

**PRO LIFE, PRO DEATH:
THE CONVERGENCE OF ABORTION RESTRICTIONS AND THE DEATH
PENALTY IN TEXAS**

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ABSTRACT

On June 24, 2022, the Supreme Court eliminated the constitutional right to an abortion in Dobbs v. Jackson Women’s Health Organization. With abortion no longer a constitutional right, there are few limits to how a state may enforce its abortion restrictions. A new era of abortion criminalization has begun. The criminalization of abortion is particularly dangerous in states that still recognize the death penalty as a form of punishment.

This paper analyzes the possibility of abortion being charged as capital homicide, with a specific focus on the state of Texas. Texas has enacted the most restrictive abortion laws and highest number of executions in the nation. Texas can enumerate capital abortion by changing the family code definition of a “living child” as one alive from the moment of fertilization and by eliminating abortion-related exemptions to homicide. Legislative initiatives and the adoption of a reproductive justice framework are the best defenses to legal pathways for capital abortion.

The article touches on several extremely difficult topics such as abortion, the death penalty, and the impact these issues have on communities of color and marginalized groups in particular. This content has the potential to be difficult and acutely affect our readers. The Law Review and the authors acknowledge the sensitive nature of the content and ask readers to take care as they navigate through the piece.

INTRODUCTION

In this paper, we explore the potential of death as the punishment for abortion in Texas. We focus on Texas because it acts as an extreme case study. Since major death penalty reform precipitated by the *Furman v. Georgia* decision, Texas has executed more people than any other state in the country.¹ Texas also has had, and continues to have, some of the most restrictive abortion laws in the United States.² Finally, Texas has before tried to introduce legislation classifying abortion as a death penalty eligible crime.³

Texas's homicide statute provides exemptions for "a *lawful* medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure. . . ." ⁴ Read closely, the exemption only applies to "a *lawful* medical procedure."⁵ Under Texas's newly passed abortion law, abortions are only lawful medical procedures when the pregnant person's⁶ life is in danger.⁷ Otherwise, abortions are not *lawful* medical procedures, and are therefore deemed illegal.⁸ Under this scheme, prosecutors would have a colorable argument that a person who has administered an abortion has killed an unborn child through

1 In this article, the term "execute" is not intended literally. Instead, the word refers to the administration of a death sentence. *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Oct. 6, 2022), <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>.

2 Alejandra O'Connell-Domenech, *Here are Five States with the Most Restrictive Abortion Laws in the Country*, THE HILL (May 5, 2022), <https://thehill.com/changing-america/respect/equality/3478896-here-are-five-states-with-the-most-restrictive-abortion-laws-in-the-country/>.

3 See H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017) (modifying the family code to defining a fetus at "the moment of fertilization" as a "living human child" and removing the abortion exemption from criminal homicide in the penal code); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021); Tex. Penal Code Ann. § 19.06 (West 2023) (codifying the murder of a child under 10 years old as a capital offense).

4 Tex. Penal Code Ann. § 19.06 (West 2023) (emphasis added).

5 *Id.* (emphasis added).

6 Throughout the paper, we strive to use language that captures the understanding that the criminalization of abortion procedures will directly impact those of all genders, who have the capacity to get pregnant. As such, we generally refer to those impacted by abortion restrictions and laws as "pregnant people" instead of "women" or "mothers." When citing laws or studies that are centered around those with a specific gender presentation, we defer to the original language of the authors.

7 TEX. HEALTH & SAFETY CODE ANN. § 171.0124 (West 2023).

8 *Id.* (emphasis added).

an *unlawful* medical procedure, thus violating the homicide statute.

In 2017,⁹ 2019,¹⁰ and 2021,¹¹ Texas lawmakers introduced bills that would make abortion a death-penalty-eligible crime.¹² The proposed bills effectively classified abortion as the murder of a person under 15 years old—a death-penalty-eligible offense.¹³ At the time the bills were proposed, the federal government protected abortion access through Supreme Court decisions such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁴ and *Roe v. Wade*.¹⁵ None of the previously proposed bills passed in the Texas State Legislature.¹⁶

On May 2, 2022, Politico published a leaked decision of *Dobbs v. Mississippi Women's Health Clinic*, which signaled the looming end to fifty years of precedent.¹⁷ The ninety-eight-page majority opinion draft warned that soon, *Roe* and *Planned Parenthood* would be overturned, and the constitutional right to abortion would be no longer.¹⁸ Less than two months later, the official *Dobbs* decision was released, formally overturning *Roe* and *Planned Parenthood*, leaving the issue of abortion for each individual state to decide.¹⁹

As states across the country begin to implement anti-abortion laws, their legislatures are left to choose a punishment.²⁰ Even before

9 H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017) (Abolition of Abortion in Texas Act).

10 H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019).

11 H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

12 In this paper we use the phrases “death penalty” and “capital punishment” interchangeably.

13 TEX. PENAL CODE ANN. § 19.03 (West 2023).

14 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

15 See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

16 See H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); *Texas House Bill 948*, LEGISCAN (2017), <https://legiscan.com/TX/sponsors/HB948/2017> (reporting the aforementioned bill as failed); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); *Texas House Bill 896*, LEGISCAN (2019), <https://legiscan.com/TX/text/HB896/id/1856170> (reporting the aforementioned bill as failed); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021); *Texas House Bill 3326*, LEGISCAN (2021), <https://legiscan.com/TX/votes/HB3326/2021> (reporting the aforementioned bill as failed).

17 See Politico Staff, *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade.*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

18 See *id.*

19 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

20 See Allison McCann et al., *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last visited Mar. 3, 2023); Elyssa Spitzer, *Some States are Ready to Punish Abortion in a Post-Roe World*, CENTER FOR AMERICAN PROGRESS (June 24, 2022), <https://www.americanprogress.org/article/some-states-are-ready-to-punish->

Dobbs, Texas sought to enforce extreme abortion punishment.²¹ Now, it is unclear how far Texas is willing to go to enforce its anti-abortion values. Before the *Dobbs* decision, when Texas representatives sought the death penalty, their success seemed unfathomable.²² At the time, states could not enforce laws that were an “undue burden” to abortion access.²³ The bills probably were not meant for enforcement, but instead, to excite constituents with strong anti-abortion ideologies. However, with the drastically changed abortion legal landscape of today, similar bills could have vastly different legislative implications.

Less than four months before the *Dobbs* decision was leaked, State Representative Bryan Slaton, the sponsor of the 2021 abortion bill tweeted, “I pledge to re-file my bill to completely abolish abortion in Texas in the next legislative session, and to fight at every opportunity to see this implemented into law. The laws of God and nature are clear: life begins at conception. It is time we start acting like it #txlege.”²⁴ Less than four months later, *Dobbs* was decided.²⁵ That said, Texas politicians continue to advocate for abortion punishment post-*Dobbs*.²⁶ The major difference between now and pre-*Dobbs* is the loss of abortion protection.

In this Note, we explore Texas’s history of capital punishment and abortion restrictions which have predominantly targeted marginalized groups. We argue that these trends, and the end of constitutional protection for abortion, have opened the door to capital abortion²⁷ in

abortion-in-a-post-roe-world/.

21 See, e.g., H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

22 See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.”).

23 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

24 Bryan Slaton (@BryanforHD2), TWITTER (Jan. 29, 2022), https://twitter.com/BryanforHD2/status/1487546311423533061?ref_src=twsrc%5Etfw.

25 See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

26 See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023); Abortion Laws, Trigger Laws, Texas State Law Libraries, (last accessed Apr. 5, 2023), <https://guides.sll.texas.gov/abortion-laws/trigger-laws#:~:text=go%20into%20effect.,Texas’s%20Trigger%20Law,Supreme%20Court%20overturning%20Roe%20v> (explaining that a restrictive abortion law that would go into effect 30 days after *Roe* is overturned); 1925 Tex. Crim. Stat. 277–78 (defining abortion and its penalties).

27 “Capital abortion” is abortion as a death penalty eligible crime.

Texas. Our Note concludes with potential defenses to capital abortion.

In Part I of this Note, we provide a background on abortion and the death penalty. We begin with a legal history of abortion in Texas split into four eras: (1) pre-*Roe v. Wade* abortion bans; (2) Supreme Court abortion decisions; (3) the era after abortion was established as a constitutional right; and (4) the post-*Dobbs* era with no federal abortion protections. Next, we provide a brief history of the death penalty in Texas from the time of informal lynchings in the 1800s to the regimented capital punishment proceedings of today. In Part II, we consider possible motivations behind Texas's strict abortion laws and its use of capital punishment. We argue that fundamentalist Christian ideology, gender roles, and race all contribute to existing Texas abortion and capital punishment law and have the potential to do the same in abortion punishment. In Part III, we consider the legal pathways to capital abortion and its legal implications. Potential pathways to capital abortion include the criminalization of self-induced and in-clinic abortions. Finally, Part IV explores potential legal defenses and strategies to combat the potential of capital abortion.

I. BACKGROUND

To evaluate the intersection between Texas abortion restrictions and death penalty regulations, it is important to first understand the history behind these distinct policies in the state. This Section provides an overview of the separate and concurrent histories of abortion regulations and death penalty procedures in Texas. The history of Texas abortion-related governance is reflected in the following phases: Pre-*Roe* Abortion Statutes,²⁸ Supreme Court Intervention, Post-*Roe* and *Casey* Abortion Regulations, and the *Dobbs* era. Death penalty regulation in Texas can be broken into early and modern eras. The histories of both

²⁸ Before 1854, the earliest instances of abortion-related governance in the United States consisted of common law decisions, outside of Texas, which only regulated the medical procedures if a fetus had “quickened,” and the pregnant person felt the perception of fetal movement. See *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812) (determining that actions that terminate a pregnancy before quickening are not considered criminal). This “quickening doctrine” became national precedent, and was adopted by states, in the absence of a governing statute or definition regarding abortion. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 4 (Oxford University Press, 1979). Popular home health manuals, midwifery texts, and formal medical training records further signal the acceptance of abortion procedures during the early stages of pregnancy. *Id.*

abortion regulations and the death penalty are analyzed through the lens of legislation, regulatory procedures, and court decisions.

A. *History of Abortion Regulations in Texas*

1. Pre-*Roe* Abortion Statutes in Texas: 1854–1973

Before *Roe* was decided in 1973, abortion regulations were largely set by the States.²⁹ Texas passed its first abortion-related statute in 1854, punishing any person convicted of intentionally administering, aiding, or abetting the miscarriage of any “woman being with a child,” by imprisonment for up to 10 years.³⁰ In 1857, the Texas Penal Code reduced the punishment for those who administer abortions to a range of two to five years, but the sentence was doubled if the abortion was done without consent.³¹ Additional acts also stated: (a) failed abortion attempts receive one-half of the punishment of a successful procedure; (b) the death of the mother during an abortion, “or by an [abortion] attempt”, constitutes murder; and (c) destroying the vitality of a child, in the state of being born, is punishable by life imprisonment or no less than five years pursuant to a jury’s determination.³² In 1858, the Texas Legislature amended the punishment for failed abortion attempts to be punishable by a fine of \$100–\$1,000.³³

In 1925, Texas echoed its stance on abortion by reiterating several earlier 1850s provisions into an updated penal code.³⁴ Within the 1925 penal code, Texas maintained the two-to-five-year imprisonment charge for any administrator of abortion;³⁵ \$100–\$1,000 criminal fine for failed abortion attempts;³⁶ murder designation for a death of a mother occasioned by an abortion;³⁷ five-year-to-life sentence for destroying the vitality of a life of an unborn child, during the parturition of the mother;³⁸ and exceptions for abortions that save the life of the mother.³⁹ In addition, Article 1192 designated any person who knowingly

29 *Roe v. Wade*, 410 U.S. 113, 116 (1973).

30 1854 Tex. Gen. Laws 1502.

31 1857 Tex. Crim. Stat. 103–04.

32 1856 Tex. Crim. Stat. 103–04.

33 1858 Tex. Gen. Laws 1044.

34 *See* Articles 1191–1196 of 1925 Tex. Crim. Stat. 277–78.

35 Article 1191 of 1925 Tex. Crim. Stat. 278.

36 Article 1193 of 1925 Tex. Crim. Stat. 278.

37 Article 1194 of 1925 Tex. Crim. Stat. 277–78.

38 Article 1195 of 1925 Tex. Crim. Stat. 277–78.

39 Article 1196 of 1925 Tex. Crim. Stat. 277–78.

furnished the means of procuring an abortion as an accomplice.⁴⁰ Under these laws, those who wished to end their pregnancies obtained illegal abortion procedures by paying a fee to discrete physicians or midwives.⁴¹ Articles 1191 through 1196 of the 1925 Texas Penal Code encompassed the rule of law on abortions until Supreme Court intervention.⁴²

2. The Supreme Court Intervenes: 1973–1992

The 1925 Penal Code, outlawing any abortion that did not save the life of the mother,⁴³ remained Texas law until the Supreme Court intervened in two seminal cases: *Roe v. Wade* and *Planned Parenthood v. Casey*.⁴⁴ Decided in 1973, *Roe v. Wade* directly confronted Texas's 1925 abortion restrictions and established the constitutional right to abortions in the United States.⁴⁵ The 1992 *Planned Parenthood v. Casey* case created a framework to analyze abortion regulations, based on the constitutional rights set in *Roe*.⁴⁶

In 1969, pregnant 26-year-old Norma McCorvey, could not afford to find and pay a Texas doctor to perform an illegal abortion.⁴⁷ In 1970, under the pseudonym of Jane Roe, McCorvey filed suit in the U.S. District Court for the Northern District of Texas “on behalf of herself and all others similarly situated.”⁴⁸ Suing Dallas County district attorney Henry Wade,⁴⁹ *Roe* sought a declaratory judgement that Texas's anti-abortion laws, under the 1925 Penal Code, were “unconstitutional on their face.”⁵⁰ After the District Court ruled that the Texas abortion

40 Article 1192 of 1925 Tex. Crim. Stat. 278.

41 See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973* 46–79 (Univ. Cal. Press ed., 1998) (detailing the status of illegal abortion practices throughout the US before 1973).

42 *Roe v. Wade*, 410 U.S. 113 (1973).

43 See Articles 1191–1196 of 1925 Tex. Crim. Stat. 277–78.

44 See *Roe*, 410 U.S. at 132–41; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

45 *Roe*, 410 U.S. at 154 (1973).

46 *Casey*, 505 U.S. at 878 (1992).

47 Margaret G. Farrell, *Revisiting Roe v. Wade: Substance and Process in the Abortion Debate*, 68 *IND. L.J.* 269, 283 (1993).

48 *Roe v. Wade*, 314 F. Supp. 1217, 1219 n.1 (1970) (consolidating *Roe*'s case with a similar case involving a married couple).

49 Wade also had a reputation for prosecuting people for performing abortions. See Merle H. Weiner, *Roe v. Wade Case (US) in OXFORD CONSTITUTIONAL LAW* 1,4 (2019), <https://law.uoregon.edu/sites/law2.uoregon.edu/files/faculty/law%20bios%20files/law-mpeccol-e564.pdf>.

