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## Death After Dobbs: Addressing the Viability of Capital Punishment for Abortion

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# DEATH AFTER *DOBBS*: ADDRESSING THE VIABILITY OF CAPITAL PUNISHMENT FOR ABORTION

MELANIE KALMANSON\*

Pre-*Dobbs* legislative efforts and states' reactions in the immediate aftermath of *Dobbs* indicate the post-*Dobbs* reality that deeply conservative states will seek to criminalize abortion and impose extremely harsh sentences for such crimes, up to and including death. This Article addresses that reality. Initially, this Article illustrates that abortion and capital punishment are like opposite sides of the same coin, and it is a handful of states leading the counter majoritarian efforts on both topics. After outlining the position of each state in the nation that retains capital punishment on capital sentencing and abortion, the Article identifies the most extreme states on both issues, referenced as "Punitive States."

Then, addressing the post-*Dobbs* reality that Punitive States could attempt to punish abortion by death, this Article shows that the current capital sentencing framework used across the country is incompatible with abortion offenses. The aggravating factors and mitigating circumstances, if applied to abortion offenses, would not serve their constitutional purposes. Therefore, this Article argues, capital sentences imposed under the current framework for abortion offenses would stand in violation of the Sixth and Eighth Amendments to the U.S. Constitution. Further, this Article argues that attempts to write abortion-specific capital sentencing procedures would prove to be acts in futility. Thus, the Article ultimately concludes that death is not a viable punishment for abortion.

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## INTRODUCTION

All eyes turned to abortion (again) in May 2022 after the unprecedented leak of the U.S. Supreme Court's draft majority opinion in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> Although the writing was on the wall that the Court would overturn *Roe v. Wade*,<sup>2</sup> the leaked opinion confirmed that the Court was poised to erase the constitutional right to access abortion.<sup>3</sup> When Chief Justice Roberts legitimized the leaked draft,<sup>4</sup> it became clear we were steamrolling toward a post-*Roe* world. States reacted immediately, positioning themselves for the inevitable.<sup>5</sup>

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1. *Read Justice Alito's initial draft abortion opinion which would overturn Roe v. Wade*, POLITICO (May 2, 2022), <http://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<http://perma.cc/5QLT-XF3F>].

2. Mary Ziegler, *The End of Roe Is Coming, and It Is Coming Soon*, N.Y. TIMES (Dec. 1, 2021), <http://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html> [<http://perma.cc/J5ZH-RXBC>]; see *Roe v. Wade*, 410 U.S. 113, 114 (1973).

3. POLITICO, *supra* note 1.

4. Press Release, SUP. CT. OF THE U.S. (May 3, 2022), [http://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-03-22](http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22) [<http://perma.cc/NH82-HYBR>].

5. Ayana Archie, *Governors swiftly react to reports of leaked draft opinion of Roe v. Wade*, NPR (May 4, 2022, 3:07 AM), <http://www.npr.org/2022/05/03/1096062374/roe-v-wade-leak-opinion-abortion-supreme-court-states-rights-governor-document> [<http://perma.cc/TAF6-9JVU>] (summarizing governors' reactions to the leaked opinion).

Indeed, on June 24, 2022, the Court issued its decision in *Dobbs*, overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—the Court’s landmark decisions that established constitutional protections for the right to abortion.<sup>6</sup> Again, states reacted immediately.<sup>7</sup> Since the U.S. Supreme Court decided *Dobbs*, women’s rights have been caught in a whirlwind of change and polarization.

Undoubtedly and justifiably, *Dobbs* will be the impetus to scholarship on a variety of topics. As part of the post-*Dobbs* discussion, this Article addresses the reality that extreme conservative states, especially with the current U.S. Supreme Court,<sup>8</sup> now have a green light to criminalize abortion and impose harsh sentences for such crimes. Even before *Dobbs*, states experimented with legislation imposing harsh penalties for abortion.<sup>9</sup> Some states went so far as to attempt to punish abortion as homicide, which is punishable by death in those states.<sup>10</sup>

After *Dobbs*, women’s rights are left to the states, and the pro-life movement maintains the belief that abortion is, in essence, murder.<sup>11</sup> Indeed, the parallel between abortion and intentional murder, or

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6. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992). The Court’s final opinion in *Dobbs* was “largely undifferentiated from the leaked version.” Erin Spencer Sairam, *How The Supreme Court’s Ruling On Dobbs Compares To The Leaked Draft*, FORBES (June 24, 2022), <http://www.forbes.com/sites/erinspencer1/2022/06/24/how-the-supreme-courts-ruling-on-dobbs-compares-to-the-leaked-draft/?sh=562001746ff5> [http://perma.cc/8LSF-58CK].

7. See, e.g., Robert Barnes & Ann E. Marimow, *Supreme Court ruling leaves states free to outlaw abortion*, WASH. POST (June 24, 2022, 7:10 PM), <http://www.washingtonpost.com/politics/2022/06/24/supreme-court-ruling-abortion-dobbs> [http://perma.cc/W2G6-LQSQ]; *id.* (“Republican officials in some states moved quickly to sign orders implementing the bans immediately, while the Democratic governor of Illinois announced a special legislative session to ensure abortion access.”); *Here’s where abortions will likely be banned or strictly limited post Roe*, CA. PUB. RADIO (June 24, 2022), <http://www.cpradio.org/articles/2022/06/24/heres-where-abortions-will-likely-be-banned-or-strictly-limited-post-roe> [http://perma.cc/Y2UM-DQHP] (“Twenty-two states have laws in place that will immediately ban abortions or pave the way to ban or severely restrict access to them, following the Supreme Court’s historic decision Friday to overturn *Roe v. Wade*. . . . Several additional states appear likely to enact new restrictions.”) (italics added).

8. See Nina Totenberg, *The Supreme Court is at its most conservative now from the last 75 years*, NPR (June 25, 2022, 8:01 AM), <http://www.npr.org/2022/06/25/1107628715/the-supreme-court-is-at-its-most-conservative-now-from-the-last-75-years> [http://perma.cc/Z2KL-ZY53].

9. See, e.g., H.B. 3326 (Tex. 2021).

10. *Id.*

11. See, e.g., *Why overturning Roe isn’t the final goal of the anti-abortion movement*, NPR (June 23, 2022, 1:45 PM) [hereinafter *Ziegler NPR Interview*], <http://www.npr.org/2022/06/23/1106922050/why-overturning-roe-isnt-the-final-goal-of-the-anti-abortion-movement> [http://perma.cc/75CP-Y4L8] (“That means that it is far easier to punish pregnant people who live in conservative states than it is to target anyone else.”).

homicide, is explicit in Justice Alito's majority decision in *Dobbs*.<sup>12</sup> Justice Alito even says that "[t]here is ample evidence that the passage of" pre-*Roe* laws criminalizing abortion was "spurred by a sincere belief that abortion kills a human being."<sup>13</sup>

In the wake of *Dobbs*, despite polls suggesting "that Americans do not want abortion to be criminalized,"<sup>14</sup> far-right groups will push to criminalize abortion and implement extreme punishments for such crimes.<sup>15</sup> Addressing that reality, this Article argues that the current capital sentencing framework, if applied to abortion, would result in sentences that violate the Sixth and Eighth Amendments to the U.S. Constitution. Part I reviews past efforts to criminalize abortion, both before and after *Dobbs*, showing that the ever-changing legislative landscape after *Dobbs* indicates there may be an increased appetite to punish women who have an abortion—in addition to medical professionals who perform the procedures. Part II explores the similarities between abortion and capital punishment, illustrating how a handful of states lead the counter majoritarian efforts on both topics. Ultimately, Part II shows that capital punishment and abortion are like opposite sides of the same coin.

Drawing on the similarities between the two and the extreme positions taken by the handful of states that lead the efforts on both fronts, Part III addresses the post-*Dobbs* reality that Punitive States (as that term is defined herein) could attempt to punish abortion by death, concluding that the current capital sentencing framework is incompatible with abortion. As a result, Part IV explores how states could attempt to write a constitutional, abortion-specific capital sentencing procedure, ultimately determining it is impossible. Thus, the Article concludes that capital sentencing is not a viable punishment for abortion offenses, to the extent states want to criminalize either the performance or receipt of an abortion as murder.

## I. REVIEWING EFFORTS TO CRIMINALIZE ABORTION

As Justice Alito's majority decision in *Dobbs* explains, at common law, "abortion was a crime at least after 'quickening'—*i.e.*, the first

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12. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, slip op. at 16–19, 26 (2022).

13. *Id.* at 29.

14. Rachel Rebouché & Mary Ziegler, *There's No Knowing What Will Happen When Roe Falls*, THE ATLANTIC (Apr. 25, 2022), <http://www.theatlantic.com/ideas/archive/2022/04/abortion-access-states-scotus-roe-casey-reverse/629579> [http://perma.cc/A7DT-LZ4P].

15. *Id.*; Ziegler NPR Interview, *supra* note 11 ("We may see efforts to punish pregnant people directly."); Mary Ziegler, *Will Americans go to prison for seeking abortions?*, THE GLOBE & MAIL (July 3, 2022), <http://www.theglobeandmail.com/opinion/article-will-americans-go-to-prison-for-seeking-abortions> [http://perma.cc/3FGB-GNBB] ("[S]tates are seriously considering the idea of punishing women.").

felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.”<sup>16</sup> The criminalization of abortion dates back to the thirteenth century when post-quickening abortion was considered homicide.<sup>17</sup> Even pre-quickening abortions “could rise to the level of a homicide” in certain situations.<sup>18</sup>

Although the quickening rule was abandoned in the nineteenth century,<sup>19</sup> criminalization of abortion continued.<sup>20</sup> Before *Roe*, “most American states criminalized abortion early as well as late in pregnancy, and some authorized the prosecution of patients as accomplices in their doctors’ crime.”<sup>21</sup>

In the decades following *Roe*, conservatives have played with the boundaries of the U.S. Supreme Court’s precedent regarding the right to access to abortion.<sup>22</sup> By no means does this Part attempt to give a comprehensive report on such legislation. Rather, this Part first gives a brief overview of the legislative efforts that occurred between *Roe* and *Dobbs*, focusing on the criminalization of abortion.<sup>23</sup> Then, Section B gives a brief overview of the legislative landscape after *Dobbs*, which is further explored in Part II.

#### A. Pre-Dobbs Legislation

Although allowed by the laws, anti-abortion activists maintained that they do not want to punish women—only the providers who perform the abortions.<sup>24</sup> As a result, “prosecutors rarely targeted women, painting them as innocent victims of brutish seducers and dishonest doctors. Women were forced to testify and were publicly shamed but rarely sent to prison themselves.”<sup>25</sup>

16. *Dobbs*, 597 U.S. \_\_\_, slip op. at 16 (2022) (emphasis in original).

17. *Id.* at 17 (2022). This continued through the 17th century. *Id.*

18. *Id.* at 18–19.

19. *Id.* at 22 (stating the quickening rule was abandoned in the 19th century).

20. *Id.* at 18–23 (explaining the history of criminalization of abortion).

21. Ziegler, *supra* note 15; see *Dobbs*, slip op. at 20–24.

22. *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court> [<http://perma.cc/4NSP-MN4X>] (last visited Apr. 13, 2023).

23. For a more thorough understanding of pre-*Roe* legislative efforts, see the work of Mary Ziegler. See, e.g., MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

24. Ziegler, *supra* note 15; see Jean Rosenbluth, *Abortion as Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. CALIF. L. REV. 1237, 1245 (1993).

25. Ziegler, *supra* note 15; accord Rosenbluth, *supra* note 24, at 1245.

Then *Roe* was decided, which slowed down the criminalization of abortion.<sup>26</sup> However, it “did not mean that pregnant people were always protected from criminal prosecution. In the 1980s and 1990s . . . prosecutors punished people for their conduct during pregnancy.”<sup>27</sup> Rather than abortion, prosecutors used “laws on everything from ‘feticide’ to child abuse” to prosecute women’s behavior while pregnant.<sup>28</sup>

Since *Roe*, conservatives have pushed the boundaries of *Roe* and *Casey*, enacting laws that incrementally placed higher burdens on women seeking abortions and medical professionals providing abortions.<sup>29</sup> Their goal: to force litigation surrounding these laws and for the U.S. Supreme Court to grant certiorari and, ultimately, overturn *Roe*.<sup>30</sup>

For example, the Texas Legislature passed HB2 in July 2013, which required, *inter alia*, (a) abortion providers to “have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced,”<sup>31</sup> and (b) abortion facilities to comply with the same “minimum standards” as those adopted “for ambulatory surgical centers.”<sup>32</sup> The effects of HB2 on women’s right to abortion in the State of Texas were drastic.<sup>33</sup> In 2016, in a 5–3 decision in *Whole Woman’s Health v. Hellerstedt*, the Court struck HB2 as unconstitutional under *Casey*, finding that each provision “place[d] a substantial obstacle in the path of women seeking a[n] . . . abortion” and “constitute[d] an undue burden on abortion access” and, therefore, “each violate[d] the Federal Constitution.”<sup>34</sup>

In 2019, Alabama enacted the Alabama Human Life Protection Act, which banned abortion “at any stage of development” without an exception for rape or incest.<sup>35</sup> The Act, which followed a 2018

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26. Ziegler, *supra* note 15.

27. *Id.*

28. *Id.*; accord Rosenbluth, *supra* note 24, at 1258–61.

29. AM. CIV. LIBERTIES UNION, *supra* note 22.

30. See, e.g., Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), <http://www.nytimes.com/2022/03/11/us/texas-abortion-law.html> [<http://perma.cc/5PE5-4VQX>].

31. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 2310 (2016) (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West Cum. Supp. 2015)).

32. *Id.* at 2300 (quoting TEX. HEALTH & SAFETY CODE ANN. § 245.010(a)).

33. See *id.* at 2301–02 (explaining the evidence that was produced in the underlying case regarding the effect of HB2).

34. *Id.* at 2300.

35. JON O. SHIMABUKURO, CONG. RSCH. SERV., FETAL VIABILITY AND THE ALABAMA HUMAN LIFE PROTECTION ACT (2019), <http://crsreports.congress.gov/product/pdf/LSB/LSB10299> [<http://perma.cc/38MC-Q46Z>].

state constitutional amendment foreclosing any right to abortion,<sup>36</sup> also imposed harsh criminal penalties for those who perform abortions.<sup>37</sup> Signing the law into effect, Governor Kay of Alabama recognized that the law was likely unconstitutional under *Roe* but explicitly stated it was time for the Court to overturn *Roe*.<sup>38</sup>

Before *Dobbs*, states also experimented with criminalizing abortion and implementing harsh penalties for either seeking and/or performing an abortion.<sup>39</sup> Several states have proposed legislation making abortion punishable as a homicide—which is consistent with the anti-abortion movement’s narrative that abortion is murder and the movement’s end goal of establishing personhood for fetuses.<sup>40</sup> For example, in 2017, a Texas legislator proposed a law that would subject women who received abortions and health professionals who performed abortions to criminal charges as extreme as assault and homicide,<sup>41</sup> with homicide being punishable by death. Similar laws were again proposed in Texas in 2019 and 2021.<sup>42</sup>

In 2019, Georgia actually passed a law that opened the door to punishing abortion as homicide by granting personhood to fetuses.<sup>43</sup> Other death penalty states like Idaho and Louisiana also proposed similar laws before *Dobbs*.<sup>44</sup>

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36. ALA. CONST. art. I, § 36.06.

37. ALA. CODE § 26-23H-4 (2019).

38. *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, OFF. OF ALA. GOVERNOR KAY IVEY (May 15, 2019), <http://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act> [<http://perma.cc/UX9L-VSJK>].

39. *A Recent History of Restrictive Abortion Laws in Texas*, AM. CIV. LIBERTIES UNION OF TEXAS, <http://www.aclutx.org/en/recent-history-restrictive-abortion-laws-texas> [<http://perma.cc/W4MC-7DL8>] (last visited Apr. 13, 2023).

40. See Rosenbluth, *supra* note 24, at 1245–47; Ziegler *NPR Interview*, *supra* note 11.

41. H.B. 948 (Tex. 2017). Laws like this deviate from history insofar as, historically, pro-life laws have avoided punishing the woman who receives the abortion. See Rosenbluth, *supra* note 24, at 1245–46.

42. H.B. 3326 (Tex. 2021); H.B. 8961 (Tex. 2019).

43. See Vanessa Romo, *Georgia’s Governor Signs ‘Fetal Heartbeat’ Abortion Law*, NPR (May 7, 2019, 11:41 AM), <http://www.npr.org/2019/05/07/721028329/georgias-governor-signs-fetal-heartbeat-law> [<http://perma.cc/V4TT-R36T>]; Mark Joseph Stern, *Georgia Just Criminalized Abortion. Women Who Terminate Their Pregnancies Would Receive Life in Prison.*, SLATE (May 7, 2019, 2:03 PM), <http://slate.com/news-and-politics/2019/05/hb-481-georgia-law-criminalizes-abortion-subjects-women-to-life-in-prison.html> [<http://perma.cc/2S7W-4SYT>] (“Once it takes effect, a woman who self-terminates will have, as a matter of law, killed a human—thereby committing murder. The penalty for that crime in Georgia is life imprisonment or capital punishment. . . . It is entirely possible that Georgia prosecutors armed with this new statute will bring charges against women . . .”).

44. H.B. 460 (Idaho 2022); see Kevin McGill, ASSOCIATED PRESS, *Louisiana debates bill that would charge women with murder for getting an abortion*, FORTUNE (May 12, 2022, 12:51 PM), <http://fortune.com/2022/05/12/louisiana-abortion-bill-murder-charges-women> [<http://perma.cc/MF2H-MUUI>].



### B. Post-Dobbs Abortion Legislation

After *Dobbs*, women's right to abortion is at the mercy of each state.<sup>45</sup> And, it began changing rapidly across the country the moment the Court released its decision.

