Supreme Court of the United States

OCTOBER TERM - 1970

In the Matter of:

THE UNITED STATES,

Appellant

vs.

MILAN VUITCH,

Appellee

Docket No. 84

Place Washington, D. C.

Date January 12, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES, Appellant	)	
vs	)	No. 84
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The above-entitled matter came on for argument at 10:21 o'clock a.m., on Tuesday, January 12, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Appellant

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On behalf of Appellee

APPEARANCES (Cont'd)

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New York City
On behalf of Appellee

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: The first case this morning for argument, is: United States against Vuitch, M.D.

Mr. Huntington, you may proceed whenever you are ready.

ORAL ARGUMENT BY SAMUEL HUNTINGTON, OFFICE OF THE SOLICITOR GENERAL ON BEHALF OF APPELLANT

MR. HUNTINGTON: Mr. Chief Justice and may it please the Court:

This is a direct appeal under the Criminal Appeals Act from the United States District Court from the District of Columbia. That Court struck down a major provision of the District of Columbia abortion statute on the grounds that it was unconstitutionally vague on its face.

Coming back to -- in the District of Columbia, charging Appellee, Dr. Milan Vuitch, who is a licensed physician, with procuring or attempting to procure two abortions in violation of Section 22-201 of the D. C. Code. That section makes it a crime to procure or attempt to procure an abortion "unless the same were done as necessary for the preservation of the mother's life or health."

Appellee's motion to dismiss the indictments was granted before trial by the District Court on the grounds that the quoted phrase was unconstitutionally vague.

The record does contain no development whatever of

any of the facts bearing on the charges contained in the indictment.

Our basic position in this Court is that the District Court erred in striking down the abortion statute for vagueness on its face. The result of the Court's decision if allowed to stand is that there is now no limitation in the District of Columbia on the performance of abortions by physicians.

We believe that under a proper interpretation of the statute there is a definite class of situations to which the statute can be applied without running into vagueness problems. For this reason we think the case should be remanded to the District Court for further proceedings.

Before reaching the merits of the District Court's ruling, however, there are certain jurisdictional questions which this Court has requested the parties to brief and argue. They are as follows: first, does this Court have jurisdiiction over the direct appeal under the Criminal Appeals Act, notwithstanding the fact that the underlying statute applies only within the District of Columbia.

Second: could the Government have appealed this case to the Court of Appeals under Section 23105 of the D. C. Code? That section gives the Government the same right of appeal that is given to the defendant. And third: if the Government could haveappealed to the Court of Appeals, should this Court, as a

matter of sound judicial administration, abstain from accepting jurisdiction under the Criminal Appeals Act?

First let me point out two significant developments since the time we filed our brief. These are the passage of the D. C. Reform Act and the Amendment of the Criminal Appeals Act. Under the D. C. Court Reform Act, which became law, or was signed into law last July and it becomes effective February 1st of this year, jurisdiction over "any criminal case under any law applicable exclusively to the District of Columbia would by mid-1972 rest in the Superior Court of the District of Columbia. Appeals from that Court will run to the District Court, the District of Columbia Court of Appeals, which, of course, is not the Circuit Court of Appeals.

The District of Columbia Court of Appeals is the Court of record and its judgment would be reviewed by this Court in the same way that the state court judgments are reviewed.

Of more immediate impact and perhaps of conclusive impact on direct appeals, of course, is the amendment of the Criminal Appeals Act which abolishes direct appeals to this Court. Now, that does not apply -- it applies only to cases begun, and by that we interpret that to mean begun by indictment, after January 2nd of this year when the law was signed.

So, that law does not apply to this case. But, the effect of these two laws, we submit, is to make the

jurisdictional issues presented here, issues which do not have ongoing significance.

Well, turning --

Q Does that mean it doesn't make much difference, as a practical matter, whether we take jurisdiction or not?

A No; I believe it does make a considerable difference whether you take jurisdiction in this case. I just mean that the issues you decide here, the jurisdictional issues, do not have overriding significance in the future.

Q Well, I put too much into my comment then. We ought not to worry too much about the jurisdictional question question and just accept it; is that the thrust of the argument?

A That's the Government's position.

Q Well, I thought it was that any jurisdictional decision will be of very limited precedential value and would be in the light of the statutory changes.

A That's right; that's true.

Well, turning to those issues now, the old act as it applies to this case, states that an appeal may be taken by and on behalf of the United States from the District Courts direct to the Supreme Court from the decision of judgment dismissing any indictment where such decision or judgment is based upon the invalidity or construction of the statute upon which

the indictment is founded.

Q I take it it's your position that that applies even to a statute restricted in its application to the District of Columbia?

A Yes; that's right.

Q As it stands in contrast to one which is applicable throughout the country in which the normal District Court elsewhere would have to deal with?

A That's right; yes. We believe that Congress perhaps could have made a distinction between a statute applicable only within the District of Columbia and statutes of nationwide application but that Congress did not make that distinction to it.

Q Certainly it is true that on the state's side we have entirely separate criminal procedure which channels its way up to the State Supreme Courts. And here we have, are dealing with a local statute which conceivably, it could be argued anyway, should go up to the Court of Appeals rather than here?

A Well, that's certainly true. I think an analogy can be drawn to the review of the challenging of the state statutes by a Three-Judge District Court. Under that statute this Court has interpreted the term "statute," to mean -- in that Three-Judge District Court provision-- to mean statute of statewide applicability rather than a local statute. We believe that this distinction was not carried over to the

Federal area in the case of Shapiro against Thompson, involving the welfare residency requirements in the District of Columbia.

There this Court interpreted the statute there: 28 USC 2282, which said that the constitutional challenge to an Act of Congress applicable only to the District of Columbia must be heard by a Three-Judge District Court. This Court decided that any Act of Congress included an Act of Congress limited in application to the District of Columbia.

Now, I would suggest that at the time of Shapiro there perhaps were arguments for restricting the scope of that phase. They were rejected. The Court stated they could see no reason to draw that distinction and we submit that that is dispositive of this issue here.

The only other phrase in the old Criminal Appeals Act which we can see would perhaps lead to some doubt as to whether this Court had jurisdiction, is the term: "District Court," as to whether that includes the District Court for the District of Columbia. Now, we have nothing to add to what we said in our brief there. We concluded in our brief that when the statute was originally passed it did not include that term -- it did not apply to the District of Columbia. It was amended in 1942 to specifically mention the D. C. Circuit Court of Appeals and it has been interpreted by the Court of Appeals and by this Court that that amendment had the effect of making the Criminal Appeals Act applicable to the District Courts. We

don't believe that is a substantial issue.

Well, coming to the second point that is whether this court has jurisdiction -- whether the Government could have taken this case to the Court of Appeals under D. C. Code Section 23-105. I would point out that that section has been amended and as of February 1st it's part of the D. C. format -- as of February 1st it's now 23-104 and the section is reworded and much more specific. We submit that it doesn't have a material effect on this issue.

We have assumed, at the time we brought this appeal here, that our only choice was to come to this court. That was because in Carroll against the United States, this court reviewed the overlap of the Criminal Appeals Act in the D. C. Appeals provision, and concluded that the explicit directions of the Criminal Appeals Act will apply, might apply to the same case. That decision, however, was placed in doubt; that observation was placed in doubt by the decision last spring in this court in the United States against Sweet.

