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Prosecutorial Discretion and the Crime of Abortion

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In an election cycle in which Republicans soundly trounced Democrats, one of the few silver linings for liberals was that voters in numerous states enshrined abortion access in their state constitutions. However, even as voters protected or expanded abortion rights in some jurisdictions, there remain serious threats to abortion rights elsewhere: In some states, we may soon see prosecutors charge people who have abortions with murder, or even capital murder. While this is not a wholly new phenomenon—even pre-Dobbs, some prosecutors brought homicide charges against people who had abortions—those charges generally did not stick. Now, in this post-Dobbs and post-election landscape, there is a credible threat not only that prosecutors will bring serious charges for abortion, but also that they will be able to secure convictions and hefty sentences. As this Article explains, individual local prosecutors have the discretion under existing criminal and fetal-personhood laws to charge people with murder or capital murder for abortion. Prosecutors also have incentives to do so. The upshot is that we could see people facing death sentences for having abortions.

When Dobbs gave more power to the states to criminalize abortion, it effectively handed that power to local prosecutors. This Article contends that local prosecutors are more likely than conventional wisdom holds to pursue serious prosecutions for abortion, and it offers a path forward for voters and

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lawmakers who seek to protect people who have abortions from draconian prosecutions.

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INTRODUCTION

In 2019, anticipating the demise of *Roe v. Wade*, Georgia decreed it “the policy of the State of Georgia to recognize unborn children as natural persons.”¹ The Living Infants Fairness and Equality (LIFE) Act, which went into effect after the U.S. Supreme Court issued *Dobbs* in 2022,² was a capstone victory for the movement to embed “fetal personhood” in Georgia law. The statute redefined the moment at which life begins under state law and conferred upon fetuses full equal-protection and due-process rights.³ The statute, moreover, banned abortion once “the presence of a detectable human heartbeat” has been identified, i.e., approximately six weeks into a pregnancy.⁴ But that is not all. With its sweeping talk of the rights of “unborn children,” the LIFE Act did something previously alien to Georgia law: It opened the door to murder charges against people who procure abortions. The chief prosecutor for Georgia’s Douglas County, District Attorney Ryan

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1. H.B. 481, 155th Gen. Assemb., Reg. Sess. § 2(6) (Ga. 2019) [hereinafter LIFE Act].
 2. See Meredith Deliso, *Georgia’s 6-week Abortion Ban to Go into Effect Immediately in ‘Unorthodox’ Ruling*, ABC NEWS (July 20, 2022), <https://abcnews.go.com/Health/georgias-week-abortion-ban-effect-immediately-unorthodox-ruling/story?id=87136941> [https://perma.cc/WFU9-NJ4L]; see also *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).
 3. A note on terminology: I use the term “fetus” throughout, even when “zygote” or “embryo” would be more medically appropriate. Also, I use “pregnancy criminalization” to mean contact with the criminal system—primarily criminal charges—that happens only because of a person’s pregnancy. Lastly, in general, I use “pregnant person” when describing someone who may procure an abortion. When describing specific incidents, statutes, and cases, I generally adopt the terminology used in media or in the statute or case itself. That noted, pregnancy criminalization is inextricable from sexism and misogyny rooted in a traditional gender binary. I do not intend to diminish the role of that sexism by using gender-neutral terminology.
 4. LIFE Act, *supra* note 1, §§ 2, 4(b). The LIFE Act transformed the legal status of fetuses in Georgia, for example, by expanding the population count to include fetuses with detectable heartbeats and allowing for child support for fetuses. See, e.g., *id.* §§ 3(d), 5; Press Release, Ga. Dep’t of Revenue, Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act (Aug. 1, 2022), <https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life> [https://perma.cc/2R42-5PVK].

Leonard, warned that people “should prepare for the possibility that they could be criminally prosecuted for having an abortion.” The district attorney—who decides which charges to bring when a crime is suspected—declared, “[I]f you look at it from a purely legal standpoint, if you take the life of another human being, it’s murder.”⁵

Abortion may therefore be soon prosecuted as murder, and not only in Georgia. As this Article explores, existing criminal and fetal-personhood laws in multiple states already provide the scaffolding for a prosecutor seeking to pursue murder or capital-murder charges for abortion. And *Dobbs* both expanded the opportunity for and intensified the risk of serious criminal charges.⁶

Perhaps this risk should not come as a surprise. Even well before *Dobbs*, prosecutors brought homicide charges against people who had allegedly terminated their pregnancies, even when the law did not clearly allow for such charges. Consider these examples: In 1994, Florida prosecutors charged unemployed teenager Kawana Ashley with third-degree murder and manslaughter after she shot herself in the abdomen in an attempt to end her pregnancy.⁷ In 2009, Utah prosecutors charged another impoverished teenager with solicitation to commit murder after she ended her pregnancy by asking a man to beat her.⁸ In 2015, St. Joseph County, Indiana prosecutors charged Purvi Patel with feticide—the killing of a fetus—among other crimes, alleging that she had self-induced an abortion

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5. Tessa Stuart, *Georgia D.A. Says He Would Prosecute Women Who Get Abortions*, ROLLING STONE (May 23, 2019), <https://www.rollingstone.com/politics/politics-news/george-d-a-says-he-will-prosecute-women-who-get-abortion-836145> [<https://perma.cc/FQ3T-JBHG>]; see also Final Order at 8 n.13, *SisterSong Women of Color Reprod. Just. Collective v. State*, No. 2022CV367796 (Ga. Super. Ct. Sept. 30, 2024) (making clear that “pregnant women . . . can be criminally liable under this statutory scheme”).
 6. Any criminal charge has potentially life-altering impact. Here, however, I focus primarily on the most serious of criminal charges, i.e., murder and capital-murder charges.
 7. See Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL’Y REV. 70, 71 (2015); *Abortion by Gunshot Brings Murder Charge*, N.Y. TIMES (Sept. 11, 1994), <https://www.nytimes.com/1994/09/11/us/abortion-by-gunshot-brings-murder-charge.html> [<https://perma.cc/3RL9-E4TZ>].
 8. Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 772 (2018); Rowan, *supra* note 7, at 71.

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at least twenty-five weeks into pregnancy.⁹ Also in 2015, Georgia's Dougherty County District Attorney charged Kenlissia Jones with malice murder, alleging that she had used the medication misoprostol to end her pregnancy at home and had caused the death of her fetus.¹⁰ Pre-*Dobbs*, these states' laws did not authorize any of these homicide charges, and not one homicide charge withstood judicial review.¹¹ But, despite their precarious legal footing, individual prosecutors pursued serious criminal charges, reflecting a longstanding appetite for treating abortion as homicide.¹²

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9. See Associated Press, *Purvi Patel Is Released After Feticide Conviction Is Overturned*, INDYSTAR (Sept. 1, 2016), <https://www.indystar.com/story/news/crime/2016/09/01/purvi-patel-releases-feticide-conviction-overturned/89707582> [<https://perma.cc/4LWQ-N2GK>]; Jess Arnold, *Prosecutor Explains Purvi Patel's Release and One Pro-Choice Supporter Reacts*, ABC57 (Sept. 2, 2016), <https://www.abc57.com/news/prosecutor-explains-purvi-patels-release-and-one-pro-choice-supporter-reacts> [<https://perma.cc/7EY6-VKE7>].
 10. NAT'L ASS'N OF CRIM. DEF. LAWS., *ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS* 25 (2021) [hereinafter NACDL], <https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf> [<https://perma.cc/QR7F-C3EM>].
 11. The Florida Supreme Court reaffirmed the common-law immunity for a pregnant woman who causes injury or death to her fetus. *State v. Ashley*, 701 So. 2d 338, 339-41 (Fla. 1997) (per curiam). A Utah court concluded that state law as then written did not permit murder charges against a person trying to end their own pregnancy. The Utah legislature promptly authorized murder charges for people who terminate pregnancies outside the confines of legal abortion. Ziegler, *Some Form of Punishment*, *supra* note 8, at 772; Rowan, *supra* note 7, at 71. Patel was sentenced to twenty years in prison for feticide and child neglect, but years later, the Indiana Court of Appeals vacated her feticide conviction. Associated Press, *supra* note 9. In Georgia, upon learning that there was no legal authority to charge someone for an abortion, the district attorney dropped the malice-murder charge against Jones. NACDL, *supra* note 10, at 25.
 12. One study identified over forty cases between 2000 and 2020 in which people faced some form of criminalization for allegedly terminating their own pregnancies. Laura Huss, Farah Diaz-Tello & Goleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings*, IF/WHEN/HOW 2 (2022), https://ifwhenhow.org/wp-content/uploads/2023/06/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL.pdf [<https://perma.cc/VEM4-F9CS>].

Since these prosecutions, *Dobbs* has sparked a tectonic shift for abortion criminalization, increasing the risk of serious criminal charges against people who have abortions. *Roe* had rejected fetal personhood,¹³ but *Dobbs* declined to do the same, freeing states to define the moment at which personhood begins and thereby empowering the fetal-personhood movement.¹⁴ With this silent imprimatur, laws such as Georgia's LIFE Act that had been shackled by *Roe*, as well as newer and farther-reaching personhood laws, went into effect.¹⁵ Moreover, by extinguishing the federal constitutional right to abortion, *Dobbs* granted states the unfettered ability to restrict and criminalize abortion access. Numerous states rushed to take up the call, and, once recent election results go into effect, nineteen states will ban or restrict abortion earlier than would have been permitted under *Roe*.¹⁶ States also devised increasingly aggressive ways of criminalizing

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13. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (considering and rejecting the fetal-personhood argument, holding instead that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).
 14. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 254, 263 (2022) (stating that the Court’s “decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests”). Even the majority’s repeated use of “prenatal life” demonstrated a commitment to a theory of life aligned with fetal personhood. See *id.* at 247, 254.
 15. Anna North, *Fetal Personhood Laws, Explained*, VOX (Mar. 4, 2024, 1:45 PM), <https://www.vox.com/policy/24090347/alabama-ivf-ruling-fetal-personhood-abortion-embryos> [<https://perma.cc/7Y2S-KC4S>]; PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 3-4 (2022) [hereinafter PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD], <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf> [<https://perma.cc/KE97-Q44H>] (surveying fetal-personhood provisions across states).
 16. As of publication, twenty-one states ban or restrict abortion earlier than *Roe* permitted, but Arizona and Missouri voters passed state constitutional amendments that will soon supersede those states’ restrictions. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/VCS3-JSGF>] (Nov. 6, 2024). In many of the other nineteen states, the bans are accompanied by a torrent of other laws that impede abortion access. For example, in addition to its near-total abortion ban, ALA. CODE § 26-23H-4 (2024), Alabama restricts abortion to procedures by licensed physicians, ALA. CODE § 26-23A-7 (2024); precludes

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abortion. For example, Louisiana reclassified the two drugs generally used in medication abortion as dangerous controlled substances, setting penalties of jail time and fines for knowing possession of the drugs without a prescription.¹⁷ And Idaho enacted a criminal law that makes helping a minor travel across state lines for an abortion punishable by up to five years in prison.¹⁸

Dobbs had a corollary, and crucial, effect on abortion criminalization. By letting states decide whether and how to criminalize abortion, *Dobbs* elevated to new heights the officials who most directly determine whether people face criminal charges under state law for pregnancy-related conduct: local prosecutors.¹⁹ A jurisdiction's chief local prosecutor, nearly always an official elected to represent a county or handful of counties, was already the

telemedicine for abortion care, ALA. CODE § 26-23E-7 (2024); and imposes further burdens on abortion providers, *see, e.g.*, ALA. CODE § 26-23E-9 (2024) (requiring reproductive health centers to meet the requirements for ambulatory healthcare occupancies).

17. Carl Nasman, *Louisiana Designates Abortion Pills as Controlled Substances*, BBC (May 23, 2024), <https://www.bbc.com/news/articles/c722llz5dz3o> [<https://perma.cc/YBB2-UX3G>].
18. Aria Bendix, *Idaho Becomes One of the Most Extreme Anti-Abortion States with Law Restricting Travel for Abortions*, NBC NEWS (Apr. 6, 2023), <https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225> [<https://perma.cc/PSD4-X6LC>]. Idaho's law is temporarily enjoined pending constitutional challenges. Rebecca Boone, *Federal Judge Puts Idaho's "Abortion Trafficking" Law on Hold During Lawsuit*, ASSOCIATED PRESS (Nov. 9, 2023), <https://apnews.com/article/idaho-abortion-trafficking-travel-ban-270a403d7b4a5e99e566433556614728> [<https://perma.cc/Ryj3-WLKS>]; *see also* Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1, 11 (2024) (listing other ways in which state lawmakers have aggressively criminalized abortion). More generally, researchers have identified a spike in pregnancy-related criminal charges post-*Dobbs*. WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER *DOBBS* 2 (2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf> [<https://perma.cc/G25F-HWYK>].
19. *See, e.g.*, Jill Habig, *How SCOTUS Gave Prosecutors Incredible Power over Abortion Access*, TIME (June 24, 2024), <https://time.com/6991206/scotus-abortion-access-prosecutors-power> [<https://perma.cc/7QNC-YSVZ>].

most powerful local actor in the state criminal system.²⁰ When *Dobbs* gave more power to states to criminalize abortion, it effectively handed that power to local prosecutors.

The upshot? In certain jurisdictions, post-*Dobbs*, a single prosecutor can wield their discretion to bring murder or capital-murder charges against someone who has had (or who is suspected of having had) an abortion. Relative to the pre-*Dobbs* prosecutions, these homicide charges are far more likely to stick.

Some prosecutors have already signaled how they will wield their expanded power. Nebraska's Madison County Attorney secured multiple felony convictions against a teenager who procured an abortion after twenty weeks and against her mother, who assisted her.²¹ One Georgia district attorney compared prosecutors who refused to bring charges against abortion patients to Nazis and segregationists, claiming the prosecutors' refusal to recognize the humanity of fetuses was reminiscent of the Nazis' and segregationists' attitudes toward, respectively, Jewish and Black people.²² In a public statement, the Texas Attorney General committed to "us[ing] the full force of [Texas's abortion ban] to make people pay."²³ The Alabama Attorney General had previously boasted of having helped

20. See *infra* Section I.A.1.

21. Mitchell McCluskey, *A Nebraska Mother Who Provided an Illegal Abortion for Her Daughter and Helped Dispose of the Fetus Gets 2 Years in Prison, Report Says*, CNN (Sept. 23, 2023), <https://www.cnn.com/2023/09/23/us/nebraska-abortion-pill-jessica-burgess/index.html> [<https://perma.cc/YF8B-YHUP>]; see also PURVAJA S. KAVATTUR ET AL., *THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 4* (2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf> [<https://perma.cc/P3PW-7P2A>].

22. Jennifer Bellamy & Adrienne Haney, *Acting Cobb DA Compares Prosecutors Who Refuse to Enforce 'Heartbeat' Abortion Law to Nazis, Segregationists*, 11ALIVE (May 29, 2019), <https://www.11alive.com/article/news/politics/acting-cobb-da-compares-prosecutors-who-refuse-to-enforce-heartbeat-abortion-law-to-nazis-segregationists/85-3b5ad261-93e8-4779-a9ac-068a4eed30dc> [<https://perma.cc/A5EV-WYBB>].

23. Elura Nanos, *Federal Judge Orders Texas AG to Testify in Abortion Case: If Paxton "Has Time to Give Interviews Threatening Prosecutions," He Can Show Up in Court*, LAW & CRIME (Oct. 5, 2022), <https://lawandcrime.com/abortion/federal-judge-orders-texas-ag-to-testify-in-abortion-case-if-paxton-has-time-to-give-interviews-threatening-prosecutions-he-can-show-up-to-court> [<https://perma.cc/JF4K-PCQ9>].

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craft legislation making it a crime to kill an unborn child.²⁴ Now, he has declared he will “vigorously enforce” Alabama’s abortion bans, including by threatening conspiracy charges for providers who help patients obtain out-of-state care.²⁵ And a Texas district attorney in fact brought murder charges against a woman for her self-induced abortion.²⁶

This Article details the implications of vast abortion-related discretion in the hands of individual local prosecutors—a looming problem that causes immediate harms and warrants immediate attention. Serious charges alone would cause swift and irreversible damage. The pregnant person could spend months, even years, in jail. They might lack an effective way to challenge the murder charges quickly, or at all. They might accept a plea deal to a lesser charge they would not have considered except for the threat of a murder conviction. And, of course, the pregnant person could ultimately be convicted of and sentenced for murder. Further, even the possibility of criminal charges kneecaps access both to abortion care and to healthcare more broadly.²⁷ For example, several women challenged Texas’s abortion bans, contending that they interfered with the women’s ability to get medical care during their complicated pregnancies.²⁸ The women testified about the horrors of being denied care under the hardline laws; one woman who was not permitted to terminate a nonviable pregnancy developed life-

24. *Meet the Attorney General*, OFF. OF THE ATT’Y GEN., STATE OF ALA., <https://www.alabamaag.gov/about> [<https://perma.cc/9RM2-522S>].

25. Nick Robertson, *Alabama AG Tells Court He Has Right to Prosecute Out-of-State Abortion Aid*, HILL (Aug. 31, 2023), <https://thehill.com/policy/healthcare/4180750-alabama-ag-lawsuit-prosecute-out-of-state-abortion-aid> [<https://perma.cc/2NAQ-GB4R>].

26. Carrie N. Baker, *Texas Woman Lizelle Herrera’s Arrest Foreshadows Post-Roe Future*, MS. (Apr. 16, 2022), <https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion> [<https://perma.cc/EZE6-8DTC>]. The district attorney dropped the charges upon realizing that Texas law precluded them.

27. *See, e.g., Why Abortion Criminalization Is a Public Health Issue*, UNIV. OF WASH. SCH. OF PUB. HEALTH (June 23, 2022), <https://sph.washington.edu/news-events/sph-blog/why-abortion-criminalization-public-health-issue> [<https://perma.cc/2Q2H-ACZA>] (describing studies demonstrating that abortion criminalization worsens maternal morbidity and mortality rates, among other healthcare measures); *see also infra* Section II.B.1.

28. *See, e.g., State v. Zurawski*, 690 S.W.3d 644, 653 (Tex. 2024). The Texas Supreme Court upheld the abortion bans, sowing further confusion as to when doctors can provide emergency abortions and related medical care. *Id.* at 653-54.

threatening sepsis and spent three days in an intensive care unit.²⁹ As long as prosecutors can threaten criminal consequences for abortion, these collateral harms will follow.

Moreover, increased discretion to pursue serious charges for abortion demands attention because the burdens of criminalization will be borne most heavily by marginalized communities. From its inception, pregnancy criminalization has been a racialized phenomenon—one that has disproportionately harmed poor women of color, especially poor Black women.³⁰ The disparate targeting of poor people, in particular poor people of color and other marginalized groups, will for many reasons be exacerbated in the abortion context. To note just a few of those many reasons: Pregnant people with financial resources will be more easily able to obtain prenatal care that may make an abortion unnecessary or will be more easily able to travel to a state that allows abortion. In addition, over half of Black women of reproductive age and over 60% of Black women who are economically insecure live in states with restrictive abortion regimes

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29. Eleanor Klibanoff, *Texas Supreme Court Rejects Challenge to Abortion Laws*, TEX. TRIB. (May 31, 2024), <https://www.texastribune.org/2024/05/31/texas-supreme-court-zurawski-abortion> [<https://perma.cc/T3C8-MJCA>]; *see also, e.g.*, Lift Louisiana et al., *Criminalized Care: How Louisiana's Abortion Bans Endanger Patients and Clinicians*, PHYSICIANS FOR HUM. RTS. (Mar. 19, 2024), <https://phr.org/our-work/resources/louisiana-abortion-bans> [<https://perma.cc/P9RZ-53XX>] (probing the alarming healthcare implications of abortion criminalization in Louisiana).
30. *See, e.g.*, Emma Milne, *Putting the Fetus First—Legal Regulation, Motherhood, and Pregnancy*, 27 MICH. J. GENDER & L. 149, 193-95 (2020) (discussing why low-income and Black pregnant people have been overrepresented among those facing pregnancy criminalization); KAVATTUR ET AL., *supra* note 21, at 44 (noting that “nearly 85%” of defendants in pregnancy-criminalization cases were legally indigent); GRACE E. HOWARD, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* 17 (2024) (“The criminalization of pregnancy . . . has grown out of race, gender, and race-gender oppressions—a collision of state reproductive control and the war on drugs. It is not surprising, then, that the first targets for arrest and prosecution were Black women.”). Indeed, many of the past homicide prosecutions discussed earlier targeted these same marginalized individuals: poor, young women and women of color. It is worth noting that the elected prosecutors making these charging decisions are overwhelmingly white men. *See* STEPHEN B. BRIGHT & JAMES KWAK, *THE FEAR OF TOO MUCH JUSTICE: RACE, POVERTY, AND THE PERSISTENCE OF INEQUALITY IN THE CRIMINAL COURTS* 20-21 (2023) (observing that, in 2019, 95% of the 2,442 elected prosecutors were white, and 73% were white men).

and are thereby at greater risk of abortion criminalization.³¹ And women of color experience pregnancy loss more frequently than white women, suggesting that women of color will more likely face surveillance and intrusive investigation that can lead to abortion-related criminal charges.³²

While scholars have begun to acknowledge the outsized role of prosecutorial discretion in abortion criminalization, this Article is the first to examine the credible risk that prosecutors will successfully prosecute people who get abortions for the most serious of crimes. Prosecutorial discretion has long been a subject of scholarly focus,³³ as has the rise of pregnancy criminalization, especially in the substance-use context.³⁴

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31. Camille Kidd, Shaina Goodman & Katherine Gallagher Robbins, *State Abortion Bans Threaten Nearly 7 Million Black Women, Exacerbate the Existing Black Maternal Mortality Crisis*, NAT'L P'SHIP FOR WOMEN & FAMS. (May 2024), <https://nationalpartnership.org/report/state-abortion-bans-threaten-black-women> [<https://perma.cc/SXH8-SRVE>]. That Black women “are at the center of a public health emergency,” in part due to lack of access to adequate healthcare and “the accumulation of disadvantages across generations,” further contributes to the risk of criminalization. See Juanita J. Chinn, Iman K. Martin & Nicole Redmond, *Health Equity Among Black Women in the United States*, 30 J. WOMEN'S HEALTH 212, 212-13 (2021).
 32. Caitlin Cruz, *Oklahoma Woman Sentenced to 4 Years for Manslaughter After Miscarriage*, JEZEBEL (Oct. 15, 2021), <https://www.jezebel.com/oklahoma-woman-sentenced-to-4-years-for-manslaughter-af-1847874545> [<https://perma.cc/R75G-N4CE>]; see also, e.g., MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 17, 21 (2020) (discussing the targeting of Black women in hospital surveillance of substance use during pregnancy).
 33. See, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521 (1981); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) [hereinafter DAVIS, *ARBITRARY JUSTICE*]; BRIGHT & KWAK, *supra* note 30.
 34. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (discussing the criminalization of substance use during pregnancy as part of a broader account of the large-scale assault on the reproductive rights of Black women); Ziegler, *Some Form of Punishment*, *supra* note 8 (reviewing the history of the anti-abortion movement's views on punishing people for abortions); KAVATTUR ET AL., *supra* note 21; Huss et al., *supra* note 12; NACDL, *supra* note 10; PREGNANCY JUST., *WHEN FETUSES GAIN PERSONHOOD*, *supra* note 15; see also Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use*

Michele Goodwin, in her seminal pre-*Dobbs* work *Policing the Womb*, meticulously detailed the surveillance and policing of pregnant women, especially poor Black women, and criminalization's roots in a desire for dominion over women and women's reproduction.³⁵ Post-*Dobbs*, scholars have begun to note the role of prosecutorial discretion in the pregnancy-criminalization context.³⁶ However, scholars have yet to thoroughly explore the implications of prosecutorial discretion in the abortion context. This Article is the first to examine the unfettered discretion vested in one individual through the lens of extreme charges for abortion, as well as to explore why a prosecutor might be motivated to seek such charges—and why they might succeed.³⁷

During Pregnancy, 133 HARV. L. REV. 770 (2020) (exploring the criminalization of opioid use during pregnancy to engage with conceptions of white privilege); Rachel Suppé, *Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in Ex parte Ankrom*, 7 HEALTH L. & POL'Y BRIEF 49 (2014) (dissecting the use of Alabama's chemical-endangerment statute to punish pregnant people who use drugs); WENDY BACH, PROSECUTING POVERTY, CRIMINALIZING CARE (2022) (examining the cases of 120 pregnant women prosecuted in Tennessee for transmitting narcotics to their fetuses and dissecting the harms of such criminalization); Valeena E. Beety & Jennifer D. Oliva, *Policing Pregnancy "Crimes,"* 98 N.Y.U. L. REV. ONLINE 29 (2023) (reviewing the expanding criminalization of substance use while pregnant and highlighting problematic forensic evidence used in such prosecutions); Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111 (2020) (detailing problems with the Floating Lung Test used in self-managed abortion cases).