When *Dobbs* was released, thirteen states had "trigger laws," or laws that would restrict the right to abortion if and when the U.S. Supreme Court overturned *Roe* and *Casey*, that were automatically activated.<sup>46</sup> "Trigger laws in three states—Kentucky, Louisiana and South Dakota—[were] set to take effect immediately, according to Guttmacher research. All three outright ban abortion, except [where] the mother's life is in danger."<sup>47</sup> In three other states [Idaho, Tennessee, and Texas], abortion bans [were set to] automatically go into effect in 30 days."<sup>48</sup> For the remaining seven states (Arkansas, Mississippi, Missouri, North Dakota, Oklahoma, Utah, and Wyoming), "a state official—like a governor, attorney general or legislative official—[had to] certify or approve the trigger law before it [could] go into effect."<sup>49</sup> In several of those states, the trigger law was certified almost immediately.<sup>50</sup>

Other states had antiquated pre-*Roe* laws that were still on the books and were suddenly revived. For example, in Michigan, the State's "1931 law banning abortion without exceptions for rape or incest" took effect following the decision.<sup>51</sup> The law also "criminaliz[es]

45. *E.g.*, Associated Press, *Report: A leaked draft opinion suggests the Supreme Court will overturn Roe v. Wade*, NPR (May 2, 2022, 9:59 AM), <http://www.npr.org/2022/05/02/1096053620/supreme-court-ro-wade-leaked-draft-opinion-politico> [http://perma.cc/KNL8-BAZF] ("The draft opinion in effect states there is no Constitutional right to abortion services and would allow individual states to more heavily regulate or outright ban the procedure.").

46. Nigel Chiwaya, *Map: These 'trigger law' states would ban abortion only if Roe is overturned*, NBC (June 24, 2022, 10:36 AM), <http://www.nbcnews.com/data-graphics/map-trigger-law-states-ban-abortion-only-ro-wade-overturned-rcna27119> [http://perma.cc/U73Q-YBQK].

47. CA. PUB. RADIO, *supra* note 7; see Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. (Aug. 24, 2022), <http://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [http://perma.cc/9JA4-BLHD].

48. *Id.*; see Gov. Bill Lee Statement on *Dobbs* Ruling, TENNESSEE OFF. OF THE GOVERNOR (June 24, 2022, 10:57 AM), <http://www.tn.gov/governor/news/2022/6/24/gov--bill-lee-statement-on-dobbs-ruling.html> [http://perma.cc/NQ9A-TWTT] (discussing Tennessee's trigger law).

49. CA. PUB. RADIO, *supra* note 7.

50. Jimenez, *supra* note 47 ("Mississippi, Arkansas, Oklahoma, Missouri, and South Dakota are now enforcing trigger bans that prohibit abortion in most circumstances, though some exceptions remain.").

51. Whitmer Statement on Ruling in *Dobbs v Jackson*, STATE OF MICH. (June 24, 2022), <http://www.michigan.gov/whitmer/news/press-releases/2022/06/24/whitmer-statement-on-ruling-in-dobbs-v-jackson> [http://perma.cc/AHY7-8KQ6].

doctors and nurses who provide reproductive care.”<sup>52</sup> In a statement after the release of *Dobbs*, Governor Whitmer reported that “a Michigan court ha[d] put a temporary hold on the law” but noted that the decision was “not final and ha[d] already been challenged.”<sup>53</sup> Governor Whitmer also reported that “[s]ome legislators” had proposed “a 10-year prison sentence for abortion providers and a 20-year sentence for anyone manufacturing, selling or distributing birth control medication.”<sup>54</sup>

For states without laws already on the books, legislation was quickly presented.<sup>55</sup> The Brennan Center for Justice reported in August 2022 that “over 100 bills restricting access to abortion ha[d] been introduced in 2022 alone.”<sup>56</sup> Consistent with the goals of the pro-life movement, legislative efforts after *Dobbs* in “Republican-led states” grant personhood to fetuses and “aim to grant all rights to pre-born children.”<sup>57</sup> States began passing and/or reviving these laws immediately after *Dobbs* (as discussed in more detail in Section II.B *infra*)—as some forecasted before the decision.<sup>58</sup>

At the other end of the spectrum, when *Dobbs* was decided, sixteen states and the District of Columbia already had policies in place guaranteeing abortion rights.<sup>59</sup> More progressive states are also taking affirmative action to protect access to abortion, including “passing laws shielding their doctors from prosecution for performing abortions on patients from out of state” and executive orders with similar measures.<sup>60</sup>

On both sides, legislative action in reaction to *Dobbs* has swept the country.<sup>61</sup> As to when or where laws will be enacted in reaction

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52. *Id.*

53. *Id.*

54. *Id.*

55. *E.g.*, Associated Press, *Noem Plans Special Session After Abortion Ban Triggered*, U.S. NEWS & WORLD REP. (June 24, 2022, 3:15 PM), <http://www.usnews.com/news/best-states/south-dakota/articles/2022-06-24/noem-plans-special-session-after-abortion-ban-triggered> [http://perma.cc/99AY-BLLB].

56. Jimenez, *supra* note 47.

57. Bob Christie, *Arizona says “personhood” abortion law can’t lead to charges*, ASSOCIATED PRESS (July 8, 2022), <http://apnews.com/article/abortion-us-supreme-court-health-child-abuse-arizona-attorney-generals-office-5e7ecd8251fe7ee7e78ca7b2b0ea2501> [http://perma.cc/8RUL-URNB]; accord Ziegler *NPR Interview*, *supra* note 11.

58. *See, e.g.*, *After Roe Fell: Abortion Laws by State*, CTR. FOR REPRODUCTIVE RTS. [hereinafter CTR. FOR REPRODUCTIVE RTS. (*After Roe Fell*)], <http://reproductiverights.org/maps/abortion-laws-by-state> [http://perma.cc/DDN8-RP28] (last visited Apr. 13, 2023) (forecasting that up to “[h]alf of U.S. states [would] . . . ban abortion in the days and weeks” following *Dobbs*).

59. Rebouché & Ziegler, *supra* note 14; CA. PUB. RADIO, *supra* note 7.

60. Ziegler, *supra* note 15; accord *see, e.g.*, *infra* notes 234–35 and accompanying text.

61. *See, e.g.*, CA. PUB. RADIO, *supra* note 7 (“Several additional states appear likely to enact new restrictions.”).

to *Dobbs*, “[n]othing is predetermined, and each state will be different, responding to the particular politics and pressures of their populations.”<sup>62</sup>

The bottom line is that, after *Dobbs*, states “have almost unlimited discretion to criminalize abortion,”<sup>63</sup> and the pre-*Roe* and pre-*Dobbs* hesitation to prosecute women who receive abortions (as opposed to just their doctors) appears to be waning.<sup>64</sup> While “[m]ost of the big anti-abortion groups” and “red states” have acted consistent with their statements that they do not intend to punish women, a group of abortion abolitionists has “written kind of model bills . . . in a variety of states that would punish women.”<sup>65</sup> Professor Mary Ziegler, one of the country’s leading legal historians on *Roe* and abortion generally, says those “who want to punish women have greater influence in the movement than they have in decades.”<sup>66</sup> More broadly, it is almost certain that criminalization of abortion will increase.<sup>67</sup> Professor Ziegler explains that this is due to “a more punitive, extreme wing of the [anti-abortion] movement . . . growing.”<sup>68</sup>

## II. COMPARING ABORTION AND CAPITAL PUNISHMENT

Putting abortion and the death penalty in the same sentence creates an eerie juxtaposition of life and death. Unfortunately, a post-*Dobbs* world is one in which abortion providers and patients could be subject to criminal punishments as harsh as the death penalty—as pre-*Dobbs* legislative efforts foreshadowed.

At first blush, abortion and the death penalty could not be any more different. On one hand, abortion addresses a woman’s choice to terminate a pregnancy—before the unborn enters the world. The conservative position seeks to require women to carry pregnancies to term to preserve life, which they conceptualize as beginning at conception.<sup>69</sup> On the other hand, the death penalty involves the

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62. Rebouché & Ziegler, *supra* note 14.

63. Ziegler, *supra* note 15; see Christie, *supra* note 57.

64. See Ziegler, *supra* note 15 (“[S]tates are seriously considering the idea of punishing women.”). In Rosenbluth, *supra* note 24, now-Judge Rosenbluth of the U.S. District Court for the Central District of California argued that the pro-choice movement should force the pro-life movement to address the discrepancy between criminalizing providers and not criminalizing women because doing so would essentially force the pro-life movement to move away from criminalizing abortion at all. See *id.*

65. Ziegler NPR Interview, *supra* note 11.

66. *Id.*

67. *Id.*

68. Ziegler, *supra* note 15 (“[T]he kind of criminal dragnet” of who is subject to punishment for abortion “is going to be broader than just doctors.”).

69. Rosenbluth, *supra* note 24, at 1247; see, e.g., Debra Cassens Weiss, *10-year-old-girl*

state affirmatively seeking to end a life, which conservatives also support.<sup>70</sup>

Conservatives' anti-abortion and pro-death penalty positions seem difficult to reconcile because of the stark contrast between the treatment of life. With the former, there is an unwavering protection of an unborn life even where it might force unconscionable results or cost another life.<sup>71</sup> With the latter, there is support for the state's intentional taking of life.

One academic writing argues that punishment is the constant thread between the two views—the “desire to see criminals punished, combined with a literalist orientation toward the Bible.”<sup>72</sup> This theory makes sense. On the death penalty, this theory is consistent with the reaction states like Texas had after the U.S. Supreme Court abolished the death penalty in *Furman v. Georgia*,<sup>73</sup> where it was felt that the Court “robb[ed] Americans of the ability to fight crime.”<sup>74</sup> On abortion, this theory is consistent with Gallup poll findings that “the depth of one’s religious beliefs . . . is what drives attitudes on abortion.”<sup>75</sup> It is also consistent with the National Right to Life Mission Statement, which distinguishes between innocent life and something else: “The mission of National Right to Life is to

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*should have carried pregnancy to term, says lawyer who drafted model anti-abortion law*, AM. BAR ASS’N J. (July 14, 2022, 2:50 PM), <http://www.abajournal.com/news/article/lawyer-who-drafted-model-anti-abortion-law-says-10-year-old-girl-should-have-carried-pregnancy-to-term> [<http://perma.cc/WC9N-RZCP>].

70. PEW RSCH. CTR., MOST AMERICANS FAVOR THE DEATH PENALTY DESPITE CONCERNS ABOUT ITS ADMINISTRATION (June 2, 2021), [http://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/pp\\_2021-06-02\\_death-penalty\\_00-04](http://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/pp_2021-06-02_death-penalty_00-04) [<http://perma.cc/E3H4-3NBH>]; see 2021 Gallup Poll: Public Support for Capital Punishment Remains at Half-Century Low, DEATH PENALTY INFO. CTR. (Nov. 19, 2021) [hereinafter DEATH PENALTY INFO. CTR. (2021 Gallup Poll)], <http://deathpenaltyinfo.org/news/2021-gallup-poll-public-support-for-capital-punishment-remains-at-half-century-low> [<http://perma.cc/R98T-KUF3>]; Joseph Carroll, *Who Supports the Death Penalty?*, GALLUP (Nov. 16, 2004), <http://news.gallup.com/poll/14050/who-supports-death-penalty.aspx> [<http://perma.cc/T6V5-JZSG>]. But see, e.g., Carol S. Steiker & Jordan M. Steiker, *Abolishing the American Death Penalty: The Court of Public Opinion Versus The U.S. Supreme Court*, 41 VAL. U. L. REV. 579, 580 (2017) (discussing that even conservative groups “have voiced their opposition to capital punishment” in recent years).

71. E.g., Weiss, *supra* note 69.

72. Filip M. Wiecko & Jacinta M. Gau, *Every life is sacred . . . kind of: Uncovering the sources of seemingly contradictory public attitudes toward abortion and the death penalty*, 45 SOC. SCI. J. 546 (2008).

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

74. MAURICE CHAMMAH, LET THE LORD SORT THEM: THE RISE AND FALL OF THE DEATH PENALTY 27 (2021).

75. Lydia Saad, *Public Opinion About Abortion—An In-Depth Review*, GALLUP (Jan. 22, 2002), <http://news.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx> [<http://perma.cc/A5EM-8XHZ>].

protect and defend the most fundamental right of humankind, the right to life of every *innocent* human being from the beginning of life to natural death.”<sup>76</sup> And this theory makes sense in that both positions empower the state to dictate which life is worthy of more protection and institute punishment for taking the former—(1) between the fetus and the mother, the fetus, and (2) between the victim and the inmate, the victim.<sup>77</sup>

Indeed, as this Part shows, a look beneath the surface reveals that abortion and the death penalty are more similar than meets the eye. Section A discusses similarities between the two on a macro level. Section B illustrates how it is the same handful of states that drive the anti-abortion movement as those that rigorously continue enforcing the death penalty, despite public support and national, even international, trends moving in the opposite direction on both fronts.

#### *A. Similarities Between Abortion and the Death Penalty*

Both abortion and the death penalty have been topics of legal and political discourse for over a century.<sup>78</sup> Modern discourse on both topics is generally conceptualized around two landmark rulings issued less than a year apart—*Furman v. Georgia* on June 29, 1972, and *Roe v. Wade* on January 22, 1973.

In *Furman*, the U.S. Supreme Court held that the way the death penalty had been imposed across the United States up until that point was so arbitrary that it violated the Eighth Amendment to the U.S. Constitution.<sup>79</sup> *Furman* essentially hit the “reset” button on capital punishment in the United States and created a baseline

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76. *National Right to Life Mission Statement*, NAT’L RIGHT TO LIFE CTR., <http://www.nrlc.org/about/mission> [<http://perma.cc/ETR2-8ELF>] (last visited Apr. 13, 2023) (emphasis added).

77. See Rosenbluth, *supra* note 24, at 1251–52 (addressing and disputing the inconsistencies in the pro-life movements parallel between life and death).

78. See, e.g., CHAMMAH, *supra* note 74, at 24 (stating that *Furman v. Georgia* was the “culmination of a long decline” in capital punishment in the United States); *id.* (“Since the 1800s, a number of states has been removing capital punishment from their laws or limiting it to rare crimes.”); DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 10–11 (2010); ZIEGLER, *supra* note 23, at 2–10 (outlining the history that led to the U.S. Supreme Court’s decision in *Roe* and the discourse throughout history); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, slip op. at 33 (2022).

79. See, e.g., GARLAND, *supra* note 78, at 12; *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). For more discussion on history surrounding *Furman*, see CHAMMAH, *supra* note 74, at 24–26. For discussion on the individual decisions in *Furman*, see, for example, Tyler Ash, *Can All Murders Be “Aggravated?” A Look at Aggravating Factor Capital-Eligibility Schemes*, 63 ST. LOUIS U. L.J. 641, 642–43 (2019).

for modern capital sentencing.<sup>80</sup> After *Furman*, each state that opted to reinstitute capital punishment had to codify individual considerations bearing on the defendant and the nature of the crime to avoid constitutional infirmities.

And, of course, in *Roe*, the Court held that the right to privacy in the Fourteenth Amendment to the U.S. Constitution protects the right to abortion.<sup>81</sup> Until *Dobbs* almost fifty years later, *Roe* served as the foundation for the constitutional right to abortion.

Since *Roe* and *Furman* ushered in modern abortion and capital punishment, both institutions have developed similarly. On both topics, the United States is an outlier, and extreme conservatives within the country lead the efforts on implementing policies that go against public opinion and international trends.<sup>82</sup>

The Court's opinion in *Dobbs* makes the United States one of only four countries to "have rolled back abortion rights . . . since 1994" and the only one in the West to do so.<sup>83</sup> "[A]round the world, it has been much more common to expand access than restrict it."<sup>84</sup> While "the legal status of abortion varies considerably by region, a large majority of countries permit abortion under at least some circumstances."<sup>85</sup> After *Dobbs*, states banning abortion join only "two dozen countries" that outlaw abortion, none of which are part of the West.<sup>86</sup>

Similarly, the United States is the only Western nation to retain the death penalty.<sup>87</sup> "More than 70% of the world's countries

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80. See, e.g., Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, 5 U. PA. J.L. & PUB. AFFAIRS 1, 13 n.55 (2020). See, e.g., Ash, *supra* note 79, at 642 (discussing how *Furman* instituted the current aggravating factor scheme but arguing that today's scheme does not meet the requirements of *Furman*).

81. See *Roe v. Wade*, 410 U.S. 113, 172 (1973).

82. Claire Cain Miller & Margot Sanger-Katz, *On Abortion Law, the U.S. Is Unusual. Without Roe, It Would Be, Too.*, N.Y. TIMES (May 4, 2022), <http://www.nytimes.com/2022/01/22/upshot/abortion-us-roe-global.html> [<http://perma.cc/NH3J-DUAW>].

83. *Id.*

84. *Id.*

85. Women & Foreign Policy Program Staff, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (June 24, 2022, 4:00 PM), <http://www.cfr.org/article/abortion-law-global-comparisons> [<http://perma.cc/6GS2-JRSL>].

86. *Id.*

87. *International*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*International*)], <http://deathpenaltyinfo.org/policy-issues/international> [<http://perma.cc/FNT8-7XBL>] (last visited Apr. 13, 2023) (The United States "remains an outlier among its close allies and other democracies in its continued application of the death penalty."); *Cornell Center on the Death Penalty Worldwide*, CORNELL L. SCH., <http://deathpenaltyworldwide.org> [<http://perma.cc/N68E-BSVU>] (last visited Apr. 13, 2023) (listing China as a retentionist country); see GARLAND, *supra* note 78, at 13 ("The American death penalty is . . . [a] peculiar [institution] insofar as it is the only capital punishment system still in use in the West").

have abolished capital punishment in law or practice.”<sup>88</sup> The countries that do retain the death penalty are generally those “with large populations and . . . authoritarian rule,” such as China.<sup>89</sup>

In the United States, both abortion and the death penalty have roots in racial disparity.<sup>90</sup> Politically, the abortion debate has been engrossed in racial politics since before *Roe*.<sup>91</sup> Practically, abortion restrictions disproportionately affect poor, non-white women.<sup>92</sup>

Likewise, as with mass incarceration and other criminal justice issues in America,<sup>93</sup> capital punishment affects Blacks disproportionately more than whites, especially where the victim is white.<sup>94</sup> This has been true since before *Furman*.<sup>95</sup> Indeed, the practice can be traced back to lynching.<sup>96</sup>

Another similarity between the two is how public opinion in the United States has developed over the years—both in the direction of the emerging consensus among developed nations to allow abortion and abolish the death penalty.<sup>97</sup> Indeed, this trend started even

88. DEATH PENALTY INFO. CTR. (*International*), *supra* note 87.

89. *Id.*; see CORNELL L. SCH., *supra* note 87.

