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## Essay

# The Ethics of Abortion Ban Exceptions: Is the “Life-Threatening” Exception Threatening Lives?

Mary E. Fleming<sup>†</sup>

## INTRODUCTION

Forty-three states have laws that outlaw abortion except when necessary to save the life of the mother.<sup>1</sup> The exact language used in each state’s respective law varies, but for ease, this Essay will refer to all variations as “life-threatening” exceptions to abortion prohibitions.<sup>2</sup> Prior to 2022, issues with life-threatening exceptions were not very common because most people were able to access abortion in a timely matter. However, now that the Supreme Court of the United States has overturned *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, women are facing many more obstacles to abortion care.<sup>3</sup> Consequently, the life-threatening exception is being

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<sup>†</sup> J.D. candidate, University of Minnesota Law School, 2024; Master of Public Health student, University of Minnesota School of Public Health, 2024; Lead Managing Editor, *Minnesota Law Review* Volume 108. Thank you to Professor Susan Wolf who taught the class which inspired this Essay and who directed me through the writing process. I am also grateful for the support of my colleagues on the *Minnesota Law Review* for their editing expertise. Copyright © 2023 by Mary E. Fleming.

1. Most states use the terminology “mother” or “woman” in abortion statutes, so to be consistent with the laws and for ease, this Essay will also use those terms. However, please note that not all people capable of having children identify as mothers or women. The problems and solutions raised in this Essay are applicable to all people capable of pregnancy, regardless of gender identity.

2. See *infra* Part I, for examples of the variation.

3. Following the *Dobbs* decision, the ability to regulate abortion immediately reverted to the states. *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled* by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). See Harris Meyer, *Hospital Investigated for Allegedly Denying an Emergency Abortion After Patient’s Water Broke*, KAISER HEALTH NEWS (Nov. 1, 2022),

relied upon more often.<sup>4</sup> Defining what conditions qualify for the life-threatening exception is now a major issue in the health care and health law fields.

This Essay will explore the issues with these life-threatening exceptions and propose an interpretation that would address them. It first explains that life-threatening exceptions as they currently stand are confusing standards and must be clarified. The Essay then argues that state legislatures should clarify the life-threatening language by adopting a standard that looks at the total well-being of the mother. That proposal is adopted from the World Health Organization's policies on abortion care, which take a broad view of what impacts a woman's life.<sup>5</sup> The Essay ends with an analysis of the well-being standard and acknowledges its potential gaps, before ultimately concluding that the standard is necessary.

### I. WHAT IS CONSIDERED LIFE-THREATENING?

The vast majority of states (forty-three to be exact) have some version of a life-threatening exception to an abortion prohibition.<sup>6</sup> In states with very conservative abortion laws, the life-threatening exception may be the only scenario in which a woman may have an abortion.<sup>7</sup> In states with more liberal abortion laws, the life-threatening exception is generally for late-

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<https://khn.org/news/article/emtala-missouri-hospital-investigated-emergency-abortion> [<https://perma.cc/TT2F-99Q2>], for an example of how this is impacting access to abortion.

4. See Elizabeth Nash, *Focusing on Exceptions Misses the True Harm of Abortion Bans*, GUTTMACHER INST. (Dec. 12, 2022), <https://www.guttmacher.org/article/2022/12/focusing-exceptions-misses-true-harm-abortion-bans> [<https://perma.cc/ZR6X-BJPH>].

5. See WORLD HEALTH ORG., *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* (2d ed. 2012).

6. See *An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2023), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/A3X6-NK7E>].

7. See, e.g., MICH. COMP. LAWS § 750.323 (2022) (“Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter.”). This particular law is part of the Michigan Penal Code to define when abortion qualifies as manslaughter. *Id.*

term abortions.<sup>8</sup> Regardless of the politics of a state legislature, the life-threatening exception is relevant.

Despite the popularity of life-threatening exceptions, there is no consensus on how to define “life-threatening.” States take various approaches in the language they use and the standard they set. This Part examines the most common of those approaches.

