Medical Emergency Exceptions in State Abortion Statutes: The Statistical Record

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ABSTRACT: This article attempts to determine, first, whether emergency exceptions in statutes regulating abortion have been abused and, second, whether the standard used in such an exception – subjective or objective – makes a difference in the reported incidence of such emergencies. A review of the statistical data supports two conclusions. First, physicians who perform abortions and have complied with state reporting requirements have not relied upon the medical emergency exceptions in state abortion statutes to evade the requirements of those statutes. Second, the use of an objective standard for evaluating medical emergencies ("reasonable medical judgment") has not been associated with fewer reported emergencies (per number of abortions performed) than the use of a subjective standard ("good faith clinical judgment"). Both of these conclusions may be relevant

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in drafting other abortion statutes including prohibitions (e.g., post-viability abortions).

In *Planned Parenthood v. Casey*,[1] the United States Supreme Court considered the constitutionality of multiple provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989.[2] These include, *inter alia*, provisions mandating detailed informed consent requirements and a twenty-four waiting period,[3] informed parental consent[4] and spousal notice.[5] Each provision is subject to an exception which excuses compliance therewith in case of a medical emergency.[6] A "medical emergency" is defined as

> That condition which, on the basis of the physician's good faith clinical judgment, so complicates a medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.[7]

Because it was "central to the operation of various other requirements," the Court began its analysis of the challenged provisions "with the statute's definition of medical emergency."[8] The plaintiffs in *Casey* argued that the definition was "too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks."[9] The Court acknowledged that if this contention were correct, "we would

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[1] 505 U.S. 833 (1992).

[2] 18 Pa. Cons. Stat. § 3201 *et seq.* (1990).

[3] *Id.* § 3205. The statute requires either the physician who is to perform the abortion or the referring physician orally to inform the pregnant woman at least twenty-four hours prior to the abortion of the nature of the proposed procedure or treatment and the attendant risks and alternatives; the probable gestational age of the unborn child at the time the abortion is to be performed; and the medical risks associated with carrying the child to term. *Id.* § 3205(a)(1). The statute also requires the attending or referring physician or another qualified health care professional or social worker to inform the woman at least twenty-four hours prior to the abortion that the state department of health has prepared printed materials for her to review that describe the unborn child and identify agencies that offer alternatives to abortion; that medical assistance may be available for prenatal care, childbirth and neonatal care; and that the father of the unborn child is liable to assist in the support her child (which information may be omitted in the case of rape). *Id.* § 3205(a)(2). Some States have imposed additional conditions. For example, the information that Pennsylvania requires in § 3205(a)(1) may be provided in Texas only by the physician who is to perform the abortion, not by a referring physician. Tex. Health & Safety Code § 171.012(a)(1). And all of the information that Texas requires a pregnant woman to be given before undergoing an abortion (which is similar to the information mandated by §§ 3205(a)(1) and 3205(a)(2) of the Pennsylvania Abortion Control Act) must be provided orally and in person in a private and confidential setting, at least twenty-four hours before the abortion. Tex. Health & Safety Code §§ 171.012(a)(1), 1710.012(a)(2), 171.012(b)(1).

[4] *Id.* § 3206.

[5] *Id.* § 3209.

[6] *Id.* § 3205(a), § 3206(a), 3209(c).

[7] *Id.* § 3203 (definitions).

[8] *Casey*, 505 U.S. at 879.

[9] *Id.* at 880 (summarizing plaintiffs' argument).

be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[10] The district court had found that the statutory definition of medical emergency failed to cover three serious conditions: pre-eclampsia, inevitable abortion and premature ruptured membrane.[11] However, as the court of appeals observed, "under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences."[12] Although the definition of medical emergency *could* be interpreted in an unconstitutional manner, the court of appeals construed the phrase "serious risk" to include those circumstances.[13] The court stated, "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman."[14] The Supreme Court deferred to the court of appeals' interpretation of state law and concluded that, as construed by the court of appeals, "the medical emergency definition imposes no undue burden on a woman's abortion right."[15]

In a subsequent case, *Ayotte v. Planned Parenthood of Northern New England*,[16] the Court unanimously held that a State may not limit the circumstances in which compliance with a statute regulating abortion is excused to situations when the life, but not the health, of the patient is at risk.[17] The holding in *Ayotte* basically stands for the proposition that whenever compliance with an abortion regulation may delay the performance of the procedure, it must include exceptions for the life or health of the pregnant woman.[18]

Following the Supreme Court's decision in *Planned Parenthood v. Casey*, many States either amended their pre-*Casey* statutes to include an exception for medical emergencies that conformed to the definition upheld in *Casey* or enacted new statutes with such an exception.[19]

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[10] *Id*. (citing, *inter alia, Roe v. Wade*, 410 U.S. 113, 164 (1973)).

[11] *Planned Parenthood v. Casey,* 744 F. Supp. 1323, 1378 (E.D. Pa. 1990).

[12] *Casey*, 505 U.S. at 880 (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 700-01 (3rd Cir. 1991)).

[13] *Planned Parenthood v. Casey*, 947 F.2d at 701.

[14] *Id*.

[15] *Casey*, 505 U.S. at 880. On the merits, the Court upheld the informed consent and waiting period requirements, *id*. at 881-87, and the informed parental consent requirement, *id*. at 899-900, but struck down the spousal notice requirement, *id*. at 887-98.

[16] 546 U.S. 320 (2006).

[17] *Id*. at 327-28.

[18] When compliance with a given regulation would not delay the procedure or otherwise jeopardize the woman's health, however, a health exception is not required. *See Gonzales v. Carhart*, 550 U.S. 124,161-67 (2007) (no health exception required in statute prohibiting a rarely used second trimester abortion technique where other techniques were commonly available and just as safe). Under *Casey*, the scope of a health exception in the definition of a medical emergency may be restricted to serious risks to the woman's physical health.

[19] In addition to these post-*Casey* developments, many States had enacted pre-*Casey* parental consent or notice statutes that excused compliance in case of an emergency. The data discussed in this article includes both medical emergency statutes based on the provision upheld in *Casey*, as well as statutes that have defined such emergencies in other terms.

