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ABORTION LAW—Friendship Medical Center, Ltd. v. Chicago Board of Health, Invalidating City Health Regulations Applicable to First Trimester Abortion Procedures

In no other procedure, including the removal of a mole in a hospital, is a local board of health barred from making rules for proper health care.1

In the wake of Roe v. Wade,2 there have been numerous problems regarding permissible state regulation of abortion.3 One of these problems encountered by state and local health officials has been the establishment of standards for medical facilities performing abortions. This article examines the complexities and the difficulties involved in any effort to regulate what remains a very controversial aspect of the law.

FRIENDSHIP MEDICAL CENTER, LTD. v. CHICAGO BOARD OF HEALTH4

After the United States Supreme Court's abortion decisions5 the Chicago Board of Health promulgated certain health regulations governing abortion clinics. Several months later the Friendship Medical Center, Ltd. and its owner, Dr. T. R. M. Howard, brought suit to enjoin the Board from enforcing the regulations6 and to obtain a declaration that these rules were unconstitutional.

1. Quote from Dr. Eric Oldberg, President, Chicago Board of Health, appearing in Chicago Tribune, Jan. 22, 1975, § 3, at 1, col. 1.

The regulations at issue were extensive and detailed. They required that each abortion service keep records of medical histories, test and examination results, social service records, and admission and discharge notes (§ IV(a)). The Board of Health required the clinics to submit monthly status reports. These included the number of pa-
In the district court the plaintiffs alleged, *inter alia*, that the abortion regulations restricted their patients' rights to privacy. Judge Austin held that the plaintiffs did not have standing to assert violations of their patients' privacy rights since the patients were capable of seeking relief on their own behalf. Consequently, the fundamental right to privacy was not at issue in the case. As a result, the principles of *Roe* and *Doe* which require a compelling state interest to justify restrictions on abortion were inapposite to the question of whether the abortion regulations were constitutional. Instead, Judge Austin employed the traditional test of whether a city has properly exercised its police power in the health area, and he found that the regulations did not violate the plaintiffs' rights to equal protection and due process. The court reached this conclusion by finding a rational relationship between the regulations and the city's interest in "preserving the health of all abortion patients regardless of the duration of their pregnancy."  

**Standing**

Since the *Roe* and *Doe* decisions, the courts have uniformly recognized the standing of physicians to challenge the validity of governmental regulations of abortions. Indeed, the issue has not even been
raised in some cases challenging statutory abortion standards. However, in light of Judge Austin's decision, the plaintiffs were compelled to argue the standing issue on appeal. The Board of Health agreed with Judge Austin that plaintiffs did not have standing and could not assert their patients' rights. Since Friendship Clinic was in compliance with the regulations, the Board asserted that plaintiffs did not face a sufficient threat of prosecution.

In contrast to the district court's determination, the Seventh Circuit found that the plaintiffs had standing to assert their patients' privacy rights. In so holding, the court found it noteworthy that the Board of Health could deny registration to, or could close any abortion facility which was not in compliance with its regulations. Also considered significant was the fact that the Municipal Code of Chicago gave certain Board officials the power to arrest anyone in violation of health regulations. Thus, both an abortion clinic and its physicians could be subject to municipal sanctions. Judge Sprecher, writing for the majority, stated that the "continuing restrictive effect" of the regulations was a sufficient deterrent to warrant the plaintiffs' standing.

The court further noted that Doe v. Bolton held that physicians facing possible prosecution for performing illegal abortions have standing to assert the invalidity of a state criminal abortion statute. Therefore, actual prosecution was not a prerequisite for seeking relief in the courts.

The plaintiffs' standing was further justified by the existence of the physician-patient relationship. The court noted that a physician is "in-
tegrally involved” in the making of the abortion decision.\textsuperscript{20} Since this close relationship was present in the \textit{Friendship} case, the court found that plaintiffs were not seeking to assert rights of third parties with whom they were only “marginally involved.”\textsuperscript{21} Rather, the physician-patient relationship ensured that plaintiffs were proper parties to raise their patients’ rights.

\textbf{Board of Health Regulations}

Finding that the plaintiffs had standing to assert their patients’ privacy rights, it was then appropriate for the court to test the abortion regulations by the principles set forth in \textit{Roe} and \textit{Doe}. Those cases provided the primary basis for the court’s decision in \textit{Friendship} that the Board of Health regulations unconstitutionally infringed a woman’s right to privacy by regulating abortion in the first trimester.

In \textit{Roe v. Wade},\textsuperscript{22} the Supreme Court held that the fundamental right of privacy is broad enough to include a woman’s decision to obtain an abortion.\textsuperscript{23} Since the right to an abortion is a fundamental right, any regulations restricting that right must be justified by a governmental interest which is “compelling.”\textsuperscript{24} The Court recognized that there are two state interests which become compelling during pregnancy. First, the state’s interest in the health of the abortion patient becomes compelling at the end of the first trimester.\textsuperscript{25} Second, the state’s interest in protecting “potential life” becomes compelling with the fetus’ viability,\textsuperscript{26} which the Court recognized to be near the end of the second trimester.\textsuperscript{27} The Court held that since the state had no compelling interest during the first trimester, it followed that during that period:

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 1147.
\item \textsuperscript{21} \textit{Id.} An argument can be made that the situation involved in \textit{Friendship} is distinguishable from that involved in \textit{Roe v. Wade}. The emphasis in \textit{Roe} was on a woman’s right to make the abortion decision in consultation with her attending physician. 410 U.S. 113, 163. This implies a close relationship, as suggested in \textit{Friendship}. But the establishment of clinics for “lunch hour abortions” presents a slightly different situation than existed before \textit{Roe}. Now, the decision to have an abortion is often made before a woman goes to a clinic. See \textbf{Buying Protection at the Abortion Mill, CHICAGO}, Jan. 1975, at 14 (comments of plaintiff Dr. Howard). Such a situation lacks the presence of a real physician-patient relationship, and the involvement of the physician may well be only marginal.
\item \textsuperscript{22} 410 U.S. 113 (1973).
\item \textsuperscript{23} \textit{Id.} at 153.
\item \textsuperscript{24} \textit{Id.} at 155.
\item \textsuperscript{25} \textit{Id.} at 163. This conclusion was based on the finding that mortality rates for women undergoing first trimester abortions were as low or lower than the mortality rates for natural childbirth. \textit{Id.} at 149. \textbf{But see} notes 57 through 65 \textit{infra} and accompanying text.
\item \textsuperscript{26} 410 U.S. at 163.
\item \textsuperscript{27} \textit{Id.} at 160.
\end{itemize}
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.\textsuperscript{28}

In \textit{Friendship}, the Board of Health contended that the abortion regulations were valid since they were rationally related to a legitimate state interest in the health of the abortion patient. The court of appeals, however, noted that in light of the fundamental right involved, the applicable test was not whether there was a rational relationship, but whether a compelling state interest existed which would justify the implementation of the regulations.\textsuperscript{29} The court concluded that the above quoted language from \textit{Roe} made it "abundantly clear" that regulations reasonably related to the health and safety of the woman could only be justified after the end of the first trimester when the state has a compelling interest in the health of the abortion patient.\textsuperscript{30}

The Board of Health conceded that the right to privacy protects the abortion decision. In attempting to justify its regulations, however, the Board argued that the abortion decision itself is distinguishable from its implementation. It contended that the regulations did not restrict the decision but merely affected the medical facility in which it is performed. It relied on the above-quoted language from \textit{Roe} as supporting this position. The Board further argued that the right to privacy did not include the right to be free of all health regulation, but only those which restrict the abortion decision. Thus the defendants submitted that the crucial test should be whether the regulations interfered with the effectuation of the abortion decision.\textsuperscript{31}

This argument might have influenced the court had not some of the regulations been so obviously contrary to the Supreme Court decisions.\textsuperscript{32} But the court rejected the Board's arguments and stated that the "regulations by their very nature restrict the abortion decision and affect whether and in what manner an abortion will take place."\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 163.
\item \textsuperscript{29} 505 F.2d at 1150. The court noted that the regulations might meet the traditional rationality test, but found that there was no basis in the record for making such a determination. \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} Brief for Appellees at 8.
\item \textsuperscript{32} One abortion regulation (§ XVI(e)) required a 24-hour waiting period between initial examination and termination of pregnancy "to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy." 367 F. Supp. at 614.
\item \textsuperscript{33} 505 F.2d at 1151.
\end{itemize}
\end{footnotesize}
The *Friendship* court held that there was an additional reason for invalidating the regulations. Once again following the rationale of *Roe*, the court observed that the Board of Health regulated abortions in a more stringent manner than it regulated medical procedures of approximately the same risk to a patient's health. When a fundamental right is involved, such a difference in regulation can only be justified by a compelling state interest. Since there can be no such interest in the first trimester of pregnancy, the regulations were in violation of the equal protection clause of the fourteenth amendment.\(^3^4\)

In *Roe v. Wade*, the Supreme Court found that an abortion performed in the first trimester of pregnancy is a relatively safe procedure. The Court based this finding on evidence showing that mortality rates for legal abortions performed early in pregnancy are "as low or lower than the rates for normal childbirth."\(^3^5\) From this finding the Seventh Circuit reasoned that there was no sufficient justification "for more extensive governmental regulations, purportedly based on health considerations, for one procedure than the other."\(^3^6\) However, the court rejected the next logical step which would have been to compare the regulations on abortion to regulations on hospital childbirth procedures. The *Friendship* court held that comparison to the regulations on hospitals would be inappropriate because the Supreme Court had determined that hospitalization could not be required for first trimester abortions.\(^3^7\) The court instead compared the abortion regulations to the local regulations concerning dispensaries.\(^3^8\) It observed that the latter are not as extensive as the regulations on abortion, and that matters included in the abortion regulations are left to the judgment of the physician by the dispensary ordinance.\(^3^9\)

But the dispensary regulations are a weak basis for comparison. They were not intended to regulate facilities in which surgical procedures are performed,\(^4^0\) and they are inadequate for that purpose. In addition, it is surprising that the *Friendship* court determined that abortion clinics were clearly covered by the ordinance.\(^4^1\) It is true that

\(^{34}\) *Id.* at 1152-53.

\(^{35}\) 410 U.S. at 149. *But see* notes 57 through 65 *infra* and accompanying text.

\(^{36}\) 505 F.2d at 1152.

\(^{37}\) *Id.* at 1152 n.16.

\(^{38}\) *CHICAGO, ILL., MUNICIPAL CODE* ch. 118 (1973).

