
RECENT LEGISLATION

REPRODUCTIVE RIGHTS — STATE LAW — ILLINOIS REPEALS ANTI-ABORTION TRIGGER LAW. — Act of Sept. 28, 2017, Pub. Act 100-0538, 2017 ILL. LEGIS. SERV. P.A. 100-538 (West) (codified in scattered sections of Ill. Comp. Stat.).

In 1975, the Illinois state legislature enacted the Illinois Abortion Act,¹ which affirmed the state's "longstanding policy" that an unborn child is considered a legal person from the moment of conception, entitled to a constitutional right to life.² According to the language of the Act, protecting an unborn child's right to life "by prohibiting abortion unless necessary to preserve the life of the [woman] is impermissible only because of the decisions of the United States Supreme Court."³ As such, the Act posits that if those decisions are ever "reversed or modified," or if the "Constitution is amended to allow protection of the unborn," then Illinois's prior policy, prohibiting abortion with an exception only to preserve a woman's life, "shall be reinstated."⁴ Such statutes are known as "trigger laws," as their substantive provisions are triggered only upon some future judicial or legislative development.⁵ Recently, Illinois Governor Bruce Rauner signed into law Public Act 100-0538,⁶ which strikes Illinois's trigger law from the Illinois Compiled Statutes.⁷ While the decision to sign the bill was not without controversy, striking Illinois's trigger law better comports with the rule of law in three key ways: it more readily allows for compliance with the statute's terms, preserves the democratic process, and improves the stability of the law.

Public Act 100-0538 was introduced as House Bill 40 by Representative Sara Feigenholtz, and sponsored in the Senate by Senator Heather Steans.⁸ The bill serves two key functions: to permit funding for abortion services under state insurance plans, including Medicaid, and to strike down the trigger provisions of the Illinois Abortion Act.⁹

House Bill 40 amends four provisions of the Illinois Compiled Statutes. First, the bill strikes the Illinois Abortion Act's language declaring that life begins at conception, the state's policy of permitting abortions only

¹ 720 ILL. COMP. STAT. 510/1 (2016).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ E.g. Matthew Berns, Note, *Trigger Laws*, 97 GEO. L.J. 1639, 1640-41 (2009).

⁶ Act of Sept. 28, 2017, Pub. Act 100-0538, 2017 ILL. LEGIS. SERV. P.A. 100-538 (West) (codified in scattered sections of Ill. Comp. Stat.).

⁷ *Id.*

⁸ See *Bill Status of HB0040*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=40&GAID=14&DocTypeID=HB&SessionID=91&GA=100> [<https://perma.cc/SD6K-Z2JP>].

⁹ See H.B. 40, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

to preserve a woman's life, and the trigger provision to reinstate such policy if *Roe v. Wade*¹⁰ were to be overturned or modified.¹¹ Second, the bill amends the State Employees Group Insurance Act of 1971¹² and the Illinois Public Aid Code¹³ to permit Medicaid and state employees' health insurance plans to fund abortions, induced miscarriages, or induced premature births.¹⁴ Third, the bill permits the Department of Human Services to make grants to nonprofit agencies and organizations that refer, counsel, or provide abortion care under the Problem Pregnancy Health Services and Care Act.¹⁵ Finally, the bill removes the requirement that patients submit a written opinion from a physician to claim reimbursement for abortion care,¹⁶ removes language prohibiting a physician from providing care for anyone eligible for medical assistance benefits if the physician has been "convicted of having performed an abortion procedure in a wilful and wanton manner on a woman who was not pregnant at the time,"¹⁷ and adds language to the Public Aid Code stating that "reproductive health care that is otherwise legal in Illinois shall be covered under the medical assistance program for persons who are otherwise eligible."¹⁸

While trigger laws have traditionally not garnered much interest from either side of the debate¹⁹ — indeed, the trigger provisions of the Illinois Abortion Act were not debated prior to its enactment in 1975²⁰ — the possibility of the Trump Administration's judicial appointees revisiting *Roe* galvanized support for the bill.²¹

¹⁰ 410 U.S. 113 (1973).

