10-1972

Doe v. Bolton

Lewis F. Powell Jr.

Conf. 10/11/72

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 70-40

DOE

vs.

BOLTON

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

70-40 Abortion Ga Case 10/13/72

DOUGLAS, J. Reverse

MARSHALL, J.
Agree with Harry's opinion

BRENNAN, J. Reverse

BLACKMUN, J.
Make Ga lead case
Base right in "Privacy" – 14th Amend – not 9th

STEWART, J. Reverse
Must deal with Q whether a fetus is a person – as ded CA 2. not a person – but this doesn't mean it has no rights. ~~Female~~ fetus not person until born.
Cannot agree Texas law is vague.
9th Amend. is irrelevant.
The right is a 14th Amend one.

POWELL, J.
I am generally in accord with Harry.

WHITE, J. Affirm
Woman must have some Const right to protection.
Fetus is not a person at any time.
But he is unwilling to second guess State leg. as to its interest.
Pure convenience of woman can't over-ride state interest.
Can't hold statutes void on vague.
Can't allow abortion on demand.

REHNQUIST, J.
Agree with Byron.

MEMO: Chief - Reverse – but unsure of grounds & will await writing

Mrs Hamer

Ct. below left standing the 3 doctors procedural requirements. committee

State's interest in w "fetal life" - but it permits abortion to protect health of mother, where rape, + where fetus is malformed.

Statute must be viewed in a "health context". Not an absolute right,

Procedure unfair - delay, no hearing, no statement of reasons, committee procedural invasion of privacy.

Mrs Hamer thinks Uniform Act is probably Const. as time limit may be constitutional privacy - say 20 weeks

(See Uniform Abortion Act - approved last yr by ABA + prepared by Comm. on Uniform Law

Mrs Hamer agrees that ~~H~~ abortions should be allowed only in licensed hospitals or clinics

Mrs Beasley

This is a 1983 action brought in 3 Judge Ct. She challenges right of Pls to bring this case. She says DC had no juris over subs. matter of this case — hence we have no jurisdiction.

→ "Abortion is the killing of the fetus — an unborn child"

But there is a "gray area" in which we don't know when a person comes into being. The fetus is a "living being" but not necessarily a person in the full legal sense.

→ The primary purpose of Ga. statute is not to protect health of mother — rather it is to protect fetal life except in the few specified exceptional circumstances. Fetus has a 9th Amend right to be let alone.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 25, 1972

Reviewed
10/2/72

MEMORANDUM TO THE CONFERENCE

Re: No. 70-40 - Doe v. Bolton

Here, for your consideration, is a memorandum on the second abortion case. What this would accomplish is the striking of the Georgia statutory requirements as to (1) residence, (2) confirmation by two physicians, (3) advance approval by the hospital abortion committee, and (4) performance of the procedure only in a JCAH accredited hospital. Thus, at this point (pending determination of the appeal in the Fifth Circuit) the District Court has stricken certain provisions of the Georgia statute and we would strike additional ones.

What essentially remains is that an abortion may be performed only if the attending physician deems it necessary "based upon his best clinical judgment," if his judgment is reduced to writing, and if the abortion is performed in a hospital licensed by the State through its Board of Health. This, I should point out, does not mean that it may be performed in a facility that is not a hospital. Some of you may wish to take that step, too.

I might say that this was not the easiest conclusion for me to reach. I have worked closely with supervisory hospital committees set up by the medical profession itself, and I have seen them operate over extensive periods. I can state with complete conviction that they serve a high purpose in maintaining standards and in keeping the overzealous surgeon's knife sheathed. There is a lot of unnecessary surgery

done in this country, and intraprofessional restraints of this kind have accomplished much that is unnoticed and certainly is unappreciated by people generally.

I have also seen abortion mills in operation and the general misery they have caused despite their being run by otherwise "competent" technicians.

I should observe that, according to information contained in some of the briefs, knocking out the Texas statute in Roe v. Wade will invalidate the abortion laws in a majority of our States. Most States focus only on the preservation of the life of the mother. Vuitch, of course, is on the books, and I had assumed that the Conference, at this point, has no intention to overrule it. It is because of Vuitch's vagueness emphasis and a hope, perhaps forlorn, that we might have a unanimous court in the Texas case, that I took the vagueness route.

