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April 27, 1973

FILE NO. S-577
CRIMINAL LAW:
Abortion

Honorable Dan Walker
Governor
State of Illinois
207 State House
Springfield, Illinois

Dear Governor Walker:

You have requested my opinion as follows:

"It has come to my attention that on January 22, 1973, the Supreme Court of the United States in consolidated cases entitled Roe vs. Wade, etc., held unconstitutional certain anti-abortion statutes, similar to Illinois statutory provisions on the subject, insofar as they apply to licensed physicians.

"I would greatly appreciate having your opinion concerning the foreseeable effects of this decision on the law of this state, including, among other matters, advice on the following:

1) Should law enforcement officers of the state cease to enforce Ill.

Rev. Stat., ch. 38, sec. 23-1 - 23-3 against licensed physicians?

2) Is the Governor now under any constitutional or other legal obligation with the respect to possible applications for pardon by persons previously convicted under that statute who were licensed physicians or women seeking abortions from licensed physicians?

3) May law enforcement officers continue to enforce the statute against persons other than licensed physicians and women seeking abortions from licensed physicians?

4) Is new legislation necessary or desirable with respect to enforcement of prohibitions against abortions by persons other than licensed physicians?"

The Illinois statute on abortion as it stood in the Illinois Criminal Code prior to the United States Supreme Court opinion read as follows:

"(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 medical facility because necessary for the preservation of the woman's life."

> "Any person who sells or distributes any drug, medicine, instrument or other substance whatever which he knows to be an abortifacient and which is in fact an abortifacient to or for any person other than licensed physicians shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.
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> "Any person who advertises, prints, publishes, distributes or circulates any communication through print, radio or television media advocating, advising or suggesting any act which would be a violation of any Section in this Article, shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both." Ill. Rev. Stat. 1971, ch. 38, par. 23-1 - 23-3

In the recent case of Roe v. Wade, 93 S. Ct. 705, 41 U. S. Law Week 4213 (U. S. Jan 22, 1973), articles of the Texas Penal Code under constitutional attack provided:

> "Article 1191. Abortion
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> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Texas Penal Code, arts. 1191 - 1196

The United States Supreme Court in Wade said:

"The Texas statutes that concern us here are Arts. 1191 - 1194 and 1196 of the State's Penal Code. These make it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' Similar statutes are in existence in a majority of the States."

* * *

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"Ariz. Rev. Stat. Ann. § 13-211 (1971): Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-20, 53-30 (1948) (or unborn child); Idaho Code § 18-1505 (App. to Supp. 1971): Ill. Rev. Stats. c. 38, § 23-1 (1971): Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971)" Emphasis supplied. pp. 4214 - 4215

Thus the Court clearly equates the Texas law with that of Illinois.

The Court states succinctly in its Wade holding at p. 4229, 41 Law Week:

"To summarize and to repeat:

"1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother,

may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

"2. The State may define the term 'physician,' as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

"In Doe v. Bolton, post, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.

"This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state

> interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.
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> * * * *
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> Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case." (Emphasis supplied)

The procedural requirements of Doe v. Bolton, (41 Law Week 4233) referred to in Wade, insofar as they apply to Illinois law, are set forth in the Criminal Code of Georgia, ch. 26-12, as follows:

> "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 <u>because</u>:

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

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

(3) <u>The pregnancy resulted from forcible or statutory rape.</u>

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

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

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

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9

> of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above.
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> (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. * * *" (Emphasis supplied)

The emphasis in the foregoing quotation reflects the sections found unconstitutional by the District Court.

The Court states, with regard to the medical facility in section 26-1202(3)b(4):

> "We hold that the JCAll accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not 'based on differences that are reasonably related to the purposes of the Act in which it is found.' Morey v. Doud, 354 U.S. 457, 465 (1957).
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> 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. 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, p. --, 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."
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> p. 4238.

While the hospital accreditation is held to be too strict, Bolton says that the State may define the term "physician," and may proscribe abortion by anyone who does not meet that definition.

