ABORTION AND THE LAW OF INNOCENCE

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As states pass increasingly strict abortion laws in a bid to reverse Roe v. Wade*, abortion opponents have suddenly abandoned exceptions for cases of rape and incest. Developing the first legal history of rape and incest exceptions, this Article argues that these exceptions open a window into issues of guilt and innocence that define the constitutional jurisprudence of abortion.*

In recognizing a right to abortion, the Court portrayed women as victims—of the physical burdens of pregnancy and societal forces governing parenthood. But as the history of the rape and incest debate shows, the rhetoric of guilt and innocence is central to the case to overturn Roe*. Seeking to dismantle abortion rights, pro-life forces have proposed a hierarchy of innocence. This hierarchy describes guilt as inherently relative, not an absolute but a matter of degrees and comparison. In this hierarchy, fetal life is supremely innocent, regardless of the surrounding circumstances both because an unborn child lacks agency (and therefore responsibility for any decision) and because that child has not yet made any choices, good or bad, for which to be held accountable.*

As the history of the rape and incest exception reveals, ideas of guilt and innocence have already destabilized protection for abortion. To shore up constitutional protection, supporters of abortion rights have to portray women in a different light—as trustworthy and autonomous rather than vulnerable to forces beyond their control.

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I. INTRODUCTION

As states pass increasingly strict abortion laws in a bid to reverse *Roe v. Wade*, abortion opponents have suddenly abandoned exceptions for cases of rape and incest.[1] Alabama's abortion ban did not include an exception for rape and incest.[2] Neither did many of the six-week bans introduced in other states.[3] The move has sparked considerable controversy.[4] At first, the uproar about the rape and incest exception seems puzzling. Although the actual number is likely much higher, only 1.5% of all women who have an abortion cite rape or incest as the reason for ending a pregnancy, and public support for the exception remains high.[5] Eliminating a rape and incest exception seems unlikely to affect many women or change the total number of abortions while triggering a potentially damaging political controversy.[6]

Developing the first legal history of the rape and incest exception, this Article argues that it opens a window into issues of guilt and innocence that define the constitutional jurisprudence of abortion. Those contesting the abortion wars, like the Supreme Court, primarily used the rhetoric of innocence in an ethical (speaking of moral culpability) rather than legal (guilt of a crime) way.[7] Nevertheless, the criminal meaning of innocence also loomed large, especially when

1. *See, e.g.*, K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html [https://perma.cc/S7VZ-G2ZK].

2. *See, e.g.*, Emily Wax-Thibodeaux, *In Alabama – Where Lawmakers Banned Abortion for Rape Victims–Rapists' Parental Rights Are Protected*, WASH. POST (June 9, 2019, 11:10 AM) https://www.washingtonpost.com/national/in-alabama--where-lawmakers-banned-abortion-for-rape-victims--rapists-parental-rights-are-protected/2019/06/09/6d2aa5de-831b-11e9-933d-7501070ee669_story.html [https://perma.cc/Z7SW-FLN6].

3. *See, e.g.*, Alia E. Dastagir, *Rape and Incest Account for Hardly Any Abortions. So Why Are They Now a Focus?* USA TODAY (May 24, 2019, 3:07 PM), https://www.usatoday.com/story/news/nation/2019/05/24/rape-and-incest-account-few-abortions-so-why-all-attention/1211175001/ [https://perma.cc/58ZC-YRM4].

4. *See, e.g.*, *id.*

5. *See, e.g.*, *NPR/PBS Newshour/Marist Poll Results*, MARISTPOLL (May 2019), http://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables-on-Abortion_1906051428_FINAL.pdf#page=3 [https://perma.cc/K22U-8GLE]; *see also* Dastagir, *supra* note 3.

6. *See, e.g.*, Dastagir, *supra* note 3.

7. *See* Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 741–46 (2017).

abortion foes argued that abortion providers—and perhaps women themselves—should be held criminally responsible.[8] From the beginning, debate about the rape and incest exception focused on sexual assault, teasing out ideas of victimhood that cast a long shadow over the Court's jurisprudence. In recognizing a right to abortion, the Court portrayed women as victims—of the physical burdens of pregnancy and societal forces governing parenthood.[9] These claims continue to play a central role in cases preserving or expanding abortion rights.[10]

But as the history of the rape and incest debate shows, the rhetoric of guilt and innocence is central to the case to overturn *Roe.* To be sure, pro-lifers have often framed women as victims of abortion; such claims stand at the center of efforts to pass onerous clinic regulations and eliminate third-party standing for providers challenging abortion laws.[11] But in seeking to dismantle abortion rights, pro-life forces have proposed a hierarchy of innocence. This hierarchy describes guilt as inherently relative, not an absolute but a matter of degree. In this hierarchy, fetal life is supremely innocent, regardless of the surrounding circumstances both because an unborn child lacks agency (and therefore responsibility for any decision) and because that child has not yet made any choices, good or bad, for which to be held accountable. Even when it seems to benefit women, the rhetoric of guilt and innocence naturally leads to comparisons between prospective victims, a point fully understood by opponents of abortion. And a hierarchy of innocence suggests that even if the Constitution recognizes multiple rights in the abortion context, there is a hierarchy of rights-holding individuals, with the most innocent deserving the most protection from the courts.

Ideas of guilt and innocence have already destabilized protection for abortion. The Court has scaled back on abortion rights by identifying alternative reasons for women's victimization, such as abortion providers[12] or poverty,[13] rather than the state. The Court has also changed abortion rights by questioning women's innocence or recognizing a still more innocent party.[14] To shore up constitutional protection, supporters of abortion rights have to portray women in a different light—as trustworthy and autonomous rather than vulnerable to forces beyond their control. And pro-choice groups should at least consider getting out of the innocence business. The risk of innocence rhetoric may simply be too great.

Part II focuses on the period between 1959 and 1973, ending with how concepts of guilt and innocence shaped the litigation of *Roe.* As this Part shows, early reform efforts focused on medical justifications for abortion, suggesting that the procedure was justified to protect women's lives or health. In 1959, when the American Law Institute ("ALI") proposed a model law, it included, among

8. *See id.*

9. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

10. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 857 (1992) (plurality opinion).

11. *See infra* Part III and accompanying text.

12. *See, e.g.*, *Casey*, 505 U.S. at 881–84; Gonzales v. Carhart, 550 U.S. 124, 157–59 (2007).

13. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 474–77 (1977); Harris v. McRae, 448 U.S. 297, 315–20 (1980).

14. *See, e.g.*, *Casey*, 505 U.S. at 846.

other things, exceptions for fetal abnormalities, rape, and incest.[15] Abortion foes almost immediately denounced the exception, explaining that women invoking it were not as innocent as they first appeared.[16] Some suggested that women falsely claimed to be victims of rape or incest.[17] Others insisted that as a matter of science, women could not easily or even possibly get pregnant as the result of sexual assault.[18] But as pro-choice groups began demanding the outright repeal of abortion restrictions, rape and incest exceptions took on a different role. Abortion opponents pointed to support for legal abortion in the so-called hard cases, including rape and incest, as proof that their opposition had embraced extremism over the views of the American mainstream.[19] *Roe* incorporated the rhetoric of innocence into its reasoning, presenting women as victims of biological and cultural forces outside of their control.[20]

Part III traces how ongoing debates about rape and incest shaped the rhetoric of innocence in the years between *Roe* and *Casey.* This Part traces the emerging political consensus in favor of rape and incest exceptions to outright abortion bans. This Part begins by exploring intense debates about rape and incest exceptions to the Hyde Amendment, a federal ban on abortion funding. Although Congress repeatedly voted against the exception in the funding context, pro-choice groups effectively wielded rape and incest as an argument against the opposition.[21] Pro-life Republicans generally embraced the exception, at least when it came to outright bans. Nevertheless, pro-life groups used rape and incest—at least in the funding context—to continue to craft a hierarchy of innocence and use that argument to change abortion jurisprudence. This approach shaped the Court's decisions in *Maher v. Roe*[22] and *Harris v. McRae*.[23] And arguments about innocence played a central role in the Court's decision in *Casey*—both insofar as the Court preserved abortion rights and insofar as the plurality expanded lawmakers' ability to restrict abortion.[24]

Part IV examines the changing rhetoric of guilt and innocence in the years between *Casey* and the present. As this Part shows, starting in the 1990s, pro-life groups increasingly tolerated the exception, viewing it as part of a necessary strategy to present women as victims of abortion rather than of abortion restrictions. Inherent in this idea was a hierarchy of innocence that described

15. *See Continuation of Discussion on the Model Penal Code*, 36 A.L.I. PROC. 243, 255 (1959).

16. John Francis, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 423 (1968).

17. *See, e.g.*, Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO L.J. 395, 398 (1961).

18. *See id.* at 399.

19. *See* Grace O. Dermody, *New Jersey Opinion; Why Thousands Will March to End Abortion*, N.Y. TIMES, Jan. 16, 1983 (§ 11), at 24.

20. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

21. *See, e.g.*, B. Drummond Ayres Jr., *House Votes to Curb Funds for Abortions*, N.Y. TIMES (June 14, 1978), https://www.nytimes.com/1978/06/14/archives/house-votes-to-curb-funds-for-abortions-representatives-challenge.html [https://perma.cc/P9FX-SALM].

22. *See* Maher v. Roe, 432 U.S. 464, 479–80 (1977).

23. *See* Harris v. McRae, 448 U.S. 297, 325–29 (1980).

24. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872–79 (1992).

women's freedom from blame as conditional on their regret of an earlier abortion. This hierarchy of innocence cast a shadow on the Court's decision in *Gonzales v. Carhart*.[25] Recently, after Brett Kavanaugh replaced Anthony Kennedy on the Supreme Court,[26] some absolutists abandoned the rape and incest exception, again using the rhetoric of innocence to describe a constitutional future beyond legal abortion. Amy Coney Barrett's confirmation has again prompted some absolutists to abandon rape and incest exceptions.[27]

Part V examines the implications of this history for efforts to protect abortion at both the state and federal levels. The rhetoric of innocence played a crucial role in decisions recognizing and expanding abortion rights, but concepts of innocence have always been slippery. This Part illuminates the traps set by innocence rhetoric and suggests ways of moving beyond it. Part VI briefly concludes.

II. FROM RAPE AND INCEST TO *ROE V. WADE*

As the fight over rape and incest exceptions makes clear, the rhetoric of innocence played a central role in the lead-up to and decision of *Roe*. In the early years of the abortion-reform movement, the doctors who sparked calls for reform focused on what they saw as the health benefits of certain abortions. This Part begins by tracing the rise of rape and incest exceptions proposed by the ALI in 1959. Although rape and incest could involve quite different issues, the ALI forever linked them. And although subsequent debate often focused on sexual assault rather than incest, discussion of the exception projected ideas of innocence onto each one. The ALI emphasized that rape victims were uniquely innocent—pregnant as a result of sexual activity to which they had never consented.[28] The ALI assumed that incest victims likewise had not consented to sex—and that others deserved access to abortion to prevent the births of children with congenital disabilities.[29] But the idea of innocence (one fundamentally linked to sexual consent) made the difference to the ALI in determining when women should and should not be able to have a legal abortion.[30] Women with other unplanned or unwanted pregnancies, by contrast, struck the ALI as too guilty to deserve ready access to abortion.[31] While the rape and incest exception won widespread acceptance and quickly became a part of the broader case for legalization, pro-lifers quickly cast doubt on the innocence of women who sought abortions under the

25. *See* Gonzales v. Carhart, 550 U.S. 124, 159–68 (2007).

26. Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/SN34-YQCS].

27. Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/8458-KLMT].

28. *Continuation of Discussion on the Model Penal Code*, *supra* note 15, at 255.

29. *Id.* at 256.

30. *Id.* at 279.

31. *Id.* at 257–59.

exception, portraying them as dishonest.[32] Abortion foes also picked up on older, inaccurate medical arguments that rape did not ever or often result in pregnancy.[33] For the most part, however, abortion foes suggested that the unborn child was even more innocent than genuine victims of sexual assault.

Ideas of supreme innocence forged in conflict about rape and incest exceptions spread even after the conflict moved beyond the ALI bill. Feminists borrowed from and transformed pro-lifers' arguments, suggesting that forced pregnancy punished women for their capacity to gestate and their willingness to be sexually active.[34] Pro-lifers responded that fetal innocence meant that there could be no constitutional right to abortion, regardless of the meaning of constitutional privacy.[35] The *Roe* Court intervened forcefully in debates about innocence and abortion, framing women as patients dependent on physicians and potentially victimized by biological and cultural forces beyond their control.[36] Nevertheless, *Roe* did not put an end to the debate about the rape and incest exception. Instead, as the abortion wars intensified, the rhetoric of innocence shaped conversations about everything from abortion funding to the fate of *Roe* itself.

A. The Invention of the Exception

When the ALI first crafted the rape and incest exception to existing abortion laws, the idea seemed to be a bit of an outlier.[37] Demands for reform were not new.[38] Since the mid-nineteenth century, every state criminalized abortion unless a woman's life was at risk.[39] Enforcement of these laws was uneven, often targeting physicians in cases in which a woman died during a botched illegal abortion.[40] Certain physicians continued performing abortions, justifying the procedure as necessary to save a woman's life.[41]

But in the 1930s and 1940s, obstetric care improved, and overall maternal mortality rates declined substantially.[42] At this point, it became extremely difficult for these physicians to justify what they saw as a necessary medical practice

32. DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 62–63 (2016).

33. *See, e.g.*, Vanessa Heggie, *'Legitimate Rape'–A Medieval Medical Concept*, GUARDIAN (Aug. 20, 2012, 7:40 AM), https://www.theguardian.com/science/the-h-word/2012/aug/20/legitimate-rape-medieval-medical-concept [https://perma.cc/8PM4-M2CF].

34. *See, e.g.*, Motion for Leave to File Brief and Brief Amici Curiae on Behalf of Named Women and Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 30, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70–18, 70–40).

35. *See, e.g.*, Motion for Leave to File a Brief as Amicus Curiae and Brief of Amicus Curiae Robert L. Sassone in Support of Respondent at 7, Roe v. Wade, 410 U.S. 113 (1973) (No. 70–18).

36. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

37. On the early reform movement, see, for example, KRISTIN LUKER, ABORTION & THE POLITICS OF MOTHERHOOD 40–70 (1985) and LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, 161–62 (1997).

38. *See, e.g.*, LUKER, *supra* note 37, at 40–65; REAGAN, *supra* note 37, at 63–80.

39. On the criminalization of abortion in the nineteenth century, see generally JAMES MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY (1979).

40. *See, e.g.*, REAGAN, *supra* note 37, at 113–14.

41. *See, e.g.*, LUKER, *supra* note 37, at 65–72.

42. *See, e.g.*, *id.* at 66.

under the life-of-the-woman exception, and a movement for reform began.[43] At first, physicians led reform efforts, often focusing on procedures claimed not to be lifesaving but rather to be necessary to protect or improve a woman's health.[44]

Rape and incest came up rarely, if at all, in discussions of abortion reform. In earlier decades, some physicians had asked the *Journal of the American Medical Association* whether performing an abortion might be morally justified, but at the start of the reform era, the issue did not attract considerable attention.[45] In 1955, however, Planned Parenthood hosted a secret conference on the potential reform of abortion laws (secret because of the potential legal consequences that could follow even a public declaration of support for reform).[46] Led by Dr. Mary Steichen Calderone, those present agreed that abortion should be legal not only in "therapeutic" but also in "humanitarian" cases.[47] Planned Parenthood attendees did not flesh out when the procedure would count as humanitarian, but several years later, when the American Law Institute responded to some physicians' calls for a model reform, attendees put the issue of rape and incest front and center.[48]

In reporting the proceedings of the ALI, Professor Louis B. Schwartz, one of those responsible, with Herbert Wechsler, for leading the writing of the new Model Penal Code, brought up the topic of humanitarian abortions.[49] Schwartz focused on two stories in which women had become pregnant after a sexual assault, one of whom, under fifteen years old, had an abortion.[50] Schwartz acknowledged that physicians performing abortions in similar cases of rape and incest went "beyond the problem of the health of the mother or the child."[51] Nevertheless, Schwartz bridled at the idea that doctors performing such a procedure should be treated as criminals.[52] "It really is hard to imagine that a physician who did that ought to be subject to a jail sentence," he said of performing an abortion after a woman was raped.[53] Schwartz did not at first elaborate on why the idea of criminal punishment in such a case seemed unprincipled.[54] Instead, he pivoted back to the idea that the law should be brought into conformity with actual medical practice and insisted that practitioners were "in . . . revolt" against criminal laws, already routinely performing the procedure in cases of rape and incest.[55]

43. *See, e.g.*, *id.*
44. *See, e.g.*, *id.*
45. *See Pregnancy from Rape Does Not Justify Abortion*, 43 J. AM. MED. ASS'N 413, 413 (1904).
46. *See, e.g.*, REAGAN, *supra* note 37, at 219–22.
47. *See id.*
48. *See id.*
49. On the role of Schwartz and Wechsler, see, for example, NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 94 (2014).
50. *See Continuation of Discussion on the Model Penal Code*, *supra* note 15, at 255.
51. *Id.*
52. *See id.* at 256.
53. *Id.*
54. *See id.*
55. *Id.* at 255.

Schwartz had a relatively easy time explaining the need for an incest exception. A child born as the result of incest could never be legitimated—a concern for ALI members—and some ALI members believed that because incest "result[ed] in a large proportion of defective offspring," exceptions for severe fetal defects could easily be harmonized with one for rape and incest.[56] Schwartz also suggested that incest often would not be consensual and may overlap with rape.[57] Incest-based abortions could fit in with an emerging, eugenic justification for abortions.[58] Rape, by contrast, posed more challenging questions. How did rape fit into a scheme based mostly on the health of a woman or an unborn child? Schwartz suggested that the innocence of rape victims (and of certain incest victims) played a crucial role.[59] He highlighted the "anxiety and shame" that a victim would feel through no fault or choice of her own.[60] If women themselves were innocent, then physicians could not have done anything morally culpable when agreeing to terminate a pregnancy.[61]

Acceptance of the exception within the broader ALI also rested heavily on ideas of guilt and innocence. Some asked Schwartz if the ALI would create an exception for unmarried women, reflecting longstanding concerns within the ALI about the legitimacy of children.[62] ALI member Laurence Howard Eldredge responded that such an exception went too far, particularly because he saw women in these scenarios as far less innocent than the rape victims that Schwartz had already described.[63] First, Eldredge saw a way to transform women who became pregnant out of wedlock from victims into what he saw as beneficiaries.[64] Whereas Eldredge saw no scenario in which rape or incest victims should marry the man who fathered a child, women who became pregnant out of wedlock might "remedy" any issue by simply marrying the men who impregnated them and legitimating any resulting child.[65]

But Eldredge's position went beyond a simple preoccupation with legitimacy. Women who consented to sex, in his view, had no humanitarian basis for seeking an abortion.[66] "I think that we are just extending an invitation to promiscuity [if we make such an exception]," he stated.[67] The distinction between rape victims and other women seemed obvious to ALI members.[68] The ALI concluded that allowing abortion for cases of out-of-wedlock pregnancy would be far too controversial and tabled the proposal.[69]

56. *Id.* at 256.
57. *See id.* at 255–56.
58. *See id.* at 256.
59. *See id.* at 255.
60. *Id.*
61. *See id.* at 280–82.
62. *See, e.g.*, *id.* at 275.
63. *See id.* at 281.
64. *See id.* at 281.
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.* at 255–56.
69. *See id.* at 279.

