

Life and Health of Mother Exceptions: Legal and Moral Standards

Chris Maska, JD; General Counsel – Texas Alliance for Life

Life and health of the mother exceptions that allow for abortions can be found in both statutes and moral standards. Abortion throughout all nine months became the law of the land when the Supreme Court allowed states in the third trimester to regulate abortion to preserve the life of the child except to preserve the mother's health and then created a health exception so broad that it always allowed for an abortion. However, in *Casey*,¹ the Court allowed for a real health exception that only applied when health was truly an issue but only in the context of parental notification. After *Dobbs*,² life and health exceptions are operative in a range of abortion laws. There are also moral standards that allow for abortion in some cases by applying the Doctrine of Double Effect. While these standards would allow for fewer abortions than do the statutory exceptions, this does not mean the laws should be changed to mirror the moral standards. Moral standards and laws have related but nonetheless different purposes.

I. Political Standards

Roe Exception Swallows the Rule

When *Roe v. Wade* and *Doe v. Bolton* were issued on the same day, every abortion law in the nation was struck down.³ While every life and health exception in state law was no longer operative, *Roe* and *Doe* used maternal health to define the limits of permissible state regulation of abortion.⁴ Under *Roe*, abortion could not be limited by states if the health of the mother was in any way at risk:

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.⁵

In the second trimester, a state could regulate abortion only for reasons of maternal health. In the third trimester, while a state could choose to regulate abortion to protect the child, this was not allowed if appropriate medical judgment determined that an abortion was

¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

² *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 597 U.S. ____ (2022).

³ Paul Benjamin Linton, *Abortion Under State Constitutions*, 2nd Edition, (Durham, North Carolina: Carolina Academic Press, 2012), 3.

⁴ *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

⁵ *Id.* at 164–165.

needed to preserve the life or health of the mother. Under *Roe*, maternal health always prevailed over the life of the child, which, without any explanation, is always referred to in *Roe* as "potential life." The bottom line was that a state could not prohibit an abortion if it was done for the health of the mother throughout pregnancy. "Health of the mother" was defined in *Doe*. The court found "health" included both mental and physical health and that the health determination was to be made by the physician doing the abortion.⁶ The Court went on to state:

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in light of all the factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This **allows** the attending physician the room he needs to make his best medical judgment.⁷ (emphasis added)

The Court also ruled that a hospital could not have a committee to review abortion decisions.⁸ Hence, a single doctor with no special training in psychology and none in sociology could exercise his medical judgment and conclude an abortion procedure—even a dangerous abortion procedure—was warranted because of his psychological and sociological judgment. Up until the moment of birth, a state could not prohibit an abortion if a doctor found a psychological or a sociological harm to a mother if an abortion was not performed. The health exception swallowed the rule. One would always be able to find a doctor who would find a "health exception" to allow any abortion.

Return of the Life and Health Exception

In *Planned Parenthood v. Casey*, the Supreme Court upheld Pennsylvania's parental notification law, which had a medical emergency exception for both life and health.⁹ That exception reads:

a medical emergency is

"[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." 18 Pa. Cons. Stat. § 3203 (1990).¹⁰

Both the life and health exceptions are based on a doctor's good faith clinical judgment. The standard that the doctor is held to is not perfection. What the doctor is called to do is to act in good faith.

⁶ *Doe* at 191–192.

⁷ *Id.* at 192.

⁸ *Id.* at 197.

⁹ *Casey* at 880.

¹⁰ *Id.* at 879.

The life exception only applies when an immediate abortion is needed to avert death. One could argue that under this exception any disease would have to progress to the point where the mother was about to die before an abortion could be performed.

The health exception applies when "delay will create serious risk of substantial and irreversible impairment of a major bodily function." Because it applies to bodily functions, it does not allow an abortion for mental health or a sociological reason. The threat must be to a major bodily function and the threat must be significant. It must also be "substantial and irreversible." This health exception can be seen as a prophylactic measure. The health exception allows an abortion when delay creates a serious risk to the mother's health. The result is that an abortion can be performed before the mother's death is imminent. When a delay would present a serious risk of substantial and irreversible impairment of a major bodily function, an abortion can occur. Because of the health exception, the mother does not have to be in actual mortal danger before an abortion can be performed. However, abortion is only allowed when delay will cause a risk of a very serious medical condition. Unlike in *Roe* and *Doe*, the health exception is truly an exception. The Court found the Pennsylvania life and health exceptions to be constitutional.¹¹ However, the *Casey* exception only applied in the case when a girl was seeking an abortion without notifying her parents.