#### A. RISK OF DEATH

A common delineation of the life-threatening exception is that a woman can abort her pregnancy if: (1) she is at risk of death and (2) an abortion would prevent that death. For example, in Idaho, abortion is not prohibited if the procedure is “necessary to prevent the death of the pregnant woman.”<sup>9</sup> Note that under this approach, the pregnancy does not necessarily have to be the cause of the death.<sup>10</sup>

However, the exact proximity to death is not defined. One conceptualization of proximity is the amount of time until death. This issue is often raised for pregnant women with cancer.<sup>11</sup> Can a pregnant woman who is diagnosed with cancer that will not cause immediate death, but could cause death if the cancer progresses, get an abortion?<sup>12</sup> Proximity could alternatively be conceptualized as the risk of death. Does a pregnant woman have to be at 100% risk of death to enable her to get an abortion?<sup>13</sup> There

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8. See, e.g., FLA. STAT. § 390.0111(1)(a) (2022) (“A physician may not perform a termination of pregnancy if the physician determines the gestational age of the fetus is more than 15 weeks unless . . . [t]wo physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman’s life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman . . .”).

9. IDAHO CODE § 18-622(3)(a)(ii) (2022).

10. See *infra* note 12.

11. See Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an ‘Impossible Choice’ When Providing Care*, NPR (June 24, 2022), <https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion> [<https://perma.cc/34MT-CPD5>].

12. *Id.* The example of a pregnant woman with cancer shines light on the debate of whether the pregnancy must be the cause of death. In the given scenario, the cause of the woman’s death would be the cancer, not the pregnancy. However, the pregnancy may be preventing her from getting life-saving treatment, namely chemotherapy. Therefore, an abortion would be necessary to save her life because it would allow her to get life-saving treatment.

13. See, e.g., Mary Kekatos, *Why Doctors Say the ‘Save the Mother’s Life’ Exception of Abortion Bans Is Medically Risky*, ABC NEWS (June 13, 2022),

is no clear point at which a pregnancy reaches the threshold proximity to death. Consequently, there is no clear point at which a pregnancy reaches the threshold for life-threatening.

#### B. RISK OF SUBSTANTIAL BODILY HARM

Similarly, some state abortion laws qualify conditions as life-threatening if there is risk of substantial bodily harm. Death could be considered a form of substantial bodily harm; however, it is generally treated as a separate entity. For example, Texas provides an exception to the state abortion prohibition if the pregnant woman “has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.”<sup>14</sup> Under this definition, substantial bodily harm equates to substantial impairment of a major bodily function.<sup>15</sup> While the risk of substantial bodily harm serves as a requirement of life-threatening, the issue of what life-threatening is remains unresolved. One could argue that pregnancy itself risks substantial bodily harm; would that be enough to meet this standard?<sup>16</sup> Likely not, but that example is illustrative of the holes in this type of standard.

Some states attempt to solve the ambiguity in their respective standards by further defining substantial bodily harm.<sup>17</sup> In Kentucky, it is not a violation of the abortion prohibition to perform an abortion if the procedure is “necessary in reasonable

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<https://abcnews.go.com/Health/doctors-save-mothers-life-exception-abortion-bans-medically/story?id=84668658> [<https://perma.cc/MX3K-K6G4>] (quoting maternal-fetal medicine physician Dr. Leilah Zahedi).

14. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2021).

15. This is an example of a definition which differentiates risk of death from risk of substantial bodily harm.

16. Interview with David Satin, Assoc. Professor, U. Minn. Med. Sch., in Minneapolis, Minn. (Nov. 8, 2022) (raising the issue that pregnancy is already the highest-risk time in a person’s life and patients are at a point of risk that would be otherwise unacceptable); see also Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion Foes Push to Narrow ‘Life of Mother’ Exceptions*, WASH. POST (May 13, 2022), <https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life> [<https://perma.cc/6D25-WC5M>] (stating that pregnancy is a dangerous state which exacerbates other health conditions).

17. See Michael Ollove, *Critics Fear Abortion Bans Could Jeopardize Health of Pregnant Women*, PEW TRUSTS (June 22, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/22/critics-fear-abortion-bans-could-jeopardize-health-of-pregnant-women> [<https://perma.cc/6L5H-8TGN>].

medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.”<sup>18</sup> Under this statute, substantial bodily harm must be serious and permanent harm to a major organ.<sup>19</sup> A statute like this does provide some guidance, but does not fully define the life-threatening exception. What if a woman’s heart gives out due to pregnancy, but she is able to survive with a pacemaker? Would that be serious and permanent enough? Again, even with some direction, this type of life-threatening exception continues to raise many questions.