Sincerely,

H.A.B.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5/25/72

No. 70–40

Recirculated: _____

Mary Doe et al., Appellants,
v.
Arthur K. Bolton, as Attorney General of the State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the Georgia criminal abortion statutes are under constitutional attack. The statutes, §§ 26–1201 to 26–1203 of the State's Criminal Code, formulated by Georgia Laws 1968, 1249, 1277, are set forth in the Appendix.[1] They have not been tested constitutionally in the Georgia courts.

no Ga. case law

Section 26–1201 defines criminal abortion. Section 26–1202, however, removes from that definition abortions "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because"

"(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health," or

"(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect," or

"(3) The pregnancy resulted from forcible or statutory rape."

[1] The italicized portions of the statutes in the Appendix are those held unconstitutional by the District Court.

Section 26–1202 then specifies a number of prerequisites for the abortion if it is to qualify under the exception. These are (1) and (2) residence of the woman in Georgia, (3) reduction to writing of the performing physician's medical judgment and written concurrence in that judgment by at least two other Georgia licensed physicians, (4) performance of the abortion in a licensed and "accredited" hospital, (5) approval in advance by a hospital abortion committee, (6) certification in a rape situation, and (7), (8), and (9) maintenance and confidentiality of records. There is a provision for judicial determination of the legality of a proposed abortion on petition of the circuit law officer or of a close relative, as therein defined, of the woman, and for expeditious hearing of that petition. There is also a provision giving a hospital the right not to admit an abortion patient, and giving any physician and any hospital employee or staff member the right not to participate in the procedure because of moral or religious grounds.

Section 26–1203 provides that a person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

As appellants acknowledge,[2] the 1968 Georgia statute is patterned after the American Law Institute's Model Penal Code § 230.3 (Proposed Official Draft, 1962). Other States have legislation based upon the Model Penal Code. See Ark. Stats. §§ 41–303 to 41–310 (Supp. 1971); Cal. Health & Safety Code §§ 25950–55.5 (West Supp. 1972); Colo. Rev. Stats. 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Del. Code §§ 1790–1793 (Supp. 1970); Kan. Stat. § 21–3407 (Supp. 1971); Md. Code, Art. 43, §§ 137–139 (Repl. 1971); N. Mex. Stat. §§ 40A–5–1 to 40A–5–3 (Supp. 1971); N. C. Gen. Stat.

[2] Brief, at 25, n. 5; Tr. of Oral Arg. 9.

§ 14–45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495; S. C. Code §§ 16–87 to 16–89 (Supp. 1971); Va. Code §§ 18.1–62 to 18.1–62.3 (Supp. 1971). Mr. Justice Clark has described some of these States as having "led the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

12 states have followed ALI lead

I

On April 16, 1970, Mary Doe,[3] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in Georgia, five as Georgia clergymen, and two as Georgia social workers), and two nonprofit Georgia corporations, instituted this action in the Northern District of Georgia against the State's Attorney General, the District Attorney of Fulton County, and the Chief of Police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the challenged statutes.

Mary Doe alleged:

(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, was with adoptive parents. Doe's husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become reconciled. He was a construction worker and only sporadically employed. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child

[3] The name is a pseudonym. Complaint, Appendix 7.

she was carrying. She would be unable to support or care for the new child.

(2) On March 25, 1970, Doe made application to the Abortion Committee of Grady Memorial Hospital, Atlanta, to be considered for a therapeutic abortion under § 26–1202 of the Georgia Code. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one within the reach of § 26–1202 (a).[4]

(3) Because of this denial of her application, Doe was faced with the alternatives of either relinquishing "her right to decide when and how many children she will bear" or seeking an abortion illegal under the Georgia statutes. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. She sued "on her own behalf and on behalf of all others similarly situated."

The other plaintiffs claimed the Georgia statutes "chilled and deterred" them from practicing their respective professions and, thus, deprived them of their constitutional rights. Those plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

A three-judge District Court was convened. An offer of proof as to Doe's identity was made but the court felt it unnecessary to receive that proof. The case was tried on the pleadings and interrogatories.

By its *per curiam* opinion the District Court held that all the plaintiffs had standing, but that only Doe presented a justiciable controversy. On the merits, the court held unconstitutional those portions of § 26–

Only Doe presented a justiciable controversy

[4] Mary Doe, by her answers to interrogatories, stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. Appendix 64.