35. GOODWIN, *supra* note 32.
36. *See, e.g.,* HOWARD, *supra* note 30 (focusing on prosecutorial discretion in the criminalization of substance use during pregnancy); PREGNANCY JUST., WHO DO FETAL HOMICIDE LAWS PROTECT? AN ANALYSIS FOR A POST-ROE AMERICA 10-34 (2022) [hereinafter PREGNANCY JUST., FETAL HOMICIDE LAWS], <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf> [<https://perma.cc/C2E7-WRE4>]; Dellinger & Pell, *supra* note 18 (exploring state-by-state the possibility of criminal charges for self-managed abortions and noting prosecutors' power to determine whether to pursue charges).
37. Melanie Kalamson has argued that there remain roadblocks to capital punishment for abortion. *See* Melanie Kalamson, *Death After Dobbs: Addressing the Viability of Capital Punishment for Abortion*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 545 (2023). However, she focuses not on prosecutorial discretion and charging incentives but on why a death sentence might not survive constitutional scrutiny in an abortion case.

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Part I establishes *how* individual prosecutors might pursue capital or other serious charges for abortion. It discusses the circumstances that give prosecutors tremendous power with respect to abortion criminalization, including their immense charging discretion and the labyrinth of criminal and fetal-personhood statutes—some of which already allow capital charges for the killing of a fetus—at their disposal. It then explains how *Dobbs* devolved to states even more power, thus paving the way for prosecutors to bring serious charges for abortion. Finally, Part I documents how some prosecutors have previously used their discretion to criminalize pregnant people even when a jurisdiction’s laws did not obviously allow such charges, and how prosecutors in certain jurisdictions might bring capital charges for abortion today.

Part II examines *why* a prosecutor would opt to bring such serious charges against a pregnant person who gets an abortion. It explains why current electoral preferences on abortion may not deter such charges. This Part further details the array of benefits that accrue to a prosecutor who pursues such charges, ranging from deterring disfavored pregnancy-related conduct to gaining litigation advantages.

Lastly, Part III offers suggestions for how voters and state legislatures might constrain prosecutors’ ability to charge people criminally for procuring abortions. This Part suggests that direct voter action is the most viable path to forestalling prosecutions. Moreover, this Part proposes that this moment—and this issue—might spur action even when legislators have previously hesitated to limit prosecutorial discretion.

To date, much of the conversation around prosecutorial discretion in the abortion context has focused on declinations, i.e., decisions by prosecutors *not* to pursue charges even when they are available.³⁸ That many prosecutors are declining to pursue charges is not surprising, because abortion rights are having a moment. Expansive abortion access is popular

38. See, e.g., Andrew T. Ingram, *Prosecutorial Authority and Abortion*, 96 S. CAL. L. REV. POSTSCRIPT 61 (2023); David A. Lord, *In Defense of the Juggernaut: The Ethical and Constitutional Argument for Prosecutorial Discretion*, 31 AM. U. J. GENDER, SOC. POL’Y & L. 141 (2023); Peter N. Salib & Guha Krishnamurthi, *Jury Nullification in Abortion Prosecutions: An Equilibrium Theory*, 72 DUKE L.J. ONLINE 41 (2022) (contending that the threat of jury nullification may reduce prosecutors’ inclination to pursue abortion criminally); Samuel F. Pollock, Note, *Criminal Law—Unfettered Discretion: Prosecutorial Discretion in the Aftermath of Dobbs v. Jackson Women’s Health Org.*, 46 U. ARK. LITTLE ROCK L. REV. 325 (2023) (arguing against blanket declinations).

with a broad spectrum of voters.³⁹ In the first two years after *Dobbs*, abortion was on the ballot in some form in seven states, and in every instance, the abortion-rights position prevailed.⁴⁰ That trend broadly continued in the 2024 election, when seven of the ten abortion-rights initiatives on state ballots succeeded.⁴¹ In line with these voter preferences, numerous local prosecutors have declared that they will exercise their discretion by not bringing criminal charges related to abortion.⁴²

But there is danger in focusing on declinations; discretion is bidirectional. Just as some local prosecutors will use their discretion to reject outright abortion criminalization, others will use it to pursue criminal charges for abortion as aggressively as possible. When we speak of giving power to states on an issue such as abortion criminalization, we are, in

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39. Nearly two-thirds (63%) of Americans say abortion should be legal in most or all cases—a share 4% higher than it was in 2021—and 54% say medication abortion should be legal. *Broad Public Support for Legal Abortion Persists 2 Years After Dobbs*, PEW RSCH. CTR. (May 13, 2024), <https://www.pewresearch.org/politics/2024/05/13/broad-public-support-for-legal-abortion-persists-2-years-after-dobbs> [https://perma.cc/62LC-A2FJ].
 40. Amanda Terkel & Jiachuan Wu, *Abortion Rights Have Won in Every Election Since Roe v. Wade Was Overturned*, NBC NEWS (Aug. 9, 2023), <https://www.nbcnews.com/politics/elections/abortion-rights-won-every-election-roe-v-wade-overturned-rcna99031> [https://perma.cc/2CB2-LMTW]; Peter Slevin, *The Lessons of Ohio's Abortion-Rights Victory*, NEW YORKER (Nov. 9, 2023), <https://www.newyorker.com/news/daily-comment/the-lessons-of-ohios-abortion-rights-victory> [https://perma.cc/MX7P-M4RQ].
 41. Even voters in some states that had near-total abortion bans, such as Missouri, adopted abortion-rights protections. Chantelle Lee, *How the 10 States' Abortion Ballot Initiatives Fared in the 2024 Election*, TIME (Nov. 6, 2024), <https://time.com/7173410/abortion-ballot-results-2024-election> [https://perma.cc/7S26-2X57]. Of course, voters also re-elected President Trump, who may take unilateral, national action to curtail reproductive rights. Alison Durkee, *How Trump Could Ban Abortion With or Without Congress—And What He's Said About It*, FORBES (Nov. 7, 2024), <https://www.forbes.com/sites/alisondurkee/2024/11/07/how-trump-could-ban-abortion-with-or-without-congress-and-what-hes-said-about-it> [https://perma.cc/J8AW-QEUK].
 42. See, e.g., Michael Atwell et al., *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022) [hereinafter *Joint Statement*], <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [https://perma.cc/RG2G-LW9V].

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essence, talking about giving that power to individual local prosecutors. That prosecutor may be one who would never treat abortion as a crime, or it may be the Douglas County District Attorney who concluded that Georgia's LIFE Act authorized murder charges for abortion. This Article explores the implications of that decision to bestow power upon states—and upon prosecutors—when it comes to treating abortion as murder.

I. HOW PROSECUTORS MIGHT BRING SERIOUS CHARGES FOR ABORTION

Although no state explicitly defines abortion as the crime of murder, in some states, prosecutors have the discretion to use existing fetal-personhood and criminal laws to bring such charges against a pregnant person. Long before *Dobbs*, some prosecutors were ready and willing to charge pregnant people for allegedly harming their fetuses by using criminal statutes intended for other purposes. Now, *Dobbs* has emboldened anti-abortion prosecutors not just to criminalize abortion, but to do so in the most severe ways possible.

A. Laying the Groundwork for Serious Charges for Abortion

Three critical factors combine to lay the groundwork for serious prosecutions of pregnant people who have abortions. The first is the immense and unconstrained discretion vested in the individual local prosecutor. The second is the inroads fetal-personhood laws have made in jurisdictions across the country and how those laws interact with existing criminal, including capital, statutes. And the third factor is *Dobbs*, which allows for broader abortion criminalization and has empowered prosecutors seeking to penalize pregnancy-related conduct. Despite the recent success of reproductive rights initiatives, these factors together make possible serious charges in the abortion context.

1. The Extraordinary Scope of the Individual Prosecutor's Discretion

Prosecutorial discretion is immense, almost always unreviewed, and virtually unreviewable.⁴³ Courts have adopted a hands-off approach to

43. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”); Vorenberg, *supra* note 33, at 1524-25 (“Decisions whether and

prosecutorial discretion, deeming a prosecutor's considerations "not readily susceptible to the kind of analysis the courts are competent to undertake."⁴⁴ The few existing constitutional restraints on charging, such as on discriminatory, selective, or vindictive prosecutions, are so difficult for defendants to prove that they have little practical value.⁴⁵ Moreover, when two statutes criminalize identical conduct but have different penalties, prosecutors have the freedom to choose which provision to charge.⁴⁶ In short, prosecutors decide freely whether to charge a crime, which crime(s) to charge, and against whom.⁴⁷ That discretion is a primary reason that serious charges for abortion are a real threat.

Examples abound of prosecutors exercising free rein when charging pregnancy-related crimes. For example, a first-degree murder charge for declining a C-section and experiencing a stillbirth? A perfectly legitimate

what to charge, and whether and on what terms to bargain, have been left in prosecutors' hands with very few limitations."); *see also, e.g.,* Vorenberg, *supra* note 33, at 1522 (recognizing that prosecutors have "great and essentially unreviewable powers").

44. *Wayte*, 470 U.S. at 607 (concluding that prosecutorial discretion is "particularly ill-suited to judicial review"); *see also* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 587 (2009) ("Judges also refuse, for the most part, to assume the responsibility for monitoring and controlling the work of criminal prosecutors."). While the Model Rules of Professional Conduct bind prosecutors, those rules "provide only limited guidance . . . when it comes to the issue of prosecutorial discretion in charging decisions." Lord, *supra* note 38, at 148 (noting that the only relevant ethical rule precludes a prosecutor from bringing charges if probable cause does not exist).
45. *See, e.g.,* *United States v. Armstrong*, 517 U.S. 456 (1996) (placing a heavy burden on defendants to show discriminatory impact just to access discovery when alleging unconstitutional selective enforcement); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 744 (1996) (noting that such claims are "rarely successful").
46. *United States v. Batchelder*, 442 U.S. 114, 115-18 (1979).
47. *See, e.g.,* *Wayte*, 470 U.S. at 607 ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

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use of discretion.⁴⁸ Homicide charges for a pregnant woman whose fetus died after someone else shot her in the stomach? That, too, was legitimate.⁴⁹ Charges against a pregnant woman for using painkillers prescribed by her doctor after a botched spinal surgery, even when the woman delivered a healthy baby? Acceptable as well.⁵⁰

Prosecutors, likewise, have near-exclusive control over the weighty decision whether to charge a crime capitally.⁵¹ Every state that permits the death penalty leaves the capital-charging decision in the hands of the prosecutor.⁵² As with other charges, prosecutors can bring capital charges

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48. Linda Thomson, *Rowland Accepts Plea Bargain in Twin's Death*, DESERET NEWS (Apr. 8, 2004), <https://www.deseret.com/2004/4/8/19821876/rowland-accepts-plea-bargain-in-twin-s-death> [<https://perma.cc/96N7-77AE>].
 49. Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html> [<https://perma.cc/6JHG-5E3G>]. The homicide charges in both this case and the C-section case were dismissed, but not because the prosecutors had exceeded their discretion. *Id.*
 50. HOWARD, *supra* note 30, at 47-48. The Lauderdale County, Alabama District Attorney eventually dropped the charges after the pregnant woman agreed to drug testing and a substance use disorder evaluation. Amy Yurkanin, *Charge Dropped Against Alabama Woman Who Renewed Pain Pill Prescription While Pregnant*, AL.COM (Feb. 23, 2022), <https://www.al.com/news/2022/02/charge-dropped-against-alabama-woman-who-renewed-pain-pill-prescription-while-pregnant.html> [<https://perma.cc/ANE4-H7NJ>].
 51. *See, e.g.*, Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & C.R. L. REV. 389, 389 (2010) (“Prosecutorial discretion in deciding whether to seek the death penalty . . . is a longstanding right and practice arguably essential to the continued function of the criminal trial process in most jurisdictions.” (footnote omitted)).
 52. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 24 (1998) [hereinafter Davis, *Prosecution and Race*]. This power is concentrated in the hands of the locally elected chief prosecutor, as many prosecutor offices have a total staff of four or fewer. *See* Misner, *supra* note 45, at 734. Moreover, most states do not require grand-jury indictments for felony charges. *See* DAVIS, *ARBITRARY JUSTICE*, *supra* note 33, at 201. In states that do, the prosecutor exercises full control over the grand-jury proceedings. The prosecutor decides which witnesses to present, does most or all the questioning, interprets the law, need not present exculpatory evidence, and may present evidence that is inadmissible in trial. The defense has no right to be present during proceedings, let alone to cross-examine

for the sole purpose of discouraging a defendant from exercising their right to a trial.⁵³ The Supreme Court has repeatedly blessed this charging discretion, hailing the importance of nearly unfettered prosecutorial discretion in the capital context, and protecting prosecutors from civil liability for their charging decisions.⁵⁴

This charging discretion is at its zenith when criminal law is expansive—when criminal codes cover all kinds of conduct, including overlapping statutes with varied penalties. For example, if certain conduct can be charged in five ways, then by bringing all five charges a prosecutor can both increase leverage to induce a plea bargain *and* increase the odds of a conviction at trial.⁵⁵ Indeed, when criminal codes cover so much behavior in so many overlapping ways, it is virtually impossible to enforce all crimes:

witnesses or to present evidence without the prosecutor's permission. DAVIS, ARBITRARY JUSTICE, *supra* note 33, at 25-26, 148. Consequently, the grand jury proceedings are largely a pro forma affair. Cf. Cynthia Soohoo & Dana Sussman, *The Threat of Murder Charges for Abortion Already Exists*, JURIST (May 14, 2022), <https://www.jurist.org/commentary/2022/05/cynthia-soohoo-dana-sussman-abortion-criminal-charges> [<https://perma.cc/MG5V-W57G>] (explaining that a prosecutor persuaded a grand jury to indict a woman for murder after her abortion despite a Texas law prohibiting such charges).

53. For example, Georgia's Gwinnett County District Attorney charged Kelly Gissendanner and Gregory Owen with murder and offered each a plea deal of life in prison with the possibility of parole. Owen, who had committed the murder, accepted the plea deal. Gissendanner, who was less culpable, went to trial, and because she did so the district attorney sought and secured the death penalty. Gissendanner was executed in 2015. BRIGHT & KWAK, *supra* note 30, at 17-18.
54. The Supreme Court declared that "the policy considerations behind a prosecutor's traditionally wide discretion suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties . . ." *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987) (footnote and internal quotation marks omitted); *see also id.* at 297 ("[The plaintiff] challenges decisions at the heart of the State's criminal justice system . . . [W]e would demand exceptionally clear proof before we would infer that the discretion [to charge a crime capitally] has been abused."); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (holding that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is immune from civil suit).
55. Stuntz, *supra* note 33, at 519-20.

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“[T]he law as enforced will differ from the law on the books.”⁵⁶ In this context, prosecutorial discretion becomes both inevitable and nearly limitless. Because prosecutors ultimately decide which laws to enforce, they become “the criminal justice system’s real lawmakers.”⁵⁷

Finally, and critically, this charging discretion at the local level—the de facto authority to serve as the system’s real lawmaker—is ultimately vested in an *individual* prosecutor. The elected local prosecutor, generally representing one county or a few counties, exerts exclusive control over prosecution policies and priorities within the jurisdiction.⁵⁸ Prosecutorial decisions are influenced by local priorities and culture, as well as by the personality and ideology of the prosecutor in charge. As a result, which individuals and crimes get prosecuted for which charges is highly dependent on the chief prosecutor and can differ dramatically from one jurisdiction to the next. For example, Alabama has become a hotbed for prosecutions of people who use drugs while pregnant.⁵⁹ But not all of Alabama. District Attorney Jody Willoughby of Etowah County, Alabama, has declared that *not* charging people who use drugs while pregnant would make his office “an enabler of a deadly addiction” and “complicit in the abuse of a child.”⁶⁰ Etowah County represents only 2% of the state’s population but has 20% of its total arrests of pregnant people for drug use.⁶¹ From 2015 to January 2023, the Etowah County District Attorney brought

56. *Id.* at 519.

57. *Id.* at 506; *see also id.* at 509 (commenting that “criminal codes that cover everything . . . serve only to delegate power to district attorneys’ offices”); Misner, *supra* note 45, at 742 (“[C]urrent criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the prosecutor. In many cases the legislature has effectively delegated its prerogative to define the nature and severity of criminal conduct to the prosecutor.” (emphasis omitted)).

58. *See, e.g.,* DAVIS, *ARBITRARY JUSTICE*, *supra* note 33, at 47 (discussing the impact of the “philosophy and management style of the chief prosecutor” on, for example, plea bargaining policies and approaches in a jurisdiction).

59. Amy Yurkanin, *One Alabama County Cracked Down on Pregnant Drug Users. 10 Years Later, Has It Gone Too Far?*, AL.COM (July 31, 2023), <https://www.al.com/news/anniston-gadsden/2023/07/one-alabama-county-pledged-to-crack-down-on-pregnant-drug-users-ten-years-later-has-it-gone-too-far.html> [<https://perma.cc/4RX4-KV8H>].

60. *Id.* (“No county does more [than Etowah County] to locate, jail and keep new mothers behind bars.”).

61. HOWARD, *supra* note 30, at 109.

289 such cases, or twenty-eight cases per 10,000 residents. The neighboring counties of Marshall, Blount, and St. Clair—represented by district attorneys who perhaps had different priorities—had, respectively, just 4.0, 2.7, and 1.6 cases per 10,000 residents.⁶² For all intents and purposes, those counties operated under different laws than did Etowah County.

2. Fetal-Personhood Laws and Their Criminal Consequences

For the lawmaking prosecutor, criminal statutes concerning pregnancy-related conduct like abortion provide rich ground to mine. That rich ground—in particular, the interplay of criminal statutes and fetal-personhood laws—is the second factor that could contribute to serious charges for abortion.

Entrenching “fetal personhood” in law and society has long represented the holy grail of the anti-abortion movement.⁶³ As noted earlier, fetal personhood calls for recognizing the fetus from the moment of fertilization as a human being who is entitled to the full panoply of constitutional protections.⁶⁴ Some anti-abortion activists began championing fetal

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62. Yurkanin, *supra* note 59. This same county-by-county (and chief prosecutor-by-chief prosecutor) variation exists in the capital context. *See America's Top 5 Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, FAIR PUNISHMENT PROJECT 2-4 (June 2016), https://dpic-cdn.org/production/documents/FairPunishmentProject-Top5Report_FINAL_2016_06.pdf [<https://perma.cc/ZK3M-JU5D>] (examining the impact of “five of America’s deadliest head prosecutors”); *cf.* *Glossip v. Gross*, 576 U.S. 863, 918-19 (2015) (Breyer, J., dissenting) (attributing huge county-level disparities in death sentencing in large part to “the decision-making authority, the legal discretion, and ultimately the power of the local prosecutor”).
63. *See, e.g.*, Kaelan Deese, *Fetal Personhood Is the Next Front Line for the Anti-Abortion Movement*, WASH. EXAM’R (Jan. 19, 2023), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/fetal-personhood-new-legal-frontline-anti-abortion-movement> [<https://perma.cc/YEA5-ESWX>]; Mary Ziegler, *The Real End Goal of the Anti-Choice Texas Abortion Lawsuit*, SLATE (Mar. 28, 2023), <https://slate.com/news-and-politics/2023/03/personhood-laws-anti-choice-texas-abortion-lawsuit.html> [<https://perma.cc/MC6B-G6JC>].
64. Deese, *supra* note 63. Historically, most states followed the common-law “born alive” rule: “A person could only be charged with homicide for injuries inflicted in utero if the pregnant person delivered an infant [who] lived for some amount of time before dying.” FARAH DIAZ-TELLO, MELISSA MIKESSELL & JILL E. ADAMS, *ROE’S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL*

personhood in the 1960s, in response to states loosening their abortion restrictions.⁶⁵ They have faced some roadblocks: *Roe* limited the reach of fetal personhood, and voters in many states repeatedly stifled fetal-personhood initiatives.⁶⁶ Still, the effort to enshrine fetal personhood in law has gained so much traction in state legislatures and courts across the country that *every* state and territory now defines “person,” “child,” or a similar term to include a fetus in at least one legal context, whether trusts and estates, wrongful death, workers’ compensation, insurance, or another area of law.⁶⁷ Several of the abortion bans that went into effect post-*Dobbs* explicitly incorporate the tenets of fetal personhood by defining human life as beginning at conception.⁶⁸ Laws like Georgia’s LIFE Act bestowed sweeping rights upon fetuses. And, at the federal level, the Republican Party platform—which President-elect Donald Trump has embraced—endorses fetal personhood.⁶⁹

With respect to criminal law, legislators in the 1970s began entrenching fetal personhood in two ways⁷⁰: first, by codifying new crimes (e.g., feticide) for acts affecting a fetus; and second, by broadening the definition of “person” or “victim” in existing crimes to encompass fetuses. In 1970, California became the first state to declare the unlawful killing of a fetus a

14 (2017), <https://ssrn.com/abstract=3082643> [<https://perma.cc/DE9F-YR3E>].

65. Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (Aug. 21, 2022), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/X9ZH-JN2C>].
66. For example, in 2011, Mississippi voters rejected a state constitutional amendment that would have redefined person to include “every human being from the moment of fertilization.” *Mississippi Initiative 26, Definition of Person Amendment (2011)*, BALLOTPEDIA, [https://ballotpedia.org/Mississippi_Initiative_26_Definition_of_Person_Amendment_\(2011\)](https://ballotpedia.org/Mississippi_Initiative_26_Definition_of_Person_Amendment_(2011)) [<https://perma.cc/X33J-WDJK>]; *The Personhood Movement: Where It Came from and Where It Stands Today*, PROPUBLICA [hereinafter *Personhood Movement*], <https://www.propublica.org/article/the-personhood-movement-timeline> [<https://perma.cc/VPE4-AFYJ>].
67. PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD, *supra* note 15, at 4.
68. See, e.g., ARK. CODE ANN. §§ 5-61-301–304 (West 2024); KY. REV. STAT. ANN. § 311.772 (West 2024); LA. STAT. ANN. §§ 14:87, 40:1061 (2024); MO. REV. STAT. §§ 188.015, 188.017 (2024); TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001, 170A.002 (West 2024).
69. Durkee, *supra* note 41.
70. DIAZ-TELLO ET AL., *supra* note 64, at 14.

homicide; since then, thirty-eight states and the federal government have followed suit.⁷¹ And at least eleven states have adopted “broad personhood language that could be read to affect all state laws, civil and criminal.”⁷²

By embracing fetal personhood in the criminal context, legislators have significantly expanded the already-sweeping morass of criminal laws.⁷³ The federal criminal code alone recognizes over 4,450 statutory crimes and over 300,000 administratively created crimes, and there are tens of thousands of similar state crimes.⁷⁴ Many of those criminal statutes relating to harms against the person now apply explicitly or potentially when a fetus is injured or a pregnancy terminated.⁷⁵

Moreover, the state high courts in Alabama, Oklahoma, and South Carolina have deemed it constitutional to import fetal personhood into criminal law.⁷⁶ Those decisions have paved the way for prosecutors to charge individuals with any number of crimes, including serious crimes, for the death of or injury to a fetus.

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71. See *People v. Davis*, 872 P.2d 591, 594-600 (Cal. 1994) (discussing the state legislature’s rewriting of the murder statute, CAL. PENAL CODE § 187(a) (West 2024), to apply to fetuses past the embryonic stage of development); *State Homicide Laws that Recognize Unborn Victims*, NAT’L RIGHT. TO LIFE COMM. (Apr. 2, 2018), <https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302> [<https://perma.cc/3A3S-L7WT>]; *Personhood Movement*, *supra* note 66; Unborn Victims of Violence Act of 2004, H.R. 1997, 108th Cong.
72. PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD, *supra* note 15, at 3. Two states, Alabama and Arkansas, have such language in their constitutions. *Id.* at app. 1-4.
73. Notably, this expansion seems to contradict the argument from twenty years ago that the core of criminal law—the major crimes—was essentially stagnant. See Stuntz, *supra* note 33, at 526.
74. John Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes> [<https://perma.cc/26G6-T7HB>].
75. See NACDL, *supra* note 10, at 3.
76. See KAVATTUR ET AL., *supra* note 21, at 4; *Ex parte Ankrom*, 152 So. 3d 397, 407-20 (Ala. 2013). In *Whitner v. State*, the South Carolina Supreme Court held that the word “child” as used in the state’s child-abuse statute encompassed viable fetuses. 492 S.E.2d 777, 778-89 (S.C. 1997) (upholding for the first time a conviction of a pregnant woman under the child-abuse statute for substance use). In *State v. Green*, the Oklahoma Court of Criminal Appeals similarly upheld a conviction for child neglect when a woman had used illegal drugs while pregnant. 474 P.3d 886, 887-88, 891, 893 (Okla. Crim. App. 2020).

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The effects are stark in death-penalty states, some of which now have capital-murder statutes that extend to fetuses.⁷⁷ For example, Texas’s criminal code defines “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.”⁷⁸ And one type of “capital murder” in Texas, for which the penalty may be death, is “intentionally or knowingly caus[ing] the death of an individual” when that “individual [is] under 10 years of age.”⁷⁹ Under existing Texas law, then, intentionally or knowingly causing the death of a fetus qualifies as capital murder. Alabama defines “person” as “a human being, including an unborn child in utero at any stage of development, regardless of viability” when referring to the victim of criminal homicide.⁸⁰ Under Alabama law, intentionally causing the death of another person is capital murder when the victim is less than fourteen years of age.⁸¹ There, as in Texas, intentionally causing the death of a fetus can be a capital crime.⁸²

77. Soohoo & Sussman, *supra* note 52 (citing research that over twenty states allow murder charges “for causing the death of an unborn child”).

78. TEX. PENAL CODE ANN. § 1.07(26) (West 2024).

79. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2024) (defining intentional or knowing murder); TEX. PENAL CODE ANN. § 19.03(a)(8) (West 2024) (classifying the intentional or knowing murder of someone under ten years of age as a capital crime); *see also* TEX. PENAL CODE ANN. § 12.31 (West 2024) (stating that a capital felony for which the State seeks death shall be punished with a death sentence or life in prison without the possibility of parole).

80. ALA. CODE § 13A-6-1(a)(2), (3) (2024).

81. ALA. CODE § 13A-5-40(a)(15) (2024); *see also* ALA. CODE § 13A-5-40(b) (2024) (explaining that the capital-murder statute applies only to murder as defined in ALA. CODE § 13A-6-2(a)(1), as opposed to other subparts of the murder statute); ALA. CODE § 13A-6-2(a)(1) (2024) (defining it as murder when, “[w]ith intent to cause the death of another person, [a person] causes the death of that person or of another person”).

82. Other jurisdictions have similarly made the killing of a fetus a capital crime in certain circumstances. *See, e.g.*, ARK. CODE. ANN. § 5-1-102(13)(B)(i)(a) (West 2024) (expanding the meaning of “person” as it relates to Arkansas’s homicide statutes, including its capital-murder statute, to include an unborn child in utero “from conception until birth”); ARIZ. REV. STAT. §§ 13-1105(A)(1), 13-1105(C), 13-1105(D) (LexisNexis 2024) (defining first-degree murder in relevant part as follows: “[i]ntending or knowing that the person’s conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child,”

Prosecutors have made routine use of these interacting criminal and fetal-personhood laws to prosecute feticide as a capital crime—and, in some cases, to secure death sentences. In Ector County, Texas, prosecutors charged Joel Luna with capital murder and aggravated assault for assaulting his pregnant ex-wife and killing her 5-week-old fetus.⁸³ In South Carolina, Joseph Ard was sentenced to death for the murders of his girlfriend and “their unborn, but viable, son.”⁸⁴ Ard was found guilty of shooting his girlfriend when she was over eight months pregnant, killing her and the viable fetus. The South Carolina Supreme Court concluded that “the legislature intended to include viable fetuses as ‘persons’ [and ‘children’]” for the purpose of the state’s murder statute, as well as for the provision making a murder capital when it involves the “murder of a child eleven years of age or under.”⁸⁵ The court upheld Ard’s death sentence.⁸⁶ And, in Alabama, the Attorney General broadcast that he had procured a death sentence for the killing of a fetus under the law he helped enact.⁸⁷ While these prosecutions targeted third parties, they demonstrate a willingness to bring capital charges for the death of a fetus that could easily extend to the abortion context.

A final note here is that the states where pregnancy-related conduct is most heavily criminalized are largely the same states that actively use the

clarifying that the victim may be an unborn child . . . at any stage of its development,” and specifying that first-degree murder may be punishable by death).

83. See Elizabeth Howard & Kortney Williams, *Capital Murder in the Death of a 5-Week-Old Fetus*, TEX. DIST. & CNTY. ATT’YS ASS’N (May-June 2022), <https://www.tdcaa.com/journal/capital-murder-in-the-death-of-a-5-week-old-fetus> [<https://perma.cc/Q8UX-W3WX>]. It appears that the prosecutors did not ultimately pursue a death sentence against Mr. Luna. A jury convicted Mr. Luna on both counts, and he was sentenced to life in prison without the possibility of parole for the death of the fetus and to thirty-six years in prison for the aggravated assault. *Ector County Jury Convicts Man of Capital Murder of Child Under 10*, ODESSA AM. (Nov. 18, 2021), <https://www.oaoa.com/local-news/courts/ector-county-jury-convicts-man-of-capital-murder-of-child-under-10> [<https://perma.cc/L6NS-7KGC>].
84. *State v. Ard*, 505 S.E.2d 328, 330 (S.C. 1998), *overruled on other grounds*, *Shafer v. South Carolina*, 532 U.S. 36 (2001).
85. *Ard*, 505 S.E.2d at 330-31 (emphasis omitted) (citing S.C. CODE ANN. § 16-3-20(c)(a)(9)–(10) (2023)).
86. *Id.* at 386-87.
87. *Meet the Attorney General*, *supra* note 24.

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death penalty. For example, the fall of *Roe* “triggered” abortion bans in thirteen states, and all thirteen of those states are death-penalty jurisdictions.⁸⁸ Texas and Oklahoma had enacted full abortion bans even before *Roe*’s demise,⁸⁹ and they are two of the most active death-penalty jurisdictions. Together, those two states accounted for more than half of the executions nationwide in 2023.⁹⁰ Nearly seventy percent of the instances of pregnancy criminalization in the country have occurred in three states: Alabama, Oklahoma, and South Carolina.⁹¹ All three states have conducted executions in 2024, and Alabama and South Carolina were among the few jurisdictions where multiple people were sentenced to death in 2023.⁹² The result is that in the places where prosecutors are, broadly speaking, more likely to want to punish abortion with capital charges, those capital charges are more likely to be available.

3. The Post-*Dobbs* Landscape

Lastly, serious charges for abortions are more likely because of *Dobbs*. As noted earlier, *Dobbs* effected several critical changes. It broke from *Roe* and paved the way for state fetal-personhood laws to take full effect. It allowed states to enact laws criminalizing abortion without restriction. It empowered the individual prosecutor, who makes the ultimate decision as to whether people will face serious criminal charges for abortion. For all of

88. See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [https://perma.cc/V428-YS6F] (listing states with trigger bans); *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. [“DPIC”] (Aug. 30, 2024), <https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf> [https://perma.cc/3P22-2QE4] (listing states with the death penalty).

89. See Act of May 25, 2022, ch. 321, 2022 Okla. Sess. Laws; Human Life Protection Act of 2021, ch. 800, 2021 Tex. Gen. Laws; Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws.

90. *2023 Death Sentences by Name, Race, and County*, DPIC, <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2023-death-sentences-by-name-race-and-county> [https://perma.cc/PK4M-BALL].

91. See KAVATTUR ET AL., *supra* note 21, at 4.

92. See, e.g., *Execution List 2024*, DPIC, <https://deathpenaltyinfo.org/executions/2024> [https://perma.cc/YH7S-6WP5].

those reasons, the threat of serious charges has worsened. But the threat also looms larger because *Dobbs* both undermined state-law precedent that blocked prosecutions and meaningfully emboldened the politicians and activists who are most enthusiastic about pushing abortion criminalization.

Fetal-personhood laws, given effect after *Dobbs*, jeopardize state-court precedent that relied on *Roe* to protect people from abortion prosecutions. For example, Georgia's feticide law criminalizes "willfully and without legal justification caus[ing] the death of an unborn child by any injury to the mother of such child."⁹³ The law makes explicit that "[n]othing in this Code section shall be construed to permit the prosecution of . . . [a]ny woman with respect to her unborn child."⁹⁴ However, Georgia's LIFE Act, which criminalized most abortions and gave fetuses equal-protection rights, declares that "[a]ll laws and parts of laws in conflict with this Act are repealed."⁹⁵ In other words, it undercuts the statutory protection for pregnant people in Georgia's feticide statute.⁹⁶ It was on this basis that the Douglas County District Attorney concluded that the LIFE Act exposed pregnant people who get abortions to homicide charges.⁹⁷

Moreover, *Dobbs* has invigorated leaders in the movement toward widespread recognition of fetal personhood, bringing practices and rights once considered safe under threat. In the words of Project 2025, the Heritage Foundation's conservative agenda that has been linked with President-elect Trump's campaign, "the *Dobbs* decision is just the beginning. Conservatives in the states and in Washington, including in the next conservative administration, should push as hard as possible to protect the

93. GA. CODE ANN. § 16-5-80(b) (2024).

94. GA. CODE ANN. § 16-5-80(f)(3) (2024).

95. LIFE Act, *supra* note 1, § 7-2 (Ga. 2019). The 2019 LIFE Act has faced legal challenges, and a superior court judge ruled the statute violated the state constitution, but the Georgia Supreme Court reinstated the ban pending appeal. Christina Morales, *Georgia Supreme Court Restores State's 6-Week Abortion Ban*, N.Y. TIMES (Oct. 7, 2024), <https://www.nytimes.com/2024/10/07/us/georgia-supreme-court-abortion-ban.html> [<https://perma.cc/Y9UN-NUQC>].

96. NACDL, *supra* note 10, at 23.

97. The Douglas County District Attorney was not the only local prosecutor ready to bring charges against abortion patients. *See, e.g.*, Bellamy & Haney, *supra* note 22.

unborn in every jurisdiction in America.”⁹⁸ On many fronts, this mission is gaining steam; what were quite recently fringe positions with respect to fetal personhood are now getting serious support from policymakers. For example, abortion restrictions enacted under *Roe* regularly included exceptions for the life and health of the mother and, in some cases, for sexual assault as well. Now, lawmakers are embracing abortion bans with fewer, if any, exceptions.⁹⁹ Before, contraception access and in vitro fertilization seemed safe from attack. Now, they are increasingly under threat.¹⁰⁰ This

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98. Katherine Long, *Two Years Later: The Demise of Roe*, POLITICO (June 21, 2024), <https://www.politico.com/newsletters/women-rule/2024/06/21/two-years-later-the-demise-of-roe-00164396> [<https://perma.cc/W7XZ-QRRU>].
99. Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/health/abortion-bans-rape-incest.html> [<https://perma.cc/83TP-7FF3>]. Moreover, the exceptions are so narrowly constructed as to be unworkable. Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html> [<https://perma.cc/VEX7-NNZ5>].
100. In early 2024, when the Alabama Supreme Court endorsed an interpretation of fetal personhood that threatened in vitro fertilization (“IVF”) in the state, Republicans in Alabama and around the country quickly professed support for IVF. The Alabama legislature rushed to protect IVF. Within months, though, many Republicans elsewhere supported bills undermining IVF or voted against bills to protect it. *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, No. SC-2022-0579, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024) (holding that the embryos are “extrauterine children” and that the wrongful-death statute “applies to all unborn children, regardless of their location”); Tessa Stuart, *Yes, Republicans Are Really Coming for IVF*, ROLLING STONE (June 22, 2024), <https://www.rollingstone.com/politics/politics-features/idaho-republicans-ivf-texas-alabama-1235044847> [<https://perma.cc/T8C5-NGS4>]; Pema Levy, *Opposition to IVF Has Entered the Republican Mainstream*, MOTHER JONES (June 21, 2024), <https://www.motherjones.com/politics/2024/06/ivf-republicans> [<https://perma.cc/JL8Z-Z65J>] (describing how some Republicans shifted in just a few months from claiming to support IVF to opposing the destruction of embryos, which is necessary for IVF); Annie Karni, *Senate Republicans Block I.V.F. Protection Bill a Second Time, Breaking with Trump*, N.Y. TIMES (Sept. 17, 2024), <https://www.nytimes.com/2024/09/17/us/politics/ivf-bill-senate-vote.html> [<https://perma.cc/A3DX-Q946>]. Efforts to protect contraception access, likewise a point of concern for many, have stalled in several states and in Congress. Mary Clare Jalonick, *Republicans Block Bill to Protect Contraception Access as Democrats Make Election-Year*

phenomenon will only get more pronounced with the incoming presidential administration.¹⁰¹

The downfall of *Roe* has galvanized legislators and prosecutors to target abortion more and more aggressively. For example, Texas Attorney General Ken Paxton sued to prevent a pregnant woman from terminating her pregnancy even though the fetus had a lethal anomaly.¹⁰² In Alabama, the Attorney General threatened to prosecute a group that helps people obtain out-of-state abortions for aiding and abetting illegal abortions.¹⁰³ Not long ago, politicians had to retreat hastily when they floated the possibility of pregnant people facing penalties for abortion.¹⁰⁴ *Dobbs* emboldened

Push, ASSOCIATED PRESS (June 5, 2024), <https://apnews.com/article/contraception-senate-abortion-biden-trump-reproductive-rights-3f9e8546624a3acf8e64d1138fcb84b1> [<https://perma.cc/C8DU-GG4D>]; see also Jill Filipovic, *How American Women Could Lose the Right to Birth Control*, TIME (May 20, 2024), <https://time.com/6977434/birth-control-contraception-access-griswold-threat> [<https://perma.cc/37F3-28MB>] (explaining that the battle against contraception is already underway).

101. Durkee, *supra* note 41.

102. A lower court had ruled that the woman, her husband, and her doctor could not face criminal or civil penalties for an abortion in the circumstances. Paxton appealed and prevailed before the Texas Supreme Court. Eleanor Klibanoff, *Texas Supreme Court Blocks Order Allowing Abortion; Woman Who Sought It Leaves State*, TEX. TRIB. (Dec. 11, 2023), <https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox> [<https://perma.cc/WXX5-N388>].

103. The group sued the Alabama Attorney General for constitutional violations, and the federal district court declined to dismiss the complaint. John Fritze, *Federal Judge Blasts Threat by Alabama to Prosecute Groups Aiding Out-of-State Abortions*, CNN (May 7, 2024), <https://www.cnn.com/2024/05/07/politics/alabama-prosecute-out-of-state-abortion/index.html> [<https://perma.cc/WXX5-N388>].

104. See, e.g., Brian Naylor, *Trump Backtracks on Comments About Abortion and 'Punishment' For Women*, NPR (Mar. 30, 2016), <https://www.npr.org/2016/03/30/472444293/trump-calls-for-punishing-women-who-have-abortions-then-backtracks> [<https://perma.cc/PD65-64BR>]. Politicians have tended to shy away from endorsing criminal penalties for people who get abortions. When *Dobbs* was imminent, the National Republican Senatorial Committee clarified its message: "Republicans DO NOT want to throw doctors and women in jail." Memorandum from Nat'l Republican Senatorial Comm. re Initial Takeaways from Opinion Research on Abortion 1 (May 3, 2022), <https://s3.documentcloud.org/documents/>

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“abortion abolitionists,” a once-peripheral element of the anti-abortion movement that “has inched closer to the mainstream” and that calls for abortion to be treated the same as any murder.¹⁰⁵ In Oklahoma, at least one “abolitionist” has won state legislative office.¹⁰⁶ Texas Republicans, spurred by these “abolitionists,” adopted a platform defining abortion as “homicide” and allowing the death penalty for abortion providers and people who obtain abortions.¹⁰⁷ In addition, a striking number of conservative legislators have sponsored bills espousing abortion as murder. Legislators in eight different states introduced bills that would allow prosecutors to bring murder or capital-murder charges against someone who has an abortion.¹⁰⁸ While none of the bills passed, some gained significant support:

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- 21847940/nrsc-memo-on-dobbs.pdf [https://perma.cc/G6XG-ZCCX]. The powerful National Right to Life Committee also asserted that it disfavors punishing women. *See* Press Release, Nat’l Right to Life Comm., We Oppose Criminalizing Women Who Have Abortions (Feb. 15, 2023), <https://www.nrlc.org/communications/national-right-to-life-we-oppose-criminalizing-women-who-have-abortions> [https://perma.cc/F7T9-HJQM].
105. Carter Sherman, *Texas Republicans Open to Death Penalty for Abortion Providers*, *GUARDIAN* (May 30, 2024), <https://www.theguardian.com/world/article/2024/may/30/texas-republicans-vote-death-penalty-abortion-providers> [https://perma.cc/88H3-HF9L]; Khaleda Rahman, *Texas GOP Proposes Potential Death Penalty for Women Who Get Abortions*, *NEWSWEEK* (May 30, 2024), <https://www.newsweek.com/texas-gop-proposes-potential-death-penalty-abortion-1906236> [https://perma.cc/YBY9-DYJ8]; *see also* Elizabeth Dias, *Inside the Extreme Effort to Punish Women for Abortion*, *N.Y. TIMES* (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html> [https://perma.cc/8BZU-7HGB](discussing the “abortion abolitionist” movement broadly). The Texas Republican platform’s language could undermine the statutory exemption from prosecution for pregnant people who seek abortions. Rahman, *supra*.
106. Mark Wingfield, *Abortion Abolitionist Pastor Running for State Senate in Oklahoma*, *BAPTIST NEWS GLOBAL* (Oct. 16, 2023), <https://baptistnews.com/article/abortion-abolitionist-pastor-running-for-state-senate-in-oklahoma> [https://perma.cc/PX8S-MQPP]; Kaylee Olivas, *‘Murderer’: OK Senator Files Bill to Punish Woman Getting an Abortion, Wants to Ban Contraception*, *KFOR.COM* (Feb. 7, 2024), <https://kfor.com/news/oklahoma-legislature/ok-senator-files-bill-to-punish-woman-getting-an-abortion-wants-to-ban-contraception> [https://perma.cc/TC3J-N2FM].
107. Sherman, *supra* note 105.
108. Legislators in Alabama, Arkansas, Kentucky, Louisiana, Missouri, Oklahoma, South Carolina, and Texas introduced bills, anticipating or in the wake of

The South Carolina legislation had well over twenty co-sponsors at various times.¹⁰⁹

Since *Dobbs*, the most extreme possibilities of abortion criminalization have not yet come to fruition. But some shifts take time: For example, litigating challenges to some states' abortion restrictions can take years. Meanwhile, the march in some states toward an absolutist vision of fetal personhood—and, by extension, the likelihood of murder and capital-murder charges for people who get abortions—is gaining speed.

B. Exploiting Existing Laws to Charge Abortion Capitally

It does not matter that there are currently no statutes explicitly defining abortion as a serious crime for which a pregnant person can be criminally penalized. It does not matter that many states have exemptions that might appear to preclude prosecutions against people who get abortions.¹¹⁰ In the

Dobbs, that would have made having an abortion a capital crime. *See, e.g.*, Meg O'Connor, *Cops and Republicans Are Criminalizing Pregnant People Without Roe*, APPEAL (June 21, 2023), <https://theappeal.org/police-republicans-criminalize-pregnant-people-roe-abortion> [<https://perma.cc/FQS4-5YP2>]; Shannon Najmabadi, *Another Texas GOP Lawmaker Is Attempting to Make Abortion Punishable by the Death Penalty*, TEX. TRIB. (Mar. 9, 2021), <https://www.texastribune.org/2021/03/09/texas-legislature-abortion-criminalize-death-penalty> [<https://perma.cc/A6LE-VXV2>]; H.B. 454, 2023 Leg., Reg. Sess. (Ala. 2023); H.B. 813, 2022 Leg., Reg. Sess. (La. 2022).

109. *H. 3549 Status Information*, S.C. GEN. ASSEMBLY, https://www.scstatehouse.gov/sess125_2023-2024/bills/3549.htm [<https://perma.cc/T6A2-GY4>]. The sheer number and extreme language of the bills—and the fact that the legislators who championed them are persistent and likely insulated from electoral backlash—reflect the extent of the changes *Dobbs* wrought. *See* Deborah Machalow, *Screwed But Not Even Kissed: The Parade of Reproductive and Economic Horribles Likely to Follow Dobbs*, 26 J. GENDER, RACE & JUST. 81, 91 (2023) (explaining how gerrymandering protects legislators who have enacted abortion restrictions even when they lack popular support).
110. Arizona, for example, specifically prohibits prosecuting “the unborn child’s mother” for first-degree murder of the fetus. ARIZ. REV. STAT. § 13-1105(C)(3) (LexisNexis 2024); *see also, e.g.*, ARK. CODE ANN. § 5-1-102(13)(B)(iii) (West 2024); IND. CODE § 35-42-1-6.5(b)(1) (2024); TENN. CODE ANN. § 39-13-214(a), 39-13-214(c) (2024); *see also* PREGNANCY JUST., FETAL HOMICIDE LAWS, *supra* note 36, at 10-34 (specifying in a chart which states have exemptions from criminal liability for pregnant people); Dellinger & Pell, *supra* note 18, at 38-

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past, prosecutors have found ways to charge people for pregnancy-related conduct even when it was not clear that their conduct was criminal, and even when they seemed to be exempt from prosecution. Now, prosecutors in some jurisdictions may pursue the same tacks to charge pregnant people who get abortions with murder or capital murder.