90. *Infra* note 92; *infra* note 93.

91. See ZIEGLER, *supra* note 23, at 97–99 (discussing racial tension in the abortion debate before *Roe*, in the crosshairs of the civil rights movement and population control efforts).

92. See, e.g., Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER INST. (Aug. 6, 2008), <http://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture> [<http://perma.cc/2UFB-RN99>].

93. For discussion on racial issues in the American criminal justice system, especially mass incarceration, see, for example, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2020).

94. See, e.g., CHAMMAH, *supra* note 74, at 26; GARLAND, *supra* note 78, at 12; *Glossip v. Gross*, 576 U.S. 863, 918 (2015) (Breyer, J., dissenting) (“Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*. Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty.”) (emphases in original).

95. See, e.g., CHAMMAH, *supra* note 74, at 26; *Furman v. Georgia*, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring); *id.* at 445–46 (Powell, J., dissenting).

96. See, e.g., GARLAND, *supra* note 78, at 12.

97. Megan Brennan, *Steady 58% of Americans Do Not Want Roe v. Wade Overturned*, GALLUP (June 2, 2022), <http://news.gallup.com/poll/393275/steady-americans-not-roe-wade-overturned.aspx> [<http://perma.cc/X5XP-9RLP>] (reporting just before *Dobbs* that “Americans remain largely opposed to overturning *Roe v. Wade*, as a steady 58% majority believe that the landmark 1973 Supreme Court ruling that recognized abortion as a constitutional right should stand, while 35% want it to be reversed”); Saad, *supra* note 75 (“For the next 15 years, from 1975 through 1990, Gallup recorded a gradual shift toward the more liberal position, with the percentage supporting abortion in all cases increasing to 31% and the percentage thinking it should be illegal in all cases dropping to 12%.”); *Death Penalty*, GALLUP [hereinafter GALLUP (*Death Penalty*)], <http://news.gallup.com/poll/1606/death-penalty.aspx> [<http://perma.cc/R5E5-LY9L>] (last visited Apr. 13, 2023); DEATH PENALTY INFO. CTR. (2021 Gallup Poll), *supra* note 70; *Public Opinion on*

before *Roe* and *Furman*.<sup>98</sup> Put differently, public support for abortion has increased while public support for the death penalty has decreased.<sup>99</sup>

Yet, as conservatives gain momentum—especially with support from the U.S. Supreme Court—the United States (or at least parts of it) continues to move against public opinion on both fronts.<sup>100</sup> This is demonstrated not only by the policies implemented in the handful of states that lead these efforts,<sup>101</sup> but also by the U.S. Supreme Court’s counter-majoritarian rulings. *Dobbs*, of course, is the most obvious and recent example in the abortion context. The same is true in the death penalty context, as illustrated by the Court’s May 2022 decision in *Shinn v. Ramirez*, which significantly rolled back capital defendants’ abilities to obtain relief based on ineffective assistance of counsel.<sup>102</sup> Another example is the Court’s April 2019 decision in *Bucklew v. Precythe*, in which the Court held “that the Eighth Amendment . . . does not guarantee a prisoner a painless death.”<sup>103</sup>

Transitioning from comparing abortion and the death penalty on a macro level as institutions, as this Section has done, Section B below zeroes in on the handful of states implementing policies that cut against the grain of national public opinion on both abortion and capital punishment.<sup>104</sup> As Professor Ziegler put it after *Dobbs*, we are looking at “two Americas.”<sup>105</sup>

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*Abortion*, PEW RSCH. CTR. (May 17, 2022), <http://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion> [http://perma.cc/VAP8-GLNS] (reporting that “61% say abortion should be legal in all or most cases, while 37% say it should be illegal in all or most cases”).

98. See, e.g., CHAMMAH, *supra* note 74, at 24 (“By 1963 . . . polls showed less than half the country favored the practice . . .”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2241 (2022) (stating that in the years before *Roe*, “about a third of the States had liberalized their [abortion] laws”).

99. See sources cited *supra* note 97.

100. See, e.g., GARLAND, *supra* note 78, at 11.

101. See *infra* Section II.B.

102. See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) (holding that “under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state post-conviction counsel”).

103. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). For another discussion on how *Bucklew* contributed to an ongoing issue related to the limited time frame in which capital defendants are permitted to litigate warrant- and execution-related claims, see Kalmanson, *supra* note 80.

104. A recent study in Louisiana suggests that these states’ acts are also against public opinion within the states. See Olivia C. Landry, *Residents split on abortion, death penalty in Louisiana, survey finds*, LA. ILLUMINATOR (Apr. 28, 2022, 1:49 PM), <http://lailluminator.com/2022/04/28/residents-split-on-abortion-death-penalty-in-louisiana-survey-finds> [http://perma.cc/3H3C-M4EH].

105. Ziegler *NPR Interview*, *supra* note 11.



*B. Narrowing in on the Most Anti-Abortion & Pro-Death Penalty States*

Twenty-seven states retain the death penalty.<sup>106</sup> Three of those states have gubernatorial moratoria on executions, leaving twenty-four states in which the death penalty remains and executions are possible.<sup>107</sup> As of April 1, 2022, 2,414 people were on death row in the United States.<sup>108</sup>

Although “there is far less uniformity among Republican leaders on the death penalty than on abortion,”<sup>109</sup> the same states that continue to implement and enforce the death penalty with the most vigor are also the most adamant against abortion. In *Dobbs*, Justice Alito’s majority opinion mentions that twenty-six states supported the Court’s decision overturning *Roe*.<sup>110</sup> Twenty-one of the twenty-four death penalty states were among that group.<sup>111</sup>

The Center for Reproductive Rights has categorized states based on their positions related to abortion; the categories are (1) “illegal,” where abortion is illegal after *Dobbs*; (2) “hostile,” where the state is likely to prohibit abortion after *Dobbs*; (3) “not protected,” where

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106. *State by State*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*State by State*)], <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [http://perma.cc/2GKR-9AZN] (last visited Apr. 13, 2023). The information in this section was updated to be as accurate as possible as of the date of publication. However, these issues are quickly and consistently evolving—especially in the states discussed. As a result, there may be updates to some of the information that are not included here.

107. *Id.* However, in early 2023, the Governor of Pennsylvania announced that he would not issue any death warrants during his time in office. *Governor Shapiro Announces He Will Not Issue Any Execution Warrants During His Term, Calls on General Assembly to Abolish the Death Penalty*, COMMW. OF PA. GOVERNOR JOSH SHAPIRO (Feb. 16, 2023), <http://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty/#:~:text=Here's%20how%20the%20system%20works,are%20present%20in%20the%20conviction> [http://perma.cc/GNH4-YU22].

108. *Death Row*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Death Row*)], <http://deathpenaltyinfo.org/death-row/overview> [http://perma.cc/6WYQ-8TTG] (last visited Apr. 13, 2023).

109. Maurice Chammah, *The Supreme Court Let the Death Penalty Flourish. Now Americans Are Ending It for Themselves.*, MARSHALL PROJECT (June 29, 2022, 5:00 AM), <http://www.themarshallproject.org/2022/06/29/the-supreme-court-let-the-death-penalty-flourish-now-americans-are-ending-it-themselves> [http://perma.cc/XGE3-CFDP].

110. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2254 (2022).

111. Brief for Petitioners, *Dobbs v. Jackson Women’s Health Org.*, et al., No. 19-1392 (5th Cir. July 22, 2021); Brief for States of Texas, et al. as Amici Curiae Supporting Petitioners, *Dobbs v. Jackson Women’s Health Org.*, et al., 597 U.S. \_\_ (2022) (No. 19-1392); Letter from Va. Att’y Gen. Jason S. Miyares to the Hon. Scott S. Harris (Feb. 18, 2022) (on file with author). The only death-penalty state that did not seek *Roe*’s undoing was North Dakota. Two death-penalty states sought to uphold *Roe*: Nevada and North Carolina. Brief for States of Cal., et al. as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Org.*, et al., 597 U.S. \_\_ (2022) (No. 19-1392).

abortion will remain accessible; (4) “protected,” where the right to abortion remains protected after *Dobbs*; and (5) “expanded access,” where the state has taken affirmative action to protect abortion rights.<sup>112</sup>

As of July 2, 2022, the twenty-four death penalty states were comprised of five states in the “illegal” category, fifteen states in the “hostile” category,<sup>113</sup> and four in the “protected” category.<sup>114</sup> All five states in which abortion was illegal were death penalty states.<sup>115</sup> By October 29, 2022, abortion was illegal in twelve states (Alabama, Arkansas, Idaho, Kentucky, Louisiana, Missouri, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, West Virginia), eleven of which were death penalty states.<sup>116</sup> That number remained the same as of November 13, 2022.<sup>117</sup>

Those in the “protected” category as of July 2, 2022, were Florida, Kansas, Montana, and Nevada.<sup>118</sup> In Florida, Kansas, and Montana, that categorization was conditioned upon an amendment to the state’s constitution or a court reinterpreting the state’s constitution in light of *Dobbs*.<sup>119</sup> No death penalty state was in the “expanded access” category; that remained true as of November 13, 2022.<sup>120</sup>

Below is a snapshot of each of the twenty-four death penalty states’ positions on the death penalty and efforts to criminalize abortion after *Dobbs*.<sup>121</sup> As this information shows, each state’s position on both topics is generally consistent with its position on the other. More significantly, a handful of states are clear ringleaders advancing conservative efforts on both topics.

**Alabama—Death Penalty:** Alabama’s death row population is the fourth highest in the country at 170.<sup>122</sup> As of 2018, the state allows prisoners to choose execution by lethal gas or electrocution rather than the default method of lethal injection.<sup>123</sup> The State was

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112. CTR. FOR REPRODUCTIVE RTS. (*After Roe Fell*), *supra* note 58.

113. *Id.* Of the 21 total states in the “hostile” category, 15 or 71.4% were death penalty states.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. CTR. FOR REPRODUCTIVE RTS. (*After Roe Fell*), *supra* note 58.

119. *Id.*

120. *Id.*

121. All death row populations listed are as of January 1, 2022. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108. Only one state that had a trigger law on the books when *Dobbs* was decided does not have the death penalty: North Dakota. *See* CA. PUB. RADIO, *supra* note 7.

122. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

123. *Authorized Methods by State*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Authorized Methods by State*)], <http://deathpenaltyinfo.org/execu>

one of only five in the country to complete an execution in 2022.<sup>124</sup> After an execution in November 2022 was halted due to “failures by corrections personnel to establish an intravenous execution line,” the Governor of Alabama ordered a review of the state’s lethal injection protocol.<sup>125</sup>

As to the capital sentencing procedure, Alabama requires that only ten of the twelve jurors vote to recommend a sentence of death before the judge may sentence the defendant to death,<sup>126</sup> making it the only state in the country that allows a defendant to be sentenced to death by less than a unanimous jury recommendation.<sup>127</sup>

*Abortion:* Alabama did not have a trigger law in place when *Dobbs* was decided.<sup>128</sup> However, immediately after *Dobbs* was decided, the State moved to dissolve the injunction that had been entered against Alabama’s Human Life Protection Act.<sup>129</sup> The emergency

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tions/methods-of-execution/authorized-methods-by-state [http://perma.cc/6BH7-75CC] (last visited Apr. 13, 2023).

124. *Execution List 2022*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Execution List 2022*)], <http://deathpenaltyinfo.org/executions/2022> [http://perma.cc/K2P3-FZE8] (last visited Apr. 13, 2023).

125. *Alabama Governor Halts Executions After Latest in Series of Execution Failures*, DEATH PENALTY INFO. CTR. (Nov. 23, 2022), <http://deathpenaltyinfo.org/news/alabama-governor-halts-executions-after-latest-in-series-of-execution-failures> [http://perma.cc/E63J-ZGVQ]. In early 2023, the state announced it was “close” to announcing a new execution method that would use nitrogen hypoxia instead of lethal injection. Maya Yang, *Alabama takes steps toward using nitrogen as new execution method*, THE GUARDIAN (Feb. 17, 2023, 5:00 AM), <http://www.theguardian.com/world/2023/feb/17/alabama-nitrogen-hypoxia-new-execution-method> [http://perma.cc/VH6J-S8V3]. The state expects the new protocol to be completed by the end of 2024. *Id.*

126. ALA. CODE § 13A-5-46(f) (2021).

127. As of 2016, there were only three states that did not require a jury’s unanimous recommendation for death—Alabama, Delaware, and Florida. *Hurst v. State*, 202 So. 3d 40, 61 (Fla. 2016); e.g., Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida’s Death Row After Hurst v. Florida*, 74 U. MIAMI L. REV. 990, 993–94 (2020). Since then, Delaware has abolished capital sentencing, and Florida has amended its capital sentencing statute to require the jury’s unanimous recommendation. E.g., *id.* at 993–94. However, in early 2023, Florida proposed legislation that would reduce the jury vote required to 8–4. Melanie Kalmanson & Maria DeLiberato, *Florida’s new death penalty proposal has constitutional issues*, SUN SENTINEL (Feb. 11, 2023, 8:00 AM) [hereinafter Kalmanson & DeLiberato (SUN SENTINEL)], <http://www.sun-sentinel.com/opinion/commentary/fl-op-com-florida-death-penalty-sixth-amendment-20230211-6l6zs7i7grhfzf2j7nljtvsszu-story.html> [http://perma.cc/4GUH-BVAR]; Melanie Kalmanson & Maria DeLiberato, *Opinion: Florida shouldn’t be different when it comes to death penalty*, CITY & STATE FLA. (Feb. 1, 2023) [hereinafter Kalmanson & DeLiberato (CITY & STATE FLA.)], <http://www.cityandstatefl.com/opinion/2023/02/opinion-florida-death-penalty-new-legislation-desantis-parkland-capital-punishment/382405> [http://perma.cc/2A53-PTHX].

128. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <http://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [http://perma.cc/7A93-ERSW].

129. Emergency Mot. Dissolve Prelim. Inj., *Robinson v. Marshall*, No. 2:19-cv-365

motion was granted, thereby making the Act effective.<sup>130</sup> Under the Act, it is unlawful “for any person to intentionally perform or attempt to perform an abortion’ unless ‘an abortion is necessary in order to prevent a serious health risk to the unborn child’s mother.’”<sup>131</sup> The Act prohibits abortions “at any stage of development”<sup>132</sup> and does not contain exceptions for incest or rape.<sup>133</sup>

The Act imposes harsh criminal penalties for those who perform abortions.

[T]he performance of an abortion is a Class A felony, which carries a prison sentence of not less than 10 years, but no more than 99 years. The attempted performance of an abortion is a Class C felony, which carries a prison sentence of not less than one year and one day, but no more than 10 years.<sup>134</sup>

The Act also makes it a felony to “help[] someone either get or even plan to get an abortion in another state . . . .”<sup>135</sup>

**Arizona—Death Penalty:** Arizona’s death row population is 117.<sup>136</sup> In 2021, the state “authorized executions with the same lethal gas the Nazis . . . used” in World War II.<sup>137</sup> While the default execution method remains lethal injection, the state allows prisoners who were sentenced before November 15, 1992, to opt for the gas chamber.<sup>138</sup>

In 2022, Arizona rejoined the small group of states that carry out executions, completing the State’s first execution in eight years.<sup>139</sup> The State completed three executions in 2022.<sup>140</sup> As of February 17, 2023, Arizona did not have any executions scheduled for 2023.<sup>141</sup>

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-MHT-JTA (M.D. Ala. June 24, 2022); see *Emergency motion granted to end injunction against Alabama abortion ban*, ABC 33/40 (June 24, 2022, 3:37 PM) [hereinafter *Alabama Emergency Motion*], <http://abc3340.com/news/local/alabama-files-emergency-motion-to-enact-human-life-protection-act-abortion-ban-roe-v-wade-kay-ivey-alabamas-human-life-protection-act> [http://perma.cc/LN8G-VVCR].

130. *Alabama Emergency Motion*, *supra* note 129.

131. *Id.*

132. SHIMABUKURO, *supra* note 35, at 1.

133. *Alabama Emergency Motion*, *supra* note 129.

134. SHIMABUKURO, *supra* note 35; accord *Alabama Emergency Motion*, *supra* note 129.

135. *Alabama Emergency Motion*, *supra* note 129.

136. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

137. *The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Year End Report—2021*)], <http://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report> [http://perma.cc/D72K-YM78] (last visited Apr. 13, 2023).

138. DEATH PENALTY INFO CTR. (*Authorized Methods by State*), *supra* note 123.

139. *Arizona*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona> [http://perma.cc/2GYR-8NA8] (last visited Apr. 13, 2023).

140. DEATH PENALTY INFO. CTR. (*Execution List 2022*), *supra* note 124.

141. *Upcoming Executions*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY

*Abortion:* When *Dobbs* was decided, Arizona had two anti-abortion laws under injunction that came back into play.<sup>142</sup> First, the state's pre-1901 law bans all abortions.<sup>143</sup> Second, Arizona's personhood law "aim[s] to grant all rights to pre-born children . . . ."<sup>144</sup> In September 2022, a state judge lifted an injunction and allowed the law to take effect, one day before a 2022 law banning most procedures before the fifteenth week of pregnancy would also have gone into effect.<sup>145</sup> A state appellate court stayed the order the following month.<sup>146</sup>

At a hearing on the personhood law, state officials told the judge that the granting of personhood to the fetus did not automatically "allow criminal charges to be filed" for child abuse, assault, or other crimes.<sup>147</sup> However, the law does allow "prosecutors [to] bring felony charges against doctors who knowingly terminate pregnancies solely because the fetuses have a genetic abnormality such as Down syndrome."<sup>148</sup> Also, the state's capital sentencing scheme is already set up to punish abortion by death, as it includes a statutory aggravating factor where "[t]he defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was . . . *an unborn child in the womb at any stage of its development or was seventy years of age or older.*"<sup>149</sup>

**Arkansas—Death Penalty:** The death row population in Arkansas is thirty.<sup>150</sup> It is the only state to have executed three persons the same night.<sup>151</sup> It did so twice, in 1994 and 1997.<sup>152</sup> The state's most recent executions occurred in 2017, when the Governor "issued executive orders scheduling eight executions to take place over the course of 11 days" in what it admitted was an "unprecedented rush

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INFO. CTR. (*Upcoming Executions*)), <http://deathpenaltyinfo.org/executions/upcoming-executions> [http://perma.cc/M2XG-BG7T] (last updated Mar. 2, 2023).

