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California's 1967 Therapeutic Abortion Act: Abridging A Fundamental Right To Abortion

This comment examines the Therapeutic Abortion Act from three major perspectives: how has the law been applied in California since 1967; does a woman have a fundamental right to have an abortion; what is the state's interest in regulating abortions? A review of some recent lower court decisions helps to illuminate the latter two questions. Recent statistical data demonstrates that the rate of legal abortions is increasing dramatically. Also included is a comparison of recent abortion laws enacted by other states.

Thus is the Judaeo-Christian ethic of reverence for life replaced by an ethic of reverence for welfare, convenience or happiness. It is ironic that the proposals for liberalizing abortion laws are made by a generation that is reconsidering and often abandoning capital punishment.¹

Prior to the enactment of California's Therapeutic Abortion Act in 1967, the California abortion law was contained in four sections of the Penal Code. The main section, 274, stated:

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. (Emphasis added.)²

Pursuant to this law, an abortion was legal only if necessary to preserve the life of the mother. In 1967, California, along with several

² This section, enacted in 1872, remained substantially unchanged from the original enactment as part of California's first penal code (Cal. Stats. 1850, c. 99, § 45, p. 233); § 275 stated that a woman who solicits or submits to an abortion is punishable by up to five years imprisonment; § 276 provided that any person who solicits a woman to submit to an abortion is punishable by up to five years imprisonment; and § 182 is the general conspiracy section of the California Penal Code proscribing conspiracy to commit any crime.
other states, enacted a Therapeutic Abortion Act based upon the American Law Institute's recommendations in its Model Penal Code. This act substantially modified California's 117-year-old abortion law and was enacted only after considerable national controversy and seven years of study by the California Legislature. Essentially, the Act permits termination of pregnancy when there is a "substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother," or the pregnancy resulted from rape or incest. However, there are additional requirements. The termination may be performed only: (1) in hospitals accredited by the Joint Committee of Accreditation of Hospitals, (2) when a committee of the hospital's medical staff (consisting of at least two or three licensed physicians and surgeons) affirmatively determines there is a substantial risk to the mother's physical or mental health, and (3) the termination is approved before the 20th week of pregnancy. Mental health as defined in the Act "means mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

The foremost purpose of the Act was to control, rather than foster as did the old law, illegal abortions. In his statement of purpose of the Act before the Senate Judiciary Committee, April 27, 1967, Senator Beilenson said:

The existing law is barbaric because we force women and girls, who could be given expert medical attention by their own physicians, to seek out the services of quacks and criminal abortionists,
or to try to abort themselves—and we drive thousands of women
to their deaths and to serious injury each year.\textsuperscript{14}

A secondary purpose of the Act was to bring California's abortion law
into line with the advances made in medical practice and social ideology
in the last several years.\textsuperscript{15}

In 1970, Senator Beilenson, introduced a bill which would have re-
pealed the Therapeutic Abortion Act.\textsuperscript{16} The proposed legislation would
further have provided that present penalties pertaining to inducing mis-
carriages would have been inapplicable in situations where such actions
were directed or performed by a licensed physician and surgeon and the
action was performed not later than the 20th week of pregnancy.

The effectiveness of the Therapeutic Abortion Act in reducing the
number of illegal abortions is not determinable since, obviously, there
has never been a system to record the illegal acts.\textsuperscript{17} However, current
data compiled by the State Department of Public Health demonstrates
the impact of the law.\textsuperscript{18}

The liberalized abortion law started slowly; however, the number of
legal abortions has steadily increased. The ratio of therapeutic abor-
tions to live births in California for 1968 was 15 for each 1,000.\textsuperscript{19}
This low figure has motivated critics to conclude that even with the lib-
eralized law, there remained a substantial number of illegal abortions in
California.

The rate rose to 35 therapeutic abortions per 1,000 live births for the
first nine months of 1969. In September of 1970, the Department of
Public Health released unofficial figures for the first six months of 1970,

\textsuperscript{14} A copy of the statement may be obtained by writing to Senator A. C. Beilenson,
State Capitol, Sacramento, California.
\textsuperscript{15} Id. Senator Beilenson stated:
Our proposed change \ldots would bring the law into conformity with the sub-
stantial body of medical judgment and public opinion which supports termina-
tion of pregnancies in cases which are illegal under current law.
\textsuperscript{16} S.B. 544, 1970 Regular Session. The bill failed to achieve sufficient votes
to pass the Senate Judiciary Committee, June 30, 1970. (Aug. 21—From Committee
without further action. Senate Weekly History 1970). Senator Beilenson plans to
introduce a similar bill in 1971. (Telephone interview with Senator Beilenson’s office,
\textsuperscript{17} See Public Health Report 5. The Public Health notes a recent study of
North Carolina cities where the researchers used a “randomized response” household
survey method and provided anonymity to the respondent on sensitive questions.
From the responses the researchers estimated that the number of women (ages 18-44)
aborted each year, either legally or illegally, was 34.2 per 1,000 women. Despite the
questions of the integrity of the sample, the survey techniques, or the demo-
graphic comparability, the Department of Public Health applied the North Caro-
lina ratio to California and estimated the total number of abortions in California to be
81,600 in 1968. The Department then concluded that 76,600 were illegal and that the
recorded 4,496 therapeutic abortions accounted for only 6% of the total number of
abortions in 1968.
\textsuperscript{18} Public Health Report.
\textsuperscript{19} Id. at 2.
showing that the number of therapeutic abortions rose during those months to approximately 24,000. On the basis of this increase, the Department estimates the total number of therapeutic abortions for 1970 will reach over 50,000.20