1. Prosecutors' History of Repurposing Laws to Criminalize Pregnant People

Long before *Dobbs*, individual prosecutors used their extensive discretion and the array of criminal and fetal-personhood statutes to target pregnant people with criminal charges, even when existing laws did not appear to contemplate such charges. Some prosecutors co-opted criminal statutes meant for other purposes and used the statutes to instead criminalize pregnant people. Other prosecutors found ways to circumvent exemptions from prosecution. The result was that even when the law as written did not appear to criminalize certain conduct by pregnant people, some prosecutors—again, lawmakers in their own right—still pursued criminal charges.

Prosecutors have consistently pushed the boundaries of laws originally intended to protect against third-party harm to fetuses to instead criminalize pregnant people.¹¹¹ An impoverished immigrant from China

73 (examining state-by-state whether people would be exempt from prosecution for self-managed abortions).

111. Many fetal harm and feticide laws were ostensibly enacted at least in part to protect pregnant women, who are particularly vulnerable to violence. See *Intimate Partner Violence Endangers Pregnant People and Their Infants*, NAT'L P'SHIP FOR WOMEN & FAMS. (May 2021), <https://nationalpartnership.org/report/intimate-partner-violence> [<https://perma.cc/KVX9-X7QC>] (reporting that “[p]regnancy can often be an especially risky period for [intimate partner violence], as many women report that abuse started or intensified when they became pregnant”); Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-Roe America*, NPR (July 3, 2022), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss> [<https://perma.cc/CCK4-R8NF>]. Feticide amendments were attached to domestic violence bills in states such as Wisconsin (where the amendment passed) and Kentucky (where it initially did not). See Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 468-69 (1998) (noting that “feticide laws serve as a weapon to combat violence against women”). Similarly, proponents of the federal Unborn Victims of Violence Act (“UVVA”) cited horrifying cases

named Bei Bei Shuai, suffering from severe depression, attempted suicide when thirty-three weeks pregnant. She did not succeed, but as a result of her attempt, her child was born early and died soon afterward.¹¹² While attempting suicide was not a crime under Indiana law, the Marion County Attorney's Office nevertheless decided to charge Shuai with murder and attempted feticide. She eventually pleaded guilty to criminal recklessness.¹¹³ In Des Moines County, Iowa, prosecutors charged Christine Taylor with attempted feticide after she fell down a flight of stairs while pregnant.¹¹⁴ Prosecutors later dropped the charges, but this case against a pregnant woman would have been the first case of feticide prosecuted in Iowa.¹¹⁵ And prosecutors in South Carolina were the first to charge a woman with homicide after she experienced a stillbirth. Prosecutors charged Regina McKnight, an unhoused young Black woman who had used cocaine

of spousal abuse against pregnant women and argued that the law would deter domestic violence, including in cases where the pregnant person would not necessarily report the violence. Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 220 (2002). Whether the UVVA would in fact deter domestic violence, as sponsors argued, was discussed extensively during legislative debate. *See, e.g., Protecting Our Silent Victims: The Unborn Victims of Violence Act: Hearing on S. 1673 Before the S. Comm. on the Judiciary*, 106th Cong. 11 (2000) (statement of Eleanor Acheson, Assistant Att'y. Gen., Off. of Pol'y Dev., U.S. Dep't of Just.) (asserting that the administration "agree[d] with the sponsors of [the UVVA] that the Federal Government can and should play an important role in the campaign to end violence against women" but noting that the UVVA would cause "troubling collateral consequences").

112. Geneva Brown, *Bei Bei Shuai: Pregnancy, Murder, and Mayhem in Indiana*, 17 J. GENDER, RACE & JUST. 221, 224-25 (2014); *see also* GOODWIN, *supra* note 32, at 34.
113. *Id.* at 226.
114. E.M. Dadlez & William L. Andrews, *Not Separate, But Not Equal: How Fetal Rights Deprive Women of Civil Rights*, 26 PUB. AFFS. Q. 103, 103 (2012).
115. Bryan Nichols, *Burlington Woman Will Not Be Charged with Feticide*, RADIOIOWA (Feb. 10, 2010), <https://www.radioiowa.com/2010/02/10/burlington-woman-will-not-be-charged-with-feticide> [https://perma.cc/YW6Q-47N9]. Prosecutors dismissed the charges after learning that Taylor had not started her third trimester, as was required under the attempted feticide statute. *Id.*

while pregnant, with homicide by child abuse. She was convicted and originally sentenced to twelve years in prison.¹¹⁶

Prosecutors have also co-opted laws meant to protect children from abuse and unsafe environments to instead criminalize pregnant people. Perhaps the paradigmatic example is in Alabama, where legislators passed a chemical-endangerment law designed to protect children from exposure to chemicals in home methamphetamine labs.¹¹⁷ Prosecutors, especially those in judicial districts like Etowah County, wielded that law to charge pregnant women who ingested drugs during their pregnancies.¹¹⁸ Amanda Kimbrough and Hope Ankrom challenged their convictions under the chemical-endangerment statute for ingesting controlled substances while pregnant, but the Alabama Supreme Court upheld the convictions in a consolidated case. The court did so even though legislators had debated *four times* whether to add fetuses explicitly to the statutory text and had voted

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116. *State v. McKnight*, 576 S.E.2d 168, 174 (S.C. 2003) (affirming the conviction because she had “cause[d] the death of a child under the age of eleven while committing child abuse or neglect,” and because the term “child” included a viable fetus); Bob Herbert, Opinion, *In America; Stillborn Justice*, N.Y. TIMES (May 24, 2001), <https://www.nytimes.com/2001/05/24/opinion/in-america-stillborn-justice.html> [<https://perma.cc/W9LC-6P2J>]; Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison.*, MARSHALL PROJECT (Sept. 1, 2022), <https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison> [<https://perma.cc/U469-3UY6>]. After McKnight had spent eight years in prison, the South Carolina Supreme Court overturned her conviction, ruling that she had not received effective assistance of counsel at trial. *McKnight v. State*, 661 S.E.2d 354, 356-65 (S.C. 2008).
117. Amy Yurkanin, *Women Can Be Prosecuted for Taking Abortion Pills, Says Alabama Attorney General*, AL.COM (Jan. 10, 2023) [Yurkanin, *Women Can Be Prosecuted*], <https://www.al.com/news/2023/01/women-can-be-prosecuted-for-taking-abortion-pills-says-alabama-attorney-general.html> [<https://perma.cc/7KL8-WDYC>]. Other states, including South Carolina and Oklahoma, have wielded felony child-abuse and child-neglect laws to criminalize pregnant people for drug use. *See, e.g.*, *Whitner v. State*, 492 S.E.2d 777, 778-89 (S.C. 1997); *State v. Green*, 474 P.3d 886, 887-88, 891, 893 (Okla. Crim. App. 2020).
118. Amy Yurkanin, *She Lost Her Baby, Then Her Freedom*, MARSHALL PROJECT (Sept. 1, 2022) [hereinafter Yurkanin, *She Lost Her Baby*], <https://www.themarshallproject.org/2022/09/01/she-lost-her-baby-then-her-freedom> [<https://perma.cc/697C-KL7E>]; *see also supra* Section I.A.1 (discussing district-by-district differences in prosecutions in Alabama).

four times not to do so—all while making clear that the legislators did not want pregnant people prosecuted. The Alabama legislature did not understand its statute to extend to fetuses and did not intend for it to do so.¹¹⁹ But, by purporting to rely on “plain language,” the court was able to ignore the legislature’s clear intent.¹²⁰ Since the law’s passage, prosecutors in certain judicial districts in Alabama have used it against over 1,000 women who ingested drugs while pregnant.¹²¹ By 2019, chemical endangerment had become the fourth-leading cause of incarceration for women in Alabama.¹²²

Prosecutors in some jurisdictions have even resorted to using criminal laws penalizing such acts as abusing a corpse and concealing a dead body to criminalize women for self-induced abortions and pregnancy loss. When Arkansas resident Ann Bynum took misoprostol with the intent of inducing labor and later delivered a stillborn child, Drew County authorities sought to prosecute her for having an abortion.¹²³ No statutory authority existed to prosecute a pregnant person for an abortion, so prosecutors charged Bynum with two archaic felonies: abusing a corpse—a felony most likely intended to punish necrophiliacs and murderers who destroyed bodies—and concealing a birth.¹²⁴ Bynum was later convicted of concealing a birth and sentenced to six years in prison.¹²⁵

119. Suppé, *supra* note 34, at 60-66 (dissecting numerous errors in the court’s reasoning, including several indicators of the Alabama legislature’s intent).

120. NACDL, *supra* note 10, at 27; *see also* *Ankrom*, 152 So. 3d at 414-16. The Alabama Supreme Court reaffirmed and extended these holdings the following year. *See Ex parte Hicks*, 153 So. 3d 53, 54 (Ala. 2014) (holding that “the use of the word ‘child’ in the chemical-endangerment statute includes all children, born and unborn, and furthers Alabama’s policy of protecting life from the earliest stages of development”).

121. Yurkanin, *Women Can Be Prosecuted*, *supra* note 117.

122. Yurkanin, *She Lost Her Baby*, *supra* note 118.

123. DIAZ-TELLO ET AL., *supra* note 64, at 19; *see also* *Bynum v. State*, 546 S.W.3d 533, 536 (Ark. App. 2018).

124. DIAZ-TELLO ET AL., *supra* note 64, at 19; *see* Ed. Bd., Opinion, *A Woman’s Rights Part 1: When Prosecutors Jail a Mother for a Miscarriage*, N.Y. TIMES (Dec. 28, 2018) [hereinafter Ed. Bd., *A Woman’s Rights Part 1*], <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [https://perma.cc/2823-HJZJ].

125. *Bynum*, 546 S.W.3d at 536. The jury took only four minutes to convict Bynum. *Id.* The Arkansas Court of Appeals held that the “concealing a birth” statute

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In other instances, prosecutors have evaded statutes that clearly exempt pregnant people from prosecution by bringing charges under different statutes. The district attorney representing Murfreesboro, Tennessee charged Anna Yocca with first-degree attempted murder for trying to end her 24-week pregnancy with a coat hanger and delivering a premature infant.¹²⁶ When a court ruled that the fetal-homicide statute could not be used to charge the pregnant person, the prosecutor countered with new felony charges. A grand jury indicted Yocca for aggravated assault with a weapon, attempted procurement of a miscarriage, and attempted criminal abortion. After more than one year in jail, Yocca pleaded guilty to attempted procurement of a miscarriage in exchange for her release.¹²⁷ In Alabama, the Human Life Protection Act exempts a pregnant person from criminal liability for fetal harm.¹²⁸ But the Alabama Attorney General has already announced that he will sidestep that statutory exemption. Instead of charging people under the Human Life Protection Act, he has promised to charge women criminally for obtaining abortions using the chemical-endangerment statute or other criminal statutes that include no exemption from prosecution.¹²⁹

extended to Bynum’s conduct but vacated the conviction on different, evidentiary grounds. *See id.* at 537-38, 541-43.

126. Liam Stack, *Woman Accused of Coat-Hanger Abortion Pleads Guilty to Felony*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/tennessee-abortion-crime.html> [<https://perma.cc/6NLM-Y5V5>]; Katie Mettler, *Tennessee Woman Who Attempted Coat Hanger Abortion Faces Three New Felony Charges*, WASH. POST (Nov. 18, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/11/18/tenn-woman-who-attempted-coat-hanger-abortion-faces-three-new-felony-charges> [<https://perma.cc/4AQZ-S6NS>].
127. Stack, *supra* note 126; Mettler, *supra* note 126; DIAZ-TELLO ET AL., *supra* note 64, at 17.
128. ALA. CODE §§ 26-23H-1–26-23H-8 (2024); *see also id.* § 26-23H-5 (“No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable.”).
129. Yurkanin, *Women Can Be Prosecuted*, *supra* note 117 (noting that the Attorney General stated by email that “[t]he Human Life Protection Act targets abortion providers, exempting women ‘upon whom an abortion is performed or attempted to be performed’ from liability under the law . . . It does not provide an across-the-board exemption from all criminal laws, including the chemical-endangerment law . . .”). Although he later walked back that statement, he did not retract his claim that he would target pregnant people

Finally, when prosecutors have been unable to circumvent exemptions, they have simply ignored them. In Texas, after legislators passed the Prenatal Protection Act, the Potter County District Attorney seized on the act to charge at least fifty women for using drugs during their pregnancies.¹³⁰ Even after one woman appealed her conviction and won on the ground that pregnant women cannot be charged for fetal harm under Texas law, Potter County law enforcement targeted at least seventeen more women with criminal action.¹³¹ A Starr County, Texas prosecutor similarly ignored Texas's statutory exemption by charging Lizelle Herrera with murder after a self-induced abortion.¹³² Such prosecutions have become common in Missouri, Arkansas, and other jurisdictions that ostensibly do not criminalize pregnant people.¹³³

These cases serve as cautionary precedents for abortion criminalization: Even when no statute explicitly authorizes treating acts associated with pregnancy as crimes, individual prosecutors can and will find a way to do so. When given any leeway at all—and existing criminal and fetal-personhood laws provide a great deal of leeway—some prosecutors

criminally for abortions. Susan Rinkunas, *Alabama AG Attempts to Walk Back Comment About Prosecuting People Who Take Abortion Pills*, JEZEBEL (Jan. 12, 2023), <https://jezebel.com/alabama-attorney-general-abortion-pills-1849979076> [<https://perma.cc/3MD3-B6RF>]. And, as the Alabama Attorney General read the exemption from prosecution in the Human Life Protection Act narrowly—not as an exemption from prosecution from generally applicable criminal laws—in his view, the Act would not necessarily exempt a pregnant person from prosecution under the state's capital-murder statute.

130. See Ed. Bd., Opinion, *A Woman's Rights Part 2: The Feticide Playbook, Explained*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-murder-charge.html> [<https://perma.cc/2823-HJZJ>].

131. See *id.*

132. Ken Miller & Heather Hollingsworth, *Women Faces Texas Murder Charge After Self-Induced Abortion*, ASSOCIATED PRESS (Apr. 9, 2022), <https://apnews.com/article/health-mexico-texas-arrests-891e20eb228a056870f0767d22086dae> [<https://perma.cc/YJ8K-37KP>]. The charges against Herrera were dropped. Ed Pilkington, *Murder Charges Dropped Against Texas Women for 'Self-Induced Abortion'*, GUARDIAN (Apr. 10, 2022), <https://www.theguardian.com/us-news/2022/apr/10/texas-woman-murder-charges-dropped-self-induced-abortion> [<https://perma.cc/2XRR-GU3J>].

133. NACDL, *supra* note 10, at 9 n.8, 10.

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will use their discretion to engineer ways to criminalize fetal harm, including by charging the pregnant person.¹³⁴

2. Possible Routes to Capital Charges

It is not hard to envision how prosecutors might seek the death penalty for people who get abortions. In some states, prosecutors could charge abortion as capital murder even though the state law at first glance does not seem to contemplate such charges—and may even seem to preclude them.

Utah is one jurisdiction where, even though no law defines abortion as murder, a prosecutor could still charge a pregnant person with capital murder for getting an abortion.¹³⁵ Utah allows prosecutors to seek a death sentence for a person charged with an aggravated murder.¹³⁶ One form of aggravated murder is “intentionally or knowingly caus[ing] the death of another individual” when the deceased individual “was younger than 14 years old.”¹³⁷ However, that subsection explicitly excludes situations in which the deceased individual was an unborn child and therefore cannot be

134. *See, e.g.,* DIAZ-TELLO ET AL., *supra* note 64, at 17-18 (discussing the prosecutorial practice of “spaghetti charging”—throwing out charges until something sticks”); BACH & WASILCZUK, *supra* note 18, at 18 (identifying several post-*Dobbs* cases in which prosecutors included allegations suggesting abortion but brought charges under homicide or other laws).

135. Utah enacted S.B. 174, a highly restrictive statute defining abortion as “the intentional killing or attempted killing of a live unborn child” and banning abortion at any time during pregnancy except in extraordinarily limited circumstances. *Planned Parenthood Ass’n of Utah v. State*, 554 P.3d 998, 1007 nn.1-2 (Utah 2024) (describing S.B. 174). S.B. 174 is at present enjoined while it is being challenged in court. *Id.* at 1046 (citing “serious” questions about S.B. 174’s constitutionality and affirming the lower court’s injunction). Under current Utah law, however, nearly all abortions after 18 weeks gestational age are illegal. UTAH CODE § 76-7-302 (West 2024). At first glance, it may seem that a prosecutor cannot invoke Utah’s criminal-homicide statute for abortions. *Id.* § 76-5-201(3)(a). However, that exemption from prosecution applies only to certain abortions, i.e., abortions performed by physicians or abortions using physician-prescribed medication. *Id.* § 76-7-301(1)(a) (defining “abortion”); *id.* § 76-5-201(1)(a)(i) (adopting that same definition of “abortion” for purposes of the criminal-homicide statute). Any other “killing of a live unborn child”—for example, through a means not involving a physician-involved abortion—“shall be punished” as criminal homicide. *Id.* § 76-7-301.5(2).

136. UTAH CODE § 76-5-202(3)(a) (West 2024).

137. *Id.* § 76-5-202(2)(a)(xx)(A).

invoked to penalize an abortion.¹³⁸ Instead, a prosecutor seeking to charge someone capitally for an abortion might turn to the following provision of the aggravated-murder statute: “An actor commits aggravated murder if the actor intentionally or knowingly causes the death of another individual” and “the actor committed homicide incident to an act . . . during which the actor committed or attempted to commit . . . aggravated child abuse as described in Subsection 76-5-109.2(3)(a).”¹³⁹ Say a Utah prosecutor charges someone who procured an illegal abortion with aggravated child abuse.¹⁴⁰ The prosecutor could go one step further and allege that the person “committed homicide incident to an act . . . of aggravated child abuse” and caused a death “intentionally or knowingly.” Then, predicated on the aggravated child abuse charge, the prosecutor could pursue aggravated-murder charges and a potential death sentence.¹⁴¹ In doing so, the prosecutor could circumvent the statutory provision making clear that the death of an unborn child is *not* aggravated murder and instead find another avenue to a potential death sentence.¹⁴²

138. *Id.* § 76-5-202(2)(a)(xx)(B). It may seem that the Utah legislature did not intend for the killing of a fetus to constitute aggravated murder, but that may not deter a prosecutor intent on pursuing capital charges.

139. *Id.* § 76-5-202(2)(a)(iv). Under § 76-5-109.2(3)(a), “aggravated child abuse” occurs if someone intentionally or knowingly “inflicts upon a child serious physical injury” or “having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child.” *Id.* §§ 76-5-109.2(2), 76-5-109.2(3)(a). A “child” is “an individual who is younger than 18 years old.” *Id.* § 76-5-109(1)(a)(i). Prosecutors have not hesitated in the past to charge pregnant people with child-abuse felonies for fetal harm. *See* discussion *supra* Section I.B.1.

140. In Utah, at least one individual has been convicted of child abuse for causing the death of a fetus. *See* *State v. Perez-Avila*, 131 P.3d 864, 866 (Utah Ct. App. 2006); *cf.* UTAH CODE § 76-5-201(1)(a) (West 2024) (defining “criminal homicide” to include “the death of another human being, including an unborn child at any stage of the unborn child’s development”).

141. *See* UTAH CODE § 76-5-202(5)(a) (West 2024) (specifying that an aggravating circumstance that constitutes a separate offense does not merge with the crime of aggravated murder).

142. Short of an aggravated-murder charge, a prosecutor could also pursue other homicide charges for a pregnant person who obtains an illegal abortion. Utah law provides that “[a] person is guilty of killing an unborn child if the person intentionally causes the death of an unborn child in violation of the provisions of [§] 76-7-302(2).” *Id.* § 76-7-314.5. This provision only exempts a pregnant

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Further, in states where existing laws ostensibly preclude such prosecutions, prosecutors can either bring charges in the hopes of defeating the statutory exemption or ignore the exemption outright, bring charges, and see what happens.¹⁴³ For example, under Oklahoma's statutory language, a prosecutor could conclude that a person who has an abortion has committed, and can be charged with, capital murder.¹⁴⁴ However, the Oklahoma Attorney General has issued an opinion concluding that current Oklahoma law does not criminalize a pregnant person for "performing or

person from criminal liability for an abortion if the abortion is legal under § 76-7-302(2). *Id.* § 76-7-314.5. If a pregnant person obtains an abortion that is illegal under § 76-7-302(2), that person could face charges for the "killing of an unborn child."

143. Prosecutors have brought such test cases in the capital context. In *Kennedy v. Louisiana*, the U.S. Supreme Court held that the Eighth Amendment bars the death penalty for the crime of child rape. 554 U.S. 407, 446 (2008). Still, Florida in 2023 passed a law making child rape a capital crime, and prosecutors used that new law to bring a capital case. The defendant quickly pleaded guilty in exchange for a sentence of life without the possibility of parole. Romy Ellenbogen, *Florida Drops Death Penalty Pursuit for Man Accused of Child Sex Abuse*, TAMPA BAY TIMES (Feb. 2, 2024), <https://www.tampabay.com/news/crime/2024/02/02/florida-death-penalty-child-rape-law-lake-county> [<https://perma.cc/ZR7N-MN7P>].
144. Oklahoma has banned abortion except when necessary to preserve the life of the mother, and its homicide statute defines "human being" to include an "unborn child" from the moment of conception until birth. *See Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1132 (Okla. 2023) (per curiam) (upholding a statute criminalizing all abortions excepting those "necessary to preserve [the] life" of the pregnant woman); OKLA. STAT. ANN., tit. 21, § 691 (West 2024); OKLA. STAT. ANN., tit. 63, § 1-730(4) (West 2024). Oklahoma further defines first-degree murder, which is punishable by death, life in prison without parole, or life in prison, as "unlawfully and with malice aforethought caus[ing] the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being . . ." OKLA. STAT. ANN., tit. 21, § 701.7(A) (West 2024); OKLA. STAT. ANN., tit. 21, § 701.9(A) (West 2024) (providing the punishments for first-degree murder). The killing of an unborn child unlawfully and with deliberate intention is therefore a basis for first-degree (i.e., capital) murder charges. Critically, Oklahoma exempts a mother who causes the death of her unborn child from prosecution—"unless the mother has committed a crime that caused the death of the unborn child." OKLA. STAT. ANN., tit. 21, § 691(D) (West 2024). While a person who procures an abortion may not have committed a crime under Oklahoma's abortion statutes, a prosecutor could conclude that the person has committed capital murder and that the exemption does not apply.

inducing an abortion on herself to intentionally terminate her pregnancy.”¹⁴⁵ A district attorney could deem it illogical that Oklahoma permits a person who uses drugs while pregnant to face life in prison—even if there is no harm to the fetus—but shields from prosecution someone who intentionally terminates a pregnancy.¹⁴⁶ Or the district attorney could parse the opinion’s wording and conclude that it does not apply to all types of abortions. That district attorney could then challenge the Attorney General’s opinion in court by bringing criminal, even capital, charges for abortion. Given the prior decisions of the Oklahoma Court of Criminal Appeals, such a challenge could well prevail.¹⁴⁷

In sum, prosecutors are already armed with the tools they need to bring serious charges—up to and including capital charges—against pregnant people for abortions. They have vast discretion, a maze of fetal-personhood and criminal laws to work with, and *Dobbs* setting the stage for such charges. And, historically, prosecutors have aggressively targeted pregnancy-related conduct even when state law seemed to preclude such charges. In some jurisdictions, then, if a local prosecutor is motivated to bring serious charges against someone who had an abortion, that prosecutor will be able to find a way.