1202 (a) and (b)(3) that would limit legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certification in a rape situation; and § 26–1202 (c) authorizing the court proceeding upon the petition of the circuit law officer or a designated relative of the woman. Declaratory relief, accordingly, was granted. The court, however, upheld the other parts of the statute and denied altogether the request for an injunction. 319 F. Supp. 1048 (ND Ga. 1970).

Claiming that they are entitled to broader relief, the plaintiffs have taken a direct appeal pursuant to 28 U. S. C. § 1253. The decision on jurisdiction was postponed to the hearing on the merits. 402 U. S. 941 (1971).

The defendants filed a direct cross appeal but this was dismissed for want of jurisdiction. 402 U. S. 936 (1971). We are advised by the appellees, Brief, at 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the decision below is adverse to the appellees, that is, the extent to which portions of the Georgia statute were held to be unconstitutional, technically is not now before us.[5] *Swarb* v. *Lennox*, 405 U. S. 191, 201 (1972).

II

Our decision today in *Roe* v. *Wade*, *ante*, at —, establishes (1) that the case is properly here on direct appeal under 28 U. S. C. § 1253, for the three-judge District Court specifically denied the injunctive relief the plaintiff-appellants requested; (2) that, despite her pseudonym, we may accept as true Mary Doe's existence and her pregnant state on April 16, 1970; (3) that the

[5] What we decide today, however, may well have implications for the issues raised by the appellees' appeal pending in the Fifth Circuit.

constitutional issue is substantial; (4) that the termination of Doe's and all other Georgia pregnancies existing in 1970 has not rendered the case moot; and (5) that Doe and her class, that is, pregnant Georgia women, do have standing to maintain the action and do present a justiciable controversy.

The standing-justiciable controversy status of the other plaintiff-appellants—physicians, nurses, clergymen, social workers, and corporations—is less certain but, inasmuch as Doe and her class are recognized, is perhaps a matter of no great significance. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by women about pregnancies, also present a justiciable controversy despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened, for violation of the State's abortion statutes. The physician is the person against whom these criminal statutes directly operate in the event he procures an abortion that does not qualify under the statutes' exception and with respect to which all the statutorily prescribed conditions are not met.

Physicians do have standing

In holding that the physicians, while theoretically having standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman*, 367 U. S. 497 (1961). There a sharply divided court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879 and, with only one apparent exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to other Georgia abortion statutes under which,

we are told,[6] physicians have been prosecuted. The present case, in our view, is closer to *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), where the Court recognized the right of a schoolteacher, though not charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965).

The parallel claims of the nurse, clergy, social worker, and corporate appellants are another step removed. As to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity as accessories or counsellor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit for the issues are sufficiently and adequately presented by Mary Doe and by the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade*, *ante*, at —.

III

The appellants attack the Georgia abortion statutes on several grounds: (A) invalid restriction of an absolute fundamental right to personal and marital privacy; (B) vagueness; (C) deprivation of procedural and substantive due process; (D) improper limitation to Georgia residents; and (E) denial of equal protection. We consider these claims in turn.

A. The Court, in varying contexts, has recognized a right of personal privacy and has rooted it in the Fourteenth Amendment, or in the Bill of Rights, or in the latter's penumbras. See *Eisenstadt* v. *Baird*, — U. S. —, — (1972); *Griswold* v. *Connecticut*, 381

Grounds of attack

[6] Tr. of Oral Arg. 21–22.

U. S., at 484; *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967); *Skinner* v. *Oklahoma,* 316 U. S. 535, 541–542 (1942); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923).

The appellants assert that the scope of this right of personal privacy includes, for a woman, the right to decide unilaterally to terminate an existing but *unwanted* pregnancy without any state interference or control whatsoever. They argue that if, by *Griswold,* one is protected in deciding to limit the size of her family by the use of contraceptives, she deserves to have that right equally protected by having a choice to terminate an unwanted pregnancy due to contraceptive failure. See Mr. Justice Clark's article, cited above, Religion, Morality and Abortion: A Constitutional Approach, 2 Loyola U. (L. A.) L. Rev. 1, 8–9 (1969).

They further argue that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. See the 1933 Georgia Criminal Code, § 26–1102, which was the codification of Acts 1876, No. 130, § 2, p. 113. And when so viewed, they contend, Georgia heretofore has given little, and certainly not first, consideration to the unborn child.

