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Abortion - Nature and Elements of Offenses - The Shot Heard Round the Nation

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RECENT CASES

ABORTION—NATURE AND ELEMENTS OF OFFENSES—THE SHOT HEARD ROUND THE NATION—Defendant, a physician, was convicted of abortion and conspiracy to commit abortion under a statute which makes abortion a criminal offense ". . . unless the same is necessary to preserve her [the mother's] life. . . ."[1] Cheryl, a young pregnant unmarried woman, threatned to seek an abortion in Tijuana unless defendant would help her. Defendant referred Cheryl to Lairtus, a skilled abortionist, licensed to practice in Mexico, but not in California;[2] because defendant believed that if the threats were carried out, ". . . Cheryl's very life [would be] in danger."[3] On appeal, the Supreme Court of California, in a four-to-three decision, after stating that a woman has a fundamental constitutional right to decide whether to bear a child; *held* the statute vague, and thus violative of due process requirements. *People v. Belous*, — Cal. 2d—, 458 P.2d 194, 80 Cal. Rptr. 3545 (1969).

Abortion, before quickening,[4] was not a crime at common law.[5] In fact, abortion was not made a statutory crime in the United States until about 1830.[6] The abortion statutes were enacted to alter the common law rule, and made criminal, abortions performed before quickening.[7] While abortion statutes may differ in some respects (some require proof of pregnancy,[8] while others do

1. CAL. PENAL CODE § 274 (West 1955). This section was amended in 1967. Ch. 327, § 3, [1967] Cal. Stats. 1521, to provide for exceptions as enunciated in the Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE §§ 25950-25954 (West Supp. 1969).

2. Lairtus was living in California at the time the offense in the instant case was committed.

3. People v. Belous, ——Cal. 2d——, 458 P.2d 193, 196, 80 Cal. Rptr. 354, 356 (1969).

4. Quickening is that point where the mother first feels the movements of the fetus. It usually occurs between the sixteenth and eighteenth week of pregnancy. C. Means, Jr., *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, 412 (1968) [hereinafter cited as Means].

5. *E.g.*, Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845); State v. Cooper, 22 N.J.L. (2 Zab.) 52, 51 Am. Dec. 298 (1849). *See* Annot., 46 A.L.R.2d 1393, 1395 (1956).

6. United States v. Vuitch, Crim. Nos. 1043-68, 1844-68 (D. D.C. Nov. 10, 1969); *see generally* R. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968) [hereinafter cited as Lucas]; L. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L. 84 (1968).

7. *See* State v. Siciliano, 21 N.J. 249, 121 A.2d 490, 495 (1956).

8. *E.g.*, IDAHO CODE ANN. § 18-601 (1948); ME. REV. STAT. ANN. tit. 17 § 51 (1965); MISS. CODE ANN. § 2223 (Supp. 1969); N.D. CENT. CODE § 12-25-01 (1960). *See* Annot., 46 A.L.R.2d 1393, 1397 (1956). *See generally* M. Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285, 310 (1966) [hereinafter cited as Sands], for a summary of abortion statutes.

not[9]), most, like California's and North Dakota's,[10] allow an abortion only to preserve the life of the mother.[11]

With the *Belous* decision, the California Supreme Court led the way, and the Battle of the Fetus had begun. Sixty-six days after *Belous*, the District of Columbia followed California's lead,[12] and plans are now being laid for an assault on New York's 139 year old abortion law.[13]

The first skirmish was fought on the grounds of vagueness. The test of vagueness has been stated thusly:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[14]

While a criminal statute must be reasonably clear, ". . . the Constitution does not require impossible standards."[15] A statute is not vague merely because it throws upon men the risk of rightly estimating a matter of degree. But, "[w]here a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."[17]

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9. *E.g.*, CONN. GEN. STAT. ANN. § 53-29 (1960); FLA. STAT. ANN. § 797.01 (1965); MASS. GEN. LAWS ANN. ch. 272 § 19 (1959). *See* Annot., 46 A.L.R.2d 1393, 1397 (1956). *See generally* Sands 310.