145. Gentner Drummond, Okla. Att’y Gen., Attorney General Opinion 2023-12 (Nov. 21, 2023), https://oklahoma.gov/content/dam/ok/en/oag/documents/opinions/ag-opinions/2023/ag_opinion_2023-12-2.pdf [<https://perma.cc/T6YM-J88H>].

146. *See* State v. Green, 474 P.3d 886, 887-88, 893 (Okla. Crim. App. 2020) (holding that a pregnant person who uses drugs can face child neglect charges); OKLA. STAT. ANN., tit. 21, § 843.5(C) (West 2024) (setting the maximum penalty for child neglect at life imprisonment); OKLA. STAT. ANN., tit. 10A, § 1-1-105(C)(49) (West 2024) (omitting from the definition of “neglect” any requirement of a showing of actual harm to the child or fetus).

147. In 2020, the Oklahoma Court of Criminal Appeals declared that the “clear trajectory that Oklahoma law has been on for at least the past quarter century . . . is to protect children, born and unborn, from potential harm because they cannot protect themselves.” *Green*, 474 P.3d at 891. According to the court, “[i]nterpreting the child neglect statute to allow others to be prosecuted for bringing harm to an unborn child while shielding from criminal liability those very same harmful acts when committed by the mother would frustrate the very purpose of the statute, which is to protect children who cannot protect themselves.” *Id.* That line of reasoning extends quite neatly to allow the prosecution of people who have abortions.

II. WHY PROSECUTORS MIGHT BRING SERIOUS CHARGES FOR ABORTION

Beyond having the authority to bring a murder or capital-murder charge, some prosecutors also have compelling reasons to do so. Those reasons may include political incentives; the ability to increase the costs of abortion and discourage other conduct prosecutors find objectionable; and improved chances of securing a conviction and hefty sentence, up to and including a death sentence. Any of those reasons could persuade a prosecutor to pursue serious charges for abortion.

A. Political Calculus When Pursuing Serious Charges

Chief prosecutors are political officials, and a prosecutor deciding whether to bring serious charges against people who have abortions will consider the political effect of such charges. At best, the charges could provide a political win; at worst, any political fallout would be limited.¹⁴⁸ For some prosecutors, then, the political calculus could well favor serious charges.

In nearly every state in the country and in every death-penalty state, chief prosecutors are elected.¹⁴⁹ There are three notable features of prosecutor elections relevant here. First, most chief prosecutors are elected at the county or district level and thus serve highly localized constituencies.¹⁵⁰ Second, most prosecutor elections—up to eighty

148. In many cities and other jurisdictions, bringing serious criminal charges against an abortion patient would decidedly spell political doom. *Cf. Joint Statement, supra* note 42 (vowing not to prosecute abortion at all). But a prosecutor in, say, a pro-choice jurisdiction would not consider such charges, and, elsewhere, the political realities are sharply different.

149. Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 77 (2011) (noting that over 95% of lead state and local prosecutors are elected); see PROSECUTORS & POL. PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS (2020) [hereinafter PROSECUTORS & POL.], <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/NU4Y-A6KA>] (identifying Alaska, Connecticut, Delaware, New Jersey, and Rhode Island as the only states where all local prosecutors are appointed).

150. Wright, *supra* note 44, at 589 (“Many prosecutors are elected on a county-wide basis while many others serve districts that only serve a few counties.”); *id.* at 591 (“[P]rosecutors answer to small, localized constituencies.”); PROSECUTORS & POL., *supra* note 149, at 5 (noting that over 1,700 jurisdictions that elect prosecutors have fewer than 100,000 people).

percent—are uncontested, meaning that elections are generally decided before a single voter casts a ballot.¹⁵¹ Uncontested elections are especially common in communities with small populations, where an incumbent faces a challenger only 22% of the time.¹⁵² Third, even though most elections are uncontested, prosecutors still face some political pressures.¹⁵³ Indeed, voters' opinions matter to prosecutors' behavior. Researchers have concluded that public opinion on, for example, the death penalty affects prosecutorial decision-making,¹⁵⁴ and several studies have found that “prosecutors change their behavior in election years”¹⁵⁵

Keeping in mind that prosecutors are, to some extent, affected by voter preferences, bringing serious charges for abortion is a politically appealing prospect in some deeply conservative jurisdictions. Certainly, the fact that several state legislators have repeatedly introduced and co-sponsored bills classifying abortion as capital murder demonstrates that some elected state

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151. DPIC, *LETHAL ELECTION: HOW THE U.S. ELECTORAL PROCESS INCREASES THE ARBITRARINESS OF THE DEATH PENALTY* 32 (2024) [hereinafter *DPIC, LETHAL ELECTION*], https://dpic-cdn.org/production/documents/Lethal-Election-Report_Spreads.pdf [<https://perma.cc/Q98P-YEWU>]; *see also id.* (noting that 73 of 88 Ohio counties had only one prosecutor candidate in 2024); PROSECUTORS & POL., *supra* note 149, at 5 (finding that, in jurisdictions with fewer than 100,000 people, approximately 75% of prosecutor elections were uncontested and that over 1,600 of the 2,300 jurisdictions with prosecutor elections had uncontested elections in a given election cycle).
152. PROSECUTORS & POL., *supra* note 149, at 6. In one national study, approximately 70% of all elected prosecutors faced no challenger in either the primary or the general election. Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 45 (2023).
153. Hessick et al., *supra* note 152, at 32-33.
154. FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008) (concluding that a one-point rise in public support for the death penalty corresponded with seven extra death sentences); *see also* DPIC, *LETHAL ELECTION*, *supra* note 151, at 28 n.100 (citing research on the import of public opinion on the death penalty to local prosecutors).
155. Hessick et al., *supra* note 152, at 32-33, 33 nn.4-5 (citing studies, including one that found election-year behavioral changes even when prosecutors faced no challengers).

officials believe serious criminalization is an electorally sound strategy.¹⁵⁶ By bringing serious charges for abortion, the chief prosecutor can demonstrate a commitment to local values.¹⁵⁷ If facing a contested election, the prosecutor will benefit if voters approve of the prosecutor's stance on harshly criminalizing abortion.¹⁵⁸ If only the primary is contested, then a

156. *See supra* Section I.A.3. While the electoral strategies of state legislators may not perfectly match those of elected prosecutors, legislators' actions still offer helpful insight into local political thinking. This is especially true because so many prosecutors run unopposed and need not offer public messaging about their priorities. *See Hessick et al., supra* note 152, at 74 (noting that when prosecutors go unchallenged, the public is left uninformed about prosecutorial decision-making).

157. Similarly, when the death penalty is popular with local voters, prosecutors use capital cases to gain electoral traction. *See, e.g.,* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078-81 (2000) (noting that if the district attorney can punish the perpetrator of a capital crime, he "can run for office on [his] success," which "often means that the more death sentences a local prosecutor can obtain, the more votes he will get"). Prosecutors have touted their death-penalty credentials as pillars of their tenures or candidacies. *See, e.g.,* Alyse Jones, *Oklahoma DA Wants to Expedite Death Penalty Process*, KOCO NEWS (Mar. 25, 2023), <https://www.koco.com/article/oklahoma-da-jason-hicks-expedite-death-penalty/43414793> [<https://perma.cc/7YW4-WWDK>] (discussing one district attorney's stated desire to speed up capital punishment); Lindsay Aerts & Samantha Herrera, *Jeff Gray to Bring Back Death Penalty After Becoming Presumptive Next Utah County Attorney*, KSLNEWSRADIO (June 29, 2022), <https://kslnnewsradio.com/1971006/jeff-gray-to-bring-back-death-penalty-after-becoming-presumptive-next-utah-county-attorney> [<https://perma.cc/WDS7-4PM8>] (noting that the Utah County Attorney announced when campaigning that his first move in office would be to "absolutely bring back the death penalty," which his predecessor had stopped pursuing).

158. Voters generally have very limited information about prosecutorial behavior. *See, e.g.,* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (describing prosecution as "a low-visibility process about which the public has poor information"); Davis, *Prosecution and Race, supra* note 52, at 58 (explaining that voter access to information is nearly as limited as it was when prosecutors were first elected in the 1820s). Murder charges for abortion would be the type of signature case a local prosecutor could emphasize in public messaging. *Cf. Wright, supra* note 44, at 582-83, 597, 602 (commenting that "campaign statements dwell on outcomes in a few high visibility cases"); Davis, *Prosecution and Race, supra* note 52, at 67 (observing that voter review "is nonexistent except for the occasional case that happens to be publicized").

prosecutor can stake out a more extreme position for the primary, such as committing to considering serious criminal charges in certain abortion cases, and need not pivot during the general election.¹⁵⁹ And, if both the primary and general elections are uncontested—as is generally the case in deeply conservative districts—the prosecutor likely faces no risk from the charges.¹⁶⁰

Even when voters do not clearly favor aggressive abortion criminalization, the fact that most elections are uncontested means that prosecutors can still bring charges without facing political harm. As long as the prosecutor will face no challenger, there is no political reason to decline to charge.¹⁶¹

Further, if there is potential for political fallout, the prosecutor could pursue serious charges in a way that would limit that fallout. For example, the prosecutor could bring such charges purely as leverage for a plea agreement.¹⁶² If the accused person were to plead guilty to a lesser charge, then the original serious charges could become less politically visible. The prosecutor could resolve an abortion case for a significant sentence without as many open-court opportunities for media frenzy or public attention, i.e., with lessened risk of political harm. Prosecutors could also choose whom to prosecute in a way that would minimize risk. With respect to substance-use charges for pregnant mothers, scholar Dorothy Roberts noted, “Prosecutors [] selected women whom society view[ed] as undeserving to be mothers in

159. See PROSECUTORS & POL., *supra* note 149, at 8-9. Among jurisdictions with contested prosecutor elections, most have elections that are meaningfully contested at either the primary or the general level, not both. *Id.* at 8. When the incumbent prosecutor belongs to the jurisdiction’s majority party, then the primary election is more likely to be contested than the general election. See Hessick et al., *supra* note 152, at 67.

160. Districts with small populations in rural areas are among the most likely to have uncontested elections. See Hessick et al., *supra* note 152, at 55, 66, 75-76; PROSECUTORS & POL., *supra* note 149, at 4; see also Michael Wines, *A Democracy with Everything but a Choice*, N.Y. TIMES (Sept. 4, 2024), <https://www.nytimes.com/2024/09/04/us/missouri-uncontested-races-elections.html> [<https://perma.cc/UJB9-MD6D>] (discussing the prevalence of uncontested local elections in heavily Republican areas).

161. Certainly, the prosecutor would not want to draw a challenger who has a meaningful chance of winning into the race. Given the difficulty of fielding a minority-party candidate in overwhelmingly one-party areas, however, a quality challenger could be hard to find. See Wines, *supra* note 160 (explaining why Democrats struggle to field candidates in deeply Republican locales).

162. See *infra* Section II.C.1 for more discussion of plea bargaining in this context.

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the first place” and thereby “ma[de] the prosecution of pregnant women more palatable to the public.”¹⁶³ Even if only subconsciously, prosecutors might well target poor people, especially poor people of color, to limit political blowback.

Finally, the political upside of seeking a murder or capital-murder conviction remains even if the death sentence is not imposed or upheld. Regardless of the ultimate disposition, the prosecutor can tout the hardline message against abortion. Moreover, the community might be more likely to blame the sentencing jurors for a non-death outcome than the prosecutor.¹⁶⁴ If the conviction or death sentence is overturned in later proceedings, the fact that such proceedings take years will temper any effect on the local prosecutor; the “loss” will instead be attributed to the attorney general’s office, which handles appellate and post-conviction proceedings.¹⁶⁵

In many jurisdictions, then, treating abortion as murder may be a political boon for a prosecutor, one with little to no accompanying risk of downside.

B. Collateral Benefits of Serious Charges

A local prosecutor also stands to enjoy a series of collateral benefits from charging abortion aggressively that extend far beyond the case at hand. These benefits include increasing the costs of abortion and thereby reducing access, as well as deterring other pregnancy-related conduct disfavored by the prosecutor and constituents. In addition, the prosecutor increases their own power by expanding their investigatory reach and normalizing harsher penalties for people who obtain abortions.

1. Discouraging Abortion Access and Other Disfavored Conduct

For prosecutors who ideologically oppose abortion and/or who view criminalizing it as part of their official mandate, serious charges provide a

163. ROBERTS, *supra* note 34, at 178.

164. When a sentencing jury declined to sentence school shooter Nikolas Cruz to death, one victim’s father declared, “This jury failed our families today.” Patricia Mazzei & Nicholas Bogel-Burroughs, *Parkland School Shooting Verdict*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/live/2022/10/13/us/parkland-trial-verdict> [<https://perma.cc/DN4C-5BKR>].

165. See Liebman, *supra* note 157, at 2120 (discussing why local prosecutors do not bear consequences of losses in later proceedings).

pathway to discouraging and punishing abortion. Through several different mechanisms, serious charges raise both the risks and costs of abortion access and erect further barriers to such care. Similarly, such charges can have spillover effects and discourage other conduct that prosecutors disfavor.

Abortion bans have already throttled abortion access in numerous states. While some people in states with bans can, at the moment, obtain care through mailed medication abortion or by traveling to a different state,¹⁶⁶ researchers have found that post-*Dobbs* birth rates have increased in states with full bans relative to states protecting abortion rights.¹⁶⁷ In other words, even without serious criminalization, bans have already deterred abortions. With serious criminal punishment, that effect would likely only worsen. Before, people considering abortions would have asked whether they had abortion access and whether they might be violating a law without criminal consequences; now they might also have to ask whether they are willing to risk imprisonment, or worse, if charged with and convicted of homicide.

The threat of serious charges alone could deter people from seeking abortions. Serious charges are often financially, professionally, and

166. Rachel K. Jones, Candace Gibson & Jesse Philbin, *The Number of Brick-and-Mortar Abortion Clinics Drops, as US Abortion Rate Rises: New Data Underscore the Need for Policies that Support Providers*, GUTTMACHER (June 2024), <https://www.guttmacher.org/report/abortion-clinics-united-states-2020-2024> [<https://perma.cc/6QS7-NGLX>] (noting that the percentage of people who traveled out of state for abortion jumped from 9% in 2020 to 17% in 2023); Rachel K. Jones & Amy Friedrich-Karnik, *Medication Abortion Accounted for 63% of All US Abortions in 2023—An Increase from 53% in 2020*, GUTTMACHER (Mar. 19, 2024), <https://www.guttmacher.org/2024/03/medication-abortion-accounted-63-all-us-abortions-2023-increase-53-2020> [<https://perma.cc/9P25-T5JV>] (stating that medication abortion went from 17% of all abortions in 2017, to 53% in 2020, to 63% in 2023); Daniel Dench, Mayra Pineda-Torres & Caitlin Myers, *The Effects of the Dobbs Decision on Fertility*, IZA INST. OF LAB. ECON. 3 (Nov. 2023), <https://docs.iza.org/dp16608.pdf> [<https://perma.cc/Q84F-LMNF>] (summarizing recent research on travel for abortions and medication abortion by mail).

167. Dench, *supra* note 166, at 15 (concluding that in the first half of 2023, “births rose by an average of 2.3% in states enforcing total abortion bans compared to a control group of states where abortion rights remained protected,” with larger effects in ban states that bordered other ban states).

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personally devastating.¹⁶⁸ The arrest process and publicity that generally ensues can be traumatizing.¹⁶⁹ Arrest may be sudden, leaving the individual no opportunity to make childcare arrangements or to notify their job.¹⁷⁰ Bail is generally statutorily or practically unavailable in capital or other murder cases, so someone facing such charges could languish in jail before trial for months or years.¹⁷¹ For example, Bei Bei Shuai, who attempted to take her own life and was charged with murder and attempted feticide, suffered in jail for over a year before managing to post bail.¹⁷² After experiencing a stillbirth, Chelsea Becker was jailed for seventeen months on murder charges before being released on her own recognizance.¹⁷³ Moreover, while stuck in jail, the person could lose their job, their home, their community, and even custody of their children.¹⁷⁴ As one former prosecutor noted, “[a]

168. *See, e.g.*, *United States v. Marion*, 404 U.S. 307, 320 (1971) (“Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”).

169. *See* HOWARD, *supra* note 30, at 137-38.

170. *See, e.g., id.* at 165-66. If the pregnant person has children who witness the arrest, that experience can be traumatizing for the children, as can be the separation from their parent. *Id.*

171. *See, e.g.*, ALA. CODE § 15-13-3 (2024) (precluding bail in capital-murder cases when the judge thinks the defendant is guilty); OKLA. STAT. ANN., tit. 22, § 22-1101 (West 2024) (precluding bail when the charged offense is punishable by death).

172. Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 877 (2014); *see also* GOODWIN, *supra* note 32, at 32 (noting the rampant sexual and physical abuse, corruption, and medical neglect in the jail where Shuai was detained); BRIGHT & KWAK, *supra* note 30 (describing jail conditions broadly).

173. Daniel N. Arshack, *Representing People Charged with Crimes Associated with Being Pregnant*, AM. BAR ASS’N (May 2, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/spring/representing-people-charged-crimes-associated-being-pregnant [<https://perma.cc/7CSN-NBSV>].

174. *See* BRIGHT & KWAK, *supra* note 30, at 184; *see also, e.g.*, Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [<https://perma.cc/V9QM-V8FW>] (discussing the case of a woman who was

prosecutor's power to damage or destroy anyone he chooses to indict is virtually limitless."¹⁷⁵

In addition, criminal charges give rise to public scrutiny and disapprobation¹⁷⁶—scrutiny and stigma that is only heightened when an abortion is framed as child murder. Women who have experienced pregnancy criminalization in various forms have seen this play out. Patience Frazier, when facing manslaughter charges after a pregnancy loss, was “chased out of stores,” called a “baby killer,” and threatened once her arrest became public.¹⁷⁷ Lizelle Herrera faced murder charges for three days before the prosecutor dropped them, but the mortification of her arrest and ensuing media attention “permanently affected her standing in the community.”¹⁷⁸

Serious charges not only increase the risks and costs of abortion but also discourage abortion by reducing access. Charges are not limited to the pregnant person: Prosecutors can pursue those who perform or facilitate abortions.¹⁷⁹ If someone who gets an abortion can face a murder charge, so

charged for taking a valium while pregnant and, as a result of her arrest, lost custody of her other child).

175. Irving Younger, *Memoir of a Prosecutor*, COMMENTARY (Oct. 1976), <https://www.commentary.org/articles/irving-younger/memoir-of-a-prosecutor> [<https://perma.cc/ET7H-BSL5>].
176. *See, e.g.*, *Klopfert v. North Carolina*, 386 U.S. 213, 222 (1967) (noting that “[t]he pendency of [an] indictment may subject [the accused] to public scorn”); GOODWIN, *supra* note 32, at 204 (acknowledging “that stigma, shame, and contrition are the intended byproducts of criminal law punishment”).
177. *See* Savana Strott, *In Pro-Choice Nevada, Obscure Law Sends Women to Prison for Late-Term Pregnancy Loss*, NEV. INDEP. (May 29, 2022), <https://thenevadaindependent.com/article/in-pro-choice-nevada-obscure-law-sends-women-to-prison-for-late-term-pregnancy-loss> [<https://perma.cc/RN6F-QKFN>]; *supra* Section I.B.1.
178. Eleanor Klibanoff, *Texas Woman Charged with Murder for Self-Induced Abortion Sues Starr County District Attorney*, TEX. TRIB. (Mar. 30, 2024), <https://www.texastribune.org/2024/03/30/texas-woman-sues-abortion-arrest-starr-county> [<https://perma.cc/TBU3-3QPC>]. Similarly, the woman arrested for taking valium while pregnant felt “ostracized”—people were “shaming [her] like [she was] a monster.” HOWARD, *supra* note 30, at 154.
179. People who perform abortions have long been targets of criminal prosecutions. From the mid-1800s, when abortion was first criminalized, until about 1930, prosecutions were rare, and providers were prosecuted only when the pregnant person died. NAT’L INST. FOR REPROD. HEALTH, WHEN

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too can the abortion provider. All states have laws punishing those who assist in criminal offenses.¹⁸⁰ Someone who performs an illegal abortion could be charged as an accomplice or co-conspirator and could face the same penalties as the pregnant person.¹⁸¹ Indeed, the risk of significant criminal exposure could touch anyone who helps facilitate an illegal abortion in any way, from a pharmacist who dispenses abortion medication to mental health professionals who counsel the pregnant person.¹⁸² The upshot would be that the network of healthcare professionals and others who help pregnant people access abortions dissipates, making abortion information and services more difficult to procure.

At least anecdotally, this chilling effect has already compromised reproductive care and healthcare more broadly. The possibility of criminal sanctions has produced fear and confusion within the medical community and has even led to “healthcare desert[s]” as medical professionals and

SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK 11 (2017), <https://nirhealth.org/wp-content/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf> [<https://perma.cc/9BK9-58WT>]. Since 1930, prosecutors have more often targeted abortion providers with criminal charges, regardless of whether the patient died. *Id.* at 12. Recently, however, potential penalties have skyrocketed. Under current Texas law, anyone who performs an abortion faces a potential sentence of life in prison. TEX. GOV'T CODE ANN. §§ 170A.002, 170A.004 (West 2024); TEX. PENAL CODE § 12.32 (West 2024).

180. *See* NACDL, *supra* note 10, at 31.

181. *See id.* (detailing how an abortion provider could face accomplice liability).