Though it is still difficult to evaluate the effectiveness of the Act toward eliminating illegal abortions the rate of legal abortions has increased significantly since the first year of enactment. Further, when one considers that the abortion rate is no higher in some countries with liberal abortion laws than it is in California,21 it appears reasonable to conclude that the therapeutic abortion law, has not been totally ineffective in curtailing illegal abortions.22

Perhaps these most recent statistics will reduce the strong criticism and skepticism concerning the practicability of the 1967 Act. Doubtlessly they will cause little restraint of those who have campaigned for a more liberal abortion law. But even if the present Act was deemed by these critics to be an acceptable solution to the abortion question in California its future remains uncertain. It is the judiciary who has now cast a menacing shadow across the Act.

THE CONSTITUTIONALITY OF THE 1967 ABORTION ACT

The issue of the constitutionality of the Therapeutic Abortion Act has been tried in lower courts and presumably will be ruled upon by the California Supreme Court within a year or two. Also, the United States Supreme Court has heard arguments on the constitutionality of the District of Columbia abortion law (similar to the old California Penal Code section 274), and may shortly hand down a decision affecting the constitutionality of all state abortion laws, including California's 1967 Act.

The issues by now are fairly clear-cut. There are five grounds on which the constitutionality of any abortion law may be attacked. These

20 Telephone interview on October 5, 1970, with the Bureau of Maternal and Child Health, California Department of Public Health, Berkeley, California. The ratios for some of the foreign countries with more liberal abortion laws are: Japan, 912 per 1,000; Czechoslovakia, 344 per 1,000; and Hungary, 256 per 1,000.
21 See note 20 supra.
22 One further indicator of the effectiveness of the act is the numbers of maternal deaths which resulted from other than abortions pursuant to the Therapeutic Abortion Act. In the years 1966-1967 there were 35 reported deaths due to criminal or self-induced abortions. In the years 1968-1969 there were 22 such deaths reported. One does not know whether this is a reduction corresponding to the increase in the number of therapeutic abortions performed during the same period, or a normal yearly variation on which the Therapeutic Abortion Act has had little effect. Also, information on adoptions and maternity admittances is sketchy and too dated to be of value to this analysis; therefore, no attempt is made to show whether the number of babies available for adoption and the number of maternity admittances have decreased, remained constant, or increased since the passage of the Therapeutic Abortion Act.
include vagueness, overbreadth, lack of compelling state interest in the regulation of a fundamental right, unconstitutional delegation of legislative power, and lack of equal protection. The first case to provide a definitive review of these issues as they relate to abortion law was People v. Belous, decided by the California Supreme Court in September, 1969. As a result of the thorough arguments presented by both parties and various amici curiae, and the careful reasoning of the court, the opinion develops some important guidelines to apply for further determination of the constitutionality of abortion laws.

In the Belous case, Dr. Belous, a prominent Los Angeles obstetrician and gynecologist, referred a girl to a doctor from Mexico, unlicensed in California, who performed an abortion on her in this state. The result of the case hinged on Dr. Belous’ ability to prove the abortion was necessary to preserve the woman’s life as required by Penal Code section 274. The court admitted into evidence the defendant's offer of proof that he was convinced the girl's very life was in danger, either from possible “butchery in Tijuana or from self-mutilation.”

Dr. Belous was convicted in the lower court and the case was appealed to the California Supreme Court. Based on two lower court decisions interpreting the words “necessary to preserve the life of,” the court found that the words of Penal Code section 274 did not impart a sufficiently clear meaning to “men of common intelligence.” The words “necessary to preserve” could range in meaning all the way from maintaining the status quo to preventing only biological death. Consequently the court found the 100 year old statute void for vagueness.

A second constitutional concept was also discussed by the court as a
basis for holding the statute unconstitutional, i.e., an improper delegation of decision-making power to a directly-involved individual contrary to the fourteenth amendment.\textsuperscript{30}

At present, there are two aspects to a finding of unconstitutional delegation of decision-making power. One aspect is represented by the case of \textit{Tumey v. Ohio}.\textsuperscript{31} In that case a village mayor was allowed to receive his costs (besides his regular salary) in each case he heard involving violation of state prohibition law if the accused was convicted. The court found that such a grant of power to an individual who had a "direct, personal, substantial pecuniary interest" in the outcome of his own decision is an unconstitutional delegation of power because it violates the due process clause of the Constitution.\textsuperscript{32}

The second aspect of an unconstitutional delegation of power is represented by the case of \textit{Schechter Poultry Corp. v. United States}.\textsuperscript{33} This case concerned the constitutionality of the National Industrial Recovery Act of 1933. Among other issues discussed was the improper delegation of legislative power resulting from an absence of definite guidelines for the agency to whom Congress had delegated the power. Though the holding of the case was later limited in the interstate commerce field by subsequent cases,\textsuperscript{34} it and the \textit{Carter} case have continued to be authority for holdings by state supreme courts on issues of unconstitutional delegation of state power to state agencies because of no definite guidelines.\textsuperscript{35}

