In the

Supreme Court of the United States

Copy A

MARY DOE, et al.,

Appellants,

v.

ARTHUR K. BOLTON, et al.,

Appellees.

No. 70-40

Doe v. Bolton #70-40

see also 1971 term v.4

Washington, D.C.
October 11, 1972

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

MARY DOE, et al.,

Appellants,

v. No. 70-40

ARTHUR K. BOLTON, et al.,

Appellees.

Washington, D. C.,

Wednesday, October 11, 1972.

The above-entitled matter came on for argument at 11:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. MARGIE PITTS HAMES, Suite 822, 15 Peachtree Street, N. E., Atlanta, Georgia 30303; for the Appellants.

MRS. DOROTHY T. BEASLEY, Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334; for the Appellees.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-40, Doe against Bolton.

Mrs. Hames, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. MARGIE PITTS HAMES,

ON BEHALF OF THE APPELLANTS

MRS. HAMES: Thank you, Mr. Chief Justice, and may it please the Court:

This is an appeal from the decision in the Northern District Court of Georgia, wherein that court below held portions of a model penal code type abortion statute unconstitutional, and upheld other provisions, and refused to issue an injunction in support of the declaratory judgment.

The case was filed on behalf of Mary Doe, a pregnant woman, doctors, nurses, ministers, social workers, and family planning organizations, as a class action seeking declaratory injunctive relief.

The District Court found that the right of privacy there did include the right to terminate an unwanted pregnancy, without hanging the case on any particular provision in the Constitution, but relying primarily on this Court's decision in Griswold.

The court found that the specification of three reasons for abortion in our statute was unduly restrictive and overbroad.

Mary Doe was given a declaratory judgment. However, the physicians and other parties, even though said to have sufficient standing, lacked sufficient collision of interest, and therefore the case was dismissed as to them.

This case stands on similar jurisdictional grounds, as the Roe vs. Wade case, which we've just heard.

I would point to only two cases on the jurisdictional point, one is Wisconsin vs. Constantineau, which dealt with a third party's constitutional rights there; and then the discussion in the Eisenstadt vs. Baird case, the recent case of this Court.

The facts of this case involved Mary Doe, who was a 22-year-old woman, married, she'd given birth to three previous children, two of whom had been taken away from her by the State authorities because she was unable to care for them. The third child, she was required by her husband to place with adoptive parents.

Mrs. Doe requested an abortion at the public hospital, where she was entitled to free medical service. She was an indigent person, by the way.

Her marriage had been unstable, and during the pendency of her pregnancy her husband abandoned her. She was about ten or eleven weeks when this lawsuit was commenced, and she subsequently applied to private physicians in Atlanta, and a private hospital, for an abortion; and that application

was approved. She was turned down, however, by the public hospital.

The abortion statute in Georgia, as I said, is modeled after the model penal code, and was adopted in 1968. The prior law was adopted in 1876, and it was of the Texas type, to save the life of the woman statute.

The Legislature, in 1968, however, permitted abortion for three reasons: rape; likelihood of grave and permanent or irremedial fetal malformation; and danger to the life of the woman or serious and permanent injury to her health.

These were the reasons that the court below declared unconstitutional. They left standing, however, the procedures in the statute. The residency requirement, the requirement that a doctor have two consultants, the hospital abortion committee approval requirement of at least three more doctors, and the requirement that all abortions be performed in accredited licensed hospitals, that is, those accredited by the Joint Commission on Hospital Accreditation. And there were several other reporting requirements that were left standing.

Appellants here contend that it's not necessary to debate the fetal life problem in the Georgia case, because, as the District Court recognized, the Georgia statute is aimed at protecting the health of the woman. Judge Smith said

that the whole thrust of the present statute is to treat the problem as a medical one.

The only compelling interest that has been asserted by the State, however, is the interest in preserving fetal life.

In taking this position, the State has found itself in a very -- in several inconsistent positions. That is, they have abandoned the fetuses that are the product of rape, they have abandoned those that might likely be malformed, and they have abandoned those that might endanger the life and the health of the woman.

So that if the State claims an interest in fetal life, they have abandoned some and are protecting others.

The State is in the further inconsistent position because, under its Public Health Code and Family Planning Service, it has, as a medical service, inserted several thousand intrauterine devices, which substantial medical opinion holds either destroys the product of conception or prevents implantation of the fertilized egg or embryo.

The brief on behalf of the State has argued that the right to life begins at the moment of conception, and we would point this out as another inconsistency in their argument.

Abortion is not a new medical procedure -- or maybe it's not a new procedure, I should say; illegal abortions

have been performed for many years. There are not any statistics that are very reliable on these, but writers in the area estimate several thousand per year in the United States, and several thousand deaths have occurred from illegal abortions.

I think the real question that this Court is faced with is whether abortion is going to be made a legal health service for women, or whether it's going to be kept in the illegal realm and handled by the unskilled, so-called non-medical practitioners.

I believe I pointed out before, in the prior argument, that we have had some 23, 25 cases now reported involving abortions in Georgia; and many of those involved nurses or contractors, and I believe a plumber in one case. And you can find those kinds of cases all over the United States, of women placing their life in the hands of an unskilled abortionist.

Therefore, we feel that the statute must be viewed in a health context. 1579 women received abortions in Georgia in 1971, and 3410 women, Georgia women, went to New York for abortions. We do not have any statistics available for the District of Columbia, California, and other more liberal States.

