Transcript of Reargument in
***Doe v. Bolton*, 410 U.S. 179 (1973)**
U.S. Supreme Court
October 11, 1972

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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
Lewis F. Powell, Associate Justice
William H. Rehnquist, Associate Justice

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

CHIEF JUSTICE BURGER: We'll hear arguments next in number 70-40, Doe against Bolton. Mrs. Hames, you may proceed whenever you're ready.

Argument of Margie Pitts Hames, Attorney for Appellants:

MRS. HAMES: Thank you. Mr. Chief Justice and may it please the Court. This is an appeal from a decision in the Northern District Court of Georgia where the three-judge 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 a 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 and 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 interests and, therefore, the case was dismissed as to them.

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

I would only point to two cases on the jurisdictional point.

One is Wisconsin versus Constantineau which dealt with a third party's constitutional rights there, and then the discussion in the Eisenstadt versus 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 had given birth to three previous children, two of whom had been taken away from her by 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 10 or 11 weeks when this lawsuit was commenced, and she subsequently applied to private physicians in Atlanta at 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 irremediable fetal malformation and danger to the life of the woman or serious and permanent injury to her health.

These were the reasons 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 products of rape, they have abandoned those that might likely be malformed, and they have abandoned those that might endanger the life or the health of the woman, so that if the state claims an interest in fetal life there, 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 aren't any statistics that are very reliable on this, 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've 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, woman placing their hands -- their life in the hands of an unskilled abortionist.

Therefore, we feel that the statute must be viewed in the health context.

1,579 women received abortions in Georgia in 1971 and 3,410 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 the 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 a lot of 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% of the applicants for abortion were forced to discontinue their application all together, 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've been ineligible for the treatment there, or to resort to a $50-illegal abortion in Atlanta, or of course $500-illegal abortion in Atlanta would've been available to them, or to place the child for adoption or rear the child.

That study further showed that by the end of the work up period of all the paper work that 56% of those applicants of that hospital had become second trimester pregnancy.

That is, later procedure, the saline procedure.

Not only is this a time-consuming procedure, it is costly to the patient.

We now can -- abortions in Georgia, in Atlanta costs from $400 to $600.

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 it of itself an invasion of the patient's privacy.

Not only must she reveal to her doctor this -- the private information or the private reasons for which she wants an abortion, but they are then -- this information, she has to give it to two other consultants.

The hospital abortion committee becomes a permanent part of the records of the state.

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

It also raises a substantial conflict of interest problem.

This is primarily because of the doctor.

The limitation of abortions 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, Kansas and Maryland both recognized that this place has 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.

They-- in fact, JCAH just does not operate in this manner or 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 unwarranted 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 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.

JUSTICE REHNQUIST: 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, but there are similar reports by the US Public Health Department. We have recently furnished reports to the Court's library and would be happy to do so on the statistical information. I do--

Q: Are those things something that goes to legislative judgment rather than to 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 a child, and I think that that is not properly a legislative judgment.

Q: Well, you were just talking about statistics, however, and recent reports in 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--

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

MRS. HAMES: Well--

Q: "A."

MRS. HAMES: "A," excuse me. He finds that complications are lower in clinics than in hospitals and were lower for hospital out-patients than for in-patients, and that study is found--

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

MRS. HAMES: He took that into consideration in arriving at his statistics, and I'm sorry, I should've pointed that out. Complications for abortion by the suction curettage method excluding preexisting complications—cases, this is strictly the normal abortion situation, the normal patient. We also say that the procedure 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 health service just-- in this area just as they would in other areas.

It's a question of how much, and I think it could be adequately regulated through the rules and regulations of the health department as are the licensing requirements for hospitals.

Q: Mrs. Hames, let me inquire here. 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 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 or-- 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.

Q: 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 abortion process to a 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 some other statutes.

Q: So the constitutionality will change depending on the advancement of medical knowledge.

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

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

MRS. HAMES: In a joint commission…..?

Q: In a hospital licensed by the State of Georgia.

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 regulation you could require that they be close to hospitals for backup services, but I think clinics are fully capable by virtue of the New York experience statistics that I was citing to perform effective and safe abortion services.

Q: Then you are conceding that the state may license an abortion facility?

MRS. HAMES: Yes, Your Honor.

Q: And I take it 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 may be one of the things that the body who draws the rules and regulations may want to require. I believe that is true in New York City.

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

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

Q: And I also take it that what you said before that you're reserving the right to say that it isn't constitutional 20 years since.

MRS. HAMES: That's correct. I would point out that under-- if your-- 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. This is quite different from turning over rules and regulations to JCHA 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 doctor's 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 physician's right to practice their professions, and we say that these procedural requirements interfere with the best professional judgment or interfere with their practicing of 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 area, it puts the doctor in a position of always having to weigh his interest against the wife's interest-- 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.

In 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 and 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.

JUSTICE REHNQUIST: Mrs. Hames, I suppose doctors are not alone in being eager to have their profession or occupation wholly taken out from state regulation. Wouldn't a lot of professional associations, other than doctors, cheerfully 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.

