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Medical Authority and the Right to Life

B. Jessie Hill
jessie.hill@case.edu

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B. JESSIE HILL[*]

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[*] Associate Dean for Research and Faculty Development, Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law. I would like to thank the organizers of this symposium for facilitating the productive dialogue that has informed my thinking considerably. Particular thanks to Professor Katie Kraschel and to Diana Kasdan for their thoughtful comments on this essay.

In the usual argument, the abortion decision is made contingent on whether the fetus is a form of life. I cannot follow that. Why should women not make life or death decisions?

—Catharine MacKinnon[1]

INTRODUCTION

The right to life, which appears in the U.S. Constitution, the Declaration of Independence, and nearly every state constitution,[2] can be conceived as a foundational concept in U.S. law. There is, however, a fundamental tension at the center of the understanding of what the right to "life" actually protects. First, the right to life can be conceived as protecting mere "physiological existence"[3]—the state of simply being alive and not dead. Alternatively, the concept of "life" protected by the right to life can be understood more robustly, as including various entitlements to a particular or preferred way of living—such as right to "enjoy a life with dignity,"[4] or a "minimum quality of life,"[5] and to cognate concepts such as liberty and happiness.[6] This central ambiguity at the heart of the concept of "life" has resulted in both doctrinal and political manipulation of the term, allowing it to be mobilized in support of multiple, even opposing, legal outcomes.

In the context of abortion rights litigation, advocates have embraced a largely medicalized framing of abortion. This medicalized approach, which can be seen most clearly in litigation surrounding medical exceptions to abortion restrictions, is most compatible with a narrower, biological understanding of life, as opposed to a more robust conception that might support a broad substantive due process right to choose one's life course and to live one's life with dignity. The medicalization of abortion rights has thus undermined the pro-choice agenda in this respect. As a result, advocates who are seeking an alternative constitutional grounding for the right to reproductive liberty in the wake of the U.S. Supreme Court's evisceration of the substantive due process right grounded in liberty[7] will face an uphill battle if they hope to expand the scope of a substantive

[1] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 94 (1987).

[2] Martha F. Davis, *Annotated Bibliography: "Persons Born" and the Jurisprudence of Life* 1-2 (Oct. 6, 2023) (unpublished manuscript) (on file with author).

[3] James Bopp, Jr. & Daniel Avila, *The Due Process "Right to Life" in* Cruzan *and Its Impact on "Right-to-Die" Law*, 53 U. PITT. L. REV. 193, 195 (1991).

[4] Human Rights Committee, General Comment 36 on Art. 6: Right to Life, U.N. Doc. CCPR/C/GC/36, at ¶ 3 (2019).

[5] Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 588 (1995).

[6] *See, e.g.*, Davis, *supra* note 2, at 3-4 (noting these narrower and wider legal definitions of "life").

[7] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

due process right to life beyond the limited context of medical exceptions to abortion bans.

There are several options for overcoming this problem. First, advocates could move away from the traditional centering of medical authority within constitutional abortion litigation. Alternatively, they could work to expand the domain of medical authority in abortion case law beyond the purely physiological, to include taking account of the non-physiological factors that contribute to a person's overall wellbeing. Finally—and perhaps most promisingly—abortion-rights advocates may be able to strategically mobilize different applications of the right to life in different contexts, much in the way abortion opponents have done.

This essay briefly explores this relationship between the understandings—existing and potential—of the right to "life" and the role of medical authority in constitutional abortion rights litigation. It proceeds as follows. Part I describes the dichotomy between two different understandings of "life" in U.S. legal discourse, with a particular focus on cases dealing with the so-called "right to die." Part II then explains why this dichotomy is relevant in the post-*Dobbs* abortion rights context, as it holds the promise of an alternate path to protection for abortion rights at the federal and state levels. Part II also discusses how and why abortion litigation both before and after *Dobbs* has relied on a medicalized framing that has worked to undermine this promise. Part III considers possible ways forward.

I. THE DICHOTOMY OF "LIFE"

In common usage and legal usage, the term "life" can have at least two different meanings: a narrow one and a broad one. Indeed, the dual usage of "life" has a long history, particularly in the context of abortion. This ambiguity has arguably led to some uncertainty in various areas of constitutional doctrine in which "life" is a central term.

"Life" can refer simply to a person's physical existence—the state of being alive and not dead—or it can refer to a person's life course and everything included in it—their relationships, career, way of life, and life choices. These two senses of the term coexist in many places, but one concise example is in the case *Cruzan by Cruzan v. Director, Missouri Department of Health*,[8] in which the Supreme Court held that the state of Missouri was entitled to require clear and convincing evidence before a surrogate decision-maker could end artificial life support for a young woman named Nancy Cruzan, who was in a persistent vegetative state, notwithstanding Cruzan's liberty interest in refusing unwanted medical treatment protected by the Due Process Clause of the Fourteenth Amendment.[9] In so holding, the Court accepted that the state may express an "unqualified interest in the preservation of human life" and refuse "to make

[8] 497 U.S. 261 (1990).

[9] *Id.* at 280.

judgments about the 'quality' of life that a particular individual may enjoy."[10] This interest was found sufficient to outweigh Cruzan's own liberty interest in refusing unwanted treatment.[11] In other words, the Court held that the state may work to protect a person's pure physical existence without regard to the substance of that existence.