The following year, Eugene Quay, a Catholic attorney, wrote a lengthy treatise attacking the ALI's rape and incest exception.[70] Quay lumped rape and incest together, focusing in either case on whether women had, in fact, consented to sex.[71] Quay certainly believed that unborn children were innocent and that taking such a life was not morally justified in the same way that procedures would be if a woman's life was at risk.[72] Then, in abortion foes' view, a woman would be acting in self-defense. In cases of rape or incest, no such justification applied. But Quay's argument went beyond fetal innocence. He stressed that while very few abortions happened in cases of rape or incest, reformers were using the emotional pull of the issue to justify a far broader range of abortions.[73] "The statistics suggest that proponents of reform are utilizing emotional reaction to this dismal situation for all it is worth," he wrote.[74] Quay further insinuated that most rape claims were false.[75] He suggested that "real rape" rarely resulted in pregnancy because women could clean themselves up and prevent a fertilized egg from being implanted.[76] For this reason, in his view, most of those seeking an abortion in cases of rape were simply lying.[77] "It is well known that many an errant female if caught will call herself a rape victim[,]" he stated.[78] When it came to incest, Quay underlined that a certain kind of woman tended to be a victim, likely poor, uneducated, and rural.[79] "The type of girl who could be a consenting victim [in an incestuous relationship] could also be an untrustworthy witness capable of detailed description of an imagined relationship," Quay wrote.[80] As he saw, women would lie about whether an incestuous relationship existed as well as about whether any sexual relationship was consensual.[81]

Quay certainly did not invent the idea that women could not become pregnant as a result of rape. As early as the thirteenth century, British medical texts made the same argument.[82] At the time, physicians believed that pregnancy was possible only after an orgasm—something that would not occur with "real rape."[83] Medical texts continued to make this assertion well into the nineteenth century and beyond.[84] In 1904, the *Journal of the American Medical Association* answered a letter on whether physicians should justify abortion in cases of rape.[85]

70. *See* Quay, *supra* note 17, at 396–99,
71. *See id.*
72. *See id.* at 437.
73. *See id.* at 439.
74. *Id.*
75. *See id.* at 397–98.
76. *See id.* at 399.
77. *Id.* at 397.
78. *See id.* at 397–98.
79. *See id.* at 398.
80. *See id.*
81. *See id.*
82. *See, e.g.*, Heggie, *supra* note 33.
83. *See, e.g.*, *id.*
84. *See, e.g.*, SAMUEL FARR, ELEMENTS OF MEDICAL JURISPRUDENCE 42–43 (London J. Callow 2d ed. 1814).
85. *See, e.g.*, *Pregnancy from Rape Does Not Justify Abortion*, *supra* note 45, at 413.

The *Journal* stressed that "pregnancy is rare after *real* rape."[86] Anti-abortion scholars and lawyers updated these arguments, suggesting that many or all women who claimed to be rape victims really sought out abortion for other reasons.[87]

Rape and incest exceptions also struck at the principle underlying a right to life in a way that certain other ALI exceptions did not. Life exceptions, in theory, could be reconciled with the idea of fetal personhood—in theory, a woman could invoke principles of self-defense. The same was not true of rape and incest exceptions. Justifying an abortion under that circumstance would imply that an unborn child was not a rights-holding person.

And fetal personhood was the linchpin of pre-*Roe* pro-life constitutional arguments.[88] Anti-abortion scholars focused on both the Equal Protection Clause and Due Process Clause, relying on fetal personhood in either context.[89] Under the Equal Protection Clause, scholars argued that abortion discriminated against unborn children because of their age or residence in the womb.[90] This claim relied on the idea that unborn children were in other ways identical to other rights-holding persons.[91] Under the Due Process Clause, commentators suggested that an abortion without a hearing or other procedural protections violated an unborn child's right to life.[92] But likewise, if the fetus was not a person, she was not entitled to any process whatsoever.[93] Rape and incest exceptions conflicted with the very idea of fetal personhood. "[F]or the law to make a general exception in all cases involving rape and incest . . . in effect [] denies the fetus any title to life," one commentator stressed.[94]

In the mid-1960s, states began seriously considering the passage of the ALI model bill. The proposal caught the attention of Republicans and Democrats, liberals and conservatives, in states from Georgia to California.[95] Perhaps unsurprisingly, the rape and incest exception played a prominent part in the debate about the proposal, with those on either side assuming that both involved issues of nonconsensual sex. Anthony Beilenson, a California state legislator and the force behind an abortion-reform bill in that state, defended the ALI bill by emphasizing the innocence of women victimized by sexual assault.[96] "We outlaw rape and incest, yet victims of rape and incest, however young, are denied the

86. *Id.*

87. *See infra* Part II.

88. *See, e.g.*, Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869. 870–71 (2014).

89. *See id*. at 890.

90. *See, e.g.*, Robert M. Byrn, *Abortion-on-Demand: Whose Morality*, 46 NOTRE DAME L. REV. 5, 26–27 (1970); Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. U. L. REV. 125, 134–35 (1966).

91. *See, e.g.*, David W. Louisell, *Abortion the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234–35 (1969).

92. *See id.* at 251.

93. *See id.* at 246.

94. Paul G. Reiter, *Trends in Abortion Legislation*, 12 ST. LOUIS U. L.J. 260, 271 (1967).

95. On the spread of the ALI bill, see, for example, WILLIAMS, *supra* note 32, at 82–84.

96. Anthony C. Beilenson, *The Therapeutic Abortion Act: A Small Measure of Humanity*, 41 L.A. BAR BULL. 316, 344 (1966).

mercy and relief of therapeutic abortion," Beilenson argued.[97] Loren Stern, a scholar supportive of reform, likewise described women as victims. "Rape and incest [are] repugnant to our society. In these situations society places an everlasting stigma on the woman and on the child," Stern contended.[98] "It is unreasonable to force a woman to bear a child whose creation was the result of a relationship which the woman neither desired nor consented to."[99]

Anti-abortion scholars, like others in the growing anti-abortion movement, responded that when it came to abortion, innocence was hierarchical, and unborn children were far more innocent than any woman.[100] In the mid-1960s, opposition to legal abortion inside and outside the academy initially centered on the Catholic Church.[101] Community by community and state by state, activists organized groups to preserve existing criminal laws on abortion.[102] Many of these groups focused on what they described as a constitutional right to life found in the Declaration of Independence and the Fourteenth Amendment.[103]

While championing this right, abortion foes also took issue with the ALI proposal specifically. In 1967, several states passed the ALI bill, including North Carolina, California, and Colorado.[104] At a 1967 symposium on the ALI hosted by the *Rutgers Law Review*, anti-abortion scholar John Francis argued that comparative innocence should be determinative.[105] "Rape and incest are unfortunate, but the product of conception is still an innocent being and should not be penalized in place of the aggressor," he stated.[106] Robert Byrn—an activist who had brought a suit seeking to be appointed as a guardian ad litem for all the unborn children scheduled to be aborted at a New York hospital—staked out a similar position in denouncing the ALI proposal.[107] Like Francis, Byrn also seized on the idea of comparative innocence.[108] "[B]efore the rapist may be punished, he must be proved guilty of the crime beyond a reasonable doubt," Byrn wrote.[109]

97. *Id.*

98. Loren G. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L. & CRIMINOLOGY 84, 94 (1968).

99. *Id.*

100. *See, e.g.*, WILLIAMS, *supra* note 32, at 7; MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 42–58 (2015).

101. *See, e.g.*, WILLIAMS, *supra* note 32, at 15–20.

102. *See supra* note 100 and accompanying text.

103. *See, e.g.*, Fred C. Shapiro, *"Right to Life" Has a Message for New York State Legislators*, N.Y. TIMES (Aug. 20, 1972), https://www.nytimes.com/1972/08/20/archives/-right-to-life-has-a-message-for-new-york-state-legislators-the.html [https://perma.cc/B5A3-Z7A2]; Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES (Dec. 29, 1968), https://www.nytimes.com/1968/12/29/archives/how-californias-abortion-law-isnt-working-californias-abortion-law.html [https://perma.cc/GLV5-Y2AD]. On the founding of the Illinois Right to Life Committee, see, for example, SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 35 (1991).

104. On the passage of the ALI bill in several states in 1967, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 323 (1994).

105. *See* Francis, *supra* note 16, at 423.

106. *Id.*

107. *See* Robert M. Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATH. LAW. 316, 321 (1965). For more on Byrn's career in the movement, see Shapiro, *supra* note 103.

108. *See* Byrn, *supra* note 107, at 321.

109. *Id.*

"Yet, beyond a reasonable doubt, the unborn child of the rape is innocent of any crime."[110]

Yet by the late 1960s, rape and incest exceptions largely faded to the background in part because the debate had moved beyond the ALI reform bill. The reform movement became an outright fight for repeal. In states like California that had passed the ALI bill, the number of illegal abortions appeared not to have declined.[111] Reporters suggested that physicians feared criminal liability for performing abortions that might not truly qualify under the ALI exception.[112] Red tape made the process exceedingly cumbersome.[113] In California, for example, if a doctor wished to perform an abortion in a case of rape or incest, she had to report the procedure to a prosecutor, who could veto the doctor's decision.[114] Frustration with the existing law fueled a movement for the outright reform of abortion restrictions. So too did changes to the composition of the abortion-rights movement.

Doctors had played a leading role in the early push to legalize the procedure, seeking to harmonize the law with what some saw as good medical practice.[115] But by the end of the 1960s, new activists shaped the movement.[116] Feminists in groups like the National Organization for Women ("NOW") and the Women's National Abortion Action Campaign ("WONAAC") rallied to the cause, framing abortion as a right for women rather than justifying it based on its policy consequences.[117] NOW had endorsed legal abortion after a heated debate in 1968, whereas WONAAC formed in 1971 to advocate for abortion rights.[118] These groups saw the ALI proposal—and the rape and incest exception—as largely irrelevant to the larger question of whether women should have a fundamental right to choose abortion.[119] As the dialogue centered on the question of abortion-law repeal, anti-abortion groups also changed their arguments, focusing less on the justifications for specific abortions and more on claims that all abortions were both unconstitutional and unethical.[120]

B. The Constitutional Rhetoric of Innocence

Nevertheless, arguments about guilt and innocence forged in the context of rape and incest exceptions continued to define the terms of the debate. Anti-abortion groups made the paramount innocence of fetal life central to political and

110. *Id.*

111. *See* Monroe, *supra* note 103.

112. *See id.*

113. *See id.*

114. *See, e.g.*, Zad Leavy & Jerome Kummer, *Abortion and the Population Crisis: Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 657 (1966).

115. *See, e.g.*, LUKER, *supra* note 37, at 65–72.

116. *See, e.g.*, ZIEGLER, *supra* note 100, at 96–127.

117. *See id.*

118. *See id.* at 99–163.

119. *See id.* at 6, 132.

120. *See, e.g.*, LUKER, *supra* note 37, at 77; *see also* Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 691–94 (1992).

constitutional arguments against the repeal of abortion restrictions. In making an ethical argument against abortion, pro-life lawyers argued that there could be no justification for killing what pro-lifers described as a supremely innocent being. "How many innocents will we kill?" stated Reverend Charles Carroll, an episcopal minister, in opposing California's abortion reform.[121] "Let us not do inadvertently what the Nazis did with deliberate intent."[122]

Those in favor of repeal responded with a variety of arguments. Some pointed to desirable consequences argued to follow legalization, such as a reduction in population growth, the prevention of deaths attributed to illegal abortion, and the expansion of opportunities for women.[123] Others simply asserted that the Constitution recognized a right to abortion based on ideas of autonomy, equality, or dignity.[124] But the rhetoric of innocence also shaped the case for recognizing abortion rights. Family-planning supporters had earlier experimented with this logic in litigating *Eisenstadt v. Baird*, a case involving Massachusetts's contraception law.[125] The state allowed married people to purchase contraception for the purpose of preventing pregnancy or preventing sexually transmitted infections ("STIs") but allowed unmarried individuals to buy birth control only to prevent STIs.[126] Bill Baird, a self-proclaimed contraceptive crusader, gave a talk in Boston in which he shared information about birth control and gave out free contraceptive foam.[127] Following a bench trial, a Massachusetts court convicted Baird of violating the anti-contraception law.[128] After his state appeals failed, the First Circuit granted his habeas petition, and the Supreme Court agreed to hear the case.[129]

Eisenstadt struck down the law on equal-protection grounds, suggesting that there was no rational basis for the differing treatment of married and unmarried people.[130] Seven years earlier, the Court had recognized a right to privacy covering married couples' use of contraception in *Griswold v. Connecticut.*[131] *Griswold*, however, extensively discussed the constitutional importance of marriage.[132] *Eisenstadt* held that constitutional privacy applied to individual childbearing decisions.[133] But the rhetoric of innocence shaped the Court's application of rational-basis review.[134] In considering the possible justification for the law, the Court acknowledged that Massachusetts might have intended its statute

121. Achsah Nesmith, *Abortion Bill Reactions—It's Not Humane, It's Murder*, ATLANTA J. CONST. 1, 1 (1968).
122. *Id.*
123. *See, e.g.*, ZIEGLER, *supra* note 100, at 112–27.
124. *See id.*
125. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
126. *See id.* at 440–42.
127. *See id.* at 440.
128. *See id.*
129. *See id.*
130. *See id.* at 449–55.
131. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
132. *See id.* at 485–88.
133. *See Eisenstadt*, 405 U.S. at 453–54.
134. *See id.* at 447.

to prevent or even punish out-of-wedlock sexuality.[135] But given that such a punishment would be wildly out of proportion to any purported wrongdoing involved in nonmarital sex, the government could not legitimately advance that goal.[136] "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor," the Court concluded.[137]

Abortion-rights supporters soon worked the idea of innocence into their own arguments for legalization, including in *Roe* itself. *Roe* involved a Texas law criminalizing all abortions except in cases where a woman's life was at risk,[138] whereas the companion case, *Doe v. Bolton*, addressed a version of the ALI bill.[139] The most obvious of these claims involved due process for physicians.[140] These arguments had a history: abortion-rights attorneys argued that exceptions for a woman's life or health were too vague to give notice to physicians about when they would face criminal charges (and impermissibly required them to prove their innocence).[141] Although these claims had failed in *Vuitch v. United States*,[142] Sarah Weddington, the attorney for Jane Roe, revived this claim in her brief.[143] Roe's brief asserted that physicians could not reasonably know how a court would view a life-saving procedure and that the law failed to provide adequate notice.[144]

But Roe's brief, like others submitted by abortion-rights amici, incorporated the rhetoric of innocence in the framing of constitutional rights.[145] Roe's brief framed forced pregnancy (and likely parenthood) as a punishment that women did not deserve.[146] "When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years," the brief argued.[147] "She must often forego further education or a career and often must endure economic and social hardships."[148] These women, the brief suggested,

135. *See id.* at 447–48.
136. *See id.* at 449.
137. *Id.* at 448.
138. Roe v. Wade, 410 U.S. 113, 117–19 (1973).
139. Doe v. Bolton, 410 U.S. 179, 182–84 (1973).
140. *See, e.g.*, Brief for Appellants at 140–150, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).
141. *See, e.g.*, *id.* at 132.
142. United States v. Vuitch, 402 U.S. 62, 64 (1971).
143. Brief for Appellants at 15, 126–27, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).
144. *See id.* at 125.
145. *See id.* at 106–07.
146. *See id.*
147. *Id.*
148. *Id.*

had done nothing to deserve this penalty.[149] Other abortion-rights groups elaborated on this argument.[150] One brief submitted by feminist organizations presented forced pregnancy as an unjustifiable punishment for women seeking abortion:

> What is the woman's crime? . . . Is her crime that of having engaged in a sexual relationship? If the relationship occurred within marriage, no crime is involved in any state. On the contrary, the woman was compelled by virtue of her married state to submit to her husband. Even if the pregnancy may have occurred as the result of some prohibited non-marital sexual conduct (according to due proof), an anti-abortion law punishing such conduct would be overbroad and beyond the competence of the state. Is her crime that of failing in knowledge of, access to, or effectiveness of contraceptives? Such crime has not been defined by the state.[151]

Women, the brief suggested, had not committed a crime or done anything immoral.[152] The brief argued that no one could justify pregnancy, childbirth, and childrearing as an appropriate penalty for sexually active women.[153]

Anti-abortion groups responded that regardless of the guilt of a woman, an unborn child was far more innocent than any other party to an abortion. Robert Sassone, a prominent anti-abortion lawyer, suggested that fetal innocence required that the Court accord due process and equal protection of the law to an unborn child.[154] "Whenever a human being is faced with the legal loss of his life, the burden of proof that that person should lose his life lies with those who are attempting to take his life, and the burden of proof is not a mere preponderance of the evidence," Sassone argued.[155] "The Court should not do less in the case of innocent unborn humans than it does for more mature humans who are accused of serious crimes."[156] Americans United for Life ("AUL"), a major anti-abortion group, submitted a brief on behalf of certain anti-abortion fellows of the American College of Obstetricians and Gynecologists making similar arguments.[157] "The voidance of state abortion statutes by court or legislature is governmental action which deprives the innocent unborn of the right to life, and therefore deprives them of equal protection and due process," the brief argued.[158]

149. *See id.*

150. *See, e.g.*, Motion for Leave to File Brief and Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 29–30, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

151. *Id.* (internal citations omitted).

152. *See id.*

153. *See id.*

154. *See* Motion for Leave to File a Brief as Amicus Curiae and Brief of Amicus Curiae of Robert L. Sassone in Support of Respondent at 7, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

155. *Id.* at 7–8.

156. *Id.*

157. *See* Motion for Leave to File Brief and Brief Amicus Curiae of Certain Physicians, Professors, and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 64–65, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

158. *Id.*

> Our law does not permit the execution or imprisonment under sentence of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood.[159]

Roe joined the conversation about innocence and abortion. At first, the Court seemed to frame abortion as an objective, medical matter that had nothing to do with moral innocence. The Court began with a lengthy medical history of attitudes toward abortion as well as the safety of the procedure.[160] Throughout, *Roe* presented abortion as a right that belonged equally to physicians and patients—as a matter that "the woman and her responsible physician necessarily will consider in consultation."[161] And at times, the Court seemed almost dismissive of moral justifications for abortion bans. Consider *Roe*'s treatment of the argument that Texas's law reflected a permissible desire to punish women for sexual promiscuity.[162] The majority viewed that justification as ridiculous, indicating that no "court or commentator had taken . . . seriously" "a Victorian social concern to discourage illicit sexual conduct."[163]

Roe, at times, described innocence as inherently subjective or even irrelevant to the disposition of the case.[164] First, consider the Court's analysis of fetal personhood. The innocence of fetal life had figured centrally in anti-abortion claims involving personhood. But in addressing arguments for fetal personhood, the Court analyzed the question as a matter of linguistics rather than morality, focusing on uses of the word "person" elsewhere in the Constitution.[165] Concluding that the word applied only postnatally, *Roe* moved on to the argument that Texas had a compelling interest in protecting innocent life from the moment of fertilization.[166] The Court noted that many viewed this as a moral, legal, or philosophical question.[167] But treating the matter as a moral one seemed to weaken, not strengthen, Texas's interest. Stressing the wide divergence of thinking on this most sensitive and difficult question, the Court did not allow Texas to impose its moral view on anyone else.[168]

But *Roe* did not always treat morality as inherently subjective. The Court held that the right to privacy outlined in *Griswold* and *Eisenstadt* encompassed a woman's decision to end a pregnancy.[169] In justifying this decision, the Court presented women as victims of circumstances beyond their control.[170] Because

159. Brief of Americans United for Life, Amicus Curiae, in Support of Appellee at 7, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).
160. *See* Roe v. Wade, 410 U.S. 113, 140–45 (1973).
161. *Id.* at 153.
162. *Id.* at 148–53.
163. *Id.*
164. *See id.* at 145–59.
165. *See id.* at 156–60.
166. *See id.* at 157–62.
167. *See id.* at 159–62.
168. *See id.*
169. *See id.* at 152–53.
170. *Id.* at 153.

only women could gestate a pregnancy, certain women had no choice but to face "[s]pecific and direct [medical] harm."[171] The Court also assumed that unwanted childrearing would victimize women obliged to carry their pregnancies to term.[172] *Roe* detailed a number of harms over which women appeared to have no say, including the "stigma of unwed motherhood," "a distressful life and future," and damage to an existing family.[173] The stakes of the abortion right depended partly on the victimization of women by unjust laws.[174]

In theory, there should have been far less debate about the rape and incest exception after *Roe*. After all, the exception had been central to a compromise bill similar to the one invalidated in Roe's companion case, *Doe v. Bolton.*[175] But surprisingly enough, *Roe* did not put an end to discussions of rape, incest, and abortion.[176] The Court's decisions invalidated the majority of abortion laws then on the books in the states, but abortion foes immediately explored options for limiting or undoing the decision's effects.[177] One of the most successful prohibited the use of public money or facilities for abortion.[178] In Congress and the states, after the introduction of funding bans, those on both sides debated whether a rape and incest exception was warranted.[179] This dialogue projected ideas of innocence that continued to shape the abortion debate.