142. Christie, *supra* note 57.

143. *Id.*

144. *Id.*

145. *Id.*

146. Andrew Jeong, *Arizona court halts enforcement of near-total abortion ban*, WASH. POST (Oct. 8, 2022, 12:02 AM), <http://www.washingtonpost.com/politics/2022/10/07/arizona-abortion-law-planned-parenthood> [http://perma.cc/728J-SUAK].

147. Christie, *supra* note 57.

148. Associated Press, *High Court: Arizona Can Enforce Genetic Issue Abortion Ban*, U.S. NEWS & WORLD REP. (June 30, 2022), <http://www.usnews.com/news/best-states/arizona/articles/2022-06-30/high-court-arizona-can-enforce-genetic-issue-abortion-ban> [http://perma.cc/2HCP-XRA7].

149. ARIZ. REV. STAT. § 13-751(F)(9) (emphasis added).

150. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

151. DEATH PENALTY INFO. CTR., ANALYSIS: WHAT IS THE MOST EXECUTIONS CONDUCTED IN THE U.S. IN THE SHORTEST TIME SPAN? (2017) [hereinafter DEATH PENALTY INFO. CTR. (ANALYSIS)], <http://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/dpic-analysis-what-is-the-most-executions-conducted-in-the-u-s-in-the-shortest-time-span> [http://perma.cc/VTT3-5M83].

152. *Id.*

to execute . . . due to the state's limited supply of midazolam, one of three drugs used in the state's lethal-injection protocol . . . ."<sup>153</sup> Ultimately, the state executed four inmates within a week.<sup>154</sup> This episode of serial executions "stands alone in the modern history of capital punishment" in the United States.<sup>155</sup>

*Abortion:* Arkansas was one of thirteen states to have a trigger law in place when *Dobbs* was decided,<sup>156</sup> which the State is now enforcing.<sup>157</sup> The trigger law bans abortion entirely.<sup>158</sup>

**Florida—Death Penalty:** Florida's death row is the second largest in the country with a population of 299 as of February 2023.<sup>159</sup> It is the largest death row population in a state where executions continue.<sup>160</sup> Florida also has the highest number of exonerations from death row, with thirty people having been exonerated.<sup>161</sup>

Until 2016, the state's capital sentencing statute only required a majority of the twelve-member jury to recommend death before the court to sentence the defendant to death.<sup>162</sup> In 2016, after the U.S. Supreme Court held that Florida's death penalty violated the Sixth Amendment for failing to require a jury to find each fact necessary to sentence the defendant to death,<sup>163</sup> the state's legislature amended the capital sentencing scheme to require a jury's unanimous recommendation for death.<sup>164</sup>

153. *The "Arkansas Eight" Update: Three Stays Remain in Place, One Granted Clemency*, AM. BAR ASS'N (Dec. 1, 2017) [hereinafter AM. BAR ASS'N (*Arkansas Eight*)], [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2017/year-end/the-arkansas-eight-update-three-stays-remain-in-place](http://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2017/year-end/the-arkansas-eight-update-three-stays-remain-in-place) [http://perma.cc/7DRZ-59CV].

154. *Id.*; *Execution List 2017*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/2017> [http://perma.cc/RAS2-3PAH] (last visited Apr. 13, 2023).

155. AM. BAR ASS'N (*Arkansas Eight*), *supra* note 153; accord DEATH PENALTY INFO. CTR. (ANALYSIS), *supra* note 151.

156. CA. PUB. RADIO, *supra* note 7.

157. ARK. CODE § 5-61-301-304.

158. CTR. FOR REPRODUCTIVE RTS. (*After Roe Fell*), *supra* note 58; see ARK. CODE § 5-61-301-304.

159. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

160. See *id.*; DEATH PENALTY INFO. CTR. (*State by State*), *supra* note 106. California has the largest death row in the country, but the state has a gubernatorial moratorium on executions. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108; DEATH PENALTY INFO. CTR. (*State by State*), *supra* note 106.

161. *Innocence*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/policy-issues/innocence> [http://perma.cc/V96V-2WJ4] (last visited Apr. 13, 2023).

162. FLA. STAT. ANN. § 921.141.

163. *Hurst v. Florida*, 577 U.S. 92, 97 (2016).

164. This change was based on the Supreme Court of Florida's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which has since been overruled in *Poole v. State*, 297 So. 3d 487 (Fla. 2020), where the Supreme Court of Florida held that the U.S. Constitution does not require a jury's unanimous vote for death. See also *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020). However, Florida's post-*Hurst* capital sentencing statute remains on the books as requiring a jury's unanimous recommendation for death.

*Abortion:* The Florida Constitution includes its own right to privacy that has been held to protect the right to abortion—hence, the Center for Reproductive Rights listing its status as “Protected.”<sup>165</sup> However, Professor Ziegler predicts that Florida will be a battleground state for abortion legislation in the wake of *Dobbs*.<sup>166</sup>

Indeed, only a couple of weeks after *Dobbs*, a Florida trial judge ruled that Florida’s fifteen-week abortion ban violated the right to privacy in Florida’s Constitution and entered a temporary injunction enjoining the law.<sup>167</sup> The State appealed the ruling,<sup>168</sup> and the Florida First District Court of Appeal reversed the trial court’s ruling.<sup>169</sup> The Florida Supreme Court accepted jurisdiction.<sup>170</sup> Following the 2022 election, in which Republicans swept the Cabinet, politicians set their sights on adopting stricter abortion restrictions.<sup>171</sup>

*Georgia—Death Penalty:* Georgia’s death row population is forty-two.<sup>172</sup> The most recent execution in the state was in 2020, when it was one of only five states to conduct an execution.<sup>173</sup> Similarly, in 2019, Georgia was one of only seven states to conduct an execution and executed three inmates.<sup>174</sup>

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FLA. STAT. § 921.141(c) (2021). In early 2023, Florida proposed legislation that would reduce the jury vote required to 8–4. Kalmanson & DeLiberato (SUN SENTINEL), *supra* note 127. If passed, Florida will have the lowest jury vote requirement in the country. Kalmanson & DeLiberato (CITY & STATE FLA.), *supra* note 127. For more discussion on *Hurst* and the fallout in Florida, see Melanie Kalmanson, *Storm of the Decade: The Aftermath of Hurst v. Florida & Why the Storm Is Likely to Continue*, 74 U. MIAMI L. REV. CAVEAT 37 (2020).

165. FLA. CONST. art. I, § 23; see CTR. FOR REPRODUCTIVE RTS. (*After Roe Fell*), *supra* note 58.

166. Ziegler NPR Interview, *supra* note 11.

167. Petitioners’ Br. Jurisdiction, Planned Parenthood of Sw. & Cent. Fla. v. State, No. SC2022-1127, \*4–5 (Fla. Aug. 31, 2022); John Kennedy, *Leon County judge rules Florida’s 15-week abortion law unconstitutional*, TALLAHASSEE DEMOCRAT (June 30, 2022, 7:01 PM), <http://www.tallahassee.com/story/news/politics/2022/06/30/florida-abortion-law-blocked-leon-county-judge/7773131001> [<http://perma.cc/Z24F-HTAJ>].

168. John Kennedy, *Florida appeals judge’s order to block abortion law, leaving in place new 15-week law*, TALLAHASSEE DEMOCRAT (July 6, 2022, 11:07 AM), <http://www.tallahassee.com/story/news/politics/2022/07/05/florida-abortion-law-15-weeks-pregnancy-appeals-desantis/7811085001> [<http://perma.cc/57PA-57W3>].

169. *Id.*

170. See Petitioners’ Br. Jurisdiction, Planned Parenthood of Sw. & Cent. Fla. v. State, No. SC2022-1127 (Fla. Aug. 31, 2022).

171. See, e.g., Mary Ellen Klas, *Florida lawmakers say further abortion restrictions likely*, TAMPA BAY TIMES (Nov. 11, 2022), <http://www.tampabay.com/news/florida-politics/2022/11/11/florida-lawmakers-say-further-abortion-restrictions-likely> [<http://perma.cc/5BLR-X9AH>].

172. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

173. *Execution List 2020*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/2020> [<http://perma.cc/2YK8-ZWJP>] (last visited Apr. 13, 2023).

174. *Execution List 2019*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/2019> [<http://perma.cc/48Q6-7QM5>] (last visited Apr. 13, 2023).

*Abortion:* In reaction to the leaked opinion more than a month before *Dobbs* was released, Republican Georgia Governor Brian Kemp vowed to “continue to fight for the strongest pro-life law in the country.”<sup>175</sup>

Georgia did not have a trigger law in place when *Dobbs* was decided.<sup>176</sup> However, in 2019, the state passed the Living Infants Fairness and Equality Act, which (a) “prohibits abortions after the detection of a fetal heartbeat,” which is usually at approximately six to seven weeks gestation, (b) “recognizes unborn children as ‘natural persons,’” and (c) “defines an ‘unborn child’ as an embryo/fetus ‘at any stage of development who is carried in the womb.’”<sup>177</sup> The Act includes exceptions “in cases of rape or incest if a woman files a police report, . . . when the life of the pregnant woman is threatened,” or if the “pregnancy is deemed ‘medically futile.’”<sup>178</sup> However, mental health is specifically excluded as a concern that would allow a pregnant woman to invoke the exception for her health.<sup>179</sup>

The Act makes the performance of an abortion “punishable by imprisonment of one to ten years.”<sup>180</sup> Arguably, as discussed above, while not explicit as in other states’ legislative efforts, the Act also opened the door to punishing abortion as homicide because it granted personhood to fetuses.<sup>181</sup>

Although a federal judge had stricken the Act as unconstitutional before *Dobbs*, upon a request from the Georgia government after *Dobbs*, the U.S. Court of Appeals for the Eleventh Circuit reversed the lower court, allowing the 2019 law to take effect.<sup>182</sup> Later, a lawsuit was filed in state court seeking to invalidate the law on several grounds.<sup>183</sup> A trial was held at the end of October 2022.<sup>184</sup>

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175. Archie, *supra* note 5. Georgia also has statutes that indicate how the State shall address women sentenced to death who are pregnant. GA. CODE ANN. § 17-10-30 (2020); *id.* § 17-10-34 (2020). The statutes direct the State to suspend the execution of the woman’s sentence until “the defendant is no longer pregnant.” *Id.* §§ 17-10-34 (2020), 17-10-39 (2021). Of course, Georgia’s ban on abortions means women sentenced to death must give birth.

176. See Nash & Guarnieri, *supra* note 128.

177. SisterSong Women of Color Reproductive Justice Collective v. Kemp, 472 F. Supp. 3d 1297, 1302 (N.D. Ga. 2020). Before the Act, Georgia allowed abortion until 20 weeks’ gestation. Romo, *supra* note 43.

178. Romo, *supra* note 43.

179. *Id.*

180. SisterSong Women of Color Reproductive Justice Collective, 472 F. Supp. 3d at 1306.

181. See Romo, *supra* note 43; Stern, *supra* note 43.

182. Lateshia Beacham, *Court allows Georgia’s ‘heartbeat’ abortion law to go into effect post-Roe*, WASH. POST (July 20, 2022, 9:57 PM), <http://www.washingtonpost.com/politics/2022/07/20/georgia-abortion-ban-ruling> [<http://perma.cc/4ZLP-7P2Y>].

183. Associated Press, *Trial over Georgia law restricting abortion to 6 weeks to begin*, PBS (Oct. 24, 2022, 10:52 AM), <http://www.pbs.org/newshour/health/trial-over-georgia-law-restricting-abortion-to-six-weeks-to-begin> [<http://perma.cc/7YMH-JCP9>].

184. *Id.* Afterward, the trial court struck the law, holding that it was unconstitutional



**Idaho—Death Penalty:** Idaho's death row population is eight.<sup>185</sup> In 2001, new DNA testing methods resulted in the release of death row inmate Charles Fain, who had been sentenced to death for a murder in 1984.<sup>186</sup> He received compensation for the wrongful conviction and imprisonment in 2021, when he was seventy-two years old.<sup>187</sup>

In February 2023, the Idaho Legislature introduced proposed legislation that would allow the state to bring back executions by firing squad.<sup>188</sup>

**Abortion:** Idaho has one of the most restrictive abortion laws in the country.<sup>189</sup> Idaho was among the few states that debated pre-*Dobbs* legislation that would criminalize abortion as homicide, which is punishable by death in the State.<sup>190</sup> When *Dobbs* was decided, the State had a trigger law in place that was passed in 2020.<sup>191</sup> Under

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because it violated federal law when passed. *Georgia State Court Blocks Unconstitutional Six-Week Abortion Ban*, AM. CIV. LIBERTIES UNION OF GA. (Nov. 15, 2022, 2:15 PM), <http://www.aclu.org/press-releases/georgia-state-court-blocks-unconstitutional-six-week-abortion-ban#:~:text=Reproductive%20Freedom-,SisterSong,State%20of%20Georgia&text=ATLANTA%20%E2%80%94The%20Superior%20Court%20of,the%20earliest%20weeks%20in%20pregnancy> [<http://perma.cc/4UR9-Z9J5>]. However, shortly after, the Georgia Supreme Court granted an emergency stay of the trial court's decision, allowing the law to remain in place. *Georgia Supreme Court Allows Six-Week Abortion Ban to Take Effect*, AM. CIV. LIBERTIES UNION (Nov. 23, 2022, 12:00 PM), <http://www.aclu.org/press-releases/georgia-supreme-court-allows-six-week-abortion-ban-again-take-effect> [<http://perma.cc/LZ9R-KDG2>]. An appeal remains pending; oral arguments at the Georgia Supreme Court were scheduled for March 2023. Abraham Kenmore, *As South Carolina shows, abortion battles are moving to state courts*, AUGUSTA CHRONICLE (Jan. 16, 2023, 4:37 AM), <http://www.augustachronicle.com/story/news/state/2023/01/16/abortion-litigation-before-state-courts-georgia-elsewhere/69805795007> [<http://perma.cc/55S5-SZAX>].

185. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

186. Charles Fain, *Idaho's first compensation for wrongful conviction, 18 years on death row*, IDAHO INNOCENCE PROJECT (June 17, 2021), <http://www.boisestate.edu/innocenceproject/2021/06/17/charles-fain-idahos-first-compensation-for-wrongful-conviction-18-years-on-death-row> [<http://perma.cc/N434-YTGT>].

187. *Id.*

188. Ruth Brown, *Idaho attorney general obtains death warrant for man on death row*, IDAHO CAP. SUN (Feb. 24, 2023, 3:48 PM), <http://idahocapitalsun.com/2023/02/24/idaho-attorney-general-obtains-death-warrant-for-man-on-death-row> [<http://perma.cc/JX6V-64ED>]. The proposal comes after the State had difficulty accessing the chemicals needed for lethal injection. *Id.* The State's last execution was in 2012. *Idaho*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/idaho> [<http://perma.cc/DQL8-CCVM>] (last visited Apr. 13, 2023). The State had scheduled an execution in November 2022 but had to delay it due to an inability to access the drugs. *Id.* In late February 2023, that execution was rescheduled for March 2023, despite the State still not having the necessary chemicals. *Id.*

189. Julie Luchetta, *Idaho's Supreme Court will hear challenges to restrictive abortion laws*, NPR (Oct. 6, 2022, 5:05 AM), <http://www.npr.org/2022/10/06/1127158938/idahos-supreme-court-will-hear-challenges-to-restrictive-abortion-laws> [<http://perma.cc/K3AH-NSPS>].

190. See sources cited *supra* note 44 & accompanying text.

191. S.B. 1385 (Idaho 2020), at Section 1; see Luchetta, *supra* note 189.

the trigger law, abortions are nearly prohibited.<sup>192</sup> The performance of an abortion is “a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.”<sup>193</sup> In addition, any health care professional who performs an abortion, attempts to perform an abortion, or assists with performing or attempting to perform an abortion is subject to having his or her license suspended “for a minimum of six (6) months upon a first offense” and “permanently revoked upon a subsequent offense.”<sup>194</sup>

The state’s trigger law went into effect thirty days after *Dobbs*.<sup>195</sup> In August 2022, a federal judge granted a preliminary injunction barring its enforcement.<sup>196</sup> An additional lawsuit was filed in state court challenging the constitutionality of the laws, which was heard by the Idaho Supreme Court in October 2022.<sup>197</sup>

**Indiana—Death Penalty:** Indiana’s death row population is eight.<sup>198</sup> The last execution was in 2009.<sup>199</sup> A 2019 article from the Death Penalty Information Center reported that, consistent with “trends across most of the Midwest, the death penalty is waning in Indiana,” with decreased capital prosecutions and “no jury . . . [voting] for death since 2013 . . . .”<sup>200</sup>

*Abortion:* Indiana’s current abortion laws are less restrictive than most of the other death penalty states.<sup>201</sup> However, less than a

192. Luchetta, *supra* note 189.

193. S.B. 1385 (Idaho 2020), at Section 1.

194. *Id.*

195. Clark Corbin, *Idaho’s abortion trigger law would take effect 30 days after Roe v. Wade is overturned*, IDAHO CAP. SUN (May 13, 2022, 4:30 AM), <http://idahocapitalsun.com/2022/05/13/idahos-abortion-trigger-law-would-take-effect-30-days-after-roe-v-wade-is-overturned> [<http://perma.cc/495W-VF3F>].

196. S.B. 1385, 65th Leg., 2d Sess. (Idaho 2020); Meredith Deliso, *Judge grants DOJ preliminary injunction in lawsuit against Idaho’s near-total abortion ban*, ABC NEWS (Aug. 25, 2022, 12:33 PM), <http://abcnews.go.com/US/judge-rule-wednesday-doj-lawsuit-idahos-total-abortion/story?id=88794648> [<http://perma.cc/2SBL-2LA8>].

