

## Abortion - Illinois Legislation in the Wake of Roe v. Wade

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## ABORTION—ILLINOIS LEGISLATION IN THE WAKE OF *ROE v. WADE*

After the United States Supreme Court handed down its decisions in January, 1973 overturning two state abortion statutes,<sup>1</sup> the Illinois legislature, attempting to conform with the new guidelines set out by the Court, passed four bills providing for the regulation of abortion procedures.<sup>2</sup> While these guidelines provide a woman with a qualified right to terminate her pregnancy, they also recognize the state's legitimate interests in protecting both the health of the pregnant woman and the potential human life which she bears.

In *Roe v. Wade*, the Supreme Court held that, during the first trimester of a pregnancy, all medical judgments as to the advisability of abortion are to be left to the attending physician.<sup>3</sup> During the second trimester, the Court said, the state may regulate abortion procedures only to the extent that they are related to maternal health.<sup>4</sup> In the third trimester, the state may regulate or proscribe abortion unless it is necessary, in the medical judgment of the attending physician, to preserve the woman's health.<sup>5</sup> The Court also held that the state may, in defining the term "physician," limit it to one licensed by the state and prohibit other persons from performing abortions.<sup>6</sup>

In *Doe v. Bolton* the Supreme Court held portions of the Georgia Criminal Code to be violative of the fourteenth amendment.<sup>7</sup> The Code, in the violating provisions, had required that the abortion be performed

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1. *Roe v. Wade*, 410 U.S. 113 (1973) attacked the Texas abortion statute, TEX. PEN. CODE ch. 9, §§ 1191-96 (1961), one of the "old" type of abortion laws which allowed abortion only to save the life of the mother; *Doe v. Bolton*, 410 U.S. 179 (1973) struck down the Georgia statute, GA. CODE ANN., §§ 26-1201 to 26-1203 (1972), which was based on the ALI "therapeutic" model laws but which also contained some highly restrictive features.

2. S.B. 1049, 78th Ill. Gen. Assembly (1973) [hereinafter cited as S.B. 1049]; S.B. 1050, 78th Ill. Gen. Assembly (1973) [hereinafter cited as S.B. 1050]; S.B. 1051, 78th Ill. Gen. Assembly (1973) [hereinafter cited as S.B. 1051]; H.B. 650, 78th Ill. Gen. Assembly (1973) [hereinafter cited as H.B. 650]. These four bills were enacted as P.A. 72-225, -226, -227, -228, 78th Ill. Gen. Assembly (1973).

3. 410 U.S. at 163.

4. *Id.* at 164.

5. *Id.*

6. *Id.* at 165.

7. 410 U.S. 179, 193-95 (1973).

in a hospital approved by the Joint Commission on Accreditation of Hospitals,<sup>8</sup> that an abortion committee composed of at least three members of the hospital's staff give approval in advance,<sup>9</sup> and that two other physicians licensed by the State of Georgia concur in this decision in writing.<sup>10</sup> The Supreme Court also held that Georgia's residency requirement violated the privileges and immunities clause of the Constitution.<sup>11</sup>

Though at common law, abortion prior to "quickening" was generally not considered to be an offense,<sup>12</sup> many states enacted stringent anti-abortion statutes for the protection of the woman. Many antiquated abortion procedures which presented a greater threat to the woman's health than did pregnancy itself necessitated this concern.<sup>13</sup> Since these statutes were first enacted, medical techniques have advanced to the stage that, with a properly performed abortion, the risk of harm to the woman is very small.

Various state courts struck down their own abortion statutes prior to the Supreme Court decisions, and state legislatures attempted to enact new abortion laws within the limits of the rulings. The California Supreme Court, for example, declared its abortion statute<sup>14</sup> to be unconstitutionally vague in 1969<sup>15</sup> and, in New York, an abortion law was amended in 1970 allowing abortions to be performed if consented to by the prospective mother and carried out by a duly licensed physician who either has a reasonable belief that the abortion is necessary to preserve the mother's life or who performs the procedure within the first twenty-four weeks of pregnancy.<sup>16</sup>

Similarly, in 1971, the constitutionality of the Illinois abortion statute in effect at that time<sup>17</sup> was challenged in federal district court.<sup>18</sup> The

8. *Id.* at 195-98; GA. CODE ANN. § 26-1202(4) (1972).