I give you these statistics to show that there is still a considerable limitation on the availability of

abortion services in Georgia.

I think the reasons that these limitations are there are apparent from the face of the statute as it remains. The procedures are that three doctors, two consultants, and a hospital abortion committee of three doctors is, on its face, a very time-consuming procedure, not only for the woman but for the doctors. Of course, time is a very important factor in the decision to terminate a pregnancy. For two reasons: the risk to a woman's life does increase as time goes on. First trimester abortions are safer than late abortions.

Complications are three to four times higher in the second trimester.

In a study that was conducted at the public hospital in Atlanta, which is cited in our original brief at page 36, Doctors Baker and Freeman showed that 54 percent of the applicants for abortion were forced to discontinue their application altogether. So their alternatives were to go to New York, if they had money -- and they wouldn't have been applying to the public hospital in the first place, because they would have been ineligible for treatment there -- or to resort to a fifty-dollar illegal abortion in Atlanta, or -- and of course a $500 illegal abortion in Atlanta wouldn't have been available to them -- or to place the child for adoption or rear the child.

That study further shows that by the end of the work-up period of all the paperwork, that 56 percent of those applicants at that hospital had become second trimester pregnancies, that is later procedure, the saline procedure.

Not only is this a time-consuming procedure, it is costly to the patient. We know that abortions in Georgia cost from four to six hundred dollars, that is, a hospital abortion under all of the procedures of the statute. You can pay airplane fare and go to New York for an abortion for about $225.

So it's no wonder that so many women choose the alternative of going away from home for abortion services. They cannot afford the three consultants and to check into a hospital in Georgia.

In addition, we feel that the procedures are not fair to the woman, or to the doctor. There is no hearing before the abortion committee. There is no right for the woman to be heard, in any event. Some abortion committees do permit doctors to come; some of them transact their hospital abortion committee business by telephone; some by review of charts only.

There is no right on behalf of the woman to know the reason she's turned down, and there's no right to have a review of the decision. And the committee procedure, we contend, is, in and of itself, an invasion of the patient's

privacy. Not only must she reveal to her doctor the private information or the private reasons for which she wants the abortion, but they are then -- this information, she has to give it to two other consultants, a hospital abortion committee, and it becomes a permanent part of the record of the State.

So we feel that the whole committee procedure is devoid of fairness and due process.

It also raises substantial conflict of interest problems. This is primarily because of the doctor.

The limitation of abortion to accredited hospitals is also limiting the availability of this service to Georgia women. The Joint Commission on Hospital Accreditation has the privilege -- requirement, rather, I believe is contained in only 4 of the 13 ALI type statutes, and this is not included as a recommendation in the Uniform Abortion Act, which was, last February, approved by the American Bar Association.

In the recent case in Kansas and Maryland, both recognize this places a substantial limitation on the availability of facilities. Even in Maryland, where only two hospitals were not accredited, the Court recognized that. And in Georgia we have some 150 -- out of our 159 counties, only 54 have accredited hospitals.

We say that the Georgia statute -- in this Georgia

statute it is said that the JCAH is to establish standards for the hospital abortion committee. We have argued that this is an unlawful delegation of legislative authority. In fact, JCAH just does not operate in this manner in this area, and it is a recognized principle of law in Georgia that delegation of legislative authority to private individuals or private organizations is an improper delegation.

Also we would point out that the limitation to accredited hospitals is shown to be unwerranted by the New York experience.

There was an article in Sunday's New York Times which reported the substantial number of abortions in New York; but, more significantly, it found that there were only 4.6 deaths per 100,000 live births the first year, and 3.5 the second year.

So that the New York clinical experience has proved to be successful.

QUESTION: Mrs. Hames, is there any limit to the judicial notice which we can take? I mean, is last Sunday's newspaper a perfectly permissible thing for us to rely on in deciding a case like this?

MRS. HAMES: Your Honor, I think that this study is a published document. It is a very recent published document, but it is something that does receive wide circulation as a Public Health Department report. I do not

have a copy of it, because it is such a recent report. There are similar reports by the U. S. Public Health Department. We have previously furnished reports to the Court's library, and will be happy to do so on the statistical information.

I do recognize --

QUESTION: Well, aren't such things something that go to legislative judgment rather than constitutional evaluation?

MRS. HAMES: I think that it is important that legislatures not encumber a fundamental constitutional right with so many procedures as to effectively manipulate it out of existence. And this is our argument about the JCAH requirement: that to limit abortions to accredited hospitals, in many instances deprives women of their fundamental right to decide whether or not to have the child.

And I think that that is not properly a legislative judgment.

QUESTION: Well, you were just talking about statistics, however, in recent reports, and this kind of thing, rather than JCAH.

MRS. HAMES: Well, I would also, instead of the New York Times, which I recognize is not a very widely accepted source for judicial notice, however a highly recognized newspaper, I would cite a study by Dr. Christopher Tietze, who is the recognized medical authority in the area

of statistics, in which he finds that complications are lower --

QUESTION: When you say "the" recognized authority, you mean there are no others?

MRS. HAMES: Well, I --

QUESTION: "a".

MRS. HAMES: -- "a", excuse me.

QUESTION: All right.

