Transcript of First Oral Argument in
***Doe v. Bolton*, 410 U.S. 179 (1973)**
U.S. Supreme Court
December 13, 1971

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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 Blackmun, Associate Justice

Appearances:
Margie Pitts Hames, Atlanta, GA, for Appellants
Dorothy Beasley, Atlanta, GA, for Appellees.

CHIEF JUSTICE BURGER: We will hear arguments next in number 40, Mary Doe against Bolton.

Mrs. Hames, you may proceed whenever you are ready.

Oral Argument of Margie Pitts Hames:

Mr. Chief Justice, and may it please the Court.

This is an appeal from the decision of the Northern District of Georgia, also a three-judge court, which declared portions of the Georgia Abortion Statute unconstitutional. It upheld certain procedural requirement and refused to issue an injunction in support of the declaratory judgment.

The parties here include: Mary Doe, a pregnant woman, a married pregnant woman, doctors, nurses, ministers, social workers and family planning and abortion counseling organizations.

They filed this action as a class action, seeking to represent members of their various classes.

The District Court below found that the right of privacy included the right to terminate an unwanted pregnancy, and that the statute which limited the reasons therefore was unduly restricted and overly broad.

The District Court found that Mary Doe and her class was entitled to declaratory relief.

The physicians, even though they were found to have standing, and other parties, were said to have insufficient collision of interests.

This question we brought to this Court also.

This case stands on jurisdictional grounds similar to the Roe versus Wade case, which has just been argued, except that no plaintiff in this case has pending criminal prosecutions outstanding against them.

It is our position that the jurisdiction of this Court is much like the case of Wisconsin versus Constantineau, where, in that case –-the statute in that case operated against a third party's rights --

Q: Excuse me. These are class actions, too?

MRS. HAMES: Yes, Your Honor, they are.

The statute in Wisconsin versus Constantineau operated against a third party's rights, and I'm sure you will recall that was the posting of the alcoholic case. The criminal penalty there ran against the bartender who sold alcoholic beverages, so that the woman -- the posted party would never have an opportunity to assert her rights -- it was a woman in the case -- in the defense of the criminal action against the bartender.

Here we have a like situation of the third party's rights, Mary Doe, who would never have an opportunity, we say, adequately to assert her constitutional rights in the defense of the doctor's criminal prosecution.

Georgia, like Texas, it is not a crime for a woman to submit to an abortion or to abort herself.

Q: Could she be guilty of a conspiracy to perform an abortion?

MRS. HAMES: I cannot cite you a case expressly but it is my recollection that the Georgia courts have held that she would not be so guilty. Her husband or her paramour could –

Q: Might be.

Mrs .Hames: -- have been charged; but that, to my recollection, there has not been a charge brought against a woman as a conspirator.

Q: Mrs. Hames, the hospital here was not named as a defendant, was it?

MRS. HAMES: No, Your Honor, it was not.

Q: Is there a reason for that?

MRS. HAMES: The hospital was not thought to be an indispensable party, since the hospital abortion committee was a statutory committee, created by the statute, of the abortion statute. It was our opinion that under the Georgia law, dealing with the Attorney General and his powers, which gave him powers over all boards, committees, and commissions, as to matters of law, that this was sufficient to bring that interest into operation.

Also, the abortion committee is a revolving committee and it would have involved various doctors from time to time. Most hospitals in Georgia have their various staff members sit on the abortion committee, so that it changes from month to month, or from day to day, even.

So that it was felt that bringing the Attorney General, the State Attorney General in as a defendant in the case would be sufficient to reach this State statutory abortion committee, in the exercise of the statutory authority given to them.

Mary Doe was a 22-year-old woman; she was married, and pregnant at the time that this action was filed. Her reasons for abortion were several; she had three previous children, two of whom had been taken from her custody by State authorities because of her inability to care for them; and the third she had placed with adoptive parents at birth.

She applied to the public hospital for an abortion, where she was eligible for free medical care. Her application there was denied. She later applied through a private physician, to a private hospital abortion committee, where her abortion application was approved.

Her -- she did not obtain the abortion, however, because she did not have the cash to deposit and pay her hospital bill in advance.

The Georgia statute is --

Q: Is there a real Mary Doe or is this just --?

MRS. HAMES: Yes, Your Honor there is. And filed in the original files, which has been sent up to this Court, is a sealed affidavit which is signed in Mary Doe's real name. It was signed and filed with the court originally in the proceedings. She was present at the hearing in this case, and we offered to have her testify and disclose her identity and the court did not deem that necessary.

We filed in the fictitious name to protect her identity and avoid embarrassment. But that original affidavit is on file in this Court.

CHIEF JUSTICE BURGER: I notice in the record that the State has removed her other three children, or at least two of them, from her custody because she's unable to care for them. Was that over her objections or with her consent, or just no opposition?

MRS. HAMES: It was not with her consent, Your Honor, as I recall; it was for the protection of her children.

CHIEF JUSTICE BURGER: But removed under the broad welfare provision?

MRS. HAMES: Yes, Your Honor. Yes. Mr. Chief Justice.

Our major contention here, our appeal here is directed primarily at the procedural requirements left standing by the District Court below.