¹¹ Ill. H.B. 40 § 20.

¹² 5 ILL. COMP. STAT. 375/6, 6.1 (2016).

¹³ 305 ILL. COMP. STAT. 5.

¹⁴ Ill. H.B. 40 §§ 5, 10.

¹⁵ 410 ILL. COMP. STAT. 230/4-100 (2016); Ill. H.B. 40 § 15.

¹⁶ Ill. H.B. 40 § 10.

¹⁷ *Id.* (quoting 305 ILL. COMP. STAT. 5/5-8, 5-9). On allegations that clinics perform abortions on women who are not pregnant for financial gain, see, for example, Robin Marty, "Abortions on Women Who Aren't Pregnant" Common Trope of Anti-Choice Movement, REWIRE (Oct. 2, 2012, 2:41 PM), <https://rewire.news/article/2012/10/02/abortions-on-women-who-arent-pregnant-common-trope-anti-choice-movement/> [<https://perma.cc/2ZCF-BZFX>].

¹⁸ Ill. H.B. 40 § 10.

¹⁹ See, e.g., Polly Ross Hughes, *Bill Would Trigger Abortion Law if Roe Is Overturned*, HOUS. CHRON. (Jan. 11, 2007, 6:30 AM), <http://www.chron.com/news/article/Bill-would-trigger-abortion-law-if-Roe-is-1807316.php> [<https://perma.cc/P69X-V9W7>] (noting that both the Texas Alliance for Life and Planned Parenthood of the Texas Capital Region considered a pending trigger law bill a low priority).

²⁰ Sarah Mansur, *Bill Removes Trigger from Abortion Law, but Impact Unclear*, CHI. DAILY L. BULL. (May 1, 2017, 10:06 AM), <http://www.chicagolawbulletin.com/Archives/2017/05/01/Abortion-trigger-bill-5-1-17> [<https://perma.cc/D6CR-MUST>].

²¹ *Id.*

The bill passed the Illinois House and Senate²² and went to Republican Governor Rauner for signature. As a candidate in 2014, the Governor voiced his support for broader access to abortion, stating that restrictions on “abortion coverage under the state Medicaid plan and state employees’ health insurance . . . unfairly restrict[] access based on income.”²³ Indeed, supporters took out a full-page ad in the *Chicago Tribune* during the gubernatorial campaign touting Rauner’s pro-choice views.²⁴ In April 2017, however, Governor Rauner threatened to veto the bill,²⁵ allegedly in an attempt to broker a compromise.²⁶ Commentators have speculated that the Governor’s ultimate decision not to veto was influenced by a desire for votes from socially moderate suburban women in the next election cycle.²⁷ Governor Rauner signed the bill on September 28, 2017.²⁸ The law went into effect on January 1, 2018.²⁹

Expanding public funding for abortion is an enormous coup for reproductive rights advocates, making Illinois “the first state in decades to lift its restriction on Medicaid coverage of abortion.”³⁰ In addition, striking Illinois’s trigger law is a step forward for governance in the state, as the trigger law conflicts with rule of law principles in three ways: first, the trigger law was so vague as to inhibit comprehension and compliance, particularly as judicial guidance was unforthcoming;

²² The vote in the House was sixty-two to fifty-five, with all but five Democrats voting for the bill and all Republicans opposing it, *Roll Call: IL HB0040*, LEGISCAN, <https://legiscan.com/IL/rollcall/HB0040/id/630991> [<https://perma.cc/RL34-M8B3>] (House vote); in the Senate, the tally was strictly along party lines, thirty-three to twenty-two, with four Democrats not voting, *Roll Call: IL HB0040*, LEGISCAN, <https://legiscan.com/IL/rollcall/HB0040/id/642129> [<https://perma.cc/C8UY-4APE>] (Senate vote).