III. FROM THE HYDE AMENDMENT TO *CASEY*

Rape and incest exceptions became a central question in debates about bans on abortion funding. At first, pro-lifers revived existing arguments about the supreme innocence of fetal life—and about the suspect motives of women who "cried rape."[180] Over time, however, opposing the exception became more costly, especially outside the funding context. This Part begins by examining ongoing battles about rape and incest in the funding context. These debates left a mark on the Court's jurisprudence. In *Maher* and *McRae*, the Court suggested that the source of women's victimization mattered.[181] Even if women suffered considerable harm, the Court upheld abortion restrictions if the government did not cause those harms.[182] Next, this Part studies the creation of a consensus in favor of the exception. By the mid-1980s, pro-choice groups used cases of rape and incest as evidence of the opposition's cruelty toward women. Groups like the National Abortion Rights Action League ("NARAL"), however, began to wonder if the pro-choice rhetoric of innocence had begun to backfire. Indeed,

171. *Id.*
172. *Id.*
173. *Id.*
174. *See id.*
175. Doe v. Bolton, 410 U.S. 179, 182 (1973).
176. *See infra* Section III.A.
177. *See id.*
178. *See id.*
179. *See id.*
180. *See id.*
181. Maher v. Roe, 432 U.S. 464, 480 (1977); *see* Harris v. McRae, 448 U.S. 297, 325 (1980).
182. *Maher*, 432 U.S. at 480; *McRae*, 448 U.S. at 326.

anti-abortion groups had begun to concede the need for an exception but insisted that almost no abortions took place in cases of rape and incest. NARAL and its allies tried to emphasize claims that all women had good reasons for having abortions, even those less supported by the public. As this Part next suggests, innocence rhetoric played an increasingly important role when the Court seemed prepared to reverse *Roe.* Abortion foes proposed bans on almost all abortions but conceded the need for a rape and incest exception.[183] This strategy did not reflect support for accessible abortion in such cases. Instead, pro-lifers believed that the Court and the public would set aside abortion rights so long as the women claiming those rights did not have the procedure for what were deemed innocent reasons. To defend *Roe*, pro-choice attorneys wove in new arguments about women's victimhood. Highlighting the harms done by a husband-notification bill, abortion-rights briefs used domestic violence as a window into the way that restrictions victimized all women.[184] Conflicting ideas of victimhood ultimately shaped the Court's reasoning in *Casey*.[185] While the justices treated women as victims of biology, culture, and restrictive laws, the Court at times suggested that abortion itself harmed women—and that women's innocence depended on their reaction to the loss of a pregnancy.

A. The Rise of Funding Bans

Immediately after *Roe*, abortion foes focused primarily on a constitutional amendment that would criminalize all abortions, recognize fetal personhood, and establish a right to life.[186] Even the most optimistic pro-lifers recognized, however, that changing the text of the Constitution was a slow and uncertain process.[187] As early as 1973, disparate anti-abortion groups met to discuss post-*Roe* strategy.[188] In addition to a constitutional amendment, pro-lifers proposed incremental laws to test what the Court would allow.[189] Such laws could also make it harder to get an abortion while the movement waged the campaign for a constitutional amendment.[190] One central strategy involved access to abortion for poor women, many of whom relied on state and federal Medicaid for their care.[191] In 1974, Representative Angelo Roncallo (R-NJ) proposed outlawing Medicaid reimbursement for abortion procedures and abortifacient drugs, but the debate

183. *See infra* Section III.A.

184. *See, e.g.*, Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 1, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).

185. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 891–93 (1992).

186. *See, e.g.*, ZIEGLER, *supra* note 100, at 42–53.

187. *See, e.g.*, Ziegler, *supra* note 88, at 899–900.

188. *See* ZIEGLER, *supra* note 100, at 41.

189. *See id.* at 49.

190. *See* discussion *infra* Section III.C.

191. *See, e.g.*, *House Rejects Plan to Prohibit Federal Funds in Abortion Work*, N.Y. TIMES (June 29, 1974), https://www.nytimes.com/1974/06/29/archives/house-rejects-plan-to-prohibit-federal-funds-in-abortion-work.html [https://perma.cc/GHY3-XYKB].

about the proposal immediately turned on whether Roncallo would include common contraceptive methods, including IUDs and the birth-control pill.[192] Roncallo's bill fell,[193] but other anti-abortion legislators saw potential in the lawmaker's proposal. Senator Dewey Bartlett (R-OK) introduced his own version, which would have prohibited the use of federal Medicaid funds to "pay for or encourage the performance of abortions" except when a woman's life was at risk.[194]

The issue of rape and incest immediately became central to the debate about Bartlett's bill. Senator Ted Kennedy (D-MA), one of the most outspoken supporters of abortion rights in the Senate, opposed the proposal partly because of its lack of a rape exception.[195] Kennedy suggested that such an outcome would deal a cruel blow to women who were already victims.[196] Bartlett responded that pregnancy as a result of rape was medically impossible or unlikely.[197] "Persons raped very seldom become pregnant," Bartlett maintained.[198] Kennedy fired back, arguing that 18,000 women a year became pregnant as a result of sexual assault.[199]

Although Bartlett's proposal also failed,[200] a year later, Congress passed the Hyde Amendment, a rider to the 1977 appropriations bill for the Department of Health, Education, and Welfare.[201] The original amendment, according to its conference report, did allow for reimbursement in cases of rape and incest.[202] At first, it seemed that rape and incest would not figure centrally in debates about the amendment.

But the following year, when Congress considered how much to restrict Medicaid reimbursement as part of yet another appropriations process, the issue of rape and incest again came to the fore, with both sides powerfully wielding the rhetoric of innocence. The fight began after the Carter Administration concluded that absent a conference report to the contrary, the most recent version of the Hyde Amendment would lack a rape or incest exception.[203] Almost immediately, debate flared about whether to authorize such an exception.[204] Abortion-

192. *See id.*; *see also* Alice Hartle, *Abortion Exclusion Fails in House*, NAT'L RIGHT TO LIFE NEWS, Aug. 1974, at 1.

193. *See House Rejects Plan to Prohibit Federal Funds in Abortion Work*, *supra* note 191.

194. *See, e.g.*, *Senate OKs Curb on Busing*, *Abortion*, CHI. TRIB., Sept. 19, 1974, at 1; Marjorie Hunter, *Senate Upholds U.S. Abortion Funds*, N.Y. TIMES (Apr. 11, 1975), https://www.nytimes.com/1975/04/11/archives/senate-upholds-us-abortion-funds.html [https://perma.cc/QK2Q-TFU6].

195. *See* Hunter, *supra* note 194.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Hunter, *supra* note 194, at 28.

201. *See* Susan Gunty, *The Hyde Amendment and Medicaid Abortions*, 16 FORUM 825, 826 (1981).

202. *See* Adam Clymer, *Abortion Aid Barred by Bell in Rape Cases*, N.Y. TIMES (Aug. 7, 1977), https://www.nytimes.com/1977/08/02/archives/abortion-aid-barred-by-bell-in-rape-cases-he-rules-that-current-law.html [https://perma.cc/YJJ6-JF42].

203. *See id.*

204. *See, e.g.*, *House Votes to Bar Abortion Aid for Victims of Rape and Incest*, N.Y. TIMES (Aug. 3, 1977), https://www.nytimes.com/1977/08/03/archives/house-votes-to-bar-abortion-aid-for-victims-of-rape-and-incest.html [https://perma.cc/SE9D-Y99M]; Martin Tolchin, *Accord is Emerging in Congress on Bar to Medicaid*

rights lawmakers insisted that omitting such an exception would victimize innocent women who had already suffered through a sexual assault.[205] Representative Elizabeth Holtzman (D-NY) argued that the Hyde Amendment would immorally punish "11 and 12-year olds" who were "victims of rape and incest."[206] Forcing these women to remain pregnant and give birth, Holtzman suggested, took from "poor women" the "right to live."[207] Hyde himself responded that these women were far less innocent than the child in utero.[208] As Hyde saw it, any woman who chose abortion engaged in the "calculated lulling of innocent, inconvenient human beings."[209] The House and Senate came to an impasse.[210] Whereas Senators demanded a rape and incest exception, the House absolutely refused one.[211] At conference, the two houses settled on a compromise, agreeing to allow for a rape and incest exception, but only if women reported to the police or to a public-health agency.[212]

The compromise only intensified the debate about the rape and incest exception the following year. Thea Rossi Barron, the head lobbyist for the National Right to Life Committee ("NRLC"), the nation's largest anti-abortion group, argued that the bill left too much room for what she saw as inevitably fraudulent claims by women who had consensual sex.[213] Barron argued that women would unethically—and falsely—claim to have been raped to hide "convenience abortion."[214] Representative Silvio Conte of Massachusetts agreed with Barron.[215] "You put rape in there; every girl who gets pregnant will say she got raped," Conte said.[216] Asserting that many alleged rape victims were not, in fact, innocent, Conte and Barron demanded a very brief required reporting period.[217]

In January 1978, the Department of Health, Education, and Welfare issued regulations defining prompt reporting, asking women to file a report within sixty

Abortion, N.Y. TIMES (Sept. 28, 1977), https://www.nytimes.com/1977/09/28/archives/accord-is-emerging-in-congress-on-bar-to-medicaid-abortion.html [https://perma.cc/78YB-2BSB]; Martin Tolchin, *Conferees Ease the Deadlock on Medicaid Abortions*, N.Y. TIMES (Nov. 1, 1977), https://www.nytimes.com/1977/11/01/archives/conferees-ease-the-deadlock-on-medicaid-abortions.html [https://perma.cc/YW8V-VMBX].

205. Martin Tolchin, *House Bars Medicaid Abortions and Funds for Enforcing Quotas*, N.Y. TIMES (Jun. 18, 1977), https://www.nytimes.com/1977/06/18/archives/house-bars-medicaid-abortions-and-funds-for-enforcing-quotas-house.html [https://perma.cc/H9EN-DTTT].

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.*

210. *See, e.g.*, Tolchin, *Conferees Ease the Deadlock on Medicaid Abortions*, *supra* note 204.

211. *Id.*

212. Martin Tolchin, *Compromise Is Voted by House and Senate in Abortion Dispute*, N.Y. TIMES (Dec. 17, 1977), https://www.nytimes.com/1977/12/08/archives/compromise-is-voted-by-house-and-senate-in-abortion-dispute-action.html [https://perma.cc/PC7V-2JKR].

213. *Bitter House-Senate Battle Ends for Now*, NAT'L RIGHT TO LIFE NEWS, Jan. 1978, at 1.

214. *Id.*

215. Martin Tolchin, *Conferees on Medicaid Abortions Deadlocked After a Futile Session*, N.Y. TIMES (Sept. 13, 1977), https://www.nytimes.com/1977/09/13/archives/conferees-on-medicaid-abortions-deadlocked-after-a-futile-session.html [https://perma.cc/X79F-R3GX].

216. *Id.*

217. *See id.; Bitter House-Senate Battle Ends for Now*, *supra* note 213.

days.[218] Senator Edward Brooke (R-MA), one of the most outspoken supporters of abortion rights, praised the regulations as a "more humane national policy" that recognized the struggles of rape victims—and the reality that some sexual assault victims did not immediately go to the police.[219] Stressing the trauma endured by sexual assault victims, the American Civil Liberties Union insisted that the reporting requirement was still "wholly inadequate,"[220] imposing cruel and unrealistic expectations on women who had been violated.[221] Henry Hyde immediately criticized the regulations, arguing that women should be required to report a sexual assault within a week.[222]

Citing similar concerns, the House voted to exclude the rape and incest exception in June 1978.[223] But abortion-rights activists began to recognize that opposition to the exception was becoming a strategic liability for the anti-abortion movement. In her own congressional testimony, Karen Mulhauser of NARAL changed the conversation, describing her own sexual assault that had taken place several months prior.[224] Mulhauser testified that she would have done anything to end a pregnancy resulting from rape.[225] "There is no way that I would be twice victimized by such a forced pregnancy," Mulhauser testified.[226] She framed the questions raised by members of Congress—who had derided the honesty of women who claimed to have been raped—as yet another form of victimization.[227] "Such unconscionable statements by elected officials reflect the insensitivity in Congress to rape victims in general and a complete disregard toward the integrity of women."[228] As Mulhauser saw it, women as a class were victims of sex discrimination, a form of discrimination that helped to explain the prevalence of rape and the willingness of legislators to deny access to abortion.[229]

Mulhauser, like many of her colleagues, often focused on claims about the willingness of state legislators to re-victimize women who had already suffered trauma.[230] The rape and incest exception, in this narrative, served as a window into the broader victimization of women.[231] Anti-abortion groups responded with familiar arguments, insisting that women were not truly victims—or at least that

218. Philip Shabecoff, *Drafting Abortion Rules, a No-Win Situation*, N.Y. TIMES, Feb. 5, 1978, at E5.

219. *Id.*

220. Dep'ts of Health and Education and Welfare Appropriations for Fiscal Year 1979 Part Nine: Testimony of Norman Dorsen Before the Senate Appropriations Committee, 95th Cong. 1785 (1978).

221. *See id.*

222. Philip Shabecoff, *H.E.W. Team Had to Match Intention with Law*, N.Y. TIMES (Feb. 5, 1978), https://www.nytimes.com/1978/02/05/archives/drafting-abortion-rules-a-nowin-situation.html [https://perma.cc/UEK5-394G].

223. *See* Ayres Jr., *supra* note 21.

224. Departments of Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1980, Part Five: Testimony Before the Senate Labor–Health Education and Welfare Appropriations Subcommittee, 96th Cong. 232–35 (1979) (statement of Karen Mulhauser, Executive Director, National Abortions Rights Action League).

225. *See id.*

226. *Id.*

227. *See id.*

228. *Id.*

229. *See id.*

230. *See id.*

231. *See id.*

dishonest women would far outnumber those truly victimized by sexual assault.[232]

When abortion-funding bans arrived in Court, these evolving ideas of innocence again shaped the litigation. The Court first took a trio of cases on funding and facilities bans, including the lead case, *Maher v. Roe*, which involved a Connecticut welfare regulation that reimbursed only therapeutic abortions, a term that the state defined to include cases of rape or incest in which a woman's mental wellbeing might be at risk.[233] Connecticut did not directly invoke rape and incest but questioned both the innocence of welfare recipients and the source of any oppression they faced.[234] The State suggested that it was inappropriate for the Court to award welfare rights when so many in society disputed who shouldered the blame for poverty.[235] "America has long looked most ambivalently at the status of poverty," the brief contended.[236] "Is it a state of helplessness before crushing obstacles or rather a condition escapable under the discipline of self-betterment? Does it represent indolence, disability, or a string of irreversible past hard knocks and circumstances?"[237] Connecticut further suggested that even if women seeking abortions were not themselves blameworthy, neither was the state.[238] After all, *Roe* had emphasized the extent to which Texas victimized women by forcing them to confront challenges over which they had little control.[239] Connecticut argued that it had done no such thing.[240] "[T]here is no interference by the defendant with plaintiffs' fundamental right to have an abortion," the state argued.[241] In an amicus brief, AUL made the same argument.[242] "[T]his Court has never held that the indigent have an independent right to public welfare," AUL explained.[243]

Mirroring ideas used by AUL and Connecticut, *Maher* and its companion cases changed the rhetoric of innocence. *Roe* had protected abortion rights partly because the law victimized women, forcing them to face biological risks, social stigma, and life challenges over which they had little control.[244] *Maher* suggested that these burdens counted constitutionally only when the government created them.[245] "The Connecticut regulation places no obstacles absolute or otherwise

232. *See id.*; Joseph A. Califano Jr., *The Infighting Over Abortion*, WASH. POST (May 19, 1981), https://www.washingtonpost.com/archive/politics/1981/05/19/the-infighting-over-abortion/30b5dd6a-30d4-40c5-8e81-dbb03fc5bea4/ [https://perma.cc/U2FA-CAPB].

233. Maher v. Roe, 432 U.S. 464 (1977).

234. *See* Brief for Appellants at 25–28, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

235. *See id.* at 28.

236. *Id.* at 27.

237. *Id.*

238. *See id.* at 22.

239. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

240. *See* Brief for Appellants at 14, 25, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

241. *See id.* at 19.

242. *See* Motion for Leave to File Brief and Brief Amicus Curiae, Americans United for Life, 1–6, Poelker v. Doe, 432 U.S. 519 (1977) (No. 75-442).

243. *Id.*

244. *See Roe*, 410 U.S. at 151–53.

245. *See* Maher v. Roe, 432 U.S. 464, 474 (1977).

in the pregnant woman's path to an abortion," the Court held.[246] The Court also came closer to anti-abortion arguments about the relative innocence of the unborn child. *Maher* acknowledged that "[t]he State unquestionably [had] a 'strong and legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries."[247] Because the Court applied rational basis review, *Maher* did not need to address how compelling this interest was, but the Court suggested that states could reasonably treat childbirth as morally superior to abortion.[248]

The rhetoric of innocence similarly shaped the outcome in *Harris v. McRae*, the case that dealt directly with the most recent version of the Hyde Amendment.[249] Although several attorneys challenged the Hyde Amendment, Sylvia Law and Rhonda Copelon's case reached the Supreme Court first.[250] The rhetoric of innocence helped Copelon and Law to distinguish *Maher*, which, after all, had upheld a similar state funding law.[251] Copelon and Law seized on the idea that Congress had not funded abortions in most cases in which women's health was at risk.[252] Whereas women having elective abortions might look different to the Court than the helpless victims described in *Roe*, Copelon and Law suggested that the women affected by the Hyde Amendment would, regardless of how they got pregnant, suffer health risks over which they had no control, including hypertension, hyperemesis, and suicidal ideation.[253] Even certain women without explicit health risks resembled the victims described in *Roe*.[254]

Copelon and Law focused partly on teenagers, whom some might see as more innocent than older women consenting to sex.[255] The two stressed that these women were not only more likely to suffer harm as a result of pregnancy but also that without funding, adolescents unknowingly signed up for the hardship and stigma described in *Roe*.[256] Adolescents could not consent to the kind of "health, education, social, psychological and vocational implications" inherent in pregnancy and parenthood.[257]

Copelon and Law further addressed *Maher*'s validation of childbirth as a valuable state interest.[258] *Maher* had moved toward the pro-life position that guilt and innocence fell along an objective, unchanging hierarchy, whereas *Roe*, in rejecting the idea of a compelling interest in protecting life, had treated morality as inherently subjective and fluid.[259] Speaking in favor of the latter approach,

246. *Id.*
247. *Id.* at 478.
248. *See id.* at 478–80.
249. Harris v. McRae, 448 U.S. 297, 300–01 (1980).
250. *See* Rhonda Copelon & Sylvia Law, *"Nearly Allied to Her Right to Be"—Medicaid Funding for Abortion: The Story of* Harris v. McRae, *in* WOMEN AND THE LAW STORIES 220–21 (Elizabeth M. Schneider & Stephanie M. Wildman eds. 2011).
251. *See* Brief for Appellees at 109, Harris v. McRae, 448 U.S. 291 (1980) (No. 79-1268).
252. *See id.* at 22, 81.
253. *See id.* at 31–32, 36.
254. *See id.* at 46–50.
255. *See id.*
256. *See id.*
257. *See id.* at 46.
258. *See id.* at 108.
259. *See* Maher v. Roe, 432 U.S. 464, 474–76 (1977).