### C. EMERGENCY

Some state abortion laws attempt to define life-threatening by defining what counts as an “emergency.” Under these exceptions, a condition is only considered life-threatening if it is an emergency, or alternatively, only considered an emergency if the condition is life-threatening. For example, the only exception to Missouri’s complete abortion prohibition is for “cases of medical emergency.”<sup>20</sup> There, a medical emergency is defined as a condition which “so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy,” either to prevent her death or if a delay in abortion would “create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.”<sup>21</sup> This definition does clarify that a condition must be physical, which gives some direction. However, the definition does not provide any guidelines for the time-sensitivity of the condition or likelihood of death required to meet the standard. The amorphous concept of life-threatening remains undefined.

### D. CONDITION LISTS

Other state laws attempt to define life-threatening by including lists of various conditions that are considered life-threatening. For example, Alaska builds off the substantial bodily harm version of a life-threatening exception by listing twenty-one specific conditions that qualify as “impairment[s] of a major

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18. KY. REV. STAT. ANN. § 311.772(4)(a) (LexisNexis 2022).

19. *Id.*

20. MO. REV. STAT. § 188.017(2) (2022).

21. MO. REV. STAT. § 188.015(7) (2022).

bodily function.”<sup>22</sup> Under that statute, a pregnant woman would need to have one of the listed conditions or “another physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy that places the woman in danger of death or major bodily impairment if an abortion is not performed.”<sup>23</sup> While the list of conditions is quite limiting, the clause allowing for additional conditions to qualify implies that the list is illustrative only. If a state were to have an exhaustive list of conditions, that would severely limit the ability of providers to make the determination that a pregnancy is life-threatening.<sup>24</sup> Thus, a list of qualifying conditions may help to define what is life-threatening, but can also severely restrict it.

#### E. MEDICAL JUDGMENT

Many states also incorporate medical judgment of a condition into the determination of life-threatening. Some state laws completely defer to medical judgment by leaving the determination entirely to health care professionals. For example, Idaho’s statute requires that a “physician determine[], in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman.”<sup>25</sup> Other state laws incorporate medical judgment into one of the preceding categories. For example, South Carolina’s abortion ban makes an exception if “in reasonable medical judgment, [the mother] has a condition which so complicates her medical condition as to necessitate the abortion

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22. ALASKA STAT. § 47.07.068(b)(4)(B) (2022). This particular statute serves to define when the state’s medical assistance program may pay for an abortion. “The department may not pay for abortion services under this chapter unless the abortion services are for a medically necessary abortion or the pregnancy was the result of rape or incest.” *Id.* at § 47.07.068(a). “[M]edically necessary abortion’ means that, in a physician’s objective and reasonable professional judgment after considering medically relevant factors, an abortion must be performed to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman’s pregnancy.” *Id.* at § 47.07.068(b)(3). This statute was enjoined on equal protection grounds. *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984 (Alaska 2019). While not in force, the language is yet illustrative of this type of life-threatening example.

23. ALASKA STAT. § 47.07.068(b)(4)(B) (2022).

24. See *Law and Policy Guide: Life Exceptions*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-life-exceptions> [https://perma.cc/7XBW-CP7C], for a discussion of why lists of medical conditions should be considered illustrative, not exhaustive.

25. IDAHO CODE § 18-622(3)(a)(ii) (2022).

of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function.”<sup>26</sup>

Some may argue that the medical judgment standard is ideal because it leaves the ultimate decision in the hands of the provider.<sup>27</sup> Under that view, the fact that life-threatening exceptions are ambiguous is actually beneficial, because it gives an abortion provider more flexibility. This view is legally precarious, though, because the ultimate decision is not the provider’s to make. Whether an abortion was legal is still up to prosecutorial and judicial discretion.

Overall, these attempts to clarify what is considered life-threatening have been futile. The question of when a pregnancy is life-threatening enough to qualify for a legal abortion remains. The short answer to that question: there is no clear answer.