10. N.D. CENT. CODE § 12-25-01 (1960).

11. *E.g.*, CONN. GEN. STAT. ANN. § 53-29 (1960); IDAHO CODE ANN. § 18-601 (1948); ME. REV. STAT. ANN. tit. 17 § 51 (1965). LA. REV. STAT. § 14:87 (Supp. 1969) does not recognize any grounds for abortion; nor does MASS. GEN. LAWS ANN. ch. 272 § 19 (1959). However, the Massachusetts court has implied the "necessary to preserve" exception. Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4, 5 (1944). The information in this footnote does not take into consideration the ten states which have adopted abortion reform statutes. CAL. HEALTH & SAFETY CODE § 25950 *et seq.* (West Supp. 1969); COLO. REV. STAT. ANN. § 40-2-50 (Supp. 1967); GA. CODE ANN. § 26-1201 (1969); MD. CODE ANN. art. 43 § 149E (Supp. 1969); N.M. STAT. ANN. § 40A-5-1 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (Supp. 1967); and according to TIME, Nov. 28, 1969, at 82, col. 3, Arkansas, Delaware, Kansas, and Oregon have adopted liberalized abortion laws.

12. United States v. Vuitch, Crim. Nos. 1043-68, 1044-68 (D. D.C. Nov. 10, 1969). While California had a replacement statute, the District of Columbia did not.

13. Three suits have been combined and set for trial before a three judge federal district court. The Minneapolis Tribune, November 16, 1969, at 11B, col. 1. For a history of New York's abortion law, *see generally* Means.

14. Connally v. General Const. Co., 269 U.S. 385, 391 (1926); *accord*, Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); State v. Henderson, 156 N.W.2d 700, 706 (N.D. 1968).

15. United States v. Petrillo, 332 U.S. 1, 7-8 (1947); *accord*, State v. McCorvey, 262 Minn. 361, 114 N.W.2d 703, 706 (1962).

16. Nash v. United States, 229 U.S. 373 (1913); *accord*, United States v. Harriss, 347 U.S. 612, 618 (1954); Jordan v. DeGeorge, 341 U.S. 223, 231 (1951).

17. Winters v. New York, 333 U.S. 507, 520 (1948).

As applied specifically to abortion legislation, statutes similar to California's are void for vagueness, because: (1) the term "necessary to preserve" is not susceptible to a construction consistent with legislative intent;[18] (2) the requirement of certainty is greater in statutes limiting constitutional rights;[19] (3) the doctor's ". . . professional judgment [as to whether an abortion is 'necessary to preserve' the life of the mother] made in good faith should not be challenged";[20] and (4) "[t]here is no clear standard to guide either the doctor, the jury or the Court."[21]

To declare an abortion statute void for vagueness is not the ultimate, in the constitutional sphere, but the beginning. Other constitutional arguments have been made. Some of these arguments are: equal protection of the law,[22] the establishment clause,[23] and the police power.[24] However, it is not the purpose of this comment to consider these arguments. Nor will this comment take issue with the state's power to regulate abortions by unlicensed practitioners. The purpose is to analyze the broader and more fundamental question: Whether the state has a countervailing interest in the protection of the fetus?[25] Stated in the alternative, the issue becomes: Does a woman have a fundamental right to decide whether she will bear a child?

A state must show a compelling subordinating interest before it may prevail, where personal liberties are impinged.[26] When such encroachment is threatened

> it becomes the duty of [the] Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.[27]

Thus, it was argued in *Belous*:

> There is no compelling state interest which justifies overriding the woman's personal liberty (and that of the man's

18. People v. Belous, ——Cal. 2d——, 458 P.2d 194, 197, 80 Cal. Rptr. 354, 357 (1969).
19. *Id.* at ——, 458 P.2d at 198, 80 Cal. Rptr. at 358; United States v. Vuitch, Crim. Nos. 1043-68, 1044-68 (D. D.C. Nov. 10, 1969).
20. United States v. Vuitch, Crim. Nos. 1043-69, 1044-68 (D. D.C. Nov. 10, 1969).
21. *Id.*
22. *See Id.*; L. Kutner, *Due Process of Abortion*, 53 MINN. L. REV. 1, 14 (1968) [hereinafter cited as Kutner].
23. *See* Brief for A.C.L.U. as Amicus Curiae at 32-38, People v. Belous, ——Cal. 2d——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) and Brief for Armstrong as Amicus Curiae at 20-22, People v. Belous, ——Cal. 2d——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
24. *See* Brief for Medical Deans as Amicus Curiae at 25-27, People v. Belous, ——Cal. 2d——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (health and morals) [hereinafter cited as Med. Deans Brief] and Kutner 14 (morals).
25. People v. Belous, ——Cal. 2d——, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969).
26. Bates v. Little Rock, 361 U.S. 516, 524 (1960); *accord*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964); Sherbert v. Verner, 374 U.S. 398, 406 (1963). *See generally* Med. Deans Brief at 13.
27. Bates v. Little Rock, 361 U.S. 516, 525 (1960).