In dissent, Justice Stevens disagreed with the majority's assessment by highlighting the distinction between these two understandings of the state's interest in a person's life:

> Nancy Cruzan is obviously "alive" in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is "life" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence. The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.[12]

Justice Stevens went on to criticize Missouri's definition of life's meaning "as a merely physiological condition or function," noting that "[w]hen people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody 'led a good life.'"[13] In Justice Stevens's view, it is the state's insistence on embracing the narrower view of life that leads to a conflict between the state interest in life and Nancy Cruzan's interest in the "liberty" protected by the Due Process Clause.[14]

Considering the history of this definitional dichotomy more generally, there is support for Justice Stevens's suggestion that the broader conception of life is the one embodied in both the Constitution and the Declaration of Independence. Indeed, tracing the notion of the "right to life" from the Magna Carta, through the seventeenth- and eighteenth-century philosophers who influenced the drafters of the United States' founding documents, Professor Sheldon Gelman has demonstrated that "life" was understood as encompassing many of the concepts that are now understood to be part of the "liberty" protected by the Due Process Clause.[15] Gelman shows that the right to "life" included natural rights beyond mere physical existence, encompassing not only a right to bodily integrity but also the right to "a full or good or unimpeded 'life,'" which includes "the basic elements people seek in their lives," including the right to property and "indolency of body," which might be roughly understood to mean the right to be left

[10] *Id.* at 282.

[11] *Id.*

[12] *Id.* at 345 (Stevens, J., dissenting) (emphasis in original) (footnote omitted).

[13] *Id.* at 345-46 (Stevens, J., dissenting).

[14] *Id.* at 347 (Stevens, J., dissenting).

[15] Gelman, *supra* note 5, at 587.

alone.[16] Gelman's description of the original understandings of "life" thus supports Justice Stevens's assertion that it is the narrow understanding of life, embraced by the state in *Cruzan*, that creates the "disquieting conflict" between Nancy Cruzan's "life" and her liberty.[17]

Stevens's and Gelman's broader conception of "life" has also been assumed by numerous state supreme courts deciding right-to-die cases since well before *Cruzan*. For example, in *Brophy v. New England Sinai Hospital*,[18] the Massachusetts Supreme Judicial Court asserted, "the State's interest in life encompasses a broader interest than mere corporeal existence," extending the term to include "the individual's right to preserve his humanity, even if to preserve his humanity means to allow the natural processes of a disease or affliction to bring about a death with dignity."[19] At the same time, the court disclaimed any right on the part of the state or the court to make judgments about an incurably ill individual's "quality of life," noting that giving expression to individual dignity is not the same thing as making such judgments.[20] To similar effect, a New York state court argued that requiring life support for a patient in a persistent vegetative state "does not serve to advance the State's interest in protecting health or life" at all.[21]

The recognition that the state's interest in life does not consist solely in perpetuating an individual's physiological existence at all costs is grounded in these courts' adoption of a sort of sliding scale, according to which the magnitude of the state's interest life interest is affected by factors such as the person's "prognosis and … the magnitude of the proposed invasion."[22] Viewing the state's interest as varying in this way is inherently incompatible with a narrow understanding of the life interest as an interest in perpetuating a person's bare physical existence. If the state's life interest were understood in this narrow sense, it would make no sense to consider factors such as the length of life remaining or the pain that is necessary to perpetuate that life; conceived in absolute, narrow

[16] *Id.* at 623-24, 631 n.250.

[17] *Cruzan,* 497 U.S. at 351 (Stevens, J., dissenting) ("Only because Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict…. The opposition of life and liberty in this case are … not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person.").

[18] 497 N.E. 626 (Mass. 1986)

[19] *Id.* at 635.

[20] *Id.*

[21] Eichner v. Dillon, 426 N.Y.S.2d 517, 543 (App. Div. 2d Dist. 1980).

[22] Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334, 1342 (Del. 1980) (quoting Matter of Spring, 380 Mass. 629, 634 (1980)); *see also* In re Colyer, 660 P.2d 738, 743 (Wash. 1983); In re Quinlan, 305 A.2d 647, 664 (N.J. 1976) (We think that the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.").

terms, the state's interest would apply regardless of the individual's circumstances.

Much of this subtlety in conceptualizing the state's life interest was submerged in the Supreme Court's *Cruzan* decision, which framed the question in terms of Nancy Cruzan's incapacity and thus the need to exercise substituted judgment. In other words, while framing the state's interest in life as a relatively narrow one interest in mere physiological existence, the Court only considered the nature of that interest in the context of decision-making by a proxy and did not speak to nature of this interest outside the terms of question regarding the state's ability to adopt a higher evidentiary standard in such circumstances, other than to note in passing that it "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition."[23] The state courts that considered the right-to-die issue before *Cruzan*, by contrast, largely separated out these questions—first considering whether individuals had an autonomy right to refuse life-saving treatment, second considering whether that interest was overridden by the state's interest (including its interest in preserving life), and then finally considering how to apply these principles in the context of a patient lacking decisional capacity.[24] As those courts have recognized, in the situation in which a patient is mentally incapacitated, in addition to the life interest, the state also possesses extremely strong interests in avoiding error and abuse, which weigh in favor of keeping a patient alive.[25] Thus, because of the Court's conflation in *Cruzan*, the Supreme Court's ruling cannot be understood as the last word on the meaning of the state interest in preserving life outside the context of patients who lack decisional capacity.

This ambiguity surrounding the concept of "life" has played out not only in right-to-die jurisprudence but also in abortion law, going back to at least the nineteenth century. In her classic work *Abortion and the Politics of Motherhood*, Kristin Luker explains that most abortion bans adopted (for the first time in the U.S.) during that century included exceptions for abortions that were necessary to protect the life of the woman.[26] Yet, the term "life" was intentionally ambiguous, and physicians at the time—and well into the twentieth century—interpreted it in widely divergent manners.[27] Thus, she explains that the word could mean "physical life in the narrow sense of the word (life, death), or it may mean the social, emotional, and intellectual life of a woman in the broad sense (style

[23] *Cruzan*, 497 U.S. at 279.

[24] *See, e.g.*, *Quinlan*, 305 A.2d 663, 670-71; *Colyer*, 660 P.2d 743, 746.

[25] *Cruzan*, 497 U.S. at 281-82.

[26] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 32-33 (1984). This essay uses the terms "woman" or "pregnant person" to refer to those who can become pregnant. While not only women can become pregnant, this essay uses the term "woman" where the context, such as summarizing the content of a nineteenth-century abortion law, makes that usage more appropriate.