JUSTICE REHNQUIST: And yet professions and occupations have been traditionally regulated by the state for a long time.

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

JUSTICE REHNQUIST: Well, but I think-- don't you think your argument is on 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: Well, it indicates only the attitude of the medical profession in Georgia and there-- I think that is important. As you say, everybody would like to be out from under regulation.

JUSTICE REHNQUIST: The bakers in Lochner versus New York didn't want any regulation 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.

CHIEF JUSTICE BURGER: Well, isn't there a professional regulation in virtually every hospital in the country on surgical procedures so that if the doctors would be performing unnecessary operations of any kind: appendectomies, tonsillectomies, or whatnot he can be disciplined?

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

Q: He has a restraint on him in many other areas apart from abortions, 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.

Q: It might. 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 not make it mandatory for the woman to exercise her right to have to submit her case to a hospital committee.

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

MRS. HAMES: To my recollection, it does have a time limitation on 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 20-week limitation with some exceptions as I recall. I would think it's constitutional.

Q: You mean the state is free to protect the life of the fetus by saying that no abortions after 20 weeks with some exceptions?

MRS. HAMES: I'm not prepared to say 20 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 woman.

Q: Yes….but

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

Q: You're saying that the state may put a limit on abortions time-wise 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.

Q: I understand.

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

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

Argument of Dorothy T. Beasley, Attorney for the State of Georgia:

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 annunciation 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 of the State of Georgia forbid abortion except in certain circumstances which the people of the state through our 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 local 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 in presented.

Mary Doe and the other appellants, whom I wish to prefer to as plaintiffs because I think they had 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 of our claim says that every person who under color of any state statute subjects or cause to be subjected any citizen to the deprivation of any rights which are protected by the constitution, has a cause of action.

So, we must 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 before she has a course of action, and that question comes before this Court because 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 could 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.

JUSTICE REHNQUIST: 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 if I lose, I didn't have a constitutional right under 1983 that was secured by anything, 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.

JUSTICE REHNQUIST: Well, but isn't that what the 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.

Q: Yes, but you need a three-judge court to decide it?

MRS. BEASLEY: Not at all. You don't need a three-judge Court to decide if there's a constitutional right. You needed a three-judge Court to determine if there should be an injunction.

Q: If you decide it isn't a frivolous claim, you do.

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

Q: 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 jurisdiction 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.

JUSTICE REHNQUIST: But you at least have got to argue whether or not their constitutional right exists?

Q: Right, exactly, and that's why I think this Court at least-- excuse me, 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.

MRS. BEASLEY: 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 still 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 a supplemental authorities. It's called "in loco parentis" and it was published by the State Welfare Department and it has to do with all 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.

CHIEF JUSTICE BURGER: I suppose when the state appropriates money to maintain a prenatal 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--

CHIEF JUSTICE BURGER: To take 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.

Q: But you wouldn't contend, would you, that the state would have authority to enact a statute or could 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.

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

MRS. BEASLEY: Yes, the state--

CHIEF JUSTICE BURGER: And on that grounds, they were going to forbid the 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 United-- of the state to protect health and safety, it could proscribe tonsillectomies at least so that it was related to health. Now, if it might be overbroad because, as a matter of fact, 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.

Q: Well --

MRS. BEASLEY: 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 abort-- criminal abortion statute of Georgia is not health.

Q: Well, it relates, does it not, in some general way to limitations a state may place on people-- it's people, does it not?

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

Q: If -- So--

JUSTICE MARSHALL: Excuse me.

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

JUSTICE MARSHALL: 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 which emanates from--

JUSTICE MARSHALL: Is there any other statute of Georgia which says under certain conditions you can kill somebody?

MRS. BEASLEY: Yes.

JUSTICE MARSHALL: Well -- Can you --

MRS. BEASLEY: We used to have capital punishment statutes.

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

MRS. BEASLEY: Not a commission of three people.

JUSTICE MARSHALL: Well, is there any statute which says three doctors can decide whether a man lives or dies or, obviously—

MRS. BEASLEY: Excuse me, not as to whether he lives or dies. There isn't a statute. But there is--

JUSTICE MARSHALL: But you can say three doctors can decide as to whether you what you claim as a living fetus with the exact same rights as a grown person, can be killed.

MRS. BEASLEY: No, I'm not saying that. What I'm 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 a person or any other term by which we want to call it. Obviously, life occurs before birth because there's movement and all-- 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.

Q: Well, what is it --

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.

JUSTICE MARSHALL: Is it a living being or not?

MRS. BEASLEY: Indeed, it is a living being, and I don't think anybody could dispute that.

JUSTICE MARSHALL: And you have a right with the permission of three doctors to kill the "human being"?

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 exceptions are not broad. The exceptions are very narrow. The health must be very seriously impaired.

JUSTICE MARSHALL: I have great problem with this human being point. I think that's what my problem is, and do you have to go so far to sustain your position and to say that the fetus is a human being. Why don't you treat it as a fetus?

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

JUSTICE MARSHALL: That's why I was distinguishing it here.