197. Luchetta, *supra* note 189. In January 2023, the Idaho Supreme Court dismissed three pending abortion-related lawsuits, holding that “Idaho’s Constitution does not implicitly enshrine abortion as a fundamental right.” Andrew Selsky, *Idaho court tosses lawsuits aiming to block abortion bans*, ASSOCIATED PRESS (Jan. 6, 2023), <http://apnews.com/article/abortion-politics-health-idaho-state-government-f5a3453fece3da739d03256e7faecea8> [<http://perma.cc/A322-ZAMN>].

198. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

199. *Indiana*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/indiana> [<http://perma.cc/E3VF-W9L8>] (last visited Apr. 13, 2023).

200. *Death Penalty Waning in Indiana, With Fewer Capital Prosecutions and No Death Sentences*, DEATH PENALTY INFO. CTR. (Aug. 7, 2019) [hereinafter DEATH PENALTY INFO. CTR. (*Death Penalty Waning in Indiana*)], <http://deathpenaltyinfo.org/news/death-penalty-waning-in-indiana-with-fewer-capital-prosecutions-and-no-death-sentences> [<http://perma.cc/3W4D-CRKT>].

201. *Id.*

month after *Dobbs*, a federal judge issued an order lifting an injunction she had issued in 2019 blocking a law that banned a second-trimester abortion procedure.<sup>202</sup> In September 2022, a state judge enjoined enforcement of the law, and the state supreme court left the injunction in place pending its review.<sup>203</sup>

**Kansas—Death Penalty:** Kansas's death row population is nine.<sup>204</sup> The state reinstated its death penalty more than two decades after the Supreme Court's decision in *Furman*, but it has not executed an inmate since 1965.<sup>205</sup>

**Abortion:** Like Florida, Kansas has a state-specific right to privacy in the Kansas Constitution.<sup>206</sup> However, in August 2022, Kansas was the first state to vote on abortion after *Dobbs*, asking voters whether the state constitution should be amended.<sup>207</sup> Kansas voters voted on the "Value Them Both" amendment, which "would alter the state constitution to say it does not guarantee a right to abortions, opening the door to pass [abortion] restrictions or ban them altogether."<sup>208</sup> In a win for abortion rights, voters rejected the amendment.<sup>209</sup>

**Kentucky—Death Penalty:** Kentucky has a death row population of twenty-seven.<sup>210</sup> The last execution in the state was in 2008.<sup>211</sup> A 1998 state law allows judges to consider whether racial bias played a role in the decision to seek or impose the death penalty.<sup>212</sup>

202. Tom Davies, *Judge lifts order against Indiana abortion procedure ban*, ASSOCIATED PRESS (July 8, 2022), <http://apnews.com/article/abortion-us-supreme-court-health-indiana-573779a456d3f34bf934aa645fb525d6> [<http://perma.cc/2RH2-S25B>].

203. Tom Davies, *Indiana Supreme Court keeps state abortion ban on hold*, ASSOCIATED PRESS (Oct. 12, 2022), <http://apnews.com/article/abortion-health-indiana-government-and-politics-c428ac15c5dded0043026e172db3a057> [<http://perma.cc/R7D3-DFL4>].

204. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

205. *Kansas*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas> [<http://perma.cc/E398-5Q2V>] (last visited Apr. 13, 2023).

206. *Kansas*, CTR. FOR REPRODUCTIVE RTS., <http://reproductiverights.org/maps/state/kansas> [<http://perma.cc/9JR8-3FRK>] (last visited Apr. 13, 2023).

207. Adam Kemp, *Kansas will be the first state to vote on abortion rights after Roe ruling. Here's what that means*, PBS (July 1, 2022, 5:38 PM), <http://www.pbs.org/news/hour/politics/kansas-will-be-the-first-state-to-vote-on-abortion-rights-after-roe-ruling-heres-what-that-means> [<http://perma.cc/ME53-LE7K>].

208. *Id.*

209. Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas decide to keep abortion legal in the state, rejecting an amendment*, NPR (Aug. 3, 2022, 2:18 AM), <http://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<http://perma.cc/UK9V-PGLR>]. The vote was 59% to 41%. *Id.*

210. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

211. *Kentucky*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kentucky> [<http://perma.cc/QZY3-DFDH>] (last visited Apr. 13, 2023).

212. *Id.*

*Abortion:* Kentucky's trigger law took effect shortly after *Dobbs*.<sup>213</sup> The law "outright ban[s] abortion, except in cases in which the mother's life is in danger."<sup>214</sup> The law was originally enjoined pending legal challenge, but the Kentucky Supreme Court "allowed the . . . laws to remain in place" while litigation was pending.<sup>215</sup> The Court heard oral arguments on a legal challenge to the laws in November 2022.<sup>216</sup>

Also that month, in another win for abortion rights at the polls, Kentucky voters rejected a constitutional amendment that would have explicitly stated that the state constitution does not "secure or protect a right to abortion or require the funding of abortion."<sup>217</sup> Of course, the vote does not affect the laws.

**Louisiana—Death Penalty:** Louisiana's death row population is sixty-two.<sup>218</sup> The last execution took place in 2010.<sup>219</sup> Eleven innocent persons have been freed from Louisiana's death row.<sup>220</sup> In Louisiana, a jury determines whether intellectual disability precludes the death penalty following a conviction of first-degree murder.<sup>221</sup>

*Abortion:* Louisiana is one of three states that had a trigger law in place when *Dobbs* was decided that would take effect immediately following the decision.<sup>222</sup> The law "outright ban[s] abortion, except in cases in which the mother's life is in danger."<sup>223</sup> Louisiana's trigger law was passed merely days before *Dobbs* was decided and "make[s] doctors who perform abortions subject to prison terms of one to 10 years . . ."<sup>224</sup> However, litigation is pending regarding the enforceability of the law.<sup>225</sup>

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213. CA. PUB. RADIO, *supra* note 7.

214. *Id.*

215. Aprile Rickert, *Kentucky voters reject amendment that would have affirmed no right to abortion*, NPR (Nov. 9, 2022, 9:37 AM), <http://npr.org/2022/11/09/1134835022/kentucky-abortion-amendment-midterms-results> [<http://perma.cc/S3XD-FWLK>].

216. *Id.*

217. *Id.*

218. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

219. *Louisiana*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/louisiana> [<http://perma.cc/AHH9-WSTR>] (last visited Apr. 13, 2023).

220. *Id.*

221. LA. CODE CRIM. PROC. § 905.5.1 (2020).

222. CA. PUB. RADIO, *supra* note 7.

223. *Id.*

224. Associated Press, *Louisiana governor signs bill criminalizing abortion providers if Roe overturned*, NBC (June 22, 2022, 8:21 AM), <http://www.nbcnews.com/politics/politics-news/louisiana-governor-signs-bill-criminalizing-abortion-providers-rove-rcna34700> [<http://perma.cc/9XLN-5PP2>].

225. Victor Skinner, *Despite court victory, Louisiana AG vows to continue fight against abortion ban injunction*, CTR. SQUARE (Aug. 1, 2022), [http://www.thecentersquare.com/louisiana/despite-court-victory-louisiana-ag-vows-to-continue-fight-against-abortion-ban-injunction/article\\_197e4dd0-11d1-11ed-987a-e34bc1db153a.html](http://www.thecentersquare.com/louisiana/despite-court-victory-louisiana-ag-vows-to-continue-fight-against-abortion-ban-injunction/article_197e4dd0-11d1-11ed-987a-e34bc1db153a.html) [<http://perma.cc>].

**Mississippi—Death Penalty:** Mississippi has a death row population of thirty-seven.<sup>226</sup> Execution is by lethal injection, electrocution, firing squad, or nitrogen hypoxia.<sup>227</sup> A 2022 law reassigned the choice of methods from the condemned to the Commissioner of Corrections, who must inform the defendant which method will be used within seven days of receiving an execution warrant.<sup>228</sup> The most recent execution occurred in 2021 following a nine-year break.<sup>229</sup>

**Abortion:** Mississippi's Gestational Age Act was at issue in *Dobbs*.<sup>230</sup> The law "generally prohibits an abortion after the 15th week of pregnancy . . . ."<sup>231</sup> In practice, the law ended abortions in Mississippi because, after the Court's ruling, the plaintiff clinic shut its doors.<sup>232</sup> It was the state's only abortion clinic.<sup>233</sup>

**Missouri—Death Penalty:** Missouri's death row population is twenty.<sup>234</sup> It is one of only five in the country to complete an execution in 2022.<sup>235</sup> One of the executed inmates, Carman Deck, had his death sentence overturned three times before it was reinstated and ultimately carried out.<sup>236</sup> Missouri continued the trend in 2023, conducting an execution on January 3, 2023, and another on February 7, 2023.<sup>237</sup>

**Abortion:** Less than twelve hours after *Dobbs* was released, Missouri became the first state to ban abortion when Attorney General Eric Schmitt issued an opinion triggering "parts of Missouri's House Bill 126, effectively ending abortion in the State . . . ."<sup>238</sup> The

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[R5K4-PZZ6]; see also Associated Press, *The Supreme Court's abortion ruling shifts legal battles to state courts*, NPR (June 27, 2022, 9:02 PM), <http://www.npr.org/2022/06/27/1108071679/abortion-state-courts-louisiana-utah> [<http://perma.cc/CP8F-3EQ8>].

226. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

227. *Mississippi Gives Department of Corrections Unprecedented Discretion Over Execution Methods*, DEATH PENALTY INFO. CTR. (June 28, 2022), <http://deathpenaltyinfo.org/news/mississippi-gives-department-of-corrections-unprecedented-discretion-over-execution-methods> [<http://perma.cc/R9PB-UCKD>].

228. *Id.*

229. *Mississippi*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/mississippi> [<http://perma.cc/N789-F4XN>] (last visited Apr. 13, 2023).

230. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2234 (2022).

231. *Id.*

232. Jaclyn Diaz & A. Martínez, *Mississippi's last abortion clinic shuts down. The owner promises to continue working*, NPR (July 7, 2022, 8:38 PM), <http://www.npr.org/2022/07/07/1110289142/mississippi-abortion-clinic-shuts-down> [<http://perma.cc/D7KY-7YAS>].

233. *Id.*

234. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

235. DEATH PENALTY INFO. CTR. (*Execution List 2022*), *supra* note 124.

236. Andy Rose, *Missouri executes man convicted of murdering and robbing an elderly couple in 1996*, CNN (May 3, 2022, 9:52 PM), <http://www.cnn.com/2022/05/03/us/carman-deck-missouri-execution/index.html> [<http://perma.cc/A259-XXVN>].

237. DEATH PENALTY INFO. CTR. (*Upcoming Executions*), *supra* note 141.

238. Bev Ehlen, *Supreme Court Overturns Roe vs. Wade Missouri First State to End*

law criminalizes the performance of an abortion, stating: “Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony . . . .”<sup>239</sup>

**Montana—Death Penalty:** Only two people are on death row in Montana.<sup>240</sup> The state has not conducted an execution since 2006.<sup>241</sup>

*Abortion:* Barring amendment, Montana has a state-specific right to privacy under the state constitution that protects access to abortion.<sup>242</sup> As a result, all of the state’s restrictive abortion laws passed in 2021 are temporarily enjoined.<sup>243</sup> If the constitution were to be amended, those laws, which include a ban on abortion after twenty weeks, would be back in play.<sup>244</sup>

**Nebraska—Death Penalty:** Nebraska’s death row population is twelve.<sup>245</sup> The Nebraska Legislature abolished the death penalty in 2015, but Nebraska voters reinstated capital punishment the following year.<sup>246</sup> Consistent with pro-death penalty states acting contrary to national and international trends against capital punishment, the state most recently conducted an execution in 2018, its first in more than twenty years.<sup>247</sup>

*Abortion:* Nebraska allows abortion up until twenty weeks gestation.<sup>248</sup> After that, abortions can only be performed where the mother’s life is in danger or her health is severely compromised.<sup>249</sup> However, in August 2022, Governor Ricketts announced that thirty of the state’s senators would support “amending Nebraska’s abortion laws to” be more restrictive and to “prohibit abortions starting at 12 weeks . . . .”<sup>250</sup> Governor Ricketts found the amount of support

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*Abortion*, CONCERNED WOMEN FOR AM. (June 24, 2022), <http://concernedwomen.org/supreme-court-overturns-roe-vs-wade-missouri-first-state-to-end-abortion> [<http://perma.cc/V9Z4-Q682>].

239. Op. No. 22-2022, MO. ATT’Y GEN. (June 24, 2022).

240. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

241. *Montana*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana> [<http://perma.cc/Z2D4-Z4YL>] (last visited Apr. 13, 2023).

242. *Montana*, CTR. FOR REPRODUCTIVE RTS., <http://reproductiverights.org/maps/state/montana> [<http://perma.cc/TNA6-3S5C>] (last visited Apr. 13, 2023).

243. *Id.*

244. *Id.*

245. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

246. *Nebraska*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> [<http://perma.cc/78YY-3A4A>] (last visited Apr. 13, 2023).

247. *Id.*

248. *State Facts About Abortion: Nebraska*, GUTTMACHER INST. (June 2022), <http://www.guttmacher.org/fact-sheet/state-facts-about-abortion-nebraska#> [<http://perma.cc/R93J-UU7M>].

249. *Id.*

250. *Gov. Ricketts Releases Statement on Potential Special Session to Amend Nebraska’s Abortion Laws*, EIN NEWS (Aug. 9, 2022, 3:43 AM), [http://www.einnews.com/pr\\_news](http://www.einnews.com/pr_news)

“deeply saddening,” adding that the proposal would be a “reasonable step to protect more preborn babies in [the] state.”<sup>251</sup> The Governor urged citizens to call senators who were not on the list of those in support of the amendment to “encourage them to reconsider their decision . . . .”<sup>252</sup>

**Nevada—Death Penalty:** Nevada’s death row population is sixty-five.<sup>253</sup> The state last conducted an execution in 2006.<sup>254</sup> Executions remain on hold during litigation on the chemicals used for lethal injection.<sup>255</sup> In 2021, the Nevada House passed a bill that would have abolished the death penalty; however, it did not progress to a vote in the Senate.<sup>256</sup>

**Abortion:** The Governor issued an Executive Order following *Dobbs* that took affirmative steps to protect access to abortion.<sup>257</sup> Specifically, the Order (1) directs state actors not to assist with criminal investigations by other states “seek[ing] to impose civil or criminal liability or professional sanction upon a person or entity” for obtaining an abortion; (2) directs state agencies related to the practice of medicine to protect healthcare professionals who provide reproductive health care; and, (3) directs the Office of the Governor to “decline any request” from other states “to issue a warrant for the arrest or surrender of any person charged with a criminal violation” by any other state for receiving or performing an abortion.<sup>258</sup>

**North Carolina—Death Penalty:** North Carolina’s death row population is the fifth largest in the country at 138.<sup>259</sup> Like Kentucky, North Carolina passed a law allowing for the consideration of racial

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/585128204/gov-ricketts-releases-statement-on-potential-special-session-to-amend-nebraska-s-abortion-laws [http://perma.cc/XXL3-8T8L].

251. *Id.*

252. *Id.* Indeed, in early 2023, despite most of the state’s citizens supporting abortion access, legislators introduced “an extreme bill that would ban abortions at around six weeks of pregnancy.” Scout Richters, *Six Things to Know About the Extreme Six-Week Abortion Ban*, AM. CIV. LIBERTIES UNION OF NEB. (Jan. 18, 2023, 2:00 PM), <http://www.aclunbraska.org/en/news/six-things-know-about-extreme-six-week-abortion-ban#:~:text=Abortion%20is%20legal%20in%20Nebraska,a%202022%20rally%20in%20Omaha> [http://perma.cc/9W2E-ZX2D].

253. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

254. *Nevada*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nevada> [http://perma.cc/ZR8X-L5TB] (last visited Apr. 13, 2023).

255. *Id.*

256. *Nevada Governor, Senate Leaders Block Death-Penalty Abolition Bill That Passed State Assembly*, DEATH PENALTY INFO. CTR. (May 19, 2021), <http://deathpenaltyinfo.org/news/nevada-governor-senate-leaders-block-death-penalty-abolition-bill-that-passed-state-assembly> [http://perma.cc/US37-E7VU].

257. *See* Nev. Governor Exec. Order No. 2022-08 (June 28, 2022).

258. *Id.*

259. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

prejudice in seeking and imposing the death penalty.<sup>260</sup> However, the legislature repealed the law in 2013, four years after its enactment.<sup>261</sup> Decisions granting relief to four inmates under the law were vacated by the state supreme court.<sup>262</sup>

*Abortion:* As of June 28, 2022, North Carolina law allowed abortion before viability.<sup>263</sup> However, in August 2022, a federal judge reinstated a twenty-week abortion ban by lifting an injunction that had previously enjoined the law, thereby diminishing access to abortion in the State.<sup>264</sup> Professor Ziegler suspects North Carolina could be a battleground state after *Dobbs*.<sup>265</sup>

**Ohio—Death Penalty:** Ohio's death row population is 134.<sup>266</sup> The last execution in the state was in 2018.<sup>267</sup> The state had originally scheduled several executions to occur in 2022, making it one of only four states to have a pending death warrant as of July 1, 2022.<sup>268</sup> However, due to the state's ongoing difficulty in accessing the drugs used in the lethal injection protocol, the executions have been postponed to 2023–2026.<sup>269</sup>

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260. *North Carolina Racial Justice Act*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/north-carolina-racial-justice-act> [<http://perma.cc/FL8M-K7EL>] (last visited Apr. 13, 2023).

261. *Id.*

262. *North Carolina*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina#executions> [<http://perma.cc/5BBN-6XMF>] (last visited Apr. 13, 2023).

263. *State Facts About Abortion: North Carolina*, GUTTMACHER INST. (June 2022), <http://www.guttmacher.org/fact-sheet/state-facts-about-abortion-north-carolina> [<http://perma.cc/9GJ5-WB7Z>]. Viability is “the point at which the fetus ‘has the capability of meaningful life outside the mother’s womb.’” *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428 (1983) (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

264. Rachel Crumpler, *Abortion access diminishes in NC after federal judge reinstates 20-week ban*, NC HEALTH NEWS (Aug. 19, 2022), <http://www.northcarolinahealthnews.org/2022/08/19/abortion-access-diminishes-in-nc-after-federal-judge-reinstates-20-week-ban> [<http://perma.cc/BZA6-MTME>].