Finally, it is argued that the statute does not adequately protect the woman's right. This is so, it is said, because it would be physically and emotionally damaging to Doe to bring a child into her poor, "fatherless"[7] family, and because advances in medicine and in medical techniques have made it safer for a woman to have a medically induced abortion than to bear a child. Thus a statute "which requires a woman to carry an unwanted pregnancy to term infringes not only on a

[7] Appellants' Brief 25.

fundamental right of privacy but on the right to life itself."

We agree that a woman's interest in making the fundamental personal decision whether or not to bear an unwanted child is within the scope of personal rights protected by the Ninth and Fourteenth Amendments, as articulated in the decisions cited above. Appellants' contention, however, that the woman's right to make the decision is absolute—that Georgia has either no valid interest in regulating it, or no interest strong enough to support any limitation upon the woman's sole determination—is unpersuasive.

The appellants themselves recognize that a century ago medical knowledge was not so advanced as it is today, the techniques of antisepsis were not known, and any abortion procedure was dangerous for the pregnant woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural and expected line drawing in the exercise of the legislative judgment of that time. A State is not to be reproached for a past judgmental determination of this kind made in the light of then existing medical knowledge. It is therefore illogical and unfair to argue, as the appellants do, that, because the earlier emphasis was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal "life" is somehow to be downgraded. That argument condemns the State for past "wrongs" and also denies it the right to readjust its views and emphases in the light of the more advanced knowledge and techniques of today.

In any event, it is clear that Georgia's concern historically has not been for the mother alone. The cases decided under the 1876 Act have given recognition in various ways to the unborn. See *Taylor* v. *State*, 105

Ga. 846, 33 S. E. 190 (1899); *Sullivan* v. *State,* 121 Ga. 183, 48 S. E. 949 (1904); *Barrow* v. *State,* 121 Ga. 187, 48 S. E. 950 (1904); *Passley* v. *State,* 194 Ga. 327, 21 S. E. 2d 230 (1942); *Tucker* v. *Howard L. Carmichael & Sons,* 208 Ga. 201, 65 S. E. 2d 909 (1951); *Hornbuckle* v. *Plantation Pipe Line Co.,* 212 Ga. 504, 93 S. E. 2d 727 (1956); *Fallaw* v. *Hobbs,* 113 Ga. App. 181, 147 S. E. 2d 517 (1966).

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one is to accept the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, pp. 478–479 and 547 (24th Edition, 1965). The situation, therefore, is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or the right to procreate, or private education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* were respectively concerned.

The heart of the matter is that somewhere, either forthwith at conception, or at "quickening," or at birth, or at some other point in between, another being becomes involved and the privacy the woman possessed has become dual rather than sole. The woman's right of privacy must be measured accordingly. It is not for us of the judiciary, especially at this point in the development of man's knowledge, to speculate or to specify when life begins. On this question there is no consensus even among those trained in the respective disciplines of medicine, or philosophy, or theology.

In related contexts we have rejected the claim that an individual has an unlimited right to do as he pleases with his body. See, for example, *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905) (compulsory vaccination), and *Buck* v. *Bell,* 274 U. S. 200 (1927) (compulsory

sterilization). Except to note that the State's interest grows stronger as the woman approaches term, we need not delineate that interest with greater detail in order to recognize that it is a "compelling" state interest. As such, it may constitutionally be asserted when the State does so with appropriate regard for fundamental individual rights. *Cantwell* v. *Connecticut,* 310 U. S. 296, 307 (1940). The woman's personal right, therefore, is not unlimited. It must be balanced against the State's interest.

Consequently, we cannot automatically strike down the remaining features of the Georgia statute simply because they restrict any right on the part of the woman to have an abortion at will. The inquiry must be one that examines with particularity the impact of the statute upon the right, as it relates to the state interest being asserted. We turn to this inquiry in Part C, *infra.* First, however, we consider the appellants' alternative theory that the statute as a whole must fall because it is unconstitutionally vague.

B. The vagueness argument centers in the proposition that, with the District Court's having stricken the statutorily stated reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." It is said that the word "necessary" is so vague that it does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretations; and that doctors will choose to err on the side of caution and will be arbitrary.

