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Theorizing the Meaning of Health in Abortion Law

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Paltrow, Harris and Marshall argue that understanding *Roe v. Wade* as a decision that only protects the right to terminate a pregnancy misconstrues its larger implications. The striking down of *Roe* has implications well beyond that focus, in increasing the vulnerability of pregnant people to legal surveillance, civil

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detention, and forced interventions while disproportionately burdening people of color and perpetuating structural racism (Paltrow, Harris and Marshall 2022). For these reasons, the overturn is morally objectionable in its effects and deeply so. One other effect is equally objectionable: the politicization of health that is sure to follow.

Dobbs v. Jackson repudiates *Roe* on the grounds that the court wrongly attributed a fundamental constitutional right to abortion.[1] That repudiation leaves states free to make their own determinations about the practice. The case triggering this judgment was a Mississippi statute that prohibited abortion after fifteen weeks of gestation "except in medical emergencies."[2] Texas also carved out an exception for "medical emergencies" when it banned abortions after the detection of a fetal heartbeat,[3] and other states are moving to do the same.[4] *Roe* protected all abortions necessary to protect the life and health of a woman at any stage of pregnancy,[5] but to the point prior to fetal viability the court authorized states to regulate abortions for certain health-related reasons, that is, to protect the health of women during the procedure. *Roe* authorized states to regulate and even prohibit abortions after viability if they chose to do so, except in instances in which an abortion is necessary to the life and health of a woman.

Surprisingly, *Dobbs v. Jackson* did not see people's interests in health as having any moral or constitutional significance. The notion of health has figured in key ways in abortion decisions. In the late 1960s, the District of Columbia prosecuted Milan Vuitch for violating a statute that prohibited physicians from providing abortions except those "necessary for the preservation of the mother's life or health." In his defense, Dr. Vuitch claimed that this standard was unconstitutionally vague; it did not give clear guidance about what was and what was not permissible. The Supreme Court rejected this claim, saying that the meaning of health is clear enough, involving as it does "modern understandings" that encompass both psychological and physical-well being.[6]

In the 1972 companion decision to *Roe*, *Doe v. Bolton* took up a challenge to a Georgia statute in force at the time; that statute generally prohibited abortion but permitted physicians to carry out an abortion on finding that "A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health." The court gave an expansive view of clinicians' entitlement to evaluate the conditions of health, saying the physician could take into consideration "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to health. of the patient. All these factors may relate to health."[7] Endorsed by the court in *Roe* as well, this broad definition of health limits states' authority to interfere with certain abortions. Certainly, however, nothing in these cases establishes life-threatening conditions or medical emergencies as the only health conditions that put abortions beyond the reach of state intervention, as some states have now done.

The definition of health is a perennial and deeply debated topic in bioethics, with naturalists at one end of the spectrum trying to formulate value-free standards and social constructivists at the other end maintaining that the standards can only be normative. It is not clear we need to decide this theoretical controversy definitively in order to make the case for pregnancy as a sometime threat to health. Let's say that a woman before pregnancy is in Status A. Pregnancy will move her to Status B. The movement from Status A to Status B can entail anatomical and physiological dysfunction, pain, and suffering, varying by degrees according to circumstance. Certain of these effects can persist after childbirth or emerge only afterward. What seems required to enfold these effects of pregnancy under the umbrella of healthcare is that they parallel other conditions that healthcare acts to treat. Parallels to the ills of certain pregnancies are to be found across the breadth of healthcare, from acting against physical risks of death to treating emotional and psychological reactions to significantly changed circumstances. Compared to abortion, pregnancy may sometimes pose a health risk in itself. The plaintiff in *Doe* sued to have the prohibition against abortion in Georgia struck down in part on the grounds that an abortion for her would be less risky than carrying a pregnancy to term and delivering. Given the expansive definitions of health set out in *Doe,* pregnancy can entail risks for many people, not just those facing 'medical emergencies' or "permanent injury" or "life-threatening" conditions.

[1]Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al. ___ U.S. ___ (2022).
[2]Miss. Code Ann. §41-41-191,
[3]Texas Fetal Heartbeat Act SB 8, Sect. 171.205.
[4]The toxicity of American's restrictive abortion laws, *Financial Times,* Apr. 23, 2022, 6.
[5]*Roe v. Wade*, 410 U.S. 113 (1973).
[6]*United States v. Vuitch,* 402 U.S. 62 (1971).
[7]*Doe v. Bolton,* 410 U.S. 179 (1973).

The justification of abortion in relation to an expansive notion of health is to be found in court majority opinions, but an even stronger case to be made in defending health interests as at the center of certain abortion interests occurs in one dissent in particular. In the analysis of William O. Douglas who disagreed with the court's finding that the health exception in *Vuitch* for permissible abortion was not vague. To the contrary, he argued that it was vague because its enforcement effects were unpredictable. He said that Georgia's 1973 criminal statute did not give "full sweep to the 'psychological as well as physical well-being" of women patients." In his concurrence to *Doe*, he said further "The vicissitudes of life produce pregnancies which may be unwanted, or which may impair 'health' … or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the 'health' factor of the mother … Or they may be part of a broader medical judgment based on what is 'appropriate' in a given case, though perhaps not 'necessary' in a strict sense."

In other words, Douglas thought the health exceptions were unsatisfactory because they did not obviously apply to all the circumstances in which abortion served a health purpose. Moreover, he worried that the law turned the decision about whether an abortion did or did not serve health interests over to prosecutors and courts, with all the subjectivity involved in their deter-minations. The law was vague in predicting the out-come of defenses of abortion as serving health interests because the breadth of healthcare needs served by an abortion is not expressed by language characterizing abortions as "necessary for the preserva-tion of the mother's life or health." For example, Douglas wondered, how proximate the risk of death must be for a pregnancy to qualify as a threat to life. Would an abortion carried out to overcome profound anxiety qualify as preserving health? Why wouldn't an abortion for a woman whose physical well-being would be greatly taxed by the additional life-long work of caring for a child qualify as necessary to the preservation of her health? He said further "Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words 'necessary for the preservation of the mother's life or health' become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices."

I submit that *Dobbs v. Jackson* wrongfully overlooks the moral and legal defense of abortion to be found in the ideas of health at work the logic of *Vuitch, Roe*, and *Doe*. In a moral sense, people's interest in their health seems a substantive right as deeply rooted in the nation's history and traditions as any other and that right seems worthy of protection from hostile moral opinions. *Dobbs v. Jackson* turns 'health' into a political football, as legislatures, prosecutors, and the courts establish for themselves the boundaries of abortions necessary in cases of "medical emergencies" or whatever boundaries states put in place. Limiting lawful abortions to "medical emergencies" or to circumstances that threaten life works against the fundamental interest people have in their health, across the entirety of the components of their health. It is a very odd to think that people have a right to health *only* in relation to protection from outright endangerment to life or only when facing permanent and serious injury. Consistent with what Paltrow, Harris, and Marshall argue, the end of *Roe* is not simply about authorizing states to prohibit the termination of pregnancy. As they argue, the overturning of *Roe* puts at risk rights to liberty, privacy, and equality and—as I have argued here—rights to act in the name of one's health as well.

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REFERENCE

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