In that case the dismissal of an indictment had been appealed to the Court of Appeals under the 23-105. The Court of Appeals without determining whether it had jurisdiction, certified the case to this court. This court determined that certification was inappropriate because the certification provisions in the Criminal Appeals Act were limited to situations where the appeal had been taken to the Court of Appeals pursuant

to the Criminal Appeals Act. And so the case was sent back to the Criminal Appeals Act. But, in its opinion, this Court noted that the Court of Appeals had not decided whether it had jurisdiction under 23-105, which would at least indicate that this Court thought there was a possibility that it did.

Well, assuming that it can be said that it would, the question then becomes whether this Court should accept jurisdiction under the Criminal Appeals Act, notwithstanding the fact that both statutes might apply to this case. We submit that the -- because the Criminal Appeals Act states that an appeal may be taken by the United States to this Court, that this is an appeal as of right, and this Court lacks discretion to reject, to refuse to take the case.

Q Well, really that was not, as you just stated, that this Court should accept this appeal, but rather that this Court must accept this appeal; is it not? And that, even though it may be that you could have appealed to the Court of Appeals for the District of Columbia, nonetheless, having appealed here, your submission is, as I understood it from your brief, that this Court has no power now to transfer to the Court of Appeals and must accept jurisdiction of this appeal under the statutes.

A Only in a very limited sense where appeals very obviously lack merit or lack -- are not based upon a substantial Federal question, has this Court construed its

appellate jurisdiction to be discretionary.

Q Well, this is a Federal case and we cannot say that --

A Right.

Q -- that it's not a substantial Federal question when it's an act of Congress; can we?

A Correct.

Q Mr. Huntington, was there ever a United States District Court in 1907?

A No; it was the Supreme Court of the District of Columbia at that time.

Q Suppose the Supreme Court of the District of Columbia in 1907, or 1908, had done what was done here by the District Court; could that case, in a dismissal of that indictment, appeal directly here?

A Now, in United States against Burroughs, this Court specifically said that the act could not apply to the Supreme Court.

Q Does that have any relevance? This statute we are dealing with, I gather, is the 1907 version; isn't it; not the 1942 version?

A No; we're dealing with the statute as amended in 1942.

Q I know, but the amendment in 1942 was, as I recall it, am I right? simply established the Government's

right of appeal to the Courts of Appeals. But the Government's right of appeal directly to this Court derives only from the 1907 statute; doesn't it?

A Well, that's right, but I think you have to interpret the statute in the light of the amendment --

Q Well, my question then is that if that's so, does the fact that you could not have come here directly from a dismissal of an indictment by the Supreme Court of the District of Columbia, does that bear on the construction we ought to give the 3731 in its 1907 -- ?

A It certainly does bear on it. The Court of Appeals and this Court in Carroll, acknowledged the decision in Burroughs and concluded that the effect of the '42 amendment had been to open up direct appeals to this Court from the District Court. Now, if this Court wishes to reexamine those reservations in Carroll and the Court of Appeals decision in Hoffman, certainly the provision of the 1907 Act is relevant.

Well, turning to the merits of the District Court's ruling, I will state again that our basic position is that the District Court should not have struck down the statute on its face. We believe that under any interpretation of the statute there is a distinct classification to which it can be validly applied; namely: we believe it can be applied where a doctor has made no attempt to determine whether or not health reasons exist which would justify an abortion.

Q You mean validly apply as far as vagueness?

A As far as vagueness is concerned. I'm limiting my discussion right now to the vagueness point.

Appellee argues that in view of the constitutional stature of the rights that he asserts and the impact which the statute has on the practice of medicine, he should be allowed to attack the statute on its face.

This Court has afforded standing in certain First Amendment cases to attack a statute on its face and it's presumably on these cases that Appellee relies. Of course the leading case in that area is in Dmbrowski against Pfister where a subversive activity statute of Louisiana was struck down by this Court. We submit that this is not the Dombrowski situation.

We concede, of course, the point that Appellee stresses in his brief that there are many physicians in the District of Columbia who are dissatisfied with the abortion statutes and that perhaps many more abortions would be performed if the statute did not exist. But, by this concession, we don't believe that that establishes that the rights asserted are of such constitutional significance that the statute should be struck down on its face.

Just comparing this case with Dombrowski, first the constitutional rights asserted here, are novel and for the most part, unexplored. We submit they should not be determined in

abstract. In Dombrowski well-established First Amendment rights were in issue. Second, as I stated, we believe there is a distinct category of cases which this statute can be validly applied to. In Dombrowski it is very questionable as to whether that statute could be applied to any significant category of cases.

Finally, in Dombrowski the conduct of those challenging the state statute was not of the hard-core type which will be prohibited by any reading of the statute. Here, only the development of a record will demonstrate whether Appellee's conduct was of the hard-core type or not.

Assuming, however, that Appellee should be allowed to attack the statute on its face, and reach the merits of the District Court holding that the statute was unconstitutionally vague, it is our view that the District Court misconstrued the statute and that under a proper interpretation the statute is not unconstitutionally vague.

Of great concern to the District Court was the possibility that a doctor would exercise medical judgment and determine that health grounds justified an abortion, and that this judgment could then be subject to being second-guessed after the fact, by first a prosecutor and then the -- ultimately the jury. This concern follows from the Court's reading in the 1933 decision of the Court of Appeals in Williams against the United States. The District Court read that case as placing the

b urden on the physician of persuading the jury that his acts were necessary.

We submit that Williams did not hold that. In the Williams case neither side at his trial -- neither side produced any evidence of justification. The total issue in that case was who had the burden of coming forward with the issues; who had the burden of raising the issues.

In affirming the conviction the Court of Appeals merely held that the burden of raising justification as an affirmative defense was on the physician. In our view, Williams is consistent with the proposition that the ultimate b urden of persuasion is on the Government, and remains on the Government, once the issue has been raised.

Q Well, wouldn't it almost follow, then, on your reading of the act that whenever an abortion is performed by a licensed physician in good standing, and the mother survives in good health, then it's a legal abortion under the statute as you read it?

A If the doctor makes a good faith judgment, exercises medical judgment --

Q Well, I assume now a licensed physician in good standing in the profession -- that is not under any disciplinary cloud -- performs an abortion, doesn't it follow in your reading of the statute that that's not a criminal act?

A No; I think we would require that he at

least raise the issue of whether he determined the health grounds that necessitated the --

Q He's a doctor and his profession is to take care of peoples' health. And if he does something and he's a licensed doctor in good standing he does something in the scope of his profession isn't there a presumption that he has been -- following his profession?

A We would --

Q If he comes to my house and treats me for a cold -- he may use good judgment or bad -- but he's following his profession.

A Well, we believe that the doctor will have broad scope in determining what health is, but we would suggest that the term health means that he has to make an examination of the woman and determine that because of some condition of that woman --

Q Well, she is pregnant. That's the condition.

A Suppose --

(Laughter)

A Beyond the mere fact that she is pregnant. I think the doctor -- if the doctor merely determined that the fact she was pregnant was sufficient grounds for performing an abortion that that would raise an element of good faith. That his good faith could be placed in doubt --

Q Well, maybe this particular doctor thinks that a woman -- let's assume she already had six children and her health, including her mental health, would be impaired by having a seventh child. Then he performs the abortion and by your reading of the statute I should think that's not illegal abortion.

A If he does conclude that; if he does conclude that her mental health requires that she have the abortion then we say he would be protected as long as that judgment --

Q But you're going through all of the rigamarole of his having to set up a defense in a criminal trial. I should think that the reading that you, yourself, give to this statute, from that reading it would follow that whenever a doctor in good standing performs an abortion that's the end of it; it's not a criminal act.

