***Doe v. Bolton* (1973)** - Justice Blackmun - 7/2.

The *Doe v. Bolton* Court
[The same Court as *Roe*.]

Majority (7): Blackmun, Burger, Douglas, Brennan, Stewart, Marshall and Powell.
Minority (2): White and Rehnquist.

Issue: An indigent, married, pregnant woman, who desired but had been refused an abortion, sought a declaratory judgment that the Georgia abortion statutes were unconstitutional.

Held: The Court set aside the accreditation, approval, and confirmation requirements of the state's abortion statutes as unconstitutional.

Reasoning: Justice Blackmun...The Criminal Code of Georgia states [The italicized portions are those held unconstitutional by the *District Court*. The underlined portions were then held unconstitutional by the Supreme Court, as well.]:

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...or uses any instrument...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, 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*

By adding "seriously and permanently" to the health picture, Georgia is attempting to narrow the definition of "health."

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...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...

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...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...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 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.

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In *Roe* v. *Wade*[1] we struck down statutes that made all abortions criminal except those necessary "to preserve the life" of the woman. Georgia's more recent legislation is different and merits separate consideration.

Mary Doe alleged:

1. She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children, 2 in a foster home because of Doe's poverty and inability to care for them and the youngest had been placed for adoption...

2. She applied to the Abortion Committee of the Hospital for a therapeutic abortion under 26-1202 and was denied when she was eight weeks pregnant on the ground that her health/life was not in jeopardy, the fetus was not defective and she was not raped.

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; i.e., 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.

The District Court concluded that the limitation in the Georgia statute of the number of reasons for which an abortion may be sought improperly restricted Doe's rights of privacy articulated in *Griswold*[2] and of personal liberty, both of which it thought "broad enough to include the decision to abort a pregnancy." As a consequence, the District Court held invalid (1) those portions of the statute limiting legal abortions to the 3 situations specified, (2) certifications in a rape situation and (3) 1202(c) authorizing a court test. The District Court also held that Georgia's interest in protection of health and the existence of a "potential of independent human existence" justified state regulation of the manner and performance as well as the quality of the final decision to abort, thereby refusing to strike down the remaining provisions.

Per *Roe v. Wade*, a pregnant woman does not have an absolute constitutional right to an abortion on demand. Doe argues 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." **Doe contends that the word "necessary" does not**

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[1]Case 9A-AP-4 on this website.

[2]Case 9A-AP-1 on this website.

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 "best clinical" judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. The vagueness argument is set at rest by the decision in *United States v. Vuitch*. **We agree with the District Court 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.

I contend that unless a Constitutional amendment debate occurs, all of the political nonsense we have been about for the past 32 years over "abortion/choice" issues is for naught. Why? Remember that the Court, in *Roe*, went out of their way to say that a state could totally proscribe abortion after viability as long as that did not get in the way of the mother's life "or **health**." I asked, "What is 'health'? Could it be "mental stress"? Now we know that a mother's "health" or "well-being" includes an evaluation of such factors as her "**physical, emotional, psychological and familial diagnoses." Even her "age" is a factor.**

Therefore, when a physician, at **any** stage of pregnancy, **even post-viability**, determines that his patient should have an abortion for "emotional" reasons, that is the end of the legal issue as I read this. What am I missing? **What woman won't be able to find a physician willing to take her money in return for agreeing with her that she is "emotionally unstable"?** The majority says, **"This allows the attending physician the room he needs to make his best medical judgment."** In other words, THIS DEFINITION OF HEALTH ALLOWS THE ATTENDING PHYSICIAN THE ROOM HE NEEDS TO ABORT **AT ANY STAGE**.

If *Roe v. Wade* is reversed, such that an abortion at any time is illegal unless it is necessary to save the life of the mother, but the "preservation of health" remains, the cause of the pro-life movement could be a "lost cause," depending upon the breadth of the definition of "health."

Let's take the argument to the max. I contend, at least in theory, that the only way for those who seek to put an end to abortion is to arrive at a place in the law where saving the life of the fetus is more important than "saving" the life of the mother. That is a radical concept and won't happen. The reason, therefore, that this never ending fight is for naught is embodied in the following hypothetical. Let us say that "pro-lifers" get all they can likely get; that is, no abortion except to "save" the life of the mother. OK...[one mother depressed over the thought of raising a child to the point of threatening suicide] + [one licensed physician willing to go along with that diagnosis] = [one legal abortion] **even after *Roe v. Wade* is reversed <u>in its entirety</u> at whatever stage of pregnancy she is in when she becomes suicidal.** THINK ABOUT IT!

Doe next argues that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in an accredited hospital; (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. Doe attacks 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 physicians 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. *Hospital accreditation*. **We hold that the accreditation requirement does not withstand constitutional scrutiny.** This is not to say that Georgia may not or should not, from and after the end of the first trimester, 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. Doe has 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. 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*) 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*. **We see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee.** 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**...

3. *Two-doctor concurrence*. **Required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant 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.

4. *Residency requirement.* Doe attacks the residency requirement as violative of the right to travel. **We do not uphold the constitutionality of the residence requirement.**

CONCURRENCE: Justice Burger...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 pregnant women, **using the term health in its broadest medical context**. **I do not read the Court's holdings today as having the sweeping consequences attributed to them 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. **This Court (the majority) rejects any claim that the Constitution requires abortions on demand**...

Justice Burger, you may deny the theory, but no one can reasonably doubt the practice that the necessary medical opinions can and will be "bought." It is on this basis I contend that it makes no difference which way the Court goes on *Roe v. Wade*. Either way, if a woman wants an "abortion," she is going to get it and **it will be legal as long as the proper opinion is "purchased."**

DISSENT: Justice White/Rehnquist...At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons -- convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

I find nothing in the language or history of the Constitution to support the Court's judgment. The

Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. **The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.**

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

Justice White seems to make a good argument for letting the political process prevail when the issue involves "sensitive areas over which reasonable men may differ." In other words, Justice White would not likely strike down any legislation that presented a close Constitutional question, thereby opting for a rule of deference to legislative bodies.

It is my view that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve **only their convenience** rather than to protect their life or health.