While the \textit{Belous} court did not specifically discuss the latter aspect of unconstitutional delegation of power (except to say the statute was void for vagueness), it did discuss the former. The court held that the doctor under the 1872 abortion law has a "direct, personal, substantial, pecuniary interest" in denying a woman an abortion because there is no penalty if the doctor wrongly \textit{denies} the abortion; only if he wrongly grants one.\textsuperscript{36} In other words, the possibility of a felony conviction, with resultant jail sentence and loss of license,\textsuperscript{37} gives the doctor a substantial pecuniary interest in \textit{not} granting an abortion. It has been argued that

\begin{footnotesize}
\textsuperscript{30} \textit{Id.} at 366.
\textsuperscript{31} 273 U.S. 510 (1927).
\textsuperscript{32} \textit{Id.} at 523.
\textsuperscript{34} \textit{See}, e.g., \textit{United States v. Darby}, 312 U.S. 100 (1941).
\textsuperscript{36} \textit{Belous} 366.
\end{footnotesize}
the doctor might have a pecuniary interest in granting the abortion in order to obtain the fee.\textsuperscript{38} However, it is questionable that the expectancy of a cash fee could ever outweigh the pecuniary loss from a jail sentence and deprivation of his right to practice medicine. Therefore, with the scales of the physician's pecuniary interest so weighted, might not his usual decision tend to deprive a woman of an abortion when she might otherwise be entitled to one—when, under the old code section, a live birth might physically or mentally destroy her? The court thought so. Such a delegation of decision-making power to an individual with a direct, pecuniary interest, the court found, was unconstitutional as a violation of due process.\textsuperscript{39}

Besides the vagueness finding, however, the primary importance of the Belous case lies in its delineation (for the first time in a constitutional case) of the fundamental right of a woman to decide whether or not to bear children. The discussion of this right absorbed the court for over two-thirds of its opinion.\textsuperscript{40} Having first found the statute void for vagueness, the court went on to say that \textit{even if} there had not been a void-for-vagueness finding, the law would \textit{still} be unconstitutional because it works an invalid infringement of a woman's fundamental rights under the due process clause of the United States Constitution. The rights involved, the court found, are the right of the woman to life and the right of the woman to choose whether or not to bear children. A finding of the latter right might be considered a weakness of the case, since there is no direct precedent for such a result.\textsuperscript{41} However, the right of a woman to abortion before "quickening", was recognized for centuries at English common law.\textsuperscript{42} The Belous holding on the funda-

\textsuperscript{38} See 118 U. PA. L. REV. \textit{supra} note 27, at 657.
\textsuperscript{39} \textit{Belous} 366.
\textsuperscript{40} Seven pages out of a total of eleven for the majority opinion.
\textsuperscript{41} The court cited as precedent a long list of cases (e.g., Griswold \textit{v.} Connecticut, 381 U.S. 479, 485, 500 (1965); Loving \textit{v.} Virginia, 388 U.S. 1, 12 (1967); Pierce \textit{v.} Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer \textit{v.} Nebraska, 262 U.S. 390, 399-400 (1923); and Perez \textit{v.} Sharp, 32 Cal. 2d 711, 715) as authority for the fact that the fundamental right of a 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." (\textit{Belous} 360).
\textsuperscript{42} For authority "that such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right," the court cited: Carrington \textit{v.} Rash, 380 U.S. 89, 96 (1965); Aptheker \textit{v.} Secretary of State, 378 U.S. 500, 505-506 (1964); and Otsuka \textit{v.} Hite, 64 Cal. 2d 596, 602 (1966), among others. The court also said: "It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right." (\textit{Belous} 360).
mental right of a woman to abortion may be an example of what Mr. Justice Harlan describes as lack of "judicial self-restraint," because the court is defining a right not specifically mentioned in the constitution. Yet the finding of the right to choose whether or not to bear children, novel to judicial history, has become precedent for the existence of that right in subsequent holdings. After announcing the fundamental rights the court then discussed the possible limitations on those rights. In other words, did there exist a compelling state interest in regulating the rights of the woman to life and to choose whether or not to bear children? The court found that while there was a compelling interest in 1872, in preserving the woman's life from the grave dangers of abortion in that era, that medical expertise regarding abortion has so greatly progressed that today legal abortion is less dangerous to a woman's health than a live birth. Therefore, there is no longer a compelling interest of the state in proscribing abortion to protect the mother's health. On the contrary, the menace of illegal abortions, with the attendant high incidence of critical infection, death, or subsequent infertility and pelvic disease, would appear to give the state a compelling interest in liberalizing legal abortions.

Three additional arguments suggesting a compelling state interest in regulating abortion—protection of the father's rights, suppression of


A discussion of two cases citing Belous as precedent will follow infra.

While it has been suggested that the court's finding on this point was mere dicta, Noonan, The Constitutionality of the Regulation of Abortion, 21 HAST. L. REV. 51, 65 (1970), or only a secondary ratio decidenti (see note 27 supra 118 U. PA. L. REV. at 649-652), one might argue that a conclusion as to dicta or ratio decidenti is no longer relevant. The trend of subsequent decisions and the more recent state laws is to grant greater protection to the right of the woman to choose whether or not to bear children. See text infra.