50 *Roe v. Wade*, 314 F. Supp. at 1220.

laws infringed on the right to choose to have a child,⁵¹ the U.S. Supreme Court decided the case in 1973.⁵²

The Court held that Texas's criminal abortion statutes violated the Due Process Clause of the Fourteenth Amendment because the restrictions did not distinguish between different states of pregnancy, did not recognize other interests involved in the pregnancy process, and only allowed for an exemption when the life of the mother was threatened.⁵³ *Roe* established that the right to personal privacy extends to the decision to get an abortion and must be balanced against the important state interests of protecting both the health of a pregnant woman and the potentiality of human life.⁵⁴ Within the balance of rights, *Roe* divided a pregnancy into trimesters, loosening abortion protections as a pregnancy develops and as the state's interest in protecting the potentiality of human life grew.⁵⁵ Nevertheless, despite the U.S. Supreme Court's adverse ruling on its abortion laws, Texas never expressly repealed the pre-*Roe* abortion statutes, Articles 1191 to 1196 of the Texas Penal Code.⁵⁶

In 1992, the Supreme Court adopted the "undue burden test" in *Planned Parenthood v. Casey* to analyze the constitutionality of abortion provisions.⁵⁷ In the case, the Court evaluated five provisions from the Pennsylvania Abortion Control Act of 1982 regarding informed consent, spousal notice, parental consent, medical emergency definitions, and reporting requirements.⁵⁸ An undue burden occurs when the "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁵⁹ In effect, states had to exercise their interests in protecting the health of a mother and the potentiality of human life without placing an undue burden on those seeking abortions.⁶⁰ The *Roe* and *Casey* decisions established abortion as a constitutional right and offered states a framework for

51 *Id.* at 1224–25.

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

53 *Id.* at 164.

54 *Id.* at 154–62.

55 *Id.* at 154–62.

56 PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS* 507 (2nd ed. 2012). *See also* discussion *infra* notes 95–100 and accompanying text.

57 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992). The "undue burden test" replaced the "rigid" trimester framework established in *Roe*. *Id.*

58 *Casey*, 505 U.S. at 844.

59 *Id.* at 877.

60 *Id.*

regulating the procedure.⁶¹

3. Post-*Roe* and *Casey* Status of Abortion: 1992-2022

In the post-*Roe* and *Casey* era, Texas was required to create abortion regulations based on the constitutional right to certain bodily autonomy during pregnancy.⁶² As such, the state pivoted away from carceral punishments for abortion and toward administrative and health-based regulations.⁶³ Even under the *Casey* undue burden test, Texas could still justify strict regulations to abortion as long as they did not pose a “substantial obstacle” for a desired abortion in the case of a nonviable fetus.⁶⁴ To that end, Texas implemented a number of rules and regulations in the post-*Roe* and *Casey* era that facially complied with the Supreme Court’s rules, but which nevertheless targeted abortion rights beneath the surface. The following list highlights the progression of Texas regulations on abortion in the post-*Roe* and *Casey* era:

- In 1997, Texas required additional inspection and health procedures for abortion facilities and prohibited public funding from civil legal services and health services that indirectly or directly support abortions.⁶⁵
- In 2000, the “Parental Notification Act” of the Texas Family Code required a physician to provide 48 hours’ notice to the parent, guardian, or managing conservator of any unemancipated minor seeking an abortion.⁶⁶
- In 2003, Texas passed the “Women’s Right to Know Act” which mandated that doctors give specific information about abortion procedures to patients, that patients wait 24 hours before the procedure, and that all abortions at 16

61 *Id.* at 833.

62 *Id.*

63 Eleanor Klibanoff, *Not 1925: Texas’ Law Banning Abortion Dates to Before the Civil War*, TEX. TRIB. (Aug. 17, 2022), <https://www.texastribune.org/2022/08/17/texas-abortion-law-history/> (Texas law banning abortion dates to 1857).

64 *Casey*, 505 U.S. at 877.

65 1997 Tex. Gen. Laws 63 (authorizing the immediate suspension or revocation of an abortion facility when the health and safety of persons are threatened); S.B. 1534, 1997 Tex. Gen. Laws 2336 (prohibiting funds from state civil legal funds to be used to directly or indirectly support abortion-related litigation); 1997 Tex. Gen. Laws 5675 (prohibiting Department of Health funds from being used to directly or indirectly support abortion services); 1997 Tex. Gen. Laws 4264 (adding requirements for abortion facilities including additional inspection procedures and a toll free number for the public to check the status of a clinic’s license, inspection and penalty history).

66 1999 Tex. Gen. Laws 2466.

weeks of gestation or later must be performed in an ambulatory surgical center.⁶⁷

- In 2005, Texas passed legislation that banned abortions after the third trimester of pregnancy and required parental consent for minors seeking an abortion.⁶⁸
- In 2011, Texas enacted a mandatory sonogram law requiring a person seeking an abortion to undergo a sonogram and listen to a verbal explanation of the sonogram at least 24 hours before the procedure.⁶⁹ The sonogram must be displayed, with the heartbeat audible.⁷⁰
- In 2013, Texas passed “HB2,” which banned abortions after 20 weeks of gestation, required doctors to have admitting privileges at a hospital within 30 miles of an abortion facility, required all abortion facilities to meet ambulatory surgical center standards, and added protocol regarding medication abortions.⁷¹ With the enactment of the 30-mile admission privileges and ambulatory standard requirements,⁷² the number of licensed abortion facilities fell from over 40 facilities to about seven or eight.⁷³ The admission and ambulatory standard requirements were later deemed an “undue burden” on abortion access and ruled unconstitutional by the Supreme Court.⁷⁴
- In 2017, Texas banned the safest and most common abortion procedure during the second trimester of pregnancy.⁷⁵ However, advocates of abortion rights protested that this law created excessive burden on the right to an abortion and this law never went into effect.⁷⁶

67 2003 Tex. Gen. Laws 2930.

68 2005 Tex. Gen. Laws 720.

69 2011 Tex. Gen. Laws 342.

70 *Id.*

71 2013 Tex. Gen. Laws 5013.

72 The “admitting privileges” provision required that physicians performing an abortion are also licensed to admit a patient to a hospital within 30 miles of the abortion center. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 611–14 (2016). The “ambulatory standard” provision required abortion facilities to meet several additional health and safety regarding recordkeeping, physical and environmental requirements, anesthesia standards, and disclosure requirements. *Id.* at 615. *See also* 2013 Tex. Gen. Laws 5013.

73 *Hellerstedt*, 579 U.S. at 591.

74 *Id.* at 624.

75 2017 Tex. Gen. Laws 1164.

76 Kevin Reynolds, *How Today’s Near-total Abortion Ban in Texas Was 20 Years in the Making*, TEX. TRIB. (Nov. 1, 2021), <https://www.texastribune.org/2021/11/01/>

- In 2019, Texas banned local governmental entities from partnering with any healthcare organization that provides abortions, regardless of the form of partnership.⁷⁷ For example, this law bans local government from partnering with Planned Parenthood clinics on non-abortion health screening and contraceptive initiatives.⁷⁸

In 2021, Texas passed the “Texas Heartbeat Act” (“SB8”), which became one of the nation’s most restrictive abortion laws.⁷⁹ The law prohibits abortion when there is a detectable heartbeat, which usually occurs during the sixth week of pregnancy—a vast departure from the previous standard prohibiting abortions after 20 weeks of pregnancy.⁸⁰ The law imposes a \$10,000 fine on anyone who performs, aids, or abets the abortion of a fetus with a detectable heartbeat.⁸¹ In addition, the law uniquely places enforcement power in the hands of private litigants, allowing individual citizens to sue abortion providers and collect the \$10,000 plus legal fees.⁸² This private enforcement mechanism functions to evade judicial review since it prevents state officials from enforcing the law.⁸³ In the 2021 case *Whole Women’s Health v. Jackson*, abortion providers argued that state officials unconstitutionally participated in SB8 enforcement when state employees (licensing officials, clerks, judges, and the attorney general) processed private civil claims.⁸⁴ The Supreme Court ultimately justified most forms of SB8 private enforcement mechanisms under a theory of Eleventh Amendment sovereign immunity protection, preventing the government from being sued without its consent.⁸⁵

Texas-abortion-restrictions-timeline/.

77 2019 Tex. Gen. Laws 1342.

78 *Id.*

79 Kelly Zielinski, Note, *The Implication of Texas Abortion Law SB8 on At-Risk Populations in Texas and Other States*, 23 DEPAUL J. HEALTH CARE L. 52, 62 (2022).

80 TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West 2021).

81 *Id.*

82 *Id.* at § 171.208(a), (b)(2).

83 *See generally* § 171.208(b)(2).

84 *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530–32 (2021).

85 *Id.* at 535 (holding that Eleventh Amendment sovereign immunity applied to clerks, judges, and the attorney general but did not apply to state licensing officials). *See generally* U.S. CONST. amend. XI.

4. The *Dobbs* Era and the Future of Abortion in Texas: 2022 to Present

On June 24, 2022, the Supreme Court officially overturned the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*.⁸⁶ Jackson Women's Health Organization, the sole abortion clinic in Mississippi,⁸⁷ argued that the Mississippi Gestational Age Act (prohibiting abortions after 15 weeks) was an "undue burden" and violated the constitutional right to abortion.⁸⁸ The Court concluded that abortion is not an incorporated right, and should therefore be left to state legislative bodies to regulate.⁸⁹ In explaining the departure from nearly 50 years of precedent and the principle of *stare decisis*, the opinion found *Roe* to be "egregiously wrong from the start,"⁹⁰ and considered any justification of abortion rights to instead be a "purported analogy to the rights recognized in other cases."⁹¹ The dissent writes, "[a]s of today, this court holds, a State can always force a woman to birth," and "from the very moment of fertilization, a woman has no rights to speak of."⁹² The decision sparked numerous protests, nationwide.⁹³ In Texas, thousands gathered in cities, including Houston, Austin, San Antonio, McAllen, and Dallas, to grieve the decision, express solidarity, and mobilize to protect abortion rights.⁹⁴

Recall that Texas never repealed its existing abortion statutes after the *Roe* decision, which means that abortion bans are still on the

86 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

87 About Us, JACKSON WOMEN'S HEALTH ORG., <https://jacksonwomenshealth.com/about-us/> (last visited Mar. 6, 2023).

88 MISS. CODE ANN. § 41-41-191 (2018); *Dobbs*, 142 S. Ct. at 2242.

89 MISS. CODE ANN. § 41-41-191.

90 See *Dobbs*, 142 S. Ct. at 2243.

91 *Id.* at 2280.

92 *Id.* at 2317-18.

93 Maura Barrett et al., *Rage, Despair, Tears Fill Streets Across Nation as Thousands Protest Roe Reversal*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/news/us-news/rage-despair-tears-fill-streets-nation-thousands-protest-roe-reversal-rcna35194>; Laura Benschoff, *Around the Nation, Demonstrators Show Support for Abortion Rights*, NPR (June 26, 2022), <https://www.npr.org/2022/06/26/1107715163/abortion-rights-protests-roe-v-wade-supreme-court>.

94 Tex. Trib. Photo Team, *Roe v. Wade, Overturned: Scenes of Despair and Joy After a Historic Decision*, TEX. TRIB. (June 27, 2022), <https://www.texastribune.org/2022/06/26/photos-abortion-protests-texas/>; Jaden Edison & Cecilia Lenzen, *Abortion Rights Demonstrators Take to the Streets in Texas: "It's Just Unbelievable,"* TEX. TRIB. (June 24, 2022), <https://www.texastribune.org/2022/06/24/abortion-rights-rallies-texas/>.

books.⁹⁵ These include Articles 1191 through 1194 and 1196 of the 1925 Texas Penal Code, which make abortion procedures punishable by two to ten years in prison.⁹⁶ According to Attorney General Ken Paxton, these 1925 abortion statutes went back into effect the instant *Dobbs* was decided.⁹⁷ On June 27, 2022, abortion providers in Texas filed a petition to prevent the state from enforcing the 1925, pre-*Roe* abortion laws.⁹⁸ The next day, Harris County District Court Judge Christine Weems granted a temporary restraining order, preventing enforcement of the old laws until July 12, 2022.⁹⁹ On July 1, 2022, however, the Supreme Court of Texas granted a request from Paxton to vacate the temporary restraining order, allowing the 1925 abortion statutes to be enforced.¹⁰⁰

In anticipation of an anti-abortion Supreme Court decision, Texas had also passed a “trigger law” in 2021 that would go into effect 30 days after *Roe* was overturned.¹⁰¹ The law makes it a criminal offense to knowingly perform, induce, or attempt an abortion.¹⁰² Violations are considered felonies of the second degree, punishable by a term of incarceration from two to twenty years,¹⁰³ except in a case where an unborn child dies as a result of the offense, considered a first degree¹⁰⁴ felony.¹⁰⁵ Violators are also liable for a civil penalty not less than \$100,000 and are subject to the revocation of any professional health care registration, certification, or other authority.¹⁰⁶ Based on the *Dobbs*

95 See LINTON, *supra* note 56.

96 1925 Tex. Crim. Stat. 277–781.

97 “Although these statutes were unenforceable while *Roe* was on the books, they are still Texas law...Now that the Supreme court has finally overturned *Roe*, I will do everything in my power to protect the unborn and uphold the state laws duly enacted by the Texas legislature.” Ken Paxton, *Advisory on Texas Law Upon Reversal of Roe v. Wade*, TEX. ATT’Y GEN. (June 24, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf>.

98 Complaint, *Whole Woman’s Health v. Paxton*, No. 2022-38397 (269 Dist. Ct., Harris Cnty., Tex. June 27, 2022).

99 *Id.*; Sarah Ethington, *Texas Judge Blocks Enforcement of State’s Abortion Ban*, JURIST (June 28, 2022), <https://www.jurist.org/news/2022/06/texas-judge-blocks-enforcement-of-states-abortion-ban/>.

100 *In re Paxton*, No. 22-0527, 2022 WL 2425619 (Tex. July 1, 2022).

101 H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021); TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2021).

102 TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a).

103 TEX. PENAL CODE ANN. § 12.33 (West 2019).

104 First degree felonies are punished with a term of incarceration from five years to life. TEX. PENAL CODE § 12.32 (West 2009).

105 TEX. HEALTH & SAFETY CODE ANN. § 170A.004(b) (West 2022).

106 TEX. HEALTH & SAFETY CODE ANN. § 170A.005 (West 2022); TEX. HEALTH & SAFETY

judgement, the trigger law went into effect on August 25, 2022.¹⁰⁷

Now, almost a year since the *Dobbs* decision, both the 1925 pre-*Roe* statutes (“1925 law”)¹⁰⁸ and the 2021 trigger law¹⁰⁹ have been enforced, which has caused some confusion.¹¹⁰ Do the laws conflict? Do they cover different conduct? Which law should prosecutors use? In some respects, the laws clearly conflict. For example, they provide different punishments for a person who administers an abortion.¹¹¹ Yet, some of the finer points are even less clear. The trigger law targets persons who “knowingly perform, induce, or attempt an abortion.”¹¹² The law apparently covers abortion *providers* or, given the lack of an exception, people who attempt to self-induce an abortion.¹¹³ The 1925 law not only punishes people who administer abortions, but also considers accomplice liability.¹¹⁴ The “Furnishing the means” section of the 1925 law states that anyone who “furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.”¹¹⁵ This section’s vague language lends itself to a more inclusive interpretation of the persons to whom the law may apply.¹¹⁶ For instance, a manufacturer or distributor of drugs that induce abortions may fit the plain meaning of parties who “furnish the means” of an abortion.¹¹⁷ However, a broader reading could also include anyone with a particular relationship with a doctor or clinic who administers abortions, including patients who receive abortions.