A Well, we don't believe that that would necessarily be true, say, of a doctor who --

Q I don't mean, of course, against the woman mother's will or --

A Oh, of course. We don't believe -- we believe that if a doctor merely performed an abortion on demand on a woman's request solely on the woman's request, without determining that special conditions separate that woman from the general class of women -- of pregnant women -- that special health grounds separate that woman from the general class of

healthy pregnant women; we believe that if a doctor merely, because of the fact of pregnancy, performs an abortion on her request, that he would violate the statute; that he would have to make a good faith judgment that there were special conditions pertaining to that woman which, in his view, jeopardize her health. Now, whether it be her mental health or her medical health.

Q And you would not agree that it follows from the very fact that he performed the abortion --

A No; we would not --

Q -- that he had made that judgment in the exercise of his professional judgment, experience and skill?

A No. Appellee does argue that because -- and he cited statistics to show that the abortion operation, at least in the first trimester is safer than proceeding to term and undergoing natural, regular childbirth.

Q Yes.

A We submit that it is not that type of danger which the statute is aimed at. The statute was passed at a time when abortion was a risky operation; we believe that certainly the standard of health that Congress had in mind when it adopted the statute, would involve a risk to health which would be greater than the risk of the abortion at that time. In other words, they had in mind complications which would interfere with childbirth.

So, we believe that just the fact that pregnancy alone is insufficient. If a doctor in his trial, if he were to introduce medical records to show that the woman was pregnant and rest his case, I don't believe that that would be sufficient to -- for a directed verdict of acquittal.

Q Mr. Huntington, let me see if I understand you. You are really speaking now of abortion on request, but nothing more?

A Yes; but nothing more.

Q Do you have in the District any statutes applicable to vasectomy?

A Not that I know of; no.

Q But wouldn't you suggest that the Government, if it is prosecuting a doctor, would have to do something more on its side of the case than to show that an abortion was performed?

A Well, this issue, I believe, does not have to be decided by this Court.

Q Well, it may nothave to be decided, but it sounds to me as though you think the Government's prima facie case could be limited to showing that the abortion was performed.

A WEll, we believe that it is reasonable for, mainly for convenience of proof, purposely to place the burden of coming forward with evidence on the justification issue --

Q This isn't at all critical to your case. You could say that your burden would be to prove that the abortion was not done for a health reason and you would still reach and present the issues you are presenting here.

A Well, that's true. I don't believe it's necessary to go into that --

Q Well, why -- you shouldn't take on more of a load than you need to.

A Well, at any rate the District Court was afraid that a physician's professional judgment made in good faith, the District Court stated that that judgment should not be challenged and we agree.

We believe that the Williams case goes a long way towards establishing good faith as a defense. We believe it's but a small step for this Court to expand on the Williams holding and certainly this Court has the power to, this being a Federal statute, this Court has the power to construe the statute so as to limit the vagueness attack on it.

There have been some decisions which we have cited in our brief where this Court has deferred on local matters, to the decisions of the District Courts. In the case of the District of Columbia against Little, construing a search regulation of the D. C. Health Code, this Court concluded that where statutory questions are so enmeshed with constitutional issuesthat complete disposition in the case is appropriate for

this Court. This is such a case.

In Williams the Court of Appeals stated that a physician should not undertake the operation unless he is convinced in good faith of its therapeutic necessity. The Court later stated "a competent physician who acts in good faith will always be in a position to come forward with a justification for any operation." We do not believe this is a strained interpretation of the statute. Other states have interpreted their statutes to allow good faith as a defense.

Q Most of the other states permit an abortion only if it's the mother's life that's in danger; do they not?

A That's true. In Massachusetts, however, the abortion statute there has been interpreted to allow health standards as a justification and good faith has been recognized there as a defense.

Q But most of the state criminal statutes in the abortion area allow a defense only if life, not just health -- is that not true?

A It was certainly true three or four years ago --

Q Isn't that still true?

A That's still true. I think Alabama is the only one that specifically mentions health. As I say, Massachusetts has interpreted their statute to include health.

Well, Appellee asserts here numerous, that numerous

other constitutional issues should be decided by this Court. Those claims were presented to the District Court but the District Court did not decide them.

Q Did the District Court discuss them?

A The District Court indicated that significant constitutional rights were involved --

Q Do you think the District Court indicated its views about any of the issues?

A Well, it stated that there was unquestionably some impingement of rights involved here. Now,it did not go into a weighing of the presumed interest of privacy versus the state interest in regulating --

Q Well, are you suggesting that the Appellees here should not be permitted to support this judgment on any other ground than the vagueness grounds?

A Yes. We're submitting that there are sound reasons for this Court not to reach those other issues. First of all, this Court has often expressed a policy against - deciding constitutional issues unless necessary for a decision in the case. And also, the general policyof the Criminal Appeals Act to construe direct appeal narrowly. But, more directly, we believe that the de novo rights here should not be adjudicated without the development of the record. A record would be helpful in this case. The precise impact of the D. C. statute is far from clear.

Q Well, on a remand you have to order evidence. I mean, the District Court, if you didn't reach these other issues, might strike down the statute on its face on another ground without any record at all.

A He might. We submit that the proper approach would be to develop a record. In fact, the questions arose which relate to the rights to receive medical practice and the rights of women to choose when and whether to have children, that they are asserted by Appellee as absolute rights. We submit that the state interest in regulating abortions has to be measured against these absolute rights in that precisely what impact the D. C. Code has in this area would be better decided in the specific context of a case.

Q Well, you would, I gather than, prefer that you would actually make a record of a lot of these medical and factual considerations, rather than attempt to take judicial notice of texts and treatises, opinions, things like that?

A Well, we submit that the issue in this particular case is somewhat different than the issues in most of the other cases dealing with abortion statutes. Only in -- I think it's Doe v. B----- the Georgia Three Judge Court was the statute involved that used the term "health." Now, because under our interpretation the doctor is given a broad scope to exercise medical judgment, we don't think that it should be determined in the abstract that the statute interferes with a

basic right to practice medicine.

Well, should this Court reach the merits of the constitutional issues here involved, I would like to state very briefly the Government's position. The basic questions about when life begins and when it should beprotected are involved and underlie all these abortion statutes. Abortion laws that reflect the views of a major segment of this country's population that the embryo should be protected. Contrary views, of course, are held by many people.

In our view, resolution of this very fundamental question is peculiarly within the province of the legislature. We believe that the significance of the medical data which is referred to in the amicus brief of Dr. Heffernan, is to show that it is very difficult ot draw a line at some stage during pregnancy. The common law drew the line at quickening because it is generally felt then that quickening was when the baby became alive.

But, during the 19th Century the medical profession realized that that was really relatively insignificant. It may have had an effect on the mother. At that point she realized that something was moving inside, but that from a medical point of view from the moment of conception on there is a fairly steady development --

Q How does this become relevant in view of the District Judge's action never reaching the merits but deciding

the facts --

A Well, we argue that you should not reach this question. I'm just trying to state our views just to meet the possibility that you do so you do not think that we do not have any views on the ultimate question.

Q As far as vagueness is concerned, it wouldn't make any difference whether the statute drew the line at three months or six months; would it? The statute would be invalid in any event, if the District Court was right on vagueness.

A Oh, yes; if the District Court was right on vagueness then of course we don't reach these issues.

Q And would your position bethe same with respect to a law that made it a crime for a mother to secure an abortion?