These statutes cover a range of abortion regulations, the most common of which mandate detailed informed consent requirements (and, in some States, a waiting period, usually twenty-four hours) for all women seeking an abortion; and, in the case of minors, consent of and/or notice to one or both of their parents or guardian (and, again in some States, a waiting period, typically twenty-four or forty-eight hours). States that have enacted abortion regulations that include a medical emergency exception generally require physicians to record in the patient's medical record the circumstances in which an emergency has excused compliance with a given regulation. Not all of those States, however, also require physicians to report such emergencies to the state health department, and even fewer States make such statistical data, when reported, available to the public. Nevertheless, it appears that at least twelve States publish on-line or otherwise produce upon request statistical data on how often a medical emergency has excused compliance with an abortion regulation.[20] That data is the subject of this article.

What has been the experience with medical emergency abortions? How frequent are they? Does the incidence of medical emergency abortions suggest that the statutes regulating abortion are being evaded? And does the phrasing of the medical emergency exception – whether an objective or subjective standard is used – make a difference in how many medical emergencies are being reported? The answers to these questions are important.

Both Americans United for Life (AUL) and the National Right to Life Committee (NRLC) which, between them, draft much of the pro-life legislation enacted in the United States, have raised concerns with respect to medical emergency exceptions. Although AUL includes a "*Casey*-style" medical emergency exception in its model legislation regulating abortion,[21] it identifies "the inappropriate use of a 'medical emergency' exception by an abortion provider" as one of the "potential loopholes" in parental consent or notice statutes.[22] NRLC, for its part, employs an objective "reasonable medical judgment" standard in its model legislation,[23] rather than the subjective "good faith clinic judgment" standard upheld in *Casey*, because of its fear that an exception that allows the physician to form his own subjective judgment as to the existence of a

[20] Alabama, Arkansas, Geogia, Idaho, Kansas, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, West Virginia and Wisconsin.

[21] *See* Parental Notification Of Abortion Act[:] Model Legislation & Policy Guide *For the 2015 Legislative Year*, §§ 3(h), 6(a); Parental Consent for Abortion Act[:] Model Legislation & Policy Guide *For the 2015 Legislative Year*, §§ 3(g), 6(a); Women's Right to Know Act[:] Model Legislation & Policy Guide *For the 2015 Legislative Year*, §§ 2(b)(4), 3(i), 4; Women's Ultrasound Right To Know Act[:] Model Legislation & Policy Guide *For the 2015 Legislative Year*, §§ 2(b)(5), 3(e), 4, 5, Americans United for Life (available on AUL's website, www.aul.org).

[22] Parental Involvement Enhancement Act [:] Model Legislation & Policy Guide *For the 2015 Legislative Year*, p. 2, Americans United for Life (available on AUL's website).

[23] *See, e.g.*, NRLC's "Pain-Capable Unborn Child Protection Act Model[:] Abortion of Unborn Child of Twenty (20) or More Weeks Post-Fertilization Age," § 2(5) (definition of medical emergency), November 18, 2010 (on file with author). The (current) federal version of this legislation, which has passed the House of Representatives and is now pending in the Senate may be found at www.nrlc.org/uphloads/fetalpain/FranksSubstituteAmendentHR36.pdf.

medical emergency is, in effect, no standard at all.[24] The statistical data set forth in this article attempts to determine, first, whether medical emergency exceptions in statutes regulating abortion have been abused and, second, whether the standard used in such an exception – subjective or objective – makes a difference in the reported incidence of such emergencies.

Alabama

Alabama enacted its parental consent statute in 1987.[25] Consent of one of the minor's parents or her guardian is not required "when, in the best clinical judgment of the attending physician on the facts of the case before him, a medical emergency exists that so compromises the health, safety, or well-being of the mother as to require an immediate abortion."[26] "A physician who does not comply with [the parental consent requirement] by reason of this exception shall state in the medical record of the abortion, the medical indications on which his or her judgment was based."[27] Medical emergency abortions must be reported to the Bureau of Vital Statistics (now the Center for Health Statistics),[28] which, in turn, is authorized to keep "statistical records and information so long as the anonymity of the minor is in no way compromised."[29]

Between 1988, the first full year the parental consent law was in effect, and 2013, the last year for which data is available, 26,442 abortions were performed on minors

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[24] Memorandum from Mary Spaulding Balch, JD, Director, State Legislation Department, National Right to Life Committee, addressed to "To Whom It May Concern," regarding the "Constitutionality of the Model Pain-Capable Unborn Child Protection Act," Part V (seventh unnumbered page) (July 2013) (citing Andrew Willis, *Note: The Emergency Exception in Parental Laws and the Necessity of Post-Emergency Notifications*, 4 Ave Maria L. Rev. 171, 196 (2006)). Ms. Balch's memorandum is available on NRLC's website. *See* http://www.nrlc.org/statelegislation (last visited August 5, 2015). It must be noted that neither Ms. Balch in her memorandum nor Mr. Willis in his article cited any statistical data suggesting that a subjective standard in a medical emergency exception is more likely to be abused than an objective standard.

Although the Supreme Court has not yet decided whether an objective, rather than a subjective, standard for evaluating medical emergencies is constitutional, it should be noted that the principal authority on which Mr. Willis relies for that proposition was a decision from the Seventh Circuit upholding a Wisconsin abortion regulation (informed consent and a twenty-four hour waiting period) that did *not* include any criminal penalties. *Id*. at 196-97, citing and quoting *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999). Whether the court would have upheld a statute like NRLC's "Pain-Capable Unborn Child Protection Act," which employs an objective standard *and* includes criminal penalties, *id*. § 6, presents an entirely different question, as the court's opinion itself makes clear. *See* 188 F.3d at 464-68.

[25] Ala. Code § 26-21-1 *et seq.* (1992). Parental consent is not required of an emancipated minor. *Id*. § 26-21-3(a). An "emancipated minor" is defined as "[a]ny minor who is or has been married or has by court order otherwise been legally freed from the care, custody, and control of her parents." *Id*. § 26-21-2(2).

[26] *Id*. § 26-21-5.

[27] *Id*.

[28] *Id*. § 26-21-8(c)(3).

[29] *Id*. § 26-21-8(a).

(women < 18 years of age) in Alabama,[30] of which thirteen were reported to have been performed without parental consent because of a medical emergency.[31] In other words, during this twenty-six year period, there was, on average, one medical emergency abortion every other year, or one emergency for every 2,034 abortions performed on minors.

