Constitutional Law: Procedural Due Process Limitations on State Abortion Statutes

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PROCEDURAL DUE PROCESS LIMITATIONS ON STATE ABORTION STATUTES

One man's justice is another's injustice; one man's beauty another's ugliness; one man's wisdom another's folly.
—Ralph Waldo Emerson

There are at least three possible federal constitutional limitations on current state abortion statutes: (1) procedural due process, (2) substantive due process, and (3) equal protection of the laws. This Comment will critically evaluate these statutes in light of procedural due process limitations resulting from recent treatment by the courts. Yet more than legal issues are involved. As the federal district court in United States v. Vuitch stated: "The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical."

To gain an introductory understanding of the term "abortion", a look at a rough portrait and summation in 1970 of abortion statutes in America is illuminating:

In American society a woman who finds herself carrying an unwanted pregnancy has several alternatives. She can carry the baby to term and make the best of it. Or, she can seek out a criminal abortionist who will terminate her pregnancy for a price. Or, if she can afford it, she might take a brief vacation to a foreign country where she would have little difficulty in obtaining a safe abortion. She can also try to obtain a legal abortion in this country by proving she is sick enough to have her pregnancy terminated on medical grounds.

Abortion statutes today offer a woman carrying an unwanted pregnancy several alternatives similar in their practical effect to those above.

The term "abortion" in this Comment means acts taken by a physician or other person to terminate a woman's pregnancy by arresting the development of the fetus before the natural time of birth. This definition includes abortions before and after "quickening"—the embryonic movement after fourteen or more weeks of pregnancy. Abortions are generally categorized as either criminal or therapeutic. "Criminal abortion generally refers to any untimely

delivery voluntarily procured with intent to destroy the fetus before natural birth." But a "therapeutic abortion" does not indicate a criminal act—rather a legal one. Such a phrase is commonly used to designate abortions usually performed in a hospital, for medical indications, and, under some statutes, for psychiatric indications. In medical terminology, "abortion generally refers to the premature expulsion from the uterus of the products of conception at a time before viability." The time of viability occurs at that stage of development of the fetus when the fetus can live outside the uterus, usually the twenty-sixth to the twenty-eighth week of pregnancy. After that time, medical authorities use the terms "miscarriage" or "premature labor" for premature expulsion of the fetus.

It is the hope of this writer to place primary emphasis upon the legal aspects in the abortion debate, but, at the same time, to show his readers how each of the aforementioned considerations interacts with them and is equally as important in arriving at possible solutions to a failure of the law.

The concepts of procedural due process and substantive due process constitute the two prongs of the important judicial doctrine of unconstitutional uncertainty: "the doctrine which requires that a criminal statute be sufficiently definite to give notice of the required conduct to those who would avoid its penalties and to guide judge and jury in its application." The application of this doctrine may result in the unconstitutionality of a statute. Yet its application encounters one inherent difficulty—the uncertainty of the doctrine itself. The notion "that a criminal statute be sufficiently definite" is necessarily subjective. As Justice Frankfurter has stated:

"[I]ndefiniteness" is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as "indefiniteness" in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained.

4. Id.
5. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 21 (1936).
7. Id.
The procedural due process uncertainty cases are those in which a court is concerned with statutory language so incapable of understanding that it fails to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication. Thus, in the often cited case, Lanzetta v. New Jersey, the Supreme Court gave this standard:

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U.S. 385, 391: "... 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."\(^{10}\)

On the other hand, the Court has cautioned against a far-reaching application of the Lanzetta test. In United States v. Wurzbach, Mr. Justice Holmes stated:

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.\(^{11}\)

Ordinarily, in procedural due process cases, the issue is quite clear. Such cases involve no question of whether the legislative body had a right to make the prohibition; the question is whether it so expressed the prohibition that the prospective defendant and the court which would try him can understand the statute.\(^{12}\)

\(^{10}\) 306 U.S. 451, 453 (1939). See also Connally v. General Const. Co., 269 U.S. 385, 391 (1926). A more recent decision is Giacco v. Pennsylvania, 382 U.S. 399 (1966), wherein the Court stated, at 402-403: "It is established that a law fails to meet the requirements of the Due Process Clause if it ... leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

\(^{11}\) 280 U.S. 396, 399 (1930). See also United States v. Petrillo, 332 U.S. 1 (1946), where the Court stated that even though there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls, this is not sufficient justification to hold the language too ambiguous to define a criminal offense. See generally Nash v. United States, 229 U.S. 373, 377 (1913).

\(^{12}\) Collings, supra note 8, at 197.
But, in these cases, the application of the unconstitutional uncertainty doctrine is unclear:

Yet who would venture to divine what courts will or will not find uncertain. To understand and rationalize the application of the doctrine would require a philosopher's stone, for which one may search in vain in the reported decisions. The more time spent in trying to understand the doctrine, the less sure one becomes about its content.\(^\text{13}\)

The recent abortion cases provide no exception.

As will be seen, abortion statutes involve a peculiar and perplexing series of dilemmas.

I. THE COURT'S DILEMMA

The application of a vague criminal statute presents a court with a difficult dilemma. On the one hand, no one should be punished for conduct without knowing that it is criminal. On the other hand, legislative pronouncements should not be lightly nullified.

The very statement of this dilemma suggests at least two alternatives for a court confronted with the application of a vague criminal statute. First, it can assume that the legislature had some purpose in mind, ascertain the purpose, and then apply the statute to the situation at hand. . . .