265. *Ziegler NPR Interview*, *supra* note 11. Indeed, in early 2023, litigation began regarding the State's restrictions on the use of “an abortion-inducing drug.” Mary Anne Pazanowski, *North Carolina Abortion Pill Regulations Invalid, Suit Says (1)*, BLOOMBERG LAW (Jan. 25, 2023, 3:11 PM), <http://news.bloomberglaw.com/litigation/north-carolina-abortion-pill-regulations-invalid-complaint-says> [<http://perma.cc/286U-X2XE>].

266. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

267. *Ohio*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/ohio> [<http://perma.cc/ZL2H-BXRV>] (last visited Apr. 13, 2023).

268. DEATH PENALTY INFO. CTR. (*Upcoming Executions*), *supra* note 141.

269. *See Governor DeWine Issues Reprieves*, GOVERNOR OF OHIO (July 1, 2022), <http://governor.ohio.gov/media/news-and-media/Governor-DeWine-Issues-Reprieves-07012022> [<http://perma.cc/U8Y5-KVLJ>]; *Governor DeWine Issues Reprieves*, GOVERNOR OF OHIO (Feb. 18, 2022), <http://governor.ohio.gov/media/news-and-media/Governor-DeWine-Issues-Reprieves-02182022> [<http://perma.cc/7MPR-TS4J>]; *Governor DeWine Issues Reprieves*, GOVERNOR OF OHIO (Apr. 9, 2021), <http://governor.ohio.gov/media/news-and-media/de-wine-issues-reprieves-04092021> [<http://perma.cc/9JFT-N5MH>].



*Abortion:* Immediately after *Dobbs*, Ohio resumed enforcing its 2019 law known as the “Heartbeat Protection Act,” which bans abortion after the detection of a fetal heartbeat.<sup>270</sup> The Act makes the performance of an abortion punishable as a felony of the fifth degree and does not contain exceptions for rape or incest.<sup>271</sup>

An injunction had been entered against the enforcement of the Act but was lifted following *Dobbs*.<sup>272</sup> Then, in October 2022, a state court judge entered a preliminary injunction enjoining enforcement of the law, thereby allowing abortions to proceed “through 20 weeks’ gestation” while legal challenges to the Act proceed.<sup>273</sup> The fate of the law remains unclear.

**Oklahoma—Death Penalty:** Oklahoma’s death row population is forty-two.<sup>274</sup> Of the seven executions that had been completed in the United States in 2022 as of July 1, 2022, three were in Oklahoma.<sup>275</sup> Similarly, in 2021, Oklahoma was responsible for two of the eight executions completed by the states.<sup>276</sup> In 2022, Oklahoma completed five executions—tied for the highest number of executions with Texas.<sup>277</sup>

*Abortion:* Consistent with its robust activity in the death penalty—realm, Oklahoma boasts having the nation’s strictest abortion law.<sup>278</sup> On the day the Court decided *Dobbs*, the Attorney General certified *Dobbs*, thereby effectuating the state’s trigger law and allowing the state to enforce its pre-*Roe* law from 1910 that “makes intentionally performing an abortion on a woman a felony, punishable

270. OHIO REV. CODE § 2919.195.

271. *Id.*

272. *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360 (S.D. Ohio June 24, 2022) (lifting injunction); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 798 (S.D. Ohio 2019) (entering preliminary injunction against enforcement of the Act).

273. Julie Carr Smyth, *Judge blocks restrictive Ohio abortion law as suit proceeds*, ASSOCIATED PRESS (Oct. 7, 2022), <http://apnews.com/article/abortion-health-ohio-government-and-politics-d4dd3a0c4816ccb9f56df30163f58b9e> [<http://perma.cc/9MCD-97WE>]. As of February 2023, several lawsuits remain pending. *Legal Landscape of Abortion in Ohio*, AM. CIV. LIBERTIES UNION OF OHIO, <http://www.acluohio.org/en/legal-landscape-abortion-ohio> [<http://perma.cc/L8R9-224H>] (last updated Jan. 12, 2023).

274. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

275. DEATH PENALTY INFO. CTR. (*Execution List 2022*), *supra* note 124.

276. *Execution List 2021*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Execution List 2021*)], <http://deathpenaltyinfo.org/executions/2021> [<http://perma.cc/3LRU-NKEK>] (last updated Feb. 10, 2023).

277. DEATH PENALTY INFO. CTR. (*Execution List 2022*), *supra* note 124; DEATH PENALTY INFO. CTR. (*Upcoming Executions*), *supra* note 141. In 2023, Oklahoma completed its first execution on January 12, with seven more scheduled for the year as of February 2023—the highest number in the country. *Id.*

278. See Associated Press, *Oklahoma governor signs the nation’s strictest abortion ban*, NPR (May 26, 2022, 5:58 AM), <http://www.npr.org/2022/05/26/1101428347/oklahoma-governor-signs-the-nations-strictest-abortion-ban> [<http://perma.cc/JLJ4-7LKE>].

up to five years in prison, unless it is ‘necessary to preserve her life.’”<sup>279</sup> The state’s more recent abortion law went into effect on August 25, 2022, becoming “the primary prohibition” against abortion.<sup>280</sup> That law is even more prohibitive and was “the first in the nation to effectively end availability of the procedure.”<sup>281</sup>

**South Carolina—*Death Penalty*:** South Carolina has a death row population of thirty-seven.<sup>282</sup> Although the state had not carried out an execution in over a decade, two executions were scheduled in 2022.<sup>283</sup> One was to be completed by electrocution, and the other was set to be the state’s first execution by firing squad.<sup>284</sup> The state implemented these execution methods in 2021, with the electric chair as its “default execution method,” amid difficulty accessing the drugs used in its lethal injection protocol.<sup>285</sup> Both executions were halted due to legal challenges to the state’s execution methods.<sup>286</sup> The Supreme Court of South Carolina heard oral arguments on those challenges but had not issued a ruling as of the time of publication.<sup>287</sup>

***Abortion*:** On the day *Dobbs* was decided, South Carolina Governor Henry McMaster promised: “By the end of the day, we will file motions so that the Fetal Heartbeat Act will go into effect in South Carolina and immediately begin working with members of the General Assembly to determine the best solution for protecting the lives of unborn South Carolinians.”<sup>288</sup> Indeed, the law went into

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279. Charles Biggs, *Here’s are some facts about Oklahoma’s ban on abortion*, TULSA BEACON (June 30, 2022), <http://tulsabeacon.com/heres-are-some-facts-about-oklahomas-ban-on-abortion> [http://perma.cc/7NLV-ZT92].

280. *Id.*

281. Associated Press, *supra* note 278.

282. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

283. DEATH PENALTY INFO. CTR. (*Year End Report—2021*), *supra* note 137; accord *Executions Halted in South Carolina Amid Challenges to Constitutionality of Firing Squad and Electric Chair*, DEATH PENALTY INFO. CTR. (Apr. 26, 2022) [hereinafter DEATH PENALTY INFO. CTR. (*Executions Halted in South Carolina*)], <http://deathpenaltyinfo.org/news/executions-halted-in-south-carolina-amid-challenges-to-constitutionality-of-firing-squad-and-electric-chair> [http://perma.cc/Y52E-234J].

284. *Id.*

285. *Id.*; see DEATH PENALTY INFO. CTR. (*Year End Report—2021*), *supra* note 137 (South Carolina moved to adopt the electric chair as its default execution method, with the firing squad as a “humane” alternative); DEATH PENALTY INFO CTR. (*Authorized Methods by State*), *supra* note 123.

286. DEATH PENALTY INFO. CTR. (*Executions Halted in South Carolina*), *supra* note 283.

287. Jeffrey Collins, *Electric chair, firing squad’s legality at S. Carolina court*, ASSOCIATED PRESS (Jan. 5, 2023), <http://apnews.com/article/south-carolina-state-government-crime-legal-proceedings-59293e90af056a4849e04dc196c46ac2> [http://perma.cc/T3WG-PZ37].

288. *Statement from Gov. Henry McMaster on Dobbs v. Jackson Women’s Health Organization Ruling*, S.C. OFF. OF THE GOVERNOR (June 24, 2022), <http://governor.sc.gov/news/2022-06/statement-gov-henry-mcmaster-dobbs-v-jackson-womens-health-organization-ruling> [http://perma.cc/35ND-VSAU].

effect shortly after *Dobbs*.<sup>289</sup> However, it was blocked by both federal courts and the South Carolina Supreme Court pending challenges to the law's constitutionality.<sup>290</sup>

Meanwhile, the State Legislature sought to enact post-*Dobbs* legislation restricting the right to abortion in the fall of 2022.<sup>291</sup> That ultimately proved unsuccessful due to members refusing to budge on their positions.<sup>292</sup>

**South Dakota—Death Penalty:** South Dakota only has one person on death row.<sup>293</sup> The state has executed five persons since 2000.<sup>294</sup> Its most recent execution was in 2019.<sup>295</sup>

**Abortion:** South Dakota's trigger law took effect immediately following *Dobbs*.<sup>296</sup> The law bans abortion outright except where necessary to save the mother's life.<sup>297</sup> Just weeks after *Dobbs* was decided, South Dakota called a special session to address abortion-related legislation.<sup>298</sup>

**Tennessee—Death Penalty:** Tennessee's death row population is forty-seven.<sup>299</sup> There were no executions in Tennessee between 1960 and 2000.<sup>300</sup> Execution is by lethal injection for crimes committed after 1998; others may select electrocution.<sup>301</sup> In a 1991 case from Tennessee, the U.S. Supreme Court approved the introduction of a victim impact statement in the penalty phase of capital trials.<sup>302</sup> The defendant in that case, Pervis Payne, was removed from death row in 2021 on evidence of his intellectual disability.<sup>303</sup>

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289. James Pollard, *S.C. court blocks abortion law as Senate considers new one*, ASSOCIATED PRESS (Aug. 17, 2022), <http://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-south-carolina-2d1807549d5e4442904d98860f217869> [<http://perma.cc/Y53G-RKYX>].

290. *Id.*

291. *Id.*

292. Megan Messerly, *Bitter GOP divisions leave abortion legal in South Carolina*, POLITICO (Nov. 9, 2022, 3:22 PM), <http://www.politico.com/news/2022/11/09/gop-abortion-rights-south-carolina-00066005> [<http://perma.cc/6RKX-GZNH>].

293. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

294. *South Dakota*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/south-dakota> [<http://perma.cc/6BBV-MY2U>] (last visited Apr. 13, 2023).

295. *Id.*

296. *See* CA. PUB. RADIO, *supra* note 7.

297. *See* U.S. NEWS & WORLD REP., *supra* note 55.

298. *See id.*

299. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

300. *Tennessee*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR. (*Tennessee*)], <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee> [<http://perma.cc/7FDR-LXNA>] (last visited Apr. 13, 2023).

301. *Id.*

302. *See* *Payne v. Tennessee*, 501 U.S. 808 (1991).

303. DEATH PENALTY INFO. CTR. (*Tennessee*), *supra* note 300.

*Abortion:* Tennessee’s trigger law, known as Tennessee’s Human Life Protection Act, went into effect thirty days after *Dobbs*.<sup>304</sup> The law “criminalize[s] performing or attempting to perform an abortion, except in cases where it is necessary to prevent death or serious and permanent bodily injury to the mother.”<sup>305</sup> The abortion ban begins at fertilization.<sup>306</sup> When *Dobbs* was released, an injunction was in place enjoining enforcement of the Human Life Protection Act.<sup>307</sup> However, after *Dobbs*, the Sixth Circuit Court of Appeals unanimously vacated the injunction.<sup>308</sup>

Before the trigger law went into effect,<sup>309</sup> Tennessee’s Heartbeat Law was in effect.<sup>310</sup> Passed in 2020, the law “[p]rohibits an abortion where a fetal heartbeat exists, in increments beginning at six weeks.”<sup>311</sup>

**Texas—Death Penalty:** Texas is undeniably an “epicenter” of capital punishment.<sup>312</sup> It has the third largest death row in the country with a population of 199.<sup>313</sup> It also has the third-highest number of exonerations from death row with sixteen—behind Florida and Illinois, respectively.<sup>314</sup>

In 2021, Texas was responsible for three of eight executions by the states.<sup>315</sup> It is one of only six in the country to complete an execution in 2022.<sup>316</sup> In 2022, the State completed five executions—tied for the highest number of executions with Oklahoma.<sup>317</sup>

304. See CA. PUB. RADIO, *supra* note 7; see also TENN. OFF. OF THE GOVERNOR, *supra* note 48; *Tennessee’s Heartbeat Law Now in Effect: Attorney General Slatery Responds to Sixth Circuit’s Ruling*, TENN. ATT’Y GEN. & REP. (June 28, 2022, 2:20 PM), <http://www.tn.gov/attorneygeneral/news/2022/6/28/pr22-21.html> [<http://perma.cc/DW34-BUT9>].

305. TENN. OFF. OF THE GOVERNOR, *supra* note 48; accord TENN. ATT’Y GEN. & REP., *supra* note 304 (“This law has an affirmative defense when necessary to save the mother’s life or to prevent irreversible impairment of a major bodily function.”).

306. See TENN. ATT’Y GEN. & REP., *supra* note 304.

307. *Id.*

308. See *id.*

309. See *id.* (“Thirty days after that, Tennessee’s Human Life Protection Act will come into effect and take precedence over the Heartbeat Bill.”).

310. See TENN. OFF. OF THE GOVERNOR, *supra* note 48.

311. *Id.*; accord TENN. ATT’Y GEN. & REP., *supra* note 304.

312. See, e.g., CHAMMAH, *supra* note 74, at 18 (“Texas has been the epicenter of capital punishment . . .”).

313. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

314. *Innocence*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/policy-issues/innocence> [<http://perma.cc/23YH-ABPE>] (last visited Apr. 13, 2023); see *Illinois*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/illinois> [<http://perma.cc/T6Y3-W2VL>] (last visited Apr. 13, 2023) (noting that Illinois abolished the death penalty in 2011).

315. DEATH PENALTY INFO. CTR. (*Execution List 2021*), *supra* note 276.

316. DEATH PENALTY INFO. CTR. (*Execution List 2022*), *supra* note 124.

317. See *id.*; see also DEATH PENALTY INFO. CTR. (*Upcoming Executions*), *supra* note 141. As of February 23, 2023, the State had completed three executions and had five

*Abortion:* Texas's trigger law went into effect thirty days after *Dobbs*.<sup>318</sup> The law bans abortions after six weeks of pregnancy and does not include exceptions for rape, sexual abuse, or incest.<sup>319</sup> The law makes the performance of an abortion "a felony punishable by up to life in prison . . . ."<sup>320</sup> The law further provides that "the attorney general 'shall' seek a civil penalty of not less than \$100,000, plus attorney's fees."<sup>321</sup>

Some district attorneys in more metropolitan areas have said they will not prosecute abortion;<sup>322</sup> however, conservative lawmakers have indicated their intent to legislate around those decisions by allowing prosecutors in other jurisdictions to bring abortion cases outside their own jurisdiction if the local district attorney refuses.<sup>323</sup>

As outlined above, legislators in Texas have, for years, been on the front lines in proposing harsh anti-abortion legislation, including legislation that would categorize abortion as homicide, which is punishable by death in the state.<sup>324</sup> The law did not explicitly provide that abortion should be punished by death, but it also did not preclude the punishment. Although the bills did not pass, the proposal "emerged as a pivotal issue" in a 2022 state legislative race and is ripe for reconsideration after *Dobbs*.<sup>325</sup>

**Utah—Death Penalty:** Utah's death row population is seven.<sup>326</sup> It was the first state to "resume executions after capital punishment was reinstated in the United States" following *Furman*.<sup>327</sup> It is also

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more scheduled. *Execution List 2023*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/executions/2023> [<http://perma.cc/Q399-XBMY>] (last updated Mar. 9, 2023). See DEATH PENALTY INFO. CTR. (*Upcoming Executions*), *supra* note 141.

318. CA. PUB. RADIO, *supra* note 7.

319. *See id.*

320. Eleanor Klibanoff, *Texans who perform abortions now face up to life in prison, \$100,000 fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), <http://www.texastribune.org/2022/08/25/texas-trigger-law-abortion> [<http://perma.cc/9NUY-95PE>]; Scott Simon, *New Texas trigger law makes abortion a felony*, NPR (Aug. 27, 2022, 8:33 AM), <http://www.npr.org/2022/08/27/1119795665/new-texas-trigger-law-makes-abortion-a-felony> [<http://perma.cc/8W8E-JU2V>].

321. Klibanoff, *supra* note 320; *see* Simon, *supra* note 320.

322. *See* Klibanoff, *supra* note 320; *see also* Christine Vestal, *Liberal Prosecutors in Red States Vow Not to Enforce Abortion Bans*, PEW: STATELINE (June 24, 2022), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/24/liberal-prosecutors-in-red-states-vow-not-to-enforce-abortion-bans> [<http://perma.cc/R9FB-FHDK>].

323. Klibanoff, *supra* note 320.

324. *See* Vestal, *supra* note 322 ("In April . . . a 26-year-old woman was arrested in Starr County, Texas, and briefly charged with murder over a self-induced abortion . . .").

325. *See* Andrew Stanton, *Death Penalty for Abortions Becomes Pivotal Issue in GOP Runoff in Texas*, NEWSWEEK (Mar. 27, 2022, 1:30 PM), <http://www.newsweek.com/death-penalty-abortion-becomes-pivotal-issue-gop-runoff-texas-1692240> [<http://perma.cc/8EVX-LGNA>].

326. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

327. *See Utah*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/utah> [<http://perma.cc/X4LV-XCA8>] (last visited Apr. 13, 2023).