Since the passage of its first statute in 1854, Texas has had a history of criminalizing abortion, enacting harsh regulations and punishments for the procedure.¹¹⁸ Texas only respected abortion protections once the Supreme Court ruled that abortion was a constitutional right

CODE ANN. §170A.007 (West 2022).

107 TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2022).

108 1925 Tex. Crim. Stat. 278.

109 TEX. HEALTH & SAFETY CODE ANN. § 170A.002.

110 *Interim Update: Abortion Related Crimes After Dobbs*, TEX. DIST. & CNTY. ATT’YS ASS’N, (Jun. 24, 2022), <https://www.tdcaa.com/legislative/dobbs-abortion-related-crimes/>.

111 Compare 1925 Tex. Crim. Stat. 278 (imposing a term of two to five years in prison for administering an abortion), with TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (deeming the administration of an abortion a second-degree felony which carries with it a two to twenty year prison sentence).

112 TEX. HEALTH & SAFETY CODE ANN. § 170A.002.

113 *See id.*

114 1925 Tex. Crim. Stat. 278.

115 *Id.*

116 *See id.*

117 1925 Tex. Crim. Stat. 278.

118 *See* 1854 Tex. Gen. Laws 1502.

in *Roe v. Wade*.¹¹⁹ After the Court published *Dobbs*, *Roe*'s protections disappeared.¹²⁰ Without federal intervention in Texas, creation of further laws that criminalize abortion rights is likely,¹²¹ with a worst-case scenario being consideration of imposing the death penalty as a punishment for abortion.¹²² To prepare for this possibility, the following Section details the history of capital punishment in Texas.

B. History of the Death Penalty in Texas

I. Hanging and Electrocuting: Founding of the Republic to 1972

Capital punishment in Texas has always been intertwined with racial violence, particularly directed toward Black men.¹²³ Before 1923, the death penalty was administered on a local basis throughout Texas.¹²⁴ Those sentenced to death were not sent to state penitentiaries to sit on death row and await execution.¹²⁵ Instead, people sentenced to death were hung by the local sheriff in the county in which they were convicted.¹²⁶ There remains little record of who was executed or for what.¹²⁷ Some crimes punishable by hanging “included treason, murder, rape, robbery, burglary, and arson.”¹²⁸

The harm caused by capital punishment fell disproportionately on Black communities.¹²⁹ Despite Black Texans accounting for only 16% of the population in 1920,¹³⁰ limited data of legal death sentences before 1923 suggests that over half of those subject to the death penalty were

119 See *Roe v. Wade*, 410 U.S. 113, 154–62 (1973).

120 See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

121 See generally discussion *supra* Section I.A: History of Abortion Regulations in Texas (analyzing the relationship between federal regulations and Texas abortion restrictions).

122 See discussion *infra* Sections III.B and III.C: Legal Pathways For Capital Abortion.

123 See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990* 12 (1994).

124 *Id.*

125 *Id.*

126 *Id.*

127 See *id.*

128 Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 66 (2000).

129 See MARQUART ET AL., *supra* note 123.

130 Jorjanna Price, *1920 Census Data Hints at Today’s Texas*, TEXAS ASS’N OF CNTYS. <https://www.county.org/County-Magazine-Main/September-October-2020/1920-census-data-hints-at-todays-Texas#:~:text=The%201920%20census%20recorded%20blacks.percent%20of%20the%20state%20population> (last visited Mar. 1, 2023).

Black.¹³¹

Further complicating the record of early death sentences, data suggests that illegal lynchings, mostly of Black Texans, vastly outnumbered “legal” hangings.¹³² Yet, in many cases, the distinction between illegal lynching and legal hangings was uncertain.¹³³

Racially motivated illegal hangings plagued Texas in the nineteenth and twentieth centuries.¹³⁴ Of the data collected of Texas lynchings in the nineteenth century, 95% of the individuals were Black.¹³⁵ Lynchings were motivated by white Texans’ desire to maintain white supremacy.¹³⁶ At times, Black men were alleged to have committed unspecified property crimes and were targeted for non-criminal behavior that white Texans felt was threatening to the social order.¹³⁷ In other instances, when Black men were accused of rape or murder,¹³⁸ instead of waiting for adjudicatory procedures, white Texans “worked themselves into a kind of frenzy” and lynched the accused persons.¹³⁹

In 1923, the Texas State Senate passed SB63, which shifted execution power from county sheriffs to the State Penitentiary at Huntsville.¹⁴⁰ Per SB63, an execution would be administered

no less than thirty days from the date of sentence, as the court may adjudge, by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of continuance of such current through the body of such convict until such convict is dead.¹⁴¹

The bill superseded sections of the Texas Code of Criminal Procedure and other laws allowing local hangings.¹⁴²

SB63 marked a shift in Texas’s death penalty procedure from a local form of punishment—seldom formally recorded—to a standardized

131 MARQUART ET AL., *supra* note 123.

132 Compare MARQUART ET AL., *supra* note 123 (describing “394 [legal hangings] took place in Texas between 1819 and 1923”), *with id.* at 4 (reporting that “in 1868 there were some 5,000 pending homicide indictments in Texas.”).

133 MARQUART ET AL., *supra* note 123, at 7, 13 (reporting that “approximately 760 lynchings of African-Americans were precipitated for unspecified crimes against the person or property, not including murder or rape.”).

134 *Id.* at 5.

135 *Id.* at 6.

136 *See id.* at 5.

137 *See id.* at 5, 7.

138 *Id.* at 7.

139 *Id.* at 11.

140 *See* S.B. 63, 38th Leg., 2d Sess. (Tex. 1923).

141 *Id.*

142 *Id.*

and documented legal procedure carried out by the state.¹⁴³ The bill's purpose appears to have been twofold: to make capital punishment more humane¹⁴⁴ and as a response to an eruption of racially motivated lynchings in East Texas.¹⁴⁵ SB63 even ends with a short explanation for its passage: "[O]ur present method of putting to death condemned convicts by hanging ... is antiquated and has been supplanted in many states by the more modern and humane system of electrocution."¹⁴⁶ The bill also waived Texas's constitutional rule requiring it be read at each state house for three days before it was passed.¹⁴⁷ SB63's explanation and hasty passage suggest the Texas Senate was concerned with keeping their capital punishment procedure in step with changing attitudes.¹⁴⁸

After SB63 was passed, the scope of death-penalty-eligible crimes began to narrow.¹⁴⁹ Crimes eligible for the death penalty were narrowed to murder, rape, and on occasion, armed robbery.¹⁵⁰ Nevertheless, Texas did not exercise particular restraint in the implementation of the death penalty.¹⁵¹ Between 1924 and 1972, the State of Texas electrocuted 361 people for the aforementioned offenses.¹⁵² Sixty-three percent of people killed by Texas in that time frame were Black.¹⁵³ Death penalty procedures changed dramatically after SB63 was passed. Instead of local hangings, state and federal oversight opened avenues for sentences.¹⁵⁴ In the 1960s, the NAACP Legal Defense Fund began making constitutional

143 *Id.*

144 *Id.*

145 MARQUART ET AL., *supra* note 123, at 18 ("[I]t was the outbreak of brutal lynchings in central Texas in May of 1922 that eventually precipitated reform of the then operating statute.").

146 S.B. 63, 38th Leg., 2d Sess. (Tex. 1923).

147 *Id.*

148 SB63 was precipitated by a particularly gruesome group of lynchings and subsequent violence in 1922 East Texas. MARQUART ET AL., *supra* note 123, at 11–12.

149 *See* Goldberg & Bunn, *supra* note 128, at 66–67.

150 *Id.*

151 Only Georgia and New York executed more people than Texas between 1930 and 1967. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 13 (1991).

152 History of the Death Penalty in Texas, TEX. EXECUTION INFO. CTR., <https://www.txexecutions.org/history.asp> (last visited Apr. 30, 2023); SB63 did not end lynchings in Texas by any means. *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE, <https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf> (last visited Aug. 20, 2022).

153 *The Future of the Death Penalty in the United States*, DEATH PENALTY INFO. CTR. (May 1, 1994), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-future-of-the-death-penalty-in-the-u-s-a-texas-sized-crisis#the-death-penalty-in-texas-a-state-of-crisis>.

154 JONATHAN A. SORENSON ET. AL., LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA 2 (2006).

challenges to death sentences.¹⁵⁵ Doing so clogged federal courts, effectively pausing executions for almost a decade.¹⁵⁶

In effect, SB63 formalized the death penalty in Texas converting it from local hangings for an unspecified array of crimes to a formal procedure, centralized in a single location.¹⁵⁷ But did this change achieve the goal of turning the death penalty into a more modern and humane system that was less susceptible to racial targeting?¹⁵⁸ Admittedly, it did shift power away from local officials who used the law to sanction racially motivated killings and toward state officials who were bound by statute and federal oversight.¹⁵⁹ Furthermore, SB63 gave procedure to the death penalty, giving defendants the chance to mount legal defenses to their death penalties.¹⁶⁰

But despite these changes to the death penalty, many of the pre-SB63 issues persisted.¹⁶¹ While the death penalty had been formalized by the state, any good faith plan to avoid arbitrary and discriminatory sentences relied on state officials, federal oversight, and the legal system sharing that good faith.¹⁶² The Texas problem of arbitrary death sentences came to a head in 1972, when *Furman v. Georgia* reached the United States Supreme Court.¹⁶³

155 *Id.*

156 *Id.*

157 *See generally* S.B. 63, 38th Leg., 2d Sess. (Tex. 1923).

158 *See* S.B. 63, 38th Leg., 2d Sess. (Tex. 1923); MARQUART ET AL., *supra* note 123, at 11–12 (stating that Texas’s death penalty reform was motivated by racially motivated lynchings and subsequent violence).

159 *Compare* MARQUART ET AL., *supra* note 123, at 12 (“The race and ethnic breakdown of those executed was 60.5 percent African American”) *and id.* at 5 (“the Chicago Tribune began chronicling lynching in the early 1880s, hangings and vigilante justice were a well-established tradition on the frontier, including the frontier in Texas.”) *with* S.B., 38th Leg., 2d Sess. (Tex. 1923).

160 S.B. 63, 38th Leg., 2d Sess. (Tex. 1923).

161 *See* SORENSON ET AL., *supra* note 154, at 2 (“One issue on which the five majority justices did agree was that a lack of juror guidance in sentencing deliberations had resulted in the arbitrary, and sometimes discriminatory, imposition of the death penalty.”).

162 *Compare* MARQUART ET AL., *supra* note 123, at 13 (“[I]t was the outbreak of brutal lynchings [of Black men] in central Texas in May of 1922 that eventually precipitated reform of the then operating statute.”), *with id.* at 43 (“Three-quarters of the death sentenced rapists were African American. Almost 90 percent had been employed in some kind of unskilled work.”).

163 *See Furman v. Georgia*, 408 U.S. 238, 242 (1972) (“It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”) (Douglas J. concurring).

2. Modern Death Penalty: *Furman* to Present

In 1972, the Supreme Court took up the question of whether the death penalty as applied by the states violated the Eighth Amendment's prohibition against "cruel and unusual punishment."¹⁶⁴ *Furman v. Georgia*, decided in 1972, was a combination of three separate proceedings from Georgia and Texas state courts.¹⁶⁵ The per curiam decision was just over a page.¹⁶⁶ The Court declared that, in the three cases at bar, impositions of death sentences were unconstitutional violations of the Eighth and Fourteenth Amendments.¹⁶⁷ While the per curiam decision did not explain why the death sentences were unconstitutional, each Justice articulated their rationale within their concurring or dissenting opinion.¹⁶⁸

The defendant from Texas, Elmer Branch, a Black man, was convicted of raping and robbing a white woman.¹⁶⁹ Elmer Branch, as well as the other defendants, had been sentenced to death by a jury.¹⁷⁰ All three defendants were Black men and had white victims.¹⁷¹ Only one of the men was convicted of murder—the other two were convicted of rape.¹⁷²

The pre-trial investigation of Elmer Branch was plagued with racism.¹⁷³ After the victim reported that she was raped by a Black man wearing dark pants and tennis shoes (an extremely general description), the sheriff requested that officers on patrol stop all cars with Black people inside.¹⁷⁴ Elmer Branch was arrested after an officer observed him wearing dark pants and tennis shoes.¹⁷⁵ The Grand Jury who indicted Branch contained no Black jurors.¹⁷⁶ In fact, between 1964 and 1967, there were no Black members among Jury Commissioners (those in charge of selecting Grand Jury panels).¹⁷⁷

In his concurring opinion, Justice Douglas took issue with the

164 *Id.*

165 *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

166 *See id.*

167 *Id.*

168 *See id.*

169 *Id.* at 253 (Douglas, J., concurring).

170 *Id.*

171 SORENSON ET AL., *supra* note 154, at 2.

172 *Id.*

173 *See Branch v. State*, 447 S.W.2d. 932, 933 (Tex. Crim. App. 1969).

174 *Id.*

175 *Id.*

176 *Id.* at 935.

177 *Id.*

arbitrary sentencing based upon unlimited judge and jury discretion that characterized death penalty procedures at the time.¹⁷⁸ One purpose of the Eighth Amendment is to prevent discriminatory punishment practices.¹⁷⁹ Justice Douglas noted that poor and Black people were disproportionately targeted for the death penalty.¹⁸⁰ He presented data that Black and Latinx men convicted of rape were disproportionately more likely to be sentenced to death compared to white men.¹⁸¹ Yet, despite these observations, despite that all three defendants were Black, and despite the fact that Elmer Branch's conviction was marred by racism,¹⁸² Justice Douglas refused to explicitly pronounce that the defendants were sentenced to death because they were Black.¹⁸³ Justice Stewart argued that defendants were arbitrarily sentenced to death, often on account of their race.¹⁸⁴ Justice Brennan iterated similar sentiments.¹⁸⁵

Justice Marshall concurred, citing discrimination, particularly toward Black people, as a reason that the capital punishment violated the Constitution.¹⁸⁶ After noting that far more Black than white people had been sentenced to death since 1930, Justice Marshall articulated these inequities as related to both discrimination and unfettered jury power and discretion.¹⁸⁷ In response to an earlier case upholding jury-imposed death sentences without standards,¹⁸⁸ Justice Marshall wrote, "this Court held 'that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution.' This was an open invitation to discrimination."¹⁸⁹ After the *Furman* decision, those on death row in Texas had their death sentences commuted or modified to life in prison.¹⁹⁰

Because at the time, judges and juries had broad discretion to sentence a person to death after they were convicted of an eligible

178 *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

179 *Id.*

180 *Id.*

181 *Id.* at 251.

182 *See Branch v. State*, 447 S.W.2d. 932, 933 (Tex. Crim. App. 1969).

183 *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring).

184 *Id.* at 310 (Stewart, J., concurring).

185 *Id.* at 295 (Brennan, J., concurring).

186 *Id.* at 364–65 (Marshall, J., concurring).

187 *Id.*

188 *See McGautha v. California*, 402 U.S. 183, 207 (1971).