## II. ISSUES WITH THE LIFE-THREATENING STANDARD

As established in Part I, it is very unclear when a pregnancy or a condition qualifies as life-threatening. Unclear standards are difficult to use and difficult to enforce, which creates issues for the legal system. However, the confusion surrounding the life-threatening standard is not merely a theoretical legal question. The confusion has real world consequences for doctors and patients. This Part will demonstrate practical issues with the life-threatening standard.

### A. DOCTORS ARE NOT LAWYERS

Medical professionals have made it clear that they do not know when a pregnancy becomes life-threatening enough to reach the threshold set by legislatures.<sup>28</sup> Their confusion is unsurprising considering that even lawyers cannot come to a consensus on the issue. Lawyers go through three years of law school, learning statutory interpretation, while doctors may get one class on health law. It is inherently unjust to ask medical

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26. S.C. CODE ANN. § 44-41-450(A) (2022).

27. Interview with Christy Boraas, Assistant Professor, U. Minn. Med. Sch., in Minneapolis, Minn. (Nov. 8, 2022) (arguing that ambiguity gives abortion providers more leeway to make patient care decisions).

28. See, e.g., Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026> [<https://perma.cc/7AFK-PQPD>].

professionals to decipher the unclear life-threatening standards set out in state laws in order to care for their patients.

This issue is magnified when considering the legal liability attached to a medical professional's actions. In many states with abortion prohibitions, there are criminal penalties attached to the provider who performed the abortion.<sup>29</sup> Abortion providers throughout the country have voiced concern, arguing that they should not have legal liability when the law is unclear.<sup>30</sup>

Some people argue that legal liability does not matter, but those arguments do not consider the full picture. One reason proponents argue that legal liability is immaterial is that some providers do not take legal liability into account when making medical decisions.<sup>31</sup> However, this argument is negated by the fact that the vast majority of providers do consider legal liability.<sup>32</sup> Other proponents may argue that whether a condition is life-threatening is just one of many legal determinations a medical professional has to make. The importance of having legal liability for medical professionals to protect patients is well-established in our society.<sup>33</sup> The difference with abortion is that the legal liability is criminal, while a medical professional's legal liability in other actions is merely civil.<sup>34</sup> A provider is much more likely to take criminal liability into account when making medical decisions. Finally, some argue that legal liability does not matter because physicians are often protected from any type of liability by standards of professional conduct.<sup>35</sup> The American

29. See Maggie Jo Buchanan, *Exceptions to Abortion Bans Further Restrict Access to Care*, CTR. FOR AM. PROGRESS (June 6, 2022), <https://www.americanprogress.org/article/exceptions-to-abortion-bans-further-restrict-access-to-care> [https://perma.cc/LC62-SW4L] (reporting that doctors face up to ninety-nine years of jail time in Alabama and life sentences in Texas).

30. See Kate Zernike, *What Does 'Abortion' Mean? Even the Word Itself Is Up for Debate.*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html> [https://perma.cc/XA3G-SS29].

31. See Simmons-Duffin, *supra* note 11 (quoting an abortion provider who says she will complete the procedure regardless of the law).

32. See *id.*

33. See, e.g., Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DEPAUL L. REV. 209 (2019).

34. See Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html> [https://perma.cc/57B8-CLKE].

35. For example, a physician can dispute a malpractice case by arguing that she acted in a manner consistent with the reasonable standard of care. See B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467



Medical Association (AMA) has taken the affirmative step to protect abortion providers by issuing guidance that expressly permits physicians to perform abortions “in keeping with good medical practice,” even if that goes against an abortion prohibition.<sup>36</sup> However, that is only guidance. The AMA’s official abortion opinion still includes language that an abortion be provided “under circumstances that do not violate the law.”<sup>37</sup> Additionally, even if the AMA’s stance were consistent, standard of care arguments will not always succeed.<sup>38</sup> The legal liability for abortion providers remains a major issue.

#### B. DELAY OF PATIENT CARE

When the delineation of life-threatening is unclear or burdensome, it can drastically delay patient care. Patient care is delayed at least two ways by these life-threatening exceptions: (1) deciphering if a situation is life-threatening under the relevant statute takes time and (2) there are often additional statutory requirements for making the determination.