Arkansas

Arkansas has enacted a detailed informed consent statute known as the "Women's Right to Know Act of 2001."[32] The Act requires every woman seeking an abortion in Arkansas to be given certain information no later than the day before the abortion is to be performed.[33] Compliance with the Act, including the waiting period, is excused "in the case of a medical emergency."[34] A "medical emergency" is defined as

> any condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of impairment of a major bodily function which is substantial and deemed to be irreversible.[35]

Another section of the statute requires the Center for Health Statistics of the Department of Health to ensure that "all information collected by the center regarding abortions performed in this state shall be available to the public in printed form and on a twenty-four hour basis on the center's website, provided that in no case shall the privacy of a patient or doctor be compromised."[36]

Since 2010, the Arkansas Center for Health Statistics has published an annual report on the "Woman's Right to Know Act." Between 2010 and 2014, a total of 16,420 abortions were performed in Arkansas.[37] In none of these cases were the requirements of the Act excused because of a medical emergency.[38]

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[30] Selected Induced Termination of Pregnancy Data: Women Under 18 Years of Age, January-December 1988, Final Data, Alabama Department of Public Health, Bureau of Vital Statistics; Selected Induced Termination of Pregnancy Data: Women Under 18 Years of Age, Alabama, Final Occurrence Data, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, Alabama Department of Public Health, Center for Health Statistics; Induced Terminations of Pregnancy Occurring in Alabama, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, Alabama Department of Public Health, Center for Health Statistics.

[31] *Id*.

[32] 2001 Ark. Acts, No. 353, *codified as* Ark. Code § 20-16-901 *et seq*. (2015).

[33] *Id*. § 20-16-903.

[34] *Id*. § 20-16-903(b).

[35] *Id*. § 20-16-902(7).

[36] *Id*. § 20-16-906(b).

[37] Induced Abortions Data, 2010, 2011, 2012, 2013, 2014, Arkansas Department of Health, Center for Health Statistics.

[38] Woman's Right to Know Act Report, 2010, 2011, 2012, 2013, 2014, Center for Health Statistics, Arkansas Department of Health.

Georgia

Georgia first enacted a parental notification statute in 1987.[39] Unless one of the minor's parents or her legal guardian personally accompanied her to the facility where the abortion was to be performed, the physician had to provide the minor's parent or guardian with at least twenty-four hours' actual notification or forty-eight hours' constructive notification before proceeding with the abortion.[40] Notification was not required "when, in the in the best clinical judgment of the attending physician on the facts of the case before him or her, a medical emergency exists that so complicates the condition of the minor as to require an immediate abortion."[41] In such circumstances, the physician had to "certify in writing the medical indications on which this judgment was based when filing such reports as are required by law."[42] A new notification statute was enacted in 2013,[43] which contained, in all relevant respects, the same provisions.[44]

Between 2006, the first year for which medical emergencies were reported, and 2014, approximately 12,000 abortions were performed on minors (women < 18 years of age) in Georgia,[45] of which only three were reported to have been performed without parental notice because of a medical emergency.[46] In other words, during this nine-year period, there was, on average, one medical emergency abortion every third year, or one emergency for every 4,000 abortions performed on minors.

Idaho

Idaho enacted its parental consent statute in 2000.[47] As originally enacted, consent of one of the minor's parents, her legal guardian or her conservator was not required when "[a] medical emergency exists for the minor so urgent that there is insufficient time for the physician to obtain the informed consent of a parent or a court order and the attending physician certifies such in the pregnant minor's medical records."[48] For purposes of this exception, a "medical emergency" was defined as

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[39] Ga. Code Ann. § 15-11-110 *et seq*. (1990).

[40] *Id*. § 15-11-112(a)(1)(A)-(C).

[41] *Id*. § 15-11-116.

[42] *Id*.

[43] *Id*. § 15-11-680 *et seq*. (2014).

[44] *See, id*., §§ 15-11-682(a)(1)(A)-(C), 15-11-686. The notification requirement applies only to unemancipated minors. *Id*. § 15-11-682(a). An "unemancipated minor" is defined as "any person under the age of 18 who is not or has not been married, or who is under the care, custody, and control of such person's parent or parents, guardian, or the juvenile court of competent jurisdiction." *Id*. § 15-11-681(3).

[45] Annual Report Abortion – A Woman's Right to Know Report Years 2006 through 2014 Part 1: Parental Notification Requirements, Georgia Department of Public Health. This figure is an approximation because Georgia does not include in its statistical reporting the number of abortions performed in Georgia on residents of other States (occurrence data).

[46] *Id*.

[47] Idaho Code Ann. § 18-609A (2004).

[48] *Id*. § 18-609A(1)(a)(v). Under both former and existing law, the consent requirement applies only to unemancipated minors. *Id*. § 18-609A(1). "Emancipated" is defined as "any minor who has been married or is on active military service." *Id*. § 18-604(3).

> a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:
>
> 1. To prevent her death; or
>
> 2. Because delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.[49]

The definition of "medical emergency" was declared unconstitutional in *Planned Parenthood of Idaho, Inc. v. Wasden*,[50] and was later amended to cure the constitutional defects found in the original definition.[51] As amended, "medical emergency" is now defined as

> a condition which, on the basis of the physician's good faith medical clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[52]

Under Idaho law, whenever an abortion is performed "due to a medical emergency and without consent from a parent, guardian or conservator or court order," the attending physician must report to the Department of Health and Welfare "the diagnosis upon which the physician determined that the abortion was immediately necessary due to a medical emergency."[53]

Effective July 1, 2000, the Department of Health and Welfare began to require physicians to report to the Department medical emergencies excusing compliance with the parental consent law.[54] Because of federal court litigation (discussed above), the consent requirement was not enforced between January 1, 2005, and March 26, 2007. According to an analyst with the Idaho Department of Health & Welfare, between July 1, 2000 and December 31, 2014 (and excluding the twenty-seven month period when the law was not in effect), a total of 827 abortions were performed on unemancipated

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[49] *Id*. § 18-609A(5)(c)(I) . The term "medical emergency" did not include "1. Any physical condition that would be expected to occur in normal pregnancies of women of similar age, physical condition and gestation; or 2. Any condition that is predominantly psychological or psychiatric in nature." *Id*. § 18-609A(5)(c)(ii).