“the only state to have executed inmates by firing squad in the modern era.”<sup>328</sup> Indeed, the state’s last execution was in 2010, when it executed Ronnie Lee Gardner by firing squad.<sup>329</sup>

*Abortion:* Passed in 2020, Utah’s trigger law bans abortion after eighteen weeks with only “narrow exceptions for rape, incest or the mother’s health . . . .”<sup>330</sup> Shortly after *Dobbs*, a Utah judge entered an injunction against the law taking effect “to allow time for the court to hear challenges” to the law.<sup>331</sup>

**Wyoming—Death Penalty:** Wyoming does not have any inmates on death row.<sup>332</sup> The state has executed one person since 1976.<sup>333</sup>

*Abortion:* Wyoming is one of the thirteen states that had anti-abortion trigger laws in place when *Dobbs* was decided.<sup>334</sup> The law bans abortion under any circumstance, except when necessary to save the mother’s life.<sup>335</sup>

In summary, while public support and national, even international, trends generally suggest one narrative (i.e., decreasing support for the death penalty and increasing support for abortion),<sup>336</sup> a handful of states maintain course in the opposite direction on both fronts, causing life altering consequences for their citizens.<sup>337</sup> Even within this set of states, an even smaller group of states are willing to go to extremes on both fronts.<sup>338</sup> On abortion, only a handful of states are willing to propose legislation that would criminalize the act of receiving or attempting to receive an abortion *and* would be willing to prosecute those crimes.<sup>339</sup>

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328. *Id.*

329. *Id.*

330. See Associated Press, *supra* note 225.

331. See *id.*

332. DEATH PENALTY INFO. CTR. (*Death Row*), *supra* note 108.

333. Wyoming, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming> [<http://perma.cc/JE3B-ZA4E>] (last visited Apr. 13, 2023).

334. See H.B. 0092, 66th Leg., Reg. Sess. (Wyo. 2022); see also CA. PUB. RADIO, *supra* note 7.

335. H.B.0092 (Wyo. 2022).

336. See Brennan, *supra* note 97; see also GALLUP (*Death Penalty*), *supra* note 97; DEATH PENALTY INFO. CTR. (2021 Gallup Poll), *supra* note 70; PEW RSCH. CTR., *supra* note 97; *Glossip v. Gross*, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting) (“[M]ost places within the United States have abandoned its use.”).

337. See CHAMMAH, *supra* note 74, at 18 (suggesting that the national trend away from the death penalty has influenced extreme states like Texas to move in the same direction).

338. See Jodie Sinclair, *Abortion, Prison and the Death Penalty*, CRIME REP. (May 4, 2022), <http://thecrimereport.org/2022/05/04/abortion-prison-and-the-death-penalty> [<http://perma.cc/2T9T-FA97>].

339. See Rachel Treisman, *This Texas district attorney is one of dozens who have vowed not to prosecute abortion*, NPR (June 29, 2022, 10:40 AM), <http://www.npr.org/2022/06/29/1108513274/a-district-attorney-in-texas-says-he-wont-prosecute-abortion-crimes> [<http://perma.cc/MA4F-JPDH>] (highlighting that prosecution is a localized

On the death penalty, while several states retain capital punishment, only a handful of states go so far as to execute those on death row.<sup>340</sup> In 2021, the Death Penalty Information Center reported that the executions and new death sentences imposed that year “pointed to a death penalty that was geographically isolated, with just three states—Alabama, Oklahoma, and Texas—accounting for a majority of both death sentences and executions.”<sup>341</sup> Within those states, executions were scheduled or carried out and new death sentences were imposed “with apparent disregard for due process, judicial review of execution methods, or potentially meritorious claims of intellectual disability, incompetence to be executed, and innocence.”<sup>342</sup>

The smaller set of states that lead the charge in anti-abortion and pro-death penalty policies consists of Alabama, Arizona, Florida, Mississippi, Missouri, Louisiana, Ohio, Oklahoma, South Carolina, Tennessee, and Texas. For discussion purposes, these states are referenced as the “Punitive States.”

Indeed, surveying the U.S. Supreme Court’s landmark decisions on both abortion and capital punishment indicates these states were main players in shaping jurisprudence on both topics, as most of the decisions emanate from these states. On the death penalty, for example:

- *Furman v. Georgia* (Georgia, 1972), combined with *Jackson v. Georgia* (Georgia)<sup>343</sup> and *Branch v. Texas* (Texas)<sup>344</sup>: The death penalty violates the Eighth Amendment to the U.S. Constitution.<sup>345</sup>

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determination depending upon the prosecutor). In June 2022, prosecutors from around the country vowed to not prosecute abortion-related crimes. *Id.*

340. See, e.g., GARLAND, *supra* note 78, at 11 (stating executions mostly occur in “the Southern states”); *id.* (“[M]ost of the thirty-five states with the death penalty rarely carry out their threat to put capital murderers to death, and the vast majority of convicted killers end up serving a life-long prison sentence.”); see also, e.g., DEATH PENALTY INFO. CTR. (Year End Report—2021), *supra* note 137; *The Death Penalty in 2019: Year End Report*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> [http://perma.cc/GSW4-LP32] (last visited Apr. 13, 2023) (indicating executions occurred in only seven states, whereas new sentences of death were imposed in eleven states).

341. DEATH PENALTY INFO. CTR. (Year End Report—2021), *supra* note 137; see CHAMMAH, *supra* note 74, at 34 (highlighting that this idea of a geographically limited death penalty is not new; Texas legislators debating capital sentencing after *Furman* understood they were different than their Northern counterparts); see also Steiker & Steiker, *supra* note 70.

342. DEATH PENALTY INFO. CTR. (Year End Report—2021), *supra* note 137.

343. See *Furman v. Georgia*, 408 U.S. 238 (1972).

344. See *id.*

345. See *id.* at 240.

- *Gregg v. Georgia* (Georgia, 1976),<sup>346</sup> combined with *Proffitt v. Florida* (Florida),<sup>347</sup> *Jurek v. Texas* (Texas),<sup>348</sup> *Woodson v. North Carolina* (North Carolina),<sup>349</sup> and *Roberts v. Louisiana* (Louisiana)<sup>350</sup>: reinstituted the death penalty following *Furman*.<sup>351</sup>
- *Roberts v. Louisiana* (Louisiana, 1976): Louisiana's capital sentencing scheme violated the Eighth Amendment for requiring death in certain instances and, thereby, removing individual sentencing determinations.<sup>352</sup>
- *Lockett v. Ohio* (Ohio, 1978): Under the Eighth Amendment, the fact-finder must have discretion to consider mitigating circumstances other than those enumerated by statute.<sup>353</sup>
- *Enmund v. Florida* (Florida, 1982): Under the Eighth Amendment, a defendant cannot be sentenced to death where the defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."<sup>354</sup>
- *Ring v. Arizona* (Arizona, 2002): Arizona's capital sentencing scheme violated the Sixth Amendment for failing to require that the jury find each fact necessary to sentence the defendant to death.<sup>355</sup>
- *Roper v. Simmons* (Missouri, 2005): The Eighth Amendment precludes sentencing a minor to death.<sup>356</sup>
- *Miller v. Alabama* (Alabama, 2012): The Eighth Amendment precludes mandatory sentences of life without the possibility of parole for juvenile offenders.<sup>357</sup>

Realistically, this list is just a sample of significant decisions from the U.S. Supreme Court that emanated from Punitive States and impacted capital sentencing across the country.

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346. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

347. See *Proffitt v. Florida*, 428 U.S. 242 (1976).

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

349. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

350. See *Roberts v. Louisiana*, 428 U.S. 325 (1976).

351. See *Gregg*, 428 U.S. at 153.

352. See *Roberts*, 428 U.S. at 325.

353. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

354. See *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

355. See *Ring v. Arizona*, 536 U.S. 584 (2002); see also *Hurst v. Florida*, 577 U.S. 92 (2016) (applying *Ring* to hold that Florida's capital sentencing scheme violated the Sixth Amendment of the same reasons).

356. See *Roper v. Simmons*, 543 U.S. 551 (2005).

357. See *Miller v. Alabama*, 567 U.S. 460 (2012).



There is a similar pattern with respect to abortion despite there being significantly fewer decisions; however, it is not as stark as the pattern on capital punishment. Decisions like *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Stenberg v. Carhart* were undoubtedly landmark decisions on the abortion front but did not come out of Punitive States, or even pro-death penalty/anti-abortion states. Nevertheless, several important decisions in the abortion narrative did, including more increasingly in recent years:

- *Roe v. Wade* (Texas, 1973): The Fourteenth Amendment right to privacy protects the right to access abortion.<sup>358</sup>
- *Doe v. Bolton* (Georgia, 1973): Georgia's law limiting reasons why a woman could obtain an abortion was unconstitutional in light of *Roe*, which was decided the same day.<sup>359</sup>
- *Planned Parenthood of Central Missouri v. Danforth* (Missouri, 1976): In reviewing the Missouri abortion law at issue, the Court held: (1) "[i]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period" rather, "[t]he time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician"; (2) the informed consent provision was not unconstitutional; (3) the spousal consent provision of the law requiring spousal consent to abortion within the first twelve weeks of pregnancy was unconstitutional; (4) the parental consent provision of the law requiring parental consent to abortion within the first twelve weeks of pregnancy was unconstitutional; (5) "the outright legislative prescription of the saline amniocentesis technique fails as a reasonable regulation for the protection of maternal health"; (6) the recordkeeping provisions of the law were not unconstitutional; and (7) the standard of care provision of the law "impermissibly require[d] the physician to preserve the life and health of the fetus, whatever the stage of pregnancy."<sup>360</sup>

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

359. See *Doe v. Bolton*, 410 U.S. 179 (1973).

360. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64, 79, 83 (1976).

- *City of Akron v. Akron Center for Reproductive Health* (Ohio, 1983): Certain provisions in the abortion ordinance of Akron, Ohio were unconstitutional under the trimester framework set forth in *Roe*.<sup>361</sup>
- *Whole Women's Health v. Hellerstedt* (Texas, 2016): The Court must consider the extent to which the law at issue serves its intended purpose and the benefits provided; Texas's anti-abortion legislation unconstitutionally infringed on the right to abortion because neither of the two provisions at issue offers "medical benefits sufficient to justify the burdens upon access that each imposes."<sup>362</sup>
- *June Medical Services, LLC v. Russo* (Louisiana, 2020): The plurality opinion reversed the U.S. Court of Appeals for the Fifth Circuit's decision, holding that the district court's decision that the Louisiana law at issue posed an undue burden to the right to abortion was properly supported.<sup>363</sup>
- *Dobbs v. Jackson Women's Health Organization* (Mississippi, 2022): The Court's decisions in *Roe* and *Casey* were wrongly decided, and the Fourteenth Amendment right to privacy does not protect the right to access abortion.<sup>364</sup>

As this Part has shown, capital punishment and abortion are, in fact, similar in meaningful ways. The aftermath of *Dobbs* threatens Punitive States attempting to connect the two through criminalizing abortion as homicide.<sup>365</sup>

### III. THE EXISTING CAPITAL SENTENCING FRAMEWORK IS INCOMPATIBLE WITH ABORTION

As outlined above, pre-*Dobbs* legislative efforts directed state authorities to punish abortion like homicide—i.e., the premeditated

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361. See *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 442 (1983).

362. See *Whole Women's Health v. Hellerstedt*, 579 U.S. 582, 591 (2016).

363. See *June Med. Servs., LLC, v. Russo*, 140 S. Ct. 2103, 2132 (U.S., 2020).

364. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2234 (2022).

365. Another way we see these two coincide in these states is through statutes that will ultimately require women on death row who become pregnant to give birth. For example, Georgia statutes indicate how the State shall address women sentenced to death who are pregnant. GA. CODE ANN. § 17-10-39 (2021). The statutes direct the State to suspend the execution of the woman's sentence until the female is "no longer pregnant." *Id.* Alabama has similar legislation. See ALA. CODE § 15-18-86 (2021). Of course, post-*Dobbs* abortion bans will mean, absent extraordinary circumstances or miscarriage, women sentenced to death in these states must give birth.

killing of a human—and clarified that unborn children were considered humans for such purposes. With the green light from the U.S. Supreme Court, post-*Dobbs* movement in Punitive States seems to follow this pattern. This personification of fetuses is consistent with the goals of the pro-life movement.<sup>366</sup>

As these efforts gain traction in Punitive States after *Dobbs*, it is likely that legislation could criminalize abortion and implement harsh penalties, up to and including death. In Punitive States—i.e., the states that are the most likely to go so far as to punish abortion as premeditated homicide—the crime is punishable by death. Indeed, current law in at least one state, Georgia, poses this threat.<sup>367</sup> And the capital sentencing statute in Arizona explicitly contemplates capital sentencing proceedings related to abortion.<sup>368</sup> Thus, looking at how capital sentencing applies in the abortion context becomes relevant in the post-*Dobbs* discussion.

This Part explores how the current capital sentencing framework could apply to abortion offenses. Section A briefly reviews the capital sentencing process, summarizing the aggravating factors and mitigating circumstance that juries consider across the country in making sentencing recommendations. With that context, Section B applies the current framework to abortion and contends that the capital sentencing process would not produce constitutionally permissible sentences if applied to abortion offenses.

*A. The Constitutional Lynchpin to Capital Sentencing Proceedings: The Jury's Review of Aggravation and Mitigation*

To satisfy the constitutional mandates of the Eighth Amendment after *Furman*, every capital sentencing proceeding must involve individualized considerations of the defendant and the crime.<sup>369</sup> Before death can be imposed, the jury and the court must go through procedures designed to ensure “the death penalty [is] reserved for ‘the worst of the worst,’” or the most aggravated and least mitigated of crimes.<sup>370</sup>

The distinction between a non-capital and capital murder is the existence of one statutory aggravating factor.<sup>371</sup> If the jury determines

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366. See Ziegler NPR Interview, *supra* note 11.

367. Stern, *supra* note 43.

368. See sources cited *supra* note 149 and accompanying text.

369. See, e.g., S.C. CODE ANN. § 16-3-20 (2010).

370. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (citing *Roper v. Simmons*, 543 U.S. 551 (2005)); see, e.g., Ash, *supra* note 79, at 645. “Statutory aggravator schemes . . . were brought about by . . . *Furman* . . .” *Id.* at 642.

371. See, e.g., ALA. CODE § 13A-5-45(f) (2021) (“Unless at least one aggravating

that the state has proven at least one aggravating factor beyond a reasonable doubt, then the defendant is eligible for a death sentence.<sup>372</sup> Without at least one aggravator, the only sentencing option is life.<sup>373</sup>

As the U.S. Supreme Court has stated, the purpose of aggravating factors is to “furnish principled guidance for the choice between death and a lesser penalty.”<sup>374</sup> Aggravating factors used in capital sentencing schemes across the country typically include:

- The purpose of the murder was to prevent or avoid arrest or to escape from custody.
- The murder was conducted during the commission of another enumerated felony.
- The murder was an act of domestic terrorism.
- By conducting the murder, the defendant created great risk of death to others.
- The murder was conducted for pecuniary gain.
- The murder was conducted during a drug deal.
- The murder was especially heinous, atrocious, or cruel (HAC).
- The murder was committed in a cold, calculated, and premeditated (CCP) manner.
- The victim was:
  - A law enforcement officer or first responder;
  - An elected or government official performing his or her official duties;
  - A child;
  - A family member who was protected by an existing injunction; or
  - Particularly vulnerable due to advanced age or disability or otherwise.
- The defendant was:

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circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.”); ALA. CODE § 13A-5-46(e)(1); GA. CODE ANN. § 17-10-31(a) (2021); see *Summary of State Death Penalty Statutes*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/summary-of-state-death-penalty-statutes> [<http://perma.cc/7TRN-MECM>] (last visited Apr. 13, 2023). An aggravating factor is a “circumstance[] surrounding a crime or tort that [is] sufficient to raise its severity and punishment to the aggravated version of the offense.” *Aggravating Factor*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/aggravating\\_factor](http://www.law.cornell.edu/wex/aggravating_factor) [<http://perma.cc/5ZVT-5R66>] (last visited Apr. 13, 2023).

372. See sources cited *supra* note 371.

373. See DEATH PENALTY INFO. CTR. (*Death Penalty Waning in Indiana*), *supra* note 200.

374. *Richmond v. Lewis*, 506 U.S. 40, 46 (1992).

- Previously convicted of a capital felony or a violent felony;
- Previously convicted of a felony and under a sentence of imprisonment or probation;
- A criminal gang member; or
- A convicted sexual predator.<sup>375</sup>

In a capital sentencing proceeding (where the defendant is eligible for a death sentence), the jury reviews the evidence to determine whether the state has proven each aggravating factor beyond a reasonable doubt.<sup>376</sup> The jury's determination that an aggravating factor has been proven beyond a reasonable doubt, which must be unanimous,<sup>377</sup> is the lynchpin for ensuring the defendant receives the benefit of his or her Sixth Amendment right to trial by jury.<sup>378</sup>

After the aggravation, the jury considers the mitigation—or circumstances that may make the defendant less deserving of death.<sup>379</sup> Mitigating circumstances used in capital sentencing schemes across the country typically include:

- The defendant does not have any significant history of prior criminal activity.
- The defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant acted under extreme duress or the substantial domination of another person.
- The defendant's ability to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

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375. For additional examples of aggravating factors found in state statutes, see, for example, ALA. CODE § 13A-5-49 (2021); ARK. CODE ANN. § 5-10-101(1)(A)(x); FLA. STAT. § 921.141(6) (2021); GA. CODE ANN. § 17-10-30 (2021); IND. CODE § 35-50-2-9(1)(J); LA. REV. STAT. § 14:30(6); S.C. CODE ANN. § 16-3-20(C)(a)(1)(h). *But see* Ash, *supra* note 79 (arguing that the aggravators used in today's capital sentencing framework do not accomplish the purpose set forth in *Furman*).

376. See sources cited *supra* note 200.

377. See, e.g., GA. CODE ANN. § 17-10-31 (2021).

378. See *McKinney v. Arizona*, 140 S. Ct. 702, 709 (U.S., 2020) (Ginsburg, J., dissenting); *Hurst v. Florida*, 577 U.S. 92, 97 (2016); *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002). Some would argue that the Sixth Amendment requires the jury to also weigh the aggravation and mitigation. See, e.g., *Hurst v. Florida*, 202 So. 3d 40, 57 (Fla. 2016). However, the U.S. Supreme Court held otherwise in *McKinney*, 140 S. Ct. at 708 (“In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances.”).