[27] *Id.* at 33-34, 45-47.

of life)."[28] As a result, some physicians were willing to terminate pregnancies not only to prevent imminent death, but when it would impact the overall physical or mental health of the patient.[29]

As discussed below, the ambiguity of the meaning of "life" in the context of abortion restrictions seems to have faded to a large extent, as abortion advocates and providers alike have assumed that the term has a relatively narrow, physiological meaning. But the broader meaning of "life" has arguably persisted to some degree in the concept of "health," most famously discussed in *Doe v. Bolton*[30] as encompassing "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[31] As Luker's analysis suggests, in so describing the factors to be taken into account by physicians deciding whether to provide an abortion, the Court was echoing the nineteenth-century legal understanding of physicians' role in the abortion decision. Indeed, demonstrating the connection between this earlier understanding of "life" and more general concepts of health and medical judgment, the Court noted that Doe's attorneys had in fact argued that, because unwanted pregnancy could be both physically and emotionally damaging, "a statute that requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself."[32]

Unsurprisingly, the breadth and wide discretion within that understanding have led anti-abortion scholars and activists to condemn *Doe*'s gloss on medical judgment, even going so far as to suggest that *Doe*'s invocation of the range of factors affecting clinical judgment constitute a sweeping definition of health that would authorize post-viability abortions for any reason whatsoever and without any meaningful limit. For example, Clark Forsythe and Bradley Kehr argued in 2012 that because the Supreme Court said that *Doe* was to be read together with *Roe*'s trimester framework for abortion regulation, those decisions "vested the provider with complete, subjective discretion to decide whether 'emotional well-being' after viability was at issue, "to ignore any regulation if the provider concludes that the patient's emotional well-being is affected by the requirements of the regulation."[33] It should be apparent, however, that this is a misunderstanding

[28] *Id.* at 34.

[29] *Id.* at 34.

[30] 410 U.S. 179 (1983), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[31] *Id.* at 192. The *Doe* Court was describing the factors that would go into the abortion provider's exercise of medical judgment in determining, in each case, whether to provide an abortion; it was not defining the term "health" for postviability abortion purposes. *Id.* at 191-92. *But see* Forsythe & Kehr, *infra* note 33, at 57-59, and accompanying text.

[32] *Id.* at 190 (1973) (quoting appellants' brief at 27 (internal quotation marks omitted)).

[33] Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 57 (2012); *see also Brief of Sandra Cano, the Former "Mary Doe" of Doe v. Bolton, and 180 Women Injured by Abortion As Amici Curiae in Support of Petitioner*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 178, 182–83 (2007) (arguing that "[b]ecause of the broad definition of health and the fact that 'health' is determined solely by one woman

of the *Doe* opinion, which was using a broad understanding of medical judgment to explain that an abortion restriction is not unconstitutional merely because it allows for the physician to exercise medical judgment in deciding whether to provide the abortion at all; at no point did the Court state or suggest that it was providing a definition of "health," much less the definition that would be applicable to post-viability abortion restrictions.

Nonetheless, those pressing a conservative agenda have exploited the ambiguities in the understanding of "life" and the related concept of "health," alternatively embracing broad and narrow understandings of the term. Thus, as noted above, anti-abortion authors Forsythe and Kehr insisted that the concepts of health and medical necessity are so broad as to mean virtually anything one physician wants them to mean, in support of their argument that the Supreme Court's protection for the right to abortion is too extensive.[34] In a similar vein, James Bopp and Daniel Avila have argued in the context of the Supreme Court's right-to-die jurisprudence that the right to life broadly includes "those things which are necessary to the enjoyment of life," including life-support for some people.[35] Bopp and Avila thus use the right to life to argue that, not only is there no right to die possessed by those without decision-making capacity—i.e., that there is no right to terminate life support—but that terminating life support itself potentially violates the Constitution (at least where a state action is involved).[36] Yet at the same time, they have embraced a notion of a fetus's "right to life" in support of abortion bans that appears to be best defined as the mere right to physical existence.[37] For example, Bopp and Avila reject the notion that the state should arrogate to itself the power to make determinations about the quality of life or what lives are worth living; the right of individuals to life, defined as mere

and one abortionist profiting from the abortion, America in effect has abortion on demand. . . .").

[34] Forsythe & Kehr, *supra* note 33, at 57; *see also* Clarke D. Forsythe, J.D. & Bradley N. Kehr, J.D., *A Road Map Through the Supreme Court's Back Alley*, 33 ISSUES L. & MED. 175, 187-88 (2018) (updating previously published article of same name).

[35] James Bopp, Jr. & Daniel Avila, *The Due Process "Right to Life" in* Cruzan *and Its Impact on the "Right-to-Die" Law*, 53 U. PITT. L. REV. 193, 195-96 (1991).

[36] *Id.* at 233.

[37] Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 592 (2009) ("'Life' as employed by abortion rights opponents is a 'thin' use of the word…. [I]t refers to the fact that a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person."); *see also* Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 485 (1992); *Cf.* Eileen McDonagh, *The Next Step After* Roe*: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L. J. 1173, 1201 (2007) (noting the difference "between a right to life, which all human beings have, and the right to intrude upon the bodily integrity and liberty of another person without consent, which no human being has, including unborn human beings").

physical existence, apparently supersedes any such judgments.[38] As Professor Caitlin Borgmann has likewise explained,

> [c]onservatives often invoke the universal value of 'human life' in opposing abortion. But they can commit only to a 'thin' conception of life (that an embryo or fetus is a human organism in the process of developing into a person), even as they trade on the more compelling 'thick' notions that the word 'life' invokes.[39]

According to Borgmann, they both insist that the state has an interest in a fetus simply being born, regardless of its circumstances, and yet evoke images of happy, healthy children living fulfilled lives when they want to persuade people of the harms of abortion.[40]

II. "LIFE" AFTER *DOBBS*

The ambiguity in the term "life" could be useful to abortion advocates seeking a new textual basis for reproductive autonomy post-*Dobbs*. If the right to "life" can be understood as a right to more than mere physiological existence to include the right to bodily integrity and even to chart one's own life course, it is deeply compatible with the existence of a right to make one's own reproductive decisions. Yet unlike the anti-abortion advocates who have shown themselves to be willing to employ either the broader or the narrower meaning of the term as necessary to advance their goals,[41] abortion-rights advocates have largely cabined their rhetoric to a narrow understanding of "life." This essay argues that this narrowness results at least in part from their medicalized approach to abortion litigation. Thus, this Part begins by briefly explaining why abortion advocates may benefit from a broader definition of "life" in abortion jurisprudence, before demonstrating how the medical framework of abortion litigation both pre- and post-*Dobbs* has made this approach more difficult.

