

Legally Recognizing Reproductive Coercion while Questioning Sexual Violence Exceptionalism

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Abstract: While sexual violence should not be the prerequisite for legal abortion, expanding definitions of abuse to include reproductive coercion can open avenues of access to abortion following the *Dobbs* decision. Understanding the increased danger and compounding challenges of intimate partner violence can inform legislative initiatives, healthcare responses, and movements for reproductive justice.

In a recent domestic violence restraining order case, my client testified about enduring years of forced sex by her boyfriend and his refusal to use condoms even after they agreed on this birth control. The judge interrupted and she asked, “Are you talking about rape?” My client haltingly responded, “I guess so, but it happened so often.”

Defining sexual violence has new significance after the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,¹ and states are facing an outcry over abortion bans that fail to include rape exceptions.² While sexual violence should not be the prerequisite for legal abortion, exploring definitional and co-occurring complexities may open avenues to expand access to abortion. Low-income abuse survivors of color facing structural barriers to abortion care are mostly likely to be harmed by the *Dobbs* decision, and understanding the increased danger and compounding challenges of intimate partner violence (“IPV”) can inform legislative initiatives, healthcare responses, and movements for reproductive justice.

This article proceeds as follows. Part I.A. explains that sexual abuse is commonly committed within broader IPV dynamics. Part I.B. defines reproductive coercion as a prevalent and harmful form of abuse. Part II.A. evaluates emerging abortion bans, some containing rape exceptions, which wrongly presume that rape is easy to name and define, and Part II.B. explains the near impossibility of utilizing rape exceptions. Reproductive justice requires examination of intersecting systemic forms of oppression and how institutions, such as carceral systems, can affect repro-

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ductive health, and Part III suggests enacting laws to recognize reproductive abuse and coercion. Reproductive coercion can be included in definitions of domestic violence to (1) provide a way of naming and recognizing the harm, and (2) create new avenues for remedies, including expanding legal access to abortion in states otherwise limiting such healthcare.

I. Sexual Violence as Intimate Partner Violence

A. Sexual Assault

Societal fears and conceptions of rape typically concern stranger rape, not the more common occurrence of sexual violence perpetrated by an intimate partner.³ Rape laws respond to stranger violence, not IPV — which encompasses physical and sexual violence, psychological abuse, coercive control, economic abuse,

women are at heightened risk of homicide.¹² One-quarter of abuse survivors report that their partners have forced them to become pregnant,¹³ and research shows IPV escalates during pregnancy.¹⁴

The Supreme Court in *Planned Parenthood v. Casey*, with Justice O'Connor writing for the majority, understood that IPV affects reproductive autonomy and decisions about pregnancy outcomes.¹⁵ The Court deemed Pennsylvania's spousal notification provision an unconstitutional undue burden, despite the provision having exceptions. Relying on empirical evidence about IPV, the Court found that spousal notification requirements expose married women to abuse, control, and economic duress, and held that statutory exceptions are insufficient protection.¹⁶

Understandably, a common reason for seeking an abortion is the desire to not be tethered to an abusive

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stalking, and harassment, and is often recurring, complex, and increasingly severe over time.⁴ Overall, one in three women in the United States experiences IPV, with higher rates among low-income women of color and LGBTQ people.⁵

Criminalizing rape originated as property laws protecting a father's ownership of his daughter's virginity,⁶ and courts granted parental immunity to fathers who raped their daughters.⁷ Rape laws also did not punish men who raped their wives because consent was presumed to be given through matrimony⁸; under coverture, wives were viewed as their husbands' property, making it conceptually impossible for a man to rape his wife.⁹ Only in 1993 was marital rape explicitly criminalized in America, and vestiges of the marital rape exemption remain today.¹⁰

Nevertheless, abuse survivors often experience sexual assault and reproductive control leading to unintended pregnancy and impeding access to abortion. Regarding the prevalence of co-occurring abuse, over two-thirds of women in physically abusive relationships also experience sexual violence,¹¹ and those

partner.¹⁷ People who seek abortions are nearly three times more likely to have been victimized by an intimate partner in the past year compared to those continuing pregnancies.¹⁸ Furthermore, women seeking a subsequent abortion are more than 2.5 times as likely as those seeking a first abortion to report histories of physical or sexual violence by male partners.¹⁹ Consistent with *Casey*, recent studies confirm that IPV causes delays in seeking abortion services, which then extends periods of abuse due to pregnancy and compounds other obstacles to abortion access.²⁰ Research also shows that abortion access reduces IPV, including findings from the Turnaway Study that women who had an abortion reported a reduction in physical violence in contrast with those who were unable to obtain an abortion.²¹

