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Politifact and Fiction on Abortion

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Jameson Taylor, Ph.D., *Using Tax Policy to Fund Pro-Life Objectives: Case Study in Mississippi,* On Point Series 79
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Robert Marshall, M.A., *We the People Say No: The Democratic Demise of the ERA*, On Point Series 76
Robert Marshall, M.A., *Three Fabrications of Roe*, On Point Series 75
Amanda Stirone Mansfield, J.D., *Alternatives to Abortion Programs: Support for Mothers and Families*, On Point Series 74

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The U.S. Supreme Court's reversal of *Roe v. Wade* and *Planned Parenthood v. Casey* has led abortion supporters to propose sweeping legislation, and to mislead Americans about pro-life legislation.

One example is a claim, repeated by many news outlets, that state laws against abortion forbid effective treatment of women undergoing miscarriages or ectopic pregnancies. That claim has been rebutted again and again, but continues to appear in online news outlets.

Occasionally such misinformation is spread even by outlets whose ostensible reason for existence is to fact-check public claims by others.

A case in point is an August 1 post by *Politifact*. It responded to a statement by Rep. Marianette Miller-Meeks (R-IA) about an abortion proposal supported by almost all Democrats in Congress, the "Women's Health Protection Act" (H.R. 8296).[1] She and others opposing the bill have said it "would permit abortion up until delivery."

Politifact accurately quoted the bill on this point: States must permit abortions "when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to the pregnant patient's life or health."

After this quote, however, *Politifact* stumbled.

Apparently ignoring its own quote, it proceeded to rate the Congresswoman's claim as "mostly false" because "A reading of the bill shows that H.R. 8296 permits abortion up until delivery, but only if it is deemed necessary to protect the life of the patient."

This misrepresented H.R. 8296's actual language about "life *or health*." The bill leaves the word "health" undefined, apparently leaving its scope up to the "good-faith medical judgment" of the abortion practitioner.

As a legal standard, "good faith" is largely subjective, having more to do with sincerity than with medical accuracy. As this bill requires states to allow performance of abortions by nurse midwives, nurse practitioners, and physician's assistants as well as licensed physicians, that subjectivity could have broad implications.

[1] See R. Doerflinger, "Lies, Damn Lies, and the Women's Health Protection Act," On Point, Issue 69 (Charlotte Lozier Institute, October 2021). Available at https://s27589.pcdn.co/wp-content/uploads/2021/10/On-Point-69.pdf.

Politifact then compounded the error. It said the bill allows these late-term abortions "*only under extreme circumstances*, in which medical professionals determine that the mother's life or health is at risk" (emphasis added).

The bill says nothing about "extreme circumstances." And the authors do not acknowledge that the bill's supporters routinely describe it as a proposal to "codify *Roe v. Wade.*" That invites readers, including courts, to consider what the Supreme Court meant by "health" when it handed down that decision, since the bill has no definition of its own.

The court said: "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." *Roe v. Wade*, 410 U.S. 113 (1973) at 163-4. But on defining "health" it deferred to its companion decision *Doe v. Bolton*, issued the same day.

And in *Doe* the court upheld the "health" exception in Georgia's abortion law, as long as it is understood broadly to mean "wellbeing." It cited a past Supreme Court decision upholding an abortion law in the District of Columbia, which said that law's "health" exception is not unconstitutionally vague as long as it is "construed to bear upon psychological as well as physical wellbeing." *Doe v. Bolton*, 410 U.S. 179 (1973) at 191-2.

To uphold Georgia's "health" exception the court defined the word in this broad way, adding that "the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the wellbeing 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. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." Id. at 192.

As law professor (and later federal appellate judge) John Noonan observed in 1979, this definition meant that the court's claim to allow limits on abortion after fetal viability was "illusory." *Roe* and *Doe* meant that once the woman's child was viable, "she must find an abortionist who believed she needed an abortion."[2]

This was also the understanding of public officials and federal and state courts during the debates on public funding of abortion that began in the 1970s. Members of Congress found that the Medicaid program's requirement to reimburse for "medically necessary" procedures was leading the federal government to pay for "between 250,000 and 300,000" abortions a year, using the court's sweeping definition of "health."[3] After Congress approved the Hyde amendment, allowing reimbursement only for abortions needed to preserve the life of the mother, and the Supreme Court upheld the amendment as

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[2] John T. Noonan, Jr., *A Private Choice* (The Free Press 1979) at 12.
[3] J. Johnson, "Abortion Opponents Rebuffed," *The Washington Post*, June 29, 1976, A3.

constitutionally valid in 1980, federally funded abortions went down to a fraction of one percent of that number.[4]

During this period some state supreme courts claimed to find a state constitutional right to a publicly funded abortion, using the same expansive meaning of "health" derived from the U.S. Supreme Court's decisions. These state court decisions produced a policy indistinguishable from a mandate for funding elective abortions.[5]

Does this mean that H.R. 8296's "right" to a post-viability abortion to preserve "health" is as irresponsibly broad as the one articulated in *Roe v. Wade*? No. The bill is far worse, because of a difference between the two -- which *Politifact* also misrepresents.