A. *Why "Life"?*

The three fundamental rights protected by the Due Process Clause of the Fourteenth Amendment are life, liberty, and property, and these are likewise protected by numerous state constitutions.[42] Additionally, all of these rights are presumably protected both by procedural due process—in that the government may not take them away without sufficient procedural safeguards—and by substantive due process—in that the government may not infringe them without a sufficient justification.[43] As Professor Martha Davis has noted, while the rights to

[38] Bopp & Avila at 215; *see also* Borgmann, *supra* note 37, at 593.

[39] Borgmann, *supra* note 37, at 555.

[40] *Id.* at 598

[41] *Id.* at 555

[42] U.S. CONST. amend. XIV; Davis, *supra* note26, at 1-2.

[43] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 570 (5th ed. 2015).

liberty and property have undergone substantial jurisprudential and scholarly development, the right to "life" has received less attention.[44]

There may be reason to reconsider "life" as a source of rights, however, after the Supreme Court determined in *Dobbs*, based in part on an originalist approach to interpreting the Fourteenth Amendment,[45] that the right to terminate a pregnancy was not included within the scope of "liberty" protected by the Due Process Clause of the U.S. Constitution.[46] There is arguably an even stronger originalist case for locating a right to abortion in the textual right to "life," which has not been directly undermined.[47] While it seems unlikely that the U.S. Supreme Court will reverse course and identify a new federal constitutional right to abortion anytime soon, there is nonetheless some value in laying the groundwork for a future revival of a federal constitutional right to reproductive freedom.[48] In addition, both before and after *Dobbs*, advocates have turned to state constitutions, many of which have similar wording to the federal Constitution's Due Process Clause but have not yet been independently interpreted, as new sources of reproductive rights.[49] The history of the right to "life" as a robust basis for rights to bodily integrity, and more, may be compelling to some state-court judges.

The right to life as a broad right that extends beyond mere physiological existence could be useful in two ways. First, it could be mobilized as a freestanding right—essentially, as a tool for striking down abortion bans as incompatible with individuals' constitutional right to life. Indeed, it is difficult to imagine a decision that has a more profound impact both on one's physical integrity and well-being and on one's life course than the decision whether to become or remain pregnant.[50] Secondly, it could be used to inform the understanding of abortion

[44] Davis, *supra* note 6, at 2.

[45] *Cf.* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs's *Method (and Originalism) in the Defense of Segregation*, 133 YALE L. J. FORUM 99, 129 (2023) (describing how the *Dobbs* majority justified its approach in originalist terms).

[46] *Dobbs*, 597 U.S. at 231 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.").

[47] Gelman, *supra* note 5 at 588-89. While Justice Alito did state in *Dobbs* that the right to abortion is not "implicitly protected by *any* constitutional provision," *Dobbs* at 231 (emphasis added), this statement must be considered dicta with respect to any provision other than the Due Process Clause's protection for liberty.

[48] David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 11-13 (2022) (arguing that abortion advocates need to plan a future long-term strategy that may include new federal legal claims to protect abortion rights).

[49] *See generally* Center for Reproductive Rights, State Constitutions and Abortion Rights, https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/ (interactive map illustrating the status of abortion rights under the jurisprudence of each state's highest court).

[50] *Cf.* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that the right to privacy is best understood as a right not to have one's life occupied, or taken

bans and restrictions that make exceptions for abortions necessary to preserve the "life" of the pregnant person.[51] In fact, this was the understanding of "life" that allowed for relatively liberal abortion provision in nineteenth-century America, at least as compared to the availability in many U.S. states in the immediate post-*Dobbs* era.[52] This approach has also found some success in the international arena.[53] One study documents how training health care providers, administrators, and advocates in understanding the interrelated concepts of life and health in abortion exceptions as broadly including "physical, mental and social well-being [as] grounds for a legal abortion" led to a meaningful expansion of abortion access in some Latin American countries.[54] A similar approach may be worth pursuing in highly restrictive states in the U.S.

B. *Why Abortion Advocates Have Not Embraced a Broad Understanding of "Life"*

The central contention of this essay is that, although a broad understanding of "life" would be useful to the pro-choice advocates, a precommitment to a medicalized approach—which includes a narrow conception of "life"—has hampered their ability to make such arguments. The medical framing of abortion has pushed advocates to a technical, purely physical notion of "life." While medicalization has certain advantages and is not necessarily an incorrect or

over, by the state and that "[t]here are perhaps no legal proscriptions with more profound, more extensive, or more persistent affirmative effects on individual lives than the laws struck down as violations of the right to privacy").

[51] Justice Kavanaugh noted in his *Dobbs* concurrence that "[a]bortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother," *Dobbs* at 339 (Kavanaugh, J., concurring), though it is also the case that at least some abortion bans do not contain true exceptions for life-saving abortions—only an affirmative defense, *see, e.g.*, United States v. Idaho, 623 F. Supp. 3d 1096, 1101 (D. Idaho 2022), *cert. granted before judgment sub nom*. Moyle v. United, No. 23-726, 2024 WL 61828 (U.S. Jan. 5, 2024), and No. 23-727, 2024 WL 61829 (U.S. Jan. 5, 2024).

