CALIFORNIA

Summary

As the result of a series of California Supreme Court decisions interpreting the California Constitution, the State of California could not prohibit abortion before viability and could not effectively prohibit abortion after viability even if the authority of the States over abortion were restored by the United States Supreme Court. Moreover, by virtue of those same decisions, California may not even enact and enforce reasonable measures regulating abortion within current federal constitutional limits.

Analysis

California does not currently have any law on the books restricting pre-viability abortions.[1] Moreover, it is unlikely that the California Legislature would consider enacting such a law even if *Roe v. Wade*,[2] as modified by *Planned*

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[1] *See* the "Reproductive Privacy Act," 2002 Cal. Stat. ch. 385, § 8, *codified at* CAL. HEALTH & SAFETY CODE § 123460 *et seq*. (West 2006). The Act purports to limit post-viability abortions to those necessary to preserve the pregnant woman's life or health, *see* CAL. HEALTH & SAFETY CODE, § 123468 (West 2006), but the undefined "health" exception would allow a post-viability abortion to be performed for virtually any reason, including mental health reasons. *See Doe v. Bolton*, 410 U.S. 179, 192 (1973): "[T]he medical judgment may be exercised in the light of all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well-being of the patient. All these factors may relate to health."

[2] 410 U.S. 113 (1973).

Parenthood v. Casey,[3] were overruled. Assuming that the legislature *did* enact an abortion prohibition, however, it almost certainly would be struck down as unconstitutional under the California Constitution.

The California Supreme Court has been extremely receptive to abortion rights claims. In a pair of pre-*Roe*, 4-3 decisions issued over vigorous dissents,[4] the state supreme court struck down the longstanding nineteenth century abortion statute, first enacted in 1872, which prohibited abortion except when the procedure was necessary to preserve the pregnant woman's life,[5] and major portions of the Therapeutic Abortion Act, enacted in 1967 (based on § 230.3 of the Model Penal Code), which allowed abortion through the twentieth week of pregnancy for physical or mental health reasons or when the pregnancy resulted from an act of rape or incest.[6]

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[3] 505 U.S. 833 (1992).

[4] *See People v. Belous*, 458 P.2d 194 (Cal. 1969); *People v. Barksdale*, 503 P.2d 257 (Cal. 1972).

[5] CAL. PENAL CODE § 274 (West 1955). Another statute prohibited a woman from soliciting an abortion or allowing an abortion to be performed upon her (subject to the same exception). *Id*. § 275. No prosecutions were reported under this statute.

[6] CAL. HEALTH & SAFETY CODE § 25950 *et seq*. (West 1984). The Act prohibited abortion after the twentieth week of pregnancy. In 2002, the Therapeutic Abortion Act was repealed, 2002 Cal. Stat. ch. 385, §§ 2-7, and replaced with the Reproductive Privacy Act, *id*. § 8, *codified at* CAL. HEALTH & SAFETY CODE § 123460 *et seq*. (West 2006). The latter act recognizes a woman's right to obtain an abortion for any reason before viability

In *Belous*, the supreme court relied upon the state and federal due process doctrine of vagueness and upon an implied right of privacy said to exist under both the state and federal constitutions.[7] With respect to the latter, the court said: "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."[8] The court added, "The critical issue is not whether such rights [*i.e.*, privacy or liberty in matters related to marriage, family and sex] exist, but whether the state has a compelling interest in the regulation of a subject which is within the police power of the state."[9] In *Belous*, the court held that the State's interest "in the protection of the embryo and fetus" was not sufficiently compelling to override "the pregnant woman's right to life . . . ."[10] Accordingly, the court rejected suggestions that the phrase "necessary to preserve" life, as used in the abortion statute, should be interpreted to mean that death from childbirth would be "medically certain,"

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and for any reason relating to her life or health after viability.

[7] *Belous*, 458 P.2d at 197-206.

[8] *Id*. at 199 (citations omitted).

[9] *Id*. (citations omitted).

[10] *Id*. at 202-03.

"substantially certain" or "more likely than not." [11] Any of those suggested interpretations, the court determined, would constitute "an invalid infringement upon the woman's constitutional rights."[12]

The supreme court recognized in *Belous* that an interpretation that would permit an abortion "when the risk of death due to the abortion was less than the risk of death in childbirth" would serve to make the statute "certain."[13] The court declined to adopt such an interpretation, however, because "[t]he language of the statute . . . does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed."[14]

In *Belous*, the California Supreme Court held was that there was no reasonably precise definition of the term "necessary to preserve" life, consistent with the language of the statute as it had been interpreted over the years, that did not violate the pregnant's woman's right to life. In other words, California could not require any pregnant woman to run the risk of death as a condition precedent to obtaining an abortion. The court's opinion did not explain to what extent the

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[11] *Id*. at 203.

[12] *Id.*

[13] *Id*. at 204.

[14] *Id*. at 205.

woman's acknowledged right of privacy limited the State's authority to prohibit an abortion, other than in life threatening circumstances.

In *Barksdale*, the California Supreme Court considered a challenge to the Therapeutic Abortion Act. At the outset of its opinion, the majority declined to address the scope of the woman's right of privacy as it relates to abortion.[15] Instead, the supreme court held that the terminology used in two key provisions of the Act, to wit, "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" and the definition of "mental health," was impermissibly vague.[16] The court concluded that "the language establishing the medical criteria upon which abortions may be approved is not sufficiently certain to meet minimal standards of due process."[17] The court did not

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[15] 503 P.2d at 261-62.