A second alternative is to refuse to apply the vague statute in any case. To assume that a statute always has meaning may be applauded by some as proper deference to the legislative will. On the other hand, such an approach has disadvantages. It means that the courts may have to struggle with badly drafted statutes in countless cases. Would it not be better for all concerned if application of an obscure statute was refused?

The problem becomes even more complicated when it is contended in a federal court that a state statute is vague. A federal court is naturally reluctant to undertake construction of a state statute. In addition to the two alternatives above suggested, the court might also decide to avoid any general conclusion and limit its holding to a declaration that the statute was not applicable under the particular facts.\(^\text{14}\)

The Supreme Court recently applied the procedural due process uncertainty doctrine to a District of Columbia abortion statute in

\(^{13}\) Id. at 196.

\(^{14}\) Id. at 198 (footnotes omitted).
United States v. Vuitch. Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of the District of Columbia abortion statute. That statutory provision provides, in part:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years.

Before trial, District Judge Edward Weinfeld dismissed the indictment on the ground that the abortion statute was unconstitutionally vague.

In reversing the judgment of dismissal by the district court, the Supreme Court chose to resolve its conflict by adopting the first of the above three alternatives open to it. The Court sought to provide a guide for adjudication in future cases, apparently implying that any set of judicially approved standards would be more in accord with legislative intent than holding the statute unconstitutionally vague. Thus, it assumed that Congress had some purpose in mind by enacting the abortion statute and then ascertained what that purpose might well have been:

When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health". Because abortions were authorized only in more restrictive circumstances under previous D.C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.

The District of Columbia abortion statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and which are not necessary to preserve the mother's life or health. Considerably narrow-
ing the vagueness issue to cover but a single word, the Supreme Court considered

the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. 19

This narrowly framed issue was based on a single consideration in regard to the vagueness question from the district court decision:

The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. 20

After noting that the legislative and judicial history of the statute gave no guidance as to whether "health" refers to both a patient's mental and physical state, 21 the Supreme Court adopted the construction given to the District of Columbia statutory provision in Doe v. General Hospital of the District of Columbia, a decision subsequent to the Vuitch district court decision. 22 In Doe, District Judge Joseph Waddy construed the statute to permit abortions "for mental health reasons whether or not the patients had a previous history of mental defects." 23 By construing the abortion statute in this way, the Court was able to dispose of the procedural due process issue with unusual brevity:

We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word "health", which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as "the [s]tate of being sound in body or mind." Viewed in this light, the term "health" presents no problem of vagueness. 24

But the district court's holding that the District of Columbia statute was unconstitutionally vague was based upon the application of the procedural due process uncertainty doctrine to the statu-

19. Id. at 71.
20. 305 F. Supp. at 1034.
23. Id. at 1174-1175, cited in 402 U.S. at 72.
24. 402 U.S. at 72 (footnotes omitted).
tory phrase "as necessary for the preservation of the mother's life or health." There the district court concluded:

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal state. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.\(^{25}\)

The concept of necessity for the preservation of the mother's health physical or mental, was considered a nebulous and uncertain statutory exception because

\[\text{[n]o body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code.}\(^{26}\)

Furthermore, the district court saw fit to state that "other uncertainties in the [statutory] phrase . . . are discussed and documented in People v. Belous . . . and need not be repeated here."\(^{27}\)

Such uncertainties were found by the California Supreme Court in Belous\(^{28}\) in the then existing California abortion statute\(^{29}\) to re-

\(^{25}\) 305 F. Supp. at 1034 (emphasis added).
\(^{26}\) Id. at 1034.
\(^{27}\) Id. (citation omitted).
\(^{29}\) CAL. PEN. CODE § 274, when the conduct involved in Belous occurred, read:

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.)

The statute was substantially unchanged since it was originally enacted in 1850. CAL. PEN. CODE § 274 (1970), reflecting amendment by Stats. 1967, c. 327, p. 1523, § 3, reads:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman . . . except as provided in the Therapeutic Abortion Act . . . of the Health and Safety Code, is punishable by imprisonment in the state prison. . . .

The Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE § 25950-54 (Supp. 1970), authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25921, subd. (a)), the abortion is approved by a hospital staff committee (§ 25951, subd. (b)), and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§ 25951, subd. (c)(1)), or the pregnancy resulted from incest or rape (§ 25951, subd. (c)(2)), or the woman is under 15 years of age (§ 25952, subd. (c)).
volve around certain key language:

Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve". There is, of course, no standard definition of "necessary to preserve", and taking the words separately, no clear meaning emerges. "Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with loss, damage, inefficiency, or the like; . . ." (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that "'necessary' has not a fixed meaning, but is flexible and relative."

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; . . . To save from decomposition, . . . 3. To maintain; to keep up; . . ." (Webster's New International Dictionary, supra.) The meanings for "preserve" range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of "life"—that is, as opposed to the biological or medical definition of "death".

Belous held that the qualification "necessary to preserve" in the California abortion statute before amendment in 1967 was not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights. Thus, both the Vuitch district court decision and Belous adopted the second alternative: nullification of a legislative pronouncement and refusal to apply the vague statute in any case.