182. *See id.* at 31-32; *Making Abortion a Crime (Again): How Extreme Prosecutors Attempt to Punish People for Abortions in the U.S.*, IF/WHEN/HOW 2, https://ifwhenhow.org/wp-content/uploads/2023/06/19_MakingAbortionACrimeAgain_Factsheet.pdf [<https://perma.cc/7WZD-XXLP>]. The National Right to Life Committee (“NRLC”) proposed expansive legislation defining “[a]iding or abetting an illegal abortion” to include knowingly giving abortion-related information to a pregnant woman if it is reasonably likely to be used to procure an unlawful abortion. Memorandum from James Bopp, Jr., NRLC Gen. Couns., to NRLC, re NRLC Post-*Roe* Model Abortion Law 15 (June 15, 2022) [hereinafter Bopp Memo], <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf> [<https://perma.cc/LRF7-X5BS>]. Indeed, the NRLC likened the “illegal abortion industry” to organized crime and suggested that squelching “[t]he whole criminal enterprise” could require a “RICO-style” approach. Bopp Memo, *supra*, at 3. Meanwhile, the Alabama Attorney General has threatened healthcare providers with felony charges for helping residents obtain out-of-state abortion care. *See supra* Section I.A.3.

hospitals abandon regions or maternal healthcare altogether.¹⁸³ A survey of obstetrician/gynecologists one year after *Dobbs* revealed that 61% of practitioners facing abortion bans were “very or somewhat concerned about their own legal risk when making decisions about patient care” concerning abortion.¹⁸⁴ That fear of legal risk has fatal consequences: At least two Georgia women and two Texas women have died because doctors waited too long to provide lifesaving abortion care.¹⁸⁵

Finally, prosecutors can use serious charges against abortion to give more force to penalties for other, non-abortion conduct they or their constituents disfavor. Say a prosecutor wants people who use drugs during pregnancy to face heavy penalties. That prosecutor might want to ensure that abortion is not an “end run” around such charges. Dissenting from opinions upholding convictions under Alabama’s chemical-endangerment statute, Alabama Supreme Court Chief Justice Malone warned that “women who have . . . run afoul of the proscriptions of the statute [would now have] a strong incentive to terminate their pregnancy.”¹⁸⁶ If the fetus dies,

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183. See Complaint at 3, *Adkins v. Little*, No. CV01-23-14744 (4th Jud. Dist. Ct., Sept. 11, 2023) (noting that post-*Dobbs*, five of Idaho’s nine maternal-fetal-medicine specialists had left or planned to retire and that rural hospital systems had closed their labor-and-delivery centers). States with total abortion bans have also seen significant drops in OB-GYN resident applications for the 2023-2024 cycle, including approximately twenty-one percent drops in Alabama and Tennessee. Kendal Orgera & Atul Grover, *States with Abortion Bans See Continued Decrease in U.S. MD Senior Residency Applicants*, AAMC RSCH & ACTION INST. (May 9, 2024), <https://www.aamcresearchinstitute.org/our-work/data-snapshot/post-dobbs-2024> [<https://perma.cc/7J26-LFC3>].
184. BRITTON FREDERIKSEN, USHA RANJ, IVETTE GOMEZ & ALINA SALGANICOFF, A NATIONAL SURVEY OF OBGYNs’ EXPERIENCES AFTER *DOBBS* 4 (2023), <https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf> [<https://perma.cc/79AP-2JVD>].
185. Irin Carmon, *The Deaths and Agonies of Trumps Abortion Bans*, INTELLIGENCER (Nov. 4, 2024), <https://nymag.com/intelligencer/article/trump-abortion-bans-deaths-agonies.html> [<https://perma.cc/9HDB-YZ3T>]; Cassandra Jaramillo & Kavitha Surana, *A Woman Died After Being Told It Would Be a “Crime” to Intervene in Her Miscarriage at a Texas Hospital*, PROPUBLICA (Oct. 30, 2024), <https://www.propublica.org/article/josseli-barnica-death-miscarriage-texas-abortion-ban> [<https://perma.cc/HTS2-6ATL>].
186. *Ex parte Ankrom*, 152 So. 3d 397, 433 (Ala. 2013) (Malone, C.J., dissenting). In one case, a pregnant woman facing child-endangerment charges for alleged drug use obtained an abortion, after which the prosecutor dropped the charges. Suppé, *supra* note 34, at 71.

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chemical endangerment can lead to a sentence of up to 99 years in prison.¹⁸⁷ To avoid incentivizing people to terminate pregnancies, prosecutors might seek to punish abortion even more harshly.

2. Enhanced Investigatory and Prosecutorial Power

Another benefit for prosecutors of serious charges for abortion is that, over time, such charges could help prosecutors expand their investigatory reach and thereby accumulate more power.¹⁸⁸

Surveillance of pregnant people is expanding, and serious charges for abortion would only intensify the breadth and depth of that surveillance. Texas has sued for access to medical records for people who travel out of state for reproductive healthcare.¹⁸⁹ Meanwhile, President- and Vice President-elect Trump and Vance have suggested they will support allowing states to monitor people's pregnancies.¹⁹⁰ Vance even signed a congressional letter intended to facilitate law enforcement's ability to use personal health data to track and potentially charge people who travel for abortions.¹⁹¹ Further, policing digital communications is already, and will remain, a common tool in investigating abortions.¹⁹² For example, after Lattice Fisher experienced a stillbirth, a Mississippi prosecutor used Fisher's internet search history to persuade a grand jury to indict Fisher for second-

187. ALA. CODE § 26-15-3.2(a)(3) (2024) (defining chemical endangerment that results in the death of the child as a Class A felony); *id.* § 13A-5-6(a)(1) (providing sentences for Class A felonies).

188. Dellinger & Pell, *supra* note 18, at 30 (observing that if a person can be charged with an abortion crime, they can be surveilled and investigated for that crime).

189. Michael Wines, *Texas Sues for Access to Records of Women Seeking Out-of-State Abortions*, N.Y. TIMES (Sept. 6, 2024), <https://www.nytimes.com/2024/09/06/us/texas-abortion-medical-records.html> [<https://perma.cc/P8PC-FU6U>].

190. Andrew Perez, Nikki McCann Ramirez, *Trump and Vance Have Backed States that Want to Surveil Pregnant Women*, ROLLING STONE (Aug. 1, 2024), <https://www.rollingstone.com/politics/politics-features/trump-vance-abortion-surveil-pregnant-women-1235072063> [<https://perma.cc/7BHE-L4TX>].

191. *Id.*

192. Machalow, *supra* note 109, at 132.

degree murder.¹⁹³ Post-*Dobbs*, Nebraska authorities used Facebook messages to help convict a teenager and her mother after the teenager had an unlawful medication abortion.¹⁹⁴ Medical, digital, and other forms of surveillance will become more prevalent and intrusive as the charges that surveillance evidence can support become more numerous and more serious. If, say, prosecutors push to identify and charge pregnant people who have used medication abortion, that could lead to expanded efforts to test for such medications in medical settings.¹⁹⁵

As hospital workers and other medical professionals grow aware of the serious criminal consequences for abortion, they may become more willing to report the slightest suspicion of an abortion or other criminalized pregnancy-related conduct to law enforcement. Already, the most common instigator for pregnancy-related arrests is that medical professionals or other hospital workers report patients to law enforcement.¹⁹⁶ Medical professionals at a public South Carolina hospital notoriously collaborated with prosecutors to screen pregnant patients—almost exclusively poor

193. Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1, 48-49 (2020); see also *id.* at 49-50 (describing how Indiana prosecutors relied on online research, emails, and text messages to convict Purvi Patel of feticide).

194. Andy Rose, *Nebraska Woman Charged with Disposing of Fetus Following Illegal Abortion Sentenced to 90 Days in Jail*, CNN (July 20, 2023), <https://www.cnn.com/2023/07/20/us/nebraska-teen-abortion-celeste-burgess/index.html> [<https://perma.cc/KBL3-E8F3>]. See also Conti-Cook, *supra* note 193, at 51-56 (discussing the range of digital evidence—from cell phone location history to wearable-device data—that could be used in abortion cases).

195. Technology exists in Poland to conduct forensic testing to detect abortion medication and could spread here. Patrick Adams, *In Poland, Testing Women for Abortion Drugs Is a Reality. It Could Happen Here.*, N.Y. TIMES (Sept. 14, 2023), <https://www.nytimes.com/2023/09/14/opinion/abortion-pills-testing-poland.html> [<https://perma.cc/D3SH-N8CZ>]. British police have already tested people who have suffered pregnancy loss for abortion drugs and have sought data from their period-tracking apps. Phoebe Davis, *British Police Testing Women for Abortion Drugs*, TORTOISE MEDIA (Oct. 30, 2023), <https://www.tortoisemedia.com/2023/10/30/british-police-testing-women-for-abortion-drugs> [<https://perma.cc/5DDT-73S9>].

196. KAVATTUR ET AL., *supra* note 21, at 25 (determining that one-third of arrests for conduct related to pregnancy were instigated by a medical professional). Other research suggests an even higher fraction of arrests begin with medical professionals. See, e.g., HOWARD, *supra* note 30, at 171.

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Black women—and reported the results of toxicology reports for potential criminal action.¹⁹⁷ Alabama prosecutors have noted that criminal cases against people who used drugs while pregnant often “hinge on informants—and many times the informants come from within the hospital.”¹⁹⁸

Some medical professionals genuinely believe they have a legal or other duty to work with law enforcement and fear repercussions for failing to do so.¹⁹⁹ Other medical professionals are driven by religious or ideological values.²⁰⁰ If the local prosecutor makes clear that the State views abortion as among the most serious of crimes, the calculus for medical professionals and hospital workers will shift further in favor of reporting. Few other countries have rolled back abortion access in recent decades,²⁰¹ but some, like El Salvador, offer a glimpse of how far pregnancy surveillance could go. In El Salvador, every pregnant person suspected of self-induced abortion is investigated criminally, and people who seek medical care for pregnancy loss are often interrogated and made to face homicide charges.²⁰²

197. Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2660-61 (2021). The hospital adopted the screening program after learning that the state prosecutor had campaigned on charging people who used drugs while pregnant with child abuse. GOODWIN, *supra* note 32, at 17, 109. After ten women sued the hospital, the U.S. Supreme Court held that a state hospital violates the Fourth Amendment when it runs a diagnostic test to obtain criminal evidence for law enforcement without consent. *See Ferguson v. City of Charleston*, 532 U.S. 67, 84-86 (2001). It is unclear whether the current Supreme Court would construe the Fourth Amendment to prohibit testing ostensibly intended to protect the governmental interest in potential life.

198. GOODWIN, *supra* note 32, at 41.

199. *Id.* at 101; *cf.* Song, *supra* note 197, at 2663 n.95 (providing examples in which police threatened to arrest doctors and nurses who declined to do blood draws on patients, despite the absence of medical need, a warrant, or patient consent).

200. GOODWIN, *supra* note 32, at 101.

201. *The World's Abortion Laws*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/worlds-abortion-laws> [<https://perma.cc/EQF9-3V9Z>].

202. NAT'L INST. FOR REPROD. HEALTH, *supra* note 179, at 24; *see also Poland: Abortion Witch Hunt Targets Women, Doctors*, HUM. RTS. WATCH (Sept. 14, 2023), <https://www.hrw.org/news/2023/09/14/poland-abortion-witch-hunt-targets-women-doctors> [<https://perma.cc/3KPN-K2TJ>] (describing a pattern of “sweeping and speculative investigations, and overbroad searches,”

The fact that pursuing serious charges could contribute to dragnet surveillance redounds to prosecutors' benefit. As prosecutors' investigatory reach extends, so does their power to decide which conduct, and which people, to condemn. By favoring serious charges—regardless of whether they believe abortion warrants such charges and sentences—prosecutors expand their own sphere of control.

3. Shift in the Discourse Around Abortion

By pursuing abortion with aggressive criminal charges, a prosecutor could normalize extreme charging and sentencing in the pregnancy context. If prosecutors were to bring capital charges even a couple of times for abortions, some portion of the public in an anti-abortion jurisdiction might become comfortable with such outcomes. Moreover, the public would then more easily tolerate less extreme, but still serious, charges for abortion.

This type of shift in the general acceptance of harsh criminal consequences has happened before. As discussed earlier, Alabama district attorneys pursued women who had allegedly used drugs during pregnancy under the state's chemical-endangerment law, even when the drugs had been prescribed by a doctor and the infants were healthy at birth.²⁰³ The district attorneys pursued hefty sentences: Brooke Shoemaker, who used methamphetamine and suffered a stillbirth, is currently serving eighteen years in prison.²⁰⁴ And the district attorneys did so even though the law, as written, did not apply to drug use by a pregnant person and was not intended to criminalize such conduct. By bringing these cases repeatedly, the prosecutors normalized both the charges and the heavy penalties, and the Alabama Supreme Court eventually sanctioned the prosecutors' interpretation of the law.²⁰⁵ The district attorneys, in effect, framed the

including the strip search of one woman who had a legal abortion). This is not some distant future. People who experience pregnancy loss already face investigation in states like South Carolina. See Lauren Sausser, *She Was Accused of Murder After Losing Her Pregnancy. SC Woman Now Tells Her Story*, CNN (Sept. 23, 2024), <https://www.cnn.com/2024/09/23/health/south-carolina-abortion-kff-health-news-partner/index.html> [<https://perma.cc/G7N2-VJ97>].

203. See *supra* Section I.B.1.

204. Yurkanin, *She Lost Her Baby*, *supra* note 118.

205. See *supra* Section I.B.1.

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conversation about drug use during pregnancy as a criminal matter and then remade the law itself.²⁰⁶

A prosecutor wielding murder or capital charges for abortion can similarly shift the discourse. As with other post-*Dobbs* movements in policy and conversation, this shift will not happen overnight.²⁰⁷ However, by using the most extreme charging tools at their disposal, prosecutors could legitimize them.

C. Increased Likelihood of Conviction

Compounding political and collateral benefits, a prosecutor has compelling litigation-related incentives to pursue serious, especially capital, charges. Depending on the jurisdiction, a capital charge can bring the prosecutor an array of benefits that improve the prosecutor's odds of securing a conviction. The court may automatically deny bail for the defendant.²⁰⁸ A capital trial increases the burden on the defense—which now may have to contest guilt, contest aggravating circumstances, and build an affirmative case of mitigating evidence—without a comparable increase in the burden for the prosecution.²⁰⁹ The prosecution may also force a shift

206. See HOWARD, *supra* note 30, at 51-52.

207. See *supra* Section I.A.3.

208. Liebman, *supra* note 157, at 2097 n.163 (quoting Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES (July 16, 1995), <https://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html> [<https://perma.cc/6RPN-WL74>]).

209. See *id.* at 2097 n.166 (noting that the prosecution's evidence of guilt often suffices to establish the aggravating circumstances necessary for a death sentence); see also Jeffrey Fagan, Garath Davies & Raymond Paternoster, *Getting to Death: Race and the Paths of Criminal Cases After Furman*, 107 CORNELL L. REV. 1565, 1577-78 (2022) (noting that capital charges “increase[] the strategic and financial burdens on the defense by expanding [its] role to include a robust mitigation defense”).

Generally speaking, a capital trial is a bifurcated proceeding, with the same jury deciding both guilt and sentence. Jury selection is followed by a guilt/innocence proceeding. If the defendant is convicted of a capital crime, the case continues to a sentencing proceeding. There, the prosecution must usually prove beyond a reasonable doubt the existence of at least one statutorily enumerated aggravating circumstance. The defendant may then present mitigating evidence to try to persuade the jury to favor leniency. At sentencing deliberations, the jury evaluates all the guilt-phase, aggravating, and mitigating evidence, and decides whether to impose death, life

in the defense's strategy. The threat of the death penalty may spur the defense to "compromise its position on guilt in order to improve the odds on penalty; . . . the defense may virtually concede guilt and focus entirely on punishment."²¹⁰

Moreover, and perhaps counterintuitively, serious charges may lead to an increased likelihood of conviction. In a state where the pregnant person is not exempt from murder charges for abortion, proving the elements of the crime may well be straightforward. Take the earlier hypothetical from Oklahoma. If the pregnant person is not exempt from prosecution under the capital-murder statute, does not contest the fact of the abortion, and does not contend that the abortion was necessary to preserve their life, then an abortion at any point during pregnancy satisfies the legal definition of first-degree murder. When "human being" includes a fetus at any time during gestation, then intentionally aborting the pregnancy is necessarily "unlawfully" and "with deliberate intention" causing "the death of another human being."²¹¹ There is no question of mistaken identity or of intent. There is likely no question as to factual guilt at all.

The prosecutor's primary concerns are, therefore, probably not about the ability to prove the elements of the charge. Instead, the prosecutor's concerns likely center on (1) maneuvering around any exemption for the prosecution of the pregnant person, and (2) the possibility of jury nullification.²¹² Bringing serious charges can help on both fronts.

imprisonment without parole, or potentially life imprisonment with the possibility of parole. In nearly all jurisdictions, the jury must be unanimous to impose a death sentence. See *Stages in a Capital Case*, DPIC, <https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/stages-in-a-capital-case> [<https://perma.cc/W5AW-HF4H>].

210. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 495 (1996); see also Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 328-34 (1983) (detailing the traditionally favored risk-averse strategy in capital guilt phases). For a period in Philadelphia, the district attorney sought the death penalty in nearly every murder case precisely in order to "give prosecutors 'a permanent thumb on the scale'" in favor of both conviction and death. Liebman, *supra* note 157, at 2097 n.163.

211. See OKLA. STAT. ANN., tit. 21, § 701.7(A) (West 2024).

212. See Salib & Krishnamurthi, *supra* note 38, at 50 (discussing the implications of jury nullification on prosecutorial decision-making).

1. Plea Negotiations

One way in which serious charges can increase the likelihood of conviction is by facilitating plea negotiations. Serious charges can increase the pressure on the person charged to plead guilty and thereby allow the prosecutor to avoid the risks of a jury trial altogether. Such charges provide tremendous plea leverage even if the prosecutor has no interest in ultimately pursuing a death sentence or a lengthy term of imprisonment. And the more serious the charge, the greater the prosecutor's leverage: A capital-murder charge is "the best plea-bargaining leverage imaginable."²¹³

As noted earlier, prosecutors may charge a crime capitally solely to increase the pressure on a defendant to waive their right to trial and to accept a plea bargain for a hefty sentence.²¹⁴ The prosecutor has full discretion over whether to offer a plea deal for any statutorily authorized sentence, which often includes a sentence of life in prison without the possibility of parole.²¹⁵ The Supreme Court has sanctioned guilty pleas made to avoid the possibility of a death sentence,²¹⁶ despite the coercive nature of such a looming threat.²¹⁷ Moreover, prosecutors have regularly wielded the leverage offered by capital charges to great effect. In a qualitative analysis of plea bargaining, "[p]rosecutors . . . acknowledged that the threat of capital punishment is frequently used to induce a guilty plea," and most defense lawyers noted that even when the alternative to a capital trial was a sentence of life in prison without the possibility of parole,

213. Liebman, *supra* note 157, at 2097; *see also* Fagan, *supra* note 209, at 1577 ("It is by now hardly a surprise that prosecutors use the threat of a capital charge as leverage in plea negotiations.").

214. *See supra* Section I.A.1; Eric Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 263 (2017).

215. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (approving of the prosecutor's discretion to offer a plea in a capital case); *see also, e.g.*, ARIZ. REV. STAT. § 13-751(1) (LexisNexis 2024) (providing that first-degree murder is punishable either by death or by life in prison without the possibility of parole).

216. *See Brady v. United States*, 397 U.S. 742, 755 (1970) (holding that a guilty plea was not involuntary solely because it was entered to avoid the possibility of a death sentence); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (reaffirming *Brady*).

217. Gross, *supra* note 210, at 487 ("There is, undeniably, a coercive aspect to this bargain—the defendant must risk a severe penalty in order to exercise his right to trial.").

they “advise[d] their clients to plead guilty in order to avoid the death penalty.”²¹⁸

By using capital or similarly serious charges, prosecutors have been able to negotiate plea deals even when they should not have been able to win at trial. Numerous innocent defendants in homicide cases have pleaded guilty for fear of execution.²¹⁹ In the pregnancy-criminalization context, prosecutors have succeeded in getting women to plead guilty to homicide charges for methamphetamine-related stillbirths even when the prosecutors’ evidence was flimsy.²²⁰ Patience Frazier pleaded guilty to manslaughter after having a stillborn fetus with methamphetamine in its system, even though Washoe County, Nevada prosecutors “did not dispute that it was impossible to determine what caused Frazier’s pregnancy loss.”²²¹ Likewise, Emily Akers pleaded guilty to first-degree manslaughter even though the medical examiner’s office attributed her fetus’s death primarily to an infection and placental complication, not Akers’ methamphetamine use.²²²

218. Nicholas Peterson & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 1233, 1250-52 (2012); *see also, e.g., id.* (citing empirical research that defendants in active death-penalty jurisdictions accepted harsher plea agreements than defendants elsewhere); Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES (July 16, 1995), <https://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html> [<https://perma.cc/6RPN-WL74>] (quoting a former homicide prosecutor on the value of capital charges: “The defense attorney has to sit down with the client and say, ‘You’re looking at a possible death penalty.’ He may want to cut a deal”).

219. Gross, *supra* note 210, at 488-89 (citing research identifying sixteen cases of innocent defendants who pleaded guilty to avoid the possibility of execution). In early 2024, a Missouri court overturned Sandra Hemme’s conviction after Hemme had spent forty-three years in prison; she had pleaded guilty to murder to avoid facing the death penalty. Heather Hollingsworth, *Appeals Court Orders Release of Woman Whose Murder Conviction Was Reversed After 43 Years*, ASSOCIATED PRESS (July 9, 2024), <https://apnews.com/article/missouri-sandra-hemme-conviction-overturned-killing-0aa17f2a099f5e6a37dcbd0f543558f3> [<https://perma.cc/RRU4-NLMB>].

220. Aspinwall et al., *supra* note 116 (citing doctors as saying “there isn’t scientific proof that using methamphetamine or other drugs causes pregnancy loss”).

221. Strott, *supra* note 177.

222. *See* Aspinwall et al., *supra* note 116; Kassie McClung and Brianna Bailey, *She Was Charged with Manslaughter After a Miscarriage. Cases Like Hers Are*

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Additionally, a plea deal may require the defendant to waive all or certain appellate and post-conviction rights. Such an agreement may insulate an abortion conviction from appellate review even if it is unclear whether the law allows prosecution of the person who had an abortion.²²³ Indeed, an agreement may insulate an abortion conviction from review even if a subsequent statutory change or court decision makes clear that the pregnant person was not subject to conviction under the cited laws.²²⁴ Lastly, a plea deal also avoids any worry of jury nullification, because it avoids altogether the jury.

Some prosecutors who have brought pregnancy-related charges have been candid about the value of plea bargaining when on uncertain legal or evidentiary ground: “We worked hard to get this negotiated plea because, frankly, we were in uncharged [sic] waters here. . . . There has never been a case like this tried in Marshall County, or anywhere. We don’t have any precedents to look back on.”²²⁵ Another prosecutor commented, “[T]his is a little cynical, so get ready, but talk about a way to avoid ever having to be held accountable on appeal!”²²⁶ Even if a prosecutor is uncertain whether a murder statute applies to a pregnant person’s conduct, the prosecutor might well bring the murder charge simply for the staggering bargaining power it offers and to help avoid the risks of a trial.²²⁷

Becoming More Common in Oklahoma., USC ANNEBERG CTR. FOR HEALTH JOURNALISM (Jan. 7, 2022), <https://centerforhealthjournalism.org/our-work/reporting/she-was-charged-manslaughter-after-miscarriage-cases-hers-are-becoming-more> [<https://perma.cc/4JZR-UZP9>].

