

Doe v. Bolton (1973)

In the 1973 court case *Doe v. Bolton*, the US Supreme Court in Washington, D.C., ruled that a Georgia law regulating abortion was unconstitutional. The Georgia abortion law required women seeking abortions to get approval for the procedure from their personal physician, two consulting physicians, and from a committee at the admitting hospital. Furthermore, under the statutes, only women who had been raped, whose lives were in danger from the pregnancy, or who were carrying fetuses likely to be seriously, permanently malformed were permitted to receive abortions. The US Supreme Court ruled that the Georgia requirements violated the right to privacy implicit in the Fourteenth Amendment to the US Constitution. Decided on the same day as the abortion case *Roe v. Wade*, *Doe v. Bolton* expanded women's access to abortion by striking down laws that restricted the reasons for which women could receive abortions.

In 1968, the state of Georgia added new three new subsections to Chapter 26, Section 12, of their criminal code, hereafter called the Georgia abortion law. The Georgia abortion law illegalized abortion except in specific circumstances. In cases where pregnant women's lives were in danger or where their health could be seriously, permanently damaged. The law permitted physicians to administer abortions. The law also permitted physicians to perform abortions if fetuses were likely to be born with a serious, permanent, and untreatable mental or physical defects. Lastly, the law permitted a physician to perform abortions if the women were pregnant as the result of being raped.

However, the Georgia abortion law required that further conditions be met for abortions to be legal. In each case, a woman seeking an abortion had to have Georgia residence. Next, the woman's physician had to consult with two other physicians and have them agree that the woman fit the special conditions described by the Georgia abortion law. Additionally, the physician had to perform the abortion in a hospital licensed by the Georgia State Board of Health and accredited by a medical organization called the Joint Commission on Accreditation of Hospitals. Then, the physician had to receive approval for the woman's case from a committee within that hospital responsible for approving or denying applications for abortions. The Georgia abortion law stipulated that hospitals were not required to create a committee, nor were they or their staff required to participate in abortions.

Even when those conditions were met, the Georgia abortion law included additional provisions restricting abortions. The law required women who claimed to have been raped to produce documentation of the rape as proof. Another provision allowed court attorneys or close relatives of fetuses to request that a court evaluate women's applications for abortions. Even if a pregnant woman's request for an abortion was approved by a physician and a hospital, a court attorney or close relative of the fetus could go to court to prevent or delay the procedure. A judge would have to review and approve the pregnant woman's application for abortion before she could receive it, to ensure she fit one of the three exceptions provided for by the law.

On 25 March 1970, Sandra Bensing applied for an abortion at a public hospital in Atlanta, Georgia. She was pregnant with her fourth child, though none of her children lived with her. Her first two children were in foster care because state authorities had determined that she was unable to care for them, and her third child had been adopted by another family. Bensing was separated from her husband and had spent time in a state psychiatric hospital. On 16 April 1970, the public hospital denied Bensing's application for an abortion because she did not fit into one of the three exceptions described by the Georgia abortion law. Her life was not in danger, she had not been raped, and the fetus did not seem to have any serious, permanent, and untreatable malformations. Bensing, after being denied at the public hospital, received an abortion at a private hospital, which was not

subject to the same rules as the public hospital.

Although Bensing received an abortion at a private hospital, and was therefore no longer pregnant, she filed a case challenging the constitutionality of Georgia's abortion law. She filed the case against Arthur K. Bolton, the attorney general of Georgia, as well as Lewis R. Slaton, the district attorney of Fulton County, Georgia, and Herbert T. Jenkins, the chief of police in Atlanta. For the case, Bensing assumed the pseudonym of Mary Doe. Several others joined Doe's suit, including physicians, nurses, and social workers. The physicians claimed that the law restricted their rights to practice medicine by requiring them to seek the approval of other physicians and a hospital committee for abortion procedures. The nurses made a similar argument, as they assisted with abortions, while the social workers claimed the law restricted their rights to counsel women freely. Doe and those that joined her claimed that the law was unconstitutional and requested enforcement of it to stop.