In agreement with the holdings in the above two decisions are three additional recent decisions. State v. Munson, a South Da-

30. 71 Cal. 2d at ___, 458 P.2d at 198, 80 Cal. Rptr. at 358 (citations omitted).
31. Id. at ___, 458 P.2d at 197, 80 Cal. Rptr. at 357. Belous did consider three possible interpretations of "necessary to preserve . . . life": (1) one which requires certainty or immediacy of death (id. at ___, 458 P.2d at 198-203, 80 Cal. Rptr. at 358-63); (2) one which determines the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of abortion (id. at ___, 458 P.2d at 204, 80 Cal. Rptr. at 364); and (3) one which permits abortions only when the risk of death due to the abortion is less than the risk of death in childbirth (id. at ___, 458 P.2d at 204-205, 80 Cal. Rptr. at 364-65). However, none of these were considered sufficient to sustain the statute.

The other part of the holding in Belous dealing with the infringement of fundamental constitutional rights shall not be discussed in this Comment.
kota Circuit Court case, concluded that the language of the South Dakota statute forbidding abortion "unless the same is necessary to preserve her life" presents the same basis for invalidity. A three-judge federal court, in a per curiam opinion holding that the Texas abortion statutes fail the vagueness test formulated by the Supreme Court, narrowed in on the grave and manifold uncertainties in the statutory standard as to whether an abortion was procured "for the purpose of saving the life of the mother".

How likely must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How imminent must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

And another three-judge court in Doe v. Scott by a 2-1 decision, struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of a woman's life."

Yet the approach of the Supreme Court in United States v. Vuitch followed the reasoning of three federal court, three-judge decisions prior to it. Babbitz v. McCann, a per curiam opinion, held that the Wisconsin abortion statute in question was not vague.

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34. State v. Munson, as quoted in 15 S.D.L. Rev. at 333.
37. Tex. Pén. Code § 1196 (1961) provides: "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."
38. 314 F. Supp. at 1223.
42. Wis. Stat. § 940.04 (1969) provides in part as follows:
   (1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.
   (2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:
      (a) Intentionally destroys the life of an unborn quick child . . . .
      (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(5) This section does not apply to a therapeutic abortion which:
   (a) Is performed by a physician; and
   (b) Is necessary, or is advised by 2 other physicians as necessary, to save the
or indefinite. In the court's opinion, "the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning" and the language "necessary to save" is not "so vague that one must guess at its meaning." In *Rosen v. Louisiana State Board of Medical Examiners*, the court, by a 2-1 decision, held that the Louisiana statute which provides for the removal of a physician's certification for "[p]rocuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician" was not vague or indefinite. The majority stated that in their opinion, the statute "allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself," and thus "the Louisiana statute makes express what is perhaps only implied in the Texas statute—that the abortion need only appear necessary, rather than actually be necessary to be permissible." And in *Steinberg v. Brown*, the court, by a 2-1 decision, rejected the contention that the Ohio abortion statute was unconstitutionally vague and indefinite:

It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. . . . The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden.

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(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

*Babbitt* held only that Wis. Stat. § 940.04(5) was not unconstitutionally vague.

43. 310 F. Supp. at 297.

44. *Id.* at 298.


47. 318 F. Supp. at 1220.

48. 318 F. Supp. at 1221.


50. *Ohio Rev. Code Ann.* § 2901.16 (1964). The statutory phrase in question reads: "unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose."

51. 321 F. Supp. at 745 (citation omitted).
This discussion of the court's dilemma in ruling on vague abortion statutes cannot be closed without stressing one salient point. As one professor of law has stated: "[T]he concept of 'preservation of life' to a woman often cannot be clearly distinguished from her interest in maintaining general good health."\(^5\) Indeed, this same point was made over thirty years ago in an English case, *Rex v. Bourne*\(^3\) where the court construed the then existing English law which simply prohibited "unlawful abortion". Justice MacNaghten made two noteworthy points in his jury instructions: (1) life depends on health; and (2) it may be that if health is gravely impaired, "death" results.\(^4\) One doctor summed up the significance of this case in this manner:

If in light of this instruction the jury believed that bearing this child of an act of assault would make the [fifteen year old] girl a physical or mental wreck, then it could rightfully decree that Dr. Bourne had operated for the purpose of preserving the life of the [girl]. The jury reached a verdict of not guilty. Precedent was then apparently established for giving a sweeping definition to the term "preservation of life". If health is menaced by threat of pregnancy, then life itself may be threatened.\(^5\)

II. THE DOCTOR'S DILEMMA

The doctrine of unconstitutional uncertainty operates on statutes, but statutes are interpreted and applied by people. Present abortion statutes offer little guidance to physicians faced with the interpretation and application of such statutes in order to treat their patients. As already discussed, "[m]ost states offer no statutory guidelines to elucidate what constitutes a threat to the pregnant woman's life, and the distinction between a danger to health and probable danger to life is a nebulous one."\(^6\) This state of American law is precisely the kind of situation that the procedural due process uncertainty doctrine is intended to prevent. By placing the burden of decision to terminate a pregnancy upon the doctor, current abortion statutes render the selection of the physician a governing factor in securing permission to perform a therapeutic

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53. [1938] 3 All E.R. 615.
54. Id. at 620.
56. Lucas, supra note 52, at 748.
abortion. Yet notwithstanding the inherent difficulty and importance of making such decision, once a decision is made by the doctor to perform a therapeutic abortion, the doctor is confronted by an even greater burden, a dilemma purely the creation of the law:

The treating physician who believes an abortion is medically or psychiatrically indicated thus finds himself threatened with becoming a felon as well as with the possibility of losing his right to practice his profession if he errs in the legal interpretation of a penal statute, the words of which have not been sufficiently definite for courts to agree on their meaning.57