Copelon and Law argued that the Hyde Amendment violated both the Free Exercise and Establishment Clauses because it imposed one subjective religious and moral perspective on everyone else.[260] Rather than involving a straightforward decision about the life or death of an innocent child, the brief suggested, abortion forced individuals to grapple with the most difficult moral questions.[261] "Like conscientious objection to military service, the abortion decision demands the protection of the Free Exercise Clause," the brief suggested.[262] The brief suggested that people of different faiths would reach strikingly different conclusions about the morality of abortion.[263] The Hyde Amendment burdened some while empowering others. "Medicaid-eligible women who adhere to the anti-abortion faiths suffer no impediment in the exercise of conscience," argued the brief.[264] "Those of the pro-choice persuasion are hindered or precluded, however, in the exercise of their religious and conscientious scruples."[265] Copelon and Law repackaged the interest in childbirth articulated in *Maher* not as an objective moral norm but as an expression of sectarian religious sentiment.[266]

AUL suggested that the women in *McRae* were identical to those in *Maher*.[267] The fact that women might suffer more serious consequences if denied money in circumstances where their health was at risk was irrelevant.[268] Some women could not afford to pay for abortions, medically necessary or not, because they were poor, not because of the government.[269] "[T]here is no independent constitutional right to a funded abortion," the group contended.[270]

AUL further asserted that the state's interest in protecting an innocent fetus was a secular, acceptable, and moral state interest.[271] When it came to the Free Exercise Clause, the brief acknowledged that women might hold different moral or religious views about abortion.[272] But because the source of some women's problems was poverty, the outcome in *Maher* and *McRae* should not be any different.[273] The government had no obligation to offer benefits to anyone because of their religious beliefs, AUL reasoned.[274] "[T]he State is not obliged to provide any exception for conscientious objectors, and . . . drafting of religiously motivated selective conscientious objectors does not violate the Free Exercise Clause," AUL claimed.[275] "Similarly, the State is not obliged to provide funds

260. *See* Brief for Appellees at 151–52, Harris v. McRae, 448 U.S. 291 (1980) (No. 79-1268).
261. *See id.* at 153–60.
262. *See id.* at 154–55.
263. *See id.* at 153.
264. *Id.* at 160.
265. *Id.*
266. *See id.*
267. *See* Brief for Intervening Defendants-Appellees at 49, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).
268. *See id.* at 43.
269. *See id.* at 49.
270. *Id.*
271. *See id.* at 51–52.
272. *See id.* at 49–51.
273. *See id.* at 56.
274. *See id.* at 49–51.
275. *Id.* at 51.

for abortion merely because the decision to abort is made in good conscience informed by religious authorities."[276] As for the Establishment Clause, AUL suggested that the Court had already held in *Maher* that there was a valid moral interest in protecting the fetus that had nothing to do with imposing any religious belief.[277] "[A]bortion and childbearing are not merely two sides of the same coin," AUL insisted.[278] "That view finds no support in our tradition, and it is not imposed by the Constitution."[279]

AUL leaders celebrated when *McRae* closely followed the approach taken in *Maher*.[280] The Court saw no difference between the women in either case.[281] *McRae* reasoned that:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade,* it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[282]

The Court rejected arguments based on the religion clauses.[283] The majority dismissed Copelon and Law's free-exercise claim by suggesting that none of the plaintiffs had standing to bring the claim.[284] As for the Establishment Clause, the Court concluded that the law reflected "'traditionalist' values," not any single religious perspective.[285]

McRae and *Maher* illuminated an approach to innocence quite different from the one detailed in *Roe. Roe* had treated moral questions as necessarily subjective and personal,[286] while *McRae* and *Maher* suggested that at least under some circumstances, the state could objectively conclude that childbirth was morally preferable—and that perhaps some abortion questions fell along an objective moral continuum.[287] And *Maher* and *McRae* suggested that abortion cases depended not only on whether innocent women suffered harm but also where that harm originated.[288] The Hyde Amendment battle aside, a political consensus on the rape and incest exception seemed to have taken hold. In 1980, Ronald Reagan became the first major party candidate to enthusiastically oppose abortion.[289] And yet Reagan supported a rape and incest exception.[290] For years,

276. *Id.*
277. *Id.* at 60–63.
278. *Id.* at 62.
279. *Id.* at 62–63.
280. *See* Harris v. McRae, 448 U.S. 297, 314–21 (1980).
281. *See id.* at 316–17.
282. *Id.* at 316.
283. *See id.* at 319–21.
284. *Id.* at 320–21.
285. *Id.* at 319.
286. *See* Roe v. Wade, 410 U.S. 113, 150–53 (1973).
287. *See* Maher v. Roe, 432 U.S. 464, 478–80 (1977); McRae, 448 U.S. at 314–21.
288. *See* Copelon & Law, *supra* note 250, at 221.
289. *See infra* Section III.B.
290. As Governor of California, Reagan passed a law allowing abortions in the case of rape or incest. On the campaign trail for president, Reagan later said he regretted that law but how much that reflects his actual

the rape and incest exception won support from those on either side of the abortion conflict. This Part next explores the creation of the rape and incest consensus.

B. The Rape and Incest Consensus

Before November 1980, the politics of rape and incest seemed unchanged. The House passed a bill allowing for abortion funding only when a woman's life was at risk but accepted a Senate version that allowed for the procedure in cases of rape and incest if reported within seventy-two hours.[291] But to a greater extent than many would have predicted, the 1980 election transformed the debate.[292] Reagan recorded a sweeping victory, and Republicans, most of whom opposed abortion, took majorities in both the House and Senate.[293] The result raised the possibility of a constitutional amendment outlawing abortions, including in cases of rape and incest.[294] Dr. John Willke, the head of NRLC, however, publicly acknowledged that there were not enough votes to pass an amendment criminalizing all abortions.[295] Stephen Galebach, a young conservative attorney, proposed one alternative, a statute declaring that legal personhood began at fertilization.[296] Galebach's bill would, if in effect, ban abortions and would, in theory, force the Supreme Court to reconsider *Roe v. Wade*.[297] But even after Senator Jesse Helms (R-NC) introduced a version of the bill, conservative legal scholars and judges worried that the Court would simply strike down the so-called human-life bill.[298] Galebach proposed that Congress had the authority to pass the bill under Section Five of the Fourteenth Amendment—as part of lawmakers' authority to remedy violations of rights spelled out under that amendment.[299] Skeptics, including Judge Robert Bork, an outspoken critic of the *Roe* decision, believed that Section Five did not empower Congress to adopt a definition of fetal personhood at odds with the holding of *Roe* itself.[300]

In 1981, Senator Orrin Hatch (R-UT) proposed an alternative: an amendment declaring that the federal Constitution said nothing about abortion.[301]

stance on abortion as opposed to the political expedience of the time is difficult to distinguish. *Reagan Affirms His Anti-Abortion Stand*, N.Y. TIMES, Feb. 8, 1976, at 44.

291. *See, e.g.*, Martin Tolchin, *Financing Bill and Abortion*, N.Y. TIMES, Oct. 2, 1980, at A19.

292. *See infra* Section III.B.

293. *See, e.g.*, ZIEGLER, *supra* note 100, at 82–83.

294. *See id.*

295. *See id.* at 82–84.

296. For Galebach's article, see Stephen H. Galebach, *A Human Life Statute*, 7 HUMAN LIFE REV. 5, 5–33 (1981).

297. *See id.*

298. *See* Joan Beck, *The Pro-Life Groups Turn to Congress on Abortion*, CHI. TRIB., Jan. 30, 1981 (§ 3), at 2; *Abortion Foes Offer Bill: Life Begins with Conception*, CHI. TRIB., Feb. 11, 1981 (§ 1), at 8.

299. *See* Galebach, *supra* note 296, at 10–11.

300. *See* SUBCOMMITTEE ON SEPARATION OF POWERS, S. COMM. ON THE JUDICIARY, REP. THE HUMAN LIFE BILL–S. 158 (1981).

301. *Hatch Introduces New Federalist Amendment*, NAT. RIGHT TO LIFE NEWS, Sep. 21, 1981, at 1; Leslie Bennetts, *Antiabortion Forces in Disarray Less Than a Year After Victories in Elections*, N.Y. TIMES (Sept. 22, 1981), https://www.nytimes.com/1981/09/22/us/antiabortion-forces-in-disarray-less-than-a-year-after-victories-in.html [https://perma.cc/G88X-H9W2].

Hatch's Amendment, by contrast to the human-life bill, would not criminalize any abortions but would allow state and federal lawmakers to do so if they wished.[302] Believing that Hatch's proposal stood a better chance of passing, feminist and abortion-rights groups mounted an unprecedented effort to defeat the Hatch Amendment, with NARAL alone working on training activists in every state to block ratification in that legislature.[303] To defeat it, abortion-rights groups reminded voters that states would again have the power to ban any or all abortions.[304] Pro-choice activists highlighted arguments that if the bill passed, lawmakers would force "women to carry to term even in pregnancies that involved rape and incest."[305]

The argument seemed powerful. Several months later, organizations like the National Organization for Women ("NOW"), a large feminist organization, opposed Reagan's efforts to further limit exceptions to the Hyde Amendment by eliminating funding for the rape and incest exception.[306] To do so, feminists used the rape-or-incest exception to insist that the president and the entire pro-life movement harbored misogynistic beliefs.[307] Jane Wells-Schooley, the vice-president of NOW, denounced the Hatch Amendment, stating: "What we're talking about here is incest and rape."[308] Iris Mitgang, the head of the National Women's Political Caucus, argued that rape and incest exceptions exposed the administration's true view of women.[309] "Women don't seek rape or incest," Mitgang argued.[310] "One crime should not perpetuate a second crime against the victim [by denying Medicaid funding]."[311] Unconvinced that there would be political fallout, Congress voted to eliminate the exception.[312] Pro-life members of the Senate repeated established arguments about the guilt of women who claimed to be raped.[313] "This is a red herring . . . whereby people come up four months later and say, 'Oh, by the way, I was raped,'" Hyde asserted on the floor of the House.[314]

302. *See* ZIEGLER, *supra* note 100, at 86.

303. *See, e.g.*, Susan Fogg, *The Abortion Factions Are Mapping Their Strategy*, L.A. TIMES, Jan. 29, 1981, at 12; Becky Thorne, *Abortion Battle Intensifies Over Hatch's Amendment*, 11 OFF OUR BACKS 5, 5 (1981).

304. *See supra* note 298 and accompanying text.

305. Nadine Brozan, *Opposing Sides Step Up Efforts on Abortion Measure*, N.Y. TIMES (Feb. 15, 1981), https://www.nytimes.com/1981/02/15/us/opposing-sides-step-up-efforts-on-abortion-measure.html [https://perma.cc/AQF3-KF9L].

306. Bernard Weinraub, *Feminists Attack Reagan Administration Plan to Curb Aid for Abortion*, N.Y. TIMES (Mar. 26, 1981), https://www.nytimes.com/1981/03/26/us/feminists-attack-reagan-administration-plan-to-curb-aid-for-abortion.html [https://perma.cc/7UYU-YQJ4].

307. *See id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *See Abortion Funding Slashed*, ATLANTA J. CONST., May 22, 1981, at 1A.

313. Francis X. Clines, *Senate Passes New Abortion Aid Curb*, N.Y. TIMES (May 22, 1981), https://www.nytimes.com/1981/05/22/us/senate-passes-new-abortion-aid-curb.html [https://perma.cc/B6GJ-RRMA].

314. *Id.*

Nevertheless, arguments about rape and incest were becoming an increasingly powerful rhetorical tool for pro-choice groups. In 1982, pro-choice columnists opposed to the human-life bill and the Hatch Amendment routinely emphasized that both would "turn back the clock on abortions by denying them even to victims of rape and incest."[315] NARAL's major fundraising campaign the previous year emphasized the elimination of rape and incest exceptions to the Hyde Amendment as evidence of "anti-woman sentiment."[316] The emphasis put on the rape and incest exception was no accident. By the mid-1980s, both pro-choice and pro-life groups sought to professionalize their operations, relying on pollsters, consultants, and focus groups to frame their messages.[317] Each movement reached this point in different ways. Groups like NARAL responded to perceived setbacks in the past elections.[318] Underfunded and small pro-life groups claimed to have punched well above their weight, shaping the GOP's 1980 platform plank on abortion and securing the election of several underdog Senate candidates in 1978, including Republican Roger Jepsen of Iowa.[319] Pro-choice groups believed that they had failed largely because they had left the field open to the opposition when it came to elections.[320] "Why, you ask, are [abortion opponents] succeeding despite the ruling of the U.S. Supreme Court? The answer is simple: they have frightened and intimidated our political leaders," wrote Karen Mulhauser of NARAL.[321] "The battle for liberty is won or lost at the polls."[322]

NARAL conducted a poll between 1979 and 1980 found that a majority of Americans fell in the middle, thinking that abortion should be legal under some but not all circumstances.[323] Leaders of the group believed that politicians caved to pressure from pro-lifers because they were more politically visible and savvy.[324] "Politicians have not felt the strength of our numbers," stated Jane Pinsky of NARAL.[325] In response, the group launched "Impact '80," a campaign to influence politicians and prove the existence of a pro-choice majority.[326] Issues like abortion in cases of rape or incest polled well—and allowed pro-choice groups to show that a majority supported their views.[327]

315. Carole Ashkinaze, *Life Amendment Would Return Horrors of Anti-Abortion Era*, ATLANTA J. CONST., Feb. 3, 1982, at 3B.

316. Letter from Nat'l Abortion Rights Action League (Nov. 5, 1981).

317. Letter from Nanette Falkenberg, Exec. Dir., Nat'l Abortion Rights Action League to Pat Keefer (Feb. 10, 1982); Internal Memorandum on Post-Election Focus Groups on the Abortion Issue, Nat'l Abortion Rights Action League (Oct. 26, 1982).

318. *See infra* notes 321 & 323 and accompanying text.

319. *See, e.g.*, Douglas E. Kneeland, *Clark Defeat in Iowa Laid to Abortion Issue*, N.Y. TIMES, Nov. 13, 1978, at A18.

320. *See infra* notes 321 & 323 and accompanying text.

321. ZIEGLER, *supra* note 100, at 138–39.

322. *Id.* at 319.

323. *See, e.g.*, Richard Phillips, *The Shooting War Over 'Choice' and 'Life' is Beginning Again*, CHI. TRIB., Apr. 20, 1980 (§ 12), at 3; *see also* Leslie Bennetts, *For Pro-Abortion Group, 'An Aggressive New Campaign'*, N.Y. TIMES (May 1, 1979), https://www.nytimes.com/1979/05/01/archives/for-proabortion-group-an-aggressive-new-campaign-i-hear-from-the.html [https://perma.cc/4Y78-QTNE].

324. *See id.*

325. *Id.*

326. *See id.*

327. *See id.*

Pro-life groups also came to see opposition to rape and incest exceptions as a political liability, at least outside the funding context.[328] Abortion foes had deepened their involvement in politics early on when progress on a constitutional amendment stalled, believing that the movement would not succeed unless it replaced sitting lawmakers with those more receptive to the movement's cause.[329] But by 1983, pro-lifers had to give up on a constitutional amendment.[330] Strategic divisions within the movement doomed both the Hatch Amendment and the human-life bill.[331] Movement pragmatists argued that the bill was pointless and would have no effect after the Supreme Court struck it down.[332] Absolutists believed that the Hatch Amendment was unprincipled and would eliminate any pressure on politicians to pass an absolute abortion ban.[333] After abandoning this constitutional campaign, leading anti-abortion groups offered a new justification for their reliance on the GOP: successful candidates could shape the membership of the Supreme Court and ultimately overturn *Roe.* But if the fate of abortion depended on election results, pragmatists urged their colleagues to maximize support for anti-abortion positions.[334] For example, in 1983, Dr. John Willke, a prominent NRLC member who believed that pregnancy after rape was a near impossibility, emphasized the results of a poll suggesting that most Americans favored abortion in cases of rape or incest.[335] Aiming to improve the odds of GOP candidates who would help pave the way for a decision overturning *Roe*, Willke and his colleagues sought to play up model laws and arguments that appealed to a broad audience.[336] Opposing rape and incest exceptions, it seemed, would backfire on election day.

With this new political approach, pro-life arguments about rape and incest changed—at least publicly. Rather than arguing that women could not become pregnant as a result of rape—or that abortion in cases of rape was unjustified—pro-lifers instead argued that almost all abortions took place for "frivolous reasons or for no reason at all."[337] Dr. C. Everett Koop, Reagan's surgeon general and a prominent abortion opponent, estimated that only three percent of all abortions took place in the so-called hard cases that included rape and incest.[338] This argument suggested that victims of sexual assault deserved different treatment—and access to abortion—while other women were perpetrators, ending human life without any justification.

The idea of a rape and incest exception fit well in a burgeoning message centered not on the benefits of abortion but the necessity of choice for women

328. *See infra* Section III.B.

329. *See, e.g.*, Dolores Barkley & Violet Graham, *Sleeper Issue: Well-Organized Movement Has Made Abortion Volatile Issue in 1976 Campaign*, ATLANTA J. CONST., Feb. 15, 1976, at 6C.

330. *See, e.g.*, ZIEGLER, *supra* note 100, at 84–91.

331. *See id.*

332. *See id.*

333. *See id.*

334. *See infra* Section III.C.

335. Dermody, *supra* note 19.

336. *See infra* Section III.C.

337. Dermody, *supra* note 19.

338. *Id.*

who had previously had their fate dictated by circumstances. In defending choice, for example, the president of Planned Parenthood of Atlanta wrote in 1983: "Many of these cases are victims of rape and incest, sexually uneducated teenagers, or women in desperate situations."[339] Without directly questioning the statistics on the prevalence of pregnancy as a result of rape, pro-choice advocates suggested that rape and incest victims resembled other women choosing abortion in powerful ways: in both cases, women found themselves victimized by circumstances beyond their control.[340] In Congress, lawmakers continued to deny funding for rape and incest, but abortion foes continued using the acceptance of rape and incest exceptions to show that other reasons for choosing abortion were trivial. "Abortion is, possibly a remedy to pregnancies caused by traumas like rape and incest . . . but it most certainly is not and shouldn't be used as a form of birth control," one activist explained.[341]

In this period, when the abortion issue returned to the Supreme Court, the rhetoric of innocence was less obvious than in earlier decisions, but abortion foes experimented with different ideas of guilt and innocence. Rather than presenting women as wrongdoers, pro-lifers increasingly argued that abortion itself victimized them. These arguments influenced advocacy in *City of Akron v. Akron Reproductive Health Center* ("*Akron I*"), a case about a multi-restriction model ordinance drafted by leading anti-abortion scholars.[342] Abortion foes placed particular importance on an informed-consent provision that they claimed would protect women's health by telling them about the supposed risks of abortion.[343] In *McRae* and *Maher*, anti-abortion briefs had insinuated that women were not always victims, even in cases where a woman claimed to have a health risk or to be a victim of rape and incest.[344] By contrast, in *Akron I*, pro-life briefs at times portrayed women as victims but suggested that it was abortion itself that harmed them.[345] "It is impossible for the state to burden the woman's right to decide by requiring that she be given factual information which . . . enhances her ability to decide," AUL attorneys wrote in an amicus brief for Feminists for Life.[346]

At first, these arguments about the victimhood of women seemed not to resonate with the Court. By a 6-3 margin, the Court struck down the informed-

339. Richard H. Russell, *Planned Parenthood Clears the Air on Position*, ATLANTA J. CONST., Sept. 21, 1983, at 14A.

340. *See, e.g.*, *id.*

341. Lynn M. Maudlin, *Abortion, Responsibility, and Birth Control*, L.A. TIMES, Nov. 10, 1984, at 2.

342. *See* City of Akron v. Akron Reprod. Health Ctr., 462 U.S. 416, 419, 421–25 (1983).

343. *See, e.g.*, Reginald Stuart, *Akron Divided by Heated Abortion Debate*, N.Y. TIMES (Feb. 1, 1978), https://www.nytimes.com/1978/02/01/archives/akron-divided-by-heated-abortion-debate-unconstitutionality-alleged.html [https://perma.cc/2BAE-DYG6]; Nick Thimmesch, *Akron Abortion Proposal Could Fuel the National Debate*, CHI. TRIB., Jan. 25, 1978 (§ 3), at 2.

344. *See supra* Section III.A.

345. *See, e.g.*, Petition for a Writ of Certiorari for the City of Akron at 1, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (No. 81-746); Brief Amicus Curiae of Feminists for Life in Support of Petitioner, City of Akron at 6–7, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (No. 81-746).

346. *See* Brief Amicus Curiae of Feminists for Life in Support of Petitioner, City of Akron at 8, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1993) (No. 81-746).

consent provision and the rest of the ordinance.[347] In discussing mandated counseling, the Court suggested that the law itself manipulated and victimized women by forcing them to consume a "parade of horribles."[348] The law, as *Akron I* framed it, intended "not to inform the woman's consent but rather to persuade her to withhold it altogether."[349] Even Ronald Reagan's first nominee, Sandra Day O'Connor, did not pick up on the rhetoric of groups like AUL, although O'Connor's dissent contained several useful tools for abortion foes.[350] Calling *Roe*'s trimester framework "completely unworkable," O'Connor reasoned that the state had "compelling interests in the protection of potential human life throughout pregnancy" and that abortion regulations should be struck down only if they created a severe or absolute obstacle.[351]

In Congress, debates about funding in cases of rape and incest continued, with feminists using the lack of an exception as a cudgel against the anti-abortion movement.[352] Increasingly, however, the leaders of groups like NOW and NARAL felt that focusing so much on victims of rape and incest had become a political liability.[353] After all, anti-abortion groups conceded support for the exception of characterizing the majority of abortions as frivolous and immoral.[354] Pro-choice groups realized the problems associated with emphasizing rape and incest after the release of *The Silent Scream*, a film that claimed to depict a first-trimester abortion in real-time.[355] To combat *The Silent Scream*, NARAL and other groups sought to "recapture the emotional side of the issue" by detailing how all women benefitted from abortion, even in so-called convenience cases.[356]

Working with other pro-choice organizations, NARAL launched *Silent No More*, a campaign that would detail the ways that access to legal abortion had helped women and their families.[357] Nanette Falkenberg, the head of NARAL, specifically advised against emphasizing arguments about rape and incest.[358] She suggested that these claims too easily trivialized the reasons that women who had consented to sex subsequently chose abortion.[359] "We must *not* focus only on the hardship cases," Falkenberg argued in 1985.[360] "Those abortions are not

347. *See Akron Reprod. Health Ctr.,* 462 U.S. at 444–46, 452.