The case *Doe v. Bolton* was first heard in the US District Court of the Northern District of Georgia in Atlanta by a three-judge panel. Judges Lewis Render Morgan, Sidney Oslin Smith, and Albert John Henderson heard and decided the case. Attorney Margie Pitts Hames argued for Doe and the physicians, nurses, and social workers who had joined her case. Hames made four major claims against the Georgia abortion law. First, she argued that the law was too vague in its requirements for physicians to determine whether giving an abortion in any particular case was legal or not. The law required physicians to use their best judgment to determine what was medically required without giving specifics beyond endangerment of the woman's health or serious malformations of the fetus. Hames claimed that the law's vagueness violated the Fourteenth Amendment to the US Constitution, which requires the government to go through due process of law before infringing on people's rights. Hames claimed that because the law was so vague, physicians could be arrested for performing abortions that they judged to be legal under the law. It was unconstitutional to arrest someone for an act that the state had not clearly stated was illegal.

Second, Hames argued that the Georgia abortion law violated women's constitutional rights to decide to terminate pregnancies. Based again on the Fourteenth Amendment and on an earlier US Supreme Court case, *Griswold v. Connecticut* (1965), Hames claimed that women had rights to privacy concerning decisions of procreation and contraception and that the Georgia abortion law violated those rights. Hames's third claim against law was that it restricted the rights of physicians, nurses, and social workers to practice their professions. Finally, Hames argued that the law discriminated against poor and non-white women because it required that they go to specifically approved hospitals that were not available in every county in Georgia. That, she stated, violated the equal protections clause of the Fourteenth Amendment, which prevents states from denying legal rights to specific subpopulations. In *Doe v. Bolton*, those legal rights were the rights to abortion.

After hearing Hames's arguments, the district court judges made their decision on 31 July 1970. In the decision of the court, the judges stated that all four groups, Doe and other pregnant women in her situation, physicians, nurses, and social workers, had standing in the case. That meant all four groups had a reason to protest the law in court. They also stated that Doe's case was justiciable, or appropriate to be decided in court, because the hospital that had denied her abortion application had been given power by the state to do so and therefore fell under the court's jurisdiction.

With the merits of the court case established, the judges gave their decision. They agreed that *Griswold v. Connecticut* established that constitutional rights to privacy encompassed rights of women to receive early stage abortions, or abortions before the end of the first trimester. However, the judges said, rights to abortions had to have limits. They referred to the potential for life that develops after a woman's egg is fertilized by a man's sperm. The state, they claimed, had an interest in protecting that potential for life and therefore limiting access to abortion procedures that would end that life.

With the assumption that women had rights to abortions and that states had an interest in regulating abortions, the judges evaluated the requirements of the Georgia abortion law. The judges noted that the Georgia law treated abortion as a medical issue. Therefore, the law charged physicians, as medical experts, to determine if an abortion was required or not. That meant, the judges continued, that physicians could consider any factor, emotional, economic, psychological, familial, or physical, when determining whether or not to provide a woman with an abortion. The judges then stated that

because abortions were medical procedures, the state had rights to regulate the quality of abortions, as it did for other medical procedures. However, the judges said that if the state viewed abortions as a medical issue, then the state had no rights to limit the reasons for which women could receive abortions, as that was not a medical consideration. Thus, the judges ruled that the Georgia law's three provisions for legal abortions were unconstitutional. Women had a constitutional right to seek abortions even if their lives were not in danger, they had not been raped, and their fetus did not have any malformations. However, the judges continued, because the state had a duty to regulate the quality of abortions, the state could require licenses for abortion facilities, specific sanitation measures, and proper medical standards.