A. Three Views on the Protection of the Physician

The late Justice Black, in writing the majority opinion58 in United States v. Vuitch,59 flatly refused to relieve the physician from such dilemma. The Court did hold that under the District of Columbia abortion statute,60 the burden is on the prosecution to plead and prove that an abortion was not “necessary for the preservation of the mother’s life or health.”61 But this was the extent of the Court’s protection for the physician faced with such an abortion statute:

It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years’ imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society’s notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society’s expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence.62

Whether the Court even recognized the doctor’s dilemma is an open question. With a concluding observation of the Court no one can disagree: “Indeed, whether a particular operation is necessary for

58. The Chief Justice, Justice Harlan, Justice White, and Justice Blackmun joined on the procedural due process issues in Vuitch.
59. 402 U.S. at 67-73.
61. 402 U.S. at 71.
62. Id. at 70-71.
a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." But also, no one can disagree that if a physician errs in his judgment, when an abortion is considered, he may become a criminal.

Justice Stewart, dissenting on the procedural due process issues, agreed with the majority in *Vuitch* that "statutes should be construed whenever possible so as to uphold their constitutionality" yet argued for a different construction of the District of Columbia abortion statute. In effect, he simply extended the reasoning of the Court's opinion to its logical conclusion. Stewart reasoned that under the District of Columbia statute the legal practice of medicine in the District of Columbia includes the performing of abortions, for the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. Thus, it followed, in his opinion,

that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it another way, I think the question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.

Justice Douglas, dissenting in part, did not think the District of Columbia abortion statute meets the requirements of procedural due process. On the one hand, he agreed with the majority of the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health".

However, Douglas probed deeper into the physician's determination:

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63. *Id.* at 72.
64. 402 U.S. at 96 (Stewart, dissenting).
65. *Id.* at 97.
66. 402 U.S. at 74 (Douglas, dissenting).
That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health".

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician.67

In disagreement with Stewart's dissent, Douglas read the District of Columbia abortion law, as did the district court and the majority of the Supreme Court, as requiring submission to court and jury of the physician's decision:

If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as MR. JUSTICE STEWART points out. But that does such violence to the statutory scheme that I believe it is beyond the range of judicial interpretation so to read the Act.68

Douglas noticeably recoiled from a judicial activist position so as to leave to the experts the drafting of abortion statutes "that protect good-faith medical practitioners from the treacheries of the present law."69

Thus, while Douglas and Stewart disagreed in the mechanics, they did not disagree that doctors need protection from the dilemma put upon them by current abortion laws.70 The importance of the judiciary in helping physicians obtain this protection is considerable, as retired Justice Tom C. Clark has indicated:

The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Very few states, if any, will repeal all abortion laws as . . . recommended. . . . If the medical profession is to be accorded complete protection it will have to come through the judicial system.71

67. Id.
68. Id. at 74-75.
69. Id. at 80.
B. Therapeutic Abortions in Light of the Doctor-Patient Relationship

The threat of prosecution is a substantial deterrent to a physician's performing an operation he believes to be best for his patient. Yet the very medical standard for the performance of a therapeutic abortion as well as any operation, that is, to do whatever the physician believes to be best for his patient, remains an entirely subjective one. The difficulty of identifying the criteria being utilized in granting therapeutic abortions is one consequence of this subjective standard:

In practice, doctors are usually willing to recommend therapeutic abortion when a woman has such a severe heart, respiratory or urinary disease that there would be a considerable risk of her dying if she had to carry the child to term. It is much harder to know if abortions are granted when there is reasonable certainty that carrying a child to term will make the mother's health worse, but will not result in her death. It is quite likely that many doctors recommend abortion in such instances, but they usually do so quietly, and also, illegally.

At the present time it is very hard to know what criteria are actually being utilized in granting therapeutic abortions on psychiatric grounds. Policies differ from state to state and from hospital to hospital. Some doctors will recommend therapeutic abortion only when they are absolutely convinced that the patient is gravely ill and suicidal. Others will recommend it when there are far less ominous [sic] signs of psychological disturbance.

This difficulty in turn leads to the conclusion of one professor of law that "[i]n any given penumbral case [under present abortion statutes] the results reached by a large number of physicians may be no more than personal inclination. . . ." Indeed, such conclusion is inescapable considering the fact that each physician forms his own individual medical opinion as to what is "necessary" for the "preservation" of the mother's "life or health" and considering the types of questions each physician must face in forming his opinion:

72. But see State v. Powers, 155 Wash. 63, 67, 283 P. 439, 440 (1929), and Commonwealth v. Wheeler, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944). Both of these cases stressed the ability of the medical profession to set its own standards in a given community and maintained that an ascertainable "general medical opinion" did exist in a community.

73. Halleck, supra note 2, at 234-35.

74. Lucas, supra note 52, at 748.
A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he act in a similar way under this abortion statute? May he perform abortions on unmarried women who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health"?