One answer to this, of course, is that this state of affairs, if it is unfortunate, has been brought about by the appellants' success in the District Court. Before portions of the statute were stricken, it possessed the

objective standards specifically stated. Now that those standards have been removed, it is the appellants who complain that the statute has become vague.

Be that as it may, the net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical judgment" in the light of all the attendant circumstances. He is not now restricted to the three situations specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest, we feel, by the decision only last Term in *United States* v. *Vuitch*, 402 U. S. 62, 71–73 (1971), when it was raised with respect to a District of Columbia statute outlawing abortions "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine. . . ." The Court interpreted the statute to bear upon psychological as well as physical well-being, and, having done so, concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. So here, whether, in the words of the Georgia statute, "an abortion is necessary," is a judgment that a Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of *all* factors—emotional, economic, psychological, familial, physical—relevant to the well-being of the patient. Despite the appellants' seeming protestation to the contrary, all these factors have a bearing

upon health. This, of course, allows the attending physician the room he needs to make his medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

C. Mary Doe's due process attack on the statute focuses on (1) the restriction of abortions to accredited hospitals, (2) the pregnant woman's asserted inability to make a presentation to the hospital abortion committee, and (3) the alleged cumbersome and time-consuming features of the confirming process. Appellant physicians argue that by subjecting their individual medical judgments whether a patient should have an abortion to additional consultation and committee approval unduly restricts their right to practice their profession, and thus deprives them of due process.

Resolution of these issues, as has been noted, requires an inquiry into the adequacy of the State's justifications for encroaching upon the fundamental personal privacy right of Mary Doe recognized in Part A *supra*.

The first aspect concerns accreditation by the Joint Commission on the Accreditation of Hospitals. This Commission is a nonprofit corporation without governmental sponsorship or overtones. No question is raised about the integrity of the organization or about the high purpose of the accreditation process.[8] That proc-

[8] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of services in hospitals." JCAH, Accreditation Manual for Hospitals, Foreward (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "to raise and strengthen the standards from their present level of minimum essential to the level of optimum achievable. . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies;

ess, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[9] Indeed, in Georgia there is no restriction on surgery being performed in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as that the hospital and the operating surgeon be licensed, are met. See Georgia Code §§ 88–1901 and 88–1905 and § 84–907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital is in operation at least one year. Accreditation is also dependent upon the hospital's having, among other things, a radiology department, a mass casualty program, and nuclear medicine facilities. These requirements do bear upon general hospital quality and status, but they impress us as having little bearing on a hospital's qualification as a place where an abortion—or any other particular medical or surgical procedure—may be safely performed. The Model Penal Code § 230.3 does not, for example, include this requirement. And see Commissioners on Uniform State Laws, Uniform Abortion Act (Second Tentative Draft, August 1970), containing no accredited hospital limitation.[10]

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a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[9] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John I. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici*, American College of Obstetricians and Gynecologists, *et al.*, p. A–3.

[10] Some statutes do not have the JCAH accredited hospital requirement. Alas. Stat. § 11.15.060 (1970); Haw. Sess. Laws, 1970,

We therefore hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U. S. 457, 465 (1957). That is not to say, as the appellants themselves concede, Brief, at 40, that Georgia may not or should not adopt standards for licensing all facilities where abortions may be performed so long as those standards have a reasonable relationship to the objective the State seeks to accomplish.

The second aspect of the attack, relating to the hospital abortion committee and the pregnant woman's access to it, is based primarily on *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), concerning the posting of an alcoholic's name. It is suggested that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions.

This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. It appears also to place undue emphasis on the abortion committee and on its seeming isolation. The pregnant woman's principal counsel in the abortion decision is her personal physician. It is he who makes the initial recommendation. Presumably, and hopefully—if she has been candid with him—

Act 1; N. Y. Penal Law § 125.05.3 (McKinney 1971–1972 Supp.). Washington's statute has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (1971 Supp.).

he knows all aspects of her case. He serves her essentially as the family physician so esteemed in memory. Following accepted medical procedure, his recommendations would be conveyed with underlying reasons to the two other physicians who, pursuant to § 26–1202 (b)(3), must separately examine and confirm. At that point the medical judgment is complete. To each and all of these physicians the woman has full access.