The confusion over when a condition is life-threatening enough to meet a legal standard has a direct impact on patient care. When medical professionals do not know if they are legally allowed to perform an abortion procedure, they tend to err on the side of caution and wait or not perform them at all.<sup>39</sup>

Secondly, some state abortion laws create additional requirements that are intended to delay and potentially prevent abortion. For example, multiple states require at least two phy-

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CLINICAL ORTHOPAEDICS & RELATED RSCH. 339 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513> [<https://perma.cc/R2YV-M36K>].

36. See Press Release, Am. Med. Ass’n, AMA Announces New Adopted Policies Related to Reproductive Health Care (Nov. 16, 2022), <https://www.ama-assn.org/press-center/press-releases/ama-announces-new-adopted-policies-related-reproductive-health-care> [<https://perma.cc/GM63-BZ9Y>].

37. *Opinion 4.2.7: Abortion*, AM. MED. ASS’N, <https://code-medical-ethics.ama-assn.org/sites/default/files/2022-08/4.2.7.pdf> [<https://perma.cc/C4K9-TUVP>].

38. See generally Bal, *supra* note 35 (describing the elements of malpractice suits and what needs to be proven).

39. Delay of care is a commonly used approach when providers face uncertainty. See Tanya Albert Henry, *Ambiguous Anti-Abortion Laws Are Putting Patients at Risk*, AM. MED. ASS’N (Sept. 16, 2022), <https://www.ama-assn.org/delivering-care/population-care/ambiguous-anti-abortion-laws-are-putting-patients-at-risk> [<https://perma.cc/3W2N-8UR9>] (discussing various ways in which abortion providers are limiting their care in response to the *Dobbs* decision).

sicians to certify that a pregnant woman is facing a life-threatening risk.<sup>40</sup> Requirements like this inevitably delay abortion care.

### C. RISK OF HARM TO PATIENTS

A life-threatening condition is fundamentally one that requires timely treatment, and delays in care put the patient's health in danger. One study found that women in Texas were forced to wait, on average, nine additional days before getting an abortion under the life-threatening exception.<sup>41</sup> Those researchers estimated that the number of women who suffered health problems which required intensive care or readmission doubled because of that delay.<sup>42</sup>

The delay of care and the resulting health outcomes are also dangerous for the providers. Putting a patient at risk of harm also puts the physicians at risk of violation of their responsibilities as a provider. A guiding responsibility of a physician is to do no harm.<sup>43</sup> Similarly, under the AMA's Principles of Medical Ethics, a physician must "regard responsibility to the patient as paramount."<sup>44</sup> Allowing a patient's condition to get worse before making a determination that it is life-threatening is a blatant violation of those responsibilities.<sup>45</sup> Physicians are ethically bound to care for their patients and prevent harm, and legal restrictions on abortion interfere with those responsibilities.

### D. HEALTH INEQUITIES

Inequity in pregnancy-related health outcomes is already rampant, and life-threatening exceptions contribute to those disparities. A prominent example of these disparities is racial inequity in maternal mortality: Black and Indigenous women are up to four times more likely to die during childbirth than a white

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40. See Zernike, *supra* note 34.

41. See Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1030, 1102 (2023) (citing a study which followed twenty-eight women admitted with pregnancy complications in two Dallas hospitals).

42. See *id.*

43. See, e.g., Basil Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 MED. PRINCIPLES & PRAC. 17 (2020) (explaining the principles of beneficence and nonmaleficence).

44. *AMA Principles of Medical Ethics*, AM. MED. ASS'N (June 2001), <https://code-medical-ethics.ama-assn.org/principles> [https://perma.cc/34A2-T68A].

45. See Kekatos, *supra* note 13.

woman.<sup>46</sup> Abortion restrictions force more women to carry a pregnancy to term, which results in more women dying. It is estimated that maternal mortality increases by 21% under an abortion ban, but in an inequitable manner.<sup>47</sup> Maternal mortality for Black women under a ban is estimated to increase by 33%, but that increase is only 13% among white women.<sup>48</sup> Furthermore, a staggering statistic found that a Black person living in Mississippi is 118 times more likely to die from carrying a pregnancy to term than from a legal abortion.<sup>49</sup> Restrictions on abortion fall most heavily on groups who are already marginalized, exacerbating the existing disparities. Abortion is a solution to these health inequities because the abortion can prevent maternal mortality.<sup>50</sup>

#### E. PATIENT AUTONOMY

Yet another impact of these life-threatening exceptions to abortion prohibitions is the infringement on patient autonomy. The issue of autonomy extends throughout the abortion debate, and life-threatening exceptions are one manifestation of that.<sup>51</sup> For example, when a provider delays care to consider the legality of an abortion, the patient loses their autonomy to decide whether to get an abortion. Even if a patient requests an abortion to which they are legally entitled, they may not get one because of their provider's interpretation of the law. The abortion decision is out of the patients' (and sometimes, providers') hands and, instead, in the hands of the state legislature.