> from the standpoint of family planning) not to be *compelled* to bear to term *every* embryo, not to override the correlative right of the doctor to medically advise or perform an abortion when in his opinion that is the proper step for the medical or physical welfare of the woman.[28]

Those who favor the "rights of the fetus" look to tort law, or the blood transfusion case.[29] They point to many cases which give the fetus a cause of action under a wrongful death statute.[30] However, these cases are distinguishable. They hold that a fetus, which is neither born alive, nor viable before the injury, has *no* cause of action under a wrongful death statute.

There are two lines of cases concerning the "rights of the fetus" under a wrongful death statute. One line is lead by *Verkennes v. Corniea*,[31] the other by *Drabbels v. Skelly Oil Company*.[32] The *Verkennes* line holds that a stillborn child has an action for wrongful death *providing* it was viable at the time the tort was committed.[33] These courts reason that at viability the fetus is no longer a potential life but a life capable of an existence separate from that of its mother.[34] As one court said, a viable child has

> its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable *now* of being ushered into the visible world.[35]

The *Drabbels* case held that an unborn child is ". . . a part of the mother until birth and, as such, has no juridical existence."[36] Thus, a child's *birth alive* may give rise to a cause of action for wrongful death. This line holds that viability is not controlling. What they require is the live birth of the child.[37] To illustrate, one court al-

28. Brief for Appellant (Supplemental Brief and Reply to Brief Amici Curiae) at 7, People v. Belous, ——Cal. 2d——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

29. *E.g.*, R. Byrn, *Abortion in Perspective*, 5 DUQUESNE L. REV. 125 (1966-67); R. Byrn, *Demythologizing Abortion Reform*, 14 CATHOLIC LAW. 180 (1968); R. Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465 (1965); J. Noonan, Jr., *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATHOLIC LAW. 124 (1969).

30. *E.g.*, Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

31. 229 Minn. 365, 38 N.W.2d 838 (1949).

32. 155 Neb. 17, 50 N.W.2d 229 (1951).

33. *See* Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Louisville v. Stuckenborg, 438 S.W.2d 94 (Ky. 1968); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E.2d 334 (1949); Annot., 15 A.L.R.3d 992 (1967).

34. Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); *accord*, Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960). *See* H. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*. 60 J. CRIM. L. 3, 19 (1969) [hereinafter cited as Ziff].

35. Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D. D.C. 1946).

36. 155 Neb. 17, 50 N.W.2d 229, 232 (1951).

37. *See* Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Annot., 15 A.L.R.3d 992 (1967).

lowed damages for the death of a *nonviable* fetus which lived for two and one-half hours after a miscarriage.[38]

Other legal areas have become involved in the "rights of the fetus" controversy. In Tennessee a stillborn child was not entitled to take under a will.[39] And in New York, it has been said that:

> Birth, rather than the date of conception, is the controlling factor in ascertaining a person beneficially interested in the trust which the grantor is seeking to revoke.[40]

Furthermore, in actions for support before birth, it is the interest of the prospective mother or parent which the law is protecting, not the "rights of the fetus."[41]

In the criminal sphere, a fetus is considered a human being, for the purposes of the homicide statute, when it has become viable.[42] Furthermore, now, as it was at common law, quickening is the determining factor as to whether or not a pregnant woman, convicted of a capital crime, will be reprieved. The unquickened fetus is

> neither innocent nor guilty of the crime of her who carries it, or indeed of any crime, because, not yet being a human person, it cannot be the subject of guilt or innocence. Once the foetus has quickened, the felon *cum foeta* complex constitutes two distinct human beings. One of them the quickened foetus, is innocent not only of the other's crime, but of any crime and therefore must be spared her fate.[43]

In *Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson*,[44] the pregnant woman, a Jehovah's Witness, refused a blood transfusion because of her religious beliefs. The court stated:

> We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event they are necessary . . .[45]

to save the life of the fetus. The proponents of the "rights of the fetus" argue that the court illustrated those rights by placing the

38. Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926, 927 (1967).
39. Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
40. *In re* Peabody, 5 N.Y.2d 541, 158 N.E.2d 841, 845, 186 N.Y.S.2d 265, 270 (1959).
41. People v. Belous, ——Cal. 2d——, 458 P.2d 194, 202 n.12, 80 Cal. Rptr. 354, 363 n.12 (1969).
42. The conviction of defendant, for aggravated assault on his ex-wife and for murder of the fetus she was carrying, was sustained. Keeler v. Superior Court For County of Amador, ——Cal. App. 2d——, 80 Cal. Rptr. 856 (1969).
43. Means at 500.
44. 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964).
45. *Id.* at ——, 201 A.2d at 538.