²³ Kim Geiger & Rick Pearson, *Rauner Signs Controversial Abortion Bill, Angering Conservatives*, CHI. TRIB. (Sept. 29, 2017, 6:30 AM), <http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-abortion-hb40-met-0929-20170928-story.html> [<https://perma.cc/A32Q-JAA7>].

²⁴ See Rich Miller, *Pro-Choice Ad Backing Rauner Runs in Tribune*, CAPITOL FAX (Oct. 14, 2014), <https://capitolfax.com/2014/10/14/pro-choice-ad-backing-rauner-runs-in-tribune/> [<https://perma.cc/2YPC-J4QU>] (ad on file with the Harvard Law School Library).

²⁵ *Breaking: Rauner to Veto Abortion Bill Facing Vote on House Floor*, ILL. REV. (Apr. 14, 2017), <http://illinoisreview.typepad.com/illinoisreview/2017/04/taxpayer-abortion-funding-up-to-governor-says-state-rep-mcsweeney.html> [<https://perma.cc/7RG7-92JN>].

²⁶ Geiger & Pearson, *supra* note 23.

²⁷ Tina Sfondeles, *First Lady Diana Rauner’s Emails Focus on Madigan, Messaging, Media*, CHI. SUN-TIMES (Aug. 16, 2017, 11:05 AM), <https://chicago.suntimes.com/news/first-lady-diana-rauners-emails-focus-on-madigan-messaging-media/> [<https://perma.cc/THV2-VB8L>].

²⁸ Natasha Korecki, *Illinois Governor Signs Bill Expanding Public Funding for Abortion*, POLITICO (Sept. 28, 2017, 4:46 PM), <http://www.politico.com/story/2017/09/28/bruce-rauner-abortion-public-funding-243270> [<https://perma.cc/685N-AVSE>].

²⁹ Anti-abortion groups have filed a lawsuit challenging the bill’s effective date, arguing that it “violates the Illinois Constitution’s requirement that bills passed after May 31 not take effect until the following June.” Brian Fraga, *Pro-Life Groups Launch Last-Ditch Legal Challenge Against New Ill. Abortion Law*, NAT’L CATH. REG. (Jan. 11, 2018), <http://www.ncregister.com/daily-news/pro-life-groups-launch-last-ditch-legal-challenge-against-new-ill.-abortion> [<https://perma.cc/9BHU-UAKJ>].

³⁰ Korecki, *supra* note 28.

second, because the trigger law did not have immediate force of law, the law did not necessarily reflect contemporary public opinion or guide behavior, either in the abstract or if triggered; finally, the trigger law was inherently unstable over time and may have interfered with a reliance interest in abortion access.

The rule of law occupies a privileged position in American constitutional discourse: it “is central to our political and rhetorical traditions, possibly even to our sense of national identity.”³¹ While there are multiple approaches to framing the rule of law, Professor Richard Fallon’s and Professor Lon Fuller’s approaches converge on three key principles: clarity,³² conformability,³³ and stability.³⁴ Though it may be the case that no political system can approach perfect compliance with the rule of law,³⁵ to the extent that laws depart from rule of law elements, they are generally considered deficient.³⁶ As Illinois’s trigger law departs from each of these principles, its removal from the Illinois Abortion Act is a notable improvement from a rule of law perspective.

Perhaps the most troubling aspect of Illinois’s trigger law was the vagueness inherent in the trigger and its eventual implementation, contrary to the maxim that “[p]eople must be able to understand the law and comply with it.”³⁷ The now-stricken provision states that “if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State . . . shall be reinstated.”³⁸ The plain language of this text raises myriad questions: What sort of “modification” would be sufficient to trigger the law? What precisely does “protection of the unborn” entail?³⁹ What official, if any, is

³¹ Richard H. Fallon Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997).

³² LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (discussing the need to “make rules understandable”); Fallon, *supra* note 31, at 8 (“People must be able to understand the law and comply with it.”).

³³ FULLER, *supra* note 32, at 39 (noting that laws should “guide action”); Fallon, *supra* note 31, at 8 (“The law should actually guide people.”).