A Yes; we believe it would be. Under the D. C. Code the mother does not commit crime -- the Code's has been interpreted that way -- we believe that this expresses the will of Congress that in regulating abortion it is sufficient to go after the doctor. We believe -- some states do make -- laws do cover the women.

But, because it's impossible to draw a line here, or because it's very difficult, there is substantial medical evidence -- it's not based solely on the views of the church as some would contend, but it is based on basic evidence as to what happens in the development of life.

Q I don't yet see how this is relevant to the case in its present posture, counsel.

A Well, I won't pursue the point. I won't --

Q It -- be stricken on its face as unconstitutional and this Court couldn't reach the merits on any posture that I can see --

A Well, we submit that that is correct. This Court should not reach the merits.

Q I thought you were trying to answer Mr. Justice White's question, who put to you: isn't it perfectly permissible for your fellow counsel on the other side to try to support this judgment on any basis that it can?

A That's right and we submit that there is sound reasoning for this Court not to reach the issues, but if you do reach that issue --

Q That's -- I thought you were directing --

A It's not an absolute rule, not an absolute prohibition in this Court reaching these issues and in some cases you have reached issues which have not been decided by the District Court. Those are cited in one of the amicus briefs.

Q I don't quite understand why you are arguing about the health of the embryo. I thought the statute referred to the health of the mother.

A The statute does refer to the health of the mother and Appellee does make the argument that the statute

was passed solely as a health measure to protect the health of the mother. We submit that while the legislative history of the D. C. provision is indeed sparse,-- I think the only statement we could determine had any possible relevance is that the author of the Code drew on the provisions of other states.

Q I don't quite understand what you mean by "drew on the provisions of other states." I thought this referred to the mother's health only.

A Well, it does refer to the mother's health, but by limiting abortions to instances where the mother's health required it, we submit that the statute reflects a desire to protect fetal life; that if that was not a factor, that a broader statute prohibiting any internal surgery unless necessary to preserve the life or health of the mother would have been more appropriate.

We think that it was during the 19th Century and the beginning of the 20th Century that most of the laws regulating abortion were passed in the states. Now, I think if we look at the --

Q Well, suppose they were. This one, as I understand it, and I'm not -- am I wrong? -- refers only to the health of the mother.

A Well --

Q Necessary for the health of the mother.

A Right. Many of the other statutes passed

refer only to the life or health of the mother; they don't mention fetal life either. What I'm saying is that by placing a state --

Q Why do we have to get into the fetal life problem when the statute is limited to preserving the health or life of the mother?

A Well, our position is that the statute, that by regulating abortion in that way, prohibiting it unless necessary to the health of the mother, reflects a judgment on behalf of Congress that where the mother's health doesn't require an abortion the fetus should be protected. In other words, if the mother just wanted an abortion on demand that this would not be sufficient, that in that case the interests of the state of protecting the fetus --

Q What you are saying as I gather it, is that the only thing involved is the health of the mother.

A That is correct; that is the only thing involved.

But, I think it is relevant, and I will just draw the Court's attention to --

Q May I ask you this one question, Mr. Huntington: in line with what Mr. Justice Black was saying, if we had a situation where the mother, during pregnancy was exposed to rubella, or there was some thalidomide background or something, then do I understand you to say that the D. C.

statute would not warrant an abortion under those circumstances because the health of the mother is not involved?

A That is correct; that's what the statute states.

I just draw the Court's attention in closing to a discussion of this particular issue in the essay by Professors Louisell and Noonan in "Constitutional Balance." It is in the recent book by Noonan entitled: "The Morality of Abortion," which is cited at page 36 of our brief and I draw the Court's attention to pages 223 to 226 of that essary which, I think, indicates the sort of background of many of the abortion statutes.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: I think the issues have been sufficiently explored here so that we are going to reduce the time a little bit, Counsel. I will allow you five minutes for rebuttal and we will reduce yours to 50 minutes instead of the full hour. You may make any adjustment you want accordingly.

ORAL ARGUMENT BY JOSEPH L. NELLIS, ESQ.

ON BEHALF OF APPELLEE

MR. NELLIS: Mr. Chief Justice and may it please the Court:

In large part Appellee agrees with the United States

with respect to the jurisdiction of this Court. This Court has asked, twice in this case, whether as a matter of sound judicial administration it should abstain from accepting jurisdiction pursuant to the Criminal Appeals Act because the case involves the validity of a statute, the application of which is confined solely to the District of Columbia.

Your Honors, the statute certainly contains sufficiently broad language to make it appear, at least facially that the Government has a right to make the executive choice of bringing this case directly to the Court.

If I may, I would just like to read the first paragraph, Title 18, USC 3731. "An appeal may be taken by and on behalf of the United States from the District Courts, direct to the Supreme Court of the United States in all criminal cases in the following instances" --and the instance of course, on which we and the Government rely jointly is: "from a decision or judgment setting aside or dismissing any indictment or information or any count thereof, where such decision is based upon the invalidity or the construction of the statute."

So, we respectfully suggest to Your Honors that the United States is correct in saying that under the Criminal Appeals Act the case is here mandatorily. But, should the Court feel that the case is not mandatorily before it under the Criminal Appeals Act, we would like to suggest that there are factors other than the scope of applicability of the statute

which dictate that the Court should entertain jurisdiction.

I believe that it is a fair statement that this Court should accept jurisdiction by the exercise of its discretion, if nothing else.

What Your Honors have before you today is a matter of landmark and historic importance in the area of constitutional law. Whatever merit there might b e to a general policy of waiving an initial decision by the United States Court of Appeals for the District of Columbia, I would respectfully suggest to Your Honors that there are myriads of cases brewing in the lower courts and I am sure Your Honors are aware of it.

We now have situations where, in the State of Wisconsin a Three-Judge Federal Court has declared the Wisconsin abortion statute unconstitutional. This is also true with respect to Georgia and Texas, and I am advised that a Three-Judge Court in Pennsylvania has done the same.

Q On vagueness terms, all of these decisions, or not?

A No, Your Honor, they vary. In the Wisconsin case, Mr. Justice Stewart, the decision of the Three-Judge Court was that under the 9th Amendment that the number of rights described in the Griswold case, the woman has a right of privacy, and indeed -- and I want to state it as succinctly as I can -- has an absolute right to an abortion. She has the absolute right, the Court said, not to carry to statutory term

and they used that phrase, an embryo which she does not desire to carry to term.

So, my point is really this: that there are so many --

Q You mean that she has a right to dispose of it if she sees fit?

A Yes, Your Honor.

The Court in the Wisconsin --

Q -- to kill it?

A Well, Your Honor, I don't accept the notion that the abortion of an embryo before the 20th week, before the common law quickening, is an act of killing at all.

Q Well, suppose it's after that.

A Your Honor, various statutes have held, on the basis of medical knowledge that has since overtaken it(?) that after quickening and abortion should be performed only for the utmost and consequential health -- the mental health as well as physical health -- reasons.

But in the Wisconsin case, Mr. Justice Black, the Court held that the woman has an absolute right not to have --

Q To dispose of.

A -- not to have the embryo continue to a point of birth up to 20 months --

Q In the usual and ordinary language, you mean to dispose of the child.

A To have an abortion, which is --

Q Would it dispose of the child?

A Your Honor, I don't --

Q I'm not saying it's wrong; I just don't care to be cluttered up in a maze of words that mean something else.

A Mr. Justice Black, I am not trying to obfuscate my answer. I cannot accept, if you don't mind my saying so, the word "child" as related to a fetus.