B. Reproductive Coercion

Calls to include rape exceptions in abortion bans rely on legal definitions of rape, which typically require sexual intercourse “compelled by force or imminent threat of force.”²² Similarly, legal definitions of IPV

may narrowly focus on physical and sexual assault. For example, a civil protection order — a non-punitive remedy to intervene in, treat, and prevent future abuse — in the District of Columbia requires the petitioner to prove an intimate partner committed “a criminal offense” against themselves or a family or household member.²³ In contrast, public health and psychology-based definitions of abuse include a range of controlling behaviors beyond what is criminalized, and reproductive coercion is recognized in medical and social science literature.²⁴

Reproductive coercion is distinct from what many people — including judges — consider to be sexual assault yet is a central part of many survivors’ experiences of abuse. Reproductive coercion can be defined as the exertion of control over another person’s reproductive health decisions and contraceptive use or access by someone who is, was, or wishes to be involved in an intimate relationship; it can occur in a single instance or a larger pattern of abusive behavior.²⁵

“Birth control sabotage,” one form of reproductive coercion, includes preventing a partner from using contraception or efforts to sabotage their contraception use.²⁶ Examples include inducing or manipulating a partner into having sex without contraception;²⁷ hiding, withholding, or destroying a partner’s contraceptives; not withdrawing despite agreeing to; removing a condom, vaginal ring, contraceptive patch, intrauterine device, or other contraception without a partner’s consent; or withholding money to prevent the purchase birth control.²⁸

“Pregnancy coercion” is a form of psychological reproductive coercion that may include threatening to leave or hurt a partner if they do not agree to become pregnant; threatening to leave or hurt a partner who becomes pregnant; forcing a partner to carry a pregnancy to term against their wishes through manipulation, threats, or violence; forcing a partner to terminate a pregnancy against their wishes; or intentionally injuring a partner to cause miscarriage.²⁹

Research shows especially high rates of reproductive coercion against teenagers and young women.³⁰ For example, in a 2019 study of sexually active high school females, approximately one in eight had experienced reproductive coercion in the past three months.³¹ Reproductive coercion has a wide array of consequences. Besides unintended pregnancy,³² reproductive coercion and lack of access to abortion care often result in post-traumatic stress disorder, which can lead to depression, substance abuse, anxiety disorders, and suicide.³³ In severe cases, reproductive coercion can result in intimate partner homicide,

with homicide being a leading cause of pregnancy-associated mortality in the United States.³⁴

II. Rape Exceptions to Abortion Bans

A. Increasing Prevalence of Abortion Bans with or without Rape Exceptions

The post-*Roe* state-by-state statutory landscape is in flux. Immediately following *Dobbs*, states that passed laws banning abortion were critiqued for failing to provide exceptions for rape, including Alabama, Arkansas, Kentucky, Louisiana, Missouri, South Dakota, Tennessee, and Texas.³⁵ Other states imposed bans at set gestational times without allowing rape exceptions.³⁶

New state laws that permit rape exceptions include hurdles, like Utah, typically requiring that the victimized individual report the sexual violence to law enforcement and that the physician overseeing or performing the abortion verify that the assault resulting in pregnancy was reported.³⁷ Similarly, abortion is illegal in Florida, Georgia, and Mississippi, with rape exceptions only when “a formal charge of rape [has] been filed” with law enforcement.³⁸

To utilize a rape exception, states including Idaho³⁹ and West Virginia⁴⁰ require that the patient provide the performing physician with the complete police report or child abuse and neglect investigative report (for incest) before an abortion can be performed. Because law enforcement will not release reports during an ongoing investigation, abortion is delayed and unavailable while waiting awaiting the report.⁴¹ West Virginia also only permits rape exceptions within the first eight weeks of pregnancy, or during the first fourteen weeks for a minor and requires parental notification, furthering the virtual impossibility of accessing abortion care.