Belous 361, n.7. In this note the court referred to three recent studies of abortion in European countries noting that there was no comparable data in the United States, but that in the first year of the Therapeutic Abortion Act there were almost 4,000 legal abortions reported without a maternal death. The only data contrary to the conclusion above was from Sweden where maternal mortality from abortion was slightly higher than from giving birth, but that figure was explainable by the fact that abortions in Sweden are often performed during late pregnancy.

Belous cites Kistner, Medical Indications for Contraception: Changing Viewpoints (editorial) 25 OBST. & GYNEC. 285, 286 (1965); KLEGMAN & KAUFMAN, INFERTILITY IN WOMAN 301 (1966); and CURTIS & HUFFMAN, GYNECOLOGY 564-566 (6th ed. 1950), as authority on this subject. See also numerous authorities cited in Belous, at 361-362, nn.9, 10.
promiscuity\textsuperscript{48} and maintaining population growth\textsuperscript{49}—were never discussed by the court. But protection of the rights of the fetus, by far the most compelling reason for proscription of abortion today, was given startling treatment. Citing various California code sections,\textsuperscript{50} the common law,\textsuperscript{51} and cases regarding wrongful death, inheritance and tort recoveries,\textsuperscript{52} the court first concluded that the rights of the fetus or embryo\textsuperscript{53} are not equivalent to the rights of a child born alive. For example, the intentional destruction of a child born alive is murder or manslaughter,\textsuperscript{54} while “the intentional destruction of an embryo or fetus is never treated as murder, and only rarely as manslaughter.”\textsuperscript{55} Usually it is treated as the lesser offense of abortion. The court concluded that the mother’s right to life always takes precedence over any interest the state may have in the unborn.\textsuperscript{56}

Such a conclusion shocks the conscience of those who believe that human life begins at conception.\textsuperscript{57} To allow life, already begun, to be legally cut off at the whim of individuals is to deny reverence for life. If one finds human life so burdensome in its early stages that there is justification in destroying it, at what point is there justification for destroying it in its later stages? When a man can no longer walk? When he is 75, or 80? When he can no longer take care of himself? It is on this point that the religious tenets of Christianity and Judaism, so basic a factor in the development of our society, exert a force in opposition to


\textsuperscript{50} CAL. CIV. CODE §§ 29; CAL. PROB. CODE §§ 250, 255; CAL. PEN. CODE §§ 3705 and 3706.

\textsuperscript{51} See note 47 supra.


\textsuperscript{53} Belous does not distinguish between the term “embryo”, usually applied to the early stages of gestation, and “fetus”, applied to the later stages, usually after the third month of development. See WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1960).

\textsuperscript{54} Perkins, On CRIMINAL LAW supra note 42, at 140.

\textsuperscript{55} Belous, at 362.

\textsuperscript{56} Id.

liberalization of abortion laws.\textsuperscript{68}

Another California case, subsequent to \textit{Belous}, acknowledged much greater awareness of the right of the fetus. In \textit{Keeler v. Superior Court}\textsuperscript{60} decided by the Third District Court of Appeal two months after the \textit{Belous} decision, Justice Friedman, denying Keeler's writ of prohibition to stay his prosecution on a murder charge for the killing of a viable fetus, interpreted the \textit{Belous} "dictum" on the rights of the fetus narrowly, and held that "a fetus which has reached the stage of viability is a human being for the purpose of California's homicide statutes."\textsuperscript{60}

On appeal,\textsuperscript{61} the California Supreme Court was presented with an extreme example of the possible effect of its reasoning in \textit{Belous}. The facts involved a couple who were divorced in September, 1968. At the time Mrs. Keeler was pregnant by another man but concealed the fact from her husband. In February, 1969, Keeler confronted his ex-wife outside her automobile, confirmed the fact that she was pregnant, and in an effort to "stomp it out," shoved his knee in her abdomen. In the subsequent Caesarian section, the fetus, weighing five pounds and at least in the eighth month of development, was found with a severely fractured skull and was delivered stillborn.\textsuperscript{62}

Consistent with the \textit{Belous} case, and contrary to the holding of the Third District Court of Appeal, the court held in a 5-2 decision that the intentional destruction of an eight-month-old fetus capable of independent life was not murder.\textsuperscript{63} Immediately the Republican Majority Leader of the California Assembly announced that he would introduce a special measure in the legislature making such an offense the crime of murder.\textsuperscript{64}

Though the \textit{Belous} decision held the 1872 statute unconstitutional on the rather technical, narrow, and disputed ground that it was void for vagueness, the importance of the case rests in its discussion for the first time of the fundamental right of a woman to choose whether or not to bear children and what interests, if any, the state might have in limiting
that right. The court's finding of no compelling state interest in protecting the rights of the fetus, on the other hand, has not found support in subsequent decisions or recently enacted state law. The case was appealed to the United States Supreme Court but denied certiorari, perhaps because the court felt either that the issue had not yet "ripened" or that the issue was one best left to the states to solve as they saw fit.

Two months after the Belous decision was rendered, United States District Court Judge Gesell, in United States v. Vuitch, cited Belous as precedent for its holding that the federal abortion law for the District of Columbia (essentially the same as the 1872 California law) was unconstitutional for vagueness and for impinging to an appreciable extent on significant constitutional rights of the individual. In Vuitch, a licensed physician and a nurse's aid, both charged with abortion in unrelated cases, moved for dismissal on grounds that the federal statute violated the due process clause. The court granted the dismissal in the case of the physician, but not in the case of the nurse's aid. It held that the words of the statute "under the direction of a physician" were a legitimate use of the police power because the government had a compelling interest in protecting the health of the mother. The higher incidence of infection and complications in abortions performed by other than licensed physicians justified the law in regard to the nurse's aid.