Q Well, whatever it is, the right to dispose of it as she sees fit.

A Yes, Your Honor; that is correct and in fact, the more modern American Penal Code Statutes provide for terminations of pregnancies under therapeutic conditions up to 20 and 24 weeks. Our neighboring State of Maryland has such a statute and there are 13 others.

My only point is that there are so many cases pending this matter is of such enormous national significance that I would hope that Your Honors would, if you don't accept the mandatory provision of the Criminal Appeals Act, that you would exercise your sound judicial discretion and take this matter under advisement on its merits. , as a matter of --

Q Mr. Nellis, may I interrupt you to ask you this question?

A Yes, Mr. Chief Justice.

Q In this evolving developing stage of medical knowledge on the subject that both of you have alluded to, how would we form any -- how would we have any basis to pass on that, absent a record of testimony as to what is the present state of medical knowledge on the time and the term?

A Your Honor, my answer would be twofold: first, I believe that it would be an enormous problem of judicial administration to deal with every variegated facet of the abortion area on a case-by-case basis. That is to say: the authorities which have been cited in our brief and in the Government's brief, the statistics, the material, the medical knowledge, all of it is available. It's before Your Honors now, if in each case where a doctor, and I feel strongly that it's an unjust indictment, that if a doctor were indicted we would have to send the case back in order to find out in each instance, what his justification was for performing a particular abortion, Your Honors would never be able to decide the tremendous of instances that occur in medical practice.

So, the first part of my answeris that this is not a subject matter, in my humble opinion, which can be dealt with on a case-to-case basis.

On the second level, I would like to suggest to you, Mr. Chief Justice, that there is hardly any area of criminal law more unique than this. Here we have a situation inw hich a woman comes to a doctor and pleads with him to help her

medically. He helps her and he becomes the defendant. He faces the one to ten years in jail. It is the most anomalous situation in which the complaining witness and I have been in the courtroom and have handled these cases, who becomes the most reluctant witness against this doctor.

As a result of what I am saying, my point is simply that there are no facts that I can think of that could be developed in the context of a criminal case that are not already fully before Your Honors in this case.

Now, I would like to say --

Q Mr. Nellis, may I interrupt you?

A Yes, Mr. Justice.

Q You referred to pending cases in Wisconsin and other Three-Judge cases and indicated that those statutes were undergoing severe strain and had been held unconstitutional for vagueness. This is not true across the board; is it? There are cases the other way?

A Mr. Justice Blackmun, in your home state of Minnesota --

Q I hadf this in mind.

A -- Yes, sir, I'm sure you did.

In your home state of Minnesota, I regret to say a Three-Judge Court has recently held otherwise, but in the first instance in that case --

Q But what about the state court there?

A I beg your pardon?

Q What about the state court there?

A Yes; have otherwise, as well.

I was going to say that the Three-Judge Court in the Hodgson case originally held that the statute was not in jeopardy because a doctor had not been indicted. But, I am very hopeful, Your Honor, that in the great state of Minnesota, the same enlightenment opinion will result that has resulted in other great states.

I feel very strongly that the proliferation, the multiplicity of suits which will be reaching -- are reaching this Court now, could be very deftly and intelligently approached by a decision here.

Q Well, my intimation there merely is that if that is the case, if it ever comes here, which is fully developed because there has been a trial with testimony, medical and otherwise, in contrast to this one.

A Yes, Your Honor. I see the difference, of course, between the situation in which a doctor has been put on trial, evidence has been adduced, he is required to come forward and give his good faith justification for his medical acts and the jury has either accepted or rejected these justifications, which I think is a matter of serious area of constitutional infirmity. But there are some cases where Three-Judge Courts up in Wisconsin, Mr. Justice, have said that the

statute is unconstitutional on its face, because in the case of the Wisconsin statute the court said in the doctrine of Griswold and other cases in this Court that a woman has an absolute right of privacy under the Ninth Amendment. And there is nothing in the way of a factual record that would either enhance or detract from, the ability of the Court to determine that right of privacy.

Q Well, thiscertainly goes to your point of: this is a good way to get rid of these statutes, which is what you are arguing.

A Yes, Your Honor.

Q Mr. Nellis, how about the ground onwhich the District Court proceeded; namely: vagueness. Now, let's assume that a doctor proceeds to give an abortion on demand; makes no medical diagnosis whatsoever; doesn't purport to act on, to protect the health of either the mother or the child or the fetus. Does -- how is that particular individual in any position to claim vagueness in the statute, which is encountered only if you really have been dealing with the health question? He hasn't been -- this fellow hasn't been confused at all. He says health is irrelevant.

Q Mr. Justice White, if I may say so, the factual circumstances you put would only be applicable, in my judgment, to a non-medical practitioner who is a quack. I do not know of any instance in which a woman comes to a reputable

doctor's office, would not be examined medically, questioned as to her history and a determination made with respect to what areas, what it is that is causing the doctor to make a judgment --

Q You just -- I'll just have to proceed further, then. Let's assume that a patient comes in and wants an examination. The doctor says: you are pregnant; you're perfectly healthy; it's going to be a wonderful child. I foresee no difficulties, and she says, "Well, by the way, doctor, I don't want the child; I want an abortion." And he says, "Oh, you do? Well, fine. There is no health reason whatsoever for your not having the child, but if you don't want the child, why, that's your right." And then he's indicted under this statute and is he in any position to claim that this statute is vague?

A Yes, Your Honor. Your Honor has put a case which makes is very clear, I think; the word "health." What does the word "health" mean in this statute?

Q Well, on the facts I said, he said "There is no health reason whatsoever for your not having the child."

A Well, if you want to restrict me to the facts you put, Mr. Justice White, I would have a difficult time, but I have -- can I add one fact of my own?

Q Go ahead.

A Well, not that the doctor suggests that she

can have an abortion just because she wants it, but that she says, "I've been married for ten years and I have four children and we can't afford another child." Now we have added a factor which raises the question of whether or not the District of Columbia statute when it uses the word "health," encompasses that kind of treatment.

Q It's a strange health argument, isn't it?

A Your Honor --

Q Just on those facts.

A Your Honor, I think it is fair to say and I don't feel cornered, if I may say so --

Q No; you shouldn't.

(Laughter)

A I think it is fair to say that socio-economic reasons in modern-day society approach health reasons. It takes money to raise children. It takes love to want children.

Q Well, I would have to deal with the case then of the first child, no problems of money whatsoever and the doctor says, "He is going to be a wonderful child; no health reasons whatsoever." And she ways, "By the way, I don't want it."

A And your question?

Q Vagueness?

A Oh, the statute is completely vague as to

whether or not --

Q But as to that doctor?

A Well, certainly.

Q Could he claim he didn't know --

A He could do the job -- although I can't perceive of any such circumstance occurring -- he could do the job at the request of the mother and, faced with an indictment under this statute, could I maintain, claim that the statute was completely vague as to whether or not the considerations that you and I have been discussing, Mr. Justice White, is a proper one under the term "health."

Q Mr. Nellis, I detected from one of your responses, a suggestion that you were contemplating one rule under this statute for "reputable doctors;" I think you used that term. And another, or doctors who are not reputable. Now, how you you have any difference?

A If I gave that impression, Mr. Chief Justice, I apoligize --

Q Between reputable doctors and --

A That is not what I meant to say. What I meant to say was that under those factual circumstances where a woman would not be examined medically , that would probably take place in a back alley or in a back room where many abortions are performed because of the abortion laws in the United States; I did not mean to distinguish between reputable and

disreputable doctors.