". . . right to life above that right which the law so zealously protects, the right of free religious conscience in the mother."[46]

But the woman's freedom of religion was not violated by the court order. As a federal court explained, it was the voluntary reception of another's blood which her religion forbade, not a transfusion ordered by the court.[47] Essentially her religion demanded suicide when it would not allow the blood transfusion. But as the court in *Georgetown College* stated:

> The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple. . . . Mrs. Jones wanted to live.[48]

Moreover, the case may be distinguished by the fact that the mother was eight months pregnant. The fetus was viable. Therefore, this decision is similar to the wrongful death cases discussed previously. The *Raleigh Fitkin* case does not stand for the "rights of the fetus."

The case of *Gleitman v. Cosgrove*,[49] a malpractice action, is frequently relied upon to support the "rights of the fetus." The mother, in *Cosgrove*, had contacted rubella (German measles) during the first trimester of pregnancy. The mother contended that she could have obtained an abortion, if the physician had informed her of the possible deformities which might occur in the child. The child was subsequently born deformed. The Supreme Court of New Jersey held that the infant could not recover because damages could not be ascertained. Also, they held that the difficulty of ascertaining damages, together with the public policy argument that a child has a right to life over the parents emotional and financial injury, barred the parents from recovery. It is impossible to argue against the rationale of the judge—if Jeffrey could talk, he would ask for life.[50] An opposing case is *O'Beirne v. Kaiser Memorial Hospital*, an unpublished decision of the California Supreme Court. The Court, in that case, ". . . denied a husband's petition to restrain his wife from obtaining an abortion."[51]

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46. Brief for Trinkaus as Amicus Curiae at 23, People v. Belous, ——Cal. 2d——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *reprinted in* 15 CATHOLIC LAW. 108, 123 (1969).

47. *Application of* Pres. & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964).

48. *Id.* at 1009.

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

50. *Id.* at ——, 227 A.2d at 693.

51. Los Angeles Herald Examiner, Dec. 8, 1967, at A-20, col. 1, *as reported in*, R. Byrn, *Demythologizing Abortion Reform*, 14 CATHOLIC LAW. 180, 183 n.18 (1968).

With the exception of the *Cosgrove* case, no court has, thus far, recognized that a state has a countervailing interest in the protection of the fetus before it quickens, in the reprieve of capital crimes cases, or reaches viability. In fact, the opposite is true. As we have seen the courts will not recognize a fetus as a "person" unless it was viable when injured, or it was injured before viability but born alive.

Having concluded that the State has no countervailing interest in the "rights of the fetus" before viability, we must determine whether the mother has a fundamental right to decide whether to bear children? Judge Gessell in *United States v. Vuitch,* stated:

> There has been . . . an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy.[52]

Among the rights Judge Gessell referred to, are: (a) the right to marital privacy and family planning through the use of contraceptives;[53] (b) the right to marry;[54] (c) the right to procreate;[55] (d) the right to educate one's children in the manner one chooses;[56] and (e) the right to possess obscene matter in one's home.[57] The rights enunciated in these decisions recognize not only the "private realm of the family" which the state is not allowed to enter,[58] but also the fundamental personal right to privacy.[59] But,

> [v]irtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.[60]

It has always been recognized that the life of a pregnant woman takes precedence over that of an unborn child.[61] Nor must the danger to the mother's life be imminent.[62] Furthermore, a mere

52. United States v. Vuitch, Crim. Nos. 1043-68, 1044-68 (D. D.C. Nov. 10, 1969); *accord,* People v. Belous, ——Cal. 2d——, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969).
53. Griswold v. Connecticut, 381 U.S. 479 (1965).
54. Loving v. Virginia, 388 U.S. 1 (1967).
55. Skinner v. Oklahoma, 316 U.S. 535 (1942).
56. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
57. Stanley v. Georgia, 394 U.S. 557 (1969).
58. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
59. Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J. concurring). Mr. Justice Goldberg believes these rights may be found in the ninth amendment. For more information on the ninth amendment, *see generally* Note, *Constitutional Aspects of Present Crimnal Abortion Law,* 3 VAL. U. L. REV. 102, 112-14 (1968); Note, *The Ninth Amendment: Guidepost to Fundamental Rights,* 8 WM. & MARY L. REV. 101 (1966).
60. Katz v. United States, 389 U.S. 347, 350 n.5 (1967).
61. People v. Belous, ——Cal. 2d——, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).
62. State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596 (1928).

