Media outlets need to talk about abortion as self-defense

We need to talk about abortion as self-defense. Terminating a pregnancy as an act of self-defense has been missing from the public conversation, despite media saturation with all manner of news and viewpoints about abortion—from the unprecedented leak of a draft Supreme Court opinion to the striking defeat of an anti-abortion ballot initiative in Kansas and the complications in miscarriage and cancer treatments that abortion bans impose.

Even if the present Supreme Court insists on making women invisible when discussing abortion, as it did in *Dobbs v. Jackson Women's Health Organization*, that hardly explains the media's inattention to abortion as self-defense.

The idea of abortion as self-defense has a long history, promoted over the years by philosophers and legal theorists. This understanding becomes especially salient today not only because the Supreme Court majority's opinion in *Dobbs* eliminated both liberty and gender equality as underpinnings of a constitutional right to abortion.

(Photo via Flickr courtesy of Miki Jourdan)

Arguments based on self-defense are also timely because they command so much support, exemplified by the Supreme Court's opinion just a day before *Dobbs* in *New York State Rifle & Pistol Association v. Bruen*. In striking down New York's license requirement for carrying a weapon in public, Justice Clarence Thomas's opinion for the majority ruled that the regulation prevented "law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."

Self-defense provides the underlying rationale for popular stand-your-ground laws and the "castle doctrine," an affirmative defense that allows residents to use force against intruders, without the duty to retreat, on the theory that one's home is one's castle. In a recent high-profile case, Kyle Rittenhouse successfully invoked self-defense against homicide charges despite facts indicating that he faced danger only because of a situation of his own making.

Why shouldn't the same principles and values apply to abortion? If we have a right to protect our bodies from outside threats, why not from inside threats? If we can protect our brick and mortar homes from unwelcome intruders, why can't we similarly protect our flesh and blood homes—our

bodies?

According to one implicit answer from the past, voluntarily engaging in heterosexual intercourse meant that one assumed the risk of pregnancy. In other words, to avoid an unwelcome embryo or fetus, one should simply avoid sex. (It would not suffice to avoid only unprotected sex because we should all know that birth control can fail.) Rape and incest exceptions to abortion bans rest on the understanding that sex in such settings is involuntary. Yet, rape and incest exceptions are evaporating in modern abortion bans.

Perhaps even more significantly, Kyle Rittenhouse's case reveals that the ability to have avoided the situation prompting the need for self-defense is not controlling. Accordingly, voluntarily engaging in sex should no more make self-defense unavailable than did Kyle Rittenhouse's voluntary trip to Kenosha with a semi-automatic AR 15 style rifle to intervene in protests in that city.

Although the *Dobbs* majority spent only a single paragraph rejecting the contention that abortion bans discriminate on the basis of sex, the argument merits a second look through the lens of self-defense, in both law and the public conversation. What does it mean in this era—when force in defense of oneself or one's home is not simply legitimate but celebrated—to single out pregnancy as a virtually across-the-board exception? It won't do to say that most bans allow abortions for "medical emergencies" or life-threatening pregnancies because self-defense is more capacious than that. Besides, the already shockingly high maternal mortality rate in the United States, ever increasing for Black and Hispanic individuals, shows that pregnancy itself presents considerable physical danger.

A related argument, again long part of the literature, relies on the principle that our laws never require us to be good Samaritans for the sake of another. Even when law imposes a

duty to help, that duty does not apply when the aid to be rendered poses a physical risk. I have a duty to rescue my child only when I can do so without danger to myself. Although my child will die unless I donate a kidney, I have no legal duty to do so because of the risk to me.

Yet, abortion bans treat pregnant bodies differently, signaling that they belong not to their "owners," but to the state, which can conscript such bodies in service to an embryo or fetus, notwithstanding the dangers. Without access to abortion, pregnancy requires exceptional self-sacrifice for the sake of another—exceptional because law imposes no similar obligations on anyone else.

Both the self-defense and the exceptional self-sacrifice arguments sidestep the question whether the fetus is a "person." Self-defense allows ending the life of a person, as does the failure to aid another in the face of danger to the rescuer.

Because the inability to invoke self-defense and exceptional self-sacrifice requirements follow a gender-based track, relying on all the traditional stereotypes, we should have a violation of equal protection. Ordinarily, that would require the state to show an "exceedingly persuasive justification . . . under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens." Yet, even if we must accept the Supreme Court's refusal to see such inequality in *Dobbs*, so that the state's approach needs only to be rational, still the singular treatment of the pregnant body stands out as irrational. It ignores not only respect for what *Bruen* calls "ordinary self-defense needs" but also the longstanding legal privilege to choose whether to place our own safety above the lives of others, another form of self-defense.

Abortion as self-defense rests on compelling legal arguments, with considerable history, a respectable pedigree, and

provocative connections to the contemporary ascent of gun rights for self-protection, stand-your-ground laws, and the castle doctrine. The media should help the public understand the gender discrimination inherent in excluding pregnancy from the legal rules of self-defense.

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