\(^{39}\) 505 F.2d at 1152-53.

\(^{40}\) Interview with Dr. Robert E. Lane, Asst. Professor of Obstetrics and Gynecology, McGaw Medical Center, Northwestern University, and Medical Consultant, Chicago Board of Health, in Chicago, Illinois, Feb. 6, 1975 [hereinafter cited as Lane interview].

\(^{41}\) 505 F.2d at 1152 n.16.
the ordinance's definition of a dispensary seems to cover abortion clinics. However, a look at the exemptions from coverage suggests that an abortion clinic, such as the Friendship Medical Center, may be exempted from the ordinance completely. Thus, the basis of the court's conclusion is unpersuasive since the dispensary standards do not purport to be comprehensive health and safety regulations of procedures comparable to abortions.

However, other courts faced with the question of the validity of governmental regulation of abortion in the first trimester have reached the same result as that reached in Friendship. For example, in Word v. Poelker, relied on in Friendship, the Eighth Circuit invalidated a St. Louis ordinance which imposed some restrictions similar to the Chicago Board of Health regulations. The ordinance was found invalid for failing to exclude the first trimester from its coverage and also for singling out abortion for regulation different from comparable medical procedures. The Word court stated that the defendant had failed to point out any "other single surgical procedure where doctors [were] required to 'prove up' their overall fitness" as the St. Louis ordinance forced them to do.

Similarly, the court in Hallmark Clinic v. North Carolina Dept. of Human Resources, held that Roe and Doe exempted abortion clinics

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42. CHICAGO, ILL., MUNICIPAL CODE ch. 118, § 1.1 (1973). Section 1.1 reads in pertinent part:

"Dispensary"—As used in this chapter, "dispensary" means any place . . . which operates . . . under the name or title of clinic, dispensary, [or] health center . . . for the purposes of furnishing at the place . . . advice, diagnosis, drugs, remedies, or treatment, to any person . . . not residing or confined in the place . . . .

43. Id. § 1.2. This section reads in pertinent part:

This Chapter does not apply to, and no license provided in this Chapter is required by:

1. A place or establishment wholly owned or operated by one or more licensed physicians and surgeons . . . and used as the office for the practice of medicine and surgery . . . of such owners, regardless of the name used publicly to identify such place. . . .

44. In fact, of the twelve abortion clinics registered with the Board of Health only four including Friendship Medical Center, were licensed as dispensaries. Interview with Jeannette Paulsen, Acting Director, Bureau of Institutional Care, Chicago Board of Health, in Chicago, Illinois, Feb. 3, 1975.

45. There are also cases invalidating regulations imposed by public hospitals forbidding elective abortions in the first trimester. See, e.g., Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974); Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 903 (1975).

46. 495 F.2d 1349 (8th Cir. 1974).

47. The ordinance required, inter alia, that a physician applying for a permit must document his training and experience. 495 F.2d at 1353. It also required that a clinic submit a copy of a transfer agreement with a hospital that is located within 15 minutes travel time of the abortion facility. Id. at 1353-54.

48. Id. at 1352.

49. Id.

from any licensing requirements not applicable to medical facilities in general. On the issue of regulations imposed on early abortions, the court stated:

Under Roe and Doe, if North Carolina may regulate the performance of first-trimester abortions at all, it may do so only to the extent that it regulates tonsillectomies and other relatively minor operations.51

Approaches to Abortion Regulations

Generally, governmental regulations concerning abortion procedures can be divided into two types. First are regulations which are directed specifically and solely at abortions. This type of regulation was invalidated in the Friendship and Word cases. Second are health regulations which cover a range of medical procedures including abortions. Although this type of regulation was not before the Friendship court, the majority stated that in its view, because of the fundamental right to an abortion in the first trimester, such regulations must meet the compelling interest test to be valid.52 The application of this standard meant that:

in all probability nothing broader than general requirements as to the maintaining of sanitary facilities and general requirements as to meeting minimal building code standards would be permissible.53

This conclusion stems from an overly strict interpretation of the first trimester rule enunciated in Roe. However, it is questionable whether Roe requires such a result. In his concurring opinion in Friendship, Judge Fairchild, relying on the following language from Roe, expressed the position that the Supreme Court recognized that the state had an interest sufficient to support general health regulations applicable to first trimester abortions:54

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51. Id. at 1157. In addition, in Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974), dismissed for lack of jurisdiction, sub nom. Spannaus v. Hodgson, 420 U.S. 903 (1975), the Minnesota Department of Health regulations on abortion were invalidated, along with several statutory provisions, since they failed to distinguish between the first and second trimesters.

52. 505 F.2d at 1153-54.

53. Id. at 1154. The court left open the possibility that a narrowly drawn regulation covering a specific problem unique to abortion could be compelling. In such a situation, the Board of Health would have to prove that there is a medical problem unique to abortion which is beyond the scope of a physician's medical judgment. Id.

But it seems that a showing of a problem which makes certain abortions in the first trimester more dangerous than others should be sufficient to justify this type of narrow regulation. Moreover, complications arising in second trimester abortions cannot be said to be outside the scope of a physician's medical judgment, yet that trimester is subject to state regulation.

