SUPREME COURT OF THE UNITED STATES

410 U.S. 179

Doe v. Bolton

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-40 Argued: December 13, 1971 --- Decided: January 22, 1973

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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, pp. 1249, 1277-1280. In Roe v. Wade, ante p. 113, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect [p182] 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, p. 202. [n1] As the appellants acknowledge, [n2] 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, p. 205. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States. [n3] The new Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113. [n4] The predecessor statute paralleled [p183] the Texas legislation considered in Roe v. Wade, supra, 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 state 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. Section 21202(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. [n5]

Section 26-1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized [p184] 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 judicial 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, [n6] 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 [p185] 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 reconciled. 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). [n7]

(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 [p186] 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 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," 319 F.Supp. 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 [p187] 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, pursuant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U.S. 936 (1971). We are advised by the 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. [n8] Swarb v. Lennox, 405 U.S. 191, 201 (1972).

III

Our decision in Roe v. Wade, ante p. 113, 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. [p188]

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 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 (Kan.1972).

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 [p189] Georgia abortion statute under which, we are told, [n9] 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 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 127.

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. Roe v. Wade, supra, 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. [p190]

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" [n10] 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 that 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 [p191] 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 statutes, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers on the proposition that, with the District Court's having struck down 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 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 [p192] well as physical wellbeing. 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.

Id. 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 wellbeing 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 demand of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals: [n11] (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 [p193] 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. [n12] That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure. [n13] In Georgia, there is no restriction on the performance of nonabortion 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) [p194] 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, Aug.1971), [n14] approved by the American Bar Association in February, 1972, contains no JCAH-accredited hospital specification. [n15] Some courts have held that a JCAH accreditation requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. E.g., Poe v. Menghini, 339 F.Supp. at 993-994.

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;s found." Morey v. Doud, 354 U.S. 457, 465 (1957).

This is not to say that Georgia may not or should not from and after the end of the first trimester, adopt [p195] 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 facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. 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 in order 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, because it fails to exclude the first trimester of pregnancy, see Roe v. Wade, ante at 163, 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 regnant woman's asserted [p196] 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, [p197] 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 sympathy and understanding for the pregnant patient that probably are 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, [p198] 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 21202(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 aspect 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 [n16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuance 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 [p199] 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. 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 and 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 [p200] 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. A requirement of this kind, of course, could be deemed to have some 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, 12 Wall. 418, 430 (1871); 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 [p201] 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 acknowledged 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, p. 113. 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 "[s]uch physician's judgment is reduced to writing."

(3) Subsections (4) and (5). [p202]

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

APPENDIX A TO OPINION OF THE COURT

Criminal Code of Georgia(The italicized portions are those held unconstitutionalby 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 [p203] 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 [p204] 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 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 record 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. [p205]

(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 TO OPINION OF THE COURT

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 [p206] 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. [p207] 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.

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

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

[3] See Roe v. Wade, ante p. 113, at 140 n. 37.

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

> Section I. Be it enacted, etc., That from and after the passage of this Act, the willful 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 willfully 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, made no specific reference to quickening. The section was construed, however, to possess this line of demarcation. Taylor v. State, 105 Ga. 846, 33 S.E.190 (1899).

[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 Oral Rearg. 32.

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

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. App. 64.

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

9. Tr. of Oral Arg. 21-22.

10. Brief for Appellants 25.

11. We were advised at reargument, Tr. of Oral 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, Foreword (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 "[t]o 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; 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 I. Brewer, M.D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for amici curiae, American College of Obstetricians and Gynecologists et al., p. A-3.

14. See Roe v. Wade, ante at 146-147, 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, subd. 3 (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. 72-196, § 1(2). Others contain the specification. Ark.Stat.Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif.Health & Safety Code §§ 25950-25955.5 (Supp. 1972); Colo.Rev.Stat.Ann.

§§ 40-2-50 to 40-2-53 (Cum.Supp. 1967); Kan.Stat.Ann. § 21-3407 (Supp. 1971); Md.Ann.Code, Art. 43, §§ 137-139 (1971). Cf. Del.Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972), specifying "a nationally recognized medical or hospital accreditation authority," § 1790(a).

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