Benefits of Pennsylvania's Health Exception

Some may argue that the only exception that should be allowed for an abortion is an exception that is at least similar to Pennsylvania's life of the mother exception. The claim is that only when the mother's life is immediately at risk should an abortion be allowed because an abortion takes the life of a child. Some have made such a moral claim. This and other moral claims will be considered in the second section of this paper. However, there are four very significant political arguments for why health exceptions, similar to those of Pennsylvania's, should be enacted into law: they make it highly unlikely that both mother and baby will die, they provide workable standards for doctors, they make it more likely states will adopt protective legislation,¹² and they make it less likely that state courts will strike down protective legislation.

Preventing the Worst

The worst possible outcome for a pregnancy is the death of both the baby and the mother. A doctor treating a pregnant mother has two patients: the mother and the baby. A doctor will be seeking the best for both patients. Fortunately, in most cases, doing the best for the mother is also doing the best for the baby. But when there are serious complications, a doctor may face a situation where the best outcome for the baby is not the best for the mother. Here, a doctor has no certain course to follow. If the doctor could only present the life of the mother exception that applies when the doctor determines the mother is

¹¹ *Casey* at 879-880.

¹² "Protective legislation" is legislation that prohibits abortion that only allows for abortion in rare circumstances.

near death, there may well be risk both to mother and child. Both the mother and child could be at risk if a doctor mistakenly thinks the mother is not near death, but she is. Allowing a doctor to present an abortion as an option under the health of the mother standards permits the doctor to present a course of action that prevents the worst possible result: the death of the baby and the mother. It should be emphasized that the doctor can only give a recommendation. It is the mother's decision as to if and when to undergo an abortion. Given a doctor's best medical analysis of the situation, the woman who has been carrying her child makes the determination to undergo an abortion when there is a serious risk to herself.

Life of the mother and health of the mother exceptions work together in real-world situations. Since the decision in *Dobbs v. Jackson Women's Health Organization* in Texas, abortion has been banned except for life and health exceptions. From August 2022 until May 2023, the last reported month, all 40 reported abortions in Texas have been done both for the life and health of the mother.¹³ There is a real link between the life of the mother and health of the mother standards. It should be recalled that in 2020, there were 53,949 reported abortions in Texas.¹⁴ This was the last year when abortions were not influenced by *Dobbs*, the Texas Human Life Protection Act, which bans virtually all abortions, or the Heartbeat Law.¹⁵ Pennsylvania type health of the mother standards make it highly unlikely that both mother and child will die.

Workable Standards

The Pennsylvania health exception is a good legal solution to the dilemma doctors face. Often, it is not clear when a patient is about to die. Instead of determining under the life of the mother exception just when a mother is imminently facing death, a doctor working under the health of the mother exception only needs to determine whether delay will risk serious harm to the mother. Laws that ban abortion typically have criminal penalties, and doctors can be sued for civil penalties. If a doctor does not present abortion as an option and the mother dies, he could be sued for malpractice. If the doctor presents abortion as an option and the mother decides to have an abortion, the doctor could face criminal liability based on a claim that the risk of the mother's death was not sufficiently imminent. Whatever course a doctor takes, there is a risk of criminal and civil liability. The health of the mother exception does not place the doctor in the predicament of guessing when the mother might die. The doctor must only determine if there is a serious risk of substantial and irreversible impairment of a major bodily function. Having clear

¹³ <https://hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics> The referenced statistics can be found at the hyperlinks for 2023 and 2022 *Selected Characteristics of Induced Terminations of Pregnancies*.

¹⁴ *Id.* for 2020.

¹⁵ The Texas Heartbeat Law bans abortion at approximately six weeks when the unborn child's heartbeat can be first detected. Tex. Health & Safety Code, ch. 171, subchapter H. It went into effect September 1, 2021.

standards allows a doctor to use the best clinical judgment to provide the mother with all her options without the doctor fearing loss of liberty or property.