As to the physician, however, besides finding unconstitutionally vague the words "necessary to preserve the life and health of the mother," the court also held the right of privacy may well include the right to remove an unwanted child at least in the early stages of pregnancy." (Emphasis added.) It is apparent from the words emphasized in this statement that Judge Gesell's opinion did not go as far as the California Supreme Court in limiting the rights of the fetus. He implied, though he did not set any time limit, that Congress should study the possibility of some limitation on abortion in the later stages of pregnancy.

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65 In Maryland, New York, Alaska, and Hawaii.  
68 See Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J., concurring opinion); see also Mr. Justice Harlan's view in Griswold v. Connecticut, supra note 43.  
69 305 F. Supp. 1032 (1969) [hereinafter referred to as Vuitch]. The United States Supreme Court agreed on April 27, 1970, to hear full arguments providing that it found jurisdiction.  
70 See Title 22, Sec. 201 of the D.C. Code.  
71 Vuitch, at 1034.  
72 Id.  
73 Id. at 1035.  
74 Id.  
75 Vuitch, at 1035.  
76 Id.
In his opinion Judge Gesell also discussed the effect of the equal protection clause on abortion, an issue that had not been analyzed in Belous. Noting that abortions are more liberally performed in private hospitals than in city hospitals, he expressed the opinion that “Principles of Equal Protection under our constitution require that policies in our public hospitals be liberalized immediately.”

Another recent federal district court case, Babbitz v. McCann dealt with an abortion statute similar to the 1872 California law and the present federal law. In this case, the three-judge court found that the statute was not vague. However, it did say the state needed a compelling interest to regulate “the right to privacy in home, sex, and marriage.” It specifically did not find such an interest in the need to protect the health of the mother, nor in discouraging promiscuity. In regard to the rights of the fetus, the court stated, “When measured against the claimed ‘rights’ of an embryo of four months or less, we hold that the mother’s right transcends that of such an embryo.” (Emphasis added.)

The court concluded:

Under its police power, a state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle her under the Ninth Amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth.

Thus, in the two recent federal district court cases there is not only a recognition of the right of the woman to choose whether or not to bear children, as in Belous, but also a greater recognition than in Belous of the probable right of the state to regulate abortion in two areas: (1) its performance by licensed physicians only, and (2) its performance within a specified time limit in the course of the pregnancy.

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77 Id.
79 See Wisc. Stat. § 940.04(5).
80 310 F. Supp., at 297.
81 Id. at 300.
82 Id.
83 Id.
84 Id. at 302.
85 In a recent Arizona court case (State of Arizona v. Keevers, 458 P.2d 974 (1969), rehearing denied Oct. 20, 1969) the court skirted the critical constitutional issues and found instead that there was no proof beyond a reasonable doubt (though a Gravindex test had been found positive) that the complainant was pregnant; and therefore one of the essential elements of the crime was missing.
86 Babbitz, 310 F. Supp. 293, also suggests it should only be performed in hospitals and clinics.
87 This latter aspect of abortion regulation could be based on a compelling inter-
Constitutional Status of California's 1967 Abortion Act

Notwithstanding the importance of the cases discussed above to the development of abortion case law, it must be remembered that each holding was determinative of only the most restrictive type of abortion law (i.e., those similar to California's Penal Code section 274 of 1872). The constitutionality of the abortion laws based on the American Law Institute's Model Penal Code still remains to be determined. The issues, however, are the same.

In regard to vagueness, the Belous court, though it expressly stated it was deciding only the validity of the 1872 law, suggested a test it felt would comply with the requisite test of certainty. The court stated that the test of the Therapeutic Abortion Act is analogous to its suggested test. The test would be a "medical" one, i.e., an abortion would be illegal when the risk of death from abortion would be greater than the risk from live birth. Apparently the court felt that such a determination could be made by the medical profession with the necessary degree of certainty. However, since the court itself recognized that "it is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child," the necessity for having the test at all is, practically speaking, eliminated. Nearly all abortion requests (except in the most bizarre circumstances) would have to be approved, and there would be no need for a committee of doctors to pass on the abortion. Therefore, even if the test of the Therapeutic Abortion Act were found certain enough to satisfy the due process clause, it would be difficult to square such a test with the intent of the legislature in enacting the therapeutic abortion law. In view of all the limitations and procedural prerequisites incorporated into the Act, est of the state in the health of the mother (as "late" abortions more nearly approach the risk rate of live birth), or in protecting the rights of the fetus. It seems to shock the conscience less to destroy an embryo in the early stages of development than in the later when it might be capable of independent life. In Foster v. State, 182 Wisc. 295, 301-302, 196 N.W. 233, 235 (1923), the court said:

That it should be less of an offense to destroy an embryo in a stage where human life in its common acceptance was not yet begun than to destroy a quick child, is a conclusion that commends itself to most men.

Such a time limitation would probably best be an arbitrary one (a certain specified number of weeks) for ease of administration. Any conflict over the time of conception could easily be resolved by factual and expert testimony.