189 *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

190 Goldberg & Bunn, *supra* note 128, at 49, 67.

offense, capital punishment was ripe with racial discrimination.¹⁹¹ Several justices, particularly Justice Douglas, worried that, without adequate oversight, marginalized groups were disproportionately the targets of state-sanctioned killings.¹⁹²

Justices Douglas, Stewart, Brennan, and Marshall's opinions take issue with the lack of guidance provided to judges and juries during capital punishment procedures.¹⁹³

Despite the Court finding the death penalty unconstitutional in the three *Furman* cases, capital punishment did not end in the United States.¹⁹⁴ After the decision, Texas legislators scrambled to rewrite capital punishment statutes with safeguards to avoid arbitrary or discriminatory sentences.¹⁹⁵ At first, the Texas House and Senate disagreed on the best approach for drafting a *Furman*-proof capital sentencing scheme.¹⁹⁶ In 1973, they agreed on a scheme with two parts: the definition of capital murder and "special issues."¹⁹⁷ The capital murder definition included an exhaustive list of aggravating factors, for which the commission of any would make the defendant death penalty eligible.¹⁹⁸ Unlike the pre-*Furman* capital punishment procedure, the new law did not allow the jury to directly decide whether the defendant would be sentenced to death; instead, they were to be asked three "special questions" which were inquiries into the defendant's culpability and "threat to society."¹⁹⁹ If jurors unanimously answered affirmatively to all three of the "special issues," the defendant would be sentenced to death.²⁰⁰

In 1976, the U.S. Supreme Court approved Texas's capital punishment scheme.²⁰¹ The Court explained that a permissible death penalty statute would have a narrow scope of capital offenses and provide an avenue for the jury to consider mitigating circumstances.²⁰² Commensurate with these requirements, in a seven-to-two decision authored by Justice Stewart, the Court held that the Texas death penalty

191 See generally *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

192 See *id.* at 255 (Douglas, J., concurring); see *id.* at 365 (Marshall, J., concurring); see also *id.* at 295 (Brennan, J., concurring).

193 See, e.g., *id.* at 295 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 364–65 (Marshall, J., concurring).

194 See SORENSON ET AL., *supra* note 154, at 3.

195 *Id.*

196 *Id.* at 4.

197 *Id.* at 4–5.

198 *Id.*

199 1973 Tex. Gen. Laws 1122, 1125.

200 SORENSON ET AL., *supra* note 154, at 5–6.

201 See *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

202 *Id.* at 268–69, 272.

statute passed constitutional muster because it was sufficiently narrow, allowed consideration of mitigating factors, and was provided “prompt judicial review.”²⁰³ Justice Stewart claimed that through such procedures, “Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be ‘wantonly’ or ‘freakishly’ imposed, it does not violate the Constitution.”²⁰⁴

A year later, the Texas legislature passed a law changing the method of execution from electrocution to lethal injection.²⁰⁵ Between 1973 and today, Texas’s capital scheme has gone through some minor changes but has kept its basic structure.²⁰⁶

Today, there are 10 aggravating factors which elevate a murder to a capital murder.²⁰⁷ Most relevant to this Note are:

- (7) the person murders more than one person:
 - (A) during the same criminal transaction; or
 - (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;
- (8) the person murders an individual under 10 years of age;
- (9) the person murders an individual 10 years of age or older but younger than 15 years of age²⁰⁸

If the State of Texas decides to charge a defendant with capital murder and the jury finds the defendant guilty, it then starts the unique sentencing portion of the proceedings.²⁰⁹ When a defendant over 18 years old is found guilty of capital murder, there are only two possible punishments: life without the possibility of parole or death.²¹⁰

Capital sentencing happens during a hearing separate from the trial, but with the same jury.²¹¹ During the proceedings, defense counsel and the State may introduce “evidence of the defendant’s background or character or the circumstances of the offense that mitigates against

203 *Id.* at 276.

204 *Id.*

205 SORENSON ET AL., *supra* note 154, at 11.

206 *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2019).

207 TEX. PENAL CODE ANN. § 19.03 (West 2019).

208 *Id.*

209 *Id.*

210 TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)(1) (West 2019).

211 *Id.*

the imposition of the death penalty.”²¹² Parties then make arguments for or against imposition of a death sentence.²¹³ Ultimately, the jury decides the sentence, although not directly.²¹⁴ The jury is tasked with addressing two questions whose answers determine the defendant’s punishment considering evidence from the trial and sentencing proceedings.²¹⁵ Jurors are instructed that if they answer affirmatively to both, a death sentence will be imposed, and if not, the defendant will be sentenced to life in prison without parole.²¹⁶ The current questions read:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.²¹⁷

The above questions require unanimous “yes” juror responses, and 10 of 12 “no” responses, for a composite “yes” and “no” interpretation of the questions, respectively.²¹⁸ If both questions are answered affirmatively, and absent mitigating circumstances warranting a sentence of life imprisonment without parole, a death sentence is imposed.²¹⁹ If any question is answered no or the jury cannot come to a decision, the defendant is sentenced to life in prison without the possibility of parole.²²⁰ Under this sentencing scheme, a defendant can be sentenced to death despite several jurors potentially believing that the criteria for a death sentence are not met.²²¹

After a defendant is sentenced to death, the legal proceedings do not end. All death sentences in Texas are automatically appealed to the Texas Court of Criminal Appeals, the highest criminal court in the state

212 *Id.*

213 *Id.*

214 *See id.* § 2(g).

215 *Id.* § 2(b).

216 *Id.* § 2(g).

217 *Id.* § 2(b).

218 *Id.* § 2(f).

219 *Id.* § 2(g).

220 *Id.*

221 *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2019).

of Texas.²²² A decision from the Texas Criminal Court of Appeals can be appealed to the U.S. Supreme Court.²²³ Aside from directly appealing the verdict, convictions can be appealed through either state²²⁴ or federal²²⁵ habeas corpus²²⁶ proceedings.

Both abortion and the death penalty are examples of extreme government power. They manifest the power of the State of Texas to decide the fate of an unborn child and the fate of those incarcerated, respectively. However, such powers appear to be at odds with a popular buzzword in Texas politics: freedom.²²⁷

II. MOTIVATIONS FOR PUNISHMENT

Since gaining statehood, Texas has exhibited a pattern of increased involvement in death penalty administration and abortion restrictions.²²⁸ The state government presides over a legal system that, since its reform in 1976, has executed more criminal defendants in the United States than any other state.²²⁹ The legislature has even framed the way a jury decides whether a defendant is executed.²³⁰ From law

²²² *Capital Punishment Appellate Guidebook* 6, TEX. OFF. OF THE ATT'Y GEN. (Oct. 2018), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/Capital-Punishment-Appellate-Guide-EGN.pdf>.

²²³ *Id.* at 6–7.

²²⁴ State habeas corpus proceedings allow the defendant to introduce evidence outside the trial record. *Id.* at 7–8.

²²⁵ Federal habeas corpus proceedings allow the defendant to argue that their conviction or sentence was unconstitutional. *Id.* at 9–10.

²²⁶ *Habeas corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“A writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review.”).

²²⁷ See, e.g., *Freer Texas*, OFF. OF THE TEX. GOVERNOR, <https://gov.texas.gov/initiatives/freer-texas> (last visited Mar. 3, 2023); *About us*, Texas Freedom Caucus, <https://www.freedomfortexas.com/about/> (last visited Mar. 3, 2023).

²²⁸ TEX. HEALTH & SAFETY CODE ANN. § 170a.002 (West 2022); *Texas Death Penalty Facts*, TCADP, <https://tcadp.org/get-informed/texas-death-penalty-facts/#:-:text=The%20State%20of%20Texas%20has,03%2F27%2F23https://tcadp.org/get-informed/texas-death-penalty-facts/#:-:text=The%20State%20of%20Texas%20has,03%2F27%2F23> (last visited May 2, 2023).

²²⁹ *Facts About the Death Penalty*, *supra* note 1.

²³⁰ Instead of the jury directly deciding whether the defendant should be sentenced to death, they are asked two special questions written by legislators. TEX. CODE

enforcement to district attorneys to judges, the Texas government is highly involved in killing criminal defendants through its death penalty statutes.²³¹

Abortion laws in Texas have experienced a trend toward increased government involvement since *Roe* was decided in 1973.²³² Notably, *Roe* and *Casey* both considered the state's interest in protecting a pregnant person's health and potential human life.²³³ While these cases protected rights to abortion, they also confirmed the state's interests in being involved.²³⁴ Between 1973 and 2022, Texas passed legislation testing the line between the privacy right that protected abortion and the state's interest in regulation.²³⁵ Now, the *Dobbs* decision has opened the door to a new era of abortion punishment in Texas.²³⁶

The pertinent question here becomes: what is motivating Texas to implement some of the most restrictive abortion laws and impose the highest number of executions?²³⁷ What motivated the pre-*Dobbs* attempts to indirectly punish abortion and what will motivate its criminalization going forward now that *Dobbs* has been decided?²³⁸ We argue that, because Christian fundamentalism, sexism, and racism

CRIM. PROC. ANN. art. 37.071 (West 2023). By writing the special questions, the State, not the jury, decides what defendant qualities determine a death sentence. *See id.*

231 *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (holding that judicial enforcement of racially restrictive covenants constitutes state action).

232 *See generally History of Abortion Laws*, TEX. STATE L. LIBR. (May 31, 2023), <https://guides.sll.texas.gov/abortion-laws/history-of-abortion-laws>.

233 *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling *state interest*'" (emphasis added)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) ("Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a *substantial state interest* in potential life throughout pregnancy" (emphasis added)).

234 *Roe*, 410 U.S. at 155; *Casey*, 505 U.S. at 876.

235 TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023) (restrictive abortion law going into effect 30 days after *Roe* is overturned).

236 *See Dobbs v. Jackson*, 142 S. Ct. 2228, 2279 (2022) (overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, both of which guaranteed Constitutional protections for abortion).

237 *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023); 1925 Tex. Crim. Stat. 278; *Facts About the Death Penalty*, *supra* note 1.

238 *See, e.g.*, S.B. 835, 2003 Leg., 78th Sess. (Tex. 2003); TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2023); S.B. 419, 2005 Leg., 79th Sess. (Tex. 2005); Tex. Health & Safety Code Ann. § 171.006 (West 2023); H.B. 15, 2011 Leg., 82nd Sess. (Tex. 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.0121 (West 2023).

have all contributed to past abortion regulation as well as death penalty administration, they are likely to continue influencing future abortion punishment.

A. *Christian Fundamentalism*

One motivation for use of the death penalty and abortion restrictions may be Christian fundamentalist ideals that have found their way into the Texas legislature. The Pew Research Center estimates that 77% of Texans identify as Christian.²³⁹ Unsurprisingly, the state legislature is overwhelmingly Christian.²⁴⁰ Given the religious affiliation of Texas constituents and legislators, it seems unimaginable that Christian principles and thinking do not play a role in political decisions.

The Bible is full of references to death as a punishment for crimes ranging from magic to murder.²⁴¹ Despite the explicit calls for death sentences in the Bible,²⁴² not all Christians support the death penalty today.²⁴³ Attitudes toward the death penalty depend on characteristics such as denominational affiliation, fundamentalism, and literal interpretivism.²⁴⁴

However, there is still significant support for the death penalty, particularly from conservative and fundamentalist Christian groups.²⁴⁵ For those Texas lawmakers who subscribe to fundamentalist thinking or are responsive to fundamentalist constituents, religion likely plays into

239 *Religious Landscape Study: Adults in Texas*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/state/texas/> (last visited June 21, 2023).

240 In 2019, only 11 out of 147 Texas State Legislature representatives did not identify with some sect of Christianity. Alexa Ura & Darla Cameron, *In Increasingly Diverse Texas, the Legislature Remains Mostly White and Male*, TEX. TRIB. (Jan. 10, 2019), <https://apps.texastribune.org/features/2019/texas-lawmakers-legislature-demographics/>.

241 See, e.g., *Revelation* 21:8.

242 See *id.*

243 Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 L. & HUM. BEHAV. 113, 121 (2007) (finding that religion appears related to death penalty attitudes although further validation studies are indicated).

244 *Id.* at 120 (“Furthermore, doubters were less likely to interpret the Bible literally or believe that God supports or requires the death penalty for murderers.”).

245 Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 167 (2000); Miller & Hayward, *supra* note 243, at 113, 127 (“Specifically, fundamentalism, belief in a literal interpretation of the Bible, the perception that one’s religious group favors the death penalty, and the belief that God requires the death penalty for murderers all predict greater verdict preference strength in the direction of the death penalty.”).

their decision-making.²⁴⁶ A fundamentalist interpretation of the Bible supports capital punishment administered by the state and abolishing it would be contrary to explicit calls²⁴⁷ in the Bible to punish certain crimes by death.²⁴⁸ Given the demographics of the Texas legislature, Christian or even fundamentalist ideology might insinuate itself into decision-making, particularly because the death penalty is often seen as a moral issue.

Yet, the pro-life movement is often associated with Christianity. While there is no explicit reference to abortion in the Bible,²⁴⁹ there are many passages interpreted to mean life begins at conception, all human life is sacred, and that harming a fetus is punishable.²⁵⁰ Accordingly, the pro-life movement is often associated with Christianity.²⁵¹

Despite the absence of a standard interpretation of the Bible, fundamentalism is a strong predictor of anti-abortion attitude.²⁵² Fundamentalism embraces a binary model—particularly the distinction

246 See, e.g., Bryan Slaton (@BryanforHD2), Head Bio Message, TWITTER, <https://twitter.com/BryanforHD2> (last visited June 21, 2023) (“Christian Conservative. Proud Texan. Defender of Liberty. Representative for House District 2.”).

247 See, e.g., *Genesis* 9:6 (New Revised Standard Version) (“[w]hoever sheds human blood, by humans shall their blood be shed; for in the image of God has God made mankind”).

248 Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 37 (2000) (“Paul’s letter to the Romans [] endorses human government as the instrument of God’s ‘wrath’ against offenders and speaks of government wielding the ‘sword,’ both of which the proponents say refer specifically to the use of death as punishment.”).

249 Michael J. Gorman, *The Use and Abuse of the Bible in the Abortion Debate*, in UNIV. FAC. FOR LIFE: LIFE AND LEARNING CONF. PROC. V 140, 142 (1995), <https://www.uffl.org/vol%205/gorman5.pdf>.

250 See, e.g., *Imago Dei*, PBS GLOSSARY, <https://www.pbs.org/faithandreason/theogloss/imago-body.html> (last visited June 21, 2023); *Genesis* 1:27 (New Revised Standard Version); *Jeremiah* 1:5 (New Revised Standard Version) (“Before I formed you in the womb I knew you, before you were born I set you apart; I appointed you as a prophet to the nations.”); *Exodus* 21:22–25 (New Revised Standard Version) (“If people are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman’s husband demands and the court allows. But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”); P. Wilson-Kastner & B. Blair, *Biblical Views on Abortion: An Episcopal Perspective*, CONSCIENCE, 1985 no. 6, at 4, 5.

251 Eric Swank, *Gender, Religion, and Pro-Life Activism*, 13 POL. & RELIGION 361, 379 (2020) (“People who valued religiosity and saw the Bible literally were significantly more pro-life during the bivariate analysis.” Note, however, that these correlations “disappeared when controlling for abortion attitudes, modern sexism, and people’s social networks”).

252 Douglas, *supra* note 245, at 167.

between man and woman giving rise to specific gender roles.²⁵³ According to those roles, men are to protect their wives and ensure that their families submit to God.²⁵⁴ Women are to submit to their husbands and become the “guardians of moral behavior,” which includes purity, domesticity, and motherhood.²⁵⁵ Submission to man, God, and morality are essential to the fundamentalist patriarchal structure because stepping outside of gender roles would be contrary to God’s will.²⁵⁶ According to Christian fundamentalism, abortion is not only the destruction of human life, it is also contrary to the woman’s role as a mother dedicated to the principles of morality.²⁵⁷ It would appear that abortion access is contrary to a literalist reading of the Bible and undermines women’s role in the patriarchal family structure prescribed by God. It would then follow that abortion is a refusal to submit to God’s will. Accordingly, belief that abortion is an affront to family structure, gender roles, and God’s will may play a role in the decision-making of politicians who hold fundamentalist ideals.