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46. Katy Backes Kozhimannil, Asha Hassan & Rachel R. Hardeman, *Abortion Access as a Racial Justice Issue*, 387 NEW ENG. J. MED. 1537, 1538 (2022).

47. Lisa H. Harris, *Navigating Loss of Abortion Services — A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, 386 NEW ENG. J. MED. 2061, 2063 (2022).

48. *Id.*

49. Kozhimannil et al., *supra* note 46.

50. *See generally id.* (arguing that access to abortion is a racial justice issue).

51. *See generally* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012) (discussing the ethical violations of counseling patients seeking information with biased information).

### III. PROPOSAL TO ADOPT A WELL-BEING STANDARD

Parts I and II described how life-threatening standards are legally confusing and harmful to patients and providers, respectively. To address this slew of issues, states should adopt a “well-being of the mother” standard to determine if a condition is life-threatening.<sup>52</sup> This proposed standard would define life-threatening to be anything that would substantially impact the well-being of the mother; a woman would be entitled to legally terminate her pregnancy if her well-being would be substantially impacted by an inability to terminate. The well-being standard solves many of the problems with the current status of life-threatening exceptions by clarifying what qualifies as life-threatening and promoting patient autonomy.<sup>53</sup>

This proposal does not aim to overhaul the legal landscape of abortion. In an ideal abortion landscape, women would not need to meet any legal standard to get care. However, the reality is that the law and abortion care are interconnected. This proposed standard works within the current legal constraints to increase access within the existing life-threatening exceptions. The goal of this incremental approach is to preempt pushback from anti-abortion states by keeping the determination of life-threatening within state legislatures’ discretion.

#### A. WHAT IS THE WELL-BEING STANDARD?

A comprehensive definition of life-threatening would address all circumstances that could impact the well-being of a pregnant person. The World Health Organization provides and advocates for a definition of life-threatening that includes medical and social conditions.<sup>54</sup> The following recommendation builds off the World Health Organization’s model, addressing three aspects of what is life-threatening: (1) physical medical conditions, (2) psychological medical conditions, and (3) social conditions. A view of life-threatening that includes all three considerations acknowledges the realities of pregnancy, parenthood, and abortion care.

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52. Ideally, a state would adopt this standard legislatively, to ensure its application in court. Alternatively, it would be possible for a court to adopt the standard, but a judicial decision carries a greater risk of being overturned.

53. See *infra* Part III.B.

54. See WORLD HEALTH ORG., *supra* note 5.

## 1. Physical Medical Conditions

Physical medical conditions are the most obvious conditions that can be life-threatening. Many physical conditions are already explicitly included in current abortion prohibition exceptions, such as ectopic pregnancies.<sup>55</sup> However, the exceptions for physical medical conditions implicate the issues described in Part I. Even if a life-threatening exception specifies that abortions are permitted for life-threatening physical conditions, questions as to the extent of physical injury or risk of injury remain. The well-being standard encompasses any physical medical condition, without regard for specific markers of illness or injury. Under the well-being standard, any physical medical condition can be considered to be life-threatening, up to the patient's and provider's discretion.

## 2. Psychological Medical Conditions

Psychological medical conditions should be treated the same as physical ones. The most convincing argument for including psychological conditions is the connection they have to physical harm. Psychological disorders like depression can lead to physical harm like suicide.<sup>56</sup> Sadly, suicide is a major cause of death after pregnancy, and that risk is increased when the pregnant woman experienced mental health issues during her pregnancy.<sup>57</sup> Inability to access abortion is likely to further increase that risk.<sup>58</sup> But, even without risk of physical harm, these conditions should be considered in the determination of a mother's well-being. A person's psychological and emotional health are just as important to well-being as physical health.<sup>59</sup>

There is political resistance to considering psychological

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55. See, e.g., Jaime Lowe, *What a High-Risk Pregnancy Looks Like After Dobbs*, N.Y. TIMES (Sept. 18, 2022), <https://www.nytimes.com/2022/09/13/magazine/high-risk-pregnancy-dobbs.html> [<https://perma.cc/6AHN-HANU>].