[50] 376 F.3d 908, 924-35 (9th Cir. 2004).

[51] 2005 Idaho Sess. Laws, ch. 393, § 2.

[52] Idaho Code Ann. § 18-604(8) (Supp. 2015). Under a subsequent amendment to the parental consent statute, parental consent (or judicial authorization) is not required if "[a] medical emergency exists for the minor and the attending physician records the symptoms and diagnosis upon which such judgment was made in the minor's medical record." *Id*. § 18-609A(7)(b).

[53] *Id*. § 18-609G(1)(b).

[54] "Abortions Occurring in Idaho, Females Aged < 18 Informed Consent by Year 2000-2014," fn. 1. Attachment to e-mail from Pamela Harder, Research Analyst Supervisor, Idaho Department of Health and Welfare, Division of Public Health, Bureau of Vital Records and Health Statistics, July 2015, to author (July 24, 2015, 2:13 p.m., CDT) (on file with author).

minors (women < 18 years of age) in Idaho,[55] of which only one (in 2013) was reported to have been performed because of a medical emergency.[56]

Kansas

Kansas enacted a parental consent statute in 2011.[57] Consent of a minor's parents or legal guardian is not required "when a medical emergency exists."[58] A "medical emergency" is defined as

> a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the woman or for which a delay necessary to comply with the applicable statutory requirements will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.[59]

The Kansas parental consent statute requires a physician acting pursuant to the medical emergency exception of § 65-6705(j)(1) to "state in the medical record of the abortion the medical indications on which the physician's judgment was based," and to include the basis for that determination "as part of the written report made by the physician to the secretary of health and environment" under the abortion reporting statute, as amended.[60] The mandatory reporting of medical emergency abortions began in 2011.[61] Between 2011 and 2014, 1,099 abortions were performed on minors (women

[55] *Id*. (table).

[56] *Id*.

[57] Kan. Stat. Ann. § 65-6705 (West Supp. 2014). This replaced the State's parental notice statute, *Id*. § 65-6705 (West 2008). The consent requirement applies only to unemancipated minors. *Id*. § 65-6705(a). An "unemancipated minor" is defined as "any minor who has never been: (1) Married, or (2) freed, by court order or otherwise, from the care, custody and control of the minor's parents." *Id*. § 65-6705(a).

[58] *Id*. § 65-6705(j)(1).

[59] *Id*. § 65-6701(g). As opposed to the objective standard for determining the existence of a medical emergency under the current parental consent law ("reasonable medical judgment"), the parental notification statute had used a subjective standard. *See* Kan. Stat. Ann. § 65-6701(e) (West 2008) ("good faith clinical judgment").

[60] *Id*. § 65-6705(j)(2) (citing § 65-445). The effective date of the parental consent statute, including the medical emergency reporting requirement, was July 1, 2011. *See* 2011 Kan. Sess. Laws, ch. 44, § 10 (p. 637), 2011 Session Laws of Kansas, Vol. 1 (cover and authentication). The administrative rule implementing the reporting requirement took effect on June 15, 2012. *See* Kan. Admin. Reg. § 28-56-6 (2012).

[61] Kan. Admin. Reg. 28-56-6.

< 18 years of age) in Kansas.[62] During that time, no case of a medical emergency for a minor was reported to the Department of Health and Environment.[63]

Nebraska

Nebraska enacted a parental consent statute in 2011 (replacing an earlier parental notice statute).[64] Consent of one of the minor's parent or her legal guardian is not required in a medical emergency.[65] A "medical emergency" is defined as

> a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[66]

Medical emergencies excusing compliance with the parental consent statute must be reported to the Nebraska Department of Health & Human Services.[67]

For the two years for which data is available (2013-2014), 154 abortions were performed on minors (women < 18 years of age) in Nebraska.[68] In none of these cases was the parental consent requirement excused because of a medical emergency.[69]

Nebraska first enacted an informed consent statute in 1977,[70] including a forty-eight hour waiting period which was declared unconstitutional and permanently enjoined by a

[62] Abortions in Kansas, 2011, 2012, 2013, 2014 (Preliminary Reports), Kansas Department of Health and Environment (KDHE), Division of Public Health, Bureau of Epidemiology and Public Health Information. According to these reports, 1,119 abortions were performed on minors. As the notes to the reports indicate, however, the numbers of abortions include an extremely small number of abortions performed on Kansas residents in other States (which number is not broken down by age category). According to an attorney with the KDHE, twenty abortions were performed on Kansas minors in other States between 2011 and 2014. E-mail from Eugene Lueger, Attorney, KDHE, Legal Services, to author (July 29, 2015, 10:46 a.m., CDT) (on file with author). Thus, the actual number of minors who had abortions in Kansas for these four years was 1,099 (1,119-20). The preliminary reports are used rather than the final reports because the latter do not include data that would enable one to determine the number of abortions performed on minors.

[63] E-mail from Eugene Lueger to author (July 14, 2015, 8:15 a.m., CDT) (on file with author).

[64] Neb. Rev. Stat. § 71-6901 *et seq*. (LexisNexis Supp. 2014). The former parental notice statute, Neb. Rev. Stat. § 28-347 (West Supp. 1981), which was declared unconstitutional and permanently enjoined in an unreported federal district court judgment, *see Knowles v. Kerry*, Nos. CV 81-0-301, CV 81-L-167 (D. Neb. Sept. 16, 1984), was repealed in 1991. 1991 Neb. Laws, L.B. 425, § 11. The consent requirement applies only to a "pregnant woman," Neb. Rev. Stat. § 71-6902(1) (first sentence), which is defined, in relevant part, as "an unemancipated woman under eighteen years of age who is pregnant . . . ." *Id*. § 71-6901(10). "Emancipated," in turn, is defined as "a situation in which a person under eighteen years of age has been married or legally emancipated [pursuant to a judicial decree of emancipation]." *Id*. § 71-6901(5).

[65] *Id*. § 71-6902.

[66] *Id*. § 71-6901(8).

[67] *Id*. § 71-6909.