253 Kimberly J. Cook, *Abortion, Capital Punishment, and the Politics of “God’s Will”*, 9 WM. & MARY BILL RTS. J. 105, 114 (2000); *Genesis* 2:22 (New Revised Standard Version) (“And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man.”).

254 Cook, *supra* note 253, at 123.

255 KIMBERLY J. COOK, *DIVIDED PASSIONS: PUBLIC OPINIONS ON ABORTION AND THE DEATH PENALTY* 26 (1998) [hereinafter *DIVIDED PASSIONS*].

256 Cook, *supra* note 253, at 26.

257 *See id.*

B. Gender Expectations and Enforcement

The influences of family and gender roles are not limited to religious thinking. Secular feminist and queer theory may help explain government involvement in abortion and the death penalty.

Access to abortion is not an issue limited to cisgender²⁵⁸ women.²⁵⁹ Queer²⁶⁰ and trans people²⁶¹ can get pregnant and will inevitably need abortions.²⁶² The *Roe* and *Casey* decisions centered on cisgender women receiving abortions after sex with cisgender men.²⁶³ *Casey* even implied that abortion protections were greater for those who fit expectations of heteronormativity.²⁶⁴ Queer and trans people do not fit into traditional conceptions of gender roles, particularly that of “motherhood,” which is a pillar of the pro-life movement.²⁶⁵ They are thus placed at particular risk by policies designed to enforce gender roles.²⁶⁶

Ambivalent sexism is a helpful framework when considering the role of gender roles in governance and punishment.²⁶⁷ Ambivalent sexism

258 *Cisgender*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/cisgender> (last visited June 21, 2023) (“of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth”).

259 See generally Marc Spindelman, *Queer Black Trans Politics and Constitutional Originalism*, 13 CONLAWNOW 93, 94 (2022).

260 *What Does Queer Mean?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/sexual-orientation/what-does-queer-mean> (last visited June 21, 2023) (“Queer is a word that describes sexual and gender identities other than straight and cisgender. Lesbian, gay, bisexual, and transgender people may all identify with the word queer. Queer is sometimes used to express that sexuality and gender can be complicated, change over time, and might not fit neatly into either/or identities, like male or female, gay or straight.”).

261 *Transgender and Nonbinary Identities*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/transgender> (last visited June 21, 2023) (“Transgender means your gender identity is different from the gender that the doctor gave you when you were born, based on the way your body looked. That label is called “sex assigned at birth” – usually ‘male’ or ‘female.’”).

262 Lauren Paulk, *Abortion Access is an LGBTQ Issue*, NAT’L CTR. FOR LESBIAN RTS. (Oct. 1, 2013) <https://www.nclrights.org/abortion-access-is-an-lgbt-issue/>.

263 Spindelman, *supra* note 259, at 105.

264 *Id.* at 105 n.31.

265 See *id.*

266 See, e.g., Allyson Waller, *Texas Sues Biden Administration Over Guidance Saying Transgender Workers can Use Bathroom of Their Choice*, TEX. TRIB. (Sept. 20, 2021), <https://www.texastribune.org/2021/09/20/texas-lawsuit-lgbtq-workplace-bathroom/>.

267 Peter Glick & Susan T. Fiske, *Hostile and Benevolent Sexism: Measuring Ambivalent Sexist Attitudes Towards Women*, 21 PSYCH. OF WOMEN Q. 119, 119–20 (1997).

can be broken into two parts. The first, benevolent sexism is the belief that women are fragile, innocent, and domestic.²⁶⁸ The other, hostile sexism is the idea that women are manipulative and that gender equality is contrary to innate differences between men and women.²⁶⁹ When combined, women who submit to patriarchy and embody traditional gender roles are commended while those who do not are punished.²⁷⁰

Adherence to traditional conceptions of motherhood is seen as especially favorable.²⁷¹ Behavior outside gender norms is heavily scrutinized, especially for people who are pregnant.²⁷² Thus, it is no surprise that ambivalent sexism is associated with support for behavioral restrictions, including abortion.²⁷³ Policies punishing pregnant people for acting outside gender norms are not limited to abortion.²⁷⁴ Since the 1980s, pregnant people have been prosecuted for endangering their fetuses, with drug and child endangerment laws being the most common avenues.²⁷⁵

Men make up the majority of the Texas State legislature and have increased in numbers since 2009.²⁷⁶ Ambivalent sexism, for those who harbor it consciously or unconsciously, is likely to play a role in policy-making.²⁷⁷ Surprisingly, Texas does not have an explicit fetal endangerment law. The wrongful death statute does apply to the death of fetuses; however, mothers are not liable for the death of their own fetus.²⁷⁸ Nevertheless, the lack of fetal endangerment laws has not stopped Texas from criminalizing issues relating to pregnancy.²⁷⁹ In the

268 *Id.*

269 *Id.*

270 *See id.*

271 Yanshu Huang et al., *Benevolent Sexism, Attitudes Toward Motherhood, and Reproductive Rights: A Multi-Study Longitudinal Examination of Abortion Attitudes*, 42 PERSONALITY & SOC. PSYCH. BULL. 970, 971–72 (2016).

272 *Id.* at 972.

273 *Id.* (“Likewise, both [benevolent sexism] and [hostile sexism] are positively associated with support for monitoring—and subsequently restricting—pregnant women’s behaviors.”).

274 *See* MICHELLE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 12–15 (2020).

275 *Id.*

276 Lise Olsen, *As Democrats Divebomb, The Texas Legislature Remains as White and Male as Ever*, TEX. OBSERVER (Nov. 5, 2020), <https://www.texasobserver.org/texas-legislature-white-male-as-ever/>.

277 Huang et al., *supra* note 271, at 980 (“[O]ur results suggest that ambivalent sexism precedes abortion attitudes (rather than vice versa). This offers some of the strongest evidence to date that ideologies influence policy positions.”).

278 TEX. PENAL CODE ANN. § 22.12(1) (West 2023).

279 *See, e.g.*, Jordan Smith, *Naked City: Save the Fetus - From Mom?*, AUSTIN CHRON.

early 2000s, Texas's attorney general attempted to enforce the Penal Code in a way that would require doctors to report mothers whose newborn children tested positive for any controlled substances.²⁸⁰ By 2005, the subsequent attorney general changed enforcement of the law, no longer requiring doctors to report expectant mothers who were, or had been, using illegal narcotics.²⁸¹ Criminalization of mothers, however, did not end there.

Texas's child endangerment law presents another potential avenue for the criminalization of the pregnant individual's behavior. The relevant section reads: "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment."²⁸² Texas prosecutors have brought numerous child endangerment cases against pregnant people for endangering their "unborn children."²⁸³ Despite a lack of legal victories for the government, pregnant people continue to face the consequences of child abuse accusations.²⁸⁴

Texas legislators and prosecutors have repeatedly pushed for law enforcement that punishes nonconformity with ideas of gender and motherhood.²⁸⁵ Abortion is yet another action contrary to the passive, nurturing, benevolent-sexism-based expectation of motherhood.²⁸⁶ Thus, it is no surprise that Texas has attempted to strictly limit abortion through a series of successfully passed legislation, and tried to criminalize it even before *Dobbs* was decided.²⁸⁷ Past legislation and prosecutorial

(Sept. 10, 2004), <https://www.austinchronicle.com/news/2004-09-10/228254/> [hereinafter *Naked City*]; Jordan Smith, *Abbott Rules for Mothers*, AUSTIN CHRON. (Jan. 14, 2005), <https://www.austinchronicle.com/news/2005-01-14/247049/> [hereinafter *Abbott Rules*].

280 *Naked City*, *supra* note 279.

281 *Abbott Rules*, *supra* note 279.

282 TEX. PENAL CODE ANN. § 22.041 (West 2021).

283 Andrea Grimes, *Pregnant Texans are Being Charged with Crimes that Don't Exist*, REWIRE NEWS GRP. (Oct. 16, 2014) <https://rewirenewsgroup.com/article/2014/10/16/pregnant-texans-charged-crimes-dont-exist/>.

284 *Id.*

285 See, e.g., *In re K.L.B.*, No. 14-9-61-CV, 2009 Tex. App. LEXIS 5519, at *3-4 (Tex. App. July 16, 2009); Allyson Waller, *Texas Sues Biden Administration Over Guidance Saying Transgender Workers Can Use Bathroom of Their Choice*, TEX. TRIB. (Sept. 20, 2021), <https://www.texastribune.org/2021/09/20/texas-lawsuit-lgbtq-workplace-bathroom/>; *Jordan v. Dossey*, 325 S.W.3d 700, 721-22 (Tex. App. 2010); Grimes, *supra* note 283.

286 See generally DIVIDED PASSIONS, *supra* note 255, at 29; Huang et. Al., *supra* note 271, at 972.

287 H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg. Reg. Sess. (Tex.

efforts make it clear that Texas is eager to punish behaviors associated with pregnancy, birth, and motherhood.²⁸⁸ Now that *Dobbs* has stripped Texans of abortion protections, it seems likely that legislators and prosecutors will renew their efforts to criminalize the procedure. Such an effort is consistent with attempts to criminalize other behaviors not conforming with ambivalent-sexism-based gender roles—particularly those involving pregnancy, birth, and motherhood.

Notably, only six out of the 574 people executed in Texas since 1976 have openly identified as women.²⁸⁹ Only twelve women have been executed in the other forty-nine states in the same time frame.²⁹⁰ As of March 2023, seven women sit on Texas's death row.²⁹¹

One death row inmate, Melissa Lucio, was sentenced to death for the murder of her two-year-old daughter.²⁹² In 2007, Lucio was arrested after her daughter was found unresponsive with bruises, a broken arm, and an alleged bite mark.²⁹³ Lucio told police that her daughter had fallen down a flight of stairs a few days before she had died.²⁹⁴ However, during a late-night interview, where law enforcement repeatedly accused Lucio of child abuse, she eventually admitted (but later recanted) that she “guessed” she did it.²⁹⁵

There is considerable evidence suggesting Lucio's confession was coerced and the death of her daughter was caused by an accidental fall down the stairs—what she had initially told police.²⁹⁶ Her prosecution

2019); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

288 See, e.g., H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021); Grimes, *supra* note 283.

289 Joshua Fechter, *Records: 6 Women Have Been Executed in Texas Since 1976, 6 Others Sit on Death Row*, SAN ANTONIO EXPRESS NEWS (Oct. 1, 2015), <https://www.mysanantonio.com/news/local/crime/article/Records-6-women-have-been-executed-in-Texas-6543820.php>; *Death Row Information: Executed Inmates*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last visited Aug. 4, 2022).

290 *Executions of Women*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/women/executions-of-women><https://deathpenaltyinfo.org/death-row/women/executions-of-women> (last visited Apr. 7, 2023).

291 *Death Row Information: Gender and Racial Statistics of Death Row Inmates*, TEX. DEPT. OF CRIM. JUST. https://www.tdcj.texas.gov/death_row/dr_gender_racial_stats.html (last visited Mar. 10, 2023).

292 Jolie McCullough, *Melissa Lucio's Execution Halted by Texas Court of Criminal Appeals*, TEX. TRIB. (Apr. 22, 2022) <https://www.texastribune.org/2022/04/25/melissa-lucio-execution-texas/>.

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.*

is a prime example of the Texas government attempting to punish a woman for conduct contrary to ambivalent-sexism-based expectations of motherhood. Agents of the government saw Lucio as a bad mother and came down hard.²⁹⁷ When law enforcement believed that Lucio had abused her daughter, they pressured her to confess to their hypothesis.²⁹⁸ Then, Texas prosecutors sought the most extreme punishment for her conduct.²⁹⁹ Lucio's case makes it clear that at least some Texas prosecutors are willing to push for the most extreme punishment when they believe someone is acting as a "bad mother."

The sexist concept of "bad motherhood" has already shown its face in Texas prosecutors' offices. Furthermore, Texas has a history of scrutinizing and criminalizing pregnant peoples' behavior when it does not meet gender-role-based expectations. It is not unfathomable to think that, if enabled by the legislature, Texas will seek extreme punishment for people who do not conform to gender roles or are labeled as "bad mothers." Without constitutional protections, Texas may consider abortion conduct outside of accepted gender and motherhood roles, and as a result, seek harsh punishment including the possibility of the death penalty.

C. *Race's Role in Punishment*

In 1987, the Supreme Court considered Warren McCleskey's habeas corpus petition challenging his death sentence.³⁰⁰ McCleskey's defense cited a study concluding that Black defendants were more likely to receive the death penalty for the murder of white victims compared to white defendants convicted of killing Black victims.³⁰¹ McCleskey argued that this disparity violated the Eighth Amendment.³⁰² In a three-page decision, the Court upheld McCleskey's death sentence holding that there was no evidence that racial prejudice played a role in *his* sentence and that the study did not prove an unacceptable risk of racial prejudice in death sentences.³⁰³

There is significant statistical research on the impact of defendant and victim race in death penalty cases.³⁰⁴ The first seminal study, *Equal*

297 *See id.*

298 *Id.*

299 *Id.*

300 *McCleskey v. Kemp*, 481 U.S. 279, 282 (1987).

301 *Id.* at 279.

302 *Id.*

303 *Id.* at 280.

304 *See, e.g.,* DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL*

Justice and the Death Penalty, concluded that defendants were four times as likely receive a death sentence if there was a white victim compared to defendants with no white victims.³⁰⁵ In 1990, the United States General Accounting Office synthesized 28 studies about racial disparities in death sentences and found that 75% of the studies concluded Black defendants were more likely to be sentenced to death compared to white defendants.³⁰⁶ More recently, *Whom the State Kills* concluded that defendants convicted of murdering white victims were seventeen times more likely to be executed when compared to defendants convicted of murdering Black victims.³⁰⁷

Moreover, stereotypes of Black men as predators have long been ingrained in the American legal system, particularly in cases involving rape.³⁰⁸ Contemporary data showing that Black defendants who murder white victims are much more likely to receive the death sentence indicates that the same sentiment is very much alive today.³⁰⁹ The racist characterization of Black defendants undoubtedly plays a significant role in criminal punishment.³¹⁰ It would be foolish to ignore the impact of race on decisions by Texas regarding whom to punish for abortion-related offenses. Furthermore, if, in fact, abortion does become a capital offense, race will certainly play a role in whom the government sentences to death.³¹¹

In the face of such disparities, the state has done nothing to change its capital sentencing procedures. Government officials uphold a

AND EMPIRICAL ANALYSIS 316 (Northeastern University Press, 1990); U.S. Gov't Accountability Office, GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (1990) [hereinafter SENTENCING].

305 BALDUS ET AL., *supra* note 304; Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 585, 587 (2022).

306 See SENTENCING, *supra* note 304.

307 Phillips & Marceau, *supra* note 305, at 587 (“the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim”).

308 John K. Cochran et al., *Rape, Race, and Capital Punishment: An Enduring Cultural Legacy of Lethal Vengeance*, 9 RACE & JUST. 383, 388 (2019).