Another consequence of the physician's subjective medical standard for the performance of therapeutic abortions was best illustrated in the classic study by Stanford Professors Packer and Gampell. That study demonstrated that reputable hospitals and physicians knowingly perform illegal abortions. The rationale seems to be that

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\text{[p]hysicians, feeling strongly that the law is unfair, and knowing that it is rarely enforced, often disregard the law on the assumption that they are best qualified to make decisions in this area.}\]

This is true even though the great majority of states authorize revocation of a physician's license when he has committed, or participated in, a criminal abortion, making the threat of colleague

76. Packer and Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan. L. Rev. 417 (1959). Packer and Gampell submitted eleven hypothetical abortion situations to twenty-nine representative California hospitals. Of these situations, two clearly required abortion to save the life of the mother and hence were legal under the California statute at that time. Two others were borderline, and the remaining situations were clearly illegal. The results showed that no case, not even the one based upon purely socio-economic reasons, was uniformly rejected.
77. See Ziff, supra note 3, at 9.
78. Id.
criticism very considerable in such a case. It cannot be doubted that
the bare fact of prosecution alone, coupled with pulpit denuncia-
tions, could wholly destroy a physician's practice and career re-
gardless of the outcome of his case before a high tribunal.80

But while some physicians knowingly perform illegal abortions
under these rarely enforced abortion statutes,81 other physicians are
undoubtedly inhibited from using their best medical judgment
under them. As a result, physicians from either of the above groups
are provided with inadequate criteria by which they can govern
their actions so as to be in accordance with the law and their best
medical judgment. Thus, present abortion statutes may be labeled
as "dead letter" laws which

far from promoting a sense of security in the community, which
is the main function of penal law, actually impairs that security
by holding the threat of prosecution over the heads of people
whom we have no intention to punish.82

C. The Doctrine of Unconstitutional Delegation as Applied to a
Physician

In People v. Belous,83 the California court took a rather novel
approach to a problem stemming from the vagueness of the then
existing California abortion statute.84 The court observed that
under the statute the doctor is, in effect, "delegated the duty to
determine whether a pregnant woman has the right to an abortion"
and also that the physician acts at his peril if he determines that
the woman is so entitled.85 Since the doctor is subject to prosecution
for a felony and to deprivation of his right to practice medicine if
his decision is wrong, he cannot be impartial but instead has a
"direct, personal, substantial, pecuniary interest in reaching a con-
clusion" that the woman should not have an abortion.86 Belous held
that this delegation of decision-making power to a directly involved
individual violates the Fourteenth Amendment:

80. Lucas, supra note 52, at 750.
81. For documentation of the unenforcement of present abortion laws in the United
States, see Comment, To Be or Not to Be: The Constitutional Question of the California
82. MODEL PENAL CODE § 207.11, Comment at 151 (Tent. Draft. No. 9, 1959), cited
in Ziff, supra note 3, at 10.
83. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354.
84. See CAL. PEN. CODE § 274 before amendment in 1970, supra note 29.
85. 71 Cal. 2d at ___., 458 P.2d at 206, 80 Cal. Rptr. at 366.
86. Id.
The inevitable effect of such delegation may be to deprive a woman of an abortion when . . . she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction; no criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous, and because section 274 authorizes—and requires—the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.87

D. Conclusion—The Physician's Medical Judgment Should Be Conclusive

In practice, it is obvious that the Hippocratic Oath88 is no longer wedded to the medical profession. The concept of a physician's duty has become considerably broadened:

From a duty of treating the specific ills of a patient, this duty has

87. Id. As authority for this holding, the court cited Tumey v. Ohio, 273 U.S. 510, 523 (1927); State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 448, 254 P.2d 29 (1953); and Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 235, 368 P.2d 101, 104, 18 Cal. Rptr. 501, 504 (1962). In Tumey, the responsibilities of a mayor in a town included trying criminal cases, and his fees were derived from the fines imposed on the defendants he convicted. The Supreme Court held this delegation of decision-making power violated the defendant's right to due process because the mayor-judge had "a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

A recent law review article questioned the applicability of Tumey to Belous: Comment, To Be or Not to Be: The Constitutional Question of the California Abortion Law, supra note 81, at 657-58. The author argued first that a doctor has a substantial countervailing incentive, that is, the immediate pecuniary interests, in combination with his personal sympathies, might weigh in favor of operating as against his fear of prosecution. Secondly, while a decision by an interested judge is obnoxious to the due process clause because a defendant is bound thereby, in the case of an abortion, a woman could always continue to seek out a doctor who would not be afraid to perform an abortion on her. "Therefore, since the effect of the decision made by the doctor is considerably less severe, one should not apply to him the same due process standards developed for the behavior of judges." The author also pointed out that the California authorities cited by the court stated that legislative power may be delegated if there is "an ascertainable standard" for its application. These authorities would seem more in line with the holding in Belous.

evolved in the minds of some leaders of the profession into a duty of keeping the patient in "health". "Health" in this context is understood to encompass not only freedom from physical disease but also a state of good relations within a community network.\footnote{90}

Perhaps, underneath the surface of \textit{Vuitch},\footnote{90} lies a fear of this broadened duty. As one professor of law has indicated:

If the physician is to seek health in this expanded, positive sense, the matters subject to his professional good judgment are infinite. If the state could not constitutionally regulate the exercise of that judgment, legislators and courts alike would be superfluous, supplanted by a wise elite of doctors.\footnote{91}

The real issue must be confronted—whether the state can challenge the physician's medical opinion that a therapeutic abortion may or may not be performed on his patient or, in other words, whether a physician may be convicted at all under such abortion statutes as were previously discussed without a violation of procedural due process. This writer is inclined to answer both statements of the issue in the negative. Such conclusion is dictated by the physician's interest in abortion law reform—an interest which not only can but must be asserted for authority to treat the patient according to his best judgment, for freedom from the dangers of statutory vagueness, for greater consistency between statutory standards and individual medical opinion, and for the protection of patients from the dangers of incompetent criminal abortionists.\footnote{92}

III. \textbf{The Jury's Dilemma}

The jury, of course, faces a difficult dilemma in every criminal case—whether or not to convict the accused. A vague criminal abortion statute, though, requires submission to court and jury of the physician's decision. The result of this submission is that very lack of certainty which the doctrine of procedural due process abhors:

The prejudices of jurors are customarily taken care of by challenges for cause and by peremptory challenges. But vagueness of criminal statutes introduces another element that is uncontrolla-

\begin{footnotes}
\footnote{89. \textit{Id.} at 61-62 (footnotes omitted).}
\footnote{90. 402 U.S. 62 (1971).}
\footnote{91. Noonan, \textit{supra} note 88, at 62.}
\footnote{92. Lucas, \textit{supra} note 52, at 750.}
\end{footnotes}
Are the concepts so vague that possible offenders have no safe
guidelines for their own action? Are the concepts so vague that
jurors can give them a gloss and meaning drawn from their own
predilections and prejudices? Is the statutory standard so easy to
manipulate that although physicians can make good faith deci-
sions based on the standard, juries can nonetheless make felons
out of them?

The Supreme Court, in *Vuitch*, indicated no fear whatsoever of the
danger that jurors might convict doctors in any abortion case sim-
ply because some jurors believe all abortions are evil:

Of course such a danger exists in all criminal cases, not merely
those involving abortions. But there are well-established methods
defendants may use to protect themselves against such jury preju-
dice: continuances, changes of venue, challenges to prospective
jurors on *voir dire*, and motions to set aside verdicts which may
have been produced by prejudice. And of course a court should
always set aside a jury verdict of guilt when there is not evidence
from which a jury could find a defendant guilty beyond a reason-
able doubt.

Thus, the expense of a lawsuit and of a corresponding appeal be-
come two by-products of the Supreme Court's insistence in its
belief that it is necessary to preserve vague criminal abortion stat-
utes. It appears that the subject of abortion presents one of those
areas where the jury hears the law as it is read but where it speaks
through its emotions, its religion, its ethical beliefs. And so a state
of jury lawlessness may exist whenever any person is tried under a
vague criminal abortion statute. As Justice Douglas has stated:

> Abortion statutes deal with conduct which is heavily weighted
> with religious teachings and ethical concepts. Mr. Justice Jackson
> once spoke of the "treacherous grounds we tread when we under-
> take to translate ethical concepts into legal ones, case by case." *Jordan v. DeGeorge*, 341 U.S. 223, 242 (dissenting opinion). The
difficulty and danger are compounded when religion adds another
layer of prejudice. The end result is that juries condemn what they
personally disapprove.

> The subject of abortions—like cases involving obscenity—is
one of the most inflammatory ones to reach the Court. People
instantly take sides and the public, from whom juries are drawn,
makes up its mind one way or the other before the case is even

94. 402 U.S. at 72 n.7.
argued. . . . The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words “necessary for the preservation of the mother’s life or health” become free-wheeling concepts, too easily taking on meaning from the juror’s predilections or religious prejudices. 

IV. CURRENT ABORTION STATUTES AND THE IMPACT OF THE PROCEDURAL DUE PROCESS DOCTRINE

Four states presently allow by statute abortion on request or on demand. New York is the only state that permits abortion on request without a residency requirement. The other three states permit abortion on request but have residency requirements: Alaska—30 days; Hawaii—90 days; and Washington—90 days. Under the statutes of Alaska and Hawaii, abortions can be performed only “to terminate the pregnancy of a nonviable fetus.” But neither statute defines “nonviable fetus.” Washington permits the termination of “a pregnancy of a woman not quick with child and not more than four lunar months after conception.” New York has a dual time limit for abortions: abortions can be performed by a licensed physician (1) at any time when the physician is “under a reasonable belief that such is necessary to preserve her life” or, (2) “within twenty-four weeks from the commencement of her pregnancy.” All four of these state statutes require that the abortion be performed by a licensed physician.

While Hawaii requires the abortion to be performed in a licensed hospital, the other three states allow more latitude. Alaska requires that the abortion be performed “in a hospital or other facil-

95. 402 U.S. at 78-80 (Douglas, dissenting).
96. N.Y. REV. PEN. LAW § 125.05 (1971).
97. ALAS STAT. tit. 11, § 15.060(a) (1970).
100. ALAS STAT. tit. 11, § 15.060(a) (1970); HAWAII REV. STAT. tit. 25, § 453-16(b) (Supp. 1970).
102. N.Y. REV. PEN. LAW § 125.05 (1971).
ity, approved for the purpose by the Department of Health and Welfare or a hospital operated by the federal government or an agency of the federal government.  

Washington, likewise, requires either that the abortion be performed in an accredited hospital "or at a medical facility approved for that purpose by the state board of health," but in case of a "medical emergency," the pregnancy may be terminated elsewhere.  

New York apparently allows abortions to be performed anywhere if done by a duly licensed physician.  

With the exception of New York, these statutes expressly provide that a hospital or any person are neither required to participate in an abortion nor liable for refusing to participate in an abortion.  

And only three of these statutes explicitly deal with the issue of who is to give consent for the abortion to be performed. New York requires merely the consent of the pregnant woman;  

Washington requires the consent of the pregnant woman "and, if married and residing with her husband or unmarried and under the age of eighteen years, with the prior consent of her husband or legal guardian, respectively"; but Alaska only requires that "consent has been received from the parent or guardian of an unmarried woman less than 18 years of age."  