The district court judges decided that women could request abortions for any reason, so long as they had physician approval, but left in place the requirements that each physician intending to perform an abortion get the opinions of two consulting physicians and the approval of a hospital abortion committee. As a result of the district court's decision, the Georgia abortion law continued to be enforced in Georgia, but the reasons for which women could request abortions were expanded.

After the decision of the district court, Doe, Hames, and the other case participants appealed the case to the US Supreme Court to request further dismantling of the Georgia abortion law. The US Supreme Court justices agreed to take the case. At that time, the Supreme Court justices had agreed to hear another case regarding abortion, called *Roe v. Wade*. Because the two cases dealt with similar topics, the justices joined the cases together and made them companion cases. Companion cases are cases that deal with such similar legal issues that a court decides them at the same time and with similar reasoning. Though the Supreme Court ordinarily has nine justices, two justices retired before hearing the cases, so seven justices heard both *Doe v. Bolton* and *Roe v. Wade*. Those seven justices were Warren Burger, William Douglas, William Brennan, Potter Stewart, Byron White, Thurgood Marshall, and Harry Blackmun. Burger served as Chief Justice.

On 13 December 1971, the justices heard oral arguments for *Doe v. Bolton*. Hames again argued for Doe and the others on her side. Hames focused her arguments on three of the Georgia abortion law's requirements. First, she argued against the requirement that a hospital abortion committee approve abortion requests. Then, she argued against accreditation of the hospitals by the Joint Commission on Accreditation of Hospitals. Finally, she disputed the requirement that the woman requesting an abortion in Georgia be a resident of Georgia. She and Doe aimed to have the entirety of the law declared unconstitutional and unenforceable.

Hames started her oral argument by noting several inconsistencies with the state of Georgia's defense of the Georgia abortion law. Hames noted that the intent the Georgia law, as recognized by the district court, was to protect women's health by addressing potential issues with the medical procedure of abortion. But, according to Hames, the state of Georgia did not defend the law on the basis of protecting women's health but instead on the basis of protecting the life and alleged rights of the fetus. If the purpose of the law was to protect fetal life, Hames continued, then the law was inconsistent because it abandoned fetal life in three scenarios: if the fetus was a result of rape, if the fetus was malformed, or if the fetus threatened the life of the pregnant woman. Hames then noted several other positions of the state of Georgia that also showed their inconsistent stance on protecting fetal life.

After noting those inconsistencies, Hames moved on to argue in favor of legalizing abortions in order to protect women's health, as the Georgia law was intended to do. Hames claimed that laws criminalizing abortions had not stopped illegal abortions from taking place, and that it would be better to make abortions a legal part of healthcare and thus safer for women seeking them. The Georgia abortion law, she said, made the process of seeking and receiving an abortion cumbersome and time consuming. She said that abortions were safer when performed in the first trimester, presenting three times less risk than when performed after twelve weeks' gestation. Therefore, she said, the process would be better if it was less time-consuming. One way to do that would be to legalize abortions and dismantle the Georgia law.

Hames's final argument in front of the US Supreme Court was against the Georgia abortion law's requirement that hospital committees approve abortion requests. She argued that the hospital committees could not properly determine if abortions were right for women, because the women

and their physicians were not permitted to present their cases to the committees. For example, some committees made their decisions based on women's medical charts, and those medical charts did not say if the women were financially able to support and raise healthy children, which she claimed was a reason why women may want to end a pregnancy. Hames further argued that the hospital committees infringed on physicians' rights to practice medicine, as the law required physicians to abide by other physicians' decisions about their patients.

After Hames argued for Doe, Dorothy T. Beasley began her arguments in favor of Bolton and the state of Georgia. Beasley opened with the question of what value should be placed on fetal life. She said that the state considered fetal lives to be valuable and thus deserving of protection. She claimed that the purpose of Georgia's law was to prevent fetal lives from being arbitrarily destroyed by pregnant women. She also claimed that the law was meant to protect women's health by making sure abortions were safe, and that physicians and hospital committees approved the abortions. Beasley stated that the law balanced the competing interests of pregnant women and their fetuses.