309 See generally Phillips & Marceau, *supra* note, 305 at 587.

310 Criminal punishment in the United States is marred with anti-Black racism. The criminal justice system has used racist characterizations such as dishonest, un-human, physically aggressive, sexually aggressive and an “us-them” mentality to justify extreme punishments for Black people. Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3019, 3105–09 (2018).

311 See *id.* at 3121; Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 62–63 n.114 (1995).

system in which racism plays an overbearing role in who the state kills.³¹² This inaction amounts to complicity.

As abortion becomes increasingly criminalized in Texas, the question remains: who will be punished? Despite comparatively low rates of neonatal abstinence syndrome,³¹³ Black mothers are more likely to be tested for prenatal drug use, face legal consequences for prenatal drug use, and be reported to child welfare services.³¹⁴ Scholarship suggests that over-punishment of Black mothers is motivated by racist stereotypes of Black people as selfish and dangerous.³¹⁵ Given racist attitudes and tendencies for over-punishment, if abortion becomes akin to child endangerment or worse, Black pregnant people will very likely be overrepresented in criminal punishment.

III. LEGAL PATHWAYS FOR CAPITAL ABORTION

The most obvious and devastating intersection of abortion regulations and the death penalty arises from the possibility of abortions being punishable by death. Although this scenario may appear to be morally incomprehensible to some, the Supreme Court and lawmakers have already guided the nation toward unprecedented levels of dystopia regarding privacy and bodily autonomy.³¹⁶ By stripping away abortion protections throughout the nation in *Dobbs*, the Supreme Court has authorized a new era in the criminalization of those seeking abortions.³¹⁷ When states institute abortion bans, irrespective of extenuating circumstances such as rape, incest, or the health of the pregnant person, they signal a complete disregard for the life, autonomy, and freedom of their pregnant citizens. Without constitutional abortion protections, there exists no identified limit to how far a state can and will go in

312 State legislators codified capital murder. See Tex. Crim. P. CODE Ann. Art. 37.071 (West 2019). Prosecutors decide who is charged with capital murder and whether the death penalty will be pursued. Judges make appellate decisions. See *Gregg v. Georgia*, 428 U.S. 153, 222–23 (1976) (acknowledging appellate courts' roles in preventing arbitrary death sentences); The Governor has the power to grant clemency or commute death sentences. Tex. Const. Art. IV § 11.

313 Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27(2) SOC. POL. 258, 262 (2020) (“Recent data indicate significant racial differences, as over 70 percent of infants born with neonatal abstinence syndrome are born to white mothers, while only 5 percent are born to black mothers.”).

314 *Id.* at 258.

315 See *id.* at 262.

316 See *supra* text accompanying notes 62–122.

317 See *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022).

enforcing complete control over the life and death of someone who is pregnant.³¹⁸ This is particularly dangerous in a state like Texas, with the highest number of death penalty executions and some of the nation's most restrictive abortion laws.³¹⁹

When a person in Texas has an unintended pregnancy, they typically move forward with one of three options: (1) have an out-of-state abortion; (2) have an illegal, in-state abortion; (3) or carry their pregnancy to term.³²⁰ Texans are most vulnerable to capital prosecution if they choose to have an illegal, in-state abortion.³²¹ For those who either do not have access to an out-of-state abortion or who cannot carry their pregnancy to term, an illegal, in-state abortion is not a choice; it is a necessity. Black and brown working-class communities, who may not be able to afford an out-of-state abortion, are already disproportionately criminalized and incarcerated by the government.³²² These communities are therefore most vulnerable to potential capital-abortion sentences.³²³ Focusing on the criminalization of illegal, in-state abortions, this Section outlines legal pathways that Texas may take to charge abortion-receivers with a capital offense.

318 *See id.*

319 *Death Row Information*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (2022), https://www.tdcj.texas.gov/death_row/dr_facts.html#:~:text=United%20States%20Capital%20Punishment%3A&text=Texas%20leads%20the%20nation%20in,death%20in%20the%20United%20States; Eleanor Klibanoff, *Texas' Restrictive Abortion Law Previews a Post-Roe America*, TEX. TRIB. (May 4, 2022), <https://www.texastribune.org/2022/05/03/supreme-court-roe-texas-opinion/>.

320 *See, e.g.*, Daniel Grossman & Nisha Verma, *Self-Managed Abortion in the US*, 328 JAMA 1693, 1694 (2022).

321 Texas is less likely to succeed with the capital prosecution of out-of-state abortions due to the fundamental right to travel, mentioned in the Kavanaugh concurrence in *Dobbs*. *See Dobbs v. Jackson*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring); *see also Saenz v. Roe*, 526 U.S. 489, 498 (1999) (establishing the fundamental right to travel). This note will not focus on the potential to prosecute those traveling for abortions outside of Texas.

322 *See generally* Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes>; Barbara Rodriguez, *Criminal Convictions for Abortion Miscarriage? Texas Abortion Ban Previews Life Without Roe v. Wade*, THE 19TH (Sept. 2, 2021), <https://19thnews.org/2021/09/criminal-convictions-abortion-miscarriage-texas-abortion-ban/>.

323 *See* Dennie & Fielding, *supra* note 322.

A. *A Shift in Blameworthiness*

The sentencing of a pregnant person to death for an abortion requires a shift in legal culpability toward abortion seekers. Traditionally, abortion providers, as opposed to abortion-receivers, have faced the most legal liability for the performance of an abortion.³²⁴ Throughout Texas's history, medical providers have been liable for fines, revocation of medical licenses, and possible jail time for the act of performing an abortion.³²⁵ The penalization of abortion providers relies on deterrence and incapacitation theories of punishment,³²⁶ acknowledging that the most effective way to prevent abortion procedures is through the targeting of medical providers and systems of reproductive care.³²⁷ Because abortion-receivers are unlikely to self-induce as many abortions as those performed by medical providers, their punishment relies less on deterrence and incapacitation and more on retribution.³²⁸ Retribution justifies the punishment of those considered to be guilty based on levels of blameworthiness.³²⁹ The sentencing of a pregnant person to death would signal a shift in blameworthiness of those who seek abortions.

Retributive punishment views are consistent with the values of those who identify as both pro-life and pro-death penalty. Through the collection of public opinion data and qualitative interviews, sociologist Kimberly Cook studied the rationale behind those who were both pro-life and pro-death penalty, finding that the most common theme that brings the two issues together is a distinction between innocent life and guilty life.³³⁰ For those who are pro-life and pro-death penalty, the fetus is considered to be an “innocent human life, a baby that has not done anything wrong,” while a person convicted of murder is considered guilty, having “sacrificed his or her right to life through violent

324 See generally 1854 Tex. Gen. Laws 1502; 1856 Tex. Crim. Stat. 103–04; 1856 Tex. Crim. Stat. 103–04; 1858 Tex. Gen. Laws 1044; 1925 Tex. Crim. Stat. 277–78 (punishing abortion providers over abortion seekers).

325 1925 Tex. Crim. Stat. 277–78.

326 The deterrence theory of punishment aims to reduce crime through “the fear of punishment,” where potential transgressors opt to not commit a crime out because of the potential legal consequences. KEVIN C. McMUNIGAL & DANIEL S. MEDWED, CRIMINAL LAW: PROBLEMS, STATUTES, AND CASES, 28–29 (Carolina Academic Press, 2nd ed. 2021) (explaining that incapacitation aims to reduce crime by “restricting an offender’s ability or opportunity to choose to commit a [future] crime.”).

327 David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 916 (2013).

328 *Id.* at 911.

329 *Id.*

330 DIVIDED PASSIONS, *supra* note 255, at 26.

actions.”³³¹ Under this rationale, the shift in culpability toward those who undergo abortions would be justified if the birthing parent were seen as responsible for the death of their unborn child.

While actualization of the death penalty as a punishment for abortion may seem unlikely or unpopular,³³² the nation has already begun to criminalize birthing bodies for pregnancy outcomes.³³³ Since *Roe* was decided, “more than 1,200 women [have been] arrested across the United States based on their pregnancy outcomes - including miscarriages, stillbirths, abortions, or neonatal losses.”³³⁴ One such prosecution took place in Oklahoma, where twenty-one-year-old Brittney Poolaw was convicted of first-degree manslaughter due to drug use allegedly contributing to her miscarriage.³³⁵ In 2021, even without a legal pathway to charge abortion as homicide, Texas police arrested and charged twenty-six-year-old Lizelle Herrera with murder after she presented to Memorial Hospital for complications related to a self-managed abortion.³³⁶ Without a legal pathway for homicide, the district attorney later dismissed the charges.³³⁷

Texas can shift the legal culpability of abortion toward those who end their pregnancies by implementing either one of two legislative pathways. The first pathway considers self-managed abortions to be

331 *Id.*

332 Although the study shows that the carceral punishment of people who undergo illegal abortions is currently unpopular, it does not serve as a predictor of political outcomes. Despite the 61% of Americans who believe that abortion should be legal, the right was still struck down by an elite and controlling minority. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/religion/2022/05/06/americans-views-on-whether-and-in-what-circumstances-abortion-should-be-legal/>.

333 Farah Diaz-Tello, *Roe Remains for Now...Will It Be Enough?*, AM. BAR. ASS'N. (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/roe-remains-for-now-will-it-be-enough/.

334 *Id.*

335 Dennie & Fielding, *supra* note 322.

336 Carrie N. Baker, *Texas Woman Lizelle Herrera's Arrest Foreshadows Post-Roe Future*, MS. MAGAZINE (April 16, 2022), <https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion/>.

337 Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, UNIV. OF PITT. SCH. OF L., 2022, at 46; University of Texas at Austin Law professor Stephen Vladeck commented that the original Herrera' original charge stemmed from a misreading of a law, and that more cases like this may occur. Giulia Heyward & Sophie Kasakove, *Texas Will Dismiss Murder Charge Against Woman Connected to 'Self-Induced Abortion,'* N.Y. TIMES (Apr. 10, 2022), <https://www.nytimes.com/2022/04/10/us/texas-self-induced-abortion-charge-dismissed.html>.

capital homicide. The second pathway considers complicity to abortion procedures to be a capital offense.

B. Pathway 1: Texas Considers Self-Managed Abortions to Be Capital Murder

Abortions can be punishable by death if Texas considers the performance of an abortion to be a capital crime. People who wish to end their pregnancy would be most directly vulnerable to prosecution if they conducted an abortion themselves in the form of a self-managed abortion. Self-managed abortions (sometimes called self-induced abortions or self-induced miscarriages) are abortions conducted outside of the formal healthcare system.³³⁸ The most common and safe type of self-managed abortion is a medical abortion, conducted through the ingestion of misoprostol, or a combination of mifepristone and misoprostol, in the form of a pill.³³⁹ While pregnant people can typically access medical abortions as a prescription deliverable by mail,³⁴⁰ Texas has banned the use and shipment of abortion pills for the purpose of terminating a pregnancy.³⁴¹ Legal abortion restrictions also increase the frequency of use of highly ineffective or unsafe self-managed abortions,³⁴² or abortions “carried out by either persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.”³⁴³ These methods include ingesting herbs and inserting objects into the vagina, among additional methods.³⁴⁴ If a person who cannot afford to procure an out-of-state abortion survives a self-managed abortion safely, they will still be at risk of legal prosecution.³⁴⁵

A person who self-manages their own abortion could be at risk of the death penalty if the state legislature enumerates these abortion procedures as a capital murder offense. The Texas Penal Code currently

338 Heidi Moseson et al., *Self-Managed Abortion: A Systematic Scoping Review*, 63 *BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNECOLOGY* 87, 88 (2020).

339 Lisa H. Harris & Daniel Grossman, *Complications of Unsafe and Self-Managed Abortion*, 382 *NEW ENG. J. MED.* 1029, 1029 (2020).

340 Abigail R.A. Aiken & Ushma D. Upadhyay, *The Future of Medication Abortion in a Post-Roe World*, 317 *BRITISH MED. J.* 1398, 1398 (2022).

341 *TEX. HEALTH & SAFETY CODE ANN.* art. 2 § 171.063 (West 2023).

342 *Abortion*, *WORLD HEALTH ORG.*, <https://www.who.int/news-room/fact-sheets/detail/abortion> (last visited Mar. 17, 2023).

343 Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2(2) *REV. OBSTETRICS AND GYNECOLOGY* 122, 122–23 (2009).

344 Moseson et al., *supra* note 338, at 88; Harris & Grossman, *supra* note 339, at 1029.

345 Harris & Grossman, *supra* note 339, at 1029.

considers the murder of an “individual under 10 years of age” to be a capital offense.³⁴⁶ At present, “conduct committed by the mother of the unborn child” is one of four exceptions to the homicide of an unborn child.³⁴⁷ People who get abortions would be at risk of receiving the death penalty if the state legislature (1) expands the definition of an “individual under 10 years of age” to unborn children, and (2) eliminates the abortion-related homicide exception of “conduct committed by the mother of the unborn child” from the Texas Penal Code.³⁴⁸

In 2017, State Representative Tony Tinderholt authored HB948, which proposed these exact changes.³⁴⁹ The bill first proposes a change to the Texas Family Code to consider a human child as alive “from the moment of fertilization on fusion of a human spermatozoon with a human ovum,” and “entitled to the same rights... as any other human child.”³⁵⁰ In addition, HB948 proposes to eliminate the abortion-related exemptions in Section 19.06 of the Texas Penal Code by requiring that homicide against an individual who is an unborn child applies to conduct “committed by the mother of an unborn child.”³⁵¹ The bill, coauthored by eleven other state representatives, did not make it past the State Affairs Committee.³⁵²

In 2019, State Representatives Tinderholt, Lang, and Swanson

346 TEX. PENAL CODE ANN. art. 5 § 19.03 (West 2023).

347 There are three other exceptions to the murder of the an unborn child which include: “lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure; a lawful medical procedure performed by a physician or other licensed health care provide with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with the law.” TEX. PENAL CODE ANN. art. 5 § 19.06 (West 2023).

348 TEX. PENAL CODE ANN. art. 5 § 19.03 (West 2023).

349 H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017).

350 *Id.*

351 *Id.* The bill proposes the elimination of all abortion-related exceptions to the homicide of an unborn child including: “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure; a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with the law. TEX. PENAL CODE ANN. art. 5 § 19.06 (West 2023).

352 H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017). H.B. 948 was coauthored by Biedermann, Cain, Hefner, Keough, Lang, Leach, Stickland, Swanson, White, Wilson, and Zedler.

introduced HB896, which proposed modifications similar to the 2017 bill.³⁵³ Like HB948 from two years earlier, this bill would change the definition of a living child and eliminate abortion-related exemptions to homicide, allowing prosecutors to charge those who have conducted self-managed abortions with criminal homicide, a capital offense.³⁵⁴ In addition, the bill proposes to eliminate abortion-related exemptions for assault, which further criminalizes the act of terminating pregnancies.³⁵⁵ HB896 was coauthored by Representatives Biedermann, Cain, and Stickland.³⁵⁶ The bill failed to make it out of the Judiciary Committee.³⁵⁷

In 2021, the Texas Legislature proposed yet another bill that would make abortions punishable by death.³⁵⁸ Authored by Representative Bryan Slaton, HB3326, known as the Abolition of Abortion Through Equal Protection for All Unborn Children Act, would also amend the Texas Family Code definition of “living” as beginning at “the moment of fertilization,” hence entitling the fertilized ovum to the same rights as children who have already been born.³⁵⁹ The bill also repeals Texas Penal Code exemptions for homicide, allowing those who self-manage their abortions to be liable for a capital crime.³⁶⁰ In addition, HB3326 would allow prosecutors to charge those who self-manage their abortions with kidnapping, unlawful restraint, smuggling, assault, intoxication assault, and intoxication manslaughter.³⁶¹ It is worthwhile to note that the bill does allow for the removal of an ectopic pregnancy that “seriously threatens the life of the mother.”³⁶² The bill did not make it past the Texas Public Health Committee.³⁶³ The Texas legislature’s efforts at

353 H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); *HB 896*, TEX. LEGIS. ONLINE (Apr. 9, 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB896>.

