy suporting the preciousness of human life.[29]

Certainly, case law affords a ready brush to paint the preferred picture. To be determined is whether the above cited cases reflect a Pickwickian approach, making somthing that does not exist in nature exist in law, or a true evolution in the law that responds to current medical and biological data.

Today the evolution favoring the greater freedom of women in matters of conception encounters the evolution favoring recognition of the fetus as a living, human person. The various rights hitherto conferred on the fetus by case law and statute are conferred on a being inherently distinct from the spermatozoon and ovum that constitute its origin.[30]

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[28] 49 N.J. 22, 227 A.2d 689 (1967).

[29] *Id.* at 30, 227 A.2d at 693. Public interest in the issue of abortion was dramatically crystallized by the German measles epidemic of 1963-64, blamed for the birth of some 30,000 U.S. infants with congenital defects. Today, the threat of German measles, rubella, has been greatly reduced not only by prospective statistical evaluation and prophylactic treatment with gamma globulin but also by the new vaccine, meruvox, which is produced by Merk and Co. and the Philips-Roxane vaccine produced in canine-kidney cells. Ray & Deutach, *The Congenital Rubella Syndrome—Ocular Pathogeneis and Related Embryology*, 62 AM J. OPTHAL. 236 (1969).

[30] Noonan, *supra* note 13, at 51-52.

> The newly conceived fetus possesses something not possessed by its individual components, the genetic (DNA) code, which transmits the human constitution. At the same time, this new being represents a dramatic jump in potentiality for survival. Of the approximately two million spermatozoa in a normal ejaculation, only one has a chance of developing into a zygote, and of the one million oocytes in a female at birth, 390 at most have a chance of becoming ova, but once spermatozoon and ovum meet and the conceptus is formed, there is an 80 per cent chance that unless deliberately aborted, the being will be delivered as a living child. It is understandable then, that the law, looking at this new being who has such a high probability of life, has recognized the fetus as a possessor of rights and interests.

Furthermore, the new science of fetology, originating in Liley's work on blood transfusions to the fetus, has offered man a hitherto unexplored mirror of his earliest growth and development:

> The head, housing the miraculous brain, is quite large in proportion to the remainder of the body, and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state through a sort of closed circuit x-ray television set), he is quite beautiful, perfect in his fashion, active and graceful. He is neither a quiescent vegetable nor a witless tadpole, as some have conceived him to be in the past, but rather a tiny human being, as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother.[31]

The *Belous* court cannot be faulted in recognizing as a fundamental, constitutional right the woman's prerogative to choose whether to become impregnated. But in extending this right of choice beyond conception to include the first trimester of pregnancy, the California Supreme Court failed to confront and adequately consider recent advances in the area of fetology. For in the light of ever-increasing, scientific evidence, the fetus must be seen as physically and intellectually in a continuum with postnatal humanity. The issue is not

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[31] H. Liley, MODERN MOTHERHOOD 26-27 (1967). See also Gesell, THE FIRST FIVE YEARS OF LIFE (1940):

> . . . [M]ental growth is a process of behavior patterning. . . . [E]ven in the limb bud stage, when the embryo is only four weeks old, there is evidence of behavior patterning: the heart beats. In two more weeks slow back and forth movements of arms and limbs appear. Before the twelfth week of uterine life the fingers flex in reflex grasps. *Id.* at 11.

It is now recognized that:

> . . . [T]he nine months spent by the individual in the womb are fundamental. It is during these nine prenatal months that the individual's foundations are . . . laid. . . . To an extent rather more profound than we had hitherto suspected, the individual's prenatal past influences his postnatal future. A. Montague, PRENATAL INFLUENCE 500 (1962).

one of contraception,[32] but one of conception and the paramount right to life that attaches thereto.

As early as 1949, the Virginia Supreme Court viewed anti-abortion legislation in this perspective: "Anti-abortion statutes are enacted, not only for protection of the woman, but for protection of the unborn child and society . . . ."[33] However intimidating the population bomb may become, however deafening the public clamor for open abortion,[34] the courts cannot properly abandon the fetus to the whim of circumstances—even in the first three months of gestation. Reason, not rationalization, must be the guardian of human life.

William T. Robinson III

UNIFORM COMMERCIAL CODE—ASSIGNMENTS—CONDITIONAL SALES CONTRACTS—WAIVER OF DEFENSE CLAUSES.—O. G. Jennings purchased a car from an automobile dealer under a conditional sales contract which embodied a "waiver of defense or counterclaim" clause.[1] The contract received the customary treatment of such agreements, assignment to a finance company. Apparently upon default of payments, the assignee repossessed and sold the car, bringing suit against Jennings to recover the deficiency on the unpaid balance. The trial court granted summary judgment for the assignee, disallowing a counterclaim that the retailer had delivered a used car misrepresented as a new one.[2]

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[32] Lucas, *supra* note 21.

[33] Miller v. Bennet, 190 Va. 162 —, 56 S.E.2d 217, 221 (1949).

[34] The trend of public opinion is clear:

> Whatever the underlying motivation, public attitudes about abortion have changed rapidly. In 1967, a Gallup poll showed that 21 percent of Americans felt abortion should be permitted for any woman wanting one. In a Gallup study last year, four out of ten persons said they regarded abortion as a private matter between a woman and her doctor. *Abortion and the Changing Law*, NEWSWEEK, April 13, 1970, at 54.

[1] It is standard procedure for car dealers to include "waiver" clauses in conditional sales contracts. To obtain enough ready cash to restore inventory, dealers assign (sell) their right to collect under a sales contract to financial institutions at a discount. The following clause was embodied in the sales contract of the instant case:

> If Seller assigns this contract, Seller shall not be assignee's agent for transmission of payments or for any purpose; Customer will settle, directly with Seller, all claims, defenses, set-offs and counterclaims there may be against Seller, and not set up any thereof against assignee. Upon full payment of Customer's obligation, assignee may deliver all original papers, including any certificate of title to Seller as Customer's agent. 442 S.W.2d at 566.

[2] The effect of the UNIFORM COMMERCIAL CODE [hereinafter UCC in the footnotes] § 9-206(1), which provides for the use of "waiver" clauses, is to make the assignee of the contract the holder in due course of a negotiable instrument. As such, he is free from certain "personal" defenses such as a failure of consideration. Receiving a used rather than a new car is a failure of consideration. *See* UCC § 3-305.