The Model Penal Code of the American Law Institute has provided the foundation for abortion law reform in thirteen states.
The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina and Virginia. Six of these states impose residency requirements: Arkansas—4 months except in the case of an emergency where the life of the pregnant woman is in danger; Delaware—120 days; Georgia—"bona fide legal resident of the State of Georgia;" North Carolina—4 months with the same exception as that of Arkansas; South Carolina—90 days; and Virginia—120 days. All thirteen states have laws permitting abortion for some or all of these grounds: (1) protection of physical or mental health of the pregnant woman, (2) possible fetal deformity and (3) cases of felonious intercourse. Time limits for performing lawful abortions

117. Ga. Code Ann. § 26-1201 to 26-1203 (1970). Acts 1968, p. 1249, which enacted the Criminal Code of Georgia did not repeal these statutes, but neither did it incorporate them as a portion of the official Criminal Code of Georgia. For this reason, the subject-matter of these statutes may also be found in Ga. Code Ann. §§ 26-9920 a and 26-9925 a (1970).
127. Del. Code Ann. tit. 11, § 1793 (1970). This statute provides exceptions from the residency requirement for those females who are "gainfully" employed in Delaware at the time of conception, or whose spouse is so employed, or to such female who has been a patient, prior to conception, of a physician licensed by Delaware, or to such female who is attempting to secure an abortion for the reason that the continuation of her pregnancy is likely to result in her death.
132. All of these states, except California and Mississippi, permit abortions for all three of these grounds. Their statutes are cited in notes 113-125, supra. The remaining eleven states basically follow the language of the Model Penal Code, §§ 230.3(1)-(3) (Proposed Official Draft, 1962), with a few notable differences in language and, quite possibly, in application. See Giannella, The Difficult Quest for a Truly Humane Abortion Law, 13 Vill. L. Rev. 257 (1968) at 258 n.3, where the author argues that the Colorado law is stricter than the Model Penal Code provision since in Colorado the pregnancy must threaten "serious permanent impairment" of the woman's mental or physical health whereas the Model
exist in only four of the thirteen states: California—20 weeks; California does not provide any lawful abortions for eugenic reasons under its statutes. California does not provide any lawful abortions for eugenic reasons under its statutes. California does not provide any lawful abortions for eugenic reasons under its statutes.

136. MD. ANN. CODE art. 43, § 149E, 149F, 149G (Supp. 1969).
137. These statutes are cited in notes 113-119 and 121-125, supra. There are exceptions to the second and third requirements in three states. Kansas also allows legal abortions to be performed “in such other place as may be designated by law,” but where “an emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother,” there is no prior certification requirement. KAN. STAT. ANN. § 21-3407 (Supp. 1970). Oregon does not prevent a physician from performing an abortion if he believes in good faith that the life of the pregnant woman is in imminent danger and there is insufficient time to comply with these two requirements. ORE. REV. STAT. § 435.445 (1969). And Virginia allows abortions to be performed by a physician without compliance
the other two. Eight of these states tackle the consent issue while nine of them provide for excuse sections.

Abortion is permitted only when necessary to preserve the life or health of the woman in Alabama, Massachusetts and Washington, D.C. Both Massachusetts and Washington, D.C., require that such abortions be performed by a physician.

The great majority of states retain the ancient statutory exception to a criminal abortion: where the abortion is necessary “to preserve” or “for the preservation of” or “to save” the life with these two requirements where it is necessary, in the opinion of the physician, in order to save her life. Va. Code Ann. § 18.1-62.3 (Supp. 1970). Where an emergency exists, three states—Arkansas, North Carolina and South Carolina—allow the written certificate to be filed with the hospital within 24 hours after the abortion. Ark. Stat. Ann. § 41-309 (Supp. 1969); N.C. Gen. Stat. § 14-45.1 (1969); and S.C. Code Ann. § 16-87 to 16-89 (Supp. 1970).

142. Mass. Gen. Laws Ann. ch. 272, § 19 (1956). This statute outlaws all unlawful abortions, but, by case law, the Supreme Court of Massachusetts has held that the term “unlawfully”, as used in the state abortion statute, has been made sufficiently definite by decisions of this court. In our cases it has been stated over the years that a physician may lawfully perform an abortion if he acts in good faith and in an honest belief that it is necessary for the preservation of the life or health of the woman.
144. See the Massachusetts cases cited in note 142, supra; D.C. Code Ann. § 22-201 (1967).

Four states—Connecticut, Minnesota, Missouri, and Nevada—also permit “abor-
of the pregnant woman. Two of these states—Illinois and Wisconsin—explicitly require that the abortion be performed by a physician while Missouri requires that the abortion either be performed by a physician or advised by him as necessary to preserve the life of the woman or her unborn child. Illinois requires that the abortion be performed in a licensed hospital or other licensed medical facility while Wisconsin requires it to be performed in a licensed maternity hospital unless "an emergency prevents." Three states have similar criminal abortion statutes with a variation in statutory exceptions: Tennessee—unless the abortion "shall have been done with a view to preserve the life of the mother;" Texas—"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother;" and West Virginia—"No person . . . shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child." Two states—New Jersey and Pennsylvania—provide a similar statutory exception for criminal abortion. New Jersey makes an abortion criminal if done "maliciously or without lawful justification" while Pennsylvania makes an abortion criminal if "unlawfully" administered. Louisiana provides no exception, either by statute or by case

tions" necessary to preserve the life of the "unborn child" or "child". West Virginia's statute, W. Va. Code Ann. § 61-2-8 (1966), also provides a statutory exception in favor of the child. One writer believes such statutes are the result of a confusion in terminology: "The obvious legislative intent would seem to be to exclude induced labor from the prohibitions of the statute. In the medical sense, induced labor is not at all an abortion but a procedure for any one of a myriad of medical indications." Comment, supra note 55, at 275.