354 H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019).

355 *Id.*; TEX. PENAL CODE ANN. art. 5 § 22.12 (West 2023).

356 H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); *HB 896*, TEX. LEGIS. ONLINE (Apr. 9, 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB896>.

357 *HB 896*, TEX. LEGIS. ONLINE (Apr. 9, 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB896>.

358 H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

359 *Id.*

360 *Id.*; TEX. PENAL CODE ANN. art. 5 § 19.06 (West 2023).

361 H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021). In addition, HB 3326 proposes modifications to the Texas Penal Code on criminal responsibility, mistake of fact, and duress to include gender neutral language (“he” is changed to “the actor”), signaling the intent to broaden prosecution to more genders. The bill also proposes to make those who end their abortions liable for civil wrongful death claims.

362 *Id.*

363 H.B. 3326, TEX. LEGIS. ONLINE (Mar. 22, 2021), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB3326>.

complete “abortion abolition,” by converting self-managed abortions into a capital offense, proposed for the past three legislative cycles, are likely to continue in this post-*Dobbs* era.³⁶⁴

C. Pathway 2: Texas Considers In-Clinic Abortion Procedures as Complicity with Capital Homicide

The second formal pathway that could result in capital punishment occurs if undergoing an in-clinic abortion procedure is considered complicity with capital homicide. This pathway would be most relevant to those who obtain in-clinic abortion procedures from an abortion provider,³⁶⁵ instead of self-managing their abortions. The pregnant individual themselves could potentially be vulnerable to charges by using abortion-inducing drugs, however, for prosecutors to charge those that end their abortions as accomplices to capital homicide, Texas will also need to change its definition of a living human child and eliminate abortion-related exemptions to homicide.³⁶⁶

Similar to self-managed abortions, obtaining an abortion procedure will also fall under the homicide exception of “conduct committed by the mother of the unborn child.”³⁶⁷ Because of the *Dobbs* decision and abortion trigger laws, most abortion procedures in Texas are now illegal.³⁶⁸ With most abortion procedures deemed unlawful, “conduct committed by the mother of an unborn child,”³⁶⁹ will also be the target exemption for those who wish to enforce capital homicide.

In situations where the pregnant person is not directly terminating their own pregnancy, prosecutors will need to prove that those who undergo abortion procedures are criminally responsible for the death of their unborn child. The Texas Penal Code currently defines criminal responsibility as:

364 See H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); and H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021). For more information on the Abortion Abolitionist movement see generally, Elizabeth Dias, *What is the ‘Abortion Abolitionist’ Movement?*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/interactive/2022/07/01/us/abortion-abolition-movement.html>.

365 Specifically, in-clinic abortion procedures are also called surgical abortions, where a medical professional uses suction to extract a pregnancy from the uterus. *In-Clinic Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures> (last visited June 29, 2023).

366 TEX. PENAL CODE ANN. art. 5 § 19.06 (West 2023).

367 *Id.*

368 See *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022); TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a).

369 TEX. PENAL CODE ANN. art. 5 § 19.06 (West 2023).

- (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
- (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
- (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.³⁷⁰

If Texas considers an unborn child as a “living human child,”³⁷¹ an abortion would be a capital offense. A prosecutor would most likely find that a person who undergoes an abortion procedure or orders a prescription for a medical abortion, acted to “solicit[], encourage[], [or] direct[] [a medical provider]”³⁷² in a homicide, and is therefore criminally responsible for the act.

Because Texas considers most in-clinic abortion procedures to be illegal, abortion procedures do not fall under Texas exemptions to homicide. In addition, the current Texas Penal Code already defines one who “solicits, encourages, [or] directs [an abortion procedure]”³⁷³ to be criminally responsible for the act. Once the definition of a living child is changed to reflect those who are unborn and eliminates the abortion exemptions to homicide, Texas would be able to successfully charge an abortion-receiver as an accomplice to capital homicide.

D. Potential Implications

Any form of expanded abortion criminalization will disproportionately harm Black and brown, working-class communities.³⁷⁴ According to a preliminary study analyzing legal cases between 2000 and 2022, poor people of color are already overrepresented among adults criminally investigated or arrested for allegedly “self-managing”

370 TEX. PENAL CODE ANN. art. 2 § 7.02 (West 2023).

371 TEX. FAM. CODE ANN. § 151.002 (West 2023).

372 TEX. PENAL CODE ANN. art. 2 § 7.02 (West 2023).

373 TEX. PENAL CODE ANN. art. 2 § 7.02 (West 2023).

374 See generally *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, THE SENT'G PROJECT (2008), <https://www.prisonpolicy.org/scans/sp/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>.

abortions “or helping someone else do so.”³⁷⁵ Out of the fifty-four cases analyzed, 41% of those arrested were people of color and 56% were people living in poverty.³⁷⁶ In a study taking place from 2008 to 2014, “three-fourths of abortion patients were low income.”³⁷⁷ Low-income levels also signal less of an ability to travel for an out-of-state abortion.³⁷⁸ This means that low-income community members seeking an abortion will either have to expose themselves to the criminal liability of an illegal, in-state abortion or carry their pregnancy to term, thereby likely falling further into poverty.³⁷⁹ Furthermore, Black people experience miscarriages and stillbirths at significantly higher rates than other races.³⁸⁰ Because miscarriages and stillbirths present similarly to self-managed abortions, Black community members who decide against an abortion will still be more vulnerable to criminal prosecution.³⁸¹

The criminalization of abortion as a capital offense will also negatively impact health outcomes. Without access to safe abortions and healthcare, pregnant people seeking to end their pregnancy may also turn to unsafe abortion methods.³⁸² Based on a 2021 study analyzing 57,506 individuals who requested medication abortions, people who experienced barriers to abortion care, such as those who have lower incomes or who encounter more restrictive abortion laws, are more likely to self-manage their abortions.³⁸³ In addition, according to Google Trends data, searches for a “D.I.Y. abortion” have been higher since the *Dobbs* decision than they have been in the past five years.³⁸⁴ While medical

375 Laura Huss et al., *Self-Care, Criminalized: August 2022 Preliminary Findings*, IF/WHEN/HOW: LAWYERING FOR REPROD. JUST. 1, 2 (2022), <https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/>.

376 *Id.*

377 Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

378 Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, GUTTMACHER INST. (Jul. 14, 2016), <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters>.

379 *Id.*

380 Sudeshna Mukherjee et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM J. EPIDEMIOLOGY 1271, 1271–78 (2013).

381 *Id.*

382 Grossman & Verma, *supra* note 320, at 1694.

383 Abigail R.A. Aiken et al., *Factors Associated with Use of an Online Telemedicine Service to Access Self-managed Medical Abortion in the US*, JAMA NETWORK OPEN (May 21, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780272>.

384 Diy Abortion :Search Term, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=today%205-y&geo=US&q=diy%20abortion,pennyroyal>

abortions are the safest method for self-managed abortions, studies have found that pregnant people have also attempted methods such as drinking vodka over several hours; physical manipulation; mixing ibuprofen, caffeine pills, antibiotics, and alcohol; and herbal remedies to end their pregnancies.³⁸⁵ Capital abortion is likely to decrease the frequency of safe abortion procedures and increase the likelihood of death from unsafe abortions.

If abortion procedures are punishable by death, more pregnant people will be deterred from seeking medical care or may be pushed into having unsafe pregnancies. In cases where someone was arrested for a self-managed abortion, law enforcement was most often alerted to the incident by healthcare providers and social workers, who are designated mandatory reporters.³⁸⁶ Out of fear of prosecution, those who have unsafe abortions may opt to not seek medical care and, more specifically, Black people, who experience these miscarriage and stillbirth disproportionately,³⁸⁷ may be deterred from going to the hospital for miscarriage complications.³⁸⁸ Hospitals may also delay or turn away care due to legal uncertainty.³⁸⁹ After the *Dobbs* decision, several hospitals in Texas reportedly refused to treat patients with major pregnancy complications for fear of violating abortion bans; this refusal to treat will only be exacerbated by further criminalization.³⁹⁰

Even when abortion was a constitutional right, Texas law consistently proposed making abortion a capital offense.³⁹¹ In this post-*Dobbs* era, capital abortion becomes even more of a possibility. In response to the overturning of *Roe*, Texas Representative Bryon Slaton,

(last visited April 1, 2023).

385 Sarah Raifman et al., “*I’ll Just Deal With This On My Own*”: A Qualitative Exploration of Experiences With Self-managed Abortion in the United States, 18 REPROD. HEALTH, 1, 6, 9 (2021).

386 Huss et al., *supra* note 375 (noting that in the analysis of legal cases from 2000–2020, 45% of the abortions reported to law enforcement came from care providers).

387 *Black Women’s Maternal Health: A Multifaceted Approach to Addressing Persistent and Dire Health Disparities*, NAT’L P’SHIP. FOR WOMEN & FAMS. (Apr. 2018), <https://www.nationalpartnership.org/our-work/health/reports/black-womens-maternal-health.html>. “Black women are [also] three to four times more likely to experience a pregnancy-related death than white women.” *Id.*

388 *Texas Hospitals Delaying Care Over Abortion Law, Letter Says*, AP NEWS, (July 15, 2022), <https://apnews.com/article/abortion-health-texas-government-and-politics-da85c82bf3e9ced09ad499e350ae5ee3>.

389 *See generally id.*

390 *Id.*

391 *See* H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017) (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

author of the 2021 “Abolition of Abortion Through Equal Protection for All Unborn Children Act,” released a statement saying “The Supreme Court has given us an opportunity, and Texas must lead [and] we cannot stop at pre-Roe laws. We must also completely and utterly abolish abortion in Texas.”³⁹² There are few legal limits to how Texas may choose to enforce abortion bans.³⁹³ Texas will be able to successfully charge those who end their pregnancies with a capital crime if they (1) make self-managed abortions capital homicide or (2) interpret abortion procedures as complicity with capital homicide.³⁹⁴ These measures would put pregnant people at risk of death by preventing safe access to medical care.³⁹⁵

IV. DEFENSES TO CAPITAL ABORTION

Not only is it possible for Texas to pass laws making abortion a capital crime, but legislators have already proposed this process.³⁹⁶ This Section outlines possible defenses to protect pregnant individuals in Texas from receiving the death penalty. Even if Texas does not make abortion punishable by death, alternative abortion criminalization procedures can still be life-threatening to Black and brown low-income communities. Defenses to capital abortion involve supporting reproductive justice movements.

A. Prevent Texas from Passing Harmful Legislation

Abortion can only become a capital crime in Texas if the state actively passes legislation making it so. The best way to protect pregnant people from the death penalty is to prevent the passage of harmful legislation with the following guidelines and admonitions:

Understand the legal pathways for capital abortion. Capital abortion can be actualized through (1) a change in the legal definition of a “living child” and (2) voiding the abortion-related exemptions to homicide.³⁹⁷ Keep an eye out for legislation that proposes any of these

392 Bryan Slaton (@BryanforHD2), TWITTER (Jun 24, 2022), <https://twitter.com/BryanforHD2/status/1540379988628623361/photo/1>.

393 See generally *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022).

394 See discussion *supra* Sections III.B, III.C: Legal Pathways for Capital Abortion.

395 See discussion *supra* Section III.D: Legal Pathways for Capital Abortion

396 See H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019) H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

397 See discussion *supra* Section III.D: Legal Pathways for Capital Abortion

mechanisms.

Look out for sneaky bills and wording. Slaton’s HB3326 of 2021 did not propose the elimination of abortion-related exemptions to homicide in any obvious way—the bill instead buried the action as a “Section 19.06, Penal Code” repeal, among a laundry list of 21 other provisions.³⁹⁸ In addition, proposals to change the definition of a “living child” may be intentionally worded to sound benign or progressive.³⁹⁹ It is important to remember that any expansion of rights to those unborn is dangerous for pregnant people. Here are some key terms that may signal harmful legislation: “19.06,” “penal code,” “living child,” “rights of a living child,” “family code,” “151.002,” “human child,” “fertilization,” “homicide,” and “unborn human.”⁴⁰⁰

Mobilize against any bill that advocates for the criminalization of abortions. Any criminalization of abortion will be dangerous to those who are pregnant and can also lead to the future justification of capital abortion.⁴⁰¹ As an example, any legislation that repeals abortion-related exemptions to assault in Section 22.12 of the Texas Penal Code will lead to the incarceration of those who end their pregnancies and will legally blame pregnant people for their pregnancy outcomes.⁴⁰²

Build intentional coalitions. Not all those who identify as “pro-life” are willing to support capital abortion.⁴⁰³ In a statement against

398 H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

399 For example, H.B. 896 is framed as an act to “protect[] the rights of an unborn child.” H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019).

400 The target language listed is taken from previously proposed bills that move to make abortion a capital crime. *See* H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 896, 86th Leg., Reg. Sess. (Tex. 2019) H.B. 3326, 87th Leg., Reg. Sess. (Tex. 2021). *See also* discussion *supra* Sections III.B, III.C (detailing the legislative pathways for capital abortion).

401 *See generally* INTERRUPTING CRIMINALIZATION, *Abortion Criminalization is Part of the Larger Struggle Against Policing and Criminalization* (2021) <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/6194235775f2a0615ea53cde/1637098383973/Decriminalize+Abortion> (“Abortion criminalization is yet another way of increasing the surveillance of our bodies, relationships, autonomy, and mutual aid—widening the net of criminalization, and potentially legitimizing other new forms and means of criminalization”). *See also supra* Sections III.A, III.D (detailing the existing status of abortion criminalization and potential for more harm).

402 Tex. Code Crim. Proc. Ann. art. 22.12 (West 2023).

403 Fifty percent of U.S. adults believe that women who have illegal abortions should not face legal penalties, let alone the death penalty. *America’s Abortion Quandary*,

a capital abortion bill from 2019, Jeff Leach, Chair of the Committee on Judiciary and Civil Jurisprudence, remarked, “My commitment to advancing the pro-life cause is stronger than ever and that’s why I cannot in good conscience support House Bill 896—legislation that subjects women who undergo abortions to criminal liability and even the possibility of the death penalty.”⁴⁰⁴ Campaigns against capital abortion may be an opportunity to build bipartisan support.

Push legislation that actively protects those who are pregnant. While playing defense against harmful legislation, it is also important to support bills that actively protect pregnant people from criminalization. It is imperative to work with legislators to propose bills that reinforce current abortion-related exemptions to homicide and expand the exemptions to all abortion procedures (not just self-managed abortions and “legal” abortion procedures). It is also necessary to develop and propose bills that expand abortion protections and access to healthcare.

Mobilize to abolish the death penalty in Texas. In addition to bills that will protect pregnant people, it is important to focus on ending the death penalty as a punishment for any crime in Texas. Even when guided by formal procedures, the death penalty gives rise to arbitrary and racially biased sentences.⁴⁰⁵ Movements to abolish the death penalty in Texas align with efforts to dismantle the injustices in the carceral state.⁴⁰⁶

Pay attention to state political and legislative cycles. The most harmful legislation, punishing pregnant people who end their pregnancies, will come from the Texas State Legislature. This emphasizes the importance of staying engaged in state elections and advocating for pro-choice candidates that understand the intersectional implications of abortion and criminal laws.

supra note 332.