56. *Suicide Prevention: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2, 2022), <https://www.cdc.gov/suicide/factors/index.html> [<https://perma.cc/52BD-SWZ4>].

57. Buchanan, *supra* note 29 (citing Sidra Goldman-Mellor & Claire E. Margerison, *Maternal Drug-Related Death and Suicide Are Leading Causes of Postpartum Death in California*, 221 AM. J. OBSTETRICS & GYNECOLOGY 489 (2019)).

58. *Id.*

59. See *generally About Mental Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 28, 2021), <https://www.cdc.gov/mentalhealth/learn/index.htm> [<https://perma.cc/J2CJ-78QU>] (“Mental and physical health are equally important components of overall health.”).

conditions in the determination of well-being. State legislatures have shown aversion to this interpretation of life-threatening. For example, South Carolina's abortion prohibition explicitly excludes psychological and emotional conditions and dictates that "a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function" does not qualify for the exception, thereby excluding risk of suicide.<sup>60</sup> Though the idea is not widely used in the United States, it has gained some traction globally. In Ireland, the Supreme Court interpreted the country's life-threatening exception to include risk of suicide.<sup>61</sup> Similarly, Nigeria's Ministry of Health's national guidelines on abortion list psychological disorders with suicidal ideation as a life-threatening condition.<sup>62</sup> International acceptance of the idea may help push the interpretation in the United States.

### 3. Social Conditions

Lastly, social conditions should be a consideration in the determination of the well-being of the mother. This social condition aspect mainly addresses socioeconomic realities. For many people, a pregnancy and a child would be completely untenable financially. Currently, about half of women who obtain abortion already live below the federal poverty level.<sup>63</sup> For those who do not, the costs associated with pregnancy and parenthood could

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60. S.C. CODE ANN. § 44-41-450(A) (2022).

61. CTR. FOR REPROD. RTS., *supra* note 24.

62. *See id.*

63. *United States: Abortion Demographics*, GUTTMACHER INST., <https://www.guttmacher.org/united-states/abortion/demographics> [<https://perma.cc/JT2B-RUBN>].

easily force them into poverty.<sup>64</sup> Poverty itself is a social determinant of health that can be life-threatening.<sup>65</sup> A non-economic social factor that could impact a pregnant woman's well-being is cultural views of pregnancy. If, for example, a patient's culture is vehemently opposed to pre-marital sex, a pregnancy out of wedlock could subject her to danger.<sup>66</sup> Social conditions are intertwined with health, so a full view of well-being must consider them.

There is not much guidance on how to implement such a standard because such an approach has not yet been legally adopted anywhere. The closest example is Laos, where the practical guidelines for abortion providers state that social or economic reasons are sufficient reasons to make abortion accessible.<sup>67</sup> Unfortunately, the criminal code in Laos does not mirror that recommendation.<sup>68</sup> This approach is not common, but that should not stop progress.

## B. ISSUES THE WELL-BEING STANDARD WOULD SOLVE

There are practical and ethical reasons to adopt the well-being standard. This Section elaborates on those reasons.

### 1. Clarity

The overarching issue with current life-threatening exception clauses is that they are not clear. The well-being of the mother standard, defined by all three of the preceding considerations, would significantly elucidate what is considered life-threatening. This would protect medical providers from legal li-

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64. The average cost of birth in the United States is \$10,808, but can be as high as \$30,000 when considering pre- and post-natal care. Hillary Hoffower & Taylor Borden, *How Much It Costs to Have a Baby in Every State, Whether You Have Health Insurance or Don't*, INSIDER (Dec. 9, 2019), <https://www.businessinsider.com/how-much-does-it-cost-to-have-a-baby-2018-4> [<https://perma.cc/3B4C-PVVB>]. The costs of parenting are even higher; families pay on average \$12,980 each year per child, and upwards of \$300,000 to raise a child until age 17, only factoring in necessities such as food and shelter. Mark Lino, *The Cost of Raising a Child*, U.S.D.A. (Feb. 18, 2020), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child> [<https://perma.cc/76DR-4SR6>].