[68] Table 8, 2013 Nebraska Statistical Report of Abortions, Table 8, 2014 Nebraska Statistical Report of Abortions, Nebraska Department of Health & Human Services.

[69] *Id*. Table 28.

[70] 1977 Neb. Laws, L.B. 38, § 42, as amended by 1979 Neb. Laws, L.B. 316, §§ 1, 2, 6, *codified as* Neb. Rev. Stat. § 28-327 *et seq*. (West Supp. 1980).

federal district court.[71] The statute has been repeatedly amended. Presently, the statute imposes detailed informed consent requirements and a twenty-four hour waiting period before an abortion may be performed.[72] Compliance with the informed consent statute, including the waiting period, is excused "in the case of an emergency situation."[73] An "emergency situation" is defined as

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function.[74]

Emergency situations excusing compliance with the informed consent requirement must be reported to the Department of Health & Human Services.[75] Starting in 1997, the Department has made available to the public statistics on how often an "emergency situation" arises.

Between 1997 and 2014, 59,876 abortions were performed in Nebraska,[76] of which twenty-two were reported to have been performed without complying with the requirements of the informed consent statute because of a medical emergency.[77] In other words, during this eighteen-year period, there was, on average, approximately one medical emergency reported every twenty months, or one emergency for every 2,721 abortions.

Oklahoma

Under current Oklahoma law, an abortion may not be performed upon a minor without at least forty-eight hours' notice to and the consent of one of her parents or

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[71] *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022, 1050 (D. Neb. 1979), *aff'd per curiam*, 636 F.2d 206 (8th Cir. 1980), *judgment vacated and case remanded for further consideration in light of H.L. v. Matheson*, 450 U.S. 398 (1981), 452 U.S. 911 (1981), *judgment reaffirmed on remand from the court of appeals*, May 24, 1982, cons. cases CV 78-L-289, CV 79-L-85 and CV 79-L-100, *aff'd per curiam*, 690 F.2d 667 (8th Cir. 1982).

[72] Neb. Rev. Stat. § 28-327 *et seq*. (Supp. 2014). The 2010 amendments to the statute, 2010 Neb. Laws, L.B. 594, § 4, were declared unconstitutional and permanently enjoined in a consent decree entered by the federal district court in *Planned Parenthood of the Heartland v. Heineman*, Case No. 4:10 CV 3122, Order and Final Judgment, Aug. 24, 2010. That decision did not affect either the twenty-four hour waiting period or other provisions of the statute enacted prior to those amendments.

[73] *Id*. § 28-327 (first sentence).

[74] *Id*. § 28-326(4). This definition is slightly different from the definition of medical emergency in the parental consent statute, *id*. § 71-6901(8), in that the latter requires the risk to include not only "substantial," but also "irreversible" impairment of a major bodily function.

[75] *Id*. § 28-343(10).

[76] Statistical Reports of Abortions, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006. 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014. The data for the total number of abortions performed in Nebraska in a given year may be found in Table 1 of each report.

[77] *Id*. The data for the number of medical emergencies reported to have excused compliance with the informed consent statute may be found in Table 14 of each report.

guardian.[78] These requirements do not apply in the case of a medical emergency.[79] A "medical emergency" is defined as

> the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the minor in order to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy . . . .[80]

In addition to the parental notice and consent statutes, Oklahoma requires all women who undergo abortions to give their informed consent at least twenty-four hours before the procedure.[81] The informed consent requirements (and the waiting period requirement) do not apply in the case of a medical emergency,[82] which is defined in the same manner as under the parental notice and consent statutes.[83]

Under Oklahoma law, when a medical emergency excuses compliance with any of the foregoing requirements, the physician must report that information to the Oklahoma Department of Health,[84] which, in turn, is required to publish statistical data on the frequency of such emergencies.[85]

Between April 1, 2012, when Oklahoma began reporting medical emergency abortions, and December 31, 2014, a total of 13,397 abortions were performed in Oklahoma,[86] of which forty-five were reported to have been performed without complying with the twenty-four hour waiting period requirement because of a medical emergency;[87] of the 552 abortions performed on minors (women < 18 years of age) during this time, no medical emergency abortions excusing compliance with the parental consent statute

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[78] Okla. Stat. Ann. tit. 63, §§ 1-740.1 *et seq*., 1-744 *et seq*. (West Supp. 2015). The notice and consent requirements apply only to unemancipated minors. *Id*. §§ 1-740.2(A)(2), 1.744.2. An "unemancipated minor" is defined as "any person less than eighteen (18) years of age who is not or has not been married or who is under the care, custody and control of the person's parent or parents, guardian or juvenile court of competent jurisdiction." *Id*. § 1-740.1(4).

[79] *Id*. §§ 1-740.2(A), 1-740.2(B), 1-740.2(C), 1.744.3.

[80] *Id*. §§ 1-740.1(2), 1-744.1(4).

[81] *Id*. § 1-738.1A *et seq*.

[82] *Id*. § 1-738.2(B).

[83] *Id*. § 1-738.1A(5).

[84] *Id*. §§ 1-738.3a(B)(3), 1-738k(F) (questions 15, 21A, 26, 34 on reporting form), 1-740.4a(A)(9)(b)(C).

[85] *Id*. §§ 1-738.3a(F), 1-738m(C)(22), (24), (27), 1-740.4a(E).

[86] Abortion Surveillance in Oklahoma 2002-2012 Summary Report, Table 1; Abortion Surveillance in Oklahoma 2002-2013 Summary Report, Table 1; Abortion Surveillance in Oklahoma 2002-2014 Summary Report, Table 1, Oklahoma State Department of Health.

[87] *Id*. 2002-2012 Summary Report, Table 28 (nine); 2002-2013 Summary Report, Table 28 (thirty-one); 2002-2014 Summary Report, Table 28 (five), as supplemented by Amber D. Freudenberger, MPH, Program Grant Coordinator, Health Care Information, Oklahoma Department of Health, e-mail from Ms. Freudenberger to author (July 29, 2015, 10:05 a.m., CDT) (on file with author).

were reported.[88] In other words, during this thirty-three month period, slightly more than one medical emergency was reported, on average, every month, or one emergency for every 297 abortions (one-third of one percent), the highest reported incidence of medical emergencies of any of the States studied.