What I meant to say was that there are abortions being performed daily as a result of laws like the one we have under examination here, Mr. Chief Justice; that are performed by nonmedical men. And Judge Gesell, wisely in his opinion in the Court below, stated that all I am saying about the vagueness of the statute is that abortions may be performed only by competent, duly-licensed and qualified physicians.

Q Well, your argument on vagueness and the Court below's judgment or opinion would mean that -- well, it wouldn't make any difference how the law was drafted in terms of the time of the pregnancy --

A I'm sorry --

Q -- I mean the law would be just as vague if it provided that abortions could be performed at three months but not afterwards.

A Yes; provided that there were no other criteria; yes, Your Honor.

I'd like briefly to return, and I hope the Court will indulge me when I say that I want to briefly return to the question of review because I know that this is troubling the Court. And I feel that in some recent cases this Court has acted in a manner to enhance the prospects of taking jurisdiction in this case.

In the Sisson case, which this Court decided in June

of 1970, was denied because in that case, as I recall, there was a motion in arrest of judgment which Judge Rosanski in Boston had rendered in connection with a Selective Service case. But, I am very impressed with the fact that in both the majority opinion and the dissent, this Court states that in a statute as unclear and as ambiguous as the Criminal Code Appeals Act which Your Honors will not have to contend with after the effective date on January 2, anymore, the words of the statute are the only -- only the first place to begin interpretation. And I would say that on the face of the statute, on the face of the Carroll opinion and the opinion of the United States Court of Appeals for the District of Columbia Circuit, that this Court mandatorily should take jurisdiction and then if there is any doubt in this Court's mind it should exercise its discretion in that regard.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Dorsen.

MR. DORSEN: Thank you.

ORAL ARGUMENT BY NORMAN DORSEN, ESQ.

ON BEHALF OF APPELLEE

MR. DORSEN: May it please the Court: I would like to return to the language of the statute that Mr. -- that Judge Gesell found to be unconstitutionally vague. And I would like to emphasize, in turning to the words of the statute that this is the only case we know of in which the professional

judgment of a physician is being second-guessed by the police, judge and jury in the exercise of his medical judgment.

Now, the language of the statute permits an abortion to be made if it's necessary to preserve the life or health of the mother. In our position every term of that statute is impermissibly vague and cannot support the criminal indictment.

The word "preserve," was discussed at great length in the Belous opinion in the California Supreme Court inwhich Judge Peters in the first case, reaching the conclusion that a statute of this kind was unconstitutionally vague, pointed out that it could be subjected to at least two meanings: preserving the life or health in the abstract or maintaining the status quo.

The word "necessary" --

Q What do you mean "in the abstract?"

A Well, it can be interpreted to mean that the doctor is attempting to preserve the life of this particular individual as distinguished from the person's health at a particular time.

The word "necessary" was commented on by Chief Justice Taft as long ago as 1926 in the Trinidad case, which is quoted in our brief, in which he said it is a word of great indefiniteness and it's objectionable in the permanent statute. The phrase "necessary to preserve life" taken in the statute

as in many other statutes that have been ruled upon by District Courts and Supreme Courts throughout the country, lay down no standard by which the term can be applied. Does the phrase "necessary to preserve life" mean that it is likely that death will occur; that death is imminent; that death is possible?

Q Do you have a brief, Mr. Dorsen? I

A Yes, sir. It's the brief for Milan Vuitch, signed by Messrs Sitnick, Nellis and Lucas.

The statutory language --

Q That's not a separate brief?

A No.

The statutory language is of no help in parsing the meaning of the statute. The legislative history is of no help and there are at least seven courts in this country that have already held that similar language is unconstitutionally vague. Most of those are cited in the brief and some have been decided in succeeding months.

The judges in a variety of courts have pointed out the anomalous and indeed, indefensible position, that physicians are placed under statutes of this kind. For example: one judge said, "This would place the physician in the position of saying to his patient that in the exercise of his best medical judgment, that an abortion was advisable, but that the law prevented him from performing the same."

Judge Nevill, in an earlier stage of the case that Mr. Justice Blackman referred to, said in a concurring opinion -- the case itself went off on a jurisdictional ground, but Judge Nevill said, "I subscribe to the view that the entire medical profession and innumerable pregnant women live under the sword of Damocles. The exercise of their best medical judgment, the giving of advice and the pregnant woman's freedom of choice is chilled by the cloud of the statute which renders their actions illegal."

Similar language and similar conclusions can be found in several other places.

Now, if the word "life," which has been the subject of most of the decisions to date, is vague, "necessary to preserve life;" the word health is innumerably vaguer. There is no possible standard that can be derived from the language of the statute, it seems to us, to give meaning and concreteness to that phrase.

What does it mean to say that there is a risk to the health of the patient? How great must the danger be? Does one take into effect the nature of the operation? What is the relevance of the person's mental health? The effect upon her family; upon her marriage?

In this connection I would merely refer to a recent article which appeared in the Alabama Law Review in December of 1970. It's not scited in the brief, but it's an article by

Clifton Meadows(?) the Dean of the Alabama Medical School, entitled: "The Mind of the Physician," pointed out to a legal audience: "Uncertainty is the part of the life of every physician," and it goes on to give numerous examples of how it's impossible frequently for diagnoses, for medical judgment to be solidly based. He gives numerous examples of situations where precision is low, in his language, and error is likely.

Then he goes on to say: "Unfortunately, often in the zones of highest medical uncertainty, medicine and law are brought together. What may appear to be negligence to a patient or lawyer may, in fact, be a reasonable decision to be faced by the physician, dealing with large amounts of uncertainty, either in the diagnosis or the treatment of the disease."

Q Can't you say all those words regarding malpractice generally?

A Well, I would say that malpractice, which is, of course, an important problem to physicians, as an important a problem of this, but raises a different question. It raises the question of whether or not a physician is living up to the standards of his profession.

In this case we have a criminal statute which forces him to guess what the word "health" means and it puts him in a wholly different position from the man who is being judged against the standards of the profession. For example, in this

case, just to amplify that point, there is no suggestion, as far as I know, that Dr. Vuitch did not live up to the standards of his profession in terms of care, in terms of exercising normal physician skills.

Q It's difficult for me to accept your explanation because, and I shouldn't go on my own experience, but I have seen physician after physician after physician say the same thing about malpractice that you have just said, and I might also say, drawing on my own experience that I have known many physicians who are not concerned about the sword of Damocles in this decision-making and who are courageous and make the decisions if they have to.

So that I take it what your argument comes down to is that fundamentally it applies to the profession as a whole and that there are, of course, exceptions.

A That's right. I think it applies who have taken the burden of making a medical judgment in the face of a statute of this kind.

Q Well, what I wanted to do in a concrete illustration is take -- pursue Justice Blackmun's point. A doctor who has a serious cardiac patient and needs certain surgery unrelated to the cardiac condition. He must make a very difficult decision there which -- whether this will endanger the health or the life of the patient; isn't that true?

A That is correct.

Q And if he makes a wrong decision as the patient sees it later, and the patient dies or is further disabled, he risks what Justice Blackmun was talking about, a malpractice suit; doesn't he?

A He may do so, and I think that is a very fair question, Mr. Chief Justice. But, I think there is this difference -- only in this type of operation is there a criminal statute which puts the issue as flatly as it is put here. In the case that you mentioned and the cases I take it Mr. Justice Blackmun is discussing, a doctor, as I understand it, must depart grossly from the proper standards of his profession before he can be criminally liable.