³⁴ FULLER, *supra* note 32, at 39 (arguing that legal systems should avoid “introducing . . . frequent changes in the rules”); Fallon, *supra* note 31, at 8 (“The law should be reasonably stable.”).

³⁵ Fallon, *supra* note 31, at 3.

³⁶ FULLER, *supra* note 32, at 39 (“A total failure in any one of these [rule of law elements] does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . .”).

³⁷ Fallon, *supra* note 31, at 8.

³⁸ 720 ILL. COMP. STAT. 510/1 (2016).

³⁹ The vagueness in Illinois’s policy led to concerns that access to contraceptives, in addition to abortifacients, may be jeopardized by the trigger law. See, e.g., Hannah Levintova, *If Trump Gets His Way, These Will Be the First Places to Ban Abortion*, MOTHER JONES (Feb. 14, 2017, 11:00 AM), <http://www.motherjones.com/politics/2017/02/abortion-law-youve-never-heard-could-be-threatening-trump-era/> [<https://perma.cc/63E4-DJWA>] (“Many such laws, including the one in Illinois, go even further, saying that if *Roe* is overturned, the state intends to renew their . . . ‘policy’ that

vested with authority to determine when the Court's decisions have been sufficiently repudiated? And by what mechanism shall the former policy be reinstated?⁴⁰

Other trigger laws answer these questions within the text of the statute. In North Dakota, for example, abortion would be prohibited in the state "on the date the Legislative Council approves by motion the recommendation of the Attorney General to the Legislative Council that it is reasonably probable that this Act would be upheld as constitutional."⁴¹ Mississippi's trigger law would become effective upon the determination of the state Attorney General that the Supreme Court has overruled *Roe*.⁴² Illinois's law lacked these procedural prescriptions, memorializing instead an intent to change the law if *Roe* is overruled or modified.

In addition, courts have been unwilling to clarify trigger laws' meanings. The Illinois trigger law is the only such provision to have been challenged in court.⁴³ In *Wynn v. Scott*,⁴⁴ the court declined to rule on the constitutionality of Illinois's trigger provision, as "the legislature clearly recognized that under Supreme Court decisions, its prior policy is unconstitutional, and [the trigger provision] is of no practical effect."⁴⁵ Thus, though the law existed on the books, Illinoisans were unable to seek judicial guidance on the meaning of the law until its substantive provisions had been triggered. This ambiguity departs too far from the rule of law maxim of clarity to permit comprehension and compliance.

Illinois's trigger law was also at odds with the conformability principle of the rule of law, which states that "people should obey the law and be ruled by it,"⁴⁶ because compliance while the law remained untriggered was problematic and compliance in the event of its triggering

life begins at conception. This approach could not only affect the legality of abortion but also common forms of birth control, such as Plan B or IUDs, which some anti-abortion advocates consider to be abortifacients despite medical consensus to the contrary."

⁴⁰ While there is always a risk that a legislature might enact a vague law, a vague law with immediate effect has presumably been debated on its terms by electorally accountable legislators; a law with ambiguous future effect cannot be democratically contested in the same way and therefore seems to pose a different or greater risk.

⁴¹ N.D. CENT. CODE § 12.1-31-12 note (2012).

⁴² MISS. CODE ANN. § 41-41-55 ed. note (2013).

⁴³ Heidi S. Alexander, Note, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 387 (2009). Nearly identical trigger language was discussed in *Margaret S. v. Treen*, 597 F. Supp. 636, 644 (E.D. La. 1984) (quoting LA. STAT. ANN. § 40:1299.35.0 (West Supp. 1981)), but the provision itself was not challenged.

⁴⁴ 449 F. Supp. 1302 (N.D. Ill. 1978).

⁴⁵ *Id.* at 1314 n.9. Similarly, the court in *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980), did not rule on the constitutionality of the trigger language, finding instead that the law's severability language controlled because, taken as a whole, the trigger provision did not "express[] an unlawful purpose" because of the General Assembly's stated intent to conform its regulations to the Court's decisions. *Id.* at 779.