348. *Id.* at 444–45.

349. *Id.* at 444 (O'Connor, J., dissenting).

350. *Id.* at 454–55.

351. *See id.* at 454–64.

352. Paul Houston & Karen Tumulty, *Conferees Agree on Funding Bill*, L.A. TIMES, Oct. 11, 1984, at B1.

353. *See, e.g.*, *supra* notes 319 and 321 and accompanying text.

354. *See, e.g.*, Dermody, *supra* note 19; Colin O'Donnell & R. Bruce Dold, *House Tightens State Restrictions on Abortion*, CHI. TRIB., Jun. 24, 1983, at 2C; Marcia Chambers, *Advocates for the Right to Life*, N.Y. TIMES (Dec. 16, 1984), https://www.nytimes.com/1984/12/16/magazine/advocates-for-the-right-to-life.html [https://perma.cc/U69H-J2FS].

355. *See* SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 156-61 (2010); JOHANNA SCHOEN, ABORTION AFTER ROE: ABORTION AFTER LEGALIZATION 145–51 (2015).

356. Letter from Nanette Falkenberg, Exec. Dir., Nat'l Abortion Rights Action League (NARAL) to Judy Goldsmith, President, Nat'l Org. for Women (Feb. 1, 1985).

357. *See, e.g.*, Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J.L. & GENDER 285, 301–04 (2014).

358. Memorandum from Nanette Falkenberg, Exec. Dir., NARAL, to NARAL Leadership (May 1985).

359. *See id.*

360. *Id.*

the only ones that are justifiable or 'right.'"[361] At a March 1985 strategy meeting hosted by NARAL, attendees detailed the reasons for avoiding so much emphasis on rape and incest.[362] Some worried that existing messages framed abortion and even sex as regrettable.[363] Attendees believed it necessary to defend the idea of "seek[ing] and hav[ing] a right to seek sexual pleasure" for women who might become pregnant as a result of intercourse.[364] The problem with vaunting a rape and incest exception, for pro-choice activists, it seemed, was the suggestion that women deserved abortion access primarily because they did not choose to have sex and thereby assume the risk of pregnancy.[365] But in using the rape and incest exception as a political weapon, pro-choice groups had not worked to ensure that the "decision not to have kids" was generally "valued as a moral decision."[366]

C. Moral Arguments and Abortion Bans

In the late 1980s, the changing composition of the Supreme Court made it seem possible that states could once again ban all abortions. The Supreme Court had struck down incremental restrictions like the one at issue in *Akron I.* But in 1986, the ground began to shift. Then, the Court considered another multi-restriction law from Pennsylvania.[367] The law bore a striking resemblance to the one invalidated in *Akron I*, but four justices dissented from the decision striking it down.[368] The year the Court decided *Thornburgh*, Reagan nominated Antonin Scalia to the Court.[369] Then a year later, Lewis Powell, one of the justices who had joined the majority, announced his retirement.[370] The potential impact of his replacement was obvious. With an additional vote, the Pennsylvania case, *Thornburgh v. American College of Obstetricians and Gynecologists*, would have come out the other way. Ronald Reagan wasted no time in nominating Robert Bork, a judge and scholar who had openly criticized the reasoning of the *Roe* decision.[371] Bork's nomination fell, but the judge who ultimately replaced him,

361. *Id.*

362. Memorandum from the Impact of Focus on Women Strategy Weekend on "Silent No More," (Apr. 29, 1985).

363. *See id.*

364. *Id.*

365. *See, e.g.*, *id.*

366. *See, e.g.*, *id.*

367. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 750–51 (1986).

368. *See id.* at 757–65, 782, 786, 814.

369. *See, e.g.*, RICHARD A. BRISBIN JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 59 (1997); JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 99 (2009).

370. Glen Elsasser & Janet Cawley, *Powell Quits Supreme Court*, CHI. TRIB., June 27, 1987, at 1; Stuart Taylor Jr., *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. TIMES (Jun. 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-leaves-high-court-took-key-role-on-abortion-and-on-affirmative-action.html [https://perma.cc/LL5J-G6D4].

371. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 169–70 (2008); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 336 (2005).

Judge Anthony Kennedy of the Ninth Circuit Court of Appeals, easily won confirmation.[372] Abortion foes hoped that with Scalia and Kennedy on the Court, there would be five votes to overturn *Roe*.[373]

While continuing to oppose a rape and incest exception to funding bans, pro-lifers had to consider whether to include the exception in laws designed to give the Court the chance to undo *Roe.* NRLC lawyers approached this question by focusing both on pleasing the Court and on appealing to popular majorities.[374] In 1988, James Bopp Jr., the general counsel of NRLC, borrowed from the logic of the rape and incest exceptions.[375] When it came to funding, fights about rape and incest centered on women who had highly sympathetic and widely accepted reasons for ending a pregnancy.[376] Bopp and Richard Coleson, an attorney who worked at his firm, at first represented men who tried to block the abortions of women with what Bopp described as inadequate reasons for seeking abortions.[377] In the first such case in 1988, Bopp and Coleson represented John Smith (a pseudonym), a truck driver who wished to stop his teenage ex-girlfriend from ending her pregnancy.[378] Bopp and Coleson described Smith as a man who wished to marry and start a family with the love of his life.[379] By contrast, Bopp and Coleson suggested that Jane Doe, Smith's former lover, wanted to end her pregnancy because of a "desire to look nice in a bathing suit this summer, her desire not be pregnant this summer, and her desire not to share the petitioner with the baby."[380] The two convinced a local judge but lost in the Indiana Supreme Court, and the United States Supreme Court refused to take the case.[381] Although Bopp and Coleson continued to represent similarly situated men, the campaign largely failed.[382] After all, in 1976, in *Planned Parenthood of Central Missouri v. Danforth*, the Court had struck down a law requiring women to get their husbands' written consent before getting an abortion.[383] Courts suggested that *Danforth* controlled the outcome of the cases brought by Bopp and Coleson.[384]

Nevertheless, cases like *Smith v. Doe* illuminated how an emphasis on the rape and incest exception did not always help supporters of abortion rights. If

372. Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), https://www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html [https://perma.cc/2XYQ-9DY6].

373. Letter from Guy Condon, President, Americans United for Life (AUL) to Richard John Neuhaus, President, Inst. Religion & Pub. Life (Apr. 1988).

374. *See supra* Section III.B.

375. Tamar Lewin, *Woman Has Abortion, Violating Court's Order on Paternal Rights*, N.Y. TIMES (Apr. 14, 1988), https://www.nytimes.com/1988/04/14/us/woman-has-abortion-violating-court-s-order-on-paternal-rights.html [https://perma.cc/HNR4-6LVE]; *Abortion Dispute Sent to Indiana Lower Court*, CHI. TRIB., Apr. 15, 1988, at 3; *Glen Elasser*, *Father's Abortion Appeal Rejected*, CHI. TRIB., Nov. 15, 1988, at 3.

376. *See supra* Part III.

377. *See* Lewin, *supra* note 375.

378. *See id.*

379. Petition for Writ of Certiorari at 8, 16, Smith v. Doe, 492 U.S. 919 (1989) (No. 88-1837).

380. *Id.*

381. *See* Smith v. Doe, 486 U.S. 1308, 1308 (1988).

382. *See, e.g.*, Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 541–44 (2018).

383. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 53 (1976).

384. *See, e.g.*, *Smith*, 486 U.S. at 1310.

Americans only supported abortion in so-called hardship cases, such as rape and incest, when women seemed to be victims, anti-abortion attorneys hoped to convince the public and the Court to allow bans of all other abortions. Within NRLC, this idea gained currency after the Court's decision in *Webster v. Reproductive Health Services.*[385] Ideas of guilt and innocence figured centrally in the litigation of *Webster.* Supporters of abortion rights drew on various visions of innocence forged in earlier cases.[386] Some suggested that moral norms of any kind remained subjective and personal.[387] One feminist brief, for example, described abortion as a "highly contextualized, uniquely private decision," one that centered on a wide variety of "religious or moral values."[388] Others suggested that overturning *Roe* would in itself be especially immoral because it would re-victimize women who had already suffered from sexual abuse or other forms of domestic violence.[389] An amicus brief submitted by the National Coalition Against Domestic Violence emphasized: "the frequency with which abortions are sought to terminate pregnancies that resulted from coercion or abuse . . . ."[390] The brief insisted that statistics on abortion in cases of rape and incest no doubt underestimated the total number of women affected.[391] The "social stigma" surrounding rape and incest meant that the two were "notoriously underreported crimes."[392] And rape and incest exceptions would never get to the heart of the problem because of the difficulty of proving that sex was not consensual and because so much sexual coercion did not meet strict definitions of sexual assault.[393] The effect of these laws on victims of domestic violence, the brief suggested, exposed the extent to which abortion restrictions constituted sex discrimination—a reflection of pernicious stereotypes about women's roles.[394]

Anti-abortion briefs suggested that innocence fell along a hierarchy but insisted that abortion, not anti-abortion lawmakers, victimized women.[395] An amicus brief submitted by the United States Catholic Conference stressed what it presented as evidence that "[p]ersonal, social, and family problems are aggravated, not alleviated by abortion."[396] The amicus brief of Feminists for Life made

385. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 490 (1989).

386. *See infra* notes 387–388 and accompanying text.

387. *See, e.g.*, Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 29, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605); Brief for Catholics for a Free Choice et al. as Amici Curiae in Support of Appellees at 2, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

388. Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 29, 44, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

389. *See infra* notes 428–429 and accompanying text.

390. Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 21, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

391. *See id.*

392. *Id.*

393. *See id.* at 21–23.

394. *See id.* at 22–25.

395. *See, e.g.*, Brief for United Catholic Conference as Amicus Curiae Supporting Appellants at 20, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605); Brief for Feminists for Life et al. as Amici Curiae Supporting Appellants at 3, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

396. *See, e.g.*, Brief for United Catholic Conference as Amicus Curiae Supporting Appellants at 20, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

this point even more forcefully, arguing: "[S]tudies and statistics cannot adequately describe the tragedy of the abortion establishment's exploitation of women—only the families of abortion's victims and the surviving victims themselves can adequately describe the pain they have endured."[397] And yet anti-abortion briefs made clear that even if women were victims, unborn children were more innocent still.[398] As one amicus brief explained: "permitting the termination of innocent life at an early stage of temporal development is baseless, arbitrary, and without moral justification."[399]

Webster did not engage with all of these arguments, but its conclusions struck abortion foes as extremely important just the same.[400] The Court upheld all of the challenged Missouri law.[401] A plurality further called into question the ongoing validity of the trimester framework, suggesting that the government had a compelling interest in protecting potential life throughout pregnancy.[402] Nor did the plurality think that the trimester framework was workable, especially given advances in obstetric medicine.[403]

To NRLC lawyers, *Webster* signaled that the Court was prepared to overturn *Roe* immediately. Bopp and Coleson believed that at a minimum, the Court would apply O'Connor's vision of an unconstitutional undue burden—O'Connor had not joined the most aggressive parts of *Webster*.[404] But if her rule applied, most or all abortion restrictions would be constitutional.[405] O'Connor wrote that an abortion regulation should be constitutional unless the law created a severe or absolute obstacle.[406] Even if a law was unduly burdensome, O'Connor reasoned, the Court should uphold it if the government could show that it had a compelling interest.[407] NRLC proposed what it called bans on abortion as a method of birth

397. Brief for Feminists for Life et al. as Amici Curiae Supporting Appellants at 7–8, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

398. *See, e.g.*, Brief for the Catholic Lawyers Guild for the Archdiocese of Boston as Amici Curiae Supporting Appellants at 25, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605); Brief for the Ctr. for Jud. Stud. and Certain Members of Congress as Amici Curiae Supporting Appellants at 18, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

399. Brief for the Catholic Lawyers Guild for the Archdiocese of Boston as Amici Curiae Supporting Appellants at 14, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

400. *See Webster*, 492 U.S. at 505–18.

401. *See id.* at 519–20.

402. *See id.* at 517–18.

403. *See id.* at 516–18.

404. *See* James Bopp Jr. & Richard E. Coleson, *What Does* Webster *Mean?* 138 U. PA. L. Rev. 157, 159–60 (1989); James Bopp Jr. & Richard E. Coleson, Webster *and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 271–79 (1990). For O'Connor's concurring opinion in *Webster*, see *Webster*, 492 U.S. at 522–31.

405. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 458–61, (1990) (O'Connor, J., concurring in part and concurring in judgment in part); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 519–20 (1990) ("*Akron II*") (opinion of Kennedy, J.); *Webster,* 492 U.S., at 530 (O'Connor, J., concurring in part and concurring in judgment); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 464 (1983) ("*Akron I*") (O'Connor, J., dissenting).

406. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part and concurring in the judgment in part).

407. *See id.*

control, measures that outlawed all abortions with the exception of rape and incest, cases of severe fetal abnormality, and threats to a woman's life or health.[408] Burke Balch, the group's legislative director, claimed that O'Connor would find that these stringent laws reflected "a compelling interest in protecting fetal life" and uphold the law, especially since it allowed for abortions in cases that most Americans supported.[409]

NRLC's model law, and the inclusion of a rape and incest exception, reflected the extent to which support for access to abortion seemed to depend on the perceived victimhood of women. Louisiana sought to revive an abortion ban that courts had previously struck down but allowed for a rape and incest exception.[410] NRLC successfully promoted its model bill in a variety of states.[411] The strategy conceded support for legal abortion in cases of rape and incest but used these exceptions to denigrate the motives and question the innocence of most women choosing abortion.

AUL likewise assumed support for the rape and incest exceptions in seeking to prove that pro-lifers were not anti-woman. Clarke Forsythe of AUL interpreted *Webster* more cautiously than did NRLC lawyers, reasoning that O'Connor had not joined the most ambitious part of the Court's opinion.[412] "While certainly opening the door to restrictions, […] *Webster* also indicates that it is not certain that there is a majority to overturn *Roe*," Forsythe reasoned.[413] In 1990, to craft a post-*Webster* strategy, AUL held a strategy session.[414] Those at the meeting agreed that it was important to show "that the pro-life movement cares about women."[415] A 1991 Gallup poll commissioned by AUL delivered similar results.[416] As AUL President Guy Condon explained, the results made pro-lifers seem "against women, against the democratic process if they defy traditional religious principles, and even against one another."[417] Accepting rape and incest exceptions seemed to be the bare minimum for an organization committed to appealing to more women. Like NRLC, AUL sought to ban abortions

408. Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES (Apr. 2, 1990), https://www.nytimes.com/1990/04/02/us/states-testing-the-limits-on-abortion.html [https://perma.cc/Y82V-2V7Q].

409. *Id.*

410. *See, e.g.*, Karen Tumulty & Michael J. Kennedy, *Louisiana Governor Vetoes Strictest U.S. Abortion Bill*, L.A. TIMES (Jul. 28, 1990), https://www.latimes.com/archives/la-xpm-1990-07-28-mn-559-story.html [https://perma.cc/527U-HM2D].

411. *See, e.g.*, *Idaho's Strict Abortion Bill Advances*, L.A. TIMES (Mar. 17, 1990), https://www.latimes.com/archives/la-xpm-1990-03-17-mn-210-story.html [https://perma.cc/EL7L-S62Y]; Gina Kolata, *Opponents of Louisiana's New Law Say It Could Limit Some Use of Contraceptives*, N.Y. TIMES (June 21, 1991), https://www.nytimes.com/1991/06/21/us/opponents-of-louisiana-s-new-law-say-it-could-limit-use-of-some-contraceptives.html [https://perma.cc/B9AW-SJZQ]; Paul Houston, *Abortion Opponents to Press State Legislate Wide-Ranging Abortion Curbs*, L.A. TIMES (Oct. 3, 1989), https://www.latimes.com/archives/la-xpm-1989-10-03-mn-579-story.html [https://perma.cc/PBS6-TNK7].

412. Letter from Clarke Forsythe to Pro-Life State Legislators and Other Interested Parties (Aug. 23, 1989).

413. *Id.*

414. Americans United for Life, Conceptual Meeting Minutes (Mar. 21, 1991).

415. *See id.*

416. *See* Letter from Guy Condon, President, Americans United for Life to Richard John Neuhaus, President, Inst. Religion & Pub. Life (Mar. 8, 1991).

417. Guy Condon, *A Strategic Proposition for the Pro-Life Movement*, Americans United for Life (Oct. 23, 1991).

pursued for what members of the group felt were harder to justify (and less publicly accepted) reasons.[418] Henry Hyde emphasized similar arguments in the media. "The 'hard cases'—maternal health, rape and incest—account for less than 1% of the 1.5 million abortions performed annually in the United States," he wrote.[419] "The rest are termed, euphemistically, 'abortions of convenience' . . . . And these are precisely the abortions that more than three-quarters of our people do not want to remain legalized."[420] Hyde's argument, like the ones made by AUL and NRLC, suggested that Americans would and should support legal abortion only if women chose it for what was perceived as innocent, ethical reasons.

Although many expected the Court to hear a challenge to one of these "birth control" bans, the justices instead took a challenge to a multi-restriction Pennsylvania law.[421] Nonetheless, many expected the Court to overturn *Roe*, authorizing states to pass the kinds of laws that NRLC favored.[422] AUL took particular note of the Court's new approach to stare decisis in a recent death-penalty case, *Payne v. Tennessee*.[423] Under *Payne*, Guy Condon argued, "reversal [was] warranted when a ruling causes confusion and defies consistent application by the Supreme Court."[424] Under this standard, a conservative Court seemed likely to overturn *Roe.*

But while many expected the justices to reverse *Roe*, support for rape and incest exceptions seemed to be growing. As pro-choice attorneys began to develop a litigation strategy for the Pennsylvania case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the rhetoric of innocence played a defining role. As many saw it, rape and incest exceptions made sense because they protected women who had been victims of crimes outside of their control. Abortion-rights attorneys explained that because many more women suffered a similar fate, abortion rights had unquestionable importance.

D. Casey *and the Victimhood of Women*

To be sure, many, including abortion-rights supporters, expected the Court to reverse *Roe*.[425] Indeed, the primary aim of many feminist attorneys was to maximize the political backlash to such a decision. In a meeting of pro-choice amicus, Kathryn Kolbert and Linda Wharton, the lawyers litigating the case, proposed stating that modifying *Roe* (for example, by applying the undue-burden

418. Letter from Clarke Forsythe, *supra* note 412, at 6.

419. Henry Hyde, *The Force Is Not with* Roe v. Wade: *Contrary to Common Wisdom, the Public Doesn't Want It*, L.A. TIMES (July 23, 1989), https://www.latimes.com/archives/la-xpm-1989-07-23-op-134-story.html [https://perma.cc/NE54-6CKY].

420. *Id.*

421. *See infra* Part III.

422. *See* Letter from Kitty Kolbert and Linda Wharton to Planned Parenthood v. Casey Work Team, "Re: Amicus Organizing Effort" 2–5 (Dec. 10, 1991) [hereinafter Amicus Organizing Effort]. On the strategy guiding the appeal in *Casey*, see Letter from Kitty Kolbert to Reproductive Freedom Project Attorneys (Sept. 26, 1991).

423. Payne v. Tennessee, 501 U.S. 808, 827–30 (1991).

424. Letter from Guy Condon, President, Americans United for Life (AUL) to Richard John Neuhaus, President, Inst. Religion & Pub. Life (Oct. 1, 1991).

425. *See, e.g.*, ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 118 (2019).

test) would be tantamount to dismantling the precedent altogether.[426] Nevertheless, Kolbert, Wharton, and amici still tried to give the Court reason to preserve abortion rights.[427] Strikingly, Wharton and Kolbert invested most in their challenge to a spousal-notification law.[428] Their brief suggested that the measure would re-victimize women who already suffered because of domestic violence.[429] Moreover, the brief used the circumstances of these women to demonstrate the extent to which abortion laws victimized all women.[430]

Kolbert and Wharton had assembled an elaborate record in the case, putting on extensive evidence of how domestic violence rendered the requirement burdensome and even dangerous for some women.[431] While pro-lifers insisted that only a handful of women confronted violence, Kolbert and Wharton suggested that one out of every two women would experience domestic violence in her lifetime, including a surprising number of married women.[432] And the victimization of women might take forms with which lawmakers were less familiar—not only "physical battering" but also "sexual abuse," "psychological abuse," "abuse of the children and other family members," and means of financial control.[433] As Kolbert and Wharton saw it, the state's effort to carve out exceptions for certain women who suffered from domestic violence only made things worse.[434] Their brief noted that the exception would sometimes trigger notice to abusers that women would otherwise have been able to avoid.[435] In other cases, the exceptions were either too narrow to protect all victims or expected too much from victims who would face retaliation or psychological barriers that would stop them from going to law enforcement.[436]

These experiences showed the extent to which restrictions victimized all women. Representing the petitioners in *Casey*, Linda Wharton and Kitty Kolbert suggested that without access to legal abortion, biology, institutional sexism, and domestic violence would make many more women victims of circumstance.[437] As a matter of biology, women (and only women) faced "significant risks of physical harm" that they neither chose nor controlled.[438] Because of widespread sex stereotypes, women had also become victims of state laws that had "a dramatic impact on a woman's educational prospects, employment opportunities,

426. Amicus Organizing Effort, *supra* note 422, at 2–5.

427. *See id.*; *see also* Brief for Petitioners and Cross-Respondents at 17, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

428. *See* Brief for Petitioners and Cross-Respondents at 40–48, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

429. *See id.* at 5–6.