We see nothing in the Georgia statute that denies access to the hospital abortion committee by or on behalf of the pregnant woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided. It is perhaps worth noting, also, that the abortion committee has a function of its own. It is a committee of the hospital and its members are members of the hospital's medical staff. The committee's composition usually is a changing one. In this way its work burden is more readily accepted and is shared. The committee's function is protective of the hospital. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations. The committee's focus is on it, and not on the pregnant woman.

To say also that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. This case involves more than extramarital sex and its product. In addition, the suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions and the concern of his feminine patients. He, more than anyone else, is

knowledgeable in this area of patient care, and is aware of human frailty, so-called "error," and needs. And the good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have a sympathy and an understanding for the pregnant woman patient that probably is not exceeded by any of those who participate in other areas of professional counseling.

Saying all this, however, does not settle the issue of the constitutional propriety of the presence of the hospital abortion committee in the Georgia statutory system. Viewing the statutes as a whole, we see no pertinence in the system for the advance approval by the abortion committee. Under § 26–1202 (e) a hospital is free not to admit a patient for an abortion and not to have an abortion committee. Furthermore, a physician or any other employee is free to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford some protection to the individual and to the denominational hospital in the observance of religiously dictated precepts, and in business decisions. From this point of view, § 26–1202 (e) affords adequate protection to the hospital and little additional protection is provided by the abortion committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unnecessary and is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

The third aspect of the attack focuses on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited"

to prompt determination and "makes a mockery of Georgia's attempt to justify its statute."

Time, of course, is critical in the abortion process. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study [11] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortive process" because the medium time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their request. It is too much to say, as the appellants do, that these persons "were victims of the system over which they had no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of any system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the hospital abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia licensed physicians in the recommendation of the pregnant woman's own consultant. We conclude that this, too, must fall.

[11] L. Baker and M. Freeman, Abortion Surveillance at Grady Memorial Hospital, Center for Disease Control (U. S. Department of HEW, PHS), June and July 1971.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. We are cited to no other voluntary medical or surgical procedure—not even childbirth—for which Georgia requires confirmation by two other physicians. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with the patient's needs and unduly infringes on the physician's right to practice. The attendant physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine for decades and know its usefulness and benefit. It is still true today that "Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U. S. 114, 122–123 (1889). That is the measure. See *United States* v. *Vuitch,* 402 U. S., at 71.

D. The Georgia residence requirement is said to be violative of the right to travel stressed in *Shapiro* v. *Thompson,* 394 U. S. 618, 629 (1969), and other cases. We see no restriction in the statute on the travel right. One is no less free, because of the statute, to come to or to depart from the State of Georgia. And it can be said that the residence requirement is not without some relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we cannot approve the constitutionality of the residence requirement. It is not based on a policy of preserving state-supported facilities for Georgia residents, for the bar applies as well to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const., Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland,* 79 U. S. (12 Wall.) 418, 430 (1870); *Blake* v. *McClung,* 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services available there. A contrary holding would mean that a State may limit to its own residents the general medical care available within its borders. This we cannot approve.

E. The last argument on this phase of the case is the usual one, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortion should be performed by others than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have non-physicians made available to them. The appellants acknowledge that the procedures are "non-discriminatory in . . . express terms," but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that 105 of the 159 counties in Georgia have no accredited hospital. Appellants' Jurisdictional Statement 18, Appendix G. We have set aside the accreditation approval and confirmation requirements, however, and, with that, the discrimination argument necessarily collapses in all significant aspects.

IV

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante,* at ——. We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two additional physicians, and as to residence in Georgia are all unconstitutional. Specifically, the following portions of § 26–1202 (b) are stricken:

(1) Subsections (1), (2), and (5).

(2) That portion of Subsection (3) following the words, "Such physician's judgment is reduced to writing."

(3) That portion of Subsection (4) following the words, "Such abortion is performed in a hospital ~~recognized~~ licensed by the State Board of Health."

The judgment of the District Court is therefore modified and, as so modified, is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

APPENDIX

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26–12. ABORTION.

26–1201. Criminal Abortion. Except as otherwise provided in section 26–1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26–1202. Exception. (a) Section 26–1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84–9 or 84–12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met;

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84–9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the

purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26–1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JAN 18 1973

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 *v.* Henry Wade. — On Appeal from the United States District Court for the Northern District of Texas.

Mary Doe et al., Appellants, 70–40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al. — On Appeal from the United States District Court for the Northern District of Georgia.