Our statute does provide that rape is grounds for abortion; also 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 declared unconstitutional, finding that there were other good reasons, good and sufficient reasons for an abortion.

The requirements that are left standing are the residency requirement, that the woman's doctor have at least two consultants, who concur in his opinion, and approval by a hospital abortion committee, or at least three more doctors. And the accredited, licensed hospital provision; this accreditation requirement is by the Joint Commission on Hospital Accreditation of Chicago, Illinois, Corporation, which is a private organization.

There were other many reporting requirements, and miscellaneous provisions left in the statute; but I wish to direct the Court's attention to these, the hospital abortion committee, the accreditation and residency requirement.

It is the appellants' contention that it's not necessary to debate the fetal life problem in this case, because, as the District Court below recognized, this statute is aimed at protecting the health of women. Judge Smith, in delivering the opinion of the court, found that the whole thrust of the present Georgia statute is to treat the problem as a medical one.

The only compelling State interest, however, that has been asserted by the State, is the interest in preserving fetal life. And in taking this approach to the statute, the State finds itself in a very inconsistent position, we feel; that is, of claiming that fetuses, from the moment of conception have the right to develop

and be born, and yet, having abandoned such right as to those fetuses, the product of rape, which may likely be malformed, or those which may endanger the life or health of the woman.

Further, the State is in the inconsistent position of financing a family planning program, which daily distributes -- excuse me.

Q: Under this statute, the fetus that's a product of rape, may that be aborted?

MRS. HAMES: Yes, Your Honor.

Q: Without more?

MRS. HAMES: I'm sorry?

Q: Without more, whether or not it's involving the health of the mother?

MRS. HAMES: That's correct. Rape both forcible and statutory; which is girls 13 years and younger in Georgia.

Q: That's by specific provision, I gather?

MRS. HAMES: Yes, that's one of the exceptions. Our law is modeled after the Model Penal Code, American Law Institute version.

The further inconsistency involves the financing of the family planning program, which distributes, through the Department of Public Health, the intra-uterine contraceptive device, which, substantial medical opinion shows, destroys the product of conception, or prevents implantation of the fertilized egg or embryo.

We feel that if the State has such an unfettered interest in fetal life, that these are very inconsistent positions.

Thus, it is our contention that the statute must be viewed as a health-of–the-woman directed-purpose statute.

I would point out that abortion is not a new medical procedure. Of course we've heard a lot about it in the last few years. But it's one that's been extensively performed throughout the history of our country, and of course illegally.

Because of the abortion statutes, the great majority of abortions have been performed by unskilled persons, those least equipped to take care of the health problems. Doctors, because it is a crime, have not been performing abortions.

Abortion statutes however, had not stopped the abortions. They have not served their purpose, or they have not -- are not reaching the purpose of protecting fetal life. If that is a valid purpose.

To assume that these statutes do protect fetal life is to ignore the actual facts. In our brief and in the many amici briefs filed in this case, there is extensive citation to statistics about illegal abortions, and the admission of patients for aseptic abortions, that is the incomplete abortions into our hospitals, which show that illegal abortions are being performed.

What we're actually talking about is getting abortion out of the illegal arena into the health service arena, and this is the purpose of this litigation.

I would point out that illegal abortion and the complications therefrom is the largest single cause of maternal mortality in the United States.

Therefore, abortion statutes have resulted in one of our nation's largest health problems.

It is our contention that the procedural requirements left standing by the court below has virtually manipulated out of existence the right to terminate an unwanted pregnancy, as recognized by the court.

The decision below characterizes the decision to terminate an unwanted pregnancy as a personal dash medical decision. In commenting about the procedural requirements, the hospital abortion committee, the limitation to the accredited hospital, the court said that the State has an interest in the quality of healthcare, to be administered to its citizens; but this is not to imply that the present procedures are the best means of control.

The present seems to be unnecessarily cumbersome and possibly a due process hazard. This was the observation of the court in a footnote. And it is our contention that these procedures are so cumbersome, costly, and time consuming as to have denied Mary Doe and members of her class, and doctors and members of their class, of their various rights.

Of course, there is an inherent time factor in pregnancy, and this must be a factor considered.

First trimester abortions are safer than late abortions. Therefore, it is imperative that the right to terminate an unwanted pregnancy be efficiently exercised.

Mortality and complications for late abortions are three times greater, after 12 weeks; and it is only about the sixth or the eighth week that pregnancy tests actually become accurate, or the degree of accuracy is such that can reasonably predict whether one is pregnant or not.

So that we actually have about 12 weeks --

Q: Does the record disclose that?

MRS. HAMES: Does the record…I'm sorry?

Q: Does the record disclose that it is medically established that pregnancy tests are not very accurate until after six weeks?

MRS. HAMES: No, Your Honor, we were not permitted to introduce our evidence at the hearing, that was -- we have many witnesses to testify about the various aspects of abortion and pregnancy. I'm sure that this Court can take judicial notice on many medical treatises which would disclose that this is fact.

Q: Well, I am asking if it is an established medical fact?

MRS. HAMES: Yes, it is my recollection, from my understanding that this is accepted procedure, that a pregnancy is not easily detectable until after the sixth week, and accuracy is about at the eighth week.