54. 505 F.2d at 1154-55 (Fairchild, J., concurring).
Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed.55

Judge Fairchild further contended that regulations applicable to a broad class of similar medical procedures would be a “valid exercise of the State's interest in protecting health and need only satisfy the traditional” test for the invocation of its police power.56 This is a realistic approach. If the regulations are not reasonably related to the health and safety concerns presented by the medical procedures involved, then the regulations would be invalid. This standard would prevent attempts to intentionally restrict early abortions by overregulating the entire class of medical procedures.

Regulations imposed solely on abortion procedures have uniformly been held invalid as applied to the first trimester.57 The basis of the first trimester rule is the finding in Roe v. Wade that abortions performed in early pregnancy are as safe or safer than natural childbirth.58 Criticism has been leveled at that finding and the conclusion drawn from it that there is no compelling state interest in a woman's health during the first trimester of pregnancy.59 The Supreme Court found that the mortality rates for women undergoing legal first trimester abortions were "as low or lower" than maternal mortality rates for normal childbirth.60 The validity of the mortality statistics used by the Court61 was questioned at the time in an amicus curiae brief.62 Moreover, all of the sources relied on in Roe for early abortion

55. 410 U.S. at 149-50 (emphasis added).
56. 505 F.2d at 1155.
58. 410 U.S. at 149.
60. 410 U.S. at 149.
61. Id. at n.44.
mortality statistics were based on reports of abortions performed in hospitals or extramural facilities which were subject to careful regulation.\textsuperscript{63} Thus, one might suggest that first trimester abortions performed in clinics which are not regulated for health and safety may not be safer than childbirth.

Nevertheless, the Court concluded that the state's interest in protecting the life of pregnant women had disappeared in the first trimester because of the lower mortality rates. Even assuming that the statistics used by the Court were valid, this conclusion does not seem to follow as naturally as the \textit{Roe} opinion expressed it. The fact that more women die from childbirth than from early abortions is no justification for prohibiting all health regulations in the first trimester, nor does it warrant excluding abortions from regulations which are applicable to medical procedures generally.\textsuperscript{64} A logical step from the recognition of the relative safety of early abortion is suggested by constitutional scholar John Harty Ely:

\begin{quote}
[E]ven a sure sense that abortion during the first trimester is safer than childbirth would serve only to blunt a state's claim that it is, for reasons relating to maternal health, entitled to \textit{proscribe} abortion; it would not support the inference the Court draws, that \textit{regulations designed to make the abortion procedure safer} during the first trimester are impermissible.\textsuperscript{65}
\end{quote}

The three-tiered scheme of \textit{Roe} was intended to ensure that a woman would be free to decide whether to terminate her pregnancy, and that she would be free to effectuate that decision. While some of the risks involved in first trimester abortions may be reached by regulations covering general medical practice, the state should not be prohibited from trying to make first trimester abortions safer by direct regulation. So long as such regulations are not used as a subterfuge to prohibit or interfere unduly with early abortions, it seems that the concern for not infringing upon the fundamental right to an abortion


\textsuperscript{64} Tribe, \textit{The Supreme Court 1972 Term—Forward: Toward a Model of Roles in Due Process of Life and Law}, 87 \textit{Harv. L. Rev.}, 1, 30 (1973) [hereinafter cited as Tribe].

\textsuperscript{65} Ely, \textit{supra} note 59, at 942 n.117 (emphasis supplied). Although early abortions are relatively safe, they are not without risk. Possible complications include hemorrhaging, perforation of the uterus and laceration of the cervix. Amicus Brief, \textit{supra} note 62, at 47.
would be satisfied.\textsuperscript{66} This argument is consistent with the Board of Health's contention in \textit{Friendship} that its regulations did not govern the abortion decision but merely related to the manner in which it was effectuated.\textsuperscript{67} But, as has been suggested, some of the Board's regulations did restrict the decision itself. For example, the stated purpose of the 24-hour rule\textsuperscript{68} was to encourage sufficient reflection before a final decision was made to have an abortion.\textsuperscript{69}

In summary, it is clear that under the \textit{Roe} guidelines any regulations that single out abortion for special treatment are invalid as applied to the first trimester.\textsuperscript{70} On the other hand, contrary to the view of the majority in \textit{Friendship}, health and safety regulations which apply to a range of medical procedures of similar risk and complexity, within which abortion necessarily falls, should be valid as long as they are reasonably related to the state's interest in the health of its citizens. Such general standards should not include separate regulations applicable only to first trimester abortion procedures.

Given the state of the law regarding direct regulations on first trimester abortions, the voluntary adoption of standards presents a possible alternative for promoting health and safety concerns. For example, medical standards drafted by a voluntary association of abortion clinics can promote proper health care by making compliance with the standards a requirement of membership.\textsuperscript{71} Also, health and safety standards may be promoted by social service groups in the form of guidelines for referral to abortion clinics.\textsuperscript{72}