88 Belous 366, n.15.
89 Id. at 364.
90 Id.
91 Id. at 360-361; also at 361, n.7.
92 In most cases, that the abortion be approved by a hospital staff committee, CAL. HEALTH & SAFETY CODE § 25951 (c) (1); and, since most applications (over 92%) are based on mental health reasons, that in these cases the woman be shown to be dangerous to herself or to . . . others . . . CAL. HEALTH & SAFETY CODE § 25954. This last requirement in effect necessitates the approval of at least one psychiatrist.
it appears that the legislature did not intend abortions to be easily obtainable in the first trimester.

In spite of the fact that the test the court considers certain enough might not coincide with legislative intent, it is possible the same court or the United States Supreme Court might find the 1967 test, upon further examination, not certain enough to satisfy the due process clause.

One Los Angeles Municipal Court case, People v. Robb, decided in January, 1970, has already held the 1967 Therapeutic Abortion Act void for vagueness. Judge Paul Mast, in dismissing the charges brought against Dr. Robb under the Act, found that, though most of the statute was definite and certain the part which refers to mental illness “to the extent that the woman is dangerous to herself or to the person or property of others, or is in need of supervision or restraint” is:

. . . completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean?

Judge Mast found these words had “no meaning certain enough to apprise a person what conduct is prohibited”, therefore, the statute was void for vagueness.

In other states with statutes similar to California’s the same questions are being raised. Dr. William Goddard, a Denver obstetrician and gynecologist, filed suit asking that the Colorado statute be declared unconstitutional. In his complaint he alleged that Colorado’s law was too difficult, if not impossible, to administer.

Related to the issue of vagueness, as discussed under Belous, is the question of unconstitutional delegation of decision-making power. The possibility of the statute’s vague language placing an undue burden on the hospital committees and physicians in interpreting the law could be considered lacking definite guidelines in the statute (as the Robb case held) and therefore grounds for holding the statute unconstitutional.

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93 A copy of the decision [hereinafter cited as Robb] may be obtained by writing to Municipal Court, Central Orange County Judicial District, 700 West Eighth Street, Santa Ana, California 92701.

In June of 1970, another municipal court judge in the same district, Judge William W. Thomson, held in a ruling that the state did have the right to regulate abortion to the extent abortions be performed before 20 weeks, by a physician in a hospital or clinic; but that the state cannot deny a woman’s right to decide whether or not to bear children. A copy of the opinion in this latter case, People v. Gwynne, may be obtained by writing the Central Orange County Judicial District at the above address.

94 Robb 7.

95 Id.


97 Robb 5-6.
Two other grounds on which California's Therapeutic Abortion Act may be attacked are overbreadth and lack of compelling state interest in the regulation of abortion. Overbreadth, in the case of abortion law, appears to be closely allied to the fundamental right theory. For instance, if a fundamental right is found (either of privacy in relation to matters of marriage, family and sex or of a woman to decide whether or not to bear children), the critical issue is whether the state has a compelling interest in the regulation of that right. If a compelling interest is found, the state may only regulate the right by legislation that is narrowly drawn and not of "unlimited and indiscriminate sweep." The regulation must be "necessary . . . to the accomplishment of a permissible state policy."

In view of the above discussion of recent case law and the trend of the more recent state statutes, one could conclude that a woman does have a fundamental right to choose whether or not to bear children. However, this conclusion has yet to be accepted by the United States Supreme Court.

The identification of a compelling state interest that would justify the regulation of the right to abortion is much more complicated. Under its police power, the state has an accepted power to regulate constitutional rights for the protection of the health, safety and welfare of its citizens. The state has a clear interest in protecting the health of the mother. But as pointed out above, abortions, at least in the first trimester, have been proven to present less danger to the life and health of the mother than a live birth, it would appear that the state would have no legitimate interest in regulating early abortions other than to insist they be performed by physicians in hospitals or clinics.

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98 See note 42 supra.
99 See note 45 supra.
102 Those of Maryland, Hawaii, Alaska, and New York.
103 This power is reserved to the states, as sovereignties, under the tenth amendment of the Constitution. For a definition of state police power, see Lochner v. New York, 198 U.S. 45 (1905).
104 The World Health Organization in 1960 defined health as "a state of complete physical, mental and social well being, not simply the absence of illness and disease." As quoted in Mietus, THE THERAPEUTIC ABORTION ACT 71 (1967).
105 See note 46 supra.
106 Even the latter limitation, that abortions be performed in hospitals or clinics, might become obsolete (see New York's law, note 134 infra, where the atmosphere of the procedure is left to the discretion of the physician, as it is with regard to any surgical procedure. However, New York is still wrestling with this problem; see New York Times, July 15, 1970, at 24, col. 4.)