Beasley argued that women did not have constitutional rights to abortion. Instead, she claimed, women had rights to self-defense. The Georgia law permitted abortions in cases of rape or incest, she said, which were examples of women defending themselves after the fact. Also, Beasley said, the law enabled women to defend themselves against the circumstances of bearing and raising gravely, permanently malformed children. Finally, Beasley stated, the law enabled women to defend themselves if their health or lives were in danger. Given that the law protected women's rights to self-defense, Beasley claimed the law was constitutional.

Beasley concluded her arguments by stating that the Georgia abortion law did not hinder due process or equal protection, as Doe and Hames had claimed in the district court case. She added that the law protected physicians from potential wrongdoing by giving them a procedure to follow when seeking abortions for patients.

On 13 December 1971, Beasley and Hames both made their arguments in front of the seven US Supreme Court justices. However, justices William Rehnquist and Lewis Powell joined the US Supreme Court on 7 January 1972 and did not hear the opening arguments of *Doe v. Bolton*. Therefore, Hames and Beasley reargued the case.

On 11 October 1972, Hames and Beasley again made arguments for their respective sides. Hames focused her arguments on how the Georgia law unduly restricted women's access to abortions and physicians' rights to practice medicine. She claimed that forcing women to go to hospitals approved by the Joint Commission for Accreditation of Hospitals meant they had fewer hospitals to choose from, which unduly restricted access to abortions. She also claimed that requiring committees at hospitals to approve women's application for abortions was burdensome. Finally, she stated that requiring physicians to gain the approval of two other physicians unduly restricted physicians' rights to practice medicine.

Beasley focused her argument on the rights of fetuses. She claimed that Doe had to show that she had constitutional rights to abortion. Beasley stated that Doe had not shown that she possessed those rights. Therefore, Beasley claimed, Doe had done something wrong in terminating her pregnancy. Beasley asserted that the state had a duty to care for fetuses and that pregnancies should only be terminated in extreme instances. She based her claims on the Ninth Amendment to the US Constitution, which states that people retain all rights not discussed in the Constitution. She interpreted the people to include fetuses, and argued that any laws about abortions had to balance the rights of women and their fetuses.

The US Supreme Court made its decision on 22 January 1973, the same day it decided the companion case *Roe v. Wade*. In their decision of *Roe v. Wade*, the justices determined that abortion was a legal procedure in the US, based on women's rights to privacy established in the Fourteenth Amendment to the US Constitution. The justices used that reasoning in *Doe v. Bolton* and added to it.

In the opinion of the Court, written by Harry Blackmun, the justices decided in favor of Doe in a seven to two decision. In his opinion, Blackmun agreed with several of the arguments made by Hames on behalf of Doe and the physicians, nurses, and social workers who joined her case. Blackmun addressed the requirement for hospital accreditation, agreeing with Hames that the re-

quirement restricted access to abortions unduly. He stated that requiring hospitals to be approved by the Joint Commission for the Accreditation of Hospitals was not relevant to providing abortions, as no one had shown that those requirements made the abortion procedure any safer for women, which was the claimed intent of the law. Blackmun also responded to Hames's claim that Georgia's system discriminated against lower income people, as not all hospitals in Georgia had Joint Commission for the Accreditation of Hospitals approval. Because the justices had already struck down the accreditation requirement, Blackmun stated that there was no longer a cause for any discrimination.

Blackmun's opinion also agreed with Hames on other requirements of the Georgia abortion law, including that hospital abortion committees approve abortion requests and that women requesting abortions be residents of Georgia. Blackmun stated that the hospital abortion committees were redundant to physicians' opinions, and that they restricted women's rights to receive medical care from their chosen physicians and physicians' rights to provide medical care. Blackmun also struck down the requirement that each physician receive two more physicians' opinions, claiming that the best judgment of one physician was sufficient. In addition, Blackmun stated that the requirement that women be residents of Georgia was not constitutional. Blackmun cited the privileges and immunities clause of the US Constitution, which says that each state in the US cannot treat the citizens of other states any differently within its borders. Blackmun ruled that Georgia could not limit its medical care, including abortions, to the residents of Georgia only.