MRS. HAMES: He finds that complications are lower in clinics than in hospitals, and were lower for hospital outpatients than for in-patients. And that study is found --

QUESTION: But don't you think there are other factors there, that more complicated cases go into hospitals, that the more complicated cases are in-patients rather than outpatients?

MRS. HAMES: He took that into consideration in arriving at his statistics. I'm sorry, I should have pointed that out. Complications for abortion by the suction curettage method, excluding pre-existing complications, cases, this is strictly the normal abortion situation, the normal patient.

We also say that the procedures imposed on the abortion service is not imposed on other medical service. And I believe that point has been previously made from the bench.

We feel that the State would have an interest in regulating the quality of a health service just in this area, just as they would in other areas. It's a question of how much. And I think that it could be adequately regulated through the rules and regulations of the health department, as are the licensing requirements for hospitals.

QUESTION: Mrs. Hames, let me inquire there: Would you oppose a Georgia statute which said that an abortion must be performed by a licensed physician? And may not be performed by a midwife or a registered nurse, or something of that kind?

MRS. HAMES: Your Honor, at the time that this lawsuit was brought I would probably have said that I would limit abortion services to being performed by licensed physicians. However, the medical technology and knowhow in this area is developing very fast. Medical students, of course, are doing abortions. And I think that midwives are going to be learning to do abortions. So that by the time I say it it may be out of date.

QUESTION: Well, then you're making a constitutional issue out of these new facts. What I'm asking you is, whether you feel a Georgia statute, confining the abortive process to a licensed physician would be unconstitutional?

MRS. HAMES: Probably not. I feel, at this time, it would probably not be unconstitutional. But in the future

it may be outdated and outlive its constitutionality as have other statutes.

QUESTION: So the constitutionality will change depending on the advancement of medical knowledge?

MRS. HAMES: Yes, sir, I think that's possible.

QUESTION: Mrs. Hames, would you think it constitutional to require that the abortion be performed in an accredited hospital?

MRS. HAMES: In a Joint Commission --

QUESTION: In a hospital licensed by the State of Georgia, first of all.

MRS. HAMES: I think that that depends on each State's particular situation. And it depends on whether your licensing requirements are so strict that that would in turn effectively manipulate out of existence the same fundamental right we're talking about. In Georgia, it is my understanding that the minimum requirement for a licensed hospital is two beds. So that you can run all the way from a very large hospital and require lots of facilities to the two-bed situation.

I think that abortions should be performed in specialized facilities, regulated by the State. Those that are designed for abortion services. And of course, in the regulations you can require that they be close to hospitals for backup services; but I think that clinics are fully

capable, by virtue of the New York experience statistics that I was citing, to afford effective and safe abortion services.

QUESTION: Then you are conceding that the State may license an abortion facility?

MRS. HAMES: Yes, Your Honor.

QUESTION: And I take it, if I heard you correctly, that among its requirements it may require -- it may list proximity to a licensed hospital?

MRS. HAMES: I'm saying that maybe one of the forms that the body who draws the rules and regulations may want to require. I believe that is true in New York City.

QUESTION: Well, I'm asking you whether you would regard this as a constitutional restriction.

MRS. HAMES: Well, I think you'd have to look at each fact situation, and in New York City it probably would not; but in some of the more rural areas it may be that you could have a safe abortion facility without being close to an emergency facility.

QUESTION: And I also take it from what you said before that you're reserving the right to say it isn't constitutional twenty years from now?

MRS. HAMES: That's correct.

I would point out that if you put the abortion facilities under the licensure requirements of the State,

then the citizens have the protection of the Administrative Procedure Act in drawing up the rules and regulations. And this is quite different from turning over rules and regulations to JCAH, which is a private organization in Chicago, over which citizens of Georgia have no control.

I would like to speak for just a moment about the doctors' interest, because this action was brought on behalf of a group of doctors, and we have asserted their rights in this Court.

We assert the physicians' right to practice their professions. And we say that these procedural requirements interfere with the best professional judgment, or interfere with their practicing their profession in accordance with their best professional judgment.

It puts them, it puts the doctor, the whole area of having abortion, in the criminal law area; it puts the doctor in the position of always having to weigh his interest against the woman's interest. If he thinks it's doubtful, he's not going to do it, he's going to resolve the question in his own favor, so that he won't go to jail.

If he -- and I think this is a conflict of interest situation that we should not put the doctor in. And the Medical Association of Georgia, in its last legislative effort, was for leaving the entire area of abortion unregulated by the Legislature, but leaving it as a medical practice

matter. So that the illegal abortionist would be guilty of practicing medicine without a license, which is a misdemeanor in Georgia. But it would take the whole area of abortion out from under the criminal statute.

QUESTION: Mrs. Hames, I suppose doctors are not alone in being eager to have their profession or occupation wholly taken out from State regulation. Aren't there a lot of professional associations, other than doctors, that certainly subscribe to that notion?

MRS. HAMES: I think we lawyers dislike having our profession regulated, and I would dislike being told that I had to do so many antitrust cases or divorce cases per month.

QUESTION: And yet professions and occupations have been traditionally regulated by the State for a long time.

MRS. HANES: Well, I think that the regulation here is too much, it comes down to a matter of degree, I think.

QUESTION: Well, but I think -- don't you think your argument is on a stronger ground there than to tell us how the Georgia Medical Association last month decided it didn't want any regulation? That doesn't really bear on the constitutional issue here, does it?