\begin{itemize}
  \item \textsuperscript{66} See Tribe, supra note 64, at 30.
  \item \textsuperscript{67} See note 31 supra and accompanying text.
  \item \textsuperscript{68} See note 32 supra.
  \item \textsuperscript{69} The waiting period was initially to be three days and was intended to keep Chicago from becoming an "abortion mill." It was also intended to encourage reflection by the woman seeking the abortion. Interview with Edward F. King, Asst. Commissioner of Health, Chicago Board of Health, in Chicago, Illinois, Jan. 31, 1975 [hereinafter cited as King interview]. A waiting period can serve a valid purpose by encouraging a less pressured decision, and it is a standard practice at some clinics. Interview with Martha Shirrel, Counselor, Planned Parenthood Assn., in Chicago, Illinois, Feb. 6, 1975 [hereinafter cited as Shirrel interview].
  \item \textsuperscript{70} Tribe comments that the court implicitly recognized that some governmental regulation based on health interests is necessary throughout pregnancy when it said that the state could require that all abortions be performed by licensed physicians. Tribe, supra note 64, at 30.
  \item \textsuperscript{71} A group of nine Chicago abortion clinics, including Friendship Medical Center, have recently formed the Chicago Abortion Service Council (CASC). One of the purposes of CASC is to set minimum medical and social standards adherence to which is a condition of membership in the organization. CASC has asked various organizations and agencies, including the Illinois Dept. of Public Health, the Chicago Board of Health and Planned Parenthood Assn., to assist in drawing up standards. Interview with David Tardy, Secretary of CASC, in Chicago, Illinois, Feb. 20, 1975.
  \item \textsuperscript{72} In Chicago, groups such as Planned Parenthood Association and HERS (Health Evaluation Referral Service) use guidelines to evaluate abortion clinics to which they
\end{itemize}
REGULATION OF ABDORTION IN ILLINOIS

While the Friendship case dealt only with local health standards, regulations on abortion promulgated at the state level must also comply with the guidelines set forth in Roe and Doe. State regulation of abortion in Illinois is based on a regulatory scheme consisting of four statutes and a set of agency regulations: (1) the Illinois Abortion Law, (2) two amendments to the Medical Practice Act, (3) the Ambulatory Surgical Treatment Center Act, and (4) the regulations issued pursuant to that Act by the Illinois Department of Public Health. The primary emphasis of this analysis of Illinois abortion law is on the Ambulatory Surgical Treatment Center (ASTC) Act and the Department of Public Health regulations. However, since all of the statutes and regulations constitute a single regulatory scheme, it is necessary to consider briefly some provisions in the other statutes which may be invalid.

Illinois Abortion Law

In defining the conditions under which abortions may be performed, the Illinois Abortion Law appears on its face to comport with the guidelines set out in Roe. The statute provides that in the first trimester of pregnancy an abortion must be performed by a physician. This is the only restriction in the statute regarding the first trimester. However, an amendment to the Medical Practice Act provides that the performance by a physician of an elective abortion in a facility other than an abortion clinic or a hospital, constitutes grounds for disciplinary action including revocation or suspension of his license to practice. In essence this is an effort to force physicians to perform first trimester abortions in an ASTC or a hospital rather than in a private office. According to Roe, the state cannot impose require-
ments as to the facility in which first trimester abortions are performed. The choice of facility is a matter which must be left to the judgment of the physician. Since this section of the Medical Practice Act constitutes an indirect restriction on first trimester abortions, under the present state of the law it would not withstand constitutional challenge.80

The abortion law further provides that second trimester abortions must be performed on an inpatient basis in a hospital.81 It has been commented that such a requirement is not valid since it is not necessary for the protection of the health of abortion patients.82 However, because second trimester abortions involve greater health risks, the provision is justifiable. It was recognized in Roe that the environment in which an abortion is performed is an important consideration. The Court noted that the American Public Health Association recommended that second trimester abortions be performed in a hospital.83 The Court also expressly recognized the right of the state to limit the performance of second trimester abortions to hospitals.84

The abortion statute further requires that in the second trimester measures for life support must be available and utilized whenever an aborted fetus shows any signs of viability.85 Requiring standby life support measures in the second trimester is an appropriate requirement even though it is not a regulation related to the abortion patient's health. The state's interest in protecting "potential life" becomes compelling at viability. The Supreme Court recognized that the point of viability can vary, although it generally occurs between the 24th and 28th weeks.86 Moreover, it is clear that technical advances in medicine will accelerate the point of time during pregnancy at which a determination of viability can be accurately made.87 If life support

80. But see notes 64 through 67 supra and accompanying text.
81. ILL. REV. STAT. ch. 38, § 81-14(b) (1973).
83. 410 U.S. at 145.
84. Id. at 163. There is some language in Doe v. Bolton which may be contradictory. It suggests that the state did not make a sufficient showing to prove that only a hospital would be appropriate for second trimester abortions. 410 U.S. 179, 195 (1973). Also, it has been suggested that the Court misunderstood evidence on the safety of abortion in the second trimester and drew the conclusion that the state had not proven that its interest in maternal health justified the hospital requirement. See Illinois Abortion Statutes, supra note 82, at 421.
85. ILL. REV. STAT. ch. 38, § 81-14(b) (1973).
86. 410 U.S. at 160. But viability has been known to occur as early as the 20th week. STEDMAN'S MEDICAL DICTIONARY 1388 (unabridged lawyers' ed. 1972).
87. See Amicus Brief, supra note 62, at 25-26; NEWSWEEK, Mar. 3, 1975, at 24-25.
measures and equipment were not required at the earliest possible period when viability may occur, the state would be greatly hampered in its efforts to protect fetal life.88