Passing Protective Legislation

With the *Dobbs* decision, the question of whether to prohibit abortion has been returned to the states. While abortion is currently banned in many states, in many other states, it is legal. In those states where abortion is legal, it will be necessary to pass a law through the state legislature and either have that bill signed by the governor or have the legislature overturn the governor's veto. The political process is not easy, particularly when the issue is controversial. One argument against a ban on abortions is if there is only a life of the mother exception like that in Pennsylvania, it is likely that it will lead to the death of mothers. Even the best doctors cannot perfectly predict just when death becomes imminent. When attempting to defeat protective legislation, the other side will try to set up an opposition between mothers and children. It is more likely that a state will pass protective legislation if the law includes a Pennsylvania style health exception than if it does not. Further, the legislature in a state that currently bans abortion could repeal its law based on maternal deaths.

Courts Upholding Protective Legislation

From the very first legislative action of the United States, the Declaration of Independence, it has been recognized that all people have a right to life. Properly understood, this includes both mothers and their children. To the extent that a protective law results or could result in the death of the mother because abortion was not allowed, a court might strike down the law as being unconstitutional. Before *Roe* and *Doe*, two state supreme courts struck down protective legislation that only allowed for life of the mother exceptions.¹⁶ It is less likely that a state supreme court will strike down protective legislation with a Pennsylvania-style health exception than one without. While this does not mean that no state supreme court will strike down a statute that has both a life of the mother and a health exception, should we not make it as difficult as possible to strike down protective laws?

As a legal matter, the combination of the Pennsylvania life and health exceptions serve: (1) to prevent the worst possible outcome by making it highly unlikely that both mother and child will die, (2) to provide workable legal standards for doctors, (3) to make the passage of protective legislation more likely, and (4) to make it less likely that courts will strike down protective legislation. These are all important advantages in creating a legal environment where unborn children will be protected from abortion, allowing only for rare exceptions.

Politics

¹⁶ *People v. Belous*, 458 P.2d 194 (Cal. 1969) and *State v. Barquet*, 262 S. 431 (Fla. 1972). This is not to say that either of these decisions was correctly decided. It is only to say that when there is only a life of the mother exception, the courts may strike down the law for that reason.

As noted above, there is a serious moral argument that it is not moral to allow an abortion unless the mother's life is in imminent danger. Assuming for purposes of argument that this is true, it would not necessarily mean that a legislature should reject a Pennsylvania style health exception. The reason for this is that the purpose of a legislator is to pass the best possible legislation. Politics has been described as the art of the possible. A legislator who believes his job is only to support perfect legislation would find that he rarely voted for any legislation, and his colleagues would rarely consult with him about legislation because of his all-or-nothing approach. Getting the best law passed that will likely survive a court challenge is the normal objective of a legislator.¹⁷ As a Cistercian monk has written:

Politics is not for the guileless, for sure. One has to be sly and cunning to get anywhere in the world of politics. So, it is only natural that politicians, even clerical politicians, are generally suspect and, more often than not, confusing to honest people. Still we ought to be grateful to those who are fit to govern and are called to it, who take such a trying burden upon themselves. They make it possible for the honest, the guileless, to survive in this world.¹⁸

This is not to say that the answer to the question—is it ever moral to allow an abortion for anything less than an imminent threat to the life of the mother—is not relevant to legislation, but to say that politics and morals do not follow the same rules.

II. Moral Standards

Doctrine of Double Effect

Whether it is proper to undergo an abortion in order to save the life of the mother is a moral issue that has been addressed through the Doctrine of Double Effect ("DDE"). This doctrine was first developed by Thomas Aquinas, not in the context of abortion but in the context of "whether it is lawful to kill a man in self-defense." To that question, Thomas begins his answer:

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above (II-II:43:3; I-II:12:1). Accordingly, the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible. And yet, though proceeding

¹⁷ There are of course some situations where minor improvements are not worth it. There is nothing wrong in voting against legislation. What is wrong is rejecting everything that is not perfect.

¹⁸ Fr. Christopher Rabay, O. Cist, *Candlelights*, (Dallas: Cistercian Abbey Our Lady of Dallas, 2017), 62. This is not to suggest that Fr. Rabay, who passed away in 1999, would agree with this paper, but that he recognized politics properly seeks to accomplish the best that is possible.

from a good intention, an act may be rendered unlawful, if it be out of proportion to the end.¹⁹

Intention is of great importance when considering the morality of an act. One who extends her leg to walk at the corner of a building may trip and hurt someone who was running on the wrong side of the pavement, and no one would accuse her of trying to injure the runner she did not see. Unlike the runner, our walker was following the rules and had no reason to suspect that a collision was in the offing. A somewhat similar action by our walker, which also involves extending her leg, but this time, as marathon runners pass, would rightly be regarded as immoral. One may argue that when she stuck out her leg, she did not intend to hurt anyone because (1) she did it because someone dared her to stick out her leg when the runners went by, (2) she only stuck out her leg for a second, or (3) bored from standing for two hours, she did not realize the runners were in front of her, and she did not bother to check before she stuck out her leg.