South Carolina

South Carolina enacted its parental consent statute in 1990.[89] Consent of one of the minor's parents, her legal guardian, one of her grandparents or "any person who has been standing in loco parentis to the minor for a period of not less than sixty days,"[90] is not required "if . . . a physician determines that a medical emergency exists involving the life of or grave physical injury to the pregnant woman . . . ."[91] The form which the physician is required to submit to the Department of Health and Environmental Control "must indicate from consent was obtained or [the] circumstances waiving consent."[92]

Between 1990 and 2013, 8,421 abortions were performed on minors (women < 17 years of age[93]) in South Carolina.[94] According to an analyst with the South Carolina Department of Health and Environmental Control, during this twenty-four year period (1990-2013) there were no instances of "excused parental consent because of a reported medical emergency for those less than 17 years old occurring in SC [South Carolina]."[95]

South Dakota

South Dakota enacted a parental notice statute in 1973.[96] Under the current version of the parental notice statute, a physician must provide one of the minor's parents or her

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[88] *Id*. 2002-2012 Summary Report, Tables 31, 32; 2002-2013 Summary Report, Tables 31, 32; 2002-2014 Summary Report, Tables 31, 32, as supplemented by Amber Freudenberger, e-mail from Ms. Freudenberger to author (July 29, 2015, 10:05 a.m., CDT).

[89] 1990 S.C. Acts, No. 341, § 1, *codified as* S.C. Code Ann. § 44-41-31 (2002). The consent requirement does not apply to emancipated minors. *Id*. § 44-41-31(A)(2). An "emancipated minor" is defined as "a minor who is or has been married or has by court order been freed from the care, custody, and control of her parents." *Id*. § 44-41-10(n).

[90] *Id*. § 44-41-31(A)(1).

[91] *Id*. § 44-41-30(C)(1).

[92] *Id*. § 44-41-60.

[93] Unlike the other parental involvement statutes discussed herein, which define a "minor" as a female under the age of eighteen, South Carolina law defines a "minor" as "a female under the age of seventeen." *Id*. § 44-41-10(m).

[94] "Abortions Occurring in SC [South Carolina] for Women Less Than 17 Years Old [1990-1996]." Attachment to e-mail from Thomas Pinner, Statistical and Research Analyst, South Carolina Department of Health and Environmental Control, Office of Public Health Statistics and Information Systems, Division of Biostatistics, to author (August 13, 2015, 4:45 p.m., CDT) (on file with author); South Carolina Vital and Morbidity Statistics 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2012, 2013, South Carolina Department of Health and Environmental Control, Office of Public Health Statistics and Information Systems, Division of Biostatistics. The data may be found in Table 43 for 1997, Table 46 for 1998, Table 48 for 1999 and 2000, and Table E-3 for the years 2001 through 2013.

[95] E-mail from Thomas Pinner to author (July 31, 2015, 5:02 p.m., CDT) (on file with author), supplemented by e-mail from Mr. Pinner to author (August 13, 2015, 4:48 p.m., CDT).

[96] S.D. Codified Laws § 34-23A-7 (1977).

guardian with forty-eight hours' written notice before proceeding with an abortion.[97] Notice is not required, however, "if . . . [t]he attending physician certifies in the pregnant unemancipated minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time to provide the required notice."[98] In 1980, the State enacted an informed consent statute.[99] The informed consent requirement applies

> unless the physician determines that obtaining an informed consent is impossible due to a medical emergency and further determines that delaying in performing the procedure until an informed consent can be obtained from the pregnant woman or her next of kin . . . is impossible due to the medical emergency, which determinations shall then be documented in the medical records of the patient.[100]

Finally, South Dakota enacted a seventy-two hour waiting period in 2011.[101] The waiting period does not apply when a medical emergency prevents compliance therewith.[102]

For purposes of all three statutes, a "medical emergency" is defined as

> any condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[103]

South Dakota began requiring physicians to report to the Department of Health circumstances in which a medical emergency excused compliance with the parental notice and informed consent statutes in 1998,[104] the incidence of which, in turn, must be disclosed in the Department's annual public report.[105] Between 1998 and 2013, 12,091 abortions were performed in South Dakota,[106] of which nine were reported to have been performed without complying with the requirements of the informed consent statutes because of a medical emergency;[107] of the 811 abortions performed on minors (women < 18 years of age), no medical emergency abortions excusing compliance with

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[97] *Id.* § 34-23A-7 (2011). The notice requirement applies only to unemancipated minors. *Id.* (first sentence). An "emancipated minor" under South Dakota law is any person under the age of eight years who "(1) Has entered into a valid marriage, whether or not such marriage was terminated by dissolution; or (2) Is on active duty with the armed forces of the United States of America; or (3) Has received a declaration of emancipation pursuant to § 25-5-26 [a statute authorizing a judicial procedure for declaring a minor emancipated]." *Id.* § 25-5-24.

[98] *Id.* § 34-23A-7(1).

[99] *Id.* § 34-23A-10.1.

[100] *Id.* § 34-23A-10.1 (first paragraph).

[101] *Id.* § 34-23A-56.

[102] *Id.* (first paragraph).

[103] *Id.* § 34-23A-1(5).

[104] *Id.* §§ 34-23A-37, 34-23A-39.

[105] *Id.* § 34-23A-36.

[106] E-mail from Thomas E. Martinec, Deputy Secretary, South Dakota Department of Health, to author (July 28, 2015, 4:55 p.m., CDT) (on file with author).

[107] E-mail from Thomas Martinec to author (July 28, 2015, 10:24 a.m., CDT) (on file with author).

the parental notice statute were reported.[108] In other words, during this sixteen-year period, a medical emergency was reported, on average, every twenty-one months, or one emergency for every 1,343 abortions.

Texas

Texas enacted a parental notice statute in 1999 that took effect on January 1, 2000.[109] Under the statute, a physician must provide one of the minor's parents, her managing conservator or guardian or her court-appointed managing conservator or guardian forty-eight hours actual or constructive notice before proceeding with an abortion.[110] Under the law in effect until January 1, 2016, compliance with the statute was not required when

> the physician performing the abortion: (A) concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function; and (B) certifies in writing to the Texas Department of Health [now the Texas Department of State Health Services] and in the patient's medical records the medical indications supporting the physician's judgment that the circumstances described in Paragraph A exist.[111]

In 2005, the State added a parental consent requirement to the parental notice requirement,[112] which included the same medical emergency exception.[113] Effective January 1, 2016, Texas changed the medical emergency exception to the consent and notice statutes to conform to the definition in the Woman's Right to Know Act.[114] A "medical emergency" under that definition means "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[115] In the case of a medical emergency, the physician must "certif[y] in writing to the Department of State Health

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[108] E-mail from Thomas Martinec to author (July 31, 2015, 1:50 p.m., CDT) (on file with author).