Finally, the Illinois Abortion Law provides that no abortions may be performed in the third trimester unless necessary "to preserve the life or to preserve the physical or mental health" of the pregnant woman.89 This section is consistent with the Roe guidelines.90 However, according to Ely, this exception is at least as controversial as the rest of the Roe decision.91 The objection is that preservation of the life or health of a pregnant woman can be no justification for aborting a fetus that is capable of survival outside the womb. Allowing any third trimester abortion would seem to conflict with the state's compelling interest in protecting fetal life. Indeed, in the late stages of pregnancy the procedures for premature delivery and for abortion are substantially the same regardless of the intention as to the survival of the fetus.92 Another commentator has submitted that the Court did not intend to allow physicians to determine whether a procedure is a late-stage abortion or premature delivery merely on the basis of the term employed.93

ASTC Act and Regulations

Before considering the provisions of the Ambulatory Surgical Treatment Center Act and the ASTC regulations, some preliminary observations will be helpful. First, the ASTC Act and Regulations were drawn to meet a need that existed prior to the Supreme Court's decisions in Roe and Doe. For medical and financial reasons there has been a trend toward performing minor surgery in medical clinics on

88. If such a provision had been in effect and adhered to in Massachusetts, the much-publicized manslaughter conviction of a Boston obstetrician, N.Y. Times, Feb. 16, 1975, at 1, col. 3, might have been avoided. That case involved a legal abortion late in the second trimester (20-24 weeks). The conviction was based on a finding that the physician was reckless in that he did not attempt to keep alive a fetus that had become a "person alive outside the womb of the mother." Id. at 59, col. 3 (jury instructions). The effect of this case in Illinois will probably be to reinforce the necessity for adherence to the life support provision. See Chicago Tribune, Feb. 18, 1975, § 2 at 1, col. 7 (comments of Dr. Frederick Lake, President of the Illinois State Medical Society). In addition, it will probably decrease the relatively small number of second trimester abortions.
89. Ill. Rev. Stat. ch. 38, § 81-14(c) (1973). For a comment on the requirement in this section that a physician performing a third trimester abortion must consult with two other physicians, see The Illinois Abortion Statutes, supra note 82, at 429.
90. 410 U.S. at 163-64.
91. Ely, supra note 59, at 92 n.19.
92. Tribe, supra note 64, at 27.
93. Id. at 4 n.24.
an outpatient basis.\(^4\) As a result, pressure has grown for the licensing and regulation of such medical clinics.\(^5\) Regulations on ambulatory medical centers were in the planning stages when \textit{Roe} and \textit{Doe} were decided, and abortion clinics were then included in the scheme.\(^6\)

Second, there are indications that the Department of Public Health has made a good faith effort to comply with the Supreme Court abortion decisions. This is not to say that good faith will save clearly invalid regulations. However, it is a factor which might tip the scales in favor of validity when considering borderline ASTC regulations.

Third, the different approaches utilized in determining the validity of state regulations on abortion should be kept in mind when examining the constitutional validity of the state standards for ASTCs. According to the rationale adopted by the majority in \textit{Friendship}, standards which are applicable to all ambulatory surgical centers must meet the compelling interest test when applied to first trimester abortion procedures.\(^7\) Since abortion clinics in Illinois can only perform first trimester abortions,\(^8\) and since the state has no compelling interest in the first trimester, under this view the ASTC Act and Regulations would be invalid as applied to abortion procedures. On the other hand, according to Judge Fairchild's opinion, regulations concerning a general class of medical procedures, which includes abortion, need only be rationally related to the state's interest in health and safety to be upheld.\(^9\)

A state attempting to regulate abortion procedures as part of a general scheme makes a fatal mistake when it singles out abortion for treatment different from that given to other procedures. With this in mind, consider the definition of an ASTC.\(^10\) It includes any place devoted primarily to performing surgical procedures or \textit{any} place where an abortion is performed regardless of the primary purpose of the place. This seems to evidence an intent to single out abortion for more extensive coverage than is given to other surgical procedures.

\(^{94}\) Services performed on an outpatient basis in a clinic can be performed less expensively. Also, treatment in such a manner involves less risk of infection. Telephone interview with Dr. Gwendolyn B. Schmidt, Chairman ASTC Licensing Board, Feb. 14, 1974.

\(^{95}\) For example pressure for regulation came from Blue Cross and public assistance agencies. Telephone interview with Robert S. Gleason, Legal Advisor, Illinois Department of Public Health, Feb. 13, 1975 [hereinafter cited as Gleason interview].

\(^{96}\) \textit{Id.}

\(^{97}\) See notes 52 through 53 \textit{supra} and accompanying text.

\(^{98}\) See note 79 \textit{supra} and accompanying text.

\(^{99}\) See notes 54 through 56 \textit{supra} and accompanying text.

\(^{100}\) Ill. Rev. Stat. ch. 111\(\frac{1}{2}\), § 157-8.3(A) (1973).
The broad definition applied to abortion is apparently intended to discourage the performance of abortions in a physician's office by subjecting the office to the same regulations as a medical clinic.\textsuperscript{101} According to \textit{Roe}, the situs of a first trimester abortion must be left to the physician's judgment. Deletion of any specific reference to abortion in the definition of an ASTC would remedy the defect since abortion would be treated the same as other procedures.