The argument that the state has an interest in prohibiting abortions because they are damaging to the mental health of the woman has been largely discredited. See Kummer, Post-Abortion Psychiatric Illness—A Myth? 119 AM. J. PSYCHIAT. 980-983 (1963); and Lovenius and Rigney, The Law, Preventive Psychiatry and Therapeutic Abortion, paper presented to A.P.A. meeting, Miami Beach, Fla., Apr. 1969.
Another possible compelling interest suggested as justifying state regulation is the interest of the state in protecting the life of the unborn. Belous seems to diminish such an interest\textsuperscript{107} though Vuitch and Babbitz do not.\textsuperscript{108} More recent state laws have recognized a protectable right of the fetus after some stage in its development, putting some time limit on the period during the pregnancy when a woman may obtain an abortion.\textsuperscript{109} In the Robb case Judge Mast, following Belous, stated that the law generally did not recognize fetal rights as being equal to human rights unless a child was subsequently born alive.\textsuperscript{110} He further added that to hold that human life begins at conception (in other words, that the state could regulate abortion from that time on in order to protect the rights of the fetus) would be to “adopt the philosophy of one of the country’s major religions, an act which clearly would be in violation of the first amendment to the United States Constitution.”\textsuperscript{111}

A middle course, which would seem to be acceptable to a majority of Americans, would be to acknowledge the rights of the fetus, as did the common law, once quickening has occurred.\textsuperscript{112} After quickening, or at least viability, abortion could be proscribed under the tenet of protecting the rights of the fetus and the health of the mother. However, any other regulation of early abortion, such as the requirement of some special health need of the mother or the approval of a committee of hospital physicians, would be questionable since, as pointed out previously, there is probably no compelling state interest in regulating such aspects of abortion. Under such a rationale, the Therapeutic Abortion Act would be void under the fundamental right theory, or for overbreadth because the regulation applies to aspects of abortion in which no compelling state interest can be identified.

The final grounds on which the Therapeutic Abortion Act might be held unconstitutional, a denial of equal protection of the law, has been explored in Robb. The court expressed that an improper delegation of decision-making power similar to that in the Therapeutic Abortion Act

\textsuperscript{107} See note 54 supra.
\textsuperscript{108} See notes 73 and 81 supra.
\textsuperscript{109} California’s present 20 week limitation is the time at which quickening is likely to occur. However, since viability would seem to be a time at which the state has a more compelling interest in limiting the mother’s right to abortion in order to protect the fetus, perhaps the 24-week limitation, as in New York’s law, is more sound.
\textsuperscript{110} Robb 9.
\textsuperscript{111} Id.
\textsuperscript{112} See Means, note 48 supra; and the quotation from Foster v. State, note 87 supra.
tends to promote, in application if not on the face of the statute, unequal protection of the rights of citizens under the Constitution.\textsuperscript{113} For instance, where guidelines are indefinite, the statute can be administered differently in different areas. The statistics collected by the State Department of Public Health demonstrate marked differences in geographical and hospital distribution of therapeutic abortions.

For example, the San Francisco Bay Area, with 22\% of the live births, accounted for 63\% of the legal abortions in 1969; the Los Angeles Metropolitan Area, with 44\% of the live births, accounted for only 18\% of the legal abortions.\textsuperscript{114} According to the Executive Director of the Sacramento Planned Parenthood Association, Mr. William Musladin, there are only five areas in California where abortions are relatively simple to obtain—San Francisco (including Palo Alto), San Diego, Santa Barbara, Oakland, and Sacramento.\textsuperscript{115} The Public Health Report pointed out that eight hospitals performed 40\% of the legal abortions in 1968, although they accounted for only 8\% of the live births.\textsuperscript{116}

With respect to county hospital statistics, of California’s 77 county hospitals, 36 are not accredited and thereby prohibited from performing abortions. Of these 36, only 20 have maternity services. Patients “utilizing county hospital services in these areas would have unusual difficulties in obtaining a therapeutic abortion.”\textsuperscript{117} However, in the accredited hospitals the five hospitals with the highest ratios of abortions per live births accounted for an overall rate of 111.3 abortions per 1,000 live births. The five with the lowest ratios averaged only 1.5—a 74-fold difference between the high and low groups.\textsuperscript{118} The report concluded that “as county hospital patients have little or no alternatives for obtaining care, this marked variation merits further study.”\textsuperscript{119} The poor, of course, account for the majority of county hospital patients.\textsuperscript{120} Those women with enough money and knowledge to obtain referrals to the more liberal private hospitals have, as these figures point out, a distinct advantage under the Therapeutic Abortion Act.

Even in Sacramento where therapeutic abortions are relatively easy to obtain, the figures show that not all applications are approved.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{113} Robb 6. See also notes 35 and 97 supra.
  \item \textsuperscript{114} Public Health Report 2.
  \item \textsuperscript{115} Interview in Sacramento, July, 1970. The figures of the Public Health Report corroborate this information.
  \item \textsuperscript{116} Public Health Report 2.
  \item \textsuperscript{117} Id. at 3.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} The special problem of the poor obtaining abortions on a national level is discussed in Abortion Law Reform at the Crossroads? supra note 42.
  \item \textsuperscript{121} In the Sacramento Valley in 1969, 92-93\% of applications received resulted in abortions being performed (Public Health Report, Table 2).
\end{itemize}
Since mental health accounted for 92% of the applications statewide in 1969, it was mandatory that, in the case of county hospitals, these applicants go through the mental health clinic prior to final approval. At this level, whether an applicant receives approval or not often depends on which doctor examines her. If the patient is turned down, she is allowed to go through the clinic once more in an attempt to obtain a different result. Or, there is the possibility of the final hospital committee's over-ruuling the psychiatrist's recommendation.

In general, in regard to satisfying the equal protection clause, the 1970 Public Health Report found that the inequalities were decreasing gradually during the three-year period from 1967 to 1970 and are "slowly disappearing." Such a trend could eliminate the question of whether the Act, as applied, constitutes a denial of the equal protection clause of the fourteenth amendment.