[52] LUKER, *supra* note 26, at 33 (finding that even under restrictive abortion laws allowing abortions exclusively to save the "life" of the woman, this exception was understood to confer "almost unlimited" and unreviewable discretion on physicians "in deciding when an abortion was necessary").

[53] *See, e.g.*, Luisa Cabal & Jaime M. Todd-Gher, *Reframing the Right to Health: Legal Advocacy to Advance Women's Reproductive Rights*, *in* REALIZING THE RIGHT TO HEALTH 120, 128-29 (Andrew Clapham & Mary Robinson, eds. 2009) (discussing *K.L. v. Peru*, Human Rights Committee, Communication No. 1153/2003, U.N. Doc. No. CCPR/C/85/D/1153/2003 (Nov. 22, 2005), and noting that the opinion "requires a broad reading of statutory health exceptions to include issues of mental health, the positive realization of a right to access abortion for states that permit abortions, necessary measures to guarantee adolescents' access to reproductive health services, and accessible, economically feasible procedures to appeal a doctor's refusal to perform a legal abortion").

[54] Ana Cristina González Vélez, *"The Health Exception": A Means of Expanding Access to Legal Abortion*, 20 REPROD. HEALTH MATTERS 22, 23 (2012).

problematic approach to reproductive rights advocacy, it may be time to reconsider whether this framing is the most advantageous one for the post-*Dobbs* world.

The term "medicalization" can be defined as the practice of "defining a problem in medical terms, using medical language to describe a problem, adopting a medical framework to understand a problem, or using a medical intervention to 'treat' it."[55] As numerous commentators have recognized, the U.S. Supreme Court's early abortion jurisprudence adopted a medicalized approach to reproductive freedom.[56] This approach, which may find its origins in the nineteenth-century movement by physicians to assert authority over decisions relating to pregnancy and abortion, places medical expertise and discretion at the center of abortion decision-making.[57] For example, *Roe v. Wade*[58] itself famously emphasized the role of the physician and medical judgment in the abortion decision; *Doe v. Bolton* arguably more so. Thus, the *Roe* Court went so far as to reference "the right of the physician to administer medical treatment according to his professional judgment," which appeared to be on equal terms with the patient's right to seek that treatment.[59] Similarly, in *Doe*, as noted above, the Court emphasized the role of clinical judgment in every abortion decision. [60]

Professor Reva Siegel points out that *Roe*, with its medical focus, appears almost as a natural extension of the broad interpretation of the "life" exception in the nineteenth century, which was essentially an unrestricted delegation of authority to physicians over the abortion decision. As she explains, "*Roe*

[55] Drew Halfmann, *Recognizing Medicalization and Demedicalization: Discourses, Practices, and Identities*, 16 HEALTH 186, 187 (2012).

[56] *See, e.g.*, Maya Manian, *A Health Justice Approach to Abortion* (Oct. 11, 2022) (manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786341; Ruth Colker, *Overmedicalization?*, 46 HARV. J.L. & GENDER 205, 256-57 (2023). I have also described the "medical model" of abortion embraced by *Roe* and subsequent case law in earlier work; B. Jessie Hill, *Reproductive Rights As Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 507 (2009) ("One strain that unquestionably runs through American abortion jurisprudence is the notion that abortion is a health care decision, to be made by the woman and her physician without government interference, and therefore that the abortion right is in part a negative health care right.").

[57] *See* LUKER, *supra* note 26, at 32 (noting that the physicians' crusade to *criminalize* abortion paradoxically gave them authority and discretion to *regulate* when abortions could be provided); *see also* Hill, *supra* note 56, at 507 ("In the medical model of abortion, the physician plays a central role, exercising at least as much power as the woman to decide whether the abortion should be performed. Indeed, according to the medical model, abortion restrictions may violate the physician's right to practice medicine as much as the woman's right to privacy and autonomy."); *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 273-74 (1992).

[58] 410 U.S. 113 (1973).

[59] *Id.* at 165-66

[60] *Supra* text accompanying note 31; *Roe*, 410 U.S. at 192.

describes a woman's interest in terminating a pregnancy in terms consonant with the logic of the therapeutic exception, which was expanding at the time of the Court's decision," specifically by "present[ing] decisions about motherhood as a private dilemma to be resolved by a woman and her doctor," with deference to medical judgment.[61] Interestingly, at the same time that it recognized a broad privacy right to choose to terminate a pregnancy, the Court retained the life-or-health exception for abortions after viability, when the state's interest in fetal life was most compelling and therefore (presumably) almost, but not quite, as compelling as the pregnant person's interest in their own life.[62] This post-viability life-or-health exception was essentially introduced and codified without explanation, after the opinion spent pages justifying its recognition of an individual privacy right to end a pregnancy. It remained part of abortion jurisprudence until *Dobbs*, begin a requirement for any abortion restriction before or even after viability, but still without any in-depth justification or explanation of its meaning, particularly with respect to the word "life."[63]

The medical framing of abortion is not necessarily a bad thing; in fact, it has benefitted abortion access in many ways. In *Roe* and *Doe*, as in nineteenth-century law, the apparent delegation of the abortion decision to medical professionals meant that the state had less of hand in the decision than it otherwise would. In *Roe*, *Doe*, and in the nineteenth century, physicians were authorized to consider not just the pregnant individual's physiological condition, but the multitude factors affecting their life—social, emotional, and psychological—in deciding whether to provide abortion services. Thus, as Professor Maya Manian has shown, abortion was more accessible under *Roe* and *Doe*, which took a medicalized approach, than under *Casey*, which emphasized the pregnant person's equality and liberty interests and weighed them against the interests of the state.[64] Moreover, framing abortion as an aspect of health care may combat some

[61] Siegel, *supra* note 57, at 274.