Regarding the first two options, our leg extender did not have a good intention. Putting runners at risk or potentially interfering with a race because one was dared or only putting runners at risk for a short time is not a justifiable reason for the act. As to the third option, she made a reckless choice. She knew there was a risk but did not bother to check. The doctrine of double effect does not condone an action just because one can come up with an explanation for the action other than wanting to harm another. An intention must be good, and the action must be proportional to the end. An action is not proportionate when the action creates a great evil. For example, while it may be legitimate for a merchant to stop a shoplifter by grabbing the shoplifter's shoulder, shooting a shoplifter is not a proportionate response to the loss of an item.

DDE has been expanded over the years to other issues than just killing in self-defense and has been refined. The classic statement of the DDE is:

- (1) The agent's end must be morally acceptable (*honestus*),
- (2) The cause must be good or at least morally indifferent,
- (3) The good effect must be immediate, and
- (4) There must be a grave reason for positing the cause.²⁰

For purposes of this paper, the most significant provisions are the third, "the good effect must be immediate," and the fourth, "there must be a grave reason for positing the cause."

Immediate Effect

What "the good effect must be immediate" means is that "the evil effect may not be the *means* to the good effect."²¹ The good, intended effect cannot be caused by the evil,

¹⁹ Thomas Aquinas, *Summa Theologica*, II-II:64:7.

²⁰ Joseph M. Boyle, Jr., "Toward Understanding the Principle of Double Effect," *Ethics* 90 (July 1980): 527–38, reprinted *The Doctrine of Double Effect, Philosopher's Debate a Controversial Moral Principle*, edited by P.A. Woodward, (University of Notre Dame Press, 2001).

²¹ *Id.* emphasis in original.

unintended effect. One classic use of double effect is that provided the other conditions are met, a military operation can be undertaken even if it is almost certain that there will be civilian casualties if civilian casualties are not the source of the military advantage gained. The unintended effect cannot cause or help cause the intended effect. It may be permissible to bomb a factory knowing that a civilian neighborhood might be hit and result in civilian deaths. It is not permissible to bomb a city in order to gain two advantages: (1) the destruction of factories, which may be a legitimate objective, and (2) the decrease in civilian morale caused by civilian deaths, which cannot be a legitimate objective. The problem here is not that decreasing civilian morale might not be a legitimate military objective but that the means of achieving that objective—killing civilians—is not legitimate. If the unintended effect is the reason why the intended effect is successful, that action is not allowed under the DDE.

Grave Reason

"There must be a grave reason for positing the cause" requires that an ethical judgment must be made that the reason for the intended result is sufficient to bring about the evil state of affairs caused by the unintended result.²² Because the unintended effect is evil, there must be a serious reason for bringing about the unintended effect.

In the abortion context, a number of cases have been analyzed using the DDE. Three examples are ectopic pregnancies, preterm premature rupture of membranes, and craniotomy. There is debate among ethicists about how the DDE applies to each of these cases.²³

Ectopic Pregnancy

Ectopic pregnancy is when the embryo attaches outside the uterus, mostly in the fallopian tubes, which is called a tubal pregnancy. Untreated, an ectopic pregnancy will often result in both the death of the mother and the death of the unborn child. There are both surgical and medical treatments for ectopic pregnancies. One medical treatment for ectopic pregnancy would be to cut out the fallopian tube. Under a DDE analysis, some argue that it is permissible to cut out the fallopian tube because, while it is certain to result in the death of the unborn child, the unborn child is not directly killed. The success of the operation, which removes diseased tissue, does not depend on killing the unborn child. Another treatment for ectopic pregnancy is to administer a drug that directly kills the unborn child. Under a traditional DDE analysis, this is impermissible. The success of the procedure depends on killing the unborn child.

Craniotomy

²² *Id.*

²³ For a good presentation of some current conflicts about disputes between ethicists including the dispute between new and traditional natural law theorists see Alan VIncelette, "On the Liceity of Previaible Induction of Labor," *The National Catholic Bioethics Quarterly*, (Winter 2022): 710–753.