MRS. HAMES: But it indicates only the attitude of the medical profession in Georgia. And I think that is

important. Of course, as you say, everybody would like to be out from under regulation.

QUESTION: The bakers in Lochner vs. New York didn't want to be regulated, either.

MRS. HAMES: Well, this is the only instance that I know of where doctors submit their medical judgment to a committee of three, and that committee of three has the right to override the practicing physician's judgment. And I think this is the type of regulation, or the degree, that I object to.

QUESTION: Isn't there a professional regulation in virtually every hospital in the country on surgical procedures, so that if the doctor is thought to be performing unnecessary operations of any kind, appendectomies, tonsillectomies, or whatnot, he can be disciplined?

MRS. HAMES: That's correct, Your Honor.

QUESTION: He has a restraint on him in many other areas, apart from abortion, doesn't he?

MRS. HAMES: Yes, but that doesn't make him a criminal if he doesn't follow them. They, then, can revoke his staff privileges.

QUESTION: It might. Of course we don't know.

MRS. HAMES: Well, it is possible, but I think that what I would say is to leave it up to the professional standards. And if a hospital chooses to have a committee,

they might want to run their business that way; but let's don'tmake it mandatory for the woman to exercise his right to have to submit her case to the hospital committee.

QUESTION: Mrs. Hames, have you studied the 1970 draft of the Uniform Abortion Act, recommended by the Uniform Committee, enough to have an opinion as to its constitutionality?

MRS. HAMES: It's my recollection that it does have a time limitation in it, is that correct?

I think that -- it's my recollection that there are no consultants required, no committee, no limitation on facility, but a twenty-week limitation with some exceptions, as I recall. I would think it's constitutional.

QUESTION: You mean the State is free to protect the life of the fetus by saying that no abortions after twenty weeks, with some exceptions?

MRS. HAMES: I'm not prepared to say twenty weeks, but I am prepared to say that the reason for enacting abortion laws in the very beginning was to protect the health of the mother.

QUESTION: Yes, but --

MRS. HAMES: And that that reason may come back into existence at some period during the pregnancy. So that it could be --

QUESTION: You're saying that the State may put a

limit on abortions, timewise, in the period of pregnancy?

MRS. HAMES: Yes, Your Honor, I think that's possible. That's not involved in the Georgia case, there's no time limitation in our statute at all.

QUESTION: I understand.

MRS. HAMES: I would like to reserve some time. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Hames.

Mrs. Beasley.

ORAL ARGUMENT OF MRS. DOROTHY T. BEASLEY,

ON BEHALF OF THE APPELLEES

MRS. BEASLEY: Mr. Chief Justice, and may it please the Court:

Underlying this suit is an appeal by pregnant women to the federal judiciary, and particularly this Court, for an enunciation that they have a right secured by our Constitution to procure the destruction of their living, unborn children. They make this plea because the people in the State of Georgia forbid abortion except in certain circumstances, which the people of our State, through the Legislature, believe constitute justifiable homicide.

I do not directly represent the unborn children here, nor the child of Mary Doe, who is probably now two years old.

Their representation by a guardian ad litem was

denied by the court below.

I do, however, represent three State and local officials of the government at this argument, and in that capacity I do represent the State in defending the statute attacked.

The State is parens patriae here, exerting the sovereign power of guardianship over persons under disability, standing, as it were, in loco parentis, or in place of the parent, here the mother, in defending the unborn child.

Now, before we get into whatever issues there may be before this Court with respect to that very basic fundamental underlying issue, I think we must look at it in the context of the jurisdiction of this Court, for which the proposition is presented.

Mary Doe and the other appellants, whom I wish to refer to as plaintiffs, because I think they have no business here as appellants, brought this action under Section 12 -- excuse me -- 1983. This is a 1983 action, which was brought in the federal court below, and a three-judge court was requested.

But that action which gives them a cause or a right or a claim says that every person who, under color of any State statute, subjects or causes to be subjected any citizen to the deprivation of any rights which are protected

by the Constitution, has a cause of action.

So you start out first with: what right under the Constitution is being abridged? Or what right is Mary Doe and the other plaintiffs alleging exists?

The burden is on Mary Doe to show what the constitutional right is, in the first place, because she has a cause of action.

And that question comes before this Court because, as this Court has not yet ruled on its jurisdiction, its jurisdiction depends on the jurisdiction of the District Court. If the District Court didn't have jurisdiction over this 1983 case, obviously there would be no jurisdiction in this Court.

Now, to begin with, since she must show what this right is, and the burden is on her, this Court can decide that question, which is a part of its jurisdictional question, because if there was no constitutional right in the beginning then the District Court had no business looking at the State statute and measuring it against that constitutional right.

QUESTION: Well, Mrs. Beasley, are you claiming that if I bring a 1983 action in the Georgia court, and the court, after granting a hearing, decides that I lose, I didn't have a constitutional right under 1983, then the court never had jurisdiction in the first place?

MRS. BEASLEY: That's right. If there was no

constitutional right in the first place, there's no 1983 action.

QUESTION: Well, but isn't that what a court has to hear and determine, and doesn't jurisdiction mean the power to hear and determine and decide against a plaintiff?

MRS. BEASLEY: Yes, indeed. But if that constitutional right is lacking, then it has no jurisdiction to go any further, because then there is no deprivation of a constitutional right.

