

JURISPRUDENCE

The Real Reason Why the GOP Is Rushing to Pass Abortion Bans Without Exceptions for Rape

BY MARK JOSEPH STERN

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A pro-choice protest. [Lorie Shaull/Flickr](#)

The Supreme Court's June 24 decision overruling *Roe v. Wade* unleashed an immediate and relentless flood of cruelty against pregnant Americans. Child victims of rape and

incest, including a 10-year-old girl in Ohio, must cross state lines to obtain abortions. Patients undergoing a miscarriage are compelled to bleed out for days and risk sepsis before doctors are willing to terminate their pregnancies. Those with ectopic pregnancies, which are lethal and non-viable, are denied treatment due to the presence of a fetal “heartbeat.” Women suspected of being pregnant are denied vital treatment for autoimmune disorders because they happen to induce abortion, too.

In the face of these horror stories, the anti-abortion movement has doubled down. Jim Bopp, general counsel for the National Right to Life, said that the 10-year-old girl rape victim Ohio should have been forced to carry her rapist’s fetus, telling Politico: “She would have had the baby, and as many women who have had babies as a result of rape, we would hope that she would understand the reason and ultimately the benefit of having the child.” Other anti-abortion groups condemned the girl’s abortion as “violence perpetuated against her.” And John Seago, the president of Texas Right to Life, acknowledged that abortion bans may cause doctors to delay care for miscarriage patients until complications arise.

These organizations are defending a legal regime that they helped to craft. Most post-*Roe* abortion bans contain no exception for rape or incest, and only an extremely vague, narrow exception to protect the life of the mother. These laws are crafted to outlaw abortion in all but the most dire circumstances, when the patient is actively dying because of pregnancy—and even then, the bans are so ambiguous that doctors fear liability if they terminate. On Monday, I spoke about this new generation of stringent laws with Mary Ziegler, a professor at the University of California, Davis School of Law and a preeminent expert on the history of abortion in the United States. Our conversation has been edited for clarity.

Mark Joseph Stern: What’s the origin of exceptions for rape and incest?

Mary Ziegler: In the ’60s, the American Law Institute came out with this law that’s supposed to be a model for states that want to make modest changes to their abortion bans. It includes a rape and incest exception. The model legislation is perceived as a compromise and a lot of Republicans support it. But the anti-abortion movement hates it—and hates the rape and incest exceptions in particular.

When these reforms came about, the anti-abortion movement was primarily Catholic, small, and under-funded. It had been talking about abortion in the same breath as contraception. That was not helpful. Americans were not interested in a movement to fight contraception. People who were non-Catholics or non-believers didn't want to support a sectarian movement. The anti-abortion movement needed some explanation why abortion bans should exist, and why these reforms—which weren't radical—were bad. The argument that really stuck was about personhood. The anti-abortion movement argued that the word "person" in the 14th Amendment applied before birth, so abortion was an unconstitutional denial of rights. That was the way they could oppose the rape exception. Because if you can't kill an adult or teenager or five-year-old because they were conceived in rape, then you can't terminate a pregnancy, either. It becomes their go-to argument.

Some anti-abortion advocates asserted that abortion bans protect rape victims. After a 10-year-old rape victim crossed state lines to terminate her pregnancy, Ohio Right to Life claimed that the abortion "only added to the pain and violence perpetuated against her." Students for Life of America said "the violence of rape will not be cured by the violence of abortion." Is this reasoning familiar to you?

That's relatively new. The movement started focusing on the idea that abortion hurt women more in the '90s. Early on, in the '60s, there was lots of other victim-blaming. Lots of anti-abortion thinkers would say: *Well, women are going to just cry rape. Women are going to have consensual sex, get pregnant, and invoke a rape exception.* Henry Hyde [author of the amendment limiting federal funding of abortion] famously complained that if women claim rape, no other accountability is asked of them. They don't have to prove it. So there is a distrust of women that runs through a lot of this. And also a sense that if there's a contrast between a fetus and a woman as to who's more innocent and more deserving, it's always going to be the fetus.

Then there was this conviction, based on an argument going back to the 19th century, that people couldn't get pregnant unless the sex was consensual. They would say that was true even of incest. So as soon as the new anti-abortion movement exists, there's very strong opposition to rape and incest exceptions. Support for these exceptions was a strategic development that came later.

What led the movement—or at least some parts of it—to make concessions for rape and incest?