A number of ethicists have commented on craniotomy:²⁴

In the Craniotomy Case (CC) a woman will die unless the head of the fetus she is trying to deliver is crushed. But the fetus may be safely removed if the mother is allowed to die.²⁵

The problem is the baby's head cannot pass through the birth canal and a normal caesarian section is not possible. Under traditional DDE analysis, it would be a violation of the third provision, as the success of the action depends on killing the unborn child.

Preterm, Premature Rupture of Membranes

Preterm, premature rupture of membranes (PPROM) occurs when the unborn child is not ready to be born but the mother's water breaks. This often results in serious infection. If untreated the mother may die. One treatment when there is infection is to induce labor which expels the infection along with the unborn child. Under the DDE, two issues are presented: whether the good effect is caused by unintended consequences and whether there is a grave reason. Most ethicists agree that the good effect is not caused by the unintended consequence, moving the unborn child out of the womb and to almost certain death does not cause the intended consequence of removing the infection from the mother.²⁶ The second issue is not so clear. Just when is it appropriate to induce an abortion in this circumstance? Alan Vincelette argues:

Still, every attempt should be made to bring the fetus to as viable a state as possible (at minimum a perivable one) and induce labor only if the mother's health is rapidly deteriorating and there is an imminent threat of her death, not just if her life is at risk.²⁷

This interpretation of the DDE is that risk alone is not enough. Rapidly deteriorating health and imminent threat are required before an induction abortion would be moral. Here, Vincelette uses both the fourth provision—grave matter—and first provision—the agent's end must be morally acceptable—to reach his conclusion. He argues that action must directly target a pathology to be morally acceptable. Only when there is more than a risk to the mother's life and death is imminent would abortion be proper. As Vincelette points out, other ethicists do not view this situation in the same way.²⁸ It is not the purpose of this paper to resolve this dispute. But to point out a current debate about the DDE that indicates the DDE both as generally understood and according to Vincelette's interpretation does not accord with Pennsylvania's emergency exception.

²⁴ *The Doctrine of Double Effect*, passim. This book provides a good analysis of the arguments for and against DDE.

²⁵ Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18, no. 4 (1989): 334–51, Princeton University Press reprinted in *The Doctrine of Double Effect*.

²⁶ Vincelette, 716–718.

²⁷ *Id.*, 718.

²⁸ *Id.*

III. Comparison of Statutory and Moral Standards

The three situations addressed—the treatment of ectopic pregnancy, craniotomy, and PPRM—would at least in some cases be allowed under Pennsylvania law but would be found immoral under traditional DDE analysis. Pennsylvania law does not use the four-part DDE analysis to determine whether an abortion is lawful. Instead, it creates a legal standard that, while sharply limiting the availability of abortion, relies on the good faith judgment of the physician to determine if there is a "serious risk of substantial and irreversible impairment of a major bodily function." The physician is not called upon to determine whether the agent's end must be morally acceptable, the cause must be good or at least morally indifferent, the good effect must be immediate, and there must be a grave reason for positing the cause. Under the Pennsylvania statute, administering a drug to kill the unborn child in the fallopian tube would not be illegal in the case of an ectopic pregnancy. In a craniotomy case, it would not be unlawful to crush the unborn child's skull so that the child's dead body could pass through the birth canal. It would not be illegal in a PPRM case to induce an abortion before the mother's life was at risk.²⁹ Different standards lead to different results. But are the different results problematic?

While it would be ideal if a law in all its applications was moral, perhaps this is too much to hope for in most legislation. Laws seek to regulate some human actions, but not all actions. For example, ingratitude is a character flaw, but how can a law require gratitude? Would a law compelling gratitude achieve its purpose? Is compelled gratitude indeed gratitude? In addition to generally being moral or at least neutral, the law should be clear. That is, those whom it governs should be able to know what the law requires. For a law to exist, it must pass the legislature and receive executive approval or a veto override. For a law to continue to exist, it must not be struck down by the courts. The process of creating and maintaining law might result in a less-than-perfect law that is much better than having no law at all.

Moral standards are very different than laws. Moral standards are used to guide human action. While clear moral standards are desirable, perhaps some moral standards cannot be clear because life is not always clear. While a lack of clarity in moral standards could lead to improper action, it does not lead to an official determination that one has violated a law and now must forfeit liberty and property. Moral standards are not created by legislatures and judged by courts.