[February —, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of the pregnant women, using the term health in its broadest medical context. See *Vuitch* v. *United States,* 402 U. S. 62, 71–72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortive procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course,

States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holding today as having the sweeping ~~impact~~ consequences attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.

L. F. P. - File Copy

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell ✓
Mr. Justice Rehnquist

From: Blackmun, J.

2nd DRAFT

Circulated: 11/22/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants,
v.
Arthur K. Bolton, as Attorney General of the State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia.

Reviewed 11/25/72

[November —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade*, *ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade*, *ante* — n. 37.

Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113.[4] The predecessor statute paralleled the Texas legislation considered in *Roe* v. *Wade, ante,* and made all abortions criminal except those necessary "to preserve the life" of the pregnant woman. The new statutes have not been tested on constitutional grounds in the Georgia courts.

Section 26–1201, with a referenced exception, makes abortion a crime, and § 26–1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Sec-

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[4] The active provisions of the 1876 statute were:

"Section I. *Be it enacted, etc.,* That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

"Sec. II. *Be it further enacted,* That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

"Sec. III. *Be it further enacted,* That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."

It should be noted that the second section, in contrast to the first, makes no specific reference to quickening. The section was soon construed, however, to possess this line of demarcation. *Taylor* v. *State,* 105 Ga. 846, 33 S. E. 190 (1899).

tion 26–1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health, or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect, or
>
> "(3) The pregnancy resulted from forcible or statutory rape." [5]

Section 26–1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26–1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is a provision (subsection (c)) for judi-

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[5] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Rearg. 32.

cial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e)) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

II

On April 16, 1970, Mary Doe,[6] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform, instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of Fulton County, and the chief of police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

Mary Doe alleged:

> "(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become recon-

[6] Appellants by their complaint, Appendix 7, allege that the name is a pseudonym.

ciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.

"(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26–1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26–1202 (a).[7]

"(3) Because her application was denied, she was forced either to relinquish 'her right to decide when and how many children she will bear' or to seek an abortion that was illegal under the Georgia statutes. This invaded her rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued 'on her own behalf and on behalf of all others similarly situated.' "

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed

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[7] In answers to interrogatories Doe stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. Appendix 64.

by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

A three-judge district court was convened. An offer of proof as to Doe's identity was made, but the court deemed it unnecessary to receive that proof. The case was then tried on the pleadings and interrogatories.

The District Court, *per curiam,* 319 F. Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," *id.,* at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," *id.,* at 1055. As a consequence, the court held invalid those portions of §§ 26–1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certifications in a rape situation; and § 26–1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia's interest in protection of health, and the existence of a "*potential* of independent human existence" (emphasis in original), *id.,* at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," *id.,* at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.,* at 1057.

Claiming that they were entitled to an injunction and to broader relief, the plaintiffs took a direct appeal pursuant to 28 U. S. C. § 1253. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971). The defendants also purported to appeal, pur-

suant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U. S. 936 (1971). We are advised by the defendant-appellees, Brief 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the District Court decision was adverse to the defendants, that is, the extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.[8] *Swarb* v. *Lennox,* 405 U. S. 191, 201 (1972).

III

Our decision in *Roe* v. *Wade, ante* —, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an

[8] What we decide today obviously has implications for the issues raised in the defendants' appeal pending in the Fifth Circuit.

abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge,* 446 F. 2d 833, 839–840 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kans. 1972).

Physicians have standing

In holding that the physicians, while theoretically possessed of standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman,* 367 U. S. 497 (1961). There a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told,[9] physicians were prosecuted. The present case, therefore, is closer to *Epperson* v. *Arkansas,* 393 U. S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut,* 381 U. S., at 481.

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity

[9] Tr. of Oral Arg. 21–22.

as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade*, *ante*, at —.

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

A. Our decision today in *Roe* v. *Wade*, *ante*, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because

it would be physically and emotionally damaging to Doe to bring a child into her poor "fatherless" [10] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." Brief 27.

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26–1202 (a) of the Georgia statute, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers in the proposition that, with the District Court's having stricken the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The

[10] Appellants' Brief 25.

appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical" judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest by the decision in *United States* v. *Vuitch,* 402 U. S. 62, 71–72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary," is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-

being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals: [11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. *JCAH Accreditation.* The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12]

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[11] We were advised at reargument, Tr. of Rearg. 10, that only 54 of Georgia's 159 counties have a JCAH accredited hospital.