The Act requires that all ASTCs be licensed by the Department of Public Health.\textsuperscript{102} The licensing procedure is approximately the same as that employed in the licensing of hospitals.\textsuperscript{103} The requirements for obtaining a license are: (1) compliance with the ASTC Regulations, (2) supervision of the facility by a physician, (3) performance of surgical procedures by a physician who "is privileged to have his patients admitted by himself or an associated physician and is himself privileged to perform surgical procedures in at least one Illinois hospital" and (4) maintenance of adequate medical records for each patient.\textsuperscript{104} In addition, the ASTC Regulations as to licensing require certain information to be supplied to the Department, including a detailed description of the facility and a schematic plan showing the location and square footage of different areas and their proposed use.\textsuperscript{105} The license application must also include information concerning personnel, surgical facilities and compliance with building codes.\textsuperscript{106} The regulations further provide that an ASTC will be licensed to perform only those procedures which it includes in its application.\textsuperscript{107}

The ASTC licensing requirements are one example of state requirements which might be invalid if applicable only to abortion facilities.\textsuperscript{108} However, since the requirements are applicable to all medical clinics performing minor surgery, it is appropriate to judge them by the traditional rational relationship test. Clearly under this standard, the state may license medical facilities in the interest of public health.

\textsuperscript{101} A physician's office in which minor surgical procedures are performed has been added to the list of exceptions to the definition of ASTC. Revised ASTC Regulations, § 2.3(6) (1974). It is doubtful whether abortion is considered a minor surgical procedure in this context in light of the examples used to illustrate the exception (e.g. cystoscopy).


\textsuperscript{103} Hospital Licensing Act and Requirements, § 1-2.7 (1972).

\textsuperscript{104} ILL. REV. STAT. ch. 111 3/4, § 157-8.6 (1973).

\textsuperscript{105} Revised ASTC Regulations, § 3.1 (1974).

\textsuperscript{106} Id. § 3.2.

\textsuperscript{107} Id. §§ 3.1, 3.3.

A plausible justification exists for the requirement that a physician have admitting privileges in a hospital in the state. It may be easier for such a physician to admit a patient to a hospital in an emergency since it is likely that the hospital at which he has privileges will be in the same area as the ASTC. The same type of regulation was at issue in the Hallmark Clinic case where one of the requirements for certification of an abortion clinic was either the existence of a transfer agreement, or staff admitting privileges at a hospital within fifteen minutes of the clinic. These requirements were held invalid since they did not exclude first trimester abortions and did not apply to medical procedures generally. The ASTC regulatory scheme does not have the same fault since it applies to all surgical procedures performed in clinics.

The requirement that all surgery in an ASTC be performed by a physician who is able to perform surgery in a hospital in the state poses a potential conflict with the Roe guidelines. This provision of the Act implies that a surgeon should perform the operations in ASTCs. If imposed directly on abortion clinics such a regulation would be invalid. However, the Department of Public Health has avoided conflict with Roe by requiring in the ASTC Regulations that surgical procedures be performed by a licensed physician rather than a surgeon.

The purpose of the ASTC Regulations is to establish standards and regulations: (1) for the care of individuals in ASTCs and (2) for the construction, maintenance and operation of ASTCs. Several provisions of the Regulations are substantially the same as the Chicago Board of Health regulations. This can probably be explained by the fact that the same sources were used as models. For example, both the Board of Health and the Department of Public Health relied on

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110. Id. at 1156. The Chicago Board of Health had a similar requirement. See Abortion Regulations § VII, 367 F. Supp. 594, 608.
111. 380 F. Supp. at 1156.
112. Revised ASTC Regulations, § 11.1 (1974). It should be noted that the interim regulations required that surgery be performed by a licensed surgeon. ASTC Regulations, § 11.1 (1973).
114. The Board of Health regulations were promulgated before the state's regulations. However, the Department of Health Regulations had been in the works for two years, during which time the Department cooperated and exchanged information with other groups. Telephone interview with Paul X. Elbow, Chief, Division of Health Facilities, Department of Public Health, May 10, 1975.
115. The Board of Health used provisions from the Hospital Licensing Act and Requirements as well as other sources, such as the abortion regulations of the New York City Health Services Administration, to draw its regulations. King interview, supra note 69.
the state Hospital Licensing Act and Requirements in drafting some of their regulations.

The first section of the Regulations states that, in many respects, the functions of an ASTC are similar to those of a hospital. The apparent goal of the Regulations is to ensure that ambulatory facilities will provide the same high quality of care as hospitals. Thus, it is not surprising that many of the regulations are patterned after the Hospital Licensing Act and Requirements. For example, the entire section of the ASTC Regulations dealing with standards for building, design and construction is adopted from the hospital regulations. Similarly, the requirement that any ASTC operating in a multi-storied building must have an elevator of certain size is incorporated from the Hospital Licensing Act Requirements. The requirement that all tissues removed during surgery be examined by a pathologist is adopted from the hospital regulations as well.

The Department of Public Health issued the ASTC Regulations shortly after the ASTC Act became law. Changes made by the Department in those regulations demonstrate that the state is attempting to avoid conflict with the Roe guidelines. For example, the first set of Regulations required that a “board certified” obstetrician, surgeon or anesthesiologist serve as supervisor of a clinic. The revised ASTC Regulations now merely require that the supervisor be a “qualified physician.”