[109] S.B. No. 30, 76th Reg. Sess., §§ 1, *codified as* Tex. Fam. Code § 33.001 *et seq*., 4 (effective date).

[110] *Id*. § 33.002. The notice requirement applies only to unemancipated minors. *Id*. § 33.002(a). *See also, id*. § 33.001(2) (definition of abortion). An "unemancipated minor" is defined as "a minor who (A) is unmarried; and (B) has not had the disabilities of minority removed under Chapter 31 [a statute authorizing a judicial procedure for declaring a minor emancipated]." *Id*. § 33.001(5).

[111] *Id*. § 33.002(a)(4).

[112] S.B. No. 419, 79th Reg. Sess., pp. 38-39, adding ¶ (19) to Tex. Occ. Code § 1.42(a), effective Sep. 1, 2005.

[113] *Id*. The medical emergency exception under the parental consent statute clarified that the exception applies only when "there is insufficient time to obtain the consent of the minor's parent, managing conservator, or legal guardian." Tex. Occ. Code § 1.42(a)(19).

[114] H.B. No. 3994, 84th Reg. Sess., §§ 2 (adding ¶ (3-a) to Tex. Fam. Code § 33.001), 13 (amending Tex. Occ. Code § 1.42(a)(19)), cross-referencing Tex. Health & Safety Code § 171.002.

[115] Tex. Health & Safety Code § 171.002(3).

Services [DSHS] and in the patient's medical record the medical indications supporting the physician's judgment that a medical emergency exists . . . ."[116]

Between 2000 and 2014, a period of fifteen years, a total of 45,465 abortions were performed on minors (women < 18 years of age) in Texas.[117] In none of these cases was the parental notice and/or consent requirement excused because of a reported medical emergency.[118] And between 2012 (the first full year for which data is available) and 2014, thirty-four abortions were reported to have been performed without compliance with the Woman's Right to Know Act (including the twenty-four hour waiting period) because of a medical emergency,[119] out of 186,400 abortions.[120] In other words, there was, on average, slightly less than one medical emergency reported every month, or one emergency for every 5,482 abortions (less than two-hundredths of one percent) performed monthly in Texas under the Act.

West Virginia

West Virginia enacted a detailed informed consent statute known as the "Women's Right to Know Act" in 2003.[121] The Act imposes detailed informed consent requirements and a twenty-four hour waiting period before an abortion may be performed.[122] Compliance with the Act, including the waiting period, is excused "in the case of a medical emergency."[123] A "medical emergency" is defined as

> any condition which, on the basis of a physician's good-faith clinical judgment, so complicates the medical condition of a pregnant female as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[124]

Under the Act, physicians must report to the Department of Health and Human Resources "[t]he number of abortions performed in cases involving [a] medical emergency,"[125] and the Department, in turn, is required to issue an annual "public report

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[116] Tex. Fam. Code § 33.002(a)(3)(B).

[117] E-mail from Jeff Swanson, Ph.D., Research Specialist, Texas Department of State Health Services (DSHS), Center for Health Statistics, Data Management, to author (August 14, 2015, 3:11 p.m., CDT) (on file with author), supplemented by e-mail from Rachael B. Hendrickson, DSHS, Center for Policy and External Affairs, to Ashley Westenhover, Chief of Staff, State Representative Phil King (Rep. 61st Dist.) (August 25, 2015, 1:40 p.m., CDT) (on file with author) (2014 data is provisional and subject to revision).

[118] E-mail from Ms. Hendrickson to Ms. Westenhover (August 17, 2015, 3:53 p.m., CDT) (on file with author), supplemented by e-mail from Ms. Hendrickson to Ms. Westenhover (August 24, 2015, 10:39 a.m., CDT) (on file with author).

[119] E-mail from Ms. Hendrickson to Ms. Westenhover (August 17, 2015, 3:53 p.m., CDT) (on file with author).

[120] 2012 Texas Vital Statistics, Table 33, 2013 Texas Vital Statistics, Table 33, supplemented by e-mail from from Ms. Hendrickson to Ms. Westenhover (August 24, 2015, 10:39 a.m., CDT) (on file with author) (reporting provisional data for 2014).

[121] W. Va. Acts 2002, ch. 252, eff. May 25, 2003, *codified as* W.Va. Code § 16-2I-1 *et seq.* (2006).

[122] *Id.* § 16-2I-2.

[123] *Id.* (second sentence).

[124] *Id.* § 16-2I-1(c).

[125] *Id.* § 16-2I-7(a)(4).

providing statistics for the previous calendar year from all of the reports covering that year submitted in accordance with [§ 16-21-7(a)], for each of the items listed in subsection (a)," including the number of medical emergency abortions.[126]

Between 2004 and 2012, the most recent year for which data is available, 16,981 abortions were performed in West Virginia, of which thirty-five were reported to have been performed without compliance with the informed consent requirements (including the twenty-four waiting period) because of a medical emergency.[127] In other words, during this nine-year period, there was, on average, slightly less than four medical emergencies per year, or one emergency for every 485 abortions (approximately one-fifth of one percent).

Wisconsin

Wisconsin enacted its parental consent statute in 1991.[128] Consent of one of the minor's parent, her legal custodian, an adult family member or, in certain circumstances, one of her foster parents is not required "if the person who intends to perform or induce the abortion is a physician" and the physician believes, "to the best of his or her medical judgment based on the facts of the case before him or her, that a medical emergency exists that complicates the pregnancy so as to require an immediate abortion."[129] Medical emergency abortions must be reported to the Department of Health.[130]

Since 1998, Wisconsin has required physicians performing abortions to indicate the reason for which parental consent was not obtained in any given case. Between 1998 and 2013, the most recent year for which data is available, 9,333 abortions were performed on minors (women < 18 years of age),[131] of which two were reported to have been performed without parental consent because of a medical emergency.[132] In other words, during this sixteen-year period, there was, on average, one medical emergency abortion every eight years, or one emergency for every 4,666 abortions performed on minors.