A law and a moral standard should only be the same if the criteria for a good law and the criteria for a good moral standard can both be met. If not, it is best to have laws and moral standards that diverge. We should have both the best law we can have and the best moral standard we can have.

²⁹ The fact that a procedure is legal does not mean that a mother should agree to having the procedure done, a doctor should agree to do a procedure, or a hospital should allow the procedure to be done. All should have the right to refuse.

Mixing Law and Moral Standards

Currently, there is a case before the Texas Supreme Court that claims Texas' abortion laws violate the Texas Constitution.³⁰ One of the claims concerns PPROM. One of the plaintiffs contends that she was not allowed an abortion until sepsis occurred and she was in danger of death because that is how doctors must interpret the law. While the lawsuit challenges multiple abortion laws, one of the laws it challenges is Texas' most recent statute banning abortion, the Human Life Protection Act, which allows for the following exceptions:

- (a) A person may not knowingly perform, induce, or attempt an abortion.
- (b) The prohibition under Subsection (a) does not apply if:
 - (1) the person performing, inducing, or attempting the abortion is a licensed physician;
 - (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted 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; and
 - (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:
 - (A) a greater risk of the pregnant female's death; or
 - (B) a serious risk of substantial impairment of a major bodily function of the pregnant female.
- (c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.³¹

The Texas and Pennsylvania life of the mother and health of the mother exceptions have many similarities but also some important differences. Both statutes hold the physician to a similar standard. Pennsylvania requires good faith clinical judgment. Texas requires reasonable medical judgment. The Texas life of the mother exception is significantly different from the Pennsylvania exception. The Texas law has no requirement that there be a need for an immediate abortion to avert death. Instead, Texas law requires a life-threatening physical condition that places the mother at risk of death. Texas law allows

³⁰ *State of Texas v. Zurawski*, On direct appeal to the Texas Supreme Court from the 353rd Travis County District Court, Docket No. 23-0629.

³¹ Tex. Health & Safety Code sec. 170A.002 (2023). It went into effect August 25, 2023.

for an abortion when there is a serious risk of substantial impairment of a major bodily function of the pregnant female. Unlike the Pennsylvania law, there is no requirement in the Texas law that risk must be of an irreversible impairment. In certain situations, the Texas law will allow for abortion, whereas the Pennsylvania law will not. The Texas law never requires the need for immediate abortion to avert death for the life of the mother exception. It does not require irreversible impairment for the health of the mother exception. The Pennsylvania law provides a clear standard. The United States Supreme Court in *Casey* found the law to be constitutional.³² The Texas law is, if anything, even clearer. There is no hint in the Texas law that abortion is allowed only when the mother is close to death. Under Texas law, there can be an abortion if there is a risk of death or substantial impairment to a major bodily function. If, in 1992, Pennsylvania doctors could interpret their less clear law as allowing for abortion when PPROM occurred, certainly Texas doctors in 2023 can, in like manner, interpret the Human Life Protection Act.

The argument that Texas law requires that the mother must be near death before an abortion can be performed seems to confuse DDE moral standards with Texas law. But there is no reason to believe that Texas law incorporates DDE standards. If the Texas Legislature wanted to adopt DDE standards, it easily could have done so. Instead, it adopted standards based on the Pennsylvania statute but even clearer than the Pennsylvania law. There is no basis in Texas law for the claim that Texas' life and health exceptions only apply when a woman is about to die. They apply when, in a doctor's reasonable medical judgment, there is a risk of death or a serious risk of a substantial impairment of a major bodily function. Under Texas law, an abortion can take place when there is a risk of death or a risk of serious harm. Texas does not only allow an abortion if a mother is close to death.

Conclusion

When an abortion can occur is a question answered in statutes. The Pennsylvania and Texas statutes allow exceptions for the life and health of the mother that only provide for rare exceptions, provide clear guidance, make it unlikely that the legislatures will repeal the law, and make it unlikely courts will find the laws unconstitutional. These laws serve to make abortion rare. Should an abortion occur is a question answered by applying moral standards. Moral standards seek to give people the best guidance. Moral standards are not concerned with whether the guidance may not be clear and whether legislatures and courts will follow the moral guidance. Because statutes and moral standards do not seek the same things, there may well be differences between what laws require to be done and moral standards. Moral standards and statutes are not the same thing and should not be confused.

³² *Casey* at 979-880. In fact, the Court considered the issue of premature ruptured membrane.