From the very beginning of polling, rape and incest exceptions have been very popular. By the mid-70s, the anti-abortion movement was being run by self-proclaimed incrementalists who were deeply pragmatic. Opposing rape and incest exceptions would alienate voters, the GOP, and the Supreme Court. Rape fell into what the movement called the “hard cases” where support for abortion access ran particularly high. There was an argument within the movement that unless you really need to, you don’t address the hard cases.

The GOP did the same thing. By the time it shakes out that the GOP is the anti-abortion party—which was not fully clear until 1980—you still have Republican politicians saying they’re for the rape and incest exception. That continues from Ronald Reagan through Donald Trump. If you ask Republican politicians whether they support a nationwide ban, the answer is always yes, but with a rape exception. That’s only started to change recently.

When did these exceptions start to fall out of favor among Republican lawmakers?

After Brett Kavanaugh was confirmed to the Supreme Court in 2018, you see this explosion of laws without rape or incest exceptions. At the time, this felt quite sudden to a lot of people. This generation of laws—the so-called “heartbeat bills”—ban abortion at six weeks, and most did not have rape or incest exceptions. I think that’s a direct response to the changing of the Supreme Court. Previously, Republican legislators had a sense that pushing too hard on unpopular things like abolishing rape or incest exceptions could make it harder to reverse *Roe*. But they read Kavanaugh’s confirmation as a sign that *Roe* would go anyway. There was no more need to soft-soap their position on things like rape, and the Supreme Court was down for anything—there was no need to worry about them anymore.

It can feel like the GOP has taken the same hardline stance against reproductive rights for decades. But you’re saying their position has grown more extreme over the last years.

The GOP did change. It became much more beholden to the anti-abortion movement and much less concerned about competition because of a combination of political polarization, gerrymandering, limits on access to the vote. These are essentially one-party states. Republican politicians aren't worried these positions will be unpopular with voters because voters wouldn't elect Democrats anyway.

In other words, democratic backsliding has allowed anti-abortion advocates to stop hiding the ball.

They think that in about half the country, maybe more, they can just say whatever they want and nothing will happen. Even if voters don't like it, they won't actually do anything about it. The Supreme Court will either ignore it or reward it. If you have always believed this, and there are no negative consequences to asking for what you want, then that's what you do.

As a result, what used to be considered fringe views are suddenly mainstream.

When the 10-year-old child in Ohio was raped and forced across state lines, the person we saw defending the idea that she should carry pregnancy to term was Jim Bopp. He had previously been the leading figure of the cautious, pragmatic wing of the movement. He had flown down to Ohio to testify *against* a heartbeat bill. These are the pragmatists. This is not the fringe of the movement at all.

Let's turn to abortion bans that contain extremely vague and narrow exceptions for the life of the mother. Already, women experiencing a miscarriage or ectopic pregnancy have been denied care as a result, resulting in horrific pain and suffering. Do you think this denial of care is one of the purposes of these laws or an unintended consequence?

I think it's one of the purposes, but it'll have unintended consequences. The more of a push there is to shut down access to anything that could be designated an abortion, the more likely it is that pregnant people who are not even seeking abortions are going to die. We know, from examples like Ireland, that when that happens, it can mobilize a lot of people who are not as interested in the abortion issue. If anti-abortion groups

were being politically savvy, they would write much more capacious, much clearer emergency exceptions. Even if they did that, a lot of doctors wouldn't perform an abortion anyway, but the groups would have more plausible deniability and less of a backlash.

My sense is that many anti-abortion advocates believe it is worth risking the death of the patient by providing extremely narrow health exemptions in order to spare a maximum number of fetuses from termination. Do you think that's fair?

I think that's fair. There has been a growing push to get rid of life-saving exceptions. In the worldview most folks in the anti-abortion movement have, abortion is murder. It's worse not only in the sense that it's certain death, but that it's intentional. From their standpoint, if some women die because they're refused care, that isn't a certain death, there isn't intentionally going to be a death, so that's the lesser of the evils in that situation.

Do you think they'll stick with that position even as we are overwhelmed with

stories of women brought to the brink of death because they're denied care for miscarriages and ectopic pregnancies?

I haven't seen any sign that they're going to change. From their own standpoint, they probably should. I don't think this will do them any favors unless the democracy is so broken that nothing matters any more. If anything, what you see is a doubling down. The Idaho GOP's platform came out opposing exceptions for the life of the pregnant person *after* these stories. If anything, the movement seems to be moving in the opposite direction. 📌

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