MRS. BEASLEY: Of course. Let's call it the fetus then. The state, it is our position, has a right in this gray area where it 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--

JUSTICE MARSHALL: 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 would have to justify some-- find some common median way in order to deal with both conflicting interests. That's what's really at issue here, the conflicting interests between the two, but under the common law and under natural law, according to Blackstone & Coke, 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 is put out in an 1865 book which we cited in our first brief as 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've asked the question earlier if it was a felony. No, it was a misdemeanor but, regardless of whether it was a felony or misdemeanor at common law, it was regarded as a misdemeanor in Georgia and although they are not cases before the statute was enacted in 1865, the cases around that time including the 1849 case of Morrow versus Scott speak of the unborn child as having any rights which the state was able to give it, whatever rights were protectable insofar as it was protectable.

JUSTICE BLACKMUN: Mrs. Beasley, 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. Were you-- 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.

JUSTICE BLACKMUN: The other question that I have, while I have you interrupted, in your list of supplemental authorities which you submitted without any particular explanation, there 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.

JUSTICE BLACKMUN: Would you have some comment on those?

MRS. BEASLEY: Yes, sir. Thank you for asking about them. I submitted those for this proposition to show that even though the statute had been 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.

JUSTICE DOUGLAS: Is that supplemental statute 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 submit another supplemental brief. So, I simply listed the authorities so that I might be able to talk to you about them in argument.

JUSTICE REHNQUIST: 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% 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, a policy to protect health, but that's not what's 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 the 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 for my-- our stand point 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. It was carried over and there were public hearings, and so on. The underlying assumption and basic foundation was we are not going to destroy fetal health or 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 an order of things emanating from the Ninth Amendment to be let alone, and that, we say, is what the right which the fetus has. The right to be let alone and not to be stopped in its growth towards 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 statute were first passed and ours was 1876 or 1859 in Texas then. Perhaps 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 a showing by the study which is 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's 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 the 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, 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' 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 things that have to do with her health. So, I think 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 which was a statutory action to be brought in a Superior Court for the trial of the fetus' underlying constitutional or other rights. That shows clearly that the legislature's purpose was to protect the fetus from being destroyed.

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

[Recess]

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 made. Although it found the basis of the statute or 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 the District Court's statute is overbroad, but she only says that 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 one 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 by the 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 is 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--

CHIEF JUSTICE BURGER: I take it you'd have no difficulty, from the position you've indicated, you'd have no difficulty in sustaining a statute if the legislature prescribed 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 it is 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. And, I think that the state has an interest in protecting, as far as it can, that life and that's illustrated by this criminal abortion law 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 that at least the 1849 case, we are going to consider an unborn child and ventra sa mere 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 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 a manifestation of that obligation on government because the natural right which an unborn fetus has to continue its existence without being disturbed, it's right to be let alone which is recognized in natural law and has been recognized in the common law under Blackstone and Coke 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 Coke as shown in the decisions which they rendered. So, it was regarded as a protectable right in the very beginning of our state's existence.

MRS. BEASLEY: I think this is a particularly critical area where what Mr. Justice Powell said in Chadwick versus Tampa recently is very important. He said that "our federal system warns of converting desirable practices into constitutional commandments," and I think that's what's 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' right to be left alone and his own self-preservation which is the ultimate responsibility of government to protect.

Q: Are you saying that even if the fetus is not, whether the fetus is or is not a person under the Fourteenth Amendment, there is a right of the fetus to be let alone that 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.

CHIEF JUSTICE BURGER: But 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 her own rights too to her own privacy but, here, another entity becomes involved. Thank you.

JUSTICE REHNQUIST: 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: 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 your necessarily 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, those type of things, or health. It may not be a constitutional right to health in that instance. Thank you.

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

[Rebuttal Argument of Margie Pitts Hames]

MRS. HAMES: 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--

JUSTICE BLACKMUN: In that connection, Mrs. Hames, I don't recall that I found it mentioned in your brief either and perhaps you would 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.

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

MRS. HAMES: I-- based on personal experience with the Emory medical schools in lectures on ethics and abortion--

JUSTICE BLACKMUN: 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. It--

JUSTICE BLACKMUN: Well, maybe one way to answer that is that kidney stone treatment is certainly different than it was 400 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 who ask---it ties it in to suicide---" nor suggest any such council 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 definitive statement of medical ethics for centuries, and yet in neither brief, in your side of the case, makes even a reference to it.

MRS. HAMES: I believe the brief filed on behalf of the OBGYN 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 when it was when it

was written. Now, it's about a 15-minute procedure with the suction device, so that the treatment is-- if you say that the treatment for kidney stone is different today, then I would answer that the treatment for abortion is also different today.

JUSTICE BLACKMUN: 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 and in that-- I think that study shows that it's the interest of the woman and not the fetus involved, and 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 measles, German measles epidemic of '64 and '65 and that did place a lot of doctors in jeopardy, and I think that there are now compelling reasons, be they socio or economic reasons, just as valid for performing abortions. Thank you very much.

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

[Whereupon, at 1:14pm, the argument was concluded and the case was submitted.]