QUESTION: Yes, but you need a three-judge court to decide that.

MRS. BEASLEY: Not at all. You don't need a three-judge court to decide it is a constitutional right, you need a three-judge court to determine if there is jurisdiction.

QUESTION: If you decide it is a frivolous claim, you do.

MRS. BEASLEY: You probably would have to make that determination.

QUESTION: Well, if it isn't a frivolous claim, you need a three-judge court; and if the three-judge court turns you down, you can appeal directly here, can't you?

MRS. BEASLEY: That's right. And that's why the question is ultimately here, because this Court must determine the jurisidction of the court below. So that we say that all these arguments and all these statistics with

regard to the statute itself are irrelevant to the argument here; that they have nothing to do at all with the argument here, because Mary Doe and the other plaintiffs cannot establish the constitutional right in the beginning, which they say was abridged by the existence of the statute.

QUESTION: But you at least have got to argue whether or not that constitutional right exists?

MRS. BEASLEY: Right. Exactly. And that's why I think this Court, at least, has jurisdiction, Mr. Justice Rehnquist, to determine that a woman does not have a right secured by our Constitution to terminate the life of her unborn child arbitrarily. This Court can make that determination in this suit, despite all the other lack of jurisdiction of the court below with regard to operation of the statute, or the application of the statute, or all these other peripheral issues.

Now, the burden, as I said, is on the woman who is exerting this so-called right, to establish that she has it, that it is secured by our Constitution. But I submit that it is not, there is no such right.

And for several reasons that I think are very fundamental. Abortion, of course, is the killing of a human fetus or embryo. The victim of criminal abortion is the fetus, not the mother. The victim is the fetus.

So it's a crime, recognized by the State, against

the unborn child. And that was one reason why I brought to your attention that little booklet published by the State in 1922, in the Supplemental Authorities. It's called "In Loco Parentis", and it was published by the State Welfare Department, and it has to do with all of the statutes of the State and the decisions of the State protecting children.

And under the caption, "Laws Protecting Children" are: crimes against children, and that's where abortion is discussed. 1922.

QUESTION: I suppose when the State appropriates money to maintain a pre-natal clinic, this is under the State's broad parens patriae authority to take care of its people, is it not?

MRS. BEASLEY: Yes, Mr. Chief Justice, I think that's correct, and that's --

QUESTION: They're taking care of both the mother and the potential child?

MRS. BEASLEY: That is precisely one of the manifestations of the State's interest, not only in the mother but also in the unborn child.

QUESTION: But you wouldn't contend, would you, that the State would have authority to enact a statute or to sustain a statute that would forbid tonsillectomies, for example?

MRS. BEASLEY: Not at all, but there again the

great distinction is that there is not another entity, human entity, involved, which there is here. And that's the source of the protection here.

QUESTION: Well, but suppose the State pointed to the fact that sometimes people die in the process of having their tonsils removed, which they do, perhaps one out of very 200,000 or some such figure.

MRS. BEASLEY: Yes, the State --

QUESTION: And that on that ground they were going to forbid performing of tonsillectomies. Would you think the State could sustain that against the constitutional -- on a constitutional basis?

MRS. BEASLEY: I don't think a constitutional basis would be involved, but under the police power of the State to protect health and safety, it could proscribe tonsillectomies, at least so that it was related to health. Now, if it went -- it might be overbroad, because, as a matter of fact, all tonsillectomies may not be dangerous, and may be a health measure. But that has little to do with the purpose of the State in prohibiting abortion.

Because that would be a health measure, and despite what the Mary Doe and the other plaintiffs or appellants say here, and despite what the court said below, the purpose of this criminal abortion statute of Georgia is not health.

QUESTION: Well, it relates, does it not, in some

general way to what limitations the State may place on people, its people, does it not?

MRS. BEASLEY: Yes, it does, indeed. It's a very direct restriction on the performance of such operations. So --

QUESTION: Mrs. Beasley -- excuse me; go ahead.

MRS. BEASLEY: Go ahead, Mr. Justice Marshall.

QUESTION: I'm a little confused. You say that the State is interested in protecting the life of the fetus, and yet the State statute, under certain conditions, allows the death of the fetus.

MRS. BEASLEY: That's right. There is a balancing of the interests, which we have talked about so much.

Under the -- Mary Doe suggests that she has a right, hich emanates from --

QUESTION: Is there any other statute in Georgia which says under certain conditions you can kill somebody?

MRS. BEASLEY: Yes -- well, we used to have capital punishment statutes.

QUESTION: Well, is there any statute in Georgia that says that commission of three people can decide whether a man lives or dies?

MRS. BEASLEY: Not a commission of three people.

QUESTION: Well, is there any statute which says three doctors can decide whether a man lives or dies?

Obviously --

MRS. BEASLEY: Excuse me, not as to whether he lives or dies. But there is --

QUESTION: -- there is no such statute. But you can say, three doctors can decide as to whether what you claim is a living fetus, with the exact same rights as a grown person, can be killed.

MRS. BEASLEY: No, I'm not saying that. I'm not saying that. What I am saying is this: under our Constitution, obviously, as Mr. Justice Stewart said, a person that's born has all the protections that the Constitution has to offer. But there is a gray area where we don't know when life, as such, begins, or humanity, or personhood, or any other term by which you want to call it. Obviously life occurs before birth, because there's movement, and medicine recognizes that.