[62] *Roe*, 410 U.S. at 163-64 ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

[63] The Court has since expounded on the health exception to some degree. For example, in *Stenberg v. Carhart* the Court interpreted the requirement of a health exception to include estimations of relative risk, allowing providers to choose a safer abortion method over one that was riskier to the patient, and the Court's subsequent about-face in *Gonzales v. Carhart* did not directly undermine this understanding. 530 U.S. 914, 936-37 (2000); Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (holding a ban on one method of abortion may be unconstitutional "if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used"). *See also* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824 (2007) (grounding the life-or-health exception for post-viability abortion in the right to self-defense).

[64] Manian, *supra* note 56, at 21-22*see also* Colker, *supra* note 56, at 257-58 (observing that the *Dobbs* majority opinion, which de-medicalized abortion, was far worse for abortion access than the medicalized framework).

of the stigma surrounding abortion care, which has long been isolated from other health care, both physically (because it is primarily performed in free-standing clinics) and legally (because it is often subject to burdensome regulations that do not apply to similar procedures).[65]

But contrary to the early understanding of medical authority with respect to abortion, the more recent litigation preceding *Dobbs* tended to embrace a narrow understanding of "life" under the so-called therapeutic exception. An abortion necessary to save a patient's life is no longer understood broadly, to include any abortion that a physician is willing to perform, nor is it generally understood to permit an abortion provider to take into account an individual's life circumstances beyond their physical well-being.[66] The prevailing legal understanding of "life" in the context of abortion bans—and the understanding advanced by abortion advocates—is thus the narrow one, referring to mere physiological existence.

Indeed, numerous cases appear to recognize precisely this fact. For example, in the 1990s and early 2000s, several courts struck down state laws banning a particular procedure because they lacked an exception to protect the patient's health, even though they often contained an exception to protect the patient's "life."[67] If "life" were understood broadly, to encompass bodily integrity and even non-medical factors, it seems unlikely that the lack of a health exception would have been a major concern, because abortions necessary to protect the patient's health would have then been included within the life exception.

There are likely many reasons for the predominance of this narrow understanding of "life" in abortion jurisprudence. One important reason may be that developments in the medical profession and in society more broadly have changed our understanding of the role of physicians and the physician's relationship with the patient. For example, the development of the doctrine of informed consent, together with the growth and influence of the field of bioethics, have led to a greater emphasis on patient autonomy and shared decision-making.[68] Under this approach to medical decision-making, it is primarily the

[65] Hill, *supra* note 56, at 537-49.

[66] *See, e.g.*, Colker, *supra* note 56, at 257 (noting that under *Roe*'s therapeutic exception for third-trimester abortions, "[t]here is no room . . . for the pregnant woman to explain how terminating a pregnancy may be essential for her life goals and aspirations").

[67] *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 429 F.3d 803, 804–05 (8th Cir. 2005), *cert. granted, judgment vacated*, 550 U.S. 901 (2007); Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 620 (4th Cir. 2005), *cert. granted, judgment vacated sub nom.* Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007); *see also* Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187, 210 (6th Cir. 1997) (holding that a ban on an abortion procedure known as D&X must include an exception for severe threats to the patient's mental health).

[68] TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 57-112 (5th ed. 2001); Carl Schneider, *After Autonomy*, 41 WAKE FOREST L. REV. 411, 413 (2006) (describing the centrality of patient autonomy to bioethics and stating that "[b]ioethics was

clinician's role to contribute medical knowledge and expertise, and the patient's role to make the sure the medical treatment decision is aligned with their values. It seems unthinkable under this new framework that the physician would continue to decide, in a paternalistic fashion, whether a patient is entitled to an abortion based on the range of life circumstances and personal reasons the patient brings to the encounter. Therefore, a doctor charged with determining whether an abortion is needed to save a patient's "life" would naturally consider that term in only its narrow, physiologically meaning and would not be expected or inclined to make judgments about the patient's quality of life, or their social or economic circumstances.

Another reason for the shift to a narrow understanding might be *Roe* itself. In *Roe*, the Court recognized a broad right to abortion for any reason up until the third trimester, and then modified that standard slightly in *Planned Parenthood v. Casey* to recognize a right to abortion for any reason up until viability.[69] Viability was the point at which the state's interest in the fetus's life became sufficiently compelling to outweigh the patient's interests.[70] Thus, the Court must have assumed only a smaller sub-category of abortions would meet the "life" or "health" exception. (Similarly, Professor Kristin Luker argues that improvements in medical care in the late nineteenth and early twentieth centuries led to a narrower understanding of the "life" exception to abortion bans, because so many of the prior indications for abortion had become treatable conditions.[71]) The logic of *Roe* and *Casey* draws a distinction between post-viability abortion, for which a particular medically-grounded reason is required, as compared with pre-viability abortion which can be performed whenever medical judgment allows. This logic is incompatible with a broad understanding of the "life" exception as permitting nearly all abortions, or permitting abortion whenever a physician is willing to provide one.

Finally, while the physicians of the nineteenth century seized on the cause of abortion criminalization to advance their authority and status, abortion advocates of the twentieth and twenty-first centuries have relied heavily on medical authority and status to advance the pro-choice cause, particularly in the context of abortion rights litigation.[72] Indeed, physicians and medical societies have regularly weighed in on the side of abortion rights in recent decades.[73] And it seems

born a reform movement" with "medical imperialism" as its enemy). The civil rights movement of the 1960s and 1970s also roughly coincided with the rise in importance of bioethics.

[69] *Roe,* 410 U.S. at 163-166; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

[70] *Roe*, 410 U.S. at 163.

[71] *See* LUKER, *supra* note 26, at 54-55.

[72] *Cf.* Manian, *supra* note 56, at 21-22 (arguing that "medicalization [in *Roe* and *Doe*] helped to protect abortion rights by rhetorically sheltering women's abortion decision-making within the trusted authority of physicians").

[73] *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, American Association of Public Health

likely that courts are more willing to accept that medical authority if it is framed as technical, drawing on specialized medical and physiological knowledge; such specialized knowledge is not easily questioned or refuted. Indeed, presenting medical expertise as highly specialized and technical, beyond the ken of non-physicians, also allowed modern abortion providers to distance themselves from the stereotype of the unethical, untrained "abortionists" of the pre-*Roe* era.[74] All of these forces pushed toward a narrow, physiological understanding of "life," at least in the context of abortion exceptions.