404 Jeff Leach (@leachfortexas), TWITTER (Apr. 10, 2019), <https://twitter.com/leachfortexas/status/1116123411330236417>.

405 *See supra* Section I.B (noting Supreme Court interventions between 1973 and 1992).

406 *See* DEATH PENALTY ACTION, <https://deathpenaltyaction.org/> (last visited Mar. 6, 2023); RESIST: THE TEXAS DEATH PENALTY ABOLITION MOVEMENT, <https://resist.org/grantees/the-texas-death-penalty-abolition-movement/> (last visited Mar. 6, 2023); TEXAS COALITION TO ABOLISH THE DEATH PENALTY, <https://tcdp.org> (last visited Mar. 6, 2023).

B. *Protect Those Who End Their Pregnancies in the Legal Process*

In the event that the Texas legislature considers abortion as capital murder, those who end their pregnancies will need protection throughout the entirety of the legal process. Consider the following initiatives:

Prevent district attorneys from prosecuting abortion-related offenses. In the aftermath of the dropped murder charge of Lizelle Herrera for a self-managed abortion, a group of five Texas district attorneys released a statement, pledging to not prosecute personal healthcare decisions.⁴⁰⁷ The statement considered the prosecution of abortion as murder to be a “distorted use of our criminal legal system,” with “devastating consequences.”⁴⁰⁸ Encourage current district attorneys and candidates to pledge to not prosecute abortion-related offenses.⁴⁰⁹ If a district attorney charges someone for an abortion-related offense, efforts should be focused to pressure them to drop the charge.

Prevent prosecutors from seeking the death penalty for capital murder. The state does not need to seek the death penalty in the event of a capital crime.⁴¹⁰ If prosecutors do decide to charge someone for an abortion-related homicide, the prosecutors should be pressured to refrain from seeking the death penalty.⁴¹¹ This alternative should only be issued in a worst-case scenario, because even if a defendant is found guilty in a capital case where the state does not seek the death penalty, the judge still must “sentence the defendant to life imprisonment or to

407 The District Attorneys who signed the statement include John Creuzot (Dallas County), José Garza (Travis County), Joe Gonzales (Bexar County), Mark Gonzalez (Nueces County), Brian Middleton (Fort Bend). John Creuzot, José Garza, Joe Gonzales, Mark Gonzalez & Brian Middleton, Travis County District Attorney’s Office (@DATravisCounty), TWITTER (Apr. 12, 2022), <https://twitter.com/DATravisCounty/status/1513882229608484885>.

408 *Id.*

409 See FAIR AND JUST PROSECUTION, *Joint Statement from Elected Prosecutors* (last updated Aug. 25, 2022) <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> (listing elected prosecutors who pledge to not enforce abortion bans); see also Lauren-Brooke Eisen & Miriam Krinsky, *The Prosecutors Pledging Not to Enforce Abortion Bans*, BRENNAN CENTER FOR JUSTICE (May 16, 2022) <https://www.brennancenter.org/our-work/research-reports/prosecutors-pledging-not-enforce-abortion-bans>; Sam McCann, *The Prosecutors Refusing to Criminalize Abortion*, VERA INSTITUTE OF JUSTICE (Sept. 19, 2022) <https://www.vera.org/news/the-prosecutors-refusing-to-criminalize-abortion>.

410 Tex. Code Crim. Proc. Ann. art. 37.071 (West 2023).

411 See Eisen & Krinsky, *supra* note 409; McCann, *supra* note 409.

life imprisonment without parole.”⁴¹²

Connect those charged with abortion-related offenses to a network of legal protections and resources. If someone is charged with an abortion-related offense, especially if they are charged with capital abortion, it is vital that they have proper legal representation. Organizations like the National Advocates for Pregnant Women provide free legal assistance to pregnant people who have been charged with crimes related to abortions, miscarriage, stillbirth, or giving birth to a baby who did not survive.⁴¹³ Publish the contact information of accessible legal networks with other resources around pregnancy.

Prevent the jury from enacting a death sentence. Even after a guilty verdict has been held in a capital crime, the jury has the power to decide if a death sentence will be imposed.⁴¹⁴ A death sentence will be imposed if 10 out of 12 members of the jury answer affirmatively that (1) there is a probability that the defendant would commit criminal acts of violence that would constitute a threat to society; and (2) the defendant “actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.”⁴¹⁵ The majority of the public does not believe in carceral solutions to abortion. According to a Pew Research study conducted in 2022, 47% of U.S. adults believe that in instances where abortion is illegal, the woman who had the abortion should be punished.⁴¹⁶ Of this 47% only 14% believe that women should serve actual jail time.⁴¹⁷ Because of this sentiment, it may be effective to conduct public education campaigns to destigmatize abortion procedures, specifically focusing on culpability and future hazards of murder. Hopefully, public education campaigns will translate into

412 Tex. Code Crim. Proc. Ann. art. 37.071 (West 2023).

413 For more information, visit the Pregnancy Justice (formerly the National Advocates for Pregnant Women) website at https://www.pregnancyjusticeus.org/issues/abortion/?fireglass_rsn=true#fireglass_params&tabid=ac04ecda58930491&start_with_session_counter=2&application_server_address=mc6.prod.fire.glass or call (212) 255-9252. *What We Do*, PREGNANCY JUSTICE (2022), <https://www.nationaladvocatesforpregnantwomen.org/issues/abortion/>.

414 Tex. Code Crim. Proc. Ann. art. 37.071 (West 2023).

415 Tex. Code Crim. Proc. Ann. art. 37.071 (West 2023).

416 Of the 47% of adults surveyed who believed illegal abortion should be punished, 16% of men and 21% of Republicans believed that women should serve jail time for illegal abortions. *America's Abortion Quandary*, *supra* note 332.

417 *Id.*

leniency among jury members. In this situation, the alternative to a death sentence remains life imprisonment, making this another option.⁴¹⁸

C. Support Reproductive Justice Initiatives for Abortion and Healthcare Equality

Because capital abortion would disproportionately affect low-income Black and brown people, it is vital that action centers the voices of those most impacted. Developed in the 1990s, the reproductive justice movement expands the social justice framework around reproductive rights to center and encompass the lived experiences of queer, low-income, people of color and other historically marginalized groups.⁴¹⁹ The reproductive justice movement operates with the understanding that systems of healthcare and bodily autonomy are heavily impacted by the legacy of slavery and colonial genocide of Indigenous land.⁴²⁰ Reproductive justice organizations like SisterSong,⁴²¹ SisterReach,⁴²² Bold Futures,⁴²³ and the National Black Women's Reproductive Agenda⁴²⁴ focus on the right to have children, the right to not have children, and the right to nurture children in a safe and healthy environment.⁴²⁵ Consider the following initiatives:

Pass legal protections for out-of-state abortion travel. To prevent those who end their pregnancies from getting charged for capital abortion in Texas, legal pathways for out-of-state abortions need to continue and be expanded. Interstate travel to other states for abortion must remain legal. Support of national legislation such as HR 8297, the “Ensuring Women’s Right to Reproductive Freedom Act,” which was passed by the United States House of Representatives on July 15, 2022, would fuel this objective. Sponsored by Representative Lizzie

418 Tex. Code Crim. Proc. Ann. art. 37.071 (West 2023).

419 Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 222 (2018).

420 *Id.* at 224–32.

421 SISTERSONG, <https://www.sistersong.net/> (last visited Mar. 6, 2023).

422 SISTERREACH, <https://www.sisterreach-tn.org/> (last visited Mar. 6, 2023).

423 BOLD FUTURES, <https://www.boldfuturesnm.org/> (last visited Mar. 6, 2023).

424 *Reproductive Justice*, NAT. BLACK WOMEN'S REPROD. JUST. AGENDA (2022), <https://blackrj.org/our-issues/reproductive-justice/> (last visited Mar. 6, 2023).

425 *Reproductive Justice*, NAT. BLACK WOMEN'S REPROD. JUST. AGENDA (2022), <https://blackrj.org/our-issues/reproductive-justice/> (last visited Mar. 6, 2023); *see also* Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change (last visited Mar. 7, 2023) <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?IID=4051> (for more resources on reproductive justice).

Fletcher, a Houston Democrat,⁴²⁶ the bill prohibits any state law that prevents “any person’s ability to travel across a state line for the purpose of obtaining an abortion service.”⁴²⁷

Pass legal protections for abortions in neighboring states.⁴²⁸ Work must continue to keep abortion legal in the states that neighbor Texas. After *Dobbs*, abortion has been banned in the neighboring states of Oklahoma, Arkansas, and Louisiana, without any exceptions for rape or incest.⁴²⁹ Focus efforts on keeping abortion legal in neighboring states such as New Mexico, Colorado, and Kansas.⁴³⁰ A recent example of a victory took place on August 2, 2022, when Kansas organizers rallied voters to reject an amendment that would have banned abortion.⁴³¹

Improve accessibility to out-of-state abortions. Protecting the legal right to an interstate abortion is only the first step to making abortion conditions safer for those who are pregnant.⁴³² A reproductive justice framework also requires that out-of-state abortions be financially accessible to all community members.⁴³³ In addition, pregnant people face numerous logistical difficulties when seeking an abortion such as securing an appointment; missing work or school; finding childcare

426 H.R. 8297, 117th Cong. (2d Sess. 2022).

427 H.R. 8297, 117th Cong. (2d Sess. 2022).

428 See Simone Shah, *What Abortion Safe Haven States Can Do*, TIME MAG. (June 27, 2022) <https://time.com/6191581/abortion-safe-haven-states/>; Shia Kapos, *America’s Abortion Access Divide is Reshaping Blue-State Border Towns*, POLITICO (Jan. 11, 2023) <https://www.politico.com/news/2023/01/11/abortion-access-blue-state-border-towns-00077367>; Victoria Hsieh, *The Fight For Rights: Shifts in Reproductive Justice Organizing After Dobbs*, THE PRAXIS PROJECT (Sept. 20, 2021) <https://www.thepraxisproject.org/blog/2022/9/20/the-fight-for-rights-shifts-in-reproductive-justice-organizing-after-dobbs>.

429 *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (Aug. 6, 2022), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

430 *Id.*

431 Alice Miranda Ollstein, *Kansas Voters Block Effort to Strip Abortion Protections from State Constitution*, POLITICO (Aug. 2, 2022), <https://www.politico.com/news/2022/08/02/kansas-voters-block-effort-to-ban-abortion-in-state-constitutional-amendment-vote-00049442>.

432 See *supra* notes 420–422 and accompanying text.

433 See Marlene Fried and Susan Yanow, *Abortion Rights and Reproductive Justice*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE, BERKELEY LAW AT 12,13 (last visited Mar. 7, 2023), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fid=4051>; *Reproductive Justice*, NAT. BLACK WOMEN’S REPROD. JUST. AGENDA (2022), <https://blackrj.org/our-issues/reproductive-justice/> (last visited Mar. 6, 2023).

for a full day or more; lack of access to paid leave; and the cost of gas, flights, hotel stays, and food.⁴³⁴ It is important to focus efforts on gathering funds and other resources to distribute to those who need help accessing out-of-state abortions.

Improve pregnancy outcomes for those most impacted by health inequities. As mentioned earlier, Black women are three to four times more likely to experience a pregnancy-related death compared to white women.⁴³⁵ Black women experience more maternal health complications and are three times more likely than white women to have fibroids (which can cause postpartum hemorrhaging); are more likely to display signs of preeclampsia earlier in pregnancy; and experience complications due to chronic stress, socioeconomic disadvantage, and discrimination.⁴³⁶ Efforts are needed to improve pregnancy outcomes to ensure that those most impacted are not at risk of dying from their pregnancies.

To prevent the actualization of capital abortion in Texas, community members should engage in legislative action that carves out protections for abortion seekers, defends those criminalized by draconian abortion laws, and pushes to expand healthcare access for all. This work requires an intersectional approach to both abortion regulations and the criminal justice system.

CONCLUSION

With abortion no longer a federal constitutional right, laws protecting access to reproductive healthcare will be left primarily to the states. As the state with the highest number of executions and some of the most restrictive abortion laws in the nation,⁴³⁷ Texas offers a case study of how states may enforce their anti-abortion viewpoints. Texas blatantly compromises its principles of freedom to uphold its current religious, sexist, and racist views on abortion and the death penalty. In the aftermath of the *Dobbs* decision,⁴³⁸ Texas has the capacity to go even further and sentence people to death for an abortion. If the

434 Kari White et al., *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, TEX. POL'Y. EVALUATION PROJECT (Mar. 2022), <https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf>.

435 *Black Women's Maternal Health*, *supra* note 387.

436 *Id.*

437 *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §170A.002(a); 1925 Tex. Crim. Stat. 278.

438 *See Dobbs v. Jackson*, 142 S. Ct. 2228 (2022).

Texas legislature changes the definition of a “living child” to being alive from the “moment of fertilization” and eliminates abortion-related exemptions to homicide, a pregnant person may be liable for, or complicit in, capital murder if they end their pregnancy.

While Texas may prove to be an extreme example of what may happen to bodily autonomy without a federal protection for abortion, other states throughout the nation can also employ draconian enforcement of abortion bans. As of August 15, 2022, abortions are either banned or at severe risk of being limited or prohibited in twenty-six states and three territories.⁴³⁹ Twenty-seven states currently retain the death penalty.⁴⁴⁰ In addition to Texas, the states of Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and South Dakota both have abortion bans and uphold the death penalty.⁴⁴¹ Capital abortion has the potential to be replicated in eight other states outside of Texas.

Even if states do not consider abortion to be a capital offense, any expanded criminalization of abortions will be life-ruining for those who do not wish to be pregnant. Those who cannot afford to travel for an out-of-state abortion will need to either risk an illegal, in-state abortion or carry their pregnancy to term.⁴⁴² Not only are those who risk an illegal, in-state abortion vulnerable to criminal prosecution and incarceration, but they may also attempt to self-manage their abortion in a dangerous way due to lack of access to proper healthcare. Carrying a pregnancy to term may also lead to life-threatening pregnancy complications or result in a life of forced parenthood and patriarchy. Low-income Black, Indigenous, and other people of color will be most impacted by an escalation in abortion bans and the criminalization of abortion.

Lawmakers, medical providers, and community members must actively work at a state and local level to defend existing abortion protections and advocate for additional care for those who are pregnant. This work not only requires passing legislation that enumerates abortion rights (or, at the very least, prevents abortion bans from going any further), but also requires the adoption of a reproductive justice framework. Those most impacted by abortion bans and criminalization

439 *Tracking the States*, *supra* note 429; CTR. FOR REPRODUCTIVE RIGHTS, *What if Roe Fell* (2019), https://reproductiverights.org/wp-content/uploads/2021/12/USP-2019-WIRF-Report-Web_updated.pdf.

440 *State by State*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Aug. 15, 2022).

441 *Tracking the States*, *supra* note 429; *What if Roe Fell*, *supra* note 439; *State by State*, *supra* note 440.

442 *See* Grossman & Verma, *supra* note 320, at 1694.

must be prioritized when strategizing defenses. Reproductive justice and bodily autonomy cannot be achieved without the assurance of proper healthcare, childcare, education, and access to resources for all pregnant people.