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[126] *Id.* § 16-2I-7(e).

[127] West Virginia Women's Right to Know Act, Annual Report 2012, West Virginia Abortion Data, 2004-2012 (July 2013), West Virginia Department of Health and Human Resources, Bureau for Public Health, Office of Maternal, Child & Family Health.

[128] Wis. Stat. Ann. § 48.375 (West 2003). The consent requirement does not apply to emancipated minors. *Id.* § 48.375(4)(a). An "emancipated minor" is defined as "a minor who is or has been married; a minor who has previously given birth; or a minor who has been freed from the care, custody and control of her parents, with little likelihood of returning to [their] care, custody and control prior to marriage or prior to reaching the age of majority." *Id.* § 48.375(2)(e).

[129] *Id.* § 48.375(4)(b)(1).

[130] *Id.* § 69.186(1)(j).

[131] Reported Induced Abortions in Wisconsin 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006. 2007, 2008, 2009, 2010, 2011, 2012, 2013, Wisconsin Department of Health and Family Services, Division of Health Care Financing, Bureau of Health Information. The data for the total number of abortions performed on minors in Wisconsin in a given year may be found in Table 4, Part A, of each report.

[132] *Id.* The data for the numbers of medical emergencies that excused compliance with the parental consent statute may be found in Table 4, Part C(1) of each report.

Conclusion

As the foregoing discussion indicates, there is no statistical evidence that reported medical emergencies have been used to evade the requirements of state statutes mandating parental consent or notice, informed consent or a waiting period. Not a single medical emergency abortion has been reported under the parental notice or consent statutes in Kansas, Nebraska, Oklahoma, South Carolina, South Dakota and Texas, or the informed consent statute in Arkansas, out of hundreds or even thousands of abortions performed in these States over the course of several years. In addition, there has been only one reported medical emergency for every 1,300 abortions performed under South Dakota's informed consent statute, one for every 2,000 abortions performed under Alabama's parental consent statute, one for every 2,700 abortions performed under Nebraska's informed consent statute, one for every 4,000 abortions performed under Georgia's parental notice statute, and one for every 4,600 abortions performed under Wisconsin's parental consent statute, and one for every 5,400 abortions performed under Texas' informed consent statute.[133] Only three States – Idaho (parental consent), Oklahoma (informed consent) and West Virginia (parental consent) – have reported more than one medical emergency abortion for every 1,000 abortions and even in the State with the highest ratio of emergencies to procedures – Oklahoma (one medical emergency, on average, for every 297 abortions) – such emergencies accounted for less than one-third of one percent of all abortions. The data from Texas is particularly striking because Texas is the second most populous State in the country. In a fifteen-year period, there was not a single medical emergency reported out of more than 45,000 abortions performed on minors, and only thirty-four out of 186,400 abortions performed on adults.

Nor is there any evidence that the use of a subjective standard for determining whether a medical emergency exists (either "good faith" or "best clinical judgment") has resulted in any more medical emergencies being reported than an objective standard ("reasonable medical judgment"). Indeed, the ratio of reported medical emergencies to procedures was higher in Oklahoma (one emergency for every 297 abortions), one of the few States to use an objective standard, than in any State using a subjective standard.[134] Moreover, the State with the most open-ended medical emergency exception (Alabama)[135] reported only thirteen emergencies excusing compliance with the parental consent law out of more than 26,000 abortions performed over twenty-six years, the longest period of time for which medical emergency data is available from any State.

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[133] Obviously, except in the extremely rare circumstances where a person is unable to provide consent (*e.g.*, because she is unconscious), no medical or surgical procedure may be performed on anyone without her consent after being informed of the relative risks and benefits of the proposed procedure. Although the medical emergency exceptions discussed in this article would certainly encompass such circumstances, they would also apply to those circumstances in which an emergency precluded compliance with the typically far more detailed requirements of an informed consent statute (*e.g.*, a requirement that the physician or his agent provide the patient with a description of fetal development) or a waiting period.

[134] The next highest ratio was found in West Virginia, one medical emergency for every 485 abortions.

[135] See text accompanying n. 26 for text of emergency exception.

And, as noted above, Texas, another State with a subjective standard (prior to January 1, 2016), reported *no* medical emergencies under its parental notice and consent statutes out of more than 45,000 abortions performed on minors over a fifteen year period (2000-2014).

The statistical data set forth in this article has certain limitations. First, the data is available only from those States which have enacted medical emergency exceptions to their abortion regulations, require physicians to report such emergencies and make such statistics available to the public on-line or upon request. States that have emergency exceptions in their abortion regulations, but which do not require them to be reported or make such reports available to the public are not included. Second, the data includes only what has been reported to the state department of health. Physicians who fail to comply with the reporting law are not included.

Notwithstanding these limitations, a review of the statistical data supports two conclusions. First, physicians who perform abortions and have complied with state reporting requirements have not relied upon the medical emergency exceptions in state abortion statutes to evade the requirements of those statutes. Second, the use of an objective standard for evaluating medical emergencies ("reasonable medical judgment") has not been associated with fewer reported emergencies (per number of abortions performed) than the use of a subjective standard ("good faith clinical judgment"). Both of these conclusions may be relevant in drafting other abortion statutes including, where constitutional, prohibitions (*e.g.*, of post-viability abortions). Carefully drafted medical emergency exceptions are not likely to be abused and a subjective standard for evaluating such emergencies is easier to defend (at least with respect to statutes that impose criminal penalties) when challenged on constitutional grounds than an objective standard.
Finally, every State that has enacted (or may consider enacting) a statute regulating abortion for which a medical emergency exception is constitutionally mandated should include, among other requirements, the following: First, the physician must include in the patient's medical record a careful description of the circumstances on the basis of which he determined that an emergency existed that excused compliance with the statute. Second, the physician must report the emergency to the state department of health. Third, the department of health must make available to the public statistical data on the incidence of such emergencies. As the data set forth in this article indicates, where such requirements have been imposed, very few medical emergencies have been reported.