148. These statutes are cited in notes 146-147, supra.
155. N.J. Rev. Stat. Ann. § 2A:87-1 (1969). The phrase "lawful justification" in this statute was interpreted in State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968), where the court held the phrase was not vague if restricted to the necessity to preserve the mother's life.
law for its criminal abortion statute. Yet Louisiana does provide by statute that the performance of an abortion is not a cause for revocation of a medical license when “done for the relief of a woman whose life appears in peril.”

Thus, in all fifty states and the District of Columbia, an abortion may be a crime for the person who performs it. But in only twelve states is the woman expressly subject to statutory criminal prosecution for intentionally performing, or submitting to, a criminal abortion.

In conclusion, the impact of the procedural due process doctrine on those criminal abortion statutes which provide exceptions to protect the pregnant woman's life or health remains considerable. These statutes shall continue to be a source of constitutional controversy until that certain set of dilemmas belonging to the court, the jury, and the doctor and stemming from those statutes are resolved in a manner more attuned to the realities of American life in the late twentieth century and to its living Constitution. The recent legislative attempts at resolving these dilemmas—encompassing those statutes based upon the Model Penal Code and those allowing abortion on demand—are certainly more effective than other criminal abortion statutes in giving adequate warning to those subject to their prohibitions as well as in providing proper standards for adjudication. Yet uncertainty remains the plague of criminal abortion statutes. Those statutes based upon the Model Penal Code face a familiar challenge:

159. ARIZ. REV. STAT. ANN. § 13-212 (1956); CAL. PEN. CODE § 275 (1970); CONN. GEN. STAT. REV. § 53-30 (1958); IDAHO CODE ANN. § 18-602 (1948); MINN. STAT. § 617.19 (1963); MONT. REV. CODE ANN. § 94-402 (1969). N.Y. REV. PEN. LAW § 125.05 (1971) provides:

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.

N.D. CENT. CODE § 12-25-04 (1960); OKLA. STAT. ANN. tit. 21, § 862 (1958); S.D. COMP. LAWS tit. 22, § 17-2 (1967); UTAH CODE ANN. § 76-2-2 (1953); WIS. STAT. § 940.04(3)4 (1969). MODEL PENAL CODE § 230.3(4) provides:

A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose.

See 5 A.L.R. 788 and 131 A.L.R. 1323 concerning criminal responsibility of a woman on whom an abortion is committed for conspiring to commit the crime.

160. These statutes are cited in notes 96-99 and 112-125, supra.
161. These statutes are cited in notes 112-125, supra.
The Model Penal Code provides no accurate guide for physicians who wish to obey the law, because such key words as "grave" and "substantial" are nowhere defined. Physicians who terminate pregnancies in good faith may find themselves criminally liable if a jury later disagrees with their opinion as to whether a particular pregnancy involved a substantial risk of gravely impairing the health of the mother. Because the recommended statute is too vague, the procedural due process rights of physicians are violated.\(^1\)

And even those seemingly clear abortion on demand statutes\(^2\) contain uncertainty in that each of them, as well as four statutes based on the Model Penal Code,\(^3\) contains a time limit on the performance of legal abortions; but such time limit is suspect from the viewpoint of the procedural due process doctrine. As one doctor observed about the California abortion statute:

> Even the provision . . . that, "In no event shall the termination be approved after the 20th week of pregnancy. . ." leaves considerable doubt. Does this refer to 20 weeks from conception or 20 weeks from the onset of the last menstrual period? How is this time to be determined—by history obtained from the patient correlated by the findings on physical examination? Certainly. Yet these dates are often inaccurate even in the most experienced hands. Is the physician who delivers a live fetus while intending to do an abortion liable to a charge of murder should the fetus inevitably die? This is a question which remains unanswered.\(^4\)

That the statutory language based upon the Model Penal Code provides a fertile ground for the application of individual, subjective notions of what the requisite degree of gravity of risk ought to be in a given case is a reasonably certain observation.\(^5\) That the Model Penal Code reference to "substantial risk" of grave physical defect, for example, in essence means that statistical probabilities are involved is also a reasonably certain notion.\(^6\)

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163. These statutes are cited in notes 96-99, \textit{supra}.

164. The statutes are those of California, Colorado, Delaware and Missouri. They are cited in notes 114-116 and 119, \textit{supra}.

165. Moyers, \textit{supra} note 162, at 243.

166. \textit{See} Louisell, \textit{supra} note 162, at 234.

In actual clinical practice we have to act largely on the basis of statistical likelihood. A 50 percent chance of fetal abnormality to one couple may not be considered a very severe risk while another couple may consider a 20 percent risk a hideous gamble. The doctor simply puts the facts on the table as he views them. The couple then has to make the decision of whether they think the risk of malformation justifies termination of pregnancy. There is no one who can make that decision better than the husband and wife.185

The above observations serve to buttress the conclusion of this writer that there are only two ways to resolve the previously discussed dilemmas in current abortion statutes. Abortion laws either ought to be interpreted as making the matter of abortion a strictly medical concern—so that the decision to allow an abortion to be done, when made according to statute, is not a matter for review by the courts169—or ought to be repealed and replaced by “abortion on demand” statutes, with a reasonably certain time limit, if so desired. Either of these two ways serves to fit the crime of abortion safely within the confines of the procedural due process doctrine.

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168. Id. at 443-44.