430. *Id.* at 17.

431. *See id.* at 5–8, 40–44.

432. *See id.* at 5–6.

433. *See id.* at 6.

434. *See id.* at 6–8.

435. *See id.* at 7.

436. *See id.* at 6–8.

437. *See id.* at 24–26.

438. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring).

and self-determination"—so much so that "restrictive abortion laws depriv[ed a woman] of basic control of her life."[439]

Pro-life groups, by contrast, either questioned the innocence of women or suggested that fetal life was far more innocent than even victimized women. Some anti-abortion briefs emphasized that the Court could preserve other privacy rights while overturning *Roe* because only abortion "cause[d] the destruction of an innocent other."[440] The Bush Administration's brief suggested that *Roe* was wrong because it undervalued the state's paramount interest in protecting life.[441] "The protection of innocent human life-in or out of the womb-certainly the most compelling interest that a State can advance," the administration argued.[442]

The Court's decision in *Casey* adopted strikingly different and perhaps irreconcilable ideas of guilt, innocence, and even morality.[443] At the outset, the Court questioned whether moral concepts like guilt and innocence belonged in abortion law, even if states allowed for abortion in cases of rape and incest.[444] Here, *Casey* invoked the vision of morality developed in cases like *Roe* and *Akron I*, suggesting that any belief about innocence and abortion was personal and subjective.[445] The Court conceded that many found abortion to be deeply immoral but initially suggested that morality, when it came to abortion, did not provide any universal answers, especially when it came to the scope of constitutional rights.[446] Instead, *Casey* reasoned that each individual had to develop a moral code when it came to "one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[447]

But *Casey*'s reasoning about why abortion rights mattered was shot through with ideas of a more objective kind of guilt and innocence. In describing the reasons that women should have the ultimate power to make decisions about abortion, *Casey* portrayed women as victims of the biology of childbearing.[448] "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear," the plurality stated.[449] "That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice."[450] Pregnancy, as the Court described it, forced women to suffer not because they

439. *See id.* at 928.

440. Brief for the Southern Center for the Law & Ethics as Amicus Curiae in Support of Robert P. Casey et al. at 15–16, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

441. Brief for the United States as Amicus Curiae Supporting Respondents at 16, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

442. *Id.*

443. *See Casey*, 505 U.S. at 850–52.

444. *See id.* at 850–51.

445. *See id.*

446. *See id.*

447. *Id.* at 851.

448. *See id.* at 852.

449. *Id.*

450. *Id.*

had made poor sexual or personal decisions but because biology required women to assume burdens "unique to the human condition."[451] *Casey* also presented women as the prospective victims of state laws eliminating access to abortion. "The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives," the Court reasoned.[452]

Women's innocence figured most centrally in the Court's analysis of the spousal-notification provision.[453] The plurality estimated that between one-third and one-fifth of all women had faced serious assaults at the hands of intimate partners.[454] The number expanded further when the Court accounted for psychological abuse, financial abuse, and sexual abuse.[455]

Women, in this narrative, were victims of both domestic violence and state abuse. "We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases," *Casey* suggested.[456] Spousal-notification laws simply re-victimized women who had already suffered too much.[457] "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family," *Casey* held.[458] The unique innocence of domestic violence victims helped to make the difference for a Court that upheld every other provision of the disputed Pennsylvania law.

Casey mentioned that some viewed abortion as "nothing short of an act of violence against innocent human life," and at times, the Court itself seemed to view abortion as morally problematic.[459] Consider the Court's analysis of a mandated-counseling law. Pennsylvania required women to receive information about fetal development, adoption, and child support before having an abortion.[460] *Casey* reasoned that the law did not constitute an undue burden.[461] The Court asserted that the law protected women from the consequences of an uninformed and morally problematic decision.[462] "It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision," *Casey* stated.[463] "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate

451. *Id.*
452. *Id.* at 856.
453. *See id.* at 893–94.
454. *Id.* at 891.
455. *See id.* at 892.
456. *Id.* at 894.
457. *See id.* at 893–94.
458. *Id.* at 898.
459. *See id.* at 852.
460. *Id.* at 883.
461. *Id.*
462. *Id.* at 882.
463. *Id.* at 881–82.

purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[464]

Why would women suffer post-abortion regret? *Casey* implied that some, or perhaps most, women would deem abortion to be immoral if they understood the impact of the procedure on innocent fetal life.[465] The Court expected this reaction not because the justices had detailed evidence of post-abortion regret but because the plurality assumed the innocence of fetal life and the likelihood of women's regret in terminating it.[466] *Casey* routinely referred to fetal life as "unborn life" or "unborn human life," language often used before an invocation of fetal innocence.[467]

Casey only intensified interest in the rhetoric of innocence, especially for abortion foes. Pro-lifers paid special attention to the Court's analysis of stare decisis, particularly whether women relied on abortion in shaping their lives. As the debate about rape, incest, and funding raged on, anti-abortion attorneys sharpened their arguments about how abortion, not abortion laws, victimized women.

IV. RAPE AND INNOCENCE AFTER *CASEY*

Anti-abortion groups had started to incorporate ideas about the victimhood of women into their argumentative strategy well before *Casey*, but these efforts ratcheted up after the 1992 decision. This Part begins by exploring how the rhetoric of victimhood changed debates about the rape and incest exception to the Hyde Amendment, especially when Congress, for the first time, decided to include the exception. Increasingly, those on both sides tolerated abortion for women who could clearly be defined as victims. Next, this Part shows how related ideas of victimization spread as pro-lifers tried to compare rape and abortion, describing the latter as well as the former as often coerced and psychologically destructive. Nevertheless, in anti-abortion reasoning, this vision of women's innocence was both contingent and subordinate to the supreme innocence of an unborn child. Finally, this Part considers how the Court's post-*Casey* abortion jurisprudence reflected evolving ideas of innocence.

A. The Recognition of a Rape and Incest Exception

In 1993, for the first time in decades, Congress extended Medicaid funding to cases of rape and incest (similar efforts had fallen to the veto of George H.W. Bush in the late 1980s).[468] The shift began in March 1993 when President Bill

464. *Id.* at 882.
465. *See id.*
466. *See id.*
467. *See id.* at 869–70, 873, 876–77, 881, 883, 885.
468. *See* discussion *infra* Part IV.

Clinton again emphasized his plans to repeal the Hyde Amendment.[469] In Congress, however, there were simply not enough votes for a complete repeal.[470] The establishment of a rape and incest exception quickly emerged as a compromise solution.[471] By December 1993, the Clinton Administration had issued regulations that would force states to reimburse women who had abortions in cases of rape and incest.[472] Although Medicaid directors in several states protested, the administration pressed on, and abortion-rights groups seized an opportunity to present the opposition as intent on victimizing women.[473] "Survivors of rape and incest have suffered enough," stated prominent pro-choice attorney Kathryn Kolbert in defending the regulations.[474] "They should not be forced to carry pregnancies to term against their will."[475] Several states ultimately refused to comply with the administration's directive, and Planned Parenthood filed a legal challenge.[476] This litigation proved consequential. In Louisiana, for example, a federal judge accepted the administration's interpretation of the Hyde Amendment and reasoned that federal law preempted Louisiana Medicaid policy.[477] Louisiana lawmakers risked losing Medicaid altogether if they did not change their policy on rape and incest.[478] By August 1994, Louisiana had changed its law.[479]

Debate about the administration's move and the new scope of Hyde Amendment exceptions reflected the degree to which debate about rape and incest had changed, even in the context of funding. Although pro-lifers had conceded the political value of rape and incest exceptions to abortion bans, Henry

469. *See, e.g.*, Karen Tumulty, *President to Propose Return to Tax Funding of Abortion: Budget: Lawmaker Who Back Abortions Rights Doubts Congress Will Go Along with Lifting of 16-Year-Old Ban*, L.A. TIMES (Mar. 31, 1993, 12:00 AM) https://www.latimes.com/archives/la-xpm-1993-03-31-mn-17208-story.html [https://perma.cc/L4JE-VVNC]; Robin Toner, *Clinton Would End Ban on Aid to Poor Seeking Abortions*, N.Y. TIMES (Mar. 30, 1993), https://www.nytimes.com/1993/03/30/us/clinton-would-end-ban-on-aid-to-poor-seeking-abortions.html [https://perma.cc/FY6J-2FXB].

470. *See, e.g.*, Karen Tumulty, *Abortion Funds Ban Retained in House Test*, L.A. TIMES (July 1, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993-07-01-mn-8826-story.html [https://perma.cc/DY9B-9S5D].

471. *See, e.g.*, David Rogers, *House Approves Rise in Social Spending, Eases Curbs a Bit on Medicaid Abortions*, WALL ST. J., July 1, 1993, at A16.

472. *See, e.g.*, Irvin Molotsky, *Clinton to Require States to Finance Abortions of Poor*, N.Y. TIMES (Dec. 25, 1993), https://www.nytimes.com/1993/12/25/us/clinton-to-require-states-to-finance-abortions-of-poor.html [https://perma.cc/98RE-6ZWF]; *Abortion Funding Rules Altered*, CHI. TRIB., Dec. 26, 1993, at 4.

473. *See, e.g.*, *U.S. Insists on Some Medicaid Abortions*, N.Y. TIMES (Mar. 25, 1994), https://www.nytimes.com/1994/03/26/us/us-insists-on-some-medicaid-abortions.html [https://perma.cc/EDY8-RB6F].

474. Robert Pear, *White House Defends Abortion Order*, N.Y. TIMES (Jan. 7, 1994), https://www.nytimes.com/1994/01/07/us/white-house-defends-abortion-order.html [https://perma.cc/AXN4-CQ2K].

475. *Id.*

476. *See, e.g.*, *Suit Planned to Seek Abortion Payments*, N.Y. TIMES (Apr. 3, 1994), https://www.nytimes.com/1994/04/03/us/suit-planned-to-seek-abortion-payments.html [https://perma.cc/N762-CD9T]; Robert Pear, *6 or More States to Flout New Federal Law on Paying for Incest or Rape Abortions*, N.Y. TIMES (Apr. 1, 1994), https://www.nytimes.com/1994/04/01/us/6-or-more-states-to-flout-new-federal-law-on-paying-for-incest-or-rape-abortions.html [https://perma.cc/2W8F-ZZ55].

477. *See, e.g.*, *Cutoff of Medicaid to Louisiana Is Upheld*, N.Y. TIMES (Aug. 19, 1994), https://www.nytimes.com/1994/08/18/us/cutoff-of-medicaid-to-louisiana-is-upheld.html [https://perma.cc/3T5H-APYA].

478. *See id.*

479. Garry Boulard, *Louisiana Legislature Approves Financing for Some Abortions*, L.A. TIMES (Aug. 24, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-08-24-mn-30675-story.html [https://perma.cc/3KKK-JVU7].

Hyde and his allies had continued to oppose rape and incest exceptions to funding prohibitions.[480] Hyde often focused on the relative innocence of the unborn child, describing degrees of victimhood in play in the context of rape and incest.[481] "Now, rape and incest are tragedies," Hyde stated in 1989.[482] "But why visit on the second victim, the unborn child that is the product of that criminal act, capital punishment?"[483] By 1993, pro-lifers instead stressed that "only about one percent of all abortions are performed because of rape and incest."[484] And when criticizing Clinton's move, Hyde and Doug Johnson, the legislative director of NRLC, did not directly address the morality of rape and incest exceptions.[485] Johnson instead highlighted what he described as the broken promises of the Clinton Administration to the states, viewing it as evidence that Clinton wanted "unrestricted abortions."[486]

At the same time, pro-lifers often conceded support for the rape and incest exception to general abortion bans, insisting that abortion, like rape, itself victimized women. Indeed, many pro-lifers drew close comparisons between rape and abortion, suggesting that neither involved true consent.[487] David Reardon, an activist and researcher, detailed one version of this strategy in his 1996 book, *Making Abortion Rare.*[488] "[W]e believe that the only reason there are so many abortions is because abortion profiteers are exploiting women who are either (1) being denied the truth about risks and alternatives, or (2) are being coerced into unwanted abortions by other people," Reardon wrote.[489] In this narrative, almost all abortions were like sexual assaults: forced onto unwilling or unknowing women by a third party with an axe to grind.[490] Reardon hoped that this strategy would expose what he saw as immoral abortion providers to disastrous medical malpractice liability.[491]

Anti-abortion lawyers saw potential in Reardon's claims. They presented evidence that no woman would willingly choose abortion if she understood its claimed risks.[492] These attorneys made disputed arguments that connected abortion to everything from breast cancer to suicidal ideation.[493] For these lawyers,

480. *See* discussion *infra* Part IV.

481. *See* Adam Clymer, *Anti-Abortion Rally; Comeback Victory in Congress Sends a Warning to Pro-Choice Lawmakers*, N.Y. TIMES (Jul. 3, 1993), https://www.nytimes.com/1993/07/03/us/anti-abortion-rally-comeback-victory-congress-sends-warning-pro-choice-lawmakers.html [https://perma.cc/T7HL-KXD5].

482. *Id.*

483. *Id.*

484. *Henry Hyde's Hard Choice*, WASH. POST (Jul. 29, 1993), https://www.washingtonpost.com/archive/opinions/1993/07/29/henry-hydes-hard-choice/8d786517-d875-411d-a094-0308b0f3e5ee/ [https://perma.cc/LU2L-65QC].

485. *See, e.g.*, Pear, *supra* note 474.

486. *Id.*

487. *See generally* DAVID REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION (1996).

488. *Id.*

489. *See id.* at 10.

490. *See id.*

491. *See id.*; *see also* NAT'L CLINIC ACCESS PROJECT, POST-ABORTION TRAUMA: LEARNING THE TRUTH, TELLING THE TRUTH, 1–3 (1993).

492. *See infra* Part IV.

493. *See id.*

these arguments showed that *Casey*'s analysis of women's reliance on abortion—and therefore of the case for preserving *Roe*—was entirely wrong.[494] Abortion foes believed that if abortion hurt women, and if women did not choose it freely and knowingly, then the foundation of abortion rights fell apart.

In a 1992 strategy memo, AUL lawyers seized on the importance of *Casey*'s reliance analysis.[495] "The irony in the Court's position," the memo explained, "is that *Roe v. Wade* introduced a nationwide social policy . . . which has undermined secure, independent, and healthy lives for American women."[496] Proving that abortion harmed women would undermine the Court's reliance analysis and establish that Americans' concerns for victims—evident in support for rape and incest exceptions—militated in favor of abortion restrictions.[497] AUL, like other anti-abortion groups, set out to develop evidence that abortion hurt women.[498] Beginning in the mid-1990s, AUL introduced laws that warned of a purported increase in the risk of breast cancer to women who had abortions.[499] Pro-choice groups argued that the initiative rested on junk science, especially when after the publication of cohort studies, the American Cancer Society, the National Cancer Institute, and the World Health Organization all concluded that there was no connection between abortion and breast cancer.[500] AUL leader Clarke Forsythe nonetheless called laws tying abortion to breast cancer "one of our most important and strategic initiatives."[501] Others added claims about psychological trauma and suicidal ideation to informed-consent abortion laws.[502] The message sent by all of these efforts was the same: rather than insinuating that sexually active women were culpable or choosing abortion for inappropriate reasons, pro-lifers would portray women as the "second victims" of abortion, a procedure that pro-lifers compared to sexual assault.

But anxieties about rape and incest exceptions—and about the innocence of women who had abortions—continued to simmer in anti-abortion circles. Preoccupation with the issue broke to the surface in 1995 after Republicans had recorded a record-breaking result in the election for the House of Representatives the year before.[503] GOP leaders pledged to pass the legislative agenda detailed

494. *See id.*

495. Americans United for Life Briefing Memo, The Good News About *Planned Parenthood v. Casey* at 7, *in* THE PRO-LIFE NEWSLETTERS COLLECTION (Jul. 1992).

496. *Id*.

497. *See, e.g.*, *id.*

498. *See, e.g.*, Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L.L. REV. 421, 449–56 (2016).

499. Letter from Judith Koehler, Senior Legis. Couns., Ams. United for Life, to Connie Marshner (June 5, 1996,) *in* The Paul Weyrich Papers.

500. Rita Rubin, *Abortion and Breast Cancer*, USA TODAY, Mar. 1, 2001, at D9.

501. Letter from Clarke Forsythe, President, Ams. United for Life, to Connie Marshner (July 18, 1996), *in* The Paul Weyrich Papers.

502. *See, e.g.*, Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 95–99 (2016).

503. JACOB HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 42 (Yale Univ. Press ed., 2005).

in the Contract with America, a lengthy policy proposal introduced by Representatives Newt Gingrich (R-GA) and Dick Armey (R-TX).[504] Fights over the rape and incest exception to funding bans ultimately shattered what had been party unity.[505] As part of a short-term spending cut, the House proposed allowing states to deny funding for abortion in cases of rape and incest (but did not change the exception written into the federal Hyde Amendment).[506] Republican moderates bridled at the move, suggesting that both the state and federal governments should pay for abortions for rape victims.[507] The moderates ultimately forced other GOP lawmakers to remove the anti-abortion amendment from the spending bill.[508] "You're talking about rape and incest," said Representative Constance Morella (R-MD), one of those who opposed the amendment.[509] "These situations are rare but tragic, and to deny funding in these situations is . . . inhumane."[510]

Some within the pro-life movement believed that full-throated opposition to a rape and incest exception was becoming too politically costly. The Christian Coalition, a conservative political lobby created by Pat Robertson, unveiled an abortion strategy centered on new limits on late abortion, bans on federal funding for abortion providers, and allowing (but not requiring) states to set their own policies on rape and incest.[511] Although the House narrowly voted to allow states to deny funding in cases of rape and incest, supporters of the proposal did not criticize abortion in cases of rape and incest.[512] Indeed, only abortion-rights supporters stressed the rhetoric of guilt and innocence.[513] "Rape is a crime," said Rep. Elizabeth Furse (D-Ore.). "Let us not punish the victims of crime."[514] By contrast, Republican backers of the proposal presented the issue as a matter of federalism.[515] "Let the states decide," said House Majority Whip Tom DeLay (R-Tex.).[516]

Meanwhile, tolerating rape and incest exceptions had become the cornerstone of an anti-abortion strategy focused on laws that would paint pro-choice organizations as extreme—and willing to victimize women. At first, NRLC and AUL primarily made this argument in the context of mandated-counseling laws

504. *See, e.g.*, FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 47 (2016).

505. *See, e.g.*, Robin Toner, *Rifts Emerge Inside G.O.P.*, N.Y. TIMES (Mar. 16, 1995), https://www.nytimes.com/1995/03/16/us/rifts-emerge-inside-gop.html [https://perma.cc/P5V9-LRU6].

506. *See, e.g.*, *id.*

507. *See, e.g.*, *id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *See, e.g.*, Jeanne Cummings, *Wish List Unveiled*, ATLANTA J. CONST. May 17, 1995, at A7.

512. *See, e.g.*, Janet Hook, *Abortion Funding Limits Clear House: Legislation: Bill passes on 215-206 Vote and Would Allow States to Deny Medicaid Money in Cases of Rape and Incest. Issue is Tied to Controversial Spending Measure*, L.A. TIMES (Aug. 4, 1995), https://www.latimes.com/archives/la-xpm-1995-08-04-mn-31360-story.html [https://perma.cc/AK3L-ME3Y].