Abortion jurisprudence has therefore assumed and reinforced a narrow definition of "life" in the abortion exception context, due at least in part to abortion advocates' own framing of the issue. But the narrow understanding of life works to the benefit of abortion opponents in many ways, especially post-*Dobbs*. First, now that state legislatures are once again empowered to ban abortion even pre-viability, many have done so, passing laws that ban abortion throughout pregnancy or at very early gestational stages, with only limited exceptions to preserve the life and sometimes prevent serious harm to the physical health of the pregnant person.[75] The pre-*Dobbs* narrow understanding of the "life" exception appears likely to prevent courts from reading the exceptions broadly in this new context; indeed, advocates challenging such bans are sometimes inclined to argue that the life exception is extremely narrow as a way of showing their harmfulness and irrationality.[76] Second, it may be difficult (albeit not impossible) to argue that abortion bans violate pregnant persons' right to "life," understood in

Physicians, et al. in Support of Respondents, Dobbs v. Jackson Women's Health Org., 2021 WL 4312120, at *2-3 (noting that briefs filed by the AMA and ACOG have been cited in cases involving numerous medical issues, including abortion).

[74] *See* James C. Mohr, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 160 (1978) (discussing nineteenth-century physicians' concern with regulating "abortionists").

[75] *Tracking Abortion Bans Across the Country*, N.Y. TIMES, (Dec. 8, 2023), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html. Indeed, many abortion bans specifically exclude mental health indications from their health-or-life exceptions. *See, e.g.*, Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services* (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/.

[76] *See, e.g.*, Pls.' First Am. Verified Pet. for Declaratory J. & Appeal for Temporary & Permanent Inj., Zurawski v. Texas, No D-1-GN-23-000968 ¶¶ 476-78 (Travis Cnty. Dist. Ct. May 22, 2023); *cf.* Planned Parenthood S. Atl. v. State, 438 S.C. 188, 251 (2023), reh'g denied (Feb. 8, 2023) ("At a minimum, [plaintiffs] assert the Act, which effectively imposes almost a total ban, is not a reasonable means of supporting any state interest when the Act's enforcement actually endangers the lives of pregnant women, rather than safeguarding their health. As a result, they maintain the Act does not satisfy even the rational basis test."); Mem. Dec. & Order on Mot. to Dismiss, Adkins v. State of Idaho, No. CV01-23-14744 (Idaho 4th Dist. Dec. 29, 2023) at 16 (arguing that Idaho's abortion ban exception is too narrow because it "den[ies] abortion care to pregnant women with 'an emergent medical condition that poses a risk of death or risk to their health (including their fertility)'").

the broad sense, if a narrow definition is applied to the term "life" when it is used in abortion ban exceptions. Indeed, it may even be the case that the constitutional requirement for an exception to preserve the patient's life, first set forth in *Roe*, itself derives from the patient's constitutional right to life.[77] Finally, a narrow concept of "life" resonates with the anti-abortion conceptualization of the state's interest in fetal "life," defined as an interest in pure physiological existence.

III. SOLUTIONS AND PITFALLS

As Part II explains, abortion jurisprudence has narrowed the understanding of "life" in the context of the life-or-health exception to abortion bans, creating an obstacle for abortion advocates who might seek to argue for a broad "right to life" to defeat those same bans. This Part briefly considers whether there might be any way past this obstacle, assuming the desirability of grounding reproductive freedom at least partly in the right to life. One possibility, of course, would be to work to place both abortion and abortion jurisprudence in a less medicalized frame. The other would be just the opposite: to expand the medical domain. Perhaps, however, neither polar opposite is desirable or necessary. Instead, advocates might argue—and courts should recognize—that a term as venerable as "life" itself is capable of different applications in different contexts.

A de-medicalized approach to abortion would center women and pregnant people rather than medical experts and expertise. It would frame abortion in the context of an individual's right to make decisions that profoundly affect their life, rather than as a purely medical decision.[78] A de-medicalized approach to abortion litigation might involve centering individual abortion seekers and their stories, including possibly as plaintiffs, rather than clinicians and medical expertise. Within this de-medicalized framework, the right to "life" might be more plausibly articulated as a right to chart one's own life course.

There are reasons for hesitation regarding such a solution as well, however. As noted above, embracing medical authority and medical framing has benefitted abortion access in many respects. In addition, a de-medicalized understanding of abortion does not necessarily entail wider abortion access, as *Dobbs* demonstrates.[79] Moreover, the criminalization of illegal abortion—as opposed regulating abortion exclusively through malpractice law and professional discipline, like other medical interventions—is one non-medicalizing element of

[77] *See* Wrigley v. Romanick, 988 N.W.2d 231, 246 (N.D. 2023) (Tufte, J., concurring) (arguing that the right to life protected by the North Dakota Constitution protects both the right to self-defense and a pregnant person's "fundamental right to preserve her life and health with the aid of a physician," at least when "a pregnancy raises a similar threat of serious bodily injury or death"); Volokh, *supra* note 63, at 1818-19 (connecting the right of "medical self-defense" to the common law right of self-defense and suggesting that right is grounded in substantive due process).

[78] *See* Manian, *supra* note 64, at 30-31 (discussing de-medicalization in *Casey*).

[79] Colker, *supra* note 56, at 257.

abortion law that has persisted since the nineteenth century. Yet, presumably no abortion rights advocate would argue that criminal regulation of abortion is desirable or advances the cause of abortion access.[80] Thus, moving abortion out of the realm of medical authority does not necessarily mean returning it to individuals; instead, it could mean handing additional power to the state and the criminal justice system.