The requirement that a physician have two consultants and then present the case to the abortion committee is unsuited, an unsuited procedure for medical treatment.

Q: Yet, hasn't it not been followed for years in accredited hospitals?

MRS. HAMES: There are many committees in hospitals; they have tissue committees; and they have other kinds of committees. But these do not make decisions about constitutional right, and whether or not it will be exercised. And the hospital abortion committee, being a statutory committee is the arm of the state government, we contend, and would be different from a mere tissue committee through which it is --

Q: As I understood, you were arguing this as being unduly cumbersome; and my response is, Is it not the fact that this has been a routine in accredited hospitals all over this country for many, many years?

MRS. HAMES: It is my understanding that the accreditation standards of the Joint Commission do not require appointment of abortion or other committees. This is a practice that has developed and grown up; and I think it grew up prior to the American Law Institute, specifically as to abortion, And it was to relieve doctors from their responsibility in making this decisions solely. And they were afraid of assuming that responsibility because of the criminal sanctions imposed by law.

Therefore, they had their hospitals constitute abortion committees, who would help share the responsibility for such a decision.

The operation of committees of a hospital, of course, would be an internal matter for hospitals, and it might be possible that a committee -- that a hospital could continue to have a committee to govern abortions in that hospital.

However, it's our contention that the right to have – to terminate a pregnancy should not be controlled by a statutory committee from which there is no appeal, where there is no opportunity for a hearing; the woman is never seen by the members of the committee, she is never told why her abortion was denied, and her doctor, many times, is not even permitted to come and present her case.

This committee, we feel, is not a vehicle which could properly determine this constitutional right. We feel that it is, as the court said below, a medical dash personal decision; that many factors in deciding whether to have an abortion are personal. Like your desire to have only two children, or your family size; your economic status is a matter of personal knowledge.

This is not a matter that can be effectively presented to a committee; a doctor could not possibly present all these matters to a hospital abortion committee. And we feel that this committee is just an improper vehicle for determining the right to terminate an unwanted pregnancy.

Additionally, there is the problem of the doctor, and he feels that his patient should have an abortion, she wants an abortion; but he must submit his decision not only to concurrence of two or more consultants, but to the hospital abortion committee.

These are his competitors, his professional competitors; they are doctors in his community who decide what he will do in his medical practice. It's the position of the doctors that this infringes their right to practice medicine in accordance with their best medical judgment. It permits the committee to substitute their judgment, their religious or personal views with those of his and the decision reached between himself and his patient.

Q: Well, that argument would be true about the maintenance of professional standards generally in the medical profession, would it not?
Disciplinary proceedings and everything else. Presumably those who pass upon malpractice or the lack of professional competence or ethical judgment on the part of doctors are his competitors.

MRS. HAMES: That's true; but I would think that he has some voice in arriving at the standards of his profession, and that the application of his professional standards would not be the same as application of his -- of the abortion committee's own personal views.

I think that these are matters that are better left to the profession.

I would think that the medical profession can develop its standards. The American College of Obstetricians and Gynecologists has taken the policy that where an abortion is requested by a woman, and there are no contra-medical indications, then the abortion will be performed without even the necessity of a consultant. Where it is recommended by the doctor, then the American College recommends that the doctor have a consultant on that decision.

I think that the profession can develop standards, and that this is where it should be controlled, rather than by a hospital abortion committee sitting in a quasi-judicial situation.

I would point out that the hospital accreditation requirement limits abortions in Georgia, and denies many rural women of access to abortion services; 105 of Georgia's counties have no accredited hospital, so that those women who are dependent upon their county hospital for free medical service are denied, by virtue of this hospital accreditation requirement, their --

Q: How many of those counties have no hospitals at all?

MRS. HAMES: There are 284 hospitals, and I have not made a comparison to see. Abortions have only been performed in 22 counties in Georgia.

Q: Well, isn't it possible that some of these counties to which you refer do not have hospitals at all?

MRS. HAMES: Yes, it is possible, Your Honor, that some 8 or 10 of the smaller, less populated hospital -- counties could have that situation.

Q: Well, if that's all there are in Georgia, with the large number of counties you have, I think you have more counties than any other state, don't you?

MRS. HAMES: I believe we do.

Q: You're far better developed than many other states. I just question your general statement about denial of relief. --

MRS. HAMES: One further thing –

Q:– generally as to counties.

MRS. HAMES: Excuse me. –as to hospitals. The New York experience has shown that abortions in clinics is a relatively safe -- is a safe procedure. There the abortions, early abortions, are not required to be performed in hospitals. And

if we had this requirement or did not have the limitation to accreditted hospitals in Georgia, then we could have abortion clinics in the more rural areas.

Q: This Georgia legislation is relatively recent, isn't it?

MRS. HAMES: It was adopted in 1968, April of 1968.

Q: May I be clear as to the relief that you're asking: You got a declaratory judgment, declaring that some provisions of the Georgia statute are unconstitutional?

MRS. HAMES: That's correct.

Q: And you're asking a declaratory judgment, declaring the entire statute unconstitutional?

MRS. HAMES: Yes, sir.

Q: And you want us to do that?

MRS. HAMES: Yes, Your Honor.

Q: And then you want us to order and issue an injunction against all future enforcement statutes, is that it?

