

Protecting the Unborn: *A Scholars' Statement of Pro-Life Principle and Political Prudence*

Lawmakers around the nation are deciding how to respond to the reversal of *Roe v. Wade*. As pro-life scholars, we believe that a truly just society would meet the myriad needs of pregnant women while legally protecting their unborn children at every stage.

We write to advance two propositions, the first of pro-life principle, the second of political prudence. First, the principle: Just as justice requires us to protect all unborn children, so too does it require us to protect access to life-affirming medical treatment for pregnant women facing grave medical complications. This is part of the pro-life ideal, not an exception to it. Ensuring access to such treatments is morally right and consistent with giving both mothers and unborn children the same protections accorded to others.

Second, the prudential: While children at all stages of development ought to enjoy the law's protections, political realities may make it impossible to achieve this fully and immediately in many jurisdictions. When that is so, enacting the most pro-life law realistically possible is justified. We should not allow the perfect to be the enemy of the good where the perfect is not currently feasible, but a law better than the legal status quo is achievable. Even as citizens and lawmakers may accept less-than-ideal laws on abortion, we must always make clear that the ultimate goal toward which we steadily work is to protect every human being in law and life.

I. A Statement of Principle: Enforcing the Child's Right to Life While Honoring the Mother's

Every human being, born or unborn, is the bearer of profound, inherent, and equal worth and dignity. From the moment of a human being's conception, he or she is morally entitled to legal protection from unjust lethal violence. This includes protection from acts in which the developing child's death is not sought for its own sake but seems necessary to bring about some other goal—for instance, to avoid parenting the child in very difficult circumstances. In these cases, the child's death is sadly the chosen means. If the child somehow survives, the procedure will have failed to achieve its end. And choosing an innocent human being's death as a means (*or end*) is unjust.

It is also possible to cause death as a foreseeable though unintended effect of pursuing a goal that is not in any way advanced by the victim's death. All innocent human beings have a right to protection against being killed even as an expected side effect of actions taken *for any but the weightiest reasons*. But when such reasons are present, accepting death as a side effect may be permissible—consistent with the right to life and just to all concerned.

Sometimes an unborn child's death falls in this category. It may be the side effect of treatment to save the mother from a grave medical complication—for example, removal of her cancerous uterus. Because the child's death is not a means to an end, every reasonable effort is made to preserve his or her life if possible, and the procedure is performed in a way that aims to treat his or her body with respect. If the child is not viable, then his or her death is expected, but still is not a means, as it contributes nothing to the mother's survival. (What saves her is, for instance, removal of the cancerous uterus, not the child's subsequent death.) And given the stakes, accepting the child's death is not unjust.

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To protect access to such treatments is not to make an exception to the right to life when it comes to the unborn. It is to treat the unborn just as we treat those already born—allowing their death only as a side effect of actions taken for proportionate reasons. (Doctors do just that, for instance, when they triage life-saving treatment in emergencies.) Not only can life-saving actions with potentially lethal side effects be permissible; allowing them can be morally *required*. In particular, pregnant women have a right to appropriate procedures that may be needed to treat medical complications posing a grave risk to them. The law must permit those procedures while requiring doctors to make reasonable efforts to save the child where possible. Doing so honors the mother’s right to life without violating the child’s. Reflecting this moral difference, public discussions (and many policies) distinguish such medical treatments from elective abortions.¹

In protecting life-saving treatments, laws should leave the question of whether the mother’s life is at serious risk to doctors’ *reasonable medical judgment*. This standard is rigorous enough to be just to the unborn but flexible enough to allow doctors to make swift judgments—sometimes in emergencies—based on incomplete information. Doctors are already subject to a “reasonable medical judgment” standard in other areas of law, including ones where failure to do what is reasonable would expose them to ruinous civil liability.

Laws protecting life-saving treatments should not require the mother’s death to be *imminent* (and no state currently requires that). If the risk to the mother is potentially grave, treating her in the same way as if she were not pregnant (while trying to save the child if reasonably possible) is not unjust to the child. Justice, and Hippocratic ethics, may well require doctors to intervene also when the continuation of a pregnancy poses a serious risk of substantial and permanent impairment of a major bodily function in the mother.²

In sum, the law should permit all appropriate procedures needed to treat medical complications that, in the doctor’s reasonable medical judgment, pose a grave risk to the mother, with reasonable efforts made to save the child if possible. This is part of the practice of life-affirming medicine. Women have a right to such procedures, and enforcing that right is fully consistent with giving unborn children the same protection from violence that others enjoy.

1. We will use “elective abortion” to refer to all procedures that (a) end a pregnancy but (b) are *not* medical treatments needed to address complications posing a grave risk to the mother.

2. For more specific guidance on legal permissions of appropriate medical treatments, see “Pro-Life Laws Protect Mom and Baby: Pregnant Women’s Lives are Protected in All States,” published by the Charlotte Lozier Institute.

II. A Statement of Political Prudence: Considering Imperfect Options

What about laws that ban some or most elective abortions while permitting them in case of rape or incest or fetal disability, or at some early stages of pregnancy? Under political constraints, it can be morally appropriate to vote for laws that fall short of full protection for unborn children, though such abortions violate the tenets of life-affirming medicine. In some cases, doing so will involve no net expansion of abortion access—and, therefore, no *intent* to expand access. In other cases, voting for imperfect laws may incidentally or indirectly contribute to a partial expansion, but accepting this effect on the unborn is permissible because no realistically available alternative would give them more protection. Lawmaking is the art of the possible.

We analyze four scenarios.