9. *Id.* at 198-200; GA. CODE ANN. § 26-1202(5) (1972).

10. *Id.* at 201; GA. CODE ANN., § 26-1202(3) (1972).

11. *Id.* at 200. See U.S. CONST. art. IV, § 2; Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

12. See State v. Siciliano, 21 N.J. 249, 121 A.2d 490 (1956). A "quick" child is one that has developed enough to be capable of movement in the womb. State v. Timm, 244 Wis. 508, 12 N.W.2d 670 (1944).

13. Yet the Illinois abortion statute stated that an affirmative defense to criminal abortion would be that the abortion is "necessary for the preservation of the woman's life." ILL. REV. STAT. ch. 38, § 23-1(b) (1971).

14. CAL. PENAL CODE tit. 9, §§ 274 to 276 (1967).

15. People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

16. N.Y. PENAL LAW § 125.05(3) (McKinney 1973).

17. ILL. REV. STAT. ch. 38, § 23 (1971).

18. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

court, rather than invalidating the entire statute, found that

during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.<sup>19</sup>

The United States Supreme Court has held that sex, procreation and marriage are, for the most part, personal matters and, as a result, has preserved the individual's right to privacy in these areas on several occasions.<sup>20</sup> That right can be viewed either implicitly as within the specific guarantees in the Bill of Rights or as one of the fundamental personal rights subsumed within ninth amendment rights "which are protected from abridgement by the Government though not specifically mentioned in the Constitution."<sup>21</sup> *Roe v. Wade* recognized that a woman's right to privacy included the decision of whether or not to bear children:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>22</sup>

The rights of the woman making the decision to abort are two-fold—her right to life and her right to choose whether to bear children.<sup>23</sup> In the framework of these two rights, the woman should be able to weigh the moral, religious and psychological considerations involved in the decision to abort without state interference. As the lower court, in deciding the *Roe v. Wade* case, framed the issue: "The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, [fundamentally effect] the privacy of individuals."<sup>24</sup> The Supreme Court pointed out, however, that

a state may properly assert important interests in safeguarding health, [and] in protecting . . . potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of

19. *Id.* at 1391.

20. See *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965) (statute forbidding the use of contraceptives violative of marital privacy which lies within penumbra of specific rights guaranteed by the Bill of Rights); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages violative of the equal protection and due process clauses of the fourteenth amendment); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1948) (sterilization statutes ruled invalid because marriage and procreation involve a "basic liberty").

21. 381 U.S. at 496 (Goldberg, J., concurring).

22. 410 U.S. at 153.

23. See 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

24. 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.<sup>25</sup>

The state's interest, indeed, is not controlling until the later stages of pregnancy. During the earlier stages, it is difficult to determine exactly what interests the state has in the prospective mother and her unborn child. As the pregnancy progresses, however, and the state's interests become better defined, a problem arises as to when those interests do become compelling. Justice Douglas has commented that "[t]his is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined."<sup>26</sup>

Responding to the abortion decisions, legislators in many states began writing new laws. In Nevada, abortions may now be performed by a licensed physician in a licensed hospital or other health care facility within the first twenty-four weeks of pregnancy if the woman consents in writing.<sup>27</sup> Before the abortion takes place, the doctor must state, on the record, his or her reasons for performing the abortion in relation to the mother's physical or mental danger.<sup>28</sup> North Carolina allows abortions to be performed during the first twenty weeks of pregnancy, although abortion after this time is legal only if it is necessary to preserve the woman's life or health.<sup>29</sup>

On March 20, 1973, the Illinois Supreme Court, in accordance with the *Roe v. Wade* and *Doe v. Bolton* decisions, struck down the Illinois abortion statute<sup>30</sup> as unconstitutional.<sup>31</sup> The court's rationale was that the statute "unduly restricts the legal justification for an abortion and completely fails to distinguish when an abortion may be performed under

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25. 410 U.S. at 154.