MRS. HAMES: That's correct. Or other application of the law, meaning by abortion committees of hospitals.

Q: And, as I understand it, you are arguing the constitutional rights of Mary Doe and the physicians here?

MRS. HAMES: That's correct.

Q: Am I correct in not detecting any constitutional argument on behalf of your other plaintiffs, your registered nurses, your counselors and the rest?

MRS. HAMES: As to the nurses, we would say that they still have a controversy or a need for relief, because they too are not permitted to practice their profession. Of course, they would not be independently performing abortions but would be assisting doctors. So that there is.

As to the ministers and other counselors, social workers who wish to counsel abortions, based -- under the decision below which said that abortions are obtainable for any reason, they would not now fear the prosecution under the

conspiracy statutes or the aiding and abetting statutes for counseling abortions. There's no real relief needed here. We --

Q: Well, relief may be needed, but are you making a constitutional argument on behalf of the nurses, counselors, and ministers, and what-have-you?

MRS. HAMES: On behalf of the nurses, yes, Your Honor. And as for the counselors, it is our contention that they had a sufficient collision of interests for the declaratory relief to be granted as to them.

Q: As a –well, do I detect that you're not making a constitutional argument with respect to them? If it's only a need for declaratory relief, isn't that a state law matter?

MRS. HAMES: We occupy a position similar to Texas, as to declaratory relief. We have a statute in Georgia which says that equity will not interfere in the administration of criminal laws, or of -- yes, criminal laws. This has recently been construed, in 1968, to prohibit a declaratory judgment in equitable relief as to a criminal statute.

So that there is no alternative to go into state court for declaratory relief.

And this is the only forum in which we contend that plaintiffs could assert their rights.

Q: Well, I still don't know whether you're making a constitutional argument.

MRS. HAMES: Yes, we are making a constitutional argument for everyone in this --

Q: With respect to all the plaintiffs?

MRS. HAMES: With respect to -- including the First Amendment argument which was made below as to counseling abortions.

Q: I didn't get that from your brief, but I'm glad to be straightened out.

MRS. HAMES: Thank you, Your Honor.

Q: Mrs. Hames, just before you sit down, perhaps you made this clear, but it hasn't been made clear to me. You're appealing here because, while you won at least a partial victory by way of a declaratory judgment, you were denied an injunction and that is what, technically, is giving you a right to appeal directly to this Court, the denial of the injunction. You're arguing now that you should have -- wholly had a complete victory on the merits, that the entire statute should have been stricken. And also that an injunction should have issued.

And I am asking you, in that connection, that second connection, whether the Georgia authorities had disregarded or manifested an intent to disregard the Federal District Court's declaratory judgment of the invalidity of the substantive part of this statute?

MRS. HAMES: No, Mr. Justice, there has been no manifestation on --

Q: You were here, I think, in the argument of the previous case –

MRS. HAMES: yes.

Q: -- where that was true, apparently, in Texas?

MRS. HAMES: Yes, I think the need for injunctive relief arises from the fact that out of the 24 appellate decisions on abortion in Georgia, 13 of those have involved doctors. So that there -- we have a history of prosecution of doctors in Georgia.

Additionally, the law is continued to be enforced, and abortions are being denied, for unknown reasons, by the hospital abortion committee. That presents a very real need for injunctive relief there.

Q: Do I understand you correctly that no hospital abortion committee has said, we're denying this because we're not going to follow the District Court's judgment in this case?

MRS. HAMES: We don't know why they're denying the abortions. They are not required to disclose, and they do not disclose.

Q: And you said of 24 appellate decisions, 13 involve doctors?

MRS. HAMES: Yes, Your Honor.

Q: What did the other 13 involve?

MRS. HAMES: Contractors.

Q: The other 11, I mean.

MRS. HAMES: Yes. plumbers, abortionists. Illegal abortionists.

Q: Non-physicians, you mean?

MRS. HAMES: Yes, non-physicians. Yes.

Q: I see. Thank you.

MRS. HAMES: Thank you.

MR. CHIEF JUSTICE BURGER: 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.

The very nut of the argument before this Court and the issue facing this Court is the value which is to be placed on fetal life.

The State, in this case, takes the position that fetal life is to be protected, that it is a protectable interest.

Now, the question is whether there should be no value placed on it, so that a woman may, in her own decision, and with her own doctor, determine without any intervention by the state, that she may abort a pregnancy after she has conceived and is carrying a live, human fetus.

Or, whether, on the other hand, the state itself may protect the interests of that fetus in any regard.

The court below determined that the state's interest -- the state was attempting to go too far in protecting fetal life, but that it could protect it to some degree because it could prohibit those abortions which were not necessary in the best clinical judgment of the physician, taking into consideration not only medical factors but really everything involved in the particular case. The woman's economic position, her family position, and so on.

But at any rate, the court did indicate that the state had an interest in protecting fetal life, at least to that extent.

Now, if the court of course had said, well, you can have an abortion in any event, whether it's necessary or not, then, of course, it would be consistent with the argument that's made by the appellant.

However, they said the state does have an opportunity to control those abortions which are not necessary. They may prohibit them, period.