The New State Laws:

Starting in March, 1970, four states have moved toward more permissive and perhaps more constitutional abortion legislation. Hawaii was the first. Its new law has done away with the requirement of a hospital committee approval and the necessity of some threat to the health of the mother from continuation of the pregnancy. Any woman may now obtain an abortion in Hawaii with only the four following requirements: The abortion must be performed (1) by a licensed physician (2) in a licensed hospital (3) before the fetus becomes viable (4) only on women who have been residents of Hawaii for 90 days. The latter requirement was included to prevent a heavy influx of applicants from other states which Hawaii's facilities might not have the capacity to handle.

In April, New York passed a bill permitting abortions up to the 24th week of pregnancy (the time of viability) if performed by a licensed

122 Public Health Report 1.
123 Interview with Dr. James L. Poindexter, Sacramento obstetrician and gynecologist, July, 1970. Dr. Poindexter is a Diplomat of the American Board of Obstetrics and Gynecology, and is vice-president of the Planned Parenthood Association of Sacramento.
124 Public Health Report 5.
125 Regarding the cost of abortion, it is interesting to note that the average abortion costs between $500 and $700, even when the hospital stay is limited to less than a day (that is, 4 hours post-general anesthesia). The doctor's fees account for about $320. The fee for the doctor performing the abortion is usually $200, the psychiatrist's $65. Of the $320 for doctors' fees, Medi-Cal pays $21 for the first office visit and $120 for the surgery itself. According to Dr. Poindexter, most doctors write off the rest of the fee on their Medi-Cal patients.
physician. There is no residency requirement nor any requirement that abortions be performed in licensed hospitals and clinics. This law presumably would allow abortions to be done in doctors' offices considerably reducing the cost. The places where abortions could be performed would be left to the discretion of the medical profession or local boards of health, as it is for any other surgical procedure.

Shortly after New York's law was passed, the Alaska Legislature overrode its Governor's veto to pass a bill, similar to Hawaii's, permitting abortion if performed in a hospital by a licensed physician on a non-viable fetus, and the woman has been a state resident for 90 days.

The Maryland Legislature also sent to its Governor a bill that was perhaps the most permissive of all in that it contained no time limit for performing the abortion and no residency requirement. It merely stated that any termination of a human pregnancy constitutes the practice of medicine and that such acts may only be performed by licensed physicians within licensed hospitals.

**Conclusion and Recommendation:**

California's 1967 Therapeutic Abortion Act, in the light of the above discussion, does not seem to be constitutional on any one of several grounds. With, (1) the number of American women asserting, either legally or illegally, their right to decide whether or not to bear children and (2) the high degree of safety to the health of women who have early abortions performed by licensed physicians, it would seem that a workable abortion law should be devised that would be permissible under our constitution.

What, then, would be a workable, valid law? If one grants the fundamental right of a woman to decide whether or not to bear children, which seems inevitable at this point in history, then the only interests the state would have in regulating that right would be to protect the health of the woman and possibly to protect the rights of a viable, or "quick," fetus. These two interests would justify requiring abortions to be done

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128 See note 134 infra.
129 However, local Boards of Health could promulgate certain local restrictions. The problem of restricting abortions to licensed hospitals was brought before the New York City Board of Health in several hearings during the Summer of 1970. The consensus of opinion at those hearings seemed to be that the matter should be left to the discretion of the physician (New York Times, July 15, 1970, at 24, col. 4).
131 See House Bill 489, Maryland, 1970. This bill has since been vetoed by the Governor of Maryland.
132 And probably, therefore, the laws of the other nine states basing their abortion laws on the Model Penal Code, e.g., Arkansas, Colorado, Delaware, Georgia, Kansas, North Carolina, Oregon, South Carolina, and West Virginia.
by licensed physicians, and setting an arbitrary (for ease of administration) time limit during the pregnancy within which an abortion could be obtained, preferably until the time of viability.\textsuperscript{133} It is difficult to see how the nature of the right and the interests of the state at this time could justify any further regulation.

New York's newly enacted abortion law, which went into effect on July 1, 1970, essentially incorporates the above two regulations and nothing more. It is carefully drafted, in contrast to Maryland's bill and there is no residency requirement as in Hawai'i's and Alaska's laws. For these reasons, New York's law could well serve as a model for a new California abortion law and therefore is reproduced \textit{in toto} below.\textsuperscript{134}

 Needless to say, great interest and attention has been focused on the abortion question during the last five years. A state trend for liberalizing legal abortions, set by the New York Legislature\textsuperscript{135} and the California and federal courts may now be in swing; however, it remains for the state supreme courts and the United States Supreme Court to say what abortion law is constitutional.

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\textsuperscript{133} See note 87 supra.

\textsuperscript{134} N.Y. PEN. LAW § 125.05, subsection 3, as amended 1970, reads:

\begin{quote}
An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy. This act shall take effect July first, 1970.
\end{quote}

\textsuperscript{135} After the first week of operation of New York's 1970 abortion law the New York Times stated that several chiefs of obstetrics reported that initial problems were rapidly being ironed out. New York Times, July 5, 1970, Sec. IV, at 12, col. 4-5. See also quotation of Dr. Shirley A. Mayer, assistant commissioner of maternal and child care services at the Health Dept. of New York in the New York Times, July 1, 1970, at 36, col. 1; and figures in article of the New York Times, July 16, 1970, at 24, col. 2.