379. FLA. STAT. § 921.141(7) (2021).

- The age of the defendant.
- Any other factors in the defendant's background that would mitigate against the imposition of death.<sup>380</sup>

In addition to the enumerated mitigating circumstances, the jury may consider any relevant mitigating evidence; this is the purpose of the “catchall” mitigator at the end of the list.<sup>381</sup> In fact, the U.S. Supreme Court has held that, to ensure constitutionality under the Eighth Amendment, the jury “may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence.’”<sup>382</sup> After considering the evidence, each juror can consider any mitigating circumstances that he or she believes is established.<sup>383</sup> Unlike the aggravation, the jury is not required to be unanimous on the mitigation.<sup>384</sup>

The jury then weighs the aggravation and mitigation in what is known as the “balancing test” or “weighing process.”<sup>385</sup> Here, the jurors determine whether the aggravation outweighs the mitigation. If not, then the juror must recommend a sentence of life. If the answer is yes, then the juror may recommend that the defendant be sentenced to death. But even where a juror determines the aggravation outweighs the mitigation, the juror may still recommend a life sentence; this is known as “mercy.”<sup>386</sup> In every state but Alabama, the jury's recommendation for death must be unanimous for the judge to sentence the defendant to death.<sup>387</sup>

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380. See, e.g., ALA. CODE §§ 13A-5-46(e), 13A-5-51 (2021); FLA. STAT. § 921.141(7) (2021).

381. *Smith v. Spisak*, 558 U.S. 139, 144 (2010) (quoting *Mills v. Maryland*, 486 U.S. 367, 374–75 (1988)); see *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982). For a discussion on evidence showing that the defendant suffered severe environmental deprivation and how it is considered in mitigation under the catchall mitigator and whether the way courts consider such evidence is effective, see Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 AM. J. CRIM. L. 167 (2018).

382. *Smith*, 558 U.S. at 144 (quoting *Mills*, 486 U.S. at 374–75) (internal quotations omitted) (emphasis removed).

383. See, e.g., GA. CODE ANN. § 17-10-30 (2021).

384. Ryan J. Winter & Stephen W. Joy, *Must the jury be unanimous?*, AM. PSYCH. ASS'N JUD. NOTEBOOK (Mar. 2010), <http://www.apa.org/monitor/2010/03/jn> [<http://perma.cc/R78V-RC7C>].

385. E.g., *United States v. Smith*, No. 3:16-cr-00086-SLG-1, 2020 WL 5949975, at n.15 (D. Alaska 2020); accord, e.g., *Richmond v. Lewis*, 506 U.S. 40, 46 (1992) (referencing “weighing” State[s], where the aggravating and mitigating factors are balanced against each other”); FLA. STAT. § 921.141(2)(b)(2) (2021).

386. See, e.g., *Smith*, 2020 WL 5949975 (discussing mercy as it appears throughout the jury's consideration in the capital sentencing process).

387. See, e.g., ARK. CODE ANN. § 5-4-603; GA. CODE ANN. § 17-10-31 (2021); IDAHO CODE § 19-2515.

*B. The Existing Capital Sentencing Framework Is Incompatible with Abortion*

The problem—both for Punitive States and opponents to their efforts—is that the current capital sentencing framework is incompatible with abortion. First, the existing aggravating factors used across the country would not serve their constitutional purpose if applied to abortion offenses. Second, the existing mitigating circumstances would almost never apply, and the absence of mitigation is a clear violation of the Eighth Amendment under *Furman*.

*1. Existing Aggravating Factors Would Not Serve Their Constitutional Purpose*

The aggravating factors used across the country, if applied to abortion, would not effectively “furnish principled guidance for the choice between death and a lesser penalty.”<sup>388</sup> This is true for either an abortion provider or the recipient of an abortion (i.e., the woman or the doctor).

On one hand, some of the aggravators are wholly inapplicable. For example, most of the aggravators focusing on the purpose of the murder (e.g., to avoid arrest, to escape from custody, during the commission of another enumerated felony) would never apply in the abortion context. Likewise, in the case of the patient, the pecuniary gain aggravator would never apply. Arguably, the pecuniary gain aggravator would not apply to the provider either; however, Punitive States would probably argue that it does due to the mere fact that healthcare providers receive remuneration for services.

On the other hand, and perhaps more problematic from a constitutional standpoint, Punitive States would likely argue some aggravators apply in almost every situation. For instance, while most of the aggravators focusing on the victim (e.g., law enforcement officer, elected or government official, etc.) would never apply, Punitive States would argue that the aggravator that the victim was a child applies in every instance.

Similarly, Punitive States would likely argue that the heinous, atrocious, and cruel (HAC) aggravator applies in every circumstance. The HAC aggravator “focuses on the *means and manner* in which death is inflicted and the immediate circumstances surrounding the death . . . .”<sup>389</sup> For purposes of this aggravator, it is irrelevant whether

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388. *Richmond v. Lewis*, 506 U.S. 40, 46 (1992).

389. *Buzia v. State*, 926 So. 2d 1203, 1211–12 (Fla. 2006) (quoting *Barnhill v. State*, 834 So. 2d 836, 849–50 (Fla. 2002) (emphasis added)).

the defendant meant for the killing to be “unnecessarily tortious.”<sup>390</sup> Rather, the focus is on “the *victim’s perceptions* of the circumstances.”<sup>391</sup> Therefore, Punitive States would likely argue HAC applies to every in-clinic abortion because of the nature of the procedure.

But a *de facto* aggravator defeats the constitutional purpose of aggravators. Where an aggravator applies every time, it is not serving its constitutional purpose of properly limiting capital punishment “to avoid the indiscriminate application of the death penalty.”<sup>392</sup> And, a capital sentencing scheme without aggravators cannot stand pursuant to the U.S. Supreme Court’s foundational decision in *Furman*.<sup>393</sup>

## *2. Existing Mitigating Circumstances Would Almost Never Apply*

The mitigating circumstances currently in place are likewise inapt for abortion offenses. The mitigation typically used in capital sentencing procedures today would have essentially no relevance to whether a healthcare professional or woman should be sentenced to death for performing or receiving an abortion, respectively. For instance, the mitigator that the victim somehow complied with the defendant’s conduct could never apply.

Other mitigating circumstances are precluded by abortion restrictions themselves. For example, where the patient is required to comply with informed consent provisions or twenty-four-hour waiting periods,<sup>394</sup> it is essentially inconceivable how the mitigator that the defendant was unable to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law would ever apply in the abortion context. The premise of those provisions—requiring the patient to fully understand and comprehend her decision to end her pregnancy—directly undermines the applicability of that mitigator.

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390. *Id.* (quoting *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990)).

391. *Id.* (quoting *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003) (emphasis in original)).

392. *State v. Joubert*, 399 N.W.2d 237, 248 (Neb. 1986); *accord, e.g., Richmond*, 506 U.S. at 46.

393. *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); *see, e.g., Joubert*, 399 N.W.2d at 248.

394. Thirty-two “states require that patients receive counseling before an abortion is performed.” *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <http://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion#> [<http://perma.cc/R84J-RMXG>] (last visited Apr. 13, 2023). Twenty-seven of those states “also require patients to wait a specified amount of time—most often 24 hours—between the counseling and the abortion procedure.” *Id.*



Even if the existing mitigators applied, Punitive States would likely push back against their applicability to abortion offenses, as they would undermine the premise upon which harsh anti-abortion laws are based. For instance, a defendant may present the mother's ability to care for the child or how motherhood would affect the mother's mental health as proper mitigation. But Punitive States and the pro-life movement have made clear those are not proper considerations in determining whether abortion is appropriate.<sup>395</sup> Thus, allowing them to be considered as mitigation presents a dilemma to Punitive States.

Ultimately, the current capital sentencing framework used around the country would not serve its constitutional purpose if applied to abortion offenses.

#### IV. WRITING A NEW CAPITAL SENTENCING FRAMEWORK FOR ABORTION PROVES UNWORKABLE

Because the current capital sentencing framework would not work for abortion offenses, punishing abortion by death would require Punitive States to write new capital sentencing frameworks specific to abortion. The question is whether it is feasible for states to write an abortion-specific capital sentencing framework that serves its constitutional function. This Part demonstrates that attempting to write a capital sentencing framework for abortion within the confines of the Sixth and Eighth Amendment ultimately proves unworkable because (A) aggravating factors would inherently create improper doubling, and (B) the framework would be without mitigation because the mitigators that would be necessary—discounting the criminality of the procedure based on the mother's circumstances—are the antithesis to the pro-life movements' goals in criminalizing abortion.

##### *A. Improper Doubling and Impermissible Vagueness with Aggravating Factors*

As to aggravators, based on the general construct that abortion is increasingly "worse" as gestation progresses, Punitive States would likely include factors related to the gestational development of the fetus. It is difficult to pinpoint where this would be, though, because the goal of the pro-life movement is to banish *any* abortion.<sup>396</sup> That being said, it does seem that abortions performed after a certain

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395. Ziegler NPR Interview, *supra* note 11.

396. *Id.*

point of gestation are considered worse than others, even within the pro-life movement. This is certainly true when distinguishing between pre-viability abortions and post-viability abortions.

Similarly, it is possible that states could see procedural abortions as worse than medical abortions.<sup>397</sup> This is supported by prior litigation about these procedures, such as in *Stenberg v. Carhart*.<sup>398</sup>

Further, based on the pro-life philosophy, it is likely that Punitive States would include aggravation based on the mother's circumstances—for example, that the mother did not have any related health risks that caused her to get the abortion, or the mother had the resources necessary to raise the child.

That leaves the following list of aggravators:

- The abortion was performed at or after twenty weeks.<sup>399</sup>
- The abortion was performed at or after viability.<sup>400</sup>
- The abortion was performed as a D&E or D&X procedure.<sup>401</sup>
- The abortion was performed when the fetus was healthy.<sup>402</sup>
- The abortion was not performed for any health-related reasons for the mother or the fetus.<sup>403</sup>
- The mother was healthy and able to carry the pregnancy to term.<sup>404</sup>
- The mother had the resources necessary to raise the child.<sup>405</sup>

These aggravators pose several issues. For instance, the first three aggravators are inherently duplicative. The Supreme Court of Florida, for example, has held that duplicative aggravation is improper because it places the defendant at an unfair disadvantage where the jury considers two aggravating factors that “refer to the

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397. See *Protecting Unborn Children from Dismemberment Abortions*, NAT'L RIGHT TO LIFE CTR., <http://www.nrlc.org/statelegislation/dismemberment> [<http://perma.cc/6F67-UC35>] (last visited Apr. 13, 2023).

398. See *Stenberg v. Carhart*, 530 U.S. 914, 922–23 (2000).

399. Based on abortion restrictions across the country, this example uses 20 weeks; this could change, and the arguments would essentially remain the same.

400. WebMD Editorial Contributors, *What Are the Types of Abortion Procedures?*, WEBMD (June 10, 2022), <http://www.webmd.com/women/abortion-procedures> [<http://perma.cc/TX84-P7FG>].

401. See *id.* (explaining different abortion procedures).

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

same aspect of the crime.”<sup>406</sup> For example, under the aggravating factors in the existing framework, it would be improper for the jury to consider as aggravation both that a murder was committed for pecuniary gain and that a murder was committed during a burglary or a robbery.<sup>407</sup>

Here, the abortion-specific aggravators inhere improper doubling. Medical abortions are only available up to the first ten weeks of pregnancy.<sup>408</sup> An abortion at or after twenty weeks is almost certainly going to be performed by dilation and evacuation (D&E)<sup>409</sup>—thereby invoking the first and third aggravating factors. And, an abortion at or after the point of viability is undoubtedly going to be performed by dilation and extraction (D&X)<sup>410</sup>—thereby invoking the second and third aggravating factors. Thus, every sentencing process for an abortion conducted by D&E or D&X would involve improper doubling.

Further, the aggravating factors related to the mother’s circumstances are inherently vague and subjective, which also poses a constitutional concern.<sup>411</sup> As the U.S. Supreme Court has explained, “[p]art of a State’s responsibility” in ensuring its capital sentencing scheme comports with the constitutional demands of *Furman* “is to define the crimes for which death may be the sentence in a way that obviates ‘standardless [sentencing] discretion.’”<sup>412</sup> The State must provide “‘clear and objective standards’ that provide ‘specific and detail guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”<sup>413</sup> In *Godfrey v. Georgia*, the U.S. Supreme Court held that Georgia’s “outrageously or wantonly vile, horrible and inhuman” aggravating factor was unconstitutionally vague, writing:

There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction

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406. *Griffin v. State*, 820 So. 2d 906, 914–15 (Fla. 2002); *accord* *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976). However, where “two aggravating factors are not based on the same essential feature of the crime or of the offender’s character, they can be given separate consideration.” *Agan v. State*, 445 So. 2d 326, 328 (Fla. 1983).

407. *E.g.*, *Rose v. State*, 787 So. 2d 786, 801 (Fla. 2001). Another example would be the jury considering that a murder was committed both to avoid lawful arrest and to hinder or disrupt law enforcement. *Bello v. State*, 547 So. 2d 914, 917 (Fla. 1989).

408. WebMD Editorial Contributors, *supra* note 400.

409. *Id.*

410. *Id.*

411. *See, e.g.*, *Ash*, *supra* note 79, at 641 (“[T]he Supreme Court has held that a sentencing scheme is unconstitutional if an *individual* aggravating factor is overbroad or vague” (emphasis in original)).

412. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

413. *Id.*

of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as “outrageously or wantonly vile, horrible and inhuman.” *Such a view may, in fact, have been one to which the members of the jury in this case subscribed.*<sup>414</sup>

In reaching its holding, the Court emphasized what it had said before—that “it ‘is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.’”<sup>415</sup>

In the abortion context, the subjective aggravating factors related to the mother’s circumstances are just as subjective, if not more so, as the aggravating factor at issue in *Godfrey*. It would be essentially impossible for a State to define the circumstances in which the mother is sufficiently healthy to carry the pregnancy to term, or in which the mother could adequately care for the child. Especially the latter is open to a broad spectrum of interpretations depending upon the juror’s subjective beliefs and/or emotions. For example, would it be sufficient that the mother has friends and/or family who could help with raising the child? Is it sufficient that the mother would be eligible for welfare? This sort of subjective and standardless aggravating factor that inheres emotion and speculation is impermissible, especially where almost any situation could theoretically fall within the scope of the aggravator.<sup>416</sup>

At its core, abortion-specific aggravators are riddled with constitutional roadblocks. A capital sentencing scheme that necessarily aggravates the offense and essentially creates an inevitable sentencing decision is the quintessential Eighth Amendment violation under the U.S. Supreme Court’s decision in *Furman*.

### *B. Counterproductive Mitigation*

Circumstances related to the mother’s situation are a double-edged sword. As discussed above, they present constitutional concerns when used as aggravation. But, they also seem to be an intuitive answer to mitigating circumstances. For example, potential mitigators could include:

- The pregnancy was the result of rape.
- The pregnancy was the result of incest.

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414. *Id.* at 428–29 (emphasis added) (footnote omitted).

415. *Id.* at 433.

416. See Ash, *supra* note 79, at 641 (“Overbroad or vague factors are problematic because, due to their vagueness or breadth, it is possible that nearly all murders could fall within their grasp.”).

- The mother was under the age of eighteen.
- The mother was involved in an abusive relationship that resulted in the pregnancy.
- Continuing the pregnancy would have detrimentally affected the health of the mother.
- Any other factors in the mother's circumstances that would mitigate against the imposition of death.

The problem is that Punitive States would likely balk at this sort of mitigation, as it counteracts the pro-life movement's goal, which is to deter abortion regardless of the mother's circumstances.<sup>417</sup> Their message is that abortion is wrong regardless of what that means for the mother who must carry the pregnancy to term and ultimately face parenthood.<sup>418</sup> As a result, one would be hard pressed to write a capital sentencing scheme with mitigation that would comport with the goals and messaging of the pro-life movement.

Even if such factors were allowed, the resulting analysis would be uncomfortable. For example, analyses under the catchall mitigator could likely venture into considering the mother's socio-economic status. Suddenly, the same factors that were considered for establishing an aggravating factor are now candidates for mitigation—depending upon the juror's subjective beliefs and emotions. Yes, mitigation is more of an independent analysis for each juror;<sup>419</sup> however, this lack of structure and amorphous boundary between aggravation and mitigation is cause for concern. Ultimately, capital punishment without mitigation creates a constitutional wasteland.

### CONCLUSION

The U.S. Supreme Court's decision in *Dobbs*, while not unexpected, instituted a paradigm shift that will affect numerous areas of law, especially as states continue exercising their newfound authority to control access to abortion. One potential consequence of *Dobbs*, which is already materializing, is that states will experiment with criminalizing abortion and imposing harsh punishments for such crimes, up to and including death—especially considering the pro-life movement's position that abortion is equivalent to murder. As a result, one area of law that could likely be catapulted into the center of the abortion discussion is capital sentencing.

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417. Ziegler NPR Interview, *supra* note 11.

418. See Rosenbluth, *supra* note 24 and accompanying text.

419. See sources cited *supra* note 371 and accompanying text.

After exploring the similarities between capital punishment and abortion, this Article identified the states that are most likely to introduce and implement such legislation. These extreme states, or “Punitive States” as this Article identifies them, are the “ring leaders” in pro–death penalty and anti-abortion efforts.

But, as this Article illustrated, the current capital sentencing framework used across the country is wholly inapposite for abortion. If applied to abortion, the aggravating factors and mitigating circumstances would not serve their constitutional purpose of sufficiently narrowing the death penalty to ensure it is not imposed arbitrarily—as required by the Eighth Amendment.<sup>420</sup>

Also, attempting to write an abortion-specific capital sentencing framework proves unworkable because the aggravating factors inhere constitutional error and Punitive States would not accept the mitigating circumstances. Thus, it becomes clear that *death is not a viable punishment for abortion*. As a result, Punitive States seeking to criminalize abortion must stop short of imposing death as a punishment for such crimes.

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420. LEGAL INFO. INST., *supra* note 371.