I think a great mistake has been made by that court, and by appellants, in saying that the purpose of the statute is single, that is, that it is only a health measure.

In the first place, it's in the criminal code.

As a separate bill, it was introduced to amend a part of the criminal code.

The original bill, or the original statute, in 1876, was a criminal action.

And it speaks of the "unborn child." It doesn't speak of a "thing" or an "organism," but it speaks of protecting the unborn child. And that is at least one of the interests of the State in this statute.

I submit that there are three, if you read the whole statute in its entirety.

Number one, and the underlying reason, is the protection of fetal life from wanton or arbitrary destruction simply upon the convenience or the desire of the woman who is bearing it.

Secondly, of course, the state is interested in protecting women who are going to undergo a very serious procedure at any stage, and that is the abortion procedure. And that, of course, is indicated by the very serious procedure that's set out, by not only having her own physician think that she could have one, but in getting consultants and also approval by the hospital abortion committee, and requiring it be done in a hospital. Which, by the way, has certainly been the position of the American Medical Association in the House of Delegates in 1967, which was just one year prior to the time this statute was enacted, and has, in my understanding at least, been in the position of the American College of Obstetricians and Gynecologists in their standards.

And in their latest standard with regard to abortion, as I read it, and of course this is not before the Court. And I just make an aside for a moment to say that that's part of the trouble with this case: it's a facial attack on the constitutionality of the statute. And all these statistics and what the doctors think on one side or on the other, and whether abortions are safer than childbirth, and so on, are really not before the Court because they were not introduced into evidence in the court below.

So they are not part of the record.

Now, certainly, the appellants tried to present evidence, and in the only hearing that was held before the lower court, which hearing lasted about two hours at the most, there was only argument, but both sides came prepared to present evidence.

And of course in order to attack the constitutionality as to its effect or its operation in Georgia or its applicability, I submit that we would need a fuller record and that if there is an attack on the face of the statute, it cannot be

supported without looking at these further facts, unless you can say that the State has no interest whatsoever in protecting fetal life.

And I think that the interest which the fetus has, as a human fetus, in this instance becomes broader as time goes on.

I think the State has a greater obligation to protect that fetal life today than it did in 1876.

And for this reason, it's more protectable now than it ever was before.

There are more methods now that can be used to protect it, including blood transfusions and surgery while it's still in the womb.

Now, this, I think, has been brought to the Court's attention in some of the briefs that have been filed by the physicians. But, at any rate, there are more possible ways now -- for example, the very growth of the science of fetology, which is, of course, the treatment of the fetus before it's born.

So, its development, it has been created, and its development up to the period of birth is such now that it can be protected by the State, and so I think there is a greater duty upon the State to do so.

Now, the question which I think comes here with regard to these exceptions is a balancing of competing interests. The state certainly takes no position that the woman has a constitutional right to abortion.

We have not been shown where that right emanates from. If it emanates from the considerations which were given in the Griswold case, I think it's erroneous, because in that case, there was not the introduction of another entity. A person has a right to be let alone, certainly; but not when another person is involved, or another human entity is involved.

The same thing with the marriage relationship. Here a third entity is involved, and the state says you may not indiscriminately dispose of or discontinue the life of that third entity except in very special circumstances.

Now, this is where we get to the competing interest and the balancing of the interests, which, by the way, I think was the statement in recognition that former Mr. Justice Clark made in his law review article about the state being in position to balance competing interests. Obviously, you have a fetus growing in the woman on one side and the woman says she doesn't want it, you've got a clash of interests there.

Now, the state has taken the position, well we're not going to prohibit all abortions, because we understand that there are circumstances in which a woman should be able to destroy that fetus, because her interest is superior.

And there are three broad reasons now that are given in our statute, of course, which were struck out by the court below, so that we can't here really argue those, although we attempted to bring an appeal here, which was denied for lack of jurisdiction; and our appeal now is awaiting its further pursuit in the Fifth Circuit.

Q: Well, Mrs. Beasley, I don't see why you can't argue that here. Your position is that the court was right in not issuing an injunction, and you can support that position by any argument you want. You are the appellee, you're not the appellant.

MRS. BEASLEY: Thank you very much.

Underlying the exceptions, the reason for the exceptions in the statute, is the broad principle of self-preservation.

We recognize that a human being has the right ultimately of self-defense, and I think that these exceptions are manifestations of that.

We allow a woman to abort a fetus, if it is a product of rape.

Now that has been construed in our state to also include incest.

This is the product of course in that situation of an unwarranted, uninvited attack on her.

And to require her to bear that child is almost a punishment; or at least she would often regard it as a punishment. So here she can defend herself from that fetus by destroying it.

Secondly, as far as the fetus which is gravely malformed and will be permanently malformed, or deficient, the state recognizes, I think, a very practical exception because it recognizes that in most cases, she is the one who is going to have to raise that child, and the state is not now in the position where it can automatically take in all of these children. And of course it would be a great deal of heartbreak to her, and so it would involve her own well-being, and the state says, in these circumstances, science is not enough developed so that we can correct these deformities. The state can't help enough in these circumstances, and therefore we regard it as an exception and allow you to defend yourself against the circumstance which would arise if you had to bear and keep this child.