513. *See, e.g.*, *id.*

514. *Id.*

515. *Id.*

516. *Id.*

that required women to see or hear contested statements about abortion.[517] Mary Spaulding-Balch, the legislative director for NRLC, recognized that the issue of rape and incest had become so persuasive that it had become a central part of slippery-slope arguments made by pro-choice leaders.[518] At times, when defending policies that attracted less public support, groups like NARAL asserted that pro-life groups did not want to stop with informed-consent laws or policies on abortion later in pregnancy but instead wanted to ban the procedure, even in cases of rape and incest.[519] Rather than defending such a ban, Balch suggested that her opponents were the true extremists, unwilling to protect women.[520] Balch reasoned that pro-choice groups had argued against informed-consent laws by suggesting they could "lead to the imminent jailing of women who have abortions in cases of rape and incest."[521] The reality, she reasoned, was that it was "pro-abortion extremists who [denied] women any information abortionists want[ed] to screen out, with the result that women 'decide[d]' in one-sided ignorance."[522]

As pro-lifers mostly abandoned the fight against rape and incest exceptions, the effort to portray women as the victims of abortion continued. Allan Parker, an attorney who founded the conservative Justice Foundation, received a request from a fellow anti-abortion lawyer, Harold Cassidy, who had been in contact with Norma McCorvey, the "Roe" of *Roe v. Wade* and Sandra Cano, the "Doe" of *Doe v. Bolton*.[523] McCorvey and Cano apparently regretted their involvement in the legalization of abortion and wanted to bring a case to reverse that outcome.[524] After agreeing to represent them, Parker launched Operation Outcry, an effort to collect affidavits from women who similarly regretted their own procedures.[525]

NRLC wove arguments about the victimhood of women into its new signature legislative campaign, an effort to ban a procedure, dilation and extraction ("D&X"), that the organization called "partial-birth abortion."[526] For the most part, NRLC leaders appealed to voters' disgust with the medical details of the procedure and moral objections to late abortions.[527] But after Representative

517. *See* Mary Spaulding Balch, *We Need Limits on Abortion*, USA TODAY, Aug. 14, 1995, at 10A.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.*

523. *See* Kathleen Cassidy, *Post-Abortive Women Attack* Roe v. Wade, AT THE CTR. (Jan. 2001), http://www.atcmag.com/Issues/ID/16/Post-Abortive-Women-Attack-Roe-v-Wade [https://perma.cc/H4QB-RCH6].

524. *See, e.g.*, *id.*

525. *See id.* For more on Operation Outcry, see, for example, Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Affidavit of Sandra Cano, Donna Santa Marie v. Whitman et al. (2000), No. 99–2962; Norma McCorvey, *The Truth About Roe v. Wade (According to "Jane Roe," Norma McCorvey)*, ETERNAL PERSPECTIVE MINISTRIES (Mar. 2, 2000), https://www.epm.org/resources/2000/Mar/2/truth-about-roe-v-wade-according-jane-roe-norma-mc/ [https://perma.cc/9UEL-WWH5].

526. *See* DEANNA A. ROHLINGER, ABORTION POLITICS, MASS MEDIA, AND SOCIAL MOVEMENTS IN AMERICA 64 (2014).

527. *See* Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L.L. REV. 409, 418 (2013).

Charles Canady (R-FL) introduced a federal ban on D&X, abortion-rights organizations emphasized that its lack of a health exception would victimize women.[528] Anti-abortion groups responded that D&X was not safer than alternatives and, in fact, would itself damage women's health.[529] Establishing that abortion, like rape, victimized women remained central to anti-abortion strategy.[530] "The challenge of public opinion over the next several decades is dispelling the notion of abortion as a necessary evil," wrote Clarke Forsythe of AUL.[531] "[W]e will need to invest more in the second part: dispelling the myth that abortion is necessary. And that will involve convincing Middle America that abortion is bad for women, or at least not good."[532]

The issue of abortions in cases of rape and incest continued to mirror these debates. During the 2000 presidential race, George W. Bush repeatedly insisted that he supported the exception, although the GOP platform endorsed a constitutional abortion ban without it.[533] Efforts to defeat the nomination of John Ashcroft, Bush's choice for attorney general, centered partly on the fact that he supported an abortion ban even in cases of rape and incest.[534] In some ways, the exception—and its rhetoric of innocence—seemed more entrenched. For example, in Tennessee, efforts to defeat a state constitutional amendment ruling out funding for abortion focused on an exception for victims of rape and incest.[535]

And when the Supreme Court considered a ban on partial-birth abortion, pro-lifers continued to invoke a hierarchy of innocence that privileged the rights of an unborn child. Following a model law promoted by NRLC, Nebraska had banned certain procedures.[536] Dr. Leroy Carhart argued that the law was unconstitutional.[537] Nebraska and anti-abortion amici responded in part by suggesting that the government had an extremely compelling interest in protecting innocent

528. *See, e.g.*, Linda Feldmann, *GOP Abortion Foes Draw Battle Lines On One Procedure*, CHRISTIAN SCI. MONITOR (June 28, 1995), https://www.csmonitor.com/1995/0628/28031.html [https://perma.cc/5KNV-HDD7]; *House Votes to Make "Partial Birth" Abortion a Felony*, ATLANTA J. CONST., Nov. 2, 1995, at A8.

529. *See U.S. Cardinals' Letter Blasts Partial-Birth Veto*, HUM. EVENTS, May 3, 1996, at 9; Katharine Q. Seelye, *States Outlaw Late Abortions as Federal Ban Faces a Veto*, N.Y. TIMES (May 5, 1997), https://www.nytimes.com/1997/05/05/us/states-outlaw-late-abortions-as-a-federal-ban-faces-a-veto.html [https://perma.cc/N65Z-PATH].

530. *See, e.g.*, Clarke D. Forsythe, *Pro-Life Strategy Five Years After Casey and Clinton: A Response to Michael Schwartz's Strategy Analysis* (1998), *in* The Paul Weyrich Papers.

531. *Id.*

532. *Id.*

533. *See* Thomas B. Edsall, *Conservatives Defend Bush on Abortion*, WASH. POST (Mar. 20, 1999), https://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/abortion032099.htm [https://perma.cc/L7BF-3K4V]; Terry M. Neal & David Von Drehle, *Abortion Slides Down GOP Agenda*, WASH. POST, Apr. 14, 1999, at A1.

534. *See, e.g.*, Charles E. Schumer, *Can John Ashcroft Overcome His Ideology?* N.Y. TIMES (Jan. 9, 2001), https://www.nytimes.com/2001/01/09/opinion/can-john-ashcroft-overcome-his-ideology.html [https://perma.cc/48BN-8CWM]; Dan Eggen, *Abortion Rights Key in Fight Over Ashcroft*, WASH. POST (Jan. 9, 2001), https://www.washingtonpost.com/archive/politics/2001/01/09/abortion-rights-key-in-fight-over-ashcroft/caf3b2ca-c551-4835-a808-c96e3cf953e1/ [https://perma.cc/2VP2-YQ6P].

535. *See, e.g.*, Paula Wade, *Exceptions Stall Abortion Amendment*, COM. APPEAL, May 15, 2001, at B1. For more on the relevance of the exception in Tennessee law, see Mary Deibel, *Abortion Regulations Grow, Reflect Nation's Ambivalence*, COM. APPEAL, Jan. 18, 2003, at F4.

536. *See* Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000).

537. *Id.*

fetal life, especially when it came to a procedure that closely resembled birth.[538] A brief submitted by the National Association of Pro-Life Nurses asked the Court to uphold the Nebraska law "to declare that the people and their lawmakers are not powerless to limit even the grossest assaults on innocent human life."[539] Constitutionally, the brief suggested that the case did not involve abortion but infanticide, a subject that precedent had not addressed.[540] The United States Catholic Conference also leaned heavily on the idea that unborn (or partially born, as the brief framed it) children were supremely innocent, regardless of the health effects for women:

> Nebraska's moral interest is not only "legitimate," but extraordinarily compelling. What is at stake, in this case, is the life of a child. Few interests could be more deserving of the law's protection. Few things could be more suggestive of who we are as a Nation than our efforts to protect the innocent lives of children or our failure to do so. The Constitution does not forbid such legislative efforts even when the child is not fully born.[541]

To be sure, the United States Catholic Conference insisted that D&X was never needed to protect women's health and, in fact, likely victimized women.[542] Nevertheless, the compelling interest described in the Conference's brief seemed to apply with equal force regardless of how the law affected women.[543] Other amicus briefs, like one submitted by African-American anti-abortion groups such as LEARN and Texas Black Americans for Life, likewise suggested that D&X damaged women's health but framed the issue as an afterthought, comparing the "victims of a partial-birth abortion" to the "victims of slavery."[544] The Knights of Columbus' amicus brief made a similar point, insisting that the "Constitution must not be turned into a death warrant for millions of helpless, innocent children."[545] Pro-choice amicus briefs responded that the law itself would victimize women by severely damaging their health.[546] The Clinton Administration submitted a brief emphasizing that Nebraska's law did not permit even victims of rape and incest to access D&X—even when their health was imperiled.[547] A group of feminists presented a brief suggesting that Dr. Carhart himself was a

538. *See infra* notes 539 and 541 and accompanying text.

539. Motion for Leave to File Brief Amicus Curiae & Brief on Behalf of National Ass'n of Prolife Nurses in support of Petitioners at 13, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99–830).

540. *See id.* at 9–14.

541. Brief Amicus Curiae of the U.S. Catholic Conference et al. in Support of Petitioners at 6, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

542. *See id.* at 4–6.

543. *See id.* at 14–15.

544. *See* Motion to File a Brief Amicus Curiae and Brief Amicus Curiae of the Texas Black Americans for Life et al. at 1, 21–22, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

545. Brief Amicus Curiae of the Knights of Columbus at 21, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

546. *See infra* notes 547–549 and accompanying text.

547. Brief for the United States as Amicus Curiae at 1–3, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

victim of violence perpetrated by abortion opponents who burned down his home.[548]

In 2000, *Stenberg v. Carhart* struck down Nebraska's law.[549] The Court reasoned that Nebraska's law did not clearly define the procedure at issue, potentially sweeping in dilation and evacuation ("D&E"), the most common and safe procedure performed after the first trimester.[550] The Court acknowledged that experts disputed the need for a health exception—and that the procedure itself was relatively rare.[551] Nevertheless, the majority reasoned that in cases of uncertainty, a health exception was warranted.[552] "Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right," the Court held.[553] "If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."[554]

Justice Kennedy's lengthy dissent more fully engaged anti-abortion arguments about innocence.[555] Kennedy disagreed that Nebraska's law touched on D&E as well as D&X, and he reasoned that when scientific uncertainty surrounded the need for a health exception, the Court should defer to legislators' assessment of the evidence.[556] Kennedy insisted that under *Casey*, Nebraska's concern with fetal innocence deserved considerable weight.[557] Kennedy wrote:

> The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.[558]

Claims about the relative innocence of fetal life played a central role after *Stenberg* as well, especially when Congress passed a federal ban on D&X. Lawmakers made findings of fact as part of an effort to distinguish the federal law from the one struck down in *Stenberg*.[559] In part, Congress tried to provide expert statements that D&X was never needed to protect women's health.[560] Lawmakers also tried to more fully articulate a unique interest in protecting innocent life that applied to the disputed procedure.[561] When Congress passed the law in 2003, lawmakers suggested that the interest in protecting innocent life applied with

548. Brief Amici Curiae of Seventy-Five Organizations Committed to Women's Equality at 7 n.9, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).
549. Stenberg v. Carhart, 530 U.S. 914, 937–38 (2000).
550. *Id.* at 929–38.
551. *See id.* at 934, 937.
552. *See id.* at 937.
553. *Id.*
554. *Id.*
555. *Id.* at 956–79 (Kennedy, J., dissenting).
556. *See id.*
557. *Id.* at 964.
558. *Id.*
559. *See* 18 U.S.C. § 1531 (2000 ed., Supp. IV), ¶¶ (1)–(8).
560. *See id.* ¶ 14(D).
561. *See id.* at 14(G)–(H).

great force in the context of D&X.[562] "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life," Congress concluded.[563]

When the Supreme Court agreed to hear a constitutional challenge to the federal Partial Birth Abortion Ban Act, anti-abortion amici, along with the petitioners, more forcefully articulated a hierarchy of innocence. While abortion-rights briefs reiterated the need for a health exception, an amicus brief submitted on behalf of pro-life professor Hadley Arkes and the Claremont Center for Constitutional Jurisprudence maintained that among the "hierarchy of those deserving dignity protections," the Court had to "find a place for the innocent and worthy unborn human life, even against claims of privacy."[564] The petitioners insisted that the evidence on the safety of or need for D&X was too uncertain for the Court not to defer to the executive branch.[565] But even if D&X was ever "marginally safer," the petitioners maintained that the interest in protecting innocent life trumped any benefit.[566] "Given the vital state interests in proscribing partial-birth abortion—a procedure that Congress found to be inhumane, bordering on infanticide, and subject to the most severe moral condemnation—such an attenuated interest does not give rise to an undue burden," the petitioners reasoned.[567] The American Center for Law and Justice, a group that litigated on behalf of conservative evangelical Protestants, likewise asserted that "[i]nvoking an adult's 'health' as a reason for killing an innocent child should be unthinkable in a civilized society."[568]

The Court's 2007 decision in *Gonzales v. Carhart* came close to articulating a hierarchy of innocence. In a 5-4 decision, the majority first concluded that the law gave adequate notice to doctors about which procedures were banned—and made apparent that D&E did not fall into the statute's prohibition.[569] With regard to the undue burden test, the Court also held that in cases of scientific uncertainty, legislators should have the latitude to intervene.[570] In considering the purpose of the law, the majority quoted Congress' findings that legal D&X jeopardized "all vulnerable and innocent human life."[571] The Court approved of this conclusion, maintaining that the law expressed "respect for the dignity of human life."[572] The majority adopted anti-abortion arguments suggesting that

562. *See id.*

563. *Id.* ¶ 14(N).

564. *See* Brief of Amici Curiae Professor Hadley Arkes et al. at 28, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-1382).

565. Brief of Petitioner at 10, Gonzales v. Planned Parenthood Fed'n of America, 547 U.S. 1205 (2006) (No. 05-1382).

566. *Id.*

567. *Id.*

568. Amicus Brief of the American Center for Law and Justice at 16, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380).

569. *See* Gonzales v. Carhart, 550 U.S. 124, 147–56 (2007).

570. *See id.* at 163.

571. *Id.* at 157.

572. *See id.* at 157–60.

women were the second victims of abortion, particularly those claims made by Allan Parker's Operation Outcry.[573] The Court suggested that many women would regret their abortions.[574]

But women's victimhood seemed conditional on the even greater claim to innocence of an unborn child. "The State has an interest in ensuring so grave a choice is well informed," *Gonzales* stated.[575]

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[576]

According to *Gonzales*, women were innocent primarily because they would agree with the majority that a D&X procedure would be morally wrong.[577] *Gonzales* implied that women who did not agree—or who found D&X to be moral—might not be victims at all. The Court assumed that informed women would bring a pregnancy to term and that doctors would "find different and less shocking methods to abort the fetus in the second trimester."[578] *Gonzales* drew on ideas forged in fights over rape and incest, suggesting that women's victimhood was secondary to and dependent on the victimhood of the fetus.[579]

In the decade after *Gonzales*, little seemed to change when it came to debate about the rape and incest exception. Most (but not all) presidential candidates for the GOP favored the exception, and while anti-abortion groups opposed it in principle, abortion foes largely tried to steer conversation away from the exception.[580] After the 2016 election and Donald Trump's transformation of the Supreme Court, however, fights about the exception changed, exposing how solid anti-abortion commitment to a hierarchy of innocence had become.

B. Abolishing the Exception

By 2016, the presence of rape and incest exceptions felt like a given. Even Donald Trump, a (formerly pro-choice) Republican with a history of misogynist comments, reiterated that he favored the exception during his successful run for the White House.[581] But the remaking of the Supreme Court changed the dialogue about rape, incest, and abortion. Early in his presidency, Trump replaced

573. *See id.*; *Allan Parker*, JUST. FOUND., https://thejusticefoundation.org/mission-statement/who-we-are/allan-parker/ [https://perma.cc/X6UZ-MWGC].

574. *See Gonzales*, 550 U.S. at 159–60.

575. *Id.* at 159.

576. *Id.* at 159–60.

577. *See id.* at 159.

578. *Id.* at 160.

579. *See id.* at 156–60.

580. Maya Rhodan, *Republicans Clash Over Rape and Incest Exceptions for Abortion*, TIME (Feb. 6, 2016, 11:45 PM), https://time.com/4211007/republican-debate-abortion-rape-new-hampshire/ [https://perma.cc/HW3B-AKJG].

581. Jay Croft, *Trump Tweets that He Favors Exceptions to Abortion Bans*, CNN: POLITICS (May 19, 2019), https://www.cnn.com/2019/05/19/politics/trump-abortion-ban-rape-incest/index.html [https://perma.cc/8R9A-

the late Antonin Scalia, a staunch opponent of *Roe* and its progeny, with Neil Gorsuch, a judge some expected to oppose legal abortion based on his previous writings.[582] Following the 2018 retirement of Anthony Kennedy, Trump successfully nominated Brett Kavanaugh to succeed him.[583] With the two new justices in place, many expected the Court to have enough votes to reverse *Roe*.[584]

As had happened after *Webster* in 1989, anti-abortion groups went to work introducing laws that would give the Court the opportunity to undo *Roe*.[585] But strikingly, a deep strategic cleavage emerged within the anti-abortion movement.[586] Established groups like NRLC and AUL did not depart from existing efforts to extend *Gonzales*, such as laws banning dilation and evacuation (so-called dismemberment bans)[587] or outlawing abortion at twenty weeks on the ground that unborn children could experience pain.[588] More recently formed organizations, however, had great success in championing more stringent measures.[589] Faith2Action ("F2A")—the primary group behind these so-called heartbeat laws or six-week bans—formed in 2011 to advocate for a more aggressive challenge to *Roe*.[590] The founder of F2A, Janet Folger Porter, had once

JPC7]. On Trump's past comments, see, for example, David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html [https://perma.cc/TB2M-FLL5].

582. *See, e.g.*, Ed O'Keefe & Robert Barnes, *Senate Confirms Neil Gorsuch to the Supreme Court*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html [https://perma.cc/HUT9-XWVC]. On Gorsuch's past writings, see for example, NEIL GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 160–64 (2006).

583. *See, e.g.*, Stolberg, *supra* note 26.

584. *See, e.g.*, Julie Hirschfeld Davis, *Departure of Kennedy*, *'Firewall for Abortion Rights,' Could End* Roe v. Wade, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/kennedy-abortion-roe-v-wade.html [https://perma.cc/UE6M-U8C5].

585. Jessica Campisi, Brooke Seipel, Alicia Cohn & Jessie Hellman, *All the States Taking Up Abortion Laws in 2019*, HILL (May 27, 2019), https://thehill.com/policy/healthcare/445460-states-passing-and-considering-new-abortion-laws-in-2019 [https://perma.cc/RB6R-U9ZM].

586. *See, e.g.*, Ed Kilgore, *Early-Term Abortion Bans Open Rift in Anti-Abortion Movement*, N.Y. MAG.: INTELLIGENCER (May 27, 2019), http://nymag.com/intelligencer/2019/05/early-term-abortion-bans-causing-strategic-rift-in-rtl-ranks.html [https://perma.cc/FU42-5F5T]; Olivia Exstrum, *Why Some Conservatives Are Freaking Out Over Alabama's Abortion Ban*, MOTHER JONES: POL. (May 28, 2019), https://www.motherjones.com/politics/2019/05/mary-ziegler-alabama-abortion-ban-roe-v-wade/ [https://perma.cc/EBB4-CT3J].

587. *See, e.g.*, *Dismemberment Abortion Bans* NAT'L RIGHT TO LIFE COMM. (Aug. 17, 2020), http://www.nrlc.org/uploads/stateleg/StateLawsDismembermentAbortionBans.pdf [https://perma.cc/6ZVV-KJV2]; Memorandum from Mary Spaulding Balch, Nat'l Right to Life Comm. to Whom It May Concern, Constitutionality of the Unborn Children Protection from Dismemberment Abortion Act (Jan. 2015), http://www.nrlc.org/uploads/stateleg/NRLCConstitutionalityDismembermentJan15.pdf [https://perma.cc/WR5W-MZDJ].

588. *See, e.g.*, *Key Points on Pain-Capable Unborn Child Protection Act*, NAT'L RIGHT TO LIFE COMM. 1 (Sept. 25, 2017), http://www.nrlc.org/uploads/fetalpain/KeyPointsOnPCUPA.pdf [https://perma.cc/XMX7-P6DB].

589. *See* Anne Ryman & Matt Wynn, *For Anti-Abortion Activists, Success of 'Heartbeat' Bills Was 10 Years in the Making*, CTR. FOR PUB. INTEGRITY (June 20, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislate/for-anti-abortion-activists-success-of-heartbeat-bills-was-10-years-in-the-making/ [https://perma.cc/4NBQ-3DAP].