223. If a pregnant person accepts a plea agreement with a full appellate waiver, that person might not be able to argue on appeal that state law exempts them from criminal charges. *See, e.g.*, *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020) (noting that a defendant who signs a plea agreement with a waiver of collateral review “waive[s] the right to challenge both illegal and unconstitutional sentences”).
224. *See, e.g.*, *Rudolph v. United States*, 92 F.4th 1038, 1049 (11th Cir. 2024) (holding that the defendant’s appellate waiver meant he could not challenge his sentences, even though the U.S. Supreme Court had later ruled one statute under which he was convicted unconstitutionally vague).
225. HOWARD, *supra* note 30, at 173.
226. *Id.*
227. Even in the Florida test capital case challenging *Kennedy v. Louisiana*, the defendant pleaded guilty and accepted a sentence of life imprisonment without the possibility of parole within 100 days of charging. *See supra* note 143. The district attorney cited “the quick resolution of the case [as]

2. The Death-Qualified Jury

Prosecutors can also improve their chances of a conviction by bringing capital charges because, at a capital trial, the prosecutor will be able to select a “death-qualified jury.” The screening mechanism known as “death qualification” is used in every jurisdiction in death penalty cases. It is intended to eliminate potential jurors whose views on the death penalty would “prevent or substantially impair the performance of [their] duties . . . in accordance with [their] instructions and [their] oath” at a capital-sentencing proceeding.²²⁸ In theory, all potential jurors who either cannot consider a sentence of life in prison or cannot consider a death sentence are eliminated for cause during death qualification, before the trial commences. But death qualification is not verdict-neutral: It produces a jury prone both to convict and to sentence the defendant to death.²²⁹

Death qualification skews the jury pool because attitudes toward the death penalty correlate with other attitudes related to criminal justice. Death-qualified jurors have a higher tolerance for false convictions, less regard for the presumption of innocence, and less commitment to the beyond-a-reasonable-doubt standard of proof for guilt.²³⁰ Overall, then, death-qualified jurors are more prone to convict than are jurors in general.²³¹ And, because death-qualified jurors tend to respond punitively to aggravating circumstances and are less willing to give credence to

proof that the new Florida [capital] law is effective.” Ellenbogen, *supra* note 143.

228. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

229. Despite these effects, the U.S. Supreme Court has deemed death qualification constitutional. *Lockhart v. McCree*, 476 U.S. 162, 165 (1986).

230. See, e.g., Brooke Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 *LAW & HUM. BEHAV.* 175, 176 (2002) (citing studies revealing the “anti-civil libertarian nature” of death-qualified juries, especially regarding “trial issues as presumption of innocence and burden of proof”); Peterson & Lynch, *supra* note 218, at 1252 n.120 (citing research that “death-qualified jurors have lower evidentiary thresholds for proof of guilt, and higher tolerance for false convictions than non-qualified jurors”).

231. See, e.g., Mike Allen, Edward Mabry & Drue-Marie McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 *LAW & HUM. BEHAV.* 715, 724 (1998) (finding from a meta-analysis of fourteen studies that death-qualified jurors “were more likely to favor conviction”).

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mitigating evidence, they are also more prone to impose a death sentence.²³²

Relatedly, culling jurors based on their death-penalty views systematically excludes certain groups from the jury pool.²³³ Racial minorities, in particular Black jurors, have consistently been excluded at twice or three times the rate of white jurors.²³⁴ Women and Catholic

232. See, e.g., Craig Haney, Eileen L. Zurbriggen & Joanna M. Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 PSYCH., PUB. POL'Y & L. 1, 12 (2022). The death-qualification process itself biases the jurors who survive the gauntlet, in part because exposing jurors to questions designed to elicit their views on the death penalty increases the chance they believe that the defendant is guilty. See, e.g., Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 138-40 (1984).

233. Punitiveness, willingness to impose a death sentence, and other attitudes about the criminal system correlate with characteristics such as race, gender, and religion. See, e.g., Peterson & Lynch, *supra* note 218, at 1252 n.120 (noting that “white men are more conviction-prone than others”); Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 164-65 (2018) (finding it more common for white survey respondents to misuse mitigating evidence to support a death sentence than for African American respondents to do so).

234. See, e.g., Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 137 (2016) (concluding based on data from Louisiana death-penalty trials that Black jurors were almost twice as likely to be excluded through death qualification as White jurors); Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L. REV. 299, 342 (2017) (finding in a study of South Carolina capital trials that thirty-two percent of Black potential jurors were removed because of anti-death penalty views versus eight percent of white potential jurors).

jurors²³⁵ have also been disproportionately excluded. As a result, capital juries are disproportionately white, male, and Protestant.²³⁶

Death-qualifying the jury also largely neutralizes the possibility of jury nullification. During death qualification, attorneys can inquire whether the potential juror could impose a sentence of death for the specific capital crime alleged.²³⁷ Courts have condoned questions such as, “If you found the defendant guilty of murdering children, would you automatically vote to impose [either a life or death sentence], no matter what the other facts are?”²³⁸ In a case involving an alleged abortion, the prosecutor could ask jurors under oath whether they could fairly consider a death sentence for murder relating to an abortion. If a potential juror could not consider a death sentence for such charges—and certainly if the juror could not consider a conviction at all—then that juror would be disqualified.

From the outset, then, death qualification eliminates anyone who supports abortion access, opposes abortion criminalization, or opposes executing people who get abortions. It produces a singularly biased jury:

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235. John Cochran & Beth Sanders, *The Death Gap in Death Penalty Support: An Exploratory Study*, 37 J. CRIM. JUST. 525, 525, 530 (2009) (reporting their own statistically significant finding that nearly 75% of surveyed men supported the death penalty, compared to 63.2% of surveyed women, and that this disparity persists “in nearly every survey, over time, and across a variety of methodological designs”); *see also, e.g.*, Alicia Summers, R. David Hayward & Monica K. Miller, *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. APPLIED SOC. PSYCH. 3218, 3224-25, 3228 (2010) (finding that women are 58% more likely to be excluded through death qualification than men and that Catholics were twice as likely to be excluded).
236. *See, e.g.*, Lynch & Haney, *supra* note 233, at 148-49 (summarizing research that “[d]eath-qualified jurors are more likely to be white and male”). Of note is that, as of April 2024, 73% of white evangelical Protestants believe that abortion should be illegal in all or almost all cases, compared to only 36% of the overall population. *Public Opinion on Abortion*, PEW RSCH. CTR. (May 13, 2024), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/#views-on-abortion-by-race-and-ethnicity-2024> [<https://perma.cc/W5GD-5TRK>].
237. *See, e.g.*, *State v. Turner*, 263 So. 3d 337, 362 (La. 2018) (reversing when the trial court prevented defense counsel from inquiring into bias related to the alleged aggravating circumstances where two victims were killed during an armed robbery).
238. *United States v. Johnson*, 366 F. Supp. 2d 822, 849 (N.D. Iowa 2005) (second alteration in original) (emphasis omitted).

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one that is primed to convict, and one that will not nullify. Death qualification is therefore a potent way of enhancing the likelihood of a conviction. As one former homicide prosecutor put it, “Everyone who’s ever prosecuted a murder case wants a death-qualified jury.”²³⁹

D. The Possibility of Death or Other Draconian Sentence

One last incentive of capital charges is, perhaps unsurprisingly, the chance to obtain a death sentence. A prosecutor may believe that abortion warrants execution. Alternatively, the prosecutor may see a death sentence as a notch on their belt. And the possibility of a death sentence is not as farfetched as it might first appear. Beyond death qualification priming the jury to impose a death sentence, several features of a capital-sentencing proceeding—including the types of aggravating circumstances some states have adopted, the difficulty of proving remorse, and jury biases during deliberations—inflate the likelihood of a death sentence for the crime of abortion. Accordingly, a prosecutor hoping for a death sentence has reason to think one is achievable.

1. Automatically Proven Aggravating Circumstances

If a capital defendant is convicted at the guilt phase, the trial continues to a penalty phase. At this phase, the prosecution must prove beyond a reasonable doubt the existence of at least one aggravating circumstance.²⁴⁰ Many states enumerated aggravating circumstances following the Supreme Court directive to define capital crimes “in a way that obviates ‘standardless [sentencing] discretion.’”²⁴¹ In these states, a capital-murder conviction does not suffice to render a defendant eligible for the death penalty; the prosecutor must also prove at least one aggravating circumstance.²⁴² If the prosecutor cannot do so, then the crime does not warrant a death sentence.

239. Rosenberg, *supra* note 218.

240. Most, but not all, death-penalty states have adopted some form of this statutory scheme. See *Summary of Death Penalty Statutes*, DPIC, <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/summary-of-state-death-penalty-statutes> [https://perma.cc/8A3K-M8LR].

241. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 196 n.47 (1976) (White, J., concurring)).

242. See, e.g., ARIZ. REV. STAT. § 13-751(E) (LexisNexis 2024).

In several jurisdictions, if the crime involves an abortion, the fact that the victim was a fetus will automatically, as a matter of law, prove an aggravating circumstance. At least ten states have made the murder victim being a child an aggravating circumstance sufficient for death eligibility.²⁴³ And each of these states defines child to include an unborn person for the purposes of its capital-sentencing scheme.²⁴⁴

Some jurisdictions have additional aggravating circumstances that will automatically be proven. In Florida, it is an aggravating circumstance that “[t]he victim of the capital felony was particularly vulnerable . . . because the defendant stood in a position of familial or custodial authority over the victim.”²⁴⁵ That is necessarily true with an abortion. In Arizona, a murder is “especially heinous, cruel or depraved”—and therefore eligible for a death sentence—if it is senseless, the victim is helpless, and there is a parent-child relationship between the defendant and the child.²⁴⁶ Following precedent, these factors are all satisfied if the victim is a child or fetus and the defendant is the child’s biological parent, as would likewise be true with an abortion.²⁴⁷

Thus, when pursuing a capital-murder case against someone who has allegedly had an abortion, the prosecutor may automatically be able to prove one or more aggravating circumstances, easing the path to a death sentence.

2. The Difficulty of Establishing Remorse

When deciding whether to impose a death sentence, the jury will not only consider the aggravating circumstances but also any reasons the defense offers for a more lenient sentence. These mitigating circumstances can be anything about the person convicted or the circumstances of the

243. See ALA. CODE § 13(A)(5)(40)(a)(15) (2024); ARK. CODE ANN. § 5-10-101(a)(9)(A) (West 2024); FLA. STAT. § 921.141(6)(l) (2024); IND. CODE § 35-50-2-9(b)(12) (2024); LA. STAT. ANN. § 14:30(5) (2024); OHIO REV. CODE ANN. § 2929.04(A)(9) (West 2024); S.C. CODE ANN. § 16-3-20(C)(a)(10) (2024); S.D. CODIFIED LAWS § 23A-27A-1(6) (2024); TENN. CODE ANN. § 39-13-204(i)(1) (2024); TEX. PENAL CODE § 19.03(a)(8) (West 2024).

244. See, e.g., ALA. CODE § 13A-6-1(a)(3) (2024).

245. FLA. STAT. § 921.141(6)(m) (2024).

246. *State v. Robinson*, 509 P.3d 1023, 1040-41 (Ariz. 2022).

247. *Id.* The Arizona Supreme Court also concluded that the fact that the victim was a child or a fetus could be used to support the jury’s finding of multiple aggravating circumstances without constitutional problem. *Id.* at 1042.

offense that could evoke mercy.²⁴⁸ Mitigation matters: when the defense can present a story about, for example, the defendant's horrific childhood, struggles with intellectual disability, and lack of external support, that story can move jurors to vote for a life sentence.²⁴⁹

An issue in the abortion context is that, while the defense can offer mitigation, the defense likely cannot easily demonstrate one of the most powerful mitigating circumstances: remorse. Remorse motivates jurors to vote for life in prison rather than the death penalty.²⁵⁰ But someone who got an abortion might well not feel remorse and therefore might not want to try to suggest otherwise to the jury.²⁵¹ Even when someone feels genuine regret or remorse, it might be difficult to convince jurors.²⁵² Jurors tend to give

248. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 109-10 (1982).

249. *See, e.g.*, Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 57, 66 (2000) (explaining that, according to data from the Capital Jury Project, for jurors who heard such a story the "usual response was sympathy or pity," which then moved some jurors to vote for life). In most capital jurisdictions, a single vote for life is dispositive.

250. *See, e.g.*, Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry?: The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1633 (1998) ("In short, if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death."); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM L. REV. 1538, 1560 (1998) (concluding that if the defendant did not express remorse, nearly forty percent of jurors were more likely to vote for death).

251. *See, e.g.*, Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Karina Kimport, *Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOC. SCI. & MED. 1-2 (2020) (finding in a five-year longitudinal study of women who sought abortions no evidence of abortion regret and that, after three years, 95% of women reported that the abortion had been the right decision); Megan Burbank & Emily Kwong, *A Landmark Study Tracks the Lasting Effect of Having an Abortion – or Being Denied One*, NPR (May 15, 2022), <https://www.npr.org/sections/health-shots/2022/05/15/1098347992/a-landmark-study-tracks-the-lasting-effect-of-having-an-abortion-or-being-denied> [<https://perma.cc/UDA2-3RYL>] (noting that some women in a ten-year longitudinal study of people who had sought abortions regretted being in a position where they needed abortions but did not regret having had abortions).

252. There is a rich literature discussing people's varied experiences after abortions. The point here is not to ignore or dismiss that full range of

more credence to expressions of remorse when the defendant is not a major participant in the criminalized conduct or when the conduct involved little premeditation or planning,²⁵³ neither of which is likely true when someone gets an abortion. Further, when the person on trial has denied guilt at the guilt-innocence phase—perhaps suggesting to the jury a lack of remorse—that denial defense correlates strongly with a death sentence.²⁵⁴

Some of these prior findings might not translate neatly to the abortion context. And the defense may be able to offer all sorts of other mitigating arguments. But if the jury has convicted a person of capital murder for having gotten an abortion, and the jurors have affirmed under oath that they can fairly consider a death sentence for that crime, then the difficulty of proving remorse increases the likelihood of a death sentence.

3. Gender Stereotypes and Death Sentencing

One last feature of capital sentencing increases the prosecutor's chances of securing a death sentence in an abortion case: the misogynistic stereotypes at play. Relatively few women are sentenced to death in the United States,²⁵⁵ but those who are share one thing in common: they "are seen as violating entrenched norms of gender behavior."²⁵⁶

responses but simply to note that remorse, should someone want to establish it, could be difficult to prove to jurors.

253. Eisenberg, Garvey & Wells, *supra* note 251, at 1613, 1614-15.

254. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1574-75 (1998).

255. *See Women*, DPIC, <https://deathpenaltyinfo.org/death-row/women> [<https://perma.cc/2KLP-EJQ5>]. About two percent of people on death row are women. *Facts About the Death Penalty*, DPIC 2 (Oct. 2, 2024), <https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf> [<https://perma.cc/3P22-2QE4>] (noting that there are currently 2,213 people on death row across the country).

256. CTR. ON THE DEATH PENALTY WORLDWIDE, CORNELL L. SCH., *JUDGED FOR MORE THAN HER CRIME: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY* 4 (2018), <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf> [<https://perma.cc/35CD-PTF6>].

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To obtain a death sentence, the prosecutor must dehumanize or “other” the defendant.²⁵⁷ Prosecutors can “other” women defendants when the women deviate from the roles traditional society expects them to play. When a woman commits adultery, kills her husband, or, worse yet, murders her children, then she is no longer meek, submissive, and needing protection, but rather an “evil woman” whose criminal actions warrant harsh punishment.²⁵⁸ Her crimes not only offend the law; they “offend[] humanity” as well.²⁵⁹ As a result, “[t]he women who end up on death row are not necessarily the women who have committed the worst murders The women on death row are the ones who are easily portrayed as unfeminine, aggressive, possessed of poor mothering skills, or sexually promiscuous.”²⁶⁰

This readiness to demonize “evil women” manifests in criminal cases in varied ways. Empirically, women are punished more severely than men *only* for the “crimes in which women seem[ed] to abandon their gender, such as child abandonment and assaults.”²⁶¹ In capital cases, prosecutors have regularly weaponized gender bias by latching onto “evidence” that the

257. Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y.C. L. REV. 473, 478 (2005) (quoting Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT’L J. SEXUAL ORIENTATION L. 104, 111 (1995)).

258. See Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 513 (1990) (framing the “evil woman” theory as the notion that when women commit certain types of “high severity offenses,” they “are treated more harshly than similarly situated men: they are punished for violating sex role expectations in addition to being punished for their crimes”); see also Melinda E. O’Neil, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 213, 221 (1999) (noting that the evil woman theory identifies the death penalty “as a social cleansing tool”).

259. O’Neil, *supra* note 258, at 221.

260. Mogul, *supra* note 257, at 482. Presumably, people who fail to conform to traditional gender stereotypes in other ways, such as nonbinary individuals, would face related forms of discrimination in a capital abortion case. Cf. Jessica Sutton, John Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 ST. JOHN’S L. REV. 1053, 1056-65 (2021) (discussing examples of gender-based discrimination against LGBTQ individuals in capital cases).

261. O’Neil, *supra* note 258, at 224-25.

defendant defied traditional gender expectations.²⁶² For example, during Brenda Andrew's capital trial for the murder of her husband, prosecutors dwelled on her sexual history and "too tight" clothing; they even used her underwear as evidence that she was not grieving appropriately.²⁶³ They depicted Andrew as a deficient mother who focused on sex at her children's expense. One judge decried that Andrew had been sentenced to death not just for her crime but for being "a bad wife, a bad mother, and a bad woman."²⁶⁴

Similarly, in pregnancy-criminalization cases, women who are deemed "irresponsible" or "bad" mothers are punished.²⁶⁵ Juries have not hesitated to convict women for ingesting drugs during pregnancy even when there was no medical evidence that their drug use caused any negative pregnancy outcome. A Comanche County, Oklahoma jury convicted Native American woman Brittany Poolaw of first-degree manslaughter after she had a stillbirth, even though a prosecution expert witness testified that Poolaw's methamphetamine use may not have caused the fetus's death.²⁶⁶ When a

262. According to one sociologist, in forty-two cases where women were sentenced to death, the woman's adultery featured heavily, even though it was not related to her crime. DAVID BAKER, *WOMEN AND CAPITAL PUNISHMENT IN THE US: AN ANALYTICAL HISTORY* 81, 94-99, 153 (2016).

263. *CTR. ON THE DEATH PENALTY WORLDWIDE*, *supra* note 256, at 33.

264. *Andrew v. State*, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (Johnson, J., concurring in the result in part and dissenting in part).

265. Feminist literature posits that one of the "myths of motherhood" is that "no woman is truly complete or fulfilled unless she has kids . . . and that to be a remotely decent mother, a woman has to devote her entire physical, psychological, emotional, and intellectual being, 24/7 to her children." Milne, *supra* note 30, at 166-67 (2020) (quoting SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN* 4 (2005)). That standard extends to pregnancy: "[T]he pregnant woman who puts her own needs and desires first is deemed irresponsible [and] is the 'bad' mother." *Id.* at 170. Taken with the "evil woman" theory, it is unsurprising that pregnant women who are deemed to have "failed" their fetuses are punished criminally.

266. Michelle Goldberg, *When a Miscarriage Is Manslaughter*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/opinion/poolaw-miscarriage.html> [<https://perma.cc/C7K2-EHLR>]. Poolaw's fetus also had a congenital abnormality. *Id.*; see also Sarah E. Burns & Sarah S. Wheeler, *A Review and Look Ahead at Criminalizing Pregnancy in the Name of the State Interest in Fetal Life*, 76 SMU L. REV. 369, 383-86 (2023) (explaining that jurors

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pregnant Pennsylvania woman overdosed, “[r]eaders of the local paper” castigated her, “calling for [her] to be sterilized, hung with piano wire[,] or shot in the back of the head.”²⁶⁷ Not conforming to traditional gender expectations has even led to numerous women being wrongly convicted of crimes that never occurred.²⁶⁸

There is every reason to think that this phenomenon would hold if a woman were convicted of capital murder for an abortion. The prosecutor could depict her as a “bad mother” and an “evil woman” to the jury and thereby increase the odds of a death sentence.²⁶⁹ Even if the prosecutor were pursuing non-capital charges, these factors could influence a judge with sentencing discretion and lead to a harsher sentence.

As this Part explains, some chief prosecutors have myriad incentives to pursue serious charges against pregnant people who get abortions. Of course, most prosecutors will choose not to do so.²⁷⁰ Such charges may not align with the chief prosecutor’s beliefs about what conduct should be criminalized,²⁷¹ or they may be so locally unpopular as to be politically

convicted Regina McKnight of homicide by child abuse because her stillborn fetus’s system had cocaine metabolites, even though there was no clear evidence that cocaine had caused the stillbirth); Yurkanin, *She Lost Her Baby*, *supra* note 118 (citing an attorney who underscored the “deep stigma about using drugs while pregnant that makes it hard for women to prevail in court”).

267. Ed. Bd., Opinion, *A Woman’s Rights Part 5: The Mothers Society Condemns*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-law-poverty.html> [<https://perma.cc/2PE5-ZUUN>].

268. Danielle Bernstein, *Why Women’s Wrongful Convictions Are So Difficult to Overcome*, APPEAL (Aug. 14, 2023), <https://theappeal.org/womens-wrongful-convictions-no-crime-sexual-stereotypes> [<https://perma.cc/EWC8-FQ56>] (“The impulse to blame a female caregiver for failing to be a perfect mother can blind practitioners and prosecutors to other potential causes of death, like medical issues or other sources of a house fire.”).

269. *Cf.* Huss et al., *supra* note 12, at 4 (noting that “juries are heavily biased against people alleged to have had abortions”).

270. *See, e.g., Joint Statement*, *supra* note 42, at 3-9 (listing nearly one hundred elected prosecutors who vowed not to criminalize abortion).

271. *See id.* at 1-3 (declining to enforce abortion bans because, among other reasons, doing so would “erode trust in the legal system”). Hitting a more personal note, Arizona Attorney General Kris Mayes announced, “As long as I am Attorney General, no woman or doctor will be prosecuted under [Arizona’s abortion ban] This is about freedom and our ability to control our own bodies.” Char Adams, *Arizona Attorney General Wants California to Be*

untenable. The prosecutor might have other policy or budgetary priorities,²⁷² or might fear that the state legislature will intervene in the prosecutor's decision-making.²⁷³ But those reasons do not apply universally; some chief prosecutors will instead conclude that there are compelling political, collateral, and/or litigation incentives to bring serious charges for abortion. Should even one prosecutor then do so, draconian outcomes could follow.

III. POTENTIAL SOLUTIONS

With democracy comes the near-inescapable fact that once elected, prosecutors are empowered to bring any available and supportable charges unless they are contravening the law. Nevertheless, as a policy matter, there should be guardrails on the process.²⁷⁴ The need for some check on prosecutorial discretion is particularly acute with such divisive prosecutions, where there is fundamental disagreement as to whether the underlying conduct should be a crime, let alone one that warrants serious criminal consequences.

Potential guardrails include stripping prosecutors of their discretion to make certain charging decisions or facilitating greater transparency into those charging decisions. Prosecutors can charge pregnant people capitally for abortion only because criminal laws in some states give them leeway to do so. If that leeway were to disappear, so too would the prosecutions. Therefore, as discussed below and as some jurisdictions have already done, the most straightforward way to prevent serious prosecutions is for voters or legislators to change the patchwork of laws that allows serious

'Safe Haven' for Abortion Providers After State Supreme Court Ruling, NBC NEWS (Apr. 12, 2024), <https://www.nbcnews.com/news/us-news/arizona-attorney-general-california-safe-haven-abortion-rcna147496> [<https://perma.cc/Y76M-UL6B>].