65. *Poverty*, HEALTHY PEOPLE 2030, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/poverty> [<https://perma.cc/8HVF-NJZX>].

66. See CTR. FOR REPROD. RTS., *supra* note 24.

67. See *id.*

68. *Id.*

ability under unclear statutes, prevent delays in care due to confusion, and enable more women to obtain abortions when they are legally entitled to them.

## 2. Ethics Concerns

As so named, the well-being of the mother standard would fully promote the health and well-being of the mother. This standard promotes bioethics by minimizing risk of harm to the patient and promoting a holistic view of patient health. The well-being standard also gives patients much more autonomy. Under this framework, a pregnant woman can communicate any information about her life relevant to her well-being and actually have it considered by her provider. This gives the patient at least a solid chance of getting an abortion if she chooses. Additionally, the expansion of the life-threatening exception would not take away any autonomy, because no statute requires an abortion, even if the pregnant woman's condition is life-threatening.<sup>69</sup>

## C. REMAINING ISSUES

While this proposed standard would address many of the issues with the current state of life-threatening exceptions, it would not fix every problem. This Section addresses the issues that remain unresolved by the well-being standard.

### 1. Legal Liability for Providers

Even if the legal definition of life-threatening could be nailed down, the problem of legal liability for providers remains. A clear legal definition does not necessarily equate to clear medical instructions; medical professionals may still be unable to determine if a condition threatens the well-being of the mother. In those particularly difficult cases, the medical professional is still at risk of criminal penalties for violating a law prohibiting abortion. Only the court can tell the medical professional if the abortion was legal. The only real solution to this problem is to completely remove criminal liability for abortion providers.<sup>70</sup>

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69. Life-threatening clauses serve as exceptions to abortion prohibitions. Under no circumstances can a state require a pregnant person to get an abortion.

70. A discussion of whether abortion providers should have any criminal liability for the care they provide is outside the scope of this Essay. See Suzanne Ost, *When Should a Doctor's Behaviour Be Criminal?*, J. MED. ETHICS BLOG (Dec. 23, 2018), <https://blogs.bmj.com/medical-ethics/2018/12/23/when>



## 2. Abortion Access is Still Restricted

This proposal only addresses a specific element of abortion restrictions: how to define life-threatening exception clauses.<sup>71</sup> This proposal does not eliminate a state's life-threatening exception, nor does it change a state's abortion prohibition. Therefore, access to abortion is still limited for women who do not qualify under the well-being standard.

On the other hand, the limitations of this proposal could also be a reason for its success. A conservative legislature that does not want to expand abortion access may be open to this proposal precisely because it does not remove all restrictions. This proposal is a compromise, allowing patients and providers more leeway, while not completely defying a state legislature's views on abortion.

## CONCLUSION

Now that state legislatures have full power over abortion law, access to abortion is severely limited.<sup>72</sup> Because pregnant women can no longer access abortion in many cases, they must seek an exception to an abortion prohibition in order to get care. Almost every state has a statutory life-threatening exception, in which abortion is permitted to save the life of the pregnant mother.<sup>73</sup> The exact language and parameters of such exceptions vary, but they are consistently poorly defined. Medical and legal professionals agree that the point at which a condition meets the threshold of life-threatening is unclear.<sup>74</sup> This Essay proposes a solution to that problem: the adoption of a well-being of the mother standard to determine if a condition is life-threatening. The well-being standard takes a holistic view of what impacts a pregnant person's life, specifically considering physical medical conditions, psychological medical conditions, and social conditions. Such a standard would expand access to abortion and protect patients and their providers.

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-should-a-doctors-behaviour-be-criminal [<https://perma.cc/SJ8X-LK6R>], for an overview of that issue.

71. There are many other types of abortion restrictions that limit access to abortion care. See generally *An Overview of Abortion Laws*, *supra* note 6 (listing different ways state legislatures restrict abortion). These other restrictions are outside the scope of this Essay.

72. See generally *id.* (listing all abortion restrictions nationally).

73. See *id.*

74. See Ollove, *supra* note 17.