The third one, of course, is the preservation of her own life or her own health; And of course it has been construed -- not judicially but as a matter of practice -- that health here includes mental health.

Now --

Q: Did you say that the first one you mentioned, which is the third one, I think, in the statute -- pregnancy resulting from forcible or statutory rape -- also includes -- by construction includes pregnancy resulting from incest?

MRS. BEASLEY: Yes, I did. And I say this only from an observation of the reports that have been collected by the Georgia Department Public Health, to whom all abortions, of course, are reported.

That, again, is not in the record because there was no evidence presented. However, particularly since the period of the court decision, the reasons that are reported in by the physicians that are performing abortions have been expanded, so that not only have you got rape and incest as separate, and not only do you have for mental problems or physical problems that are maternal, you also have economic and social now being given as a separate category and reason.

So that brings me to the point that an injunction is not needed also.

Q: Yes, but, incidentally, I gather no court below said that that's the correct interpretation of this point?

MRS. BEASLEY: That's right. But no one has brought the matter to the attention of the Georgia Courts. And I would dispute --

Q: Well, you say this has happened since this court decision though, didn't you? That's the -- so it's the effect of the decision, is it not?

MRS. BEASLEY: As far as the social and economic --

Q: Yes.

MRS. BEASLEY: – is concerned. I think your question as to the rape or incest as suggested before, I am not certain of that but I think it would, because the court decision would make no distinction or voiding it , necessarily, in that regard.

Q: Well, the statute does not mention incest.

MRS. BEASLEY: That is correct but I --

Q: And it clearly does not mention economic or social conditions –-

MRS. BEASLEY: Clearly.

Q: – and now, if abortions are taking place, based upon those extra-statutory reasons, I would suppose that this has begun to happen since this case was decided by the District Court. Is that true?

MRS. BEASLEY: Yes, indeed, it has happened since then, and I think that's one of the very reasons why no injunction would be necessary. In the first place, the parties against whom the --

Q: Well, is that the state thrust, to the extent of the judgment below was affirmed, Georgia accepts it and would not prosecute under the statute --

MRS. BEASLEY: Until it's changed, otherwise. But the state, of course, takes the position that the statute is constitutional as it was written.

Q: Yes, I know, but my prophesy was if the judgment below were to be affirmed.

MRS. BEASLEY: If the judgment below were to be affirmed, certainly there is no indication that the state and the district attorneys and the hospital abortion committees would not follow the mandate of this Court, as has been done. No prosecutions have been brought, despite the fact of the reporting of these other extra-statutory abortions.

Q: My assumption is relied on the judgment below and the positions I gather –

MRS. BEASLEY: That is correct.

Q: – in performing abortions, and relying on the judgment as permitting abortions?

MRS. BEASLEY: Yes, indeed. And so there would be no purpose for an injunction, because it's being obeyed as a declaratory judgment. Moreover, an injunction against any one of the defendant parties would really lead nowhere, because the Attorney General, of course, is not one to bring prosecutions in the first place, and has no connection whatsoever with these hospital abortion committees, despite what the court below believed

Another suit, as a matter of fact, was instituted last year against the Fulton-DeKalb Hospital authority, a body of politic and corporate, doing business as Grady Memorial Hospital.

Now, that's where you get the abortion committee in the hospital. And the attorney general has no idea what the abortion committees in this particular case did, or how much it knew, And that again is one of the great problems with this case. We know of no facts, there are no facts in this case, no established facts.

Q: Why was it the three-judge court did not permit the introduction of evidence?

MRS. BEASLEY: The court apparently believed that it was not necessary, because they were going to consider it as a facial attack only. And I think the court made a mistake in that circumstance. I think they confused these two things: one, whether you need facts to establish a justiciable controversy, and two, whether you need facts and a concrete circumstance in order to decide facial unconstitutionality.

And I think they jumped to the second situation, and said, Well, we're going to just look at that statute anyway, so the facts don't matter."

And I would submit that that's a wrong circumstance, even the --

Q: Are you -- do you say there was or wasn't a case or controversy?

MRS. BEASLEY: I say there was not. There was not a case or controversy. The Attorney General, the District Attorney of Fulton County, and the Chief of Police of the City of Atlanta had no case or controversy whatsoever with Mary Doe or any of the doctors or nurses or organizations or ministers or counselors.

Q: Well, say a person alleges that she is pregnant and has tried to get an abortion, and been refused.

MRS. BEASLEY: I think the controversy is with the -- whoever denied the abortion. That is, it may have been the committee. I think that that would have to –- They would have to be an important party.

Q: Let's assume though that there is -- that their refusal to abort is wholly consistent with the law, and that the refusal was precisely what the law required them to do. Then who is the controversy with?

MRS. BEASLEY: I think you would indeed have a case or controversy there.

Q: With the Attorney General?

MRS. BEASLEY: No sir, not with the attorney general, with those who were implementing the law. The attorney general would be interested and would undoubtedly -- as required by law, he would file a brief.

Q: If a doctor refuses an abortion because he's afraid of criminal prosecution, I suppose one effective way to resolve the controversy is to enjoin the person who might prosecute.

MRS. BEASLEY: And that's not the attorney general.

Q: Who is it?

MRS. BEASLEY: It would be the district attorney.