So let's not talk about life then, let's just say personhood, which of course is not a medical term at all.

QUESTION: Well, what is a fetus?

MRS. BEASLEY: There's a gray area, and that is the area in which we say the State has a right to determine, by its Legislature, how far it will go in protecting that, because it's a matter of public policy.

QUESTION: Is it a living being or not?

MRS. BEASLEY: Indeed it is a living being, and I

don't think anybody could dispute that.

QUESTION: And you have a right, with the permission of three doctors, to kill the, quote, "living being" end quote?

MRS. BEASLEY: Because the State also recognizes the competing interest of self-preservation that the mother has in extreme circumstances. The statute doesn't allow the -- the exceptions are not broad, the exceptions are very narrow. The health must be very seriously impaired.

QUESTION: I have great problem with the living being point. I think that's my problem, where it is. And do you have to go so far to sustain your position as to say that the fetus is a living being? Why don't you treat it as a fetus?

MRS. BEASLEY: I think that's a matter of terminology.

QUESTION: That's why I was distinguishing it here.

MRS. BEASLEY: Of course. Let's call it a fetus, then.

The State, it is our position, has a right in this gray area, where we can't say the particular moment at which the State can protect human beings or fetuses, or whatever area on the continuum of life that you want to talk about.

But there is a right, we think, that a living being has, which emanates from the Ninth Amendment itself. Because

those rights are retained by the people, under the Ninth Amendment. And --

QUESTION: Well, you can't give -- you can't recognize the Ninth Amendment for the fetus and not recognize the Ninth Amendment for the mother, can you?

MRS. BEASLEY: If you recognize both, then you simply will have to justify some -- find some common median way in order to determine the interest. That's what is really at issue here, the conflicting interest between the two.

But under the common law, and under natural law, according to Blackstone and Cobb, and we still rely on those despite what Professor Means may say; and I cite to the Court strongly the history of the common law, which was put out in 1865, the booklet which we cited in our first brief, the Storer and Heard book, describing the cases before any statute was enacted in England, where abortion was regarded as a crime. It was not a felony. You asked the question earlier, if it had been a felony. No, it was a misdemeanor.

But, regardless of whether it was a felony or a misdemeanor at common law, it was regarded as a misdemeanor in Georgia, and although there are not cases before the statute was enacted in 1865, the cases around that time, including the 1849 case of Morrow vs. Scott, speak of the unborn child as having any right which the State was able to

give it, whatever rights were protectable insofar as it was protectable.

QUESTION: Mrs. Beasley, I think, if my memory serves me correctly, the last time around I asked you why the situation as to incest was left out of the Georgia statute. Have you been able to trace that down at all?

MRS. BEASLEY: Yes, Mr. Justice Blackmun. I apologize for so late providing to the Court the legislative history, such as it is, in the North Carolina Population Center study on this statute.

But it indicates in there that the thought was that rape included incest. And, as a matter of fact, the statistics which are kept by the Georgia Department of Public Health, Maternal Health Section, classify incest separately from rape, and indicate that prior to the time the statute was emasculated by the court below abortions were being performed and were being reported and were not being prosecuted under the title "incest " as opposed to rape.

So that, as a matter of practice, it has included that.

QUESTION: The other question I have, while I have you interrupted: In your list of supplemental authorities, which you've submitted without particular explanation, are some, what I take it to be, proposed bills in Georgia which would change your current statute. Am I correct in that

impression?

MRS. BEASLEY: That's right. There were two.

QUESTION: Would you have some comment on those?

MRS. BEASLEY: Yes, sir. I thank you for asking about them.

I submitted those for this proposition, to show that even though the statute, as it was passed in 1968, there are still efforts being made to change it, and that, despite the fact that after the District Court changed the statute and really wrote its own statute, because it gave an entirely different purpose to the statute than the Legislature had, efforts were made and they were still knocked down. Those statutes were not passed because they were too liberal with respect to dealing with the fetus.

QUESTION: Is that supplemental statement in the form of a brief?

MRS. BEASLEY: No, it isn't. I moved very lately to file supplemental authorities, and I simply listed them. Because I felt that, as shown by the stack in front of you, Mr. Justice Douglas, there were so many briefs that it would be superfluous for me to try to submit another supplemental brief; so I simply listed the authorities so that I might be able to talk toyou about them in the argument.

QUESTION: Mrs. Beasley, supposing that the Georgia Legislature, on evidence presented before one of its

committees, were to determine that there had been, say, more than 50 percent fatalities in connection with open-heart surgery that had been performed in Georgia, and as a result of that the Legislature were to enact a law prohibiting open-heart surgery in the State of Georgia. On your theory, would that be a constitutional exercise of legislative power?

MRS. BEASLEY: It might be under a health measure, public policy to protect health. That's not what is involved here.

This is not to protect the health of the person who wants the operation, which is what you would have in the open-heart surgery. Legislation to protect the life or the health, and the police power comes in there, to protect the life of one who wants it, or the one whose doctor thinks they ought to have it.

But that's not the purpose of the Georgia abortion statute. It is not health related, or primarily health related. That is not its primary purpose, and I think that this study of the North Carolina Population Center, which, by the way, in the very preface to the study, says that the reason they were doing it was to assist those who might be trying to get more liberal abortion legislation. So that the study was not done for us or from our standpoint at all, but it shows, underlying all of the consideration that was given in the passage of this bill in 1968, which was proposed

actually in 1967, and was carried over, and there were public hearings, and so on, that underlying assumption and base and foundation was that we are not going to destroy fetal life except in very unusual and exceptional, extreme circumstances.