26. *United States v. Vuitch*, 402 U.S. 62, 78 (1971) (Douglas, J., dissenting).

27. NEV. REV. STAT. § 630.230 (Supp. 1973).

28. *Id.*

29. N.C. GEN. STAT. § 14-45.1 (Supp. 1973).

30. ILL. REV. STAT. ch. 38, § 23-1 (1971):

(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to 10 years.

(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed facility because necessary for the preservation of the woman's life.

31. *People v. Frey*, 54 Ill. 2d 28, 294 N.E.2d 257 (1973).

the guidelines established in *Roe v. Wade*.<sup>32</sup> This decision left Illinois without any statutory regulation of abortions. In response to this situation, both houses of the Illinois General Assembly sponsored bills which would govern abortions performed within the state. State Senator Dan Wooten of Rock Island introduced three abortion bills on April 14, 1973.<sup>33</sup> These bills, drafted with the aid of the Illinois Hospital Association, the Illinois State Medical Society, and the State Department of Mental Health, were passed by the Senate on May 29, 1973 and, by the House, on July 1, 1973. Governor Walker signed the bills into law on July 19, 1973 to become effective immediately. A House bill dealing with abortion was also approved by Governor Walker on July 19, 1973.<sup>34</sup>

The bills essentially comport with the *Roe v. Wade* guidelines. Senate Bill 1049 serves to protect the health of a woman seeking an abortion and sets forth standards to be followed by persons and facilities performing abortions during each trimester of the pregnancy. Abortions may be performed, after informed consent, only by licensed physicians in facilities which will protect and can care for the woman's life and health. The bill requires that abortions be reported to the Department of Public Health. The bill further establishes penalties for violation of the provisions of the bill and repeals relevant sections of the Criminal Code.<sup>35</sup>

The State of Illinois assumes no regulatory role in abortion procedures, other than to require that the abortion be performed by a licensed physician, until after the first trimester.<sup>36</sup> This is in accordance with the Supreme Court's guidelines:

[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment the patient's pregnancy should be terminated.<sup>37</sup>

The Court and the Illinois legislature are apparently willing to submerge any interest the state may have in the life of the unborn child at this early stage of the pregnancy.

The state's interest becomes more compelling as the second trimester begins—especially when the fetus is viable—and thus the statutory re-

32. 54 Ill. 2d at 32, 294 N.E.2d at 259.

33. S.B. 1049; S.B. 1050; S.B. 1051. See 22 LEG. SYNOPSIS AND DIG. vol. I, 78th Ill. Gen. Assembly 507-08 (1973).

34. H.B. 650. See 22 LEG. SYNOPSIS AND DIG. vol. II, 78th Ill. Gen. Assembly 331 (1973).

35. S.B. 1049. See note 30 *supra* for the repealed Code sections. ILL. REV. STAT. ch. 38, § 23-1 (1971).

36. S.B. 1049, § 4(a).

37. 410 U.S. at 163.

quirements become more restrictive. After the first trimester, the abortion must take place in a hospital, and be performed by a licensed physician.<sup>38</sup> If the fetus manifests any definite signs that it may be viable, life support equipment must be available.<sup>39</sup> The Supreme Court did not provide much more than a broad statement of policy with regard to guidelines for regulating second trimester pregnancies. The legislature's initiative in these cases is represented best in Senate Bills 1050 and 1051 and will be discussed more fully below.

Abortion during the third trimester is permitted only when necessary for the health or life of the mother, and only after the attending physician has consulted with two physicians not engaged in practice with the attending physician.<sup>40</sup> It is interesting to note that, while the Court in *Roe v. Wade* allowed for regulation of third trimester abortions *except* when such regulation may interfere with the health of the woman,<sup>41</sup> the Illinois legislature allows such abortions *only* when it may be *necessary* to preserve the woman's health. It remains to be seen whether the courts will read significance into this difference.