590. *See, e.g.*, Ally Boguhn, *Janet Porter: The Architect of Ohio's "Heartbeat" Bill*, REWIRE (Dec. 19, 2018, 1:21 PM), https://rewire.news/article/2018/12/19/janet-porter-architect-heartbeat-bill/ [https://perma.cc/MUA8-ELH8].

headed NRLC's Ohio affiliate but left after concluding that the organization took too cautious an approach.[591] She proposed a bill that would criminalize abortion after physicians could detect fetal cardiac activity, usually around the sixth week of pregnancy.[592] Folger Porter promised that the bill would replace viability, which she described as uncertain and fluid, with the "consistent and certain" marker of a heartbeat.[593] Folger Porter's model bill did not include an exception for rape and incest. But for some time, six-week bans seemed to be largely irrelevant—the latest absolutist crusade that would fall short.[594] While Ohio lawmakers passed the law in 2011, the move divided pro-lifers, and Republican John Kasich ultimately vetoed it, suggesting that the Supreme Court would strike it down.[595] A handful of states considered Folger Porter's proposal in the ensuing years, but it took on far more importance after Trump reconfigured the Supreme Court in 2018.[596]

In 2019, nine states passed a law banning abortion at six weeks or earlier. Alabama criminalized abortion at fertilization.[597] Almost none permitted a rape and incest exception.[598] At first, many interpreted this move as nothing more than an effort to force the Supreme Court to reconsider *Roe v. Wade*.[599] Alabama lawmakers, for example, insisted that they wanted to pass a "clean" and stringent law for maximizing the chances that the Court could not uphold the law without directly confronting the fate of *Roe*.[600]

But in the face of criticism, more abortion foes called explicitly for the rejection of the rape and incest exception. In leaked talking points, the Republican Study Committee, a conservative caucus comprising 70% of House Republicans, defended the elimination of the exception, suggesting that abortion for rape victims would cause more psychological trauma than would continuing a pregnancy

591. *See, e.g.*, *id.*; Ryman & Wynn, *supra* note 589.

592. *See* Boguhn, *supra* note 590. The term "heartbeat law" is itself controversial because at six weeks, fetuses have fetal cardiac activity but not heart. *See* Adam Rogers, *'Heartbeat' Bills Get the Science of Fetal Heartbeats All Wrong*, WIRED (May 2019, 6:00 AM), https://www.wired.com/story/heartbeat-bills-get-the-science-of-fetal-heartbeats-all-wrong/ [https://perma.cc/V7S2-N6NA].

593. *The Pro-Life Heartbeat Bill*, FAITH2ACTION, https://secure6.afo.net/f2a/includes/QnA_support.pdf (last visited Mar. 13, 2021) [https://perma.cc/W77P-7CPS].

594. *See, e.g.*, Erik Eckholm, *Anti-Abortion Groups Are Split on Legal Tactics*, N.Y. TIMES (Dec. 4, 2011), https://www.nytimes.com/2011/12/05/health/policy/fetal-heartbeat-bill-splits-anti-abortion-forces.html [https://perma.cc/U7SN-Q857]; Reid Wilson, *Kasich Signs 20-Week Abortion Ban, Vetoes 'Heartbeat' Measure*, HILL (Dec. 13, 2016, 4:16 PM), https://thehill.com/policy/healthcare/310238-kasich-signs-20-week-abortion-ban-vetoes-heartbeat-bill [https://perma.cc/9F4P-ML3F].

595. *Id.*

596. *See, e.g.*, Lai, *supra* note 1.

597. *See, e.g.*, *id.*

598. *See, e.g.*, *id.*

599. *See, e.g.*, Anna North and Catherine Kim, *The "Heartbeat" Bills That Could Ban Almost All Abortions, Explained*, VOX (June 28, 2019, 9:50 AM), https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019 [https://perma.cc/WND7-6SA4]; Emma Green, *The New Abortion Bills Are a Dare*, ATL. (May 15, 2019), https://www.theatlantic.com/politics/archive/2019/05/alabama-georgia-abortion-bills/589504/ [https://perma.cc/EF7Z-KSSK].

600. *See, e.g.*, Erin Durkin, *Alabama Abortion Ban: Republican State Senate Passes the Most Restrictive Law in U.S.*, GUARDIAN (May 15, 2019), https://www.theguardian.com/us-news/2019/may/14/abortion-bill-alabama-passes-ban-six-weeks-us-no-exemptions-vote-latest [https://perma.cc/JM4Y-BUFL].

that began with sexual assault.[601] Mike Pence praised Alabama's law.[602] When President Trump tweeted a request to state legislators to preserve rape and incest exceptions, several large and prominent anti-abortion groups, including March for Life and Students for Life, fired out a letter insisting that the time had come to abandon all rape and incest exceptions.[603] "A child conceived in rape is still a child," the letter argued.[604] "We don't blame children for other matters outside their control. Why should we do so here?"[605] In its own talking points, Students for Life forcefully articulated a hierarchy of innocence for rape victims, suggesting that women remained innocent only if they did not end their pregnancies.[606] The group contended that abortion would not heal women victimized by sexual assault.[607] "Rape is an act of violence for which she bears no responsibility; the abortion is an act of violence for which she would be morally culpable," Students for Life asserted.[608] The Pro-Life Action League likewise argued: "We can never justify the killing of an innocent human being, even in cases of rape and incest."[609] In 2021, South Carolina included a rape and incest exception in its own heartbeat bill, but inclusion of the exception divided anti-abortion lawmakers.[610] Other states considering a heartbeat bill similarly debated whether an exception punished innocent fetal life.[611]

As had been the case for decades, debates about rape, incest, and abortion exposed how much the rhetoric of innocence shaped broader debates about reproductive rights. This rhetoric had influenced the Supreme Court's jurisprudence. Concepts of victimhood, moral responsibility, and innocence had justified the expansion and contraction of abortion rights. Part V explains how the rhetoric of innocence has and likely will continue to destabilize abortion doctrine.

601. *See* Daniel Newhauser, *Here Are the GOP's Secret Talking Points Defending Alabama's Abortion Law*, VICE NEWS (May 23, 2019, 10:31 AM), https://news.vice.com/en_us/article/8xzm5g/here-are-the-gops-secret-talking-points-defending-alabamas-abortion-law [https://perma.cc/5BDV-VG8A].

602. *See, e.g.*, Michael Tackett, *On the Abortion Issue, Pence Leads the Way*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/politics/pence-abortion-trump.html [https://perma.cc/ZU8S-BU55].

603. *See, e.g.*, Kristan Hawkins et al., *Read Letter to GOP Leaders on Why All Lives Matter*, STUDENTS FOR LIFE OF AM. (May 22, 2019), https://studentsforlife.org/2019/05/22/read-letter-to-gop/ [https://perma.cc/Q4CF-96NE]; Sarah McCammon, *Anti-Abortion Rights Groups Push GOP to Rethink Rape and Incest Exceptions*, NPR (May 22, 2019, 9:58 AM), https://www.npr.org/2019/05/22/725634053/anti-abortion-rights-groups-push-gop-to-rethink-rape-and-incest-exceptions [https://perma.cc/WF63-4GGP].

604. Hawkins et al., *supra* note 603.

605. *Id.*

606. *See* STUDENTS FOR LIFE OF AM., *What About Rape?*, https://studentsforlife.org/high-school/what-about-rape/ (last visited Mar. 13, 2021) [https://perma.cc/SB4X-EXP5].

607. *See id.*

608. *Id.*

609. *Abortion for Victims of Rape and Incest*?, PRO-LIFE ACTION LEAGUE https://prolifeaction.org/wp-content/uploads/docs/RapeAbortion.pdf (last visited Mar. 16, 2021) [https://perma.cc/3GPL-R4XD].

610. Jeffrey Collins, *Rape and Incest Exceptions Quietly Added to SC Abortion Bill*, AP NEWS (Jan. 26, 2021), https://apnews.com/article/bills-south-carolina-3f453465fe1b5a31ce26c2bab03555d7 [https://perma.cc/5X4D-2953].

611. Lai, *supra* note 1.

V. THE RHETORIC OF INNOCENCE

From the beginning, the victimhood of women has played a role in the recognition of and even justification for abortion rights. Nevertheless, from the beginning, these justifications have been slippery—as likely to lead to a retreat from abortion rights as to strong protection. This Part considers ways in which the rhetoric of innocence has already destabilized abortion jurisprudence and then considers current efforts to further use innocence arguments to chip away at abortion rights.

A. Alternative Sources of Victimization

Roe recognized abortion rights partly because of the negative consequences that abortion laws imposed on women.[612] As *Roe* framed it, these consequences—stigma, physical risks, social penalties, and the burdens of childbirth and childrearing—fell largely outside of women's control.[613] Abortion rights, in this narrative, restored the agency of women who had been victims.[614] Early on, however, the idea of women as victims did not always assure protection for abortion rights.

The Court began scaling back on protection by suggesting that women's burdens came not from the government but from an alternative source. This line of reasoning began with abortion funding cases. Starting with *Maher v. Roe*, the Court suggested that if poor women were victims, the burdens they suffered were constitutionally irrelevant.[615] "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth," the Court held.[616] Since the government did not make women poor, women's victimhood did not bolster the case for abortion rights.[617] *McRae* reached a similar conclusion regardless of the fact that certain women lacked funding for abortions needed to prevent serious health damage.[618] The source of women's victimhood—the perpetrator, in some cases—mattered as much as the severity of the consequences women faced.[619] *McRae* recognized that women could face grave harm to their health under certain circumstances if they could not access abortion.[620] Nevertheless, because the government was not obviously to blame, then those harms made no difference to the Court's reasoning.[621]

Outside the context of funding, the identification of the source of women's victimization can limit protection for abortion rights. Consider arguments made

612. *See* Roe v. Wade, 410 U.S. 113, 150–53.
613. *See id.* at 153.
614. *See id.*
615. Maher v. Roe, 432 U.S. 464, 474 (1977).
616. *Id.*
617. *See id.*
618. Harris v. McRae, 448 U.S. 297, 316 (1980).
619. *See, e.g.*, *id.* at 314–15.
620. *See id.* at 315.
621. *Id.* at 316.

in the lead-up to *Whole Woman's Health v. Hellerstedt*, the Court's 2016 abortion decision.[622] That case involved two Texas regulations.[623] One required doctors performing abortions to have admitting privileges at a hospital within thirty miles of a clinic.[624] A second mandated that abortion clinics comply with the regulations governing ambulatory surgical centers.[625] The majority in *Whole Woman's Health* struck down both provisions and suggested that there was enough record evidence supporting the trial court's conclusion that the law, not another force, had caused the clinic closures.[626] Writing in dissent, Samuel Alito suggested that lower demand for abortion or competition from other clinics could easily have explained the closures.[627] Much as the *McRae* Court had blamed poverty for the obstacle, Alito contended that market forces could explain the clinic closures in *Whole Woman's Health.*[628]

The strategy of identifying alternative sources of women's victimization continues to matter after *Whole Woman's Health.* Abortion providers in Louisiana challenged an admitting-privileges law identical to the one invalidated by the Court in 2016.[629] Louisiana insisted that unlike in *Whole Woman's Health*, any harm done to women could not be blamed on the state.[630] "[M]ost of the effects Plaintiffs attributed to clinic closures resulting from Act 620 would flow (if at all) from the independent decisions of doctors not to seek in good faith to comply with the law, or to leave abortion practice out of their own volition," the state argued.[631] At the time of this writing, the Court has not decided whether to hear the Louisiana case, *June Medical Services v. Gee*, but five justices agreed to enjoin enforcement of the law pending the appeal.[632] Dissenting from the stay, Brett Kavanaugh reiterated the claim that petitioners could not conclusively establish that the state was at fault.[633]

Identifying an alternative perpetrator has not always served to narrow abortion rights. In the context of spousal notification, for example, the fact that women suffered from domestic violence did not depend on or arise because of the Pennsylvania government.[634] Nevertheless, the Court reasoned that the law interacted with women's underlying circumstances to create an absolute barrier

622. Whole Woman's Health v. Hellerstadt, 136 S. Ct. 2292 (2016).

623. *Id.* at 2300.

624. *See id.* at 2300–03.

625. *See id.*

626. *See id.* at 2310–18.

627. *See id.* at 2344–46 (Alito, J., dissenting).

628. *See id.*

629. June Med. Servs. v. Gee, 814 F.3d 319, 321 (5th Cir. 2016).

630. Objection to Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 8, June Med. Servs. v. Gee, 814 F.3d 319 (2016) (No. 18-A774), https://www.supremecourt.gov/DocketPDF/18/18A774/86542/20190131142745421_Opp%20to%20SCT%20MTS.pdf [https://perma.cc/W2N8-WRN2].

631. *Id.*

632. *See* June Med. Servs., LLC v. Gee, 1–4, 586 U.S. __ (2019), https://www.supremecourt.gov/opinions/18pdf/18a774_3ebh.pdf [https://perma.cc/EH85-RYB6].

633. *Id.*

634. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 887–94 (1992).

to abortion.[635] Similarly, in *Whole Woman's Health*, the number of clinics alone did not dictate women's abortion access—their income, geographic location, and access to a car also played a part—but the Court still found the law to be unconstitutional.[636] Nevertheless, the rhetoric of innocence leaves abortion rights inherently unstable—dependent on how the Court identifies the source of any harm women suffer.

Innocence rhetoric is especially destabilizing when the Court suggests that abortion (or at least abortion providers) actually victimizes women. In *Casey*, for example, the Court invoked the victimization of women in upholding a mandatory-counseling law, suggesting that abortion providers might victimize women by declining to inform them of the consequences of abortion for the fetus.[637] Similarly, in *Gonzales*, the Court reasoned that banning D&E could protect women from the victimization they might otherwise suffer at the hands of providers who did not inform them of how the disputed procedure would kill an unborn child.[638] The innocence rhetoric of *Casey* and *Gonzales* can upend abortion doctrine in several ways. First, abortion providers can serve as an alternative perpetrator, absolving the government of any constitutional responsibility. Second, in both cases, the Court suggested that women's innocence was conditional and limited. Women's innocence—and the Court's solicitude for women—seemingly depended to some extent on women's sympathy with fetal life and willingness to regret abortion or refuse it altogether. While innocence rhetoric may seem to expand abortion rights, similar reasoning often hollows out existing protections.

B. A More Formal Hierarchy of Innocence

Abortion foes recognize the potential of innocence rhetoric to further undermine abortion rights. First, if abortion rights depend to a certain extent on the innocence of women, then abortion foes can seek to establish that certain women (or perhaps all women) are, in fact, culpable. Indiana and other states have seemingly pursued this strategy in passing versions of AUL's model law outlawing abortions in cases of sex selection, race selection, or disability.[639] This strategy has multiple dimensions. First, supporters of these laws seek to narrow abortion rights by establishing that neither *Casey* nor *Roe* authorized abortion chosen for any reason—women who choose abortion for unjustifiable or stigmatized reasons, the argument goes, are no longer the rights-holding victims described in *Roe* and its progeny.[640] The Susan B. Anthony List argued in *Box v. Planned*

635. *See id.*

636. *See* Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292, 2310–18 (2016).

637. *See Casey*, 505 U.S. at 881–87.

638. *See* Gonzales v. Carhart, 550 U.S. 124, 159–63 (2007).

639. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2020: EVERYONE COUNTS 81–85 (2020), https://aul.org/wp-content/uploads/2019/12/Defending-Life-2020.pdf [https://perma.cc/YA7G-PHWX]; *Legislation*, AMS. UNITED FOR LIFE, https://aul.org/what-we-do/legislation/ [https://perma.cc/RV6C-666V].

640. *See infra* notes 641 & 643 and accompanying text.

Parenthood of Indiana and Kentucky that the Court could and did permit different gestational limits depending on the strength of the state's interest in regulating (and the presumed weakness of women's justification for having) abortions.[641] In the case of what the group's brief called "eugenic abortion," the brief argued that the Court should allow bans at fertilization rather than at viability.[642]

Clarence Thomas's concurrence in the Court's per curium opinion in *Box* questioned the innocence of women who have abortions.[643] The Court upheld without much discussion Indiana's law on the disposal of fetal remains, treating it not as an abortion law but as a medical regulation to which rational basis applied.[644] As for Indiana's "eugenic abortion" law, the Court decided to wait to reach a merits decision until after more circuit courts had an opportunity to weigh in.[645] Thomas concurred, writing at length about the justification for the abortion law.[646] To be sure, Thomas reiterated anti-abortion arguments that the Court could uphold the bill without disturbing *Roe* and *Casey*.[647] Indeed, Thomas reasoned that striking down the law would radically redefine abortion rights, "[e]nshrining a constitutional right to an abortion based solely on the race, sex, disability of an unborn child."[648] But Thomas went further, questioning the innocence of women having abortions. Thomas wrote that the use of "abortion to achieve eugenic goals is not merely hypothetical."[649] He linked the movement to legalize birth control, led by Margaret Sanger of Planned Parenthood, to the eugenic legal reform movement of the early twentieth century.[650] Thomas then tied the birth control movement to demands for population control in the 1970s when *Roe* came down.[651] Thomas's narrative considerably, misleadingly, and inaccurately oversimplified the historical relationship between eugenics, population control, and abortion.[652]

But this narrative nonetheless served to suggest that the entire movement to legalize abortion did not advance the cause of innocent women but of racists bigoted against not only people of color but also the disabled and the poor. Thomas went on to suggest that women choosing abortion still often harbored similar intentions.[653] "[W]ith today's prenatal screening test and other technolo-

641. Brief for Amicus Curiae Susan B. Anthony List in Support of Petitioners at 11–15, Box v. Planned Parenthood, 139 S. Ct. 1780 (2019) (No. 18-483).

642. *See id.*

643. Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019) (Thomas, J., concurring).

644. *Id.*

645. *Id.* at 1782.

646. *See id.* at 1782–93.

647. *See id.*

648. *Id.* at 1792.

649. *Id.* at 1783.

650. *See id.* at 1783–93.

651. *See id.* at 1789–90.

652. *See id.* at 1783–93.

653. *See id.* at 1790–93.

gies, abortion can easily be used to eliminate children with unwanted characteristics," Thomas wrote.[654] Questioning the innocence of women and of the movement to legalize abortion helped to make the case for undoing abortion rights altogether. Indeed, Thomas stressed that "the Constitution itself is silent on abortion."[655]

The debate about rape and incest exceptions suggests another way of using the rhetoric of innocence to dismantle *Roe*. If innocence is the currency used in abortion jurisprudence, then abortion foes suggest that unborn children are far more innocent than women. Rape victims remain innocent only until they choose to end their pregnancies. Other women can be victims only if they choose abortion without understanding what it involves or without having the freedom to choose for themselves because of coercion. If innocence is hierarchical, then the Court has no choice but to limit or eliminate abortion rights.

And a hierarchy of innocence suggests that even if the Court recognizes multiple rights in the abortion context, that some of those rights count more than others. Innocence rhetoric suggests that some rights-holding persons, notably unborn children, should enjoy more constitutional protection than others. Finally, although innocence rhetoric primarily invokes moral ideas, a hierarchy of innocence may also have implications for the criminalization of abortion in a post-*Roe* world. If women are morally culpable for ending pregnancies, even in cases of rape or incest, then lawmakers may have every reason to criminally punish women, especially those who self-abort.

Supporters of abortion rights have already forged alternatives to the rhetoric of innocence, many of which already figure centrally in abortion law. The Court at times frames abortion as constitutionally relevant because of its importance to the individual.[656] These arguments need not spell out the harm to women that would result if the law prevents women from ending a pregnancy. Equality arguments for abortion can invoke stereotypes underlying abortion laws or illuminate opportunities gained as a result of abortion access rather than the victimhood of women. And in some circumstances, the rhetoric of innocence may be worth the cost. But as history shows, those costs are real and growing, especially when the Court seems prepared to reverse *Roe.* Pro-choice groups should consider abandoning the rhetoric of innocence. It certainly can do—and already has done—their movement more harm than good.

VI. CONCLUSION

The rhetoric of innocence has played a central and mostly understudied role in transforming abortion doctrine. Recent debates about rape and incest expose the extent to which ideas of guilt, innocence, and victimhood shape abortion rights. The ongoing battle over rape and incest exceptions rests in part on conflicting ideas of victimhood that leave a mark on broader debates about abortion.

654. *Id.* at 1790.
655. *Id.* at 1793.
656. *See* Planned Parenthood Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Abortion foes play on stereotypes about the dishonesty of women, suggesting that women's victimhood is never authentic or beyond question. And the rape and incest debate frames innocence and victimhood as both conditional and relative. Ideas of victimhood already run through abortion law. These arguments have already undercut the foundation of abortion rights, and they may yet do more.