Though Blackmun largely agreed with Hames and decided in favor of Doe, he also included some caveats in his opinion. Blackmun stated that even though the *Roe v. Wade* decision legalized abortion, it did not give women unbounded rights to receive abortions. Blackmun disagreed with Hames's claim that Georgia had previously restricted abortions to save women's lives, but now emphasized fetuses' rights. He claimed that states had a compelling interest in protecting the lives and rights of fetuses and that a state's interest of protect fetuses lives should not be downgraded as Hames had suggested. Blackmun also disagreed with Hames and Doe's claim that the law was vague. Blackmun stated that the Georgia abortion law required physicians to act on their best clinical judgments, and that the law was not vague, but rather a directive that required physicians to consider all factors before providing women with abortions.

Blackmun authored the majority opinion in favor of Doe, with justices Brennan, Stewart, Marshall, and Powell joining, or agreeing, with Blackmun's opinion. Two other justices, Burger and Douglas, also agreed with the majority decision in favor of Doe, but wrote their own concurring opinions to address specific points they agreed or disagreed with. In his, Burger noted that Georgia's law violated the Fourteenth Amendment to the US Constitution and reiterated that states were allowed to regulate abortions but must avoid uncertainty in those regulations because the consequences could be severe. Burger said that he did not view the requirement of two additional physicians' opinions as burdensome. He also mentioned that the US Supreme Court rejected the claim that the US Constitution requires that women be able to receive abortions on demand.

Douglas also wrote a concurring opinion. In it, he asserted that people in the US had control over developing and expressing their intellects, interests, tastes, and personality. They also had rights to make their own choices about marriage, divorce, procreation, contraception, and child rearing. However, he noted that some of those decisions could be regulated by the state if it had a compelling interest. The Georgia law, he said, conflicted with those freedoms, especially women's rights to decide to bear or not bear unwanted children. Douglas argued that states had an interest in protecting women's health, but could not limit the reasons for which women could receive abortions. He claimed that the state, therefore, must limit the performance of abortions to qualified physicians, which had little impact on women's privacy. But Georgia's abortion law, he said, outlawed nearly all procedures and was thus overbroad. Finally, Douglas concluded that states could not force women to share private medical details with physicians other than their own. Requiring that those details be shared with two other physicians, he claimed, violated the Fourteenth Amendment to the US Constitution.

Justices White and Rehnquist both wrote dissenting opinions, disagreeing with the majority of the Court. In White's opinion, which Rehnquist joined, White asserted that without laws like Georgia's, women could get abortions for no discernable health-related reason. He claimed that such a policy

would value the convenience of pregnant women over the lives of their fetuses. He denied that the US Constitution gave women those rights. He also claimed that the Court had used its power extravagantly in *Doe v. Bolton*, and he stated that he would reverse the district court's decision, retaining the full Georgia law.

Rehnquist, in addition to joining White's opinion, also wrote his own. In it, he referenced his dissent in the *Roe v. Wade* decision. In both *Roe v. Wade* and *Doe v. Bolton*, the majority of the Court decided that women's rights to abortion outweighed states' rights to regulate abortions. Rehnquist agreed that a complete ban on abortions would violate women's rights. However, he stated that the women's rights did not prevent states from regulating abortions in the first trimester.

Doe v. Bolton, along with *Roe v. Wade*, overturned many laws in the US that restricted women's access to abortion. It helped establish women's access to abortion as a legal right, insulated from states' regulation before the second trimester. The precedent established by the case was used in later court cases to protect women's access to abortion.

Sources

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