The standards established by the legislature must be "legitimately related to the objective the state seeks to accomplish."<sup>42</sup> The Court elaborated on the type of regulation which would be permissible:

[R]equirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.<sup>43</sup>

Apparently in keeping with the Court's suggestions, Senate Bills 1050 and 1051 define the kind of medical facility and persons who are allowed to perform abortions. Senate Bill 1050 amends the Medical Practice Act<sup>44</sup> to allow abortions in licensed hospitals and ambulatory surgical treatment centers.<sup>45</sup> Senate Bill 1051 enacts the Ambulatory Surgical Treatment Center Act and defines what such a center is.<sup>46</sup> These centers, which are solely outpatient facilities, are licensed by the State Department

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38. S.B. 1049, § 4(b).

39. *Id.*

40. S.B. 1049, § 4(c).

41. 410 U.S. at 164-65.

42. 410 U.S. at 195.

43. 410 U.S. at 163.

44. ILL. REV. STAT. ch. 91, § 16(a) (1971).

45. S.B. 1050, § 1.

46. S.B. 1051, § 3(A).

of Public Health who may be advised by the Ambulatory Surgical Treatment Center Licensing Board.<sup>47</sup> This Board is to be composed of members appointed by the Governor and must approve all rules, regulations and standards prior to their adoption by the Department.<sup>48</sup>

The Illinois legislature has, for the most part, followed the Supreme Court guidelines in regard to the first and second trimesters. As far as the third trimester is concerned, the legislature took advantage of the broad language of the Court and, for all intents and purposes, retained the old standards regarding such abortions.

Of primary interest is a section of the Illinois abortion statute which provides that, if it is against the conscience of a hospital, ambulatory surgical center, physician, or employee to permit, perform or participate in an abortion, no penalty or liability shall arise from a refusal or failure to do so.<sup>49</sup> Courts have already made attempts at clarifying this section.<sup>50</sup> On June 1, 1973 the United States Court of Appeals for the Seventh Circuit held that a private hospital may refuse to allow its facilities to be used for abortions even if the hospital is regulated by and has received funds from the state.<sup>51</sup> This ruling may lead to the problem of women having to travel to large cities to have abortions since many of the hospitals in rural areas are privately owned. Additionally, to the extent that a privately owned hospital receives state or federal funds, the reluctance of the hospital or its personnel to perform abortions may well raise problems in terms of the fourteenth amendment.

A final problem which arises from the passage of these bills centers on the date of their effectiveness. The bills were not passed until July 1, 1973 which brings into play a section of the Illinois Constitution stating that:

A bill passed after June 30 shall not become effective prior to July 1 of the next calendar year unless the General Assembly by the three-fifths vote of the members elected to each house provides for an earlier date.<sup>52</sup>

The problem arises from the fact that, although the Senate passed the bills prior to July 1 and the House passed them by more than a three-

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47. S.B. 1051, § 14.

48. *Id.*

49. S.B. 1049, § 6.

50. *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973). H.B. 650, which protects hospitals and medical personnel from liability for refusing to perform an abortion, was approved by Governor Walker on July 19, 1973.

51. 479 F.2d at 760-61.

52. ILL. CONST. art. IV, § 10. The purpose of this provision was to encourage the General Assembly to complete its work in the first half of the year.

fifths majority,<sup>53</sup> the Senate votes on the three Senate bills was by less than three-fifths majority vote<sup>54</sup> and the House voted on the bills after June 30. Though each of the bills contained the provision that "[t]his Act shall take effect upon its becoming a law,"<sup>55</sup> the problem is hardly eliminated by such language and will probably require a judicial determination. Since this is, for the most part, merely a technical problem and the alternative is leaving the state without abortion laws, the courts may well be inclined to liberally interpret the statutory language as to the effective date of the bills.

Abortion is an issue which is highly charged with emotion as well as individual, moral and religious belief. The Supreme Court and the Illinois legislature have, in their recent actions on abortion, moved the issue further away from the legal structure than it has been in the past. It is hoped that the hands into which the issue is now being placed can more adequately resolve the differences as well as fill the social needs involved.