Earlier response to your opinion request was not possible because several cases concerning the Illinois Abortion Statute were in litigation in the United States Supreme Court and in the Illinois Supreme Court.

The United States Supreme Court on February 26, 1973, remanded Doe v. Scott, 321 F. Supp. 1385, to the United States District Court, Northern District, Eastern Division, with directions to enter an order not inconsistent with the findings of Wade.

Thereafter, on March 20, 1973, the Illinois Supreme Court rendered its opinion in The People of the State of Illinois v. Frey, et al., Docket Nos. 43729 and 43882, consolidated. The Illinois court set forth a view completely consistent with Wade, in finding the Illinois statute unconstitutional in toto. The court stated, in part, beginning at page 1 of the Slip Opinion:

> "In Roe v. Wade, the court was concerned with certain sections of the Texas Penal Code pertaining to abortion. The court characterized the Texas statutes as similar to those of numerous States, including Illinois, ___ U.S. _____,

n. 2, 35 L. Ed. 2d 147, 157 n.2, 93 S.Ct. 705, 709 n.2.

* * * *

The Texas statute (art. 1196) of primary concern in Roe v. Wade read in part as follows:

> 'Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' Texas Penal Code, ch. 9, title 15, art. 1196.

After comparing this provision to the aforementioned guidelines, the court found that the statute was overly broad and violative of the due-process clause of the fourteenth amendment because it unduly limited the legal justification for an abortion (saving the life of the mother) and made no distinction as to the stage of pregnancy when the abortion was performed.

The court reasoned that the constitutional deficiencies of article 1196 resulted in the invalidity of the remaining Texas abortion provisions. 'The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.' ___ U.S. at ____, 35 L. Ed. 2d at 184, 93 S.Ct. at 733. (Emphasis supplied)

We note that in Roe v. Wade the court discerned no constitutional infirmities if the State prohibited an abortion being performed by a layman or in the State's restricting the term 'physician' to include only those currently licensed as such by the State.

In the present appeals the statute under which the criminal proceedings were initiated (Ill. Rev. Stat. 1963, ch. 38, par. 23-1) states:

> '(a) Any 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 medical facility because necessary for the preservation of the woman's life.'

Section 23-1(b) is substantially identical to article 1196 of the Texas Penal Code for it unduly restricts the legal justification for an abortion and completely fails to distinguish when an abortion may be performed under the guidelines established in Roe v. Wade.

We therefore hold that section 23-1(b) is unconstitutional. The statutory provision which remains (Ill. Rev. Stat. 1963, ch. 38, par. 23-1(a)) would prohibit the performance of abortions by both physicians and laymen without distinction and without regard to medical necessity. This construction would

> be improper. We hold that section 23-1(a) is unconstitutional under the rationale of Roe v. Wade." (Emphasis supplied)

The time for Petition for Rehearing in the Frey case has now passed.

Anything in the United States District Court opinion in Scott to the contrary, the erstwhile Illinois Abortion Act has been totally nullified by the Illinois Supreme Court, and by the United States Supreme Court. Thus Illinois has at present no statute prohibiting or regulating abortions.

The answers to your questions are, then, as follows:

Question 1: Law enforcement officers cannot enforce the unconstitutional section 23-1 against licensed physicians. Section 23-2, selling and distributing abortifacients, and 23-3 advertising abortions, fall under the United States Supreme Court ruling that the entire Texas Act failed. If there is no criminal abortion, there is no crime in selling or distributing abortifacients, or in advertising abortion.

Question 2: The answer to your question 2 lies purely in the realm of gubernatorial discretion. Section 12,

Article V of the Illinois Constitution of 1970 provides:

> "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law." (Emphasis supplied)

Section 13, Article V, Illinois Constitution of 1870, provided:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided in law relative to the manner of applying therefor."

The 1970 provision, "on such terms as he thinks proper", would seem even broader in its discretion than the prior provision.

While section 4-8 of "AN ACT in relation to pardons and the commutations of sentences" (Ill. Rev. Stat., 1971, ch. 104 1/2, pars. 6-10) places in the Parole and Pardon Board certain administrative and investigative duties with regard to pardons, and prescribes rules and forms for pardon applications and procedures, it does not and cannot negate the

exclusive discretionary authority given to the Governor to pass upon applications for pardon.