272. The costs of a capital case can be hefty. *See, e.g.*, Peterson & Lynch, *supra* note 218, at 1240-44. *But see id.* at 1243-45 (noting that local prosecutor offices can offload some costs to the state).

273. Mostly, however, state legislatures have considered intervening when prosecutors *decline* to enforce abortion bans. *See, e.g.*, Scott S. Greenberger, *Republicans Try to Rein in 'Rogue' Progressive Prosecutors*, STATELINE (Mar. 23, 2023), <https://stateline.org/2023/03/23/republicans-try-to-rein-in-rogue-progressive-prosecutors> [<https://perma.cc/MH3J-EZYB>].

274. The jury is similarly a democratic body, and there are guardrails on its decision-making.

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prosecutions.²⁷⁵ Alternatively (or in addition), legislators may enact measures that increase transparency in prosecutorial decision-making, thereby bringing to light, for example, the use of serious charges to coerce plea deals.

As a preliminary matter, although judges or prosecutors could theoretically curb prosecutorial discretion, they are not likely to do so. Trial courts have tended not to interfere with prosecutors' statutory interpretations,²⁷⁶ and courts more broadly have shown little interest in second-guessing charging decisions.²⁷⁷ Further, while some scholars have explored ways in which prosecutors' offices can create internal restraints on discretion,²⁷⁸ that approach seems paradoxical here. Chief prosecutors who want to charge aggressively will not voluntarily constrain their own discretion.

The most attainable method of preventing serious abortion criminalization is through direct voter action. Indeed, Justice Kavanaugh emphasized in his *Dobbs* concurrence that it is for "the people" "to address the issue [of abortion] through the democratic process."²⁷⁹ Twenty-four states have an initiative process through which citizens can bypass their state legislature and place a statute and/or constitutional amendment directly on the ballot.²⁸⁰ Such citizen-initiated measures to protect abortion rights in state constitutions have been, on the whole, remarkably successful

275. *See, e.g.,* Ziegler, *Some Form of Punishment*, *supra* note 8, at 784.

276. In cases like *State v. Ashley*, 701 So. 2d 338 (Fla. 1997), and *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016), appellate courts interpreted state criminal laws to preclude the prosecution of pregnant women. However, in those and similar cases, the charges had withstood scrutiny in the trial courts, and the appellate processes took years. Further, numerous appellate courts have condoned prosecutions against pregnant people. *See supra* Sections I.A, I.B.

277. *See supra* Section I.A.1.

278. *See, e.g.,* Vorenberg, *supra* note 33, at 1562-63 (discussing internal guidelines on charging and plea bargaining); Fish, *supra* note 214, at 279 (advocating for a split between a prosecutor's office's adjudicative and adversarial functions); Bibas, *supra* note 158, at 1003-14 (arguing for self-regulation through internal policies, personnel decisions, and shifts in office culture).

279. *Dobbs*, 597 U.S. at 341 (Kavanaugh, J., concurring).

280. *Initiative and Referendum Processes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/7695-RVQG>].

at the ballot box.²⁸¹ Voters in multiple states have succeeded in protecting abortion rights even when state legislatures had previously enacted sweeping abortion bans.²⁸² And voters have succeeded in protecting abortion rights even when state officials tried to interfere with voters' ability to use the initiative process altogether.²⁸³ Abortion criminalization is singularly unpopular with the public—a 2024 poll found that 84% of Americans believe that a person who has an abortion should *not* face fines

281. See, e.g., Elissa Nawordny & Ryland Barton, *Most States That Considered Abortion Rights Amendments Approved Them*, NPR (Nov. 6, 2024), <https://www.npr.org/2024/11/06/g-s1-32962/abortion-rights-amendments-2024-election> [<https://perma.cc/Y7XW-XWHV>]. In Florida, the abortion-rights constitutional amendment received 57.2% but fell short of the required 60% threshold. *Id.*; Sareen Habeshian & Ivana Saric, *Charted: How Abortion Fares on State Ballots*, AXIOS (Nov. 6, 2024), <https://www.axios.com/2024/11/05/abortion-election-2024-results-state-amendments> [<https://perma.cc/WEQ9-NTB7>].

282. For example, in November 2023, Ohio voters passed constitutional protections for abortion access by a resounding measure, even though the Republican-led state legislature had worked diligently to restrict abortion rights. Julie Carr Smyth, *Ohio Voters Just Passed Abortion Protections. When and How They Take Effect Is Before the Courts*, ASSOCIATED PRESS (Nov. 24, 2023), <https://apnews.com/article/abortion-ohio-constitutional-amendment-republicans-courts-fb1762537585350caeee589d68fe5a0d> [<https://perma.cc/AD5H-RYYK>]. In 2024, Missouri voters approved a constitutional amendment guaranteeing abortion access until fetal viability. Missouri had been the first state to enact a near-total abortion ban after *Dobbs*. Nawordny & Barton, *supra* note 281.

283. In Missouri, state officials tried numerous avenues to stymie the citizen-led initiative, such as delaying the process to certify the measure so it could appear on the ballot, drafting inaccurate ballot summary language, and attempting to decertify the measure after it had been approved for the ballot. Anna Spoerre, *Failed GOP Attempt to Keep Abortion Off Missouri Ballot Could Foreshadow Fight to Come*, MO. INDEPENDENT (Sept. 25, 2024), <https://missouriindependent.com/2024/09/25/amendment-3-challenges-abortion-missouri-legislation> [<https://perma.cc/P7X8-G6QN>]. However, in Arkansas, initiative opponents succeeded in keeping the citizen-led initiative off the state's ballot. Alice Miranda Ollstein, *Arkansas Supreme Court Blocks Abortion Measure*, POLITICO (Aug. 22, 2024), <https://www.politico.com/news/2024/08/22/arkansas-supreme-court-blocks-abortion-measure-00175823> [<https://perma.cc/5EDX-KZ4C>].

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or jail time²⁸⁴—and so initiatives intended to preclude serious abortion criminalization could easily garner enough support to succeed.²⁸⁵

While any abortion-rights protection might forestall some prosecutions, not all ballot measures are created equal: Some more directly insulate pregnant people from abortion criminalization than others. For example, voters in Michigan amended their state constitution to provide that “[e]very individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.”²⁸⁶ Notably, the constitutional amendment includes a specific and unambiguous protection from any prosecution whatsoever: “The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion.”²⁸⁷ And that proscription on prosecution is not time-limited; it does not end at, say, fetal viability.²⁸⁸ Michigan’s constitutional protection is a more effective and immediate bulwark against an abortion prosecution than a constitutional provision

284. Domenico Montanaro, *Most Americans Say Criminalizing Abortion Is Wrong—and Are Divided on Deportation*, NPR (Apr. 3, 2024), <https://www.npr.org/2024/04/03/1242285012/biden-trump-2024-election-poll> [<https://perma.cc/UZP5-L3SY>]. While the NPR poll does not offer state-specific figures, even among Republicans only 18% support penalties for abortion. *Id.* Presumably a smaller percentage would support serious penalties.

285. Ballot initiatives are distinguishable from prosecutor elections in ways that make the former more effective for preventing serious charges for abortion. Ballot initiatives are citizen-initiated efforts that attract a lot of attention and build grassroots support, while voters tend to have little information about prosecutor elections. *See supra* note 158. Moreover, a statewide electorate decides ballot initiatives, while a highly localized electorate selects the chief prosecutor. Even in a state where some localities elect prosecutors who are ready to criminalize abortion, the statewide electorate could enact abortion protections.

286. MICH. CONST. art. I, § 28, cl. 1.

287. MICH. CONST. art. I, § 28, cl. 3.

288. *See* MICH. CONST. art. I, § 28, cl. 3.

that does not explicitly preclude prosecution or that lapses partway through a pregnancy.²⁸⁹

State legislatures also currently offer a viable path to thwarting serious abortion prosecutions.²⁹⁰ While legislatures usually have little incentive to constrain local prosecutors,²⁹¹ these are not usual times. We are in a unique moment of legislative discomfort with free-rein prosecutorial decision-making, where legislators on different sides of the aisle (for different reasons) are interested in checking prosecutors whom they perceive as rogue. For example, multiple state legislatures have recently clawed back discretion from local prosecutors who refuse to pursue criminal charges in certain cases.²⁹² In Georgia, the legislature attempted to create new rules for

289. Any form of protection is valuable. That said, a constitutional amendment, where possible through the initiative process, is more protective than a statute.

290. Even though some state legislators support serious abortion criminalization, *see supra* Section I.A.3, the fact that state legislators must act collectively can mute the influence of legislators with extreme views. And, while state legislative seats are heavily gerrymandered and many elections go uncontested, state legislators still have more democratic accountability than do local prosecutors, as measured by contestation. *Cf.* Barry C. Burden & Rochelle Snyder, *Explaining Uncontested Seats in Congress and State Legislatures*, 49 AM. POL. RSCH. 247, 255 (2021) (finding that around thirty percent of seats in the lower chambers of state legislatures, and a higher percentage in the South, go uncontested); *supra* Section II.A. That additional measure of voter accountability could increase state legislators' willingness to oppose serious criminal charges for abortion.

291. *See, e.g.*, Stuntz, *supra* note 33, at 509-10, 547-48; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 872-73 (2009) (noting Congress's lack of incentives to curb prosecutorial discretion). For this reason, even though scholars have long suggested that legislatures should place *ex ante* restraints on prosecutorial discretion by changing the criminal code, those suggestions have fallen flat. *See, e.g.*, Vorenberg, *supra* note 33, at 1566-68 (championing legislative action to curtail discretion); *see also* Bibas, *supra* note 159, at 965-68 (noting that "[l]egislation is too crude" to resolve the problem of discretion).

292. Tennessee's legislature enacted a law allowing its attorney general to intervene in local prosecutorial decision-making. The attorney general can, with the aid of the state supreme court, temporarily replace district attorneys who categorically refuse to prosecute certain cases. Mariah Timms, *Gov. Bill Lee Signs Law Allowing Attorney General to Intervene in Local Prosecutors'*

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prosecutors that would have subjected “rogue prosecutors” to oversight and supersedure.²⁹³ A Missouri state legislator noted that interfering with prosecutorial discretion is “treading on pretty sacred ground” but still sponsored a bill to curb the discretion of district attorneys.²⁹⁴

Further, even state legislatures that have generally been hostile to abortion rights have acted to avoid some extreme outcomes. For example, after the Arizona Supreme Court upheld an 1864 ban on abortions except when needed to save the life of the mother, the majority-Republican Arizona legislature moved quickly to repeal that law.²⁹⁵ Also, when a fetal personhood ruling from the Alabama Supreme Court posed a threat to IVF, the Alabama legislature hastily passed a legal fix to ensure that IVF could continue.²⁹⁶ The ruling—and the “stunning levels of [accompanying public]

Decisions, TENNESSEAN (Nov. 12, 2021), <https://www.tennessean.com/story/news/politics/2021/11/12/lee-signs-law-allowing-attorney-general-intervene-local-prosecutors-decisions/6267077001> [https://perma.cc/R4SW-T4UH]. In Texas, when some local prosecutors pledged not to pursue criminal charges for abortion, the state legislature enacted a law permitting a judge from District A to remove a prosecutor from District B. J. David Goodman, *With an Array of Tactics, Conservatives Seek to Oust Progressive Prosecutors* (Aug. 12, 2023), <https://www.nytimes.com/2023/08/12/us/conservatives-progressive-district-attorneys.html> [https://perma.cc/WKV9-GLFT]; John Krinjak, *Gov. Abbot Signs Bill Aiming to Hold ‘Rogue District Attorneys’ Accountable*, FOX7 AUSTIN (June 6, 2023), <https://www.fox7austin.com/news/texas-governor-greg-abbott-signs-hb-17-bill-district-attorneys> [https://perma.cc/K9ZK-TFAJ].

293. The Georgia Supreme Court declined to endorse the new rules on separation-of-powers grounds, so the rules did not go into effect. *Citing Constitutional Separation of Power, Ga. Supreme Court Declines Action on DA Oversight Rules*, WSBTV.COM (Nov. 23, 2023), <https://www.wsbtv.com/news/local/atlanta/citing-constitutional-separation-power-ga-supreme-court-declines-action-da-oversight-rules/LZU2EJ5GQ5HNFCLF54KWAJUPQQ> [https://perma.cc/RAC6-6RBS].

294. *See* Greenberger, *supra* note 273.

295. Wayne Schutsky, *Arizona Lawmakers Vote by a Narrow Margin to Repeal Civil War-Era Abortion Ban*, NPR (May 1, 2004), <https://www.npr.org/2024/05/01/1247532066/arizona-1864-abortion-law-outlawing-almost-all-abortions-repealed-15-week-ban> [https://perma.cc/FU8D-8CEW].

296. Liz Baker, Debbie Elliott & Susanna Capelouto, *Alabama Governor Signs IVF Bill Giving Immunity to Patients and Providers*, NPR (Mar. 6, 2024), <https://www.npr.org/2024/03/06/1235907160/alabama-lawmakers-pass-ivf-immunity-legislation> [https://perma.cc/5JLN-FWB8]; *see also supra* Section I.A.3.

outrage”—caught the attention of state legislatures across the country.²⁹⁷ Lastly, even with the growing influence of “abortion abolitionists,” legislators have been squeamish about serious criminal punishment for abortion. Many legislators have in fact made clear that they oppose targeting pregnant people with harsh criminal sanctions.

In these unusual circumstances, when shown how far prosecutorial discretion might go, legislators might be less inclined than usual to ally themselves with prosecutors. Extreme situations have prodded legislatures to change laws available to prosecutors before: In Douglas County, Georgia, seventeen-year-old Black teenager Genarlow Wilson was prosecuted for consensual oral sex with his fifteen-year-old white girlfriend. Wilson was convicted of aggravated child molestation and sentenced to ten years in prison and required to register as a sex offender, while white classmates who had engaged in the same behavior did not face criminal charges.²⁹⁸ Galvanized in part by Wilson’s harsh conviction and extreme sentence, the Georgia legislature changed the law to make consensual conduct between minors a misdemeanor.²⁹⁹ Here, the gulf between how serious abortion prosecutions could get and legislators’ preferred outcomes in abortion cases might be vast enough to jolt previously hesitant legislators into action. Like voters, legislators have the authority—and, in this moment, the willpower—to bring about statewide reform.

With that in mind, states can and should enact ironclad laws exempting from prosecution pregnant people who are alleged to have terminated (or to have attempted to terminate) their pregnancies.³⁰⁰ The “ironclad” part is

297. Megan Masserly, “Scratching Their Heads”: State Lawmakers Take a Closer Look at Personhood Laws in Wake of Alabama Ruling, *POLITICO* (Feb. 29, 2024), <https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973> [<https://perma.cc/8XSW-HAEG>].

298. GOODWIN, *supra* note 32, at 216-17.

299. Brenda Goodman, *Georgia Supreme Court Frees Man in Sex Case*, *N.Y. TIMES* (Oct. 26, 2007), <https://www.nytimes.com/2007/10/26/us/26cnd-georgia.html> [<https://perma.cc/Y2DP-VG69>].

300. While a legislature could curb discretion by, for example, transferring it from local prosecutors to the state’s attorney general, thus far, legislatures have only seen fit to do so for declinations. *See* Greenberger, *supra* note 273. No state legislature has yet checked a prosecutor for too-extreme charges by divesting them of discretion. State legislatures could also, in theory, repeal some of the overlapping criminal statutes that give rise to broad prosecutorial discretion. But, even if one law were to be successfully repealed, that would hardly prevent prosecutors from forging a different path to prosecuting the

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important. As we have seen, determined prosecutors will find ways through or around porous exemptions from prosecution, and any ambiguity or room for confusion benefits prosecutors.³⁰¹ But ironclad protections are possible. California, for example, has come close. There, several pregnant women had faced potential homicide charges for pregnancy-related conduct.³⁰² After *Dobbs*, the California legislature amended its penal code to clarify that its murder statute could not apply “to any person who commits an act that results in the death of a fetus if . . . [t]he act was committed, solicited, aided, abetted, or consented to by the mother of the fetus.”³⁰³ California also amended its Health and Safety Code to declare as follows:

Notwithstanding any other law, a person shall not be subject to . . . criminal liability or penalty, or otherwise deprived of their rights . . . based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to causes that occurred in utero.³⁰⁴

The enactment must be a separate statute that unequivocally applies across the criminal code and trumps any conflicting provisions. Otherwise, prosecutors may argue that the prosecution exemption applies only to

same people for the same conduct. Moreover, it has traditionally been easier to protect people from prosecution than to try to repeal altogether a criminal law. *See* Stuntz, *supra* note 33, at 556-57 (noting that groups fighting sodomy laws “found it easier to lobby for favorable civil regulation than for narrower criminal liability” and that “[w]hen the issue is subtracting crimes . . . legislative inertia is probably stronger in criminal law than elsewhere”).

301. *See* Dellinger & Pell, *supra* note 18, at 60.

302. *See, e.g.,* Nigel Duara, *Prosecutor Vows to Refile Murder Charge Against Woman Who Delivered Stillbirth*, CAL. MATTERS (May 10, 2022), <https://calmatters.org/justice/2022/05/stillbirth-murder-perez-prosecutor-abortion> [<https://perma.cc/8ES6-BNXJ>]; Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, GUARDIAN (June 4, 2022), <https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade> [<https://perma.cc/J9NM-2P49>] (reporting on the case of Chelsea Becker, who was charged with “murder of a human fetus” with “malice” in California in 2019 after having lost a pregnancy when eight months pregnant).

303. CAL. PENAL CODE § 187 (2024); *see also* S.B. 345, 2023-2024 Leg., Reg. Sess. (Cal. 2023).

304. *See* A.B. 2223, 2021-2022 Leg., Reg. Sess. § 7 (Cal. 2022).

certain criminal laws and that they may prosecute pregnant people under other criminal laws.³⁰⁵ And the text of the provision must define abortion broadly and extend, at the very least, to all forms of pregnancy termination.³⁰⁶ Finally, the state legislature should incorporate a civil enforcement mechanism to disincentivize “interfere[nce] with” individuals’ “reproductive rights,” as California has done.³⁰⁷ If a legislature adopts such an unambiguous and carefully constructed statutory prohibition, the legislature can cut off all but the most extreme or lawless prosecutions before they begin.³⁰⁸

It is worth noting that even if state legislators or voters enact new explicit, emphatic, and unequivocal protections for pregnant people from criminal liability, that may not dissuade every prosecutor from trying to charge a pregnant person criminally or capitally for getting an abortion.³⁰⁹ Such legislation, however, would make it meaningfully harder for such

305. As noted earlier, the Alabama Attorney General has argued that the exemption from prosecution in the state’s Human Life Protection Act does not extend to prosecutions under the chemical-endangerment law. *See* Yurkanin, *Women Can Be Prosecuted*, *supra* note 117; *supra* Section I.A.3.

306. *See supra* notes 7-10 and accompanying text (detailing stories of pregnant teenagers who harmed themselves to terminate their pregnancies because they had no other form of abortion access); *see generally* Greer Donley & Caroline M. Kelly, *Abortion Disorientation*, 74 DUKE L.J. 1, 13-30 (2024) (cataloging the varying legal definitions of “abortion” across jurisdictions).

307. CAL. HEALTH & SAFETY CODE § 123469 (2023) (creating a civil right of action).

308. If California intended to protect pregnant people for their conduct through the birthing process, including in the minutes post-birth, it failed. Kelsey Carpenter, afraid of hospitals because of her drug use, delivered her baby at home in 2020. She cut, but did not clamp, the umbilical cord, and the baby died shortly thereafter. *Carpenter v. Superior Court*, 311 Cal. Rptr. 3d 669, 674-75 (Cal. Ct. App. 2023). The San Diego County District Attorney charged Carpenter with implied malice murder and felony child endangerment. When A.B. 2223’s immunity provisions went into effect, Carpenter moved to dismiss the charges, but the trial court and then the California Court of Appeals concluded that Carpenter could still face charges—including charges of implied malice murder—“for her acts and omissions after her daughter was born alive.” *Id.* The ambiguity in California’s statutory exemption created an opening for a prosecutor intent on pursuing charges.

309. *See supra* Section I.B.1 (noting examples in which prosecutors charged people for abortions despite legislative exemptions).

charges to survive media or judicial scrutiny. These protections would, therefore, still offer some kind of shield, albeit delayed, from charges.³¹⁰

Legislatures might also consider the potentially less-intrusive approach of requiring greater transparency in prosecutorial decision-making. For example, legislatures could require local prosecutors offices to publish basic charging information, including the key facts of each case; the original charges (or the charges in any superseding indictment); whether the defendant elected to go to trial, pleaded guilty, or had the charges dismissed; which, if any, charges the defendant was convicted of; the terms of any plea bargain, including the waiver of appellate or other rights; the sentence; and the elapsed time from charging to any conviction.

While some of this information may be publicly available at present, it is often not easily accessible or digestible, and few have the time or resources to compile it in any meaningful way.³¹¹ With granular and readily available information, people would be able to tell whether prosecutors were initially pursuing very serious charges in pregnancy-criminalization cases only to coerce defendants to plead quickly to far less serious charges. In addition, people could discern whether their district attorney's office had different charging, plea bargaining, and sentencing practices than those of nearby offices.

Such transparency-oriented reforms would benefit legislators who seek to know whether prosecutors are making case-by-case charging determinations or applying the blanket declinations that legislators disfavor.³¹² Moreover, it would help make public information about when and to what extent prosecutors use serious charges solely to extract plea deals from pregnant people who get abortions. If that "trial penalty" in such cases is both extremely harsh and easily discernible to the public, it may then become more difficult for prosecutors to maintain such charging practices.³¹³ In addition, more accessible information about the waiver of rights through plea bargaining may encourage prosecutors' offices, for

310. See Pilkington, *supra* note 132 (discussing an abortion case in which the prosecutor dropped the murder charges within three days because Texas law precluded such charges).

311. See Gold, *supra* note 149, at 78 (noting that the public only has easy access to aggregate case data).

312. See, e.g., Misner, *supra* note 45, at 770-71 (explaining how transparency can aid legislators in developing state policy).

313. Scholars have noted that, in some contexts, greater transparency could lead to harsher charging decisions. See Barkow, *supra* note 291, at 912. That is less of a concern here, where increasing criminalization is generally unpopular.

example, to limit the use of waivers in plea agreements. Transparency could help ensure that charging decisions are driven by considerations other than how to secure the most onerous plea deal or the longest sentence. And legislators are in a position both to demand and to benefit from that type of transparency.

CONCLUSION

The natural conclusion of the fetal-personhood movement is that abortion is murder and should be treated as such, and some courts and policymakers have already shown indifference to the lives of pregnant people. Moreover, local prosecutors have extraordinary power; there is nothing else like it in our criminal system. *Dobbs* only amplified that power, giving local prosecutors free rein to wield state criminal laws against people who have abortions or who are suspected of having done so. The expansiveness of prosecutorial discretion is far from a new problem, and many have not considered it a problem at all. But the specific circumstances at play here, which allow prosecutors to pursue capital or other serious charges against pregnant people for abortion, provide a much-needed wake-up call about the consequences of unchecked prosecutorial discretion. These unusual circumstances could spur a shift in the status quo even when little else has. Right now, there is an opportunity for voter-initiated or legislative change to curb prosecutorial discretion on the abortion criminalization front. It is an opportunity worth seizing.

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