⁴⁶ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 212 (1979).

would have been unlikely. At the moment of passage, trigger laws are uncertain to ever have substantive force. As such, trigger laws tend to generate little public discussion or dissent, particularly when they are bundled with abortion regulations that have more immediate substantive impact.⁴⁷ While Illinois's trigger law did not preclude modification by future legislatures,⁴⁸ this lack of discussion may have distorted democratic processes by obscuring contemporary public opinion. Indeed, according to public opinion data from 1972–2012, average support for abortion peaked in 1974.⁴⁹ The law's passage in spite of this data can be easily explained: the majority of citizens did not think that the law would ever be triggered or had bigger fish to fry — abortion restrictions with immediate substantive effect — and therefore did not mobilize to oppose it.⁵⁰ In a majoritarian system, the assumption is that laws passed by electorally accountable lawmakers will align with the preferences of the constituent majority. While public disagreement does not necessarily undermine a law's legitimacy, the strength of public opinion at the time of the trigger law's passage indicates that processes of democratic accountability were not functioning correctly: the legislature enacted and maintained the trigger law despite the balance of public opinion.

Furthermore, to the extent that the trigger law did guide behavior, it did so in a troubling manner: the law signaled disrespect for the Court's existing abortion jurisprudence.⁵¹ Though the Court recognized an implied fundamental right to privacy that encompasses abortion,⁵² the trigger law treated the doctrine as subject to change and the Court as morally bankrupt on the issue. Though the law had only expressive content before triggering, it implicitly encouraged people to disregard constitutional law, which does not comport with the stricture that people should be ruled by the law and obey it.

Just as the trigger law encouraged disrespect for law in the abstract when untriggered, it may have encouraged disregard for the law in practice when triggered, as Illinoisans would have been unlikely to comply. Polling data from April 2017 indicates that “73 percent of all Illinois

⁴⁷ See Neil Steinberg, *Steinberg: Abortion Trigger Law 'A Nightmare Scenario for Women,'* CHI. SUN-TIMES (Jan. 31, 2017, 7:28 PM), <https://chicago.suntimes.com/news/steinberg-abortion-trigger-law-a-nightmare-scenario-for-women/> [<https://perma.cc/F3TM-8KWF>] (“[I]f we had tried to do it in the past, even the recent past, we would be a laughingstock because [overturning *Roe*] was never going to happen,” said [Representative] Kelly [Cassidy]. “We would have had [the] same reaction: “Why are you fixing something that’s not broken?”” (second alteration in original)).

⁴⁸ Alexander, *supra* note 43, at 392.

⁴⁹ TOM W. SMITH & JAESOK SON, NORC, GENERAL SOCIAL SURVEY 2012 FINAL REPORT: TRENDS IN PUBLIC ATTITUDES TOWARDS ABORTION 2 (May 2013), http://www.norc.org/PDFs/GSS%20Reports/Trends%20in%20Attitudes%20About%20Abortion_Final.pdf [<https://perma.cc/MK4Z-NY8H>].

⁵⁰ See Berns, *supra* note 5, at 1642 & n.10.

⁵¹ See Alexander, *supra* note 43, at 398.

⁵² *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

voters, including 48 percent of Republicans and 85 percent of 18- to 29-year-old millennials, agreed with the statement that ‘abortion should be a private decision between a woman and her doctor, without government interference.’⁵³ The trigger law’s overt contravention of the majority’s preferences increases the likelihood of noncompliance,⁵⁴ in violation of the rule of law precept that citizens should obey the law. By striking Illinois’s trigger provision, the General Assembly must contend with constituent opinion directly on any further abortion regulation, providing an opportunity for a more accurate reflection of the public’s interests in lawmaking that will actually guide behavior.