Both general law and Illinois law consistently have held pardon to be a matter of grace, not right.

67 C.J.S., Pardons, sec. 6, states:

> "The power of pardoning is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made; but, not being a judicial process, it is not a corrective judicial process to remedy a wrong. A pardon is granted, not as a matter of right, but as a matter of grace bestowed by the government through its duly authorized officers or departments. It is, however, not a personal favor or a private act of grace from the individual happening to possess power; it is granted in the exercise of a public function or as an act in the interest of the public welfare. The exercise of the power lies in the absolute and uncontrolled discretion of the officer in whom it is vested."

I. L. P., Pardons, sec. 2, states:

> "The power to pardon or parole rests with the executive department of government, and the judiciary has no right to usurp such power.
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> * * * *
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> Under Article V, § 13, of the Constitution the Governor of Illinois may pardon or commute sentences of persons incarcerated in the State penitentiary, but his only authority to interfere with, control, modify, or annul any judgment is derived from such constitutional provision, and he has no authority to change the judgment of a Criminal Court from a conviction for one crime to a conviction for a lesser offense. The Governor's pardoning power extends to both misdemeanors and felonies, but not to civil offenses.
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> The Governor has no power to extend the benefits of the Sentence and Parole Act to persons convicted of murder except as authorized by the Act itself, but if an act of the Governor in the exercise of his constitutional authority to commute a sentence is inconsistent with the Sentence and Parole Act, then the Sentence and Parole Act, as far as its enforcement would impose a limitation on the Governor's constitutional power, must give way to the Constitution.
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> The pardoning power is restricted to the Governor and may not be delegated.
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> pp. 111, 112.

I can therefore state that there is no constitutional or statutory obligation for you to act in any specified manner with regard to possible applications for pardon by persons previously convicted under the statutes here considered.

However, the Illinois Supreme Court in the Frey case stated, page 3, Slip Opinion:

> "The statute creating the offense is invalid and a judgment entered thereon is erroneous and void. (People v. Collins, 50 Ill. 2d 295; People v. Hudson, 50 Ill. 2d 1; People v. Eisen, 357 Ill. 105.) * * *"

This statement by the court could well affect your decision concerning pardon of persons convicted of the offense.

Still replying to Question 2, I would point out that women who seek abortions are not subject to prosecution. At common law, they were considered victims, not offenders, or aiders and abettors. (1 Am. Jur., Abortion, sec. 11; 1 C.J.S. Abortion, 861 et seq.). There is no provision in Illinois statute or precedent in case law that holds criminally liable a woman who seeks an abortion or submits to abortion. Ill. Rev. Stat., 1971, ch. 38, sec. 23-1 - 23-3.

Question 3: In the decisions in Wade, Bolton, and Frey, the United States and Illinois Supreme Courts have held that the Texas and Illinois type abortion statutes fall in toto. There is consequently no statute to enforce and no offender

against whom action could be taken, either the person who performs the abortion, or the woman who seeks an abortion, the latter as noted in my reply to Question 2.

In Question 4, you ask about the necessity and advisability of legislation prohibiting abortions by persons other than licensed physicians. Since the early 19th Century, regulation of abortion for the protection of the woman has been enacted and enforced in the several states. It is, of course, one of the functions of your office and of the General Assembly to determine if such legislation is now necessary and desirable in Illinois. You may request legislation as you deem it proper. If it is the consensus of the General Assembly that there should be state regulation in this area, it can certainly proceed to enact such regulation. Indeed, in Wade the United States Supreme Court set forth guidelines for appropriate legislation:

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 34, that until the end of the first trimester mortality in

abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements 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.

This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the 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. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

> Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those 'procured or attempted by medical advice for the purpose of saving the life of the mother,' sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, 'saving' the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here."
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> pp. 4228, 4229.

I trust that this opinion will be of assistance to you.

Very truly yours,

A T T O R N E Y G E N E R A L