JUSTICE DOUGLAS: He's one of the appellees here?

MRS. BEASLEY: Yes, he is one of the appellees, Mr. Justice Douglas.

Q: So, is the chief of police.

MRS. BEASLEY: That is indeed correct. Of course the chief of police would not bring a prosecution, and there were no prosecutions or threats --

Q: Well, I know, but isn't there a case or controversy —if a woman has been refused an abortion, and because a doctor is afraid of being prosecuted, don't you have a controversy with the law enforcement officers who are enforcing the law?

MRS. BEASLEY: Yes, you may; but there was no enforcement here which was threatened or impending.

Q: Well, but it was conduct pursuant to the law, though, mainly in the refusal of an abortion --

MRS. BEASLEY: But we don't know that it was pursuant to the law. You're assuming, I believe, another circumstance: that there was compliance with the law. That's what the State --

Q: What did the complaint allege?

MRS. BEASLEY: It alleged that that was the reason, but, again, they also stated that they didn't know --

Q: When do you decide standing, after a trial or on the face of a complaint?

MRS. BEASLEY: I'm sorry; I didn't hear your question.

Q: When do you decide standing, after a trial?

MRS. BEASLEY: No sir; I think it must appear in the –- as the case proceeds.

Q: All right, well, let's assume the facts are true as alleged in the complaint. Case or controversy?

MRS. BEASLEY: I think there aren't enough facts there. No. No case or controversy. Not with these defendants.

CHIEF JUSTICE BURGER: We will continue after lunch.

MRS. BEASLEY: Thank you.

[Recess]

CHIEF JUSTICE BURGER: You may proceed, Mrs. Beasley.

MRS. BEASLEY: Thank you, Mr. Chief Justice.

We were speaking I think, when we stopped about case or controversy. And I think that it's very clear that a case or controversy would exist with a hospital or hospital abortion committee in all of the constitutional questions which are sought to be raised and argued in this case could be brought there.

I think also that --

Q: I suppose if your requirement was satisfied, and they would show the threat, you would then conclude it would be beyond the competence of the three-judge court to enter a decree?

MRS. BEASLEY: That's correct. If there were that. But here we have no case or controversy, and the threat of course would involve the anti-injunction statute, I think, rather than whether it could be --

Q: Well, a threat would make it a case or controversy

MRS. BEASLEY: A threat might.

Q: Yes.

MRS. BEASLEY: If the proper parties were involved. But here for example we don't have -- as far as we know, we do not have Mary Doe's doctor, someone who is taking any action; and even in the cases which the Court recently has considered, about the facial constitutionality of some criminal statutes, there was an actual case or controversy -- not even with regard to the --

Q: Well, Mary Doe's real, isn't she?

MRS. BEASLEY: I don't know.

Q: I thought it was conceded that she was

MRS. BEASLEY: No sir. We know no facts about her at all. We assume that since there is an affidavit concerning it, that those facts may very well be true; but we have had no opportunity to see whether there are other facts.

Q: Did the…as I remember your colleague on the other side answered that there was an offer of proof to the District Court, that she was real, and that he said that wasn't necessary.

MRS. BEASLEY: That is correct.

Q: That means he accepted. Did he accept the fact that this was a real human being, a person?

MRS. BEASLEY: The court below accepted, as far as I know, the statements that were made in allegation as being true. So that no proof was submitted, no interrogatories were answered; we had no opportunity to find out.

Q: But it was -- but the plaintiff expressed a willingness and did offer to show this, is that correct?

MRS. BEASLEY: Yes, through counsel.

Q: Yes.

MRS. BEASLEY: That is correct.

JUSTICE MARSHALL: I understand she was in the courtroom?

MRS. BEASLEY: That is what counsel informs us is correct but she was not pointed out; she didn't stand up in court for example and indicate herself to the court. But we just understand that she was there. We don't know who she was. There was a courtroom full of people. So that we couldn't follow up you see, in any way.

Q: Yes

CHIEF JUSTICE BURGER: Once it's accepted, what difference does it make to the case, if any?

MRS. BEASLEY: Pardon. I'm sorry.

Q: Once that's accepted as a fact, why will that make any difference to the case?

MRS. BEASLEY: If her allegations are accepted?

CHIEF JUSTICE BURGER: If the proffer, if the court says the proffer of proof was unnecessary, then why do we need to be concerned about whether she is a fictitious or a real person?

MRS. BEASLEY:; Because it was not a complete divulgence of the facts surrounding her circumstance. For example, we don't know that the hospital abortion committee knew as much about her as in her allegation. We don't know the real reason for which they denied her the abortion. Particularly since she was assertedly granted the approval of another hospital abortion committee, which again makes her situation somewhat moot. Because she did not receive --

JUSTICE DOUGLAS: If you should lose on your point that there's no case of controversy, do you concede that the remedy given was proper?

MRS. BEASLEY: No sir, Mr. Justice Douglas, we think that the statute itself, in toto, does not render any lack of Due Process or Equal Protection on its face, to any of these plaintiffs or anyone else. We think that the statute is a constitutional one as written.

Q: Suppose you lose on that, do you think the remedy as given was improper?