In this statute there is no indication at all of what the standard is. It just says "to preserve the life and the health of the patient."

There is one other factor here: in all of these statutes the doctor is put into the position where because he may be afraid of the very type of thing Mr. Chief Justice and Mr. Justice Blackmun have both referred to, he is bound to act in many situations, inconsistently with the interest of the patient. He wants to stay clear of the zone where he might be put to criminal prosecution. He wants to be sure that he will not be prosecuted and therefore he may state his -- he may refrain from exercising what would be ordinarily be his medical judgment because he doesn't want to take the risk of criminal

prosecution if a jury or prosecutor second guesses him.

Q Is that different from the malpractice case, again?

A The difference is in the standards. The malpractice case, as I understand it, Mr. Chief Justice --

Q I'm speaking of the caution, Professor Dorsen. If he wants to be this very cautious practitioner and cautious in the sense of protecting himself and he would simply say: it's too risky to do this surgery and then he refrains from doing the surgery.

Now, is that any different --

A The difference, I think, is that in the malpractice case there is a well-established standard by which the professional judgment of the physician is being evaluated. This statute, neither in its history, nor in its language, suggests what that standard is.

Q Professor Dorsen, isn't one of the standards of the medical profession with respect to surgeons, that surgeons are not to perform operations that are not required by the health of the patient?

A That is correct.

Q And the risk if the doctor performs -- he must make a judgment at the risk of being suspended if he's wrong with respect to whether perhaps the patient requires the operation.

A I don't think in most cases that would be a realistic --

Q Well, isn't that the standard inthe medical profession with respect to surgeons?

A I think it is. As I understand it, Mr. Justice White, in order for a doctor to be suspended he would have to depart grossly from the standards of his profession. In this particular --

Q Well, I don't care whether it's gross or not, the standards is the health of the patient requiring the operation.

Q Professor Dorsen, isn't the real difference that it's not a criminal offense?

A That's right; the suspension, of course, would not be a criminal offense.

Q He can't get insurance against criminal offenses.

A I might add that much of our brief covers this fully, but to indicate the difference between the conventional malpractice situation and the very special kind of situation that physicians are faced with here, that this past summer the American Medical Association and the American College of Obstetricians and Gynecologists, as well as the American Public Health Association, all voted in favor of having criminal penalties for abortions removed.

In other words, I am suggesting that the phsyician who takes it upon himself to operate on the woman in the abortion context, is not departing from what seem to be the present standards of the medical profession, as recently stated this past summer in one case -- I think it was in June -- and one case that was in August.

Now, I think, turning to a point that the Government stressed --

Q Mr. Dorsen, may I interrupt you one more and I hope that neither you nor Mr. Nellis nor Mr. Huntington regard these questions as hostile. I think it's a matter of interest in the subject matter.

Is it not true, or I suggest that the average physician and certainly the operating surgeon also have another avenue which he must bear in mind, and that is the investigating team sent out by the AHA, the American Hospital Association and the AMA, checking records to see whether there is any unnecessary surgery going on.

So that, speaking of your sword of Damocles, not only is the criminal aspect here, but also professional standards which bear upon him. And I merely mention that the criminal aspect is one, but are there not these other factors which have some significance?

A They certainly do have significance and we are making no suggestion -- I hope none is related to what Mr.

Nellis or I said regarding the continued applicability of the professional standards. We feel these should be applied. What we are speaking about is the criminal law coming in in this kind of practice with a vague criminal statute and imposing additional sanction to what you talk about and the one that Mr. Justice Whitehas talked about.

Q Well, I would suggest that in the abortion area, probably, investigation by AHA and AMA teams is probably more acute than in almost any other area.

A A further consequence of the statutes of this kind is what seems to be the unfortunate application of the laws concerning abortion in a way which operates differently against the poor than the rich.

The statistics in the District of Columbia which are cited in our brief and are found in the medical journals with respect to other jurisdictions, suggest that in Europe where people without funds get their medical treatment, the number of abortions that are performed is significantly less, frequently one-fifth as many as in private pavilions.

Now, I mention this, even though the facts are not here in the record, because there is a case that was decided in the District of Columbia in the Doe case, which is cited in our brief, by the D. C. General Hospital which indicates the special problems of poor people in getting an abortion.

A second important, perhaps ultimately precise a

factor here is the consideration that Judge Gesell did lead to did not decide, but did allude to, and that is the right of women to have an abortion.

Underlying this case, in our judgment, is a basic constitutional right recognized by Judge Gesell and he did not rule on the point specifically and by courts in many other jurisdictions that it is a right of a woman to make her own decision, unaffected by the criminal law of the state, whether or not to bear a child.

Q At any stage?

A I could, myself, not take a firm position on that. We are not making the claim of any stage in this case. Certainly we would say up to the point where the embryo is viable. But it is not necessary for us to go further than that here and I wouldn't try to do so.

Q You say it is not necessary to go that far insofar as you are talking about vagueness?

A As far as vagueness is concerned, but not in terms of the ultimate question of whether or not a woman is entitled to an abortion at every point up to birth. The text-books on the subject, as I understand it, once the embryo reaches a certain state then it isn't called abortion; it is called induced labor and it becomes a somewhat different medical problem, as I understand it.

But I wouldlike to emphasize --

Q Why does it become a different problem in terms of that fundamental right of the woman not to bear a child?

A Now, this is a question I would not have an answer to in this particular case.

Q It is difficult; isn't it?

A Yes, it is.

Q To draw a distinction.

A Yes. It is, and we are making the claim, as spelled out at some length in our brief, that certainly up to the traditional lines of 20, 22, 24 weeks there is a right of a woman to have an abortion.

Q You mean a constitutional right?

A That's correct, sir.

Q Under which provision or provisions of the constitution?

A Well, I would rely on the liberty of the woman in the Federal case under the Fifth Amendment --

Q Well, the liberty of what; not to be deprived of life or property or liberty without due process of law?

A That is correct.

Q It's not unrestrained, absolute liberty, but it is liberty that cannot be taken away without due process of law.

A That is correct. Our position is explicitly,

Mr. Justice Stewart, that if there is -- if there were a compelling state interest that the state could come forward with, to justify a restriction on this fundamental right we might have a different case.

Q I don't understand from what the right derives under the constitution.

A Well, the right comes from the liberty of the individual. For example in cases like Skinner and Oklahoma, which specificially talk about the right to bear children. Meyer and Nebraska discusses that. They, of course, go to the privacy cases: the Griswold case, which, at great length in three opinions on the prevailing side discuss the right of privacy.

The position, in other words, is a position based upon both the right of privacy and the liberty of --

Q What does this really have to do with the right of privacy?

A Well, I would suggest --

Q Unless there is any constitutional right and --

A I would suggest that if a woman wishes to use her body in a way which would mean disposing of the embryo, that that is a choice that she can make and that the doctor, in the exercise of his professional judgment, could make upon her request without the intervention of the criminal law.

Q It's not then, the right of motherhood; to be a mother or not to be a mother?

A Well, it's certainly related to that, but in a more narrow sense it's the use of the woman's body, which she has dominion over and which this Court should protect.

Q Do you give any status there or posture to the rights of the father?

A I have given a great deal of thought to that and I reluctantly come to the conclusion that it's the woman's right and not the father's right; that it is her body and that she should have the right to make the awesome decision of whether or not to bear the child.