The basic proposition is we don't destroy it. And I submit that it's up to Mary Doe to show that there is -- she has to have the burden; she has the burden of showing what the justification is, because it is a natural right under our order of things, emanating from the Ninth Amendment, to be let alone. And that, we say, is the right which the fetus has: the right to be let alone and not to be stopped in its growth or its birth at a time which would be premature.

And despite the fact that perhaps, now as we look at all the old authorities, perhaps when the statutes were first passed, in our State in 1876, or 1859 in Texas, perhaps then the original purpose was to protect the health of the woman from aseptic surgery. But purposes evolve and change, things are not static. Our Constitution is not static.

And we now have, as shown by the study which was done by North Carolina, and by looking at the statute itself -- we don't even have to go to the North Carolina study -- but looking at the statute itself, shows that the purpose has evolved to protect this fetus. And, as an illustration of that, let me point to the very procedure which is being

attacked here, the procedure involves four doctors or six -- there is some question about whether the hospital committee can include the two consultants; but let's say six. They are not required by the statute to determine whether the method that's used for the abortion is safe or not, or whether the woman is too far advanced to undergo abortion. All they are required to do under this statute is to determine whether the abortion should be performed, whether it comes within one of the exceptions. That's all.

They don't make a medical judgment about the operation itself. What they're concerned about, is this an instance, is this an extreme instance in which we should allow the fetus to be destroyed. That's all.

And that shows that the purpose is the fetus's protection.

Look also at the exceptions, the three exceptions. If it were that the purpose of the exceptions was any time that it was for the woman's desire or want, it would deal only with her own health; but the exceptions are only when extreme circumstances of self-preservation or self-defense, as far as she's concerned, not the things that have to do with her health. So I think that the statute itself shows that the underlying purpose is the protection of fetal life.

Also, I think that very clearly the part that was struck out by the court below, with respect to the action,

the statutory action to be brought in a superior court for the child or the fetus's underlying constitutional or other rights. That shows clearly that the legislative -- the Legislature's purpose was to protect the fetus from being destroyed.

MR. CHIEF JUSTICE BURGER: We'll terminate until after lunch, Mrs. Beasley.

MRS. BEASLEY: Thank you.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mrs. Beasley, you may continue. You have seven minutes left.

MRS. BEASLEY: I'd like to point out, at this juncture again, with respect to jurisdiction, that the right which Mary Doe is asserting here as being protected by the Constitution is really not the right that she asserts in her brief, and I say that for this reason: She doesn't disagree with the court below and the statute that it makes. Although it found the basis of the statute, the purpose of the statute to be health oriented, it said the State has some interest in protecting fetal life.

The State does have an interest which it can assert by statute, and therefore, the District Court-made statute recognized from the very beginning that there was something protectable by the State prior to birth.

So I say that Mary Doe is beat from the beginning, because she doesn't come to this Court and say that the District Court's statute is overbroad, but she only says it's vague. So that what we have here is not a question as to whether a woman has a constitutional right to abort any pregnancy, but whether she has them in the terms that the District Court outlined, that is, one that is not necessary in the best clinical judgment of the physician.

Now, I say that supports the State's position, because that's a recognition bythe court below that there is protectable fetal life, and that it becomes a matter of degree how far the State can go in protecting it. And the District Court below said that under the Constitution the State can only protect it if it isn't necessary to take the fetal life for the health of the mother, whereas the State Legislature said, no, it's more protectable than that, and we're only going to allow abortions except in the three unusual extreme circumstances which we set out.

So the District Court was not making a judgment based on constitutional law, but a value judgment once it had already accepted the proposition that there was protectable human life involved in the destruction of an unborn human child.

So --

QUESTION: I take it you'd have no difficulty, from the position you've indicated, that you'd have no difficulty in sustaining a statute if the Legislature proscribed one set of standards for the first trimester or the first 140 days, and a more rigorous standard after that period?

MRS. BEASLEY: That's right. I think it is a matter of degree, I think it's a value judgment that is best left in the hands of the Legislature to determine in this gray area of prior to birth, what human rights are there prior to

birth.

And I say this also for the reason that, under our Constitution, we've talked a lot about the term "person", but the term "person" is not defined in the Constitution. And as we said earlier, the Constitution, of course, is a living document. And today we know more, medically and under science, with respect to personhood and what occurs prior to birth, and what the movement is and at what stage and so on, what a person is.

I think the State has an interest in protecting, as far as it can, that life. And that's illustrated by this criminal abortion law, statute, that Georgia has in the context of its many statutes which protect fetal life in various forms, and the decisions of its courts over the years, which say, time after time after time, beginning with at least that 1849 case: We're going to consider an unborn child in ventre simare as being in rerum natura. That is, in the secular world. Where it's in its own interest to do so.

So that it's part of Georgia's whole public policy to protect the fetal life, which it is seeking to protect in this instance.

Now, there is one other basis, I think, or at least two: of course it wants to protect the health of the mother, and that's why it allows these exceptions, at least the exception for her own health and her own life, and the

rape exception, it protects her mental health. But there is also the basis that the State wants to protect not only health, as I said, primarily it was for the protection of the fetal life and also for the general welfare, to protect the public ethic, as Mr. Justice Blackmun suggested, the Hippocratic oath.