"possibility" of suicide may fulfill the requirements of "necessary to preserve" the woman's life.[63] Thus our inquiry narrows. Is the life of the fetus subordinate to that of the mother, where the mother's death will *not* result?

In *Griswold v. Connecticut*,[64] the United States Supreme Court struck down Connecticut's anti-contraception statute. The Court held that a married couple is insured the power to control the size of their family by using contraceptive devices. The Court posed and answered the question:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[65]

Several authors have compared the anti-abortion statute, with the anti-contraceptive statute in *Griswold*.[66] One author has concluded, that since the court in *Griswold*

> declared unconstitutional a statute which prohibited the limitation of family size through the use of contraceptives, the constitutional right to 'raise a family' must also be a constitutional right to limit family size.[67]

Therefore, he continued, there should be no distinction, before viability, ". . . between the fetus and individual sperm and ovum";[68] for the prohibition of abortion, in the early months, is as much an invasion of marital privacy as is the anti-contraceptive statute.[69]

The mere fact of fertilization should not limit or abolish the right to decide whether to have a child.[70] A woman should not be required to use her body as a "baby factory" from conception to childbirth.[71] Clearly no government may compel the coming together of the spermatozoa and the ovum.

> Why then should the state sanctify the two cells after they have come together and accord them, over the woman's objection, all the rights of a human being *in esse*? [72]

The state, by ordering her to produce a child, once she has a

63. People v. Abarbanel, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965).
64. 381 U.S. 479 (1965).
65. *Id.* at 485-86.
66. *E.g.*, Med. Deans Brief at 22-24; Kutner 13; Lucas 761-62; Ziff 23.
67. Ziff 23.
68. *Id.*
69. *Id.*
70. Med. Deans Brief at 23.
71. *Id.* at 20-21.
72. Lucas 759.

fertilized ovum within her, ". . . drastically interferes with a woman's right to control the use of her own body."[73] "If the bedroom [in *Griswold*] is a sanctuary of marital privacy, the law cannot regard a married woman's reproductive organs differently."[74]

The *Belous* decision not only invalidated the "necessary to preserve" type statute, but also placed the validity of any abortion statute in question. The State does not have an interest in protecting the fetus before viability, and the woman's right to privacy allows abortion as she may desire. The fetus has lost the Battle. While the shot fired at Lexington was the shot heard round the world, the decision in *Belous* may well be the shot heard round the nation.

WILLIAM E. SHERMAN

OBSCENITY—PROTECTION OF SPEECH—NECESSITY OF HEARING TO DETERMINE OBSCENITY PRIOR TO SEIZURE OF PROPERTY—The attorney of the Commonwealth and Chief of Police seized a motion picture being shown by the lessee of a motion picture theatre. The lessee brought an action to enjoin the seizure. The United States District Court for the Eastern District of Virginia granted an injunction requiring return of the film and prohibiting the seizure of any other film until its obscenity had been determined in an adversary hearing.

The Commonwealth's attorney and Chief of Police appealed. The Court of Appeals *held* that an adversary hearing was required to determine obscenity before seizure of the motion picture and *reversed* that portion of the injunction prohibiting seizure of the film, and ruled that the lessee must make a copy of the film reasonably available to the Commonwealth's attorney. *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639 (4th Cir. 1969).

In rendering its decision in this case, the court was quick to point out that its decision would not determine the obscenity of the seized movie,[1] nor the constitutionality of the statute under which the movie was seized.[2] Thus, the only issue for decision was whether a hearing on the obscenity of a movie is necessary before its seizure for use in a prosecution under an obscenity statute.

The defendants sought the injunction against seizure on the grounds of an alleged violation of First, Fourth and Fourteenth Amendment rights.[3]

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73. Med. Deans Brief at 20-21.
74. Ziff 23.
1. Tyrone, Inc. v. Wilkinson, 410 F.2d 639, 640 (4th Cir. 1969).
2. The statute under which the movie was seized was VA. CODE ANN. §§ 18.1-227 to 18.1-236.4 (1960).
3. The action was brought under 42 U.S.C. § 1983 (1964