[12] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreward (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "to raise and strengthen the

That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia there is no restriction of the performance of non-abortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. See Georgia Code §§ 88–1901 (a) and 88–1905 (1971) and 84–907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, August 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH accredited hospital specification.[15] Some courts have held that a JCAH accredita-

standards from their present level of minimum essential to the level of optimum achievable . . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies; a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John L. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici*, American College of Obstetricians and Gynecologists, et al., p. A–3.

[14] See *Roe* v. *Wade, ante* —, n. 40.

[15] Some state statutes do not have the JCAH accreditation requirement. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453.16 (Supp. 1971); N. Y. Penal Code § 125.05.3 (McKinney Supp. 1972–1973). Washington has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (Supp. 1972). Florida's new statute has a similar provision. Law of Apr. 13, 1972, c.

tion requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. *Poe* v. *Menghini,* 339 F. Supp. 986, 993–994 (Kan. 1972); *People* v. *Barksdale,* 96 Cal. Rptr. 265, 273–274 (Cal. App. 1971).

We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U. S. 457, 465 (1957).

This is not to say, as the appellants themselves concede, Brief 40, that Georgia may not or should not adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some institutions other than hospitals are entirely adequate to perform abortions if they possess these qualifications.

72–196, § 1 (2). Others contain the specification. Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Cal. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Kan. Stat. Ann. § 21–3047 (Supp. 1971); Md. Ann. Code Art. 43, §§ 137–139 (Repl. 1971). Cf. Del. Code Ann. §§ 1790–1793 (Supp. 1970) specifying "a nationally recognized medical or hospital accreditation authority," § 1790 (a).

The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has shown to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital rather than in some other facility.

2. *Committee Approval.* The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted lack of access to that committee. Relying primarily on *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), concerning the posting of an alcoholic's name, Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they advance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that

the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see

no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26–1202 (e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26–1202 (e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

3. *Two-Doctor Concurrence.* The third aspects of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study [16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their applications. It is too much to say, as appellants do, that these particular persons "were victims of [a] system over which they [had] no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient.

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[16] L. Baker & M. Freeman, Abortion Surveillance at Grady Memorial Hospital Center for Disease Control (June and July 1971) (U. S. Dept. of HEW, PHS).

The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U. S. 114, 122–123 (1889). See *United States* v. *Vuitch,* 402 U. S., at 71.

E. The appellants attack the residency requirement of the Georgia law, §§ 26–1202 (b)(1) and (b)(2), as violative of the right to travel stressed in *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969), and other cases. We see in the statute no undue restriction on the travel right as such. One is no less free, because of the statute, to come to or to depart from the State of Georgia. Further, it cannot be said that the residency requirement might not have a possible relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy

of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland,* 79 U. S. (12 Wall.) 418, 430 (1870); *Blake* v. *McClung,* 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer* v. *Witsell,* 334 U. S. 385, 396–397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions should be performed by persons other than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have nonphysicians made available to them. The appellants acknowleged that the procedures are "nondiscriminatory in . . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante.* We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26–1202 (b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).

(2) That portion of Subsection (3) following the words "such physician's judgment is reduced to writing."

(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26–12. ABORTION.

26–1201. Criminal Abortion. Except as otherwise provided in section 26–1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26–1202. Exception. (a) Section 26–1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84–9 or 84–12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met;

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84–9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(*c*) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the

purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26–1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B

American Law Institute
MODEL PENAL CODE

Section 230.3. Abortion.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any

of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) *Section Inapplicable to Prevention of Pregnancy.* Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
						10/24/72		
Concurring opinion circulated 1/18/73	Concurring 1/15/73		Concurring 11/27/72			3rd draft 12/20/72 4th draft 1/16/73	Agrees to concur 12/5/72	Concur in part dissent in part 12/4/72
	Join HAB 12/20/72	Join HAB 12/27/72	Will circulate Concurring opinion 12/27/72	Dissent circulated 1/11/73	Join HAB 12/27/72		Join HAB 1/3/73	Circulated dissent 1/4/73
	Concurring opinion 2nd draft 12/29/72		6	2nd draft 1/13/73 3rd draft 1/16/73				Join BRW 1/11/73
					70-40 Doe v. Bolton			