Illinois Representative Peter Breen argues that these possible defects in the trigger law are not material, as the “General Assembly would have to pass an entirely new law in order to recriminalize abortion.”⁵⁵ While a new law could be passed to recriminalize abortion, the former state policy could just as easily have been reinstated by executive order, on the grounds that the trigger law was democratically enacted and further political deliberation is unnecessary.

Finally, Illinois’s trigger law was by nature unstable, as it would have come into force at some unspecified future point in time. This instability violates the rule of law principle that laws should “facilitate planning and coordinated action over time.”⁵⁶ The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁷ described this stability interest as a key element of stare decisis: “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁵⁸ Of course, courts may overrule prior decisions; however, prior to making such a decision, the Court may consider “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”⁵⁹

⁵³ Heather Steans, Sara Feigenholtz & Terry Cosgrove, Opinion, *Sign HB 40 in Full, Gov. Rauner*, CRAIN’S CHI. BUS. (Sept. 25, 2017), <http://www.chicagobusiness.com/article/20170925/OPINION/170929913/sign-hb-40-in-full-gov-rauner> [<https://perma.cc/A8C4-P4KN>].

⁵⁴ The likelihood of noncompliance is evinced in Illinois history: even in 1972, before the Supreme Court’s decision in *Roe*, there was substantial support for legal abortion access under certain circumstances. See SMITH & SON, *supra* note 49, at 7. At the time, the Chicago-based Jane Collective provided covert referrals and direct abortion services to women from Illinois and neighboring states. See, e.g., LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* ix–x (1995). It is reasonable to conclude that, if the law were to be triggered, similar groups might spring up again, particularly as conflict with public opinion, perceived legitimacy, or individuals’ own conceptions of justice can increase the risk of noncompliance. See, e.g., Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1400–01 (2005).

⁵⁵ Mansur, *supra* note 20.

⁵⁶ Fallon, *supra* note 31, at 8.

⁵⁷ 505 U.S. 833 (1992).

⁵⁸ *Id.* at 854.

⁵⁹ *Id.*

The Court went on to locate a reliance interest, worthy of protection, in access to abortion services, given that “for two decades of economic and social developments, people have organized intimate relationships and made choices . . . in reliance on the availability of abortion.”⁶⁰ In resonance with the conformability element of rule of law, abortion has been legally accessible for decades and individuals have organized their behavior accordingly. Triggering Illinois’s law could create enormous problems of fair notice with immediate consequences. “To suddenly announce that abortion is illegal would chill abortion activities and punish others who justifiably relied on the right to choose,”⁶¹ in violation of rule of law principles.

Not only would such a decision be unstable in terms of abortion law, but a “modification or outright reversal of *Roe* would be the first instance in history that the United States Supreme Court, in reversing itself, took away a fundamental right and in so doing left individuals exposed to criminal prosecution.”⁶² Given the enormity of this sea change, citizens should have adequate notice of the change in the law and an appropriate amount of time to adapt their behavior, neither of which was guaranteed in Illinois’s trigger law.

Trigger laws that comport with Supreme Court jurisprudence do not provoke the same concerns: the requirements of these laws are clear, conformable, and stable insofar as they extend the status quo and do not telegraph disrespect for the Court. A trigger law stating that if *District of Columbia v. Heller*⁶³ were overruled, an individual right to firearms shall remain legal in Illinois does not pose the same problems as one that would outlaw firearms; the settled nature of that area of law indicates that the political process should be invoked to incorporate all existing information and context prior to policy change, which trigger laws would not permit.

Citizens should be able to understand what the law means, have the law guide their behavior, and receive adequate notice of changes to the law; these ideals are central to the rule of law, which itself undergirds American constitutional discourse. However, the structure and function of certain trigger laws obfuscate these aims. Striking Illinois’s trigger law realigns state policy with fundamental elements of the rule of law and better comports with fair governance.

⁶⁰ *Id.* at 856.

⁶¹ Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey Abortion Statutes in a Post-Casey World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 374 (1992).

⁶² *Id.* at 362.

⁶³ 554 U.S. 570 (2008).