MRS. BEASLEY: If this Court decides that the restrictions that were made on the statute are correct, and a declaratory judgment should issue, we would think that would indeed be proper; and that an injunction would not be necessary.

Q: Do you think an injunction would be proper in light of 1983?

MRS. BEASLEY: We think not, because we find no necessity, and of course an injunction is an extraordinary legal relief. Injunction against any one of these appellees would do nothing, as far as the enforcement, that isn't already being done, as far as the statute is concerned.

Q: But you would construe the word "inequity" in 1983 as allowing an injunction in some cases?

MRS. BEASLEY: There may be a situation in which an injunction would be appropriate, but not in this circumstance, where there is no –- well, if the Court considers that there is a case or controversy, there still would not be a need for an injunction; of course, an injunction being a discretionary type of thing, and the court below finding no necessity for one, we think that was a correct finding by the court and so there should be no necessity for this Court to direct --

Q: So, a declaratory decree would not be proper under 1983?

Mrs .Beasley: Yes sir.

Q: And then, of course, I suppose the court could, in the interest of effectuating its declaratory judgment, at some later time issue an injunction, couldn't it?

MRS. BEASLEY: Yes sir. If it became necessary.

Q: That would be if there were indications that the declaratory judgment were not being otherwise obeyed or effectuated?

Yes, indeed. I think that there would be a continuing opportunity to do so.

JUSTICE STEWART: Fine. We don't have here, Mrs. Beasley, do we, any question of the application of 2283? There was no pending state --

MRS. BEASLEY: No sir.

Q: -- proceeding of any kind, was there?

MRS. BEASLEY: No.

Q: Civil or criminal?

No. Mr. Justice Stewart, there were no -- nothing at all, as far as that's concerned, not even a threat. And I think that's one of the things that makes it so different from the Wisconsin versus Constantineau case, where there was something actually done. It was conduct there.

Q: Right.

MRS. BEASLEY: Taken on behalf of the officials of the state, in that case the chief of police, I believe it was.

Q: Right.

MRS. BEASLEY: which we do not have here at all. I would like to point out one other thing, though, we were —I was mentioning to the Court the purpose of the statute. I think one of the other purposes of it -- I think there are primarily three -- being to protect fetal life and of course the health of the mother, in having to go through this procedure, and also to protect doctors who are going to perform therapeutic abortions. The procedure is set out and they're protected if they stay within those wide protections that are given in the statute, the procedure that's given, the District Attorney has no basis on which to refer an indictment against them; and of course the burden would be on him to show that the abortion was not necessary.

So I think the statute is also to protect the doctors so that they can operate with regard to therapeutic abortions.

JUSTICE MARSHALL: Well, isn't the doctor already protected -- you don't have any criminal prosecution for any other operation, do you?

That's correct.

JUSTICE MARSHALL: In Georgia? You don't, do you?

MRS. BEASLEY: No, it does not. Not that I know of.

JUSTICE MARSHALL: Then why do they need that particular protection on abortions?

MRS. BEASLEY: Because abortions --

JUSTICE MARSHALL: Because the abortion statute is there

MRS. BEASLEY: That's right.

Q: That's what I thought.

MRS. BEASLEY: ; One other point I would like to make, and that is this: In another area, the state does recognize fetal life as being human life, and that is with regard to fetal death certificates, which are required to be filed when there is a fetal death.

In that portion of the statute which deals with funeral arrangements and so on, vital records, the distinction is made between live birth and fetal death.

Live birth is regarded as a situation where a product of conception, at whatever stage it occurs, is expelled or extracted from a mother's womb, and there is evidence of life; which means –- and some examples are given in the statute -- voluntary muscle movement or heartbeat or something that indicates breathing or movement, some independent activity in that fetal life. And that's regarded as a live birth.

A fetal death is regarded as that type of extraction where there is no evidence of life.

So I think in that instance, too, the State carries forward the consistent concept and attitude towards pre-birth children, in that they are indeed human life that needs to be recorded, and that should be very carefully watched before there is any destruction of it.

And I think that, in closing, I would like to just say that we look at a criminal defendant and say, before he is going to be condemned, his guilt must be proved

beyond a reasonable doubt. Now, we look at an unborn child and say, Can we not at least limit the destruction of his life to these certain circumstances, or is he, as an innocent human life, allowed to be extinguished without any regard whatsoever?

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mrs. Beasley. Mrs. Hames, you have one minute left if you have something that you want to cover.

[Rebuttal Argument of Margie Pitts Hames]

MRS. HAMES: Just a few things Mr. Chief Justice.

All of the defendants in this case did file a motion to dismiss, which the court treated as motion for summary judgment, and the judgment of the court specifies that at page 87 of the Appendix.

We have not designated a constitutional basis for our case, but I would like to say that it is -- we contend that the procedural requirements infringe Due Process and Equal Protection, and that the right of privacy, as enunciated in Griswold, of course, is our basic reliance.

I would commend to the Court the article of Professor Means also, which goes into the abortion – criminal law -- common-law of abortion; and point out that in Georgia abortion before quickening was only a misdemeanor, beginning in 1876, and prior to that time it was no crime at all.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Thank you, Mrs. Hames. The case is submitted.

[Whereupon, at 1:10pm, the case was submitted.]