1. Assume that until now a state has (as was required by *Roe v. Wade*) allowed abortions for any reason until a child becomes viable, currently around 22 weeks. The state has no pre-*Roe* law still on the books that would prohibit earlier abortions, and no “trigger law” that took effect upon *Roe*’s reversal. And suppose that because of political pressures, the only two live options now are for the legislature to pass a bill that would prohibit elective abortions after 8 weeks or do nothing. Given the status quo, passing the bill would have the positive effect of banning some elective abortions that would otherwise remain lawful: those obtained between 8 and 22 weeks. And it would have no direct negative effect because it would not legalize earlier, pre-8-week elective abortions. (Those are already legal.) It would not withdraw protection from anyone at any stage. Thus, the bill’s immediate impact would include one positive legal change—the most extensive one currently available—and *no harmful legal change whatsoever*.

Voting for such a bill need not even do the less tangible, social harm of contributing to a culture that devalues early human life if legislators make clear that they are supporting the bill, despite their objections to all elective abortions and their unsuccessful efforts to make the bill more just, in order to secure the best protections available now. Of course, the bill’s passage could still erode a culture of life (and degrade the practice of medicine) to some extent. But then it might well be better on that score—and ultimately protect more lives—than the alternative of doing nothing.

In these scenarios, voting for the bill can be morally appropriate. Doing so need not involve any intent to harm or any injustice, given that the bill’s direct—and perhaps only appreciable—effect is, again, exclusively positive and the best available.

The bill’s direct legal impact may be entirely positive even if its text, after declaring elective abortions after 8 weeks unlawful, adds: “but pre-8-week elective abortions remain legal.” This clause, neither changing the legal status of early elective abortions (they are already legal) nor disabling the legislature from banning them later (no statute can do that), would itself have no legal effect. So the legal impact of passing the bill would be exactly the same with or without the extra clause.³

2. The situation is similar if a state law revived by *Roe*’s reversal is substantially protective of unborn children but practically certain to be replaced with one of two less protective bills. Suppose the law on the books now prohibits elective abortion at all stages, but a legislator makes a well-informed, good-faith assessment that political pressures guarantee its repeal. The only question is whether the state will now prohibit elective abortions from 20 weeks or 10 weeks. So children from conception to 10 weeks are sure to be exposed no matter what, and children from 20 weeks to birth are sure to be protected. The most salient

3. Unless, for example, the courts of the state at issue have their own authority to impose liability for early abortions, subject to override by the state’s legislature. Then any statutory language affirming a limited abortion right would make at least one legal difference: it would disable courts from outlawing early abortions themselves. In that version of this first case—or if the added clause is expected to undermine future pro-life political efforts—each of the options facing lawmakers would have both good and bad effects. We discuss such scenarios at point 4 below.

question facing lawmakers—the one legal issue they could directly *affect*—is whether children between 10 and 20 weeks are protected or exposed. (Exposing them will reliably increase the number of abortions, including later-term abortions that are riskier and that it may be especially coarsening for the culture to allow.) In that case, pro-life lawmakers may vote for the 10-week bill to head off passage of the 20-week bill.

3. When identifying their options, lawmakers should take into account a law's durability. Imagine two bills to prohibit elective abortions that differ only in whether they make an exception in case of fetal disability. Assume it is reasonably certain that in the absence of that exception, tragic episodes would inspire a backlash and swift passage of a more permissive law—perhaps one allowing all abortions up to 12 weeks. Then the options are best understood as: (1) protection of all unborn children, except those with a fetal disability, for the long term; or (2) the short-lived protection of all children, followed by the lasting exposure of all children for the entirety of their first trimester. Here pro-life lawmakers may choose (1) over (2) if they make clear that they reject the notion, sometimes associated with disability exceptions, that the lives of the severely disabled have less value. Lawmakers may also cite the availability of fetal and newborn therapy (including surgery) and perinatal hospice to buttress arguments that the disabled have inherent dignity and deserve protection and care, and to educate and encourage parents and clinicians to consider these options.

Expected developments can cut the other way, too. If the options are to (1) pass a 24-week law today that spends so much political capital as to make greater restrictions impossible for the foreseeable future, or (2) pass nothing today but educate the public, lobby, and so build enough capital to pass a 12-week law at the end of the legislative session, then (2) can be the more reasonable choice.

Needless to say, political developments are hard to predict, and pro-life lawmakers must guard against overconfident “predictions” that are really just attempts to rationalize cowardice in the cause of life. We cannot emphasize this point strongly enough. But when consequences are highly likely, they must be considered in any deliberation about what choice would be the most just and most protective of the unborn. To disregard political realities is no virtue.

4. Finally, consider cases where the legal effect of any available option is mixed. Suppose that the feasible options are to pass (1) a prohibition of elective abortions from 20 weeks, or (2) a prohibition of elective abortions from 10 weeks, with an exception for cases of fetal disability at any stage. Unlike in the scenarios above, here *both* options have some negative net effect. Compared to the alternative, option (1) would withdraw protections from the unborn between 10 and 20 weeks, and option (2) from those with disabilities (at later stages). Each would result in some exposure to abortion that would not otherwise exist. Yet for pro-life lawmakers, that exposure could and should be a side effect, not their end or their means. Accepting this side effect would be just if supported by a sufficiently strong reason. And there would be such a reason to choose (2), which protects many more lives. (The number of abortions sought between 10 and 20 weeks would far exceed the number involving severe disability.)

In short, it is reasonable for pro-life lawmakers faced with imperfect options to choose the one that promises the most protection of unborn children over time, rather than to do nothing. Far from violating unborn children's right to life, such choices honor and promote it. Lawmakers must also remain committed, and make clear that they remain committed, to continually advancing a culture in which every human being is protected in law and welcomed in life.

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