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53. There being 177 representatives in the Illinois House, a three-fifths majority would require 107 votes. The House votes on the three Senate bills was 111 to 13. Chicago Sun-Times, July 2, 1973, at 1, col. 1.

54. There being 60 Senators in the Illinois Senate, a three-fifths majority would require 36 votes. All three of the Senate bills received less than 36 votes. Chicago Sun-Times, May 30, 1973, at 18, col. 1. The effective date of H.B. 650 is not in question since it was passed by both the House and the Senate before July 1, 1973. See LEG. SYNOPSIS AND DIG., vol. II, 78th Ill. Gen. Assembly 331 (1973).

55. S.B. 1049, § 11; S.B. 1050, § 2; S.B. 1051, § 16.

78th ILLINOIS GENERAL ASSEMBLY

DISPOSITION OF HOUSE AND SENATE BILLS CITED  
IN THIS SECTION

EFFECTIVE DECEMBER 1, 1973

| BILL<br>NUMBER | DISPOSITION                | DATE     | PUBLIC ACT<br>NUMBER | EFFECTIVE<br>DATE |
|----------------|----------------------------|----------|----------------------|-------------------|
| H.B. 18        | Passed                     | 10-31-73 | 78-921               | 11- 8-73          |
| H.B. 20        | Vetoed                     | 9-12-73  | —                    | —                 |
| H.B. 213       | Passed                     | 11-14-73 | 78-934               | 11-14-73          |
| H.B. 214       | Passed                     | 9-21-73  | 78-886               | 10- 1-73          |
| H.B. 215       | Passed                     | 9-21-73  | 78-887               | 10- 1-73          |
| H.B. 216       | Passed                     | 9-21-73  | 78-888               | 10- 1-73          |
| H.B. 217       | Passed                     | 9-21-73  | 78-889               | 10- 1-73          |
| H.B. 218       | Passed                     | 9-21-73  | 78-890               | 7- 1-74           |
| H.B. 219       | Passed                     | 9-21-73  | 78-891               | 10- 1-73          |
| H.B. 269       | Passed                     | 8-23-73  | 78-359               | 10- 1-73          |
| H.B. 270       | Passed                     | 8-23-73  | 78-360               | 10- 1-73          |
| H.B. 271       | Failed                     | 6-25-73  | —                    | —                 |
| H.B. 429       | Failed                     | 4-11-73  | —                    | —                 |
| H.B. 650       | Passed                     | 7-19-73  | 78-228               | 10- 1-73          |
| H.B. 1058      | Passed                     | 8-21-73  | 78-355               | 10- 1-73          |
| H.B. 1508      | Passed                     | 9-21-73  | 78-903               | 10- 1-73          |
| H.B. 1620      | Tabled in<br>committee     | 6-12-73  | —                    | —                 |
| H.B. 1 *       | Tabled                     | 11-30-73 | —                    | —                 |
| H.B. 2 *       | Tabled                     | 11-30-73 | —                    | —                 |
| H.B. 10*       | Failed                     | 11-15-73 | —                    | —                 |
| H.B. 20*       | Tabled                     | 11-30-73 | —                    | —                 |
| S.B. 187       | Consideration<br>postponed | 10-23-73 | —                    | —                 |
| S.B. 953       | Failed                     | 7- 2-73  | —                    | —                 |
| S.B. 1049      | Passed                     | 7-19-73  | 78-225               | 7-19-73           |
| S.B. 1050      | Passed                     | 7-19-73  | 78-226               | 7-19-73           |
| S.B. 1051      | Passed                     | 7-19-73  | 78-227               | 7-19-73           |
| S.B. 1198      | Passed                     | 10-22-73 | 78-918               | 10-22-73          |
| S.B. 1 *       | Failed                     | 11-14-73 | —                    | —                 |
| S.B. 8 *       | Tabled                     | 11-30-73 | —                    | —                 |
| S.B. 12*       | Tabled                     | 11-30-73 | —                    | —                 |

\* denotes First Special Session