B. Insufficiency of Rape Exceptions

Pre-*Dobbs*, abuse survivors experienced significant barriers to timely and safely accessing abortion.⁴² Post-*Dobbs*, restrictions on abortion cause abused individuals to be more vulnerable to control, and rape exceptions give the false impression that rape is easy to define. Instead, rape is difficult for many survivors to label, IPV survivors rarely desire carceral responses, and rape exceptions are challenging to exercise.

Against the backdrop of historic reluctance to legally recognize marital rape, cultural invalidation of intimate-partner rape persists. Rape by an intimate partner is largely treated with skepticism and disbelief,⁴³ which discourages survivors from labeling their victimization as rape.⁴⁴ Research shows that over half of all rapes are “unacknowledged and thus not labeled

by the victim as ‘rape,’” who instead dismiss their experience as a miscommunication.⁴⁵

The closer a survivor’s relationship is to the person who committed rape, the less likely they are to label the assault as “rape.” An abuse survivor who knew the assailant well or felt an emotional connection to or had previous consensual sexual relations with the abusive person is substantially less likely to use the label “rape” compared to identical actions by a stranger or new acquaintance.⁴⁶ Lawyers will receive very different answers to the questions “Were you raped?” and “Was there ever a time you had sex because you were afraid of what would happen if you didn’t?” Research also shows that both the general public and abuse survivors often believe that sexual behavior within a relationship is a “private matter,” rather than “real rape.”⁴⁷

Someone who does not define their experience as rape is unlikely to report sexual violence to police,⁴⁸ as required by rape exceptions to new abortion bans. Intimate partners are understandably often reluctant to label a significant other as a “criminal” or “rapist,” even when acknowledging to themselves that they were raped,⁴⁹ or to desire a carceral response to abuse. In total, three out of four sexual assaults are never reported to law enforcement.⁵⁰ Also, survivors are often criminalized in the process of seeking help, police involvement increases risk of violence for survivors of color, and many survivors desire medical care without police.⁵¹

Even when abuse survivors report marital or intimate-partner rape, police officers often discourage filing a complaint or seeking to collect medical evidence, and religious advisers and domestic violence agency staff may fail to treat the experience as legitimate rape, invalidating a survivor’s experience and ability to address corresponding trauma.⁵² Rape exceptions requiring police reporting create the illusion of options but will not be exercised by most abuse survivors.

III. Reproductive Coercion Legislation

During a legislative debate in 1979, California State Senator Bob Wilson exclaimed, “If you can’t rape your wife, who can you rape?”⁵³ Forty years later, California removed the distinction between marital and non-marital rape in a bill that eradicated the spousal rape exemption and equalized punishments for rape.⁵⁴ Soon thereafter, California became the first state to legally recognize reproductive coercion through California Senate Bill 374 (Min).⁵⁵

During 2021, the University of California, Irvine School of Law Domestic Violence Clinic that I direct sponsored legislation on behalf of clients, including the client identified in the Introduction, to make

reproductive coercion part of the civil definition of domestic abuse in California. Reproductive coercion is a new basis for a civil protection order and is defined to consist of “control over the reproductive autonomy of another through force, threat of force, or intimidation, and may include, but is not limited to, unreasonably pressuring the other party to become pregnant, deliberately interfering with contraception use or access to reproductive health information, or using coercive tactics to control, or attempt to control, pregnancy outcomes.”⁵⁶ Legally defining reproductive coercion enables survivors to name their experiences of abuse, allows judges to validate and address the unique and prevalent harm of reproductive coercion, and creates pathways for non-carceral remedies for survivors’ health and safety needs to address a broader expanse of sexual violence and reproductive harm than heretofore legislated.

Legal recognition of reproductive coercion has the potential to expand access to abortion in states now restricting or banning abortion without being “abortion law.” While the post-*Dobbs* development of abortion access should not be limited to exceptions for sexual violence, civil definitions of abuse and legal protections can provide means to advocate for states to expand categories of exceptions for legal access to healthcare in states otherwise hostile to abortion. Reproductive justice can only be achieved once the needs of low-income survivors of color facing structural barriers to abortion care are prioritized, which includes legislating and providing healthcare informed by co-occurring abuse and compounded challenges of IPV.

Note

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