[16] *Id.* at 262-66. An abortion for "mental health" reasons was authorized if the pregnant woman "would be dangerous to herself or to the person or property of others or is in need of supervision or restraint." CAL. HEALTH & SAFETY CODE § 25951 (West 1984). Despite this narrow definition (essentially the same standard as for civil commitment), more than 60,000 abortions were performed in California in 1970, 98.2% of which were performed for mental health reasons. *Barksdale*, 503 P.2d at 265. In *Barksdale*, the California Supreme Court expressed "[s]erious doubt . . . that such a considerable number of pregnant women could have been committed to a mental institution" as the result of becoming pregnant. *Id*. The experience in California strongly suggests that mental health exceptions in abortion statutes are inherently manipulable and subject to abuse.

[17] *Barksdale*, 503 P.2d at 266, citing U.S. CONST. AMEND. XIV, § 1, and what is now CAL. CONST. art. 1, § 15 (West 2002).

reach the constitutionality of the prohibition of abortion after the twentieth week of pregnancy because the case before it (a criminal prosecution) concerned a physician who performed an abortion at thirteen weeks.[18]

In a pair of post-*Roe* decisions,[19] also issued over vigorous dissents, the California Supreme Court struck down restrictions on public funding of abortion,[20] and the State's parental consent law.[21] In *Committee to Defend Reproductive Rights v. Myers*, the state supreme court noted that it had "first recognized the existence of [a] constitutional right of procreative choice" in its 1969 opinion in *Belous*.[22] Since then, art. I, § 1, of the California Constitution had been amended (in 1972) to included an express right of privacy.[23] In light of this amendment, the

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[18] *Id.* at 268. After the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the California Attorney General ruled that the ban on post-20 week abortions was enforceable except at to nonviable fetuses and those abortions necessary to preserve the life or health of the mother. *See* 65 OP. CAL. ATT'Y GEN. 261 (1982).

[19] *See Committee to Defend Reproductive Rights v. Myer*s, 625 P.2d 779 (Cal. 1981); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997).

[20] The challenged restrictions were contained in the annual budget acts for three consecutive years.

[21] CAL. HEALTH & SAFETY CODE § 123450 (West 1996).

[22] *Myers*, 625 P.2d at 784.

[23] Article I, § 1, as amended, states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. I, § 1 (West 2002).

Attorney General conceded that "the state has no authority *directly* to prohibit rich or poor women from exercising their right of procreative choice as they see fit."[24] The question for the supreme court to decide in *Myers* was whether art. I, § 1, as amended, also disempowered the legislature from *indirectly* affecting the choice of an indigent woman to carry her child to term or undergo an abortion by funding the former and not funding the latter.

Upon reviewing the effect the funding restrictions would have on poor women, the court found that "the statutory restrictions in question will severely impair or totally deny the actual exercise of this intimate and fundamental constitutional right."[25] Under California fundamental rights jurisprudence, the issue was "whether the benefits the state derives from the restrictions 'manifestly outweigh' such significant impairment."[26] The majority opinion held that "only the most compelling of state interests could possibly satisfy this test."[27] After considering and rejecting other proposed state interests, the court addressed the State's argument that the funding restrictions were necessary "to protect the life

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[24] *Myers*, 625 P.2d at 784 (emphasis added).

[25] *Id*. at 793.

[26] *Id.* (citation omitted).

[27] *Id*.

and health of the fetus."[28] The majority opinion rejected this proffered defense of the restrictions, however, ruling that the State's interest in "protecting the potential life of the fetus" was not compelling before viability and that even after viability the State's interest was subordinate to the woman's health.[29] In so ruling, the court held that "the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*."[30]

In one of its concluding paragraphs, the majority opinion stated:

> By virtue of the explicit protections afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, . . . the decision whether to bear a child or have an abortion is so private and so intimate that each woman in this state–rich or poor–is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by government intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.[31]

This passage suggests that, under *Myers*, the California General Assembly

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[28] *Id*. at 791.

[29] *Id*. at 795-96.

[30] *Id*. at 796.

[31] *Id*. at 798 (emphasis in original).

has little or no authority to prohibit abortion, either directly or indirectly. Whether the legislature has any vestigial authority even to regulate abortion is doubtful. This was borne out in the supreme court's fractured (and fractious) 2000 opinion striking down the state parental consent law.[32] In *American Academy of Pediatrics v. Lungren*, the court reaffirmed *Myers* and reiterated that "the protection afforded by the California Constitution of a pregnant woman's right of choice is broader than the constitutional protection afforded by the federal Constitution as interpreted by the United States Supreme Court, ..."[33] The court concluded that, "under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding 'compelling interest' test."[34] As previously noted, a bare majority of the court held that the parental consent law failed this test.[35]

In sum, in the absence of a state constitutional amendment overturning the holdings in *Myers* and *AAP*, there is virtually no enforceable legislation

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[32] *American Academy of Pediatrics v. Lungren* (hereinafter *AAP*) 940 P.2d at 848-65 (Mosk, J., dissenting); *id.* at 865-71 (Baxter, J., dissenting); *id*. at 871-91 (Brown, J., dissenting).

[33] *Id*. at 809-10.

[34] *Id.* at 819.

[35] *Id.* at 830 (plurality opinion), 847-48 (Kennard, J., concurring in the judgment).

prohibiting or even regulating abortion that California could enact.

Conclusion

Because of the California Supreme Court's decisions in *People v. Belous*, *People v. Barksdale*, *Committee to Defend Reproductive Rights v. Myers* and *American Academy of Pediatrics v. Lungren*, California would have no authority to prohibit pre-viability abortions even if *Roe*, as modified by *Casey*, were overruled. The State's authority to prohibit post-viability abortions is questionable. Moreover, the State has virtually no authority to regulate abortion within current federal constitutional limits.