One section of the ASTC Regulations deals exclusively with ASTCs which perform abortions. Among the provisions in this section are requirements: (1) that diagnosis of a pregnancy is the re-

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118. Id. § 13.
119. Hospital Licensing Act and Requirements § 20 (1972).
121. Compare Revised ASTC Regulations § 11.6 (1974) with Hospital Licensing Act and Requirements § 20-10.4 (1972). The same provision appears in the Board of Health’s regulations. See Abortion Regulations § XVIII(e), 367 F. Supp. 594, 615.
122. ASTC Regulations §§ 2.4 to 2.6, 4.3. This requirement applied to abortion clinics as well. Id. §§ 2.4 to 2.6, 12.1.
123. Revised ASTC Regulations §§ 2.4, 4.3 (1974).
124. Id. § 12. Dr. Joyce C. Lashof says that this section is included because it is standard practice to tailor regulations to specific problems. Telephone interview with Dr. Joyce C. Lashof, Director, Illinois Department of Public Health, Feb. 11, 1975.
sponsibility of the physician performing the abortion;\textsuperscript{125} (2) that certain laboratory tests be performed;\textsuperscript{128} (3) that sufficient time be allowed between initial examination and the abortion procedure to permit thorough consideration and a "firm decision" by the patient;\textsuperscript{127} (4) that there exists a written informed consent statement and signed authorization from the patient;\textsuperscript{128} and (5) that family planning services be available.\textsuperscript{129}

This separate section regulating abortion is unconstitutional under present case law since it fails to exclude the first trimester and subjects abortion to regulations which do not apply to other medical procedures of the same risk and complexity.\textsuperscript{130} The regulations would be valid only under the view that the state should be allowed to make first trimester abortions safer by direct regulations that do not interfere with the right to an abortion.\textsuperscript{131} An example of a direct regulation permissible under this view is one requiring a thorough medical history and complete physical examination prior to abortion.\textsuperscript{132} This regulation would not infringe upon the woman's right to an abortion, nor would it interfere with the physician's right to make the abortion decision with his patient. It merely attempts to ensure that abortions will be performed safely. The \textit{Roe} approach to such a regulation requires that the extent of the medical examination must be left to the medical judgement of the physician with judicial and professional remedies available for any failure to exercise proper judgment.\textsuperscript{133} However, the availability of subsequent remedies does not eliminate the need for minimal public health standards.

Whatever the theoretical validity of some of the Regulations, realistically it is possible that they will not be challenged. Since the ASTC Regulations contain no provision which is as objectionable as the 24-hour rule that precipitated the \textit{Friendship} suit,\textsuperscript{134} it is likely that the Regulations will be complied with. Moreover, state officials are aware of the tenuous validity of some provisions of the ASTC Act and Regu-

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\begin{itemize}
\item\textsuperscript{125} Revised ASTC Regulations § 12.32 (1974).
\item\textsuperscript{128} Revised ASTC Regulations, § 12.51 (1974).
\item\textsuperscript{127} \textit{Id.} § 12.35. This section is similar to the 24-hour waiting requirement in the Chicago regulations. See \textit{supra} notes 6 and 32.
\item\textsuperscript{129} \textit{Id.} § 12.55. This would include the type of counseling recommended by the American Public Health Assn. and approved in \textit{Roe v. Wade}, 410 U.S. 113, 145 (1973).
\item\textsuperscript{130} See note 57 \textit{supra} and cases cited therein.
\item\textsuperscript{131} For further discussion, see notes 57 through 69 \textit{supra} and accompanying text.
\item\textsuperscript{132} See Revised ASTC Regulations §12.33.
\item\textsuperscript{133} \textit{Roe v. Wade}, 410 U.S. 113, 168 (1973).
\item\textsuperscript{134} \textit{Cf. Buying Protection at the Abortion Mill}, \textit{CHICAGO}, Jan. 1975, at 14 (comments of Dr. Howard).
\end{itemize}
Therefore, some restraint in enforcement may be expected from the Department.

In the event that the Act and Regulations are challenged, all mention of abortion must be striken in order to remedy the defects which presently exist. However, under the view taken in this article, the basic scheme of regulations should be upheld as a legitimate exercise of the state’s police power. The state should not be compelled to exempt abortion procedures from health standards designed to cover medical procedures which are similar to abortion in risk and complexity.

**CONCLUSION**

The *Roe* and *Doe* decisions spawned confusion and uncertainty regarding acceptable governmental regulation of abortion. The efforts of state and local health authorities to regulate abortion procedures have not always fallen within the guidelines set by the Supreme Court. In the *Friendship* case, the Seventh Circuit applied the principles of *Roe* to invalidate regulations which were promulgated by a local health board and were applicable only to first trimester abortion. The *Friendship* decision also offered two different views of the validity of general health regulations applicable to a class of medical procedures which includes abortions. The majority held that general regulations, like regulations dealing solely with first trimester abortions, must meet the compelling interest test when applied to abortion procedures. The opposing view was that general regulations need only satisfy the rational relationship test to be valid.

Although *Roe* and *Doe* require the result reached in *Friendship*, protection of the right to an abortion does not require that direct regulations on first trimester abortions must be automatically invalidated. As long as such regulations do not interfere with the abortion decision or unduly hamper its effectuation, health authorities should not be prevented from employing direct regulations to make early abortions safer. Further, *Roe* and *Doe* do not require that general regulations must meet the compelling state interest test. Regulations which include abortions in a class with similar medical procedures should be valid if rationally related to the state’s interest in health.

**JAMES W. FORD**

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