On the other hand, the realm of medical authority might be expanded further, and medical decision-making could be understood to incorporate a wide range of values and factors beyond the patient's physical well-being. Essentially, this approach would vindicate abortion seekers' right to life through reviving a version of the nineteenth-century understanding of the life exception to abortion bans. But an expanded medicalization of the abortion decision would not need to rely on the nineteenth century's paternalistic model of medical decision-making; instead, it could be informed by modern models of shared responsibility for health care, in which the patient's values and life plans ultimately inform the course of treatment.[81] This approach to medical authority resonates with the "health justice" approach to health care and reproductive rights advocated by several scholars and recognizes the role that social determinants play in individual well-being.[82]

This "expanded medicalization" approach may bring its own challenges, however. It is not clear, for example, that constitutional abortion litigation, which is likely to draw on recent precedents assuming a narrow physiological definition of "life," is a suitable tool for realizing this model of medical decision-making.[83] Moreover, embracing an expanded medicalization approach runs the risk that it will simply end up increasing medical power and expanding medical jurisdiction over patients' private lives, to the detriment of individual abortion seekers. On the other hand, to some extent this expanded medicalization approach is compatible with an originalist judicial methodology that might look to pre-*Roe* understandings of "life," rather than placing value on its interpretation in more modern cases.

Of course, it may seem unlikely that originalist judges will be ready, anytime soon, to embrace a brand-new basis for abortion rights that is grounded in the very same historical period and events that formed the basis for the rejection of abortion rights in *Dobbs*. It is not impossible, however. For example, in a post-*Dobbs* case challenging North Dakota's stringent abortion ban that lacked sufficient exceptions to protect patients' life and health, the North Dakota Supreme

[80] *Cf.* Reva Siegel & Cary Franklin, *Equality Emerges as a Ground for Abortion Rights in and After Dobbs* (2023) (discussing the need for a non-carceral presumption).

[81] *See supra* text accompanying note 68.

[82] Manian, *supra* note 56; Angela P. Harris and Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020).

[83] *See generally* Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74-76 (2011) (arguing that litigation "can deradicalize both the message and the objectives of a movement" and help reinforce existing hierarchies).

Court relied on nineteenth century sources to find a right, grounded in North Dakota history and tradition, to an abortion when the patient's life is threatened.[84] In reaching this conclusion, the court even noted a wide range of physical and mental health circumstances in which the right had been understood to apply.[85]

Finally, perhaps the right to life must instead be understood to have narrower or broader applications, depending on the specific context in which it is used. Indeed, as explained above, abortion opponents have strategically relied upon broader or narrower understandings of terms like "life" and "health" in different settings.[86] Abortion rights advocates might do the same. Indeed, the concept of "life" has already given rise to many doctrinal offshoots—for example, in addition to the term's use in medical exceptions to abortion bans, it makes an appearance in connection with the right to self-defense,[87] which itself has given rise to an apparently broad Second Amendment right to possess and bear a firearm.[88] Similarly, as noted above, the state interest in life has been interpreted by state courts as being more or less robust, depending on the particular patient's medical circumstances.[89]

A similarly context-sensitive understanding of the right to life emerged in the litigation over Oklahoma's total abortion ban, in which the Oklahoma Supreme Court first held that the right to life was violated by the Oklahoma law's lack of an adequate exception to protect patients,[90] but subsequently extended that holding to other legal requirements that more indirectly burdened patients' health, such as a waiting period for abortion and a requirement that providers of medication abortion possess admitting privileges at a nearby hospital.[91] Having previously recognized a right to life-saving abortions, the court in the subsequent case struck down laws that constituted burdens, but not outright bans, on exercising that right. "Any additional delay in access to the procedure once the necessity has been determined is clearly detrimental to the health of the patient and

[84] *Wrigley*, 988 N.W.2d at 241-42.

[85] *Id.* at 241 (stating the life exception applied to "the mentally unfit who might become deranged; the woman with a narrow brim or outlet because of which her life might be in danger and a Cesar[e]an section is the only relief; the woman who may bleed to death; the eclamptic; and those suffering from dangerous diseases" (quoting *Criminal Abortions*, 34 JOURNAL-LANCET 81, 82 (1914)).

[86] *Supra* [text accompanying notes 34-40.

[87] *See supra* note 77.

[88] *Compare* D.C. v. Heller, 554 U.S. 570, 635 (2008) (grounding recognition of an individual Second Amendment right to possess a useable firearm in the home in the right to self-defense) *with* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 10 (2022) (holding that the Second and Fourteenth Amendments protect a right to carry a firearm publicly for self-defense, without a showing of special need).

[89] *Supra* [text accompanying note 21-23].

[90] Oklahoma Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1131 (Okla. 2023).

[91] Oklahoma Call for Reprod. Just. v. Drummond, 2023 OK 111, ¶ 6, reh'g denied (Feb. 5, 2024).

her constitutionally protected right to terminate the pregnancy to preserve her life," the court explained.[92] Of course, this strategic approach is not a magic pill. It depends on courts' willingness to gradually expand the right to life, and it is by nature incremental. Indeed, in Oklahoma, abortion remains illegal in all but a narrow class of cases. But in abortion hostile states, where patients have essentially no other option, such an incremental strategy may be the only hope.

CONCLUSION

While the concept of "life" admits of broader and narrower definitions, and while the anti-abortion movement has exploited both possible definitions to its advantage, abortion rights jurisprudence has exclusively relied upon the narrow meaning of "life" as mere physical existence. This narrowing of the definition of "life," which has occurred most clearly in the context of the therapeutic exception to abortion bans, may have hobbled abortion-rights advocates who wish to use the "right to life" as a tool for expanding abortion access post-*Dobbs*. It may be possible to remedy this state of affairs, either through working to demedicalize our understanding of abortion or by working to expand the domain medical decision-making authority. Perhaps most promising, however, is the possibility of a concept of life that is flexible and capacious, and which varies in its application depending on the specific factual context. Such an approach could be developed through proliferating pro-choice "right-to-life" litigation that draws on both the historical pedigree of the right, as well as the variety of doctrinal offshoots it has produced.

[92] *Id.* at 2023 OK 116, ¶ 8.