The State has an obligation to uphold the general welfare, which includes how government protects the individuals that live in it. And I would suggest that this is an emanation of that, or manifestation of that obligation on government, because the natural right which an unborn fetus has to continued existence without being disturbed, its right to be let alone, which is recognized in natural law, and has been recognized in the common law under Blackstone and Cobb, and those authorities, which were accepted, by the way, by the Georgia courts. They didn't have all the cases, necessarily, from England, but they relied on Blackstone and Cobb,as shown in the decision which they rendered.

So it was regarded as a protectable right at the very beginning of our State's existence.

I think this is a particularly critical area where, what Mr. Justice Powell said in Chadwick vs. Tampa recently, it's very important. He said: That our federal system warns of converting desirable practices into constitutional commandments.

And I think that's what is being asked for here. I think that's what Mary Doe is asking for, for her desire, or a desirable practice, getting into all the health significances of infant mortality or maternal mortality; that may be desirable, but let's not turn it into a constitutional commandment, because it isn't there.

If there's anything emanating from the Ninth Amendment, it's the fetus's right to be left alone, and his own self-preservation which is the ultimate responsibility of government to protect.

QUESTION: Are you saying that even if the fetus is not -- whether the fetus is or is not a person under the Fourteenth Amendment, that there is a right of the fetus to be let alone, and it must be balanced with all the other factors involved?

MRS. BEASLEY: Yes, indeed. I think there is that right. Plus other rights, or other interests which the State has, to see that it is let alone from undue destruction.

QUESTION: You don't suggest that the potential mother, the woman, is without rights?

MRS. BEASLEY: Not at all. Not at all. Of course she has rights, too, to her own privacy, but here another entity becomes involved.

Thank you.

QUESTION: Mrs. Beasley, I take it that the State,

in making its determination as to what sort of a statute it will enact and what rights it will support, need not choose only from those guaranteed by the federal Constitution?

MRS. BEASLEY: Oh, that is correct, because it has powers of -- under its police powers, to pass statutes to protect other interests, which aren't necessarily constitutional rights. I don't think you necessarily are balancing two constitutional rights here at all. And certainly, despite what Mrs. Weddington said, there are constitutional rights abridged by compelling State interests which are other than the protection of other constitutional rights in many regards, public welfare type of things, or health.

It may not be a constitutional right to health in that instance.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Hames, you have about three minutes remaining.

REBUTTAL ARGUMENT OF MRES. MARGIE PITTS HAMES,
ON BEHALF OF THE APPELLANTS

MRS. HAMES: Thank you.

I wanted to mention some of the things that came up in the argument, the Hippocratic oath, I believe, was mentioned. I have had some --

QUESTION: In that connection, Mrs. Hames, I don't

recall that I found it mentioned in your brief, either. And perhaps you'll tell me why it wasn't even footnoted.

MRS. HAMES: I do not consider it medically relevant, and I understand that medical schools are not now using it, and that the oath also forbids the treatment of kidney stones, and so that is an example of its relevance to today.

QUESTION: Where do you get the authority to say that medical schools are not now using it?

MRS. HAMES: Based on personal experience within the medical schools, in lectures on ethics in abortion.

QUESTION: Would it surprise you if some are using it?

MRS. HAMES: I don't doubt that some might still be using it, but I think it was an oath that was of its time, and that the prohibition against treatment for kidney stones indicates that also.

QUESTION: Well, maybe the answer to that is that kidney stone treatment is certainly different than it was four hundred years B.C.

But you must concede that it goes directly to the point, doesn't it?

"I will give no deadly medicine to anyone that asks" -- it ties it in with suicide -- "nor suggest any such counsel, and in like manner I will not give to a woman a pessary to produce abortion."

Or, in another translation: "Nor will I make a suggestion to this effect, similarly I will not give to a woman an abortive remedy."

Now, this is the definite statement of medical ethics for centuries, and yet in neither brief, on either side of the case, is there any reference to it.

MRS. HAMES: I believe the brief filed on behalf of the OB-GYN doctors does go into it, I'm not sure. It's a very extensive brief. But I think that your comments indicate the lack of relevance to it today, too, because the treatment for abortion is quite different today than what it was when that was written. Now it's about a fifteen-minute procedure, with the suction device. So that the treatment -- if you say that the treatment for kidney stones is different today, then I would answer that the treatment for abortion is also different today.

QUESTION: But of course the oath was formulated at a time when abortion was prevalent and widely practiced, historically.

MRS. HAMES: It was not a very safe procedure then, either.

Further, to just kind of summarize some of the other things that have come up, the State, in its supplemental authorities, did refer to this legislative study, and I would like to point out some information in there. I think that

that study shows that it's the interest of the woman and not the fetus involved.

I would also like to point out information in there that's not contained anywhere else, and that is that there were about 60 or 70 abortions performed in Georgia during the German measles epidemic in '64 and '65, and that did place a lot of doctors in jeopardy. And I think that they are now compelling reasons, be they socio or economic reasons, just as valid for performing an abortion.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Hames.

Thank you, Mrs. Beasley.

The case is submitted.

[Whereupon, at 1:14 o'clock, p.m., the argument in the above-entitled matter was concluded, and the case was submitted.]