Q Either way?

Q I assume that you also say that she can delegate that right to a doctor.

A Yes --

Q A constitutional right that she can delegate?

A I would not use the word "delegate." She can consult the physician --

Q That's what it would be; wouldn't it?

A I don't suppose --

Q Which provision of the constitution would allow them to say that a doctor has -- had a right to make a woman have an abortion?

A I would not permit the doctor to make that

judgment against a woman's will. She is the one who makes the decisions, just as a client --

Q You mean she can convey the right on him?

A Yes.

Q Constitutional right?

A Yes; yes.

Q Mr. Dorsen, does your argument involve her right to do with her body what you have suggested, have as its ultimate conclusion the right to commit suicide?

A I'm not sure; I'm not sure. I'd be inclined to think it would, but I am not sure.

Q So that the next step is a challenge to the statutes which make suicide --

A There may well be such a statute. I don't think that this case presents the same type of problem. We're not dealing here with a human being in the same sense as a suicide case suggests.

Q Well, it just seems to me your argument has as its logical conclusion that if she can do this with the fetus, can she come in to the doctor and say, "Saw off my right arm because I want it off." And from then on I -- maybe not; I'm just asking.

A Well, I think if the doctor is exercising medical judgment because a disease situation or there is a situation that he would feel that he should do it, I then would

say that she could do so in an unrestrained way.

Q Previously you suggested that there need be no diseased condition, no other factor except the direction of the woman to authorize the abortion.

A That is correct.

Q Then why should it be different on amputating the arm?

A The --

Q She just doesnt --

Q She just doesn't want the arm.

Q She just wants to mutilate herself and she wants to do it in a safe sort of way.

A Well, I do have problems with that. I do have problems with that.

Q Why do you have problems with that if you are going to take this position?

A Well, I take the position because abortion is a well-recognized medical operation and that the operation if it had any indication at all --

Q If you have trouble with the arm I think you would have trouble with the abortion, especially in a fortiori if you even thought that the unborn child had some rights.

A I would think that this court --

Q Certainly an arm doesn't.

A That's right.

I might say in connection with the very point that's being raised here, that Mr. Justice Clark, now retired, in an article in the Loyola Law Review, 2 Loyala Law Review, dealt with some of the same problems that are before the Court now. And he concluded, after discussing the issues, saying: "I submit that until the time that life is present the state could not interfere with the interruption of pregnancy through abortion performed in a hospital under appropriate clinical conditions." And he discusses the argument that amicus curiae supporting the Government's position here, take and concludes that their arguments are without foundation. He discusses it at length and I would repeat his arguments --

Q You mean that there isn't right?

A That is correct.

Q That there isn't right to --

A No, no; what he says, and I'd like to quote the relevant passage very briefly, Mr. Justice White. That is: "To say that life is present at conception is to give recognition to the potential rather than the actual. The unfertilized egg has life and if fertilized it takes on human proportions. But the law deals with reality, not obscurity -- the known, rather than the unknown."

In other words, his position is not that there is no life, but that this is not the way in which the court should approach the problem. We do not know that people have different

philosophical and theological attitudes toward the subject; that they should not be determinative once a decision is made by --

Q They shouldn't be determinative on medical grounds?

A That they should be determined on medical grounds.

Q You say your brief relies on Griswold against Connecticut?

A Yes, Mr. Justice, among other --

Q Well, I notice it doesn't have any pages cited; it just says "passing." What does that mean?

A Well, I didn't prepare that. I suppose because it's cited very frequently in the brief; almost every page.

But I would like to go back, in conclusion -- I wouldn't want to suggest that by dealing with the question we have been discussing for the past ten minutes or so, that I want to get away from the precise issue that Judge Gesell dealt with, the law.

Our contention is that this language is unconstitutionally vague; the statute cannot be cured and that this Court should therefore, affirm the judgment of the court below.

MR. CHIEF JUSTICE BURGER: Thank you, Professor Dorsen.

Mr. Huntington.

REBUTTAL ARGUMENT BY SAMUEL HUNTINGTON,
OFFICE OF THE SOLICITOR GENERAL, ON
BEHALF OF APPELLANT

MR. HUNTINGTON: I would first like to refer to the question of Mr. Justice Blackmun at the end of my argument about the question of rubella. I think perhaps I was too hasty in my response to that question, that that would not be grounds for an abortion.

I think that if there is a substantial chance that there may be a defect in the fetus that it could quite possibly be that psychiatric grounds would exist for justifying the abortion in that case. Obviously, the prospect of raising a deformed child would have a very definite traumatic effect in a woman and I think that would be in the realm of the psychiatrist to determine professionally what that effect would be.

Referring to Professor Dorsen's attacks on the vagueness issue, and mainly that it is an interference with the exercise of professional judgment by a doctor. I would just like to emphasize the narrowness of our interpretation of the statute. We don't believe the doctor will be second-guessed by a prosecutor or a jury. We believe that if he, in good faith, determines that health grounds exist, that that is the end of it.

I'd like to refer to --

Q Is that a necessary -- under the writing of the statute, is that a necessary construction?

A I believe it is a possible construction and the theological construction --

Q Necessary for health.

A Necessary for health.

Q And a jury is not capable of determining that from evidence?

A Well, we believe that a reasonable interpretation is that the word "health" is a medical test and that if a doctor concludes in good faith that health grounds exist, that should be the end. That is the sole question before the jury.

Q That would be a rather unusual criminal act, to let the man charged with the crime determine whether in good faith that crime ought to be performed.

A Well, we don't believe it would be a crime, provided that he exercises the judgment.

I would just like to point out that this statute is not -- that the Government does not harrass physicians with numerous indictments; that this Court is not going to be faced with a flood of cases involving physicians. In the last ten years I believe something like six or seven indictments -- six or seven physicians have been prosecuted in the memory of the Chief of the U. S. Attorney Criminal Division. In none of those

cases did a doctor raise the defense of good faith.

The position of the Government is to go after doctors who -- the enforcement of the law against doctors who do not make medical judgments, but perform abortion on demand.

Q In good faith.

A On demand without making a determination in each instance that health grounds exist.

Q But in each instance it would have to be if he thought it was in good faith you say?

A If he thinks it's in good faith that he is protected. If he believes that the health grounds, that there is some complication that would raise a medical problem in carrying the pregnancy to term, or if he is a psychiatrist, and the psychiatrist concludes that the pregnancy will have a harmful effect to the woman's mental well-being and they determine that in good faith --

Q Who determines it?

A The psychiatrist or the doctor. Those are medical tests and we believe that their judgment on that issue should be --

????? Q It seems to me that when we concede that in ?????? this action, is that all that's conceded is it is too ambiguous to be administered.

A No; we believe that it can be administered against those -- against people --

Q How can they prove it if he says it's in good faith?

A I think if a physician says it's in good faith and it was shown by the Government that in every single case where a woman requested an abortion he performed it, that that would place him -- in issue his good faith in meeting the grounds of the statute.

Q Well, in all of your research have you found any instance where a doctor was acquitted?

A Where a doctor was acquitted?

Q Yes, sir.

A No; I'm afraid I haven't determined, I haven't read over the old cases to determine that that's the case.

Q Well, when you speak of good faith you link that up to medical judgment; do you not, and the medical judgment made in good faith, not good faith in the abstract.

A Yes; the medical judgment made in good faith.

Q Very well.

Thank you, Mr. Huntington and Mr. Nellis, Professor Dorsen. The case is submitted.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was concluded)