As quoted above, *Roe* said state laws must allow an abortion after viability that "is *necessary* to preserve the life or health of the mother" (emphasis added). But H.R. 8296 says an abortion at that late stage must be allowed if "*continuation of the pregnancy* would pose a risk to the pregnant patient's life or health" (emphasis added). That is a far more permissive standard.

Politifact obscures this reality by saying that the bill "would allow abortions only if medical professionals believe in good faith that *delaying to do so* would produce a risk of life or health for their patient" (emphasis added). This assumes that the only choices after viability are an abortion now or continuing the pregnancy to do an abortion later. And that ignores what viability is.

"Viability" is the stage of pregnancy at which the child can survive outside the womb if *delivered alive*.[6] During this period, there may be situations in which continuing the pregnancy to full term (39-40 weeks) would increase health risks for the mother – in which case the child can be delivered *now*, and both mother and child will generally be alive and healthy.

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[4] From Fiscal Years 1982 to 2007, federally funded Medicaid abortions varied from 71 to 893 annually. U.S. Department of Health and Human Services, *FY 2009 Moyer Material* (March 2008) at 96.

[5] In 1981, for example, the Supreme Court of California ruled that the state's Medi-Cal program must fund abortion for low-income women whenever it funds childbirth, noting that the Supreme Judicial Court of Massachusetts had ruled similarly. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252 (1981) at 285. The court argued that California's Budget Act violated *Roe*'s expansive protection for the woman's "health" by allowing reimbursement for post-viability abortions only when "the threatened harm is severe, long-lasting, and relates to physical health." Id. at 280.

[6] While it is not the primary focus of this analysis, note that *Politifact* says this occurs around 24 weeks of gestation, citing a source from 1998. With medical advances, infants delivered between 22 and 23 weeks now have a significant likelihood of survival. See A. Dance, "Survival of the littlest: the long-term impacts of being born extremely early," 582 *Nature 20-23* (2 June 2020).

One very common situation in which "continuation of the pregnancy" may increase risks for mother and/or child involves a healthy pregnancy that has reached full term without the onset of contractions. In that case, a physician may decide to induce labor (or more rarely, perform a Cesarean section) to deliver the child instead of waiting longer.

In *all* these post-viability situations in which "continuation of the pregnancy" may pose a risk to life or health, H.R. 8296 says that states must allow a post-viability abortion instead of a delivery. At this late stage an abortion is almost certainly more dangerous for the mother than childbirth, as it *is* a delivery -- complicated by extra steps designed to deliver a dead child rather than a live one.[7]

After viability, doctors have three options: Let the pregnancy continue, deliver the child, or destroy the child. H.R. 8296 says the third option must be allowed whenever the first option is seen by a health professional as risking the mother's health ("wellbeing"). But that means the second option, a live delivery before or at full term, can be replaced by an abortion for any reason -- or for no reason except the desire for a dead child rather than a live one. The bill does not say that substituting abortion for delivery need be based on any pretext regarding "health."

And yet *Politifact* rates the Congresswoman's statement as "mostly false." It argues that abortions at this very late stage are rare, and the Congresswoman should have mentioned that. But this reasoning does not negate the truth in her statement. The fact that few doctors are willing to perform abortions on nearly full-term children may only underscore how extreme the bill is. Moreover, under *Roe*, those "rare" abortions (citing the U.S. Centers for Disease Control, *Politifact* says they are "less than 1%" of the total) meant the killing of *thousands* of viable children a year. And these abortions could become less rare under this legislation if it is enacted, as its policy is broader than that of *Roe* as explained above.

It is true that H.R. 8296 legalizes abortions up to delivery, instead of delivery, for any reason. At full term, a time when "continuing" a healthy pregnancy further may compromise the mother's "wellbeing" and delivery is warranted, the bill says states must allow an abortion instead.

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[7] Maternal mortality from abortion increases dramatically with later gestational age. In 1998, using data from the U.S. Centers for Disease Control and other sources, researchers with the American Medical Association concluded: "At 21 weeks or more, the mortality was 16.7 per 100 000 procedures and exceeded the risk of maternal death from childbirth, which was 6.7 per 100 000 deliveries, although the difference was not statistically significant." J. Epner et al., "Late-term Abortion," 280.8 *JAMA* 724-9 at 727. A more recent study has found: "In the United States, the death rate from legal induced abortion performed at 18 weeks gestation is more than double that observed for women experiencing vaginal delivery." P. Marmion and I. Skop, "Induced Abortion and the Increased Risk of Maternal Mortality," 87.3 *The Linacre Quarterly* (August 2020) 302-310 at 302.

In short, it is *Politifact*'s claim that must be rated as false, for two reasons. It ignores the expansive meaning "health" has been given in the abortion context; and it misreads H.R. 8296 as allowing post-viability abortion only when "necessary" to preserve the woman's health. This careless "fact check" may have been intended to downplay the extremism of abortion advocates, and/or to discredit the pro-life members who have objections. It succeeds only in discrediting itself.

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